

CONSTITUTIONAL GOVERNMENT AND DEMOCRACY IN INDIA

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COURSE INTRODUCTION

This course attempts to acquaint you with certain aspects of the Constitutional government and democracy in India. It introduces you to the democratic values enshrined in the Constitution and to the provisions which explain relationships among citizens, between the citizens and the state, and among different units of the state – the Union government, the state governments and the local governments, and among the organs of the state – the executive, the legislature and the judiciary. As you will read in different units of this course, the Constitution of India provides for the governance of the people, in which their rights, dignity and sovereignty are protected. The provisions of the Constitution also protect social, cultural and linguistic pluralism. The constitution even has provisions for restrictions which can be imposed on the right of people through different kinds of emergencies.

The issues in the course have been discussed in thirteen units. Based on thematic unity, these units have been divided into three blocks. Block 1 is about the Constituent Assembly and Constitution. The Block 2 deals with Organs of Government. And Block 3 discusses Federalism and Decentralisation. Introductions to the blocks are given in the beginning of each block.

Each unit has inbuilt *Check Your Progress Exercises*. After having read the units, you can try to answer the questions given in these exercises. At the end of each unit, there are answers to the questions mentioned in the *Check Your Progress Exercises*. You can match your answers with the answers given in the units. But be careful to write answers in your own words. The course ends with a list of *Suggested Readings*. You are advised to go through them.

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Block 2

Organs of the Government

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BLOCK 2 INTRODUCTION

Legislation, execution and adjudication of the rules, their implantation and evaluation are important functions of a government. In the modern democracies, these functions are performed by the legislature, executive and judiciary, which function under the principles of checks and balances. The nature of a political system or the government depends to a large extent on the relations and functioning of these institutions. The sharing powers between the three organs of government – the legislature, the executive and judiciary is called separation of powers.

This block deals with the institutional framework of Indian political system in which three organs of government, i.e., Legislature, Executive and Judiciary have been discussed. In other words, this block is about the separation of powers. All the three organs have different characteristics and role in Indian Constitution. Unit 7 discusses the Legislature. Unit 8 deals with the Executive. Unit 9 provides the whole perspective of Judiciary System of India.



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UNIT 7 LEGISLATURE*

Structure

- 7.0 Objectives
- 7.1 Introduction
- 7.2 Union Legislature
 - 7.2.1 The President
 - 7.2.2 Lok Sabha
 - 7.2.3 Rajya Sabha
 - 7.2.4 Special Powers of Rajya Sabha
- 7.3 The Presiding Officers
 - 7.3.1 The Speaker
 - 7.3.2 The Chairperson of Rajya Sabha
- 7.4 Legislative Procedure
 - 7.4.1 Money Bills
- 7.5 Parliamentary privileges
- 7.6 Parliamentary devices to control the executive
 - 7.6.1 Parliamentary Committees
- 7.7 State Legislature
- 7.8 Let Us Sum Up
- 7.9 References
- 7.10 Answers to Check Your Progress Exercises

7.0 OBJECTIVES

This unit examines the evolution, structure and functioning of the Indian Parliament. After going through this unit, you will be able to:

- Trace the evolution of modern legislature in India;
- Discuss the organisation and functions of the Parliament; and
- Explain parliamentary procedures

7.1 INTRODUCTION

The term legislature has been derived from the Latin word *lex*, which means a distinct kind of legal rule mainly of general application. This rule is named legislation, and the institution, which enacts it on behalf of the people is known as legislature. Essentially, there are two models of legislative structure: the Parliamentary and Presidential. In the parliamentary model, the executive is selected by the legislature from among its own members. Therefore, the executive is responsible to the legislature. The Presidential system is based on the theory of separation of powers and does not permit any person to serve simultaneously in both executive and legislature.

* Prof. Pralaya Kanungo, Centre for Political Studies, JNU, New Delhi, this Unit is adopted from course BPSE-212, Unit 10

In India, the legislature exists at two levels: at the union level, i.e. the Parliament of India, and the State level, i.e. State legislatures. The unit deals specifically with the Parliament of India. In sub-section 7.7, you will also read about the State legislature. The Parliament of India, which is the creation of the Constitution, is the supreme representative authority of the people. It is the highest legislative organ and the national forum for the articulation of public opinion.

7.2 UNION LEGISLATURE

Under the provision of Article 79, the Parliament of India consists of the President and the two Houses - the Lower House or Lok Sabha (House of the People) and the Upper House or Rajya Sabha (Council of States). While the Lok Sabha is subject to dissolution, the Rajya Sabha is a permanent chamber which cannot be dissolved. The office of the President also never remains vacant.

7.2.1 The President

While the American President is not a part of the Legislature (Congress), the President of India is an integral part of the Indian Parliament. However, he cannot sit and participate in the deliberations in any of the two Houses. The President of India performs certain important role vis-à-vis the Parliament. The President summons and prorogues the House from one session to another and has the power to dissolve the Lok Sabha. A bill can not become law without the President's assent even though the bill may be passed by both the Houses. The President also has the power to promulgate Ordinances when both the Houses are not in session. These Ordinances, though temporary in nature, have the same force and power as a law passed by Parliament. In Unit 8, we will examine the position and powers of the President of India in detail.

7.2.2 The Lok Sabha

The Lower House or the House of the People is popularly known as Lok Sabha. People of the country directly elect members of the Lower House. It includes not more than 530 members chosen by direct election from territorial constituencies in the States and not more 20 members to represent the Union Territories. Moreover, the President may nominate two members of the Anglo-Indian community if in his opinion the community is not adequately represented in the Lok Sabha.

The distribution of seats among the States is based on the principle of territorial representation, which means each State is allotted seats on the basis of its population in proportion to the total population of all the States. For the purpose of election, each state is divided into territorial units called constituencies which are more or less of the same size in terms of the population.

The members of the Lok Sabha are elected on the basis of the adult franchise; every adult who has attained 18 years of age is eligible to vote. The candidate who receives the largest number of votes gets elected. The tenure of the Lower House is five years. However, it can be dissolved earlier by the President.

To be a member of the Lok Sabha, a person should be the citizen of India and must have completed 25 years of age. The person must also possess all other qualifications that are prescribed by the law. A candidate is free to contest from

any parliamentary constituency of any States in India. The Constitution has laid down certain disqualifications for membership of parliament. A person can not be a member of both Houses of the Parliament. The candidate may contest from several seats. However, he/ she can have only one seat according to his/her choice despite being elected from more than one seat; If a person is elected from both the State Legislature and the Parliament, and if he does not resign from the State legislature within the defined time period, he/she will forfeit his seat in Parliament; A member should not hold any office of profit under the Central or State government except those that are exempted by a law of Parliament and should not have been declared as an insolvent or of unsound mind by a competent court. A member also gets disqualified on the following conditions such as when he remains absent from the sessions of the House for a period of sixty days without prior permission; or when he voluntarily acquires the citizenship of another country; or is under any acknowledgement of allegiance to a foreign state.

7.2.3 The Rajya Sabha

According to Indian constitution, the Rajya Sabha or the Council of States is the house of representatives of the States. The Rajya Sabha or the Council of States consists of not more than 250 members out of which 12 members are nominated by the President from amongst persons having ‘special knowledge or practical experience in literature, science, art, and social service.’ The remaining members are elected by the members of the State Legislative Assemblies on the basis of the population of the state. Unlike Lok Sabha, Rajya Sabha adopts the method of indirect election. There is no uniformity in the members of representatives of the Council of States. It largely depends on the population of the state. It means that the state which have larger population has more representative in the house compared to the states which have small population). The number of representatives of the States to the Rajya Sabha varies from one (Nagaland) to 34 (Uttar Pradesh) depending upon the population of a state. The Council of States thus reflects the federal character by representing the States or the units of the federation.

Rajya Sabha is a continuing chamber as it is a permanent body not subject to dissolution. One-third of its members retire at the end of every two years, and elections are held for the vacant positions. A member of Rajya Sabha has a six-year term unless she/he resigns or is disqualified.

7.2.4 Special Powers of Rajya Sabha

It has every right to seek information on all matters which are exclusively in the domain of Lok Sabha. It has no power to pass a vote of no-confidence in the Council of Ministers. It also does not have much influence on the matters of Money Bill. However, the Constitution grants certain special powers to the Rajya Sabha. As the sole representative of the States, the Rajya Sabha enjoys two exclusive powers which are of considerable importance. First, under Article 249, the Rajya Sabha has power to pass a resolution by a majority of not less than two-thirds of members present and voting, declaring that it is ‘necessary or expedient in the national interest’. The matter in such resolution should belong to the State List. The law passed on the matter in the resolution shall be valid for one year. The second, Article 312 also provides special power to the Rajya Sabha to pass a resolution on another matter, i.e. to create one or more All India Services.

Like the resolution to be passed under Article 249, under Article 312 also, the resolution should be passed by two-third of members present and voting in the House. Thus, these special provisions make the Rajya Sabha an important component of Indian Legislature rather than just being an ornamental body. Its compact composition and permanent character provide continuity and stability in the system.

7.3 PRESIDING OFFICERS

Each house of the Parliament has a presiding officer. The Lok Sabha has a Speaker as its principal presiding officer and a deputy speaker to assist him and manages as presiding officer in the absence of the speaker. The Rajya Sabha is presided by the Chairperson, assisted by a deputy chairperson. The latter performs all the duties and functions of the former in case of his/her absence.

7.3.1 The Speaker

The position of the Speaker of the Lok Sabha is more or less similar to the Speaker of the English House of Commons. The office of the Speaker is a symbol of high dignity and authority. Once elected to the office, the speaker does not have affiliation to any party but works in an impartial manner. He/ She acts as the guardian of the rights and privileges of the members.

The Speaker has the power to ensure an orderly and efficient conduct of the proceedings of the House. He/She conducts the proceedings of the house, maintains order and decorum in the house and decides points of order, interprets and applies rules of the house. The Speaker's decision is final in all such matters. The Speaker certifies whether a bill is money bill or not and he/she also authenticates that the house has passed the bill before it is presented to the other House or the President of India for his assent. The Speaker in consultation with the leader of the house determines the order of business. He/she also decides on the acceptability of questions, motions and resolutions. The Speaker does not vote in the first instance but can exercise a casting vote in case of a tie. The Speaker appoints the chairpersons of all the Committees of the House and exercises control over the Secretarial staff of the house. The Speaker's conduct cannot be discussed in the House except in a substantive motion. His/Her salary and allowances are charged to the Consolidated Fund of India.

A special feature of the Speaker's office is that even when the House is dissolved, the Speaker does not vacate his/her office. He/She continues in office until the new House elects a new Speaker. In the absence of the Speaker, the Deputy Speaker presides the House.

7.3.2 Chairperson of Rajya Sabha

The Vice-President of India is the ex-officio chairperson of the Rajya Sabha. But during the period when the Vice-President acts a President or discharges the functions of the President, he/she does not perform the duties as a presiding officer of the Rajya Sabha. The Vice-President is elected by the members of both the Houses of Parliament assembled at a joint meeting, in accordance with the system of proportional representation by means of single transferable vote and the voting at such elections is by secret ballot. The Vice-President is not a member

of either House of Parliament or a House of the Legislature of any State. He holds office for a term of five years from the date on which he enters upon his office or until he resigns or is removed from his office by a resolution passed by a majority of members of the Rajya Sabha and agreed by the Lok Sabha. The functions and duties of the Chairperson of the Rajya Sabha are the same as those of the Speaker of the Lok Sabha.

Check Your Progress Exercise 1

Note: 1) Use the space below for your answers.

2) Check your answers with the model answers given at the end of this unit.

1) What are the qualifications and disqualifications for a member of Indian Parliament?

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2) What are the powers of Speaker of the Lok Sabha?

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7.4 LEGISLATIVE PROCEDURE

Law making is the primary function of the legislature. The Constitution of India prescribes the following stages of the legislative procedure:

The first stage of legislation is the introduction of a bill which embodies the proposed law and is accompanied by the “Statement of Objects and Reasons”. The introduction of the bill is also called the first reading of the bill. There are two types of bills: ordinary bills and money bills. A bill other than money or financial bill may be introduced in either House of Parliament and requires passage in both the Houses before it can be presented for the President’s assent. A bill may be introduced either by a minister or a private member. Every bill that is introduced in the House has to be published in the Gazette. Normally, there is no

debate at the time of introduction of a bill. The member who introduces the bill may make a brief statement indicating broad the aims and objects of the bill. If the bill is opposed at this stage, one of the members opposing the bill may be permitted to give his reasons. After this, the question is put to the vote. If the House is in favour of the introduction of the bill, then it goes to the next stage.

In the second stage, there are four alternative courses: first, after its introduction, a bill may be taken into consideration; second, it may be referred to a Select Committee of the House; third, it may be referred to a Joint Committee of both the Houses; and fourth, it may be circulated for the purpose of soliciting public opinion. While the first three options are generally adopted in the case of routine legislation, the last option is resorted to only when the proposed legislation is likely to arouse public controversy and agitation.

The day one of these motions is carried out, the principles of the bill and its general provisions may be discussed. If the bill is taken into consideration, Amendments to the bill and clause by clause consideration of the provisions of the bill is undertaken. If the bill is referred to the Selection Committee of the House, it considers the bill and submits its report to the House. Then the clauses of the bill are open to consideration and amendments are admissible. This is the most time-consuming stage. Once the clause by clause consideration is over and every clause is voted, the second reading of the bill comes to an end.

In the third stage, the member in charge moves that “the bill be passed”. At the third reading, the progress of the bill is quick as normally only verbal or purely formal amendments are moved, and discussion is very brief. Once all the amendments are disposed, the bill is finally passed in the House where it was introduced. Thereafter, it is transmitted to the other House for its consideration

When the bill comes up for consideration of the other House, it has to undergo all the stages which has undergone in the House where it was originally introduced. There are three options before this House: first, it may finally pass the bill as sent by the originating House; second, it may reject the bill altogether or amend it and return to the originating House; and, third, it may not take any action on the bill and if more than six months passes after the date of receipt of the bill, it is considered as rejection.

The originating House now considers the returned bill in the light of the amendments. If it accepts these amendments, it sends a message to the other House to this effect. If it does not accept these amendments, then the bill is returned to the other House with a message to that effect. In case, both the Houses do not come to an agreement; the President convenes a joint-sitting of the two Houses. The disputed provision is finally adopted or rejected by a simple majority of vote of those who are present and voting.

A bill that is finally passed by both the Houses is presented with the signature of the Speaker to the President for his assent. This is normally the last stage. If the President gives the assent, the bill becomes an Act and is placed in the Statute Book. If the President withholds his assent, there is an end to the bill. The President may also return the bill for the reconsideration of the Houses with a message requesting them to reconsider it. If, however, the Houses pass the bill again with or without amendments and the bill is presented to the President for his assent for the second time, the President has no power to withhold his assent.

Thus, law-making is a long, cumbersome and time-consuming process; it becomes difficult to pass a bill within a short time. Proper drafting of the bill saves time, and skilful soliciting of opposition support makes the task easier.

7.4.1 Money Bills

Finance bill may be said to be any bill which relates to revenue and expenditure. But the finance bill is not a money bill. Article 110 states that no bill is a money bill unless it is certified by the Speaker of the Lok Sabha. A money bill cannot be introduced in the Rajya Sabha. Once a money bill is passed by the Lok Sabha, it is transmitted to the Rajya Sabha. The Rajya Sabha cannot reject a money bill. It must, within a period of fourteen days from the date of receipt of the bill, return the bill to the Lok Sabha which may thereupon either accept or reject all or any of the recommendations. If the Lok Sabha accepts any of the recommendations, the money bill is deemed to have been passed by both Houses. Even if the Lok Sabha does not accept any of the recommendations, the money bill is deemed to have been passed by both the Houses without any amendments. If a money bill passed by the Lok Sabha and transmitted to the Rajya Sabha for its recommendations is not returned to it within fourteen days, it is deemed to have been passed by both the Houses at the expiry of the said period in the original form.

7.5 PARLIAMENTARY PRIVILEGES

Parliamentary privileges are certain rights which assure free and efficient functioning of the members of Parliament. There are two types of privileges for the members of Parliament: enumerated and unenumerated. The enumerated privileges are: i) Freedom of speech in each House of the Parliament, ii) Immunity from proceedings in any Court in respect of anything said or any vote cast, iii) Immunity of liability in respect of publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings, iv) Freedom from arrest in civil cases for duration of the session for a period of 40 days before and after the session, and v) Exemption from attending as a witness in a Court. The unremunerated privileges empowers the Indian Parliament to punish a person, whether a member or a non-member, in the case of contempt of Parliament.

7.6 PARLIAMENTARY DEVICES TO CONTROL THE EXECUTIVE

One of the important functions of the Parliament is to control the executive. A number of mechanisms are available to it for this purpose. The rules of procedure and conduct of business in Parliament provide that unless the presiding officers are otherwise direct, every sitting begins with the Question Hour, which is available for asking and answering questions. Asking question is an inherent parliamentary right of all the members irrespective of their party affiliations. The real object of the member in asking the question is to point out the shortcomings of the administration, to ascertain the thinking of the government in formulating its policy and where the policy already exists, in making suitable modifications in that policy.

In case, the answer given to a question does not satisfy the member who raised it and if he/she feels the need for detailed 'explanation in public interest', he/she may request the presiding officer for a discussion. The presiding officer can allow discussion, usually in the last half an hour of a sitting.

Members can, with the prior permission of the presiding officer, call the attention of a Minister to any matter of public importance and request the Minister to make a statement on the subject. The Minister may either make a brief statement immediately or may ask for time to make the statement at a later hour or date.

The adjournment motion is intended to draw the attention of the house to a recent matter of urgent public importance having serious consequences for the country, and regarding which a motion or a resolution in the proper notice will be too late. Adjournment motion is an extraordinary procedure which, if admitted, leads to setting aside the normal business of the House for discussing a definite matter of public importance. Adoption of an adjournment motion amounts to the censure of the government. Besides these devices, Parliament exercises control over the executive through various house committees. You will read about them in the next sub-section.

7.6.1 Parliamentary Committees

The accountability of the Executive to the Parliament and the Parliament's right to oversee, and scrutinise the way in which the executive functions are accepted as a matter of routine. . But in practice, it is difficult for parliament to undertake thorough scrutiny of details of the functioning of the executive on daily basis. Parliament has solved this problem by establishing a series of committees. These committees have necessary powers to scrutinise the working of the different departments of the government.

Among the important Committees, which scrutinise the government's works, particularly in the area of public finances, two committees need special mention: Public Accounts Committee and Estimates Committee. These two and other Committees are expected to keep an eye on the executive. They ensure an effective and comprehensive examination of all the proposed policies. Often, Committees provides an ideal context for discussing controversial and sensitive matters in impartial manner, away from the glare of publicity. They provide a useful forum for the utilisation of experience and ability that may otherwise remain untapped. They also constitute a valuable training ground for future ministers and presiding officers.

7.7 STATE LEGISLATURE

The State legislature consists of the Governor and the Legislative Assembly. In many aspects, state legislatures are similar to the Parliament of India. However, all state legislatures do not have both houses, Legislative Assembly (Vidhan Sabha) and Legislative Council (Vidhan Parishad). The state legislatures which have both houses are known as bicameral, and those which have only one house, i.e. Vidhan Sabha are known as uni-cameral. The choice of having unicameral or bicameral legislature was left to the states. It depended on the assessment of a state whether it wanted to have both houses or only one (Vidhan Sabha). The principal reason for not having both houses has generally been financial. Some states found it difficult to maintain cost of two houses. They preferred to have

only one house of the state legislature. Very few states (seven out of twenty nine) have opted to have bicameral legislature consisting of the Legislative Assembly (Vidhan Sabha) and the Legislative Council (Vidhan Parishad). As of 2019, Andhra Pradesh, Bihar, Karnataka, Maharashtra, Telangana and Uttar Pradesh have legislative councils. In 2019, Jammu and Kashmir is divided into two Union Territories. Jammu and Kashmir and Laddakh with the Jammu and Kashmir having assembly and Laddakh without it.

The Legislative Assembly of each State is composed of members chosen by direct election on the basis of adult suffrage from territorial constituencies. The size of the Assembly varies from a minimum of 60 to no more than 500. The duration of the Legislative Assembly is for five years.

The membership of the Legislative Council shall not be less than 40 but not more than one-third of the total membership of the Assembly. The House is composed of partly elected and partly nominated members. Normally, 1/6 of total members are nominated by the Governor, and the rest are indirectly elected on a complicated formula involving graduates, educators and members of the Assembly. The role of legislative councils, where they exist, are considered as weaker than the legislative assemblies compared with the Status of the Council of States vis-a-vis the House of the People. It may be considered as unnecessary due to some reasons: A) The very nature of the composition of the Legislative Council makes its position weak, being partly elected and partly nominated, and representing various interests; B) Its survival depends on the will of the Assembly, as the latter has the power to abolish the Second Chamber by passing a resolution. C) The Council of Ministers is responsible only to the Assembly and not to the Council. D) As regard, any ordinary bill originating in the Assembly, the Council's position is very weak for it can only delay its passage for a limited period. Hence, the second chamber of the State legislature is not a revising body, but a mere dilatory body.

The legislative process in the State Assembly is similar to that in the Parliament with one significant exception. The Governor can reserve any bill passed by the State legislature for the consideration of the President. Particularly in one case, it is obligatory on the Governor to reserve the bill, i.e., when the bill is derogatory to the powers of the High Court. If the President directs the Governor to return the Bill for reconsideration, the Legislature must reconsider the bill within six months, and if it is passed again, the bill is presented to the President again. But it shall not be obligatory on the President to give his assent. Thus, it is clear that once the Governor reserves a bill for the President, its subsequent enactment remains with the President and the Governor has no further role in it. Since the Constitution does not put any time limit on the President either to declare his assent or withhold, the President can keep the bill in cold storage for an indefinite period without revealing his intention.

Check Your Progress Exercise 2

Note: 1) Use the space below for your answers

2) Check your answers with the model answers given at the end of this unit.

1) What is Question Hour?

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2) Bring out the significance of adjournment motion.

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7.8 LET US SUM UP

The Parliament of India, the supreme legislative organ in the country, has a long historical background. The Parliament consists of the President, the Lok Sabha and the Rajya Sabha. To get elected to the Parliament, one has to fulfil certain qualifications prescribed by the Constitution and the Parliament. Members of the Parliament have certain privileges to enable them to function better. Each house has its presiding officer to conduct the meetings of the House and to protect the dignity and honour of the House.

The primary function of the Parliament is to enact laws and to hold the Council of Ministers responsible for its policies and criticises the policies wherever necessary. It also has the powers to amend the constitution and to impeach the President. There are several Committees appointed from among its members for effective functioning. Devices like the question hour, adjournment motion, calling attention motion, etc. are available for Parliament to check the government. The passing of the budget as an important function of the Parliament, provides an opportunity to scrutinise the activities of the government.

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7.10 ANSWERS TO CHECK YOUR PROGRESS EXERCISES

Check Your Progress Exercise -1

- 1) To be a member of the Lower House of the Parliament (Lok Sabha), a person should have completed 25 years of age; and for being the member of the Upper House of Parliament, a person should have completed 30 of age; for being members of the both Houses, a person should be a citizen of India. A person gets disqualified to be a member of the either House of Parliament, if as an MP he/she is absent from meetings in the House for more than 60 days without the permission of the Speaker of the Lok Sabha or Chairman of the Rajya Sabha, holds an office of profit under Government of India, is found to be of unsound mind, is declared insolvent, acquires citizenship of another country or is under any acknowledgement of allegiance to a foreign state. A member elected to the State Assembly forfeits his/her membership of Parliament if he/she does not resign from the State Assembly within a specified period.
- 2) The Speaker of Lok Sabha has wide and extensive powers. These include power to preside over the sitting of Lok Sabha, to conducts the Lok Sabha proceedings, to maintain order in the house and determine the order of business in the house. He/she also acts as spokesperson of the house, interprets and applies rules of the House, and authenticates bills, certifies, Money Bills- etc

Check Your Progress Exercise-2

- 1) The first hour of the sitting of a house that is available for asking and answering questions.
- 2) It is an extraordinary procedure to call the attention of the House to a matter of grave importance and affecting the whole country. Normal business is set aside to discuss the motion. And adoption of this motion amounts to the censure of the government.

UNIT 8 EXECUTIVE

Structure

- 8.0 Objectives
- 8.1 Introduction
- 8.2 President of India
 - 8.2.1 Qualifications
 - 8.2.2 Method of Election
 - 8.2.3 Term of Office and Removal of the President
- 8.3 Powers of the President
 - 8.3.1 Emergency Power
- 8.4 The Prime Minister
 - 8.4.1 The Council of Ministers and the Cabinet
 - 8.4.2 Collective Responsibility
- 8.5 The Cabinet and the Parliament
 - 8.5.1 Sources of Prime Minister's Power and influence
- 8.6 The President and the Prime Minister
- 8.7 Let Us Sum Up
- 8.8 References
- 8.9 Answers to Check Your Progress Exercises

8.0 OBJECTIVES

After going through this unit, you should be able to:

- Describe the powers of the President of India;
- Explain the procedure for the election of the President of India;
- Describe the composition and functions of the Council of Ministers;
- Identify the sources of power and influence of the Prime Minister; and
- Discuss the position of the President and Prime Minister in the Indian political system.

8.1 INTRODUCTION

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 Constitution of India, however, bestows authority and dignity on the office of the President without providing adequate powers to rule. The President performs essentially a ceremonial role. The Prime Minister exercises real executive power. While the President is the head of the state, the Prime Minister is the head of the government. The President carries out the actual functions of the government only with the aid and advice of the Prime Minister. How are the incumbents of these two important offices of the executive elected or selected? What is the position of the President and the Prime Minister in the Indian political system?

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What is the relationship between the executive and legislature in a parliamentary system such as one prevailing in India? These are some of the questions that we seek to address in this unit.

8.2 PRESIDENT OF INDIA

The constitution has made detailed provisions to see that the President, the head of the state, is a ceremonial head and that he does not arrogate to himself any real power. The President is indirectly elected for a term of five years and can be removed on the basis of impeachment proceedings brought against him by the Parliament. The Constitution also provides for the post of a Vice -President. He/she is also indirectly elected, who would serve as head of the state in the event of the President's resignation, removal by impeachment or death.

8.2.1 Qualifications

Articles 58 and 59 of the Constitution of India lay down the qualifications for the office of the President of India. A candidate for the office of the President should be a citizen of India, must have completed 35 years of age and possess other qualifications which are necessary to become a member of the Lok Sabha. He/she should not hold any office of profit under the Union, State or local governments at the time of his election, nor should he/she be a member of either House of Parliament or state legislature. Besides, the candidate should possess such other qualifications as may be prescribed by the Parliament from time to time.

8.2.2 Method of Election

The Constitution prescribes an indirect election through an electoral college (composed of the elected members of Parliament and the elected members of the state legislative assemblies) on the basis of proportional representation and by means of a single transferable vote. Based on the system of principles of uniformity among states and parity between the centre and the states, the election procedure is designed to ensure the election of a truly national candidate.

To ensure uniformity among states, the value of the votes of elected members of the state assemblies is calculated on the basis of the total population of the state. The value of a state elector's vote is worked out by dividing the total population of the state, by the total number of elected members in the assembly. The quotient obtained is divided by 1000 to obtain the value of the vote of each member of the assembly in the presidential election. The value of the vote of a member of Parliament is obtained by dividing the total number of votes given to all the elected members of the States assemblies by the total number of elected members of both the houses of the Parliament.

Voting is by single transferable vote, with electors casting first and second preferences. A candidate who receives an absolute majority of votes cast by the Electoral College is declared the winner. In case no candidate secures an absolute majority in the first counting, the second preference votes of the lowest polling candidate are transferred to the other remaining candidates until one candidate crosses the threshold of 50 percent of the votes cast.

This method of election was intended to make the Presidential election broad-based to achieve a political balance between the Centre and the States.

Consequently, the President represents not only the Union but also the States and it shows the federal character of the Indian polity.

8.2.3 Term of Office and Removal of the President

The tenure of the office of the President of India is five years. His/her term commences from the date on which he/she assumes office after taking an oath administered by the Chief Justice of India. However, the President can seek a second term. For instance, Rajendra Prasad was elected as the President twice despite not being favoured by the then Prime Minister Jawaharlal Nehru but strongly supported by a large number of Congress leaders.

The President remains in office until his/her successor enters the office. However, if the President wishes to resign, he can send his resignation letter to the Vice-President. If the post of the President falls vacant, the Vice-President takes over the charge. But the election for the post of President must be conducted within six months from the date of occurrence of the vacancy.

Articles 56 and 61 deal with the procedure for impeaching the President of India. In this regard, the constitution lays down 'violation of the Constitution' as the ground for removal. The process of impeachment can be initiated in either house of parliament and must be passed by not less than two-thirds of the total membership of the House in which it has been moved. If the other House investigates the charge and two-thirds majority of that house find him guilty, the President stands impeached from the office from the date of passing of the resolution. Thus, the procedure of removal of the President is difficult and has been made so to prevent misuse of this power by the Parliament. Till date, no President of India has been impeached.

8.3 POWERS OF THE PRESIDENT

Article 53 deals with the executive powers of the President of India. The powers of the President are broadly divided into two types, namely, ordinary and emergency powers. The ordinary powers of the President can be defined as executive, legislative, financial and judicial powers.

The executive powers of the Union are vested in the President. Article 53 confers all executive powers in him and empowers him to exercise these powers directly by himself or through officers subordinate to him. Article 75 requires the Prime Minister to communicate to the President regarding all decisions of the Union Council of Ministers. Article 77 holds that all executive powers of the Union government shall be exercised in the name of the President.

The President has both administrative and military powers. The supreme command of the armed forces is vested in him/her and all appointments in the armed forces are made under the authority of the President as the supreme commander of the armed forces. The President appoints the Prime Minister and, on the latter's advice, the council of ministers, the Attorney-General, the justices of the Supreme Court and High Courts, members of special commissions (such as the Union Public Service Commission and the Election Commission), and the governors of states. The choice of the Prime Minister is not a discretionary prerogative of the

President but is usually dictated by the party commanding a majority following in the Lok Sabha.

The President of India is also the Commander-in-Chief of the Defence Forces. He appoints the Chiefs of the Army, the Navy and the Air Force. He has the power to declare war and conclude peace. But all these powers have to be exercised by him subject to the ratification of the Parliament. However, the President is not a member of either house of Parliament; Article 79 states that the President is an integral part of the Union Parliament. As we saw in Unit 7, the President has the power to summon both the Houses of Parliament, nominate twelve members to the Rajya Sabha, has the right to address either house or their joint session at any time and the power to dissolve the Lok Sabha. All money bills to be introduced in the Parliament have to obtain the recommendation of the President. Such a prior recommendation is also necessary for introducing bills regarding the formation of new states, alteration of areas, boundaries, names of the existing states, etc. Finally, when any bill is passed by the Parliament, it can become an Act only when it has the assent of the President. The President can withhold or return a non-money bill for the reconsideration of the Parliament. However, if the same is passed by both the houses with or without modifications and returned to the President, the latter is bound to give his assent.

When the Parliament is not in session, the President can promulgate ordinances in public interest. These ordinances have the same force and effect as the laws passed by the Parliament. However, they have to be placed before the Parliament within a period of six weeks from the day of the reassembling of Parliament. Without the Parliament's approval, the ordinance will become invalid.

Article 254 empowers the President to remove inconsistencies between laws passed by the Parliament and State Legislatures and the subjects included in the concurrent list. There is another legislative function of the President which has a bearing on states; the Governor of a state can reserve certain bills passed by the State Legislatures for the consideration of the President.

The judicial powers of the President of India include the appointment of the justices of the Supreme Court and High Courts, and the power to grant pardon, reprieve, suspension, remission or commutation of punishment or sentence of the court. These powers of granting pardon are given to the President for removing the extreme rigidity in the criminal laws and for protecting the persons on humanitarian considerations. The President also has the right to seek the advice of the Supreme Court on some important constitutional, legal and diplomatic matters. In 1977, the President sought the advice of the Supreme Court for creating Special Courts to try the emergency excesses.

8.3.1 Emergency Power

With the intention of safeguarding the sovereignty, independence and integrity of Union of India, the constitution bestows emergency powers on the President of India. The President is empowered to declare three types of emergencies, namely, a) national emergency arising out of the war, external aggression or armed rebellion, b) emergency arising due to the breakdown of the constitutional machinery in the States, and c) financial emergency.

The President can make a proclamation of national emergency at any time if he is assured that the security of any part of India is threatened by war, external aggression or armed rebellion. This proclamation must be submitted to the Parliament for its consideration and approval. It must be accepted within one month by both the Houses of Parliament by two-thirds of the members present and voting. If the Parliament fails to approve the proclamation bill, it ceases to operate. If approved, it can continue for a period of six months. However, it can continue for any length of time if the President approves the proclamation for every six months. The Parliament, however, has the power to revoke the emergency at any time by a resolution proposed by at least one-tenth of the total members of the Lok Sabha and accepted by a simple majority of the members present and voting. National emergency under Article 352 was proclaimed for the first time in 1962 when the Chinese aggression took place. The second proclamation was made in 1971 during the Bangladesh war. On 25 June 1975, for the first time, the President proclaimed, on the advice of the Prime Minister, emergency in the name of grave danger to internal security.

According to Article 356, the President can impose emergency in a state when there is a breakdown of the constitutional machinery. However, imposition of President rule in a state has become more difficult after the supreme Court verdict in a case known as Bommai Case. According to this case the President can dismiss a state government only after the approval of the proclamation by the both houses of Parliament. If both houses of Parliament do not approve the proclamation, it lapses at the end of two months and the dismissed government is revived. In this case, in 1989, Nineteen letters from Council of Ministers were sent to the Governor of the State (Karnataka) for withdrawing support from the ruling party under the S.R. Bommai leadership (as Chief Minister). Following this the Governor dismissed the Bommai government. But within a short period, the defected MLAs promised to support back the Bommai government. But the governor did not give an opportunity to Bommai to produce his majority on the floor of house. The Governor dismissed the government on the plea that the Chief Minister lost majority in the house. S.R. Bommai challenged the Governor's decision in the Supreme Court. The Supreme Court gave its verdict in 1994.

The proclamation of this type of emergency, popularly called as President Rule, which can remain in force for a period of six months. By the 44th Amendment, the Parliament can extend the duration of the state emergency for a period of six months at one instance. Ordinarily, the total period of such emergency cannot exceed one year unless there is a national emergency in force. However, the total period of state emergency cannot go beyond three years.

The President can impose financial emergency. Article 360 states that if the President is satisfied that a situation has arisen where the financial stability or credit of India or any part of the country is threatened, he may declare a financial emergency. Like the National emergency, such a proclamation has to be laid before the Parliament for its approval.

On its face value, one can say that the President enjoys formidable powers. In reality, however, he can exercise his powers only on the aid and advice of the Council of Ministers, headed by the Prime Minister. In this respect, the Presidents position is more like that of the British Monarch rather than that of the President

of the United States of America. While the President of India may be the head of the state, the head of the government is the Prime Minister.

Check Your Progress Exercise 1

- Note:** 1) Use the space below for your answers
 2) Check your answers with the model answers given at the end of this unit.

1) How is the President of Indian Republic elected?

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2) What are the legislative powers of the President of India?

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8.4 THE PRIME MINISTER

The real executive power under the Constitution vests with the Union Council of Ministers with the Prime Minister as its head. The President is obliged to act according to the advice of the Council of Ministers which is responsible in the real sense of the term, not to the President but the Lok Sabha.

As in Britain, the Prime Minister in India is usually a member of the lower house of Parliament. When Indira Gandhi was selected as a Prime Minister in 1966, she was a member of the Rajya Sabha. By getting elected to the Lok Sabha, she strengthened the convention of the Prime Minister being a member of the lower house.

The Prime Minister is appointed by the President. However, the President has hardly any choice in selecting the Prime Minister. He can only invite the leader of the party in majority in the Lok Sabha or a person who is in a position to own the confidence of the majority in the house. The Prime Minister holds office during the pleasure of the President. The ‘pleasure’ of the President in this regard is related to the unwavering majority support which a Prime Minister receives in the Lok Sabha.

The President appoints the other members of the Council of Ministers on the advice of the Prime Minister. A minister may be chosen from either house and has a right to speak and take part in the proceedings of the other house, though he can vote only in the House to which he belongs. Even a person who is not a member of either house of Parliament can be appointed as a minister, but he has to qualify for it by being elected or nominated to either house within a period of six months.

8. 4.1 The Council of Ministers and the Cabinet

The term 'Cabinet' is used interchangeably with that of Council of Ministers. But they are different. The Council of Ministers, or the Ministry, consists of different categories of ministers. At the time of independence, there was no such institution as a cabinet in India. What existed then was the Executive Council. On 15 August 1947, the Executive Council was transformed into a Ministry or Council of Ministers that is responsible to the Parliament.

The term 'Cabinet' was used thereafter as an alternative to the Council of Ministers. At this stage, all the members of the ministry or the Cabinet except the Prime Minister had the same status. But the situation changed once junior ministers were appointed to the Council of Ministers. In 1950, based on the recommendations of the Gopalswamy Ayyangar's report, a three-tier system of the ministry was established with the cabinet ministers at the top, ministers of the state at the middle, and deputy ministers in the lowest rung. The Cabinet, composed of the 'senior-most ministers' whose responsibilities transcended departmental boundaries into the entire field of administration, is a smaller body and the most powerful body in the government. The Cabinet serves three major functions: i) It is the body which determines government policy for presentation to the Parliament, ii) It is responsible for implementing government policy, and iii) It carries out inter-departmental coordination and cooperation.

The cabinet meets regularly, as it is a decision-making body. It is assisted by the cabinet secretariat, headed by a senior member of the civil services, the cabinet secretary. To manage the volumes and complexities of work that comes before it, the cabinet members have developed standing and ad hoc committees. There are four Standing Committees which are permanent in nature. These are the defence committee, economic committee, administrative organisation committee and parliamentary and legal affairs committee. Ad-hoc Committees are constituted from time to time.

Next in rank are the ministers of state who hold independent charge of individual ministries and perform the same functions and exercise the same powers as a cabinet minister. The only difference between a minister of state and a cabinet minister is that he/she is not a member of the cabinet, but attends cabinet meetings only when specially invited to do so in connection with the subject that he/she is given charge of. There are other ministers of state who work directly under cabinet ministers.

At the bottom of the hierarchy are the deputy-ministers who do not have specific administrative responsibilities. However, their duties include: i) Answering the questions in parliament on behalf of the ministers concerned and helping to pilot bills, ii) Explaining policies and programmes to the general public and maintaining liaison with members of parliament, political parties and the press, and iii)

Undertaking special study or investigation of particular problems, which may be assigned to them by particular minister.

From the above, it is clear that the Cabinet is the nucleus of the Council of Ministers. Precisely because of this reason Walter Bagehot calls the Cabinet ‘the greatest committee of the legislature’. It is the ‘connecting link between the executive and legislative power’.

8.4.2 Collective Responsibility

The Council of Ministers functions on the principle of collective responsibility. Under this principle, all ministers are equally responsible for each and every act of government. That is, under the collective leadership, each minister accepts and agrees to share responsibility for all decisions of the cabinet. Doubts and disagreements are confined to the privacy of the cabinet room. Once a decision has been taken, it has to be loyally supported and considered as the decisions of the whole government. If any member of the Council of Ministers is unable to support government policy in the Parliament or the country at large, that member is morally bound to resign from the Council of Ministers.

Even if the Council of Ministers is formed as a result of a coalition of various political parties, a minimum common programme becomes essential for maintaining the solidarity of the ministry, and the various political parties forming the coalition government have to stand behind that programme. Unless they do so, the Cabinet cannot survive. Unity within Council of Ministers is not only essential for its very survival but also necessary for its efficiency and efficacy, and it is also necessary to enjoy the confidence of the people. Open bickering between members of the Janata government on matters of public policy was the prelude to the collapse of the government in 1979.

8.5 THE CABINET AND THE PARLIAMENT

The core of the parliamentary government is the accountability of the Prime Minister and the Cabinet to the Parliament. The Parliament does not govern but critically examines the policies and acts of the government, and approves or disapproves of them as the representative of the people. The very existence and survival of the Prime Minister and the Council of Ministers depend upon the support they receive in the Parliament. As we observed, the Council of Ministers is collectively responsible to the Parliament. Thus, the general feeling is that the Parliament controls the Executive. But in reality, the Prime Minister with his majority support controls the very working of the Parliament.

8.5.1 Sources of Prime Minister’s Power and influence

Though the Constitution does not enumerate the powers and functions of the Prime Minister, in practice he/she enjoys a wide range of powers as a leader of the Council of Ministers and the Lok Sabha.

The Prime Minister’s prerogative of constituting, reconstituting and reshuffling the Ministry as well as chairing the meetings vests the office with considerable influence over the members of Parliament. It must, however, be noted that the Prime Minister’s has the freedom to select his colleagues and it is subjected to his/her own position within the party. For example, India’s first Prime Minister,

Jawaharlal Nehru, could not ignore Sardar Patel who was very powerful in the Congress party. He was, therefore, appointed as the Deputy Prime Minister and Home Minister. Some of Patel's followers were also made members of the ministry. Similarly, Indira Gandhi in the early years of her office had to accommodate powerful leaders of her party in the ministry. Emerging as an all-powerful leader after the 1971 mid-term elections, she had complete freedom in choosing and reshuffling ministers. In coalition governments, the Prime Ministers do not have much choice in choosing ministerial colleagues. In the Janata government, Morarji Desai had many ministers whom he never knew before. In H.D. Deve Gowda's and later I.K. Gujral's governments, the ministers were selected not by the Prime Minister but by the leaders of the 14 regional parties that formed the United Front.

The Prime Minister also derives power and influence from the fact that he/she is the leader of the majority party in the legislature, and sometimes even the leader of the parliamentary wing of the party. As a leader of the Lok Sabha, the Prime Minister has enormous control over parliamentary activities. He/she advises the President on summoning and prorogation of the sessions of Parliament. The Speaker consults the Prime Minister in finalising the agenda of the Lok Sabha. The Prime Minister enjoys enormous legislative power in the form of recommending Ordinances to the President for promulgation when the Parliament is not in session. But the most important power of the Prime Minister regarding Parliament is to recommend dissolution of Lok Sabha. The President has to accept the advice of the Prime Minister. It is the power by which the Prime Minister controls even the opposition.

As the head of the government, the Prime Minister enjoys the power of patronage. All the major appointments of the Central government are made by the Prime Minister in the name of the President, which include Chief Justice and judges of the Supreme Court and High Courts, the Attorney-General, the Chiefs of the Army, the Navy and the Air Force, Governors, Ambassadors and High Commissioners, the Chief and members of the Election Commission, etc. Further, the Prime Minister's control over the administration, including the intelligence agencies and other administrative wings of the government enhances his/her influence over other members of parliament and administration. Apart from these structural factors, there are other features that increase the power and authority of the Prime Minister. In several instances, the general elections in most democratic systems virtually become an election of the leader, and it is interpreted as a popular mandate. Sometimes a leader derives strength from his/her charisma. Jawaharlal Nehru, Indira Gandhi and Narendra Modi present examples of charismatic leaders.

Check Your Progress Exercise 2

Note: 1) Use the space below for your answers

2) Check your answers with the model answers given at the end of this unit.

1) What are the three most important functions of a Cabinet?

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2) What is collective responsibility?

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8.6 THE PRESIDENT AND THE PRIME MINISTER

Article 78 enumerates the duties of the Prime Minister. The Prime Minister is to: a) communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation; b) furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and c) if the President so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council. These duties of the Prime Minister seem to suggest that the President is the real executive with vast power. But as we saw, the President can exercise his powers only with the aid and advice of the Council of Ministers. The Prime Minister, heading the Council of Ministers, is, therefore, the real executive. However, there have been occasions when the President had differences of opinion with the Prime Minister on the policies of the government.

The first President of India, Rajendra Prasad, tried to break from the British convention that the head of the state is always bound by the advice of the Prime Minister and the Cabinet. For instance, he was unhappy with the Nehru government's attempt to reform Hindu personal law. In 1987, President Zail Singh withheld his assent to the Indian Postal (Amendment) Bill, despite its having been passed by both the Houses of Parliament. This was a reflection of differences between the President and the Prime Minister Rajiv Gandhi.

8.7 LET US SUM UP

Following the pattern of British Westminster model, India evolved its system of the 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/her authority only with the aid and advice of the Council of Ministers headed by the Prime Minister. 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 of the Parliament, the Prime Minister enjoys considerable power and authority. Though the Prime Minister is appointed by the President and holds office during 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.

Sometimes here have been differences between the President and the Prime Minister. But these did not assume serious proportions culminating in any constitutional crisis.

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8.9 ANSWERS TO CHECK YOUR PROGRESS EXERCISES

Check Your Progress Exercise 1

- 1) The President is elected by the members of the Electoral College, in accordance with the system of proportional representation and by means of a single transferable vote. The Electoral College comprises the elected members of the Union Parliament and State Assemblies.
- 2) To summon and prorogue the Parliaments; to dissolve the Lok Sabha-power to promulgate Ordinances; to summon and address the joint sitting of the two houses of Parliament; to veto of non-money bills-powers; to nominate members to the Parliament, etc.

Check Your Progress Exercise 2

- 1) The Council of Ministers functions on this principle. Each member accepts and agrees to share responsibility for all decisions of the cabinet. It's necessary for efficiency and efficacy but also for the very survival of the cabinet system of government.
- 2) In a parliamentary system, the Prime Minister is the head of the Council of Ministers, leader of the majority party in the Lower House and head of the government.

UNIT 9 JUDICIARY

Structure

- 9.0 Objectives
- 9.1 Introduction
- 9.2 Evolution of Judiciary in India
- 9.3 The Supreme Court
 - 9.3.1 Composition and Appointments
 - 9.3.2 Tenure
 - 9.3.3 Salaries
 - 9.3.4 Immunities
- 9.4 Jurisdiction of the Supreme Court
 - 9.4.1 Original Jurisdiction
 - 9.4.2 Appellant Jurisdiction
 - 9.4.3 Advisory Jurisdiction
 - 9.4.4 Review Jurisdiction
- 9.5 The High Court
 - 9.5.1 Composition of the High Court
 - 9.5.2 Jurisdiction
- 9.6 Subordinate Courts
- 9.7 Judicial Review
- 9.8 Judicial Reforms
- 9.9 Let Us Sum Up
- 9.10 References
- 9.11 Answers to Check Your Progress Exercises

9.0 OBJECTIVES

After going through this unit, you will 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, the High Court, and the Subordinate Courts; and
- Explain the concept of judicial review and its importance in safeguarding fundamental rights.

9.1 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 - 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

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Judiciary is also the final arbiter of 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.

9.2 EVOLUTION OF JUDICIARY IN INDIA

The evolution of the contemporary judiciary in India can be traced to the colonial period. It was with the Regulating Act of 1773 that the first Supreme Court came into existence in India. Located at Calcutta (Kolkata), the Supreme Court consisted of Chief Justice and three judges (subsequently it was reduced to two judges) appointed by the Crown, and it was made a King's court rather than a Company's court. The court held jurisdiction over "his majesty's subjects" wherever the Supreme Courts were established. Supreme Courts were established in Madras (Chennai) first and in Bombay (Mumbai) later. Judicial system during this period consisted of two systems, the Supreme Courts in the Presidencies and the Sadr courts in the provinces. While the former followed the English law and procedure, the latter followed regulation laws and personal laws. Subsequently, these two systems were merged under the High Courts Act of 1861. This Act replaced the Supreme Courts and the native courts (Sadar Dewani Adalat and Sadr Nizamat Adalat) in the presidency towns of Calcutta, Bombay and Madras with High Courts. The highest court of appeal, however, was the judicial committee of the Privy Council.

At this stage of development of the Indian legal system, we see the beginning of a new era in the emergence of a unified court system. The Federal Court of India was established in Delhi by the Act of 1935. It was to act as an intermediate appellant between the High Courts and the Privy Council regarding matters involving the interpretation of the Indian constitution. In addition to this appellate jurisdiction, the Federal Court had advisory as well as original jurisdiction in certain other matters. This court continued to function until 26 January 1950, the day independent India's constitution was implemented. As you have read in unit 1, this is also known as the date its "commencement".

9.3 THE SUPREME COURT

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

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

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

9.3.1 Composition and Appointments

The Supreme Court consists of the Chief Justice of India and not more than twenty-six other Judges. When the Supreme Court was inaugurated, it had only eight judges. Its strength has risen to twenty-six judges. The President of India, who is the appointing authority, makes these appointments on the advice of the Prime Minister and the Council of Ministers.

The Constitution stipulates in Article 124 (2) that the President shall appoint judges of the Supreme Court after consulting other persons besides taking the advice of his ministers. In the case of the Chief Justice of India, the President shall consult such judges of the Supreme Court and the High Courts as he may deem necessary. In spite of this clear constitutional provision, the appointment of the Chief Justice of India has become a matter of political controversy. Here, it may be worth recalling the issues that were raised in 1973 when the Government of India appointed Justice SS Ray as the Chief Justice of India superseding four other judges, against the recommendations of the outgoing Chief Justice, SM Sikri. Avoiding political interferences in the appointment of Judges of the Supreme Court, some important qualifications have been set for the post such as: a person should be a citizen of India; a Judge of the High Court for at least five years; or should have been an advocate of High Court for at least ten years; or a distinguished jurist in the opinion of the President of India.

The Collegium System of appointment of judges is unique in nature. It is also popularly referred to as judges-selecting judges. This system was created by two judgements of the Supreme Court in 1990s. In this, a body of senior apex court judges are responsible for appointment and transfer of judges of the Supreme court and High Court.

9.3.2 Tenure

Once appointed, a judge holds office until he attains 65 years of age. A judge of the Supreme Court may resign his office or may be removed in case of misbehaviour or incapacity. According to the procedure laid out in the Constitution, each house of the Parliament will have to pass a resolution supported by two-third of the members present and voting. The device to remove a judge is known as impeachment. The motion of impeachment against a judge was tabled in Parliament for the first in 1991. It involved Supreme Court Justice V. Ramaswami. When an audit report revealed several irregularities committed by the judge during his tenure as the Chief Justice of the Punjab and Haryana High Court, a three-man judicial committee was set up with a serving and a retired Supreme Court judge and the Chief Justice of the Bombay High Court. The Committee concluded that there had indeed been a wilful and gross misuse of official position and intentional and habitual extravagance at the cost of the public interest which amounted to 'misbehaviour'. Justice V. Ramaswami was the first judge of the Supreme Court against who impeachment proceedings were initiated. Justice Ramaswami, however, maintained that there were procedural irregularities in the notice of the motion, the constitution of the committee and its functioning. The impeachment motion which was moved in May 1993 failed with 196 out of 401 voting for it and the remaining 205 abstaining. However, the Judge eventually resigned.

9.3.3 Salaries

A very important element that determines the independence of the judges is the remuneration received by them. The salaries and allowances of the judges are fixed high to secure their independence, efficiency and impartiality. Besides the salary, every judge is entitled to a rent-free official accommodation. The Constitution also provided that the salaries of the judges cannot be changed to their disadvantage, except in times of a Financial Emergency. The administrative expenses of the Supreme Court, the salaries, allowances, etc., of the judges, are charged on the Consolidated Fund of India.

9.3.4 Immunities

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

Check Your Progress Exercise 1

Note: 1) Use the space below for your answers

2) Check your answers with the model answers given at the end of this unit.

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

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

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9.4 JURISDICTION OF THE SUPREME COURT

Article 141 declares that the law laid down by the Supreme Court shall be binding on all courts within the territory of India. The different categories into which the

jurisdiction of the Supreme Court is divided as follows: 1) Original Jurisdiction, 2) Appellate Jurisdiction, 3) Advisory Jurisdiction, 4) and Review Jurisdiction.

9.4.1 Original Jurisdiction

The Supreme Court has original jurisdiction initially as a federal court. In a federal system like India, both the Union and the State governments derive their powers from and are limited by the same constitution. Differences of interpretation of the Union-States distribution of powers or conflicts between States governments require authoritative resolution by a judicial organ independent of both levels of government. Under Article 131, the Supreme Court is given exclusive jurisdiction in a dispute between the Union and a State or between one State and another, or between a group of States and others. When we say that the Supreme Court has an exclusive jurisdiction, we mean that no other court in India has the power to entertain such disputes. Similarly, the original jurisdiction of the Supreme Court will mean that the parties to the dispute should be units of the federation. Unlike the Supreme Courts in Australia and the United States, the Indian Supreme Court does not have original jurisdiction to decide disputes between residents of different states or those between a State and the resident of another State.

The Supreme Court also has an extensive original jurisdiction as the protector of Fundamental Rights. As you have read in the unit 4 Article 32 of the Constitution gives citizens the right to move the Supreme Court directly for the enforcement of any of the fundamental rights enumerated in Part III of the Constitution. As the guardian of Fundamental Rights, the Supreme Court has the power to issue writs such as *Habeas Corpus*, *Quo Warranto*, *Prohibition*, *Certiorari*, and *Mandamus*. *Habeas Corpus* is a writ issued by the court to bring before the court a person from illegal custody. The court can decide the legality of detention and release the person if the detention is found to be illegal. By using the writ of *Mandamus*, the court may order the public officials to perform their legal duties. *Prohibition* is a writ to prevent a court or tribunal from doing something in excess of its authority. By the writ of *Certiorari*, the court may strike off an order passed by any official of the government, local body or a statutory body. *Quo warranto* is a writ issued to a person who authorised occupies a public office to step down from that office. In addition to issuing these writs, the Supreme Court is empowered to issue appropriate directions and orders to the executive.

9.4.2 Appellate Jurisdiction

The Supreme Court is the highest court of appeal from all courts in the territory of India. It has comprehensive appellant jurisdiction in cases involving constitutional issues; civil and criminal cases involving specified threshold values of the property or a death sentence; and wide-ranging powers of special appeals.

Article 132 of the Constitution provides for an appeal to the Supreme Court from any judgement or final order of a court in civil, criminal or other proceedings of a High Court; if it involves a substantial question of law as to the interpretation of the Constitution. The appeal again depends upon whether the High Court certifies, and if does not, the Supreme Court may grant special leave to appeal.

Article 133 of the Constitution provides that an appeal in civil cases lies to the Supreme Court from any judgement, order or civil proceedings of a High Court.

This appeal may be made, if the case involves a substantial question of law of general importance or if in the opinion of the High Court the said question needs to be decided by the Supreme Court.

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

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

9.4.3 Advisory Jurisdiction

The Supreme Court is vested with the power to render advisory opinions on any question of fact or law that may be referred to it by the President. The advisory role of the Supreme Court is different from ordinary adjudication in three senses: first, there is no litigation between two parties; second, the advisory opinion of the Court is not binding on the government; and finally, it is not executable as a judgement of the court. The practice of seeking an advisory opinion of the Supreme Court helps the executive to arrive at a sound decision on important issues. At the same time, it gives a soft option to the Indian government on some politically difficult issues.

9.4.4 Review Jurisdiction

The Supreme Court has the power to review any judgement pronounced or order made by it. It means that the Supreme Court may review its judgement order.

The Supreme Court in India is far more powerful than its counterpart in the United States of America. The American Supreme Court deals primarily with cases which arise out of the federal relationship or those relating to the constitutional validity of laws and treaties. Apart from interpreting the Constitution, the Indian Supreme Court functions as the court of appeal in the country in matters of civil and criminal cases. It can entertain appeals without any limitation upon its discretion from the decisions not only of any court but also of any tribunal within the territory of India. The advisory jurisdiction of the Indian Supreme Court also is something absent from the purview of the American Supreme Court.

Despite these powers, the Indian Supreme Court is a creature of the Constitution and depends on the continuation of these powers on the Union legislature which can impose limitations on them by amending the Constitution. Moreover, all these powers can also be suspended or superseded whenever there is a declaration of emergency in the country.

9.5 THE HIGH COURT

The Constitution provides for a High Court at the apex of the State judiciary. Chapter V of Part VI, from Articles 214 to 231 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”, 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, Mizoram and Arunachal Pradesh.

In the 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, Madras even when it was a Union Territory, had a separate High Court while, the High Court has been having jurisdiction over Pondicherry, the Kerala High Court over Lakshadweep, the Bombay High Court over Dadra and Nagar Haveli, the Calcutta High Court over Andaman and Nicobar Islands, the Punjab Haryana High Court over Chandigarh.

9.5.1 Composition of the High Court

Unlike the Supreme Court, there is no minimum number of judges for the High Court. The President, from time to time will fix the number of judges in each High Court. The Chief Justice of the High Court is appointed by the President of India in consulting with the Chief Justice of India and the Governor of the State, which in actual term means 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. There is also a provision for direct appointment of Judges of Supreme Court and High Court through the Collegium System, in which Senior Judges of Apex Court select or recommend the names for appointment of Judges.

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. The President can remove a judge on the grounds of misbehaviour or incapacity in the same manner in which a judge of the Supreme Court is removed.

9.5.2 Jurisdiction

The original jurisdiction of a High Court includes enforcement of Fundamental Rights, settlement of disputes relating to the election to Union and State legislatures and jurisdiction over revenue matters. Its appellate jurisdiction extends to both civil and criminal matters. In civil matters, the High Court is either a first appeal or a second appeal court. In criminal matters, appeal from decisions of a session’s judge or an additional sessions judge where a sentence of imprisonment exceeds seven years, and other specified cases other than petty crimes constitute the appellate jurisdiction of a High Court. In addition to these normal original and appellate jurisdictions, the Constitution 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 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 violates of Fundamental Rights or not.

Check Your Progress Exercise 2

- Note:** 1) Use the space below for your answers
2) Check your answers with the model answers given at the end of this unit.

- 1) In what areas does the Supreme Court have original jurisdiction? Which area is an exclusive preserve of the Supreme Court?

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9.6 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 differ from state to state. However, there is a uniformity regarding its organisational structure.

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

The Constitution ensures the independence of the 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.

9.7 JUDICIAL REVIEW

The notion of judicial review means the revision of the decree or sentence of an inferior court by a superior court. Judicial review has a more technical significance in public law, particularly in countries having a written constitution, founded on the concept of limited government. Judicial review, in this case, means that Courts of law have the power of testing the validity of legislative as well as other governmental action concerning 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 regarding 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? It 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. It was held that a constitutional amendment is a law and if that amendment violated any of the fundamental rights, it could 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. It 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 should 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 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 a 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 by 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 Bharathi Case (otherwise known as the Fundamental Rights Case) of 1973. The Supreme Court ruled that while the parliament could amend even the fundamental rights guaranteed by the Constitution, it was not competent to alter the 'basic structure' or 'framework' of the Constitution. Under the newly evolved doctrine of 'basic structure', a constitutional amendment is valid only when it does not affect the basic structure of the constitution. The second part of Article 31C (no law containing a declaration to implement the Directive Principles contained in Article 39 (b) and (c) shall be questioned) was held not valid because the amendment took away the opportunity for judicial review, which is one of the basic features of the Constitution. The doctrine of basic features gave wide amplitude to the power of judicial review.

Later history shows the significant role played by this doctrine in the review of constitutional amendments. For challenging the election to Parliament of a person who holds the office of Prime Minister, the 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 a law shall not be called in question. The Supreme Court held that this amendment was invalid as it was against the basic structure of the Constitution. It argued that free

and fair elections are essential in a democracy. Excluding judicial examination of the fairness of the election of a particular candidate is not proper and goes against the democratic ideal which is the base 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.

Since the late 1970s, the judiciary began to take an active role to protect and implement the constitutionally guaranteed fundamental rights of citizens. It is commonly described as judicial activism; the Supreme Court has stepped to protect the rights of the disadvantaged sections which on account of poverty, social disability or lack of awareness, could not approach the courts for denial of their rights. The Supreme Court did this by diluting the principle of *locus standi* which limited the Court's power of judicial review. By the principle of *locus standi*, only persons aggrieved by an administrative action or by an unjust provision of law had the right to move the court for denial of rights. In 1979 the Supreme Court, however, decided to hear a case filed not by the aggrieved persons but by others on their behalf as the case involved a consideration of public interest. Again in 1982, the Supreme Court in judgement on the democratic rights of construction workers of the Asian Games granted the Peoples Union for 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 a petition, the Supreme Court of India stated that any 'public spirited' individual or organisation could move the court even by writing a letter. It opened the gates for a large number of cases where a large number of public spirited individuals and non-governmental organisations sought judicial intervention for the protection of existing rights, the betterment of life of the poor, protection of the environment, etc. The momentum for the implementation of rights generated by judicial activism ultimately led to the setting of mechanisms for the protection of rights of the weak and the deprived. In the 1990s, the National Commission of Minorities, the National Commission on Women, the National Commission for Backward Classes, the National Commission for Scheduled Castes and Scheduled Tribes were established by law to protect the rights of the minorities, Dalits, Backward classes, tribals and women. Further, the National Human Rights Commission (NHRC) was established in 2000 to protect the fundamental and other kinds of rights. The NHRC conducts an enquiry on its initiative or petition presented to it by a victim into complaints of human rights violations. Although the NHRC does not have the power of prosecution, it can make a recommendation to the government or to the courts to initiate proceedings against the violators of human right.

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 further pressure on the courts that are already overloaded.

9.8 JUDICIAL REFORMS

While the judiciary has earned respect for its contribution to protecting citizens from arbitrary exercise of power, a large number of pending cases and the delays in the dispensation of justice are seen as its major drawbacks. At the All India Seminar on Judicial Reforms in August 2010, the Chief Justice of India, S.H. Kapadia pointed out that there are over one crore cases pending for more than one year. 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. It leads to the piling up of cases as well as a 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 been helpful to achieve a new order and bring economic, political and social justice.

9.9 LET US SUM UP

As we saw in this unit, the existing judicature in India can be traced to the British period. 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 the modern judicial system in India. According to the Constitution of India the Supreme Court is 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 a 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 limits set by the constitution. The foundation of judicial review is (a) that the constitution is a legal instrument, and (b) that this law is superior in status to the laws made by the legislature that is itself set up by the constitution. It is now well established in India that judicial review constitutes the basic structure or feature of the Constitution of India.

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9.11 ANSWERS TO CHECK YOUR PROGRESS EXERCISES

Check Your Progress Exercise 1

- 1) A person to be appointed as a judge of the Supreme Court should be a citizen of India, should have been a High Court judge for at least five years, and an advocate of High Court for at least ten years or a distinguished jurist.
- 2) A Supreme Court judge can be removed by the impeachment motion. According to this procedure each house of the Parliament has to pass a resolution supported by the two third of the members present and voting.

Check Your Progress Exercise 2

- 1) It has original jurisdiction as a guardian of Fundamental rights and as a federal court. As a federal court, it has exclusive jurisdiction in disputes between the Union and a State or between one State and another, or between a group of States and others.



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