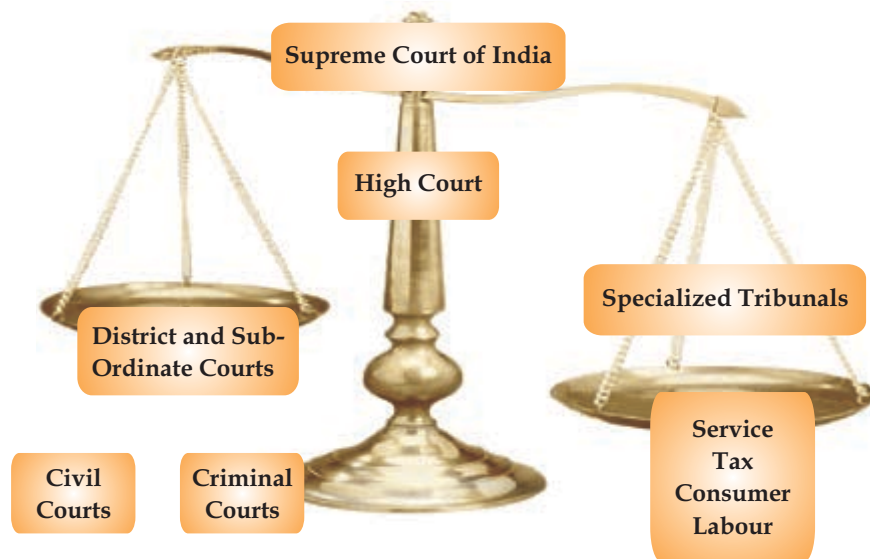


Unit-1: Judiciary

To Understand the Following Concepts

Common law, Adversarial system of law, Due process of law, Public Interest Litigation, Impartiality of judges, Judicial review, Separation of powers, Division of powers, Checks and balances, Basic structure, Collegium system in appointment of judges, Impeachment.




A. Structure, Hierarchy of Courts, and Legal Offices In India

1. Structure & Hierarchy of Courts in India

The Constitution of India lays out the framework of the Indian judicial system. India has adopted a federal system of government which distributes the law enacting power between the Centre and the States. Yet the Constitution establishes a single integrated system of judiciary comprising of courts to administer both Central and State laws. The Supreme Court located in New Delhi is the apex court of India. It is followed by various High Courts at the state level which function for one or more number of states. The High Courts are followed by district and subordinate courts which are known as the lower courts in India. To supplement the functioning of the Courts, there exist specialised tribunals to adjudicate sector specific claims such as labour, consumer, service matter disputes.

Supreme Court of India

The Supreme Court of India came into being on 28 January 1950. It replaced both the Federal Court of India and the Judicial Committee of the Privy Council which were at the apex of the Indian court system, under the colonial era. The Constitution of India



as it stood in 1950 envisaged a Supreme Court with a Chief Justice and 7 Judges. The Parliament was granted the power to increase the number of judges in the coming years. At present, the total strength of the Supreme Court is 31 judges including the Chief Justice of India.

High Courts

India consists of 24 High Courts at the state and union territory level. Each High Court has jurisdiction over a state, a union territory or a group of states and union territories. Below, the High Courts exists a hierarchy of lower courts functioning as civil courts and criminal courts as well as the specialised tribunals. The Madras High Court in Chennai, Bombay High Court in Mumbai, Calcutta High Court in Kolkata and the Allahabad High Court in Allahabad are the first four High Courts in India.

District and Sub-ordinate Courts

The Courts that function below the High Courts are popularly known as the lower Courts. They consist of district and sub-ordinate courts. Each state is divided into judicial districts presided over by a 'District and Sessions Judge'. The judge is known as a 'District Judge' when she/he presides over a civil case and a 'Sessions Judge' when he presides over a criminal case. The district judge is also called a 'Metropolitan Sessions Judge' when she/he is presiding over a district court in a city which is designated as a metropolitan area by the State government. District judges may be working with Additional District judges, depending upon the judicial workload.

The district judge is the highest judicial authority below a High Court judge. The District Court also holds appellate jurisdiction and supervision over all sub-ordinate Courts below it. On the Civil side, the sub-ordinate Courts below the District Court include (in ascending order) - Junior Civil Judge Court, Principal Junior Civil Judge Court, Senior Civil Judge Courts (also called sub-Courts). Sub-ordinate Courts on Criminal side (in ascending order) include- Second Class Judicial Magistrates Court, First Class Judicial Magistrate Court and Chief Judicial Magistrate Court.

Apart from the sub-ordinate Courts, Munsiff Courts also form a part of this hierarchy. They are the lowest in terms of handling matters of civil nature and function below the sub-ordinate Courts. Their pecuniary limits, meaning the Court's ability to hear matters upto a particular claim for money, are notified by respective State Governments.

Points to Note

A group of judges sitting together on a legal matter in the Court constitutes a bench. The lawyers constitute the members at the bar.

A division bench comprises of two or three judges.

A constitutional bench comprises of five or more judges and may even extend to thirteen judges



Tribunals

Apart from these judicial bodies, Indian judiciary is also characterised by numerous semi-judicial bodies involved in dispute resolution. These bodies function as semi or quasi-judicial bodies because they may consist of administrative officers or judges without a legal background. Yet they function in their judicial capacity and hear relevant legal matters and settle claims between the parties.

Tribunals have been constituted under specific constitutional mandate enshrined in the Constitution of India or through legal enactments, e.g. a law passed by the legislature. Their creation aims at increasing efficiency in resolving disputes and reducing the burden on courts. Examples of some of these tribunals include: Central Administrative Tribunal (CAT) for resolving the grievances and disputes of central government employees, and State Administrative Tribunals (SAT) for state government employees; Telecom Dispute Settlement Appellate Tribunal (TDSAT) for resolving disputes in the telecom sector in India; and the National Green Tribunal (NGT) for disputes involving environmental issues. Some of these tribunals function with regulators. Regulators are specialised government agencies that oversee the law and order compliance in the relevant government sectors. For example, one of the tribunals TDSAT functions alongside the regulator, TRAI (Telecom Regulatory Authority of India) in formulating laws and policy for resolving telecom disputes in India. Therefore these tribunals complement and supplement the role of courts in maintaining law and justice in the society.

Let us Ponder

India has no court of appeal unlike the UK. The Law Commission has, in its 227th report, recommended setting up four regional benches of the Supreme Court in Delhi, Chennai/Hyderabad, Kolkata and Mumbai. However, the Full Court of the Supreme Court has rejected the Law Commission's suggestion for establishing a Constitutional Bench in Delhi and Cassation Benches in the four regions.

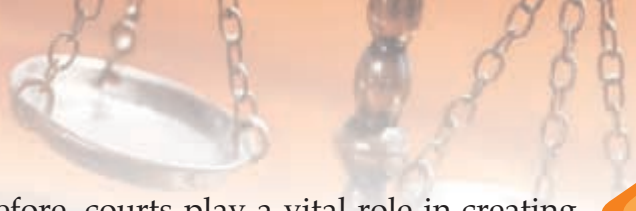
The Indian Supreme Court hears more than 50,000 cases a year. The UK and US Supreme Courts, on the other hand, hear less than 100 cases a year on average. India, unlike the US, has a unified judicial system. So each State does not have a separate hierarchy of courts that adjudicate state laws.

Discuss the benefits and demerits of having regional benches for Supreme Courts in India.

2. Salient Features of Indian Judiciary

India as a Common Law Jurisdiction

Taking its precedence from the British tradition of 'common law', India has adopted a similar model. Under this scheme of the common law system, the decisions, orders and judgments developed by the judges in India help in the creation and development of laws and legal principles, which becomes binding precedents for all



subordinate courts in the hierarchy. Therefore, courts play a vital role in creating laws, especially where gaps in law exist, and the legislature or executive have failed to enact laws. Thus, apart from administering civil and criminal justice, courts and judges serve a vital function in the federal set up of the country.

Opposed to this model, is a concept of civil law system followed in countries such as Germany, Russia, and Continental Europe. The main difference between common and civil law is with respect to the source of law. Under common law, judiciary can make laws through judicial decisions of courts; however under civil law, only the legislature or executive has the power to create laws and rules. This salient feature of Indian judiciary in following a common law model further strengthens the role of courts in India.

Adversarial Model of Dispute Resolution


Courts in India follow the adversarial system of adjudication as opposed to the inquisitorial model followed in several civil law countries. In an adversarial model, the role of lawyers representing the party becomes vital. Lawyers of the opposing parties present their cases before a neutral judge who in turn provides a decision based on the merits of the case, as presented by the lawyers. In the inquisitorial system of law, on the other hand, judges are more pro-active in adjudicating the matter. Rather than acting as neutral judges, they have rights to inquire and probe into the matter, much like a police. Here the role of lawyers representing the party and the role of judge cumulatively becomes important in determining the manner in which a civil case or criminal trial proceeds.

Let us Ponder

Choose a civil law country in the world that follows an inquisitorial model of legal system. In this context, find out the main differences in the legal systems between India and the chosen country? Discuss your findings in class.

3. Attorney General of India and Law officers in India

The discussion on the structure of Indian judiciary would remain incomplete without an explanation of law offices and officers appointed by the central and state governments in India. Certain law offices at the Union and State level exist to advise the executive wing of the government. These law officers are taken up by law officers, who derive their mandate either from the Constitution or other statutory enactments and rules. The Attorney General is the first legal officer of the country. The Attorney General of India is appointed by the President of India under Article 76 of the Constitution, which states that he can hold the office during the pleasure of the President. The Attorney General must be a person qualified to be appointed as a Judge of the Supreme Court, possessing adequate legal practice or have served as a



judge for a requisite duration as mandated by the Constitution. It is the duty of the Attorney General for India to give advice to the Government of India upon legal matters and to perform other duties of legal character as may be referred or assigned to him by the President. In the performance of his duties, he has the right to appear in the Courts. This is known as a right to audience given to the Attorney General. He may also take part in the proceedings of the Parliament without a right to vote. In discharge of his functions, the Attorney General is assisted by a Solicitor General and four Additional Solicitors General. The position of the Solicitor General and Additional Solicitors General is not recognised in the Constitution. However they are governed through rules enacted by the Parliament.

Similar to the Attorney General of India, the position of Advocate General exists at the state level. An Advocate General is a senior law officer who acts as a legal adviser to the State Government. According to Article 165 of the Constitution, Advocate General is appointed by the Governor of the respective state. The Advocate General is the chief legal advisor of the State and performs duties of a legal character including representing the State before the courts either through himself/herself or through the law officers or pleaders appointed by the State. The qualification required for appointment as an Advocate General is similar to that of a judge of a High Court. The office of an Advocate General is held during the pleasure of the Governor, who also determines the nature of remunerations for the Advocate General. Additional Advocate Generals are also appointed to assist the office of the Advocate General.

Group Activity


"The Judiciary is an important pillar of the Indian judiciary". What is your perception of the Indian judiciary? What do you think is the major role of the judiciary?

B. Constitution, Roles and Impartiality

The judiciary in India derives its powers and functions from the Constitution, which till date remains the fundamental legal text for the functioning of Indian democracy.

1. Independence of Judiciary as a Constitutional Safeguard

As has been discussed in Part I (Legal Studies), Article 50 of the Indian Constitution lays the rule of independence of judiciary. This is understood as judiciary's autonomous status, separate from the executive or legislative wings of the government. Independence of judiciary helps in the maintenance of rule of law, ensuring good governance and creating a free and fair society. The independent status of the judiciary and roles to be performed by it; can be understood as two sides



of the same coin. In this context, one must understand the reasons for granting a special status to the judiciary:

First, Judiciary's independence is linked to its role as the watch-dog in a democracy. It monitors and maintains the checks and balances over the other arms of the government. Thus judiciary emerges as a mediator when any organ of the government exercises 'excess power' which tends to violate the larger societal or individual interest. For instance, the Indian Police has extensive powers for crime detection and gathering evidence for prosecution of criminals. It is common for the police to interrogate suspect criminals in-order to gather the best evidence of the crime. However such powers should not impinge upon the rights of the accused or the suspected criminal. An accused cannot be coerced into giving statement pointing to his/her guilt. This right has been constitutionally guaranteed to the accused under Article 20(3) of the Constitution, which states:

"No person accused of any offence shall be compelled to be a witness against himself".


Judiciary steps in when such delicate interests are at loggerheads. Similarly, when there is a thin line of difference as in case of a police exercising their power to gather witness, in the exercise of the 'legitimate' and 'excess' right of a state organ, the role of judiciary becomes vital.

Second, in-order to ensure that constitutionally guaranteed freedoms such as freedom to speak in public or peacefully assemble, are interpreted as per the true constitutional philosophy, judiciary has been kept free from any external pressures. This is particularly useful when judiciary is interpreting a case of conflict between say between the government (political party in power) and certain protesting people of the civil society who have peacefully articulate their opinions on social issues for example, crime against women.

Third, Judiciary acts as a guardian of fundamental rights which are constitutionally granted to every citizen in India. Independence of judiciary was carved out during the formation of Indian Constitution as India was transitioning from a feudal to a democratic order. It was done to fully translate the well-knit provisions of extensive rights guaranteed under the Constitution into the lives of average citizens. Our Constitution grants us unique rights such as:

- ❖ Civil and political rights- e.g. the right to life; right to freedom of discrimination based on religion, race, caste, sex or place of birth.
- ❖ Economic, social and cultural rights- e.g. freedom to practice any religion; protection of interests of minorities.

An independent and impartial Judiciary has empowered Indian citizens and performed this role. Illustratively, one may look into the role of Court in giving an



expanded meaning to Article 21 of the Indian Constitution which talks about a general right to life and personal liberty. For example, within this freedom, the Supreme Court has held that a street vendor has a right to operate on streets as selling products on street is linked to his livelihood and daily living which is protected under Article 21. Similarly, the Supreme Court has also stated that those who are aged, disabled and destitute in India including men and women have a right to food, which is most essential for their survival. State has a corresponding duty to provide them with food. This right has been read into the general right under Article 21. Therefore, the Court is performing the role which it was granted at the time of the drafting of Indian constitution. Even though the drafters did not include specific rights such as livelihood and food, within the constitutional ambit of enforceable fundamental rights, they are now made available to the citizens of India as matters of rights. This has been possible only by the interpretation and rule making function of the courts in India.

In the domain of criminal law as well, independence of judiciary is linked to the granting of a fair trial to the accused. This becomes extremely important even when the accused are foreign nationals or persons who have committed crimes against the state, e.g. terrorists.

Independence of judiciary is vital for the respect of due-process of law. Due process of law means that the State must respect all the legal rights that are owed to a person and confirm to the norms of fairness, liberty, fundamental rights etc. Only an independent judiciary can make this concept operational. History has evidenced that whenever the independence of judiciary has been disturbed, it has directly impacted upon the due process of governance and rights granted to average citizens.

These lessons teach us that even in grave political circumstances, the rights of citizens should not be compromised and this could only be possible through an independent and impartial judiciary. Therefore independence of judiciary remains a vital and core principle even in the modern democracy.

Let Us Ponder

Are there examples of non-independent judiciaries in the world? Find examples of social or political events and occurrences in newspapers or other sources that suggest some countries may not have independent judiciary.

2. Role of Indian Judiciary

The Role of Courts

Indian judiciary comprises of the Supreme Court, High Court, Sub-ordinate Courts and other Tribunals. The role of these courts along with their composition, powers and procedures for functioning have been elaborated in the Constitution.

Supreme Court



Adjudicator



Interpreter



Advisor



Activist

Different Roles of the Supreme Court of India


The Supreme Court of India primarily exercises the role of an adjudicator and interpreter. This is explained through different jurisdictions vested with the court. Its role as an adjudicator and interpreter can be understood through the original and appellate jurisdiction vested with the Court. Under Article 131 of the Constitution, the Supreme Court is granted original jurisdiction. This power is exercised to adjudicate amongst disputes between Union and one or more states and between two or more states. Such disputes must involve some question of law or fact on which the existence or extent of legal rights can be adjudicated. For example, the dispute between the sharing of river or other natural resources between two states in India can be directly brought to the Supreme Court under exercise of its original jurisdiction.

Article 32 of the Constitution further gives an extensive original jurisdiction to the Supreme Court for the enforcement of fundamental rights of the citizens, through issuing directions, orders and writs (See Part I, Legal Studies Class XI). This is popularly known as the 'Writ Jurisdiction' of the Court.

The appellate jurisdiction of the Supreme Court can be invoked by a certificate granted by the High Court. Appeal to the Supreme Court may be made against any judgement, decree or final order of a High Court in both civil and criminal cases. Like the exercise of original jurisdiction, these cases must involve a substantial question of law as to the interpretation of the Constitution. Substantial questions of law as highlighted above connote questions of law or fact on which the existence or extent of legal rights can be adjudicated.

Apart from the listed appellate powers of the Court, the Supreme Court is also vested with wide appellate jurisdiction over all Courts and Tribunals as provided in Article 136 of the Constitution. Under its discretion, the Court may grant a special leave to appeal and receive any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in the territory of India.

Besides being an adjudicator and interpreter, Supreme Court also functions as an



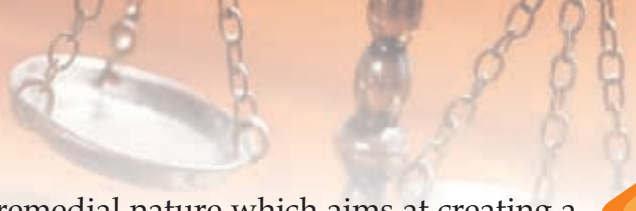
adviser. Court's advisory jurisdiction may be sought by the President under Article 143 of the Constitution. This procedure is termed as "Presidential Reference" and is recognised as the 'Advisory jurisdiction' of the Court. Under this scheme, President may refer any question of law or fact of public importance. However, it is not binding on the Supreme Court to answer questions raised in the reference. In the last more than sixty years, only a handful of references have been made. The Supreme Court can refuse to provide its advisory opinion if it is satisfied that the questions are either socio-economic or political in nature.

So far we have seen the constitutional imperatives that permit the Supreme Court to adjudicate and advice on disputes coming from the sub-ordinate courts, individuals exercising writ jurisdiction and the President of India. In the recent years, the Supreme Court has relaxed its locus standi (meaning the right of a party to appear and be heard by a Court) and has permitted public spirited citizens and civil society organisations to approach the Court on behalf of the victims for better administration of justice. On other accounts, the Court has on its own initiative started cases of public importance. For instance, it has summoned and reprimanded state authorities for their apathy and lack of diligence in running child care homes in the states. All, this has been possible through the judicial activism of the Supreme Court through Public Interest Litigation (Janhit Yachika) (PIL). This extra-ordinary jurisdiction has been invoked either through writs or even by writing letters to Judges, whose modalities are maintained under the guidelines for PIL enacted by the Court.

The first ever PIL is listed as *Hussainara Khatoon v. State of Bihar* and dates back to 1979. A public interest activist lawyer filed this case on behalf of thousands of prisoners of the Bihar jail against the inhuman conditions of the prison. A Supreme Court bench headed by Justice P.N. Bhagwati declared the right for free legal aid and expeditious trial of these prisoners, which ultimately led to their release. Since then, PILs have encompassed several issues including socio-economic rights (freedom from bonded labour), legal entitlements (right to food; right to work), environment issues (clean air and water) and political reforms (disclosure of assets by members of the executive; disbursement of natural resources done by the government).

The progress of PIL has thus seemed to incorporate several issues. Yet common characteristics encompass these litigations. These characteristics include:

- i) PILs can be termed as non-adversarial litigation that pits the interest of one party over the other. Rather than focussing on traditional litigation of adversary character, PILs are recognised as tools for social change.
- ii) PILs are based on the tenets of citizen standing and representative standing which expands the rights of third-parties to approach the Court.

- 
- iii) PIL from its inception is modelled on remedial nature which aims at creating a dynamic, welfare oriented model of judiciary. PIL thus incorporates the Directive Principles whose claims cannot be brought directly to the Courts, into the domain of fundamental rights under Part III of the Constitution, which can be invoked before the Courts as a matter of rights by the citizens of India. Therefore PILs are creating new rights and laws within the realm of the state. These laws are also democratising citizen's access to justice, thereby strengthening the democracy in India.
- iv) PIL further strengthens the role of judiciary as a monitor and watch-dog agency. Fear of being dragged to the Court via PIL has improved the quality of several social institutions in the country such as jails, protective homes, mental asylums etc.

However, with the advent and growth of PILs, they have also been misused for private gains, and led to frivolous litigation on unnecessary issues. They have also been criticised for judicial over-reach and stepping into the shoes of legislature.


Let us Ponder

Are PILs replacing or supplementing the role of legislature which is the primary law enacting organ in India?

High Courts and Lower Courts

The High Courts function as the organs of judicial administration at the State-level. Similarly, the lower courts function as centres of civil and criminal justice at the district level. Lower courts as explained above comprise of district and sub-ordinate courts. Districts Courts are usually Courts of first instance, where litigants proceed for their disputes. These Courts have set territorial and pecuniary limits when accepting cases of civil nature. A similar hierarchy exists in the criminal courts at the sub-ordinate level. Once matters are adjudicated by these courts, they proceed to the High Courts on appeal. Thus sub-ordinate courts are mainly vested with the establishment of facts while the appellate courts deal with interpretation of statutes the correct application of law.

The High Courts have power to issue within their jurisdiction directions, orders, or writs including writs which are in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for enforcement of Fundamental Rights and for any other purpose. (See, Part I, Legal Studies) This writ jurisdiction is similar to the Supreme Court of India. The role of High Court also becomes similar to the Supreme Court in the exercise of public interest litigation. Furthermore, each High Court has powers of superintendence over all Courts within its jurisdiction. It can call for



records from such courts, make and issue general rules and prescribe forms to regulate their practice and proceedings and determine the manner and form in which book entries and accounts shall be kept.

3. Independence & Impartiality of Indian Judiciary

The meaning and rationale for independence of Indian judiciary has been dealt in the previous section. However we must also understand how the independence of judiciary is ensured and maintained by the Constitution. The theory of 'constituent mechanism' of independence of judiciary defines judiciary's independence in terms of the independence of its judges. Judges ought to function in an unbiased manner and scholars as pointed out by Simon Shetreet (The Culture of Judicial Independence; Judges on Trial).

One must note that, independence of judiciary and impartiality of judges exist as two distinct concepts- the former referring to the institution, and the latter referring to its constituent actors. The concept of impartiality of judges can be understood within the broad framework of independence of judiciary. These concepts must be studied in conjunction as they aim at achieving the same goal of maintaining judicial integrity in the democratic process of the country.

It is important to discuss the constitutional framework for the independence of judiciary. Broadly, the Indian Constitution contains several provisions to serve these twin functions.


Provisions Relating to the Institution of Judiciary

The Constitution recognises that vast powers enjoyed by the courts, especially the Supreme Court cannot be curtailed by the Parliament. In the civil cases, Parliament only has a limited right to change the pecuniary limits for appeal to the Supreme Court. In turn, the Supreme Court has a vast appellate jurisdiction and supplementary powers to enable its efficient functioning. Both the Supreme Court and the High Courts are courts of record and possess the power to punish for contempt against the judiciary or judges.

Provisions Relating to the Judges

Independence of judges is crucial to ensuring independence of judiciary. The following legal provisions mandate judge's independence and impartiality:

- i) Once appointed, judges are provided with a security of tenure till they reach a retirement age. This age remains 62 for the High Court judges and 65 for the Supreme Court judges. Judges are not allowed to practice as advocates in the same or equivalent courts, post their retirement. For example, a retired High



Court judge can practice in the Supreme Court, but is prevented from practicing in the same or other High Courts. This ensures that ex-judges practicing at the bar do not influence the decision of the bench, with whom they may have presumed familiarity.

- ii) Judges cannot be easily removed from their office except for proven misbehaviour and incapacity. The legal process is kept stringent to ensure security of tenure of the judges.
- iii) The salaries and allowances of judges are fixed and not subject to vote of the legislature. Judges derive their salaries from the consolidated fund of India (for the Supreme Court) and consolidated fund of state (in case of High Courts). Their emoluments cannot be altered to their disadvantage except in the event of financial emergency.

Activity

Salary of judges is a constitutionally conferred privilege. Is it a sufficient measure in ensuring independence?

Examine whether the concept of life tenure for judges of Constitutional courts, as in the case of the United States of America, is suitable for judges of the Supreme Court of India and other High Courts?

- iv) Even the judicial conduct of the judges has been kept immune from examination by other Constitutional organs. The conduct of judges of both the Supreme Court and High Courts cannot be discussed in Parliament or state legislature, except when a motion for removal of a judge is being presented to the President.
- v) Supreme Court of India has been authorized to have its own establishment and to have complete control over it. It is further authorized to make appointments of officers and staff of the court and determine their service conditions.

Therefore, one can conclude that independence of judiciary is a constitutionally conferred protection.

Let us Ponder

Can independence of judiciary ever be achieved through complete impartiality of judges?

Judges are part of the same society that we live in; their inherent sociological and psychological biases impact decision making, thereby affecting the independence of judiciary as a whole? Discuss this Statement.

If you concur with this view, participate in the following activity:

Activity

The following table represents different forms of biases that judges may hold. In your views, would they have any impact on decision making? Based on your views, can you visualise the categories of

disputes (civil- land & property; marriage & divorce, liability claims; civil- murder; sexual offences, constitutional- public interest litigation or any other/all disputes) where the biases would impact the judges. The first illustrated example is drawn from an empirical study conducted by the Harvard Law School in 2005.

Nature of Bias	Impact on Decision Making (Yes/No)	How (in which category of dispute?)
Race of a judge	Yes	Employment Dispute
Judges coming from a poor rural background having witnessed sharp class, religious, caste discrimination		
Gender of the judge in adjudicating heinous crimes		
Judges who have served as government advocates before elevation		
Judges who are strong supporters of economic liberalisation		


C. Appointments, Trainings, Retirement and Removal of Judges

1. Appointment of Judges

Constitutional Mandate

The method of appointment of judges at the Supreme Court, High Court and District Courts has been enshrined in the Constitution of India. According to Article 124 of the Constitution, 'every judge of the Supreme Court shall be appointed by the President after consultation with such of the Judges of the Supreme Court and of the High Courts in the States, as the President may deem necessary'. The Article also provides that in case of appointment of a judge other than the Chief Justice of India, the Chief Justice must be consulted. The Article further provides for the qualifications required to become a judge at the Supreme Court. These qualifications include:

- ❖ Citizenship of India, and

- 
- ❖ Has been for atleast five years a Judge of a High Court or of two or more High Courts in succession; or
 - ❖ Has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
 - ❖ Is a distinguished jurist in the opinion of the President

Similarly, the procedure for appointment of judges at the High Court has been enshrined in Article 217 of the Constitution. This Article prescribes that every Judge of the High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor of the State; and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court concerned. The qualifications of a High Court judge includes:


- ❖ Citizenship of India, and
- ❖ Has for at least ten years held a judicial office in India; or
- ❖ Has for at least ten years been an advocate in a High Court or of two or more such Courts in succession.

For the district and sub-ordinate Courts or the lower judiciary in India, the procedure for appointment is mentioned in Article 233 of the Constitution. Appointment of district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. The qualifications for appointment as District Judge include:

- ❖ Member of judicial service of the State; or
- ❖ Any person who has had a minimum of seven years of practice as a lawyer at bar.

Current Practice in the Appointment of Judges

Despite a clear Constitutional mandate, the appointment of Judges in practice remains a complex process. There has been an extensive debate over the appointment procedure of judges which has seen alterations in actual practice. At present, the appointment at the Supreme Court and the High Court follows a collegium model, which is a judicial creation through case-laws, even though not constitutionally mandated. Under the collegium model for appointment of judges of the Supreme Court, the Chief Justice of India consults four senior most judges of the Supreme Court. The Chief Justice of India sends his recommendations to the Union Minister of Law and Justice, who then puts up the same to the Prime Minister. The Prime Minister will then advise the President. For High Courts, the collegium comprises of the Chief Justice of the High Court and two senior most judges of the High Court. The Chief Justice conveys his recommendations to the Chief Minister of the State and the Governor of the State, who in turn send their views directly to the Union Minister of




Law and Justice. The complete material is then forwarded to the Chief Justice of India, who in consultation with a collegium of two Judges of the Supreme Court, would send his recommendations to the Union Minister of Law and Justice. The Union Minister of Law and Justice then puts up the same to the Prime Minister who will advise the President in the matter of appointment.

The seniority of a Judge plays a vital role in his/her elevation or appointment as Chief Justice. For initial appointment as a Judge in a High Court for those from the lower judiciary inter-se seniority does matter; and for elevation of advocates from the bar, relative merit matters. The collegium model, considers the relative merits of those Judges/advocates in the zone of consideration for elevation with reference to their judgements and cases.

Tracing the Historical Debate on the Issue of Appointment of Judges

The issue of appointment has often been linked to the independence of judiciary and there has been a constant tussle between executive and judiciary over the appointment of judges. As early as the 14th Law Commission Report under the chairmanship of M.C. Setalvad, India's first attorney general in 1958, these concerns were raised. The Commission noted the appointment or rejection of appointment of judges by the executive, in contrary to what the judiciary suggested, creating rather awkward situations. The report highlighted that several appointments were being made on political, regional, communal or other grounds as a result of which the fittest of the lot were never appointed. The Commission thus suggested on strengthening the process of consultation between the executive and the judiciary.

Later, a series of three judicial decisions popularly known as the Three Judges Cases helped in the development of the modern collegium system. This development has been a result of a tumultuous process, but in modern practice governs the rule for judicial appointments. The first Judges case (1981) gave primacy to the Executive and stated that the CJI's recommendation to the President can be refused for cogent reasons. It gave vast powers to the Executive for the next 12 years, in making judicial appointments. This however was modified in the second Judges case (1993). 'The Judgment held that the Chief Justice of India has primacy in the matter of appointments to the Supreme Court and the High Courts, and that an appointment 'has to be in conformity with the final opinion of the Chief Justice of India', while emphasising the desirability of consultation of the Chief Justice with other Judges. The executive element in the appointment process was reduced to a minimum and political influence eliminated. This decision rendered by a nine-judge bench was however supported by only five judges on the bench and the four other judges did not concur with the majority opinion. The years that followed thus witnessed some confusion in the process of appointment as CJI made some unilateral appointments



and the role of the President was reduced to a mere approval. Later in 1998, the Supreme Court in a Presidential reference (1998 advisory decision) emphasized upon the role of 'consultation' and held that the process of appointment of Judges to the Supreme Court and the High Courts is an 'integrated participatory consultative process'. The Chief Justice of India firms up his opinion after consultation with a plurality of judges; his opinion is formed by a body of senior Judges.

As stated before, the collegium system is not constitutionally mandated and thus the legality of such a system invokes certain scepticisms.

To remove these concerns, an amendment has been proposed to the Constitution where the President shall appoint the judges on the recommendation of Judicial Appointments Commission (JAC). The JAC aims to replace the collegium system with a more formal body. This Commission as proposed will be chaired by the Chief Justice of India and will have 2 senior Supreme Court judges, besides the Union Law Minister, the Law Secretary as its convenor, and two 'eminent persons' nominated by a 'collegium' comprising the Prime Minister, Leader of Opposition and the Chief Justice of India. The Bill was introduced in the Rajya Sabha in August 2013. The Bill if legislated will provide a meaningful role to the executive and judiciary, and seeks to broaden the appointment process and make it more participatory to ensure greater transparency and objectivity in the appointments to higher judiciary. The composition and the functions of the JAC in the selection of the judges would be incorporated into the Constitution, once this amendment has been debated and finds enough votes in its favour in the Indian Parliament.


2. Judicial Training

National Judicial Academy is a government funded training institute constituted for the training of Supreme and High Court judges and judicial officers in India. This body was founded in 1993 and is located in Bhopal, with a registered office in New-Delhi. It aims at suggesting judicial reforms and providing research support services for greater efficiency, fairness and productivity in judicial decisions.

As a part of providing judicial training, the National Judicial Education Strategy (NJES) has been established in 2006 to provide judicial education to High Court judges, District Judiciary and State Judicial Academies. The training consists of conferences, orientations, workshops on core judicial skills and administration and seminars on substantive law and justice. The Academy also aims at enhancing the online skills registry of Indian judges to increase their proficiency and making better access to judicial decisions.

3. Retirement of Judges

The retirement age for a Supreme Court judge is 65 years. Similarly, a High Court



judge continues in his office, till the retirement age which is 62 years. The age of retirement of District Court judges is determined by their respective State Government under special service rules.

The retirement age of judges as specified in the Constitution has been subject to intense debate in India. There lies a pending bill in the Parliament (114th Amendment Bill, 2010) which proposes to increase the retirement age of High Court judges from 62 to 65. However, since the bill is still being debated in the Parliament, it has no legal effect. Similarly, the Venkatachalliah Committee formed to review the working of the Constitution (2000) suggested to increase the retirement age of Supreme Court judges from 65 to 68. These proposals have been made in the light of global comparative standards, followed to determine the retirement age for the judges.

For instance, there is no retirement age for Supreme Court judges in the United States. In the High Court of Australia, the retirement age is 70. The Supreme Court of Canada has fixed the retirement age of their judges as 75. Similarly in the UK Supreme Court, the retirement age is 75, while the Constitutional Court of South-Africa follows the age of 70 or after 12 years of the service of the judge.


Source: T.R. Andhyarujina, The Age of Judicial Reform, The Hindu, September 1, 2012

Similarly, Indian proposals focus on enhancing the age of retirement for the judges. It is done in-order to facilitate them excel in their service like their counter-part judges in the foreign jurisdictions. Similarly, several senior lawyers with requisite expertise and experience decline to accept judge-ship due to the lower retirement age of 62, especially in the High Courts. By an enhanced age, this problem could be rectified as advocates would have greater incentive to forego their individual legal practice and function in the role of judges. Further, the relatively early retirement age in India is often linked to the declining quality of judicial service and the inability of a judge to properly effectuate the stipulated judicial work-load. Overall, the proposals mention that such issues could be taken care of, if the retirement age of the judges would be increased.

4. Removal of Judges

Judges of the Supreme Court and the High Courts can be removed through a process called as 'impeachment'. The process for removal of the judges is exactly the same for both the Supreme Court and the High Courts. This has been stated explicitly in the Constitution of India.

As a part of the process of impeachment, an inquiry is made into the grounds of removal of the judges. The grounds for removal include: (i) proven misbehaviour or (ii) incapacity. The inquiry into these grounds is made under the Judges Inquiry Act, 1986. This inquiry is done by a committee of three members, of which two are judges -



one from the Supreme Court and second is the Chief Justice of High Court. If the complaint is against the high court judge then two judges from the Supreme Court constitute this Committee.

Based on the findings, the recommendation to impeach the judge has to be made by the Chief Justice of India to the President of India. If it is accepted then, the proposal of impeachment must be introduced in the Parliament for discussion by 100 MPs in Lok Sabha or 50 MPs in Rajya Sabha. The copy of the proposal is given to the concerned judge before the proceeding starts in the Parliament of India.

The impeachment process in the Parliament is governed under Article 124(4) of the Constitution. Under this scheme, the motion of impeachment has to be passed by the two-third majority members present and voting must be done separately in the each house of the Parliament. If the motion is passed then the formal announcement is done by the President of India. Therefore, the overall process of impeachment is lengthy and complex.

Consequently, in the history of Indian judiciary, this process has been successful only once. Justice Soumitra Sen, the Chief Justice of Calcutta High Court was impeached in 2011 for misappropriation of funds. Previously in 1991, the impeachment process was initiated against Justice V Ramaswamy, Chief Justice of Punjab and Haryana High Court but did not succeed on falling short of the two-thirds voting criteria.

As to the removal of judges in the lower judiciary, a District Judge or an Additional District Judge can be removed from his office by the State Government in consultation with the High Court.

Understanding the linkages amongst appointment of judges, independence of judiciary and Rule of Law in a democracy.

"...The success of a democracy largely depends upon an impartial strong and independent judiciary endowed with sufficient power to administer justice,"

"Although both judicial independence and judicial accountability are vital for maintaining the rule of law, they are sometimes projected as conflicting phenomenon. Judicial accountability has become an indispensable counterbalance to judicial independence.

"In that connection, accountability is fostered through the process of selection, discipline and removal found in the Constitution and the statutes in various judicial systems,"

Stressing the need for an independent judiciary, he said, without it, there is a little hope for the rule of law.

Justice P. Sathasivam, Chief Justice of India (2014). The views are reproduced from- CJI defends Collegium System of appointment of judges, The Hindu, September 14, 2013.



D. Courts and Judicial Review

1. Introduction


(a) Judicial Review - General

Judicial review is a principle or a legal doctrine or a practice whereby a court can examine or review an executive or a legislative act, such as law or some other governmental or administrative decision, and determine if the act is incompatible with the constitution. In some countries, like the United States, France and Canada, judicial review allows the court to invalidate or nullify the law or the act of the legislature or the executive if they are found to be contrary to the constitution. In the United Kingdom, judicial review powers are restricted; the courts do not have authority to nullify or invalidate legislation of the Parliament. Likewise, there may be other countries where courts may have different kind of restrictions and may review only one branch.

(b) Separation of Powers - General

Although the doctrine of separation of powers have been dealt with in this unit as well as elsewhere in the legal studies course, it will be helpful to have a brief recap of the doctrine as it relates with the topic on judicial review. Most democratic countries have adopted in their Constitutions partial or complete system of separation of powers horizontally among the three branches of the government or of the state-- the legislative, the executive, and the judiciary. The doctrine of separation of powers ensures that each branch has distinct powers and responsibilities, based on organizational scheme of the Constitution. Furthermore, Constitution provides checks and balances so that no one branch exercises its supremacy over the others or misuse the powers provided to them. In this way, each branch puts a check on the other whenever there is an encroachment or conflict of powers among them and thereby preventing any concentration of powers in one branch. It is believed that the system of separation of powers may have few advantages: 1) it allows for liberty as it avoids concentration of powers in one branch; 2) it promotes efficiency; and 3) it facilitates and enriches democratic discussion through the powers of checks and balances of each branch. The powers of judicial review allow judiciary to safeguard the checks and balances and to ensure the separation of powers of the other two branches of the government.

Another related concept is the doctrine of division of powers between the federal or centre and states or provinces. Federal government has law making powers different than that of states or provinces. For example, the subject matters on



national defense and foreign affairs often fall with the federal government, and matters of prisons and direct taxes may fall with the state or provincial governments. The doctrine of division of powers stipulates and delimits subject matters or items on which the federal government and provincial/state governments have powers to make laws. The scheme may also involve common items on which both governments may have powers to make laws. Courts have judicial review powers to declare any law as unconstitutional if it is enacted by breaching the demarcation.


India, which is based on the parliamentary form of government, follows the system of separation of powers among the three branches of the government as prescribed in the Indian Constitution. The executive branch consists of the President, the Prime Minister and the bureaucracy. The legislative branch includes both houses of Parliament: the Lok Sabha and the Rajya Sabha. In the judiciary, the Supreme Court is the final authority for interpreting the constitution; judiciary is quiet independent of the other two branches.

2. Scope of Judicial Review in India

Judicial review is one of the essential features of the Indian Constitution; it has helped preserve the constitutional principles and values and the constitutional supremacy. The power of judicial review is available to the Supreme Court and the High Courts in different states in the matters of both legislative and administrative actions. Largely, this power has been applied for the protection and enforcement of fundamental rights provided in the Constitution. To a lesser extent, judicial review has also been used in matters concerning the legislative competence with regards to the Centre-State relations. With respect to judicial review on matters of executive or administrative actions, courts have employed doctrines such as 'proportionality', 'legitimate expectation', 'reasonableness', and the 'principles of natural justice'. Essentially, the scope of judicial review in courts in India has developed with respect to three issues: 1) protection of fundamental rights as guaranteed in the Constitution; 2) matters concerning the legislative competence between the centre and states; and 3) fairness in executive acts. Discussed below are some of the salient features, issues, as well as examples of the ways in which judicial review is practiced by the Supreme Court of India.

(a) Individual and Group Rights

Article 13(2) of the Constitution of India provides that: "The State shall not make any law which takes away or abridges the rights conferred by this Part (Part III - Fundamental Rights) and any law made in contravention of this clause shall, to the extent of the contravention, be void." B. R. Ambedkar, the chairman of the



Constitution drafting committee of the Constituent Assembly, has termed this provision as the 'heart of the Constitution'. This Article provides explicitly the powers of judicial review to the courts in the matters of fundamental rights. Furthermore, Article 32 offers the Supreme Court the power to enforce fundamental rights, and provides one the right to move the Supreme Court for the enforcement of those rights. From this article, the Supreme Court derives authority to issue directions or order or writs in the nature of: 1) habeas corpus, i.e., to order the release of person is unlawfully detained; 2) mandamus, i.e., to order to a public authority to do its duty; 3) prohibition, i.e., to prevent a subordinate court from continuing on a case; 4) quo warranto, i.e., to issue directive to a person to vacate an office wrongfully occupied; and 5) certiorari, i.e., to remove a case from a subordinate court and get the proceedings before it.

Like Article 32, Article 226 is a parallel provision for High Courts in states and allows one to institute similar writs in the High Courts for the enforcement of fundamental rights.

Courts, through its judicial review practice, have liberalized the doctrine of locus standi (right to appear before or petition the court) for the enforcement of fundamental rights of those who lack access to courts due to the reasons of poverty or social and economic disabilities. This method led to the development of Public or Social Action Litigation (PIL or SAL) whereby any public spirited person can petition or write letters to courts on behalf of the human rights violation victims or aggrieved parties. This topic has already been dealt with elsewhere in this Unit; students may refer to the relevant section for more on this topic.

(b) Centre-State Relations

Judicial review has also been used in matters concerning the legislative competence with regards to the Centre-State relations. Article 246 of the Constitution provides that the Parliament has exclusive powers to make laws with respect to matters itemized in the 'Union List' (List 1 of the Seventh Schedule of the Constitution). It provides further that both the Parliament and the Legislature of any State have powers to make laws with respect to matters enumerated in the 'Concurrent List' (List III of the Seventh Schedule of the Constitution). With respect to the States, it provides that the Legislature of any State has exclusive power to make laws with respect to matters listed in the 'State List' (List II of the Seventh Schedule). This Article delivers clear division of law-making powers (division of powers) as well as room for intersection between the Centre and the State. Judicial review helps demarcate the legislative competencies and ensures that Centre does not exert its supremacy over the state



matters and likewise states do not encroach upon matters within the ambit of the Centre.

(c) Fairness in Executive Actions


In matters of executive or administrative actions, judicial review practice of courts have often employed doctrines like 'principles of natural justice', 'reasonableness', 'proportionality', and 'legitimate expectation'; discussed below are few examples.

There is a Latin phrase *audialterampartem*, which literally means 'listen to the other side'. This phrase is an established principle in the Indian law practice and was applied by the Supreme Court in several cases including the landmark decision of *Maneka Gandhi v. Union of India*. Her passport was confiscated by the governmental authorities without giving her any chance of prior hearing. Invoking its judicial review powers in administrative matters, the Supreme Court held that in the matter of confiscation of passport a hearing should have been given to the petitioner in the interest of the principles of natural justice. Consequently, a hearing was given and the passport was returned to her. This is an example where the court adopted the principle of post decision-hearing, in situations of urgency where prior hearing is not feasible, and recognized that a chance of hearing cannot be debarred completely.

To deal with the questions of secrecy and related inefficiency and corruption in the administration, courts have adopted the judicial method of requiring disclosure of reasons in support of any order or decision delivered by the administration. This requirement holds good even when a statute or legislation does not provide for this requirement. Courts have emphasized that the right to provide reasons is an inherent part for justice delivery. Furthermore, judicial method of disclosure requirements deters the practice of arbitrary action by the officials and offers legal safeguard to the victims. Also, by notifying the aggrieved about the reasons, such disclosure satisfies the requirements of the principles of natural justice.

The courts have often used the principle of reasonableness in most cases that involve state action. The realm of contract law offers an example. Whenever states are parties to any contract, the courts attempt to distinguish such contracts with that of contracts entered between private individuals or parties. In that, private contracts concern personal interest; state contracts concern public good and public interest and is expected to act reasonably and not with freedom of discretion.

Another principle frequently utilized by courts in administrative law, especially



in service matters, is the principle of proportionality. Essentially, judicial review offers safeguards to the aggrieved against any sentence or punishment that is disproportionate and burdensome. For example, Supreme Court, in a case, has held that the quantum of penalty or punishment sentenced by a court martial on any army persons should not be disproportionate to the offence.

(d) Basic Structure


The Supreme Court has extended the practice of judicial review to the matters concerning the constitutional amendments by developing the doctrine of the basic structure of the Constitution. Article 368 confers power to the Parliament to amend the Constitution: "...by way of addition, variation or repeal any provision of this Constitution..." This Article in its wordings does not provide any limitation on the power of the Parliament to amend the Constitution. And as discussed earlier, Article 13(2) states that "the State shall not make any law which takes away or abridges the rights conferred by this Part (Part III - Fundamental Rights)." Article 13(2) limits Parliament's amending authority in matters of fundamental rights. In order to overcome this restriction, in 1971, the Parliament adopted the 24th Amendment to the Constitution altering Articles 13 and 368 in a way that allowed itself with unlimited powers of amendments including authority to amend the fundamental rights provisions.

The landmark 1973 Supreme Court case of *Keshavanda Bharathi v. State of Kerala* discussed the question about the unlimited constitutional amendment powers of the Parliament and established the doctrine of the basic structure or feature of the constitution. This doctrine invalidates any constitutional amendments that destroys or harms a basic or essential feature of the Constitution, like secularism, democracy and federalism. Supreme Court has also held judicial review to be the basic structure or feature of the Constitution; as a result, it can nullify any constitutional amendment that abolishes or disregards judicial review in issues concerning to fundamental rights of citizens.

E. Exercise

I. True/False

1. The Supreme Court of India came into being in 1947.
2. The law declared by the Supreme Court of India is binding on all courts.
3. India has an integrated system of judiciary.
4. The judges of the Supreme Court of India have life tenure.
5. Sub-ordinate Courts are superior to District Courts in the order of their hierarchy.

- 
6. India is a civil law jurisdiction.
 7. The office of Solicitor General and Additional Solicitor General is governed by the Indian Constitution.

II. Questions

1. How is the concept of independence of judiciary linked to the doctrine of separation of powers?
2. How does independence of judiciary relate to due process of law?
3. What are the benefits of independence of judiciary?
4. What are the main roles of the Supreme Court of India?
5. Comment on the types of jurisdictions that are vested with Courts in India?
6. What are the common elements in public interest litigation cases?
7. Differentiate between independence of judiciary and impartiality of judges.
8. What are the existing Constitutional mandates for the appointment of Judges in India?
9. Provide examples of how judges are trained once appointed? What are the benefits of such trainings?
10. Discuss the retirement age of judges in India. In the light of global comparison, provide your views regarding extending the retirement age.
11. Discuss in detail the procedure for impeachment. How many times has this process been successful in the history of Indian judiciary?
12. Define the concept of judicial review?
13. Explain the concept of separation of powers under the Indian Constitution? How does it relate with the concept of checks and balances? What are the advantages of having a system of separation of powers?
14. What are the ways in which the scope of judicial review has evolved in courts in India?
15. What are the different kinds of writs Supreme Court can issue under Article 32 of the Indian Constitution?
16. Discuss how judicial review is used for the enforcement of fundamental rights.
17. Define division of powers in the context of the Indian Constitution.
18. Give few examples to show that judicial review ensures fairness in executive actions.
19. What is doctrine of basic structure of the Constitution?



III. Essay Questions

Write a long essay based on your understanding of the following concept and issues:

- i) Appointment of judges
- ii) Independence of judiciary
- iii) The role of independence of judiciary in Indian democracy
- iv) Impartiality of judges and procedure to safeguard and remove them from their office.

Draw possible linkages amongst the concepts discussed above.

IV. Activity Based Learning

Activity based learning provides opportunities to students with direct observation and learning about some aspect of the practice of law.

In this activity, students are required, in groups or individually, to visit any of the places given below to observe the practice of law. Students could watch how transactions are conducted and understand the key players. For example, a court room will have a judge, lawyers, parties, witnesses, advocate clerks, police men, and other court officers and staff. Understand the role of each person. After this visit, each student is required to write one page essay on any one or more aspects of the law practice that they have observed and/or just a summary of the visit. Students are then required to share and discuss what they have written with the entire class.

- 1. Court
- 2. Lawyer's chamber/office
- 3. Law office in corporation/company
- 4. Non-Governmental Organization (any NGO that is involved with some law related work, for e.g., advocacy on human rights)
- 5. Tribunal
- 6. Prison
- 7. Police Station
- 8. Commission on Women / Children / Human Rights / Minorities / Scheduled Caste / Scheduled Tribe
- 9. Any administrative office involved with quasi legal work
- 10. Parliament or legislative assemblies