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## Unit 12: JUDICIARY

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### 12.0 OBJECTIVES

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This unit deals with the structure, composition, jurisdiction and functions of the Indian judiciary. After going through this unit, you should be able to:

- Trace the evolution of the judicial system in India;
- Describe the composition of the courts in India;
- Explain the functions and jurisdiction of the Supreme Court, High Court and the Subordinate Courts; and
- Explain the concept of judicial review and its importance in safeguarding fundamental rights.

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### 12.1 INTRODUCTION

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In a political system based on constitutional government, the functions of rule making, rule enforcement and rule interpretation are separated into the three institutions of the legislature, the executive and the judiciary. A judiciary that is independent of and acting as a check on the arbitrary exercise of legislative and executive power is an essential feature of a constitutional government. The judiciary is also the final arbiter on what that constitution itself means. In a federal system, the judiciary also serves as a tribunal for the final determination of disputes between the union and its constituent units. Given the tremendous importance of the role and functions of the Supreme Court and the High Courts, various measures have been adopted to ensure the independence of the judiciary. Let us first trace the evolution of the modern



Bombay and Madras with High Courts. The highest court of appeal however was the judicial committee of the Privy Council.

At this stage of development of the Indian legal system, we see the beginning of a new era in the emergence of a unified court system.

The Federal Court of India was established in Delhi by the Act of 1935. This was to act as an intermediate appellant between the High Courts and the Privy Council in regard to matters involving the interpretation of the Indian constitution. In addition to this appellate jurisdiction, the Federal Court had advisory as well as original jurisdiction in certain other matters. This court continued to function until 26 January 1950, the day the independent India's constitution came into force.

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### **12.3 THE SUPREME COURT**

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The entire judicature has been divided into three tiers. At the top there is a Supreme Court, below it is the High Court and the lowest rank is occupied by session's court.

The Supreme Court is the highest court of law. The Constitution says that the law declared by the Supreme Court shall be binding on all small courts within the territory of India. Below the Supreme Court, are the High Courts located in the states. Under each High Court there are District Sessions Courts, Subordinate Courts and Courts of Minor Jurisdiction called Small Cause Courts.

Given the importance of the judiciary in a federal system resting on limited government, the Supreme Court was designed to make it the final authority in the interpretation of the Constitution. While framing the judicial provisions, the Constituent Assembly gave a great deal of attention to such issues as the independence of the courts, the power of the Supreme Court and the issue of judicial review.

#### **12.3.1 Composition and Appointments**

The Supreme Court consists of the Chief Justice of India and such other number of other judges as is provided by the law. When the Supreme Court was inaugurated, it had only eight judges. Its strength has risen to twenty five judges. The President of India, who is the appointing authority, makes these appointments on the advice of the Prime Minister and the Council of Ministers.

The Constitution stipulates in Article 124 (2) that the President shall appoint judges of the Supreme Court under his hand and seal after consultation with such of the judges of the Supreme Court as the President



accommodation. The Constitution also provided that the salaries of the judges cannot be changed to their disadvantage, except in times of a Financial Emergency. The administrative expenses of the Supreme Court, the salaries, allowances, etc., of the judges are charged on the Consolidated Fund of India.

### 12.3.4 Immunities

To shield judges from political controversies, the Constitution grants them immunity from criticisms against decisions and actions made in their official capacity. The Court is empowered to initiate contempt proceedings against those who impute motives to the judges in the discharge of their official duties. Even the Parliament cannot discuss the conduct of the judge except when a resolution for his removal is before it.

### Check Your Progress Exercise-1

**Note:** I) Use the space below for your answer.

ii) Check your answer with the model answer given at the end of this unit.

- 1) What are the qualifications required for appointment as a judge of the Supreme Court?

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- 2) What is the procedure for removing a judge of the Supreme Court.?

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## 12.4 JURISDICTION OF THE SUPREME COURT

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Article 141 declares that the law laid down by the Supreme Court shall be binding on all courts within the territory of India. The different categories into which the jurisdiction of the Supreme Court is divided is as follows: 1) Original Jurisdiction, 2) Appellate Jurisdiction, 3) Advisory Jurisdiction, 4) and Review Jurisdiction.

### 12.4.1 Original Jurisdiction

The Supreme Court has original jurisdiction firstly as a federal court. In a federal system like that in India, both the Union and the State governments derive their powers from and are limited by the same constitution. Differences of interpretation of the Union-States distribution of powers, or conflicts between States governments require authoritative



the interpretation of the Constitution. The appeal again depends upon whether the High Court certifies, and if does not, the Supreme Court may grant special leave to appeal.

Article 133 of the Constitution provides that an appeal in civil cases lies to the Supreme Court from any judgement, order or civil proceedings of a High Court. This appeal may be made if the case involves a substantial question of law of general importance or if in the opinion of the High Court the said question needs to be decided by the Supreme Court.

Article 134 provides the Supreme Court with appellate jurisdiction in criminal matters from any judgement, final order, or sentence of a High Court. This jurisdiction can be invoked only in three different categories of cases: a) if the High Court on appeal reverses an order of acquittal of an accused person and sentenced to death. b) if the High Court has withdrawn for trial before itself any case from any court subordinate to its authority and has in such a trial convicted the accused person and sentenced him to death, and c) if the High Court certifies that the case is fit for appeal to the Supreme Court.

Finally, the Supreme Court has the special appellate jurisdiction. It has the power to grant, in its discretion, special leave appeal from any judgment, decree sentence or order in any case or matter passed or made by any court or tribunal.

### **12.4.3 Advisory Jurisdiction**

The Supreme Court is vested with the power to render advisory opinions on any question of fact or law that may be referred to it by the President. The advisory role of the Supreme Court is different from ordinary adjudication in three senses: first, there is no litigation between two parties; second, the advisory opinion of the Court is not binding on the government; finally, it is not executable as a judgement of the court. The practice of seeking advisory opinion of the Supreme Court helps the executive to arrive at a sound decision on important issues. At the same time, it gives a soft option to the Indian government on some politically difficult issues. A case in point is the controversy surrounding the Babri Masjid complex in Ayodhya. The government decided to refer aspects of the dispute to the Supreme Court for an opinion. Since there was no legal point at issue, the referral to the Supreme Court had had the potential for politicising the judiciary instead of resolving what was essentially a political problem.

### **12.4.4 Review Jurisdiction**





### 12.5.1 Composition of the High Court

Unlike the Supreme Court, there is no minimum number of judges for the High Court. The President, from time to time will fix the number of judges in each High Court. The Chief Justice of the High Court is appointed by the President of India in consultation with the Chief Justice of India and the Governor of the State, which in actual terms mean the real executive of the State. In appointing the judges, the President is required to consult the Chief Justice of the High Court. The Constitution also provides for the appointment of additional judges to cope with the work. However, these appointments are temporary not exceeding two years period.

A judge of a High Court normally holds office until he attains the age of 62 years. He can vacate the seat by resigning, by being appointed a judge of the Supreme Court or by being transferred to any other High Court by the President. A judge can be removed by the President on grounds of misbehaviour or incapacity in the same manner in which a judge of the Supreme Court is removed.

### 12.5.2 Jurisdiction

The original jurisdiction of a High Court includes enforcement of Fundamental Rights, settlement of disputes relating to the election to Union and State legislatures and jurisdiction over revenue matters. Its appellate jurisdiction extends to both civil and criminal matters. In civil matters, the High Court is either a first appeal or a second appeal court. In criminal matters, appeal from decisions of a session's judge or an additional sessions judge where sentence of imprisonment exceeds seven years and other specified cases other than petty crimes constitute the appellate jurisdiction of a High Court. In addition to these normal original and appellate jurisdictions, the Constituent vests the High Courts with four additional powers. These are:

- The power to issue writs or orders for the enforcement of the Fundamental Rights. Interestingly, the writ jurisdiction of a High Court is larger than that of the Supreme Court. It can not only issue writs not only in cases of infringement of Fundamental Rights but also in cases of an ordinary legal right.
- The power of superintendence over all other courts and tribunals except those dealing with the armed forces. It can frame rules and also issue instructions for guidance from time to time with directions for speedier and effective judicial remedy.



Gram Panchayat, Panchayat Adalat etc). These are, however, not considered as courts under the purview of the criminal courts jurisdiction.

The principle function of the District Court is to hear appeals from the subordinate courts. However, the courts can also take cognisance of original matters under special status for instance, the Indian Succession Act, the Guardian Act and Wards Act and Land Acquisition Act.

The Constitution ensures independence of subordinate judiciary. Appointments to the District Courts are made by the Governor in consultation with the High Court. A person to be eligible for appointment should be either an advocate or a pleader of seven years standing, or an officer in the service of the Union or the State. Appointment of persons other than the District Judges to the judicial service of a State is made by the Governor in accordance with the rules made by him in that behalf after consultation with the High Court and the State Public Service Commission.

The High Court exercises control over the District Courts and the courts subordinate to them, in matters as posting, promotions and granting of leave to all persons belonging to the State judicial service.

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## **12.7 JUDICIAL REVIEW**

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Literally the notion of judicial review means the revision of the decree or sentence of an inferior court by a superior court. Judicial review has a more technical significance in public law, particularly in countries having a written constitution, founded on the concept of limited government. Judicial review in this case means that Courts of law have the power of testing the validity of legislative as well as other governmental action with reference to the provisions of the constitution.

In England, there is no written constitution. Here the Parliament exercises supreme authority. The courts do not have the power to review laws passed by the sovereign parliament. However, English Courts review the legality of executive actions. In the United States, the judiciary assumed the power to scrutinise executive actions and examine the constitutional validity of legislation by the doctrine of 'due process'. By contrast, in India, the power of the court to declare legislative enactments invalid is expressly enacted in the constitution. Fundamental rights enumerated in the Constitution are made justiciable and the right to constitutional remedy has itself been made a Fundamental right.

The Supreme Court's power of judicial review extends to constitutional amendments as well as to other actions of the legislatures, the



done pursuant to giving effect to the Directive Principles of State Policy. No court was permitted to question such a declaration. The 28<sup>th</sup> Amendment act ended the recognition granted to former rulers of Indian states and their privy purses were abolished.

These amendments were challenged in the Supreme Court in the famous Kesavananda Barathi Case (otherwise known as the Fundamental Rights Case) of 1973. The Supreme Court ruled that while the parliament could amend even the fundamental rights guaranteed by the Constitution, it was not competent to alter the 'basic structure' or 'framework' of the constitution. Under the newly evolved doctrine of 'basic structure', a constitutional amendment is valid only when it does not affect the basic structure of the constitution. The second part of Article 31C (no law containing a declaration to implement the Directive Principles contained in Article 39 (b) and (c) shall be questioned) was held not valid because the amendment took away the opportunity for judicial review, which is one of the basic features of the constitution. The doctrine of basic features gave wide amplitude to the power of judicial review.

Later history shows the significant role played by this doctrine in the review of constitutional amendments. For challenging the election to Parliament of a person who holds the office of Prime Minister, the 39<sup>th</sup> Constitutional Amendment provided a different procedure. The election can be challenged only before an authority under special law made by Parliament and the validity of such a law shall not be called in question. The Supreme Court held that this amendment was invalid as it was against the basic structure of the Constitution. It argued that free and fair elections are essential in democracy and to exclude judicial examination of the fairness of the election of a particular candidate is not proper and goes against the democratic ideal that is the basis of our constitution.

In a later case, the *Minerva Mill Case*, the Supreme Court went a step ahead. The 42<sup>nd</sup> Constitutional Amendment of 1976, among other things, had added a clause to Article 368 placing a constitutional amendment beyond judicial review. The Court held that this was against the doctrine of judicial review, the basic feature of the constitution.

One of the limits on judicial review has been the principle of *locus standi*. This means that only a person aggrieved by an administrative action or by an unjust provision of law shall have the right to move the court for redressal. In 1982, however, the Supreme Court in a judgement on the



### Check Your Progress Exercise-3

Note: I) Use the space below for your answer.

ii) Check your answer with the model answer given at the end of this unit.

1) What is the significance of the Keshavananda Bharati Case of 1973?

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2) What is PIL?

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### 12.9 LET US SUM UP

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As we saw, the existing judicature in India can be traced to the British period. The Royal Charter of the Charles II (1661), the Regulating Act of 1773, the Indian High Courts Act of 1861 and the Act of 1935 are the important milestones in the evolution of modern judicial system in India. The Constitution of India has designed the Supreme Court as the highest court of law. The law declared by the Supreme Court has been made binding on all small courts, that is, the High Courts and the Subordinate courts

Given the importance of judiciary as a federal court and as a guardian of fundamental rights of the citizen, the framers of the Indian Constitution gave great deal of thought to such issues as the independence of the courts and judicial review.

Judicial review is a technique by which the courts examine the actions of the legislature, the executive and the other governmental agencies and decide whether or not these actions are valid and within the limits set by the constitution. The foundation of judicial review is (a) that the constitution is a legal instrument, and (b) that this law is superior in status to the laws made by the legislature that is itself set up by the constitution. It is now well established in India that judicial review constitutes the basic structure or feature of the Constitution of India.

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### 12.10 SOME USEFUL BOOKS

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