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Odisha State Open University
Sambalpur

BAPS

BACHELOR OF ARTS (HONOURS) IN

POLITICAL SCIENCE

CONSTITUTIONAL GOVERNMENT AND DEMOCRACY IN INDIA

Organs of Government

This course material is designed and developed by Indira Gandhi National Open University (IGNOU), New Delhi and Krishna Kanta Handiqui State Open University (KKHSOU), Guwahati.

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Odisha State Open University, Sambalpur, Odisha
Established by an Act of Government of Odisha.

Bachelor of Arts
POLITICAL SCIENCES (BAPS)

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UNIT- 5 THE LEGISLATURE

Structure

5.1 OBJECTIVE

This unit deals with the structure, composition, and functions of the union and state legislature. After going through this unit, you should be able to:

- Trace the structure of the legislative system in India;
- Describe the composition of the legislature in India;
- Explain the powers and functions of the union legislature and state legislature. and
- Explain about the president, governor, chief minister and their powers and functions.

5.2 INTRODUCTION

Modern nation state seeks political power to govern by the process of legitimacy attributed to it by its citizens. This political power is an essential instrument of State, in a democracy, for maintaining order and reconciling conflicts in the civil society. It also concerns itself with guiding humanity from lower forms of civilisation to higher forms. The State embodies the political goal of a society, and its institutions express the proper array of principles and techniques that are used in efforts to accomplish that very avowed goal. The entire range, scope, style, purpose and control effectuated by the state needs to be analysed to understand democracy at work.

Modern State, therefore, has undergone structural differentiation in the form of Legislature, Executive and Judiciary as methods of control and guidance to society at large. Out of these three institutions, legislature is a body that represents the people in two distinct ways. One, the representatives can transmit the fears and hopes of their constituencies to the other members of the legislature and to the executive. And second, legislature can represent the cross section of the nation, a "mirror image" of their "multi-cultural" society.

5.3 LEGISLATURE

Legislature is often used synonymously with the term parliament. Legislature is derived from the Latin word "Lex", meaning legal rule through legislation, and "Parliament" from the French verb "to speak". Legislatures in the classic scheme of government were the law making bodies. Today it is associated with a multitude of functions and has undergone phenomenal structural differentiation. For instance, to exercise control over executive, one of the important functions it performs, various legislative committees and innovations in the interpellation procedure have sprung.

Or, legislature is the site where most national "leadership" is trained in participatory democracy. Nevertheless, dialogical discourse in the form of contestations, deliberations and constitutive ethical laws remains at the core of the political process being situated in legislatures.

The post-colonial Indian legislature began its journey of democracy and political development since 1952, but the Indians were introduced to this novel institution of the legislature by the British. The chief means by which the British parliament usurped the monarch's power of rule over subjects was "responsible government". As early as 1833, during the colonial government, a conceptual distinction was made between the executive and legislative functions of the Governor-General Council. Further, with the introduction of the Indian Councils Act of 1861, there was both gradual expansion of the legislative tasks entrusted to the legislative councils, and a progressive incorporation of "natives" into the legislative machinery. Morley-Minto Reforms of 1909 sought to enlarge the imperial legislative council and provincial legislative council by including elected non-official members. An element of election was also introduced in the imperial legislative council. The deliberative functions of the legislative council were also increased, and it provided for the first time, a separate electorate for the Muslim community.

The belief persisted, nonetheless, that parliamentary politics was unsuitable to Indian conditions. Lord Morley, Secretary of State for India, read in the House of Lords during the first reading on the Indian Council Bill on 17th December 1908, "If the bill were attempting to set up a Parliamentary system in India, or if it would be said that this chapter of reforms led directly or necessarily up to the establishment of a Parliamentary system in India, I, for one, would have nothing to do for it."

However, the established British opinion had begun to change by the end of the First World War. The Montague-Chemsford Reforms of 1919 introduced substantive changes into the existing system. It brought further legislative reforms in the form of responsible government in the provinces through Devolution Rules and dyarchy. Indian legislature was made representative and "bicameral" and elected majority was introduced in both the Houses. Despite the declared aim of gradually developing self-governing institutions leading to the progressive realisation of responsible government in India, the political structure still remained unitary and centralised, with the Governor-General in Council continuing to be responsible, as before, to the British Parliament through the Secretary of State. Nevertheless, the roots of parliamentary democracy in India may be traced with these reforms.

Another major reform took place by the introduction of the Government of India Act 1935 which provided, among others, federation and provincial autonomy, dyarchy at the Centre, distribution of legislative powers between the Centre and the provinces, and six provincial legislatures were made bicameral. However, the Central Council

retained control over provinces, advised, as before, the Governor General, and was not made responsible to the legislature. The Crown and the Governor General retained the power to veto bills passed by the Central legislature. The Governor General had ordinance making powers, independent powers of legislation or permanent Acts. Provincial legislature also suffered from similar kind of limitations.

In December 1946, when a constituent assembly was convened to work on the principle of "constitutional autochthony" as K.C. Wheare puts it, and to provide the structural arrangements of State power, it became quite evident that India would have its own legislature. The Government of India Act 1947 further made it clear, by abolition of the sovereignty and responsibility of British parliament, the crown no longer to be the source of authority and the constituent assembly to have dual function, constituent and legislative, till the framing of new constitution and the constitution of new legislatures, that India embarked on the process of democracy and development, with parliamentary government integral to its political system. The constituent assembly, therefore, framed the legislative provision of the constitution with the aim of creating a basis for the social and political unity of the country. Partition had made this task difficult.

5.3.1 Structure

The legislature in India, functioning within the parliamentary system, is the totality of Central, State and local legislatures, their formal and informal arrangements, with interlinkages and their interaction with the other state bodies and environment. The central legislature, also referred to as Parliament, consists of the President and the two Houses – Lok Sabha (House of people and Lower House) and Rajya Sabha (council of states and Upper House). The State Legislature shall include Governor and two Houses (Legislative Assembly and Legislative Council) in some of the states or one house (Legislative Assembly) in the rest (Article 168). The local legislature – Gram Sabha and Municipality- is an institution of self government constituted by the Constitution. The 73rd and 74th Amendment are still in the process of acquiring substantive legislative power to be devolved by the concerned state.

For the purpose of legislation, the Constitution introduces a federal system as the basic structure of the government, wherein there is a threefold distribution of subjects between the Centre and the States enumerated in the Seventh Schedule, viz. Union List, State List and Concurrent List. There is also an effort to distribute the subjects between state and local bodies by incorporating the Eleventh Schedule into the Constitution by the 73rd and 74th Amendments. Such distribution of subjects is essential to make legislature at all levels responsible and accountable by following the ambit of items in the list. However, ambit is defined, in case of conflict, by the judiciary time and again.

5.4 CENTRAL LEGISLATURE/ PARLIAMENT

5.4.1 President

The President of India is an integral part of the Indian Parliament like the Crown of England and unlike the American President. However, the Indian President differs from the Crown of England in respect of his power and status, e.g. certain discretionary powers vis-a-vis legislation and administering of oath.

The Constitution vests the power of carrying on the business of government in the President, but the President exercises this power under the Constitutional limitations, e.g. Article 74(1) " the executive powers shall be exercised by the President of India 'in accordance with the' advice of his Council of Ministers, or Article 53(1) demands that the President must exercise his powers according to the Constitution." The President represents the nation and is the symbol of unity and it is in this sense that (s) he is the "head of the state". However, the post of President has raised a few questions, such as, what exactly is a President supposed to do? How can he exercise the powers, formally or informally, vested in him by the Constitution? Is the President something more than "the first citizen" or a "rubber stamp"? S.S.Khera says that he can certainly have a "mind of his own, free of all political trammels and without any urge or ambition to take an active hand in governmental decision making, Or towards changing the provisions of the existing constitution relating to his position and powers."

However, a harmonious correlation between the President and various legislative institutions has led to a sort of successful working of parliamentary democracy. For instance, the relationship between the President and the Prime Minister is crucial in legislation. A sore relationship between the two indicates problematic in the legislative issues and therefore will catch attention of the opposition and civil society for a sustained debate. The relationship may have political ramifications, which perhaps may be echoed in the President's speech inside as well as outside the Parliament.

5.4.2 Lok Sabha

The Parliament of India is bicameral. The Lower House is the Lok Sabha, or House of the people. Its members are elected on the basis of universal adult suffrage. Every adult citizen (18 years and above) is entitled to vote, other than non-residents, the insane, criminals and those who have been convicted of corrupt electoral practices. In a reserved constituency, only members of the Scheduled Castes and Tribes may run for office, but all adults within the constituency may vote. The two nominated seats are filled by the President with representatives of the Anglo-Indian community.

The system of voting is the single member constituency. The system has produced governments that have substantial majorities in the Parliament, yet lack endorsement from a majority of the voters. A proportional reservation system would have been fairer to opposition parties and more representative in a mathematically defined version of deliberative democracy. By and large, Parliament is fairly chosen with the help of the Constitutional body called the Election Commission. While individual seats may have been determined by musclemen or bribes, no general election in India has produced an overall result that was not a fair reflection of voter preferences.

The term of the Lok Sabha is for a maximum period of five years, although in an emergency this may be extended to one year at a time indefinitely. There is no minimum term of the parliament. While the parliament may be dissolved and fresh elections held because a government has lost the confidence of the house, the more common occurrence is for a prime-minister to time a call for fresh elections with the goal of maximising personal or party political gains.

The Lok Sabha is required by the Constitution to convene, twice a year, with a maximum allowable period of gap between the two sessions being six months. In practice the Lok Sabha has often met in three sessions per year. The language of parliamentary business is mostly Hindi or English, although a member may use any of the recognised official languages.

The process of legislation involves three stages corresponding to the familiar three readings of bills in the parliamentary systems: the introduction of a bill, its consideration and its enactment into law. The first reading consists of the bill being introduced along with an explanation of its aim and purposes. After the second reading, a bill may be referred to select committee, circulated for public response or taken up for immediate consideration. The last course is rare and reserved for urgent and uncontroversial items. The second course is the most frequent. The select committee reports back either unanimously or with a majority recommendation and a minority note of dissent. The bill is then considered in the House clause by clause, with members being able to introduce amendments. Once all clauses have been dealt with, the bill has crossed the report stage, and is listed for its third and final reading, which is tidying-up amendments and then the bill is put to vote. If the speaker authenticates its passing, the bill is sent to the second house, where the entire procedure is repeated. When both Houses of Parliament have passed an identical version of a bill, it is presented to the President for formal assent, and becomes law on receiving his assent.

The sessional and daily business of the government is decided by the cabinet and its Parliamentary affairs committee under the chairmanship of the chief whip. Each session of the Lok Sabha is opened with a presidential address. The quorum for the Lok Sabha to be able to meet is one-tenth of its membership. The Lok-Sabha is of

course fundamentally akin to other Legislative Assemblies in Parliamentary regimes, its context can, however, be quite different, reflecting its own unique socio-political environment. The conduct of the House is in the hands of the Speaker who recognises members, keeps order and does other things, which are required of presiding officers. The speaker may not vote on an issue before the Lok Sabha, but can exercise a casting vote in the event of a tie on any motion. The Speaker is selected by the governing party for formal election by the House but is expected to conduct Parliamentary business with fairness and impartiality.

Parliament is the central forum for amending the Constitution under article 368. The procedural powers are those which allow the parliament to make rules for the conduct of its business. The legislative powers pertain to the authority and role of Parliament in enacting laws for governing the country. Parliament is technically the legislature, the institution that enacts the law of the land and the authority of the people and the assent of the head of state. In reality the legislative agenda is controlled by the government and endorsed by the Parliament with the help of tightly maintained party discipline. The financial powers of Parliament are those empowering it to raise and spend money as it sees fit, including discussion and approval of the annual budget. Only the Parliament has the authority to levy taxes and spend money from the Consolidated Fund.

Parliament formally controls the reins of the government in the sense that the cabinet is required to have the confidence of the Lok Sabha and is collectively responsible to the Parliament. Under constitutive powers, finally, parliament can legislate to admit or create new states into the Union of India; to create a High Court for a Union Territory and to extend the jurisdiction of a High Court to or restrict it from a Union Territory; and to create or abolish a Legislative Council (an Upper House) for a state with the consent of the State's Assembly (Lower House).

5.4.3 Rajya Sabha

Rajya Sabha or the Council of States is the Upper House of India's bicameral Parliament. Three sets of reasons guided the adoption of bicameral legislature for the Union of India. First, Rajya Sabha as the name implies, was to be the chamber for representing and protecting the rights of the states in a federal polity. Rajya Sabha, therefore, has equal role and status to that of the Lok Sabha in the Electoral College for choosing the president. Members of state legislative assemblies elect Rajya Sabha representatives for their States on a proportional representation system. The Constitutional position of the Rajya Sabha is not comparable in power, functions or prestige to the US Senate when conceived of solely in terms of State rights. In the event of a deadlock between the two Houses of Parliament, for example, if reconsideration of a bill fails to achieve a mutually satisfactory resolution, then the president can convene a joint sitting of both the Houses. Its decisions are made by

simple majority. Since Lok Sabha MPs outnumber their Rajya Sabha counterparts by more than 2:1, in a combined sitting, the Rajya Sabha can generally expect to be defeated.

The second purpose of establishing a bicameral legislature was to provide an institutional opportunity for second thoughts and a wiser counsel even after the passage of a bill by the Lok Sabha. This largely depends on the party composition in both the Houses. Rajya Sabha's role as critique seemed largely a chimera during the period of Congress party dominance.

The third function of Rajya Sabha in the Indian system of governance is to enable a bill to be introduced in the Parliament even when the Lok Sabha is not in session. Much of the Parliamentary debate and work on the bill can be completed by the time the Lok Sabha reconvenes.

In respect of certain specified federal features of the Constitution, the primary amending role has been given to the Rajya Sabha as the custodian of State rights. For example, the powers of Rajya Sabha itself can be altered only with the consent of a two-thirds majority in the Upper House. In theory, the House provides the means to bring in competent or skilled personnel who are not prepared to face the uncertain rigours of political campaigns. They can be appointed to the Rajya Sabha and be inducted into the cabinet without having to go through the formal process of elections.

5.4.4 Committees

The Lok Sabha operates with the aid of Parliamentary Committees. The composition of the committees is determined by the Speaker and the chief whip with due regard to the respective party strengths in the house. To prevent undue Executive influence, no minister who is in charge of a bill being considered by the committee, is permitted to participate in the deliberations of that committee.

Parliamentary Committees help to expedite Parliamentary business and to scrutinise the government activities. They may be divided into four broad groups: those that are concerned with the organisation and powers of the House, for example the rules committee; those that assist the House in their legislative functions, for example select committee; those that assist the House in making government departments more accountable, for example various standing committees; and those that assist the House in their financial functions such as Public Accounts Committee (PAC), Estimates Committee (EC) etc.

Parliamentary committees act as watchdogs in the Parliament to ensure culture of accountability and good governance. The financial committees, particularly, are

regarded as the most important ones as they unearth 'scams' and the convention requires that their recommendations be implemented and to report to the Parliament on the follow-up-actions by the concerned minister

5.4.5 The Opposition

The opposition in a Parliamentary democracy is expected to play the role of an alternative government. This has not been the case for most of the independent Indian history due to the complete dominance of the Congress party. Because of the multiplicity of political parties in India, the status of the leader of the opposition can be conferred only on the leader of a party with at least fifty seats in the Lok Sabha.

Regardless of the capacity or numbers to form an alternative government, opposition parties do register and express the diversity of opinions in a country as large and varied as India. The opposition also serves to keep the government on its political toes. The opposition loses when it comes to tallying up the votes on any motion. But its statements in Parliament are heard in the country at large and often listened to within the ranks of the political parties. Opposition arrangements, therefore, often strike a resonance within the party and can shape public policy by this indirect means. The debate that is ostensibly between the government and the opposition can, in effect, serve to structure the internal debate within the ruling party. Jawaharlal Nehru himself was very sensitive to the range of opinion in the ranks of the opposition. This has been a distinctive feature of the Indian politics since independence.

5.5 STATE LEGISLATURE

India is a federation in which power is clearly demarcated between Union and States. Indian Constitution is the largest written constitution in the world wherein the powers of state legislatures are well-defined in part VI of the Indian Constitution. Being federal in nature, Indian Constitution has made provision for uniform structure of government for state governments similar to that of central government barring Jammu &Kashmir. States in India enjoy freedom within the limits imposed by the Constitution. Since, India does not comply with the norm of classical federalism; there are many unitary features in its Constitution which puts severe restrictions on the authority of states. As states in India have also adopted the similar parliamentary pattern, the state governments too have the provision of actual head and nominal head. Governor in state is the nominal head whereas Chief Minister exercises real executive authority along with its council of ministers. State legislatures too, consist of two houses commonly known as Legislative Assembly (Vidhan Sabha) and Legislative Council (Vidhan Parishad) although it is not a uniform phenomena and it depends on the size and willingness of the state government. As in the case of union government, Legislative Assembly is more powerful than legislative council. The state legislatures are empowered to frame laws for their respective states on the subjects mentioned in the State Subject.

Legislatures of states usually consist of Governor and state legislature and state legislatures are further divided into two houses namely Legislative Assembly and Legislative Council. While Legislative Assembly is found in every state, Legislative Council may or may not exist in a state. The Constitution makes the provision that the second chamber may be abolished where it exists as well as it may be created where it is not present by a simple procedure. It does not involve constitutional amendment. In order to bring such amendment, the state assembly must pass a resolution by a special majority i.e. two-thirds of the members actually present and voting for creation or abolition of the council.

This extraordinary arrangement was made in the Constitution for the states however; same was not done in case of Union Legislatures. The reason for not making it mandatory was that states being of poorer resources may find it difficult to have second chamber. Taking advantage of this provision the state of Andhra Pradesh created Legislative Council in 1957 and abolished it in 1985. Similarly West Bengal and Punjab too abolished their legislative Councils in 1969.

5.5.1 Legislative Councils

The provision regarding Legislative Council is made in the Article 171 of the Indian Constitution. The strength of the house varies however, the minimum strength is fixed as 40 and the maximum is determined on the basis of strength of the Legislative Assembly. The total strength should not exceed one third of the Legislative Assembly of the state. The composition of the council consists of partially nominated and partially elected members. 5/6 of the total numbers of the Council are indirectly elected and 1/6 will be nominated by the Governor. Those who are nominated by the Governor are persons having special knowledge in literature, science, art, co-operative movement and social service. The members are elected through indirect method of proportional representation by the single transferable vote system.

5.5.2 Tenure

Like Rajya Sabha, the Council is a permanent body and is not subject to dissolution. One-third of its members retire on the expiry of every second year. [Art.172 (2)]

5.5.3 The Chairman and Deputy Chairman

Article 182 of the Constitution has provision of The Chairman and Deputy Chairman. They preside over all the sessions of the Council except where a resolution for their removal is under consideration. They never participate in voting except where there is a tie, they exercise their casting vote. Article 183 lays down rules through which they may either vacate their office or if a resolution of the council passes by its majority for their removal.

5.5.4 Qualification

As per provisions laid down under Article 173 in order to be member of state legislature a person should be a an Indian citizen and in the case of a seat in Legislative assembly not less than 25 years of age and in the case of a seat in the Legislative Council not less than 30 years of age. The disqualification criterion is discussed in the Article 191 of the Indian Constitution under which certain norms have been laid down for the disqualification of the members.

The disqualification criterion is as follows:

- Those members who hold any office of profit under central or state governments. However, state may by law declare certain offices as not attracting disqualification.
- Is of unsound mind.
- Is an undischarged insolvent.
- Is not a citizen of India or has voluntarily acquired citizenship of another country.
- Is disqualified by law made by Parliament

5.5.5 Powers and Functions of the legislative Council

In order to pass an ordinary Bill, a procedure similar to that of Parliament is followed. An ordinary Bill may originate in either House of State Legislature in which there is a provision of two houses. Ordinary Bills other than Money Bills can originate in either House. In case of Money Bills, the Legislative Council must return the Bill to the Legislative Assembly along with its recommendations and suggestions within 14 days from the date of its receipts. However, in case of Non-Money Bills, certain restrictions have been placed on Legislative Council under Article 197. It stipulates that if a Bill is passed by State Legislature and transmitted to the Legislative Council, it may

- Rejected by the Council
- Three months have passed from the date on which the Bill was laid before the Council and the Council has not passed it., or
- The Bill is passed by the Council with certain amendments to which the Assembly does not agree.
- In such case, assembly may pass the bill once again with or without amendments as suggested by the Legislative Council and transmit it to the Legislative Council for reconsideration

If, however, the Bill is passed by the Legislative assembly for the second time, despite having certain delaying powers of Council, the Bill shall be deemed as passed. So, what we observe, that Legislative Council can delay the passage of a Bill

for three months initially and second time for a month but ultimately, the will of the Legislative Assembly prevails.

Apart from that, since there is no provision of joint sitting to iron out differences between both houses, the will of Legislative Assembly ultimately prevails.

5.5.6 Control over Executive

As in the centre, the Council of Ministers headed by the Chief Minister is collectively responsible to the Legislative Assembly and not to the Council. The council has hardly any power to influence the governments except raising questions for its deeds or misdeeds.

5.6 Legislative Assembly

State Legislative Assembly is also known as popular chamber which consists of directly elected members from territorial constituencies. The number of Assembly members should not be more than 500 nor less than 60. However, after the creation of smaller states, the minimum number has been reduced in respect of some states like Sikkim, Arunachal Pradesh and Goa. At present, the biggest state Assembly is Uttar Pradesh and smallest is that of Sikkim having just 32 members. Moreover, provisions have been made to reserve seats for women, S.Cs and S.Ts in legislative Assemblies. Apart from that, Governor has the power to nominate on member from the Anglo-Indian community as he deems fit (Article 333).

5.6.1 Tenure

The tenure of state Legislative Assembly is 5 years as laid down in Article 172. It may be dissolved earlier also by the State Governor. Governors very often misused their authority at the direction of central government and imposed emergency under Article 356.In 1977, Janata Government imposed emergency in 9 Congress ruled states and when Congress came back to power it imposed emergency in 9 states where it was not in power. This could only be checked when in S.R. Bommai v. Union of India (1994) case, a 9 judge bench advised the government to follow the recommendation of Sarkaria Commission and avoid dissolution of state Assemblies. However, in case of proclamation of emergency, the period of the Assembly can be extended by the law of the Parliament for a period of one year at a time and not exceeding six months after the proclamation ceases to have effect. [Article 172(2)]

5.6.2 The Speaker and the Deputy Speaker

The Legislative Assembly of each state must choose from its members Speaker and the Deputy speaker (Article 178). They may also resign from their post if they cease to be member of the Assembly or may offer their resignation or if a resolution to this effect has been passed by a majority of the members of the Assembly. They preside over the meetings of the Legislative Assembly except when the process of their removal is under process.

5.6.3 Powers and Functions of Legislative Assembly

The Legislative Assembly of state is the most powerful house and it has wide array of Legislative, Executive and Financial powers. It makes laws on the subject mentioned in the state list as well as Concurrent List. The powers of Legislative Council in this regard are very limited and at most it can delay the legislation. Under its executive power, Legislative Assembly, exercises control over the Council of Ministers headed by the Chief- Minister. The Council of Ministers is collectively responsible to the Executive for its policies and programmes. Apart from moving resolutions and motions, it can also move a no-confidence motion against the Government. By passing the no-confidence motion, the Assembly can bring down the Government. Legislative Assembly is also vested with the financial power and without its concurrence, no taxes can be levied, no appropriation can be made, no taxes can be introduced and money bill cannot be introduced. Finally, it also has power with regard to Constitutional amendment under article 356. Once, the bill is passed by the Parliament, it is referred to the states for ratification.

5.7 RELATIONS BETWEEN THE TWO HOUSES OF THE STATE LEGISLATURE

Normally speaking, the relation between two houses remains cordial and even in case of conflict, due to the strength of the Lower House, its will prevails. At the most, Legislative Council can only delay the passage of the bill and it is up to the Legislative Assembly to either incorporate the changes proposed by the Council or pass the Bill in its original form.

5.8 GOVERNOR

Governor is the formal head of the State executive and executive authority of the State is vested in him. He exercises his executive authority either directly or through officers subordinate to him. Chief –Minister and his Council of Ministers aid and advise him in discharging his duties. Normally, for each state Governor is appointed. However, under Article, 153 the same person may be appointed as Governor of two or more States. He also acts as a link between Centre and State and his role becomes very crucial when state is under President Rule. During emergency period, he applies his discretionary powers. Although, in some cases he looks as replica of the President at the Centre, however, unlike President, he is not merely a figurehead, but plays a very crucial role in smooth functioning of the Government.

While, the criteria of having Governors in each state being discussed in the Constituent Assembly, there was lot of confusion regarding their mode of selection. Originally, it was suggested that he should be directly elected. However, deadlock between Governor and Chief Minister, it was finally decided to have nominated Governor. Similarly, there was also debate regarding appointing Governor as the head of the state in true spirit of parliamentary democracy or nominating him. However, it

was, ultimately decided that he should be nominated by the Centre. The confusion that prevailed in determining the criteria to be followed in the appointment of the Governor surfaced because there was no precedence in British Parliamentary arrangement (from where, India borrowed the principle of Parliamentary democracy) to suggest that what norm should govern the functioning of the Governors. Finally, the Constitutional experts agreed that, he should act in a restrained manner under normal circumstances and apply his extraordinary authority, when situation goes out of hand.

5.8.1 Appointment

Article 153 lays down that there shall be a Governor for each State. However, the same person may be appointed as Governor for two or more states. The Governor is appointed as per the conditions laid down in Article 158 of the Indian Constitution. Sarkaria Commission has recommended that in order to maintain neutral and unbiased constitutional position of the Governor, someone who is detached figure and not intimately connected with politics be appointed as Governor. Generally, while appointing Governors in India, two conventions are followed.

1) The Governor is appointed from outside the State. However, there have been examples in the past when this convention was not followed.

2) Under normal circumstances, the States are consulted by the Centre before appointing Governors. However, this is often violated and more particularly if it is opposition ruled state then the chances of consultation is very minimal.

5.8.2 Removal

Governor is normally appointed for a period of 5 years or he may continue in his office till his successor takes over from him. He may also offer his resignation before expiry of his term on personal grounds or may be asked to resign if he fails to discharge his duties as per the Constitution. Although, the grounds for his removal by the President is not specified in the Constitution. They may also be transferred to other States as it has happened on several occasions. Constitution remains silent on the issue of transfer of Governor.

5.8.3 Powers and Functions of the Governor

Unlike, President of India, Governors of States does not have military or diplomatic power which is normally granted to the Head of the State. However, he too, enjoys similar legislative, executive, judicial powers similar to that of President. The Governor is bestowed with various powers which may be bracketed into different categories.

1. Executive powers
2. Legislative powers
3. Financial powers

4. Judicial Powers
5. Discretionary Powers

1. **Executive Powers :** The Governor is the Chief Executive of the State and all the executive functions of the State are performed in the name of the Governor. Article 154 of the Indian Constitution has clearly stated that the Executive power of the state shall remain vested in the Governor. Governors in India have similar powers and responsibilities at the State level as that of the President of India at the centre. In discharging his duties and responsibilities, he is aided and advised by the Council of Ministers headed by the Chief- Minister, except where application of discretionary power by the Governor is required. Although, Governor appoints the Chief- Minister but his role is very limited in the sense that as long as Chief- Minister enjoys majority support, they can remain in office and also they are accountable to the State Legislature and not to the Governor. However, if the Governor feels that Chief-Minister has lost majority support, he may anytime ask him to prove his majority on the floor of the house within a specified period. Governor has power to dismiss even a State Government which has majority, if he feels that it is not working according to the provisions of the Constitution. Although, under normal circumstances, Governor and Chief- Minister works together and Chief-Minister always remains in touch with the Governor and briefs him about the major policy decisions of the Government. On the other hand Governor may ask for certain specific information from the Chief-Minister about certain specific issues. The Governor of the State has also the power to appoint the Advocate General of the State and he remains in office during the pleasure of the Governor.

2. **Legislative Powers :** Although, the Governor is not a member of the State Legislature, but he is an integral part of it and thus enjoys a variety of powers. For Example, he has the right to address the legislature and to send message to it. He also summons, prorogues [Art. 174(1)] and dissolves the State Legislature [Article 174(2) (b)]. He also addresses the first session of State Legislature after election and at the beginning of each new session. He may also send messages with respect to any bill to the House and House will consider the message. The Governor is also empowered to nominate a member of the Anglo-Indian community to the Legislative Assembly in case the community does not get adequate representation in the Legislative Assembly.

   Another important power of the Governor is the power to give assent to the Bill passed by the State Legislature. A Bill cannot become an Act unless it gets assent of the Governor. He exercises wide ranging powers in this regard. For Example, he may either give his assent to any Bill or withhold his assent or reserve the Bill for the assent of the President (Article200).Another

important power of the Governor is to issue ordinances when the State Legislature is not in session (Article 213).

3. **Financial Powers :** The Governor of the State also enjoys limited financial powers as well. For example, a Money Bill can be introduced in the Legislative Assembly only on the recommendation of the Governor. The annual Budget is also presented with the recommendation of the Governor. The Contingency Fund remains at his disposal. However, in exercising his financial powers, he is advised by the Chief Minister.

4. **Judicial Powers :** Article 161 confers limited powers to the Governor to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the Executive power of the State extends. The Governor is also consulted by the President while appointing Chief Justice and other Judges of the High Court.

5. **Discretionary Powers:** A discretionary power of Governor means the power of the Governor which he exercises as per his own individual judgment or without the aid and advice of the council of ministers. However, the Constitution has also vested him with the power to act as per his own discretion. During normal circumstances, he may act according to the aid and advise of the council of ministers, however, he may or may not act as per the advise of the council of ministers. Discretionary powers of the Governor may be divided into two parts.
    a) Specific Discretionary Powers
    b) Circumstantial Discretionary powers

Specific Discretionary powers are the one which are specified and mentioned in the Constitution under which Governor may use his discretion. Circumstantial Discretionary powers are not defined by the Constitution. These are implied powers which are exercised by the Governor as per circumstances which may vary. Many a times, when Governor exercises this power, his role becomes controversial.

The Governors in Indian State are bestowed with wide amount of discretionary powers which makes their position very significant. Art. 163(1) clearly states that "There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is or under this Constitution required to exercise his function or any of them in his discretion. In the exercise of his discretionary power, Governor will not be required to act according to the advice of his ministers or even to seek their advice. The clause 2 of the same Article further says that…. Anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. Constitution has not elaborated in detail the discretionary powers of the

Governor and therefore it is said that the power to decide his discretion is itself a discretionary power of the Governor.

Some of the discretionary powers of the Governor are: Dismissal of the ministry, imposition of President's rule, withholding of a bill etc. Under Article 356, the Governor may also recommend to the President for the imposition of the President's rule in the state if he feels that there is complete breakdown of the Constitutional machinery. And the state cannot be carried on in accordance with the Constitutional provisions. He may also dismiss the state government and dissolve the Legislative Assembly.

The Governor applies his discretionary powers if any Bill passed by the state legislature contravenes with constitutional provisions or may not be in the national interest. He may reserve such Bills for the consideration of the President. Similarly, the Governor may exercise his discretion, if he is convinced that state government is indulged in anti-national activities, which may pose threat to national security.

Another discretionary power of the Governor is enshrined in the Article 175(1) of the Constitution, which envisages that Governor can address either house of the State Legislature either together or separately. Conventionally speaking, the address of the Governor is prepared by the party in power and it contains apart from other issues, political agenda of the ruling party. Hence, it raises the question that whether Governor can refuse to read such address drafted by the ruling party or decline to do so. The normal opinion in this regard is that he may exercise his discretion and avoid reading such objectionable portion of the speech.

The application of discretionary powers by the Governor, especially in favour of the party in power at the centre and contrary to the interest of the ruling party of the state has created bitter animosity in centre-state relations. In order to check the abuse of authority by the Governor, in the famous Bommai case the Hon'ble Supreme Court delivered its landmark judgment, stating that the state Legislative Assembly will not be dissolved and kept in suspended animation till the issue gets finally resolved by the Court.

Thus, we see that Governor enjoys considerable amount of power in Indian political system and plays a key role in centre-state relations. Unfortunately, due to the partisan role of some of the state Governors, the strain has developed in centre-state relations. Although, it has been observed that in the era of coalition politics, this tendency has been curtailed to a very great extent. In order to further improve the relation between two federal units, the recommendation of the Sarkaria Commission need to be adhered. It recommended that, active politicians should not be appointed as state Governors and Chief Minister should be consulted before appointing the Governor.

The office of the Governor is very crucial as he has to play a very significant role in the governance of the state. The problem occurs when Governor begins to act under the dictation of the central government. Being a Constitutional head, it is expected from the Governor that he would act in a reasonable and rational manner even while exercising his discretionary authority and moreover, he must have materials to sustain his judgment. Otherwise, the Constitution would have to be credited with granting its approval to malafide and unreasonable exercise of discretionary power by the Governor.

5.9 CHIEF MINISTER

Similar to the pattern followed in parliamentary system of governance at the state level, the Constitution provides for the office of the Chief Minister to be the real executive authority of the state. Being head of the Government, he runs the affairs of the government in consultation with the Governor. He remains in office as long as he enjoys the support of the majority members of the state legislature. The Chief-Minister under Indian political system is expected to perform wide ranging powers. However, our founding fathers were initially more concerned with maintaining national unity and therefore put fetters on the powers of Chief Minister by granting discretionary powers to Governor. Although, under normal circumstances, generally the role of Governor is very limited, however, it has been observed that even when Chief Minister had majority support in the house, the Governors did make effort to dislodge the state government. Of late, this practice has somewhat diminished due to the coalition nature of the political system and presence of strong and popular regional government.

Generally, the simple Constitutional arithmetic is that the leader of the majority party is invited by the Governor to form the government. However, in reality many factors play a determining role in the appointment of Chief Minister. For example, in case of national parties, the selection of Chief Minister is made by the high command than by the elected members of the state legislative assembly.

Similarly, in matters of removal of Chief Minister, the Constitution states under Article 164(2) that Chief Minister holds office during the pleasure of the Governor which in practice, means having majority support in the state legislature, thereby neutralizing the role of the Governor in playing an activist role. In practice, however, it is the party in power at the centre misuses its authority and literally forces the Governor to act as the agent of the centre or otherwise face the music and that is the reason that Article 356 is the most abused and misused articles of the Constitution which is strongly criticized by those who are advocates of state autonomy.

5.9.1 Powers and Functions of the Chief Minister

Being real head of the Government, Chief Minister is bestowed with many powers and responsibilities. They are as follows:

i) According to Article 163, there shall be a Council of Ministers with Chief Minister as its head to aid and advice the Governor in the exercise of his functions except in the cases where Governor acts in his own discretion.

ii) He selects his cabinet colleagues and also allocates portfolios to them. He is authorized to reshuffle his cabinet anytime and may drop any minister from his cabinet.

iii) Chief Minister presides over the meeting of his cabinet and also co-ordinates the activities of the various ministries.

iv) Chief Minister also communicates the Governor regarding all the decisions of the Council of Ministers. He acts as a channel of communication between Governor and his Council of Ministers. He also acts as a link between the legislature and his ministers.

v) The sessions of the Legislative assembly are summoned and prorogued by the Governor on the advice of the Chief Minister.

vi) The Chief Minister may tender his resignation any time and then advise the Governor to dissolve the Legislative Assembly even if its term has not expired. He may also recommend for President rule. However, it is up to the Governor to accept such advice or not.

vii) All the Bills have prior approval of the Chief Minister, before being introduced in the Legislative Assembly and he also ensures that it gets passed in the Legislative Assembly.

5.9.2 Position of the Chief Minister

The position of the Chief Minister is similar to that of the Prime Minister at the central level although his area of activities remains confined to his state. The chief minister in the state exercises real authority in selecting his cabinet colleagues and allocating portfolio to them. He presides over the meeting of the cabinet and is the chief spokesperson of the Government. Besides discharging day to day activities of the government, Chief Minister also acts as a bridge between State Legislature, The Council of Ministers and the Governor. Chief Minister performs various roles as the head of the government which are as follows.

Being head of the Government, he presides over the meetings of the Cabinet, keeps the Governor informed about the developments in the state, initiates welfare policies for the state, allocates portfolios to the ministers, keeps check on their activities, interacts with Union Government and various ministries and demand money for the various policies and programmes. He may also tender his resignation at any time, and may ask the Governor to dissolve the House. It is up to the Governor to accept such advice or not.

Although, the Powers and responsibilities of the Chief Minister are well defined in the Constitution, in actual practice, it depends on various factors. For example, the position of a Chief Minister heading a coalition government or belonging to a national party is distinct from the position of a Chief Minister belonging to a regional political party owing to the functional space available to them. Various leaders of regional political parties like Nitish Kumar, Karunanidhi, Jaylalita, Naveen Patnaik, Mulayam Singh, Mayawati etc. wields enormous clout. The strong position of the Chief Minister helps him in various ways like selecting his cabinet colleagues to providing stable government in the state. Earlier, many Chief Ministers, in order to accommodate various groups used to have unwieldy cabinet but after 91st Constitutional amendment a ceiling has been fixed, limiting their size of the ministries to 15 per cent of the total strength of the State Legislative Assembly.

Chief Minister is also concerned with the welfare of the state government and in this regard he has to maintain regular and smooth contact with the central Government. Chief Ministers pay regular visit to New Delhi and interacts with various ministries of the Government so that various developmental activities in the state could be initiated. Chief Ministers pays visit to Planning Commission and meet the Chairman and apprise him about the various financial requirement of the state and seek fund for that.

Thus, we see that position of the Chief Minister is very crucial in the governance of the state. Many states that were lagging far behind have surged ahead because of the presence of an able and visionary Chief Minister. The example of Bihar, Gujarat can be cited in this regard.

5.10 SUMMARY

The above discussion clearly reflects that in order to understand India's federal democratic structure the holistic understanding of the structure and functions of the executive in state is urgently required. Although, it is patterned on the similar model that prevails at Union level, the discretionary powers of the Governor and the controversy associated with it makes it somewhat different from the Union Government. The success and failure of the state Government largely depends on the understanding between Governor and Chief- Minister. It has been observed that on most occasions, it is not the Constitutional provisions that create obstacles in smooth functioning of the Government, but due to lack of understanding between Governor and Chief Minister and interference by the Central Government, the smooth functioning of the government gets affected. For the smooth and successful functioning of democracy at the state level, proper co-ordination between these institutions are urgently required.

5.11 EXERCISES

1. Write a brief note on the sources of the legislature functioning in India (in the Pre-1952 period).
2. Analyse the role of Lok Sabha and Rajya Sabha as the custodians of the Parliamentary functions.
3. What is Parliamentary Sovereignty? Is it immune to judicial review?
4. Write short notes on: (1) Role of the President in the legislature process. (2) State legislature.

5.12 REFERENCES

1. Das, BC, 1977, *The President of India*, New Delhi
2. Jennings, Sir, Ivor, 1969, *Cabinet Government*, Cambridge.
3. Patnaik, Raghunath, 1996, *Powers of the President and Governors of India*,

UNIT-6 THE EXECUTIVE

Structure

6.1 OBJECTIVE

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

- Trace the position of President in India;
- Describe the composition of the Executive in India;
- Explain the functions of president of India including Emergency powers ; and

- Explain the powers and functions of the cabinet and prime minister.

6.2 INTRODUCTION

The Constituent assembly debates hold significance in the making of republican India. The discussion on the kind of Executive republican India should have, was also debated in detail. While the Constituent Assembly discussed the type of Executive India should have, the Euro-American constitutional traditions had three major kinds of Executive- the Presidential system of America, the elected one in Switzerland and the Cabinet government in Britain. The founding fathers looked back into the functioning of the British executive in India and then quite intelligently differed from the British executive as well as American Executive and adopted a combination of American and British systems, though tilted towards British Cabinet system. Though, they adopted parliamentary democracy with ministerial responsibility to the peoples representatives in the lower house i.e. Loksabha, but did not absolutely resemble it with that of the British executive. Thus the assembly chose a modified form of British Cabinet system with the Head of the State i.e. President of India being indirectly elected for five years that could be removed by impeachment and not be a permanent Monarch like the British Head of State. The modified version was for the needs of strength and quick effectiveness, for huge strides in industrial, agricultural, and social development that were to be made and to govern the enormous population. i The Constituent Assembly also tried to maintain separation of powers between branches of government. It feared that the executive branch as a whole might become too strong, ignoring its responsibility to the Legislature and President may also become despot in the absence of balance of power. One of the authority of his times on the Indian Constitution observed.

- Indeed, it was in part due to the feared misuse of Executive power that the Assembly adopted cabinet government instead of the fixed Executive: members believed that with the separation of powers of the Swiss and American systems, the Executive would not be subject to legislative control.

The overall impression of the Constituent Assembly that comes out with the adoption of the Executive system for India makes it clear that the Members wanted that the Executive should not become too powerful that it ignores accountability towards the Parliament taking capricious and illogical decisions. And also the President uses constitutional powers in a manner that s/he personally assumes governance instead of heeding to the advice and desires of the council of ministers.

The Indian Executive system is known as Cabinet system of government as it is the Cabinet headed by the Prime Minister which takes the major policy and administrative decisions. However, these decisions are taken in the name of the President. In this write up we shall look into the basic features of the Executive

system, the powers and position of its constituents and the relationship among the constituents.

The Indian Executive system has the following features:

6.3 PRESIDENT AS NOMINAL HEAD

One of the major characteristics of the Indian executive system is that it is headed by the President who acts as a nominal head as all the powers though vested in him and used in his name but are pragmatically used by the Council of Ministers. In this light, s/he is also termed as a mere "Rubber Stamp" consenting to all the decisions of the Council of Ministers without looking into the consequences. Nevertheless, in the subsequent discussion, we shall find that the position of President constitutionally may be that of Nominal Head but in the emerging scenario of recent decades, this position has become crucial taking him/her beyond the Nominal Head and becoming significant in particular political situations.

6.4 PRIME MINISTER AS ACTUAL HEAD

President is the head of the State but it is the Prime Minister who is the actual head and his position remains significant in the Indian executive system. It is the Prime Minister with council of ministers who makes policy and administrative decisions in the name of the President. The position of the PM becomes very crucial in the parliamentary system as it is s/he who heads the council of Ministers, enjoys the confidence of parliament and the party that makes him/her more powerful. It is through him/her that the President gets the information of function of the government.

6.5 POLITICAL HOMOGENEITY AND ITS CHANGING NATURE

Soon after the declaration of republic, the Indian political system was dominated by the Congress and so the Executive had political Homogeneity the President, Prime Minister Ministers and most of the ministers belonged to the same party. However, in recent years that has transformed and now the Executive has ministers belonging to various parties so there is a lack of political homogeneity in appearance but the ministers as Executive members have to agree for the decisions taken together.

6.6 COLLECTIVE RESPONSIBILITY

The Executive is collectively responsible to the Parliament for all its decisions. It means that in fact all the Members of the council of Minister may not belong to the same party but they maintain collective responsibility for all the decisions. There might emerge situations, when a particular minister or ministers may not agree with the collective decisions then they have to either accept such decisions or resign from the ministerial position.

6.7 THE PRESIDENT

Under article 52, the Constitution mentions about the post of the President. S/he holds highest honor, dignity and prestige as head of the State. All the powers of the executive are exercised by or through him/her.

6.7.1 Election of the President

The President is elected indirectly by an Electoral College comprising of Members of Parliament and Members of State Legislatures. The election of the President is done with a comprehensive method known as a system of proportional representation by means of single transferable vote, wherein all the members of the Electorate do not have equal value for their votes.

6.8 POWER AND FUNCTIONS OF PRESIDENT

The President of India has been conferred many powers as the Executive Head of the State which may be used by him directly or through subordinate officers as per the Constitutional provisions. These powers are divided into the following:

6.8.1 Executive Powers

Article 53 provides that the Executive powers of the Union shall be vested in the President but we need to read it with article dealing with the Prime Minister and his/her council of ministers which exist to aid and advice the President in the exercise of such powers and related functions. However, while using this power, the President is bound to consult his council of ministers and as per the 44th amendment, s/he may ask it to reconsider any given advice, nonetheless, if such advice is sent back to the President after reconsideration then s/he is bound to act accordingly. Among the executive powers of the president, the power to appoint and remove high level state functionaries is major. These functionaries include, the Prime Minister and his council of Ministers, the Attorney General, Comptroller and Auditor General, Judges of the Supreme Court and High Courts, Governors of the States, Finance Commission, Chief Election Commissioner and his/her member-Colleagues.

6.8.2 Legislative Powers

The Legislative powers of the President include-1) Summoning the Houses of Parliament in normal circumstances; 2) Dissolving the Lower House and summoning a joint session of both the Houses in case of deadlock between the two on a particular bill; 3) Addressing first session of the both Houses of Parliament after each General Election to the Loksabha;4) Nominating 12 Members to the Upper House and 2 Members to the Lower House, if the Anglo-Indian section has not got representation in the Loksabha; 5) Giving accent to the bills passed by both Houses of Parliament to make in an Act; 6)Promulgating Ordinances in the absence of meeting of the Houses sitting during the intervals of two sessions, etc.

6.8.3 Emergency Powers

The founding fathers of the Constitution of India could visualize that there will emerge some abnormal or extra-ordinary situations in the country, wherein the Union government will have to play very crucial and decisive roles. However, they were also aware that such circumstances should not make the Executive despotic so they made provision to handle the both. There are three emergency powers of the President:

6.8.3.1 National Emergency (Article - 352)

The President can impose National Emergency under Article 352 that is caused by- a) war, and b) external aggression or internal revolt. This has been proclaimed only twice once in 1962 and secondly in 1971. It is interesting to note that the while the National emergency was continuing under external aggression in 1971, another proclamation was made in 1975 in continuation as there were internal disturbances. When questions were raised for such a continuation then the Indira Gandhi regime made 38th Constitutional amendment by giving sweeping powers to the President and making it unjustifiable in the court of law that got reverted by the Janta Party regime through 44th Constitutional Amendment

Impact

- Federal Character becomes Unitary due to-1) the Union Executive gets power to give directions to the States, 2) Parliament gets the right to make law on a subject eve though in the State List, and 3) President may change distribution of revenues between the Union and the States.
- The Tenure of the Lok sabha may be extended for one year at one go.
- The Fundamental rights especially given under Article 19 of the citizens may be suspended during the period of emergency but not the rights under Article 20 and 21.

The National emergency imposed in 1962 continued up to 1968 and within next 3 years in 1971 it was again imposed that lasted till 1977. However, the emergency of 1975 due to internal disturbances was widely criticized not only by civil rights activists but also the academics. A French Scholar writes that the imposition of emergency like the one in 1975 due to internal emergency may bring in a system of governance that might make structural changes in the political system creating its own rules and invoking its own logic.

6.8.3.2 State Emergency (Article - 356)

No other provision of the Constitution might have been in bigger controversy than the imposition of President's rule under Article 356 on a State of the Indian Union on the alleged failures of the constitutional machinery and difficulty to carry on the business

of the state in accordance with the Constitution. This power has been used more than 100 times. There was a time when the Congress started losing its power in the States and in that context on the pretext of the failure of constitutional emergency, this power began to be misused that continued when the opposition parties got chance to destabilize the state governments of Congress rule.

Impact

- The President assumes the executive authority of the State and exercises powers through the Governor or any other authority in the State
- The Legislative Assembly may be suspended, may be restrained to do business or may be dissolved
- Legislative powers of the State transferred to the Parliament
- Though High Courts are specified with respect to States but they carry on their business as usual
- The Parliament sanctions the expenditure from the Consolidated Fund of the State while not in session but President needs to get its approval

A proclamation needs to be laid before the Parliament and it ceases to be in operation after two months unless gets approved by a special resolution of both houses i.e. Lok Sabha and Rajya Sabha. The operative period in normal circumstances is six months and may be extended for three years. However, in case of Punjab in 1980's it was extended for more than three years as per 44th Constitutional Amendment Act, 1978 if the Election Commission certifies that holding Elections to the Legislative Assembly are difficult and also when the emergency is in force in whole of India or part of it, while such a resolution is being passed.

6.8.3.3 Financial Emergency (Article - 360)

Under this provision, the President of India has to be satisfied that there is a threat to financial stability or credit of India. The interesting part in this is that it has no time limitation once Parliament gives its consent. Though the emergency under the previous mentioned provisions have been in operation but under this Article, there has been no need to impose emergency

Impact

- The state governments may be directed to observe measures of financial propriety as may be specified in the direction by the central government
- The salaries of various officials may be reduced including that of High Court and Supreme Court Judges.
- All money bills may require President's consideration and may be reserved for him/her

6.9 CRITIQUING THE EMERGENCY POWERS OF THE PRESIDENT

While discussing the emergency powers of the President, some of the founding fathers of the Constitution were apprehensive of such powers as reflected in the observation of H.V. Kamath who said, "..By this single chapter we are seeking to lay the foundation of totalitarian state, a police state...a state where if there be peace, it will be the peace of grave and the void of the desert." However, as there are extra-ordinary times in the lives of people so are in the lives of the nations, therefore to tackle the political situations of emergency and maintain the constitutional supremacy these provisions were accepted by the Constituent assembly. In spite of the rationale and legitimacy given to them, the criticism remains which include the following:

1. Contravening the Democratic ethos: The emergency provisions are considered against the democratic ethos as these make the union government to be totalitarian at times. The elected governments of the states may be axed by using Article 356 and the Union government may become all powerful in case of emergency imposed by internal disturbances as happened in 1975-1977, when emergency was imposed.
2. Fundamental rights Become Insignificant: Under these provisions, the Fundamental rights become meaningless making the citizens mute spectators of the events or putting them in jails etc. This makes the citizenship of insignificance.
3. Federal Structure becomes Unitary: Constitutionally, India is having a federal nature of state, where the Union and states have their own division of powers and need not venture into each others' spheres. However, the emergency powers of all three kinds turn the Federal Structure into Unitary as all the powers are used by the Union Executive or the Parliament. Thus, it brings in erosion in the autonomy of the States.

As stated, the President is the nominal head so he himself/herself does not take major decisions rather it is the Council of Ministers headed by the Prime Minister which helps the President in taking the decisions and executing them. The issue was resolved during the first presidency of Dr. Rajendra Prasad, who sometimes questioned the position of the President vis-à-vis Nehru's cabinet decisions sent for the consent of the President when he had to give his consent while having different opinion personally but as President of the Republic, he abided by the constitutional mandate.

Coalition Politics and the President's Discretions:

With the emergence of coalition politics in India, the President is getting opportunities where s/he can use discretion. As no party is in a position to get majority in the general elections so who should be the PM becomes a discretionary choice for the President. Though first of all s/he tries to invite the single largest party

to form the government but if he feels that the single largest party may not prove majority on the floor of the House then it become a kind of discretion for him/her. In case of Chandra Shekhar, President Venkatraman allowed him to form the government though he had support of only around sixty MPs of Loksabha who defected from the Janta Dal. Secondly, dissolution of the Loksabha may be advised by a Council of Ministers but it is up to the President to accept such a move, especially in circumstances where the existing council of Ministers might have lost the confidence of Parliament and thus s/he may like to explore the possibilities of government formation by any other political group. Thirdly, asking the Council of Ministers to resign or get confidence of the Parliament if they seem to have lost the confidence of the lower House.

6.10 THE CABINET

Parliamentary system of government is usually termed as the Cabinet system of government as it is the Cabinet (not even the Council of Ministers as mentioned in the Constitution) which largely carries out the functions of the Executive in general. Looking into the importance of the Cabinet, we need to mention the powers and functions of the Cabinet, which include approving the legislative proposals of the government for enactment; recommending major appointments; coordinating among the ministries; resolving interdepartmental disputes; and, supervising the execution of policies of the government. The Cabinet also forms various committees for smooth functioning. Analyzing the major role played by Political Affairs Committee of the Cabinet, Kochanek observes that this committee became responsible for coordinating major domestic and international cabinet concerns and acquired most important status of decision making body.

Although, there is collective responsibility principle for the Cabinet but the individual members also are responsible to manage their departments effectively and they hold the office till the pleasure of the Executive Head. If the PM feels that a particular minister is not able to handle affairs of his/her ministry then, the individual responsibility is fixed in a smooth manner and the concerned minister/ministers are asked to resign by the PM and the colleague abides by the decision of the PM avoiding any embarrassment for whole of Cabinet and particularly for the PM. In May 2013, the Law Minister Ashwani Kumar and Railway Minister Pawan Kumar Bansal of United Progressive Alliance regime resigned from their positions in the same manner that has been practice in the past as well.

6.11 THE PRIME MINISTER

The Prime Minister is selected in principle by the President but in practice earlier it was the leader of the majority party in Lok Sabha who was selected. In recent years, it may not be leader of the majority party who is selected but someone about whom the President thinks that s/he enjoys support of the majority in the Parliament and as per

constitutional obligation who may prove majority on the floor of the House. Under circumstances, when a party does not get majority in the Loksabha elections then the President's discretion becomes important. The President may or may not request the single largest party to form the government and thus his/her discretion becomes significant.

As mentioned above, the Prime Minister is the real Head and thus his status, powers and functioning have a bearing on the working of the government. In recent times, his/her selection has become somewhat complicated as compared to the times of Congress system, when the Congress Party enjoyed majority in the Loksabha. The selection of the Prime Minister is theoretically done by the President but in fact it is the majority party whose leader is supposed to be invited by him/her to form the government. The appointment of Prime Ministers in republican India may be divided into two phases, first, before 1989 and after 1989. Before 1989, it was not difficult for the President to make a choice of Prime Minister as a particular party used to obtain a majority in the General elections and its leader was invited to form the government, except in case of Charan Singh in 1979 who got splintered from the Janta Party to form his own government. However, after 1989, in the era of coalitions, it became difficult to invite a particular party as no single party has been able to muster majority in the Loksabha elections. And, thus the appointment of PM has also become complicated and sometimes even controversial. It was during this period that an unwritten law got established if a party does not get majority in the general elections then to invite the single largest party to form the government and former President Venkatraman claims this being his contribution in his autobiography.

6.11.1 Powers and Functions

The PM is the head of the government as compared to the president being the head of the State. The powers bestowed upon the President are in fact used by the PM. S/he functions as a link between the Cabinet and the President, who does not have direct access to the Cabinet. S/he communicates the decisions of the council of Ministers, furnishes the information required relating to the administration of the affairs of the Union government and any other proposals for legislation, etc. All the major appointments of the government are practically made by the PM like the Council of Ministers, Planning Commission, Governors, etc. If required then it is s/he who asks the Ministers to resign from their positions. S/he only presides over the meetings of the Cabinet and decides the agenda for such meetings. S/he distributes the portfolios of the Ministers. However, the status of the Minister in the party becomes a major qualification for determining the portfolios to each and every minister.

6.11.2 Prime Minister and President

The relationship between the PM and the President have significant bearing on the functioning of the government. PM is the Chief Advisor of the President and all the Administrative and Legislative decisions of the Cabinet are taken by him/her to the

President. Before the 42nd Amendment Act, the President was bound to accept the decisions of the Cabinet. However now in special circumstances s/he may ask the Cabinet to reconsider its decision. President KR Narayanan in 1997 sent back for reconsideration the need to impose President's rule in Bihar against the democratically elected government of Rashtriya Janta Dal and same was done in 1998 in case of Uttar Pradesh, when there as a deadlock after fall of the Mayawati government as the Bhartiya Janta Party withdrew its support. And such situations make uncomfortable relations between the two. It is not the there were no difference of opinion among various PMs and the Presidents at a given point of time but such differences if surfaced were substantially subdued as was the case of Nehru and Prasad in case of Hindu Code Bill, Rajiv Gandhi and Gaini Zail Singh on the regular intimation to the Presidency, Bajapayi and Narayanan on the imposition of President's rule in opposition states, on review of the Constitution and even between Bajapeyi and APJ Abul Kalam while seeking consent for the ordinance amending the Representation of Peoples Act in 2002. Interestingly, the PMs and Presidents have shown lot of maturity in handling such crucial situations and did not allow embarrassment for each other or bringing a constitutional deadlock.

6.12 POSITIONING THE EXECUTIVE IN INDIA

The Executive system in India comprise of three constituents namely, President, Cabinet and the Prime Minister. Aw we have adopted parliamentary system of government that has turned out to be Cabinet system of government as per Westminster model. However, there is a changing trend in the Westminster model as well at the role and position of the PM is becoming too crucial for the survival of the government. Traditionally, the PM had been termed as primus inter pares i.e. first among equals with reference to the Cabinet system. Once upon a time, it was thought that the parliamentary system of government has transformed into Cabinet system of government due to the predominance of the Cabinet in the decision making process. However, the position of the PM has become so unparalleled that observers started calling it Prime Minister Government.

The PM is emerging as the most powerful among the constituents of the Executive in India for the following reasons:

- The General elections are fought with a particular personality or probable personalities projected as PM in the post election scenario. Most of the General elections have been fought with announcing of the PM candidate by various parties be it Congress or BJP. Presently, a major debate is going on in the BJP who should be projected as PM whether Narendra Modi or any other senior leader of the party. Similarly the Congress may also announce its candidate for the General election to be held in 2014.
- PM functions as the only link between the President and the Council of Ministers that has been constitutionally mandated to advice the President.

Thus for all practical purposes the PM communicates with the President. One may usually read in the newspapers that the PM visited the President and apprised him of the National scenario.

- Selection, Termination and change of portfolios of the Ministers is virtually done by the PM. There could be various other reasons also but no minister could remain against the wish of the PM in the Cabinet.
- Call/ Summons the meetings of the Cabinet and functions as the Chairperson and¬ usually his opinion is accepted on major issues of governance.
- Government comes into existence with him/her and shines off with his/her resignation/termination.
- Increasing role of Prime Minister's Office (PMO) in coordinating and supervising the decisions and policies of various ministries. The recent controversies of Telecommunications (2G) Scam, Coalgate Scam, etc. show how the PMO's role has been crucial.

If we look into the functioning of the PMs at various junctures, it may be observed that Nehru was in a position to have his say in the government despite collogues of his own stature. Shastri was a docile personality and used to make consensus for the decision making. Indira Gandhi became autocratic and held remarkably undivided allegiance of his cabinet colleagues. Morarji Desai was with equally important leaders in the Cabinet so could not take unilateral decisions. Rajiv Gandhi is alleged to have been surrounded by sycophants and it was during his time that the word "Kitchen Cabinet" became popular in media and among the people. V.P. Singh, Chandra Shekhar, H.D. Deve Gowda, I.K. Gujral like Maorarji Desai were surrounded by heavy-weight colleagues and could not create their dominance or pre-eminence in the running of the government. They were heading the coalition governments so PMO could not become dominant factor in governance. Atal Bihari Vajpayee, though led a coalition government but had hold on the government, Kargil War and Nuclear Experiments made him a strong PM despite various ups and downs in the running of the government. Now Manmohan Singh is heading the coalition government but the confidence of his party in him and support from the coalitions partners made him an able PM in the initial years but in the last phase of his term, he seems to loosing the control and the impression is fast emerging his inability to have control on his colleagues and is seen primarily playing on the tune of the Congress high command.

If the influence of the PM has increased in running the government as the real head, then the role of the President, who may be nominal head has also become noticeable in the changed political scenario of coalition politics (although first President Rajendra Prasad himself did not behave as rubber stamp and asserted his position, but recent political circumstances have led to more assertion in the Presidency). Indicating towards this James Manor analyzes the role of various Presidents in the light of coalition politics and he looks at them from the assertion lens and observes

that in post 1989 the President R Venkataraman, ‘maybe’ termed as assertive, Shankar Dayal Sharma non assertive and KR Narayanan definitely an assertive President. Further as he appears to believe that the legitimacy of government in India is in some doubt and that new approaches to development need to be restored and goes on to argue that “in an era of hung parliaments, people in India need to become more tolerant of legitimate presidential interventionsbecause the changed conditions will inevitably require more of these.

Thus the Executive constituents in India despite having constitutional mandate and expected to work within the given frame of powers and functions could acquire significance beyond the constitutional provisions as the political circumstances unveil. However, they may not become absolutist and maneuver the powers of other constituents as there are various checks and balances imposed by Constitution itself. Above all in the last sixty three years the Courts interventions and emergence of larger maturity among the power holders and the civil society in general forces the individual power holders of the Executive to behave in particular mode as per the Constitutional provisions. This basic understanding is taking the Executive to a stage where, even if the Cabinet wants the President to behave in a particular way then the President also asserts and thus the Constitutional morality is restored.

6.13 SUMMARY

Following the pattern of British Westminster model, Indian evolved its own system of parliamentary form of government in which the executive is responsible to the legislature. The executive power of the government of India is vested in the President of India, who is both the formal head of the state and the symbol of the nation. The President is endowed with authority and dignity without adequate powers. The President can exercise his authority only with the aid and advice of the Council of Ministers headed by the Prime Minster. It is the Prime Minister who exercises real executive power in the Indian political system. As the head of the Council of Ministers, the leader of the majority party in the Lok Sabha and often the leader the Parliament, the Prime Minister enjoys considerable power and authority. Though the Prime Minister is appointed by the President and holds office with the pleasure of the President, the Prime Minister is in reality responsible to the Parliament. The Council of Ministers and the informal cabinet headed by the Prime Minister work on the principle of collective responsibility. As we saw, there have been differences between the President and the Prime Minister; these did not assume serious proportions culminating in any constitutional crisis. The President on the whole, worked only as a constitutional head.

6.14 EXERCISE

1. Why president is known as nominal head?
2. Explain the method of Election of the president.
3. Explain the Executive powers of president.
4. Explain the legislative powers of president.
5. Explain the emergency powers of Indian constitution.
6. Explain the Role of prime minister in India.

6.15 REFERENCES

1. Kashyap, Subhas, 1995, *History of the Parliament of India,* Vol. 2, Shipra Publications, New Delhi.
2. Austin, Granville 2000 *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press, New Delhi, p 116
3. Zins, Max Jean 1988 Strains in Indian Democracy, New Delhi p. 3.

UNIT-7 THE JUDICIARY: SUPREME COURT

Structure

7.1 OBJECTIVES

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.

7.2 INTRODUCTION

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 Content judicial system in India and then examine the various constitutional provisions relating to its powers and functions.

From being a reliable guardian and protector of constitution, an able propagator of rights of poor and faceless citizens to an institution of last recourse for millions of citizens to activism on issues that often get little or no attention from the executive, the judiciary in India has come full circle since its inception in 1950. The judiciary which has so far played extremely stellar role in having emerged as institution of last resort as executive and legislative branches have failed to perform their constitutional roles, has in many occasions intruded into the constitutional spaces of other organs. Such activism of judiciary has brought tensions in established constitutional 'separation of powers' and therefore criticism. In addition to this, there are equally critical issues/concerns with regard to reforms in terms of appointments of judges, accountability, corruption, pendency, issues of access and affordability of justice for ordinary citizens and so on. In short, the judiciary is on spotlight both for right and wrong reasons.

7.3 STRUCTURE AND COMPOSITION

Soon after his appointment as the Chief Justice of India in June 2013 Justice Altamas Kabir described Indian judiciary among the most powerful in the world in a speech in Sri Nagar. Unlike the US and other federal countries, the judiciary in India is a single integrated system. The framers of the Constitution consciously opted for an integrated judicial system to 'eliminate all diversities in a remedial procedure.' Under the arrangement, the Supreme Court is the highest court of the land, followed by the High Courts at the state levels which cater to one or more number of states. Down the High Court there are subordinate courts comprising of the District Courts at the district

level. This apart, there exist various quasi-judicial bodies such as Tribunals and Regulators to resolve disputes. The Indian Judicial System it follows 'common law system'. In a common law system, law is developed by the judges through their decisions, orders, or judgments. Unlike the British legal system which is entirely based on the common law system, where it had originated from, the Indian system incorporates the common law system along with the statutory law and the regulatory law.

7.4 INDEPENDENCE

The makers of the constitution were aware that many of democratic ideals would remain meaningless if they would not be backed by an independent and impartial judicial system (Austin 1966; 1999). No subordinate or agent of the Government could be trusted to be just and fair in judging the merits of a conflict in which the Government itself was a party. Thus, in a bid to establish complete independence of the judiciary, the Constitution has first erected a barrier that separates the executive from the judiciary. The judicial independence is further ensured by laying down rigid qualifications for the appointment of judges, in their tenure security and other conditions of service. For instance, judges are appointed almost for life and their conditions of service cannot be altered to their disadvantage, once they are appointed (Austin 1966; Pylee 1980). Similarly, their removal has been made extremely difficult case with two-third majority vote of the parliament.

7.5 THE SUPREME COURT

The Supreme Court of India (SC) is elaborated in Part V, Chapter IV of the Constitution as the highest court of the land, the highest court of appeal and the guardian of the Constitution. Therefore, any law passed by this apex body is binding on all the law courts in the country. By virtue of being the highest court of law, the SC controls and supervises the entire judicial edifice of the country to ensure the realisation of the high judicial standards (Pylee 1980). Articles 124 to 147 of the constitution lay down the composition and jurisdiction of the SC. Essentially it is an appellate court which takes up appeals against judgements of the provincial High Courts (HC). It also takes writ petitions in cases of serious human rights violations of if a case involves serious issue that requires urgent resolution (Mohanty 2009).

7.5.1 Composition

While the original constitution (1950) had provisioned for a Chief Justice and 7 other judges for the SC, over the years with word loads increasing the numbers have steadily gone up. Now there are 30 judges apart from the Chief Justice. The Chief Justice is appointed by the President of India, largely on seniority basis. Other judges (including High Courts) are chosen by a collegium comprised of the Chief Justice and 4 senior judges of the Supreme Court. The collegiums system was established by the Supreme Court in a series of judgments popularly known as three Judges case.6 In

terms of composition, the SC has somewhat maintained regional and ethnic representation as it has good share of judges belonging to religious and ethnic minorities. For instance, Justice K.G. Balakrishnan was the first dalit to be appointed as Chief Justice of Indian in 2000.

7.5.2 Powers and Jurisdictions

As the highest court, the SC has been granted a wide range of powers and functions. The SC has original, appellate and advisory jurisdictions to perform the role of the defender of the Constitution.

7.5.2.1 Original Jurisdiction

Under Article 131, the original jurisdiction of the SC extends to any dispute arising between Union and one or more States and between two or more states. Original jurisdiction, thought, restricts to question of law or fact brought before the court by any party mentioned above. In this regard, cases or disputes primarily involving the enforcement of fundamental rights (Article 32) come under the ambit of original jurisdiction. Under Article 32 of the Constitution, the court is empowered to issue orders, directions or writs in the nature of habeas corpus (बंदी प्रत्यक्षीकरण) mandamus (परमादेश) prohibition (निषेधाज्ञा), quo warranto (अनधकार पृच्छा) and certiorari (उत्प्रेषण लेख) to enforce Fundamental Rights (Mohanty 2009). However, the SC does not have any original jurisdiction or power over disputes arising out of any treaty, agreement, covenant or similar instruments which had been agreed upon or executed before the commencement of the constitution.

7.5.2.2 Appellate Jurisdiction

The SC is the highest appellate court in the country and by virtue of this it can hear appeals against the judgement of the High Courts in both civil and criminal cases involving substantial question of law which involves the interpretation of constitution (Article 132). This jurisdiction of the SC is intact both in the cases where a High Court certifies or otherwise. If the court is satisfied that case involves (criminal and civil) an interpretation of constitution, the SC can issue special leave to appeal (Pylee 1980). This apart, the Supreme Court has wide ranging appellate jurisdiction over all courts and Tribunals in the country. Under Article 136, the court can use its discretion to grant special leave to appeal from any judgement, decree, sentence or order in any cause or matter passed by any court, tribunal in India (Mohanty 2009).

7.5.2.3 Advisory Jurisdiction

The advisory jurisdiction ranges from specific advises sought by the President of India function of the SC is also very important. If there arises any ambiguity regarding the interpretation of a clause of the constitution or certain constitutional problem arises, the President can refer the same to the SC for its expert opinion. To

spell the exact wordings of Article 143 'If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the SC upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.' However, the opinion of the Court is not binding on the President.

7.5.2.4 Miscellaneous Powers

Apart from three key jurisdictions as mentioned above, the SC has many miscellaneous powers. Notably, it is a court of records, meaning that the records of its decisions and proceedings are preserved and published. Further, the decisions of the SC are binding on all the courts of the country. Importantly, the highest court has powers to review its own judgment or order. More importantly, the SC is provided with the power of judicial review. This apart, the SC is authorised to make rules for regulating the practice and procedure of the Court with the approval of the President. Further, the court has power to appoint amicus curie (friend of the court) to argue the case of the accused who is unrepresented. Finally, the court has power to extend free legal aid to person belonging to poorer sections (Austin 1999; Mohanty 2009).

7.6 GROWTH AND EVOLUTION OF JUDICIAL POWERS: AN OVERVIEW

While formulating structures and various provisions for the supreme court, Alladi Krisnaswami Ayyar, a key member of the Drafting Committee had remarked that "The future evolution of the Indian constitution will thus to large extent rest upon the work of the Supreme Court and the direction given to it by that Court." To a great extent, the Indian judiciary ably led by the Supreme Court has lived up to the expectations of the framers of the Constitution. Below is a brief overview of evolution and growth of judiciary as an independent organ of the government.

7.6.1 First Phase: A Positivist Court

The judiciary (meaning the higher courts) has evolved in different phases in its response to legislative and executive branches of the government. The judiciary in its early years was understated yet potent, using restricted confines of the judicial space to act as an effective check on legislative pronouncements. This check exercised through the power of judicial review, was used judiciously by the judiciary in the early years. At least three key aspects of early years of judiciary stand out. First, it strictly adhered to the constitutional text. Second, it refused to support lofty ideologies of the government of the day. Third, at the same time, it conceded parliament to have plenary power to amend constitution (Rajamani and Sengupta 2010). Thus, although the judiciary declared zamidari abolition as illegal and violation of right to property in Kameshwar Prasad vs. State of Bihar, it refrained from using the provision of judicial review when parliament quickly brought out first amendment to constitution which placed the provision (inserted Article 31B) out of

the purview of judicial review. Similarly in State of Madras vs. Champakam Dorairajan, it the court struck down government's decision to have reservations in educational institutions based on caste as violation of right to equality (Article 14), it did not oppose parliament's right to bring a constitutional amendment to justify such affirmative action on the basis of caste.

The court did follow near similar approach in Seventeenth Amendment in 1964 that arose as a result of its verdict in Sajjan Singh case. 14 In all these, the Court seems to have followed a positivist interpretation of constitution in the first fifteen years of its functioning. To quote Rajamani and Sengupta (2010), "The Court kept its head above the hurly-burly of custodian politics, in the first fifteen years of India's Independence, it was a controversial institution, its decisions generating fierce and bitterly contested public debates. This was no surprise given the matters it was called upon to adjudicate. Civil liberties, free speech, caste discrimination, and most notably land reforms were matters central to the ideals, aspirations, and lived realities of people in the new republic." It perceived itself as an institution discharging a function that the drafters of the Constitution envisaged for it.

7.6.2 Second Phase: Bending Backward

The second phase that began with famous Golak Nath15 verdict was rather tumultuous and politically charged. The judiciary which was perceived apolitical institution in character and essence notwithstanding its dealing with many politically sensitive issues such as abolition of zamidari, reservation policy which often caused direct confrontation with parliament, entered the political water with its expansive interpretation of Fundamental Rights in Golak Nath. The SC in this case reconsidered the constitutionality of the Seventeenth Amendment and by a majority verdict declared the said amendment illegal. Thus, it overruled Sankari Prasad and Sajjan Singh cases that it had avoided to confront with the parliament. The Court held that the amending power of the parliament to be subject to fundamental rights tests. In short, with one stroke the SC denied parliament its legislative sovereignty and restored its power of judicial review even on matters related to right to property. The court went farther in R.C. Cooper vs. Union of India16 when it struck down much touted bank nationalization scheme as illegal. This prepared a stage for direct confrontation between judiciary and parliament. To restore its supremacy, the Parliament passed Twenty-fourth Amendment which overturned Golak Nath.

The Twenty-fourth Amendment (along with Twenty-fifth and Twenty-ninth Amendments) led the Court to delivering historic Kesavananda Bharti vs. State of Kerala17 judgment that saw the judiciary limiting parliament's sovereign power to amend the constitution. All thirteen judges bench of the Supreme Court in a majority verdict (7 judges supported) held that while parliament was supreme to amend constitution, under Article 368 it cannot alter the 'basic structure' of the constitution (Basu; 2012; Austin 1999). This act of judiciary, however, opened up further resistance and opposition from the parliament particularly the ruling congress

government at the centre. The government reacted very strongly by superseding three senior most judges to appoint Justice AN Ray as Chief Justice of India. The ensuing confrontation reached its peak in Raj Narain case18 involving the validity of Mrs. Indira Gandhi's election. The Allahabad High Court which set aside Mrs. Gandhi's election and subsequent declaration of Emergency in June 1975, set the stage for rapid marginalization of judiciary. National Emergency and the supersession of judges which led to rapid politicization judiciary, actively contributed to judicial surrender to the executive in the controversial ADM Jabalpur vs. Shivkant Shukla19 that backed government's act of suspending right to life under Article 21 of the Fundamental Rights. The SC overturned the decisions of several High Courts that had declared suspension of habeas corpus illegal and took a stand that supported government's claims.

The judiciary which fought all these decades to defend and protect Fundamental Rights maintained that "the right to life and personal liberty were bounties given to citizens by the state and hence could be withdrawn in times of Emergency."20 Thus, with one judgment the judiciary which had assiduously nurtured a positivist, apolitical and independent course, lost it to the diverse tactics of executive branch which exercised further supremacy with Forty-second Amendment that took away most critical judicial powers including the power of judicial review. The judiciary which had earned accolades and respects in the previous decades became prey to politicization, turned unpopular and lost much acquired legitimacy (Rajamani and Sengupta 2010).

7.6.3 Third Phase

Era of Judicial Supremacy With the defeat of ruling government in 1977 and new Janata government claiming powers at the Centre, situation turned favourable for the judiciary to undo its mistakes and restore lost ground that it had gradually ceded to the executive over the years. The judiciary which was viewed to have made abject surrendering to the government tried to do the 'repentance' acts by taking on an activist course through many of its subsequent judgments. Post-Emergency, the most immediate response from the judiciary was to quickly undo the damage it had done in Habeas Corpus case (known as ADM Jabalpur). In the famous Maneka Gandhi vs. Union of India21, the judiciary went on to widen the ambit of Article 21 by linking it to grounds of procedural and substantive fairness. In this case, the court opened up a new dimension of right to life and personal liberty when it laid down that Article 21 was not only a guarantee against the executive action unsupported by law, it is also a restriction on law making. It also struck down the key provisions of Forty-second Amendment that had kept judicial review out of the ambit of constitutional amendments in Minerva Mills. However, these verdicts were just the beginning of a new era by judiciary was recovering from the shock of its Emergency bungling. In a gradual manner, the judiciary fashioned an era of judicial activism in the later decade through expansive interpretation of fundamental rights by creative use of a new

instrument called public interest litigation (PIL). By actively embracing PIL route, "the Supreme Court of India for the first time became Supreme Court for Indians."

7.7 PUBLIC INTEREST LITIGATION AND JUDICIAL ACTIVISM

Public interest litigation (PIL) which had gained considerable popularity in America and other western democracies as an emancipatory tool to defend the rights of third parties mostly disadvantaged minorities, poor and marginalized, was embraced by Indian judiciary in early 1980s to expand 'access' to justice. PIL fostered judicial innovation and doctrinal creativity that a postEmergency judiciary was looking out desperately to salvage its image (Sahoo 2002; Rajamani and Sengupta 2010). The starting point of PIL revolution was with landmark S.P. Gupta vs. President of India and others. Delivering the judgment, Justice P.N. Bhagwati, the key architect of PIL relaxed the locus standi, and opened up the doors of the judiciary to public spirited citizens – both those wishing to espouse the cause of the poor and oppressed and those wishing to enforce performance of public duties (Sathe 2001; Rajamani and Sengupta 2010). While delivering the judgement, Justice Bhagwati made it clear that "any member of the public acting bona fide and having sufficient interest in instituting an action for redressal of public wrong or public injury could move the court. The court will not insist on strict procedures when such a person moves a petition on behalf of another or a class of persons who have suffered legal wrong and they themselves cannot approach the court by reason of poverty, helplessness or social backwardness." In other words, with S.P. Gupta, the court changed the old concept of locus standi by allowing people who had a stake, direct or indirect, in the outcome of a suit, to be represented in the judicial proceedings.

Beyond relaxing the locus standi, the judiciary went ahead and allowed public participation in the judicial process even as it recognized the group rights to participate in legal proceedings. In doing so, the judiciary granted workers, residents and general public the right to appeal the courts against violation of their collective rights. For instance, the court in the National Textile Workers Union vs.

P.R. Ramakrshnan27 held that although the Companies Act did not provide for participation of workers in the winding up of proceedings of a company, they had stakes in the outcome of the action proposed to be taken. In another important case Sunil Batra vs. Delhi Administration28, the court relaxed the adversial procedures to the extent that it recognized the right to a prisoner to move the court complaining of alleged torture of another prisoner. In the same breadth, the judiciary treated the letters written to it as writ petitions as it would expand 'access to justice' (Sahoo 2002). The court made further innovation in public interest cases by granting interim relief to the victims, specifying the amount of compensation and supervising the process of their implementation.29 The Court's active promotion of PIL encouraged thousands of public spirited individuals, lawyers, citizen forums and NGOs to file litigations on behalf of underprivileged and helpless individuals and groups.

Hundreds of litigations were filed on all kind of issues ranging from human rights violation, women rights, child rights, bonded labour, environmental pollution and even constitutional and governance issues.

In every sense, PIL heralded the era of judicial activism31 in India. This is not to deny the roles of other instruments in aiding the activism of the court. Through PIL, the court creatively expanded substantive rights (i.e., Fundamental Rights especially Article 21) to cover unarticulated but implicit rights such as right to live with human dignity, the right to livelihood, the right to education, the right to health and medical care of workers, and the right to healthy environment (Baxi 2000; Rajamani and Sengupta 2010). In the process of performing such roles, which many name as 'judicial activism' (Sahoo 2002; Khosla 2009), the judiciary seems to have taken up or assumed the functions of other organs of the government. Scholars and practitioners cite such judicial tendencies of taking up the roles of other organs to inaction or failures of these branches to perform their constitutional roles which brought judiciary into the scene (Baxi 2000; Sathe 2001). However, there are equal numbers of scholars who point this to the ambition of a handful of ambitious judges to usurp the powers of executive and legislature at a time when the governance regimes are fragile and weak. Regardless of its origin, court's activism through PIL route has got into take various avatars: mainly law making and executive.

7.8 COURT IN EXECUTIVE SHOES

In hundreds of PIL based judgements, the court has entered itself unto the shoes of executive branch. Beyond delivering verdicts, the court virtually has gone into executive spheres when it granted compensation to the victims,33 passed orders to rehabilitate bonded labourers,34 issued directions to rickshaws to rickshaw pullers and to prevent them from unemployment,35 issuing guidelines to check environmental pollution.36 In a significant judgement in Vineet Narain vs. Union of India37, court used 'continuing mandamus' to give government a series of policy directions including conferment of statutory status to Central Vigilance Commission, manner of their selection, tenure and other nittygritty of executive job (Rajamani and Sengupta 2010). All these acts suggest that the judiciary has intruded into the areas, which were usually known as domains of executive. The fact is, in all these cases, judiciary is apparently telling the executive branch to implement their own laws on bonded labour, minimum wages, equal remuneration, contract labour and so on (Baxi 1985).

7.9 JUDICIAL LAW MAKING ROLE

Through PIL backed judicial activism, the court often assumed law making role meant exclusively for the legislative branch. For instance, in Hussainara38, the court went to the extent of redrafting the prison jurisprudence. Similarly, in Azad Rickshaw, the court directed reforms need to be infused in the existing laws. In a

significant judgement in Vishaka vs. State of Rajasthan, in the absence of law the Court took the reasonability of laying down guidelines on sexual harassment in the workplace apart from providing procedures and mechanisms for investigation and redress. The court justified such act under Article 32 of the Constitution (constitutional remedies). The Court emphasized that this would be treated as the law declared by this court under the article 141 of the Constitution. In short, in a number of PIL related judgments, the court has assumed law making role, often raising uncomfortable constitutional questions.

To sum up, the implantation of PIL into justice delivery process and its further improvisation by the court in numerous cases ranging from human rights violations, rights of disadvantaged, environment, redress for executive inaction to constitutional questions restored public faith on judicial institution and eventually made it one of the most powerful judiciaries in the world. Yet, PIL and host of other instrumentalities that the court has been employing in increasing number of instances have led to growing tensions among key branches of the government, thereby raising serious constitutional questions of separation of powers. Scholars and critiques monitoring the judicial story feel that in growing number of issues, the court is usurping powers of other constitutional branches, something rarely visualized by the constitution makers (Shunmugasundaram 2007; Mehta 2007). That Court is adjudicating matters beyond its jurisdictions and often dabbling in policy making (Mehta 2007, Rajamani and Sengupta 2010). From cases ranging to decide technical issues such as nature of environmental pollution to political questions such as dissolution of state Assembly (Article 356) to anti-defection laws, judicial overreach has been spread in all spheres of state policies.

7.10 JUDICIAL ACCOUNTABILITY

PIL aided judicial activism which has led to an unprecedented growth of judicial powers, is ironically an institution with very little formal accountability. By creating a 'basic structure' conditionality (to effectively restrict legislature's power to amend constitution), by including judicial review into the new clause, by expansive interpretation of traditional rights and by investing itself with the power to select the judges, the judiciary has made itself a supra institution. In every sense, the court has moved closer to becoming an 'imperium in imperio' (Rajamani and Sengupta 2010). For all practical purposes, there exists no oversight over judicial exercise of constitutional roles. The only way in which the executive used to retain some control i.e., appointment of judges, have been taken away by the judiciary after its controversial judgement in three Judges case. In fact, India is only country in liberal democracies where the judges alone appoint judges to the higher judiciary (Menon 2008). Similarly, with impeachment provision remaining extremely arduous process (has been exercised successfully only once in the last 68 years), judiciary increasingly look above the democratic processes (Mehta 2007). The most striking fallout of such unaccounted powers is reflected in many individual judges often going out of rule

book and decide cases and make remarks that can clearly bring down the reputation and legitimacy of judiciary. Most worrisome trend is growing trends of corruption41 among the judicial fraternity which have been openly acknowledged by the Chief Justices and senior members of the Bar. 42 In fact, alarmed by the lack of accountability and other vices gripping judiciary, the government has put up a Judicial Accountability Bill to address many of the maladies currently afflicting judiciary. In short, there exist little or no institutional mechanisms to enforce accountability and responsiveness among the judges of higher judiciary.

7.11 JUDICIAL REFORMS

Notwithstanding its activist streak and far reaching contributions in terms of expending new frontier of rights and justices via PIL, this critical constitutional instrument of last resort is in deep crisis today. Not only are the courts in India sitting over mountain of litigations, judicial decisions becoming inconsistent often contradicting each other43, expensive and time consuming and far beyond the reach of average citizen, let alone the poorest and marginalised as the court have been trying to do through PIL.

By government's own admission, there are 32 million cases pending in all tiers of the judiciary. 44 While about 66,569 cases are currently pending with the Supreme Court, 42 lakh with High Courts and 2.8 crore with subordinate courts. According to estimation by PRS Legislative, a parliamentary watchdog, pendency has increased by 148% in the SC, 53% in High Courts and 36% in subordinate courts in the last 10 years. 45 Added to this is very low conviction rate (6%). Disposal rate is just over 17%. According to a recent McKinsey study, if Indian courts continue operating at their current rates, they would take more than 300 years to clear their judicial backlog. The reasons for pendency according to the Union Law Minister are multifarious (i) increase in institution of fresh cases; (ii) inadequate number of judges and vacancies; (iii) inadequate physical infrastructure and staff; and (iv) frequent adjournments.

Linked to pendency is ever increasing number of vacancies at various courts. According to a recent estimate, there 3,422 unfilled vacancies in the district and subordinate courts and 276 in the High Court (out of sanctioned strengths of 895).More startling is that as many seven high courts in the country are without full-time chief justices, largely because the existing collegiums have not time to make recommendations. In short, even the collegiums system of appointment by the judiciary has not kept pace with the demands of the time.

Growing instances of corruption is something which bothers the judiciary as much it has to other branches of the government. Once viewed above corruption, the judicial branch is news for corruption and favouritism. According to Transparency International judicial corruption survey, some 77% of Indians believe judiciary to be corrupt.48 Nearly 3600 crores goes in terms bribing lawyers and judges to get justice

and avoid long dragging of cases and frequent adjournments. Several sensational cases of corruption and misuse of official position by some judges have grabbed the attention of press and public, thereby sullying the image of judiciary in the recent years.

The most important issue, however, is the issue of access to justice. For countless citizens especially poor and marginalised, access to justice remain a distant dream. Many special schemes such as Lok Adalat and free legal aid have remained of symbolic in nature (Menon 2008). According to many reports and studies, justice delivery system in India remains cumbersome, time and money consuming for most citizens, let alone the poor.

Last but not the least; the judicial process is yet to embrace modern information technology in a big way. It is evident from global experiences that application of communication technologies and automation of judicial process is revolutionising justice delivery process and the aspects of speed and efficiency. However, except for the higher courts to some extent, much of the judicial system at lower level function with old and inefficient process. The judiciary in India is lacking both physical as well as knowledge infrastructure to meet the gargantuan expansion of workload and public expectations.

In response, both judiciary and the government have undertaken a slew of measures to overhaul an ailing justice delivery system. The government has set up a number of commissions and committees to study and suggest remedial measures. The most recent have been the elaborate suggestions made by the Report of Second Administrative Commission and 170th Report of the Law Commission of India. Against a growing outcry about a dysfunctional justice system, the SC and several High Courts have initiated number of initiatives to reduce pendency, expand infrastructure facilities, improve governance process and be more accessible to citizens. For instance, the SC set up a National Court Management Systems Scheme in May 2012 to address the issues of efficiency and governance. Under the scheme, a National Framework of Court Excellence has been instituted which will set "measurable standards" of performance for courts addressing the issues of quality, responsiveness and timeliness. Similarly, the Court has set up an E-Committee to devise and implement a National Policy on computerization of judicial administration in order to expedite delivery of justice in civil and criminal cases. On pendency issue, the idea of Fast Track Courts which have reduced pendency of nearly 20 lakh criminal cases. In Tamil Nadu, Andhra Pradesh and Gujarat, such courts have been proved to be quite effective in disposal of cases involving minor offences which are clogging our criminal justice system. Delhi High Court has recently started evening courts initially for cases under Section 138 of Negotiable Instruments Act, involving small amounts. Most important development, however, is allocation of substantial financial resources for judiciary by the 13th and 14th Finance Commissions.

These apart, there have been slew of other proposals of huge promise doing the round of judicial reforms. While the judiciary has proposed for Alternative Methods of Delivery of Justice to dispose cases more rapidly through out of court settlements, the Union government has come out with several key bills on appointments, accountability, judicial conduct and so on. Also, there is a pending proposal for the constitution of All India Judicial Services. In short, a number of ideas and proposals are being mooted and actively debated to reform judiciary in India.

7.12 SUMMARY

From this above discussion, we can sum up the concept of Indian judiciary as follows:

The government of India has three organs namely Legislative, Executive and Judiciary. The Judiciary organ of India is the independent organs of the government. The Supreme Court is the highest court of apple in India. Indian judiciary is based on democratic ideals and backed by an independent and impartial judiciary. As the highest court of India it provides various jurisdictions like: Original jurisdiction, Appellate jurisdiction, Advisory jurisdiction and others. Including the entire jurisdiction Supreme Court also deals with public interest Litigation. Judicial review is also one of the powers of the judiciary to examine the constitutionality of legislative and executive orders of both the central and state governments

7.13 EXERCISES

1. Explain the composition of Supreme Court in India?
2. What is original jurisdiction of Supreme Court?
3. What is Appellate jurisdiction of Supreme Court?
4. What is Advisory jurisdiction of Supreme Court?
5. What is public interest litigation?
6. What is judicial reforms?

7.14 REFERENCE

1. Kirpal B.N, Desai, Subramaniam, et al (eds.) (2002*), Supreme but not infallible: Essays in Honour of the Supreme Court of India,* Oxford University Press, New Delhi
2. Baxi, Upendra, (1976), *Sociology of Law*, Satvahan,
3. Babu, D.D., (1972), *Limited Government and Judicial Review*.
4. Lingat, Robert (1973), *The Classical Law of India*, translated by JDM Derette, Thomson Press, New Delhi
5. Stokes, Eric, (1959), *The English Utilitarian & India*, Cambridge, London.

UNIT-8 THE JUDICIARY: HIGH COURT

Structure

8.1 OBJECTIVE

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

- Describe the composition, appointment, salaries, transfer of High Court judges
- Explain the functions and jurisdiction of the High Court,; and
- Explain the concept of subordinate courts, judicial review, and judicial reforms

8.2 INTRODUCTION

The constitution provides for a High Court at the apex of the State judiciary. Chapter V of Part VI of the Constitution of India contains provisions regarding the organisation and functions of the High Court. By the provision of Article 125 which

says “there shall be a High Court for each state”, every state in India has a High Court and these courts have a constitutional status.

The parliament has the power to establish a common High Court for two or more states. For instance, Punjab and Haryana have a common High Court. Similarly, there is one High Court for Assam, Nagaland, Meghalaya, Manipur and Tripura.

In case of Union Territories, the Parliament may by law extend the jurisdiction of a High Court to, or exclude the jurisdiction of a High Court from any Union Territory, or create a High Court for a Union Territory. Thus, Delhi, a Union Territory, has a separate High Court of its own while, the Madras High Court has jurisdiction over Pondicherry, the Kerala High Court over Lakshadweep, the Mumbai High Court over Dadra and Nagar Haveli, the Kolkota High Court over Andaman and Nicobar Islands, the Punjab Haryana High Court over Chandhigarh.

8.3 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.

8.3.1 Appointment and conditions of a High Court (Article 217)

Article 217 states that:

1. Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal 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, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years.

Provided that:

- a Judge may, by writing under his hand addressed to the President, resign his office;

- a Judge may be removed from his office by the President in the manner provided in clause (4) of Article 124 for the removal of a Judge of the Supreme Court;
- The office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.

2. A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and
   A. Has for at least ten years been an advocate of a high court or of two or more such courts in succession. or
   B. Has for at least ten years held a judicial office in the territory of India

Explanation: For the purposes of this clause –

a) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an Advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;
b) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate;
c) in computing the period during which a person has held judicial office in the territory of India or been an advocate of High Court, there shall be included any period before the commencement of this Constitution during which he has held judicial office in any area which was comprised before the fifteenth day of August, 1947, within India as defined by the Government of India Act, 1935, or has been an advocate of any High Court in any such area, as the case may be.

3. If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.

8.3.2 Salaries, etc., of Judges (Article 221):

Article 221 states that:

- There shall be paid to the Judges of each High Court such salaries as may be determined by Parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule.
- Every Judge shall be entitled to such allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or

under law made by Parliament and, until so determined, to such allowances and rights as are specified in the Second Schedule:

Provided that neither the allowances of a Judge nor his rights in respect of leave of absence shall be varied to his disadvantage after his appointment.

8.3.3 Transfer of a Judge from one High Court to another (Article 222):

According to Article 222:

- The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.
- When a Judge has been or is so transferred, he shall, during the period he serves, after the commencement of the Constitution (Fifteenth Amendment) Act, 1963, as a Judge of the other High Court, be entitled to receive in addition to his salary such compensatory allowance as may be determined by Parliament by law and, until so determined, such compensatory allowance as the President may by order fix.

8.4 JURISDICTION OF EXISTING HIGH COURTS (ARTICLE 225)

Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the Justice Delivery System respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

Provided that any restriction to which the exercise of original jurisdiction by any of the High Court's with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction.

8.5 POWER OF HIGH COURTS TO ISSUE CERTAIN WRITS

Article 226 states that:

- Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government within those territories, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari,

or any of them, for the enforcement of any of the rights conferred by Part I11 and for any other purpose.

- 'The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.
- Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (l), without:
  a. furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
  b. Giving such party an opportunity of being heard. tr38~es an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favor such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

8.6 POWER OF SUPERINTENDENCE

Article 227 confers upon the High Court the power of superintendence over the courts subordinate to it. It provides that every High Court shall have superintendence over all Courts and Tribunals throughout the System territories in relation to which it exercises jurisdiction. It may call for returns from such Courts, make issue general rules and prescribe forms for regulating the practice and proceedings of such courts and prescribe forms in which books, entries and accounts shall be kept by the officers of any such court. The High Court may settle tables of fees to be allowed to the Sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein. However, any rules made, forms prescribed or tables so settled cannot be inconsistent with the provision of any law for the time being in force and require the previous approval of the governor.

In Rena Drego v Lalchand Soni (1998, p.1990) the Supreme Court held that in the exercise of the supervisory jurisdiction under Article 227 the High court cannot

disturb the findings of facts recorded by the lower court relying upon the fresh materials. The Supreme Court made it clear that the power under Article 227 is one of the judicial superintendence which cannot be used to upset conclusions of facts however erroneous those may be, unless such conclusions are so perverse or so unreasonable that no court could ever have reached then. Hence, the High Courts are at the top of the hierarchy in each State but are below the Supreme Court. These courts have control over a State, a Union Territory or a group of States and Union Territories. Below the High Courts are secondary courts such as the civil courts, family courts, criminal courts and various other ' district courts. The High Courts are established under Part VI, Chapter V of the Constitution. The High Courts are the principal courts of original jurisdiction in the state, and can try all offences including those punishable with death.

The High Courts are the principal civil courts of original jurisdiction in the State along with District Courts which are subordinate to the High Courts. However, the High Courts exercise their original civil and criminal jurisdiction only if the courts subordinate to the High Court in the State are not competent (not authorized by law) to try such matters for lack of pecuniary, and/or territorial jurisdiction. High Courts may also enjoy original jurisdictionin certain matters if so designated specifically in a State or Federal law, e.g. Company law cases are instituted only in a High Court.

The work of most High Courts, however, consists of appeals from lowers courts and summons, petitions in terms of Article 226 of the Constitution of India. The precise jurisdiction of each High Court varies from each other. Writ jurisdiction is also original jurisdiction of High Court. The precise territorial jurisdiction of each High Court varies. Each State is divided into judicial districts presided over by a 'District and Sessions Judge'. He is known as a District Judge when he presides over a civil case, and a Sessions Judge when he presides over a criminal case. He is the highest judicial authority below a High Court judge. Below him, there are courts of civil jurisdiction, known by different names in different States. Under Article 141 of the Constitution of India all courts in India including High Courts are bound by the judgments and orders of the Supreme Court of India by precedence.

The Calcutta High Court is the oldest High Court in the country, established on 2 July 1862. High Courts which handle a large number of cases of a particular region have permanent benches (or a branch of the court) established there. Benches are also present in States which come under the jurisdiction of a court outside its territorial limits. Smaller States with few cases may have circuit benches Justice Delivery System established. Circuit benches (known as circuit courts in some parts of the world) are temporary courts which hold proceedings for a few selected months in a year. Thus, cases built up during this interim period are judged when the circuit court is in session.

Article 214 of the Constitution of India states that there shall be a High Court for each of the States. In addition to that, Article 23 1 of the Constitution empowers the

Parliament to set up one High Court for two or more States. For example, Gauhati High Court has jurisdiction over the State of Tripura and some other States of North-East India besides its jurisdiction over the State of Assam.

A High Court is composed of a Chief Justice and as many other judges as the President of India may from time to time deem it necessary to appoint. In appointing the Chief Justice of High Court, the President consults the governor t and the Chief Justice of the Supreme Court. Judges in a High Court are appointed I by the President of India in consultation with the Chief Justice of India and the 1 governor of the State. High Courts are headed by a Chief Justice. The Chief I Justices are ranked 14 (in their State) and 17 (outside their State) in the Indian order of precedence. The President can appoint additional judges also for a maximum period of two years. The number of judges in a court is decided by dividing the average institution of main cases during the last five years by the I national average, or the average rate of disposal of main cases per judge per year I in that High Court, whichever is higher.

Though the judges of the High Courts of India can remain in office till the age of 62, the judges may resign from their posts prematurely by applying in writing to the President. Besides, the judges of a High Court can be removed from office on various grounds like rnisdemeanour and corruption. The judges of the High Court may be transferred to High Court of another state or to the Supreme Court, as may be required. The judges of the High Court must be an Indian citizen and must have ten years of experience in adjudication or in legal practice. To ensure independence of judiciary, a special mode of removal of the judge has been prescribed in the Constitution of India. The proposal of removal of the judges must be passed by a two thirds majority of the members present in the Legislature. The proposal then shall have to be sent to the President for his assent. The President will then ask the judge to resign.

The High Court acts as the Court of Original Jurisdiction and the Court of .Appellate Jurisdiction at the same time. As a Court of original jurisdiction the High Court can try original cases. The Constitution has vested the High Court with power of trying revenue cases also. The High Court in every State is the highest court of appeal in respect of any criminal or civil cases of the State. The High Court may either give its verdict on constitutional point only and leave it to the lower court concerned to pass verdict on the other issues or try the cases as a whole.

Article 226 empowers High Courts to issue directions, orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. Such directions, orders or writs may be issued for the enforcement of fundamental rights or for any other purpose. It is well established that the remedy provided for in Article 226 of the Constitution of India is a discretionary remedy and the. High Court has always the discretion to refuse to grant such a relief in certain circumstances even though a legal right might have been infringed. Availability of an alternative remedy is one of such considerations which the High Court may take into account to refuse to exercise its

jurisdiction. However, this principle does not apply to the enforcement of fundamental rights either by the Supreme Court under Article 32 or by the High Court under Article 226 of the Constitution.

The Supreme Court in Mohd. Yasin v Town Area Committee (1 952, p.115) held that an alternative remedy is not a bar to move a writ petition in the High Court to enforce a fundamental right. This does not apply to all other cases where no fundamental right is involved; it has been ruled that the High Court would not exercise its jurisdiction under Article 22h when an alternative, adequate, and efficacious legal retnedy is available and the petitioner has not availed of the same before coming to the High Court. Of course. Article 226 is silent on this point; it does not say in so many words anything about this matter, but the Courts have themselves evolved this rule as a kind of self-imposed restriction on their jurisdiction under Article 226.

The rule of exhaustion of a remedy before invoking jurisdiction under Article 226 has been characterised as a rule of policy, convenience and discretion rather than a rule of law, as per decision of the Supreme Court in State of Uttar Pradesh v Md. Nooh (1958, p.86) and Baburum Prakash Clzandra Maheshwari v Antarim Zila Parishad (1969, p.556). The rule has been justified on the ground that persons should not be encouraged to circumvent the provisions made by a statute, providing for a mechanism and procedure to challenge administrative or quasi-judicial actions taken there under (Union of India v TK Var .la, 1957, p.882). Article 226 is not meant to circumvent statutory legal remedies. It is quite often held and reiterated by Courts that ordinarily the High Court should not entertain writ applications filed, bypassing the statutory legal remedies, where violation of fundamental rights is not involved.

At times, it becomes necessary for the Court to remind itself about the self imposed restraints and limitations in exercise of the power granted to the Court by the Constitution under Article 226. The Court can take judicial notice of the fact that large numbers of writ petitions are filed in the High Court by persons without exhausting statutory alternative remedies or other remedies available to them. Since the High Courts are the apex judicial institutions in the States, and it is but natural that if an alternative, suitable and equally efficacious remedy is available to the party, they may refuse to exercise the extraordinary jurisdiction under Article 226 and direct the aggrieved party to first avail of the said alternative remedy before approaching the High Court. The extraordinary jurisdiction of the High Court under Article 226 cannot be reduced to an ordinary jurisdiction of the High Court.

The Andhra Pradesh High Court in Institute of Chartered Financial Analysts of India v Asst. CIT (256 I.T.R. I 15) held that remedies by way of judicial review under Article 226 are fundamentally different from other remedies. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, the High Court on review under Article 226 is concerned only with the question whether the act or order under attack should be allowed to stand or not. It is quite

often stressed by Courts that judicial review is not against a decision under attack but against the decision-making process.

A writ will not ordinarily be issued by the Court where the impugned order, not patently erroneous, is made by an authority within his jurisdiction. However, where the defect of jurisdiction is apparent on the face of the proceedings, or there is an abuse of power, a writ of prohibition or other appropriate writ or order will be issued despite some delay in filing the petition or the existence of an alternative remedy, e.g. the right of appeal.

8.7 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 appellant 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 appellant jurisdiction of a High Court. In addition to these normal original and appellant 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.
- The power to transfer cases to itself from subordinate courts concerning the interpretation of the constitution.
- The power to appoint officers and servants of the High Court.

In certain cases, the jurisdiction of High Courts is restricted. For instance, it has no jurisdiction over a tribunal and no power to invalidate a Central Act or even any rule, notification or orders made by any administrative authority of the Union, whether it is violative of Fundamental Rights are not.

8.8 SUBORDINATE COURTS

Under the High Court, there is a hierarchy of courts which are referred to in the Indian constitution as subordinate courts. Since these courts have come into existence because of enactments by the state government, their nomenclature and designation

differs from state to state. However, broadly in terms of organisational structure there is uniformity.

The state is divided into districts and each district has a district court which has an appellant jurisdiction in the district. Under the district courts, there are the lower courts such as the Additional District Court, Sub-Court, Munsiff Magistrate Court, Court of Special Judicial Magistrate of the II Class, Court of Special Judicial Magistrate of I Class, Court of Special Munsiff Magistrate for Factories Act and Labour Laws, etc. At the bottom of the hierarchy of Subordinate Courts are the Panchayat Courts (Nyaya Panchayat, 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 form 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.

8.9 JUDICIAL REVIEW

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 pubic 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 executive and the other governmental agencies. However, judicial review has been particularly significant and contentious in regard to constitutional amendments. Under Article 368, constitutional amendments could be made by the Parliament. But Article 13 provides that the state shall not make any law which takes away or abridges fundamental rights and that any law made in contravention with this rule shall be void. The issue is, would the amendment of the constitution be a law made by the state? Can such a law infringing fundamental rights be declared unconstitutional? This was a riddle before the judiciary for about two decades after India became a republic.

In the early years, the courts held that a constitutional amendment is not law within the meaning of Article 13 and hence, would not be held void if it violated any fundamental right. But in 1967, in the famous Golak Nath Case, the Supreme Court adopted a contrary position. In was held that a constitutional amendment is law and if that amendment violated any of the fundamental rights, it can be declared unconstitutional. All former amendments that violated the fundamental rights to property were found to be unconstitutional. When a law remains in force for a long time, it establishes itself and is observed by the society. If all past amendments are declared invalid, the number of transactions that took place in pursuance of those amendments become unsettled. This will lead to chaos in the economic and political system. In order to avoid this situation and for the purpose of maintaining the transactions in fact, the past amendments were held valid. The Supreme Court clarified that no future transactions or amendments contrary to fundamental rights shall be valid. This technique of treating old transactions valid and future ones invalid is called prospective over-ruling. The Court also held that Article 368 with amendments does not contain the power to amend the constitution, but only prescribes the procedure to amend. This interpretation created difficulty. Even when there is a need to amend a particular provision of the constitution, it might be impossible to do so if the amendment had an impact on fundamental rights.

In 1970, when the Supreme Court struck down some of Mrs Indira Gandhi's populist measures, such as the abolition of the privy purses of the former princes and nationalisation of banks, the Prime Minister set about to assert the supremacy of the Parliament. She was able to give effect to her wishes after gaining two-thirds majority in the 1971 General Elections. In 1972, the Parliament passed the 25th Constitutional Amendment act which allowed the legislature to encroach on fundamental rights if it was said to be done pursuant to giving effect to the Directive Principles of State Policy. No court was permitted to question such a declaration. The 28th 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 the 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 39th 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 as 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 42nd 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 democratic rights of construction workers of the Asian Games granted the Peoples Union of Democratic Rights, the right of Public Interest Litigation (PIL). Taking recourse to epistolary jurisdiction under which the US Supreme Court treated a post card from a prisoner as petition, the Supreme Court of India stated that any 'public spirited' individual or organisation could move the court even by writing a letter. In 1988, the Supreme Court delineated the matters to be entertained as PIL. The categories are: matter concerning bonded labour, neglected children, petition from prisoners, petition against police, petition against atrocities on women, children, Scheduled Castes and Scheduled Tribes, environmental matters, adulteration of drugs and foods, maintenance of heritage and culture and other such matters of public interest.

Since the granting of the right to PIL, what some claim to be the only major democratic right of the people of India, and granted not by the Parliament but by the judiciary, the courts have been flooded by PILs. While the flood of such litigation indicates the widespread nature of the deprivation of democratic rights, they also pose the danger of adding to the pressure on the courts that are already overloaded.

8.10 JUDICIAL REFORMS

The most striking criticism against administration of justice is the large number of pending cases and the delay in the dispensation of justice. In the early 1990s, there were more than two crore cases pending in different courts. Reasons for the piling of a large number of cases can be attributed to structural and procedural flaws in the judiciary. The availability of multiple remedies at different rungs of the judicial ladder also enables dishonest and recalcitrant suitors to abuse the judicial system. This leads to the piling up of cases as well as delay in the dispensation of justice.

Another weakness of the judicial system is cumbersome procedures and forbidding cost of justice. Suggestions for judicial reforms have come up, to help achieve a new order and bring economic, political and social justice.

In fact, the Tenth Law Commission had invited suggestions for judicial reforms. One suggestion was to reduce the workload of the Supreme Court of India which accepts nearly one lakh cases every year (whereas the US Supreme Court accepts only 100 to 150 cases of the five thousand filed). Among the suggestions to reduce the load of the Supreme Court, one was to establish a Constitutional Court to deal exclusively with constitutional matters and another was to establish Zonal Courts of Appeal in the country.

8.12 SUMMARY

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.

8.12 EXERCISES

1. Which part of the Indian constitution explains about the state judiciary (High Court)?
2. Who appoint the chief justice of High Court?
3. What is the normal tenure of a High Court Judge?
4. Explain the composition of High court.
5. Explain writ jurisdiction of High Court.
6. Explain Judicial Review and Judicial Reforms.

8.13 REFERENCES

1. Acharya, N. K. 2010. *The Constitution of India.* Hyderabad: Asia Law House.
2. Austin, 1999. *The Indian Constitution: Cornerstone of Nation.* Delhi: Oxford University Press,
3. Jain, M. P. 1996. *Principles of Administrative Law.* Nagpur: Wadhwa & Company.
4. Pandey, J. N. 2007. *Constitutional Law of India.* (44th Edition). Allahabad: Central Law Agency.

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