

# JUDICIARY: Structure, Role & Function (UNION & STATE)

**For**  
**B.A. (Pol.Sc.(Hons.)**  
**Degree Part-II, Paper-III**

**By**  
**G K Jha**  
**Asst. Prof.**  
**Deptt. Of Pol. Sc.**  
**Marwari College, Darbhanga**

# SUPREME COURT OF INDIA

- **Composition:** According to Art.124, the Supreme Court consists of the Chief Justice of India and not more than 30 other Judges. Besides, the Chief Justice has the power, with the previous consent of the President, to request a retired SC Judge to act as a Judge of the Supreme Court for a temporary period. Similarly, a High court Judge may be appointed ad hoc Judge of the Supreme Court for a temporary period if there is a lack of quorum of the permanent judges.
- **Appointment of Judges:** The Judges of the Supreme Court are appointed by the President. The Chief Justice of the Supreme Court is appointed by the President in consultation with such Judges of the Supreme Court and the High Courts as he deems necessary for the purpose. But in appointing other Judges, the President shall always consult the Chief Justice of India. He may consult such other Judges of the Supreme Court and High Courts as he may deem necessary.

# Appointment of judges

- **Qualification for appointment as Judges:** A person shall not be qualified for appointment as a Judge of the Supreme Court unless he/she is
  - a citizen of India; and
  - either- a distinguished Jurist or has been a High Court Judge for at least 5 years; or has been an advocate of a High Court for at least 10 years.
- **Tenure :** No minimum age is prescribed for appointment as a Judge of the Supreme Court, nor any fixed period of office. Once appointed, a Judge of the Supreme Court may cease to be so, on the happening of any of the following contingencies (other than death):
  - on attaining the age of 65 years
  - on resigning the office by writing addressed to President
  - on being removed by the President upon an address to that effect passed by a special majority of each House of Parliament.
-

# Removal and restrictions on SC Judges

- **Prohibition of practice after retirement:** No person, who had held office as a Judge of the Supreme Court can plead or act in any Court or before any authority within the territory of India. But there is no constitutional prohibition against a retired judge being appointed for a specialized form of work by the Government such as becoming a Chairman of NHRC or other important bodies.
- **Removal :** A judge of the Supreme Court can be removed from his position only on the ground of ***proved misbehaviour or incapacity***. He can be removed from office by an order of the President passed after an address from each House of Parliament, supported by a majority of the total membership of that House and by a majority of not less than 2/3 of the members present and voting. So far, no judge has been removed on this ground.

# Jurisdiction, power and Functions of the Supreme Court

- **Appellate Jurisdiction:** the Supreme Court is the highest court of appeal in the country. It means the Constitution provides for an appeal to the Supreme Court from any judgment or final orders 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. In other words, the Supreme Court in India has been entrusted with a power to hear and decide appeals against the judgments of lower courts. The appellate jurisdiction of the Supreme Court can be classified as follows:
- Appeal in ***civil*** cases-Art. 133 provides that an appeal in civil cases lies to the Supreme Court from any judgment, 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 SC.

# Appellate Jurisdiction

- Appeal in ***criminal*** cases- The jurisdiction can be invoked from an appeal in three different categories of cases:
  - if High Court on appeal reverses an order of acquittal of an accused person and sentence to death;
  - if the High Court has withdrawn for trial before itself any case from any court subordinate to its authority and has such a trial convicted the accused person and sentenced him to death; and
  - if the High Court certifies that the case is fit for appeal to the Supreme Court.
- Appeal by ***Special Leave***-under Art.136 the Supreme Court is authorized to grant in its discretion special leave to appeal from (a) any judgment, decree, determination, sentence or order, (b) in any case or matter, (c) passed or made by any court or tribunal in the territory of India. The only exception to this power of the SC is with regard to any judgment, etc. of any Court or tribunal constituted by or any law relating to the armed forces.

# Advisory Jurisdiction

- **Art.143** confers advisory jurisdiction on the Supreme Court. If, at any time, it appears to the President that a question of law or fact has arisen or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Court for consideration. The Court may, after such hearing as it thinks fit, report to the president its opinion thereon.
- The opinion of the Supreme Court is not binding on the President.
- There is no constitutional compulsion for the Court to give its advise.
- Till 1981, there were several cases of reference of this class made by the President. Till recently the President had asked an opinion on matters pertaining to Tehri Dam.

# A Court of Record

- **Art.129** makes the Supreme Court a ‘Court of Record’ and confers all the powers of such a court including the power to punish for its contempt. A Court of Record is a court whose records are admitted to be of evidentiary value and they are not to be questioned by when they are produced before the court. Once a court is made a Court of Record, its power to punish for contempt necessarily follows from that position.
- Thus the Supreme Court acts as balancing wheel of our federal system by playing the role of a custodian of the Constitution. It also acts as the guardian of the citizen in protecting their Fundamental Rights from being violated by the legislature or executive actions.



# THE HIGH COURTS

- High Court stands at the head of a State's judicial administration.
- Under Art.**214**, there shall be a High Court in each state, but Parliament has the power to establish a common High Court for two or more states.
- There are 24 High Courts in the country, three having jurisdiction over more than one state. The Union Territories come under the jurisdiction of different State High Courts. Delhi has a High Court of its own among the Union Territories.

# Composition of High Courts

- Each High Court shall consist of a Chief Justice and such other Judges as the President of India may from time to time appoint. The president has the power to appoint :
  - **additional Judges** for a temporary period not exceeding 2 years, for the clearance of arrears of work in a High Court;
  - an **acting Judge**, when a permanent Judge of a High Court (other than a chief justice) is temporarily absent or unable to perform his duties. The acting judge holds office until the permanent judge resumes office.
- **Appointment** : Every Judge of a High Court shall be appointed by the President, shall consult the Chief Justice of India, the Governor of the state (and also the Chief Justice of that High Court in the matter of appointment of a Judge other than the Chief Justice).

# POWER OF THE HIGH COURT

- Each High Court has powers of jurisprudence over all subordinate courts within its jurisdiction, namely the District and Sessions courts and other lower courts.
- It can call for returns from such Courts, make and issue general rules and prescribe forms to regulate their practice and proceedings and determine the manner and form in which book entries and accounts shall be kept.

# District Court

- The **District and Session Courts** comprise the highest level of courts in a District for Civil and Criminal cases respectively, and may be trial courts of original jurisdiction, applying both federal and state laws. States are divided into districts and within each, a District and Sessions Judge is head of the judiciary. A District Judge presides over civil cases, while a Sessions Judge over criminal cases. These judges are appointed by the Governor of the state in consultation with the state's High Court. There is a hierarchy of judicial officials below the district level, many selected through competitive examination by the state's public service commissions.

# JUDICIAL REVIEW

Independence of Judiciary

# Judicial Review:what&why

- Judicial review is the idea, fundamental to the system of government, that the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judicial branch.
- Judicial review allows the Supreme Court to take an active role in ensuring that the other branches of government abide by the constitution.
- Judicial review was established in the classic case of *Marbury v. Madison*, 5 US 137 (1803).
- •Dealt under Article 13, Article 32 and Article 226 of the Constitution of India

# Importance of Judicial Review

- Judicial review is one of the checks and balances in the separation of powers: the power of the judiciary to supervise the legislative and executive branches when the latter exceed their authority
- Judicial review should be understood in the context of both the development of two distinct legal systems (civil law and common law) and two theories of democracy (legislative supremacy and separation of powers) is that some countries with common-law systems do not have judicial review of primary legislation
- A basic structure of the constitution

# Is Judicial Review a menace?

- It is not very easy to understand and all the more difficult to justify is the very idea of Judicial Review in the India. It is to be noted that USA perhaps gives the same range of power to Judiciary to maintain the Impartiality and Independence of Judiciary.
- Question arises as when Judiciary becomes super active in asserting its role and responsibility with the intent of the law and it takes sometime an obnoxious spill over of tussle named vicariously as “Judicial Activism/Judicial overreach’.
- In next few slides with the help of example I try to explain the both and taking cognisance of some of the illustrative cases we’d try to unravel the mystery behind it.



# JUDICIAL ACTIVISM

The emergence of judicial review gave birth to a new movement which is known as judicial activism.

Black Law Dictionary defines judicial activism as a "philosophy of judicial decision making whereby judges allows their personal views about public policy among other factors to guide their decision".

Exercise of unconventional jurisprudence or creative approach of judiciary can be called as judicial activism for a instance in India the Supreme Court has treated even a letter as a writ petition and has passed appropriate orders. This concept has turned into a important means to enhance the applicability of a particular legislation for social betterment and also to bring improvement in the concerned state machinery.

# VISHAKA . V. STATE OF RAJASTHAN AIR 1997 SC 301141

- The Supreme Court has laid down exhaustive guidelines for preventing sexual harassment of working women in place of their work until legislation is enacted for this purpose.
- The court held that the court has the power under Article 32 to lay down such guidelines for affective enforcement of fundamental rights of working women at their work places and declared that this would be treated as the law declared by the Supreme Court under Article 141 of the constitution

# BAN ON SMOKING IN PUBLIC PLACES

- Murali S.Deora Vs. Union of India, AIR 2002 SC

The Supreme Court has directed all states and union territories to immediately issue orders banning smoking in public places and public transport, including railways.

# JUDICIAL OVERREACH

Tendency of judges to intrude into the domain of the executive and the legislature

- Accountability of Judges
- Undermining of sovereign functions of Govt.
- Subjectivity of Judges' opinion and perception based verdicts

# JUDICIAL OVERREACH

- Judicial Activism either in support of the other organs of the state or in opposition to them, but it is the latter pattern which usually happens
- Perhaps no State activity can be spared from the purview of the Supreme Court as a PIL matter.
- Can culminate in judiciary taking over the total administration of the country

# JUDICIAL OVERREACH

- Violates the basic structure of constitution and negates the doctrine of separation of power
- Perils of judiciary venturing into areas where it doesn't have expertise and try to run the govt.
- Check and balances is also applicable to Judiciary for a healthy democracy

# Examples of Judicial Overreach

- SC directing video-graphy of proceedings of Jharkhand Assembly, appointment of temporary speaker and convening a special session of assembly
- Creation of various high powered committees to monitor – e.g. monitor parking, regulation of traffic and implementation of traffic rules
- Declaring unconstitutional the order of Governor dissolving the Bihar assembly
- Allahabad HC order prohibiting caste based rallies

# examples

- Banning iron ore mining in Goa and Karnataka
- Gujarat HC order that new vehicles registered must run on CNG
- HC deciding on whether toll should be collected on toll plazas
- Order of Delhi HC on legality of constructions in Delhi and order of demolition
- Interlinking of rivers



# JUDICIAL RESTRAINT

- Judiciary to keep re-inventing itself through introspection and self-correction •
- SC has said that judiciary must refrain from encroaching from executive and legislative domain •
- Case laws :
- Divisional Manager Aravali Golf Course vs Chander Haas, 2008
- Almithra H Patel vs UoI, (2000) 2 SCC 679
- UoI vs Kishan K Sharma, (2004) 5 SCC 518
- However, the effect of Judicial restraint vis-à-vis Judicial overreach is yet to be realized

# In lieu of Conclusion

“justice consists not in being neutral between right and wrong, but in finding out the right and upholding it wherever found, against the wrong”

THEODORE ROOSEVELT