- In a constitutional govt, the functions of a) rule making b) rule enforcement & c) rule interpretation are separated : – into the three institutions 1) Legislature, 2) Executive & 3) Judiciary (Limited Govt) respectively.
- An integrated & independent judiciary (एकीकृत न्यायिक प्रणाली) is the acting as a check on the arbitrary exercise of legislative & executive power is the basic structure of the constitution (Limited Govt).
- The judiciary is also the final arbiter on what that constitution itself means in a federal system, the judiciary also serves as a tribunal for the final determination of disputes between the union & its constituent units.

EVOLUTION OF JUDICIARY

- The development of judiciary in general can be traced to the growth of modern nation-states.
- It was assumed that power & administration of justice was prerogative of the state.
- During the ancient times, administration of justice was not considered a function of the state as it was based on religious law or dharma.
- Most of the kings courts dispensed justice according to dharma, 'a set of eternal laws rested upon the individual duty to be performed in four stages of life (ashrama) & status of individual (varna)'.
- King had no legislative powers because a law enacted & recognised, royally could have violative of dharma.
- At the village level, the local/village/popular courts dispensed justice according to the customary laws.
- However, during the medieval times, the Turkish ruler assumed the role in administering justice. He was the highest judge in the land.
- With the advent of the British rule in India, judicial system on the basis of Anglo-Saxon jurisprudence was introduced in India.
- The Royal Charter of Charles II of the year 1661 gave the Governor & the Council, the power to adjudicate both civil & criminal cases according to the laws of England.
- But it was with the Regulating Act of 1773 that the first Supreme Court came to be established in India.
- Located at Calcutta, the Supreme Court consisted of Chief Justice & three judges (subsequently it was reduced to two judges) appointed by the Crown & it was made a King's court rather than a Company's court.
- Supreme Courts were established in Madras & in Bombay later.
- Judicial system during this period consisted of two systems, 1)Supreme Courts in the Presidencies 2)the Sadr courts in the provinces.
- Courts followed the English laws & procedure, the Sadr court followed regulation laws & personal laws.
- Subsequently, these two systems were merged under the High Courts Act of 1861.
- This Act replaced the Supreme Courts & the native courts (Sadr Dewani Adalat & Sadr Nizamat Adalat) in the presidency towns of Calcutta,Bombay & Madras with High Courts.
- The highest court of appeal was the judicial committee of the Privy Council.
- This was the stage of 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.
- Federal court was to act as an intermediate appellate between the High Courts & the Privy Council in regard to matters involving the interpretation of the Indian constitution.
- Along with the appellate jurisdiction, the Federal Court had advisory & original jurisdiction in certain other matters.
- This court continued to function until 26 January 1950.

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 Constitution says that the law declared by the Supreme Court shall be binding on all small courts within the territory of India.
- Below the Supreme Court, are the High Courts located in the states. Under each High Court there are : – 1)District Sessions Courts, 2)Subordinate Courts & 3) Courts of Minor Jurisdiction called Small Cause Courts.
- When the Supreme Court was inaugurated, it had only eight judges. Currently there are 34 judges in the supreme court.
- The Supreme Court can have 34 judges, including the CJI.
- The number was raised from 30 to 33 (excluding the CJI) in 2019 when the govt passed the Supreme Court (Number of Judges) Amendment Bill, 2019 in August.
- The Constitution stipulates in Article 124 (2) that the President shall appoint judges of the Supreme Court under his hand & seal after consultation with

such of the judges of the Supreme Court as the President may deem necessary.

- In the case of the Chief Justice of the India, the President shall consult such judges of the Supreme Court & of 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.
- To eliminate politics in the appointment of judges, high minimum qualifications have been prescribed.
- For appointment to the Supreme Court : – 1) a person should be a citizen of India 2) 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

- The Collegium of judges is the Supreme Court's invention. It is not mentioned in the Constitution
- Judges of the Supreme Court & High Courts are appointed by the President & speaks of a process of consultation.
- It is a system under which judges are appointed by an institution comprising judges.
- After some judges were superseded in the appointment of the Chief Justice of India in the 1970s, & attempts made to effect a mass transfer of High Court judges across the country, there was a perception that the independence of the judiciary was under threat.
- When a vacancy for the post of a Supreme Court judge arises, the Chief Justice of India (CJI) sends his recommendation to the Union Minister of Law .
- The CJI decides on his recommendation in consultation with a collegium of the four senior-most judges of the Supreme Court.
- If the CJI's successor is not among the senior-most judges, he/she will be made a part of the Collegium.
- In case the person being considered for the post of the judge is from a High Court, the CJI takes into account the view of the Collegium member who may have worked in the same High Court.
- If this situation does not apply, the CJI can consult the next senior-most judge in the Supreme Court from the High Court in question.
- The opinions of all Collegium members about each of the recommended candidates are given in writing & made part of the record.
- The opinion of the senior-most judge of the Supreme Court from the same High Court as the prospective candidate is also included.
- The CJI's opinion is recorded along with the opinion of all concerned & sent to the Govt of India.
- Opinions from others, especially non-judges, need not be mentioned in writing but their essence should be conveyed to the central government.
- The Union Law Minister presents the CJI's final recommendation to the Prime Minister, who then advises the President of India in appointing the Supreme Court judges.
- Once the appointment is approved, the Secretary to the Govt of India in the Department of law & Justice informs the CJI & obtains a certificate of physical fitness from the appointed judge, signed by a civil surgeon or a district medical officer.
- The appointment is announced by the Secretary once the warrant of appointment is signed by the President of India
- The Chief Justice of High Courts is appointed as per the policy of having Chief Justices from outside the respective States. The Collegium takes the call on the elevation.
- High Court judges are recommended by a Collegium comprising the CJI & two senior-most judges.
- However the proposal of appointment of judges of High Court is initiated by the Chief Justice of the High Court concerned in consultation with two senior-most colleagues.
- The recommendation is sent to the Chief Minister, who advises the Governor to send the proposal to the Union Law Minister.

TRANSFER OF JUDGES

- The Collegium also recommends the transfer of Chief Justices & other judges. Article 222 of the Constitution provides for the transfer of a judge from one High Court to another.
- In matters of transfers, the opinion of the CJI "is determinative", & the consent of the judge concerned is not required.
- However, the CJI should take into account the views of the CJ of the High Court concerned & the views of one or more SC judges who are in a position to do so.
- All transfers must be made in the public interest, that is, "for the betterment of the administration of justice".
- The 'First Judges Case' (1981) ruled that the "consultation" with the CJI in the matter of appointments must be full & effective. However, it rejected the idea that the CJI's opinion, albeit carrying great weight, should have primacy.
- The Second Judges Case (1993) introduced the Collegium system, holding that "consultation" really meant "concurrence". It added that it was not the CJI's individual opinion, but an institutional opinion formed in consultation with the two senior-most judges in the Supreme Court.
- The Supreme Court, in the Third Judges Case (1998) expanded the Collegium to a five-member body, comprising the CJI & four of his senior-most colleagues.

CRITICISM ON COLLEGIUM SYSTEM

- It is not foreseen by constitution makers

- It has scope of : – Nepotism, Opaqueness & a lack of transparency
- Retired SC judge Justice Ruma Pal once said: "The mystique of the process, the small base from which the selections were made & the secrecy & confidentiality ensured that the process may on occasions, make wrong appointments and, worse still, lend itself to nepotism."
- The attempt made to replace it by a 'National Judicial Appointments Commission' was struck down by the court in 2015 on the ground that it posed a threat to the independence of the judiciary.
- In respect of appointments, there has been an acknowledgement that the "zone of consideration" must be expanded to avoid criticism that many appointees hail from families of retired judges.
- The status of a proposed new memorandum of procedure, to infuse greater accountability, is also unclear.

TENURE OF JUDGES

- Once appointed, a judge holds office until he attains 65 years.
- A judge of the Supreme Court may resign his office or may be removed in case of misbehaviour or incapacity.
- To remove a judge each house of the Parliament will have to pass a resolution supported by two third of the members present and voting.
- The motion of impeachment against a judge was table in Parliament for the first in 1991. This involved Supreme Court Justice V Ramaswami.
- The impeachment motion moved in May 1993 failed but accepting reality, the judge subsequently resigned.
- The salaries & allowances of the judges are fixed high in order 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.

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.

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 is as follows: 1) Original Jurisdiction, 2) Appellate Jurisdiction, 3) Advisory Jurisdiction, 4) Review Jurisdiction.

ORIGINAL JURISDICTION (मूल न्यायाधिकार)

- The Supreme Court has original jurisdiction firstly as a federal court. (संघीय न्यायालय)
- In a federal system like that in India, both the Union & the State govts derive their powers from & are limited by the same constitution.
- Differences of interpretation of the Union-States distribution of powers, or conflicts between States govts 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 & a State or between one State & another, or between a group of States and others.
- 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 & 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 non-exclusive original jurisdiction as the protector of Fundamental Rights.
- 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
- 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 govt, local body or a statutory body.
- Quo warranto is a writ issued to a person who authorizedly 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 & orders to the executive.

APPELLATE JURISDICTION

- Supreme Court is the highest court of appeal

- It has comprehensive appellate jurisdiction in cases involving constitutional issues; civil & criminal cases involving specified threshold values of property or a death sentence; & wide ranging powers of special appeals.
- Article 132 provides for an appeal to the Supreme Court from any judgement 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 & if does not, the Supreme Court may grant special leave to appeal.
- Article 133 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 in 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 & sentenced to death.
  b) if the High Court has withdrawn for trail before itself any case from any court subordinate to its authority and has in such a trial convicted the accused person and sentenced him to death, and
  c) if the High Court certifies that the case is fit for appeal to the Supreme Court.
- Supreme Court has the special appellate jurisdiction.
- It has the power to grant, special leave appeal (विशेष अनुमति याचिका)in its discretion from any judgment, decree sentence or order in any case or matter passed or made by any court or tribunal.

ADVISORY JURISDICTION (सलाहकार क्षेत्राधिकार)

- 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. (Art 143)
- The advisory role of the Supreme Court is different from ordinary adjudication in three senses: 1) there is no litigation between two parties;2) the advisory opinion of the Court is not binding on the govt; 3) it is not executable as a judgement of the court.
- The practice of seeking advisory opinion of the Supreme Court helps the executive to arrive at a sound decision on important issues.
- It gives a soft option to the Indian govt on some politically difficult issues.
- A case in point is the controversy surrounding the Babri Masjid complex in Ayodhya.

REVIEW JURISDICTION (समीक्षा क्षेत्राधिकार)

- The Supreme Court has the power to review any judgement pronounced or order made by it. This means that the Supreme Court may review its own judgement order.
- 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 arising out of the federal relationship or those relating to the constitutional validity of laws & treaties.
- The Indian Supreme Court apart from interpreting the Constitution, functions as the court of appeal in the country in matters of civil & 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 (अधिकरण)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 & depends for the continuation of these powers on the Union legislature which can impose limitations on them by amending the Constitution and during emergency

THE HIGH COURT

- The constitution provides for a High Court at the apex of the State judiciary. Chapter V of Part VI of the Constitution — contains provisions regarding the organisation & functions of the High Court.
- Article 125 says “there shall be a High Court for each state”
- The parliament has the power to establish a common High Court for two or more states.
- Punjab & Haryana have a common High Court.
- 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.
- Delhi, a Union Territory, has a separate High Court of its own
- Madras High Court has jurisdiction over Pondicherry
- The Kerala High Court over Lakshadweep
- Mumbai High Court over Dadra & Nagar Haveli
- Kolkata High Court over Andaman & Nicobar Islands
- Unlike the Supreme Court, there is no minimum number of judges for the High Court.
- The President, from time to time will fix the number of judges in each High Court.
- The Chief Justice of the High Court is appointed by the President of India in consultation with the Chief Justice of India and the Governor of the State

- A judge of a High Court normally holds office until he attains the age of 62 years.
- He can vacate the seat by : – 1) resigning 2)by being appointed a judge of the Supreme Court or 3)by being transferred to any other High Court by the President.
- A judge can be removed by the President on grounds of misbehaviour or incapacity in the same manner in which a judge of the Supreme Court is removed.

JURISDICTION OF HIGH COURT

- The original jurisdiction of a High Court includes: – 1) enforcement of Fundamental Rights 2)Settlement of disputes relating to the election to Union & State legislatures & 3) Jurisdiction over revenue matters.
- Appellate jurisdiction : – Civil & criminal matters. In civil matters, it is either a first appeal or a second appeal court.
- In criminal matters, appeal from decisions of a session's judge or an additional sessions judge where sentence of imprisonment exceeds seven years & other specified cases other than petty crimes constitute the appellate jurisdiction of a High Court.
- The power to issue writs or orders for the enforcement of the Fundamental Rights.
- The writ jurisdiction of a High Court is wider than that of the Supreme Court.
- It can issue writs: -1) in cases of infringement of Fundamental Rights & 2) in cases of an ordinary legal right also
- The power of superintendence over all other courts & tribunals except those dealing with the armed forces.
- It can frame rules & issue instructions for guidance from time to time with directions for speedier & effective judicial remedy
- The power to transfer cases to itself from subordinate courts concerning the interpretation of the constitution.
- The power to appoint officers & servants of the High Court.
- In certain cases, the jurisdiction of High Courts is restricted.
- It has no jurisdiction over : –
  1) A tribunal
  2) To invalidate a central act or even any rule
  3) Notification or orders made by any administrative authority of the union, whether it is violative of fundamental rights or not.

SUBORDINATE COURTS

- They are referred as subordinate courts,Since they have came into existence because of enactments by the state govt, their nomenclature & designation differs from state to state
- However, broadly in terms of organisational structure there is uniformity.
- Under the district courts, there are - 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 & Labour Laws, etc.
- At the bottom of the hierarchy of Subordinate Courts are the Panchayat Courts (Nyaya Panchayat, Gram Panchayat, Panchayat Adalat etc).
- These are, however, not considered as courts under the purview of the criminal courts jurisdiction.
- The principle function of the District Court is to hear appeals 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.
- 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 & the State Public Service Commission.
- The High Court exercises control over the District Courts & the courts subordinate to them, in matters as posting, promotions and granting of leave to all persons belonging to the State judicial service.

JUDICIAL REVIEW

- Literally the notion of judicial review means the revision of the decree or sentence of an inferior court by a superior court.
- Judicial review has a more technical significance in pubic law, particularly in countries having a written constitution, founded on the concept of limited government.
- Judicial review in this case means that Courts of law have the power of testing the validity of legislative as well as other executive action with reference to the provisions of the constitution.
- In England, there is no written constitution & the Parliament is sovereign. 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 : – 1) executive actions &2) examine the constitutional validity of legislation by the doctrine of 'due process'.
- In India, the power of judicial review of legislative enactments is expressly enshrined 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 & to other actions of the legislatures, the executive & the other govt agencies.
- Under Article 368, constitutional amendments could be made by the Parliament.
- Article 13 provides that any law made by legislature & any executive action thereby inconsistent with fundamental rights shall be void.
- In the early years, the courts held that a constitutional amendment is not law within the meaning of Article 13 & hence, would not be held void if it violated any fundamental right.
- In 1967, in the famous Golak Nath Case, Supreme court held that a constitutional amendment is law & if that amendment violated any of the fundamental rights, it can be declared 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,it will lead to chaos in the economic & political system.
- In order to avoid this situation & for the purpose of maintaining the transactions , the past amendments were held valid
- This technique of treating old transactions valid and future ones invalid is called "prospective overruling".
- In 1970, when the Supreme Court struck down some of Mrs Indira Gandhi's populist measures, such as the abolition of the privy purses of the former princes & nationalisation of banks, the Prime Minister set about to assert the supremacy of the Parliament.
- In 1972, the Parliament passed the 25th Constitutional Amendment act which allowed the legislature to encroach on fundamental rights to giving effect to the Directive Principles of State Policy
- 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. (Kesavananda Bharati Case 1973)

WRIT JURISDICTION OF COURTS

HIGH COURTS

- Supreme Court jurisdiction is laid down under Article 32 of the Constitution of India
- The writ jurisdiction of the Supreme Court is, however, narrower than that of the High Courts
- The High Court's jurisdiction is laid down under Article 226 of the Constitution
- Notwithstanding anything in Article 32 every High Court shall have' power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs
- The power conferred by clause (I) to issue directions, orders or writs to any Govt authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Govt or authority or the residence of such person Writs as Remedies is not within those territories.

DISTINCTION BETWEEN ARTICLE 32 & ARTICLE 226

- The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.
- Article 32 can be exercised for the enforcement of fundamental rights only, but Article 226 can be exercised not only for the enforcement of fundamental rights but also for the enforcement of rights other than fundamental rights. Thus, the writ jurisdiction of High Courts under Article 226 is wider than the writ jurisdiction of the Supreme Court under Article 32.
- According to Dr. Ambedkar, right to Constitutional remedy is the heart and soul of the Constitution.

HABEAS CORPUS

- Writ of habeas corpus, is a Latin phrase, which can be literally translated as "We command that you have the body".
- It means, you have the body & produce it before the Court.
- The object of this writ is to release a person who is illegally detained.
- It secures the release of a person from illegal detention either in prison or in private custody.
- According to law, no person shall be detained unlawfully.
- The Court can direct to have the body of the person detained to be brought before it in order to ascertain whether the detention is legal or illegal.
- If a person who is arrested is not produced before the Magistrate within 24 hours from the time of arrest, he will be entitled to be released on the writ of Habeas Corpus.
- It can be issued against any private person or executive authority.
- The disobedience of this writ amounts to contempt of Court, and is punishable
- For this writ, following conditions must be fulfilled -
  - There must be illegal detention of a person.
  - The detention must be illegal at the time of filing the petition.
  - The detention must be unwarranted by law.
- Who can apply for writ of Habeas Corpus?
  - A person who has been detained illegally
  - A prisoner himself whose detention is illegal or
  - Any person on behalf of the detainee/prisoner.
- When writ of Habeas Corpus is not issued?

- If the detention has been made in accordance with law & procedure.
- the person who is detained is not within the jurisdiction of the Court.
- If a person who has been imprisoned by a Court of law on a criminal charge.
- If the proceedings interfere with a proceeding for contempt by a Court of record or by Parliament.

SOME CASES

- In A. D. M. Jabalpur v S. Shukla (1976, p.1207) case, popularly known as 'Habeas Corpus Case ', the Court held that if the enforcement of Article 21 is suspended by the Presidential Order under Article 359, the detenue shall not have right to file a writ petition challenging the legality of detention.
- According to the present position even the Presidential Order cannot suspend the right to life & liberty under Article 21.
- In Sunil Batra v Delhi Administration (1978, p. 1575), the solitary confinement imposed on Sunil Batra & Charles Sobhraj, who were under sentence of death was challenged as violative of Article 14,19,20 & 21 of the Constitution.
- The Court treated their letter as writ petition. The Court held that writ of Habeas Corpus can not only be granted for releasing a person illegally detained but also it will be used for protecting him from ill treatment inside jails.
- Court denied the Hands - off doctrine - Pursuant to the "hands-off" doctrine, the courts were without power to supervise prison administration or interfere with ordinary prison rules and regulations.
- In Kanu Sanyal v District Magistrate, Darjeeling (1974, p.510), Kanu Sanyal, a Naxalite leader was arrested and detained without trial in Visakhapatnam jail. He challenged the validity of his detention and filed a writ of Habeas Corpus. The Court issued necessary directions and held that the production of the body of the person detained before the Court was not necessary for hearing and disposing of the writ petition under Article 32.

MANDAMUS

- In Latin means "we command, or sometimes "we mandate"
- It is issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly.
- Mandamus means 'the order'. Mandamus is an order by Supreme Court or High Courts to any public authority to do or not to do something in the nature of public duty.
- It is issued against the persons or authorities who fail to perform their mandatory duties.

CONDITIONS FOR ISSUING THIS WRIT

- There must be public duty upon the respondent.
- The petitioner must have legal right to compel the performance of public duty
- Such duty must be mandatory duty cast by law.
- The public authority must have failed to perform or refuse to perform the pubic duty
- In Gujarat State Financial Corporation v M/s Lotus Hotel Pvt. Ltd. (1983, p.848) case, the Corporation established under the State Financial Corporation Act, 1951 had entered into an agreement with Lotus Hotels to provide finance on long term credit and failed to release the funds.
- The Court issued the writ of Mandamus & directed the Corporation to release the funds as per agreement.

WHEN MANDAMUS CANNOT BE ISSUED

- When the duty is merely discretionary in nature
- Cannot be issued against private individuals or private organisations because they don't have public duty
- Writ of Mandamus cannot be granted to enforce a duty arising out of contract.
- In Manjula v Director Public Instructions (1952) the petitioner filed a writ of Mandamus to compel the director, Public Instructions to include her book in the list of books approved for the schools.
- The writ was not granted on the ground that the choice of the textbooks was a matter entirely left to the discretion of the DPI

IMPORTANT CASE

- In State of M. P. Vs. G C. Mandawara, (1954, p.493), it was held that a licensing officer has a duty to issue licence to the persons who fulfil the necessary conditions.
- Despite the fulfilment of all the necessary conditions by the applicant, if the licensing officer fails to issue licence, the aggrieved-applicant has a right to seek the remedy through a writ of mandamus.
- The object of writ of Mandamus is to compel performance of public duties prescribed by Statute.

CERTIORARI

- It is an Order by the Supreme Court or the High Courts to an inferior Court to remove a suit from such inferior Court & adjudicate upon the validity of the proceedings or to quash the Orders of the inferior Court.
- It can be issued not only against any inferior Courts but also against a body exercising judicial or quasi-judicial functions
- This writ is issued under the supervisory or original jurisdiction & not under appellate jurisdiction.

CONDITIONS

- When there is practice of excess jurisdiction
- Principle of natural justice is violated
- There must be an error of law
- It is granted when
  - Before the trial to prevent an excess or abuse of jurisdiction and removal the case for trial to higher Court.

- After trial to quash an order which has been made without jurisdiction or in violation of the principles of natural justice.

- Who can apply for writ of Certiorari?
  - Any person whose fundamental right is violated can apply for writ of Certiorari.
- Against whom writ of Certiorari is issued?
  - Inferior Courts, and A body exercising judicial or quasi-judicial functions.
- Against whom writ of Certiorari cannot be issued?
  - Against a private individual or body of private persons (A. Ranga Reddy v General Manager; Co-op Electric Supply Society Ltd, 1977, p.232).
- When a writ of Certiorari cannot be granted?
  - To remove or cancel executive acts.
  - To declare an Act as unconstitutional or void.
- In the case of Rafiq Khan v State of UP (1954, p.3) the Magistrate maintained the conviction of the accused as passed by a Panchayat Adalat which is not authorised under Section 85 of the U. P. Panchayat Raj Act, 1947. Hence, the High Court quashed the conviction by a writ of certiorari.

PROHIBITION

- Prohibition means 'to prevent'. Each Court is expected to act within the limits of their jurisdiction.
- A writ of prohibition is issued to prevent an inferior Court or Tribunal from exceeding its jurisdiction, which is not legally vested, or acting without jurisdiction or acting against the principles of natural justice.
- The writ of Prohibition can be issued not only against the Courts but also against the authorities exercising judicial or quasi-judicial functions.
- In East India Commercial Co. v Collector of Customs (1962, p.1893) the Court compelled the inferior court to keep itself within the limits of jurisdiction
- The person whose right is violated can apply for the writ of prohibition.
- When there is an apparent error on the face of the judicial record.
- When there is violation of fundamental right of an individual and needs the prohibition of such extra - jurisdictional action

QUO WARRANTO

- Quo warranto means 'what is your authority? It is an Order questioning the authority of a person holding a public office.
- It is issued against the holder of a public office calling upon him to show with what authority he holds such office.
- The object of this writ is to control the executive action in making appointments to the public offices and also to protect the public from usurpers of public offices.

CONDITIONS

- The office must be a public office.
- The office must be substantive in character with independent title.
- The respondent must not be legally qualified to hold the public office.
- Who can file Writ of Quo Warranto?
  - Any member of the public can file writ of Quo Warranto, whether any right of such person has been infringed or not (Venkataraya v Sivarama, 1965, p.491).

WHEN QUO WARRANTO CANNOT BE ISSUED

- When the office is a private office.
- When the holder of the office is qualified to hold that office.
- When the holder subsequently gets qualified for the office
- When the writ does not serve any purpose.

SOME IMPORTANT CASES

- In K. Bhima Raju v State of Andhra Pradesh (198 1, p.24), the Government pleader was appointed against the rules. The petitioner filed a writ of Quo Warranto. The High Court quashed the appointment of Government Pleader on the ground that the appointment was not made in accordance with rules.
- The power of the Supreme Court of India to decide disputes between the Centre & the States falls under its
  (a) advisory jurisdiction
  (b) appellate jurisdiction.
  (c) original jurisdiction
  (d) writ jurisdiction
- What is the provision to safeguard the autonomy of the Supreme Court of India?

1. While appointing the Supreme Court Judges, the President of India has to consult the Chief Justice of India.
2. The Supreme Court Judges can be removed by the Chief Justice of India only.
3. The salaries of the Judges are charged on the Consolidated Fund of India to which the legislature does not have to vote.
4. All appointments of officers & staffs of the Supreme Court of India are made by the Govt only after consulting the Chief Justice of India.

Which of the statements given above is/are correct?
(a) 1 and 3 only
(b) 3 and 4 only
(c) 4 only
(d) 1, 2, 3 and 4

- Which of the following are included in the original jurisdiction of the Supreme Court?(2012)

1. A dispute between the Government of India & one or more States
2. A dispute regarding elections to either House of the Parliament or that of Legislature of a State
3. A dispute between the Government of India and a Union Territory

4. A dispute between two or more States
Select the correct answer using the codes given below :
(a) 1 and 2
(b) 2 and 3
(c) 1 and 4
(d) 3 and 4

- The power to increase the number of judges in the Supreme Court of India is vested in

1. the President of India
2. the Parliament
3. the Chief Justice of India
4. The Law Commission

- With reference to the writs issued by the Courts in India, consider the following statements:

1. Mandamus will not lie against a private organization unless it is entrusted with a public duty.
2. Mandamus will not lie against a Company even though it may be a Government Company.
3. Any public minded person can be a petitioner to move the Court to obtain the writ of Quo Warranto.

Which of the statements given above are correct?
(a) 1 & 2 only
(b) 2 & 3 only
(c) 1 & 3 only
(d) 1, 2 & 3

JUDICIARY & POLICY MAKING

- An impartial judiciary is a sine-qua-non for the smooth functioning of a political system
- The judiciary does not have a substitute in the present society.
- In modem democratic political systems, the judicial system is known as open, impartial, consistent, stable and predictable.
- The judiciary operates in accordance with the prescriptions of the Rule of Law.
- Such judicial system believes in the fairness and openness of proceedings.
- In India, there is a unified structure of the judiciary despite the fact that our Constitution is quasi-federal.
- It is a very complex process through which persons in power authority exercise power or influence over each other.
- Dr. P. R. Dubhashi explains the policy making process as "something like a policy making ladder with the chief executive like the Prime Minister at the top and apathetic non-voting citizens at the bottom.
- In between are the Prime Minister's cabinet colleagues, legislative leaders, policy making judges, high level administrators, interested group leaders, politically active citizens, and ordinary voters.
- The proximate policy makers, skilled practitioners of policy analysis, managerial elite, elite of wealth, are all policy makers.
- Most citizens influence policy very little but energetic citizens can influence policy to an extent.
- The judicial system in a democratic country like India has a major role in the public policy making process.
- All policies are formulated keeping in view the existing laws & legal provisions.
- The judiciary enters the area of policy making delivering suggestive or advisory judgements – aimed at the effective achievement of the goals of the country as contained in the Preamble & the body of the Constitution.
- At times, the judiciary issues directions for formulating a particular policy or changing the existing policy to suit a particular purpose.
- It may also determine certain guidelines for the legislature & the executive that ought to be followed in the process of public policy making.
- It is therefore, clear that the judiciary is an essential part of the political process wherein cooperation & conflict are of equal significance.
- In the words of A. R. Ball, the courts "interact with other parts of the political system, not as illegitimate outsiders but as part of the stable ruling political alliance".
- In fact, it is the need of modern times that the role of the courts should be appreciated & confrontation between the legislature, the executive and the judiciary should be minimised , while not totally avoided.
- However, it may be added that there have been situations & occasions when the actions or decisions of the judiciary have been either not welcomed by the political authority or its principal advisory,the bureaucracy.
- Despite all that, it has been the thinking of a civilised society, that a society can be thinkable without a fully developed legislative organ but a civilised State without any viable judicial branch is hardly conceivable.
- In the system analysis, the system and its counterparts, the sub-systems, are continually in active or passive interaction at various levels & degrees to bring some acceptable outputs to society.
- It is, therefore, necessary to view the judicial system as an essential aspect of a political structure be it any form of govt.
- The political process in a given system does not spare any facet of the citizens' life.
- In one way or another, it influences them and their actions and reactions.
- Ultimately, they become essential ingredients in the interplay of socio-political forces that determine the areas, facets, contents, priorities & distribution of policy benefits in society.
- The judiciary has always, with some institutional constraints, played its role in moderating the public

demand & the system's capacity to bear such implications of its pronouncements.

- The judicial system cannot remain immune to major socio-economic developments, as also to the ever changing thinking of the total political process.
- According to, Stephen L. Wasby , the political situation affecting the administration of justice at the state & local levels has particularly attracted the attention of political scientists, concerned with the allocation of justice, with why different members of the community are treated differentially by law enforcement officials.
- A very significant area of operation of the judicial system, is to ensure a desired level of social & economic development so as to reach a viable equilibrium for a tension free social system.
- It is in this context that the judiciary "investigates, declares & enforces liabilities as they stand on present or past facts & under laws supposed already to exist".
- Moreover, the judiciary establishes the values of equity & justice for stabilising society in its best possible egalitarian form.
- The Supreme Court in India has developed new methods and remedies for dispensing justice to the masses through public interest litigation
- It is said that it has taken socio-economic justice to the common man.
- The former Chief Justice; P. N. Bhagwati has observed that "the Supreme Court has developed several new commitments It has carried forward participative justice. It has laid just standards of procedure. It has made justice more accessible to citizens."
- The Supreme Court in India has been instrumental in the deliverance of relief to the poor and other underprivileged sections of society.
- It has also provided relief for the under-trial prisoners, licensed rickshaw pullers etc.
- It has been successful in the release of women from the clutches of those indulging in promoting immoral traffic.
- It has tried to lay down that except in serious cases, bail must be granted on personal bond.
- Again, it was on the insistence of the courts that free legal aid was strengthened.
- The Supreme Court has also allowed monetary compensation for administrative wrongs & violation of the citizens fundamental rights.
- It is, therefore, clear that the judiciary has made very serious attempts for dispensing social & economic justice to the masses despite of its inherent limitations.
- It is in this manner that it has been able to put pressure on the legislature and the executive to initiate and implement many major policies.
- The socio-economic change cannot be brought about only through public interest litigation.
- It is an arduous task which the social activists must carry forward. The administration has to be imbibed with a missionary zeal for achieving this objective.
- It is more so because the major responsibility for framing & implementing policies relating to the socio-economic welfare of the masses rests with the govt.
- The govt, in modern times, has to perform not only a magnitude of functions but has to deal with the complexities & technical nature of functions.
- In the sphere of policy making, govt is helped by the legislature, executive, the judiciary, political parties, interest groups, media & public opinion.
- The judiciary being the sole guardian of the Constitution, ensures that none of its provisions is contravened by the legislative, executive or administrative actions.
- In order to achieve this goal, the judiciary tries to formulate guidelines to be' followed both by the legislature & the executive.
- In the absence of such guidelines, the courts restrain the concerned parties from contravening the constitution by the application of the Rule of Law.
- Its decisions have facilitated a comparatively smooth working of the Indian federal system.
- It has helped the govt in formulating its policies in a manner that does not dispute with the Fundamental Rights.
- The 24th and 25th Amendments were struck down in order to protect the basic structure of the Constitution (as in the Golaknath Case).
- The decisions of the courts have many a times led to the protection of private interests as was done while rejecting the Bank Nationalisation.
- Some policies are partly struck down by the courts & certain directions are issued which are mandatory for the govt to follow, as was done in the Bhopal Gas Leak Case.
- There are number of court cases in which the administration has either framed rules in a wrong way
- The cases may relate to selection, promotion, implementation of a particular scheme or consumer protection.
- Thus, it is clear that the judiciary has an important role in policy making. However, its nature and extent may vary from case to case
- In brief, the judiciary ensures:

1. That policies are framed in accordance with the provisions of the Constitution;
2. That any negligence on the part of the govt in not formulating a policy or not implementing all the provisions of a policy, is taken very seriously by the courts. In such cases specific directions are issued to the concerned authority.

3. That all policies are aimed at the protection of the national interest & are likely to increase the pace of social and economic development.
- It is clear from the above that the judicial system has a definite role, not only in influencing the process of policy making, but also in its actual preparation as it gives definite direction guidelines to the govt. Hence, it gives more acceptable tenure to the public policies.

JUDICIAL REVIEW

- The judicial review is a very important tool in the hands of the judiciary, especially in a federal system, to keep the legislature & executive measures within the framework of the Constitution.
- It is largely the outcome of the written Constitution.
- The rigid procedures for 'judicial review' may be defined as "the power of any court to hold unconstitutional any law or any official action based upon it, as illegal or void".
- Therefore, it is the power of the courts to examine the actions of the govt, so as to ensure that such actions conform to the provisions of the Constitution of the country.
- Although courts use wisdom and experience while delivering judgements, yet some mistake or error may be committed by them unintentionally.
- The Supreme Court of India is, therefore, vested with the power to review any of its own decisions or orders for rectifying the wrong, if any, in its earlier judgement.
- Such power is also necessary because there is no appeal against the judgement of the supreme Court, except in inimical cases involving the death penalty.
- The term 'judicial review' is nowhere mentioned in our Constitution but still the Supreme Court has this power as can be seen from the provisions of Article 13

ARTICLE 13 : –

- All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void.
- The states shall not make any law which takes away or abridges the rights conferred in this part and any law made in contravention of this cause shall, to the extent of contravention, be void.
- Nothing in this Article shall apply to any amendment of the Constitution made under Article 368.
- In India, the struggle between the supremacy of judicial review vs. parliamentary sovereignty in interpreting the Constitution, began soon after the commencement of the Constitution.
- One of the principle aspects of the struggle was the meaning of, and limitations on the right to property.
- The court concentrated on the meaning of compensation which, in effect, was held as the market value.
- However, the govt came with a series of amendments, especially the 24th & 25th, which made the adequacy of the compensation paid by the states for acquired private property as non-justiciable.
- The Govt did try to establish the sovereignty of the Parliament against the judicial review &, to establish the primacy of the Directive Principles of State Policy over the Fundamental Rights.
- The issue was more seriously taken by the judiciary in the famous Golaknath Case in which it held that the Parliament had no power to amend Fundamental Rights
- However, the govt amended the Constitution (24th Amendment) & gave blanket power to the Parliament for amending any part of the Constitution including the Fundamental Rights.
- The reaction of the court was very clear and assertive in its judgement in the Keshvananda Bharti Case.
- While agreeing that, Fundamental Rights were subject to amendment, the Supreme Court held that the Constitution had a 'basic structure' which could not be amended.
- Then came the 42nd amendment, a part of which gave primacy to the Directive Principles of State Policy over the Fundamental Rights, and this provision attempted to put the matter beyond the reach of the judiciary.
- However, the Supreme Court, in the Minerva Mills Case (1980) reiterated that Parliament does not have unfettered power of amendment.
- Thus, Fundamental Rights continue to have precedence over the Directive Principles of State Policy .

A POLITICAL COURT

- The Supreme Court of India is a political court in the sense that it is the final arbiter of political disputes.
- Accordingly, the political and ideological positions of judges may influence their judgments — at least on contentious political questions. Thus, concern about the ideological/political leanings of judges is perfectly justified.
- “It is a centre of political power because it can influence the agenda of political action, control over which is what power politics is in reality all about,” wrote philosopher-jurist Upendra Baxi.
- The Court is routinely drawn into the politics of the establishment as well as the politics of the Opposition.

CASES :- COURT ACTING LIKE A POLITICAL COURT

- Any number of examples can be cited: the Hindutva judgment (1996) (Manohar Joshi vs Nitin Bhaurao Patil) was a big boost & legitimised the ruling party’s ideological position.

- So too ADM Jabalpur (1976) to the Indira Gandhi government.
- S.R. Bommai (1994) that had upheld the dismissal of the BJP governments in Madhya Pradesh, Rajasthan and Himachal Pradesh after the demolition of the Babri Masjid, on the ground of secularism as the basic structure, was a big victory for the Congress.
- The Rafale verdict in 2018 which came before the general election in 2019 was a big political boost for the government.
- The final judgment in the Ayodhya case (2019) too had huge political significance.
- Similarly, though there was nothing much in the Pegasus order (2021) of the Chief Justice of India (CJI) N.V. Ramana, on constituting an independent probe, it was still presented as a big setback for the govt & a huge political victory for the Opposition
- Governments do take into account the ideological leanings of judges. On May 12, 1973, in a speech in Parliament, M. Kumaramangalam, Mrs. Gandhi's cabinet colleague, audaciously defended the appointment of the CJI (Justice A.N. Ray . He said: "We had to take into account what was a judge's basic outlook on life
- There were judges with left, centrist and right ideological leanings.
- The left-leading Justice V.R. Krishna Iyer was a Minister in the communist government in Kerala.
- Justice Baharul Islam was an elected member of the Rajya Sabha representing the Congress. He was first appointed as Guwahati High Court judge and, was appointed as Supreme Court judge by the Indira Gandhi government.
- CJI Subba Rao was the Opposition candidate in a presidential election.
- Justice Guman Mal Lodha had rightist leanings and subsequently thrice won the Lok Sabha election on the BJP ticket.
- Justice K.S. Hegde even became Speaker in the Janata government.
- Justice Vijay Bahuguna was Chief Minister of Uttarakhand.
- But fortunately, many govt-appointed judges were able to assert their independence; barring a few exceptions
- Even in the pre-collegium days, governments generally used to go by the CJI's recommendations. Of the 547 appointments made between January 1, 1983 and April 10, 1993, the CJI's views were ignored only in seven.
- The collegium system has not drastically improved the situation as the govt continues to have the final word in the judicial appointments.
- Since the govt does have a veto power in practice in spite of the Memorandum of Procedure laying down that the govt would be bound to appoint a judge if his/her name is reiterated by the collegium, it is better to include the Union Law Minister in the collegium (just as in several other countries).
