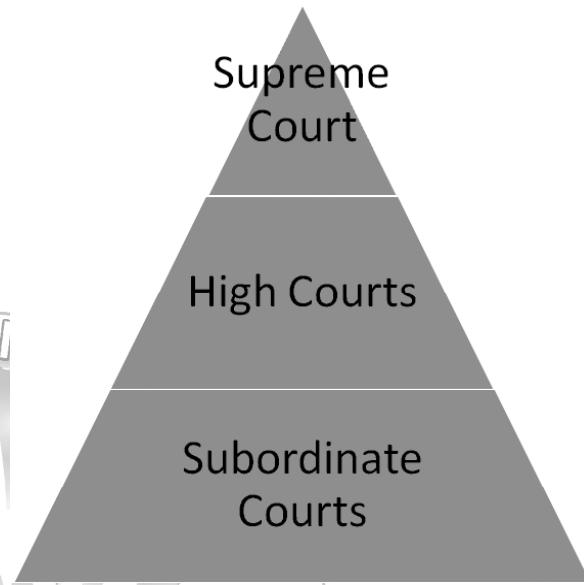


THE JUDICIARY

India has one of the oldest legal systems in the world. Its law and jurisprudence stretches back into the centuries, forming a living tradition which has grown and evolved with the lives of its diverse people. India's commitment to law is created in the Constitution which constituted India into a Sovereign Democratic Republic, containing a federal system with Parliamentary form of Government in the Union and the States, an independent judiciary, guaranteed Fundamental Rights and Directive Principles of State Policy containing objectives which though not enforceable in law are fundamental to the governance of the nation.

One of the unique features of the Indian Constitution is that, notwithstanding the adoption of a federal system and existence of Central Acts and State Acts in their respective spheres, it has generally provided for a single integrated system of Courts to administer both Union and State laws. At the apex of the entire judicial system, exists the Supreme Court of India below which are the High Courts in each State or group of States. Below the High Courts lies a hierarchy of Subordinate Courts. Panchayat Courts also function in some States under various names like Nyaya Panchayat, Panchayat Adalat, Gram Kachheri, etc. to decide civil and criminal disputes of petty and local nature. Different State laws provide for different kinds of jurisdiction of courts. Each State is divided into judicial districts presided over by a District and Sessions Judge, which is the principal civil court of original jurisdiction and can try all offences including those punishable with death. The Sessions Judge is the highest judicial authority in a district. Below him, there are Courts of civil jurisdiction, known in different States as Munsifs, Sub-Judges, Civil Judges and the like. Similarly, the criminal judiciary comprises the Chief Judicial Magistrates and Judicial Magistrates of First and Second Class.



SUPREME COURT

On the 28th of January, 1950, two days after India became a Sovereign Democratic Republic, the Supreme Court came into being. The inauguration took place in the Chamber of Princes in the Parliament building which also housed India's Parliament, consisting of the Council of States and the House of the People. It was here, in this Chamber of Princes that the Federal Court of India had sat for 12 years between 1937 and 1950. This was to be the home of the Supreme Court for years that were to follow until the Supreme Court acquired its own present premises.

The inaugural proceedings were simple but impressive. They began at 9.45 a.m. when the Judges of the Federal Court - Chief Justice Harilal J. Kania and Justices Saiyid Fazl Ali, M. Patanjali Sastry, Mehr Chand Mahajan, Bijan Kumar Mukherjea and S.R. Das - took their seats. In attendance were the Chief Justices of the High Courts of Allahabad, Bombay, Madras, Orissa, Assam, Nagpur, Punjab, Saurashtra, Patiala and the East Punjab States Union, Mysore, Hyderabad, Madhya Bharat and Travancore-Cochin. Along with the Attorney General for India, M.C. Setalvad were present the Advocate Generals of Bombay,



Madras, Uttar Pradesh, Bihar, East Punjab, Orissa, Mysore, Hyderabad and Madhya Bharat. The Prime Minister, other Ministers, Ambassadors and diplomatic representatives of foreign States, a large number of Senior and other Advocates of the Court and other distinguished visitors were also present.

Taking care to ensure that the Rules of the Supreme Court were published and the names of all the Advocates and agents of the Federal Court were brought on the rolls of the Supreme Court, the inaugural proceedings were over and put under part of the record of the Supreme Court.

After its inauguration on January 28, 1950, the Supreme Court commenced its sittings in a part of the Parliament House. The Court moved into the present building in 1958. The building is shaped to project the image of scales of justice. The Central Wing of the building is the Centre Beam of the Scales. In 1979, two New Wings - the East Wing and the West Wing - were added to the complex. In all there are 15 Court Rooms in the various wings of the building. The Chief Justice's Court is the largest of the Courts located in the Centre of the Central Wing.

The original Constitution of 1950 envisaged a Supreme Court with a Chief Justice and 7 puisne Judges - leaving it to Parliament to increase this number. In the early years, all the Judges of the Supreme Court sat together to hear the cases presented before them. As the work of the Court increased and arrears of cases began to cumulate, Parliament increased the number of Judges from 8 in 1950 to 11 in 1956, 14 in 1960, 18 in 1978 and 26 in 1986. As the number of the Judges has increased, they sit in smaller Benches of two and three - coming together in larger Benches of 5 and more only when required to do so or to settle a difference of opinion or controversy.

ESTABLISHMENT AND CONSTITUTION OF SUPREME COURT

The **Supreme Court of India** is the highest court of the land as established by Part V, Chapter IV of the Constitution of India. According to the Constitution of India, the role of the Supreme Court of India is that of a federal court, guardian of the Constitution and the highest court of appeal.

According to **Article 124 (2)** Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.

Note: The Parliament has passed a *Constitution Amendment Bill* which provides for a National Judicial Appointment Commission. The Commission has to give recommendation on the appointment of the judges of the Supreme Court and the High Courts and the transfer of the Judges of the High Court.

The Act is under Judicial Review

Qualification of the Judges

According to **Article 124(3)** a person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and—

- (a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or
- (b) has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
- (c) is, in the opinion of the President, a distinguished jurist.

Appointment of Acting Chief Justice

According to Article 126 When the office of Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

Appointment of Ad Hoc Judges

According to Article 127(1) if at any time there should not be a quorum of the Judges of the Supreme Court available to hold or continue any session of the Court, the Chief Justice of India may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, request in writing the



attendance at the sittings of the Court, as an ad hoc Judge, for such period as may be necessary, of a Judge of a High Court duly qualified for appointment as a Judge of the Supreme Court to be designated by the Chief Justice of India.

Attendance of Retired Judges at Sittings of the Supreme Court

According to Article 128, the Chief Justice of India may at any time, with the previous consent of the President, request any person who has held the office of a Judge of the Supreme Court or of the Federal Court or who has held the office of a Judge of a High Court and is duly qualified for appointment as a Judge of the Supreme Court to sit and act as a Judge of the Supreme Court, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that Court:

Provided that nothing in this article shall be deemed to require any such person as aforesaid to sit and act as a Judge of that Court unless he consents so to do.

Supreme Court to be a Court of Record

According to Article 129, the Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

Note: A Court of Records is that court which fulfills two conditions- firstly, its judgement is of evidentiary value in all the courts within the territory of India and secondly, it has the power to punish the individuals for its contempt.

Seat of Supreme Court

According to Article 130, the Supreme Court shall sit in Delhi or in such other place or places, as the Chief Justice of India may, with the approval of the President, from time to time, appoint.

Removal of The Judges Of Supreme Court

Article 124 (4) provides for the removal of a judge of Supreme Court. It states that a judge of the Supreme Court is removed by the President upon the passage of resolution by both the houses of the Parliament supported by not less than 2/3 of

the members present and voting and by a majority of the house on the grounds of proved misbehavior or incapacity.

Article 124 (4) is an incomplete provision. **Article 124 (5)** authorizes the Parliament to regulate by law providing for the procedure for the introduction of the resolution and the proof of misbehavior or incapacity. Accordingly, the parliament enacted the Judges (Inquiries) Act, 1967. The act contains the procedure to be adopted for the passage of resolution in the Parliament.

The resolution can be introduced in either House of the Parliament. However, for its introduction in the Lok Sabha, it should be supported by not less than 100 members of the House and if it is introduced in the Rajya Sabha, it must be supported by not less than 50 members of the House. After its proper introduction the presiding officer shall appoint a Judicial Committee to investigate charges against the judge. The committee is headed by a sitting judge of the Supreme Court. The second member can be a sitting Judge of either the Supreme Court or High Court and the third member can be an eminent jurist. The concerned judge has the right to defend himself before the judicial committee. After the presentation of the report of the Committee, both the houses can pass the resolution by the majority mentioned under Article 124(4). On the passage of the resolution, the president can remove the concerned judge.

Till this day there has been a solitary case of a judge being forced to resign because of sharp public opinion with even a threat of removal if he did not resign — that of Justice Imam of the Supreme Court who had, while on the Bench, suffered from physical disability.

In regard to investigation and proof of misbehaviour alleged against Justice V. Ramaswami of the Supreme Court, a three-member committee was appointed under the Judges (Inquiry) Act. It comprised Justice P. B. Sawant of the Supreme Court as presiding officer, P. D. Desai, Chief Justice, Bombay High Court and Justice O. Chinnappa Reddy, former judge of the Supreme Court, as members. This committee unanimously found the charges levelled against Justice V. Ramaswami proved but the motion for his removal in the Lok Sabha failed because of political



considerations. The enquiry committee indicted the sitting Supreme Court judge but Parliament absolved him. Thus the removal of a Supreme Court judge by parliamentary process was unsuccessful in the only case brought before Parliament so far.

Note: *The procedure used for the removal of a judge of the Supreme Court and the High Courts is the same.*

Jurisdiction of the Supreme Court

The Supreme Court has original, appellate, writ, advisory and revisory jurisdiction.

Original Jurisdiction: The original jurisdiction of the Supreme Court is federal in nature. Its exclusive original jurisdiction extends to any dispute between the Government of India and one or more States or between the Government of India and any State or States on one side and one or more States on the other or between two or more States.

According to **Article 131**, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute—

- (a) between the Government of India and one or more States; or
- (b) between the Government of India and any State or States on one side and one or more other States on the other; or
- (c) between two or more States, and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends;

Appellate Jurisdiction: The appellate jurisdiction of the Supreme Court can be invoked by a certificate granted by the High Court concerned under Article 132(1), 133(1) or 134 of the Constitution in respect of any judgement, decree or final order of a High Court in both civil and criminal cases, involving substantial questions of law as to the interpretation of the Constitution. Appeals also lie to the Supreme Court in civil matters if the High Court concerned certifies: (a) that the case involves a substantial question of law of general importance, and (b) that, in the opinion of the High Court, the said question needs to be decided by the Supreme Court. In criminal cases, an appeal lies to the Supreme Court if the High Court (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to imprisonment for life or for a period

of not less than 10 years, or (b) has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial convicted the accused and sentenced him to death or to imprisonment for life or for a period of not less than 10 years, or (c) certified that the case is a fit one for appeal to the Supreme Court. Parliament is authorized to confer on the Supreme Court any further powers to entertain and hear appeals from any judgement, final order or sentence in a criminal proceeding of a High Court.

The Supreme Court has also a very wide appellate jurisdiction over all Courts and Tribunals in India in as much as it may, in its discretion, grant special leave to appeal under Article 136 of the Constitution from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in the territory of India.

Writ Jurisdiction: **Article 32** of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari to enforce them. The Supreme Court has been conferred with power to direct transfer of any civil or criminal case from one State High Court to another State High Court or from a Court subordinate to another State High Court. The Supreme Court, if satisfied that cases involving the same or substantially the same questions of law are pending before it and one or more High Courts or before two or more High Courts and that such questions are substantial questions of general importance, may withdraw a case or cases pending before the High Court or High Courts and dispose of all such cases itself. Under the Arbitration and Conciliation Act, 1996, International Commercial Arbitration can also be initiated in the Supreme Court.

Advisory Jurisdiction: The Supreme Court has special advisory jurisdiction in matters which may specifically be referred to it by the President of India under Article 143 of the Constitution. The advice of the Supreme Court is not binding on the President. The Supreme Court is also not bound to give its advice.

In a special reference made by the President in respect of the Ram Janma Bhumi-Babri Masjid, the



question referred to the Supreme Court was: "Whether a Hindu temple or any Hindu religious structure existed prior to the construction of the Ram Janma Bhumi-Babri Masjid (including the premises of the inner and outer courtyards of such structure) in the area on which the structure stood?". The Supreme Court declined to answer the reference and returned the same

Revisory Jurisdiction: Article 137 provides: "*Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgement pronounced or order made by it.*"

The power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication.

Under Order XL of the Supreme Court Rules the Supreme Court may review its judgment or order but no application for review is to be entertained in a civil proceeding except on the grounds mentioned in Order XLVII, Rule 1 of the Code of Civil Procedure and in a criminal proceeding except on the ground of an error apparent on the face of the record

In other words the Supreme Court enjoys the power to revise its own judgments direction or orders and incorporate the necessary changes keeping in view the socio-economic changes of society. The legal position is that, the decision of Supreme Court is binding on all the courts but the Supreme Court itself is not bound by its own decision.

Doctrine of stare Decisis

Article 141 provides: "*The law declared by the Supreme Court shall be binding on all Courts within the territory of India.*"

Article 141 incorporate, what is known in English law, 'the doctrine of stare decisis'. The doctrine envisages that the lower courts are bound by the decisions of the higher courts. Article 141 gives a constitutional status to the theory of precedents according to which the judicial decisions are considered to have binding force for the future. However, law laid down by the Court, on the basis of wrong confession or admission does not constitute a binding precedent.

Doctrine of Prospective Overruling

The doctrine of prospective overruling originated from the American judicial system. It was for the first time laid down by Cardozo J. and Learned Hand J. The doctrine aims at Overruling a precedent without causing a retrospective effect. The concept of prospective

Overruling is now an integral part of legal systems world over. The basic meaning of prospective overruling is to construe an earlier decision in a way so as to suit the present day needs, but in such a way that it does not create a binding effect upon the parties to the original case or other parties bound by the precedent. The use of this doctrine overrules an earlier laid down precedent with effect limited to future cases and all the events that occurred before it are bound by the old precedent itself. In simpler terms it means that the court is laying down a new law for the future.

The concept of the Doctrine of Prospective Overruling has now been accepted in its full form in India. This doctrine was for the first time applied in *India Golak Nath. v/s .State of Punjab*. The court overruled the decisions laid down in *Sajjan Singh v/s State of Rajasthan* and *Shankari Prasad v/s Union of India*. The honorable Judges of Supreme Court of India laid down its view on this doctrine in a very substantive way, by saying—"The doctrine of prospective overruling is a modern doctrine suitable for a fast moving society. It does not do away with the doctrine of stare decisis but confines it to past transactions. While in strict theory it maybe said that doctrine involves the making of law, what the court really does is to declare the law but refuse to give retroactivity to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely, that a court finds the law and that it does make the law but restricts its operation to the future. It enables the court to bring about a smooth transition by correcting its errors without disturbing the impact of those errors on past transactions. By the application of this doctrine the past maybe preserved and the future protected."

However the Supreme Court gave certain restrictions to the usage of the doctrine of



Prospective Overruling. The court said that this doctrine can only be used by the Apex court and it would be applicable only to the laws and cases relating to the Constitution of India. It was further added that this doctrine is nowhere against the Constitution and Articles 32,141 and 142 of the Constitution of India give Supreme Court the power to declare "the law and the term declare is a very wide meaning term. By not giving retrospective effect to the above mentioned case the court certainly saved the parties bound by it from a lot of chaos and injustice. It was also stated that giving or not giving a retrospective effect to the overruled precedent is to be left on the learned Judges depending on the facts of the case.

HIGH COURTS

Chapter V of Part VI of the Constitution provides for the provisions for the High Courts. **Article 214** holds that there shall be a High Court for each State. The High Court stands at the head of a State's judicial administration. There are 24 High Courts in the country, four having jurisdiction over more than one State. Among the Union Territories Delhi alone has a High Court of its own. Other six Union Territories come under the jurisdiction of different State High Courts. According to Article 216, each High Court comprises of a Chief Justice and such other Judges as the President may, from time to time, appoint.

Some important points to remember

- ❑ The Allahabad High Court originally known to be established at Agra. Shifted to Allahabad in 1875.
- ❑ Lahore High Court established in 21-3-1919. Jurisdiction covered undivided Punjab and Delhi. In 11-8-1947 a separate High Court of Punjab was created with its seat at Simla under the Indian Independence Act, 1947 which had jurisdiction over Punjab, Delhi and present Himachal Pradesh and Haryana. In 1966 after the reorganisation of the State of Punjab, the High Court was designated as the High Court of Punjab and Haryana. The Delhi High Court was established on 31-10-1966 with its seat at Simla.

- ❑ Originally known as the High Court of Assam and Nagaland, renamed as Guwahati High Court in 1971 by the North East Areas (Reorganisation) Act, 1971.
- ❑ Originally known as Mysore High Court, renamed as Karnataka High Court in 1973.
- ❑ High Court established at Ernakulam by an Ordinance of 1948. This was repealed by the Travancore-Cochin High Court Act, 1949. The State then came to be known as Kerala. The Kerala High Court Act, 1958 laid down the powers, jurisdiction and authority of the Kerala High Court.
- ❑ Under the Government of India Act, 1935 by a Letters Patent dated 2-1-1936 a High Court was established at Nagpur for the Central Provinces. After the reorganisation of States, this High Court was shifted to Jabalpur in 1956.
- ❑ Originally known as Punjab High Court, renamed as Punjab & Haryana High Court in 1966.

Appointment of the Judges

The Chief Justice of a High Court is appointed by the President in consultation with the Chief Justice of India and the Governor of the State. The procedure for appointing puisne Judges is the same except that the Chief Justice of the High Court concerned is also consulted.

According to **Article 217(1)** Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting Judge, as provided in article 224, and in any other case, until he attains the age of sixty-two years.

The National Judicial Appointment Commission has to give recommendation on the appointment of the Judges of a High Court.

Qualification of the Judges

According to **Article 217 (2)**, a person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and

- (a) has for at least ten years held a judicial office in the territory of India; or



(b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession.

Restriction on practice after being a permanent Judge

Article 220 puts restriction on practice after being a permanent Judge. This Article reads as, "No person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court shall plead or act in any court or before any authority in India except the Supreme Court and the other High Courts."

Article 222 provides for the provisions regarding the transfer of a Judge from one High Court to another. According to Article 222 (1) The President may, after consultation with the Chief Justice of India, transfer a Judge from one High Court to any other High Court.

Appointment of Acting Chief Justice

According to Article 223, when the office of Chief Justice of a High Court is vacant or when any such Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

Appointment of Additional and Acting Judges

According to Article 224(1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify.

According to Article 224(2) When any Judge of a High Court other than the Chief Justice is by reason of absence or for any other reason unable to perform the duties of his office or is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties.

Appointment of Retired Judges at Sittings of High Courts

According to Article 224A, the Chief Justice of a High Court for any State may at any time, with the previous consent of the President, request any person who has held the office of a Judge of that Court or of any other High Court to sit and act as a Judge of the High Court for that State, and every such person so requested shall, while so sitting and acting, be entitled to such allowances as the President may by order determine and have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a Judge of that High Court.

Jurisdiction of the High Court

The High Court has original, appellate, writ, and supervisory jurisdictions.

Original Jurisdiction: The original jurisdiction of the High Court is in cases related to probate matrimonial, cases of admiralty and contempt of courts.

Appellate Jurisdiction: The appellate jurisdiction is over the decisions of subordinate courts and also over the decision of a single judge bench of the High Court.

Writ Jurisdiction: Under Article 226 of the Constitution gives an extensive original jurisdiction to the High Court in regard to enforcement of Fundamental Rights as well as other legal rights of the citizens. It is empowered to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari to enforce them.

Supervisory Jurisdiction: Articles 227, 228 and 235 provides for the provisions regarding the supervisory jurisdiction of a High Court.

Article 227 confers Power of superintendence over all courts by the High Court. Article 227(1) holds that every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

Article 227 (2) holds that without prejudice to the generality of the foregoing provision, the High Court may—

- (a) call for returns from such courts;



- (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and
- (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

Article 228 empowers the transfer of certain cases

to High Court: This Article states that if the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may—

- (a) either dispose of the case itself, or
- (b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

According to **Article 235** the control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

High Court as a Court of Record

According to Article 215, "Every High Court shall be a court of record and shall have all the powers of such a Court including the power to punish for contempt of itself".

Article 215 is identical with Article 129 which declares the Supreme Court as a Court of Record. The scope and nature of the power of the High Court under Article 215 is therefore similar to the powers of Supreme Court under Article 129.

PUBLIC INTEREST LITIGATION AND JUDICIAL ACTIVISM

The Executive, the legislature and the judiciary are the three wings of the Indian democracy. The constitution empowers them and burdens them with duties at the same time. The legislature formulates the law, and the judiciary interprets it. Simple as it may sound, studying the ambit of the words "formulation" and "interpretation" can actually leave the best in the business confused. Most believe that the judiciary, under the guise of interpreting the law, goes a step beyond, and ends up giving the country new binding law, which is usually different from the existing one. This is called judicial activism.

In the contemporary era, it is felt that the legislature and the executive have failed to discharge their respective duties. Ideally the legislature and the executive are the custodian of honest public life. They should indeed remove the mask which the corrupt and the inefficient wear and they are the ones who should initiate action against those who steal, cheat or deceive. But when the custodians themselves compromise with corruption and inefficiency, the judiciary has to step in. The power of judicial activism sets no limit for itself. It punishes officials and demoralizes the bureaucracy as a class, pulls up and injects the Election commission of India, monitors the quantum of rainfall and irrigation waters, regulates admission to professional colleges, order the closure of fume emitting factories, calls up data on deforestation, orders CBI inquiry into scandals, crimes and custodial deaths, grants promotions as well as increment to officials, Restrains and Censors human rights violations and what not but stops short of Imposing taxes.

The Judicial activism in India started with the Public Interest Litigation movement. Although the proceedings in the Supreme Court arise out of the judgments or orders made by the Subordinate Courts including the High Courts, but of late the Supreme Court has started entertaining matters in which interest of the public at large is involved and the Court can be moved by any individual or group of persons either by filing a Writ Petition at the Filing Counter of the Court or by addressing a letter to Hon'ble the Chief Justice of India highlighting the question of public importance for invoking this jurisdiction. Such concept is



popularly known as 'Public Interest Litigation' and several matters of public importance have become landmark cases. This concept is unique to the Supreme Court of India only and perhaps no other Court in the world has been exercising this extraordinary jurisdiction. A Writ Petition filed at the Filing Counter is dealt with like any other Writ Petition and processed as such. In case of a letter addressed to Hon'ble Chief Justice of India the same is dealt with in accordance with the guidelines framed for the purpose.

The PIL is a strategic arm of the legal aid movement and is intended to bring justice within the reach of the poor masses. It is a device to provide justice to those who individually are not in a position to have access to the courts. It was initiated for the benefit of a class of people who had been denied their Constitutional and legal rights because they were unable to have access to the courts on account of their socio-economic disabilities.

The term PIL originated in the United States in mid-1960's. PIL had begun in India towards the end of 1970s and came into full bloom in the 1980s. The term PIL was for the first time used by Justice V.R. Krishna Iyer and Justice P.N. Bhagwati in the Fertilizer Corporation Kamagar Union v/s Union of India case, 1981.

Some of the important issues that can be covered under the Public Interest litigation are as follows:

1. The matters related to basic amenities such as roads, water, medicines electricity, preliminary School, primary health centre etc.
2. Rehabilitation of displaced persons.
3. Identification and rehabilitation of bonded and child labourers.
4. Illegal detention of arrested person.
5. Torture of persons in police custody.
6. Custodial deaths.
7. Jail reforms
8. Speed trial of the under trials.
9. Police atrocities.
10. Atrocities against Schedule Castes and Schedule Tribes.
11. Neglect of inmates of government welfare homes.
12. Corruption charges against public servants.

13. Legal aid to the poor.
14. Starvation deaths.
15. Indecent Television Programmes.
16. Environment Pollution.
17. Protection of pavement and slum dwellers.
18. Dowry deaths.
19. Implementation of welfare laws.

The judgment of the majority in the *Keshavananda Bharati case* was the high-water mark of judicial activism in India. For the first time a court held that a constitutional amendment duly passed by the legislature was invalid as damaging or destroying its basic structure. This was a gigantic innovative judicial leap unknown to any legal system. The masterstroke was that the judgment could not be annulled by any amendment to be made by Parliament because the basic structure doctrine was vague and amorphous. The judgment was severely and passionately criticized by the executive and many eminent lawyers. The immediate response of the executive was the supercession of three senior-most judges (Justices Shelat, Hegde, and Grover) while the fourth Judge Justice A.N. Ray who had decided all major cases in favour of the Government was appointed Chief Justice. However, the critics were soon silenced. The excesses of the Internal Emergency of 1975 completely legitimized this judgment and one of its severest critics the great jurist H.M. Seervai changed his views.

Judicial activism earned a human face in India by liberalizing access to justice and giving relief to disadvantaged groups and the have-nots under the leadership of Justices V.R. Krishna Iyer and P.N. Bhagwati. The Supreme Court gained in stature and legitimacy. Later, when the independence of the judiciary was threatened by punitive transfers, the court entered the arena of judicial appointments and transfers. With the increasing criminalization and misgovernance and the complete apathy of the executive, the court (under the leadership of Chief Justice Verma and Justices Bharucha and Sen) took up the case of terrorist funding linked to political corruption through the 'hawala' route in the *Vineet Narain Case* (*Jain hawala Case*). A cover-up by the Central Bureau of Investigation to protect its political masters was exposed and the court monitored the investigation upholding the principle "Be you ever



so high the law is above you." During the hearing there were reports that Prime Minister P.V. Narasimha Rao was interfering with the investigation and the court passed an interim order on March 1, 1996. It directed "that the CBI would not take any instructions from, report to or furnish any particulars thereof to any authority personally interested in or likely to be affected by the outcome of the investigation into any accusation. This direction applied even in relation to any authority which exercises administrative control over the CBI by virtue of the office he holds, without any exception." In substance Prime Minister Rao was forbidden from exercising control over the CBI in relation to that case. It was a bold and courageous order and carried judicial activism to hitherto unscaled heights. The fallout of the case was resignations following initiation of prosecutions against high profile political personalities including three Cabinet Ministers, two Governors, and the Leader of the Opposition. In the next general election the ruling Congress lost power.

The courts on several occasions have issued directions in public interest litigation (PIL) covering a wide spectrum such as road safety, pollution, illegal structures in VIP zones, monkey menace, dog menace, unpaid dues by former and serving legislators, nursery admissions, and admissions in institutions of higher learning. There is no doubt that sometimes these orders are triggered by righteous indignation and emotional responses.

The common citizens have discovered that the administration has become so apathetic and non-performing and corruption and criminality so widespread that they have no recourse except to move the courts through PIL, enlarging the field for judicial intervention. If a citizen's child is attacked by a stray dog or cattle roam the streets or hospitals suffer from monkey menace and nothing is done, should not the court intervene?

The great contribution of judicial activism in India has been to provide a safety valve in a democracy and a hope that justice is not beyond reach. Judicial activism has come to stay in India and will prosper as long as the judiciary is respected and is not undermined by negative perceptions, which have overtaken the executive and the legislature. There

is concern among the public about lack of transparency in judicial appointments and a sense of increasing unease because of a lack of a credible mechanism to deal with serious complaints against the higher judiciary.

The plants slowly nurtured by judicial craftsmanship have grown into sturdy trees and have blossomed with colourful and fragrant flowers. Judicial activism has added much needed oxygen to a gigantic democratic experiment in India by the alchemy of judico-photosynthesis.

Today PIL has acquired the title of "Personal Interest litigation" or "Publicity Interest litigation". This title has been used by many to question the motivation of the judges, lawyers and journalists who pursued this technique of litigation. Sometimes it is alleged that proponents of PIL were propounding it more for their personal publicity and less for the weaker sections. The entertaining of PIL cases and their outcome depend very much on a particular bench of judges and their socio-political ideology. The social activists and the lawyers are not willing to spend energy, time and money to collect relevant facts and to present them to the courts in a systematic and proper manner. Moreover, the PIL is still a Supreme Court phenomena and it has not taken deep roots at the High Court level.

The most serious judicial shortcoming is excruciating slowness. Because of a large number of cases coming to the higher judiciary through PIL, traditional litigation is suffering. In 1982, Justice V.R. Krishna Iyer famously remarked that "Once you start litigation, please execute a will, naming the person who will continue the case in court." The number of cases pending in India's courts runs into tens of millions. I do not know the most recent statistics. But when I last did the research several years ago, the Supreme Court of India was accepting 1000 times as many cases per year as its U.S. counterpart. It should be more selective and avoid becoming mired in judicial trivia, taking up only the really significant cases and dealing with those in depth.

The success of the Public Interest Litigation will depend upon the judiciary's appreciation of the State as a welfare state and the willingness on the



part of the state to implement the Constitutional mandate. There is a need for establishing PIL cell in the high Courts and a bench of judges may be given the charge of PIL matters. The cases filed through PIL should be based on substantive evidences. The petitioners before filing litigation should also look for other remedial measures to solve the problem. To ensure the effective implementation of its judgments, the courts should make monitoring committees to ensure its implementation. To discourage non-serious or false petitioners, fine or punishment can be imposed on the concerned individual.

The judiciary is the guardian of the Constitution. It is the interpreter of the Constitution. The Parliament, the state legislatures and the executive are the creatures of the Constitution and the judiciary has the moral duty to correct their aberrations if at times they cross their limits or do not discharge three functions as defined in the Constitution. It is a matter of great regret that the Supreme Court has to intervene in every matter, because morality has taken a back seat. Judicial activism is a welcome step. It has led to eradication of many problems in the society, but it should not be a permanent affair. The judiciary should practice auto-limitation and should try to maintain and respect the principle of separation of powers. The need of the hour is restraint and conformity to the letter and spirit of the Constitution, both by the judiciary and the politicians. This will make the Indian democracy a successful democracy. The great contribution of judicial activism in India has been to provide a safety valve in a democracy and a hope that justice is not beyond reach. Judicial activism has come to stay in India and will prosper as long as the judiciary is respected and is not undermined by negative perceptions, which have overtaken the executive and the legislature. There is concern among the public about lack of transparency in judicial appointments and a sense of increasing unease because of a lack of a credible mechanism to deal with serious complaints against the higher judiciary.

SUBORDINATE JUDICIARY

Appointment of District Judges

Clause (1) of Article 233 provides for the

appointment of district judges. It provides that the "*appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State*".

Clause (2) says that "*a person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment*".

It thus follows that the appointment, posting and promotion of District Judges are to be made by the Governor in consultation with the High Court.

Article 235, (as already discussed under supervisory jurisdiction of High Courts), vests with the High Court, the control over District Court and Courts subordinate thereto including the posting and promotion of and grant of leave, to persons belonging to the judicial service of a state.

According to Article 236(a) the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions Judge;

In view of the setting up of a number of specialized courts exercising different categories of civil jurisdiction, it has been held that the term "District Judge" would be given a wide interpretation so as to include the hierarchy of specialized Civil Courts such as a hierarchy of Labour Courts and Industrial Courts.

Clause (b) of Article 236 defines the expression "judicial service" to mean a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

Reading Articles 233 to 236 together, it follows:

- That the initial appointment and initial promotion of persons to be either District Judge or any of the categories included in it (Article 236) is a matter coming under Article 233 and the power therefore is vested in the



- Governor, acting in consultation with the High Court.
- That further promotion of District Judges shall be matter vested with the High Court under Article 235.
 - Article 234 provides for the recruitment of persons other than District Judges to the judicial services of a State, the power for this purpose is vested in the Governor to frame rules after consultation with the State Public Service Commission.
 - However, the power of appointment under Article 234 does not include the power to confirm and promote judicial officers other than District Judges, which is vested in the High Court under Article 235.

Application to Chapter VI to Certain Class of Magistrates (Article 237)

Article 237 empowers the Governor to direct by public notification that the provision of Chapter VI relating to Subordinate Courts and any rules made thereunder shall apply in relation to any class or classes of Magistrates in the State as they apply in relation to persons appointed to the judicial service of the State. The Governor may provide for exceptions and modifications subject to which the provisions or the rules shall be so applicable.

A Special Court- Whether Subordinate to High Court?

The question as to whether a Special Court constituted under a Statute is a Court subordinate to the High Court, was considered by a bench of seven judges of the Supreme Court in **Re The Special Courts Bill, 1978**. The apex Court by majority, ruled that the special Courts to be established under the impugned Statute were not be subordinate to the High Court. Speaking on behalf of the majority, Justice Chandrachud observed:

"It is true that the Special courts created by the Bill will not have the constitutional status which High Courts have because such Courts are not High Courts as envisaged by the Constitution... It is also true that the Special Courts are not District Courts within the meaning of Article 235, with the result that the control over them will not be vested in any High Court."

The above observations show that the Special Courts were not High Courts. At the same time they were not District Courts within the meaning of Article 235. This shows that the control over the Special Courts did not vest in the High Courts.

JUDICIAL REFORMS: NEED OF THE HOUR

The institution of judiciary and the rule of law is the essence of modern civilization and democratic governance. It is important that people's faith in judiciary and the rule of law is not only preserved but enhanced as well and simple way to achieve that is by ensuring an effective system of justice delivery.

For decades judicial system has been crying for reforms as the cheap and speedy justice has been by and large elusive. There is a huge pendency of over 2.5 crore cases despite measures to reduce it. Experts have expressed fears that there has been a loss of public confidence in the judiciary, and an increasing resort to lawlessness and violent crime to settle disputes. They feel that public confidence in the judiciary must be restored immediately, in order to arrest and reverse this negative trend.

Over the last five decades various legally constituted/government authorities such as the Law Commission of India, Parliamentary Standing Committees, and other government appointed Committees, several benches of the Supreme Court, eminent lawyers and judges, various legal associations/ organizations and NGOs have identified problems in the judicial system and called for addressing them speedily. Yet, the effective implementation of many such recommendations is still pending. According to one of the Parliamentary Standing Committee on Home Affairs (2001) almost 50% of the reports of the Law Commissions awaited implementation.

The poor budgetary support to the judiciary has been alluded to as one of the reasons for non-implementation of judicial reforms. Rs.700 crore allocated to the judiciary during the 10th Plan (2002-2007) constituted 0.078 percent of the total plan outlay of Rs. 8,93,183 crore. During the Ninth Plan the allocation was even less, only 0.071percent. It has been observed that such



meager allocations are too inadequate to meet the requirements of the judiciary. It is said that India spends just 0.2 percent of the gross national product on judiciary. According to the first National Judicial Pay Commission, all states but one have been providing less than 1% of their respective budgets for subordinate judiciary which is afflicted with huge pendency.

But, lack of resources cannot be a reason for denying justice or any other fundamental right to most citizens, especially the disadvantaged sections, who "have limited access to justice, due to unclear laws and high costs that act as effective barriers". Observing that 'justice delayed is justice denied' in P. Ramachandra Rao v/s State of Karnataka case, 2002, a Constitution Bench of the Supreme Court reiterated from Hussainara Khatoon case that "It is the constitutional obligation of the State to dispense speedy justice, more so in the field of criminal law, and paucity of funds or resources is no defence to denial of right to justice emanating from Articles 21,19 and 14 and the preamble of the Constitution as also from the directive principles of State policy. It is high time that the Union of India and the various States realize their constitutional obligation and do something concrete in the direction of strengthening the justice delivery system."

Other major factors include neglect in improving judicial infrastructure over the past decades, inordinate delays in filling up vacancies of judges and very low population-to-judge ratio that require immediate attention to improve the performance of judiciary.

The 120th Law Commission Report had pointed out that India's population-to-judge ratio is one of the lowest in the world with only 10 judges for every million of its population as compared to about 150 judges for the same number in the United States and Britain. According to the 'All India Judges' Association', the Supreme Court had directed the government to increase the judge strength to 50 judges per 10 lakh population by 2007 in a phased manner, which has not been fulfilled so far.

Even for filling up of vacancies of approved strength of judges much needs to be done. It is observed that 25 percent of the judge positions remain vacant due to procedural delays. The

sanctioned strength of judges of the High Courts was 886 and working strength was 608 as on 6th January 2009 leaving 278 vacancies. Similarly, with 11,767 working strength of Subordinate Judges there were 2710 vacancies on March 1, 2007.

However, there have been measures in recent years to improve functioning of courts. For application of information and communication technology (ICT) to the justice delivery system for better management, a Scheme for computerizing all the district and subordinate courts across the country and for upgrading the ICT infrastructure of Supreme Court and High Courts was approved by the central government in February 2007 to be completed in two years at cost of Rs.442. Under the project 13,365 laptops have been provided to Judicial Officers, laser printers to about 12,600 judicial officers and eleven thousand judicial officers and 44 thousand court staff have been given training in the use of ICT tools so far. 489 district court and 896 taluka court complexes have been provided with broadband Internet connectivity. Under this Project, computer rooms are to be set up in all the court complexes in the country. The E-enabling will help the courts to function more efficiently and speed up the disposal of cases. It would also network these courts with the higher courts and thus facilitate greater accountability.

Another centrally sponsored scheme for development of infrastructure facilities including setting up of court buildings and residential accommodation for the judicial officers is under operation since 1993-1994. Rs. 286.19 crore were released to the States from 2006-07 to 2008-09 under this scheme. The outlay for the judiciary during the 11th Plan has been sought on the basis a perspective plan having projections of such requirements over a ten year period.

Meanwhile, the disposal of cases can be increased by greater use of the existing infrastructure with courts having more than one shift. Gujarat is one of the states where evening courts are functioning with appreciable results.

Fast Track Courts (FTC) recommended by 11th Finance Commission have also proved effective in addressing pendency. Keeping this in mind the government has already extended the term of 1,562



FT courts operating at sessions' level up to 31st March 2010 by providing central support to the states. As per union Law Ministry, these courts have out of 28.49 lakh transferred cases to them disposed off 21.83 lakh cases.

The Central Government proposes to set up more than five thousand Gram Nyayalayas at intermediate panchayat levels under the Gram Nyayalayas Act, 2008 in order to bring justice delivery system at the door step of rural population. The procedure to be followed by these courts has been kept simple and flexible so that these cases can be heard and disposed of within 90 days' period.

Recourse to Alternate Dispute Redressal (ADR) mechanism can greatly help in reducing pendency of cases through arbitration, negotiations, conciliation and mediation. In the United States and many other countries, ADR as dispute resolving mechanism has been highly successful. India already has Arbitration Conciliation Act 1996 and the Code of Civil Procedure has also been amended. However, the measure suffers from grossly inadequate number of trained mediators and conciliators. Both judicial officers and lawyers need to be trained with a view to grow alternate system into the mainstream of justice.

While all these measures need to be further strengthened and expanded, the reforms would have to keep in view future needs as litigation is bound to increase in future with more sections of society becoming aware about their legal rights as a consequence of the spread of education.

The government will have to take an overall view of procedural laws that allow endless interlocutory appeals and the role of 'delay lawyers' in posing impediments to resolve cases. Despite the Criminal Procedure Code (Amendment Act) 2002, bringing change in the procedure in suits and civil proceedings by way of reducing delays, the situation remains far from satisfactory. The issue of frivolous litigation will also have to be addressed and one of the ways could be by imposing heavy costs. The police investigation system needs to be strengthened and modernized that would decrease load on judiciary.

While having a holistic view of all the intricacies and nuances of the justice delivery system, its present pitfalls and fault lines will have to be considered to ensure transparency and accountability of the judicial system.

It has to be remembered that delayed justice, poor appreciation of evidence, and inability to apply constitutional and legal principles to real-life situations play havoc with people's lives.

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