The Role of the Supreme Court in the Constitutional System of the United Arab Emirates - A Comparative Study.

Hadif Rashid Al-Owais

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ABSTRACT

The Role of the Supreme Court in the Constitutional System of the United Arab Emirates - A Comparative Study.

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This study is concerned with demonstrating the importance of the Supreme Court in the constitutional system of the United Arab Emirates, discovering its possible contributions to constitutional development and recommending measures to improve the effectiveness of the Court.

A brief analysis of the modern history of the United Arab Emirates and an outline of the characteristics of this country and its society are provided. The constitutional history of the country is given, with specific emphasis on the process of drafting the current constitution.

The role of constitutional courts in federal systems, their contributions to, and the theoretical basis for participation in the development and maintenance of, constitutional systems is discussed.

This study includes a fairly detailed analysis of the arguments about the role of the U.S. Supreme Court and the American Federal judiciary in practising judicial review, and the authority of judicial interpretations of the constitution. The West German experience in judicial review and its effects on federalism is analysed.

The constitutional system of the United Arab Emirates and the position and competence of its Supreme Court is studied. The legislative regulation of the Supreme Court is evaluated.

A detailed study is provided of the development of the jurisprudence of the Court since its establishment.

Findings and recommendations aimed at improving the contribution of the Supreme Court in the constitutional system of the United Arab Emirates are provided.

CONTENTS

DECLARATION

The material contained in this thesis is the work solely of this author. None of the material has been submitted previously for a degree in this or any other university.

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INTRODUCTION

The purpose of this study is to demonstrate the importance of the role of the Supreme Court in the constitutional system of the United Arab Emirates (U.A.E.), to discuss its possible contributions to constitutional development and to suggest measures to improve its performance.

The importance of the court can be discovered through the study of the competence it is given and by analysing the way in which it discharges its duties. The importance of the competence of the Supreme Court in the constitutional system of the U.A.E. is based primarily on the power it is given to render binding constitutional interpretations, and also on the role it plays in resolving disputes about the federal system.

Because of their involvement in constitutional interpretation and the importance of their competence in determining the distribution of powers and the limits on the use of power, constitutional courts are often the subject of debate as to their proper roles and the legitimacy of their interpretations. In their application of legal rules courts are by no means passive participants in the legal process. The myth that courts only interpret the law is supported neither in theory nor in practice.

Constitutional interpretation involves wide use of discretion and choice for those empowered to carry it out. The nature of constitutions, the language used in them and the fact that they are intended, generally, to last over long periods of time are some of the factors that make the interpretation of such

constitutions involve wide discretion. The framers of a constitution cannot foresee all possible needs and situations in which a constitution will apply, so they provide texts that are general and allow for wide interpretive choice. Theorists who call for literal interpretations of constitutional texts cannot deny the general nature of the language used therein, and cannot argue that those who framed the constitution had the ability to predict all future applications. The ultimate result of the characteristics of language and the purposes of a constitution is a large measure of interpretive discretion for the constitutional judges.

The nature of constitutional interpretation and the choices available for judges result in critical comments from academics as well as from those in power. One basis for criticism of constitutional choice by judges relies on the traditional theory of law, that the law is "there" to be discovered, and that judges have no right to participate in the development of that law. Another cause for criticism is that constitutional choices by judges can be considered undemocratic in that it gives unelected or unaccountable persons the right to make choices that may contradict choices made by representative institutions.

In the face of challenges to the role of constitutional courts, these courts maintain the legitimacy of their choices by demonstrating judicial coherence in their decisions. This process begins with reference to constitutional texts, but as their reliance extends beyond the express words of constitutions to include principles such as implied powers and measures like

balancing the federal systems, more refinement in their choices and rationalisation of their principles is needed.

Because of the political nature of constitutions, the courts in their interpretations are bound to affect the political process, but the important justification of the courts depends on the rationalisation of their decisions in the light of constitutional texts and their underlying values, and established jurisprudence.

In federal systems courts have been an essential part of maintaining and adjusting federal balance. There is no single concept of federalism, even within a single state. The federal balance cannot be left to political organs without the risk of 'nationalisation' by the central government, or the disintegration of the Constitution by the action of the governments of the states. It is of particular importance that the short term aims of a single state or the desires of central institutions do not thwart the general commitment to federalism.

As federal experiences gather importance and cross national borders to new areas, and as solutions and adjustments within such systems are utilised in other countries, a comparative study of federal systems and their institutions becomes more important. Judicial review of legislation is adopted in many places, and the justifications and challenges it faces are common to several countries.

The importance of comparative investigation into constitutional judicial review is to refute the myth that judges simply apply the law, to show the role of courts in umpiring and maint-

aining federal systems and to show the necessity of justification and coherence in the judicial interpretations of constitutions. Comparative investigation is not meant to show that arguments which have succeeded in a particular jurisdiction must succeed in another, but rather to demonstrate the core features of the process which must be present in any jurisdiction if the role of the constitutional court is to be discharged effectively.

This study will examine the realities and possibilities of the role of the Supreme Court in the development of the constitutional order in the U.A.E. The purpose of the study is to enable those concerned with the constitution of the U.A.E. to understand the role of the Supreme Court in developing the constitutional order of the country, and to make suggestions as to how its functions may be more effectively discharged.

The U.A.E. has its own characteristics, some of which are unique to the country and some which have been received from other countries and from earlier experiences. The country has a written constitution which came into force on 2 December 1971: the day of independence from Britain. The constitution of the U.A.E. adopted the federal system, with the creation of a central government to which the emirates surrendered parts of their powers and sovereignties. The constitution of the U.A.E. is labelled "provisional". According to its provisions, the provisional constitution, intended as a basis for stronger union, was to be replaced by a new permanent constitution after five years. As will be seen, this replacement has not occurred. The distribution of powers within the constitutional arrangements

contains no radical shift away from the concentration of powers with the heads of the emirates. The Supreme Council in the Union, which is the central focus of legislative and executive power, is composed of the rulers of the respective emirates.

The continued operation of the constitution beyond the initial five year period has meant that its provisions are to be applied to situations and for a duration beyond the intentions of its framers. Effective answers, solutions and decisions were needed in the early years of the Federation and continue to be needed as the constitution continues in force. Due to the importance of the constitution and its necessity for the continued existence and development of the country, all problems created and questions raised about its operation need to be dealt with effectively. Effective interpretations of the constitution are needed, and answers where none are clear-cut, not just clause-bound interpretations of its provisions. As the country develops and becomes more open to the world, in contrast to a rigid and closed society, the enquiries and challenges it faces grow, with the concomitant need to satisfy the demand for constitutional answers.

The provisional constitution of the U.A.E. adopted judicial constitutional review. The task of constitutional review and interpretation was given to the Supreme Court. In addition, the Supreme Court has jurisdiction in disputes between the member emirates and between them and the federal government. All of these matters are within the competence of the Court and, because

of the federal nature of the country, the Supreme Court has an essential task to perform. It is important to study the possibilities available, the discretion provided and any obstacles to the Court's full performance of its duty. Improvements cannot be made unless knowledge and appreciation are available as to the obstacles that exist and the potential for such improvements. Study of the formal and informal factors affecting the Court and of its past experience is needed for better understanding and better prospects for improvements.

Several of the institutions and instruments utilised by the framers of the constitution are closely connected with, and largely attributed to, the U.S. constitutional system. The written constitution, federalism and judicial review of constitutionality are all attributed to the U.S. system. Examination of the controversies and possibilities in the U.S. Supreme Court's performance of its duties is helpful to the achievement of the purposes of this study.

West Germany has a more modern constitution (The Basic Law) than that of the U.S., and has the three characteristics of: written constitution, federal system and judicial review of constitutionality. Study of this system is also of help for this subject. The West German system has an added benefit of being in a Civil Law country, which is more associated with the system adopted in the U.A.E. Examination of experiences of constitutional courts' experiences in federal systems is helpful in shedding more light on the solutions available to, and ways of improving the performance of, the Supreme Court of the U.A.E.

Following this introduction will be a study of the general history of the emirates, the nature of the society and the country as a whole. Developments in the twentieth century, leading to the formation of the federal system will be analysed. The process of adopting the current constitution will be reported. All of this introductory information about the emirates will be dealt with in Part 1.

Part 2 will deal with the role of supreme courts in federal systems; the necessary interpretive roles of these courts; the experience of the U.S. in establishing the legitimacy of judicial review; the role of the West German constitutional court in maintaining federal balance; and the effect of judicial review of the commerce power of the U.S. and its general effect on the federal system.

Part 3 will deal with the constitutional system of the U.A.E.; the actual position of the Supreme Court in this system; and the performance of the court since its establishment. A critical analysis of the powers, impediments and possibilities of the Court's role will be provided. The development of the jurisprudence of the court will be studied to show the importance of the court's role and its consistency in the discharging of its jurisdiction.

The conclusion will list findings and recommendations resulting from this study.

PART ONE

CHAPTER ONE

THE COUNTRY, ITS HISTORY AND MOVE TOWARDS UNITY

The United Arab Emirates is composed of seven emirates, namely Abu-Dhabi, Dubai, Sharjah, Ajman, Um-Al-Qaiwain, Ras-Al-Khaimah and Fajairah. Previously these emirates were autonomous polities. The geographical location and characteristics of the country are determinant factors in its past and present socio-political, economic and strategic affairs. As part of the Arabian Peninsula it is part of the Arab world and the so-called Middle East area, and is inhabited by indigenous Arabs. The United Arab Emirates identifies itself as part of the Islamic world, having a totally Muslim indigenous population.

The geographical and demographic characteristics of the country do not differ much from those of the neighbouring countries. The land is extremely arid, with vast desert areas. The north eastern part of the country is well known for its Hajar Mountains which rise from the sea. These mountains continue southward into neighbouring Oman and are rugged, with difficult passes. They separate eastern United Arab Emirates from the rest of the country. Due to long separation from the main part of the country, the mountain region and the eastern area are marked by the differences of population and economic status. The mountains more than simply divide the country into two. They act as a barrier for clouds coming from the Indian Ocean, the effect of which is to precipitate rain on their peaks. From this watershed, the water runs downhill, providing the underground water which has for a long time supplied the necessary water for most of the

population of the country.

The western and south western part of United Arab Emirates is marked by an expanse of desert, an extension of the Empty Quarter, which is comprised of a vast ocean of sand and sand dunes with hardly any vegetation except in small isolated oases of Liwa villages. The coastline stretches about 430 miles along the Arabian Gulf and about 60 miles along the Gulf of Oman. The main populated and economic centres are along the coast.

The United Arab Emirates is located on the southern coast of the Arabian Gulf, bordering Saudi Arabia on the south and west and Oman on the south east and north east. The total area of United Arab Emirates is approximately 32,000 square miles, made up as follows [1]:

AREA	SQUARE MILES
Abu-Dhabi	28,000
Dubai	1,500
Sharjah	1,000
Ras-Al-Khaimah	650
Fujairah	450
Um Al-Qaiwain	300
Ajman	150

The main cities are situated on natural coastal inlets allowing people in past and present times to harbour their ships and exploit marine resources for their living. Agriculturally, the land is poorly endowed. The people of the country have traditionally depended for their living on the sea and on the vary sparse vegetation on the land. There were seasonal movements, between the sea and the hinterland. In summer, people tended to move to the coast in order to pearl and fish. In

winter the rainfall is sufficient to provide food for their camels and goats. A proportion of the population lived in the good harbours to work in the local and the inter-port trade. Other people were employed transporting seasonal crops and pearls between Iraq, India, Southern Iran, Oman and East Africa.

In recent years the economic position and financial strength of the emirates have been deeply affected by the discovery of oil in several of them, and the subsequent huge sums of money resulting from the export of crude oil.

The discovery of oil has had far reaching consequences on the society and its economic well-being. The material development of the emirates since 1965 has been revolutionary. Social, educational, medical and other services have been generously provided for the citizens free of charge.

The oil money has brought modern technology and diversified skills. This has transformed and modernised the country, which is now excellently equipped to provide comfortable living for its residents. The large influx of money and the huge infrastructure projects and development plans have contributed in bringing to the country alien workers: technical, managerial and unskilled. The indigenous population form only about 18% or 20% of the total population resident in the country (2).

British Entry to the Gulf

For a long time the coast of what is now the United Arab Emirates was under Omani rule. Omani domination spread from the current Oman to include the Musandam Peninsula and the Gulf coast, as well as some islands of the lower Gulf and parts of the Eastern coast, which now comprise part of Iran. Omani rule was challenged by the Iranians and the Portuguese, as well as by the rising power of the Qawasim who managed to unite a number of tribes and lead them to oust the Omanis from the United Arab Emirates coast and from all their positions in the Gulf.

Although the Portuguese had a stake in the affairs of the lower Gulf in the 16th century before the rise of the Qawasim, they departed the area leaving few traces of their presence, except for some forts. The Qawasim took a position on Qishim Island and from there they managed seriously to affect the customs receipts of the British East India Company from Bandar Abbas by controlling the inter-port trade of the area (3).

The first notable contact between the British and the Arabs of the southern shores of the Gulf (United Arab Emirates) was a military confrontation. The ruler of Ras-Al-Khaimah seized Basidu on Qishim Island and established a trading centre there. This seriously affected the customs receipts which were being shared between the British and the Persians. In 1727, the Agent of the British East India Company at Bandar Abbas led a naval expedition to Qishim Island and recovered the company's share of dues from the Qasimi representative on the island (4).

British trade with India grew in importance, and the trade

route needed to be safeguarded, using force where necessary to prevent any intrusion on their ships en route to and from India. Britain took responsibility for policing the southern shore of the Gulf against competing activities, by Europeans as well as Arabs (5).

The activities of the British East India Company remained mainly commercial until the end of the seventeenth century. British political and military involvements increased steadily in the eighteenth century (6).

Confrontation between the Qawasim and the British East India Company

Britain saw the Gulf area as important for a variety of reasons. Firstly, it was both a source of Persian silk and offered a large market for the textiles produced in Surat in India. Secondly, the Gulf is close to India, and was therefore strategically vital. In order to protect India from other European nations, and to safeguard British passage to India, Britain had to ensure that no other power, foreign or local, could challenge them in the Gulf. Thirdly, the route from India and other eastern dominions, which were spice producing areas, passed through the Gulf to Basra in Southern Iraq and from there to the Mediterranean, from where the spices were shipped to Britain and other European trade centres, was considerably shorter than the alternative route, used by Portugal and the Netherlands at that time, which passed around the Cape of Good Hope.

The rivalry of economic interests between the British and the Qawasim, the Alliance between the British and the Imam of Musqat who was the Qawasim's rival in the area, and the further alliance between the Qawasim and the Wahhabi state, all combined to make the clash between the two sides inevitable.

The first confrontations between the Qawasim and the British were on Qishm Island and at sea, but these were insignificant. The first real war between the Qawasim and the British was in 1809 when around 18 British warships attacked Ras-Al-Khaimah, the Qawasim's main base, and destroyed all the ships in the harbour, burned the city and took whatever they could, returning to sea in spite of retaliation by the Saudi allies of the Qawasim. The British discovered after four years that what they had destroyed was only a small part of the Qawasim navy, and that the Qawasim had resumed their activities at sea by 1812 (7). In 1812 the Imam of Oman with the assistance of the British, and with the help of the Bani-Yas tribes of Abu-Dhabi, attacked Ras-Al-Khaimah to regain a position there, restore the situation and put an end to Qawasimi activity. The attempt failed and the Qawasim proved again that they were still strong enough to retain their independence and maintain the area under their rule (8). In 1814 the Imam of Oman was finally successful, and imposed a truce on the ruler of Ras-Al-Khaimah by which this ruler relinquished his claim to Ras-Al-Khaimah and removed to Sharjah. One of his cousins became the new ruler of Ras-Al-Khaimah with the consent of the British representative. This step was aimed at dividing the territory under the control of the Qawasim in order to limit

their power.

Through time and the weakening of Qawasimi dominion, new cities along the Gulf coast began to claim independence from Qawasimi control.

The Inception and Development of the Treaty Relationship between Britain and the Emirates

The Qawasim continued their maritime activities against those who they considered trade or political rivals, in particular the British, Indian subjects of the British government in India, and the Omanis. The years from 1808 to 1818 witnessed the fall of the Saudi state at the hands of the Egyptians led by Ibrahim Pasha. The British in India were determined to take conclusive action to restore peace and stability for their trade in the Gulf. They sent Sir William Keir with a considerable naval force and instructed him to destroy all piratical vessels and naval and military stores found at Ras-Al-Khaimah. The British fleet stormed and occupied Ras-Al-Khaimah in December 1819 (9). Preliminary agreements were signed by the Sheikhs of Sharjah, who also signed on behalf of the Sheikhs of Ajman and Um-Al-Qaiwain, the Ruler of Ras-Al-Khaimah, and the Hinawi rulers of Dubai and Abu-Dhabi (10).

The terms of these preliminary agreements were not always the same but they amounted to assuring the surrender of vessels, fortified towers, guns and British Indian prisoners, while the rulers were assured of their rights to safe pearling and

fishing [11].

This occasion marks the first identifiable incident in which the individuality of the emirates was recognised by an international power.

The emirates already existed as individual tribal confederations, but this individuality and independence had extended only as far as domestic affairs were concerned. These emirates were increasingly treated as one political community by the foreign powers entering the area. That the British signed the agreement of 1820 with each ruler individually, was an act with several levels of significance. One in particular concerns this study, that is it gave an extra dimension to the individuality of the emirates, by recognising their independence in the international sphere. The British could have signed the agreement with only one of the rulers, and recognised his authority over all the area. Such an act would have united the area even though military force might have been necessary to enforce this unity.

Why did the British choose to sign the agreement with each individual ruler rather than recognise only one dominant figure?

There were several reasons for this attitude. One factor was that the British were determined not to interfere in local domestic affairs. Another factor was that the British preferred to deal with several small (and therefore weak) entities rather than with one comparatively strong entity. A third reason was that the domestic sphere was so complicated that the British found themselves obliged to deal with several rulers rather than with one alone.

An Evaluation of the General Treaty of 1820

The name of this treaty is The General Treaty for Cessation of Plunder and Piracy. This treaty was signed by the British East India Company with the Trucial states and Bahrain [12].

The purpose of signing this treaty was to preserve the trade of the East India Company and other British subjects against piracy or disruption. This treaty was not concerned with domestic matters, so it did not prevent the rulers from waging war against each other [13].

Article 4 of this treaty included a paragraph that the rulers:

> "undertook to be at peace with the British government and not to fight each other."

But this part was viewed as extending further than the original purpose of the treaty, so it was not enforced [14].

The Perpetual Truce of 1853

The British policy of non-interference in domestic matters and its lack of interest in inter-emirate disputes left the door open for conflicts and attacks by sea and on land between the emirates. There were several reasons why the British were not keen on preserving local security. These included the difficulty of communication, the sense of nationalism and the rejection of foreign interference in the local sphere. Another important reason was that the British were mostly concerned about the preservation of peace for their trade in the Indian Ocean and in

the Gulf which they considered not to be threatened by local wars. The frequency of conflicts between the emirates especially at sea disrupted the principal economic activity of the inhabitants, which was pearl fishing. In 1835 the British acting Political Resident suggested a maritime truce during the next pearl fishing season. So in August 1835 the rulers signed the suggested truce. The rulers bound themselves in this truce not to retaliate against any aggression if it happened in the pearling season, but to report the matter to the British naval authority. The non-retaliation truce was renewed annually to 1853, at which point the Political Resident consulted the rulers as to the possibility of signing a permanent peace at sea agreement (15).

In this truce the rulers agreed to a complete cessation of hostilities at sea. The rulers also agreed not to retaliate if they came under attack from another emirate at sea but to inform the British Resident about the incident. The importance of this agreement is that whilst it was signed between the individual rulers and the British Representative, its prime objective was to deal with relations between the emirates themselves to ensure peace at sea. So in this agreement we can see a major step towards normalising and pacifying relations between the emirates, who had for a long time confronted each other at sea and on land.

The comprehensive agreement of 1892

During the 1870s and 1880s there were various activities of other states which the British considered to be an unacceptable

challenge, and intervention in their domination of the emirates area. The French, Turks, Greeks and Persians all had some contact with the emirates. In order to ensure that other countries had no political or commercial contact with the emirates which might harm their interests, the British introduced and signed an agreement with the emirates allowing the British to control all the foreign political and commercial relations of the emirates.

In this agreement, signed in 1892 with the individual rulers, the rulers agreed not to enter into any agreement or correspondence with any power other than Britain, not to consent to the residence within their territories of any agent of another government and on no account cede, sell or otherwise give occupation of any part of their territories to anybody but the British government. This agreement has been called the comprehensive agreement. In this agreement it is manifest that the emirates surrendered a great part of their independence to the British government.

This was the last of the important treaties between the emirates and the British government.

The Legal Status of the Emirates under the British Treaty Relations

The British government treated the rulers of the emirates as heads of independent states. On various occasions in the nineteenth century, these rulers professed some kinds of allegiance to more powerful governments in the area. The governments, such as the Wahhabis of Saudi Arabia were interested in extending

their influence to the area. The fact that the British government decided to establish direct relations with the emirates shows that it did not consider that allegiance of the rulers to the other powers seriously affected their independence.

During the period 1820-1892 the British treaties with the rulers were all in the nature of military alliances and friendship. The British government exercised no legal jurisdiction over any part of the territories of the emirates (16).

In the period 1892-1911 treaties of protection and various other agreements were concluded between the British government and the rulers of the emirates. These agreements established closer relations between the British government and the emirates.

From 1911 agreements concerning economic matters and natural resources were signed, strengthening relations between the emirates and the British government further and creating a desire on the part of the British government to define more clearly the boundaries of the emirates.

Position of the emirates within the British Constitutional framework under the exclusive agreement of 1892

Under British Constitutional law, Protectorates differ from Colonies in that they do not constitute part of the British Dominions. In all British Protectorates foreign relations are controlled by the British Crown. However, the extent of power reserved by each protectorate internally is the basis on which British protectorates may be legally classified as:

(a) **Colonial Protectorates:** In these protectorates the amount of power exercised by the Crown does not differ very much from that exercised in the colonies. In general the Crown reserves most powers of legislation and administration. However, in contrast to the colonies, these protectorates are regarded as foreign territories (17). Powers of the Crown were acquired by virtue of agreements with tribal chiefs who agreed to place themselves under the sovereignty of the Queen. The Crown exercises jurisdiction in these protectorates over all subjects on the basis of the Foreign Jurisdiction Act, 1890. Legislation is enacted by Orders in Council, and an act of the Crown in relation to a native individual is regarded as an act of state which cannot be questioned in English courts (18).

(b) **Protected States:** In these states the British government has recognised the sovereignty of the local rulers, who have retained their independence at least with regard to the administration of their own governments. With regard to the external affairs of those states, the powers reserved by the Crown are based on treaty obligations. In practice the extent of powers exercised by the Crown in these states varies from one state to another, according to the particular circumstances. They are all, however, considered to be sovereign states and their rulers are granted immunities from jurisdiction in British courts.

The difference between Protectorates and Protected States is that

in the Protectorate the British government assumes and exercises full sovereign authority, although without annexing the territory, while in the Protected State the sovereign authority belongs to the sovereign of the state, and the role of the British government is derived from treaty agreements with the states [19]. In relation to the Gulf states, the first official reference to them as "British Protected States" was contained in The British Protectorates, Protected States and Protected Persons Order in Council, 1949 [20].

For the purposes of this order the Gulf states, together with other states, were classified as "British Protected States". Under this classification and the treaty, the rulers of the Gulf states, and the states themselves remained, internally independent of British control. The governments of the Sheikhdoms were headed by absolute rulers who reserved the power to make laws by proclamations and to administer, through representatives appointed by themselves, justice, police and various other functions of government. The British government exercised no power of legislation over any persons in the Sheikhdoms, other than those subject to the jurisdiction of British courts [21].

The Effects of British Treaties with the Emirates

British involvement with the emirates was fuelled by the search for greater stability and safety for its commercial interests in India. Raids on its commercial fleet, and on ships owned by its subjects, triggered the British attack on Ras-Al-Khaimah and the signing of the 1820 treaty. So the original

British interest was in the sea rather than on land. This goes some way to explaining why the British were not interested in the domestic affairs of the emirates, and wished to avoid incurring unnecessary expense by intervening in domestic politics.

British attitudes and policy had several consequences. By analysing British policy to, and its treaties with, the emirates we can note the following effects.

1) **The recognition by Britain that the rulers of the emirates are truly sovereign with whom it could have valid agreements under international law**

The emirates were comprised of numbers of people residing in certain areas alongside the Gulf, enjoying constant contact and relations with other groups of people living around the scattered oases of the interior. Since the entry into the area of the British, the rulers have been recognised as independent heads of tiny states subject to international law. The independence and sovereignty of each emirate was placed in relation to the whole world and in relation to each other. Before the treaties, the influence of each emirate varied through time. Sharjah was united with Ras-Al-Khaimah and included Ajman, Um-Al-Qaiwain and Fujairah, and was ruled by the Qawasim. Abu-Dhabi at one time extended from the Peninsula of Qatar to the eastern part of the inlet of Dubai. The 1820 treaty was the first written external recognition of the individuality of each emirate. Through time, and change in the balance of power in the domestic sphere, new emirates appeared (e.g. Fujairah) and other emirates disappeared

(e.g. Kalba), until the number of emirates stabilised. British recognition of new emirates was important for the bestowal of official credibility. British abstention from recognising the existence of a new emirate delayed its appearance (as with the case of Fujairah, which was not recognised by the British until the 1950s).

The treaties with Britain were an important factor in recognising the sovereignty and the individuality of the emirates.

2) The strengthening of the coastal rulers as opposed to their counterparts inland

The British originally signed the treaties because of their need to safeguard their trade routes to India. Their dealings, therefore, were with the coastal rulers. Recognition by the British government of the sovereignty of the coastal rulers made these rulers the only ones recognised as politically sovereign in the eyes of the rest of the world. The international emergence of the coastal rulers was reflected internally by the need of the leaders of the interior to align themselves with, and be subordinate to, the coastal rulers. This was done in order to receive the support and achieve the stability they needed to establish permanent existence on lands which had previously been in common use by all the turbulent people of the interior.

The stability resulting from the signing of treaties with Britain allowed pearling to flourish and the inter-port trade to increase. The increased wealth and enhanced economic status of the people on the coast had enriched their rulers who taxed the

incoming pearling ships and commercial vessels. The enhanced economic status of the coastal rulers was a further incentive for inland leaders to subordinate themselves and their territories to the authority of the coastal rulers.

The increasing strength of the coastal rulers helped to establish the present centres of political importance. The relative stability and security of the coastal cities, coupled with their economic strength resulting from the treaty, made these cities attractive to the inland population, resulting in further concentration of people in the coastal cities.

The emigration of people from the hinterland to the coastal cities had many consequences. Politically, it led to the increase in power of the rulers of these cities, and to a tendency for the cities to become full city states. Profound changes in the economic structure of the hinterland took place. Agricultural activities such as animal husbandry were abandoned in favour of those activities based on the sea, such as pearling, fishing and inter-port trade. This shift of economic importance in favour of the coastal cities was later consolidated when oil revenues replaced pearling revenues as the major source of income.

3) The improvement in inter-emirate relations, and the formation of the seven emirates as one group

Inter-emirate relations went through several phases. The first phase was that prevailing prior to the involvement of the British. This phase was characterised by the division into conflicting tribal alliances of the Qawasim and the Bani-Yas.

Later, the tribal alliances were restructured and a different pattern of conflict emerged. The restructuring occurred because of the alliances formed during the Omani civil war. The Qawasim allied themselves with the Ghafiri, whereas the Bani-Yas supported the Henawi. The alliances, however, could not be maintained. So Bani-Yas suffered internal conflicts, one of which resulted in the establishment of the emirate of Dubai (22). The Qawasim alliance suffered similar conflicts which resulted in their sphere of influence being divided into several new emirates. Inter-emirate relations were far from friendly or stable. Rather, there were constant conflicts, competition over economic resources and tribal disagreements. The signing of the 1820 treaty with the British started a series of events which resulted in the signing of a truce, the subject of which was to end the acts of transgression between the emirates. The British were not prepared to play the role of perpetual mediator between the emirates, so they did not maintain an adequate force to do this job. After signing the treaty with the British, the rulers felt that although there were no British naval ships in their area, they were capable of calling on the British military force in any major conflict. As this feeling strengthened, the incidence of war between the emirates declined. There were times when acts of aggression at sea began to increase, jeopardising the vital pearling in the Gulf. To reduce conflict, the treaties of 1835 and 1853 were introduced. The 1853 treaty introduced new factors into inter-emirate relations: because the rulers agreed not to retaliate against any aggression suffered at the hands of

other emirates during the pearling season. The non-retaliation policy activated under the 1853 treaty eliminated a principal cause of inter-emirate wars and conflicts.

A later treaty added a new dimension to inter-emirate relations: the grouping of the emirates into one unit. This treaty of 1897 has been has been called "The agreement for the mutual surrender of fraudulently absconding debtors". This agreement provided for the establishment of an Arbitration Council convened on behalf of the emirates' rulers. It was a significant step towards moulding the emirates into one political structure and separating them from the other Sheikhdoms in the area (23).

The grouping of the emirates into a single unit became increasingly evident. One reason was the common treatment by the British. Treaties were often signed by all the rulers, whilst the British interests were represented by one representative who was for a considerable time the native Resident Agent, situated in Sharjah.

4) The abolition of slavery

The 1820 treaty called upon the rulers to prevent their subjects from carrying off slaves from anywhere and transporting them. This did not end slavery in the area, although the treaties helped to curtail the slave trade. Later in the twentieth century, the British representative began to issue certificates to slaves pronouncing them free. This ended slavery in the emirates. The abolition of slavery precipitated major changes in the social and economic status of the people of the emirates.

THE DEVELOPMENT OF THE EMIRATES IN THE TWENTIETH CENTURY

1. Political Developments

The British expedition and attack against the Qawasim helped to disintegrate their state into several Sheikhdoms which were subsequently recognised by the British. At the same time, the Bani-Yas state was left intact because it was an inland-based state with no maritime power, (and therefore causing no threat to British trade). This helped to shape the political geography of the area.

The first signs of change were the appearance of two emirates, namely Ajman and Um-Al-Qaiwain, with local leaders who had previously fallen under the authority of the Qawasim. These leaders were now elevated to the status of independent rulers, with the power to sign treaties with the British. A further step in the disintegration of the Qawasim state was the division of the Qawasim themselves into two independent Sheikhdoms, Sharjah and Ras-Al-Khaimah. In time, the town of Kalba on the eastern coast was also recognised as an independent Sheikhdom.

The disintegration of the Qawasim state continued into the twentieth century. Fujairah was recognised as an independent emirate in 1951, and there have been attempts by two other towns (Himriyah and Rams) to gain independence from the Qawasim. In 1838 the Bani-Yas state, which continued to prosper, suffered an incident of disintegration. Some Bani-Yas families left to settle in Dubai, ousting the governor who was appointed by the Abu-Dhabi ruler. They established a new Sheikhdom with the Al-Bu-falasah

family as a ruling family. The present number of seven emirates dates from the 1950s.

The geographical size of each emirate is related to its history and development. For example, Abu-Dhabi is the largest because it is a land-based Sheikhdom, whereas the Qawasim have two smaller emirates because, being a maritime state, it was attacked by the British, and eventually disintegrated into several emirates.

The growth of Abu-Dhabi was enhanced by the strength of its ruler, Zayed bin Khalifa, who ruled for over sixty years (1855-1909). During the reign of Zayed bin Khalifa, the capital of Bani-Yas was transferred from Liwa to Abu-Dhabi Island; pearling activities brought economic success to the emirate; and the dominance of Abu-Dhabi was recognised over the Islands facing its territory as well as over the important Buraimi Oasis. The policies followed by Zayed proved successful in gaining the allegiance of several important tribes, through financial assistance as well as through marital relationships and well-conducted diplomacy. The British were mostly interested in preserving peace at sea for the benefit of their trade and postal routes, their emerging strategic interests in the area in the form of air routes to India and telegraphic stations in the emirates. The British were concerned to preserve the status quo and were against any change which might undermine the stability of the area. This policy entailed activities to maintain the existing emirates and their ruling families, their defence

against any threat from inside or outside and defending the emirates from the ambitions of each other.

In their treaties with the emirates, the British undertook to protect them from foreign attacks, so they were saved both from the Saudi expansionist designs and from Iranian ambitions.

Relationships among the emirates in the nineteenth century were marked by continuing animosity between the Bani-Yas of Abu-Dhabi and the Qawasim of Sharjah, and between each of them and Dubai. This latter was established when part of Bani-Yas seceded in 1838.

The relationship between the smaller emirates, established in the former Qasimi territory, and the remaining Qasimi state was one of continuing unrest. All the rulers of the emirates used the nomads of the interior as fighting men. To enlarge their territory, the rulers attempted to gain the loyalty of the residents. Their success in gaining the loyalty of the nomads was an assurance of their expanding and increasing power. Abu-Dhabi was remarkably successful in its alliance with the nomads, and continued to expand and to gain strength.

There were, however, times when the rulers felt the need to co-operate in order to achieve their common ends.

One of the remarkable co-operative achievements was the signing of the Perpetual Peace Agreement in 1853. In 1905 the rulers of the emirates of that time (Abu-Dhabi, Dubai, Sharjah, Um-Al-Qaiwain and Ajman) held a meeting to solve a dispute concerning some mountain villages. This was the first recorded meeting of all the Sheikhs in a Council [24].

The British policy of general non-interference in domestic politics left the different relevant factions to interact as they chose. What concerns us here is that the rulers felt the need for joint action and co-operation. Co-operation among the emirates continued, and later developed into institutional bodies with the permission and encouragement of the British authorities. These experiences of joint actions and the later co-operative institutions had a decisive effect in encouraging the emirates to accept the Federation when it was time for the British to leave the area.

British policy appeared to encourage co-operation between the emirates. At the same time, each emirate retained its independence. The British policy of guaranteeing the independence of the emirates from the ambitions of other emirates entailed the repeated threat to use force against any emirate which appeared to be challenging the independence of another emirate (25).

As a general rule, fighting decreased with the passage of time. Maritime fighting was virtually eliminated by the Perpetual Peace treaty. Fighting on land decreased steadily, with sporadic exceptions. The emirates were gradually moving from an era of continuous war and hostility into an era of mutual understanding and co-operation.

The absence of a law of primogeniture in the emirates has been a cause for continuous turmoil and unrest. In the event of the death of a ruler, rulership used to be handed down to the nearest adult male, but this was not a general rule accepted by

all the ruling families and their members. Furthermore natural death was not the only way of ending one reign and beginning another. There were murders by brothers, nephews and cousins, and there were depositions and secessions. The challenge of power in the emirates was continuous. While the people of each emirate generally accepted the ruling family as their source of rulers, competition among the members of such families was generally endless. The murder of some rulers and the deposition of others was a feature of all the emirates except Dubai in which troubles among the members of its ruling family were never allowed to escalate to the level of changing the ruler. A reason for this may have been that Dubai is the trading centre of the area and the ruling family was aware that political unrest on the domestic scene might lose the emirate its privileged position. Two emirates experienced the greatest domestic turmoil. These were the two largest emirates, namely Sharjah and Abu-Dhabi.

The competition for the ruler's post used to begin after a long reign by a strong Sheikh, so in Abu-Dhabi the troubles began after the death of Zayed bin Khalifa (who ruled from 1855 to 1910), and in Sharjah the major turmoil occurred after the death of Sultan bin Sagr (who ruled from 1803 to 1866) (26).

It was common for the rulers to regard the threat from their family members as more dangerous than the threat from other emirates or foreign powers, so there were incidents in which the rulers invited the British to defend them against ambitious family members, and in other incidents the rulers called on the co-operation of other emirates to end a domestic challenge by a

family member [27].

Domestic challenges to government played a significant role in inter-emirate relations. Two emirates could improve relations at a time when it was important for one or the other to have outside support to end a domestic challenge to power. At other times new animosity could erupt and wars begin if the ruler and his closest family members considered that another emirate was assisting and providing refuge for one of their family members trying to wrest the rulership from them.

The final stage of gaining power in an emirate involved official recognition of the new ruler by the British authorities. This was signified by the delivery to them of copies of all the previous treaties and agreements, and by having the ruler agree to abide by these treaties.

The British, by their recognition of new rulers and new emirates, were the final arbiters in the settlement of domestic unrest by recognising the status of the new ruler, or the new emirate.

2. Economic Development of the Emirates and its Effects

Traditionally, the people who resided in the emirate areas were either camel breeders or fishermen, with both engaging in date palm plantations. The coastal people also used their boat building skills to build larger vessels to engage in inter-port trade between Iraq, Iran, India and Eastern Africa. The desert people were mostly camel breeders and date palm growers. They

would drink camels' milk and eat dates as their daily diet. There was an interchange of goods between the coast and the interior, so the people of the interior would bring firewood and milk products to the coast and buy dried fish and some imported products. The traditional way of life had implications for the inter-emirate relations. Among the reasons for friction among the emirates were: disputes over grazing areas, inter-tribal feuds, disputes over water resources and other kinds of competition over resources both on the coast and in the interior.

This, then, was the pattern of life until the appearance of the British and their treaties with the rulers in the early nineteenth century. Treaties with the British authorities in India assured the rulers and their subjects of access to Indian markets, and also gave an assurance of protection if they flew the appropriate flags on their ships. The ensuing period witnessed rapid growth in pearling, because of the assured access to Indian markets and the new markets for their pearls in Europe and the United States.

During the era in which pearling flourished, new kinds of inter-emirate disputes arose. Pearl diving needed to be financed. The money came from local financiers as well as from Indian merchants living in the area. One problem was that sometimes (especially towards the end of this era) the pearling vessels were earning less than what was expected of them. Consequently their owners suffered loan repayment difficulties, and sometimes absconded to a neighbouring emirate where they could start afresh. The flight of debtors caused disputes, and

sometimes wars, between the emirates. In 1897, therefore, all the trucial Sheikhs signed an agreement for the surrender of fraudulent absconders [28]. The disputes referred to in the 1897 agreement were to be decided by a council of the rulers. This was a positive step towards solving their disagreements by co-operative efforts.

The pearling era brought with it a new source of income for the rulers and their families: taxing pearling vessels. The increased wealth of the coastal rulers and their acquired ability to support inland nomads and tribes financially, brought them not only strength but also sometimes new sources of territorial conflict between the emirates and disputes over loyalty of the inland tribes. Taken as a whole, the pearling era was beneficial to the rulers.

The rulers and their people had found a significant source of income. Overall, this tended to stabilise the region because it was recognised that unrest and disturbance could ruin their pearling activities and endanger their economic progress.

Among the benefits of the pearling era, and the financial well-being it brought to the people of the emirates, was access to the outside world. In contrast with the situation of the emirates prior to the pearling era, the people were able to travel to India to sell their pearls and to buy goods. The people also developed an interest in regional affairs.

By 1930 the Gulf pearl trade was in decline. The introduction of Japanese cultured pearls; the world recession;

and the new restrictions imposed by India on the importation of the Gulf pearls; all had a cumulative effect.

The sudden decline of the pearl trade had several social and political effects. Large numbers of people migrated to neighbouring countries looking for work. Once-wealthy pearl merchants accumulated debts to Indian financiers. Intervention by the British Political Resident attempted to ensure that the debts were paid, but the rulers failed to pay their debts, because they were used to paying for their allies and inland tribes. Starvation became apparent in most of the emirates, and the people returned to their old ways of life. The emirate area and its people lost much of what they had gained in past decades and returned to being an isolated area with little attention paid to it by the outside world.

One emirate was excepted from the sudden return to poverty; this was Dubai. Its geographical position and the liberal trade policy adopted by its ruler encouraged commercial activity. Inter-port trade with the Iranian coast throve. Dubai became the centre of commercial activity in the area, and a number of Persian traders emigrated to Dubai in order to continue their trade. The importance of Dubai was further acknowledged by the British transfer of their Political Residency from Sharjah to Dubai. As a whole, however, the emirate area remained economically unimportant until the discovery of oil in neighbouring countries, and the prospects of oil discovery in the emirates area.

Oil was first struck in commercial quantities in Abu-Dhabi

in the late 1950s and increased into the 1960s with oil income doubling and trebling bi-annually. The other emirates benefited from oil money even before production carried oil from their territories. This was by the payment of rent of concession lands.

The dawn of the oil era was, to an extent, a mixed blessing. One consequence was the rekindling of territorial disputes between the emirates, and the challenge by the inland tribes to the authority of the rulers to grant concession rights over their home-lands. The British began to take a more active interest in the domestic politics of the emirates. They formed a new defence force, gave financial assistance to the emirates, and advised over concession agreements. Employment prospects for the people rose, and modern medical and educational (and other) services became available for the first time.

The rulers of the oil producing emirates were acquiring unprecedented financial strength. These emirates were Abu-Dhabi and Dubai, and later Sharjah and Ras-Al-Khaimah.

3. Some Aspects of Development in the Twentieth Century

(a) The number of emirates fluctuated from just two in the nineteenth century (the Qawasim and the Bani-Yas) to about nine, and stabilised at seven emirates in the 1950s. The seven emirates appeared as independent from each other and were each recognised by Britain.

(b) As the number of the emirates stabilised at seven, with most of the emirates having seceded from the original two, a new

problem arose of how to determine territorial boundaries between emirates. The problem of defining boundaries was complicated by several factors:

i the absence of clear conventional rules for defining territories;

ii the fluctuation of tribal loyalty, which was the most important sign of the distribution of land among the emirates;

iii the discovery of oil dramatically increased the importance of land, and precipitated vigorous competition between the emirates to claim ownership of territories which had for a long time been neglected;

iv the scarcity of water had sometimes been the cause of disputes about the ownership of wells and other water sources;

v the small original area of some emirates coupled with their need for land to provide for residential and other services, led them to try to enlarge their areas by claiming ownership of territories lying between them and other emirates [29] and;

vi the complex intertwining of the emirate territories complicated the problems of defining the exact territorial boundaries.

Territorial disputes have been a traditional feature of relations between the emirates. Moreover, territorial disputes continued, even after Federation. In one instance, the conflicts led to confrontation between two emirates with the resulting loss

of several lives. Fortunately most of the territorial disputes have been settled gradually over the past few years.

(c) The gain by the rulers of a new source of power, which was the money received as royalty payments and concession rentals from the oil companies. The potency of oil to enhance the power of the rulers lay in the fact that, on the one hand, ownership of the natural resources was vested in the government of each emirate, and on the other hand that the rulers were fiscally almost unrestricted. Each local economy became dependent on the local government and the will of the ruler to spend the oil money on public services and investment projects. Local governments, and particularly the rulers, were able to strengthen their positions by providing money for tribal groups and establishing new services. This resulted in increasing the loyalty of the people to them. In direct contrast, the old system of financing the governments of the emirates was mainly from taxes and customs duties which meant that the rulers needed the co-operation of the people to ensure their incomes.

(d) In the middle of the twentieth century the emirates area began to open up to the rest of the Arab world from whence teachers, doctors and civil servants came. Radio broadcasts received from Egypt and other Arab countries transformed Arab nationalism, and engendered resentment of the heavy presence of non-Arabs in the area, especially in the 1950s and 1960s.

(e) The rapid educational development in the area transferred the attentions and concerns of the majority of people from local

affairs to regional concerns.

(f) The competition for power in the ruling families continued to weaken the rulers and their power in most of the emirates. The rulers have generally tended to have their family members share with them their political power and financial gains. The attention of rulers was mostly divided between the competing emirates and challenging members of their families.

(g) The flow of oil money and the need to spend it on infrastructure and to provide services made it essential to bring in foreign workers.

The money brought with it foreign companies and foreign investors. The result of the flow of foreigners was that they became the majority - about 85% at one time. The large number of foreigners in the country had several effects. As well as using the free health and other services, the foreigners brought with them a range of problems for emirate society, including an increase in the crime rate, and the introduction of drugs.

(h) Confirmation about the independence of the emirates and the new-found strength of the rulers served to make the emirate governments focal points in emirate political life. To gather the tribal units and the nomads, encouraging them to identify with one of the emirates became politically important. The oil money strengthened the appeal of affiliation with the emirates, especially those producing oil. Recognition of affiliation and the benefits derived from their governments gradually eroded tribal loyalties, which transferred to the emirates instead. With the appearance of the Federal Government and its role of

bestowing nationality, and providing education, health services, most of the civil service and social services and allowances, it began to command loyalty.

4. Islam and its Effects in the Emirates

At the beginning of the twentieth century, the residential population of the emirates was almost homogeneously Sunni Muslim. The exceptions were a few Shi'a Muslims who had emigrated from the Persian coast and India, and even smaller numbers of Hindu pearl merchants living in the area temporarily. There were no signs of competition between a majority and a minority, and no differences among the indigenous residents in their religious beliefs. The Sunni sect comprises four schools of opinion. All of these schools agree on the religious beliefs and fundamental principles but differ in some of the interpretations of some legal and behavioural duties contained in the original sources. But the differences were minor and had no schismatic effect on the population, despite the presence of three of the four schools in the emirates.

The overwhelming uniformity of belief, and the fact that Islam occupied a supreme position in the people's lives, unified the population, especially in the face of foreign intervention. Islam was and still is the basis for both public and private life of the people in the Gulf area.

Islam was considered the most important basis for constitutional and legal rules in the emirates. Customary law generally

played a major role in interpreting the general rules, filling the gaps, and adapting Islamic legal principles to the local society. There were few educated Judges and Religious Leaders employed by the rulers. Despite this fact the general rules applicable to the different matters of public and private life were usually known by inheritance from generation to generation with modification from time to time. So, Islamic law was applicable, but its rules were supplemented by custom and usage. The rulers were the final arbiters in their emirates, but with the passage of time and the increased complications of life, the rulers began to appoint Judges educated in Islamic Law. In the 1960s, Western laws were introduced in Dubai and Abu-Dhabi with the emirates applying their rules. Judges with Western legal education began to appear with the introduction of the new laws. The new laws were basically concerned with commercial, traffic, tax, penal and emigration matters. Islamic law was to govern in all matters not provided for in the new codes. The British political agent was responsible for matters concerning foreigners and this was provided for by Orders in Council of 1950, 1956 and 1959.

5. Joint Actions and the Road to Federation

The emirates were on the road to greater co-operation and closer relations with the passage of time. The common needs and characteristics of the emirates were overwhelming and the British authorities encouraged them to co-ordinate activities and establish friendly relations towards each other.

The first examples of joint action were treaties for peace

at sea and other kinds of agreements, further the rulers felt the need to meet as a council to solve some problems concerning tribal disputes. After the Second World War and the beginning of the British policy of increased attention to the domestic affairs of the emirates, the British encouraged joint activities and established projects to institutionalise the new increased co-operation between the emirates.

British concern about the domestic affairs began with activities in two different spheres. The first was the provision and organisation for the development of the service sector in the emirates starting with health and extending to agriculture, education, roads and other kinds of services. Development assistance was launched in 1939 with a dispensary in Dubai, then developed to be administered by the Development office. The second of the British projects was the establishment of a modest military land force to protect peace under a variety of circumstances. This force was called the Trucial Oman Levies, subsequently renamed the Trucial Oman Scouts. The new force was needed to protect the oil explorations and the airfield, and to ensure peace between the emirates. The Trucial Oman Scouts later formed the core for the Union Defence Force after independence. To co-ordinate the development projects and co-operative efforts, the British established a council of the rulers of the emirates. This council was called the Trucial States Council (TSC). The TSC was established in 1952 with the British political agent as President and the rulers of the seven emirates as members of the

council. This council was a venue for co-ordination and co-operation between the rulers. It had neither written documents regulating its work nor any real power to execute its decisions. However the TSC remained for a period of about 20 years helping to draw the emirates and their rulers together and to open the way for closer and more friendly relations between them. To organise its work, the TSC set up specialised committees and established the Development Fund which administered the financial assistance received from the different sources, channelling the assistance towards several vital services in the emirates. The TSC was helpful proof for the emirates that together they could achieve success and move forward to developments. More importantly, the rulers came to feel that their independence would be preserved while the co-operative projects were provided. The rulers met in the TSC nearly twice annually, so it was a good chance to forget the age old tensions and begin to strengthen personal relations between each other.

In the mid 1960s Chairmanship of the Council was transferred from the Political Resident to one of the rulers elected by the Council for a specific period of time [30]. The TSC had an important effect on the people of the emirates. It gave them a sense of unity by demonstrating to them that their vital services of health, communication and agriculture were provided to each emirate by the one council. Towns saw the establishment of work-shops and offices carrying the name of the TSC and its Development Fund. These developments helped to make the idea of inter-emirate co-operation acceptable and welcome. Relations

changed from animosity between the emirates to friendship and co-operation.

The idea of Federation between the seven emirates, Qatar and Bahrain was triggered by the announcement by the British government on 16th January, 1968 of its intention to terminate its official treaty obligation with all of the emirates and to leave the area by the end of 1971 (31).

6. The Dubai Agreement of 1968 and its Effects

The announcement by Britain of its intentions to leave the area, prompted anxiety and fear of a future full of dangers and challenges. Politically, militarily and economically the emirates had always had the security of Britain as representative, protector and keeper of the status quo. There were ambitions from Iran and other forces in the area for more power. Could the small emirates face the world as independent States? This question, and hosts of others, prompted the rulers of the emirates and the neighbouring countries to start discussions and speculations about the future of the area (32).

The first concrete result of Union of the area, following the British announcement was a bilateral agreement between Abu-Dhabi and Dubai. On 19 February 1968 Abu-Dhabi and Dubai announced that they had reached agreement on federation between them, stipulating that the federation should be established under one flag and be responsible for foreign affairs, defence and internal security, medical and educational services, and

citizenship and migration (33).

The rulers of Abu-Dhabi and Dubai extended a pledge in their agreement for the five other emirates of the coast of Oman, and the two other emirates of Qatar and Bahrain, to consult on the issue of unifying their efforts to ensure a better future for the area (34).

A week after the accord between Abu-Dhabi and Dubai was announced, all the rulers of the other seven emirates responded positively to the invitation extended in that accord. A meeting of the nine rulers was convened in Dubai from 25 - 27 February 1968 for consultation on forming a union of all nine emirates (35). An agreement was reached to form the "United Arab Emirates Federation" (which we will refer to as the Dubai Agreement). Objectives of this federation, that were announced in the declaration, included: stability in the region, common defence, strengthening joint actions and co-operation for development and a better future for the people. The agreement determined federal authorities to be:

1) A Supreme Council comprising the rulers of the emirates to oversee the affairs of the federation and to be the supreme legislative and executive authority in the Union (36).
2) An Executive Council was provided under the name the Federal Council. This council was to assist the Supreme Council and act according to the policies established by the rulers in their meetings as the Supreme Council. The decisions of this council do not take effect unless approved by the Supreme Council (37).

3) The Federal Supreme Court, which was determined to be the highest judicial authority in the Union. The composition and competence of this court was to be defined by law (38).

The agreement provided in Article 4, that the Supreme Council shall undertake responsibility for laying down a charter for the federation, which was to be ultimately called "The Provisional Constitution".

The Dubai agreement was drafted hastily under pressures of need, to stabilise feelings of anxiety within the emirates and to respond to threats from outside. There was a feeling among all the rulers that to fill the vacuum left by Britain, the bilateral agreement between Abu-Dhabi and Dubai presented an opportunity for the others to join and to satisfy the need of that time. As to the agreement itself, it was very brief (17 Articles in total) and was to prove unworkable and too vague in order to form a basis for a continuing federation.

All the decisions of the Supreme Council were to be taken unanimously (39). The decisions of the executive body (the Federal Council) had to be approved by the Supreme Council in order to be implemented. Ultimately all decisions, legislation and orders of the federation created by the Dubai agreement had to be approved unanimously by the rulers. This fact was to prove an obstacle to any effective operation for the Union.

The agreement left a host of important areas undecided: Who was to finance the federation ? Had each emirate a right to maintain its own armed forces ? How were the executive posts to

be distributed ? Resolving these and other questions was to prove very difficult, as through the passage of time competition for power and authority gathered momentum.

The first test for the Dubai agreement proved to be a disappointment. In preparation for the first meeting of the Supreme Council, the advisors of the rulers of the emirates met in Abu-Dhabi on 18 and 19 May 1968 in order to agree on the minutes of the Supreme Council's meeting. There was a fundamental disagreement about the interpretation of the Dubai agreement about whether to discuss details necessary to form a working union, or else take matters step by step, the first meeting of the Council focusing on the matter of the permanent charter. The representatives failed to reach agreement and the matter was transferred to the meeting on 25 May 1968 of the Supreme Council, which also failed to agree on the matters to be included on the agenda of the first meeting. The meeting ended in failure and reached agreement on no decisions at all (40).

There were two different perceptions about the Dubai agreement, each perception held by a number of emirates. The first group saw the Dubai agreement as a preliminary agreement drawing general outlines, and as such, not self-executing. In this groups' idea, the full operation of the federation could not be discussed until the permanent charter was drafted. The second group were of the opinion that the agreement determined that it was to come into force on 30 March 1968 and as such, starting from that date, it was a binding agreement which was supposed to be applied, and therefore the Supreme Council in its first

meeting, should discuss the details of the formation and operation of the different federal authorities and draft its policies (41).

As the first meeting failed, there was the possibility that the whole federation was endangered, so neighbouring countries intervened to help solve the problem and save the federation (42).

On 6 and 7 July 1968 the Supreme Council met in Abu-Dhabi and agreed to start putting into operation their Dubai agreement. It was apparent that full enthusiasm for the federation was missing. So instead of choosing a president for the Union for a term of one year, the rulers agreed that in every meeting of the Supreme Council they would agree to choose a president for the meeting, and there was a clear retreat from the principle of choosing a president for the Union into choosing a president for the meeting. The clear cause for this retreat was the competition for power between the rulers, and this kind of competition and jealousy was continuing. As a consequence of the decisions of the Supreme Council at this meeting, the Federal Council (the executive body) was formed. The federation looked real for some time, and the Federal Council started operation and formed several committees to discuss unification in several areas. The competition for power and the disagreements about the distribution of power and the sharing of the important posts in the Federal Government, combined ultimately to bring the federation to failure.

7. Developments of the Idea of the Constitution

The Dubai agreement of 1968 was the basis for the federation of the nine emirates but, according to its provision, it was not enough to form a basis for a continuing federation. Article 4 of the Dubai agreement gave to the Supreme Council the responsibility for drafting a permanent charter for Union. The matter of the permanent charter (which was to be called the Constitution and later still, the Provisional Constitution) was on the agenda of all the meetings of the Supreme Council.

1) The First Stage

In the first successful meeting of the Supreme Council, the first resolution of this meeting was Federal Resolution Number 1:

> "The public law expert, Dr. Ahmed Al-Sanhouri should be contacted in order to be entrusted to undertake the mission of drafting the full and permanent charter of the Union. The expert should complete his mission in a period not exceeding six months from the time of reaching agreement with him. The expert has the right to seek help from assistants, provided that these assistants are approved by the committee entrusted with communication with the expert". (43)

The second resolution concerned appointment of members to communicate with the constitutional expert and to represent the emirates in the committee. Each of the nine emirates was represented by one person on this committee.

Dr. Al-Sanhouri began by appointing two assistants who would undertake some of the preparatory proceedings. One of the

assistants visited each of the emirates on an information gathering mission on which he travelled extensively throughout the emirates (44).

Due to illness, Dr. Al-Sanhouri was unable to complete his work of drafting the permanent Charter for the Union, making it necessary for the Supreme Council to look for an alternative solution in order to get the charter drafted.

2) The Second Stage

In its meeting from 10 - 14 May 1969, the Supreme Council agreed to form a committee of legal experts, nominated by individual emirates, to draft a charter which would be submitted to constitutional experts in order to study it and provide recommendations about it. The draft would then be presented to the Supreme Council for adoption.

It is noticeable that in this stage, the charter began to be called a "Provisional Constitution" (45).

The committee of legal experts was required to complete its drafting of the Provisional Constitution within two months of its formation. The committee produced their draft of 126 articles within the time allocated.

The constitutional expert appointed to review the draft produced by the committee of legal experts was Dr. Wahid Ra'fat, who was familiar with the needs and circumstances of the emirates due to his work as advisor to the government of Kuwait, and his previous visits accompanying the Kuwaiti Foreign Minister during some of the years that witnessed the birth of the federation.

The constitutional expert, Dr. Wahid Ra'fat, was supposed to receive, in addition to the draft constitution, the ideas and notices from the emirates concerning this draft constitution. Dr. Ra'fat received only some remarks from Dubai and a full substitute draft from Qatar (46). He met with the members of the committee of legal experts and discussed with them the concerns of the emirates.

Dr. Ra'fat considered it appropriate to draft a complete revision, instead of merely commenting on the version produced by the legal committee. He contended that he had to re-organise the constitutional draft and provide for the matters omitted by the committee. The result was a new constitutional draft of 164 articles.

This constitution contained the unanimity condition for taking decisions in the Supreme Council, so this impediment was not removed (47). The matter of the permanent and temporary capitals of the Union was dealt with vaguely (48). The provision for the composition of the consultative council was controversial in this draft and not in line with the agreed basis (49).

The draft provided by Dr. Ra'fat contained his perception of the state of defence and the military forces within the emirates, that only the Federal Government should have the right to keep armed forces (50).

The draft provided by Dr. Ra'fat contained ideas that needed negotiations and concessions to be agreed to, but not a mere inclusion in a draft constitution. The draft as provided, therefore, needed more time and major changes to reach a form

that was acceptable to the emirates.

At the meeting of the Supreme Council in October 1969, a project resolution was passed, to transfer the draft Provisional Constitution to a committee of experts to study it and present further recommendations.

The mere fact that the adoption of draft was not agreed on, reveals a disagreement about the content of the draft presented. Indeed, the council passed a projected resolution to form a consultative council composed of equal numbers of representatives from each of the emirates, and other decisions which were incompatible with the draft constitution.

The failure of the Supreme Councils' meeting and the failure of its members to sign the declaration containing the decisions of this meeting, meant that the issue of the Provisional Constitution was left without any effective decision to move it forward.

3) The Third Stage

At this stage, the future of the federation of the nine emirates appeared to be increasingly uncertain. The possibility of separation from the other emirates of Bahrain and Qatar began to appear after the failure of the Supreme Council meeting in October 1969, and their failure to re-convene the council in November of the same year.

The committee, proposed in the Supreme Council meeting of October 1969, began its meetings despite the fact that the decision concerning its formation had not been formally signed,

since there had been unanimous agreement to its formation. The work of the committee involved the two drafts: the one presented by the committee of legal experts, and the other devised by Dr. Ra'fat. The result was a new draft of 153 articles (51).

Three main areas proved difficult for the committee to agree about, so the articles dealing with these were left blank and were referred to a meeting of the Supreme Council, which was supposed to take place in August 1970, but was delayed until October 1970. These three areas were:

1. The Capital of the Union.
2. Voting in the Supreme Council, and
3. Distribution of seats in the Consultative Council.

Agreement on these matters was expected to be difficult due to competition between the emirates, and the difficulty of reaching agreements due to the unanimity requirement in the Dubai Accord.

The developments which took place in 1970 and 1971 resulted in the declaration of Bahrain and Qatar of their independence as sovereign states. The federation of the seven emirates appeared a very strong possibility.

Six emirates announced their adherence to the Federation Agreement in December 1971, followed by the seventh in February 1972. The signing of the Federation Agreement coincided with these emirates becoming fully independent political entities. The United Arab Emirates was declared a sovereign entity in December 1971, one day after the British agreements with the emirates lapsed.

The Constitution, which was originally drafted for the

Federation of the original nine emirates, was modified to fit the needs of the new government. The Constitution of the United Arab Emirates was called a Provisional Constitution, to be replaced by a Permanent Constitution after five years.

The strong re-appearance of the TSC was central to the formation of the seven-member federation. During a regular meeting of the TSC, all the rulers, with the exception of the ruler of Ras-Al-Khaimah, agreed to form a federation of their emirates with Sheikh Zayed Bin Sultan of Abu-Dhabi as President for five years. Abu-Dhabi was chosen to be the temporary capital of the Union.

Voting in the Supreme Council was agreed to be by majority, with the condition that votes of Abu-Dhabi and Dubai were to be among the majority. Agreement was reached to distribute Cabinet posts among the emirates.

Conditions requested by some of rulers were granted in order to assure the completion of the Federation. Among these conditions was one, presented by Dubai, that it kept control of its own customs regulation and duty collection, this being central to its economy. The main reason for hesitation by Ras-Al-Khaimah in joining the federation, was the rejection of its demands to be given rights on equal terms with Abu-Dhabi and Dubai, namely the same quota of members in the legislative council and veto powers in the Supreme Council (52).

Chapter One Footnotes

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3 See Qasim, J.Z. "Ancient Emirates and New States" in: The Arab League, op. cit. p.26.

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15 Ibid, p134.

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17 Keith, A.B. The Governments of the British Empire (reprint) London: Macmillan and Co., 1936, pp.500-501.

18 Al-Baharna, op. cit. p82.

19 Keith, op. cit. p.508.

20 Al-Baharna, op. cit. p82.

21 Ibid, p83.

22 Qasim, op. cit. p30.

23 Heard-Bey, op. cit. p292.

24 Hawley, op. cit. p148.

25 For example, the British representative ordered the ruler of Abu-Dhabi to relinquish his hold of Zora which is a strip of land near the Sheikhdom of Ajman. The ruler of Abu-Dhabi used this area to extend his authority northward. See Hawley, op. cit. p147.

26 Zahlan, R. The Origins of the United Arab Emirates: A Political and Social History of the Trucial States London: The Macmillan Press, 1978, p35.

27 Dubai, which was at most times at odds with Sharjah and Abu-Dhabi, used to give refuge to the contenders for power in these two emirates.

28 Heard-Bey, op. cit. p212.

29 For example, the dispute which took place between Sharjah and Dubai.

30 Khalifa, A. The United Arab Emirates: Unity in Fragmentation Boulder, Colorado: West View Press, 1979, p26.

31 The announcement was made by the then Labour Prime Minister, Harold Wilson, in the House of Commons. See Taryam, A, The Establishment of the United Arab Emirates: 1950-85 London: Croom Helm, 1987, p.64.

32 Ra'fat, W. A Study and Documents about the Union of the Arab Gulf Emirates (in Arabic) Cairo: The Egyptian Society of International Law, 1971, pp.4-5.

33 See Taryam, op. cit. p.89.

34 See the text of the declaration in: Ra'fat, op. cit. p.161.

35 Ra'fat, op. cit. p.6.

36 Articles 3 and 4.

37 Articles 7, 8 and 9.

38 Article 13.

39 Article 4.

40 Ra'fat, op. cit. p.17.

41 Loc. cit.

42 See Ra'fat, op. cit. p.18.

43 Quoted from Ra'fat, op. cit. p.183.

44 Taryam, op. cit. p.104.

45 See Ra'fat, op. cit. p.97.

46 Ibid. p.103.

47 Art.52, in Ra'fat, op. cit. p.328.

48 Article 10, Ra'fat, op. cit. p.323.

49 Article 164, Ra'fat, op. cit. p.350.

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PART TWO

CHAPTER TWO

THE SIGNIFICANCE OF SUPREME COURTS IN FEDERAL SYSTEMS

The federal system of government is associated with the American Constitution of 1787, and with constitutions which have been influenced by it.

There is no all-embracing definition of federalism, as several authors in this field have each stressed different aspects of the federal system (1).

For our purpose, we can identify the federal system as:

> A system of government in which there are two layers of government governing the same people and the same land with a specific agreement of the division of power enabling each layer to have a sphere of power in which it is autonomous. With a written guarantee of autonomy for both layers of government in their respective spheres. (2)

The federal system of government co-exists with other forms of government in a world of constant change and shifting variables. The division of power in the federal system is usually embodied in a written constitution. But the application of the constitutional provisions which deal with the division of power (and other important areas) creates controversy. It is in the application of federal constitution that the supreme courts and constitutional courts play a vital role.

The Role of Supreme Courts in Federal Systems

The most important feature of federal systems is the combination of unity and diversity. A single national policy is created but without hindering or jeopardising regional autonomy.

It is argued that for the federal system to preserve its all-important division of power there should be an arbiter to decide the points of controversy regarding divisions of power, and in most federal systems this function is allocated to the highest Constitutional Court (3).

Constitutional Courts need to be impartial. In order that they are not influenced in their decision-making by federal or state authorities, Constitutional Courts need to be protected in some way. Moreover, the Supreme Courts, through their review of the federal and state legislation, are supposed to allow for the adjustment of constitutional norms, reflecting development in various aspects of national life. The judges of the Supreme Courts have to be protected from the reactions of either state or national authorities. The judges also have to be selected and appointed in a way which allows them to function without prejudice.

The idea behind the division of power is that aspects for which national uniformity is considered important are deemed the responsibility of federal government. Matters which it has not been possible to add to the sphere of the federal government or that have been felt not to be important to unity are usually left to the state.

Changes in local, national and international life demand legislative responses. Most federal constitutions, however, are difficult to amend. Constitutional Courts carry the burden of constitutional construction, liberalising and where desirable adding to the remit of federal government (4).

It is by no means acceptable to all commentators that Supreme Courts involve themselves in expanding the sphere of powers allocated to national governments, a subject which will be discussed in the next chapter.

Supreme Court judges are elected or appointed by different means in different federal systems, but none of these means of appointing the judges is sufficient to ensure complete neutrality (5). In the United States, the President nominates the judges and the Senate confirms the nominations, a procedure which was designed to give those who were thought to represent the states a say in the appointment of the judges. From experience it is obvious that federal government dominates the choice of judges because the Senate has become less directly representative of the states. The act of appointing the Justices of the Supreme Court has acquired an enormous importance for Presidents in their attempts to leave a long-lasting imprint on the governmental matters of the country, not only in federal state relations but also in other matters. The issue now in the appointment of new judges to the Supreme Court of the United States is not one of national and state control but is really one of party politics and political ideas (6).

In West Germany half the judges of the Constitutional Courts are selected by the Bundesrat and thus by the states, while the other half is chosen by a special electoral committee of the Bundestag (7). Again, in the West German Constitutional Court, political ideology has come to figure in the Court's opinions

more than supposed national and state interests. So in the case of the European Defence Community controversy, the position adopted by each Senate of the Court was based on the dominant political ideology (8).

Judicial review in federal systems

Judicial review of the constitutionality of legislation is designed to limit the power of legislative authorities to disregard the constitution and the limits and values it contains. The roots of the judicial review lie with the ancient notion that people have a right to disobey unjust laws (9). Judicial review in the United States is based on the theory of the separation of powers. This is coupled with the American system of checks and balances. It is arguable that those who framed the United States constitution did in fact intend to give the judiciary the power to review the constitutionality of acts passed by Congress. In 1803 Justice Marshall, in his opinion in Marbury v. Madison (10), did not hesitate to announce the right of the courts to disregard those legislative acts which it considered to be contrary to the constitution. Judicial review became one of the bases of the United States constitutional system. The Supreme Court, through its power of judicial review, asserted its power to have the final say about the interpretation of constitutional provisions. The Supreme Court, through its right to refuse cases, increasingly specialised in constitutional cases. As the constitution grew older, the importance of the role of the Court in interpreting its provisions increased.

Federal-State relations is one of the most important areas in which the Supreme Court has come to play a role.

Article 1 of the United States Constitution contains the powers of Congress. The States, however, have the power to legislate on the areas which are not delegated to Congress. Thus a principle is announced clearly by Amendment X to the Constitution. The Supreme Court has the power to construe Article 1 of the Constitution, thereby setting the limits it perceives constitutional provisions contain for congressional powers.

The interpretation by the United States Supreme Court of the Constitution and especially Article 1 have changed according to the changing circumstances of the federal government, and have increasingly tended to favour the federal government. One important area of federal-state relations in which the development of the Court construction of the Constitution is obvious, is that of commerce clause cases, with which we shall deal later (11).

Judicial review became popular in different parts of the world after World War I.

In Western Europe the legislature was originally seen as the supreme source of law and there was resistance against any attempt by the Courts to impose higher or constitutional standards on the legislative acts. But after such experiences as the Nazi regime in Germany and the Fascists in Italy, people began to consider the Judiciary as a means of checking the legislature (12).

The majority of Commonwealth countries have embodied in their constitutions the institution of judicial review. Most of these Commonwealth countries were federal countries, so in addition to using judicial review as a means of protecting the basic ideas and values, it was used to settle differences between the central and state governments over meanings of federal constitutions (13).

The most comprehensive statement of judicial review of the constitutionality of laws is that which is contained in the Basic Law of West Germany of 1949. The jurisdiction of the constitutional court of West Germany involves:

- The constitutional disputes involving the highest organs of the federal government.
- The abstract norm control jurisdiction which involves the difference of opinion or doubts on the compatibility of federal or provincial laws with the constitution, or the compatibility of provincial laws with federal law. This may be initiated by the federal government or a provincial government or one third of the members of the lower federal House (Bundestag). This does not require an actual case or controversy.
- The challenge to the constitutionality of federal or provincial laws or compatibility of provincial law with federal law in an actual case before one of the federal or provincial courts. The courts should stay their proceedings in case of challenge of constitutionality or compatibility with provincial laws and obtain a decision from the

Constitutional Court.

- Individual constitutional complaints. These are complaints brought directly to the constitutional court. People have the right to approach the Constitutional Court if they consider that their constitutional rights have been violated by public authorities, provided that they first exhaust the lesser legal remedies.

- Federal-Provincial conflicts. Involving rights and duties of each.

- Uniformity of the interpretation of the constitution by the courts. Any court, if in doubt about the standing construction of the Constitution, should apply to the Constitutional Court for a binding construction.

- Appeals about the electoral process.

- Impeachment of the federal President by either house of the federal legislative authority.

- Removal of federal judges, by way of an application from the lower federal house.

- To decide on the constitutionality of political parties.

- To guarantee the self-government of the municipal governments within the Provinces (14).

In Canada, the British North America Act of 1867 did not create any Canadian federal courts but left to the U.K. Parliament the power to establish such courts. In 1875 Parliament passed the Supreme Court Act, which created a court of general appeal. No lower federal courts have ever been established. The

same system continues to operate under the Canadian Constitution and the Canadian Charter of Rights and Freedoms of 1982.

The Canadian courts system is comprised of a single system, the lower courts termed Provincial and the highest court termed Federal. The Federal Court has some power over the Provincial Courts.

The Supreme Court has discretionary jurisdiction over the final judgement of the highest court of final resort in any province. The Supreme Court has appellate jurisdiction:

i in all cases involving writs of habeas corpus or mandamus;

ii over advisory opinions issued by the provincial courts;

iii over inter-provincial and dominion-provincial questions and in those cases where a provincial court considers that a particular question should be submitted to the Supreme Court (provided that it has the permission of the court of the highest resort in the province).

The Canadian Supreme Court has no original jurisdiction except regarding advisory opinions. The Supreme Court has the duty to answer questions from certain authorities in the same way as it gives decisions in regular appeals. The constitution gives the Governor-General, the Senate and the Lower House the right of direct questions to the Court. The Supreme Court Act provides that such questions should be about:

1 the interpretation of the British North America Acts;

2 the Constitutionality or interpretation of any provincial or dominion acts;

3 the powers of the Canadian Parliament, of the provincial

legislatures, or of the respective governments;

4 any other matters.

The Court has rendered several important opinions regarding federal relations as a result of this advisory jurisdiction (15).

In the area of constitutional interpretation, the Swiss federal system differs from the federal systems of the United States, Canada, Australia and Commonwealth federations. In Switzerland, the federal legislature is the final interpreter of the federal constitution, subject to a referendum of the electorate. The Federal Tribunal has the duty of maintaining the federal constitution against the Cantonal Constitutions, and Cantonal Constitutions against Cantonal laws.

The adoption of a system of judicial review of the constitutionality of legislation has been connected with the desire to limit legislature. The need to limit the legislatures has been a product of the belief in separation of powers and sometimes a direct result of legislative abuse of power. In countries where the abuse of power has been connected with the judiciary, like France where before the French Revolution the judiciary was believed to have been abusing power, the judiciary is denied the general power of reviewing the constitutionality of laws.

Factors affecting Judicial Review

(a) Appointment and tenure of judges

Supreme or Constitutional Court judges in federal countries play two important roles. Federal constitution judges play a role similar to that played by constitutional judges in unitary states, that is, of interpreting the constitution. Like many unitary government constitutional judges, they have the power to review the constitutionality of laws and to over-rule those laws which they regard as contrary to the constitution.

Constitutional judges in most federal systems also perform the important task of umpiring between national and state governments through their power to review the constitutionality of federal laws and the compatibility of state laws and constitutions with those of the national government.

The recognition of the important roles entrusted to the federal constitutional judges have sometimes, but not always, played decisive roles in designating the method of their appointment in some federal countries.

Identifying the nature of the judicial role effectively identifies the method used to appoint constitutional judges in federal and unitary countries. There are two main opposing considerations of the nature of the role of the judiciary in applying constitutional jurisdiction. Traditionally those countries with strong British influence, such as India and other countries affected by the traditional Anglo-Saxon view of the judicial role, tended to look at the role of judges in applying and interpreting the constitution as being mainly a technical one. These countries

stressed the technical background of judges. The theory behind this attitude was that judges announce and apply existing law but they do not participate in making laws. They failed to recognise that in applying and construing the constitution, judges make choices between more than one possible answer in most of the constitutional cases they adjudicate, and that such choices are policy decisions. They failed to provide sufficient protection against the political views or preferences of the judges.

In these countries, constitutional judges were mainly or usually appointed by federal executives. The states are not usually given any say in the appointment of constitutional judges even when these judges are going to decide cases involving issues of federal-state relations and distribution of power between states and the federal government.

Although there has been considerable development on the theory of the judicial role, the practice survives of neglecting the rights of the states to participation in the appointment of Supreme Court Justices. Obvious examples of the system of appointment of constitutional judges by a federal executive are India and Canada [16].

Countries on the other side of this theoretical divide take the view that judges have an apparent effect on the laws and constitutional rules when they come to construe the texts and apply the law. In other words, these countries, from their appointment procedures and other measures, can be understood to believe that judges de facto make law by their 'filling the gaps' in the legal

rules and by construing the constitutional and other legal texts. Judges are understood by these countries to be making policy choices.

The countries which recognise the fact of judicial law-making take precautions to ensure the principle of separation of powers is allerted to, or else, through the careful choice of judges, preclude the abuse of judicial power on the grounds of political preference alone.

Federal division of powers plays a part in the choice of judges in those countries which acknowledge judicial law-making. The states, through their presumed representatives in the legislature, are given a decisive say in the procedure of appointing judges.

The most obvious examples of the assurance of state representative participation in the choice of judges are the United States and West German experiences. In the United States, the Senate, which was originally composed of representatives of state legislatures, has the power to confirm or reject the nomination by the President for the membership of the Supreme Court. In West Germany, half of the members of the Constitutional Court are elected by the upper house of legislature which is composed of representatives of state legislatures, and the other half are elected by the lower house of legislature which is composed of popularly elected members (17).

On the question of tenure, those countries which believe that complete independence is needed for the members of the Constitutional Court, appoint the judges for life so that the judges

will not worry about the renewal of their term or about their future careers being affected by the stances they take in their constitutional decisions. The most notable of these countries is the United States where some judges have served the Supreme Court for over thirty years (18).

In some countries emphasis on the representative electoral processes, and their relation with the choice of judges, has caused the tenure of judges to be for a limited period. An obvious example of this category is the tenure of judges on the Constitutional Court of West Germany. Here, under the 1971 Amendment to the Statute of the Constitutional Court, judges serve a non-renewable term of twelve years (19).

The nature of Courts System Participation in Judicial Review of Constitutionality

Reviewing the compatibility of laws with rigid constitutions, and judicial participation in this process, are of growing importance. However, the forms of the judicial systems of review vary considerably. Differences in the judicial systems of constitutional review arise in the different legal systems.

We can divide the judicial systems of constitutional review into two major groups. One of these groups is decentralised and the other is centralised.

The decentralised system is identified with the American system of judicial review. This system gives the power of reviewing the compatibility of legislation with the Constitution

to all the judicial organs, and is followed mainly by other common law countries.

The centralised system is identified with the European Civil Law legal systems. This kind of judicial review gives the power of reviewing the constitutionality of laws to a single judicial organ. The original archetype of this kind of judicial review was the system established by the Austrian Constitution of 1920 (20).

The decentralised system is based on several grounds. One of the justifications of decentralised judicial review is that which was mentioned by Chief Justice Marshall in his opinion in Marbury v. Madison. This was that judges are charged with the job of interpreting laws and whenever they find a law contradicting a higher law they have a duty to apply the latter and disregard the former. Because of the supremacy of the Constitution, it is said by adherents to decentralised judicial review, whenever a statutory provision contradicts a constitutional norm, the statutory provision should not be applied. Another ground for decentralised judicial review is the separation of powers. The base of both legislative and judicial power is constitutional stipulation, and the legislature should accept that the judiciary will not apply the statutes which exceed the legislative limits of power.

The centralised system of judicial review rests on several bases concerned with the legal beliefs and the legal systems of the states concerned.

One of the reasons for the choice of a centralised system of judicial review is the idea that the act of invalidating the laws

enacted by the legislature is a political act not fit for the ordinary courts. This is a product of another way of looking at the principle of separation of powers. Ordinary courts should not be given the power to over-rule legislative acts because they should accept legislative acts as they are or refer them to specially empowered courts capable of dealing with constitutional construction.

A further reason for centralised judicial review is the absence of the principle of stare decisis in Civil Law jurisdictions. In countries with decentralised judicial review, where the system of common law exists, the decisions of higher courts are binding on lower courts. The appeals which get to the highest courts produce decisions on the constitutionality of laws binding on the entire judicial system of the country. For example, in the United States, law declared unconstitutional by the Supreme Court remains on the books but becomes dead law (until in exceptional cases the Supreme Court reverses its past decision and declares the law constitutional). Since the principle of stare decisis is absent in civil law countries, the fact that any court can decide on the constitutionality of legislation could create contradiction and confusion in the legal system of the country. For instance, a kind of tax could be nullified by one court while the same kind of tax could be found binding by another, were decentralised judicial review to operate along with the absence of the principle of stare decisis.

Another reason for the centralised process of judicial

review is that, in civil law countries, the Supreme Courts are unable to give constitutional questions sufficient consideration if these questions come to them as a result of the regular appellate process. This is because the High Courts in civil law countries cannot refuse to take cases which come to them on appeal from lower courts. In the United States, the Supreme Court can refuse to take cases, which has resulted in it being almost entirely specialised in constitutional jurisdiction. In civil law countries, were the High Courts given constitutional jurisdiction along with their civil and criminal jurisdiction, they would be submerged beneath civil and criminal appeals, and constitutional jurisdiction would occupy only part of their time and consideration. This practical lack of emphasis would not be commensurate with its importance. Thus civil law countries have established special courts or institutions, the main task of which is to construe the constitution and review the constitutionality of legislation (21).

Federal countries have either a centralised or decentralised system of judicial review, according to the legal system present. The archetype of federal states with a decentralised system is the United States, while an example of a federal system with a centralised judicial review of constitutionality is West Germany.

Switzerland does not give the federal courts power to review the compatibility of federal laws with the federal constitution. However it gives the federal courts the power to disregard cantonal laws which are found not to be compatible with either federal laws or the federal constitution. This power is taken

from the principle of the superiority of the federal constitution and federal legislation over those of the individual cantons.

Ordinary courts in civil law countries do not participate in the process of reviewing the constitutionality of laws. The ordinary courts have the right in most civil law countries to stop the proceedings of any case before them and refer the matter to the appropriate constitutional court, if they suspect the compatibility of the applicable law with the constitution.

In this way, ordinary courts play an important role in the process of judicial review, by bringing the question of constitutionality to the special courts, while able to apply the law without referring to the Constitutional Courts.

Decision-making processes: Civil law and common law approaches to collegiality of Judges

The approach to the collegiality of judges on Constitutional Courts varies from country to country, but there are two general lines taken by civil law and common law countries.

The traditional civil law system of decision-making processes in the Supreme Courts is that of collegial responsibility of all the judges for the opinion of the court. The judges, as far as outside observers are concerned, act as a united group. The Courts issue one opinion in each case reflecting the unity of the court. This system originally did not allow for dissenting or concurring opinions to be announced with the Court's opinion.

The other system of decision-making processes in Supreme Courts was the plural system. The plural system is connected with common law countries. The Supreme Court of the United States is the obvious example of the use of the plural system of opinion writing by a court. This system recognises the right of each individual judge to pronounce his own opinion about the cases presented to the courts whenever he considers it appropriate to dissent or concur with the opinion of the majority of the court.

Each of these two systems has its own justifications and philosophical bases. The collegial system favours the unity of the Court in relation to all outside individuals and institutions. This system is also justified because it ensures the clarity and steadiness of the development of legal norms without the confusion that can be caused by differences in constitutional or statute construction between judges.

The plural system favours the enrichment of the legal environment by allowing competing opinions to be voiced. The pronouncement of opinions by individual judges, either agreeing or disagreeing with the court's decision, along with the justifications, can result in the proper development of law by offering the participants concerned a range of opinions and justifications (22).

The American Supreme Court is the archetypal plural system in federal countries. Several Commonwealth federal countries adopt the plural system of decision-making in their Supreme Courts, India being one example, which also has a common law system.

Canada has adopted an extreme version of the plural system.

Each judge can write his own decision, therefore there is no real "majority opinion". The judges on the Canadian Supreme Court vote "Yes" or "No" on the issues presented to the Court but each either goes on to write his or her own reasons or else concurs with another judge. It is difficult therefore to analyse the decisions of the Supreme Court in Canada (23).

West Germany was an example of the use of the collegial decision-making process, along with other European countries, until the influence of the American experience prompted the judges to stress the right of voicing their differences. Now the judges of the West German Constitutional Court have the right to publish their dissenting opinions along with the opinion of the majority of the Court (24).

The case/controversy requirement and advisory opinions

There is more than one way in which Constitutional Courts can be brought to decide constitutional questions. The major and traditional route for bringing constitutional questions to Constitutional Courts is in a case or controversy which is compatible with the judicial role of the Courts. In this way the Court is asked to interpret the constitution or apply its terms in relation to a case involving a factual situation with real contending parties.

The other way of bringing constitutional questions to Constitutional Courts is by putting questions to the Courts requiring advisory opinions. The Courts are presented with

questions which are hypothetical with no contending parties. This way is exceptional today. The advisory opinion jurisdiction of the Supreme Courts is incompatible with the traditional function of the Judiciary which is to decide issues in real controversies and cases (25).

The only Supreme Court in the major federal countries with the power to render an advisory opinion is the Canadian Supreme Court. This jurisdiction of the Canadian Supreme Court has proved to be very important in relation to federal questions. It is reported that some of the important questions of federalism have been decided by the Canadian Supreme Court through its power to render advisory opinions (26).

The West German constitutional court had the power to render advisory opinions under Article 95 of its statute, but this power was abolished in 1956 after dramatic experiences of the Court in relation to political questions. The Constitutional Court was accused of becoming too political rather than concentrating on its proper judicial function (27).

In several countries, the quest for constitutional opinions has prompted individuals rather than public authorities to confront the Supreme Courts with questions regarding the constitutionality of legislation. The United States has witnessed actions brought by individuals challenging the constitutionality of legislation. These actions have often been rejected for lack of sufficient interest. The raising of constitutional cases is hampered by many obstacles. Apart from the question of standing, constitutional cases are often costly and therefore beyond the

means of most people.

In Canada where the Supreme Court has the power to render advisory opinions, this power is regulated by the Court's Statute. The law requires the Court to answer every question put to it on reference from the Governor-General or from the Senate or Lower House, and to pronounce judgement in such instances in precisely the same way as if it were a regular appeal in a regular case involving regular litigants. The law defines the kinds of cases that can be referred to the Court for advisory opinion. Such cases should fit into one of the following categories:

1 The interpretation of the British North America Act (The Canadian Constitution).

2 The constitutionality or interpretation of Dominion or Provincial Legislation.

3 The powers of the Canadian Parliament, of the Provincial Legislature, or of the Executive Governments thereof.

4 Any other matters [28].

Giving power to the Supreme Court to render advisory opinions led to criticism of the Courts for involving themselves in political questions rather than legal ones. In the only case where a federal Supreme Court in a major federal country was given the power to render advisory opinions it has proven to be very important in relation to federalism. It is reported that most of the important decisions of the Court about federal questions are the results of its power to give advisory opinions.

Conclusion

Although there are wide differences between federal systems, and the organisation and powers of constitutional courts in these systems vary, these courts have a special significance in most federal systems.

Among the most important factors contributing to this significance are the interpretation of federal constitutions and the resolution of differences over the distribution of powers.

As societies and their respective federal systems continue to develop, further opportunities arise for constitutional courts to interpret constitutions and to resolve differences about their meanings.

Constitutional courts play an important role in the development of federal constitutions, and in adapting them to changing requirements.

Chapter Two Footnotes

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2 See: Riker, op. cit. p11.

3 See: Wheare, op. cit. p60; Watts, R.L., New Federations:- Experiments in the Commonwealth Oxford: The Clarendon Press, 1966, p284; Sawer, G., Modern Federalism London: C.A. Watts & Co., 1969, p155; and Johnston, R.E., The Effect of Judicial Review on Federal State Relations in Australia, Canada and the United States Baton Rouge, Louisiana: Louisiana State University Press, 1969, px.

4 Johnstone, op.cit. pix.

5 Sawer, op. cit. p156.

6 As is obvious from the Reagan nominations to the Supreme Court of the U.S..

7 The Bundesrat is the upper house of legislation composed of delegates from the Laender (states). The Bundestag is the lower house of legislation composed of people elected nationally.
See: Blair, P.M., Federalism and Judicial Review in West Germany Oxford: The Clarendon Press, 1981, p13.

8 McWhinney, E., Supreme Courts and Judicial Law Making: Constitutional Tribunals and Constitutional Review Dordrecht: Martinus Nijhoff Publishers, 1986, p71.

9 Cappelletti, M., Judicial Review in the Modern World Indianapolis, Indiana: The Bobbs-Merrill Co., 1971, pviii.

10 C.J. Marshall, 5 U.S., 137 (1803).

11 See Chapter Six.

12 Cappelletti, op. cit. pviii.

13 Watts, op. cit. p285.

14 The Basic Law of the Federal Republic of Germany, Ch. IX.
McWhinney, op. cit. p10.
Blair, op. cit. p10.

15 Johnston, op. cit. p38.

16 McWhinney, op. cit. p46.

17 Ibid., p48.

18 Abraham, H.J., The Judicial Process: An Introductory Analysis of the Courts of the United States, England and France (5th ed.) Oxford: Oxford University Press, 1986, p41.

19 McWhinney, op. cit. p54.

20 Cappelletti, op. cit. p46.

21 Ibid., p60.

22 McWhinney, op. cit. p25.

23 Johnston, op. cit. p35.

24 McWhinney, op. cit. p15.

25 Loc. cit.

26 Johnston, op. cit. p38.

27 McWhinney, op. cit. p17.

28 Johnston, op. cit. p38.

CHAPTER THREE

JUDICIAL REVIEW AND JUDICIAL ACTIVISM

One important task of most of the supreme or constitutional courts is to review the constitutionality of laws. Constitutional texts can never be comprehensive and self-explanatory of all the problems that the courts may encounter.

Constitutional texts have open ended clauses and words with broad and vague meanings. Constitutional courts are presented with cases in which, therefore, specific meanings have to be allotted to general constitutional provisions. In interpreting constitutional provisions, courts have to deal with the entire range of subjects covered by a constitution, and these interpretations will substantively affect the different subjects.

The most important subject with which a constitution may deal is the protection of fundamental rights, but they also deal with the distribution and organisation of power in the government. Federalism is a subject which is regulated by the constitutions of the federal States.

The constitutional interpretations of the constitutional courts are usually final interpretations binding on all the other governmental branches. In some constitutions, the power of the constitutional courts to render final constitutional interpretations is based on explicit delegation by the constitution; in other constitutions this power is claimed by the courts as a necessary requirement of their function of applying the law.

In both cases, whether or not there exist clear provisions

empowering the courts with the right of final constitutional interpretation, arguments exist about the extent and limits of the power of judicial review. Should the courts make policy choices or should they leave them to the elected branches of government (1).

In the constitution of the United States there is no explicit provision empowering the judiciary with the final interpretation of the constitution. Chief Justice Marshall announced this right of the court in Marbury v. Madison in 1803 (2).

The whole matter of judicial review has provoked discussion and controversy on the proper role for the Supreme court in the American constitutional and political system. The United States experience in judicial review is worthy of examination because it was the first country in which judicial review, in its present definition, was recognised and practised.

Judicial review and judicial activism in the United States

The controversy regarding the role of the Supreme Court involves several areas, all of which are subject to the constitution. One such area is that of federal-state relations. A second is that of individual rights. In the former, the court denies one level of government a certain power, because in its opinion such power belongs to a higher level of government. In the second, as a result of its constitutional interpretation, the court denies a governmental institution a certain power because this power does not belong to any government or institution, the

right in question being guaranteed by the constitution.

The debate about judicial review by constitutional writers and commentators in recent years has evolved around several ideas.

One argument concerns whether the judiciary should be active in its constitutional interpretation or whether it should be restrained. The active judiciary is that which second-guesses the legislature's value choices and on the result nullifies those legislative acts with which it disagrees. The restrained judiciary is one which submits to the ultimate sovereignty of the legislature over society's substantive value choices. The argument of the partisans of judicial restraint continues over how the judiciary should be restrained. Should it be left to restrain itself or should the restraining come from other branches of the government? Are the existing constitutional and legislative arrangements enough to restrain the judiciary or is there a need to introduce new legislation or constitutional amendments to curb the ability of the judiciary to interfere with legislative choices? (3)

There is another argument in constitutional theory between two contending sides, the "interpretivists" and the "non-interpretivists". The interpretivists argue that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written constitution. The non-interpretivists argue that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.

It has been shown that interpretivism, at least in a clause bound form, is not possible. There are many problems for which there are no ready solutions in the constitution because these situations have not been foreseen and there is a large number of open-ended constitutional provisions which need to be supplemented with value choices in order to be implemented (4).

As there is no effective restraint by governmental institutions, then it is impracticable to argue for judicial self-restraint (5).

But what are the bases for arguing against an active or non-interpretivist judiciary? Most of the objections to the non-interpretivist or active judiciary stem from the allegation that this kind of judiciary encroaches on the province of the legislature because it will be substituting its value choices for that of the legislature. The opponents of a non-interpretivist judiciary continue to argue that the active judiciary is anti-democratic, because the judges, especially federal judges, are not elected and have secure tenures; they continue to argue that this is against the democratic and majoritarian form of government established by the United States constitution.

Although few today deny the need for more than clause-bound constitutional interpretations, the opponent of the active judiciary calls for more faithful adherence to the text of the constitution and more restraint against legislative acts.

We shall return later to the argument of whether or not a judiciary which makes value choices is against the American

system of government. Now we shall discuss the development of the theories about the proper role of the judiciary in the American legal system.

The development of theories challenging the traditional theory of law and the role of the judiciary

The traditional theory is that judges only discover and apply the law and do not create law. It holds that the law is "there" waiting to be discovered and judges have the duty to find and apply it to specific fact situations where it properly applies.

The traditional American theory of the judicial function is that the courts have a passive role in making the law. The courts do not extend protection to property and they do not put people in jail, it is rather the law which does these things operating through the courts. The traditional theory goes further to hold that the extraordinary protections within which the courts operate were devised in order to guarantee that the responsible element in the process would always be, insofar as people could humanly arrange it, the law and not the courts. The courts, this theory holds, were not protected in order that they might govern the country according to their wisdom, but they were protected so that there would be no interference with the laws governing the nation (6). This theory about the judicial function has been the dominant theory for the greater part of American legal history. All the other theories which have challenged this theory did not achieve the same wide acceptance (7).

Judicial review has been connected from the beginning with the traditional theory of judicial function. Although judicial review was at the time of its announcement a unique American legal institution, American writers tried to justify it under Blackstonian traditional theory of judicial function. Judicial review has been presented as no more than a particular application of a generally accepted idea of the judicial function.

Judges undertaking review of the constitutionality of laws were considered as exercising "judgement" not "will". In Chief Justice Marshall's words:

> 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 the rule. If laws conflict with each other, the Courts must decide on the operation of each. (8)

In the twentieth century the traditional theory of the judicial function has been attacked as an inadequate description of what takes place in the decision of cases.

The possibility and desirability of the rigid application of laws has been the subject of wide discussion by American legal theorists.

The first major challenge to the traditional theory of the judicial function came from Oliver Wendel Holmes. Holmes argued that practical expedients, made necessary by the conflicts and needs of human society, were more important to the development of law than were any logical propositions. (9)

Holmes believed that the standard by which law should be measured is its contemporary usefulness, not the fact that

someone in the past has followed it. As Holmes has put it,

> Everyone instinctively recognises that in these days the justification of a law for us cannot be found in the fact that our fathers always have followed it. It must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants. (10)

Holmes rejected the idea that the law had an existence of its own apart from the decisions of the courts. He argued that the law was a means and it was real because it affected the lives of men. To Holmes law was not an abstract problem of logic, but a practical question of social management. Judges did not in fact settle cases by deductive reasoning, rather, they necessarily decided, consciously or unconsciously, what they felt to be socially desirable.

Holmes opposed the idea that law is a given institution by "nature" and that logic is a device both for the extension of legal principles and at the same time for limiting the discretion of the judge. Holmes held that law moves in a climate of opinion made up of moral and political beliefs, judgement of policy and sometimes prejudices, all of which affect the judge.

Holmes, who became a Supreme Court Justice, took the position that much was to be gained from the acceptance and recognition of the judicial making of law. Holmes was of the opinion that it is better to discuss this part of the judicial function and that judges were actually legislating more under the traditional theory than they would have done if they recognised this process and brought it into the open.

The essence of the arguments advanced by Holmes was a plea

for judicial moderation and self restraint (11).

The beginning of the twentieth century marked an increase in opposition to the orthodox theory of law and judicial function (12).

One of the newer and more important theories was sociological jurisprudence, which was led by Roscoe Pound. Pound's arguments rely extensively on the judicial function in the process of legal change.

Legal development, according to Pound's theory, is a series of adjustments which are interactions between societal demands and the legal system which are made necessary by the function of law as a controlling and stabilising force in a society constantly tending to change.

The law is both a controlling force in society and a reflection of the conflicting needs and demands in society, according to Pound. Society, in his view, should be seen in terms of the interests active within it. He shifts the emphasis from individuals to groups in society.

Because society is in a constant state of change and development, the law is supposed to be continually modified to suit these changes and accommodate new situations. The legislature, situated as it is in the centre of the governing process, could scarcely devote the required time and attention to the desired development of the law. It was therefore necessary to leave these matters to other agencies of the government (13). Pound's whole theory comes to rest upon the judicial function. The courts should be aware of developments in society and should

assume their rightful task of bringing the law up to date.

In studying law the student should not only know what the courts decide, but equally the circumstances and conditions to which these principles are to be applied. Law as an institution is the product of social demand and should be considered in terms of its adequacy to the end for which it exists.

Pound labelled the judge "the pragmatic social engineer" and argued that judicial activity is rightly the creative element in the law.

The emergence of sociological jurisprudence marks a formulation of a general trend in American legal thought contrary to the traditional theory of law and the judicial function.

The law is a social institution, a product of the society it governs, subject to the same influences as other social institutions. The development of the law was not achieved by the logical development of assumed principles, but rather through a series of adjustments.

Judges have the duty and the right to undertake legal change. It is socially advantageous for the judges to develop the law as they consider necessary for the development of society.

The degree to which judges would modify the law and develop its rules varies according to the different advocates of sociological jurisprudence. The difference is rather one of degree, because all the advocates of this theory consider it proper and necessary for judges to make law in their decision of cases.

The emphasis on the role of the judiciary in the development of law is the important consideration for our present investigation. The effects of the sociological theory are very important because it has been adopted by a number of the most respected legal writers in the American legal system.

Among the theories that have challenged the traditional theory is legal realism. This term has its origin in the Holmes dictum that law is "prophesies of what the courts will do in fact".

Legal realism, like sociological jurisprudence, developed as a protest against the orthodox theory of law and the judicial function. Legal realism shares with sociological jurisprudence the attempt to broaden the study of law with the aid of borrowings from the other social sciences.

Legal realism includes several types of juristic thought according to the type of science effectively used to be connected with the study of law. Legal realism includes some social jurists, a group of psychological jurists, several statistical jurists and some institutional jurists.

One of the leading legal realists was Jerome Frank, who called the traditional theory of law "The basic Myth" (14). Jerome Frank wished to dispel various popular conceptions about law and the Judicial process. Frank wrote:

> "Modern civilisation demands a mind free of a father governance ... until we become thoroughly cognizant of, and cease to be controlled by, the image of the father hidden away in the authority of law, we shall not reach that first step in the civilised administration of Justice, the recognition that man is not made for the law, but that the law is made by and for men" (15).

To meet the needs of modern civilisation, in Frank's opinion, Law must adapt itself to modern mind. Law must be pragmatic in serving the needs of man and society.

Appearing in the years of the Great Depression, Jerome Frank's first book (Law and the Modern Mind) [16] had an effective role in clearing the way to a new set of conceptions of government and law and to free people from the old authoritarian conception of Law [17].

The result of the debate which took place starting at the turn of this century was the establishment of a wide acceptance of the existence of Judicial discretion. What remained was to establish the degree and fields in which this discretion should be used and for what purposes it should be utilised.

Judicial review, democracy and the separation of powers

The most common argument against judicial review and activism is that it is undemocratic, leaving major policy decisions to unelected judges. The practice of judicial review, the critics argue, is contrary to the American commitment to democracy and majoritarian rule [18].

The critics of judicial review assume that, in the U.S. political system of popular representation, the exercise of powers which cannot find their justification in the ultimate consent of those governed is difficult if not impossible to justify [19]. Judicial review, then, is rejected according to this view. Judges do not acquire their position through popular

election, and they are not accountable either to the people or to the elected officials who nominated and confirmed them; rather, the justices of the Supreme Court are secure in their positions because of their life tenure and their salaries are guaranteed.

Furthermore, judicial review of statutes is said to be undemocratic because it allows the court to disregard Acts of Congress which have the sanction, even if indirectly, of the electorate.

The argument that judicial review is against the democratic system has been raised frequently throughout American Constitutional history. One of the earliest to argue against judicial review was Thomas Jefferson, one of the political opponents of John Marshall. He saw judicial review as violating the constitutionally mandated theory of separation of powers and as representing a patent denial of the veritable popular will (20). Another of the early opponents of judicial review was Justice John B. Gibbons of the Supreme Court of Pennsylvania who said that it was a "postulate in the theory of our government ... that the people are wise, virtuous, and competent to manage their own affairs" (21).

The critics of judicial review further argued that judicial review and judicial activism is against the principle of separation of powers. The separation of powers is a system of separate and co-equal powers and this makes it contrary to separation to subject the validity of the decisions of one branch of the government as to the limits of its powers under the constitution to the judgement of another branch.

The critics of judicial review and judicial activism argued that in striking down legislation the court is involved in law-giving, a task for which the courts have not been established. They argue that courts are not meant to be law givers. They argue that courts, in striking down legislation, make policy choices; the courts, they argue, replace the policy choices of the proper legislature with their own policy choices.

In reply to the accusation that value choices by the judiciary are an encroachment on the legislative power and a violation of the principle of separation of powers, it is important to remember that separation of powers is connected with the system of checks and balances and that the effective judiciary is the one which can check the other branches of government. By invoking its power to review legislative acts the judiciary serves as a necessary and proper barrier against the excesses of the legislature. One of the most famous advocates of judicial review is Justice Benjamin Cardozo, who served on the Supreme court. Cardozo says, in defending judicial review:

> By conscious or subconscious influence, the presence of this restraining power aloof in the background, but none the less always in reserve, tends to stabilise and rationalise the legislative judgement, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith. (22)

There are several points of argument put to defend against the anti-majoritarian accusation which is pointed at judicial review and judicial activism.

The U.S. Constitution (Article III) does provide for an independent judiciary, by granting judges life tenure and fixed

salaries, and by making their removal very difficult, but the appointment process is entirely political and capable of reflecting the change in the political consensus.

The political process affects the judiciary by several means other than the appointment process. Constitutional decisions can be overturned by constitutional amendments which are entirely political and which have been used successfully on several occasions (23).

The critics who argue against judicial review because it lacks popular consent do in fact overstate the democratic content of the legislative and executive branches because it is shown by several means and studies that representative democracy in practice diverges from the ideal notion. So even the democratically elected branches may not accurately represent the popular will (24).

Finally, is judicial review the only departure from majoritarian rule in the American system of government? The answer is no, the Senate is a major example of departure from majoritarian rule because all states have senators regardless of the size of their populations, no equality of representation is given by such a system which goes against conceptions of the representative democracy.

The authors of the Constitution did not believe in democracy as a solution to all the questions and problems which would face the nation; one important area of rights, individual rights, has not been entrusted to the majoritarian will by the Constitution

(25). The founding fathers did not have complete confidence in the form of democracy they were establishing, so they established the separation and division of powers to check the work of the political branches of government. To argue that any departure from textbook democracy is improper is not a valid argument since the founders of this form of democracy recognised its needs for checks, and that its benefits are not absolute but relative (26).

The binding quality of the Supreme Court's constitutional decisions

There is a group of critics of the Court who argue against the binding quality of the Court's constitutional decisions on persons and institutions other than those involved in the case, on which the decisions are rendered (27). We shall include here some of the arguments given by those who argue for the limited binding effect of the Supreme Court's constitutional decisions.

Attorney General Edwin Meese, in his address to a Tulane University audience, tried to distinguish between the Constitution and constitutional law. He argues that the Constitution is the supreme law of the land and that constitutional law, which is composed of Supreme Court decisions, is binding only on the parties in the case and the executive branch for whatever enforcement is necessary.

One of the points put forward by Attorney General Meese to support his position is that if we regard constitutional law in the same way as the Constitution it will be impossible for the Court to reverse its previous decisions and change its

interpretations.

Attorney General Meese argues that constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.

The advocates of the limited-binding quality of constitutional decisions point to several ways in which the constitutional structure contradicts the claim of the advocates of the final constitutional construction of the Court. They point to some examples: Congress may vote down, on the grounds of unconstitutionality, a Bill which is similar to one which has been declared constitutional by the Supreme Court; the President may pardon men convicted of violating an Act which has been declared to be compatible with the Constitution.

The rejection of the binding quality of the Supreme Court's constitutional decisions will lead to chaos because each branch of government will claim its own final interpretation of the Constitution: the Constitution will mean different things to the different branches. This will deprive the United States legal system of an authoritative voice concerning the meaning of the Constitution, thus making it impossible for the Constitution to operate effectively to guide primary behaviour. Law is said to have two roles in society. It provides the ground rules pursuant to which legal consequences are ascribed to an event that has already occurred. It also guides primary behaviour so that people can organise their lives so their conduct will fall within what the law allows [28]. It will be destructive of the guiding value

of constitutional law if the different governmental organs speak with more than one authoritative voice about its meaning.

If the executive is permitted to apply its own construction of the Constitution even if it contradicts the Court's construction, this will mean that those who have the resources to challenge the constitutionality of legislative or executive acts will enjoy judicial protection while others will have to bear the negative effects of legislative or executive acts. The legal consequences of any event will become a function of the resources and capabilities of the affected parties, which will damage the equal protection of the laws in the country (29).

Depriving the Supreme Court of the binding force of constitutional decisions on other branches and individuals will result in imbalance in the U.S. system of separate and coequal powers. Judicial review, which is the power of the judiciary to declare constitutionality, is the only judicial power that balances the powers of other branches of government. Judicial review balances the power of Congress to pass laws and to raise and spend taxes, and the President's power to veto, enforce the laws and appoint government officials, including judges (30).

Judicial review and federalism

Judicial review, especially the non-interpretivist version, has been accused of endangering the federal system.

These critics argue that the fact of recognising the Court as the final interpreter of the national Constitution is against federalism; they argue that the national Constitution is by its

nature not merely the concern of central government but also affects the states, and that the Supreme Court as an organ of central government will consequently ultimately favour the national government over the states. These critics use the extension of the Fourteenth Amendment and the incorporation of the Bill of Rights in its application to the states as an example of the deterioration of federalism because of judicial review and activism (31).

Judicial review, which is carried out by an independent judiciary with sufficient isolation from the political branches of government, is the best way to ensure the protection of federalism in cases of difference of interest between the two levels of government.

There is sufficient evidence that a majority of those who framed the Constitution intended the Supreme Court to be the ultimate protector of federalism (32).

Judicial review of constitutional issues involving federal problems is a relief for the legislators from the task of resolving conflicts between local power and national concern - a task which might have been felt to call for a duty of insularity (33).

Conflicts between localism and centralism, like other constitutional matters, are not merely resolved by judicial review. The President may veto a bill on constitutional grounds, and, if not overridden by Congress, will foreclose the courts from receiving the question. By passing new legislation in areas

of commerce Congress may change the effects of previous court decisions which were based on Commerce Clause grounds. As the record of the Supreme Court has shown, the court has been particularly successful in finding vindication for co-operation in the federal system. In Leisy v. Hardin (34) the Court announced that in the case of difficulty in drawing the line between the interests of the two levels of government the line should be drawn to achieve co-operation for the general good.

Conclusion

My view is that complete interpretivism is not possible. The reasons for the impossibility of complete interpretivism are numerous, for example, there are vague words in the Constitution which need to be given precise meanings and there are open-ended provisions in the Constitution. What is "due process"? What is meant by "freedom of speech"? There are other examples requiring precise meanings when being applied to actual facts (35).

The fact that the judiciary can make value choices in interpreting and applying the Constitution is not contrary to the system of government established by the United States Constitution. The United States Constitution based its system of government on several principles, one of which is the system of checks and balances.

The purpose of having separate and interdependent governmental branches that participate in the checks and balances is so that more than one branch of government makes and executes the decision, in order for more discussion to take place into the

appropriateness of the decisions, thus preventing arbitrariness.

The debate which has taken place in several occasions in American constitutional history about judicial activism and government by judiciary has been caused by the differences of opinion between the political branches of government and the majority of the Supreme Court.

The constitution has separated the governmental powers and given the federal judges independence and secure tenure, and it was inevitable, from the time of ratification of the constitution, that the judges would deal with the actual facts in their constitutional decisions and would make substantive value choices when needed. It is another matter whether or not they announce in express terms that they are making value choices or not, what matters is that in reality they make these choices and properly so.

There are several ways to check the judiciary. Some of these are more effective than others, but the judiciary is not totally insulated from being checked. The courts have made and will continue to make substantive value choices in dealing with the constitutional provisions which need to be supplemented by choices by the judiciary. The best approach in dealing with judicial interpretation of the constitution is by recognising the fact that the judiciary makes value choices and by using the different ways to check and influence judicial opinion, not by trying to limit or ignore the necessity of the judiciary to make these choices.

Chapter Three Footnotes

1 For detailed arguments about the rights of courts to involve themselves in substantive decision making in the U.S., especially about Constitutional Law, see Ely, J.H.,. Democracy and Distrust: A Theory of Judicial Review Cambridge, Massachusetts: Harvard University Press, 1980; Tribe, L.H., Constitutional Choices Cambridge, Massachusetts: Harvard University Press, 1985, and see Chapter 4 of this thesis.

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11 In Holmes' opinion a statute should not be struck down "unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law". This was in his dissent from the opinion of the court in Lochner v. New York (1905) 198 U.S. 45, in which the court struck down a New York Law concerning regulation of hours of labour as unconstitutional.

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CHAPTER FOUR

JUDICIAL REVIEW AND SUBSTANTIVE CHOICE IN THE UNITED STATES

In the United States the power of the judiciary to review the constitutionality of legislation is widely accepted at the present time. There is a debate going on now between American constitutional scholars in this field which is mainly about the basis on which to establish the right of the judiciary to strike down legislation as unconstitutional. Two major groups can be identified whose basis of difference is about whether the court should use a value choice in striking down legislation. In each group there are differences in the details. The first group denies the court the right to use value choices in reviewing the constitutionality of legislation. This group takes this position to avoid the alleged violation of democracy in the court's value choices (1). The other group argues that there are value choices in the constitution and that it is a fact that the court shall and does make decisions based on substantive value choices and that the procedural tendency of some constitutional provisions is meant to achieve a substantive result and that it is therefore inevitable that the court will consider these values in its decisions.

Discussion in this chapter will concentrate on arguments about individual rights. The main reason for this focus is the extent to which the matter has been debated in the U.S. in relation to individual rights cases. Similar results can be achieved in the area of federal-state powers.

We shall discuss the theory of the first group, which is the process based group, in order to prove that this approach does not constitute a complete and sufficient theoretical substitute for the value based approach.

My view is that the constitution has value choices in it and it was framed not just to establish procedure but to achieve a substantive aim. The court has the duty of identifying the fundamental values in the constitution and of considering the compatibility of legislation with these values in its decisions. I am not defending the view that constitutional decisions should be bound absolutely by the decisions of long-deceased framers. If Americans wish no longer to retain values in the constitution, they can amend the constitution to change them. In the meantime the courts have to construe the constitution to arrive at its message and values and to apply these values to decide whether or not legislation is contrary to them. The values remain constant but more debate and study of the constitution will result in clarifying them. The social and political circumstances in society will develop and the details of applying these values will thus change but the court has the duty to apply them unless they are changed by a constitutional amendment. The court has the power to interpret the constitution and to review the constitutionality of legislation and it should be bound by the letter and the values of the constitution. The criticism that is directed at judicial review as being undemocratic will not be avoided by denying the existence of the substantive content of the constitution.

Process based theories of judicial review

The problem with the process based approach is that it takes a reactionary-defensive line which in the end misleads its followers. The core problem is the allegation that judicial review (especially when it is based on value judgement) is undemocratic. The correct approach is to ask some questions which can lead to a solution to this problem of reconciling democracy with judicial review. The first question requiring an answer is: why is democracy important? Is it important for its own sake? - or does its importance stem from some benefits accruing to the society in which it operates?

The second question is whether democracy as an idea is perfect and can be applied without any restraints or whether its benefits are relative depending on the society and whether it should be restrained in order to avoid harmful effects.

Democracy is important because it prevents tyranny, gives value to the human being and provides an opportunity to have the consent of the governed in the choice of the way they are governed. Principally this choice is exercised by the election of those people who will take the legislative and executive decisions affecting the lives of the voters and the provision of a way of evaluating how far these representatives fulfil their duties through re-election. So, to follow this line means to value not only democracy for its own sake, but the fulfilment by democracy of its promise and objective. This is the beginning of the correct way of reconciling democracy with judicial review.

Democracy, like so many other social or political ideas working in human society, is relative and can be abused. One of the abuses is through the suppression of minorities, denying them their rights as citizens and human beings. Another defect of democracy is that a minority may dominate the majority through the abuse of the electoral process and so the majority and the minority need to be protected from abuse and from the misuse of the democratic idea (2).

My opinion respecting the reconciliation of democracy with judicial review is based on the achievement of the benefits of democracy to society by applying the democratic idea with the necessary restraints. The constitution provides several restraints, one of which is subjective, the others systematic. The subjective restraint operates by giving the values around which the political system will function. There are several systematic restraints. One is the separation of powers, the idea of checks and balances. Another is federalism. The whole system is based on the division and distribution of powers in order to divide the decision-making process so that the system will assure that no government institution will dominate and tyranny will thus be avoided.

The best way to answer the accusation of the undemocratic nature of judicial review is not to take a defensive approach, but to analyse the system so that we can remove the points of objection and understand how democracy and judicial review coexist to bring about the best results for society.

We shall begin by stating and evaluating the leading theory in the process based group, the process perfecting theory of John Hart Ely [3].

The process perfecting theory of approach is one which the court has been tempted to take in the face of criticism that it was contradicting democracy by nullifying the actions of the elected representatives of the people.

The Supreme Court has often invoked a vision of how politics should work. The court justifies its intervention as a proper action to remedy the harm resulting from the inconsistency between political reality and the constitutional limits on the political process [4].

The best known statement by the court of this view is the Caroline Products footnote in the decision which was written by Justice Stone [5].

This approach depends on the idea that the role of the judiciary is to guard against the misuse of the process provided by the constitution in order to give the political branches of the government the right to make value choices. In other words, the court is a referee to make sure that the players abide by the rules in making choices for the people. This approach denies that the court should make value choices.

The leading constitutional scholar who elaborated and defended this theory is John Hart Ely [6]. Ely begins by stating the controversy which exists between interpretivism and non-interpretivism. Ely states that non-interpretivism is not popular because of the prime importance of democracy in the American

constitutional system. Non-interpretivism is clearly contrary to democracy because it gives the judges, who are not elected, the power to overrule the choices of the elected representatives, especially in constitutional matters for which there is no easy way to respond to the court's decisions. He then states that interpretivism is attracting support partly because of the failure of non-interpretivism to provide clear justifications for its existence.

Ely next turns to interpretivism and criticises it on several grounds. His main concern is that even interpretivism cannot convince him that it complies with the democratic theory which he has stated at the beginning of his argument as an essential basis of the American system of government and which is provided for by the constitution. The conclusion of this argument is that neither interpretivism nor non-interpretivism is democratic.

Ely then offers the process perfecting theory of judicial review as a substitute for these theories, and goes on to prove that it is a democratic theory. Ely objects to the judicial practice of searching for and announcing fundamental values: he saw the court as interventionist in its value choices (7). Although Ely does not accept the court's value choice in its decision-making, he defends most of the activist record of the Warren court because it was "process perfecting"; most of this record dealt with freedom of speech, minority rights, voters' qualifications, criminal due process and other procedure based

fields [8]. From Ely's acceptance of much of the Warren court's record, we begin to see that his theory is not one which limits completely the court's intervention or activism. Like many other theories it is rather a theory based on avoiding the accusation that judicial review is antidemocratic. The final result of this theory is to overrule the decisions of democratically elected branches of government and at the same time to see these decisions as a protection of democracy.

In Ely's view the constitution is

> "overwhelmingly concerned, on the one hand, with procedural fairness in resolution of individual disputes (process writ small), and on the other, with what might capaciously be designated process writ large - with ensuring broad participation in the process and distributions of government". (9)

The court's duty, in Ely's view, is to supervise the process established by constitution. Examples of the court's role mentioned by Ely are indicated by some of the chapters of his book: policing the process of representation, clearing the channels of political change and facilitating the representation of minorities.

Ely's picture of the constitution and its various provisions is constructed to arrive at the conclusion he wants. This picture of the constitution, however, is not a complete one and if completed and pursued in more detail, will lead us to a conclusion that Ely tried to avoid.

Substantive values in the constitution and the process-perfecting theory

There are several problems with the process-perfecting theory. The most serious problem with this theory is that the substantive commitments of the constitution cannot be avoided in the application of constitutional provisions to actual cases. Indeed some constitutional provisions have substantive content and others clearly call for injection with value choices. Even the procedural provisions of the constitution have to be based on value choices in their application if they are to be applied to produce a result consistent with the purpose for which they were drafted. Among the constitutional commitments which are substantive in character are the First Amendment's guarantee of religious liberty and the prohibition of the establishment of religion, the protection of private property in several ways, and the abolition of slavery: all of these principles are evident from several provisions of the constitution (10).

In fact most of the constitution addresses matters of procedure. These procedural provisions have purposes beyond their procedural content. The procedural commitments in the constitution are either adjudicative (procedure due to individuals who become defendants in legal action) or representative (procedure which governs the election of representative persons or bodies).

To understand the purpose of the procedural prescription of the constitution, substantive values must be involved. In order to determine whether the process involved is adjudicative or representative, we must look at the values and rights these

procedural provisions are meant to protect. In the application of these procedural provisions, the court has to look at the values these provisions are meant to protect and their relationship to the person or group involved and consider whether a person or group is denied a right or suffers the imposition of a duty that the application of the constitutional provisions will correct. In Londoner v. City of Denver (11), the Supreme Court decided that a hearing is required before assessment for the cost of street improvement is made of a property owner to satisfy the due process of law guaranteed by the U.S. Constitution in the 14th Amendment. Under the process-based theory, there is no need for such a hearing because the officials who are responsible for the assessment of costs are elected, and therefore subject to the elective process, obviating the need to subject them to the adjudicative process which is intended for non-elected judiciary. Trying to explain this rule by a process-based analysis will lead nowhere unless the right protected by the process is borne in mind, and its protection is emphasised. The protection of private property is a substantive right and is central to explaining the rule established in this case.

In Griswold v. Connecticut (12), the Supreme Court held that the statute involved was invalid as an unconstitutional invasion of the right of privacy of married persons. The Court cited several cases to prove that the Fourth Amendment implies the right to privacy (13). Certainly the Fourth Amendment protects rights other than privacy, but proving this fact does not lead to

the conclusion that the Fourth Amendment is concerned with procedure as a purpose for protection (14).

Successive decisions have proved that there is a need to invoke rights of substance, such as the right to privacy, individual dignity and the protection of privacy, in deciding whether some superficially procedural provisions of the constitution warrant its intervention (15).

We come now to one of the functions Ely has announced to be among the duties of the judiciary in order to perfect the governmental process, which is the protection of minorities. From the analysis of the judicial duty to protect minorities, it is obvious that value choices are inevitable. The most important question in the protection of minorities is whom to protect. How can we determine which minorities deserve protection?

The process perfecting theory suggests the use of immutability, discreteness and insularity (16). There are several characteristics and factors by which groups of people are identified: colour, religion, nationality, gender, sexual orientation, legitimacy and wealth. But the question is how to determine which minorities deserve protection? Or should people belonging to, or identified with, such groups, be denied substantive rights because of certain feelings and attitudes towards them? Are the determining factors those distinguishing characteristics. The determining factor in the identification of a group deserving protection should not be based on a suspect categorisation, which assumes that there is a flaw in the process, but rather the determination that it is unjust that the group is denied the

opportunity fully to realise their humanity, and practise their fundamental rights [17]. To identify minorities which deserve judicial protection, a search for fundamental values must be invoked to discover whether or not certain groups of people are unjustly denied some rights, or have imposed on them unwarranted duties. The search for the minorities deserving judicial protection will involve an application of attitudes to fundamental values that the process perfecting theory tries to avoid [18].

Another function that Ely has announced to be among the proper duties of the judiciary in the constitutional field is "clearing the political channels", through speech and voting [19]. The First Amendment protections of freedoms of speech, press and the right of assembly are among such rights that will if protected, keep the channels open for political change and evaluation [20]. In analysing this point, we begin by asking why politics should be open to equal participation by all.

Clearing political channels is obviously not sufficient as an aim in itself, but should be considered a means of achieving some benefit to society. The importance of clearing political channels and guaranteeing the right to vote stem from a substantive view of human rights. The determination of whether the elective procedure warrants the interference of the court in a particular case involves the determination of whether or not the rights protected have been denied. This will involve the judiciary in the kind of fundamental value determination which the process perfecting theorists want to avoid [21]

The judiciary and the correction of malfunction in the political process

The whole idea of giving the determination of proper procedural functioning to the judiciary is contrary to the history of the American constitution. Ely contends that:

> "Obviously our elected representatives are the last persons we should trust with identification of legislative malfunction". (22)

Ely justifies giving the judiciary the role of correcting malfunction in the political process using the idea that an outsider, the judiciary, should determine the abuses and not leave it to the political branches themselves (23). This is contrary to the whole structure of the American constitution, which is based on involving many separate and independent parties in making decisions and executing them. The involvement of different parties and levels of government in the political process is intended to correct its malfunctions and prevent domination by any one party which produces the checking effect famous in the U.S. Constitutional system. There are many incidents in political history which show that the political process can successfully correct some of its malfunctions (24). There are no convincing reasons in Ely's arguments to give the judiciary the role of correcting malfunctions in the political process.

There are provisions in the constitution which specifically give power to correct the political process to the political branches. The commerce clause, for example, gives to Congress the

power to regulate interstate commerce in order, among other things, to protect the voteless out-of-state traders. There are some procedural provisions which cannot be affected by any of the government's branches, including the judiciary: one example is the duration of office of members of Congress.

There is one other defect in Ely's theory: he supposes, correctly, that the political branches may overstep the limits of power prescribed by the constitution and may try to prevent others from entering the decision making process. This is correct in that the political branches are human institutions susceptible to mistakes, but what about judicial mistakes in determining the limits of constitutional procedure? Ely does not address the judicial role of process-perfection to correct malfunction in it.

The process-perfecting theory of John Hart Ely is one important example of a host of theories which have one thing in common in that they try to avoid dealing with the substantive content of judicial review in different ways (25).

All of these theories fail to achieve a reasonable objective even if judged by their own standards. As we have seen in the case of Ely, these theories do not provide beneficial dialogue for the development of the content of constitutional law. The best approach to judicial review of the constitutionality of legislation is to recognise the substantive choices that the courts have to make in their review and from that point, to argue for the best choices that are consistent with the constitution and are good for the nation. The participation of constitutional

scholars with judges, trial lawyers and other concerned parties will no doubt benefit the development of constitutional law. The fact is that there are several provisions in the constitution which are open-ended. In applying the open-ended constitutional provisions the court has to inject meanings and choices of substantive values. The argument which does take place is about the proper source of the choice of the values to apply the constitution. Certainly the legislature does apply the constitution and its provisions to practical situations and in doing this it gives certain meanings to some open-ended constitutional provisions. The executive does give meanings to some open-ended constitutional provisions. The legislature and executive sometimes give meanings and interpret the constitution without expressly announcing that they are doing so. The judiciary, being in charge of dealing with the law, and constitutional law is part of the law of the land, does interpret the constitution. The Supreme Court was especially created by the constitution and given certain powers by the constitution itself. The Supreme Court acts from a strong position because of the express constitutional source of power it enjoys. The Supreme Court has the power to apply the constitution, and it is accepted that it has the power to review the acts of the legislature and the executive. With its independence and autonomy, it acts as a check on the other branches of the government and it deals with matters which sometimes appear, on the face of it, to be procedural and sometimes with more obviously substantive provisions. All of these provisions have substantive meanings and aims. The

Supreme Court does, quite properly, deal with substantive value choices. The argument which insists on proclaiming the judicial role in the constitutional field to be about perfecting the process, avoids dealing with the substantive choices made by the Supreme Court, and deflects attention from an actual and necessary part of judicial review, regardless of the stated role of the court.

The result of this will be to encourage the judiciary and especially the Supreme Court to make substantive choices in the name of perfecting procedure, knowing that commentators and critics will focus on this part of the court's work without questioning its substantive choices.

A proper constitutional analysis, in my view, is one which considers reality and the real extent of judicial review, acknowledges that in judicial review the courts deal with substantive choices about constitutional provisions, and tries to question the appropriateness of these choices and their compatibility with constitutional provisions and values. The constitution does contain value choices and there are values in the constitution which are not stated in words but understood from the constitution. The judiciary has the power to review the compatibility of the legislative as well as the executive acts against the provisions and values of the constitution. Discussion of judicial review which admits value choices and questions them is a healthy analysis which can participate in the development and correction of constitutional law.

Intergovernmental actions and fundamental values

In actions between the state (political branches) and the individual, the court should take into consideration the substantive values and ends that the constitutional provisions appear to protect.

Between national government and the states, the court must look at the basic component of the nation, the individual, and what he is meant to gain from the system. Does the encroachment of one level of the government upon the other disturb the balance put forward in the constitution in order to prevent one level of government from domination? One purpose of federalism is to protect the individual by a division of powers, and this, coupled with the separation of powers, is meant to distribute governmental powers among several parts and layers of government, which in the end serve to provide a balanced government in which decisions are debated and pass through different parts of government in order to allow correction and protection of individuals and groups of citizens. The basic issue in federalism cases is whether challenged action by one government, state or federal, exceeds the scope of its constitutional authority and thereby invades the authority of the other. One kind of constitutional case in which the court frequently strikes down state actions on grounds of federalism, is commerce clause cases (26).

The basis on which striking down state legislation occurs mostly concerns the interests of the nation, and the material

well-being of the country. The constitutional provisions are indeterminate and the original intentions of its framers are hard to establish and controversial to invoke [27]. Federalism involves imposition of limits on individual states as well as on the federation. The ultimate effect of such limits is to have a checking and limiting effect on the powers of both levels of government. The courts, especially the Supreme Court, have wide discretion in the declaration of the limits of powers. The Supreme Court is bound by constitutional provisions which give it a wide range of choice in its decisions in cases involving issues of federalism [28].

The doctrine of enumerated power that Congress has

"all legislative powers herein granted",

and the doctrine of implied power [29] that

> "Congress shall have power ... to make all laws which shall be necessary and proper for carrying into execution of the foregoing powers, and all other powers rested by this constitution in the Government of the United States, or any Department or Office thereof" (30)

make the Federal Government a government of limited powers. The limits of the legislative power of the Federal Government are not precisely defined and are subject to variation and developing interpretation. The overall attitude of the court's decisions in the commerce clause cases has been towards strengthening unity, encouraging integration and suppressing the forces of localism [31], but this does not indicate that the restraining effects of the states in the operation of the National Government and the Federal system has diminished [32]. Federal legislation under the

commerce clause may be subject to close judicial scrutiny. Legislation passed under authorisation from the commerce clause, must be consistent with the Bill of Rights and other restrictions which protect not only individual interests but State interests as well (33).

Summary

Using the process perfection theories may serve to justify active judicial involvement in several areas including fundamental rights by labelling the courts intervention as Process-Perfecting or Clearing-Political Channels, or other terms that are used, but this theory does not lead to restraining the judiciary (34).

There are substantive meanings and objectives of constitutional provisions, even those dealing with processes. Judicial interpretation of constitutional provisions involves choices and results in checking other branches and levels of government. Studying the Courts' choices and discretion is better than ignoring them or avoiding dealing with them under any label or approach.

The courts, especially the Supreme Court, deal with various areas of the Constitution, and therefore have discretion to affect various rights and relationships. The application and interpretation of the Constitution involves rights of individuals towards government and rights of government authorities towards other governmental levels and branches.

Chapter Four Footnotes

1. See Ely, J.H. Democracy and Distrust: A Theory of Judicial Review Cambridge, Massachusetts: Harvard University Press, 1980, pvii.

2. Komesar, K. A job for the judges: the judiciary and the constitution in a massive and complex society 86 Mich. L. Rev., 1988, p671.

3. They are several. They include John Hart Ely and Neil K. Komesar.

4. Tribe, L.H. Constitutional Choices Cambridge, Massachusetts: Harvard University Press, 1985, p9.

5. United States v. Carolene Products Co. 304 U.S. 144, 152 N:4 (1938). Justice Stone wrote in this footnote:
"It is necessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibition of the Fourteenth Amendment than are most other types of legislation ... Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, ... or national, ... or racial minorities, ... whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of these political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial enquiry".

6. Ely's theory is stated in his book: Democracy and distrust, op. cit.

7. Ely, op. cit., p73.

8. Examples of such cases are Gomillion v. Lightfoot. 364 U.S. 339 (1960), Ely at p140; and Oestreich v. Selective Service Board. 393 U.S. 233 (1968), Ely at p142; See Ely pp145-149.

9. Ely, op. cit., p87.

10. Tribe, op. cit., p10.

11. 210 U.S. 373 (1908).

12. 381 U.S. 479 (1965).

13. Among the cases cited in this decision are: Boyed v. United States, 116 U.S. 616 (1886) and Mapp v. Ohio, 367 U.S. 643 (1961).

14. See the argument of Ely, op. cit., pp96-97.

15. Ibid., p12.

16. The criteria are suggested by Justice Stone in the famous footnote 4 in the Carolene Products case 304 U.S. 144, 152 N:4 (1938).

17. See Tribe, op. cit., p7.

18. Ibid., p17.

19. Ely, op. cit., p105.

20. Loc. cit.

21. See Baker v. Carr, 369 U.S. 186 (1962), and Reynolds v. Sims, 377 U.S. 533 (1964).

22 Ely, op. cit., p103.

23. Loc. cit.

24. Komesar, Taking institutions seriously: Introduction to a Strategy for Constitutional Analysis 51 U. Chicago L. Rev., 1984, p405.

25. There are several theories which tried to avoid dealing with substantive choice in judicial review; one example is Komesar, "Comparative institutional analysis".

26. See National League of Cities v. Usery, 426 U.S. 833 (1976); and see Chapter Six of this thesis.

27. See Perry, M.J. The Constitution, The Courts, and Human Rights: An Inquiry into the Legitimacy of Constitional Policy Making by Judiciary New Haven, Connecticut: Yale University Press, 1982, p38.

28. Although in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) the court tried to use a process-based analogy to refrain from striking down the Statute in question, the court in fact had a choice, either to strike that Statute down, or to announce its validity. In its decision, the court has changed previously existing authority of National League of Cities v. Usery 426 U.S. 833 (1976), and this is another proof of the courts discretion.

29. U.S. Const. Art.1 sec.1.

30. U.S. Const. Art.1 sec.8.

31. Tribe, L.H. American Constitutional Law (2nd Ed.), Mineola, New York: The Foundation Press, 1988, p316.

32. See Weschler, H. Principles, Politics and Fundamental Law: Selected Essays Cambridge, Massachusetts: Harvard University Press, 1961, p50.

33. Tribe, American Constitutional Law, op. cit., p316.

34. See Ely's justification of the Warren Court's decisions, in Ely, op. cit., pp99-100; also see Tribe, Constitutional Choices, op. cit., p21

CHAPTER FIVE

THE ACTIVE ROLE OF THE CONSTITUTIONAL COURT IN WEST GERMANY

Unlike the United States Constitution, the Basic Law of West Germany (the constitution) gave the Constitutional Court the power to determine the constitutionality of federal and Laender (state) legislation in clear and explicit provisions [1].

The Constitutional Court has the power (inter alia) to decide:

> in case of differences of opinion or doubt on the ... compatibility of federal or land law with this Basic Law ... at the request of the Federal Government, of a Land government, or of one third of the Bundestag members. (2)
>
> on complaints of unconstitutionality, which may be entered by any person who claims that one of his basic rights ... has been violated by public authority (3)
>
> in the case of difference of opinion on the rights and duties of the Federation and the Laender... (4)

and

> on other disputes involving public law, between the Federation and the Laender, between different Laender... (5)

As a result of this clear constitutional stipulation, it is universally accepted that the Constitutional Court has the power to review the constitutionality of federal and Land legislation. There is, however, no uniform opinion about the rules or scope of constitutional interpretation.

From the early days of the Court opinions were divided as to whether or not the political effects of the Court's decisions should be considered. In one of its early cases the second senate of the Constitutional Court declared:

> The decisions of the Constitutional Court relate to political realities, and the Court must on no account disregard the political environment in which its decisions take effect. (6)

In another of the Court's early decisions the second senate observed:

> The political consequences which may arise from the rejection of the applications as inadmissible cannot be allowed to influence the Federal Constitutional Court. It must decide according to the law alone. (7)

Nevertheless political and social considerations were always present and can be traced in different cases considered by the Court.

One way of taking political considerations into account was to use the passing of time, leaving the case pending either until it was resolved by other factors or until it became more appropriate for the court to take action. In the Communist Party case, (8) the Court waited for five years until East-West relations changed and other political factors took effect, and then declared the Communist Party to be unconstitutional (9).

Another way in which the Court took account of the political implications of its decisions was by recognising that the justification for these decisions lay in the spirit of the Constitution rather than falling within its written provisions. Reliance on the spirit of the Constitution sometimes implied the violation of written constitutional provisions. In confirming the constitutionality of the act ratifying the Saar Agreement of October 1954 the Court did not deny that the act violated some constitutional provisions, but argued that the outcome of the treaty was the best result politically attainable and that the

Constitution must not prevent the bad from giving way to the better just because the best was unattainable (10).

The special nature of the West German legal and federal systems and their relationship with the Constitutional Court

The West German legal system is a civil law system. Under this system the state is at the centre of law-making. Traditional German jurisprudence is a positivist jurisprudence based on the idea that there is only one "right" decision and that the task of the court is to "discover" it by a process of logical deduction (11).

In the twentieth century the positivist view has been declining. Even in the heyday of positivism there was no agreement as to whether the criterion of judgement was the "objective" meaning of a statute or the "subjective" will of the legislator. The Constitutional Court has declared its preference for the objective statutory construction (12).

Even when judgement is based on the objective meaning of statutes and constitutional norms, it is possible to consider either what the words meant at the time when the law was framed or what they mean at the time when it is being applied. The present trend is to interpret laws on the basis of their meaning at the time they are applied; this is another way of taking social, political and economic developments into account in applying the law.

Judges in West Germany and other civil law systems do not

view their decisions as binding on them in later cases or as binding on other judges. The interpretations of the Constitutional Court are binding on all other courts and government authorities. Even the Court itself cannot easily avoid following its previous precedents because of the way this will affect its relationship with other branches of government. The Court itself takes the view that self-restraint is a guard against any crisis in relations with other branches of government which might result in reduction in or restriction of the role of the Constitutional Court.

Basic law declares West Germany to be a "democratic and social federal state". Basic law established a party democracy, and the West German federal system is a centralised federal system in terms of both its constitutional arrangements and its practical operation.

The federation is divided into ten Laender each of which has its own constitution. Most of the Laender were in no sense historical entities, but rather, fortuitous creations of the western powers within their zones of occupation, and were partly intended to prevent a strong, unified West German government from repeating the experience of Hitler (13).

The legislative powers allocated to the Laender are meagre, because Basic Law allocates most of the important legislative powers to the federal government. The Laender are compensated for their limited power of legislation in two ways. Firstly, the second chamber of the Bundestag is composed of members of the state governments. The members for each Land cast their votes (en

bloc). This institutionalises the influence of the governments of the Laender on national government. Secondly, the way federal legislation is executed balances the distribution of powers between the Laender and the federal government. The federal government does not have an administrative substructure in most fields of its legislative powers, so it has to depend on the Laender administration to execute its legislation. This inevitably gives the Laender a considerable degree of latitude in interpreting legislation (14).

The fact that the West German federal system is a centralised one and that most of the Laender were only organised comparatively recently has caused the work of the Constitutional Court to favour the Laender and to guard the federal system, as was demonstrated in the South West case (15). In this case the Constitutional Court announced that there are certain fundamental principles which can be deduced from Basic Law and to which all other constitutional provisions are subordinated; one such principle is federalism.

The institutional independence of the Constitutional Court

In the Constitutional Court Act of 1951 the court is defined as "an autonomous court of the federation independent of all other constitutional organs" (16). Initially the Court was under the administrative supervision of the Ministry of Justice, a fact which annoyed the justices because it placed the independence of the Court at risk.

The justices of the Constitutional Court realised the importance of preserving the independence of the court and started a move to correct the position of the Court from the very first month of its existence. One of their most important demands was that the Court be accorded a status equal to other governmental institutions and authorities such as the presidency, the Council of Ministers and the two houses of the legislature. The justices argued that the position of the Court at that time was contrary to Basic Law, which established the Court as a supreme constitutional organ and its justices as supreme guardians of Basic Law (17). The justices recommended that the Constitutional Court should be given budgetary autonomy and that it should be freed from any financial dependence upon the Ministry of Justice; that the Court should be given total control over all internal administrative matters; and that the Court's justices should be exempted from all disciplinary regulations applicable to other judges.

The justices achieved all their objectives for the independence of the Court. The Court now has its own budget, which is independent of that of the Ministry of Justice. The justices of the Court have the same status as the highest state officials. The president of the court holds the same rank as the President of the Republic, the Chancellor and the presidents of the two legislative houses (18).

Selection of Judges and Internal Organisation of the Constitutional Court.

Recognition of the political importance of Constitutional Courts is a decisive factor in determining the manner in which these courts are staffed. Where the significance of the role of these Constitutional Courts is valued, manners of appointing members are designed to give political groupings and legislative bodies a part in the appointing process (19).

Following the American example, and perhaps stressing to a greater degree the role of the legislature and of the Laender, the West German system of appointing members of the Constitutional Court is a significant factor for the consideration of the Court's importance.

The Basic law provided that the Judges of the Constitutional Court shall be elected by the two houses of the Federal legislature (20). One half of the members of the court are elected by the Federal lower house (Bundestag), which is a popularly elected body, and the other half are elected by the upper house of the Federal legislature (Bundesrat), whose members are appointed by the governments of the Laender (21).

The Constitutional Court is composed of two separate chambers (Senates). Justices are specifically elected to either the first or the second Senate, and may not sit on the other panel. The first Senate is presided over by the President of the Court and the second Senate is presided over by the Vice-President of the Court. Both Chief Justices are independent as far as judicial and administrative matters of their Senates are

concerned. Under the Constitutional Court Statute of 1951, the Bundestag elects its quota of judges through a specially organised committee representing a reflection of the strength of the different political parties in the lower legislative house (22). The Bundesrat elects its quota of judges directly.

The effect of giving the two legislative houses the rights to elect members of the two Senates of the court, and dividing in half the seats they elect in the two houses, serves several purposes. The first is to prevent domination of the court by any one party. The second purpose is to provide a formula by which the court represents the influence of the strengths of the different parties in both Federal and Laender levels. The third purpose of the design of the system of staffing the court is to represent the interests of the Federal Government and the governments of the Laender, due to the courts' role in umpiring the Federal system and its power of Constitutional review. Another possible consequence of the system of staffing the Constitutional Court is to reduce the objections to the courts' substantive choices and moral judgements, on the basis of democratic principles, due to the close connection between the court and the legislative houses, and the care taken to provide it with a system that reflects the voting powers at both the Federal and Laender levels (23).

Each of the two Senates has the same number of judges. The Senates started with twelve judges each, which meant that in 1951 the Constitutional Court comprised of twenty-four judges. Now

the Constitutional Court is comprised of only sixteen judges, eight judges in each Senate [24]. Functionally the Constitutional Court operates as two separate courts. Each Senate has its own distinct jurisdiction.

In staffing the Constitutional Court, there are qualifications determined by the courts' Statute emphasising the need for a variety of experience and backgrounds. To qualify to be elected to the Constitutional Court the minimum age of the persons is forty years, and they have to be eligible for election to the Bundestag and possess the qualifications for judicial office. In addition there is a special requirement that three seats out of the eight seats in each Senate are reserved for judges who are already members of the highest Federal courts [25]. The other judges elected to the Constitutional Court comprise a mixture of people with experience in government career service, professional legal practice, academic life and direct political activity [26].

The mixture of past experiences and the design of the system of electing the members of the Constitutional Court recognises the need for diversity of knowledge and experience besides the need for wider representation. All of these diversities equip the court for handling subjects that affect various aspects of the lives of individuals and the operation of the Constitutional system, in addition to the important advantage of providing wider confidence in the ability of the judges and legitimacy of their substantive choices in deciding constitutional cases.

According to the Constitutional Court Statute, as amended in

1971, Judges are elected for a non-renewable term of twelve years with a mandatory retirement age of sixty-eight years (27).

The independence of the Constitutional Court allows it to check the other branches of government without fear of intervention or pressure from the Ministry of Justice. This independence is in accordance with Basic Law, which gave the Court the power to construe Basic Law in a way which is binding on the federal government as well as the Laender. The decisions made by the Court have demonstrated that it is acting from a strong and independent position, especially in dealing with the federal government.

The Constitutional Court and the interpretation of Basic Law

The South-West Case

This case came very early in the life of the Constitutional Court; the Court's statute was enacted in 1951 and this case dates from the same year. The Court decided that it would be beneficial to use this case to introduce itself to other branches of government and to remove any ambiguities about the place of the Court in the constitutional system.

This case involves the federal government's attempt to redress the artificial division of the traditional territories of Baden and Wurtenberg into three new states by the Allies. The issue raised by this case was whether the federal government had the authority under Basic Law to suspend elections and extend the term of a state legislature pending the outcome of a popular

referendum on the merger of the state in question with another state [28]. Under Basic Law the federal government has the power of territorial reorganisation of the Laender, [29] but the Court denied it the power to extend the life of the state parliament as long as the Land exists and its legislation does not violate the requirements of Basic Law. The court said that if the federal government interfered with such matters as when and how an elected Land parliament was dissolved, it would be violating the principle of federalism guaranteed by Basic Law.

The Constitutional Court announced several important propositions in this case:

(1) The federal Constitutional Court is absolutely supreme in the interpretation of Basic Law.

(2) The Court's function is to examine the legality or validity, not the wisdom, of public policy; the extent of the legislature's power is a constitutional question on which the Constitutional Court reserves finality.

(3) Constitutional provisions are to be interpreted not as independent rules standing alone but within the context of Basic Law as a whole. No constitutional right, duty or power is absolute, but is to be measured by competing rights and responsibilities under Basic Law.

(4) There are certain fundamental principles such as democracy, federalism and the rule of law which can be deduced from Basic Law as a whole and to which all other constitutional provisions are subordinate.

(5) Certain higher law principles constitute standards against

which positive law and the actions of public officials are to be reviewed (30).

In expounding on the principle of "federal comity" announced by the Court in this case, the Court said that as members of the federation the Laender are states with their own supreme state power, which although limited in its field of application is not derived from the federal government but rather recognised by it (31). In setting out the limits of the federation's power to organise new states, the Court signified clearly its intention to guard the autonomy of the Laender.

The North-Rhine Salaries Case (1954)

This case was brought by the federal government against legislation by the Land of North-Rhine Westphalia, on the grounds that it violated the legislative framework of the federal government, which, under article 75 of Basic Law, has the power to enact framework legislation.

Basic Law gave the federal government the power to enact framework legislation in certain fields; the purpose of this power is to ensure a certain degree of uniformity throughout the Federal Republic. The Basic Law did not define the meaning of the term "framework", so it was a question for the Court to answer.

One area in which the federal government has the right to enact framework legislation is the "legal status of persons in the public service of the Laender, Communes or other corporate bodies under public law" (32). In 1951 the federal government

enacted legislation which prohibited the Laender from fixing the salaries of their officials more favourably than those of the corresponding federal officials.

The Land government denied the constitutionality of this legislation, arguing that it did not leave free scope to the Laender but went into detail such as could only be justified by exclusive legislative authority. This, the Land argued, was contrary to the purpose of the framework legislation, which is meant to allow the Laender the discretion to adapt their legislation to the special circumstances of their areas.

The Court struck down the federal legislation as unconstitutional, and said that the definition of framework power was a legal question to be decided by the Court. The Court differentiated between framework legislation and concurrent legislation, saying that framework legislation must not be of the same intensity as concurrent legislation. The main distinction is that the federal government is given the right to occupy the area of legislation; until this time and to this extent Land legislation is void, while framework legislation presupposes Land legislation in the same area. Framework legislation should thus leave sufficient scope for Land legislation. In finding invalid the federal framework regulations on civil servants' salaries, the Court stressed that, due to the principle of federal comity, Laender are not absolutely free to determine the salaries of their officials (33). This principle stems from the spirit of the federal constitution and means that whenever the effects of a Land's legislation extend beyond the area under that Land's

jurisdiction, the Land must take account the interests of the federal government and of other Laender. In determining the salaries of their officials the Laender should bear in mind that the Federal Republic has a single overall financial structure. The Laender should take into consideration the general salary situation in the federal government and in the other Laender, so that the general financial structure is not shaken. Large variations in public sector salaries between different Laender and between Laender and federation may cause dissatisfaction within the civil service.

The Court ruled that a Land law can only be invalidated on the basis of violation of federal comity in cases of obvious misuse of legislative discretion. In this case the Court found no obvious misuse of legislative discretion by North-Rhine Westphalia (34).

The television case of 1961

This case brought the Constitutional Court into direct conflict with the federal government on a matter of policy which the federal government considered vital (35). The federal government had decided in 1951 to create a second television channel in addition to the existing channel which was run in collaboration between the Laender and some private associations. The Laender argued that the federal government did not have the right to interfere in the regulation of television matters because these matters fell within their recognised competence

over cultural matters. Four Laender challenged the federal government's action before the Constitutional Court on the grounds of infringement of the guarantee of "freedom of reporting by broadcasting" contained in Article 5 of the Basic Law, of the residual powers of the Laender under Article 30 and of the duty of federal comity (36).

The federal government's case rested on generic interpretation of some traditional areas of federal authority under Basic Law, because there was no explicit allocation of authority over television. Among the federal powers invoked to support the federal government's argument was its power over post and telegraphs (37). The Court ruled that while this power might extend to the regulation of arrangements for the technical aspects of television transmission, it could not cover the organisation and making of programmes. The content of television broadcasting, the Court decided, fell within the cultural sovereignty of the Laender. The Court's decision made use of the principle of federal comity at several points. It provided an example of the use of the doctrine of federal comity to modify the existing freedom of discretion, particularly in establishing limits for both the federal government and the Laender in the exercise of their powers.

The Court was concerned to prevent the federal government's power over broadcasting from being so far-reaching in its effects as to prejudice the organisation of broadcasting by the Laender. If existing broadcasting stations were prevented from controlling their own transmissions, the court argued, this would be a

violation of the principle of federal comity.

The Court was criticised for its highly political arguments and the severity of its criticism of the federal government in a matter which was incidental to a fairly clear-cut question of legislative and administrative powers under Basic Law (38). There were many complaints that the Court had obscured the boundary between constitutional judgement and political criticism, especially in its detailed discussion of the manner in which the federal government had dealt with the whole issue of the new channel (39).

The extent to which the doctrine of federal comity was developed by the Constitutional Court in several cases, especially the Television Case, made it susceptible to almost unlimited extension to every aspect of political relations between the federal government and the Laender. But in a later case the Constitutional Court restrained its use of the doctrine of federal comity, especially for the protection of the rights of the Laender, announcing that the principle constitutes or limits rights or duties within an existing relationship between the federal government and the Laender but does not independently establish a legal relationship between them (40).

The Constitutional Court and fundamental rights in constitutional interpretation.

The Constitutional Court announced that human dignity is the "highest legal value" and the Basic Law in Article 1, which

proclaims the inviolability of human dignity, is beyond parliament's powers of amendment. The Constitutional Court announced that fundamental rights are pre-existent and binding upon both the founders of the Constitution and the legislature. The Constitutional Court further announced that even though Basic Law authorises the legislature to derogate from fundamental rights in some subjects, it is unacceptable to interpret the constitution in ways which would give the legislature a free hand to tamper with fundamental rights, even in those subjects in which Basic Law explicitly gives the legislature the right to derogate from these rights (41).

Federalism was one area in which stricter scrutiny is applied to political acts because of decentralisation and the limits it imposes in particular on the acts of federal political branches. In West Germany the federal system was created to protect against repetition of the Nazi experience. New states were created artificially by dividing the areas under Allied occupation.

The Constitutional Court has formulated certain unwritten constitutional principles on the basis that these principles have their source in the guiding ideas which inspired the founding fathers and informed the deliberations of the parliamentary council, but were not expressly set out in any specific constitutional provision. These principles include federal comity, the social state, and the principle of proportionality, which is the equivalent of due process. The important principle of human dignity, which is based on Article 1, can be included with these

unwritten principles to form higher constitutional principles to which constitutional amendments should conform (42).

The use of unwritten constitutional principles and the primacy of individual dignity, all of which relate either directly or indirectly to the protection of the individual, have given individual rights a prime position in constitutional interpretation. These constitutional principles have affected constitutional interpretation in another respect: because they are general and most of them are not written, they allow the Court ample room to manoeuvre and develop its decisions.

The active role of the Constitutional Court in constitutional adjudication

From its early days the Court signalled to the other branches of government that it wanted to be independent and active in performing its duty. In the first year the justices sought and eventually received independence from the Ministry of Justice in the Court's non-judicial affairs. The reason behind the justices' seeking the independence of the Court in administrative and financial matters was that they considered that these matters could jeopardise the independence of the Court, which is important if it is to play its role effectively.

In its first major case the Constitutional Court announced that it was absolutely supreme in the interpretation of Basic Law and that it was prepared to carry its responsibility independently.

The Court took a positive attitude and played an active role within the latitude it possessed, using the power available to it in the context of the legal system to develop and balance the constitutional structure of the Federal Republic. One example of the role of the Court in balancing the constitutional structure and preserving the federal system is its protection of the Laender and the small area of legislation they control compared to the federal government.

In guarding the federal system the Court did not confine itself to the letter of Basic Law, but rather admitted the existence of basic unwritten principles such as federal comity and considered all other provisions of Basic Law to be subordinate to these principles.

In its interpretation of Basic Law the Constitutional Court takes different factors into consideration by adopting the meanings of the constitutional provisions current at the time when the provisions are applied.

The active role of the Court was obvious not only from what it chose to do but also from what it chose not to do. The Court used to leave some cases pending for a long time, so that the problems could be solved in different ways or the positions in the case could develop and become clearer.

The Court is an independent judicial institution and a powerful actor in the West German constitutional structure. The legal system and the nature of the constitutional structure in West Germany have not prevented the Constitutional Court from carrying out its duty. The Court has practised its constitutional

adjudication while taking into consideration the different circumstances of the individual cases and their parties.

The jurisdiction provided by the Basic Law and the manner of staffing the court provided it with a wide discretion and a moral justification to become involved in more than the application of positive legal rules.

The Constitutional Court is the supreme guardian of the Constitution, with the authority of providing interpretations of the Constitution which are binding on all (43). The Constitutional Court has a political significance due to its jurisdiction to interpret and resolve disputes about the contents of a political document, namely, the Constitution (Basic Law). Therefore the Constitutional Court is, by its design and competence, an important institution affecting the political and constitutional developments of the country.

The Constitutional Court is involved in issues of a controversial nature, (as in the case of the Supreme Court of the U.S.), like the right to abortion and the right to life of unborn babies (44). The Constitutional Court is not without moral and legitimate rights when involved in deciding such issues. In deciding such cases, the Court's judgement will not satisfy the positions of all people. The Court can reduce the criticism and any popular or political resentment by pointing to the Constitutional provisions of the Basic Law and showing the coherence of its interpretation of them, as well as adopting restraint in the disposition of some of the issues before it (45).

The Constitutional Court is accorded a major responsibility to ensure protection of rights given to governments and individuals by the Basic Law, and to ensure the supremacy of that Basic Law. The court's discretion in disposing of matters within its competence is wide. The success of the Constitutional Court in the past and its role as protector of individual rights and of Federal balance depended on mixed measures of self-restraint and decisive involvement in appropriate cases. The success of the Constitutional Court is reflected in the growing confidence in it and in the increased constitutional responsibilities accorded to it by successive enactments (46).

Chapter Five Footnotes

1. The Basic Law of West Germany Article 93.

2. Ibid., Article 93 (2).

3. Ibid., Article 93 (4a).

4. Ibid., Article 93 (3).

5. Ibid., Article 93 (4).

6. The decision concerning the 1951 electoral law of the Land of Schleswig-Holstein. Quoted from Blair, P.M. Federalism and Judicial Review in West Germany Oxford: The Clarendon Press, 1981, p36.

7. The decision on the European Defence Community. Quoted from Blair, op. cit., p36.

8. McWhinney, E. Supreme Courts and Judicial Law Making: Constitutional Tribunals and Constitutional Review Dordrecht: Martinus Nijhoff Publishers, 1986, p103.

9. Loc. cit.

10. Blair, op. cit., p37,

11. Kommers, D.P. Judicial Politics in West Germany: A Study of the Federal Constitutional Court Beverly Hills, California: Sage Publications, 1976, p43.

12. Blair, op. cit., p31.

13. Kommers, op. cit., p56.

14. Blair, op. cit., p5.

15. The South West case, decided in 1951.

16. Quoted from Kommers, op. cit., p83.

17. Ibid., p84.

18. Ibid., p85.

19. See Cappelletti, M. Judicial Review in the Contemporary World Indianapolis, Indiana: The Bobbs-Merrill Co., 1971, p.55; see also McWhinney, op. cit., pp45-46.

20. The Basic Law, Art. 94.

21. The Basic Law, Art. 94 (1).

22. See McWhinney, op. cit., p49.

23. Johnson, Nevil, The Interdependence of Law and Politics: Judges and the Constitution in West Germany 5 West European Politics, July 1982, p247.

24. See McWhinney, op. cit., p34.

25. McWhinney, op. cit., p49.

26. McWhinney, E. Judicial Restraint and the West German Constitutional Court 75 Harv. L. Rev., 1961, p9.

27. See Kommers, op. cit. p.88 and McWhinney, Constitutional Courts op. cit., p54.

28. McWhinney, Constitutional Courts op. cit., p234.

29. The Basic Law, Article 118.

30. Kommers op. cit., p209.

31. Blair op. cit., p151.

32. Ibid., p85.

33. See National League of Cities v. Usery, 426 U.S. 833 (1976), and the latter case of Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), for an analogous U.S. experience.

34. Blair, op. cit., p166.

35. McWhinney, op.cit., p171.

36. Blair, op. cit., p177.

37. The Basic Law, Article 73 (7).

38. Blair, op. cit., p181.

39. Loc. cit.

40. Territorial Organisation Case (1961), cited from Blair, op. cit., p183.

41. Kommers, op. cit., p216.

42. Ibid., p.210.

43. Leibholz, Gerald, The West German Constitutional Court, in McWhinney, E. and Pescatore, P. (ed.), Federalism and

Supreme Courts and the Integration of Legal Systems
Bruxelles: Editions U.G.A.M 1973, p62.

44. In the U.S., see Roe v. Wade, 410 U.S. 113 (1973); In Germany the issue was brought by some members of the Bundestag and five Laender. The decision was handed down in 1 of Feb, 1975 - see Johnson, Nevil, op. cit., p.240.

45. Johnson, Nevil, op. cit., p249.

46. One of such enactments is giving the Constitutional Court of Competence to hear direct constitutional complaints from individuals by the Amendment of Article 92 in 1968.

CHAPTER SIX

JUDICIAL REVIEW OF THE COMMERCE POWER OF CONGRESS AND ITS IMPACT ON THE FEDERAL SYSTEM IN THE U.S.

Introduction

The Judiciary has an important role in deciding the limits of the legislative powers of the national government and of the states in the U.S. federal system.

The general pattern in the development of the U.S. federal system has been towards increasing the National government's share of legislative power. The courts have played two different roles regarding the distribution of legislative power: they have played a vital and major role in the promotion and preservation of federalism by curbing state action incompatible with the integration of the nation, and allowing for the expansion of federal legislative authority. The importance of both of these roles cannot be played down. The courts' role regarding curbing state actions incompatible with the integration of the national economy has been a central one. Regarding protection of the expansion of the national powers, the role of the judiciary has been secondary. To say that in the performance of the second task the role of the judiciary is secondary does not discount the importance of such a role in the continuing integration of the national economy (1).

In the face of the expansive power of Congress arises the necessity of putting certain limits to this power in order to preserve the federal system. The constitution is premised on the

existence of the states as independent entities.

What is the branch of government most suitable to promote and support the integration of the nation and at the same time ensuring the true existence of the individual states within the parameters provided by the constitution? There are calls to entrust the Congress with this task. I shall argue that the best guardian of the federal system is the Judiciary.

My aim is to prove the positive role of the judiciary in promoting the growth of national power, while preserving the federal system.

The Commerce Power

The power of Congress "to regulate Commerce ... among the several states" (2) has been one of the areas which witnessed a great expansion over the years.

The commerce power has been used throughout the history of the U.S. federal system to strengthen the powers of the National government in many different fields. Federal Labour statutes, even the Civil Rights statutes, and countless others rest on commerce power. The underlying construction of the scope of the Commerce clause has been that Congress has the power to regulate the activities which it can show to be burdening, obstructing or affecting inter-state commerce (3).

Originally the resolution of commercial rivalries between states was among the reasons behind calling the 1787 Convention. Under the Articles of Confederation there were different forms of

commercial rivalries among the states, the enactment of tariff laws against other states being just one example of the trade restrictions on interstate commerce. The elimination of these rivalries and the abolition of restrictive trade practices was one of the primary tasks of the Convention (4).

The sparse language of the Commerce clause was presumed by the framers to be adequate to allow the resolution of commercial rivalries between the states. Nevertheless, it soon became apparent that the clause had left several questions unanswered, so it was the duty of the judiciary to address these questions and to resolve them, to serve the purposes of the Constitution to unify the states and abolish harmful trade practices.

The need for integration of the market and the role of the Supreme Court

The constitutional regulation, in the constitutional text of 1787, has not been amended since coming into force (5). This fact itself shows the importance of the role of the judiciary in the interpretation of the limits of both state and national powers regarding commerce, which has had the effect of allowing the integration the national economy to an extent quite unforeseen in 1787. The role of the judiciary in providing for and protecting the expansion of the national economy has become necessary for several reasons, primarily the desirability of national economic integration brought about by the development of the country's economy from being rural and decentralised towards greater integration and sophistication. Since the adoption of the

constitution, the industrial revolution took place and congress needed to provide legislation to cope with this, and to help expand it and distribute its benefits in the interests of the whole country (6).

The first opportunity for the Supreme Court to deal with the questions left unanswered by the Commerce clause was in 1824, in Gibbons v. Ogden (7).

Gibbons v. Ogden involved the validity of a New York statute that conferred a monopoly to navigate the waters of the state by steamboat. The challenge to the statute rested, in part, upon the grounds that it conflicted with a federal statute licensing such interstate commerce, and was therefore an unauthorised state legislation. Chief Justice Marshall, who wrote the Court's decision, held that the New York's statute was void and took the opportunity to interpret federal power expansively.

Marshall rejected the claim which restricted commerce to purchase and sale of goods. He asserted that "Commerce" is a general term which describes the commercial intercourse in all its branches.

Marshall did not end his discussion of the scope of federal powers at this point, although it was sufficient for the holding of the Court to establish that navigation was affecting commerce among the states sufficiently, in this case, to hold the New York statute void. Marshall went on to establish that under the Commerce clause Congress could legislate with respect to "all commerce which concerns more states than one" (8). This means

that any activity which "concerns" or affects interstate commerce would be within the power of Congress to legislate. This also means that the power of Congress to legislate on interstate commerce would be absolute, plenary and subject only to the Constitution's affirmitive prohibitions on the exercise of federal authority (9). According to Marshall, in his opinion Gibbons v. Ogden was to be understood as conforming to the general design of the Constitution. The design is that Congressional power should extend to the nation generally, but not to disputes which are completely within a particular state, which do not affect other states and with which it is not necessary to interfere for the purpose of executing some general power of the National government.

Although Gibbons v. Ogden respected the theory of enumerated powers, it demonstrated that this theory was compatible with a very broad view of Congressional authority. Gibbons v. Ogden represents a landmark in the development of the Constitutional law of the U.S., and gives a clear example of Marshall's view of Congressional power. Not until Congress used its legislative power with respect to Commerce in the Inter-state Commerce Act of 1887 etc., did the national legislature take up the power it had under the Constitution. Before then the cases which reached the Supreme Court were largely concerned with the compatibility of State legislation with the still dormant power of Congress under the Commerce Clause.

The Pre-New Deal Decisions (from 1887 to 1937)

During this period the Supreme Court was repeatedly required to define the limits of Congressional power. The Supreme Court departed from the empirical test for determining Congress's authority, which was suggested by Marshall in Gibbons v. Ogden, and replaced it with a formal classification of economic activity. This test was restrictive of Congress's power and resulted in the invalidation of a number of Congressional acts. It distinguished "Commerce" from "mining" and "manufacturing", and the result of this classification was to deny Congress the power to regulate the latter activities even if the products of these activities would subsequently enter the realm of interstate commerce (10).

In U.S. v. E.C. Knight Co. (11) the Supreme Court held that an acquisition of four sugar refineries which brought 98% of the U.S. refinery capacity under common control did not violate the Sherman Act. This decision was based on a narrow conception of Congress's power under the Commerce clause. The court maintained that commerce did not include manufacturing, agriculture or other production activities. The court in its distinction between manufacture and commerce was trying to preserve the state's police power in order to protect the autonomy of states. The court did not succeed in establishing principles that were adequate to confine federal power. The interactions between the different economic activities and the wider effects of the developments in states upon interstate commerce was becoming apparent with the passage of time. So, in Swift and Co. v. U.S.

(12) the Supreme Court recognised the interconnectedness of markets among the states. In this case the Supreme Court held that price fixing in livestock markets could be prohibited under the Sherman Act since the markets, although themselves each located in a single state, were part of interstate commerce.

The trend towards widening the reach of interstate commerce continued and resulted in the ratification of important congressional exercises of the Commerce power.

In the Shreveport Rate Case (13) the Supreme Court sustained Congress's power to act to regulate rates of intrastate railroads in competition with interstate railroads. The court did not explain why it approved Congressional authority to regulate intrastate railroads which affected interstate commerce while at the same time denying Congress power to regulate production activities which eventually affect interstate commerce. Justice Hughes, who wrote for the Court in this case, gave reasons which could be applied to other activities relating to interstate commerce: in his words, " ... all matters having such a close and substantial relation to interstate traffic ... " would justify extending Congress's authority to them as a fair extention to ensure "... the efficiency of interstate traffic". Why then could this not be applied to other activities affecting interstate commerce? The answer to this question was not provided by the court in this case.

The New Deal and Interstate Commerce

The Supreme Court in the pre-New Deal era was reluctant to approve the expansion of Congress's commerce power. In some cases the court approved the power of Congress to regulate and prohibit the interstate transportation of goods considered to be harmful in certain ways. So, the transportation of lottery tickets in interstate commerce was held to be within Congress's power under the Commerce clause, in the Lottery Case in 1903 (14). In this case the court refused to accept the argument that "to regulate does not include to prohibit". The court confirmed that Congress's power over interstate commerce is plenary and is subject to no limitations except such as may be found in the Constitution. Among the subjects held to be within Congress's power to prohibit from being transported in interstate commerce were adulterated food and women for immoral purposes (15). But the court refused to sustain the Federal Child Labour Law of 1916, which prohibited the shipment in interstate commerce of products of enterprises employing under-age labour, in Hammer v. Dagenhart (16). The court insisted that the power to prohibit the shipment of goods across state lines was limited to goods that were harmful in themselves.

The insistence of the court on preserving the states' police power and the formal classification of economic activity were to be major obstacles to the acceptance of several New Deal programmes which were introduced to improve the economic development of the nation and to remove the obstacles which contributed to the problems of that period.

In the years of the Great Depression the courts were considered by many as an obstacle to national solutions to the economic problems. The court in several cases demonstrated its insistence on using the formal classification and the "direct/indirect" test to economic activities and so excluded many from Congress's power by labelling them as having an "indirect" effect on interstate commerce.

In Railroad Retirement Board v. Alton Railroad Co. (17) the Supreme Court held unconstitutional a statute that established a compulsory retirement and pension for all carriers subject to the Interstate Commerce Act. The Court held that the scheme had no relation to the business of interstate transportation, and that it was essentially related solely to the Social Welfare of the workers, therefore it was not in purpose or effect a regulation of commerce within the meaning of the Constitution. In another case, Schechter Poultry Corp. v. United States (18), the Supreme Court invalidated parts of the National Industrial Recovery Act partly because the regulation of wages and hours in the Act had only an "indirect" effect upon commerce and was, therefore, beyond the authority of Congress.

In Carter v. Carter Coal Co. (19), the Supreme Court invalidated the Bituminous Coal Conservation Act of 1935 in part because the Act regulated incidents of "production", and "production", the Court ruled, was a purely local activity beyond the powers of Congress to regulate under the Commerce clause.

The Supreme Court invalidated several New Deal programmes by

the use of its restrictive tests and thereby precipitated a political crisis. The Court was considered to be an obstacle to the needed national solutions to the economic problems. The Court's insistence on excluding a wide range of economic activities and labour regulation from the power of Congress and reserving them to the states was considered to be a failure of the Court to understand the economic realities. The states were impotent to deal with the problems of the economy and their regulation was useless because it usually resulted in competition among the states for local advantage rather than the solution of the wider problems. The effect of the Court's decisions resulted in public disfavour for it, partly because it was considered by many observers and commentators that the Court's limits on the power of Congress were not required by the Constitution but were merely of the Court's own opinion [20]. It was argued that had the Court used doctrines dating back to Gibbons v. Ogden it might have sustained Congressional authority in the New Deal legislation.

In the face of the Supreme Court's refusal to sustain the New Deal programme President Roosevelt moved against the Court shortly after his second election in 1937. Roosevelt urged Congress to enact legislation which would permit the increase of the justices of the Court, with the ultimate aim of allowing for the appointment of new justices who would conform to the Constitutional views of the President and Congress. The "Court packing" was a serious challenge to the independence of the Court. Eventually the Congress refused to adopt the suggested

legislation in the face of bitter and widespread debate. But before the defeat of the Court-packing legislation the Court retreated from its position and acceeded to political pressure in its famous decision in National Labour Relations Board v. Jones and Laughlin Steel Corp. (21).

The Scope of the Commerce Power as Established by Jones & Laughlin and subsequent cases:

In Jones & Laughlin the Court sustained Congress's power to regulate labour relations at a manufacturing plant operated by an integrated steel company. The Court held that labour relations in the company was within Congress's power to regulate because any work stoppage at its plants "would have a most serious effect on interstate commerce" (22).

The Court used language the effect of which was to broaden the reach of Congressional authority and signified the abandonment of the classification tests which were used at some earlier cases. The Court announced the shift in its emphasis from the consideration of each economic activity separately in view of its nature and "direct" or "indirect" relation to interstate commerce, to one in which the attention was paid to the cumulative effect on interstate commerce. The Court announced in Jones & Laughlin that "the power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement". The Court further announced that " ... Although activities may be intrastate in character when separately

considered, if they have such a close and substantial relation to interstate commerce that their control is essential or it is appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control" (23).

This decision marks the recognition by the courts that the earlier test it used was irrelevant and signified the return to Chief Justice Marshall's earlier view of Congressional power over interstate commerce. This case marks the start of a new era in which Congress's power was sustained on a wide range of activities and different fields, so long as it can prove they have an effect on the flow of interstate commerce.

In Wickard v. Filburn (24), the Court sustained Congress's power to regulate activities which are not in themselves involved in interstate commerce at all, but where the aggregate effect of the class of those activities was understood to influence interstate commerce. In Wickard the Court held that Congress could control farmers' production of wheat for home consumption because the cumulative effect of home consumption of wheat by farmers might reasonably be thought to alter the supply-and-demand relationships of the interstate commodity market (25).

The Post-1937 decisions and the Protective Principle

In addition to extending Congress's power to regulate activities affecting interstate commerce, the post-1937 Supreme Court approved the imposition by Congress of protective conditions on the privilege of engaging in an activity that

affects interstate commerce. It is now established that Congress may impose any conditions on the use of commerce privileges as long as the conditions do not violate independent constitutional prohibitions (26). The limits which were imposed by the decision in Hammer v. Dagenhart (27) on Congressional power have been removed. One of the examples of the protective conditions was the exclusion from interstate commerce of goods produced in plants whose employees' wages and hours did not meet federal standards. Such conditions were included in the Fair Labor Standards Act of 1938, which was affirmed by the Supreme Court in United States v. Darby (28). Congress, the Court said, could follow its own conception of public policy in imposing restrictions to exclude from interstate commerce articles the use of which is considered by Congress to be injurious to public health, morals or welfare. The power to exclude goods and activities from interstate commerce enabled Congress to expand its powers to achieve objectives which by their nature are not economic.

In Heart of Atlanta Motel v. United States (29) the Supreme Court unanimously sustained the Civil Rights Act of 1964, which prohibited racial discrimination in any "Inn, Hotel, Motel or any other establishment which provides lodging to transient guests". Congress had ample evidence, the Court said, that racial discrimination in these establishments impeded interstate travel by blacks.

The Commerce Power and the Limits Required by the Federal System

The expansion of the Commerce power since 1937, and the inclusion of even non-economic activities and the achievement of non-economic objectives through the Commerce power, gives rise to the question of whether or not there are limits to this power.

The use of the "protective principle" and the "necessary and proper" clause (30) resulted in the extension of Congress's power to activities which are so peculiarly "local" that even their repeated performances cannot have substantial effect on the economy of more than one state (31).

The Supreme Court has indicated that there are limits on the Commerce power resulting from the federal system of government. These intimations are reinforced by the effort the Court makes, when sustaining legislation, to demonstrate that the conduct regulated has some connection with interstate commerce. There would be no need to prove the existence of connections between the conduct regulated and interstate commerce were there no limits to Congress's power over these kinds of activities. And yet it is easy to prove the existence of connections between economic activities and interstate commerce, the result is a plenary Congressional power over the national economy. Congress needs only to indicate its express intention to include certain kinds of economic activities in its regulation for the Court to sustain their inclusion under Congress's authority. Only in the absence of express language to include economic activities under Congress's regulation will the Supreme Court construe a Congressional Act not to include such activities if they are intrastate

activities. In United States v. Five Gambling Devices [32], the Supreme Court ruled that the Congressional statute should not be construed to govern wholly intrastate activity when it is not expressly included, because of the premised respect to the federal system [33].

Congress's authority over economic activities in the United States is effectively a plenary authority insofar as its intention to include such activity is obvious and that it can prove the relevance of that activity to interstate commerce. There is, though, the question of whether the sovereignty of states forms a limit to the power of Congress to regulate interstate commerce.

State Sovereignty as a Limit on Congressional Power

Does the independence of the states as sovereign entities have a limiting effect on the national commerce power? And who should declare the limits? These and other relevant points will be the subject for our investigation in this section.

The Constitution, clearly, presupposes the existence of the states as entities independent of the national government. The Tenth Amendment to the United States Constitution, which provides that "the powers not delegated to the United States by constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people" [34] was treated by early Judicial decisions to be a defence against federal overreaching [35]. After 1937 the Supreme Court rejected the

earlier construction of the Tenth Amendment and instead recognised it to be a truism, that the states retain powers not given to the federal government (36).

The protection of state sovereignty should depend now on the presumed independence of the states under the federal system created by the Constitution. Congressional action which treats the states in a manner contrary to their constitutional status should be void. In order to preserve Constitutionally created federalism, what matters is mainly the preservation of states as sovereign entities which can practice their governmental authorities in their proper fields.

In Maryland v. Writz (37) the Supreme Court, as a result of the post-1937 interpretation of the Tenth Amendment and of the federalism restraint in general, held to be a constitutionally authorised practice the application of the minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA) (38) to some employees of states and municipalities. Eight years later in 1976 the Supreme Court, in National League of Cities v. Usery (39), the Court overruled by a 5-4 vote Writz and struck down as unconstitutional a 1974 Congressional amendment to the FLSA which extended Federal minimum wage and maximum hour provisions to almost all state and municipal employees. Nine years later the Supreme Court overruled National League of Cities in Garcia v. San Antonio Metropolitan Transit Authority (40) by a 5-4 vote.

The interesting thing about National League of Cities was that it was the first decision in which the Court struck down

Congressional legislation under the commerce clause on federalism grounds since Carter v. Carter Coal Company, four decades earlier (41). National League of Cities established a three-part test to determine whether a Congressional act infringed state sovereignty. The first part is that the challenged law should be established to aim to regulate the "states as states". The second part is that the challenged law should address matters which are "attributes of state sovereignty". The third part is that the challenged law should directly impair the ability of states "to structure integral operations in areas of traditional governmental functions" (42).

This three part test was designed to protect the sovereignty of states from federal encroachment. As the Supreme Court said in National League of Cities, the challenged statute was well within the area of authorised Congressional power under the commerce clause, except for the fact that it disregards the limits of federalism. The decision in National League of Cities was not based on the Tenth Amendment argument, but was rather based on the idea that there exist under the constitutional structure judicially enforceable limits on the federal power to protect the existence of states as sovereign entities with meaningful powers to provide for the purposes of their independent existence. It is questionnable, though, whether the role of states as employers and providers of services is an essential role for their existence as independent sovereign entities in the federal system. There is no satisfactory evidence to prove that the role of the

states to provide services is basic to their independence, as was the decision in National League of Cities meant to protect.

There are better areas to offer the states protection on the grounds of federalism, among which are the ability of the states to structure their subdivisions, and their role as legislators (43).

The three part test announced by the Court in National League of Cities proved to be a problematic one, as demonstrated by later decisions. The meaning of "traditional" functions is ambiguous; does it mean "customary" in a certain period? What are the traditional functions which are beyond the reach of Congress? This and other parts of the test presented the Court with difficult choices on several occasions (44). Several cases in which the applicability of National League of Cities was a central issue, during the nine years until Garcia, were decided (45). In none of these cases did the Court eventually find an immunity from federal regulation.

In Federal Energy Regulatory Commission (FERC) v. Missippi (46), for example, the Supreme Court upheld the application of certain provisions of the Public Unity Regulatory Policies Act (PURPA) of 1978 to the states. FERC involved a claim by the State of Missippi that certain provisions of PURPA encroached upon its sovereignty. The Court in its 5-4 vote upheld the statute, but noticeably did not depend for its decision on the three part test. The Court in FERC considered the ability of a state administrative body to make decisions and set policies independently of federal control as an important condition for

the state to be able to promulgate regulations of its own in the federal system (47). The Court, however, upheld the federal law depending on the finding that it did not compel the states to adopt its proposals, therefore it did not impair their independent sovereignty. The unhappiness of the Supreme Court with the three part test was made obvious in FERC by the fact that the Court avoided using it, and in other cases by using the test and somehow finding the statute to be constitutional (48).

In Garcia the Supreme Court announced that the granting of immunity to "traditional governmental functions" of states and municipalities was unworkable and inconsistent with the "established principles of federalism" (49). Due to the problematic nature of the three part test of National League of Cities, especially of its third part, and to the lack of sufficient support in the Supreme Court, it was inevitable that it would be abandoned or changed. Indeed, the conversion of Justice Blackmun, who concurred in National League of Cities to join the dissenters of the National League of Cities, suggests the moment at which the judicial struggle with the test of the National League of Cities ended. What was not totallly predictable, however, was how far the court would go in its reversing of the National League of Cities. What happened was that the Supreme Court disengaged itself from the substantive judicial review of federalism. The Court, in Garcia, went too far in abandoning the test of the National League of Cities. The Supreme Court adopted in Garcia the political process theory of

judicial review of federalism. Justice Blackmun, in his opinion, said

> "we are convinced that the fundamental limitation that the constitutional scheme imposes on the commerce clause to protect the 'states as states' is merely one of process..." (50).

Justice Blackmun went on to declare that it is for Congress, not the Court, to measure the scope of the commerce power and the countervailing weight of the Tenth Amendment. The interests of states, the Court announced, are protected by the structure of the government as a whole.

Other than the fundamental defects in the "political process" theory of judicial review in general which we dealt with in Chapter Four, there are inherent defects in the argument contained in the decision of Garcia about the sufficiency of the political process to protect the rights of the states in the federal system. The fact that Congress is composed of individuals does not guarantee that it could be trusted to protect individual rights. Likewise, the fact that Congress is composed of representatives of states does not guarantee that it could be trusted to protect the rights of states (51).

The process of legislation is one of compromise, to accommodate several interests in order to guarantee the passage of the proposed legislation. The interests of states have very little effect on the legislative process in Congress. The states have lost several of the original means by which the original design of the constitution sought to ensure sufficient state representation. Among these lost state protections was the

composition of the Senate, which has been changed by the Seventeenth Amendment. There are several other lost state protection measures in the original constitution design (52).

Because of the deficiencies in the protection provided by political process of the states' rights, it is in the power of the judiciary to interpret and apply the constitution, and because of its independence it can be trusted to announce the limits to the power of Congress under the commerce power and to protect states' sovereignty. The test established by the Supreme Court in National League of Cities was an unfortunate one and tried to establish the limits of commerce power by using inappropriate areas of state power. But the decision in Garcia is wrong in its total judicial disengagement from the substantive judicial review of federalism's limits on Congressional power.

Commerce Clause Limits on State Regulation and the Doctrine of the Dormant Commerce Clause

Other than the strong influence of the judicial interpretation of congressional acts enacted under its commerce power strengthening the Federal system and increasing the power of the national government, the Commerce Clause has been interpreted by the judiciary to be a limit on state regulation of commerce even where there is no Congressional action under what came to be known as the "dormant commerce power" doctrine.

One of the earliest cases establishing the dormant commerce power doctrine is Gibbons v. Ogden (53). In this case Chief Justice Marshall said, about the argument of dormant commerce

clause, that it had "great force" (54). Within the basis of the dormant commerce is that one of the principle aims in calling for the Constitutional Convention was the abolition of the restrictive trade practices among the states.

The importance of the dormant commerce power doctrine is that it affects the whole structure of the federal system, the relations between the federal government and the states, and among the states.

In the early stages of the development of the doctrine of the dormant commerce clause there was an opposing doctrine supported by Chief Justice Taney, Marshall's successor. The opposing doctrine was that the commerce clause left states free to regulate as they wished as long as their actions did not conflict with validly enacted federal legislation (55). Later, Taney retreated and joined the majority in supporting the doctrine of the dormant commerce clause.

An important development of the doctrine of dormant commerce clause was the decision in Cooley v. Board of Wardens of the Port of Philadelphia (56). In his opinion, Justice Curtis attempted to reconcile all preceding opinions. In Cooley, the Supreme Court upheld the power of Pennsylvania to require ships in interstate and foreign commerce to engage local pilots when entering or leaving the port of Philadelphia. The doctrine developed in Cooley was that states are free to regulate those aspects of interstate and foreign commerce so local in character as to demand diverse treatment, while Congress can regulate those

apects that are so national that they demand a single, uniform rule (57). The remaining impression on later commerce clause jurisprudence left by Cooley is the recognition of the need, in some cases, to permit local legislation while understanding the need for uniformity in those instances that are necessary for the unimpeded flow of interstate commerce. Following Cooley, the test of whether to allow state regulation which is burdening interstate commerce was to classify the burdens either as "direct" or "indirect", allowing those that have an indirect effect and invalidating state regulations which have a "direct" effect on interstate commerce (58).

The Contemporary Development of Dormant Commerce Clause Doctrine

The contemporary doctrine used by the Supreme Court is that the constitution established a national interstate and foreign commerce free from excessive state interference. The Court sought to clarify the process by which it determines whether state regulation is unconstitutionally burdening interstate commerce. The test used by the Supreme Court is known as the "balancing test", and is associated with the decision in Pike v. Bruce Church, Inc (59). According to the balancing test, state regulation of interstate commerce will be upheld if the regulation is rationally related to legitimate state interest and that the burden it imposes on interstate commerce is outweighed by the state interest in enforcing that regulation.

According to the advocates of the political process theory of judicial review, state laws burdening interstate commerce or

disadvantaging non-residents should be invalidated only to reinforce accountability. And this happens when the courts make void state laws which predominantly burden non-residents who are unable to vote in the state elections. There is an inference in the commerce clause that state and local law makers are especially susceptible to pressures which may lead them to disadvantage those who are not constituents of their political subdivisions. There is a limited value in the dependence on political process as a justification for the doctrine of the dormant commerce clause. The political process theory makes the majoritarian democracy by noting the predominant constitutional value in every situation. Whilst the majority of the cases are raised by private parties to defend their interests, the main issue under the commerce clause is the allocation of power in the federal system between states and the national government (60).

Another alternative to the balancing test used by the Supreme Court in determining the limits to state regulation of interstate commerce is the "protectionist intent" test of Professor Donald Regan (61). Regan argues that for the movement of goods cases, the correct rule which the court uses, even without expressly saying so, is the test to find purposeful protectionism. If the protectionist intent is found to be of substantial effect for enacting the law, then the state regulation of interstate commerce is unconstitutional. The motivation test is borrowed from the Fourteenth Amendment. The motivation test, if applied, would result in the invalidation of

more state regulation than the current test used by the court. The protectionist motive test would apply to partial discrimination in import-export and movement of goods cases, which are rarely struck down under the balancing test. Contrary to the allegation by Regan, the Court sustained state regulation of interstate commerce in Minnesota v. Clover Leaf Creamery Co. (62), and Exxon Corp. v. Governor of Maryland (63), despite lower courts finding the existence of protectionist motivations. The Court does not and need not rely on the motivation for state regulation of interstate commerce, because what matters is whether there is a protectionist effect and whether interstate commerce is excessively burdened, not whether that protectionism was deliberate or not (64). There are limitations to the balancing test, one of which is the existence of sufficient representation in the regulating state of the interests affected by the regulation. In Minnesota v. Clover Leaf Creamery Co. (65) the Supreme Court upheld a Minnesota statute banning the sale of milk products in plastic, non-returnable containers. The statute was obviously for the benefit of the pulp-wood industry, whose products would fill the void left by the ban on plastic containers, the pulp-wood industry being an important state industry. The Supreme Court's decision rested on several findings, one of which was that the burden imposed on the interstate movement of goods was relatively minor. The Supreme Court also found that the ban on plastic containers served a substantial state interest, which is the conservation of resources and the reduction of solid waste. The Supreme Court

also found, in this case, that the interests of out-of-state manufacturers of plastic containers was adequately represented by the few Minnesota firms that were adversely affected by the ban. Those overlapping interests and the existence of sufficient representation of the interests affected in the state provided, in the view of the Court, a powerful safeguard against legislative abuse (66).

The achievements of judicial review regarding the commerce Power

From very early in the life of the federal system, the interpretation by the courts of the commerce clause and the commercial power of the national government took a clear direction towards supporting the integration of the national economy, and against allowing strict and narrow interpretations. Doctrines, such as the dormant commerce power developed by the judiciary have helped to curb state powers even where there was no clear federal legislation in the specific matter. These powers have helped to strengthen the Union and to support an economic system capable of coping with development and overcoming impediments to its progress. A clear example of the stricter interpretations of the commerce power can be seen in understanding the implications of cases decided since 1887, and in particular during the period of economic depression prior to 1937 (67). The clear role of judicial review in the support of a stronger Union and more integrated economy is evident from cases

decided after 1937 (68).

National League of Cities was an exceptional case in which the court turned back to pre-New Deal ideas. It was an unfortunate decision which was bound to be struck down. However, the way in which Garcia over-ruled National League of Cities and announced the disengagement of judicial review from determining the limits of power in the federal system was a decision with mixed fortunes. Whilst it was a welcome decision in over-ruling National League of Cities and its three part test, which proved unworkable in later cases, it went to extremes by announcing the adoption of the process-based idea of limitation to Congressional power. Surely the judiciary has, since early in the life of the federal system, played its part in supporting the federal system, and helping a positive, productive and beneficial integration of the economy. To announce that determination of the limits of the power of Congress was to be left to the political branches, was neither a beneficial statement, nor was it supported by the history or design of the constitution. The role of the judiciary in its use of its power of judicial review was a helpful and significant factor in shaping the existing federal system, and helping that system throughout its various stages of development.

The Court has both shaped and followed the development of the national market, its judgements sometimes creating economic opportunities, sometimes confirming independent economic achievements. In the American experience of federalism, the reservation of economic independence to the States has not been considered to be a value of sufficient importance to obstruct the

integration of the national market. It has not been regarded as an essential ingredient of the identity of states as discrete political units.

Chapter Six Footnotes

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3 Epstein, B. The Proper Scope of the Commerce Power 73 Va.L.Rev., (1987) p1387

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5 Linde, H. "Transportation and State Laws under the United States Constitution: The Evaluation of Judicial Doctrine" in: Sandelow, T. and Stein, E. (eds.), op. cit., p140.

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7 22 U.S. (9 Wheat) 1 (1894).

8 Ibid. at 194.

9 Tribe, L.H. American Constitutional Law (2nd ed.) Mineola, New York: The Foundation Press, 1988, p306.

10 Tribe, op. cit., p308 and Sandalow, op. cit., p65.

11 156 U.S. 1 (1895).

12 196 U.S. 357 (1905).

13 Houston E. and W. Texas Ry. Co. v. U.S., 234, U.S. 342 (1914).

14 Champion v. Ames 188, U.S. 321 (1903).

15 See Hipplite Egg Co. v. United States 220 U.S. 45 (1911), in which the Court upheld the power of the federal government to seize adulterated food that was no longer in interstate commerce.
See also Hoke v. United States 227 U.S. 308 (1913) in which the Supreme Court upheld the power of Congress to prohibit the transportation of women for immoral purposes.
The Supreme Court also upheld the federal statute which imposed retail labelling requirements on goods that had moved in interstate commerce, in McDermott v. Wisconsin 228 U.S. 115 (1913).

16 247 U.S. 251 (1918).

17 295 U.S. 330 (1935).

18 295 U.S. 495 (1935).

19 298 U.S. 238 (1936).

20 See Sandalow, op. cit., p64; Tribe, op. cit., p308; and Johnston, R. The Effect of Judicial Review on Federal-State Relations in Australia, Canada and the United States Baton Rouge, Louisiana: Louisiana State Univ. Press, 1969, p225.

21 301 U.S. 1 (1937).

22 Ibid. at 41.

23 Ibid. at 37.

24 317 U.S. 111 (1942).

25 Ibid. at 128.

26 Tribe, op. cit., p312.

27 247 U.S. 251 (1918). In this case the court held that Congress could not prohibit the use of child labour by preventing inclusion of products by institutions using child labour in their activites.

28 312 U.S. 100 (1941).

29 379 U.S. 241 (1964).

30 U.S. Constitution, Article 1, Section 8, Clause 18.

31 Tribe, op. cit., p313.

32 346 U.S. 441 (1953).

33 See Sandalow, op. cit., p77.

34 U.S. Constitution, Amendment X.

35 Redish, M. and Drizin, K. Constitutional Federalism and Judicial Review: The Role of Textual Analysis 62 N.Y.U.L.Rev., 1987, p10.

36 See e.g. U.S. v. Darby, 312 U.S. 100 (1941).

37 392 U.S. 183 (1968).

38 29 U.S.C. sections 201-219 (1982).

39 426 U.S. 833 (1976).

40 469 U.S. 528 (1985).

41 Carter v. Carter Coal Co. 298 U.S. 238 (1936). See Van Alestein, W. The Second Death of Federalism 83 Mi.L.Rev., 1985, p1713.

42 The three part test was clearly stated in Hodel v. Virginia Surface Mining and Reclamation Assn., Inc., 452 U.S. at 288 (1981).

43 See Tribe, op. cit., pp396-397.

44 See e.g. United Transportations Union v. Long Island R.R. Co., 455 U.S. 678 (1982).

45 See E.E.O.C. v. Wyoming 460 U.S. 226 (1983);
F.E.R.C. v. Missippi 456 U.S. 742 (1981);
United Transport Union v. Long Island R.R., 455 U.S. 678 (1982);
Hodel v. Virginia Surface Mining and Reclamation Assn., 451 U.S. 264 (1981); and
Hodel v. Indiana, 452 U.S. 314 (1981).

46 456 U.S. 742 (1982).

47 Ibid. at 761.

48 See e.g. E.E.O.C. v. Wyoming, 460 U.S. 226 (1983), where the Court applied the three part test to the Age Discrimination Act extension to states, and found it to be constitutional.

49 469 U.S. 528 (1985).

50 Loc. cit.

51 Tribe, op. cit., p388.

52 Among them: the poll tax and the malapportioned election districts. See Tribe, op. cit., p315.

53 22 U.S. (9 Wheat) 1 (1824).

54 Ibid. at 209.

55 See The License Cases, 46 U.S. (5 How) 504 (1847).

56 53 U.S. (12 How) 299 (1851).

57 See Tribe, op. cit., p407.

58 Ibid., p408.

59 397 U.S. 137 (1970).

60 See more detailed argument against the (process-based) theory and dormant commerce clause in Collins, R. Economic Union as a Constitutional Value 63 N.Y.U.Rev., 1988, pp111-116.

61 Regan, D. The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause 84 Mich. L. Rev. p1091 (1986).

62 449 U.S. 456 (1981).

63 437 U.S. 117 (1978).

64 See Collins, op. cit., p118.

65 449 U.S. 456 (1981).

66 Ibid., p473.

67 Examples of which are:
Railroad Retirement Board v. Alton R.R. Co, 295 U.S. 330 (1935);
A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); and
Carter v. Carter Coal Co., 298 U.S. 238 (1936).

68 Examples of which are:
N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937);
United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942);
and United States v. Rock Royal Co-operative Inc., 307 U.S. 533 (1939).

PART THREE

CHAPTER SEVEN

THE U.A.E. PROVISIONAL CONSTITUTION, THE FEDERAL SYSTEM AND THE SEPARATION OF POWERS

The governments of the Emirates agreed to establish the new Federal Government as a union of their respective Emirates. In July 1971 they declared their intention and announced their Constitution. The new Constitution, which was to come into force on 2nd of December 1971, was originally drafted for nine Emirates, but eventually amended to suit the new federation. The number of the original Emirates was six, namely: Abu-Dhabi, Dubai, Sharjah, Ajman, Um-Al-Qaywayn and Fujairah. On 10th February 1972, seventh Emirate (Ras-al-Khaimah) joined the Federation.

The new Constitution was entitled "Provisional Constitution" and by its provisions it was intended to last for five years, during this period a new permanent Constitution was to be drafted.

The provisional Constitution ("the Constitution") represented the result of a compromise between the opposing forces of localism and the need and desire for unity. The powers which were surrendered from the Emirates to the Federal Government were considered to be the minimum possible. Even these were agreed only under the pressure of time and the proximity of the date of the British withdrawal. There were clear signs that, for the Federation to survive and prosper, further powers would have to be surrendered to the Central Government, but this was

deferred to the drafting of the permanent Constitution (1).

The Constitution defined the new Central Government it created as "...an independent, sovereign, Federal State ..." (2). Among the Federal characteristics of the Constitution is the distribution of the legislative powers which is contained in Part 7 of the Constitution. Article 120 listed the areas in which the Central Government has exclusive legislative, as well as executive, powers. Among the most important areas of power reserved for the Central Government are foreign affairs, defence and nationality. Article 121 contains the areas in which the Central Government has legislative power while the Emirates have executive power. Article 122 declared that the residuary powers are left to the Emirates.

From the area of powers given to the Federal Government we can see clearly that it was envisaged as an entity representing the Emirates at the international level; providing most of the major services such as health and education; unifying the Emirates at the local level; and showing the basic, driving forces which led to the formation of the Federal Government. The areas which are left for the Emirates show the existence of the localising forces, among which are the local economic interests, leaving the important areas of mineral resources and customs regulation for the individual Emirates. The fact that in the supreme body of the Federal Government, the rulers themselves, represent their Emirates, shows the strong and prevailing power of the heads of the Emirates, even at the Central level.

The Central Government comprises five authorities listed in

Article 45, namely: The Supreme Council of the Union, The President of the Union and his deputy, The Council of Ministers of the Union, The National Assembly of the Union, and the Judiciary of the Union.

The Supreme Council is the highest authority in the country because of its composition and powers. The members of the Supreme Council are the rulers of the Emirates. It is vested with executive as well as legislative powers. Each Emirate has one vote, the special majority required for passing substantive matters has to include Abu-Dhabi and Dubai (i.e. these two Emirates have veto powers in these matters) while in procedural matters, simple majority is enough to pass a decision (3).

The Supreme Council ratifies laws and decrees of the Union. Article 110 enables the Supreme Council to ratify a law which has been rejected or amended by the National Assembly. The Supreme Council appoints the Prime Minister and sets the main policies for the country (4).

The main powers vested in the Supreme Council are not utilised to the fullest extent because of the relatively few occasions on which the Council meets (5). This is for several reasons, among which is the lack of provision in the Constitution itself for the frequency of the Council's meetings (6).

The President of the Union has wide ranging powers, both legislative and executive. The President and his deputy are elected from among the seven rulers of the Emirates. Theoretically any one of the seven rulers could be elected as the

President or the Vice-President, but in practice these two positions are certain to go to Abu-Dhabi and Dubai because of their importance and of their having veto power in the Supreme Council of the Union. The terms of office for the President and Vice-President are five years with no restriction on their re-election. The President of the Union is the President of the Supreme Council and represents the unity of the Emirates on local as well as international levels.

The powers and position of the President are defined in Articles 51 to 54 of the Constitution. Among the important powers of the President is his role as the Supreme Commander of the Armed Forces and Head of the Supreme Council for Defence (7). The President nominates the Prime Minister and appoints ministers, ambassadors and other senior officials of the Federal Government with the exception of the President and members of the Supreme Court (8). The President signs Union laws, decrees and decisions which the Supreme Council has sanctioned and has the duty of supervising their implementation by the different ministries and divisions of the Federal Government (9). The President signs and promulgates treaties after their passage by the Supreme Council (10).

The Council of Ministers is a part of the executive authority of the Union under the supervision of the Supreme Council and the President (11). The main policies of the Federal Government are set by the Supreme Council and entrusted to the Council of Ministers to be implemented under the supervision of the President, who has the authority to question the cabinet as a

whole or individual ministers about their duties and jurisdictions (12).

The Prime Minister has been from Dubai ever since the establishment of the Federal Government. For several years, the Deputy ruler of Dubai was the Prime Minister, then the ruler of Dubai, who is the Vice-President of the Union, took the position of Prime Minister (13). The Prime Minister has two deputies, one from Dubai, the second from Abu-Dhabi. The seats in the Cabinet are distributed among the Emirates. Abu-Dhabi and Dubai have reserved key ministries for themselves ever since the first Cabinet, whilst the other seats are given to the other Emirates in relation to their size and importance (14).

The National Assembly represents the legislative authority in the Constitution, but the analysis of its power reveals that this is limited to a large degree. The National Assembly, by its powers in the Constitution, is mainly a consultative body in legislative matters (15).

The National Assembly is currently composed of 40 members apportioned to the Emirates according to their size and importance (16).

The Constitution gives the Emirates the right to determine the systems by which their representatives are selected for the National Council (17). Currently all the Emirates appoint their representatives in the Council by decisions from the rulers. This does not mean that the representatives always voice the opinions of their respective rulers (18). The Constitution states that the

members in the Council represent the whole of the population of the Union [19]. The stage of development, especially on the educational level and the tribal base of the society, made it, to some degree, difficult to adopt popular election especially in the first few years of the Federation [20]. The development of the society during the time since independence, makes the causes for delaying the popular election of representatives no longer valid, but it is yet to be seen how committed the Emirates and their rulers are to the democratic representation of their people [21].

The National Council plays a genuine, though limited, role in checking and balancing the other bodies of Government. The fact that there are representatives from the Emirates, symbolising the concerns of the public, cannot be played down, and, compared to the immediate neighbours of the U.A.E., is a step in the right direction [22].

The National Assembly's role in the legislative process is that it discusses the proposed bills and accepts them as they stand, rejects them totally, or amends them [23]. The bills originate in the Council of Ministers, and after passing through the National Assembly's discussions are referred to the Supreme Council which has the right either to accept the opinions of the National Assembly and promulgates them with the amendments added or, in the case that the Supreme Council disagrees with the opinions of the National Assembly, return the bills to the Assembly to review them for a second time. The bill then returns to the Supreme Council which has the power this time to disregard

amendments made by the National Assembly (24). The powers of the National Assembly, then, are more of a consultative nature than real legislative power, but it has a persuasive discussion and can delay proposed laws for some considerable time, so that the Supreme Council is tempted not to disagree with the Assembly's opinion if it feels the need for a certain law to be promulgated (25). Increased awareness by the people and the supposed representation by the Assembly of public opinion place a moral obligation on the Supreme Council, either to accept the Assembly's opinions or to disregard them with proper explanation (26).

The National Assembly has the power to question the policies of the Government in the different fields by addressing questions to the Prime Minister or the Ministers concerned (27). The Prime Minister and the Ministers have a Constitutional obligation to answer the questions addressed to them from the National Assembly. The Assembly's power is limited to discussion of the Government's policies and to the issuing of recommendations regarding these policies (28). This power strengthens the National Assembly's powers, and though not binding, enables the Assembly to exert moral pressure by checking the other branches of government. The National Assembly's checking power is directed mostly at the Council of Ministers, but it also applies to the Supreme Council because it is the Supreme legislative as well as executive branch of the Government and is responsible for sorting and supervising the Government's policies in the different fields.

It is evident that there is no division of legislative and executive powers, and that the separate headings for these powers in the Constitution do not have sufficient content either theoretically or practically. The Supreme Council is the supreme executive as well as legislative body of the Government. Bills originate in the Council of Ministers and the legislative jurisdiction of the National Assembly is merely of a consultative nature. The fact that the members of the Supreme Council are the rulers of their respective Emirates, where they have the final say in nearly all the legislative and executive powers, leads to underlining the fact that the major legislative and executive powers are concentrated with the seven rulers on the local and central levels of Government.

Continuing our analysis of the concentration of powers in the Federal Government, we can understand that the main executive and legislative powers in the Federal Government are further concentrated into the hands of the two major Emirates, namely Abu-Dhabi and Dubai. These two Emirates control the resources on which the Federation survives, and they have the power of veto over substantive matters in the Supreme Council. Major decisions in the Federal Government are left to the discretion of the two main Emirates to a large extent. The attitudes of the two main Emirates concerning Federal matters depends on the relationship between these two Emirates and whether or not the interests of their Emirates are involved. This was evident in the discussion, decisions and application of several major decisions concerning the development of the Federal Government. One of the areas in

which there was a disagreement which has hampered the development of the Federal Government, is the contributions of the Emirates in financing the Federal Budget (29). Another area which represents the importance and effect of the relationship between the two main Emirates for the Federal Government is the Unification of the Armed Forces (30). The framing and promulgation of the permanent Constitution is another area which demonstrated the real effect the two main Emirates can play in the development of the Federal Government (31).

Knowing all of these facts and understanding the influences under which the Federal Government operates and develops, leads us to feel the need for an independent and effective Judiciary to check and supervise the application of the Constitution and the proper development of the country according to the desires and aspirations of the writers of the Constitution and of the people. The Judiciary of the Union is dealt with in Chapter 5 of the Constitution. The mere dedication of a separate chapter of the Constitution for the Judiciary reveals the existence of the feeling of the importance of the Judiciary and the necessity of its independence from the early stages of the Union.

The Constitution provides for the establishment of a Union Supreme Court and Union Courts of first instance. Articles from 96 to 101 inclusive, deal with the jurisdiction and the composition of the Supreme Court, which is given great importance mainly because of its Constitutional Jurisdiction and its being the umpire of the Federal System.

The Constitution gives the Emirates the option of transferring the jurisdiction of their local courts to the Federal Government. Four Emirates, thus far, have chosen to transfer the jurisdiction of their courts to the Federal authorities, namely: Abu-Dhabi, Sharjah, Ajman and Fujairah, whereas the other three Emirates retain their own local courts. The provision of allowing the Emirates to join their courts and transfer their jurisdiction to the Federal Judiciary was mainly because of the temporary nature of the Constitution when it was drafted and ratified. It would be better now, after past experience, to unify the court system in order to avoid the confusion which is created by the current situation and because of the success of the experience of those Emirates which have transferred their judicial jurisdiction to the Federal Judiciary, especially after the passage of two major pieces of legislation on Civil Transactions and the Criminal Law (32). Saying that the inclusion of the judiciaries of some Emirates in the Federal Judiciary is a successful experience does not mean that it did not experience any problems. Indeed the sudden transfer of the judiciaries of some Emirates created some conflicts between the rulers and the Federally-controlled Judiciary. However, the experience has generally been a successful one. More co-operation is needed, especially between the Federal and Local Authorities, in order to convince the remaining Emirates to follow the same route. What is happening is that there is official and un-official co-operation to solve the problems that arise in the operation of the judiciaries of

those Emirates that have transferred their courts to the Federation. One area of co-operation is consultation between the Ministry of Justice and the rulers on the appointment to key positions in the judicial departments in those Emirates which have Federal lower courts. Overall the experience of the Lower Federal Courts is like that of most other services which were transferred to Federal control after a long time of local control, but the passage of time and the clearer regulations and more defined and understood Constitutional limitations are among the solutions for these problems (33).

The Judiciary in the U.A.E. is composed of Civil and Sharia Courts. The jurisdiction of the Sharia Courts varies from one Emirate to another. Generally the Sharia Courts have jurisdiction in family law (Laws of Personal Status) such as proof of marriage, divorce and inheritance for Muslims, and in a majority of the Emirates, jurisdiction in matters concerning some criminal offences such as theft, adultery and alcohol intake. Civil Courts have jurisdiction in major areas like criminal law generally, civil and commercial transactions, banking, insurance and traffic matters. In those Emirates which have Federal Lower Courts, Sharia Courts have two stages, and the Cassation is for the Supreme Court. The area of dividing jurisdiction between Civil and Sharia Courts is a confusing one and needs better regulation.

Judges of Sharia courts are required to, or preferred to have a degree in Law and Sharia (34).

The Federal Courts are of three stages, Courts of first instance, Appeal Courts, and Cassation which was given to the Supreme Court by a special law in 1978. The Federal Courts have general jurisdiction, because there are no specialised courts, so the Federal judiciary has jurisdiction in administrative and commercial matters, in addition to the other areas in which it has jurisdiction, such as labour, traffic, criminal and civil matters.

The legal system in the U.A.E. is substantially affected by the Egyptian legal system, which is, in turn, based on the French legal system. The legal system in the U.A.E., then, is modelled on the Civil Law System with its characteristics opposed to those of the Common Law System. The principle of Res Judicata does not apply in the U.A.E., other than in exceptional cases where a judicial opinion is binding, when it is applied by special legal stipulations (35). In studying the legal system in the U.A.E. then, more attention should be given to the text of the Constitution and the Codes. The Common Law System did have some effect in some Emirates, for example Dubai and Sharjah, but its effect is declining and the trend is for the Civil Law System. This is the case in the whole area around the U.A.E. as well. The majority of those who participated in drafting the Constitution and the Codes in the U.A.E. were Egyptians (36). The majority of the judiciary is of Egyptian nationality.

The Emirates still have legislation on a variety of different matters. Whilst some legislation has now been over-ruled by new Federal legislation, in areas which have been

transferred to the Central Government, others are still applicable (37). The Emirates do not have written Constitutions. The Constitution was passed to serve as a basis for the formation of the Union and to have a duration of five years, according to Article 144. The whole idea was to agree on a Union which although not up to the aspirations of complete unity (which was and still is the dream of many people in the area) was nevertheless enough to present the newly emerging country as one state to the outside world, and to provide services which were greatly needed by the population. The argument at the time of the formation of the Union, was that the passage of time would help in welding the people of the Emirates and their Governments, to strengthen their unity (38).

The Provisional Constitution was meant to be an instrument for unity and for a closer relationship, but what was not obvious at that time was that this instrument itself would have a life of its own, would standardise relationships and create a balance of rights and duties which would itself need some force of need or urgency to change. It was easy to argue, at the time of the formation of the Union, that in future the atmosphere for a stronger Union would occur in the five-year duration of the Constitution. Experience has proved otherwise. Indeed it is not peculiar for the Federal System of the U.A.E. to prove hard to change, and not unique for the Constitution of the U.A.E. to acquire a life of its own. That is also the experience of Federal Systems elsewhere, as well as for Federal Constitutions to change

from being instruments of accommodation for varying interests, into a barrier for stronger unity (39).

According to Article 144 of the Constitution, six months before the expiry of the five-year term of this Constitution, the Supreme Council should present a draft permanent Constitution to be discussed by the National Assembly. What happened was that the Supreme Council formed a committee of twenty-eight members with a Constitutional expert to draft the permanent Constitution. After several meetings, the draft permanent Constitution was presented to the Supreme Council. The general feature of this draft was that it moved clearly towards more participation by the people in the legislative process, clear solutions for the participation from the Emirates in the Federal Budget, unification of the Armed Forces and most importantly, the strengthening of the Federal institutions and Federal President. The Supreme Council failed to agree on this draft, for several reasons, among these being the persisting competition between the two larger Emirates and the view taken by Dubai that this draft favoured Abu-Dhabi, and the resistance of several Emirates to surrendering more powers to the Federal Government and to the people generally (40).

Instead of presenting the draft Permanent Constitution to the National Assembly, the Supreme Council presented an amendment of Article 144 of the Constitution to extend the duration of the Constitution for a further five years. This draft amendment faced strong objections from members of the National Assembly and caused confrontations and discomfort from several members, but after all of this, and due to the understanding of the

distribution of power in the country and to the division of the members of the National Council, especially those from Abu-Dhabi and Dubai, on Emirate lines, the Amendment was passed on 12th October, 1976. The whole process of extending the duration of the Constitution was the first real constitutional crisis in the U.A.E., and its results showed the difficulty of changing the Constitution and the difficulty of removing the suspicions of the Emirates towards each other. There were many lessons to be learned from the experience of attempting to draft the new Constitution and the debacle around its fall. There was a build up towards the end of the first term of the Constitution, which involved certain steps taken by those Emirates which have more enthusiasm for a strong Union. For example Sharjah surrendered its army, broadcasting authority and judicial authority to the Union and abolished its flag. Other steps were taken by Abu-Dhabi, which involved joining its judiciary with the Union. Fujairah also took some steps towards stronger Union. Dubai, and to a lesser extent, Ras-Al-Khaimah, proved to be be harder to convince in joining these efforts (41).

The second term of the Constitution began with a feeling of suspicion among the Emirates and a sense of uneasiness among those who were committed to stronger Union and among the population generally (42).

The build-up towards the end of the second term of the Constitution witnessed strong moves designed to strengthen the Union by means of persuasion and pressure from different

quarters. A joint meeting was held by the Council of Ministers and the National Council, which resulted in the issuing of a lengthy memorandum calling for, inter alia, a Permanent Constitution, democracy and a stronger union (43). There was an opposing memorandum presented by Dubai, and a second crisis which warranted the intervention of the Foreign Minister of Kuwait to bring the opposing factions closer and preserve the Federation (44). The Council of Ministers was changed, and those who were leading the tide for stronger Union were removed. More importantly, the ruler of Dubai became the new Prime Minister, and it was apparent that what prevailed after this crisis were the demands of Dubai. All of this led to the extension of the Constitution for a further period of five years, from December 1981 to December 1986. It was renewed again in 1986 until December 1991. It is now apparent from the experience that the renewal of the Constitution has become a usual occurrence, with hardly any official opposition, and it is expected to stay like this for a considerable period in the future (45).

So the Constitution which was labelled "Provisional" and was given five years to survive, has proved to be difficult, if not impossible, to replace, and has become effectively a permanent Constitution and should be treated as a permanent one. The fact that this Constitution was designed and agreed to be a provisional one, an experimental Constitution in a sense, means that by their design its provisions require major changes in order to serve as a basis for steady and organised growth and development for the future of the country (46). Partial changes

and amendments have to be made and some of these have already been made, especially to unify the Armed Forces. Other changes have to be made by the custom of implementing the Constitutional terms and carrying on the organisation of the Federal System and the Governmental organisation in practice.

All of this combined, will not be enough for the adaptation of the Constitution to the development of the country. Some changes may create their own problems and may generate challenges (47). All of this leads to the understanding and appreciation of the role which can be played by that institution which is given the responsibility to interpret the Constitution and determine the validity of Local and Federal Laws under its terms. This institution is the Supreme Court of the Union (48).

Constitutional amendments originate in the Supreme Council and are presented to the National Council to be debated, with a higher than usual majority being required to pass its decisions. Then the matter goes back to the Supreme Council to be passed. The opinions of the National Council are not binding on the Supreme Council, so even if the National Council insisted on its opinions a second time, the Supreme Council can still disregard them (49). Therefore, the burden of responsibility for amending the Constitution lies mainly with the Supreme Council, and with both Abu-Dhabi and Dubai having a veto power over this decision, it has proved to be very difficult to pass the amendments (50).

It is apparent that the Federal System is suitable for the Emirates as the Union of these Emirates has survived several

internal crises and disputes. Moreover, the Union has proved to be a step forward in the solution of old problems and for furtherance of future ambitions. There were several problems for which the Federation offered successful solutions. Among these problems were the border disputes, most of which have been solved now with the remainder being in the process of being solved (51). The Federation has been the medium for solution of other problems, including coups in the Emirates, of which Sharjah has suffered two unsuccessful ones since 1971. The first unsuccessful coup in Sharjah happened in January 1972, six weeks after the birth of the Federation. In this attempt the previous ruler, a member of the ruling family, with an armed group forced his way into the palace of the ruler demanding to be recognized as the sole legitimate ruler. In a joint action the armed forces of the federal government and of Abu-Dhabi managed to bring the situation under control. The coup failed and the attackers were held prisoners. Although as a result of the confrontation the ruler of Sharjah, Sheik Khalid Al-Qassimi, was killed, the effect of the federal government's role in suppressing the attack and preventing change of ruler by force gave the Federation strength and prominence in all the Country (52).

The second attempt to seize power in Sharjah by force happened in June 1987, when the Commander of the Emiri Guard and brother of the ruler, Shaikh Abdul Aziz, used his position in the Guard to seize control of the emiri palace and government head quarters and demanded to be recognized as the legitimate ruler. Again the federal government played an important role in

resolving the dispute and preventing forcible change of ruler. The federal government, its Supreme Council in particular, used peaceful negotiations to put the attempted coup to an end (53). Through the period of trouble the Supreme Council remained in session and did not end its meetings until the problem was over. The Supreme Council refused to bow to the pressure and insisted on its position not to recognize use of force as a legitimate way of transferring power. Those who were occupying the palace and government offices were forced to negotiate and accept the return of the ruler Sheikh Sultan Al-Qassimi to the emirate.

The Federal System has proved through time that it is destined to stay but, contrary to the aspirations of many, it has proved to be too difficult to change it into a complete Unitary System.

Among the characteristics of the Federal System which are clearly observable in the U.A.E. Constitution are the following:

1. The Constitution is clearly a written one, stating the division of powers between the Emirates and the Central Government.

2. The Constitution is a rigid one, meaning that it requires special procedures to amend it, which are more difficult than those needed to pass ordinary laws.

3. The Constitution includes division of powers between the Emirates and the Central Governments, especially the legislative powers.

4. Both the Emirates and the Central Government have direct powers over the citizens.

5. The Constitution cannot be amended by the Federal Authorities alone, instead the Emirates have a vital role to play in these procedures.

6. Foreign affairs are mainly the province of the Central

Government.

7. There is an authority which has a sufficient amount of independence which is entrusted with solving the Constitutional problems between the Emirates and the Central Government, which also has the power of the binding interpretation of the Constitution.

8. There are provisions in the Constitution ensuring the supremacy of the Constitution and the Federal Laws issued accordingly, over those of the Emirates (54).

9. The member Emirates do not have the right to secede from the Union.

Generally, a major weakness of the Federal System in the U.A.E. is that the Central Government does not have sufficient independent financial resources and it has to depend on the contribution from the Emirates, especially Abu-Dhabi and Dubai, for its needs (55). The Emirates control the two major sources of income which are mineral resources (especially oil) and customs.

The second major weakness in the Federal System of the U.A.E. is one of design. The Supreme Council which is the main body of the Central Government having control over all main subjects and policies is composed of the rulers of the Emirates. The Supreme Council by its design has major contradictions. It is supposed to be the guardian of the Federation, the heart of the Central Government. Yet at the same time the members of this Council are the rulers of the Emirates protecting and promoting the interests of their respective Emirates. Experience has proved that the bias towards the individual Emirates is strong and the Supreme Council functions better or worse according to whether the relationship between Abu-Dhabi and Dubai is good or

bad, and to whether or not there are clashes of interest between these two Emirates. Moreover, there is no provision in the Constitution to regulate the frequency of meetings of the Supreme Council, so months and even years pass without any meeting of the Supreme Council taking place, which means delay in discussing important issues. Consequently, great harm can befall the development of the Federation.

Federalism is not a static formal design of Government but, rather, a continuing process (56). The development of the Federal System depends on the application of the Federal Constitution, on the co-operation between the Central Government on one hand, and the member States on the other, and on the relationships between the member States. As far as the realisation of the need for the Federation, that is quite clear in the U.A.E. on both formal and popular levels. It is left to the member Emirates to co-operate with the Federal Government, to provide all the help they can and to respect the decisions of the Federal institutions when they are issued according to the Constitution and laws which are all products of agreements among the Emirates.

It is obvious that a lot more good faith and co-operation are required from the Emirates in the future to strengthen the Federal experience, especially when co-operation is spoken of and done not on the local level but on the regional level now after establishment of the Gulf Co-operation Council (57).

The Constitution of the U.A.E. is the first written Constitution for the Emirates. The individual Emirates were, and

still are, governed by traditional regimes based on tribal alliances. Adherence to the letter of the Constitution requires time and patience for the individual Emirates and their respective Governments to get used to it. The rulers of the Emirates used to enjoy an absolute power in their Emirates, so for them to get used to the limits which the Federal System introduced is a difficult and a gradual process. The institutions responsible for enforcing and supervising functions of the Federal System are faced with all of the problems produced by the environment in which the Federal System and its institutions are to work.

Umpiring the Federal System, interpreting the Federal Constitution, and resolving the disputes which arise from its application, are tasks belonging to the Federal Supreme Court. Understanding the nature of the Federal System in the U.A.E. and the environment in which it is working, makes us appreciate the difficult and important task entrusted to this court.

Chapter Seven Footnotes

1 See Heard-Bey, F. From Trucial States to United Arab Emirates: A Society in Transition London: Longmans, 1982, p372; and Al-Tabtabai, A. The Federal System in the United Arab Emirates (in Arabic) Cairo: Cairo New Press, 1976, p91.

2 U.A.E. Prov. Const. Article 1.

3 U.A.E. Prov. Const. Article 49.

4 U.A.E. Prov. Const. Article 47.

5 See Al-Tabtabai, op. cit., p432.

6 Although, according to the decision of the council which contains the internal by-laws of the council, the council is supposed to meet at least six times a year. Supreme Council decision 4/1972.

7 U.A.E. Prov. Const. Article 141.

8 U.A.E. Prov. Const. Article 54 (5) and (6).

9 U.A.E. Prov. Const. Article 54 (4) and (8) and Article 64.

10 According to the procedures described by U.A.E. Prov. Const. Article 47 (4).

11 U.A.E. Prov. Const. Article 60.

12 U.A.E. Prov. Const. Article 54 (8).

13 This was one of the results of the constitutional crisis of 1979. See Taryam, A. The Establishment of the United Arab Emirates 1950-1985 London: Croom Helm, 1987, p246.

14 See Al-Tabtabai, op. cit., p228.

15 It is noticeable that the provisional constitution offers no definition of the nature of either the Council of Ministers or the National Council. In contrast, the Supreme Council is defined by Article 46 of the Constitution as: "...The Supreme Authority in the Union...". The regulation of the National Assembly in a separate chapter of the Constitution, and the nature of these regulations, give the impression that this council is the legislative authority. Close analysis of the powers of the council reveal that it is not a true legislative council. See Tabtabai, A. The Legislative Authorities in the Arab Gulf States (in Arabic) Kuwait: Journal of Gulf and Arab Peninsula Studies Publications, 1985, p261.

16 U.A.E. Prov. Const. Article 68 distributes the seats of the National Assembly as follows: Abu-Dhabi 8, Dubai 8, Sharjah 6, Ras-Alkhaimah 6, Ajman 4, Um-Alquaywayn 4 and Fujairah 4. The total number of seats is 40.

17 U.A.E. Prov. Const. Article 69.

18 For details about the records and policies taken by the members of the Council from its establishment until 1986 see Ibrahim, A. The Experience of the Federal National Council in the United Arab Emirates (in Arabic) Beirut: Al-Safir, 1986, p1.

19 U.A.E. Prov. Const. Article 77.

20 See Al-Tabtabai, The Federal System, op. cit., p277; and Al-Tabtabai, The Legislative Authorities in the Arab Gulf States, op. cit., p182.

21 The preamble of the constitution called for "Establishment of a representative ... rule". The projected permanent constitution calls for the composition of the National Assembly by popular election in the future. During the period until the Council members are popularly elected, the rulers of each emirate choose a number of people five times the number of representatives of his respective emirate on the Council (i.e. a number proportionate to the emirate's membership to the council). The people chosen by the rulers elect from among themselves the representatives of each emirate to the council. The principal reason for not adopting the popular election of the members of the council in the first place was the state of political development of the people. This has certainly undergone major and fundamental changes in the past years, and therefore warrants the reconsideration for the full and democratic popular election of the members of the council.

22 Two neighbouring states, namely Kuwait and Bahrain, had experiences of representative democracies, but Bahrain ended the popular elections for its legislative house in 1975 only two years after the first elections. Kuwait ended the popular elections for its legislative house in 1986. Qatar has a consultative council, which the Amir has power to dissolve at any time he wants, provided he gives reasons for the dissolution. See Al-Tabtabai, Legislative Authorities in the Arab Gulf States, op. cit., pp169-241.

23 U.A.E. Pro. Const. Article 89.

24 U.A.E. Prov. Const. Article 110 (2) and (3).

25 Experience has shown that discussions in the National Council can take a considerable length of time. If the

amendments proposed by the council are not accepted, the proposed law will take much longer to come to fruition. See the proceedings for the passage of the criminal law in Ibrahim, op. cit., pp349-362.

26 Especially while the calls for democratization exist and the tune of the provisional and projected permanent constitutions describes the members of the council or representatives of the people with all its effects on the people. See Prov. Const. Article 77. Projected Permanent Const. Article 70.

27 U.A.E. Prov. Const. Article 93.

28 U.A.E. Prov. Const. Article 93. See Ibrahim, A. Fundamentals of the Constitutional and Political Organisation in the United Arab Emirates (in Arabic) Abu-Dahbi: Centre for Documents and Studies, 1975, p356.

29 Since the beginning of the Federation the emirate of Abu-Dhabi shouldered most of the financial burdens of the federal government. Dubai, which is the second richest emirate (due to its oil exports and customs duties), was not ready in the first few years to contribute to the federal budget. In 1976, which was the first year of the second term of the federal constitution, the problem of the federal budget surfaced. As a result of constitutional crisis in 1976 and 1979, all the emirates agreed to pay 50% of their revenues to the federal government. Abu-Dhabi and Dubai have been paying to support the federal budget, Sharjah is currently contributing in kind (in the form of gas supplies). See Heard-Bey, op. cit. p388, Al-Tabtabai, op. cit., p452.

30 Article 142 of the Prov. Const. in its original form gave the member emirates the right to set up "local security forces ...to join the defensive machinery of the Union... to defend ...the Union against any external aggression". In 1976 the constitution was amended and Article 142 cancelled, so only the federal government now can have armed forces. This is at least in theory, since the unification of the armed forces was and still is not completely successful in practice. There has been disagreement between Abu-Dhabi and Dubai about the manner in which the unified forces are to be commanded. The appointment of one of the sons of Sheikh Zayed of Abu-Dhabi as commander in chief on 6 February 1978 was objected to by Dubai; the son of Sheikh Rajid of Dubai is the Minister of Defence. This disagreement contributed to the constitutional crisis of 1979, which resulted (inter alia) in the removal of the son of Sheikh Zayed from his position.

31 During discussions on the framing of the permanent constitution it was obvious that there were two opposing sides. One side was lead by Abu-Dhabi, with some emirates, one of which was Sharjah. This side calls for the ratification of the draft permanent constitution and strengthening the central government. The other side was lead by Dubai, with other emirates, one of which was Ras-Alkhaimah. This side was suspicious of the Abu-Dhabi side and called for the renewal of the provisional constitution for a further five years. See Al-Tabtabai, op. cit., p446.

32 Among the main legislative acts is:
Law no. 5/85: Law of Civil Transactions.
The experiences of the emirates which choose to transfer their judiciaries to the federal government have proved to be successful. There are certain characteristics of the country and its judicial and constitutional system which encourage the unification of the judiciary:

1 The emirates, through their representation in the highest authority in the federal government, that their interests will be assured.
2 The current system gives the jurisdiction to the local council on a territorial basis, and does not give jurisdiction to the federal council when citizens of more than one emirate are involved, (as is the case in U.S. See U.S. Const. Article III this can result in biases and may cause reprisals, or at least suspicion in the judiciary.
3 The area is small, the movement between the emirates is constant, which may lead to conflict of jurisdiction between local councils in the different emirates. Because of the size of the emirates and that the small number of litigations do not warrant establishment of dual systems of judiciary, the best solution is to unify the judiciary on all levels.

33 In the U.S. there are two parallel judiciaries. One is the federal judiciary, the other is the state judiciary. Both of these judiciaries begin with the level of first instance, and end at the top with, respectively, the federal and state Supreme Courts. See Abraham, H. The Judicial Process: An Introductory Analysis of the Courts of the United States, England and France (5th ed.) Oxford: Oxford University Press, 1986, p142.

In Canada all the first instance and appelate courts are provincial. Only the supreme court is federally administered, although the constitution gives the federal government the right to set up primary constitutional courts. See Johnstone, R. The Effect of Judicial Review on Federal State Relations in Australia, Canada and the United States, Baton Rouge, Louisiana: Louisiana State University Press, 1969, p35.

In Germany the situation is more like that of the U.S. in having a dual judicial system. See Article 92 of the Basic Law.

34 See Ballantyne, W. Commercial Law in the Arab Middle East: The Gulf State London: Lloyds of London Press, 1986, p57.

35 Ibid., p4.

36 The final version of the U.A.E. Constitution was drafted by the Egyptian Jurist, Wahid Rafat. See Chapter One of this thesis.

37 Article 149 of the Prov. Const. gives the emirates the right to legislate in matters which are within the province of the federal legislative power, until the federal government occupies the field.

Article 148 gives another exception to the distribution of power between the emirates and the federal government, this article provides:

"All matters established by laws, regulations, decrees, orders and decisions in the various emirates of the union in effect upon the coming into force of this constitution, shall continue to be applicable unless amended or replaced in accordance with the provisions of this constitution...". Taking into account the slow legislative process in the federal government, especially during the first few years, the application of Articles 148 and 149 had, and still have, considerable effect.

38 Al-Tabtabai, The Federal System in the United Arab Emirates, op. cit., p67.

39 See Livingston, W. Federalism and Constitutional Change, Oxford: The Clarendon Press, 1956, p7.

40 Ibrahim, The Experience of the Federal National Council, op. cit., p128; and Al-Tabtabai, The Federal System in the United Arab Emirates, op. cit., p446.

41 See Heard-Bey, op. cit., p394.

42 Ibid., p395.

43 See Taryam, op. cit., pp239-248.

44 Ibid.

45 Among the causes for the inability to adopt a new constitution are:

a the uneasy relationship between the emirates (especially the governments of the emirates) which

makes agreement on the new constitution difficult.
b the lack of strong incentive to change the current situation.

46 Examples of the unsuitability of the current constitution for becoming permanent one are numerous, as examples show:
1 The organisation of federal and local judiciary.
2 The federal budget. U.A.E. Const. Article 127. The application of this have encountered major difficulties.
3 The permanent capital of the union. U.A.E. Const. Article 9 which has not been carried out until now, which makes changing this provision necessary.

47 For example the amendment of the constitution to unify the armed forces created confrontations and disagreements between some emirates. See Al-Tabtabai, The Federal System in the United Arab Emirates op. cit., pp410-417; and Heard-Bey, op. cit., pp393-395.

48 The experiences of other countries, especially federal countries, have proven that the constitutional councils can play useful parts in developing their constitutional systems and in supporting federalism. See McWhenby, E. Supreme Courts and Judicial Law-making: Constitutional Tribunals and Constitutional Review Dordrecht: Martinus Nijhoff Publishers, 1986, pp165-184.

49 U.A.E. Prov. Const. Article 144.

50 The Constitution Amendments, which have been passed in the U.A.E., are in three areas:

1 Amending Article 1 in 1972 by adding a paragraph allowing the Supreme Council to allocate new seats in the event of admitting a new member to the Union. This was a solution to a problem presented by admitting the seventh emirate to the Union.
2 Amending Article 138 and cancelling Article 142, to prohibit the member emirates from raising and keeping armed forces. This was done in 1976 to satisfy the demand of unifying the armed forces.
3 Amending Article 144 three times to extend the duration of the provisional constitution by five years each time. The dates of these amendments are 2nd December of: 1976, 1981 and 1986.

51 The (Dubai - Sharjah) border dispute has been solved amicably, see Taryam, op. cit., p233. The (Ras-Alkhaimah - Fujairah) border dispute is currently the subject of a supreme court case, which has not yet been decided.

52 See Taryam, op. cit., pp191-192.

53 See Peterson, J.E. "The Future of Federalism in the United Arab Emirates" in: Sindlair III, H.R. and Peterson, J.H. (eds.) Cross Currents in the Gulf: Arab, Regional and Global Interest, London: Routledge, 1988, pp207.

54 U.A.E. Prov. Const. Article 151.

55 U.A.E. Prov. Const. Article 127. See Heard-Bey, op. cit., pp379-380.
The policies of the U.A.E. and its development have been widely and greatly affected by the current arrangement for the provision of the Budget. The Federation came on several occasions to crisis situations because of the budget problem. See Ibrahim, The Experience of the Federal Council op. cit., pp261-301.

56 For further information, see: Friedrich, Carl J. Trends of Federalism in Theory and Practice, London: Pall Mall Press, 1968; Elzar, Daniel, J. Exploring Federalism, Tusca Loosa, Alabama: University of Alabama Press, 1987.

57 The establishment of the G.C.C. was signed by agreement by the heads of the six member countries on 25 May 1981 in the city of Abu-Dhabi.

CHAPTER EIGHT

THE SUPREME COURT IN THE CONSTITUTION AND THE LAWS OF THE UNITED ARAB EMIRATES

The importance of the Supreme Court stems from its power of reviewing the constitutionality of laws, giving binding interpretation of the constitution and its position as an umpire of the federal system.

The modern principle of constitutional judicial review, that is the subordination of ordinary laws to the higher law, was first effectively enunciated in the United States by John Marshall in Marbury v. Madison [1]. One of the main reasons given as justifications for empowering the judiciary to review the constitutionality of laws is that the Constitution is a higher law and that the courts have the duty of applying laws, so if an inferior law violates a higher one, the courts have to apply the higher one. The institution of judicial review serves to limit the power of the legislature and preserve and supervise the adherence to the Constitution. Judicial review of the constitutionality of laws has spread throughout the world [2]. One of the countries that has adopted the institution of judicial review of the constitutionality of laws is the United Arab Emirates.

Federal government has two tiers of authority, central and state. Both are governed by the same constitution. The two levels of government in the federal system are supposed to be co-ordinated and independent in their respective spheres. The

federal constitution is the basis on which the division of power is governed in the federal system. Differences of opinion and occasional disputes between central and state governments are bound to occur as a result of the application of the federal constitution. These differences of opinion and disputes are to be resolved and decided by an independent authority which is capable of rendering decisions on an unbiased basis. The preservation of the federal balance and the protection of the rights of the two levels of government in the federal system has led the majority of federations to entrust the function of deciding federalism-based disputes and differences of opinion to the judiciary (3).

The constitution of the United Arab Emirates gave the task of interpreting the Constitution and resolving federalism-based disputes to the Supreme Court of the Union (4).

In this chapter we shall discuss the establishment, composition and jurisdiction of the Court, and the guarantees provided by the Constitution and the laws to protect the independence of the Court. We shall analyse the powers of the Court and the significance of its jurisdiction for the constitutional order and federal system of the United Arab Emirates. The comparative study shows us the importance of the constitutional courts and the systems which are employed to give these courts the best chances of doing properly the job which is entrusted to them. The comparative study also shows that there is much debate and controversy surrounding the constitutional courts in their attempts to invalidate legislation, accusations of

judicial legislation and of illegitimate judicial activism. All of the accusations of activism directed to the constitutional courts stem from the allegation that these courts encroach on other departments' powers and by that undermine the same constitutional system they were meant to protect and guard (5).

In the United Arab Emirates we have seen the way in which the Constitution functions, where power is concentrated and what kind of federal system operates in the country (6). In this chapter we shall try to understand and find out what are the possibilities that are presented to the Supreme Court, how the Court can carry out its responsibilities in the constitutional system without creating a crisis or causing permanent damage to the Court itself in relation to the other important government authorities either federal or local. Traditional theory concerning the judicial function, which prevailed until the turn of this century, held that the Courts only apply the law but do not participate in making legal rules. It was held that law making was the exclusive province of legislatures, whereas Courts have a duty to implement the law as they find it (7). This theory is what legal realists call "The Basic Myth" (8). In the context of Constitutional Law, the traditional view holds that the framers are the only source of Constitutional Law, and that the Courts only apply this law. In the early years of this century, a great debate took place aimed at dispelling the basic myth (9). It is now generally accepted that the traditional theory is a myth, not a reality, and few today believe in such a theory (10). To defend the traditional theory in the ordinary law is a

difficult if not impossible task. In the field of Constitutional law the task is even harder. Constitutions usually contain general rules and are meant to last for long periods. The Constitutional rules and provisions form a basis for ordinary legislation. Constitutional Courts interpret Constitutional provisions in the course of the different tasks entrusted to them. Among these tasks is the examination of the conforming of regular laws to a Constitution (11).

In the case of the U.A.E., the nature of the Provisional Constitution makes adherence to traditional theory unworkable. There are several reasons for this, among which are the provisional, temporary nature of the Constitution, and that its intended purpose is to be an instrument leading to stronger unity (12).

Another reason, especially in the first few years of the federation, was the existence of a vast legislative volume which left a large number of Constitutional provisions without details and without statutory regulation. The consequence of this has been the generation of applications to the Court for interpretation, and in some cases the resolution of disputes about the rights of different authorities. These eventually arrive at the Court for settlement (13).

The Supreme Court is entrusted with the task of interpreting the Constitution either as a direct interpretation, or else in a decision in a judicial review case (14). The Court has declared its role in the interpretation of the Constitution to be passive,

which would accord with one of the ideas from traditional theory: of simply removing ambiguities from the text and applying the law's provision without any judicial law-making (15). The facts and the actual interpretations provided by the Court do not support this claim. The Supreme Court establishes Constitutional Principles and in reality makes Constitutional law, and this law which is made by the Court is binding on all (16).

The duty entrusted to the Supreme Court is an essential and important one and its task is delicate. The Court needs to understand the importance of its task and the results which are attainable from its attitudes. It needs to live up to the aspirations of the people and those who established the federal government and drafted the Constitution. It needs to keep in mind that the United Arab Emirates is a progressive country on the road of development, which is one unit in the face of the whole world, yet is still being introduced to the world. It is important that these aspirations and expectations are realised. The different governmental departments and authorities bear their share of the burden of promoting developments and removing obstacles to the country's progress. The Court bears its share, which makes an important contribution to the whole development process. The Supreme Court deals with the Constitution, which prescribes the limits of power and distributes responsibilities. Whilst the Supreme Court is needed to play a positive role in the progress and development of the constitutional system, at the same time those who can disrupt the functions of the Court, and even question its existence, should be assured of their powers

and not provoked. Keeping the balance required of the Supreme Court is a difficult task. We want to study the Court and its power to see whether all of these enable the Court to keep the balance and to be a forward-looking Court.

The Constitution deals with the Supreme Court in seven articles of the fifth chapter, which is devoted to the judiciary. This chapter contains sixteen articles (17). It is obvious from the large number of articles devoted to the Supreme Court that the founders of the Constitution preferred a somewhat detailed constitutional regulation of the Supreme Court instead of leaving this regulation to the legislature. The detailed constitutional regulation of the Court and the substance of this regulation reveals the supposed importance of the Supreme Court for the constitutional order and development of the United Arab Emirates. Whether the practice of the Court during the past years of the life of the Court lived up to the initial expectations is a different matter which deserves special analysis to discover its causes and effects (18).

The Constitution provides for the issuance of a law to regulate in more detail the composition of the Court and its working procedures (19). This law was enacted in 1973 (Union law number 10 for the year 1973). The name of this law is the law of the Federal Supreme Court. The enactment of this law marked the beginning of the life of the Supreme Court. This law regulated the Supreme Court as a specialised constitutional court on the same basic lines contained in the Constitution. The year 1978

marked a major transformation in the life of the Supreme Court. In this year the Supreme Court ceased to be only a specialised constitutional court when Union Law (17/1978) was passed under Paragraph (9) of Article 99 of the Constitution. Paragraph (9) of Article 99 makes the Supreme Court competent to embrace "Any other jurisdiction stipulated in this Constitution, or which may be assigned to it (the Supreme Court) by law". Law (17/1978) added to the Supreme Court cassation jurisdiction in all matters. Provided that the parties bringing a case for cassation to the Supreme Court follow the procedures correctly, the Court cannot refuse to hear the case. Law (10/1973) was amended in 1985 by law (14/1985) to accommodate the increased volume of cases and provide certainty and simplify some procedures. Law (17/1978) was amended in 1985 by law (3/1985).

We shall discuss the Court's composition, procedures and jurisdiction under the Constitution, law (10/1973) as amended by law (14/1985), and law (17/1978) as amended by law (3/1985).

The Composition of the Supreme Court

The Constitution provided that the Supreme Court "... shall consist of a president and a number of judges not exceeding five in all..." (20). The law determined the number of judges of the Court to be a president and four judges (21). There is an option in the law to add an unlimited number of alternate judges, provided that not more than one is sitting on the Constitutional panel, not more than two are sitting in the five-member panels which consider matters included in the first seven paragraphs of

Article 33 of law (10/1973), and that none of them is allowed to preside on any panel (22).

The qualifications for the appointment of those who are appointed to the Supreme Court stress technical experience in judicial affairs. The members of the Court should be nationals of the United Arab Emirates and hold a University degree in Sharia and law (23). The president and members of the Supreme Court are appointed by decree issued by the President after approval by the Council of Ministers and ratification by the Supreme Council (24).

The Constitution and the law provide the president and the members of the Court with guarantees that they will be secure in their positions. The president and members of the Court may not be removed except by death, resignation, expiration of term of contract or completion of term of secondment (for those who are appointed for fixed terms or are on secondment from other countries), reaching retirement age, permanent incapacity, or being appointed to other jobs with their approval (25).

The constitutional regulation of the appointments to the Court, and the guarantees given by its provisions to the members of the Court, reflect the conviction by those who framed and ratified the Constitution of the importance of the Court, especially due to its constitutional jurisdiction and its role in umpiring the federal system. But there are several problems stemming from the regulation by the Constitution and the law of the composition of the Supreme Court, all of which problems

contribute by different degrees to hampering the Court and depriving it of the integrity and independence which is necessary for it to function in a proper way.

The main guarantee for the members of the Court is that they are secure in their positions, and they cannot be removed from their positions except in very few exceptional cases, which do not reduce their independence. All of this looks to be enough to allow the Supreme Court to play its part in checking the other branches of government. We have seen already that the Supreme Council of the Union controls both the main executive and legislative powers. The Supreme Court, in its checking other departments of government, has to confront the Supreme Council, if not immediately, eventually. The Supreme Council has the power to amend the Constitution, through somewhat lengthy procedures, but nevertheless it can insist on having amendments made (26). Despite the moral obligation on the Supreme Council not to harm the Supreme Court, and the negative political consequences which may result from actions which are directed against the Supreme Court, the possibility of such actions cannot be ruled out. And although it is difficult for the Supreme Council to make decisions on important issues, the Council can amend the Constitution to limit the powers and effectiveness of the Supreme Court (27).

The possibilities of the Supreme Council actions to limit the powers of the Supreme Court include:

a) The removal of certain conditions of appointment, such as the removal of the life tenure of the judges.

b) The removal of certain judges (28).

c) The reduction of the jurisdiction of the Supreme Court, by removing certain items from the competence of Court.

d) The use of the Supreme Council's power to finance the Court as a pressure device on the Court.

The existence of these possibilities can have restricting effects on the Court's work when it considers issuing decisions which may trigger the anger and displeasure of the members of the Supreme Council. In a sense the Supreme Council is too powerful for the Court to confront in the present constitutional arrangements in the United Arab Emirates Constitution. Although, for the Supreme Court to play its role to the full extent, the current constitutional arrangements will have to be changed, the Supreme Court can still play a useful role in providing constructive interpretations of the Constitution. There is a need for the positive and thoughtful interpretations by the Supreme Court to the Constitution. The involvement of the Supreme Court in the development of Constitutional law is needed for the stable and constructive development of the Constitutional system. The need for the Court's interpretations became apparent soon after it began functioning (29). The need for the Court's insights and authority in the interpretation of the Constitution is still continuing and is bound to develop as its system, and the legal relations in it, become more complicated (30).

Generally, the requirements for the appointment to Constitutional Courts, and the procedures for such appointments,

depend to a large extent on the degree of adherence to the basic legal myth that judges do not make law (31). Where adherence to the traditional theory of the judicial process prevails, the procedures for appointment to Constitutional Courts tend to be undertaken by the executive, without recourse to consultation with the legislature; Canada and India are examples of such an attitude (32). In countries where the nature of Constitutional Courts is recognised to include more than the mere mechanical application of existing law, the legislative authorities are given decisive roles in the appointment process; the U.S.A. and West Germany are examples of this system (33).

In the U.A.E., the procedure for the appointment of members of the Supreme Court proves adherence to the traditional view of the judicial process. The Supreme Council and the President are empowered by the Constitution to appoint judges of the Supreme Court (34). The National Council is given no role in the process of appointment to the Supreme Court. This suggests a lack of appreciation of the possible effects and role of the Court (35). The traditional view of the judicial process is open to criticism, and has been shown to be misleading in its consideration of the technical, mechanical role of the judges of a merely discovering the law without participation in its shaping (36). In the appointment to the Supreme Court of the U.A.E., bearing in mind its political importance, attention should be paid to the political knowledge of the judges, in addition to the emphasis on their legal knowledge and technical experience (37). Limiting the attention paid to qualifications other than the

technical knowledge and experience neglects the need for judges to be sufficiently politically aware that confidence in them can be maintained. The consequence of this neglect has a negative effect on the operation of the Court, limiting its checking effect, and curtailing its role in developing the constitutional law in the United Arab Emirates (38).

Although, generally, the members of the Supreme Court are appointed for life, there are exceptions to this rule which overshadow life tenure and, in reality, empty the guarantee of judicial independence that life tenure carries with it. Article 96 paragraph (2) of the Constitution mentions among the causes to end the tenures of the judges of the Court, "...Expiration of term of contract for those who are appointed by fixed term contract or completion of term of secondment", Article 5 of the Supreme Court law (10/1973) gives as an exception to the requirements of appointment to the Court the option of appointing someone from "...among the citizens of the Arab countries to the Court for a limited, renewable period". In fact this exception has been, and still is, the general rule for the appointment to the Court since its establishment. It is obvious that those judges who are appointed to the Court for limited renewable periods will not be free from pressure of wanting the renewal of their contracts, and the authorities which have the power to renew the judges' contracts are the same authorities which the judges are supposed to check and supervise. For the Court to be independent, this option of allowing the appointment of judges

for limited periods of time has to be discontinued. The excuses given for making exceptions to the life tenure to the Supreme Court and for appointing citizens of other countries to the Supreme Court was that the United Arab Emirates was in its early stages of development and that this exception was to continue until there were among the citizens of the country people well qualified to be appointed to the Court. If this reason had merit in 1973, it has surely now lost all justification (39). The way in which the Supreme Court is and has been staffed, since its establishment explains to a large extent why it has not been effective in reviewing the legislative as well as executive acts and has not been useful to check their adherence to the Constitution.

The independence of the Supreme Court as an institution in relation to the other branches of government has to be closely reviewed and evaluated. The current arrangements by which the Supreme Court is included under the Ministry of Justice is incompatible with its general and constitutional powers. The Supreme Court has to be among the independent government branches which deal with other branches and departments on equal terms. This Court is meant to check the adherence to the Constitution by the executive as well as the legislative branches. The Court is, moreover, empowered to render constitutional interpretations which are binding on all concerned. In other words, the interpretations given by the Court to the Constitution have the same effect that the constitutional provisions have. The Supreme Court also is entrusted to umpire the federal system, which means

that it has to resolve problems between the emirates and the central government, as well as problems among the emirates. This Court has to be independent from the Council of Ministers, yet in its current situation, depending for its budget on the Council of Ministers and under the supervision of the Minister of Justice, it is restricted by this relationship.

This same arrangement was originally made for the West German Constitutional Court but, after strong pressure from the Court, it finally won its independence from the Federal Ministry of Justice, and other objectives, by 1960 (40).

The Supreme Court in the United Arab Emirates, in order to be in a better position to carry out its responsibilities of judicial review and constitutional interpretation, has to be distanced from the Ministry of Justice and has to be provided with its own budget and insulated against any possible restriction from the executive as well as from legislative departments.

The founders of the United Arab Emirates Constitution chose to mention the number of the members of the Supreme Court in the constitutional text (41). This, by implication, means that the legislature is excluded from interference in this matter except to add more details to the constitutional regulations. The constitutional delegation for a law to prescribe detailed regulation for the Supreme Court did not include changing the number of judges on the Court. All of this casts doubt on the constitutional legitimacy of the option of appointing alternative

judges to the Supreme Court which is included in law (10/1973) (42). The appointment of alternative judges to the Supreme Court means that even if there are members of the Court who have life tenure (therefore with a sufficient degree of independence and insulated from reprisals by the other branches of government) the appointment of alternative judges who are appointed for limited periods of time and are subject to more pressure can have a negative effect on the work of the Court and can limit its independence.

The Supreme Court, according to its statute, is organised into at least three chambers (43): one chamber for constitutional matters, one for criminal matters, and one or more for other matters (44).

The formation of the different chambers is the duty of the plenum of the Court (45). Decisions on matters of Constitutional importance are handed by a five-member chamber (46). One alternate judge can be a member of such a panel (47). The inclusion of alternate judges in the work of the Supreme Court, and participating in decisions on constitutional interpretations, judicial review and the different kinds of disputes between the federal government and the emirates could have significant consequences. In Supreme Courts to which judges are appointed with life tenure, as in the U.S. Supreme Court, the judges form distinct groups, in matters of constitutional consequence, so that any change in the formation of the Court is bound to have some effect on the decisions taken by the Court (48). At present, and in the absence of life tenured appointee to the Court, the

significance of alternate judges is not highlighted. However, it is not only alternate judges who are vulnerable to pressure resulting from the lack of security in their jobs; all the judges of the Court share the same lack of security. Through the passage of time, and with the appointment of life tenured judges to the Court, the negative effects of the existence of alternate judges could become apparent.

The Competence of the Supreme Court

The jurisdiction of the Supreme Court of the United Arab Emirates is fashioned along the same lines as the jurisdiction of the Constitutional Court of West Germany (49). The jurisdiction of the Supreme Court is especially close to the original, unamended enumeration of powers of the West German Constitutional Court, save, of course, the matters which are non-existent in United Arab Emirates, such as party political matters (50).

The Constitution gives the Supreme Court its major powers in its enumerations of jurisdiction in Article 99 and in other parts of the Constitution (51). The main powers of the Court are its constitutional and federalism-based jurisdictions. The constitutional jurisdiction of the Court includes advisory opinions as well as reference to it in actual cases from other courts in the country. Federalism-based jurisdiction involves disputes between emirates and also between the emirates and the federal government. The federalism-based jurisdiction involves issues of supremacy of the Federal Constitution and laws issued

by delegations from its provisions. The federalism-based jurisdiction involves settling differences about laws and treaties between central and regional governments.

The Supreme Court has powers other than those which concern the constitutional review and supremacy and the federal system, but these powers do not concern us in this study (52).

A: The Constitutional Jurisdiction of the Supreme Court

This jurisdiction includes both advisory opinions and concrete case/controversy.

1) Requests for Constitutional Interpretation: (Advisory Opinions) (53)

The original style of judicial review, which is attributed to the American experience, limits the way in which the issues of compatibility of legislative and judicial action with the Constitution can be brought, that is only through a real case/controversy. The American experience of judicial review depends on the notion that the proper role for the Courts is to decide cases, and through this process they apply the Constitution as a higher law. Constitutional questions, according to the American experience, have to be connected with a factual situation to warrant judicial decisions. The Court can then give its decision in full appreciation of the factual background and the need for a resolution of the presented case (54). There are exceptions to the role of requiring concrete case/controversy in order to approach the Supreme/Constitutional Courts for decisions on

constitutional matters. These exceptions include Canada and the original West German system under the Constitutional Court Act of (1951) (55). The West German Constitutional Court, as a result of the controversy arising from the European Defence Community case, has been deprived of the power of rendering advisory opinions by the Court Reform of 1956 (56).

The power of rendering interpretative opinions by constitutional courts, by its nature, can be used for political reasons and can be employed by the political branches of the government in applying pressures on other departments or for achievement of certain desired ends. All of these possibilities can create problems for the courts or result in mistrust in their work, or, as has been the experience in West Germany, depriving them of some of their powers. The Constitution of the United Arab Emirates gives the Supreme Court the power of rendering interpretation to the Constitution upon application from certain authorities. The right to apply for advisory opinions from the Court is given to all federal authorities and the governments of the emirates. The federal authorities include: the President, the Council of Ministers, and the National Council. On the local level the governments of the emirates, which are represented in the rulers, have the right to apply for interpretation of the Constitution to the Supreme Court.

The Constitution provided that the interpretations provided by the Court in its opinions upon the request for such interpretations are binding on all, which makes its opinions

practically on equal terms with the provisions of the Constitution. The only ways in which the opinion of the Court can be changed are either by constitutional amendment or by the Court's own change of decision in later opinions (57).

This jurisdiction of the Court has proved to be a useful tool for engaging the Court in clarifying ambiguities in the Constitution and in providing informative opinion for the newly established federal authorities in their dealing with the written Constitution, especially in the early years of the Federation (58). This power can be utilised by the Court and by the authorities applying for the opinions to serve several purposes. The Court can use this power to provide opinions suitable for the purposes of the Constitution and for the need of the country at the time when the opinion is given. The Court can use this power to help the development of application of the Constitution to help strengthen the federal authorities and, at the same time, protect the emirates from any intrusions on their powers. Parties have the right to apply to the Court to obtain an authoritative opinion which clarifies the powers and limitations of each party, or else to prevent the occurrence of undesirable actions by other parties (59). The party applying for an opinion from the Court can use this way of obtaining information to stabilise their position and protect their actions against later attacks or allegations of illegitimacy. Hence this right of the authorities can be used to gain knowledge and to provide confirmation of their actions, and also as a protective device for future development. Because of their failure to agree to a Permanent

Constitution the emirates have repeatedly opted to extend the duration of the Provisional Constitution [60]. The repeated extension of duration of the Provisional Constitution means that, in practice, the Provisional Constitution is functioning as a permanent one. The fact that this Provisional Constitution was originally drawn up to operate for only a limited period of time makes it by necessity unable to provide long term solutions for new problems as they arise. This gives the Court opportunities to participate in adjusting its opinions to the development of the country. The actual use the Court makes of its power of rendering interpretations to the Constitution depends to some extent on the Court's understanding of its opportunity and the importance of its opinions but also to some extent on its appreciation of the political risks involved if it chooses to render opinions unfavourable to the political branches of the federal or local government. The Court's role depends also on the willingness of authorities who have the right to apply to the Court to have resort to the Court and their choice of issues to present to the Court.

2) Federalism-based Application of Review (Abstract Norm Control) [61]

The Constitution and the law give the two levels of government the right to challenge the consistency of the other level's laws within the agreed distribution of powers. This involves differences of opinions or doubts about the formal or

material compatibility of federal or regional law with the Constitution, or the compatibility of regional laws with federal laws. This process is initiated either by the authorities of the central government or by the emirates. No adversary proceedings are necessary. This is similar to the abstract normal control power given to the Constitutional Court in West Germany (62).

This item of the Supreme Court's jurisdiction is meant to be a guarantee for the two levels of government to protect their spheres of power without having to wait for individuals or legal persons to bring cases to the Court to decide whether the offending legislation should be declared null. In this power of the Court there is another departure from the traditional judicial role of deciding cases or controversies - another manifestation by the Constitution of the special nature of the Court and its significance in the political system of the country. The parties in these proceedings are either central government authorities or governments of the emirates. No private person is involved. The Court in these proceedings acts as an umpire on legislative matters between the two levels of government. The institution which is put in this position of having to resolve differences on such important, political matters should have, by its design and structure, assurances of independence and integrity in order to have the respect and confidence of the opposing parties.

The Court's decisions in these proceedings are, as in other cases, binding on all. Where the Court decides that the law under consideration is inconsistent with the Constitution or federal

law, the Constitution instructs the concerned authority to "take the necessary measures to remove or rectify the constitutional inconsistency" (63). The Constitution opts for the instruction of active removal of laws deemed improper, rather than the effective removal of these laws by inapplicability. Anyway, the final result is the same in this case because the decision of the Court is binding on all and the words of the Constitution require the quick removal of doomed laws.

3) The Reference of Cases from Lower Courts for Constitutional Review (Concrete Norm Control) (64)

This is the only way open for individuals and other private persons to challenge an unconstitutional law. If, while hearing a case, a lower court considers unconstitutional any statute the validity of which is relevant to its decision, then it must stay the proceedings and give the concerned party a limited period to take his petition of unconstitutionality to the Supreme Court (65). Consideration of the unconstitutionality of laws by lower courts can be either by a challenge from one of the parties or by the Court's own initiative. If the lower court considers the challenge of unconstitutionality unfounded, then it has to give the reason for its finding in the decision (66). There is no special remedy for the party whose challenge of unconstitutionality of laws has been refused. The only remedy for those parties whose challenge on the constitutionality of laws has been refused is the normal appellate procedures (67).

If the consideration of the unconstitutionality of the law was by the lower court's own initiative, then it has to refer the concerned provisions to the Supreme Court with details of the reasons for its decisions (68).

Article 99 (6) of the Constitution holds that the Supreme Court shall have jurisdiction in:

> "Examination of the constitutionality of laws, legislation and regulations in general, if such a request is referred to it by any Court in the country during a pending case before it..."

All Courts in the country can bring questions of review of the constitutionality of legislation to the Supreme Court. Both Federal courts and local Courts can bring constitutional review applications to the Supreme Courts. Primary, appellate, final and Sharia Courts can bring questions of review of constitutionality to the Supreme Court. Questions of constitutionality of legislation can be referred to the constitutional chamber from other chambers in the Supreme Court, especially after the enactment of the law of cassation (Law 17/1978) (69).

The laws that can be referred to the Supreme Court through this jurisdiction can be either federal or emirate laws, they include statutes, bye-laws, and any form of legislation and regulation (70). The Constitution gives the power of deciding on the constitutionality of laws to the Supreme Court but this does not exclude the role of inferior courts in the process of reviewing the conformity of laws with the Constitution. Indeed, the role of inferior courts in the decision on the

constitutionality of laws is a vital one. Article 58 of the Supreme Court's statute (Law 10/1973) includes regulation of the procedure of referring questions concerning Constitutional review of legislation to the Supreme Court from other Courts. This article gives the Court the right to initiate questions of Constitutionality, thereby referring them to the Supreme Court. The Courts in the country have the power to decide on the merits of questions of constitutionality of legislation initiated by parties to cases before them. The inferior courts have the right to question the conformity of any law with the Constitution as long as the decision on this matter affects the ultimate decision of that court on the case before it. To initiate proceedings of reviewing the conformity of laws with the Constitution, the inferior courts have a wide discretion which means that they should be willing to refer laws to the Supreme Court and, at the same time, they should be confident of the procedural and material ability of the Supreme Court to guard and enforce the supremacy of the Constitution. Even when the question of the constitutionality of laws is presented by parties in cases before inferior courts, the discretion of these courts is still wide. The inferior courts have to decide on the matter of constitutionality of laws. If a constitutional question is raised by the parties, then, these courts either stay the proceedings before them and allow the party concerned to take his request to the Supreme Court or proceed with the decision on the case, having explained the reason for not granting the right to approach the Supreme Court. Paragraph (6) of Article 99 of the

Constitution allows the inferior courts to refer laws to the Supreme Court even if they have only a slight doubt regarding their constitutionality and, at the same time, when the reference is requested by a party before them, there may be a strong possibility of contradiction of the questioned law with the Constitution but the question will not be referred to the Supreme Court if the opinion of the court is wholly on the other side of the argument. The absence of special procedures of appeal for parties whose applications for referral to the Supreme Court have been denied by lower Courts strengthens the power of the inferior judges on the referral of constitutional objections to the Supreme Court. Currently only ordinary appeals procedures are possible for those who have been denied referral to the Supreme Court for constitutional review. These procedures are not sufficient in all cases because there are special requirements for ordinary appeals which may be absent from the case in which the constitutionality of laws was raised. Therefore the concerned party may have no way to appeal against the refusal to grant him the right to approach the Supreme Court (71).

The Supreme Court's jurisdiction to decide on the constitutionality of laws referred to it by inferior courts resulting from cases or controversies before them makes the Supreme Court an important guarantor of constitutional rights of individuals against violation by legislation. There is an inherent defect in the kind of procedure chosen in the United Arab Emirates. The constitutional court receives an application

to review the compatibility with the Constitution of a piece of legislation. The legislation is referred to without the facts of the case, and the decision of the Court will be binding on all, not simply to the particular case in which the question of constitutionality arose. The emphasis of the Supreme Court becomes concentrated not on the individual and the breach of his constitutional right but rather on the piece of legislation referred to. The separation of the constitutional questions from the specific fact situation deprives the Supreme Court of the flexibility enjoyed by such courts as the American Supreme Court. For, if the Supreme Court receives all of the case (both its facts and the question of constitutionality) it may consider it proper to postpone deciding the question of constitutionality or to interpret the Constitution in a way to restore and protect the rights of the concerned party and others in a similar situation to a greater extent (72). The Supreme Court's understanding of its primary duty regarding laws referred to it by lower courts, that is, of not having to decide a particular case but having to give a formal declaration of the compatibility of a law with the Constitution, could have adverse effects on those parties who willingly or unwillingly caused the statute to be referred to the Supreme Court.

The procedures prescribed by the law for referring laws for constitutional scrutiny by the Supreme Court may not be adequate to protect all constitutional rights that are violated by the legislature. The element of time may be a cause for the insufficiency of the procedure to protect individual rights by

referring laws to the Supreme Court, for example a person whose right to obtain a passport to travel has been violated by a law or administrative regulation. If he brings a case to ordinary court, the court either grants or refuses to grant him the right to approach the Supreme Court. If the lower court decides to allow the person to approach the Supreme Court, the court's protracted procedure takes a long time, after which the decision must still return to the lower court which decides the case accordingly. If the lower court decides not to grant the concerned person the right to take his case to the Supreme Court, then this person has to appeal to the Appellate Court which may or may not reverse the lower court's decision. Then the only remaining course for this person is by way of cassation to the Supreme Court. Each of these procedures may result in a denial of a person's fundamental rights. Even if the Supreme Court's decision ultimately favours the person who initiated the procedures, it may be too late for him to benefit from it.

Another disadvantage resulting from the lengthy procedures and the special requirements in the court's statute is the high financial cost of bringing applications of constitutional review by individuals to the Supreme Court, which may result in discouraging people from requesting these procedures or abandoning them after they are permitted to approach the Supreme Court (73).

4) The Resolution of Disputes Between the Member Emirates and Between Them and the Federal Government (74)

General disputes can be presented to the Supreme Court through this jurisdiction. The emirates and the federal government can bring these disputes to the Court. These disputes can be between the emirates and the federal government or between the emirates. The subjects of these disputes can vary widely. The dispute presented to the Court through this jurisdiction can be about territorial border differences, financial commitments, the application by the emirates of the federal laws, or many other subjects. The parties to these disputes are political bodies, so dealing in a dispute between them is politically sensitive. Due to the position of the Court there are no appeals from its decisions. These facts place the Supreme Court in a position which is both powerful and could be delicate. The position of the Court - to be able to decide disputes between the emirates and the federal government - demands that the court is without bias and thus deserving the trust and confidence of all parties.

5) Constitutional Questions Coming to the Court Through its Role as the Court of Cassation

The Supreme Court was given the role of a cassation court to hear final appeals on matters concerning errors of law by lower courts (75). Some constitutional questions may reach the Supreme Court on the basis of the error of application of laws or constitutional provisions.

The Role of the Supreme Court in the Federal Balance

In the United Arab Emirates federalism has different meanings to different categories of people. To the people of the country, the term itself has a kind of attractiveness and holds promise. The principle of unity between the emirates and the ending of a period during which the area was under British influence, promoted a sense of national pride and nationalistic emotion. The independence of the country came during a period in which the total structure of the society and its economic, cultural, educational and other aspects were undergoing fast development. The development of education connected the inhabitants of the country with the people of the Arab world and brought to the fore several historic facts, all of which strengthened the call for unity. The economic situation was changing fast, oil money was seen as a cause and promise of a better life. Unity between the emirates meant better services to the population, especially to those in emirates unable to provide these services. To the rulers the federation meant security and stability, and a source of financial support to the non-oil producers (76).

Article 1 of the Constitution presented the country as a "Federation". The preamble emphasised the desirability of unity, and the need to enhance the quality of life and strengthen the bonds between the emirates. But what does "Unity" or "Federation" mean? There is no explanation of these terms in the Constitution other than the prescription for the division of powers between the emirates and the central government. The distribution of

powers in the Constitution between the emirates and the central government is set out in a series of fairly detailed lists of powers to the federal government, with the residuary given to the emirates. The kind of distribution of powers is closer to the system of West Germany and Canada than that of the U.S. which stresses the creating of a strong central government (77).

Owing to the immediate history of the emirates, their existing system of government, and their tribal character, the emirates are likely to be strong and reluctant to submit totally to the authority of the federal government or help it to grow and prosper (78).

The Supreme Court is the final reference to interpret the Constitution and is given the jurisdiction to decide on the allegations of unconstitutionality of either federal or emirate laws if challenged either directly by the other level of government or indirectly by individuals and parties to cases before inferior courts. By their nature constitutional cases are, in a sense, political, especially if the dispute is between the two levels of government. The laws promulgated by both levels of government could affect various subjects and there are bound to be questions and disputes of whether or not each level of government did in fact adhere to the province of power it is allowed by the Constitution. Not all of the areas of legislation by the two levels of government will be clearly coherent with the constitutional distribution of power (79). The position of the Supreme Court as an umpire of the federal system, and the lack of

precise definition of the term "federal" or "federal government" put on the Court the responsibility of affecting and maintaining the federal balance in areas which are not regulated in detail. The judgement of the Court is not only to abide according to "positive" constitutional law but also to include substantive judgement of creative quality. The Supreme Court cannot remain passive. Its decisions are bound to include more than just removal of ambiguity from constitutional provisions (80). The question which should be asked then is not whether the Supreme Court will make constitutional law but rather according to what guidelines will and should it make such law? (81)

In the area of constitutional distribution of power between the two levels of government and in maintaining the federal system, there are several principles which should be considered by the Court in its decisions. These principles stem from the constitutional text and history, from the nature of the society and other relevant factors. Maintaining the federal system is the best way to ensure better protection for the individuals. The federal system is better than small, completely independent, emirates and, at the same time, it is better than one large unitary state. The origin of the federal system, the modern version of which is attributed to the U.S. system of government, was designed to afford the best protection for individuals by distributing the powers of the government among many institutions through separation of powers and the federal system. The result is a system of many quarters of power, each sharing part of the power and all participating in guaranteeing protection of the

people through the system of checks and balances (82). In West Germany the current federal system was organised to prevent the repetition of the Nazi experience and any other tyranny. Indeed in West Germany new states were artificially created in order to divide the power and to assure protection of the individuals (83). The United Arab Emirates' federal system may help in the protection of individuals. For a very long time before the federation the rulers in the emirates used to enjoy complete power over individuals and over domestic matters in their respective emirates. The federal system helped to break the complete dominance of the rulers over individuals by dividing powers between the two levels of government. The creation of the federal system, in producing a new institutional infrastructure, offered the people a wider choice of employment and a better quality of services. Wealth in the United Arab Emirates is associated with the government which distributes the benefits of oil to the people through various different channels: employment, services, projects for building the infrastructure and other government schemes. All of the opportunities and choices are increased by the federal system which, ultimately, results in increasing the choices and benefits accruing to the citizens. The protection of the individual and the prevention of tyranny are ends associated with judicial review. The Supreme Court is a court empowered to practice judicial review of the constitutionality of laws, the ultimate purpose of which is to afford better protection for individuals. The Supreme Court has

to support and maintain the federal system according to its original powers in the Constitution (84). In supporting the federal system and maintaining the federal balance, the Supreme Court will be participating in protecting the individual and serving the same end that is linked with the judicial review (85).

In order for the Supreme Court to support and maintain the federal system, attention must be paid to providing measured support for the central government, at least in the current period, and for the foreseeable future. However, current circumstances surrounding the federal system tend to favour the emirates against central government, which results in weak central government. The continued weakness of central government hampers the development of the country, particularly in that the central government is given the duty to provide vital services. The weakness of central government leaves the whole federal system out of balance. This imbalance not only prevents the full protection of the people, but also denies them access to a better life with more choice (86).

The weakness of the central government is the result of different factors, all of which play some role in weakening its powers or preventing it from the proper exercise of them. We shall discuss some of these factors and their effects.

1) The previous existence of the emirates as independent entities

The emirates were governed by their rulers for a long period. Originally the rulers held all the power in their emirates, some of which they relinquished to the British through treaties. Mainly, the rulers had the final say in all matters of government. The tribal nature of the people helped to direct power and loyalty to the person of the ruler and the ruling family. The later flow of oil and the increased financial strength of the rulers served to enhance their position over the people (87). The powers of the rulers were established for a very long time in their respective emirates. By comparison, the federal government is new. In the early stages of its life, therefore, the federal government needed support to establish its power and to be recognised by the people and by the rulers. The transference of popular loyalty from the emirates to the federal government needed time to occur.

2) The arrangements in the Constitution favouring the Emirates

Due to the nature of the process of devising the current Constitution, which was initiated, supervised and approved by the rulers, the arrangements in the Constitution concentrate power in the rulers and stress the rights of the emirates.

The supreme body which has the principal executive and legislative powers is composed of the rulers of the emirates. The emirates reserved large and important areas of power (88). Under the original arrangements the emirates have the power over:

(i) Oil production and other minerals, and their revenue.

(ii) Customs regulations and duty collection.

(iii) Adjudication of matters not allocated to the federation (which is the majority of civil and criminal matters and matters of public laws which arise in the emirates).

(iv) Raising armies and security forces which include all arrangements and different military forces.

(v) Police matters.

and several other important areas of power, the use of all of these powers resulting in the existence of strong emirates and weak central government.

3) The financial dependence of central government on the emirates

Compared to the federal government the emirates have the means and the capabilities to be independent in their financing. The central government, on the contrary, has to depend on the contributions from the individual emirates. There are no means to force the emirates to pay their respective shares. The only means of pressure on the emirates is a moral one. The emirates pay their shares because of their felt need to maintain the central government. The payment of their shares by the emirates can be used as a means of pressure to achieve certain ends. The emirates can, and do sometimes, delay payment of their shares as a protest against the political decisions of central government (89).

The Supreme Court is a judicial body and its decisions are relatively immune from the pressures that face the political department of central government. Its decisions may, therefore,

support central government to an extent unavailable to the political departments.

These are only some of the factors that contribute to weakening central government and thereby contributing to the imbalance of the federal system.

It was clear that the arrangements provided in the Constitution and the powers given to central government were not totally satisfactory and that is why the Constitution was labelled "provisional" and given a duration of five years during which time a permanent constitution of a more powerful union was to be prepared and approved. The new Constitution was not approved and, therefore, the arrangements for the stronger union were not achieved. The current constitution is a document which its authors and framers wanted to be revised and improved to provide for a strong central government (90). Were the Supreme Court to interpret the Constitution in a manner favouring central government, it would not contradict the Constitution. Rather it would achieve the results desired by those who framed it. In addition to living up to the desires of those who founded the Constitution, the Supreme Court, in supporting central government, would be protecting the individual and maintaining the strength of the federal system.

The Supreme Court can, through the interpretation of the Constitution, achieve what the reformers of the Constitution failed to achieve. Those who attempted to reform the Constitution were confronted by political differences and pressures. The

Supreme Court can, through authoritative decisions, achieve the same desired ends with fewer obstacles (91).

There is a possibility that negative reactions and unwelcoming responses, or even objections, from the emirates would follow a decision of the Court to support central government. Such reactions could be reduced or avoided by the Court adopting the gradual approach and by persuasive arguments. In the U.S. and West Germany, the courts were sometimes accused of being anti-democratic if they confronted the legislatures, and their acts were made void. This objection cannot exist in the United Arab Emirates because of the absence of democracy. What can be upheld is the accusation of politicising the judiciary and the accusation to the Court of trespassing in the provinces of other departments of government. All of these objections can be answered logically and could be avoided by the Court using a cautious approach. Judges must be assured of immunity from reprisals as a necessary protection for the Court to carry its responsibilities and play its proper role in the development of the federal system of the United Arab Emirates. The minimum role played by the Court must be to support the centre as a viable government and so preserve a federal system rather than allowing local power to reduce the arrangement effectively to a confederal one.

The Cassation Jurisdiction and its Effect on the Court

The year 1978 marked a major turn in the operation and jurisdiction of the Supreme Court. This turning point was the

move of the Court from being mainly a constitutional court to being a court of more general competence. Law (17/1978) added to the Supreme Court the cassation jurisdiction.

Cassation is an appeal to a high court to review and discover errors in the application of law by lower courts. Cassation originated in France after the revolution. It was a means by which a non-judicial organ, strictly connected to the legislative power, ensured that the courts applied only the letter of the law and did not interfere in the legislative sphere (92). The creation of the "Tribunal de Cassation" in 1790 was the result of the French Revolutionary distrust in the judiciary (93). Comparing the original institutions of cassation and judicial review we can discover profound theoretical differences. Cassation assumes the supreme will of the legislature, whilst judicial review requires the subjection of ordinary laws to a supreme judicial body sufficiently immune from political decisions. Cassation presupposes profound mistrust of the judiciary, whilst judicial review presumes a great confidence in it. The development of cassation in France transformed the institution carrying it into a judicial body and the "Cour de Cassation" became the supreme court for the judicial interpretation of the law. This development of cassation effectively removed the contradiction between it and judicial review. Hence, whilst judicial review is the institution for the control of constitutionality, cassation is the institution for the control of legality (94).

The jurisdiction of cassation in its modern form and according to Article 4 of Law (17/1978) does not contradict judicial review. What cassation effectively does is considerably widen the field of jurisdiction of the Supreme Court by adding to its original control of constitutionality the jurisdiction of controlling legality. Generally, in civil law countries where cassation has been received, as in France, there are specialised higher courts. For example, in West Germany there are no fewer than six higher courts (95). In the United Arab Emirates there are no such specialised courts which means that the ultimate court of appeal for all cases is the Supreme Court. In common law countries where there is no such specialisation in Supreme Courts of Appeal, there are usually devices by which the Supreme Courts can choose cases or refuse to decide in others. For example, in the U.S. the Supreme Court has the discretion to refuse jurisdiction through certiorari (96). The Supreme Court of the United Arab Emirates lacks such a device so it has the duty to hear all cases brought before it. The result of the inability of the Supreme Court to avoid jurisdiction will inevitably lead to the Court being submerged beneath a deluge of cassation cases, thus draining the Court of time and energy which it was, by its original jurisdiction, supposed to give to interpreting and supervising the development of the Constitution. An ordinary civil law high court is unsuitable to be given, in addition to cassation jurisdiction, the power of a constitutional court, nor is a specially created constitutional court suitable to be given the general jurisdiction of cassation.

Because of the special nature of the cassation jurisdiction, it needs technically-minded and experienced judges which makes it unsuitable to be given to the Supreme Court in the United Arab Emirates. The Court's State (Law 10/1973) expressed the desire to appoint local judges to the Supreme Court, the addition of cassation jurisdiction makes it difficult to do this. Because of the relatively recent development of the United Arab Emirates and the scarcity of experienced judges, the cassation jurisdiction makes it difficult, if not impossible, to fulfil the desire of the legislature to appoint local judges to the Court at the present time or in the near future.

The cassation jurisdiction was included under Paragraph (9) of Article 99 of the Constitution which permits the addition to the Court's jurisdiction of other matters. But, to use this permission to take up more than 90% of the Court's time is incompatible with the constitutional purpose, although, literally, this can be justified. The incompatibility of the addition of cassation to the Court is evident:

1) The Constitution has a relatively large part devoted to the Supreme Court. This can be justified by the importance of the constitutional jurisdiction of the Court but is quite unjustified for a court whose occupation is to supervise the proper interpretation and application of ordinary laws.
2) The appointment procedure and the tenure of the judges are especially formulated because of the political nature and constitutional importance of the Court. The participation

of the Supreme Council and the President in the appointment of the judges and President of the Supreme Court is not necessary for a Court which is mainly a court of cassation.

The inclusion of the cassation jurisdiction was mainly because the Court was underworked before 1978. The inclusion of cassation within the jurisdiction of the Court did not solve the problem of the Court but rather increased it. The real problem was that there were constitutional issues affecting the federal system, and the constitution in general required decisions. The Supreme Court, by the application of Law (10/1973) especially concerning staffing and tenure, was unable to provide effective solutions for them. There was a lack of confidence in the Court. There was also a lack of experience, and all of these factors contributed to the ineffectiveness of the Court as a constitutional court. These problems require special solutions. The approach used in the United Arab Emirates was to use the Court as a cassation court, which adversely affected the constitutional jurisdiction.

This approach did not address the real problem. It simply solved a superficial problem. It may have appeared desirable for the Cabinet or the Supreme Council to avoid this judicial body which deals with constitutional matters by occupying it with cassation cases. But, in reality, this means the increased ineffectiveness of this body in constitutional cases which will leave a gap in the constitutional structure, the effect of which is to harm the development of the country and to hamper the constitutional system.

Characteristics of Constitutional Review and Interpretation by the Supreme Court in the United Arab Emirates.

There are several characteristics of the method chosen by the Constitution and legislation for constitutional review and interpretation. These characteristics entail certain effects and result in advantages and disadvantages in the practice of the Supreme Court.

1) Centralised Review

The only institution empowered to provide binding constitutional interpretations and declare federal and local legislation unconstitutional is the Supreme Court (97). All other courts have to refer legislation to the Supreme Court for declaration on its compatibility with the Constitution. The choice of the centralised form of review is common in countries with mainly civil law systems (98). The rationale for adopting the centralised form of judicial review is that it is coherent with the civil law system. Firstly, civil law countries adhere to the supremacy of statutory law. Judicial review is recognised to have political character, therefore it is not the function of ordinary judges to engage in practising it. Ordinary judges should presume the validity of legislation and adhere to it in their decisions. Should any doubt arise in the validity or conformity of legislation with the Constitution, judges should stay their proceedings and refer the matter to a specialised

court empowered specifically by the Constitution to decide in the conformity of legislation with the Constitution. Special care is given to the appointment of members of constitutional courts because of their political significance.

The special political significance of the Supreme Court in the United Arab Emirates is enhanced by the other areas of its competence, such as providing constitutional interpretation on request. Whilst the final decisions and binding constitutional interpretations are the province of the Supreme Court, lower courts are not completely excluded from engaging in actual judicial review. Indeed, lower courts play a vital role in bringing legislation for constitutional review to the Supreme Court. Lower courts, either federal or local, can, by their own initiative and according to their own opinions, refer legislation affecting decisions on cases before them to the Supreme Court if they consider, or even suspect, incompatibility of this legislation with the federal constitution. If a party to a case before a lower court raises the question of unconstitutionality, the lower court has to decide whether there is merit in the attack or not. If it decides that it is not founded, the only requirement for the court to refuse reference to the Supreme Court is to give reasons (99). There are no special remedies or appellate procedure for constitutional issues raised by parties to cases in lower courts to review the decisions of refusal to refer them to the Supreme Court. The result is that the system, which was designed by the Constitution to be a centralised system of review, is in practice distorted by Law (10/1973) into a

decentralised system. The practice of judicial review depends to a large extent on the will and enthusiasm of judges in lower courts to activate constitutional review and encourage its practice.

2) Unspecialised Court.

The Supreme Court, which is the Court empowered to practice judicial review in the United Arab Emirates, is an unspecialised constitutional court, especially after the addition of cassation jurisdiction to its competence (100). Elsewhere, in other countries, the trend has been to give judicial review to a specialised court created for this jurisdiction or else the courts, through their practice, becoming practically specialised constitutional courts (101). Coupled with the inability of the Supreme Court to refuse or avoid jurisdiction on cases brought to it, the lack of specialisation has an adverse effect on the constitutional role of the Court. Constitutional courts need a wide range of political judgements and emphasis on the different effects of their decisions on present and future development of their respective societies, whereas general courts need more technical legal experience, with only a limited emphasis on the effects of their decisions (102).

3) Retroactive General Binding Effect of Decisions

The decisions of the Supreme Court concerning constitutionality of laws are not only binding on the parties to the case in

which the decision was given, but also on all others in similar situations in the future. The decisions of the Court are binding on all, and although the unconstitutional laws are not removed from the books, they are pronounced null and void for the future (103). The Constitution instructs the concerned government to remove the unconstitutional law as soon as possible (104).

The express constitutional provisions empowering the Supreme Court to pronounce legislation null and void towards all and for the future, have effectively saved the Court from the kind of arguments which surround the practice of judicial review in the U.S. and the allegations of judicial legislation which confronted the American Supreme Court for a long time. What remains for the Supreme Court is the wise use of its given powers. The degree to which the Court uses its constitutional power, and the wide sweep of its general conclusions, can cause confrontation with the legislatures and other political departments of the country. The fact of unconstitutionality of a law is a ground for absolute nullity and therefore ineffectiveness of that law even before the actual unconstitutionality has been declared. The Court discovers the nullity of the unconstitutional law (105).

Chapter Eight Footnotes

1 5 U.S. (1 Cranch) 137 (1803).
For more details, see Chapter Three.

2. See Cappelletti, M. Judicial Review in the Contemporary World Indianapolis, Indiana: The Bobbs Merrill Co., 1971, pix; and McWhinney, E. Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review Dordrecht: Martinus Nijhoff Publishers, 1986, p1.
The reception of the institution of judicial review was more obvious after the Second World War.

3. See Chapter Two of this thesis.

4. U.A.E. Provisional Constitution Article 99, especially paragraphs 2, 3 and 4.

5. See Chapters Three and Four of this thesis.

6. See Chapter Seven of this thesis.

7. For a critical view of the traditional theory of the judicial function, see Freidmann, W., Law in a Changing Society (2nd ed.) London: Stevens & Sons, 1972, pp45-90; and see Chapter Three for discussion of the development of the theory of the role of the judiciary in the U.S..
The adherence to the traditional theory was evident in both civil law and common law countries, and the demise of this theory took place in countries of both legal traditions.
Friedmann, op. cit., p.45.

8. Lochner v. New York, 198 U.S. 45 (1905), (Holmes J., dissenting.

9. See Friedmann, op. cit., p.62.

10. See McWhinney, op. cit., p.xii; and see Chapter Three.

11. See McWhinney, op. cit., p.xv.

12. The preamble of the Constitution holds that:
"...Desiring to create closer links between the Arab Emirates...
Desiring to lay the foundation for federal rule...
We proclaim our agreement to this provisional constitution... which shall be implemented during the transitional period indicated in it..." (the period indicated is five years.)

13. See the driving causes in the cases discussed in Chapter (9)

14. U.A.E. Prov. Const. Article 99.

15. Application 1, year (1). For more detailed analysis, see Chapter Nine.

16. According to Article 101 of the U.A.E. Prov. Const. the decisions of the court are binding on all. In several cases the interpretations provided by the Court included making constitutional law.
For example: In application (1 year 4) (the case of federal appellate Courts) the Supreme Court deviated from the system which was clearly intended by the framers of the Constitution for the organization of the federal judiciary. This change carried out by the Court was made necessary by the changing circumstances and the new developments. See Chapter (9).

17. The articles devoted to dealing with the Supreme Court are Articles 95-101 inclusive.

18. Chapters Nine and Ten deal with the practice of the Court since its establishment.

19. Article 96.

20. Article 96.

21. Law (10/1973), Article 3 as amended by Article 3 of law (14/1985). This article provides: "The Court shall be composed of a President and four judges. A sufficient number of alternate judges can be appointed to the Court, provided that not more than one of them is sitting in the constitutional chamber..."

22. Ibid. and Article 9 of law (10/1973) as amended by law (14/1985).

23. Law (10/1973), Article 4.

24. U.A.E. Constitution Article 96. Law (10/1973), Article 7.

25. U.A.E. Constitution Article 97. Law (10/1973), Article 18.

26. U.A.E. Constitution Article 144, Paragraph (2).

27. The decisions of the Supreme Council in substantive matters have to be approved by at least five members of the Council including Abu-Dhabi and Dubai.
U.A.E. Prov. Const. Article 49.
The veto power possessed by the two large emirates can play a vital role in the decision making of the Council.
Relations between the two large emirates are usually of suspicion and competition rather than of agreement. See John Duke Anthony pp104-112; and see Chapter Seven.

28. This can be achieved by several means. One of these is the refusal to extend appointment of alternate judges for limited periods of time, or the complete adoption of the limited renewable period of tenure for the judges of the Court.

29. See Chapter Nine.

30. See Chapter Ten.

31. See McWhinney, op. cit., p45.

32. Ibid., p46.

33. See Kommers, D. Judicial Politics in West Germany: A Study of the Federal Constitutional Court Beverly Hills, California: Sage Publications, 1976, p89.
According to Article 9 of the West German Basic Law half the members of the Federal Constitutional Court have to be elected by the Bundestag and half by the Bundesrat.
See Abraham, H. The Judicial process: An Introductory Analysis of the Courts of the United States, England and France (5th ed.) Oxford: Oxford University Press, 1986, p24.
According to Section 2 of Article 11 of the U.S. Constitution
> "The President... shall nominate and by and with the advice and consent of the Senate, shall appoint... judges of the Supreme Court..."

34. U.A.E. Prov. Const. Article 96.

35. For similar remarks on the Kuwaiti procedure of appointment to the Constitutional Court see Al-Saleh, O. Judicial Review Before the Constitional Court of Kuwait (in Arabic) Kuwait: Faculty of Law, University of Kuwait, 1986, pp57-58.

36. See discussion of this matter above in Chapter Three.

37. The competence of the Supreme Court according to Article 99 of the U.A.E. Prov. Const. admits the resolution of disputes between political institutions, interpretation of the Constitution and judicial review of legislation, all of which is by its nature politically sensitive.

38. See for a comparative analysis McWhinney, op. cit., p45.

39. The appointment of local judges for a life tenure can happen gradually, but there are no signs that this will happen in the near future. There are local judges who are qualified enough to fill at least some of the positions in the Court, if not all of them.

40. See Kommers, op. cit., p84.
The justices of the Constitutional Court initiated a battle to remove the subordination they were effectively put under and to the Ministry of Justice by the 1951 Constitutional Court Act. The battle to win the Court's independence started in the very first months of the Court's life. The justices issued a lengthy memorandum addressed to the Presidents of the two legislative houses, the President, and the Chancellor. The Constitutional Court now has:

    1. Budgetary autonomy.

    2. Total control over all internal administrative matters.

    3. The Justices are accorded a status in law corresponding to that of the highest state officials.

    4. The President of the Court enjoys the fifth highest position in the Republic following the President, the Chancellor, the President of the Bundesrat, and the President of the Bundestag.

    The reasons for which the Justices of the West German Constitutional Court initiated the battle for independence are currently present in the case of the Supreme Court of the U.A.E. Nothing short of the status won by the West German Court will ensure an effective functioning of the U.A.E. Supreme Court.

41. The number of the Justices is set as "... a President and a number of judges not exceeding five in all ...". That is, a President and a maximum of four members. U.A.E. Constitution Article 96.

42. The number has been increased by adding the option of appointing alternate judges by Article 3 of Law (10/1973). While nothing in Article 96 of the Constitution suggests or allows such an increase in the membership of the Court.

43. Law (10/1973) Article 9.

44. Ibid.

45. Law (10/1973) Article 10.

46. Law (10/1973) Article 9.

47. Law (10/1973) Article 3,

48. See McWhinney, op. cit., pp74-82.

49. Ibid., p10; and Kommerce, op. cit., p106.
Basic Law Articles 93 and 100.

Article 93 of the Basic law of West Germany under the title "Federal Constitutional Court, Competency" includes the following:

(1) The Federal Constitutional Court shall decide:

1- on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a highest federal organ or of other parties concerned who have been vested with rights of their own by this Basic Law or by rules of procedure of a highest federal organ;

2- in case of differences of opinion or doubts on the formal and material compatibility of federal law or Land Law with this Basic Law, or on the compatibility of Land Law with other law, at the request of the Federal Government, of a Land Government, or of one third of the Bundestag member;

3- in case of differences of opinion on the rights and duties of the Federation and the Laender, particularly in the execution of federal law by the Laender and in the exercise of federal supervision;

4- on other disputes involving public law between the Federation and the Laender, between different Laender or within a Land, unless recourse to another Court exists.

Article 100 Provides under the title Compatibility of Statutory Law with Basic Law:

1- If a Court considers unconstitutional a law the validity of which is relevant to its decision, the proceedings shall be stayed, and a decision shall be obtained from the Land Court competent for constitutional disputes if the Constitution of a Land is held to be violated, or from the Federal Constitutional Court if this Basic Law is held to be violated. This shall also apply if this Basic Law is held to be violated by Land Law or if a Land Law is held to be incompatible with a Federal Law.

2- If, in the course of litigation, doubt exists whether a rule of public international law in an integral part of federal..., the Court shall obtain a decision from the Federal Constitutional Court.

50. In the original jurisdiction of the Constitutional Court, it had the power to provide advisory opinions on the meaning of constitutional provisions, which is a part of the competence of the Supreme Court of the U.A.E. The original jurisdiction of the Constitutional Court did not include hearing constitutional complaints by individuals, which is not included in the powers of the Supreme Court of the U.A.E.

51. Articles 123, 124 and 151 in addition to the main jurisdiction of the Court contained in Article 99.

Article 99 states that the Supreme Court: "...shall have jurisdiction in the following matters:

1- Various disputes between member Emirates in the union, or between any one Emirate or more and the Union Government, whenever such disputes are submitted to the Court on the request of any of the interested parties.

2- Examination of the constitutionality of Union Laws, if they are challenged by one or more of the Emirates on the grounds of violating the Constitution of the Union.
Examination of the constitutionality of legislations promulgated by one of the Emirates, if they are challanged by one of the Union authorities on the grounds of violation of the Constitution of the Union or of Union Laws.

3- Examination of the constitutionality of laws, legislations and regulations in general, if such request is referred to it by any Court in the country during a pending case before it. The aforesaid Court shall be bound to accept the ruling of the Union Supreme Court rendered in this connection.

4- Interpretation of the Provisions of the Constitution, when so requested by any Union authority or by the Government of any Emirate. Any such interpretation shall be binding on all.

5- Trial of Ministers and Senior officials of the Union appointed by decree regarding their actions in carrying out their official duties on the demand of the Supreme Council and in accordance with the relevant law."

Other matters included in this article are conflict of jurisdiction between federal and local courts and between the emirates. The Constitution allowed addition of "Other Jurisdiction" by the Constitution or by law to the Court.

Law 10/1973 in Article 33 added the interpretation of treaties and international agreements to the Court.

Law 17/1978 added the cassation jurisdiction in all matters to the Supreme Court.

Articles 123 and 124 of the Constitution give the Supreme Court the power of resolving disputes between the emirates and the federal government about their rights to enter into treaties and international agreements, in case of objection

from the other layers of government.

Article 151 gives the Supreme Court jusrisdiction in resolving disputes about the supremacy of the Federal Constitution and Federal Laws.

52. These powers include subjects included in paragraphs (5), (6), (7) and (8) of Article 99 of the Constitution.

53. U.A.E. Constitution Article 99 (4). Law (10/1973), Article 33(5).

54. See McWhinney, op. cit., p15.

55. Ibid., p16.

56. See Kommerce, op. cit., p282.

57. According to Article 65 of law (10/1973), if any of the chambers of the Supreme Court decide to deviate from a principle layed down by the Supreme Court in an earlier case, this chamber has to refer the matter to the plenum of the Supreme Court, which must then decide on the matter in the presence of all its members.
The effect of this rule is to enhance the authority of and stabilise the principles established by, the Supreme Court.

58. See Chapter Nine.

59. The history of the advisory opinion jurisdiction of the West German Constutional Court show some of the possibilities that exist for the use of this power. See Kommers, P. (282) and McWhinney, op. cit., p17.

60. The original period of duration provided for in the Constitution expired on 1 December 1976 (U.A.E. Prov. Const. Article 144 (1)). Before the expiration of the initial period of operation of the Constitution, a draft was prepared for a Permanent Constitution. Due to the failure of the emirates to agree on the new Constitution, they opted to extend the duration of the Provisional Constitution. The Provisional Constitution has been extended three times, the last of which was in 1986 and it will expire in 1991. The extensions of the Constitution are likely to continue. See Chapter (7).

61. U.A.E. Constitution, Article 99 (2). Law (10/1973), Article 33 (2) & (3).

62. West German Basic Law, Article 93 (1) and (2). See McWhinney, op. cit., p11; and Kommerce, op. cit., p106.

63. U.A.E. Constitution, Article 101.

64. U.A.E. Constitution, Article 99 (3). Law (10/1973) Article 33 (4).

65. Law (10/1973), Article 58.

66. Ibid.

67. Ibid.

68. Ibid.

69. In the application for constitutional interpretation of law (14/year 9), appellants in the case before the Supreme Court decided to apply for interpretation from the constitutional chamber for consideration of unconstitutionality.

70. The language used in Article 99 (3) seems to be deliberately widened to include virtually any kind of legislation.

71. In some constitutions there are special procedures to review the decisions of inferior courts of refusing to allow reference of constitutional questions to the constitutional courts. An example of such procedures is Article 4 of the statute of the Constitutional Court of Kuwait which gives the party whose request to refer a constitutional review question is refused, the right to appeal to a specialised committee of the Constitutional Court through specialised procedures.

    See Al-Tabtabai, A. The Federal System in the United Arab Emirates Cairo: Cairo New Press, 1978, p325; and Al-Saleh, op. cit., p50.

72. See Cappelletti, op. cit., p79. For a comparative discussion of the inherent risks and defects in the (incidental) way of judicial review.

73. Among the special requirements set by Law (10/1973) is the requirement of raising the constitutional question to the Supreme Court through a qualified attorney (Article 52). This requirement, and the same original procedure, contribute to rendering constitutional review procedures expensive. This may serve to deter individuals or other parties from contesting a case, or else to abandon their case if constitutional questions become involved.

74. U.A.E. Constitution Article 99 (1). Law (10/1973), Article 33 (1).

75. Law (17/1987).

76. See Taryam, A. The Establishment of the United Arab Emirates

1950-85 London: Croom Helm, 1987, p207.

77. See Blair, P. Federalism and Judicial Review in West Germany Oxford: The Clarendon Press, 1981, p2 for comparison between West Germany and U.S. Federations.

78. See Al-Tabtabai, op. cit., p342ff; and Peck, M. The United Arab Emirates: A Venture into Unity London: Croom Helm, 1986, p132.

79. See Commerce Clauses cases of the U.S., which are discussed in Chapter Five.

    See cases about distribution of power on the federal level in West Germany. Examples of these cases are:

    1. The South West Case (Decisions of the Constitutional Court 1, 14) (1951).

    2. The Boiler Judgement (Decisions of the Constitutional Court 11, 6) (1960).

    For more detail, see Blair, op. cit., pp50-65.

80. An example of the requirement of positive judgement of the Court is the determination of the limits of the powers of both levels of government in conclusion of treaties, according to Article 124 of the Constitution.

81. The reality of the Court's ability to provide positive interpretations of the Constitution is reinforced by giving the Court's decisions a binding effect on all people and institutions concerned by Article 101 of the Constitution.

82. See Elazar, D. Exploring Federalism Tuscaloosa, Alabama: University of Alabama Press, 1987, p128.

83. See Blair, op. cit., p3; and McWhinney, op. cit., p168.

84. U.A.E. Prov. Const., Article 99.

85. See Cappeletti, op. cit., p41; and McWhinney, op. cit., pp168-184, for comparative analysis of the value and importance of federalism in the work of constitutional courts.

86. See The Preamble of the Constitution, which announces:

    "... It is our desire ... to establish a Union ... to promote a better, more enduring stability and a higher international status ...".

87. See Al-Tabtabai, op. cit., p364.

88. See Chapter Seven.

89. The crisis of 1979 proved the effectiveness of the financial independence of the emirates and the degree by which they can disrupt the operation of the federal government through this financial power.
See Taryam, op. cit., p243.

90. Article 144 of the U.A.E. Constitution limits the duration of the Constitution to 5 years. The preamble of the Constitution calls for a stronger Union to be included, formed by the permanent Constitution.

91. The experience of the Supreme Court of the U.S. proves the availability of a wide range in which the constitutional courts can move in development of constitutional law.
See Tribe, H. Constitutional Choices Cambridge, Massachusetts, 1985, pp5-8.

92. See Cappelletti, op. cit., p13; and von Mehren, A.T. & Gordly, J.R. The Civil Law System: An Introduction to the Comparative Study of Law (2nd ed.) Little, Brown, 1977, p220.

93. Later the "Tribunal de Cassation" was called "Cour de Cassation" and changed from being a political committee to being a judicial body. Nonetheless, the special purpose and theoretical basis for the cassation jurisdiction remained unchanged.
See Cappelletti, op. cit., p14; and von Mehren & Crordly, op. cit., pp220-228.

94. See Cappeletti, op. cit., p16.

95. See Kommerce, op. cit., p49. The High Courts of West Germany are:

    1. The Federal Constitutional Court.

    2. The Federal Supreme Court.

    3. The Federal Administrative Court.

    4. The Federal Labour Court.

    5. The Federal Social Court.

    6. The Federal Finance Court.

96. See Cappeletti, op. cit., p62; and Abraham, op. cit., pp181-187. About 90% of the cases decided by the Supreme Court reach it by the Certiorari. In this way a petitioner,

otherwise having no right to the Court, has the privilege to petition the Supreme Court to grant him a writ of Certiori. The Court has a wide range of discretionary powers either to grant or refuse to grant a writ of Certiori. Unless the Court detects an issue of substantial significance or controversy in the case, or happens to be specially interested in it, the application will be rejected. In this way the Supreme Court can avoid being flooded by cases or controversies of minor interest of of no real general importance. The Supreme Court in the U.A.E. and generally Civil Law Courts of last resort, lack such devices by which they can avoid cases of no real or general interests. The result of the lack, or the minimal availability of discretion in Civil Law Courts of last resort is the creation of specialised courts of last resort. There are no such specialised courts in the U.A.E.

97. According to the competence of the Supreme Court under Article 99 of the U.A.E. Constitution and under Article 33 of Law (10/1973) the binding effect of the Court's judgements is according to Article 101 of the Constitution and Article 67 of law (10/1973).

98. See Cappeletti, op. cit., p51.

99. Law (10/1973), Article 58.

100. The addition of the Cassation Jurisdiction to the Supreme Court was according to Law (17/1978).

101. For more detail and special examples of this trend in Constitutional Court, see McWhinney, op. cit., p272.

102. Two of the most prominent institutions practising constitutional review, namely the U.S. Supreme Court and the Constitutional Council of France, do not require judicial experience, or even official legal training, in their prospective members. See McWhinney, op. cit., p273; and Abraham, op. cit., pp52-64.

103. U.A.E. Constitution Article 101. Law (10/1973), Article 67.

104. Article 101.

105. Al-Tabtabai, op. cit., p326. For a similar analysis of the Kuwaiti system of judicial review, see Al-Saleh, op. cit., p34. For a more general comparative analysis, see Cappeletti, op. cit., p88.

CHAPTER NINE

THE EARLY DEMANDS FOR THE SUPREME COURT'S CONSTITUTIONAL INTERPRETATIONS

The Decisions of the Supreme Court Delivered from 1973 to 1978.

The Constitution called for the enactment of a law to regulate details of structure and procedure for the Supreme Court (1). Law 10/1973 (the Supreme Court Statute) was enacted in 1973 and published in August of the same year (2).

The first case to come before the Court, was registered on 24 October 1973, about two months after establishment of the Court, and the decision was given on 29 November of the same year (3). The Court's business during the period from 1973 to 1978 was dominated by applications for Constitutional interpretation (4). Each application may contain more than one request (5). The Court's decisions in these applications, therefore, may establish more than one principle. In its reply to the applications before it, the Court may need to establish principles which are not necessarily answers to the questions put before it (6). There was a need for authoritative interpretations from the Court for several reasons. The Court's interpretations were needed to remove ambiguities from the Constitutional text (7), and to settle differences between competing Federal Institutions (8). The Court's interpretations were, moreover, needed to aid the new Federal Institutions to pass through the critical first few years of their formation.

The Court's decisions during this period had a special

importance, namely by providing interpretation which supported the Federal system and Institutions, thus producing a stabilising effect on the whole country and its chosen Constitutional structure. The new country, as organised by the Federal Constitution, needed to be enlightened as to the proper functioning of the Constitution, and objections to this functioning needed to be disarmed. All of these needs were satisfied by the Court's decisions.

A. The Federal Distribution of Powers in the First Two Applications to the court.

The distribution of legislative and executive power between the centre and the constituent units is one of the main characteristics of Federal systems (9). Federalism is one of the most important features introduced to the Emirates by the new Constitution (10). The idea and practice of Federal Government was new to the area. The Constitution distributed the legislative and executive powers between the Emirates and the Federal Government (11). The language used, inevitably, led to interpretational differences of opinion. The factors which led to the formation of the specifically Federal Government (in contrast with either the complete political separation of the Emirates, or else a unitary Government) could, within the possible interpretations to the Constitution, continue to exert their influence in the emergence of either a strong Federation, or else a restricted one. The stronger Federation is preferred by the newly organised Federal Authorities, whilst the restricted

Federation is preferred by those Emirates which are still suspicious of the Federation and its authorities [12]. There are some provisions in the Constitution which can produce either a strong, or a weak Federation, according to the interpretations given to them [13]. By Constitutional design, the Supreme Court is the arbiter in these matters, and the strength of the Federation will depend, to a great extent, on its vision and on the position it is willing to take.

In view of the above, it is unsurprising to find the Court faced with questions about the distribution of powers in the first two applications submitted. The opinions of the Court in these two cases should be viewed in context and should be understood to mean more than just providing answers to specific authorities' questions; rather these opinions are precedents in a subject which was still in the moulding process and the effects of the Court's opinions in these two cases have profound and long-lasting effects.

The First Application: The Emigration Law Case

(Application for Constitutional interpretation 1/1, 29 November 1973). 15 Official Gazette [14].

This application was addressed to the Court from the Ministry of the Interior. The Public Prosecutor urged rejection of the application because an individual Minister does not have the capacity to submit applications to the Court according to Article 99 (4) of the Constitution, which states that only the

Federal authorities are capable of submitting applications of interpretation to the Court, and these authorities do not comprise individual ministers (according to Article 45 of the Constitution) (15). The newly created Court, eager to start its business and to present itself on the scene, rejected the call of the Public Prosecutor and decided to proceed in the case. In the Court's opinion, the Ministers are collectively responsible for their works and policies (16). Depending mainly on the collective responsibility of Ministers in its argument, and on the known fact of the recent creation of the Federal machinery and the lack of the proper procedures for representing the Council of Ministers (17), the Court accepted the case against a strong objection from the Public Prosecution. In this application there are several questions, and to each the Court supplied an answer, interpreting Constitutional provisions and providing priorities and general principles.

This case was effectively started because of problems in the application of a newly drafted Federal Law. The Ministry of the Interior is the authority responsible for the implementation of the Emigration and Residency Law (Law 6/1973). As a consequence of its being faced with several difficulties in the application of this law, the Ministry moved to bring this enquiry to the Court to help resolve the problems, and provide it with authoritative opinions and guidance. The application submitted to the Supreme Court involved numerous questions concerning interpretation of several Constitutional provisions.

This case represented the enthusiastic pursuit by a federal

ministry for more power. The constitution was in its early years and the limits of power in the federal system created by it were still vague. The questions presented were grouped and phrased in a manner inviting an interpretation of the constitution which favoured the federal authorities.

Questions involved in this case:

The Ministry of the Interior presented a list of questions in its application to the Supreme Court. This list included:

1 - Whether matters included in all Criminal Federal Legislation are within the scope of Paragraph (6) of Article 99 of the Constitution? (18). And whether these crimes can be understood to violate the interests of the Federal Government.

2 - Whether violation of Criminal Federal Legislation, including Criminal Provisions of Federal Emigration Law (19), are within the jurisdiction of the Supreme Court according to Paragraph (6) of Article 99 of the Constitution.

3 - What is the purpose behind separating legislation from execution of matters included in Article 121 of the Constitution? And what is the purpose of giving legislation in these matters to the Federal Government yet execution to the Emirates?

4 - What is the purpose of giving the Federal Government legislative power in "Major Procedural Legislation"? (20)

5 - What is the meaning of "Major Procedural Legislation"?

6 - Does the Constitution authorise the Emirates to enact legislation which contradicts Federal legislation, in Major Procedural matters?

7 - What is the effect of the exception contained in Article 149 of the Constitution, on the application of Article 121? And what is the significance of the Federal supremacy of Article 151 on these matters? (21)

8 - Whether Federal Law regulating Judicial relationships among the Emirates (Law 11/1973), which is requested by Article 11(a) of the Constitution, is a "Major Procedural Legislation", and, accordingly, whether the Federal supremacy and the Federal occupation of the field prevents the Emirates from interfering in these matters.

9 - Whether Article 121 of the Constitution abolishes the contents of Article 119 of the same Constitution. Possibly because the matter which is the subject of Article 119 is included under Article 121.

10 - Whether the requirement of regulation with "utmost ease" of Article 119, in regulation of Judicial relationships among the Emirates, has a binding effect over the Federal legislature.

As a consequence of the U.A.E., at the time of presentation of this application, having been in a transitional period, and because of the existence of a wide legislative vacuum, many important questions still awaited answers. It is obvious from the questions in this case, that many Constitutional provisions are open to more than one interpretation. This case presents several

examples of the probability of the existence of different and variable meanings to the Constitutional provisions, namely:

1 - What are "Major Procedural Legislations"? What is major and what is minor? Who sets the standard by which these legislations can be classified? It is obvious that the Constitutional provisions cannot provide much help in answering these questions.

2 - What are the crimes that "... directly affect the interests of the Union ..." ?

These are only examples, certainly there exist a great many other provisions of the Constitution which give rise to several possibilities of interpretation and which can come to the Court for resolution and authoritative answers. It is obvious that there was more than one motive for bringing this application. One purpose of the application was to gain an authoritative declaration from the Court in a matter which was still in dispute as to whether it fell under Federal or Local Authority. The way in which the questions were organised and styled, are evidence of this driving force behind the application. Another cause was the quest for guidance, especially as to whether the Judicial authority has competence in related matters.

The Ministry of the Interior, by presenting this application wanted to achieve several results. The Ministry wanted jurisdiction over all Federally criminalised acts, including those which result from violation of Emigration Laws, to be given to the Federal Judiciary. The Federal Judiciary, at the time of the

enquiry, was composed of the Supreme Court alone. The Ministry wanted this jurisdiction to be given to the Supreme Court under Article 99 (6) as crimes against the interests of the Federation. The benefits of giving the jurisdiction to the Supreme Court were numerous. One benefit was that the Supreme Court is a Court of last instance, and there are no appeals from its decisions. Another benefit of giving the jurisdiction to the Supreme Court was that it is geographically better for the Ministry to bring cases to one Court situated in the same city as the headquarters of the Ministry itself, rather than to argue the case in different courts dispersed throughout the Emirates. A third benefit was that the legal rules and procedures which would be applied by the Supreme Court would be more consistent and simpler for the Ministry, than to involve local judiciaries with their variant details of regulations and procedures. These same benefits explain the reasons for which the Ministry moved to invoke the Federal Supremacy of Article 151 and the Federal occupation of the field of Articles 121 and 149 of the Constitution.

Principles announced by the Court in this case.

In this case the Supreme Court was put in a position to test its vision of the Federal balance in the country. Was the Court aware of the aims of the Ministry which submitted the application? And was the Court prepared to submit to those demands? What role did the Court choose for itself concerning the Federal distribution of power? Where was the Court prepared to draw the line between the Emirates and the Federal Government

in matters which are not clearly stipulated in the Constitution? The answers to these questions would depend on the stance that the Court took in this case and on the decisions it produced.

The decision of the Court contained several principles regarding interpretations of the Constitutional provisions and policies.

1 - The Supreme Court has jurisdiction, according to Article 99 (6), only over crimes which represent direct intrusions on basic interests and foundations of the Union.

2 - Not all acts criminalised by Federal legislation are within the jurisdiction of the Supreme Court. For acts criminalised by Federal legislation to be within the jurisdiction of the Supreme Court, they have to be of such a nature as to represent intrusions on basic interests and foundations of the Union.

Whilst the Court did not mention those crimes stemming from violations of the Emigration Law in particular, the test announced by the Court in this case excludes these crimes from the jurisdiction of the Court. The motive behind the establishment of such a test in this early case can be understood to be the desire of the Court not to be overburdened with a vast number of cases.

3 - The distribution of legislative and executive powers, which is included in Article 121 of the Constitution, stems from the Federal nature of the country. In the Federal system, which is adopted by the Constitution, there is a central

government which has its sovereignty and international personality on one hand, and on the other, there are several Emirates, each with its own sovereignty and powers, both legislative and executive, by which it has the right to practise its powers independently. The Emirates have powers in areas which are not specifically given to the Federal government.

This principle partly serves the purpose of the Ministry because it announces clearly that areas of power, which are reserved for the Union, are forbidden to the Emirates. This principle was needed by the Ministry to exclude the Emirates from legislating in "Major Procedures" which is, by Article 121, reserved to the Union.

4 - Major legislation in civil and criminal procedures is any legislation which deals with the general rules for adjudication and specific requirements in civil and criminal cases. The legislation may deal with the bringing of cases before the Courts, the organisation of levels of the Courts, organisation of clerks and ancillary personnel, procedures for handling decisions, organising appeals, execution of judgements and other related matters. Moreover these regulations cover collection of evidence and its presentation, interrogation, prosecution and execution of judgements in criminal cases.

This principle further advanced the cause of the Ministry, though not in this particular case, because it interpreted the Federal Governments' power in the issuance of legislation

concerning major procedures in a fairly wide manner. In this case the Ministry wanted to include specific legislation (22) under the "Major Procedural Legislation" of Article 121, but the Court distinguished between the two. The motive of the Ministry was to exclude the Emirates from interference in this matter. Whilst the Ministry's desire to include the specified law under "Major Procedural Legislation" was not satisfied by the Courts' decision, the principle is a fairly wide one and opens the door for future Federal legislation in the subject, with the combined benefit of excluding the Emirates from intervention in the matter.

5 - The Emirates have the right to issue legislation laying down detailed procedures for the application of the general rules contained in the Federal Major procedural legislation. The Local legislation should observe the limits imposed by Articles 149 and 151. These limits are: (i) Federal occupation of the field of Articles 149 and 121 which means the Emirates are excluded from matters of Article 121 when, and to the extent that, the Federal Government occupies the field and (ii) the supremacy of Federal legislation, which means that Federal legislation prevails over Local legislation, if the Federal legislation is properly enacted in areas within the power of the Federal Government, according to the Constitution.

The details of the principle in this case, had a negative effect on the aims of the Ministry, namely its insistence of

mentioning Article 151 in addition to Articles 121 and 149, and the inclusion of a question concerning the authority of the Emirates in contradicting Federal legislation. Their aim was to obtain a declaration which excluded Local legislation completely from areas in which there are Federal regulations.

6 - There are no contradictions between Articles 119 and 121 of the Constitution, therefore both are still applicable. Each of these articles has its own specific meaning and specific area of application.

The aim of the ministry's enquiry in this matter was to obtain a declaration including matters of Article 119 in the general area of "Major Procedural Legislation" of Article 121, therefore excluding the Emirates from interference as far as there is Federal legislation in the matter. The Court's decision clearly rejected the demands of the Ministry concerning this matter.

7 - Article 119 of the Constitution ordered the issuance of Federal Law to regulate "...with utmost ease..." those matters pertaining to the execution of requests of commissions in judicial proceedings, the procedures of serving judicial documents and surrender of fugitives among member Emirates. All of these matters, in which the Emirates have judicial power, are those matters left by the Constitution for the Emirates. The Constitution required that Federal Law regulate these matters with "utmost ease", but it did not provide any measure of guidelines for the ease required, which puts this matter within the judgement

of the legislature, within the supervision that is included in the Constitution.

The supervision mentioned by the judgement is most probably the supervision practised by the Court in its review of compatibility of legislation with the Constitution. (23)

Other than these principles, the Supreme Court announced its power regarding the Constitution and legislation. The Court ruled that its power in interpreting the Constitution was to remove ambiguities and clarify matters in the constitutional provisions which were unclear, and to harmonise the application of these provisions within the country. The power of the Court is to interpret constitutional provisions and does not include interpretation of legislative acts unless this is needed to determine their compatibility with the Constitution.

The need for the guidance and principled interpretations by the Court is evident from this case despite its announcement that it only removes ambiguities from constitutional provisions. The fact is that there are open-ended constitutional provisions requiring, not interpretation in the strict sense, but judgement, and the Court is required to make this judgement. The provisions which were included in this case, are examples of the need to inject more details and to use judgement in interpreting constitutional provisions.

The Second Application: The Case of Social Security Law

(Application for constitutional interpretation 1/2, 14 April 1974). Not published in the Official Gazette [24].

This case was brought to the Court by the Council of Ministers because of a dispute it had with the National Council about the powers of the latter with regard to the legislative process [25]. The case involved a request to define the meanings of "legislation" and "execution" which are contained in Articles 120 and 121 of the Constitution. According to these definitions, the spheres of power of the two levels of Government, as well as those within the Federal Government would be affected.

The question of the powers of the Council of Ministers and the National Council arose in the process of enactment of the Social Security Law [26]. When the bill of this law was presented to the National Council from the Council of Ministers, the former suggested amendments to the bill. The bill was transferred to the Supreme Council to be discussed and considered for enactment. The Supreme Council approved the original contents of the bill, without the amendments suggested by the National Council, and the President signed it to become law. The National Council objected to the enactment of this law as being in violation of the procedures established by the Constitution [27]. The National Council insisted that the bill was supposed to be re-submitted to them, in the event of its amendments not being accepted by the Supreme Council, so that the enactment procedure was as stated in the Constitution.

The Principles announced by the Court in this case:

In this case definition was requested of the general terms of "legislation" and "execution" within the context of Articles 120 and 121. The Court in this case established standards by which acts can be determined to be either legislative or executive. In future disputes, as to the nature of any act, whether it is legislative or executive, the Supreme Court is the competent authority to resolve the dispute, according to its original powers and along the lines of the general principles it announced in this case. It is the Supreme Court which has the competence to resolve disputes between, and answer questions from, Federal and Local Authorities. It is the Supreme Court which sets the standard for classifying acts as either legislative or executive. It is the Supreme Court which is competent to resolve differences about classification of acts as legislative or executive, if submitted to it, in the future, by the relevant authorities. The Court pronounced several principles in its decision in this case:

1 - The meaning of "legislation" in Articles 120 and 121 of the Constitution is the general rules regulating interactions among the subjects of the law. This legislation is issued by the competent Federal Authorities in accordance with the procedures prescribed by the Constitution. It takes the form of a statute, a decree which has the power of law, or a delegation by a law, and within the limits established by that law. All matters contained in Articles 120 and 121

should be regulated by such legislation, not by any inferior form of regulation which does not have the essential characteristics of legislation. The legislation has to be confined to the limits prescribed by the Constitution. It has to be general in nature, not directed to specified persons, and has to exclude unnecessary details, all of which should be left to the executive authority.

2 - The meaning of "execution" in Articles 120 and 121 of the Constitution, is the administrative acts which are performed by the competent authorities. These acts are those which are required for operation of the legislation, and can take two forms. They can be in the form of general executive ordinances, prescribing detailed rules for the application of the legislation, or in the form of decisions concerning individual cases relating to matters necessary for the operation of the legislation, such as employment of people who will work on, and supervise the execution of, the legislation, or other kinds of acts, the purpose of which is to simplify and remove obstacles from the execution of the legislation. The executive acts have to be performed without unnecessary delay, especially if the legislative provisions are not self-executing.

3 - Whilst the Emirates have executive power over matters contained in Article 121, the Constitution made a special condition for the delegation of this power. They have, according to the Constitution, to be without prejudice to the provisions of Article 120. This condition means that if

there is an eminent connection between matters of Articles 120 and 121, so that the execution of both of these matters is inseparable, then the execution of both these matters has to be within the power of the Federal Government, in order not to prejudice the delegation of power in Article 120. This exception should be limited to the minimum possible extent, in order not to hinder or abuse the distribution of power in the Constitution.

4 - The founders of the Constitution intended to support the Federation by providing the Federal Government with powers sufficient for it to achieve its goals, whilst protecting the independence of the Emirates. The distribution of legislative and executive powers between the Emirates and the Federal Government stems from the Federal nature of the Constitution. The Constitutional limitations on the powers of the Federal and Local Governments, have to be applied logically and with a view to preserve the balance intended by framers of the Constitution.

The Council of Ministers presented this case to the Supreme Court, requesting a pronouncement on the division of powers within the Federal Government. The Council wanted the Court to announce in its favour, limiting the authority given to the National Council. The Court's decision, however, favoured the National Council by its insistence that, in the event of disapproval of the National Council's interventions, re-submission of bills to the National Council is part of the legislative process.

Although this case was presented to the Court as a result of disagreement between the Council of Ministers and the Federal National Council, the provisions invoked and the questions it presented, were equally important for the Federal balance as it was for the competition for power between the original parties to the dispute.

The Court's interpretation of Articles 120 and 121 and its principles, are obviously benefiting a stronger Federation because of several attitudes and stances adopted by the Court:

1 - The Court invoked the preamble of the Constitution, and used it to achieve the interpretation which it gave to Articles 120 and 121 in this case. This has resulted in a favourable conclusion for the Federal Government. This was an effort by the Court in the direction of strengthening the Federation. So, instead of engaging in a literal interpretation of the Articles requested, the Court moved to use the preamble to support the Federal Government.

2 - The use of the preamble as a binding Constitutional Provision is significant in itself. The consequence of the Court's reference to the preamble is that, in the future if there is doubt about whether or not the Federal Government has a certain powers in relation to the Emirates, this doubt should to the extent possible, be resolved to strengthen the Federal Government, according to the attitude and desire of the framers of the preamble.

The Court's interpretations of the Constitution have a binding effect [28], and can be used in the future by the

Federal Government or other interested parties, so its use of the preamble and the consequences of this use, all have important significance for the future in the direction of supporting the Federal powers. The Court in this case removed the possibility of the mere guiding effect of the preamble, and stressed its binding effect, with significant consequences for the powers and future of the Federal Government.

3 - The combined effects of the Court's attitude, which was favourable to the Federal Government, and of its use of the preamble as a binding part of the Constitution is an interpretation of the distribution of power which is clearly supportive of the Federal Government. The interpretation of the first paragraph of Article 121 (29) that was given by the Court is clearly in favour of the Federal Government. Although the Court restricted its interpretation of Article 121 (first paragraph) with certain conditions, the fact remains that this interpretation is a significant step in favour of the Federal Government. The principle of giving executive power to the Federal Government in matters covered by Article 121, if their execution is inseparable from matters of Article 120, has been established by the Court. The existence of the binding conditions will be in the usual cases a relative fact which will need judgements concerning the surrounding circumstances to prove its existence or not. The effect of this is the possibility of increased powers

for the Federal Government. The Court opened the door to the addition of new powers. The use of this opportunity however, will depend upon the Federal Government taking advantage of the Court's interpretation.

The General Approach of the Supreme Court Towards the Federal System.

The Court's attitude towards the Federal system during this period was to emphasise its importance to the Constitution, and the priority of the interpretation which protects and strengthens this system. The preservation of the Federal system, besides the preservation of the independence of the Emirates, requires the promotion and support of the Central Government and its powers. The Court was not willing to submit to all the desires of the Federal officials but, nevertheless used its interpretations for the support of the Federal Government through a cautious attitude.

B. The Supreme Court and the Powers of the Federal National Council.

Although the Federal National Council has only a consultative role to play in the legislative process, it can play a useful role in checking the other Federal legislative authorities, by disputing projected laws, amending or completely rejecting them (30). Because of the possibilities for the National Council to participate, and the effects it can produce, the Council became involved in several disputes about the extent and effects of its

interventions in the legislative process.

The Supreme Court can, through its authoritative decisions, play the role of umpire between the National Council and the Council of Ministers. It can provide opinions about its view of the balance in the legislative process. These views can have important effects on future developments in the legislative process.

The occurrence of these applications in the early period of the Federation was evidence of the competition for power and attempts to gain authority by the different quarters of power in this transitional period.

The Case of Social Security Law

(Application for Constitutional Interpretation 1/2, 14 April 1974)

"Concerning the effects of objections to, and amendments to bills by the National Council"

This case demonstrates the hesitation and unwillingness of the traditional absolute power holders to submit to the recently created Federal Institutions. Although the National Council is composed of members chosen by the Rulers themselves, the real effect of dissent by the Council is to delay the promulgation of laws. The Supreme Council and its Chairman (the President) represented in this case by the Council of Ministers, insisted on an interpretation of the Constitution which would deprive the National Council of the delaying effect of its dissent upon bills.

The Council of Ministers submitted a draft of Social

Security Law to the National Council who amended the draft, and submitted it to the Supreme Council to be considered for promulgation.

The Supreme Council approved the original un-amended version of the draft and the President promulgated it as originally proposed by the Council of Ministers. This provoked a protest from the National Council, which argued that the step taken by the Supreme Council and its president, was unconstitutional, because it conflicted with Article 110 (3)a [31]. The Council of Ministers argued that there was no breach of the Constitution by the action of the Supreme Council and the President. Article 110 (3)a in fact states:

> "If the Union National Assembly inserts any amendment to the bill, and this amendment is not acceptable to the President of the Union or the Supreme Council, or if the Union National Assembly rejects the bill, the President of the Union or the Supreme Council <u>may</u> refer it back to the National Assembly" (Emphasis supplied).

The National Council's opinion in the second submission to it has no binding effect on the future of the bill. The National Council's opinion is that the second submission of the bill to it is not binding on the President or the Supreme Council, because the bill can be promulgated without the amendments of the National Council, and despite its rejection of it.

The Council of Ministers, acting as the representative of the Government, insisted that, whatever the opinion of the

National Council, the re-submission of the bill to that Council was an option of the President and the Supreme Council. The bill could be promulgated into law despite the opinion of the National Council and without re-submission of the bill to that Council. The National Council argued that if the President or the Supreme Council wanted to override their opinions in proposed legislation, they had a constitutional obligation to re-submit the bills to the National Council.

The Council of Ministers after a period of dispute with the National Council, moved to put an end to the argument by submitting the matter to the Supreme Court to obtain its decision, which would be binding on all, and would remove tensions between the two Councils (32).

Two questions were submitted to the Supreme Court, namely:

1 - A request for an interpretation of Article 110 (3)a, and whether it was compulsory for the President and the Supreme Council to re-submit bills to the National Council, if they want to override its amendments and objections.

2 - A request for interpretation of Articles 120 and 121 and clarification of the meaning of "legislation" and "execution" in these Articles.

The second request is discussed above in this chapter. The first part of this application is examined here below.

The Principle Announced by the Court as to the First Request in this Application.

The question here is about the option of the President and the Supreme Court to re-submit the bills to the National Council. There are two distinct positions: one is that of the National Council, which is that this option is between accepting the amendments and opinions of the National Council, in which case no re-submission is necessary; the second possibility is that the President and the Supreme Council reject the opinions of the National Council, in which case re-submission to the National Council is necessary. The second opinion is that of the Council of Ministers, insisting that this option is not tied to any condition and that even if the President and the Supreme Council want to override the National Council's opinions, re-submission is optional, and abandoning it does not affect the validity of the legislative procedures and does not affect the value of the resulting law.

The Supreme Court stressed that re-submission of bills to the National Council is an option, according to Article 110 (3)a. But if the President and the Supreme Council want to override amendments and objections to bills by the National Council, re-submission becomes a necessary part of the legislative process and the promulgated law will not be valid without it. The consultative nature of the National Council does not affect the requirement of re-submission of bills to it in this case, because this re-submission is required by the Constitution. The President and the Supreme Council have to wait for the opinion of the

National Council, and then it becomes the right of the President and the Supreme Council to promulgate the law despite the opinions of the National Council. This opinion of the Supreme Court is, obviously, against the wish of the Council of Ministers, and more importantly, contrary to the desires of the Supreme Council, and because of this it is a remarkable decision. The Supreme Court produced a decision limiting the power of the Supreme Council, and the result is an effective role for the National Council in limiting the options of the Council of Ministers. The importance of this decision is enhanced by its being the first case brought by the Council of Ministers, desiring a favourable declaration from the Supreme Court in an issue which was in dispute between it and the National Council. The decision of the Court was against the wishes of the Council of Ministers, so it was a lesson to this Council and to the Supreme Council, that the Supreme Court was not a subsidiary of the Council of Ministers and should not be expected to submit to its desires. Several consequences could be expected from the position of the Court in this case, including increased confidence in it from institutions and individuals in their own disputes with the Government and an unwillingness of the Council of Ministers to submit issues to the Supreme Court in future.

The National Council emerged vindicated and with its powers clarified, its future role in the legislative process was strengthened and promoted. To the entire Constitutional system of the U.A.E., which was in the early stages of transition, the

decision was remarkable. Here was an institution which had the courage and the willingness to tell the Supreme Council that, in the case of the Social Security Law, it was in breach of the Constitution, and that it should refrain from doing such a thing in the future. A pronouncement like this was a new occurrence in the U.A.E., and should be understood in its context of its time to be appreciated. The message of the Court's decision was that the Constitution would be applied even against the wishes of the Supreme Council, and that Federal institutions had constitutional powers which they were entitled to exercise. There were new conditions which must be faced and that the rights of the Federal institution had real value which should be recognised.

The Case of Investment and Development Bank Law

(Application for Constitutional Interpretation 2/4, 14 April 1976) 38 Official Gazette.

The Limits to the Amending Power of the National Councils to bills.

This case was brought to the Supreme Court by the National Council in the form of an application for interpretation of Article 89 of the Constitution. The National Council and the Council of Ministers were involved in a dispute about the extent of the rights of the National Council in amending bills which were submitted to it from the Council of Ministers, containing projected amendments to applicable statutes. The cause of this dispute was that the Council of Ministers submitted to the National Council a bill containing proposed amendments to Law

(10/1974) the "Law of Investment and Development Banks". Upon discussion of this bill in the National Council, it was found that the Council of Ministers was proposing to change the name of the bank without any other changes in the law. The National Council decided to add other amendments to the original bill, in addition to the proposed amendments from the Council of Ministers. The Council of Ministers objected to the position taken by the National Council on the grounds that the National Council, according to Article 89, must limit its amendments to the content of the bill submitted from the Council of Ministers, and that its action in this case was a new bill and new amendments, which was beyond the powers delegated to it by the Constitution (33). The National Council submitted an application to the Supreme Court for interpretation of Article 89 of the Constitution and clarification of the powers of the Council towards bills submitted to it from the Council of Ministers.

The Principles Established by Supreme Court in this Case.

The Council of Ministers submitted a memorandum concerning the power of the National Council regarding bills which are proposals to amend existing laws. This memorandum contained the opinion of the scholar who was responsible for completing the final draft of the Constitution (34), and it stressed that bills seeking to amend existing laws should be limited to the subject of the amending bill and should not touch the other contents of the original law unless this is necessary to the operation of

amendments supplied by the National Council to the proposed bill.

The National Council argued that they could add, remove parts, or change parts of bills submitted to it by the Council of Ministers, whether they were new bills or merely bills proposing amendments to existing laws, and that the Constitution contained nothing which restricted the powers of the National Council in the manner it chose to amend or change these bills. They argued that, even if bills containing amendments to existing laws had a relationship to those laws, these bills were in a sense new laws on their own, and since the Council could add to bills of new laws matters and provisions, the contents of which were related to the subject of the bills, this same power should be understood to include the bills proposing amendments to existing laws.

The Supreme Court decided that according to Article 89 of the Constitution, the National Council had the power to add to, delete parts of, or amend bills submitted to it from the Council of Ministers. These alterations should be related to the general subject that the bill was related to, and should concern the same legal relationships which the bill dealt with. The Supreme Court added that if the bill was proposing to amend an existing law, the power of the National Council was limited to that bill, and did not extend to other parts of the original law which were not included in the submitted bill, unless changes to those other provisions was made necessary by the changes desired to be made by the National Council to the bill before it, and that those changes in the original law should be kept to the least possible extent.

The opinion of the Court in this case came according to the wishes of the Council of Ministers, and on the same line as the opinion obtained by that Council from its consultant, the person who was involved in drafting the final version of the current Constitution.

There were critical comments regarding the Court's decision in this case (35) and there were demands that the Supreme Court was supposed to strengthen the powers of the National Council, and that it was supposed to back its demands for more extensive powers and wider interpretations of its authority, on the grounds that its powers were not final, and that the Supreme Council and the President could override the opinions of the National Council if they did not agree with them (36). The Court's opinion was right in the principle it established. The final victor in this case was the Constitution. The Court had proved that it was prepared to stand with the Council of Ministers, and to satisfy its desires, if the Constitution so demanded.

In the first case of disputes between the Council of Ministers and the National Council (37), the Court gave a decision for the latter, whilst in the present case the decision went against them. But in both cases, the Court's opinion was compatible with the Constitutional Provisions, and did not extend them beyond reasonable limits, nor restrict them unjustifiably. If the Constitution denied the National Council the power to introduce new bills, then the Supreme Court was not willing to allow that Council to achieve that power under the disguise of

making amendments to bills submitted by the Council of Ministers. The integrity of the Court and confidence in its work is important. Even the National Council benefited indirectly from the decision which appeared, on the face of it, to be against their wishes. This can be imagined by the increased confidence and trust this decision brought to the Court, and that in the future, all concerned will eventually benefit from this.

General Observations About the Effects of the Court's Decision on the Relationship Between the National Council and the Council of Ministers.

The Supreme Court in its decisions, managed to establish its independence from the Government, and to prove its intentions to defend and promote principled interpretations of the Constitution.

The Court defended the area of power given to the National Council and promoted its cause against the powerful Supreme Council, so the effects of opinions of the former were protected, despite their being, in nature, merely a consultative body.

The Court, through its role as umpire between the two Councils, played a useful part in removing tensions, and solving disputes about the distribution of powers between these two Councils.

C. The Constitutional Limitations on the Jurisdiction and Structure of the Federal Judiciary.

During the early years of the Federation, the Supreme Court was faced with several issues regarding its own jurisdiction and the limits of the structure of the Federal Judiciary which are possible under the Constitution. The period in which these questions arose, was the period in which the guidance and the authoritative declarations by the Court were most in need.

These cases were the results of several factors. One of the main factors, which was true regarding other kinds of issues, was the generalisation contained in the Constitution. The framers of the Constitution chose to deal with a wide range of subjects in general terms, leaving the details to the legislature. In the early stages of the Federation, when the legislative vacuum was extensive, the executive authorities were faced with situations for which there was no legislative guidance, only general Constitutional Provisions. In response they resorted to the Supreme Court for more detailed guidance in the application of the Constitution (38). The legislative authority faced some difficulties in its effort to provide legislation for the application of the Constitution. The Court's help and authority was therefore needed in this situation (39).

There were unclear limits to the jurisdiction and function of the Court in its power of interpretation, whether it included the Constitution only or covered statutes and other legislation as well, which prompted the Court to clarify its power and provide guidance for the future (40).

The Case of Emigration Law

(Application for Constitutional Interpretation 1/1, 24 November 1973) 15 Official Gazette.

The Power of the Supreme Court in the Interpretation of Ordinary Law.

This case, which was the first case to come before the Court, included several questions directed towards the Court. These included enquiries which were mainly requests for interpretation of regular law (41). The Supreme Court answered the questions about the Constitution, but refused to provide interpretations of statutory provisions. The Court took this opportunity to clarify its position on the proper areas of its interpretation power.

The Principle Established by the Court in this Case.

The role of the Supreme Court in interpreting the Constitutional provisions was to remove ambiguities from these provisions, in order to clarify their meaning, and to provide harmony and consistency in their application. The interpretation of the Constitutional provisions did not extend to the interpretation of Statutory provisions, except in the case that an interpretation of a statute was needed for the determination of its compatibility with the Constitution.

The significance of this principle for future cases was

obvious, it was a declaration by the Court that it would not be drawn into providing Statutory interpretations. The Court restricted its duty to interpret Statutory provisions to instances where the compatibility of the provisions with the Constitution was questioned before the Court, and then only to the extent necessary for it to make a decision in these matters. The Court regarded its duty as one which promoted the application of the Constitution and removed doubts and ambiguities from this application, and declared its supremacy against Statutes and other inferior forms of law.

The Case of Federal Appellate Courts

(Application for Constitutional Interpretation 1/4, 14 March 1976) 37 Official Gazette.

According to the original design of the Federal Lower Courts, they were given power to operate in a very limited territory and with limited competence. The general territorial jurisdictions were intended to be mainly the permanent Capital of the Union, which was supposed to be purpose-built in lands donated by Abu-Dhabi and Dubai on the border between them (42). The competence of these Courts was designed to be all matters arising in the permanent Capital of the Union, and "all Civil, Commercial and Administrative disputes between the Union and individuals" (43). The permanent Capital has not been built, but has been abandoned without real prospect of it being built in the foreseeable future. The option given to the Emirates, to transfer their Judiciaries to the Federal Judicial System has

been used by the four Emirates, Abu-Dhabi, Sharjah, Ajman and Fujairah (44). The territory in which the Federal Lower Courts have general competence has been widened extensively. These facts and developments have created certain problems for the Federal Authorities, because the original design of the Constitution for the Federal Judiciary was felt to be inadequate to deal with the emerging situation.

Originally the Emirates were presumed to keep their Judiciaries. The permanent Capital was supposed to be of limited size and therefore a few primary Federal Courts would be sufficient to deal with cases arising within its area. Appeals from the Federal Primary Courts were intended, or permitted, to be made to the Supreme Court. The design provided for the Federal Primary Courts was provisional and transitional in nature, which was the nature of the Constitution. This design was certainly insufficient for the development that followed and for the extended periods of operation that were repeatedly added to the Constitution.

One of the areas which caused the present case to be brought to the Supreme Court was that there was no clear permission to establish Federal Appellate Courts, whereas permission to create Primary Courts was express (45). The primary task of the Court here was not to remove ambiguity from the Constitution, but rather to provide an authoritative interpretation that was flexible and that overcame the deficiency of the Constitution in dealing with the development of the Federal Judiciary.

This case was important for the role that could be played by

the Supreme Court in facing the development that was occurring in the country, and in providing a Constitutional interpretation which enabled the country to develop and deal with new facts in the changing circumstances at the time.

There were two questions included in this case:

1 - Does the Constitution, according to Articles 95 and 103, allow the establishment of Federal Courts of Appeal, which are Courts specialising as Appeal Courts, to hear appeals from the Federal Primary Courts? Is the stipulation of the types of Federal Court which were included in Article 95 of the Constitution, meant to be comprehensive, preventing additional types of Court? Is it permissible, according to Article 95, to establish Federal Appellate Courts? (46)

2 - What is the meaning of the word "final" in the second paragraph of Article 105? Does it allow any kind of appeal from judgements of the Federal Courts in appeals from Local Courts?

Principles Announced by the Court in this Case:

As answers to the two points that the application to the Supreme Court required, the Court announced two principles:

1 - That the Constitution, according to Articles 95 and 103, did not prohibit the establishment of Federal Appellate Courts.

This decision was based on several conclusions. It was clear that Article 103 gave the legislature a wide discretion in organising the procedure and the judicial institution for appeals. This discretion included determination of the

institution to which appeals from Primary Courts could be brought, because the Constitution did not specify the Supreme Court as the only Court to which appeals from Primary Courts could be taken. The language used by Article 103 gave the legislature the option of making appeals from Federal Primary Courts to the Supreme Court. This necessarily meant that if the legislature decided not to take this option, an alternative was to establish Courts whose duty was hear appeals from the Federal Primary Courts. The absence of mention of Appellate Courts in Article 95 did not mean that their establishment was prohibited. The mention of Federal Courts in Article 95 is not meant to be conclusive, and there was no evidence that the Constitution meant to prohibit establishment of other Courts. The general rule was that means which were not clearly prohibited by the Constitution, and which can serve purposes stated in the Constitution, were permitted by the Constitution to the legislature.

In the decision of the Court, there were explanations as to the nature of appeals and their benefits. The conclusion of this was that these procedures would serve the purposes of the Constitution. The main points used by the Court to reach the conclusion of the permission to establish Appellate Courts, were:

(a) The mention in Article 103 of the possibility of appeals from Primary Federal Courts, was optional.

(b) The mention in Article 95 of kinds of Federal Court, was not meant to be conclusive.

(c) That, generally, means which can serve purposes stated in

the Constitution are allowed to be used by the legislature, unless specifically prohibited.

2 - That the meaning of the word "final" in Article 105 of the Constitution, was that these decisions exhausted all ordinary forms of appeal. This does not mean that the decision cannot be subjected to extraordinary ways of appeal, such as Cassation and petition for re-consideration. Therefore, it was permissible for the law to subject decisions of Local Courts, to extraordinary forms of appeal.

From the decision of the Court in this case, it can be seen that the Court was not just involved in removing ambiguities from the Constitutional Provisions. The Court was involved in a judgement as to the permissible discretion allowed in the interpretation of the Constitutional Provisions. Was this interpretation supposed to be limited to the ideas at the time of the drafting of the Constitution, as in the case of the design of the Federal Judiciary? Or was it to take a general and wider discretion to other areas not clearly prohibited by the Constitution? The principle established by the Court in this case of permitting use of means which are not clearly prohibited was a useful one for the development of the Constitution. The question of whether certain means or ways are prohibited can be a question of judgement: that is relative. However, if such a question is brought to the Court, it is prepared, as in this case, to give its authoritative decision, and use its judgement in order to further the general aims established by the Constitution and as the Court understands them to be at the particular time and stage

when they come before the Court. This decision is good evidence about the the ways that can be used by the Court, and the role that can be played by these decisions in promoting the flexibility of interpretation of the Constitution in dealing with the changing circumstances of the country.

The Case of Trial of Senior Federal Officials

(Application for Constitutional Interpretation 3/4, 18 November 1976) 74 Official Gazette.

According to Article 99 (5) of the Constitution, the Supreme Court has jurisdiction in:

> "...trial of Ministers and Senior Officials of the Union appointed by decree regarding their actions in carrying out their official duties on the demand of the Supreme Court..."

The Minister of Justice submitted an application enquiring whether this paragraph of Article 99 included all kinds of actions, or if it embraced only criminal actions.

There were two opposing opinions. The first was that of the Ministry of Justice, which stressed that criminal actions alone were the subject of this paragraph. They argued that disciplinary actions were the jurisdiction of the disciplinary council as far as senior Federal officials were concerned, but Ministers could not be subjected to such procedures. The Ministry of Justice further argued that study of comparative Constitutions revealed that Ministers were usually not subjected to disciplinary procedures and that political responsibility was dealt with sufficiently elsewhere in the Constitution. This suggested that,

according to this paragraph, criminal actions were the only kind of actions which could form the subject for trial of Ministers and senior Federal officials.

The alternative view was represented by the Public Prosecution, which argued that the language used in the relevant paragraph was wide and general enough to include all actions of Ministers and senior officials, either disciplinary or criminal. The Public Prosecution argued that there was no justification for restricting the meaning of the appropriate paragraph.

The Principle Announced by the Court in this Case:

The Court decided that:

1 - Paragraph (5) of Article 99 of the Constitution was comprehensive of all types of act that are related to official duties, and that the jurisdiction in these cases was given to the Supreme Court, whether the people involved were Ministers or senior officials.

2 - There was no basis on which the meaning of the word "actions" in the relevant provision could be understood to mean "crimes", because in another paragraph in the same Article the word "crimes" was being used, which was the use of this word in Paragraph (6). If the drafters or the founders wanted to limit the actions in Paragraph (5) to crime, they could have specified it, as happened in the following paragraph. The Constitution delegated the regulation of details of the trial of Ministers and senior officials (according to who was concerned) to the

legislature, to provide the types of actions, their penalties and their procedures that could be followed in these cases. Until there was legislation providing the intended details there was no basis for specifying and limiting a term in the Constitution, which was both general and comprehensive.

The Court's decision in this case was significant. The reason for the importance of this decision was in the rules followed in interpreting the Constitutional Provisions. The Court registered the idea of restricting the meaning of a Constitutional term which was, by its nature, a comprehensive one. The Court announced that unless there was a clear indication that this general term was meant to be less comprehensive than originally stated, the Court would give the term the full meaning originally designed for it. This kind of interpretation, especially in the context, for example of enumeration of the powers of the Federal Government and the authorities of Federal officials, could be employed to support the Federal Government, as was the case here, because according to the interpretation given to the concerned provision, the result was support for a wider jurisdiction for the Supreme Court than the Ministry of Justice insisted.

General Observations about the Effects of the Decisions of the Supreme Court Regarding the Federal Judiciary.

The Supreme Court displayed, through its decisions in these cases, its flexibility in interpretation of the discretion of the establishment of Federal Courts and the jurisdiction provided for these Courts. The Court's interpretations in these cases allowed wide discretion for the legislature to create the kinds of Courts found to be necessary or useful for the performance and establishment of justice, whether these Courts were Appellate Courts, or any other kinds of Courts. Indeed the language used by the Court was general enough to permit other means which may serve the achievements of the aims of the Federal Government.

The Court in these cases used interpretations which permitted the widening of competence given to it by the Constitution. The general provisions used in specifying areas of competence or in enumerating spheres of power were to be given the full meaning, to be interpreted generally, and to deal with all concerned if they were general provisions. These provisions were not to be restricted unless it was so required by the Constitution.

These rules of interpretation of the Constitution promoted increased powers for the Federal Government. The was necessary because the Federal Government had limited and enumerated powers, whereas the Emirates had the residuary power (47).

Summary

An essential task for the Supreme Court during the period discussed in this chapter was the assurance of the continuation of the federal system and preservation of the balance created by the constitution. The court found for the federal government in some cases and for the Emirates in others. The court resisted demands from the federal executive to be provided with wide powers, whilst the interpretations provided by the court limited the powers of the emirates to ensure the progress and work of the federal system. The court used its interpretation of constitutional provisions, its understanding of the nature of the federal system and the aims provided in the preamble of the constitution to promote the federal balance it viewed as proper and necessary.

The federal institutions created by the constitution needed assurance, so the court provided opinions that helped the Federal National Council and the Federal judiciary to achieve the organisation and jurisdiction necessary for their development.

One of the most remarkable achievements of the court in this period was its refusal to submit to the demands of the federal executive authority, representing the Supreme Council, for concentration of power and for domination in the federal system. The balance created by the constitution and the federal system serves, ultimately, to limit the powers of the executive and the Supreme Council of the Union. The institution which could ensure application of these provisions and preservation of the balance of power was the Supreme Court. The consistent interpretations by the Supreme Court were effective for the assurance of the

application of the constitution and were necessary for the continuation and effectiveness of the federal system.

Chapter Nine Footnotes

1. U.A.E. Prov. Const., Article 96.

2. Al-Jaridah Al-Rasmyyah (The Official Gazette), Aug. 1973.

3. Application for Constitutional Interpretation 1 Year 1, 29 November 1973.

4. There have, in total, been five different applications: 1/1, 1/2, 1/4, 2/4 and 3/4. (The first number is the number of the application, the second number is the year since the Court's establishment, 1973 being Year 1).

5. Application for Constitutional interpretation 1/1 contains more than five requests. See the discussion of the case below.

6. For example, the Court established that it can hear applications for Constitutional interpretations from individual ministers, in Case (1/1).

7. See Case 1/1, below.

8. As in applications 1/2, 14 April 1974, and 2/4, 14 April 1976.

9. See Watts, R.L. New Federations: Experiments in the Commonwealth Oxford: The Clarendon Press, 1966, p164.

10. See the definition contained in Article 1 of the Constitution. See also the purpose established in the Preamble.

11. In Articles 120 and 121 of the Constitution.

12. See Taryam, A. The Establishment of the United Arab Emirates 1950-85 London: Croom Helm, 1987, pp200-219.

13. For evidence, see cases 1/1 and 1/2 below.

14. Application for Constitutional interpretation 1/1. This application was submitted on 24 October 1973 and decided on 29 November 1973.

15. According to Article 45 of the Constitution, there are five Union authorities, these include the Council of Ministers.

16. Article 64, for example, holds that: "...Ministers shall be politically responsible collectively before the President...".

17. At present there is a special institution in the Ministry of Justice, which represents the Council of Ministers before the Courts.

18. According to this paragraph, the Supreme Court has competence regarding: "...crimes directly affecting the interests of the Union...". The paragraph gives some examples of these crimes.

19. Law 6/1973.

20. U.A.E. Prov. Const. Article 121.

21. U.A.E. Prov. Const. Article 149 contains: "...As an exception to the provisions of Article 121 of this Constitution, the Emirates may promulgate legislation necessary for the regulation of the matters set out in the said Article, without violation of the Provisions of Article 151 of this Constitution..". This Article makes the matters contained in Article 121 as concurrent jurisdiction. These matters are within the the power of the Emirates to legislate in, until and to the extent to which there is a Federal legislation in them. In other words, the Emirates can legislate in matters contained in Article 121 until there is Federal occupation of the field in these matters. The Federal Supremacy Principle is contained in Article 151 of the Constitution.

22. Union Law (11/1973) for the Regulation of judicial relationships among the Emirates.

23. The Court did not explain the source of supervision in its decision. The matter of the degree of ease is largely a matter of policy and is hard to be judicially determined.

24. Application for Constitutional interpretation 1/2.

25. This case involved application to interpret Article 110 (3)a of the Constitution.

26. Law 13/1972.

27. According to Article 110 (3)a: "...If the Union National Assembly inserts any amendment to the bill and this amendment is not acceptable to the President of the Union or the Supreme Council, or if the Union National Assembly rejects the bill, the President or the Supreme Council may refer it back to the National Assembly. If the Union National Assembly introduces any amendment on that occasion which is not acceptable to the President of the Union or the Supreme Council, or if the Union National Assembly decides to reject the bill, the President of the Union may promulgate the Law after ratification by the Supreme

Council..."

28. According to Article 101 of the U.A.E. Prov. Const.

29. Article 121 of the U.A.E. Prov. Const. starts with the following paragraph: "...without prejudice to the provisions of the preceding Article, the Union shall have exclusive legislative jurisdiction in the following matters...".

30. See Chapter 7 for more details about the position of the National Council and the effect it can have on the legislation process.

31. See Ibrahim, A. The Experience of the Federal National Council (in Arabic) Beirut: Al Safir, 1986, p115.

32. Ibid., p116.

33. See Al-Tabtabai, A. The Legislative Authorities in the Arab Gulf States (in Arabic) Kuwait: Journal of Gulf and Arab Peninsula Studies Publications, 1985, p264.

34. This scholar is: Dr. Wahid Ra'fat.

35. See, for example, Al-Tabtabai, The Legislative Authorities op. cit., pp266-267.

36. Loc. cit.

37. Application for Constitutional interpretation 1/2.

38. See, for example, The Case of the Trial of Senior Federal Officials, Case 3/4.

39. See The Case of Federal Appellate Courts, Case 1/4.

40. The Case of Social Security Law, Case 1/2.

41. There were included in the application, requests to establish the limits of power of the authorities according to the emigration law. The request was not fashioned as a Constitutional question, though the intention of the applicant may have been to set the standard for what the authorities could, and could not do, as the Constitution prescribed their limits. For example, the case involved a question about the powers of the executive authority in deporting certain categories of immigrants according to Article 42 of Law 6/1973.

42. U.A.E. Prov. Const. Article 9.

43. U.A.E. Prov. Const. Article 102.

44. This option is according to Article 105 of the Constitution which provides: "...All or part of the judicial authorities in accordance with the preceding Article maybe transferred by a Union law issued at the request of the Emirate concerned, to the Primary Union Tribunals...".

45. U.A.E. Prov. Const. Article 95 which provides: "...The Union shall have a Union Supreme Court and Union Primary Tribunals as explained hereinafter...".

46. Article 103 of the U.A.E. Prov. Const. includes: "...The law may stipulate that appeals against the judgements of these Tribunals (Union Primary Tribunals) shall be heard before one of the chambers of the Union Supreme Court...". (emphasis supplied).

47. U.A.E. Prov. Const. Articles 120, 121 and 122.

CHAPTER TEN

THE INCREASED BURDEN ON THE SUPREME COURT AND THE CHALLENGES OF SUBSTANTIVE JUDICIAL REVIEW

The decisions of the Supreme Court since 1978

Through the passage of time, the Federation was able to prove its strength, and its ability to endure became evident. The end of the first term of the Provisional Constitution marked the end of the constitutional system as purely experimental. The extension of its operation for a further period of five years demanded that practical problems be addressed by the introduction of long term solutions, Tensions that occurred in the early stages of the Federation were absorbed by the federal government with success. The oil boom happened at a time favourable to the federal government: 1973, 1974 and 1975 were years of extensive building of the infrastructure and provision of major services (1). The federal institutions became more stable and regarded as permanent governmental institutions. As regard for the constitutional system, and for the country, changed, legislation that had been delayed during the first period began to be prepared (2).

The period from 1978 to the present day has characteristics that distinguish it from the earlier period. The first period was a period of establishment, of removal of doubts and ambiguities. The second period, being a period of continuity and of substantive constitutional challenges, has been different in several major respects.

The first period was a period of establishment of the

country, a move from a country of separate and independent emirates to a federal system composed of emirates committed to surrender parts of their individuality and sovereignty, to create a federal state which would provide them with unity and represent them on an international level. The move to abiding by a written constitution and surrendering parts of their sovereignty created problems which needed the special authority and strong voice of the Supreme Court to resolve, and to serve the purposes, established by the constitution, of promoting development of the federal system.

In this second period, the federal state now established was reasonably stable. It had passed the experimental stage. Doubts about the viability of the federal system and its suitability for the emirates were fading. Fears of the emirates over their sovereignty were quelled. The need for the continuance of the federal system was obvious and the desire of the rulers to continue with it was proved through their stand in overcoming the crisis surrounding the expiration of the original term of the constitution.

What was most needed now was further development of the federal system, which involved confronting several major practical constitutional problems. The U.A.E. has its unique characteristics, which may or may not resemble those of other countries, which were bound to create challenges and problems for the constitution and the legislation which was being introduced into the country.

The U.A.E. is an Arab country inhabited by Muslims. These two factors influence the constitution in particular ways. The country is a developing one, open to the world, and cannot live in isolation; its systems are heavily affected by those of other countries. All of these created their own problems for the U.A.E., some important aspects of which required solutions from the Supreme Court. The Court's decisions in these matters were bound to be of great significance to the country.

Legislation passed since the establishment of the country has not always been obviously coherent with the constitution, giving rise to special problems and requiring special solutions. The Court was, and continues to be, the institution responsible for providing insights, removing doubts and having the final say about compatibility of these statutes and legislations with the constitution.

The start of this period was marked by the promulgation of the cassation law, which transformed the Supreme Court from a mainly constitutional Court to a Court of Last Resort in all matters. This change is significant. It has altered the position of the Supreme Court and resulted in adverse consequences for its constitutional jurisdiction (3).

Because of the large number of cassation cases, we shall choose only some of them which have constitutional significance as examples of the Court's role in the constitutional order and development in the country. All constitutional cases will be reported and discussed, and the cases will be divided according to their subject matter.

Characteristics of Law 17/1978 (Law of Cassation)

This law was promulgated and signed by the President on 18 December 1978, it was published on 30 December 1978 and, according to its provision, it began operation two months later on 1 March 1979 (4)

The petition of cassation is allowed to challenge a decision on the basis of error of Law, either material or procedural (5). Errors of fact cannot be a basis for a petition of cassation. The main purpose of cassation is to control and harmonise interpretation and application of Law. This Law made the Supreme Court the final appellate Court in all matters, other than constitutional matters, and other subjects which are included in the competence of the Supreme Court by the constitution and Law 10/1973. Petitions of cassation can be brought against decisions of federal appellate Courts only (6).

The effect of the introduction of this Law has been, inevitably, to increase the volume of cases before the Supreme Court and to change its emphasis from concentrating on constitutional and federalism cases and other issues of political importance, into a Court of general competence. The consequence of the introduction of this Law was apparent in the practical ending of the applications for constitutional interpretation that distinguished the earlier period of the Court. A possible explanation of the end of such applications to the Court is that it became a Court of general competence and, therefore, was not

worthy and capable of attracting the confidence that a specialised Court may attract. The new face of the Supreme Court is different from that originally introduced by the constitution, though no literal contradiction is available (7).

The operation of the cassation Law necessitated a reform of the composition of the Supreme Court and the formation of its chambers. This introduced reform was necessary to accommodate the increased volume of cases before the Court, due to the petitions of cassation. Law 14/1985 removed the limit on the number of alternate judges that can be appointed to the Court. Originally, Article 3 of Law 10/1973 prescribed that the maximum number of alternate judges that could be appointed to the Court is three. The amended Article 3 provides that: "...a sufficient number of alternate judges can be appointed to the Court...". There is no limit to the number of alternate judges, which is a significant change to the membership of the Court (8). Originally in Law 10/1973 a maximum of one alternate judge could sit on any chamber of the Court (9). Law 14/1985 removed this restriction from most chambers. Only the Constitutional Chamber is restricted to one alternate judge. Matters of the first seven items of Article 33 can be decided by five-member chambers, of whom there could be two alternate judges. Other matters could be decided by chambers of three judges, two of whom could be alternate judges (10).

By the nature of their positions, the alternate judges are prone to pressure. The appointment of alternate judges by decisions from the executive, without consultation with the National Council, and the nature of their terms of office being

fixed yet renewable, place them in a position whereby they are unprotected from arbitrary removal from office. The matters with which the chambers in which these alternate judges sit are concerned can be very important and politically sensitive, such as disputes between the emirates and the Union. In matters arising under the cassation Law, jurisdiction can be heard by panels on which the majority (two out of three) are alternate judges.

The importance of matters included in the jurisdiction of the Supreme Court, either the original or the added cassation jurisdiction, cannot be overlooked; and the new prescriptions for the imposition and formation of chambers provided for by Law 14/1985 deprive the Supreme Court of the special protections provided by the constitution, making a substantial number of members of the Court vulnerable, which gravely affects the special nature and protection required for the Supreme Court.

Cases decided since introduction of the cassation jurisdiction

A. Cases involving federal distribution of power

(a) The Fisheries Case [11]

(Application for constitutional interpretation 5/8, 8 November 1981) 100 Official Gazette.

This is the last of the applications for interpretation that characterised the first period. It was requested by the Council of Ministers on behalf of the Ministry of Agriculture.

This case involves the entry by one of the emirates into

agreement with a neighbouring country to determine rights to engage in fishing activities in adjacent sea areas. As an objection to this agreement, the Ministry of Agriculture moved to obtain a declaration from the Supreme Court that regulation of fisheries is the sole power of the federal government, according to Article 121 of the constitution, and that the emirates do not have the right to enter into agreements with other countries about fisheries. Article 121 provides:

> without prejudice to the provisions of the preceding article, the Union shall have exclusive legislative jurisdiction in the following matters:...protection of agricultural and animal wealth.

Article 120, which precedes this article, prescribed matters on which: "the Union shall have exclusive legislative and executive jurisdiction", and among these matters is: "1 - Foreign Affairs".

Article 123 provides:

> As an exception to Article 120 concerning exclusive jurisdiction of the Union in matters of foreign policy and international relations, the member emirates of the Union may conclude limited agreements of a local administrative nature with the neighbouring states or regions, save that such agreements are not inconsistent with the interests of the Union or with Union laws and provided that the Supreme Council is informed in advance...

Article 149 provides:

> As an exception to the provisions of Article 121 of this constitution, the Emirates may promulgate legislations necessary for the regulation of the matters set out in the said Article without violation of the provisions of Article 151 of this constitution.

Article 151 contains the supremacy clause, that the federal constitution and legislation should prevail over local ones.

The dispute then involves entry into an international

agreement by an emirate, according to the exception provided by Article 123, from the exclusive control of the federal government over foreign affairs according to Article 120 (1). The agreement entered by the emirate concerned, effectively involves regulation of fisheries, and this is an exception of the federal government's power of regulating animal wealth. The questions involved in this case are two:

1 whether or not the regulation of fisheries is a part of the federal government's power of regulating and legislating in matters concerning animal wealth;

2 whether or not the emirates are excluded from legislation in matters dedicated by Article 121 to the federal government's legislative power.

Principles announced by the Court in this case

The Supreme Court announced two main principles in this case:

1 - The first is that regulation of fisheries, restrictions and requirements of special permits is within the legislative power of the federal government. The main basis for such a finding is that fish are part of the animal wealth, the regulation of which is a part of the legislative power given to the federal government by Article 121 of the constitution.

2 - The second is that originally the federal government has the power to regulate matters included in Article 121, but as an

exception to this rule, Article 149 gives the emirates the right to legislate in these matters until and to the extent of federal legislation. Foreign affairs are within the legislative and executive federal power, but as an exception the emirates are allowed to conclude agreements of an administrative nature with neighbouring countries.

The result of these two rules is that the emirates can enter into agreements with neighbouring countries to regulate fishing activities in the adjacent waters. The agreement entered into by the emirate concerned is, as a consequence of the principles and findings of the Court in this case, not inconsistent with the constitution.

This case was not presented in the form of a direct challenge to an act taken by one of the emirates. It was brought in the form of an enquiry and application for the interpretation of some of the constitutional provisions. The real cause of the move to bring this case was to challenge the compatibility of an agreement made by one of the emirates with a neighbouring country with the provisions of the constitution. The reasons for avoiding the direct challenge, resorting instead to an application for advisory opinion were political. Direct challenge by the Federal Cabinet to an action of one of the emirates, necessarily headed by a member of the Federal Supreme Council, is sensitive and could result in negative consequences. Bringing an application for the interpretation of constitutional provisions is less sensitive than a direct challenge of unconstitutionality of an act of an emirate.

It is unclear from the documents available whether or not permission from the Supreme Council was granted for the emirate concerned to enter into this agreement (12). However, regardless of whether or not permission was granted to the emirate, it would have been very difficult for the Supreme Council to agree on challenging this act by an emirate which is headed by a member of the Council. The matter of challenging the constitutionality of the entry of the emirate concerned into the agreement was left to the Federal Cabinet to bring to the Supreme Court. The Cabinet chose a way which saved it from a direct confrontation with the emirate concerned.

The Supreme Court, as is evident from its decision, was aware of the facts of the case. All the political factors affecting the matter involved in this case played some role favouring the emirate concerned. The Supreme Court had under its disposal means by which it could have redressed the balance, and defended the interests of the federal government despite the negative effects of the political factors. Article 123 of the constitution required that an agreement which may be entered into by one of the emirates should not be inconsistent with the interests of the federal government (13).

The act of bringing this application, and therefore the challenge, is clear evidence of the disapproval of the federal authorities with the contents of the agreement entered into by the emirate concerned. The announcement by a federal authority, even in an indirect way, of its disapproval of an international

agreement, could have been used to render this agreement void because of its contradiction with the interests of the Union. The Supreme Court could have stressed the condition of the consistency of international agreements of the emirates with the interests of the Union, and could have explained the ways by which any inconsistency of international agreements of the emirates with the interests of the Union could be discovered. The direct or indirect declaration of the Federal Cabinet could be used as evidence which may lead to the investigation of the contents and circumstances of international agreements by the Supreme Court, to decide on their viability (14)

(b) Shah Noah Case

(Criminal cassation case 1/8, 23 September 1985)

This case involves the constitutionality of an executive act by the ruler of the Emirate of Fujairah. The executive order was carried out according to authorisation by the local law of criminal procedure, which meant that a decision had to be made on the constitutionality of some provisions of this local law, on the grounds of their incompatibility with the federal constitution, which renders them invalid according to the federal supremacy of Article 151 of the constitution.

The facts of the case involved two people who were convicted by the federal primary Court of Fujairah for assault, causing bodily harm to a third person. The two convicted people appealed to the federal appellate Court. While the case was pending awaiting appellate hearings, an amnesty order was issued for

these two people. They were released and the appellate court decided to dismiss the case on the grounds of the amnesty issued by the ruler, by authorisation from the local criminal procedures law. The appellate Court decided that, because of the order of amnesty, the criminal action was terminated.

The Public Prosecution Authority brought appeal of cassation to the Supreme Court. The appeal was based on two points of error of Law:

1 - The first is that the decision of the Court of Appeals confused two different kinds of amnesty. The first kind is amnesty from the crime, which effectively renders lawful the acts on which conviction is based, with the result of removing all the effects of the conviction. This kind of amnesty is authorised by Article 109 of the constitution, through the promulgation of a special law (15). The second kind of amnesty is amnesty from sentence, which is authorised by the constitution to be granted by a decree signed by the President following recommendation of special committee created for this purpose (16). Amnesty from sentence does not remove the criminal nature of the actions of the convicted, and does not stop criminal action. The ultimate effect of amnesty from sentence is to stop application of sentence resulting from a final Court decision.

2 - The second point of error of Law is that the decision was based on legal provisions which are no more applicable. The

decision was based on Articles 186 and 187 of the local criminal procedures act, which give the ruler the right to grant amnesty to persons involved in criminal proceedings. According to Article 107 of the constitution, only the President can grant pardon from sentence. General amnesty for crimes is allowed only by legislation, according to Article 109. By the application of the supremacy of the federal constitution and legislation over local legislation, the local articles allowing the ruler to grant amnesty are no more applicable [17].

The Court's decision in this case

The Supreme Court accepted the points raised by the Public Prosecution and reversed the decision of the Court of Appeal. The Court decided that, because the Court involved is a federal Court, it applies local legislation only as far as it does not conflict with the constitution or federal Law. In this case, the constitution prevails on local legislation conflicting with its provisions.

The powers given to the ruler of Fujairah by the local criminal procedure Law are examples of the wide range of powers the rulers used to enjoy before the federation. These rulers, as far as internal matters in their emirates are concerned, were reluctant to surrender power to the federal institutions. The ruler of Fujairah in this case acted in the way he had been accustomed to act. The new factor in this case, absent before the Union, is action of federal authorities which were prepared to object to an

order by a ruler in his emirate, depending on limitations imposed by the constitution for the benefit of the Union.

Some institutions, even after becoming federal institutions, were still treating the rulers as having unlimited powers in their emirates. The institutions, which used to be local and later transferred to federal control, needed time to get used to the new situation. The Court of Appeal which was involved in the case was transferred to the Union in 1978 (18).

The Supreme Court's decision in this case is a significant precedent in balancing the federal system and enforcing the limits prescribed by the constitution on the powers of the emirates and their rulers.

B. Cases involving compatibility with the constitution of laws alleged to be incompatible with Islamic Shari'a

Introduction

The constitution provides in Article 7 that:

> Islam is the official religion of the Union. The Islamic Shari'a shall be a main source of legislation in the Union.

The choice to refer to Shari'a as "a main source", is in contrast to reference to it as "the main source" (19). It is understood that the language used in Article 7 puts Shari'a on an equal basis with other sources of Law. The emphasis in this Article is on sources of Law, so it is meant principally for legislatures, to guide them in the promulgation of laws. If no clear legislation is available, then the Courts, while looking to other sources of Law, should bear this guidance in mind in

choosing rules that are not incompatible with Shari'a [20].

This explanation is supported by the content in Article 8 of Law 6/1978, which set up the Union Courts of First Instance and Appeal, and transferred to these Courts the jurisdiction of the local judicial bodies of four emirates (Abu-Dhabi, Sharjah, Ajman and Fujairah). This Article provides:

> The Union Courts shall apply the provisions of the Islamic Shari'a, Union Laws, and other Laws in force, just as they shall apply those rules of custom and general legal principles which do not conflict with the provisions of the Shari'a.

In its reference to Union Laws and other Laws in force, this Article puts them on equal terms with the rules of Shari'a, but in its reference to the remainder of sources, the Article required that the rules taken from those sources should be compatible with Shari'a. These Courts, federal, primary and appeal, have the general competence in their respective emirates, and the one in Abu-Dhabi has the competence provided for the primary federal court in the capital. So in civil and criminal matters, where federal legislation and local legislation apply in the territorial jurisdiction of the included emirates, there is generally no confusion about the sources of Law and the rules applicable, according to Law 6/1978 and according to the constitution [21].

The Supreme Court's statute (Law 10/1973) provides in Article 75 that:

> The Supreme Court shall apply the Islamic Shari'a, Union Laws and other laws in force in the member Emirates of the Union conforming to the Islamic Shari'a. Likewise it shall apply those rules of custom and those principles of natural

> and comparative Law which do not conflict with the principles of that Shari'a.

It should be noted that in Article 8 of the Lower Courts Statute 6/1978, Union Laws and other applicable Laws are not expressly required to conform to Shari'a, whereas in Article 75 of the Supreme Court's Statute, express provision is included to require Union Laws and other applicable Laws to conform to the rules of Shari'a. It should be noticed, moreover, that the Supreme Court's Statute was not intended for general application regarding civil and criminal matters, but to apply originally only to matters included in Article 99 of the constitution and Article 33 of Law 10/1973 (22).

In 1978, and by Law 17/1978, cassation jurisdiction was given to the Supreme Court. This Law prescribed rules and procedures for petitions of cassation to the Supreme Court to oversee the application by lower Courts of laws applicable in the country. Article 33 of Law 17/1978 (the cassation law) provides that:

> Law 10/1973 of the Federal Supreme Court should apply regarding matters not regulated in this Law.

One of the matters not regulated in Law 17/1978 is the hierarchy and applicability of the different sources of rules, so Article 75 of Law 10/1973 applies for cassation cases.

A strange situation is created by the rule just mentioned, in that the Federal Lower Courts are bound by Article 8 of Law 6/1978 regarding the priority and applicability of the different legal rules, whereas the Court of Cassation (the Supreme Court), which is supposed to oversee the application by lower courts of

the existing laws, is governed by a different rule regarding the priority of sources of rules, which is Article 75 of Law 10/1973. This resulted in making parts of Law 10/1973, which was passed to create and regulate a Court of special competence, applicable regarding commercial, civil and criminal matters. The significance of this result is that Article 75 insists on the compatibility with Shari'a of all legal provisions and rules to be applied by the Supreme Court, as a consequence of which several local and federal laws could now be challenged for incompatibility with Shari'a.

This raises again the idea mentioned in Chapter Eight, that the Supreme Court is not suitable to be given the jurisdiction of cassation. The problem of the applicability of the rules of Shari'a is another problem created by Law 17/1978 (law of cassation) and it would have been better to establish a special court of cassation with a clear stipulation for the applicable laws than to create the current confusion for lower Courts and for the Supreme Court itself.

Under the trend of the revival and reinstatement of Shari'a in the Islamic World (23) and because of the importance of Islam as one of the bases of society in the U.A.E. (24), the issue of the supremacy of Islamic Shari'a over other sources of Law was bound to come before Lower Courts and eventually to the Supreme Court.

The importance of the matter of application of Shari'a is signified by the prohibition in Shari'a of bank interest and

usury (in Arabic - Riba), the application of which has great significance to the country's banking and commercial operations. Another area of importance to the application of the rules of Shari'a is in criminal matters, especially as related to drinking alcohol, and its prohibition and special penalties under Shari'a.

Cases about the legality and constitutionality of bank interest (Riba)

(a) The Janatta Bank Case

(Application for constitutional interpretation 14/9, 28 June 1981) 95 Official Gazette.

In 1979 two new laws organising the federal judiciaries began operation simultaneously [25], creating confusion about the prevalence of the sources of Law and of applicable legal rules governing the federal judiciary. An important part of the emerging confusion concerned the applicability of the interest rate on loans involving banks and commercial transactions. A large number of cases came to the Courts in Abu-Dhabi regarding interest payments, and several decisions were taken by primary and appeal Courts in this emirate. The Janatta Bank case was the case in which the Constitutional Chamber of the Supreme Court sought to use its authority to remove the confusion by settling the matter and avoiding difficulties for the commercial operations and banking systems in the country.

We shall examine the situation in Abu-Dhabi during the first two years of operation of laws regarding the federal judiciary.

Abu Dhabi Law of Civil Procedures (Law 3/1970) allows, in

its Articles 61 and 62, the Civil Court to require the levying of interest upon a judgement sum until the full debt has been paid. In 1979 and 1980 some Courts in Abu-Dhabi argued that Law 3/1970 of Abu-Dhabi did not order or command the judge to include levying of interest but permitted such inclusion in civil decisions. Since Law 6/1978 made Shari'a the first source of law for federal Courts and it is obvious that payment of interest is against Shari'a, these Courts refrained from including payment of interest in their decision. They declared that federal Courts were prohibited by statute from including any interest payment in their decisions (26).

The confusion reached the Supreme Court, under its new role as a Court of cassation: the Civil Chamber of the Supreme Court faced several petitions and appeals (27). The Civil Chamber of the Supreme Court was unable to act, because of its problem with Law 17/1978 (Law of cassation) and its reference to Article 75, which prohibited enforcement by the Supreme Court of any Law unless such a Law or instrument is compatible with the rules of the Islamic Shari'a. The Civil Chamber of the Supreme Court sought the help of the Constitutional Chamber, which is more powerful and is empowered to give constitutional interpretations which are binding on all (28).

The Civil Chamber had before it the case of Janatta Bank v. Najib Transportation and Construction Company (29). In this case the Federal Appeal Court of Abu-Dhabi refused to order the payment of interest with its decision ordering the payment of the

original loan, arguing that payment of interest is against Shari'a and that the Law prohibits any decision by federal courts that is in breach of Shari'a rules (30).

The Civil Chamber of the Supreme Court submitted a constitutional question to the Constitutional Chamber, asking for a declaration on the compatibility with the constitution of Articles 61 and 62 of Law 3/1970 of the Emirate of Abu-Dhabi, which permitted the order by civil Courts to levy interest. The underlying premise is that, if these articles are permitted and supported by the constitution, and that Article 7 of the constitution (of the Shari'a as a main source of Law) does not have the effect of over-ruling such articles, then there is no justification for lower federal courts avoiding the enforcement of such articles. The ultimate effect of the Court's decision in this case would not be confined to Abu-Dhabi, but would have effect in other emirates which subscribed to the federal judiciary and, because of the constitutional authority, in the rest of the country.

The question submitted to the Supreme Court in this case was whether or not Articles 61 and 62 of the Civil Procedures Law of Abu-Dhabi, which permit the inclusion of interest payments in judicial decisions, were compatible with the constitution in the light of its Article 7.

Principles announced by the Court in this case

Before discussing the principles established by the Court in this case, it is beneficial to consider the importance of the

subject matter in general. The case arose due to confusion resulting partly from conflicting decisions by lower courts and partly because of the inability of the Cassation Chamber of the Supreme Court to offer help in avoiding these confusions. This environment of uncertainty created negative feelings in the commercial banking sector and prompted large numbers of debtors to default, signalling a crisis that required an authoritative voice to resolve. In order to protect commercial banking and commercial transactions in the area, reassurance was required.

The confusion was triggered by new federal legislation, 6/1978 and 17/1978. This latter gave cassation jurisdiction to the Supreme Court, which is governed by Law 10/1973 and its Article 75, which insists on conformity with Shari'a of all legislation to be applied by the Court.

The sense of urgency about the need to bring an end to the confusion can be appreciated from the speed at which this case was decided. The case was brought on 24 May 1981 and decided on 28 June 1981. The case was important and the decision set a precedent used as a basis in subsequent decisions by federal courts (31).

The Supreme Court established three important principles in this case:

1 - That promulgation of laws is the duty of the legislature and that Article 150 of the constitution directed the federal legislature to issue laws to replace legislation which existed before the federation, and to regulate matters in

detail in accordance with the constitution's purposes and orders [32]; that Article 7 of the constitution is a direction from the constitution to the federal legislature to issue laws and regulations and to have the Islamic Shari'a as a main source of such legislation. The speed and the form of such federal legislation, especially regarding Islamic Shari'a rules, is a matter of policy which is not for the judiciary to decide.

2 - That the Laws, regulations, orders and other measures in force at the time when the constitution commenced its operation are saved from application of Article 151 (federal supremacy clause) because of the protection extended to them by Article 148 [33].

The Court argued that it was obvious from Article 148 and the following articles, that the framers of the constitution differentiated between two categories of legislation. In the first category is legislation in force at the time of coming into force of the constitution. This category is granted extension of authority and continuation of application by Article 148.

In the second category is all legislation issued subsequent to the coming into force of the constitution. This category is regulated by Articles 149 and 150 [34]. The hierarchy of this second category is established by Article 151 (federal supremacy clause). This second category is subject to review by the Supreme Court to ensure observation of the order established by Article 151.

Accordingly, all measures of legislation preceding the coming to force of the constitution remain in force and acquire authority from the provisions of the constitution so far as they remain unamended or abolished expressly. There is no excuse for any authority in the country to refrain from observing legislation preceding the operation of the constitution, as they stand, under the cover that some of these laws do not conform with the provisions of the constitution. The reason for the continuation of the operation of such legislation is that the constitution expressly ordered their observation and saved them from application of Article 151. Indeed, the Court argued, any abandonment of the application of these measure would amount to abandonment of constitutional orders prohibited by Article 145.

Because of the foregoing, the Court argued, Articles 61 and 62 of the Civil Procedure Code of Abu-Dhabi are parts of a law which came into force before commencement of the operation of the constitution, therefore, these two articles are considered to be constitutional according to Article 148 of the constitution. Nothing in Articles 8 of Law 6/1978 or 75 of Law 10/1973 (which ordered federal courts to apply the Islamic Shari'a), affects or removes the constitutional authority extended to the two articles of the Abu-Dhabi Law by the constitution.

3 - That the purpose of the language used in Article 62 of Abu-

Dhabi's civil procedure code is to establish the maximum allowable rates of interest. Nothing in this or Article 61 authorises the judges to refrain from enforcing the interest rate agreed by parties or abandon the payment of interest in their judgement. The purpose of establishing maximum rates of interest is the protection of debtors from exploitation. Therefore, if the parties exceeded in their agreements the prescribed limits, it becomes the duty of the judges to decrease the rate of interest to conform to the maximum limit prescribed by the code.

Evaluation of the principles established by the Court in this case

Evaluation will be confined to the first two principles, due to their significance to the purposes of this study.

1 - That issuing federal Laws to replace local legislation (especially legislation inconsistent with the constitution), and the direction of Article 7 to make Shari'a a main source of Law, are matters of policy not for the Courts to question.

If the timing, form and details of new federal legislation ordered by Article 150 of the constitution are mainly matters of policy for the legislature to decide, there is a duty on the Supreme Court to review compliance of the legislature with the orders and provisions of the constitution. Any undue delay in issuing federal legislation required by the constitution could result in effects contrary to those sanctioned by the

constitution. The determination of the existence of undue delay is a matter of judgement but it cannot be left entirely to the legislature without any checking and supervision from the Supreme Court, which has the power of judicial review of constitutionality. Although the legislature has wide discretion for choosing the timing of the passing of legislation requested by the constitution, the power of review given to the Supreme Court can be invoked to remedy obviously unjust or negative effects resulting from any clearly unnecessary delay in issuing federal laws. Moreover, if the details of issuing federal legislation are largely a matter of policy, leaving local legislation in contradiction to the provisions of the constitution, is not a matter of policy left to the discretion of the legislature. Depriving such legislation of effect is a matter of principle governed directly by the constitution, particularly by Article 151, and is subject to review and enforcement by the Supreme Court's decisions in accordance with Article 99 of the constitution and Article 33 of Law 10/1973.

2 - That all local legislation in force before the coming into force of the constitution is saved by Article 148 of the constitution from being subjected to the order of Article 151 and, therefore, not subject to review by the Supreme Court.

This principle is based on an interpretation of some constitutional provisions, which is not obviously sanctioned by the language used in these provisions, especially Article 148.

The interpretation provided by the Court is not compatible with the literal meanings of these provisions, nor with the federal system created by the constitution. Such interpretations were not essential for arrival at the conclusion that the Court reached.

It is essential to remember that the constitution is the supreme Law of the land. This constitution prevails not only over local legislation, but also over the constitutions of the member emirates. Any legislation of the member emirates is supposed to be sanctioned by the local constitution, whether this is written or customary. To argue that the federal constitution prevails over local constitutions but not over some inferior legislation is not reasonable, and is contrary to Article 151 of the federal constitution.

The constitution which created the federal system and distributed powers between the federal government and the emirates has the position of being the supreme law of the land. After the constitution came into force, all legislation in the country has been required to observe the constitution-imposed limitations. It is against this premise for the Supreme Court to deduce, as the Court did in this case, from an article of this constitution, a rule not clearly stated nor strongly implied by its language that it sanctions breach by any kind of legislation of its rules and limitations.

Article 148 can be understood to have a meaning similar to that of Article 149. According to Article 149 the emirates have the power to legislate in matters included in Article 121 until

the federal government uses its right to legislate in these matters, and to the extent that local legislation does not contradict federal legislation in these matters. In other words, the emirates have the right to legislate in these matters until and to the extent of federal occupation of the field. Likewise, Article 148 could be understood to have similar meaning. According to this understanding, local legislation existing in the emirates prior to the coming into force of the constitution remains valid to the extent that it does not conflict with the provisions of the constitution or federal law.

Nothing in Article 151 or in any other provision of the constitution necessarily or expressly indicates that legislation existing before the coming into force of the constitution is to be excluded from the federal supremacy rule of Article 151. Indeed, from the language used in Article 150, that the federal authorities shall issue legislation as soon as possible to replace existing local legislation, especially those conflicting with the federal constitution, this constitutional sanction could be understood to have the same meaning as the sanction in Article 101, for the concerned authorities, upon a decision by the Supreme Court of the incompatibility with the constitution of their legislation, that they:

> shall be obliged to hasten to take the necessary measures to remove or rectify the constitutional inconsistency.

This cannot be understood to mean that, until inconsistency with the constitution is rectified, such legislation should remain valid. In the same light, it is not a convincing argument

that provisions of emirate legislation operating before the constitution came into force should be held valid until amended or abolished.

The Supreme Court, in its decision in this case, used a measure of self restraint, and the judgement was neither beneficial nor detrimental to the constitution. The arguments used by the Court in this case give the emirates a wide discretion, removing from federal supremacy some local legislation that had been subject to federal rules. The result of arguments used by the Court in this decision are to the disadvantage of the federal government. The federal system requires submission by member emirates of parts of their powers to the central government. Compatibility of local laws with the federal constitution is required by the nature of the federal system and by express provisions of the federal constitution. The principle announced by the court in this decision contradicts the federal system and the requirements of the federal constitution.

(b) The Baruda Bank Case

(Civil cassation case 17/5, 6 September 1983)

This case was among the cases brought to the federal courts of Abu-Dhabi in the environment of uncertainty of the legality of bank interest payments created by Laws 6 and 17 of 1978. Baruda Bank brought the case to recover the principal debt and interest accruing from the defendant, Abu-Dhabi Electronics Company. The

Court of first instance ordered payment of the principal debt but refused to include an order of payment of the interest accruing. The Court argued that, because it is ordered to apply Shari'a, and interest payment is prohibited according to Shari'a, it could not order such payment.

The Bank appealed, and the appellate Court reversed the decision of the lower Court and ordered payment of the principal and the interest. The defendant in these proceedings brought a challenge of cassation to the Supreme Court, requesting reversal of the appeal Court's decision, on the ground of error of Law in its enforcement of the interest clause in the original agreement.

The Cassation Decision

The Supreme Court upheld the appeal Court decision and cited the constitutional decision in the Janatta Bank case (constitutional interpretation 14/9). This authority of the Janatta Bank case shows the importance of that decision for later cases.

Criminal Cases about the application of Shari'a

The confusion created by the enactments of Laws 6/1978 and 17/1978 of the federal judiciary involved uncertainty and questioning of some local criminal laws as to their compatibility with Article 7 of the constitution and their application by federal Courts under the new Court legislation. The majority of the cases involved the applicability of the special penalty prescribed by Shari'a for the drinking of alcohol by Muslims, and

whether this penalty should be applied in conjunction with, or as a replacement to, the punishments prescribed by local legislation. The causes of the confusion in this matter are the same that resulted in confusion about interest payments, but the consequences are less significant (35).

(a) The case of the compatibility with the constitution of the punishment of drunkenness in a public place under Abu-Dhabi Law 8/1976

(Application for constitutional interpretation 1/8, 8 November 1981) 100 Official Gazette.

A number of cases for constitutional interpretation were joined with this case to be provided with one decision, due to the similarity of their requests (36). These cases were referred by the Abu-Dhabi Appeal Court for decisions on the compatibility with the constitution of the penalties imposed by the Abu-Dhabi Alcoholic Drinks Law (Law 8/1976). The Court of Appeal invoked Article 7 of the constitution, which makes Shari'a a main source of law, Federal Law 6/1978 of the federal judiciary, the application of which leads to application of the penalties imposed by the Abu-Dhabi Alcoholic Drinks Law (37), and Law 17/1978 of cassation, which refers to Article 75 of Law 10/1973 of the Supreme Court, in which application of Shari'a is stressed.

The Court of Appeal argued that there appeared to be a conflict between the application of Article 75 of Law 10/1973,

which makes the penalty for drunkenness and consumption of alcohol by a Muslim to be flogging as an Islamic Hadd, and the application of Law 8/1978 of Abu-Dhabi, which provides for another penalty (38). The Court of Appeal argued in its application that the problem is created by the inclusion of a penalty other than that prescribed by Shari'a, which is a breach of the rules of Shari'a amounting to a breach of the constitution in its sanction that Shari'a be made a main source of legislation.

Principles established by the decision of Court in this case

The Court used several principles in order to reach its final result, some of which were already established, others of which were new. The principles used in this case were as follows.

1 - That Article 7 of the constitution cannot be used as a basis for the scrutiny of legislation with the constitution because of non-compliance with Shari'a. The purpose of Article 7 is to provide guidance for legislators in the legislative process; compliance with this guidance is a matter of policy not for the Courts to question.

2 - That the proper basis for constitutional scrutiny is Article 75 of Law 10/1973, which provides that the Court in its disposal of matters in its original jurisdiction, provided by Article 33 of its statutes including constitutional scrutiny of legislation, has to disregard any measures incompatible with Shari'a. As a result of this, the Court argued that, to decide on the constitutionality of

punishments included in Law 8/1976 of Abu-Dhabi, it needed to decide on the compatibility of the punishments included in Article 17 of that Law with the rules of Shari'a (39). If these rules were found to be compatible with Shari'a, then they would be constitutional, and vice-versa.

3 - That the punishment prescribed in Article 17 of Abu-Dhabi Law 8/1976 is for a special crime of drunkenness in a public place or public road, whether such a person is a Muslim subject to the Islamic punishment of Hadd or a non-Muslim. This is a special crime described by its defined condition; for such a crime a special discretionary punishment is allowed by Shari'a, which could be regulated by legislation. There is nothing to prohibit the application of the Hadd punishment for Muslims in addition to the punishment provided by Article 17. Therefore, Article 17 of Abu-Dhabi Law 8/1976 is not against Shari'a and, consequently, it is constitutional.

Evaluation of the Court's decision

The principle, reiterated by the Court here, of considering compliance with Article 7 a matter of policy not to be questioned by the Courts, has been evaluated above (40). Evaluation here will be confined to the principle announced by the Court that Article 75 of its statute is the basis on which compatibility with Shari'a is essential to decide that a provision of law is compatible with the constitution. Central to this principle is

the Court's argument that Article 75 governs the original jurisdiction of the Court contained in Article 33 of its statute, including constitutional scrutiny of legislation.

Article 75 provides:

> The Supreme Court shall apply the rules of the Islamic Shari'a, Union Laws and other laws in force in the member Emirates of the Union conforming to the Islamic Shari'a, as well as those rules of custom and those principles of natural and comparative law which do not conflict with the principles of that Shari'a.

This article is not meant to be a comprehensive catalogue of all the sources of regulations that can be applied by the Court in all the matters in its original jurisdiction. There is one essential source omitted from Article 75, and this source is the constitution itself. This omission makes the idea that Article 75 is a comprehensive catalogue of applicable sources of regulation for the Court unfounded, and is certainly a wrong idea. An explanation of the omission of the constitution from Article 75 is that it is implied that the Court will apply the constitutional provisions directly in cases of constitutional interpretation and scrutiny. Article 75 is, according to this understanding, to apply to the other items in the original jurisdiction of the Court.

According to the afore-mentioned idea, the Court was wrong to base its constitutional scrutiny in this case on Article 75.

(b) Case regarding the constitutionality of the punishment for drunkenness contained in Law 8/1976 of Abu-Dhabi.

(Application for constitutional interpretation 4/9, 25 November 1983) 135 Official Gazette.

Several cases were joined with this case to be provided with one decision, due to the similarities of their requests [41]. Basically, the causes and requests in this and the cases joined with it are the same that were in case no. 1, year 8 discussed above. This case concerned the compatibility with the constitution of the punishment of drunkenness contained in Article 17 of Law 8/1976 of Abu-Dhabi, because of the provision of a punishment other than required by Shari'a.

The principles established by the Court

The Court based its decision on two main principles.

1 - That, although it may appear from Article 7 of the constitution that Shari'a is to be on equal terms with other sources of Law because it is referred to as "a main source" instead of "the main source" of Law, the doubt has been removed by Article 75 in which the legislature has explained the intention from Article 7 of the constitution that Shari'a is to have a paramount position that makes it prevail over other sources of Law.

2 - That applying the punishment required by Shari'a to the consumption of alcohol by a Muslim, therefore, is made obligatory by Article 7 of the constitution, according to its added explanation by Article 75 of the statute of the

Supreme Court. At the same time, the rules of Shari'a permit the imposition of discretionary punishments over special kinds of crime. This discretion can be regulated by the legislature.

The crimes mentioned in Article 17 of Law 6/1976 of Abu-Dhabi are more than just consumption of alcohol, and include acts committed by Muslims as well as non-Muslims.

The Court arrived at the same conclusion at which it arrived in the previous case, that there is no conflict between Shari'a and the punishment rules of Law 6/1976 of Abu-Dhabi, therefore the Abu-Dhabi Law is not unconstitutional.

Evaluation of the decision

As a start, the case here did not warrant a special decision, because the case discussed above (Case No. 1, Year 8) included a similar request. It was acceptable for the Court of Appeal to refer the case because of the environment of confusion created by the federal judiciary statutes (6/1978 and 17/1978), since at the time of the referral (5 April 1981) the decision in the case having the same question (No. 1, Year 8) was undecided, but at the time of deciding this case (No. 4, Year 9), which was 25 December 1983, the other case had already been decided (decision in Case No. 1, Year 8 was on 8 November 1981), it was sufficient for the Court to refer to the earlier decision.

In evaluating the principles used in the decision, we shall deal with those unique to this case.

1 - That the legislature in Article 75 of Law 10/1973 provided explanation about the meaning of Article 7 of the constitution, the result of which is for Shari'a to be the main source of Law.

The decision here confuses two different providers of binding rules of Law: the first is the constitutional framers who have a paramount and supreme position; the second is the regular legislature, who are subordinate to the first. The regular legislature has the right and power to legislate in the fields and to the extent provided by the constitution. The provisions of the constitution bind the legislature, but the legislature does not have such a binding effect on the constitutional framers or constitutional provisions. The Court argued in this case that the legislature in Article 75 of Law 10/1973, effectively transformed the place of Shari'a among the sources of Law from being "a main source" into "the main source" of Law. Their argument is unacceptable because of the inherent hierarchy of the two sources of rules, the constitution and the regular Law (42).

2 - That the use of Article 7 of the constitution as a provision enforceable by the Court contradicts a principle established earlier by the Court that Article 7 is meant as a guidance to the legislature & that compliance with it is not for the Court to question (43). In order for the Court to change this principle, a special procedure has to be followed, which has clearly not been followed in this case (44).

(c) Case concerning the compatibility with the constitution of Article 58 of the Abu-Dhabi Criminal Code.

(Application for constitutional interpretation 1/14, 19 April 1987) Not published in the Official Gazette.

This case involved a person who was prosecuted and brought to the Court of first instance of Abu-Dhabi on the grounds of breaching public morals, as defined by Article 58 of the Abu-Dhabi Criminal Code. The Court of first instance decided to submit an application of constitutional interpretation to the Supreme Court, inquiring about the compatibility with the constitution of Article 58 (45). The referring Court argued that the article in question did not define precisely the acts which represent a breach of public morals, which gives rise to a possibility of incompatibility of this article with the constitutional principle established by Article 27 of the constitution that "All crimes and punishments shall be defined by Law...".

Principles established by the Court's decision

The Court, in sustaining the compatibility with the constitution of Article 58 of the Abu-Dhabi Penal Code, depended on two points.

1 - That it is apparent from Article 58 that there is no ambiguity in the acts subject to it. These are all acts that represent breach of public morality. Therefore, there is no conflict between this Article and Article 27 of the

constitution in its principle that punishments and crimes shall be defined by Law.

2 - That the absence of precise definitions of the acts representing breach of public morality does not deprive this Article from compatibility with the constitution. The absence of precise definition of the acts covered by Article 58 is a sign of flexibility in order to suit the customs and culture in its development and changing considerations. Basic guidance to the definition of public morality should be sought in the Islamic Shari'a, which is the official religion of the state and the religion of the inhabitants of the country.

It is apparent from this case, as well as from others, that the Court in its relations with other authorities practises self restraint and avoids finding legislation unconstitutional.

General Observations

The importance of the Supreme Court for the federal system and the constitutional system in general continued to gather more evidence in this period. The promulgation of the federal judiciary Laws (Law 6/1978 and Law 17/1978) brought new confusions and challenges to the Supreme Court.

It is evident that the Supreme Court, because of its original design and because of its statute (Law 10/1973), is not suitable as a Court of cassation. Article 75 of the Court's statute, which is unique in insisting on the prevalence of Shari'a over other sources of Law, created a crisis in the

country, especially since Article 7 of the constitution and Law 6/1978 of lower federal Courts do not have the same degree of insistence on prevalence of the rules of Shari'a.

In order for the Court to avoid the creation of further confusion, especially for the financial sector, it resorted to interpretations to the constitution which are in some cases not compatible with the federal system. The large number of cases coming to the Court increased its responsibility, especially due to the binding power of its constitutional decisions. The interpretations provided by the Court, either in the cases of bank interest payments or consumption of alcohol were, in my view, insufficient and not well founded. The main cause of the problem is Article 75 of Law 10/1973 and the Court failed to come up with an interpretation to this article that removes the cause of the confusion.

As a solution to the problem the following argument could serve the purpose of removing the restrictions imposed by Article 75 of Law 10/1973. It is worth remembering the original purpose of Article 75, which is to govern the items of the Supreme Court's competence other than the constitutional interpretations. A main reason for this understanding is the absence of mention of the constitution itself in Article 75 (46).

It is also worth remembering the original purpose of the special appeal of cassation. The purpose of cassation is to control legality, that is to supervise adherence by the Courts to the rules prescribed by Law (47). The result is that in its

constitutional review the Supreme Court has to resort directly to the provisions of the constitution without regard to Article 75 of its statute, because this is implied in the statute itself. In its review of cassation cases, the Supreme Court has to resort to Law 6/1978 for reviewing adherence by the Courts to the hierarchy of sources of Law provided by the legislature.

By using this argument the Supreme Court can avoid the contradictions it faces as a result of legislation providing it with jurisdiction incompatible with its original purpose. Giving the Supreme Court the Cassation jurisdiction not only had a negative effect on the Supreme Court as a specialised court, but also confused the lower courts and caused a large number of cases to come to the Supreme Court for which contradicting and unfounded decisions were given.

The Supreme Court was intended by the Constitution to be a primarily constitutional court. Preservation of its original nature, understanding the importance of its constitutional jurisdiction and solution to the confusion created by the law of Cassation make it necessary to transfer cassation from the jurisdiction of the Supreme Court to a special court suitable for this purpose.

At present the argument provided in this part as a suggestion for removing the confusion about the application of the rules of Shari'a can serve as a way in which the Court could avoid the continuation of interpretations that are contrary to the design and objectives of the Constitutuion.

Chapter Ten Footnotes

1 The quantity of oil produced in the U.A.E. went up from 51.1 million metric tons in 1971 to 81.8 million metric tons in 1975. The income from exportation of oil rose from 431 million dollars in 1971 to 6500 million dollars in 1975. See Al-Farra, M. "The Geography of Oil in the U.A.E." in: The Arab League, Institute of Arab Research, The U.A.E.: A General Survey Cairo: 1978, pp.452 and 471.

2 The work started in preparing major legislations such as Criminal Law, Civil Law and other Laws concerning commercial activities. The long term projects involved in preparing these Laws represent evidence of the confidence emerging as to the durability of the federation and the confidence that the constitutional system in existence is to remain for a long time to come. The main Laws which were promulgated in the 1980s:

- Commercial Agency Law, Law 18/1981
- Law of Civil Transactions (Civil Code), Law 51/1985
- Law of Islamic Banks, Financial Institutions and investment companies, Law 6/1985
- Criminal Law, Law 6/1986

3 See Chapter Eight.

4 This Law was published in the Official Gazette, issue No. 64 of 30 December 1978.

5 Law 17/1978 Article 4

6 Law 17/1978 Articles 1 & 4

7 See discussion on the effects of the cassation jurisdiction on the Supreme Court in Chapter Eight.

8 The principle of appointing alternate judges to the Court is deserving of criticism because the matter of membership of the Court is established by Article 96 of the constitution, which entails that any further prescription for the membership of the Court by legislation should be of adding details to the constitutional prescription not of a complete transformation of the Court. Even if these judges are called alternate judges, they mainly have the same powers of the full members of the Court, with some exceptions. The only main difference between these members and full members of the Court, according to the original constitutional design, is the security of office which exists for the full members and does not exist for the alternate judges. See Chapter Eight for further discussion of the matter.

9 Article 3

10 Article 9 of Law 10/1973 as amended by Law 14/1985

11 This application was submitted to the Court on 5 August 1980. The law of cassation (17/1978) came into effect early in 1979, so the virtual end of applications from government authorities constitutional interpretation coincided with the introduction to the court of the new jusrisdiction.

12 Article 123 of the constitution requires the permission of the Supreme Council for any agreement to be made by a member emirate with neighbouring countries.

13 Article 123 provides that international agreements by member emirates with neighbouring countries are permitted if they are of administrative nature and "save that such agreements are not inconsistent with the interests of the Union".

14 According to Article 123 of the constitution.

15 Article 109 of the constitution provides:
> there shall be no general amnesty for a crime or for specified crimes except by Law. The promulgation of the law of amnesty shall consider such crimes being deemed never to have been committed, and shall remit the execution of the sentence or the remaining part of it.

16 Article 107 of the constitution provides:
> The President of the Union may grant pardon from the execution of any sentence passed by a Union judiciature before it is carried out or while it is being served, or he may commute such sentences, on the basis of the recommendation of the Union Minister of Justice, after obtaining the approval of a committee formed under the Chairmanship of the Minister.

17 According to Article 151 of the Constitution.

18 By Federal Law 6/1978

19 The original Egyptian constitution of 1971 and the Kuwaiti constitution provide in Article 2 of each that Shari'a is a main source of law. The current amended Egyptian constitution and the constitution of Qatar provide that Shari'a is the main source of law.

20 See Al-Jamal, Y, The Constitutional System in Kuwait Kuwait: (in Arabic) Kuwait University Press, 1970, p.469. In case for interpretation 14, year 9, the Supreme Court stated that the content of Article 7 that Shari'a is a main source of law is a guidance to the legislature and is a matter of policy not for the Court to question. See reporting and discussion of the case infra.

21 Article 1 of Law 6/1978 provides that the Primary Courts in the Emirates of Abu-Dhabi, Sharjah, Ajman and Fujairah should become Federal Primary Courts on the start of coming to force of this law and that appellate courts in these emirates should become Federal Appellate Courts.
Article 2 provides that the jurisdictions of the local courts that are subject to Article 1 should be transformed to the federal courts.
Article 3 provides that the Federal Primary Court in the capital of the Union shall have jurisdiction in the administrative disputes between the Union and individuals, while civil and commercial disputes between the Union and individuals shall be heard by the federal primary courts according to the place of residency of the defendant.
Notice the reference in this article to "the capital of the Union", not the permanent capital in Article 102 of the constitution and the difference in the jurisdiction between the Court of Article 3 of Law 6/1978 and the Court of Article 102 of the constitution.

22 These matters include: disputes between the emirates and between them and the Union; interpretation of the provisions of the constitution by application or as a result of challenge of unconstitutionality of legislation; trial of senior federal officials regarding actions in carrying out their official duties; crimes directly affecting the interests of the Union; resolution of conflict of jurisdiction between federal judiciary and local judiciaries and interpretation of treaties and international agreements. (Article 99 of the constitution and Article 33 of Law 10/1973)

23 See Ballantyne, W.M. Legal Development in Arabia: A Selection of Articles and Addresses on the Arabian Gulf. London: Graham and Trotman Ltd. 1980, pp.109-120.

24 See Heard-Bey, F. From Trucial States to United Arab Emirates: A Society in Transition. London: Longman, 1982, pp.126-163.

25 This year was the first to witness the operation of both laws 6/1978 and 17/1978, the former became effective on 15 June 1978 and the latter on 30 February 1979.

26 Article 61 of Law 3/1970 of Abu-Dhabi Civil Procedure Law permits the Courts to specify the commencement and ending points of the interest they include in their decisions. Article 62 specifies the maximum enforceable limits for interest rates in commercial and non-commercial transactions. For example, in civil appeal case No 5, 1979, the Court refused to include interest payment with its decision.

27 Civil cassation cases 5, 6 and 40/2.

28 According to Article 101 of the constitution.

29 Civil cassation case 40/2.

30 Depending on Article 8 of Law 6/1978 (the Law establishing federal primary and appeal courts).

31 See the next case below.

32 Article 150 of the constitution provides:

> The Union authorities shall strive to issue the laws referred to in this constitution as quickly as possible so as to replace the existing legislations and systems, particularly those which are not consistent with the provisions of the constitution.

33 Article 151 of the constitutions provides:

> The provisions of this constitution shall prevail over the constitutions of the member Emirates of the Union and the Union Laws which are issued in accordance with the provisions of this constitution shall have priority over the legislations, regulations and decisions issued by the authorities of the Emirates. In case of conflict, that part of the inferior legislation which is inconsistent with the superior legislation shall be rendered null and void to the extent that removes the inconsistency. In case of dispute, the matter shall be referred to the Union Supreme Court for decision.

Article 148 provides:

> All matters established by laws, regulations, decrees, orders and decisions in the various member Emirates of the Union in effect upon the coming into force of this constitution, shall continue to be applicable unless amended or replaced in accordance with the provisions of this constitution.

34 Article 149 is the occupation of the field clause which allows the emirates to legislate in matters included in Article 121 until and to the extent of federal legislation occupying the field. Article 150 orders the federal authorities to issue legislation referred to in the constitution as quickly as possible.

35 Because the problem regarding the bank interest payments involved disrupting the commercial sector of the country.

36 The cases which were joined with this case are applications for interpretations nos. 2, 3, 4, 6, 7 for year 8, and 1, 2, 3, for year 9.

37 In Article 17

38 A basic cause of this is the granting by Law 17/1978 of cassation jurisdiction to the Supreme Court. This Court is not suitable to operate as a cassation court, a main reason for this conclusion being the problem created here and in other cases by having a cassation court governed by a statute not compatible with the statute governing the lower courts. See Article 8 of Law 6/1978 and Article 75 of Law 10/1973, which is referred to by Law 17/1978 (statute of cassation). See other argument in Chapter Eight.

39 Article 17 of the Abu-Dhabi Law 6/1976 provides:

> Any person caught in a public place or public road in a state of apparent drunkenness, should be punished by imprisonment for a period not less than two months and not more than one year, in addition to a fine of not less than five hundred Dirhams and not more than two thousand Dirhams. If such a person committed a breach of public safety or public morals, the punishment should be imprisonment for a period not less than six months and not more than two years, in addition to a fine of not less than one thousand Dirhams and not more than five thousand Dirhams, without prejudice to any other punishment provided by the penal code or any other law.

40 See Case of Janatta Bank (constitutional case no.14, Year 9) discussed above in this chapter.

41 The cases which were joined with this case are cases of constitutional interpretation nos. 5 to 13 and 15 to 23, Year 9. In later cases, this case and case no. 1, Year 8, were used as binding precedents. These cases are nos. 1, Year 10 and 14, Year 10, to which decisions in other cases in the same year were referred.

42 See the argument provided before that Article 75 is not meant to govern the constitutional interpretation or general matters.

43 See constitutional cases nos. 14, Year 9, and 1, Year 8, discussed earlier.

44 Article 65 of the statute of the Supreme Court (Law 10/1973) provides for the establishment of a special committee, the duty of which is to consider cases referred from the Chambers of the Supreme Court who decided to abandon or amend principles established earlier.

45 Article 58 of the Abu-Dhabi Criminal Code provides in paragraph 4 that:

> Any person who commits an act representing a breach of public morals shall be punished by imprisonment for a period not less than three months and not more than two

years and by a fine of an amount not less than five thousand Dirhams and not more than twenty thousand Dirhams, or by one of these punishments.

46 See argument to this purpose above in this chapter.

47 See Cappelletti, M. Judicial Review in the Contemporary World Indianapolis, Indiana: The Bobbs Merrill Co., 1971, pp12-16.

CONCLUSION

During the past few decades the United Arab Emirates has experienced, and continues to experience, rapid development and accelerating change. This development, facilitated by wealth acquired from oil, has resulted in the transformation of the Emirates into a wider and more open society, receptive to new experiences, and responsive to institutions in other parts of the world. The transformation underway is happening through the interaction between local culture and institutions with those brought in from elsewhere in the world. Experience has demonstrated to the Emirates that the demands of a growing, more educated and open society need the kind of political and social unity engendered by the federal system and the modernisation of a traditional way of government.

Federalism is in its nature a system of two co-ordinated units of government, each with its respective sphere of power, delimited by a written constitution which seeks to ensure neither that central power grows to such an extent that the identity of the local units as distinct governments is threatened, nor that the separate areas of power at the local level emasculate the central authority and put in jeopardy the whole federal enterprise. Experience has shown that constitutional courts, as independent umpires of the federal system, have a crucial role to play in preserving the federal balance. The courts can protect each sphere of government from the creeping encroachment on its powers by the other and yet are flexible and sensitive enough to adapt the federal arrangements to changing circumstances. Ultimately, where the political differences between the units are

irreconcilable, the courts provide authoritative decisions on the interpretation of the constitution. It is this role which the Supreme Court of the U.A.E. is inevitably called on to perform. Deeper and wider understanding of the place of the Supreme Court in the constitutional and federal system of the U.A.E. is needed. Equipping the Supreme Court to carry out its important duties is essential for the success not only of the Court itself, but also the performance of the constitutional and federal systems of the country. Support of the written Constitution and improvement in its application, protection of rights of governments and people, solutions to constitutional problems, all of these call for the strengthening and supporting of the role of the Supreme Court.

The experience of other systems, particularly the U.S. and West Germany, shows that judges in constitutional courts have a particularly wide judicial discretion. The understanding of this phenomenon has developed in the U.S. by reference to cases involving individual rights, but the lessons which are learned by a study of such cases are equally applicable to questions of federalism. In the U.S. the Supreme Court had to claim for itself the final power of interpreting the Constitution because there was no explicit provision in the Constitution. No similar difficulty arises for the Supreme Court of the U.A.E. because of its express authority to interpret the Constitution. The issue is not whether the Court shall do so, but how it shall do so.

Constitutions do not only establish rights and duties of government, they also establish the basic and fundamental rights

of people. Constitutional Courts in their interpretation of constitutional charters and in their settlement of constitutional complaints, have some effect on the rights and duties established by constitutions. These facts increase awareness and intensify attention given to constitutional Courts. By increased attention, fuller understanding and clearer analysis and arguments concerning the work of constitutional courts, there is more chance of improvement and development.

As in the other countries studied, the Supreme Court in the U.A.E. plays an important role in the constitutional order and the federal system. The importance of constitutional interpretation by the Supreme Court has been enhanced by the successive extensions in duration of the Provisional Constitution. This has subjected the interpretative provisions of the Court to a longer period of use, and therefore in the context of a more advanced political and legislative environment, than intended by its framers, calling for involvement by the Supreme Court in interpretations for newly emerging needs and inquiries.

The original competence of the Supreme Court of the U.A.E. suggests that it can play a role similar to that of the U.S. Supreme Court and the West German Constitutional Court. There are, however, several factors which restrict the effectiveness of the U.A.E. Supreme Court as a constitutional court.

Compared to the U.S. and West German courts, the U.A.E. Supreme Court has some major differences. These differences concern the specialisation of the court; the conditions of appointment of its justices, their tenure and protection; and the

institutional independence of the court.

Whilst the U.S. and West German courts are specialised courts, de facto or de jure, the U.A.E. Supreme Court is a court of general jurisdiction. This fact, in addition to the legal system in which it operates as a civil law system, makes the court ineffective as a constitutional court. The Supreme Court is currently over-burdened with cassation cases, and is effectively denied the resources and the confidence needed for it to become an effective constitutional court.

Whilst the U.S. and West German courts are provided with institutional independence and are placed in prominent positions in relation to other branches of their respective governments, the U.A.E. Supreme Court lacks the necessary independence. The U.A.E. Supreme Court is linked to, and subject to the influence of, the Ministry of Justice in administrative matters, financial needs and choice of members.

Amongst the most important differences between the U.A.E. Supreme Court and those of the U.S. and West Germany, is the procedure for the appointment of justices. The U.S. and West German procedures are designed to give the full legislatures and the member states of the federal systems major roles in the appointment of justices. This system is designed on an understanding of the roles that a constitutional court can play in the development and shaping of its country's constitution and federal system. The U.A.E. Supreme Court, however, is staffed according to procedures that show a lack of appreciation of the

real effect that a court can have.

Whilst the U.S. and West German constitutional justices are provided with protections and guarantees to operate without fear of reprisals by their political branches, the U.A.E. justices lack such protections. There are many defects in the legislative enactments dealing with the membership of the Supreme Court. The Supreme Court's statute allows the appointment of foreign judges for limited terms of office, as an exception to the conditions of appointing nationals of the country with life tenure. This exception has been and remains the general rule for appointment to the Supreme Court. No U.A.E. national has been appointed to the court, nor has there been anyone appointed with life tenure. The consequence of this is that the original procedures designed to protect the judges and provide them with the necessary confidence are not utilised, with consequential reduction in the effectiveness of the court. The Supreme Court's statute, as amended provides for an option of appointing to the court an unlimited number of alternate judges. This adds to the already damaging regulations dealing with the membership of the court.

The U.S. Supreme Court and the Constitutional Court of West Germany have major roles to play in the development of their respective constitutional systems, in part due to the large number of constitutional cases they receive. The U.A.E. Supreme Court, by way of contrast, receives few constitutional cases. This is due to its relatively recent establishment and also to the system in which it operates. The effect is that the Supreme Court is unable to play a full role in the development of the

constitutional system. The passage of time and the further development of the U.A.E. and its constitutional system may allow the Supreme Court greater opportunity to practise its constitutional role.

In addition to these differences which limit the effectiveness of the Supreme Court, there are differences which are supposed to allow the court greater freedom and give it more opportunity to be an effective constitutional court. In countries such as the U.S., where there is no clear sanction given for constitutional review by the supreme court, doubts are expressed and controversy flares up about the legitimacy of such review. There is no doubt about the right of the U.A.E. Supreme Court to provide final and binding constitutional interpretations because of the clear sanction for such interpretation by the constitutional text.

In democratic countries, such as the U.S. and West Germany, the choices employed by constitutional courts in their review of legislation are often criticised on the grounds that they contradict majority rule and that they are undemocratic. In the U.A.E., the political system is not democratic, and such disputes are therefore inapplicable.

The finality of constitutional review is a threat to political power within the U.A.E. and to the individual emirates. This threat to traditional and political power makes the influence of the political organs on the Supreme Court such a serious obstacle to its fulfilling its full constitutional potential.

The Supreme Court has played an important role in the early years of the establishment of the federation and the operation of the written Constitution to support the federal system, and solved disputes about the rights of different authorities. All of these have helped the federal system to continue and pass through the critical first few years. But in order for the federation to continue into the future, and to prosper for the good of the Emirates and their people, more still is needed from the Court. The Supreme Court has played an important role to support the application of the constitution without negative implications for individuals and commercial activities, especially in the field of application of Sharia. For the Supreme Court to continue and to improve the manner in which it plays its constitutional role, improvements are needed in its composition and regulation.

Recognition has to be given to the important role that can be played by the Court for the development and maintenance of the constitutional system of the country, and to the need for greater confidence in its independence, in order to encourage resort to it by government authorities, courts and individuals. Distancing the process of appointing members of the Court from the complete domination by the executive authority, granting the Court institutional independence from the Ministry of Justice and preservation of the number of judges established by the Constitution and their life tenure are important for supporting the independence of the Court. The Court was intended by the framers of the Constitution to be mainly a Constitutional Court. If preserving the Constitutional nature of the Court is

desirable, cassation jurisdiction must be moved to another Court.

In discharging its role of constitutional interpretation a court will find itself embroiled in questions of political controversy to which the Constitution provides no clear answers. The court's judgement will, inevitably, favour one side over the other. In order to convince the losing party that the court has not made a political choice, it is necessary that the court in its judgement strives for judicial coherence, justifying its decisions by reference to the values, as well as the express words, of the Constitution; keeping in mind its own pronouncements on other constitutional issues; and being aware that, if it is to survive over a long time, a constitution must be adapted to the changing circumstances of its State and of the world. Sometimes, the best a court can do is to show that its decision is a defensible interpretation rather than demonstrate that it is the only conceivable one. This is the general lesson of comparative constitutional law. A comparison between the U.S. and West German Supreme Courts shows that the language and structure of a constitution is significant to the outcomes of particular cases: there is no single model of federalism. An examination of the commerce clause jurisprudence of the U.S. Supreme Court shows just how important a court's contribution to the development of a particular national version of federalism can be. The judgements of the Supreme Court prevented the States from arrogating local interests over the needs of the national market and then created the legislative opportunity for Congress

to take the integration of the national economy further as changed conditions demanded further governmental action.

It is against this background that the constitutional position and jurisprudence of the Supreme Court of the U.A.E. must be considered. It is not suggested that the precise details of the U.S. or West German systems should be decisive for the U.A.E., but that it should be recognised what the Supreme Court in any federal system must do. Although the Court is given a major place in the U.A.E. system, there is evidence that the proper nature of constitutional interpretation is not fully appreciated within the U.A.E., perhaps even by the judges themselves. When exercising its judicial discretion on federalism questions, the Court should be aware of certain features of the Constitution. Although it emphasises the importance of the federal enterprise in the Preamble, the actual structure of government gives great weight to the interests of the individual emirates by reason of the direct participation in some organs of government and their ability to exercise powerful influence over others. The dangers to the federal system appear to come more from local government than from the national government. In these circumstances, there is a special responsibility on the Court to act as a counterweight to tendencies which, if taken to extremes, could destroy the federal system. The study of the practice of the Court shows that it has sometimes been aware of this obligation, and its understanding of its role should develop as it deals with more cases. Equally, the cases show some inconsistency and weakness of reasoning which undermines the

coherence of its jurisprudence, an important matter if its judgements command less than enthusiastic acceptance by the political organs of government. The Supreme Court has not been assisted in fulfilling its constitutional role by some of the changes made to its jurisdiction, particularly the addition of cassation functions.

Constitutional Courts are not without discretion in their interpretations of constitutions, and the Supreme Court of the U.A.E. is no exception. Recognition of the real potential, nature and functions of these Courts is better than denying the realities about these characteristics.

APPENDIX A

THE PROVISIONAL CONSTITUTION OF THE UNITED ARAB EMIRATES

THE PROVISIONAL CONSTITUTION OF THE UNITED ARAB EMIRATES (1)

We, the Rulers of the Emirates of Abu Dhabi, Dubai, Sharjah, Ajman, Umm Al Qawain and Fujairah (2):

Whereas it is our desire and the desire of the people of our Emirates to establish a Union between these Emirates, to promote a better life, more enduring stability and a higher international status for the Emirates and their people;

Desiring to create closer links between the Arab Emirates in the form of an independent, sovereign, federal state, capable of protecting its existence and the existence of its members, in co-operation with the sister Arab states and with all other friendly states which are members of the United Nations Organisation and of the family of nations in general, on a basis of mutual respect and reciprocal interests and benefits;

Desiring also to lay the foundation for federal rule in the coming years on a sound basis, corresponding to the realities and the capacities of the Emirates at the present time, enabling the Union, so far as possible, freely to achieve its goals, sustaining the identity of its members providing that this is not inconsistent with those goals and preparing the people of the Union at the same time for a dignified and free constitutional life, and progressing by steps towards a comprehensive, representative, democratic regime in an Islamic and Arab society free from fear and anxiety;

And whereas the realisation of the foregoing was our dearest desire, towards which we have bent our strongest resolution, being desirous of advancing our country and our people to the status of qualifying them to take appropriate place among civilised states and nations;

For all these reasons and until the preparation of the permanent Constitution for the Union may be completed, we proclaim before the Supreme and Omnipotent Creator, and before all the peoples, our agreement to this provisional Constitution, to which our signatures were appended, which shall be implemented during the transitional period indicated in it;

May Allah, our Protector and Defender, grant us success.

PART ONE

THE UNION, ITS FUNDAMENTAL CONSTITUENTS AND AIMS

Article 1

The United Arab Emirates is an independent, sovereign, federal state and is referred to hereafter in this Constitution as the Union. The Union shall consist of the following Emirates:-

Abu Dhabi - Dubai - Sharjah - Ajman - Umm Al Qawain - Fujairah - Ras Al Khaimah. (3)

Any other independent Arab country may join the Union, provided that the Supreme Council agrees unanimously to this.

Article 2

The Union shall exercise sovereignty in matters assigned to it in accordance with this Constitution over all territory and territorial waters lying within the international boundaries of the member Emirates.

Article 3

The member Emirates shall exercise sovereignty over their own territories and territorial waters in all matters which are not within the jurisdiction of the Union as assigned in this Constitution.

Article 4

The Union may not cede its sovereignty or relinquish any part of its territories or waters.

Article 5

The Union shall have a Flag, an Emblem and a National Anthem. The Flag and the Emblem shall be prescribed by Law. Each Emirate shall retain its own flag for use within its territories.

Article 6

The Union is a part of the Great Arab Nation, to which it is bound by the ties of religion, language, history and common destiny.

The people of the Union are one people, and one part of the Arab Nation.

Article 7

Islam is the official religion of the Union. The Islamic Shari'ah shall be a main source of legislation in the Union. The official language of the Union is Arabic.

Article 8

The citizens of the Union shall have a single nationality which shall be prescribed by law. When abroad, they shall enjoy the protection of the Union Government in accordance with accepted international principles.

No citizen of the Union may be deprived of his nationality nor may his nationality be withdrawn save in exceptional circumstances which shall be defined by Law.

Article 9

1. The Capital of the Union shall be established in an area allotted to the Union by the Emirates of Abu Dhabi and Dubai on the borders between them and it shall be given the name "Al Karama".

2. There shall be allocated in the Union budget for the first year the amount necessary to cover the expenses of technical studies and planning for the construction of the Capital. However, construction work shall begin as soon as possible and shall be completed in not more than seven years from the date of entry into force of this constitution.

3. Until the construction of the Union Capital is complete, Abu Dhabi shall be the provisional headquarters of the Union.

Article 10

The aims of the Union shall be the maintenance of its independence and sovereignty, the safeguard of its security and stability, the defence against any aggression upon its existence or the existence of its member states, the protection of the rights and liabilities of the people of the Union, the achievement of close co-operation between the Emirates for their common benefit in realising these aims and in promoting their prosperity and progress in all fields, the provision of a better life for all citizens together with respect by each Emirate for

the independence and sovereignty of the other Emirates in their internal affairs within the framework of this Constitution.

Article 11

1. The Emirates of the Union shall form an economic and customs entity. Union Laws shall regulate the progressive stages appropriate to the achievement of this entity.

2. The free movement of all capital and goods between the Emirates of the Union is guaranteed and may not be restricted except by a Union Law.

3. All taxes, fees, duties and tolls imposed on the movement of goods from one member Emirate to the other shall be abolished.

Article 12

The foreign policy of the Union shall be directed towards support for Arab and Islamic causes and interests and towards the consolidation of the bonds of friendship and co-operation with all nations and peoples on the basis of the principles of the Charter of the United Nations and ideal international standards.

PART TWO

THE FUNDAMENTAL SOCIAL AND ECONOMIC BASIS OF THE UNION

Article 13

The Union and the member Emirates shall co-operate, within the limits of their jurisdiction and abilities, in executing the provisions of this Part.

Article 14

Equality, social justice, ensuring safety and security and equality of opportunity for all citizens shall be the pillars of the Society. Co-operation and mutual mercy shall be a firm bond between them.

Article 15

The family is the basis of society. It is founded on morality, religion, ethics and patriotism. The law shall guarantee its existence, safeguard and protect it from

corruption.

Article 16

Society shall be responsible for protecting childhood and motherhood and shall protect minors and others unable to look after themselves for any reason, such as illness or incapacity or old age or forced unemployment. It shall be responsible for assisting them and enabling them to help themselves for their own benefit and that of the community.

Such matters shall be regulated by welfare and social security legislations.

Article 17

Education shall be a fundamental factor for the progress of society. It shall be compulsory in its primary stage and free of charge at all stages, within the Union. The law shall prescribe the necessary plans for the propagation and spread of education at various levels and for the eradication of illiteracy.

Article 18

Private schools may be established by individuals and organisations in accordance with the provisions of the law, provided that such schools shall be subject to the supervision of the competent public authorities and to their directives.

Article 19

Medical care and means of prevention and treatment of diseases and epidemics shall be ensured by the community for all citizens.

The community shall promote the establishment of public and private hospitals, dispensaries and cure-houses.

Article 20

Society shall esteem work as a corner-stone of its development. It shall endeavour to ensure that employment is available for citizens and to train them so that they are prepared for it. It shall furnish the appropriate facilities for that by providing legislations protecting the rights of the employees and the interests of the employers in the light of developing international labour legislations.

Article 21

Private property shall be protected. Conditions relating thereto shall be laid down by Law. No one shall be deprived of his private property except in circumstances dictated by the public benefit in accordance with the provisions of the Law and on payment of a just compensation.

Article 22

Public property shall be inviolable. The protection of public property shall be the duty of every citizen. The Law shall define the cases in which penalties shall be imposed for the contravention of that duty.

Article 23

The natural resources and wealth in each Emirate shall be considered to be the public property of that Emirate. Society shall be responsible for the protection and proper exploitation of such natural resources and wealth for the benefit of the national economy.

Article 24

The basis of the national economy shall be social justice. It is founded on sincere co-operation between public and private activities. Its aim shall be the achievement of economic development, increase of productivity, raising the standards of living and the achievement of prosperity for citizens, all within the limits of Law.

The Union shall encourage co-operation and savings.

PART THREE

FREEDOM, RIGHTS AND PUBLIC DUTIES

Article 25

All persons are equal before the law, without distinction between citizens of the Union in regard to race, nationality, religious belief or social status.

Article 26

Personal liberty is guaranteed to all citizens. No person may be arrested, searched, detained or imprisoned except in accordance with the provision of law.

No person shall be subjected to torture or to degrading treatment.

Article 27

Crimes and punishments shall be defined by the law. No penalty shall be imposed for any act of commission or omission committed before the relevant law has been promulgated.

Article 28

Penalty is personal. An accused shall be presumed innocent until proved guilty in a legal and fair trial. The accused shall have the right to appoint the person who is capable to conduct his defence during the trial. The law shall prescribe the cases in which the presence of a counsel for defence shall be assigned.

Physical and moral abuse of an accused person is prohibited.

Article 29

Freedom of movement and residence shall be guaranteed to citizens within the limits of law.

Article 30

Freedom of opinion and expressing it verbally, in writing or by other means of expression shall be guaranteed within the limits of law.

Article 31

Freedom of communication by post, telegraph or other means of communication and the secrecy thereof shall be guaranteed in accordance with law.

Article 32

Freedom to exercise religious worship shall be guaranteed in accordance with established customs, provided that it does not conflict with public policy or violate public morals.

Article 33

Freedom of assembly and establishing associations shall be guaranteed within the limits of law.

Article 34

Every citizen shall be free to choose his occupation, trade or profession within the limits of law. Due consideration being given to regulations organising some of such professions and trades. No person may be subjected to forced labour except in exceptional circumstances provided for by the law and in return for compensation.

No person may be enslaved.

Article 35

Public office shall be open to all citizens on a basis of equality of opportunity in accordance with the provisions of law. Public office shall be a national service entrusted to those who hold it. The public servant shall aim, in the execution of his duties, at the public interest alone.

Article 36

Habitations shall be inviolable. They may not be entered without the permission of their inhabitants except in accordance with the provisions of the law and in the circumstances laid down therein.

Article 37

Citizens may not be deported or banished from the Union.

Article 38

Extradition of citizens and of Political refugees is prohibited.

Article 39

General confiscation of property shall be prohibited. Confiscation of an individual's possessions as a penalty may not be inflicted except by a court judgement in the circumstances

specified by law.

Article 40

Foreigners shall enjoy, within the Union, the rights and freedom stipulated in international charters which are in force or in treaties and agreements to which the Union is party. They shall be subject to the corresponding obligations.

Article 41

Every person shall have the right to submit complaints to the competent authorities, including the judicial authorities, concerning the abuse or infringement of the rights and freedom stipulated in this Part.

Article 42

Payment of taxes and public charges determined by law is a duty of every citizen.

Article 43

Defence of the Union is a sacred duty of every citizen and military service is an honour for citizens which shall be regulated by law.

Article 44

Respect of the Constitution, laws and orders issued by public authorities in execution thereof, observance of public order and respect of public morality are duties incumbent upon all inhabitants of the Union.

PART FOUR THE UNION AUTHORITIES

Article 45

The Union authorities shall consist of:-

1. The Supreme Council of the Union.

2. The President of the Union and his Deputy.

3. The Council of Ministers of the Union.

4. The National Assembly of the Union.

5. The Judiciary of the Union.

CHAPTER I - THE SUPREME COUNCIL OF THE UNION

Article 46

The Supreme Council of the Union shall be the highest authority in the Union. It shall consist of the Rulers of all the Emirates composing the Union, or of those who deputise for the Rulers in their Emirates in the event of their absence or if they have been excused from attending.

Each Emirate shall have a single vote in the deliberations of the Council.

Article 47

The Supreme Council of the Union shall exercise the following matters:-

1. Formulation of general policy in all matters invested in the Union by this Constitution and consideration of all matters which leads to the achievement of the goals of the Union and the common interest of the member Emirates.

2. Sanction of various Union laws before their promulgation, including the Laws of the Annual General Budget and the Final Accounts.

3. Sanction of decrees relating to matters which by virtue of the provisions of this Constitution are subject to the ratification or agreement of the Supreme Council. Such sanction shall take place before the promulgation of these decrees by the President of the Union.

4. Ratification of treaties and international agreements. Such ratification shall be accomplished by decree.

5. Approval of the appointment of the Chairman of the Council of Ministers of the Union, acceptance of his resignation and his removal from office upon a proposal from the President of the Union.

6. Approval of the appointment of the President and Judges of the Supreme Court of the Union, acceptance of their resignations and their dismissal in the circumstances stipulated by this Constitution. Such acts shall be accomplished by decrees.

7. Supreme Control over the affairs of the Union in general.

8. Any other relevant matters stipulated in this Constitution or in the Union laws.

Article 48

1. The Supreme Council shall lay down its own bye-laws which shall include its procedure for the conduct of business and the procedure for voting on its decisions. The deliberations of the Council shall be secret.

2. The Supreme Council shall establish a general Secretariat which shall consist of an adequate number of officials to assist it in the execution of its duties.

Article 49

Decisions of the Supreme Council on substantive matters shall be by a majority of five of its members provided that this majority includes the votes of the Emirates of Abu Dhabi and Dubai. The minority shall be bound by the view of the said majority.

But, decisions of the Council on procedural matters shall be by a majority vote. Such matters shall be defined in the bye-laws of the Council.

Article 50

Sessions of the Supreme Council shall be held in the Union capital. Sessions may be held in any other place agreed upon beforehand.

CHAPTER II - THE PRESIDENT OF THE UNION AND HIS DEPUTY

Article 51

The Supreme Council of the Union shall elect from among its members a President and a Vice President of the Union. The Vice President of the Union shall exercise all the powers of the President in the event of his absence for any reason.

Article 52

The term of office of the President and the Vice President shall be five Gregorian years. They are eligible for re-election to the same offices.

Each of them shall, on assuming office, take the following oath before the Supreme Council:

"I swear by Almighty God that I will be faithful to the United Arab Emirates; that I will respect its Constitution and its laws; that I will protect the interests of the people of the Union; that I will discharge my duties faithfully and loyally and that I will safeguard the independence of the Union and its territorial integrity."

Article 53

Upon vacancy of the office of the President or his Deputy for death or resignation, or because either one of them ceases to be Ruler in his Emirate for any reason, the Supreme Council shall be called into session within one month of that date to elect a successor to the vacant office for the period stipulated in Article 52 of this Constitution.

In the event that the two offices of the President of the Supreme Council and his Deputy become vacant simultaneously, the Council shall be immediately called into session by any one of its members or by the Chairman of the Council of Ministers of the Union, to elect a new President and Vice President to fill the two vacant offices.

Article 54

The President of the Union shall assume the following powers:-

1. Presiding the Supreme Council and directing its discussions.

2. Calling the Supreme Council into session, and terminating its sessions according to the rules of procedure upon which the Council shall decide in its bye-laws. It is obligatory for him to convene the Council for sessions, whenever one of its members so requested.

3. Calling the Supreme Council and the Council of Ministers into joint session whenever necessity demands.

4. Signing Union laws, decrees and decisions which the Supreme Council has sanctioned and promulgating them.

5. Appointing the Prime Minister, accepting his resignation and relieving him of office with the consent of the Supreme Council. He shall also appoint the Deputy Prime Minister and the Ministers and shall receive their resignations and relieve them of office in accordance with a proposal from

the Prime Minister of the Union.

6. Appointing the diplomatic representatives of the Union to foreign states and other senior Union officials both civil and military (with the exception of the President and Judges of the Supreme Court of the Union) and accepting their resignations and dismissing them with the consent of the Council of Ministers of the Union. Such appointments, acceptance of resignations and dismissals shall be accomplished by decrees and in accordance with Union laws.

7. Signing of letters of credence of diplomatic representatives of the Union to foreign states and organisations and accepting the credentials of diplomatic and consular representatives of foreign states to the Union and receiving their letters of credence. He shall similarly sign documents of appointment and credence of representatives.

8. Supervising the implementation of Union laws, decrees and decisions through the Council of Ministers of the Union and the competent Ministers.

9. Representing the Union internally, vis-a-vis other states and in all international relations.

10. Exercising the right of pardon and commutation of sentences and approving capital sentences according to the provisions of this Constitution and Union laws.

11. Conferring decorations and medals of honour, both civil and military, in accordance with the laws relating to such decorations and medals.

12. Any other power vested in him by the Supreme Council or vested in him in conformity with this Constitution or Union laws.

CHAPTER III - THE COUNCIL OF MINISTERS OF THE UNION

Article 55

The Council of Ministers of the Union shall consist of the Prime Minister, his Deputy and a number of Ministers.

Article 56

Ministers shall be chosen from among citizens of the Union known for their competence and experience.

Article 57

The Prime Minister, his Deputy and the Ministers shall, before assuming the responsibilities of their office, take the following oath before the President of the Union:-

> "I swear by Almighty God that I will be loyal to the United Arab Emirates; that I will respect its Constitution and laws; that I will discharge my duties faithfully; that I will completely observe the interests of the people of the Union and that I will completely safeguard the existence of the Union and its territorial integrity."

Article 58

The law shall define the Jurisdiction of the Ministers and the powers of each Minister. The first Council of Ministers of the Union shall be composed of the following Ministers:-

1. Foreign Affairs
2. Interior
3. Defence
4. Finance, Economy and Industry
5. Justice
6. Education
7. Public Health
8. Public Works and Agriculture
9. Communications, Post, Telegraph and Telephones
10. Labour and Social Affairs
11. Information
12. Planning.

Article 59

The Prime Minister shall preside over the meetings of the Council of Ministers. He shall call it into session, direct its debates, follow up the activities of Ministers and shall supervise the co-ordination of work between the various Ministries and in all executive organs of the Union.

The Deputy Prime Minister shall exercise all the powers of the Prime Minister in the event of his absence for any reason.

Article 60

The Council of Ministers, in its capacity as the executive authority of the Union, and under the supreme control of the President of the Union and the Supreme Council, shall be responsible for dealing with all domestic and foreign affairs which are within the competence of the Union according to this Constitution and Union laws.

The Council of Ministers shall, in particular, assume the following powers:-

1. Following up the implementation of the general policy of the Union Government, both domestic and foreign.

2. Initiating drafts of Federal Laws and submitting them to the Union National Council before they are raised to the President of the Union for presentation to the Supreme Council for sanction.

3. Drawing up the annual general budget of the Union, and the final accounts.

4. Preparing drafts of decrees and various decisions.

5. Issuing regulations necessary for the implementation of Union laws without amending or suspending such regulations or making any exemption from their execution. Issuing also policy regulations relating to the organisation of public services and administrations, within the limits of this Constitution and Union laws. A special provision of the law or the Council of Ministers, may charge the competent Union Minister of any other administrative authority to promulgate some of such regulations.

6. Supervising the implementation of Union laws, decrees, decisions and regulations by all the concerned authorities in the Union or in the Emirates.

7. Supervising the execution of judgements rendered by Union Law Courts and the implementation of international treaties and agreements concluded by the Union.

8. Appointment and dismissal of Union employees in accordance with the provisions of the law, provided that their appointment and dismissal do not require the issue of a decree.

9. Controlling the conduct of work in departments and public services of the Union and the conduct and discipline of

Union employees in general.

10. Any other authority vested in it by law or by the Supreme Council within the limits of this Constitution.

Article 61

Deliberations of the Council of Ministers shall be secret. Its resolutions shall be passed by a majority of its members. In the event that voting is evenly divided, the side on which the Prime Minister has voted shall prevail. The minority shall abide by the opinion of the majority.

Article 62

While in office, the Prime Minister, his Deputy or any Union Minister, may not practise any professional, commercial or financial occupation or enter into any commercial transactions with the Government of the Union or the Governments of the Emirates, or combine with their office the membership of the board of directors of any financial or commercial company.

Furthermore, they may not combine with their office more than one official post in any of the Emirates and shall relinquish all other local official posts, if any.

Article 63

The members of the Council of Ministers shall aim to serve in their conduct the interests of the Union, the promotion of public welfare and totally renounce personal benefits. They must not exploit their official capacities for their own interests or that of any person related to them.

Article 64

The Prime Minister and the Ministers shall be politically responsible collectively before the President of the Union and the Supreme Council of the Union for the execution of the general policy of the Union both domestic and foreign. Each of them shall be personally responsible to the President of the Union and the Supreme Council for the activities of his Ministry or office.

The resignation of the Prime Minister, his removal from office, his death, or the vacating of his office for any reason whatsoever shall involve the resignation of the whole Cabinet. The President of the Union may require the Ministers to remain in office temporarily, to carry out immediate administration, until such time as a new Cabinet is formed.

Article 65

At the beginning of every financial year, the Council of Ministers shall submit to the President of the Union for presentation to the Supreme Council, a detailed statement of internal achievements, on the Union's relations with other states and international organisations, together with the recommendations of the Cabinet on the best and most practical means of strengthening the foundations of the Union, consolidating its security and stability, achieving its goals and progress in all fields.

Article 66

1. The Council of Ministers shall draw up its own bye-laws including its rules of procedure.

2. The Council of Ministers shall establish a general Secretariat provided with a number of employees to assist it in the conduct of its business.

Article 67

The Law shall prescribe the salaries of the Prime Minister, his Deputy and the other Ministers.

CHAPTER IV - THE NATIONAL ASSEMBLY OF THE UNION

Section 1 - General Provisions

Article 68

The National Assembly of the Union shall be composed of forty (4) members. Seats shall be distributed to member Emirates as follows:-

Abu Dhabi	8 seats
Dubai	8 seats
Sharjah	6 seats
Ras Al Khaimah	6 seats
Ajman	4 seats
Umm Al Qawain	4 seats
Fujairah	4 seats

Article 69

Each Emirate shall be free to determine the method of selection of the citizens representing it in the Union National Assembly.

Article 70

A member of the Union National Assembly must satisfy the following conditions:-

1. Must be a citizen of one of the Emirates of the union, and permanently resident in the Emirate he represents in the Assembly.

2. Must be not less than twenty-five Gregorian years of age at the time of his selection

3. Must enjoy civil status, good conduct, reputation and not previously convicted of a dishonourable offence unless he has been rehabilitated in accordance with the law.

4. Must have adequate knowledge of reading and writing.

Article 71

Membership of the Union National Assembly shall be incompatible with any public office in the Union, including Ministerial portfolios.

Article 72

The term of membership in the Union National Assembly shall be two Gregorian years commencing from the date of its first sitting. When this period expires, the Assembly shall be completely renewed for the time remaining until the end of the transitional period as laid down in Article 144 of this Constitution.

Any member who has completed his term may be re-elected.

Article 73

Before assuming his duties in the Assembly or its Committees, a member of the Union National Assembly shall take the following oath before the Assembly in public session:-

"I swear by Almighty God that I will be loyal to the United Arab Emirates; that I will respect the Constitution and the laws of the Union and that I will discharge my duties in the Assembly and its Committees honestly and truthfully."

Article 74

If, for any reason, a seat of any member of the Assembly becomes vacant before the end of the term of his membership, a replacement shall be selected within two months of the date on which the vacancy is announced by the Assembly, unless the vacancy occurs during the three months preceding the end of the term of the Assembly.

The new member shall complete the term of membership of his predecessor.

Article 75

Sessions of the Union National Assembly shall be held in the Union capital. Exceptionally, sessions may be held in any other place within the Union on the basis of a decision taken by a majority vote of the members and with the approval of the Council of Ministers.

Article 76

The Assembly shall decide upon the validity of the mandate of its members. It shall also decide upon disqualifying members, if they lose one of the required conditions, by a majority of all its members and on the proposal of five among them. The Assembly shall be competent to accept resignation from membership. The resignation shall be considered as final from the date of its acceptance by the Assembly.

Article 77

A member of the National Assembly of the Union shall represent the whole people of the Union and not merely the Emirate which he represents in the Assembly.

Section 2 - Organisation of Work in the Assembly

Article 78

The Assembly shall hold an annual ordinary session lasting not less than six months, commencing on the third week of November each year. It may be called into extraordinary session

whenever the need arises. The Assembly may not consider at an extraordinary session any matter other than those for which it has been called into session.

Notwithstanding the preceding paragraph, the President of the Union shall summon the Union National Assembly to convene its first ordinary session within a period not exceeding sixty days from the entry into force of this Constitution. This session shall end at the time appointed by the Supreme Council by decree.

Article 79

The Assembly shall be summoned into session, and its session shall be terminated by decree issued by the President of the Union with the consent of the Council of Ministers of the Union. Any meeting held by the Council without a formal summons, or in a place other than that legally assigned for its meeting in accordance with this Constitution, shall be invalid and shall have no effect.

Nevertheless, if the Assembly is not called to hold its meeting for its annual ordinary session before the third week of November, the Assembly shall be ipso facto in session on the twenty first of the said month.

Article 80

The President of the Union shall inaugurate the ordinary annual session of the Assembly whereupon he shall deliver a speech reviewing the situation of the country and the important events and affairs which happened during the year and outlining the projects and reforms the Union Government plans to undertake during the new session. The President of the Union may depute his Vice President or the Prime Minister to open the session or to deliver the speech.

The National Assembly shall select, from among its members, a committee to draft the reply to the Opening Speech, embodying the Assembly's observations and wishes, and shall submit the reply after approval by the Assembly to the President of the Union for submission to the Supreme Council.

Article 81

Members of the Assembly shall not be censured for any opinions or views expressed in the course of carrying out their duties within the Assembly or its Committees.

Article 82

Except in cases of "flagrante delicto", no penal proceedings may be taken against any member while the Assembly is in session, without the authorisation of the Assembly. The Assembly must be notified if such proceedings are taken while it is not in session.

Article 83

The President of the Assembly and its other members shall be entitled, from the date of taking the oath before the Assembly, to a remuneration which shall be determined by law, and to travelling expenses from their place of residence to the place in which the Assembly is meeting.

Article 84

The Assembly shall have a Bureau consisting of a President, a First and Second Vice President and two controllers. The Assembly shall select them all from among its members.

The term of office of the President and the two Vice Presidents shall expire when the term of the Assembly expires or when it is dissolved in accordance with the provisions of the second paragraph of Article 88.

The term of office of the controllers shall expire with the choice of new controllers at the opening of the next ordinary annual session. If any post in the Bureau becomes vacant, the Assembly shall elect who shall fill it for the remaining period.

Article 85

The Assembly shall have a Secretary-General who shall be assisted by a number of staff who shall be directly responsible to the Assembly. The Assembly's standing orders shall lay down their conditions of service and their powers.

The Assembly shall lay down its standing orders, issued by decree promulgated by the President of the Union with the Consent of the Council of Ministers.

The standing orders shall define the powers of the President of the Assembly, his two Vice Presidents and the Controllers and shall define generally all matters pertaining to the Assembly, its committees, its members, its Secretariat, its employees, its rules and procedures of discussion and voting in the Assembly and the Committees and other matters within the limits of the provisions of this Constitution.

Article 86

Sessions of the Assembly shall be public. Secret sessions may be held at the request of a representative of the Government, the President of the Assembly or one third of its members.

Article 87

Deliberations of the Assembly shall not be valid unless a majority of its members at least are present. Resolutions shall be taken by an absolute majority of the votes of members present, except in cases where a special majority has been prescribed. If votes are equally divided, the side which the President of the session supports shall prevail.

Article 88

Meetings of the Assembly may be adjourned by a decree promulgated by the President of the Union with the approval of the Council of Ministers of the Union for a period not exceeding one month, provided that such adjournment is not repeated in one session except with the approval of the Assembly and for once only. The period of adjournment shall not be deemed part of the term of the ordinary session.

The Assembly may also be dissolved by a decree promulgated by the President of the Union with the approval of the Supreme Council of the Union, provided that the decree of dissolution includes a summons to the new Assembly to come into session within sixty days of the date of the decree of dissolution. The Assembly may not be dissolved again for the same reason.

Section 3 - Powers of the National Assembly

Article 89

In so far as this does not conflict with the provisions of Article 110, Union Bills, including financial bills, shall be submitted to the National Assembly of the Union before their submission to the President of the Union for presentation to the Supreme Council for ratification. The National Assembly shall discuss these bills and may pass them, amend or reject them.

Article 90

The Assembly shall examine during its ordinary session the

Annual General Budget draft law of the Union and the draft law of the final accounts, in accordance with the provisions in Chapter Eight of this Constitution.

Article 91

The Government shall inform the Union Assembly of international treaties and agreements concluded with other states and the various international organisations, together with appropriate explanations.

Article 92

The Union National Assembly may discuss any general subject pertaining to the affairs of the Union unless the Council of Ministers informs the Union National Assembly that such discussion is contrary to the highest interests of the Union. The Prime Minister or the Minister concerned shall attend the debates. The Union National Assembly may express its recommendations and may define the subjects for debate. If the Council of Ministers does not approve of these recommendations, it shall notify the Union National Assembly of its reasons.

Article 93

The Government of the Union shall be represented at sessions of the Union National Assembly by the Prime Minister or his deputy or one member of the Union Cabinet at least. The Prime Minister or his deputy or the competent Minister, shall answer questions put to them by any member of the Assembly requesting explanation of any matters within their jurisdiction, in conformity with the procedures prescribed in the standing orders of the Assembly.

CHAPTER 5 - THE JUDICIARY IN THE UNION AND THE EMIRATES

Article 94

Justice is the basis of rule. In performing their duties, judges shall be independent and shall not be subject to any authority but the law and their own conscience.

Article 95

The Union shall have a Union Supreme Court and Union Primary Tribunals as explained hereafter.

Article 96

The Union Supreme Court shall consist of a President and a number of judges, not exceeding five in all, who shall be appointed by decree, issued by the President of the Union after approval by the Supreme Council. The law shall prescribe the number of the chambers in the Court, their order and procedures, conditions of service and retirement for its members and the preconditions and qualifications required of them.

Article 97

The President and the Judges of the Union Supreme Court shall not be removed while they administer justice. Their tenure of office shall not be terminated except for one of the following reasons:-

1. Death.

2. Resignation.

3. Expiration of term of contract for those who are appointed by fixed term contract or completion of term of secondment.

4. Reaching retirement age.

5. Permanent incapacity to carry the burdens of their duties by reason of ill health.

6. Disciplinary discharge on the basis of the reasons and proceedings stipulated in the law.

7. Appointment to other offices, with their consent.

Article 98

The President and the Judges of the Union Supreme Court shall, before holding office, swear on oath before the President of the Union and in the presence of the Union Minister of Justice that they will render justice without fear or favour and that they will be loyal to the Constitution and the laws of the Union.

Article 99

The Union Supreme Court shall have jurisdiction in the following matters:-

1. Various disputes between member Emirates in the Union, or between any one Emirate or more and the Union Government, whenever such disputes are submitted to the Court on the

request of any of the interested parties.

2. Examination of the constitutionality of Union laws, if they are challenged by one or more of the Emirates on the grounds of violating the Constitution of the Union.

   Examination of the constitutionality of legislations promulgated by one of the Emirates, if they are challenged by one of the Union authorities on the grounds of violation of the Constitution of the Union or of Union laws.

3. Examination of the constitutionality of laws, legislations and regulations in general, if such request is referred to it by any Court in the country during a pending case before it. The aforesaid Court shall be bound to accept the ruling of the Union Supreme Court rendered in this connection.

4. Interpretation of the provisions of the Constitution, when so requested by any Union authority or by the Government of any Emirate. Any such interpretation shall be considered binding on all.

5. Trial of Ministers and senior officials of the Union appointed by decree regarding their actions in carrying out their official duties on the demand of the Supreme Council and in accordance with the relevant law.

6. Crimes directly affecting the interests of the Union, such as crimes relating to its internal or external security, forgery of the official records or seals of any of the Union authorities and counterfeiting of currency.

7. Conflict of jurisdiction between the Union judicial authorities and the local judicial authorities in the Emirates.

8. Conflict of jurisdiction between the judicial authority in one Emirate and the judicial authority in another Emirate. The rules relating thereof shall be regulated by a Union Law.

9. Any other jurisdiction stipulated in this Constitution, or which may be assigned to it by a Union law.

Article 100

The Union Supreme Court shall hold its sittings in the capital of the Union. It may, exceptionally, assemble when necessary in the capital of any one of the Emirates.

Article 101

The judgements of the Union Supreme Court shall be final and binding upon all.

If the Court, in ruling on the constitutionality of laws, legislations and regulations, decides that a Union legislation is inconsistent with the Union Constitution, or that local legislations or regulations under consideration contain provisions which are inconsistent with the Union Constitution or with a Union law, the authority concerned in the Union or in the Emirate, accordingly, shall be obliged to hasten to take the necessary measures to remove or rectify the constitutional inconsistency.

Article 102

The Union shall have one or more Union Primary Tribunals which shall sit in the permanent capital of the union or in the capitals of some of the Emirates, in order to exercise the judicial powers within the sphere of their jurisdiction in the following cases:-

1. Civil, commercial and administrative disputes between the Union and individuals whether the Union is plaintiff or defendant.

2. Crimes committed within the boundaries of the permanent capital of the Union, with the exception of such matters as are reserved for the Union Supreme Court under Article 99 of this Constitution.

3. Personal status cases, civil and commercial cases and other cases between individuals which shall arise in the permanent capital of the Union.

Article 103

The law shall regulate all matters connected with the Union Primary Tribunals in respect of their organisation, formation, chambers, local jurisdiction, procedures to be followed before them, the oath to be sworn by their judges, conditions of service relating to them and the ways of appeal against their judgements.

The law may stipulate that appeals against the judgements of these Tribunals shall be heard before one of the chambers of the Union Supreme Court, in the cases and according to the procedures prescribed therein.

Article 104

The local judicial authorities in each Emirate shall have jurisdiction in all judicial matters not assigned to the Union judicature in accordance with this Constitution.

Article 105

All or part of the jurisdiction assigned to the local judicial authorities in accordance with the preceding Article may be transferred by a Union law issued at the request of the Emirate concerned, to the Primary Union Tribunals.

Circumstances in which appeals against judgements by the local judicial authorities in penal, civil, commercial and other litigations may be referred to the Union Tribunals, shall be defined by a Union law provided that its decision in such appeals shall be final.

Article 106

The Union shall have a Public Prosecutor who shall be appointed by a Union decree issued with the approval of the Council of Ministers, assisted by a number of members of the Public Prosecutor's office.

The law shall regulate matters relating to the members of the Union Public Prosecutor's Office with respect to their method of appointment, ranks, promotion, retirement and the qualifications required of them.

Besides, the Union Law of Criminal Procedure and trials shall regulate the power of this body and its procedures and the competence of its assistants from the police and the public security officers.

Article 107

The President of the Union may grant pardon from the execution of any sentence passed by a Union judicature before it is carried out or while it is being served or he may commute such sentence, on the basis of the recommendation of the Union Minister of Justice, after obtaining the approval of a committee formed under the chairmanship of the Minister and consisting of six members selected by the Union Council of Ministers for a term of three years which may be renewed. The members of the committee shall be chosen from citizens of good repute and capability.

Membership of the committee shall be gratis. Its deliber-

ations shall be secret. Its decisions shall be issued by a majority vote.

Article 108

No sentence of death imposed finally by a Union judicial authority shall be carried out until the President of the Union has confirmed the sentence. He may substitute it by an attenuate sentence in accordance with the procedure stipulated in the preceding Article.

Article 109

There shall be no general amnesty for a crime or for specified crimes except by law.

The promulgation of the law of amnesty shall consider such crimes being deemed non avenu, and shall remit the execution of the sentence or the remaining part of it.

PART FIVE

UNION LEGISLATIONS AND DECREES AND THE AUTHORITIES HAVING JURISDICTION THEREIN

CHAPTER I - UNION LAWS

Article 110

1. Union laws shall be promulgated in accordance with the provisions of this Article and other appropriate provisions of the Constitution.

2. A draft law shall become a law after the adoption of the following procedure:-

(a) The Council of Ministers shall prepare a bill and submit it to the Union National Assembly.

(b) The Council of Ministers shall submit the bill to the President of the Union for his approval and presentation to the Supreme Council for ratification.

(c) The President of the Union shall sign the bill after ratification by the Supreme Council and shall promulgate it.

3. (a) If the Union National Assembly inserts any amendment to the bill and this amendment is not acceptable to the President of the Union or the Supreme Council or if the

Union National Assembly rejects the bill, the President of the Union or the Supreme Council may refer it back to the National Assembly. If the Union National Assembly introduces any amendment on that occasion which is not acceptable to the President of the Union or the Supreme Council, or if the Union National Assembly decides to reject the bill, the President of the Union may promulgate the law after ratification by the Supreme Council.

(b) The term "bill" in this clause shall mean the draft which is submitted to the President of the Union by the Council of Ministers including the amendments, if any, made to it by the Union National Assembly.

4. Notwithstanding the foregoing, if the situation requires the promulgation of Union laws when the National Assembly is not in session, the Council of Ministers of the Union may issue them through the Supreme Council and the President of the Union, provided that the Union Assembly is notified at its next meeting.

Article 111

Laws shall be published in the Official Gazette of the Union within a maximum of two weeks from the date of their signature and promulgation by the President of the Union after the Supreme Council has ratified them. Such laws shall become in force one month after the date of their publication in the said Gazette, unless another date is specified in the said law.

Article 112

No laws may be applied except on what occurs as from the date they become in force and no retroactive effect shall result in such laws. The law may, however, stipulate the contrary in matters other than criminal, if necessity so requires.

CHAPTER II - LAWS ISSUED BY DECREES

Article 113

Should necessity arise for urgent promulgation of Union laws between sessions of the Supreme Council, the President of the Union together with the Council of Ministers may promulgate the necessary laws in the form of decrees which shall have the force of law, provided that they are not inconsistent with the Constitution.

Such decree-laws must be referred to the Supreme Council within a week at the maximum for assent or rejection. If they

are approved, they shall have the force of law and the Union National Assembly shall be notified at its next meeting.

However, if the Supreme Council does not approve them, they shall cease to have the force of law unless that it has decided to sanction their effectiveness during the preceding period, or to settle in some other way the effects arising therefrom.

CHAPTER III - ORDINARY DECREES

Article 114

No decree may be issued unless the Council of Ministers has confirmed it and the President of the Union or the Supreme Council, according to their powers, has ratified it. Decrees shall be published in the Official Gazette after signature by the President of the Union.

Article 115

While the Supreme Council is out of session and if necessity arises, it may authorise the President of the Union and the Council of Ministers collectively to promulgate decrees whose ratification is within the power of the Supreme Council, provided that such authority shall not include ratification of international agreements and treaties or declaration or rescission of martial law or declaration of a defensive war or appointment of the President or Judges of the Union Supreme Court.

PART SIX

THE EMIRATES

Article 116

The Emirates shall exercise all powers not assigned to the Union by this Constitution. The Emirates shall all participate in the establishment of the Union and shall benefit from its existence, services and protection.

Article 117

The exercise of rule in each Emirate shall aim in particular at the maintenance of security and order within its territories, the provision of public utilities for its inhabitants and the raising of social and economic standards.

Article 118

The member Emirates of the Union shall all work for the co-ordination of their legislations in various fields with the intention of unifying such legislations as far as possible.

Two or more Emirates may, after obtaining the approval of the Supreme Council, agglomerate in a political or administrative unit, or unify all or part of their public services or establish a single or joint administration to run any such service.

Article 119

Union law shall regulate with utmost ease matters pertaining to the execution of judgements, requests for commissions of rogation, serving legal documents and surrender of fugitives between member Emirates of the Union.

PART SEVEN

DISTRIBUTION OF LEGISLATIVE, EXECUTIVE AND INTERNATIONAL JURISDICTIONS BETWEEN THE UNION AND THE EMIRATES

Article 120

The Union shall have exclusive legislative and executive jurisdiction in the following affairs:-

1. Foreign affairs.
2. Defence and the Union Armed Forces.
3. Protection of the Union's security against internal or external threat.
4. Matters pertaining to security, order and rule in the permanent capital of the Union.
5. Matters relating to Union officials and Union judiciary.
6. Union finance and Union taxes, duties and fees.
7. Union public loans.
8. Postal, telegraph, telephone and wireless services.
9. Construction, maintenance and improvement of Union roads which the Supreme Council has determined to be trunk roads. The organisation of traffic on such roads.

10. Air Traffic Control and the issue of licences to aircraft and pilots.

11. Education.

12. Public health and medical services.

13. Currency board and coinage.

14. Measures, standards and weights.

15. Electricity services.

16. Union nationality, passports, residence and immigration.

17. Union properties and all matters relating thereto.

18. Census affairs and statistics relevant to Union purposes.

19. Union Information.

Article 121

Without prejudice to the provisions of the preceding Article, the Union shall have exclusive legislative jurisdiction in the following matters:-

Labour relations and social security; real estate and expropriation in the public interest; extradition of criminals, banks; insurance of all kinds; protection of agricultural and animal wealth; major legislations relating to penal law, civil and commercial transactions and company law, procedures before the civil and criminal courts; protection of cultural, technical and industrial property and copyright; printing and publishing; import of arms and ammunition except for use by the armed forces or the security forces belonging to any Emirate; other aviation affairs which are not within the executive jurisdiction of the Union, delimitation of territorial waters and regulation of navigation on the high seas.

Article 122

The Emirates shall have jurisdiction in all matters not assigned to the exclusive jurisdiction of the Union in accordance with the provisions of the two preceding Articles.

Article 123

As an exception to paragraph 1 of Article 120 concerning the exclusive jurisdiction of the Union in matters of foreign policy

and international relations, the member Emirates of the Union may conclude limited agreements of a local and administrative nature with the neighbouring states or regions, save that such agreements are not inconsistent with the interests of the Union or with Union laws and provided that the Supreme Council of the Union is informed in advance. If the Council objects to the conclusion of such agreements, it shall be obligatory to suspend the matter until the Union Court has ruled on that objection as early as possible.

The Emirates may retain their membership in the OPEC organisation and the Organisation of Arab Petroleum Exporting Countries or may join them.

Article 124

Before the conclusion of any treaty or international agreement which may affect the status of any of the Emirates, the competent Union authorities shall consult that Emirate in advance. In the event of a dispute, the matter shall be submitted to the Union Supreme Court for ruling.

Article 125

The Governments of the Emirates shall undertake the appropriate measures to implement the laws promulgated by the Union and the treaties and international agreements concluded by the Union, including the promulgation of the local laws, regulations, decisions and orders necessary for such implementation.

The Union authorities shall supervise the implementation by Emirates' Governments of the Union laws, decisions, treaties, agreements and Union judgements. The competent administrative and judicial authorities in the Emirates should forward to the Union authorities all possible assistance in this connection.

PART EIGHT

FINANCIAL AFFAIRS OF THE UNION

Article 126

The general revenues of the Union shall consist of the income from the following resources:-

1. Taxes, fees and duties imposed under a Union law in matters within the legislative and executive jurisdiction of the Union.

2. Fees and rates received by the Union in return for services

provided.

3. Contribution made by member Emirates of the Union in the Annual Budget of the Union in accordance with the article herein coming after.

4. Union income from its own properties.

Article 127

The member Emirates of the Union shall contribute a specified proportion of their annual revenues to cover the annual general budget expenditure of the Union, in the manner and on the scale to be prescribed in the Budget Law.

Article 128

The law shall prescribe the method of preparing the general budget of the Union and the final accounts. The law shall also define the beginning of the financial year.

Article 129

The draft annual budget of the Union, comprising estimates of revenues and expenditure, shall be referred to the Union National Assembly at least two months before the beginning of the financial year, for discussion and submission of comments thereon, before the draft budget is submitted to the Supreme Council of the Union, together with those comments, for assent.

Article 130

The annual general budget shall be issued by a law. In all cases, where the budget law has not been promulgated before the beginning of the financial year, temporary monthly funds may be made by Union decree on the basis of one twelfth of the funds of the previous financial year. Revenues shall be collected and expenditure disbursed in accordance with the laws in force at the end of the preceding financial year.

Article 131

All expenditure not provided for in the budget, all expenditure in excess of the budget estimates and all transfers of sums from one part to another of the Budget must be covered by a law.

Notwithstanding the foregoing, in cases of extreme urgency, such expenditure or transfer may be arranged by decree-law in

conformity with the provisions of Article 113 of this Constitution.

Article 132

The Union shall allocate in its annual budget a sum from its revenue to be expended on building and construction projects, internal security and social affairs according to the urgent needs of some of the Emirates.

The execution of these projects and the disbursement thereon shall be drawn from these funds, accomplished by means of and under the supervision of the competent Union bodies with the agreement of authorities of the Emirates concerned.

The Union may establish a special fund for this purpose.

Article 133

No Union tax may be imposed, amended or abolished except by virtue of law. No person may be exempted from payment of such taxes except in the cases specified by law.

Union taxes, duties and fees may not be levied on any person except within the limits of the law and in accordance with its provisions.

Article 134

No public loan may be contracted except by a Union law. No commitment involving the payment of sums from Union Exchequer in a future year or years may be concluded except by means of a Union law.

Article 135

The final accounts of the financial administration of the Union for the completed financial year shall be referred to the Union National Assembly within the four months following the end of the said year, for its comments thereon, before their submission to the Supreme Council for approval, in the light of the Auditor-General's report.

Article 136

An independent Union department headed by an Auditor-General who shall be appointed by decree, shall be established to audit the accounts of the Union and its organs and agencies, and to

audit any other accounts assigned to the said department for that purpose in accordance with the law.

The law shall regulate this department and shall define its jurisdiction and the competence of those working therein, and the guarantees to be given to it, its head and the employees working in it in order that they may carry out their duties in the most efficient manner.

PART NINE

ARMED FORCES AND SECURITY FORCES

Article 137

Every attack upon any member Emirate of the Union shall be considered an attack upon all the Emirates and upon the existence of the Union itself, which all Union and local forces will co-operate to repel by all means possible.

Article 138

Only (5) the Union shall have army, navy and air forces with unified training and command. The Commander in Chief of these forces and the Chief of the General Staff shall be appointed and dismissed by means of a Union decree.

The Union may have a Union Security Forces.

The Union Council of Ministers shall be responsible directly to the President of the Union and the Supreme Council of the Union for the affairs of all these forces.

Article 139

The law shall regulate military service, general or partial mobilisation, the rights and duties of members of the Armed Forces, their disciplinary procedures and similarly the special regulations of the Union Security Forces.

Article 140

The declaration of defensive war shall be declared by a Union decree issued by the President of the Union after its approval by the Supreme Council. Offensive war shall be prohibited in accordance with the provisions of international charters.

Article 141

A Supreme Defence Council shall be set up under the chairmanship of the President of the Union. Among its members shall be the Vice President of the Union, the Chairman of the Council of Ministers of the Union, the Ministers of Foreign Affairs, Defence, Finance, Interior, the Commander in Chief and the Chief of the General Staff. It shall advise and offer views on all matters pertaining to defence, maintenance of the peace and security of the Union, forming of the armed forces, their equipment and development and the determination of their posts and camps.

The Council may invite any military adviser or expert or other persons it wishes to attend its meetings but they shall have no decisive say in its deliberations. All matters pertaining to this Council shall be regulated by means of a law.

Article 142 (6)

The member Emirates shall have the right to set up local security forces ready and equipped to join the defensive machinery of the Union to defend, if need arises, the Union against any external aggression.

Article 143

Any Emirate shall have the right to request the assistance of the Armed Forces or the Security Forces of the Union in order to maintain security and order within its territories whenever it is exposed to danger. Such a request shall be submitted immediately to the Supreme Council of the Union for decision.

The Supreme Council may call upon the aid of the local armed forces belonging to any Emirate for this purpose provided that the Emirate requesting assistance and the Emirate to whom the forces belong agree.

The President of the Union and the Council of Ministers of the Union collectively, may, if the Supreme Council is not in session, take any immediate measure which cannot be delayed and considered necessary and may call the Supreme Council into immediate session.

PART TEN

FINAL AND TRANSITIONAL PROVISIONS

Article 144

1. Subject to the provisions of the following paragraphs, the provisions of this Constitution shall apply for a transitional period of five Gregorian years beginning from the date of its entry into force in accordance with provisions of Article 152 (7).

2. a) If the Supreme Council considers that the topmost interests of the Union require the amendment of this Constitution, it shall submit a draft constitutional amendment to the Union National Assembly.

   (b) The procedure for approving the constitutional amendment shall be the same as the procedure for approving laws.

   (c) The approval of the Union National Assembly for a draft constitutional amendment shall require the agreement of two-thirds of the votes of members present.

   The President of the Union shall sign the constitutional amendment in the name of the Supreme Council and as its representative and shall promulgate the amendment.

3. During the transitional period, the Supreme Council shall adopt the necessary measures to prepare a draft permanent Constitution to take the place of this temporary constitution. It shall submit the draft permanent Constitution to the Union National Assembly for debate before promulgating it.

4. The Supreme Council shall call the Union National Assembly into extraordinary session at a time not more than six months before the end of the period of validity of this temporary Constitution. The permanent Constitution shall be presented at this session. It shall be promulgated according to the procedure laid down in paragraph 2 of this Article.

Article 145

Under no circumstances, may any of the provisions of this Constitution be suspended, except when Martial Law is in force and within the limits specified by this law.

Notwithstanding the foregoing, sessions of the National Assembly of the Union may not be suspended during that period nor may the immunity of its members be violated.

Article 146

In case of necessity defined by law, Martial law shall be declared by a decree promulgated with the approval of the Supreme Council on the basis of a proposal made by the President of the Union with the consent of the Council of Ministers of the Union. Such decree shall be notified to the Union National Assembly at its next meeting.

Martial law shall be similarly lifted by decree issued with the approval of the Supreme Council when the need, for which it was imposed, no longer exists.

Article 147

Nothing in the application of this Constitution shall affect treaties or agreements concluded by member Emirates with states or international organisations unless such treaties or agreements are amended or abrogated by agreement between the parties concerned.

Article 148

All matters established by laws, regulations, decrees, orders and decisions in the various member Emirates of the Union in effect upon the coming into force of this Constitution, shall continue to be applicable unless amended or replaced in accordance with the provisions of this Constitution.

Similarly, the measures and organisations existing in the member Emirates shall continue to be effective until the promulgation of laws amending them in accordance with the provisions of the Constitution.

Article 149

As an exception to the provisions of Article 121 of this Constitution, the Emirates may promulgate legislations necessary for the regulation of the matters set out in the said Article without violation of the provisions of Article 151 of this Constitution.

Article 150

The Union authorities shall strive to issue the laws referred to in this Constitution as quickly as possible so as to replace the existing legislations and systems, particularly those

which are not consistent with the provisions of the Constitution.

Article 151

The provisions of this Constitution shall prevail over the Constitutions of the member Emirates of the Union and the Union laws which are issued in accordance with the provisions of this Constitution shall have priority over the legislations, regulations and decisions issued by the authorities of the Emirates.

In case of conflict, that part of the inferior legislation which is inconsistent with the superior legislation shall be rendered null and void to the extent that removes the inconsistency. In case of dispute, the matter shall be referred to the Union Supreme Court for its ruling.

Article 152

The Constitution shall take effect from the date to be fixed in a declaration to be issued by the Rulers signatories to this Constitution.

Signed in Dubai on this day the 18th of July, 1971, corresponding to this day the 25th of the month of Jamad Awwal 1391.

(Signatures of the Rulers of Abu Dhabi, Dubai, Sharjah, Ajman, Umm Al Qawain, Fujairah). (8)

Appendix A Footnotes

1 This constitution is based, to a large extent, on the model set by the Egyptian Constitution. A principal reason for the heavy influence of the Egyptian Constitution is the general place which the Egyptian legal system occupies as a model for other Arab countries.

A second reason for the Egyptian influence was the participation of a number of Egyptian legal advisers and scholars in the process of drafting the U.A.E. Constitution. Dr. Wahid Ra'fat, the Egyptian scholar, was the main drafter of the final version of this constitution.

The U.A.E. Constitution is also affected by British influences in some of its major characteristics. The federal system adopted by this constitution is a system favoured by the British for adoption by their former colonies and protectorates.

2 Ras Al Khaimah joined the Union on the 10th of February, 1972.

3 The original signatories of the Constitution did not include Ras Al Khaimah. which adhered to the Union on 10 February, 1972. A new paragraph was added by a Declaration of Constitutional Amendment No. 1 (1972) which reads as follows:-

> "In the event of the acceptance of a new member joining the Union, the Supreme Council of the Union shall determine the number of seats which will be allocated to that member in the National Assembly of the Union, being in addition to the number stipulated in Article 68 of this Constitution."

4 Decision of the Supreme Council of the Union No. 3, 1972.

5 Added by Constitutional Amendment No. 1 (1976).

6 Depleted by Constitutional Amendment No. 1 (1976).

7 This paragraph has been amended three consecutive times, the last of which was in 1981. The effect of the last amendment is to make the term of this Constitution expire on 1st of December 1991.

8 Ras Al Khaimah joined the Union on the 10th February, 1972.

APPENDIX B

UNION LAW NUMBER 10 FOR THE YEAR 1973

REGARDING THE UNION SUPREME COURT

UNION LAW NUMBER 10 FOR THE YEAR 1973 REGARDING THE UNION SUPREME COURT (1)(2)

Article 1

A Supreme Court shall be established in the United Arab Emirates, this Court shall be called "The Union Supreme Court". Reference will be made to it in this law as "The Supreme Court".

This Court shall be the supreme judicial authority in the Union.

Article 2

The seat of the Supreme Court shall be in the capital of the Union. The Court can hold its sessions in any of the capitals of the Emirates whenever appropriate.

Article 3 (3)

The Supreme Court shall be composed of a President and four judges. A sufficient number of alternate judges can be appointed to the Court. No more than one alternate judge can sit in the Constitutional Chamber. Regulations concerning the judges of the Supreme Court shall be applied to the alternate judges with the exception of the matters specifically regulated for the alternate judges.

Article 4

To be appointed to the Supreme Court a person has to satisfy the following requirements:-

1. To be a citizen of the United Arab Emirates and of a complete civil capacity.

2. To be at least thirty five years of age.

3. To hold a degree in the Islamic Shari'a and Law from an accredited University or a higher educational institution.

4. To have completed a period of work of at least fifteen years in judicial or legal employment in a Court or an equivalent employment in the public prosecution, or legal consulting departments of the government; engagement in the representation of the government before the Courts; teaching of Law or Islamic Shari'a in an accredited University or higher educational institution; practice in the legal profession as

an attorney; or in any other employment which is equivalent to the judicial employment.

Article 5

As an exception from the requirement of item 1 of the preceding Article, citizens of Arab countries can be appointed to the Court, provided that they fulfil the other requirements.

Appointments of such individuals should be by way of secondment from their governments or by contracts of employment for limited and renewable periods.

All rules of this Law shall be applied to judges on secondment or appointed by contract.

Article 6

The period specified in item 4 of Article 4 shall be reduced to half its length, and the age requirement contained in the second item of Article 4 shall be reduced to thirty years, for citizens of the Union who fulfil the other requirements for appointment.

The application of the preceding paragraph shall continue in the first seven years following the coming into force of this Law.

Article 7

Appointment of the President and judges of the Supreme Court shall be by decree, issued by the President of the Union after approval by the Council of Ministers and ratification by the Supreme Council of the Union. The seniority of the judges shall be based on the date of the decree of appointment and in accordance with the order in that decree.

Article 8

The President of the Court and its judges shall, before assuming their responsibilities, take the following oath before the President of the Union and in the presence of the Minister of Justice:-

"I swear by Almighty God that I will decide in accordance with justice, without fear or prejudice, and that I will be faithful to the Constitution of the United Arab Emirates and its Laws."

Article 9 (4)

The Supreme Court shall have one Chamber for Constitutional matters and other Chambers for consideration of other matters included in this Law, Union Law Number 17 for the year 1978, or any other Law. The Chambers shall be presided over by the President of the Court or the most senior judge. No alternate judge shall be allowed to preside over any Chamber.

Decisions in matters included in the first seven items of Article 33 of this Law shall be passed by a five-member Chamber with a maximum of two alternate judges. Decisions in other matters shall be passed by a three-member Chamber. In both cases, decisions shall be taken by majority. However, decisions of death sentence shall not be issued except by unanimous decision.

Article 10

The Supreme Court shall have a plenum of all its judges presided over by its President or acting president. The plenum shall have jurisdiction in organising Chambers, distribution of workloads between them, determining the number, dates and times of sessions for each Chamber, in addition to all matters relating to the organisation of the Court, its internal matters and all other matters provided by Law.

Article 11 (5)

The plenum of the Court shall hold a meeting at the beginning of every year, on the summons of the President of the Court or its acting president. Additional meetings may be arranged whenever such are felt necessary.

The Public Prosecution shall be called to the meetings and its representative given the right to raise his opinion in matters relating to its duties.

For the plenum's meetings to be quorate, at least three of its original judges, including the President of the Court or its acting president, have to be present. Decisions of the plenum shall be taken by absolute majority of the present members. In case of a split vote, the side of the President shall prevail. The proceedings of the plenum's meetings shall be recorded and signed by the president of each meeting.

Article 12

The Court shall have an annual judicial recess starting from the beginning of July and ending at the end of August. The recess shall be considered ordinary holiday for those who are not assigned work during it.

The plenum of the Court shall organise holidays of judges and the work of the Court during the annual judicial recess. Judges shall not be given their annual holidays in periods other than the annual judicial recess, unless such are necessary and only within the possible limits allowed by the Court's work.

Permission for such holidays shall be given by the President of the Court, and for a maximum of fifteen days.

Article 13

The Supreme Court shall have a technical office composed of a president and a sufficient number of members chosen from members of the judiciary, public prosecution, consultation and legislation authorities, or others who are employed in performing works equivalent to the judicial employment.

In case of necessity, posts may be filled by way of secondment from local judicial authorities or from lawyers from Arab countries who acquire sufficient experience and ability.

The attachment of the members of the technical office shall be by way of secondment or temporary employment according to a decision from the Minister of Justice, after suggestion from the President of the Court and approval of the authority from which the member is seconded or given temporary leave.

A sufficient number of staff shall be attached to the technical office.

Article 14

The technical office shall undertake the performance of the following matters:-

1. The expedition of legal rules established by the Supreme Court in its decisions, categorisation and organisation of such rules to simplify future reference to them.

2. Supervision of copying, printing and publishing of the Court's decisions.

3. Preparation of research required by the President or any of the Chambers of the Court.

4. Supervision of the Court's schedules and registration of cases, petitions and applications in these schedules.

5. Other matters referred to it by the President of the Court.

Article 15

The Supreme Court shall have a secretariat of clerks, and another of summons servers, headed by a senior clerk and a senior summons server respectively, and assisted by a sufficient number of staff.

The clerks and summons servers shall take an oath before assuming their duties, before a Chamber of the Court, to discharge their duties honestly and faithfully. The oath shall be recorded and kept in a special record. A copy shall be filed in the employee's file.

In matters not regulated by the preceding paragraphs, the Union Law of Civil Service shall apply in relation to these employees.

Article 16

The President of the Court shall have the right to supervise its judges and business, and the right to caution regarding occurrences incompatible with the duties and requirements of office.

Article 17

The President of the Court has the disciplinary power over civil servants and employees of the Court, that is given to the Minister and Under-Secretary by the Union Law of Civil Service.

Article 18

The tenure of office of the President and the judges of the Supreme Court shall not be terminated except for one of the following reasons:-

1. Death.

2. Resignation.

3. Expiration of term of contract for those who are appointed by fixed term contract or completion of term of secondment.

4. Reaching retirement age.

5. Permanent incapacity to carry the burden of their duties by reason of ill health.

6. Disciplinary discharge on the basis of the reasons and proceedings stipulated in the Law.

7. Appointment to other offices, with their consent.

Article 19

The retirement age for the President and judges of the Supreme Court shall be sixty five years. If such age is reached within the period from the first day of October to the last day of June, the member shall continue to hold office until the latter date.

Whenever considered appropriate, extension of service of members of the Court may be decided for a period or periods not exceeding three years, provided that each period shall not be less than one judicial year. Extension of service shall be by the same means of appointment.

PART TWO TRIAL OF JUDGES AND THEIR IMPEACHMENT (6)

PART THREE COMPETENCY OF THE SUPREME COURT

Article 33

The Supreme Court shall have exclusive jurisdiction in the following matters:-

1. Various disputes between member Emirates in the Union, or between any one or more Emirates and the Union Government, whenever such disputes are submitted to the Court at the request of any of the interested parties.

2. Examination of the constitutionality of Union Laws, if they are challenged by one or more of the Emirates on the grounds of violating the Constitution of the Union.

3. Examination of the constitutionality of legislations promulgated by one of the Emirates, if they are challenged by one of the Union authorities on the grounds of violation of the Constitution of the Union or of Union Laws.

4. Examination of the constitutionality of laws, legislations and regulations in general, if such request is referred to it by any Court in the country during a case pending before it.

5. Interpretation of the provisions of the Constitution, when so requested by any Union authority or by the Government of any Emirate.

6. Interpretation of treaties or international agreements, when so requested by any Union authority, by any of the member Emirates, or if such interpretation is the subject of a dispute pending before any Court.

7. Trial of Ministers and senior officials of the Union appointed by decree, regarding their actions in carrying out their official duties on the demand of the Supreme Council and in accordance with the relevant law.

8. Crimes directly affecting the interests of the Union, such as crimes relating to its internal or external security, forgery of the official records or seals of any of the Union authorities and counterfeiting of currency.

9. Conflict of jurisdiction between the Union judicial authorities and the judicial authorities of the Emirates.

10. Conflict of jurisdiction between a judicial entity in an Emirate and a judicial entity in another Emirate, or among judicial entities in a single Emirate.

11. Any other jurisdiction stipulated in the Constitution or any Union Law.

PART FOUR THE UNION PUBLIC PROSECUTION AUTHORITY

(This Part includes establishment of the Public Prosecution Authority and its general regulations.)

PART FIVE THE PROCEDURES BEFORE THE SUPREME COURT

Article 51

Until legislations regulating civil and criminal procedures are passed, rules included in this Part and general adjudicative rules shall be applied in relation to proceedings before the Supreme Court.

Article 52

Except in criminal actions, petitions to the Court shall be brought by means of a memorandum. This memorandum must include, in addition to names of the parties, their capacities and addresses, information about the subject of the petition and the constitutional or legislative provisions relating to the application of interpretation or the dispute besides clarification of the suggested contradiction or vagueness in such provisions, together with all elements of the case and documents necessary. The memorandum shall be signed by the petitioner.

In the case of petitions brought by federal or local authorities, signature shall be by their legal agents. If petitions are brought by individuals, signature shall be by an attorney accepted to appear before the Supreme Court.

The petitioner shall file with the original copy, additional copies of the memorandum and documents, of a number sufficient for the other parties and the members of the Court.

Criminal actions shall be brought by the Prosecutor General by way of summoning the accused to appear before the Court. The summons shall indicate the alleged offence and the legal provisions stipulating the penalties, in regard to felonies a list of the available evidence shall be served with the summons.

The summons shall be served to the receiver in person or to his domicile in accordance with the manner stipulated in Article 54.

Summons shall be served to prisoners in the presence of the governors of the prisons or their deputies.

Summons for members of the armed forces or the police shall be served in the presence of their superiors or through the authority entrusted with receiving such summons.

Article 53

The clerk secretariat of the Court shall record petitions in the same day of receipt of their memoranda. Such recording shall be in a special record and in the same subsequent order of their receipt. Record of petitions shall be transferred to the President of the Court to determine a session for consideration of each, then he shall pass the record with a note for each petition containing the date, number and session in which each petition shall be considered.

The clerk secretariat shall expediently notify the concerned parties. The case shall be considered starting from the date of its recording. Notification shall be carried out by the

secretariat of summoners. Help may be sought from persons designated for such purpose by the Minister of Justice. Notific-action shall include, in addition to the special information regarding the date and time of service of such notice, the name and occupation of its server and the name and capacity of its receiver.

No notice shall be served before sunrise or after sunset, or in holiday or festivity days, except on occasions of urgency provided that this is ordered by the President of the Court and that he signs the original copy of the notice.

If the person serving notice encounters resistance or major difficulties, he shall suspend his procedures and refer the matter to the President of the Court for his orders about the following actions.

The server shall return the original copy of the notice to the clerk secretariat of the Court with the impression of what has occurred.

Article 54

The person whose interests have been affected by a crime has the right to act as a plaintiff requesting redress of his civil rights before the Criminal Chamber of the Court considering the action, unless the case contains an issue on which decision has been reserved.

The civil action can be considered started by serving a memorandum containing requests to the Public Prosecution in order to proceed with the criminal action. Claim of civil rights can be initiated in the session of the Court considering the criminal action, if the accused is present, otherwise the case shall be adjourned until the accused has been informed of the claims of the plaintiff, provided that the criminal action is not completed and ready for decision.

The plaintiff can include in his action a person responsible for the civil rights of the accused, and this person can intervene in the action of the case on his own initiative at any stage.

Article 55

Without prejudice to the preceding Article, the party harmed by a crime has the right to refer to the Civil Court which has jurisdiction, to request indemnity from harm suffered because of the crime.

Whenever such a route has been chosen, the plaintiff cannot

refer his claim to the Criminal Chamber. If the civil action has been started while the criminal action is still pending before the Criminal Chamber of the Supreme Court, the Civil Court shall suspend its proceedings until the criminal action is decided.

Article 56

The criminal action shall be considered extinguished by the death of the accused.

Article 57

Testimony of witnesses of legal age shall be heard after taking oath to testify according to the truth. Any witness who refuses to appear before the Court despite notification, or refuses to testify without justifiable cause, shall be liable to a penalty of a maximum of one hundred Dirhams.

If a witness refuses for the second time to appear before the Court despite notification he shall be liable to a penalty of a maximum of two hundred Dirhams. The Court can at this time order the police to compel him to appear if his appearance is considered necessary.

In all cases the Court can relieve witnesses of penalties if they appear and offer acceptable excuses.

Article 58

Applications for constitutional review that are raised before the Courts in the course of their consideration of cases pending before them, shall be referred to the Supreme Court by a decision of the concerned court containing the grounds for referral. The application shall be signed by the President of the Circuit concerned and shall contain the provisions subject to the review requested. This shall apply if referral is by the initiative of the Court concerned.

If the referral to the Supreme Court has been caused by a plea from a party to the case and accepted by the Court, the Court shall specify a time limit within which the interested party can refer his request for review to the Supreme Court. If such a limit elapses without proof of referral of the matter to the Supreme Court, the person shall be considered to have abandoned his plea.

In the case of refusal by the Court to accept the petition to refer a question of constitutional review to the Supreme Court, the decision of refusal shall be grounded. The concerned shall have the right to appeal the decision with the remainder of

the Court's decision to the Court which has jurisdiction, provided that the decision is appealable.

The Court before which the original case is pending shall suspend its proceedings until the Supreme Court issues its decision in the constitutional application. The decision of suspension shall be issued with the decision of referral mentioned in the first paragraph of this Article or after the actual referral to the Supreme Court mentioned in the second paragraph.

Article 59

Applications for the interpretation of treaties which are raised before the Courts in the course of their consideration of cases before them, shall be referred to the Supreme Court by a decision of the concerned Court according to the procedures contained in the first paragraph of the preceding Article, that is in the case in which referral has been started by the Court's own decision or by a serious petition from one of the parties.

The rule contained in the last paragraph of the preceding Article shall apply in this case.

Article 60

In the cases of conflict of jurisdiction between two or more judicial authorities, that are mentioned in items 9 and 10 of Article 33, in case none of these authorities relinquish consideration of the case, or if all of these authorities relinquish the case, or if conflicting decisions have been issued, the application to determine the competent Court may be brought by way of a memorandum from a party to the case or from the Prosecutor General.

The memorandum shall be accompanied by copies of memoranda of conflicting cases or of the conflicting decisions.

As a consequence of filing the mentioned memorandum with the clerk secretariat of the Supreme Court, cases which are in conflict shall be suspended until the competent Court has been determined. The concerned Chamber of the Supreme Court may order the suspension of the enforcement of all the conflicting decisions until the applicable decision has been determined. The President of the Supreme Court may order suspension of the enforcement of the conflicting decisions until the matter is considered by one of the Chambers of the Court.

Article 61

The clerk secretariat of the Court shall submit the case to the President of the Court to determine the Chamber which shall consider the case.

Except in criminal matters, the President of the Court shall nominate a member of the Chamber assigned the case, to prepare it for hearings.

The clerk secretariat shall notify the parties and the public prosecution about the sessions of preparation of the case, in order to attend before the judge responsible for such preparation. The judge responsible for peparing the case may request the fulfilment of certain duties and procedures from the public prosecution in order to complete preparation of the case.

Article 62

After completion of the preparation of the case, the judge responsible shall file a report listing the facts and legal issues raised by the case without including his own opinion regarding them.

The clerk secretariat shall submit the report mentioned to the President of the Chamber concerned, to determine the session in which the case shall be considered. The clerk secretariat shall inform those concerned about the date of the session in which the case will be considered. After that, it becomes their responsibility to follow the proceedings of the case.

The judge who prepared the case shall be the reporter of the case, while others may be assigned this job by the President of the Chamber.

Article 63

The judge who prepared the case shall read his report in the session. Decisions shall be passed after hearing the requests of the public prosecution, without argument of the case unless the Court decides to seek clarification from parties in person or from their legal representatives.

No decision shall be passed in criminal cases without hearing defence of the accused.

Article 64

In cases other than those specified in this Law, it shall not be a consequence of bringing of a case to suspend enforcement

of a decision or judgement which is subject to the case.

Article 65

A Committee shall be established in the Supreme Court of the President or his deputy and the four most senior of its judges, provided that the number of alternate judges does not exceed two.

If any of the Chambers of the Court decides, in the course of considering a case or petition, to depart from a principle previously established by the Court, except in constitutional matters, or in the existence of conflicting principles previously established by the Court, the Chamber shall refer the matter to this Committee for decision.

Article 66

All civil, administrative and judicial authorities in the Union and in the member Emirates shall provide the Court with the information and documents it requests.

The Court shall have the authority to issue any order to ensure the presence of any person or submission of any document it considers to be necessary to the determination of cases, requests or petitions before it.

All the mentioned authorities shall endeavour, within their respective powers, to fulfil any order issued to them by the Court in order to help in performance of its duties.

PART SIX FINAL AND TRANSITIONAL PROVISIONS

Article 67

Decisions of the Supreme Court shall be final and binding on all. No appeal of any kind may be heard regarding such decisions except in decisions issued in absentia in criminal matters, in which case special kinds of appeals included in Laws of Criminal Procedures shall be applied.

Article 68

The basis for the determination of values of cases, the charges payable and ways of appeal against such, shall be established by decree. Petitions and applications of the Union authorities or authorities of the member Emirates shall be exempted from payment of charges.

Article 69

Expenses of cases shall be determined by the Court if possible, otherwise such determination shall be by the President of the Chamber which issued the decision, by means of an unappealable order on a memorandum presented by the beneficiary.

Article 70

The President of the Court, or his designate, shall decide in applications of postponement of payments of charges, bails or relief therefrom. Such decisions shall be issued after review of documents and hearing from the applicants in case such hearing is considered appropriate.

As a consequence of applications for relief from payments of charges, dates of cases shall be suspended.

Article 71

The decision shall be issued and enforced in the name of the President of the Union.

Article 72

Until Federal Courts of First Instance are established, the Supreme Court shall have competence to decide in civil, administrative and commercial disputes between the Union and individuals, whether the Union is a plaintiff or defendant.

Decisions in these cases shall be passed by a panel of the Court composed of three judges.

Article 73

The copy of the decisions which is to become the basis for enforcement, shall be stamped by the seal of the Court and signed by the designated employee of the clerk secretariat, after entering the following phrase in writing on the copy:-

> "All Ministers, heads of government establishments and departments and all competent authorities of the Union or Member Emirates, shall endeavour without undue delay to execute this decision and perform its orders. The Prosecutor General, his representatives and other officials mentioned, shall help enforce application of this decision, even if they are required to use force in such application."

Article 74

All decisions of the Supreme Court in constitutional cases, applications for constitutional interpretation, and for interpretations of treaties and international agreements, shall be made public without cost in the Official Gazette.

Article 75

The Supreme Court shall apply the Islamic Shari'a, Union Laws and other Laws in force in the member Emirates of the Union conforming to the Islamic Shari'a. Likewise, it shall apply those rules of custom and those principles of natural law and comparative law which do not conflict with the principles of that Shari'a.

Article 76

All local authorities in the member Emirates of the Union shall transfer, without cost or request, all cases available with them, which come within the competence of the Supreme Court in accordance with this Law.

The clerk secretariat of the Supreme Court shall undertake performance of procedures required by this Law and carry notification for the parties about sessions designated for their cases.

The two preceding paragraphs shall not apply regarding cases in which decisions have already been issued or those in which arguments have been completed and are held awaiting decisions.

Article 77

The Minister of Justice shall issue the necessary orders to implement this Law. Ministers shall within their respective powers implement the rules of this Law.

Article 78

This Law shall be published in the Official Gazette and applied after two months of its date of publication.

Appendix B Footnotes

1 Published in the Official Gazette issue 12, August 1973.

2 As amended by Union Law 14/1985, published 29.12.85

3 Amended by Union Law 14/1985

4 Amended by Union Law 14/1985

5 Amended by Union Law 14/1985

6 Generally, hearings in trial of judges and their impeachment, and decisions are passed by an impeachment council composed of the President and the two most senior of its judges or by the plenum of the Court in other cases.

APPENDIX C

MEMBERSHIP OF THE UNITED ARAB EMIRATES' SUPREME COURT SINCE ITS ESTABLISHMENT

Justice	Nationality	Date of Appointment	Date of Release
Adel Younos (Pres)	Egyptian	31 05 1973	16 04 1975
Ahmed Talat	Egyptian	31 05 1973	03 05 1976
Jamal Al-Noumani	Egyptian	31 05 1973	26 09 1973
Mahammed Mahfouz	Egyptian	31 05 1973	01 06 1976
Ahmed Al-Dewani	Egyptian	31 05 1973	01 01 1980
Abdul-Majid Al-Garaybeh	Jordanian	30 07 1973	29 07 1977
Ahmed Sultan	Syrian	11 08 1975	----------
Mohammed Al-Mulhem	Syrian	26 08 1976	25 08 1980
Mustafa Al-Khalid (Alt)	Syrian	22 09 1978	----------
Mohammed Al-Qadi	Egyptian	24 09 1978	25 09 1987
Mohammed Al-Bagdadi	Egyptian	07 04 1979	----------
Othman Othman	Syrian	10 09 1980	14 05 1987
Amin Mazyad	Syrian	21 12 1980	09 09 1987
Salah Al-Shash (Pres)	Syrian	03 02 1981	01 01 1984
Darwish Abdul-Majid	Egyptian	27 01 1983	21 09 1987
Omar Awad	Sudanese	01 09 1983	----------
Moh'd Al-Quaizani (Alt)	Tunisian	03 02 1988	----------
Moh'd Al-Bajouri (Pres)	Egyptian	17 02 1988	----------
Fahmi Al-Khayyat (Alt)	Egyptian	03 03 1989	----------
Al-Husni Al-Kanani	Eyyptian	03 03 1989	----------

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