UNIT 8: JUDICIARY IN INDIA: SUPREME COURT AND HIGH COURTS; JUDICIAL REVIEW AND JUDICIAL ACTIVISM

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8.1 LEARNING OBJECTIVES

After going through this unit you will be able to:

- discuss the composition, powers and functions of the Supreme Court of India
- discuss the composition, powers and functions of the High Courts of India
- discuss the concept and practice of judicial review in India
- discuss the concept and practice of judicial activism in India
- explain the independence of the judiciary in India

8.2 INTRODUCTION

In India, we have an independent and integrated judicial system. Unlike other federations, India has a single and unified judicial system for

the entire country. There are High Courts at the State level and further below are subordinate courts. In this unit we shall discuss the various aspects regarding the Supreme Court and High Courts and learn about judicial review, judicial activism and independence of the judiciary as prevalent in India.

8.3 THE SUPREME COURT

The Supreme Court is the highest court of appeal in India. Let us discuss the following aspects regarding the Supreme Court:

Composition:

At present the total sanctioned strength of the Supreme Court is 31 consisting of the Chief Justice and 30 other judges appointed by the President. The President may appoint an adhoc judge at the request of the Chief Justice. The President may appoint an adhoc judge at the request of the Chief Justice.

Appointment:

Every judge of the Supreme Court is appointed by the President of of India after consultation with such judges of the Supreme Court and the High Courts of States as the President may deem necessary for the purpose. However, in the matter of appointment of a judge other than the Chief Justice, consultation of the Chief Justice of India by the President is obligatory.

Qualifications:

To be a judge of the Supreme Court, one must be

- a citizen of India
- has been a judge of a High Court at least for five years; or
- has been an advocate of a High Court for at least ten years
- is a distinguished jurist in the opinion of the President.

Tenure:

A judge of the Supreme Court retires at the age of 65 years. He or she may also resign from his or her office.

Removal:

A judge of the Supreme Court can also be removed by the President from his or her position only on the ground of proved misbehaviour or

incapacity if a resolution in this regard is passed by the Parliament supported by two-thirds of the members present and voting in each Hose and the majority of the total membership of each House.

Powers and Fuctions :

The jurisdiction of the Supreme Court may be categorised as original, appellate and advisory.

- *Original Jurisdiction*: Under this jurisdiction, the Supreme Court can settle disputes (a) between the Centre and one or more States; (b) between the Centre and any State or States on the one side and one or more other States on the other; or (c) between two or more States.
- *Appellate jurisdiction* : Under this jurisdiction, the Supreme Court can hear appeals on the following cases:
  - (a) Constitutional Cases —— An appeal can be made to the Supreme Court in cases which relate to the interpretation of the Constitution.
  - (b) Civil Cases —— In a civil cases also, an appeal can be made to the Supreme
    Court against a decision of a High court. In these cases, the High Court must certify that the case involves a substantial question of law as to the interpretation of the Constitution.
  - (c) Criminal Cases —— An appeal can be made in the Supreme Court against any judgement, final order or sentence given by a High Court. In criminal matters, ordinarily, the High Courts are the final courts of appeal. But the Supreme Court has been given the special power by the Parliament to hear appeal against the decisions of the High Courts in criminal matters.
- *Advisory Jurisdiction* : The Supreme Court has some advisory powers also. The President of India can seek the opinion of the Court if there is a question of law or fact where the interpretation of the Constitution is involved. The Supreme Court may give its opinion on the President's question but it is not binding on any party.
- *Court of Records* : The Supreme Court also acts as the Court of Records. The judgements of the Supreme Court are recorded and

considered as authoritative and serves as cases, laws and proceedings. These records have great evidentiary value.

- *Directions, orders or writs*: The Supreme Court is regarded as the protector of the Fundamental Rights of the citizens. For this purpose, it has been given the power of issuing certain writs like that of habeas corpus, mandamus, prohibition, quo warranto and certiorari. It can also issue orders and directions.
- *Contempt of Court*: The Supreme Court can punish any one who is found to be indulged in contempt of the court. Contempt of court includes criticism of a judgement of the court, criticism of judges and the court, passing derogatory remarks against the court, refusing to abide by the decisions of the court, etc.
- *Review of judgment and order*: The Supreme Court is empowered to review any judgement given by it earlier. It can do this if —— (a) some new facts or evidences appear ; (b) a fault is found according to its own record ; and (c) there are sufficient reasons for review.
- *Guardian of the Constitution*: The Supreme Court of India is regarded as the guardian of the Constitution. It is the Supreme or final interpreter of the Constitution. The interpretation of the Constitution given by the Supreme Court is to be respected.
- *Judicial Review*: The Supreme Court has been given the power to decide whether a law passed by the Parliament or the State legislatures and the excutive decisions taken by the Central or State government is constitutional or not. If such a law or executive decision is found unconstitutional, then it can declare it as invalid.
- *Public Interest Litigation*: Even if the victim or affected parties do not file cases, any one from the general public, not involved in the case, may file litigation (law suit), if it is in the general public interest. It is the privilege of the Court to entertain or not to entertain the application for Public Interest Litigation.



CHECK YOUR PROGRESS

Q 1: Which is the highest Court of appeal in India?

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Q 2: India has an integrated judiciary. (True/False)

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Q 3: What is the retirement age of a judge of the Supreme Court ?

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Q 4: What are the qualifications to be a judge of the Supreme Court?

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LET US KNOW

1. Two recent devices in the judicial system of India are the Lok Adalats and Public Interest Litigation. They provide speedy and affordable judicial service to the poor and the downtrodden.
2. A writ is a formal written court order. The writ of Habeas Corpus is a remedy against wrongful detention of a person. The writ of Mandamus is an order given by the court to some subordinate authority to perform an act which falls within its jurisdiction. The writ of Prohibition is issued by a superior court to a subordinate court to prevent it form dealing with a matter over which it has no jurisdiction. The writ of Quo-warranto is issued by the court to prevent a person from acting in a public office to which he is not entitled. The writ of Certiorari is issued by a superior court to a subordinate one to submit the record of a case for its proper consideration.

8.4 THE HIGH COURT

The Constitution provides for a High Court in every State which works under the Supreme Court of India. But in some cases, one High Court serves more than one State. For example, the Gauhati High Court serves not only Assam but also the other States of the North-Eastern region.

Composition:

The High Court consists of a Chief Justice and other judges. There is no fixed number regarding the judges of the High Courts. The President may also appoint a qualified person as an additional judge in a High Court for two years.

Appointment:

The judges of the High Court are appointed by the President of India. The President appoints the Chief Justice of a High Court after consultation with the Chief Justice of India and the Governor of the State.

Qualifications: To be a judge of a High Court one must be :

- a citizen of India,
- he or she must have held for, at least ten years a judicial office in the territory of India or;
- he or she must been for, at least, ten years an advocate of a High Court.

Tenure:

A judge of a High Court retires at the age of 62 years. He or she may also resign from his or her office at any time.

Removal:

The President may remove a judge of a High Court on the ground of "proved misbehaviour" or "incapacity."

Powers and Functions:

The High Courts have been given three types of powers or jurisdictions, such as, original, appellate and administrative.

- *Original Jurisdiction* : Under the original jurisdiction, a High Court has the power to issue direction or orders including writs to any person, authority and any government within its jurisdiction against the violation of the Fundamental Rights of the citizens. It has limited original

jurisdiction in cases relating to admiralty, will, divorce, marriage, company laws and contempt of Court.

- *Appellate Jurisdiction* : Under this jurisdiction, a High Court has the power to hear appeals about civil and criminal cases against the decisions of the lower Courts.
- *Administrative Jurisdiction* : Under the jurisdiction, a High Court has the authority to supervise the workings of all subordinate Courts. It can issue general rules to regulate their proceedings. The judges of the subordinate Courts are appointed, promoted and transferred in consultation with the High Court of the state.
- *Other Jurisdiction* : (a) The jugments of the High Courts are regarded and considered authoritative and serve as case law. (b) A High Court can start contempt proceedings against anyone who is found to indulge in contempt of the court. (c) Every High Court can admit Public Interest Litigation like that of the Supreme Court of India.

8.4.1 Subordinate Courts

All the subordinate Courts function under the supervision of the concerned High Court. The Court of the District Judge is the highest Court in a District. The judge is called the District Judge while dealing with civil cases and Sessions Judge while dealing with criminal cases. Besides these Courts, there are Courts of Assistant judges, Sub-Judges, Munsifs and Courts of small causes.

The High Court has been given control over District Courts and courts subordinate thereto including the posting and promotion of and the grant of leave to persons belonging to the judicial service of a State and holding any post inferior to the post of District Judge.



CHECK YOUR PROGRESS

Describe the composition of the High Courts in India?

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Q 6: What are the qualifications to be judge of the High Court?

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Q 7: Who appoints the judges of the High Court?

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Q 8: Mention the different types of subordinate Courts.

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8.5 JUDICIAL REVIEW, JUDICIAL ACTIVISM AND INDEPENDENCE OF THE JUDICIARY IN INDIA

8.5.1 Judicial Review

Judicial review is a special power of the Supreme Court and the High Courts in India to scrutinize whether a law passed by the legislature or an action taken by the executive is in accordance with the provisions of the Constitution or not. If it is found that such a law or an action not in accordance with the Constitution, then it can declare them as invalid or unconstitutional. This means that the judiciary has to act as the guardian or custodian of the Constitution.

The Supreme Court and the High Courts can exercise this power on two conditions — (1) whether the law or the executive action which has come under scrutiny falls within the competence of the authority that has framed it, and (2) whether it is consistent with Part III of the Constitution dealing with the Fundamental Rights.

This is an important power of the Supreme Court and the High Courts. They have been protecting the Constitution from irresponsible laws and arbitrary use of power by the executive, by exercising this power. Our Fundamental Rights are also preserved

by this power of the judiciary.

The concept of judicial review originated in the United States of America in the Marbury V.Madison case of 1803. The Chief Justice of the Supreme Court of America, John Marshall while delivering his judgement in this case used the famous "Due Process of Law" clause of the American Constitution. According to this clause, "due" means what is just and proper and "law" means natural law. Justice Marshall said that as the Supreme Court had been made the protector of the Constitution and the rights of the people, so it had to perform its duty and give justice. While doing so, it would try to determine the exact meaning of law, to expand its details and apply the general principles of justice, equity and morality. The process, thus, initiated by justice Marshall has been continuing and the Supreme Court has been creating some new laws while deciding various cases. The power of judicial review has made the Supreme Court of America one of the strongest judiciaries in the world.

However, the Supreme Court of India is not as powerful as the Supreme Court of America so far as the power of judicial review is concerned. In India, the Supreme Court while exercising its power of judicial review has to follow the principle of "procedure established by law." Article 21 of the Indian Constitution provides that "no person shall be deprived of his life or personal liberty except according to procedure established by law". Here, the term" law" does not mean "natural law" but it means "State-made laws." In other words, the court can only question the procedure and if the procedure is not followed, the court can declare any legislation made by the Parliament as unconstitutional. Further, the Supreme Court can declare any legislation as invalid if it violates the provisions of the Constitution. Thus, the Supreme Court of India has limited power of judicial review. Still, it has been able to exercise this power effectively in many cases and interpret and protect the provisions of the Constitution.

8.5.2 Judicial Activism

In India, the judiciary has been given the power to protect the Constitution and to preserve the Fundamental Rights of the people. It has been empowered by the authority of judicial review and in that capacity it has been exercising its power in recent years which is dubbed as judicial activism. Under judicial activism, the court has begun to intervene in and question the activities of the executive and the legislature, reminding them, from time to time, of their duties and responsibilities to the society.

The beginning of judicial activism in India could be traced back to 1985 when the then Chief Justice of India, Justice P.N. Bhagavati converted a letter written to him on a aost card by an aggrieved person into a Public Interest Litigation. By the middle of the 1990s, judicial activism became more and more pronounced. The activism of the Supreme Court became visible in terms of sensitizing the Central Bureau of Investigation(CBI) to discharge their constitutional obligations in the hawala cases in which top level political personalities were involved. It has passed landmark judgements over environmental degradation, pollution control, preservation of historical monuments, eviction of unauthorized occupation of government buildings, etc. In this way, the judiciary has become overwhelmingly busy with cases brought before it from various quarters of the society and the activism of the Indian Judiciary has benefitted the common people in terms of addressing their grievances to a large extent.

8.5.3 Independence of the Judiciary

The Constitution of India has provided for an independent and impartial judiciary in India. For ensuring independence of the judiciary, some provisions have been made which can be discussed as follows:

- ***Appointment of judges:*** In India, the judges of the Supreme

Court and the High Courts are appointed on the basis of prescribed qualification. They are appointed by the President of India.

- ***Security of tenure:*** The President appoints the judges but he can not dismiss them during their term of office without a resolution passed by the Parliament in this regard.
- ***Economic Security:*** The judges are paid handsomely. The salary of the judges is charged from the Consolidated Fund of the Union and the States. Their salary can not be decreased during their term of office.
- ***Privileges:*** Various privileges have been given to the judges like allowances, sent free residence, etc. Adequate steps are taken for the protection of the judges.
- ***Contempt of Court:*** The judges can not be criticized in public for the judgement they give while deciding cases. The Supreme Court and the High Courts can punish anyone for contempt of the Court.

Independence of judiciary is very impartment in a democracy as its main responsibility is to give justice to the people. Therefore, provisions should be made so that the judiciary can not be controlled by either the executive or the legislature and it can discharge its duty fairly and impartially.



CHECK YOUR PROGRESS

Q 9: In India, the Supreme Court while exercising its power of judicial review has to follow the principle of "procedure established by law." (True/False)

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Q 10: What could be regarded as the first case of judicial activism in India?

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Q 11: Mention any two means whereby the independence of judiciary is ensured.

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Q 12: The Supreme Court cannot declare any legislation as invalid if it violates the provisions of the Constitution.(True/False)

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8.6 LET US SUM UP

- In India, we have an independent and integrated judicial system. Unlike other federations, India has a single and unified judicial system for the entire country.
- The Supreme Court is the highest court of appeal in India.Every judge of the Supreme Court is appointed by the President of of India.
- The jurisdiction of the Supreme Court may be categorised as original, appellate and advisory. The Supreme Court can issue directions, orders or writs and acts as the guardian of the Constitution. It also has the power of judicial review and that of entertaining Public Interest Litigation suits.
- The Constitution provides for a High Court in every State. The judges of the High Court are appointed by the President of India.
- The High Courts have been given three types of powers or jurisdictions, such as, original, appellate and administrative.
- All the subordinate Courts function under the supervision of the concerned High Court. The Court of the District Judge is the highest Court in a District.
- The Constitution of India has provided for an independent and impartial judiciary in India. For ensuring independence of the judiciary, some provisions have been made in terms of security of tenure, contempt of court, etc.



8.7 FURTHER READING

1) Chander, Prakash.(2000). *Indian Government and Politics*. New Delhi :Cosmos Bookhive Pvt. Ltd.

2) Ghai, K.K.(2007). *Indian Government and Politics*.New Delhi: Kalyani Publishers.

3) Kapur, Anup Chand and Misra, K.K. (2006). *Select Constitutions.*New Delhi : S. Chand and Company.

4) Pylee, M,V. (2006). *Constitutional Government in India.* New Delhi:S. Chand and Company.



8.8 ANSWERS TO CHECK YOUR PROGRESS

Ans to Q No 1: The Supreme Court

Ans to Q No 2: True

Ans to Q No 3: 65 Years of age

Ans to Q No 4: To be a judge of the Supreme Court, one must be

(i) a citizen of India

(ii) has been a judge of a High Court at least for five years; or

(iii) has been an advocate of a High Court for at least ten years

(iv) is a distinguished jurist in the opinion of the President.

Ans to Q No 5: The High Court consists of a Chief Justice and other judges. There is no fixed number regarding the judges of the High Courts. The President may also appoint a qualified person as an additional judge in a High Court for two years.

Ans to Q No 6: *Qualifications:* To be a judge of a High Court one must be :

(i) a citizen of India,

(ii) he or she must have held, for at least ten years, a judicial office in the territory of India or;

(iii) he or she must been, for at least ten years, an advocate of a High Court.

Ans to Q No 7: The President of India

Ans to Q No 8: All the subordinate Courts function under the supervision of the concerned High Court. The Court of the District Judge is the highest Court in a District. The judge is called the District Judge while dealing with civil cases and Sessions Judge while dealing with criminal cases. Besides these Courts, there are Courts of Assistant judges, Sub-Judges, Munsifs and Courts of small causes.

Ans to Q No 9: True

Ans to Q No 10: The beginning of judicial activism in India could be traced back to 1985 when the then Chief Justice of India, Justice P.N.Bhagavati converted a letter written to him on a aost card by an aggrieved person into a public interest litigation.

Ans to Q No 11: (i) *Appointment of judges:* In India, the judges of the Supreme Court and the High Courts are appointed on the basis of prescribed qualification.

They are appointed by the President of India.

(ii)*Security of tenure:* The President appoints the judges but he or she cannot dismiss them during their term of office without a resolution passed by the Parliament in this regard.

Ans to Q No 12: False



8.9 POSSIBLE QUESTIONS

Q 1: Discuss the original, appellate and advisory functions of the Supreme Court of India?

Q 2: Discuss the original and appellate jurisdictions of the high Courts.

Q 3: How is the independence of judiciary in India maintained ?

Q 4: Examine the power of Judicial Review enjoyed by the Supreme Court of India.

Q 5: Discuss the composition, powers and functions of the Supreme Court of India.

Q 6 Discuss the composition, powers and functions of the High Court of India.

Q 7: Discuss the practice of judicial review and judicial activism in India.

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