



6. Role of the Judiciary

In this chapter, we will discuss the structure and function of the Judiciary. In almost all democracies today, whether Parliamentary or Presidential, whether Republic or Constitutional Monarchies, the Judiciary is independent of the other two branches of government. There are constitutional and legal provisions to ensure that it stays independent. The members of the Judiciary, known as judges, are also very vigilant about maintaining independence of the judiciary. This of course does not mean that the Judiciary functions in an unchecked manner. Constitutional and legal provisions do exist to restrain it if it exceeds the powers granted to it.

Judicial Independence

What are the powers granted to the Judiciary? Why is judicial independence so important? The primary function of the Judiciary is that of adjudication. This means that the judiciary takes decisions about disputes or cases according to the law, and then issues orders to ensure that these decisions are carried out. There are many instances where the Executive is a party to the dispute either as the plaintiff or as the defendant. Given the power of the Government, any legal dispute between it and one or more citizens is usually unequal. There is a possibility that the Government would use its powers to secure a favourable decision. This is where the independence of the Judiciary becomes important. An independent judiciary would ensure that all those who appear before it are treated on an equal plane, and thus make sure that decisions are in accordance with the law.

It must be noted that the concept of judicial independence or an independent Judiciary is a modern one. Monarchies desired a Judiciary which did as it was ordered. As countries became more and more democratic, the idea that the Judiciary should be independent of both the Executive and the Legislature emerged.

The first country to explicitly make provisions in its Constitution for an independent Judiciary was the United States of America. The Judges of the Supreme Court of America and the courts subordinate to it were to be appointed by the President of the United States of America. The appointments were confirmed only after the Senate gave its approval. Judges served for life, but could retire if they so wished. Judges could be removed from office for violating the Constitution or exceeding the powers allotted to the judiciary. This process was known as 'Impeachment'. Any proposal for removing a judge would be implemented only after it had been approved by the Congress.

The Constitution of India also provides for judicial independence. Judges cannot be removed from office unless any violations of law have been enquired into and proved. Any proposal for such a removal from office has to be approved by the Parliament before it can be implemented.



Judicial System in India

The structure of the judicial system is also broadly laid down by the Constitution. The Supreme Court of India headed by the Chief Justice of India is the highest court of the land. The next level consists of the High Courts, whose head is also known as the Chief Justice. Generally, there is one High Court for each State, but in exceptional circumstances, one or more States may have single High Court to them. These courts and their judges enjoy constitutional protection. Below the High Courts are the District Courts for each district. At the lowest level are courts which deal with petty offences. Those who are not satisfied with the decisions of a court can appeal to a higher court to ask for a reconsideration of the decision. The High Court controls and supervises the functioning of the District Courts and the other courts. In larger cities, there are Family Courts which deal with family matters.



Supreme Court
(One for all)



High Court
(One for every State)



District Court
(One for every District)

The Constitution lays down the procedure for the appointment of the judges of the Supreme Court and the High Courts. They are formally appointed by the President in consultation with the

Chief Justice of India, and in the case of High Court judges also with the Governor of the concerned State. Till the 1990s, the President appointed the judges on the recommendation of the Government of the day, after having consulted the Chief Justice of India. However, in the 1990s, the Supreme Court of India interpreted the relevant Constitutional provisions and ruled that the Judiciary must have the leading role in the appointment process. The Supreme Court set up a Collegium consisting of the Chief Justice of India and the four most senior judges of the court which would recommend names to the President for appointment to the Supreme Court and the High Courts. The Government role in this process has now been minimised.

In addition to the courts mentioned above, there are tribunals established by both the Central Government as well as the State Governments to deal with disputes of a specialised nature. The examples of the first type are the Armed Forces Tribunal, the Income Tax Appellate Tribunal, and the National Green Tribunal. The examples of the tribunals established by the state Government in Maharashtra are the Maharashtra Administrative Tribunal and the Maharashtra Revenue Tribunal. These bodies are known as quasi-judicial bodies, and their functioning is governed by separate laws. They consist of retired judges, as well as individuals who are experts in the fields which fall within the jurisdiction of the relevant tribunal. For instance, the Armed Forces Tribunal also has retired officers from the armed forces as the expert members. All the tribunals in India, like all the courts, are ultimately subordinate to the Supreme Court of India.

The Judiciary and its functions

As mentioned in the previous section, the primary duty of the Judiciary is the adjudication of the cases. But can the courts hear any kind of cases? What do the courts do? What are their functions?

(i) Each court can adjudicate or hear cases pertaining only to a specified range of areas. This range is known as the jurisdiction of that court. Jurisdiction is of two types:

(a) *Original Jurisdiction* : Cases regarding certain matters can be heard for the first time only in certain courts. These matters constitute the Original Jurisdiction of that court. For instance, the Supreme Court of India has Original Jurisdiction in any case between two State Governments, and between the Government of India and any State Government, as well as any disputes about the election of the President and the Vice-President of India. Only the Supreme Court of India in the country can hear the above mentioned cases. Thus, here its Original Jurisdiction of the Supreme Court is also its Exclusive Jurisdiction.

(b) *Appellate Jurisdiction* : Appeals against the decisions regarding certain cases can be heard in a certain court. These matters constitute the Appellate Jurisdiction of that court. The Supreme Court also hears appeals regarding decisions of the High Courts over a wide range of issues. The High Courts in turn hear appeals regarding decisions of the District Courts.

(ii) The Supreme Court also has an Advisory Jurisdiction. This includes only those matters which have been specifically referred to it by the President for advice.

(iii) The Supreme Court of India and the High Courts also perform other functions. One of them is the interpretation of the Constitution and the laws made under it. In all cases, the question that the courts have to decide is whether a certain action is in accordance with either the Constitution or any given law. In doing so the Courts have to interpret the constitution and the laws. For instance, the Supreme Court has ruled that the 'Right to Life' guaranteed by the Constitution does not merely mean the right to exist but also the right to live in a pollution-free environment.

(iv) The Supreme Court and the High Courts also perform another important function that is the protection of the Fundamental Rights, guaranteed by the Constitution. These rights are regarded as being essential for any individual to lead a dignified life and hence are described as being 'Fundamental'. The people of India also possess another set of rights known as legal rights, which are specified in the laws passed by the legislature.

The Constitution empowers the Supreme Court and the High Courts to issue writs or a special kind of orders for the protection of the Fundamental as well as the legal rights of individuals, if someone complains that they have been violated. There are five types of Writs specified in the Constitution of India: Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari.

Writs under the Constitution of India (Art. 32 (2))

1. Habeas Corpus- A court can order any officer of the Government or any private person to produce before itself any individual or individuals to examine whether they have been legally detained or not.

2. Mandamus- A court can order any officer or any department of the Government to perform its duties.

3. Prohibition- A court can order a court lower than itself in the judicial structure not to hear a particular case on the grounds that the case does not fall within the jurisdiction of the latter.

4. Quo Warranto- The court can ask whether the holder of any public office or post is holding it in accordance with the law or not.

5. Certiorari- A higher court can order a court lower than itself in the judicial structure to send all the relevant documents pertaining to a case to itself.

Such cases are known as Public Interest Litigation (PILs). There have been instances where the courts of their own accord, without anyone complaining or filing a petition, have taken note of matters of public concern.

Find out!

Can you find out some important cases under Public Interest Litigation in India? Discuss any one in the classroom.

This wider view taken by the Judiciary of its function has been termed as 'Judicial Activism'. Earlier, the Judiciary generally did not look, beyond a certain point, into how the Executive exercised its authority. For instance, into matters like the imposition of President's Rule in the states or a Governor's decision to appoint a certain individual as the Chief Minister were matters that the Judiciary did not interfere. But in recent years, Judicial Activism has led to the courts examining the legality of the decision of the Executive over a wide variety of issues including the ones referred to above. Moreover, in many instances, they have also either issued orders on what should be done over many issues or have directed the Executive to take action about the same in a specified time period.

There has been much debate over Judicial Activism. Some feel that the Judiciary was compelled to intervene because the Executive was not discharging its functions properly, while others believe that the courts are overstepping their mark and are exceeding their powers by looking into matters which fall within the jurisdiction of the Executive.

Judicial Activism

Generally speaking, a matter goes to the court on the basis of a formal complaint, or a petition filed before the court by an individual who is directly connected with it. However, this situation has changed in the recent decades because the Judiciary in India has started taking a wider view of its functions. For instance, the courts have allowed individuals to file petitions on matters of important public concern. The individual may or may not be directly connected with the matter.

Discuss these cases. Are they cases of Judicial Activism? :

Case 1 : Reforming Board for the Control of Cricket in India (BCCI): The Lodha Panel was set up by the Supreme Court, following the allegations of corruption, match-fixing and betting scandals in Indian cricket. The committee was set up in an attempt to bring back law and order into the BCCI and the game of cricket.

Case 2 : National Anthem in Cinema Halls: In 2016, the Supreme Court passed a judgement that stated: (i) All the cinema halls in India shall play the National Anthem before the feature film starts. (ii) All present in the hall must stand up to show respect to the National Anthem.

Judicial Review

A written Constitution in any democratic country is the highest law of the land. The laws made by the Legislature have a status lower than that of the Constitution. Moreover, these laws are expected to be consistent with the Constitution. But what would happen if they are not? The Constitution would say one thing, while the laws would say something else. The provisions and the values of the Constitution, that is to say the Constitution itself would be rendered meaningless. Hence it becomes necessary to have an institution which would examine whether the laws are consistent with the Constitution or not. But this is not enough. That institution should also have the power to declare any law found inconsistent with the Constitution to be invalid and therefore not to be

implemented. This would prevent the Legislature from making laws which violate the Constitution. In democracies with written Constitutions, this power is vested in the Judiciary. Thus, Judicial Review means the power of the Judiciary to examine if any law approved by the Legislature is consistent with the Constitution or not, and if it is not then to declare it unconstitutional.

But why does the Judiciary have this power? Both the Executive and the Legislature are involved in the process of law-making. It would be highly inappropriate to give them the power to examine whether the laws that they have made are consistent with the Constitution or not. It is likely that they would be biased while doing so. The Judiciary is not involved in any way in the law-making process. It is an independent body. Hence it has been assigned this power.



Supreme Court of the United States of America

The origins of the power of Judicial Review can be traced to a decision of the Supreme Court of the United States of America given in 1803 in a case known as *Marbury vs Madison*. This was for the first time that the American Supreme Court declared a law passed by the United States Congress to be invalid on the grounds that it was inconsistent with the Constitution of the United States. However, it must be noted that the

American Constitution does not have any explicit provision that gives the Judiciary the power of Judicial Review. It is an implied power. Till date, the American Supreme Court's power of Judicial Review has been unchallenged. This is so because it is accepted that such a power is necessary to retain the supremacy of the Constitution.

Marbury vs. Madison

William Marbury, an American businessman, was appointed to a position in the judicial system by President John Adams of the United State. However, Adams lost the election immediately afterwards, and the new President, Thomas Jefferson, instructed James Madison, who was the new Secretary of State or the minister in charge of issuing the appointment orders, not to do so in the case of Marbury. At this, Marbury filed a petition against Madison in the Supreme Court. This is how the case came to be known as Marbury vs Madison.

Marbury asked the Court to issue a writ of mandamus so as to force the new government to give him the appointment order. In its judgment, the Court led by the then Chief Justice, John Marshall, upheld Marbury's claim that he was legally appointed and therefore must receive the order. At the same time it declared the relevant law which allowed Marbury to directly approach the Supreme Court instead of approaching a lower court first to be invalid on the grounds that it was inconsistent with the Constitution and therefore unconstitutional.

However, the power of Judicial Review does not exist in countries which have unwritten Constitutions (for instance in the United Kingdom). This is so because there is no specific highest law of the land and thus the laws passed by the Legislature cannot be examined with reference to anything.

The Constitution of India also does not explicitly provide the Judiciary with the power of Judicial Review. However, like in the United States, these powers are implied. The Supreme Court of India has on many occasions declared laws passed by the Legislature as being inconsistent with the Constitution and therefore unconstitutional.

But in the Indian context the real issue has been whether the amendments to the Constitution can be held unconstitutional. The issue was settled by the Supreme Court in the Kesavananda Bharati case. In its judgment, the Court stated that the Constitution of India had a 'Basic Structure'. The Constitutional Amendments passed by the Parliament have to be consistent with this 'Basic Structure', and if they are found to be not, then the Supreme Court would declare them unconstitutional. It is widely agreed that that the power to declare Constitutional Amendments unconstitutional rests only with the Supreme Court.

Kesavananda Bharati Case (1973)

The validity of the Constitution (24th Amendment) Act 1971 was challenged in the case of Kesavananda Bharati vs. State of Kerala (also known as the Fundamental Rights Case). This Amendment gave the power to the

Parliament to amend Fundamental Rights of the Constitution. The Supreme Court had to decide whether Parliament had power to abrogate the basic elements and fundamental provisions of the Constitution of India. The Supreme Court held that the Constitution (24th Amendment) Act 1971 is valid and that Parliament has power to amend all the provisions of the Constitution, including fundamental rights, but could not amend the basic structure of the Constitution.

From the citizen's point of view, Judiciary is the most important organ of the government. It is the guardian-protector of the constitution and the fundamental rights of the people. The common man depends upon judiciary for getting justice. The feeling in an average citizen that he can rely on the certain and prompt administration of justice makes him feel secure. The welfare of citizens greatly depends upon speedy and impartial justice.

Please see the following websites for further information:

(1) Parliament and the Judiciary

Parliament and the Judiciary (PRS Legislative Research Institute for Policy Research Studies, New Delhi) November 29, 2016

https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/Parliament%20and%20Judiciary.pdf

(2) Public Interest Litigation

Supreme Court of India

Compilation of Guidelines To Be Followed For Entertaining Letters/Petitions Received In This Court As Public Interest Litigation.

<https://www.sci.gov.in/pdf/Guidelines/pilguidelines.pdf>



Exercise

1. (A) Choose the correct alternative and complete the following statements.

1. _____ is the first country to create Independent Judiciary.
(India, United States, United Kingdom, Soviet Union)
2. The primary function of the judiciary is _____.
(making laws, executing laws, adjudication, make appointments)

(B) Identify the incorrect pair in every set, correct it and rewrite.

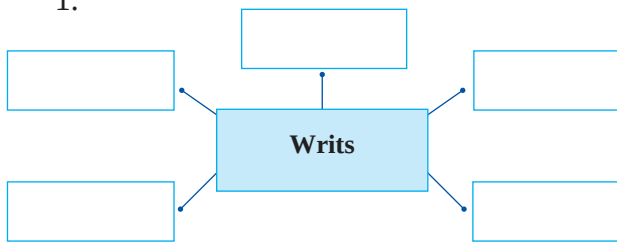
- (a) Written Constitution - India
- (b) Judicial Review - United Kingdom
- (c) Independent Judiciary - United States

(C) State the appropriate concept for the given statement.

1. Petition regarding important public concern -
2. The process of removal of judges -
3. Cases can be heard for the first time only in certain courts -

2. Complete the concept map.

1.



3. State whether the following statements are true or false with reasons.

1. There is no need to approve appointment of judges by the Senate in the United States.
2. In India judiciary is independent.

4. Explain the co-relation between the following.

1. Judiciary and Executive
2. Supreme Court and High Court

5. Express your opinion of the following.

1. Judiciary must have a leading role in the appointment of judges.
2. Judicial activism is significant today.

6. Answer the following in detail with reference to the given points.

Explain the process of judicial review?

(a) meaning (b) need (c) when and where it started (d) Indian context

Activity :

Make a list of examples of Judicial Activism in India.