

## Judiciary

Legislature, executive and Judiciary are the three organs of government. Legislature makes laws; the executive is responsible for implementing the Laws enacted by the legislature. Formulation of policies is also the task of the Executive. However, the Judiciary is a dispute settlement mechanism. Peaceful resolution of disputes is an essential feature of democracy. The Judiciary resolves disputes peacefully. Judiciary is not associated with party politics. It is an **impartial, neutral institution**, which is not associated with any party. Apart from impartiality of Judiciary it is an independent organisation of the government. Judiciary is not subordinate to the legislature or executive. The Judiciary keeps check over the functioning of the legislature and executive. Judiciary protects the principle of rule of law. Function of any agency of government should not encroach the fundamental law of the land that is the constitution. The Supreme Court is the guardian of the constitution too.

Indian constitution prescribes **these tiers of Judiciary** -

Supreme Court



High Court



District Court

Provision of administrative tribunals was also incorporated in the constitution by 42<sup>nd</sup> Constitutional amendment. Now tribunal becomes a mandatory feature of Indian democracy. In the present age of technological advancement numerous types of alternative dispute settlement mechanisms are put into place.

### **Why Independent Judiciary?**

1. Indian constitution incorporates the fundamental rights in Part-III and Supreme Court is given the responsibility of **protection of fundamental rights** under Article – 32.
2. Indian constitution is federal in nature which is based on the principle of **division of power** and in case of conflict between Union and state, the Supreme Court settles the dispute under Article – 21.
3. Indian constitution is **Written and Supreme** but it is Supreme Court who is responsible for interpreting the constitution and the landmark judgment **Kesavananda Bharati case (1973)**. Supreme Court propounded the principle of basic structure which cannot be amendment by parliament.
4. Without independence judiciary the principle of separation cannot work at all. Durga Das Basu said that no organ of the government is supreme and constitution put various limitations over every organ of the government which is defined by judiciary through the interpretation of constitution.

## Supreme Court

### **Constitution**

There shall be a Supreme Court of India, consisting of a Chief Justice of India (CJI) and not more than seven other Judges, under Article - 124. The Constitution of India mentions about 8 judges including Chief Justice of India (CJI). But Article - 124 authorises parliament to increase the number of Judges in the Supreme Court. Parliament enacted Supreme Court (Number of Judges) Act, 1956 for

raising the number of Judges in Supreme Court. According to this Act, the number of Judges increased up to 10 Judges excluding Chief Justice of India.

### **Change in Number of Judges don't need Constitutional Amendment**

After 70 years, of completion of the republic of India, constitution still mentions number of Judges 7 excluding Chief Justice of India (CJI). For the increase in the number of Judges, the Constitution needs not to be amended. Amendment in parliamentary act is required. Parliament brought about amendment 1960, and the number of Judges is gone up to 13, in 1977 again the number was raised up to 17; Number of Judges up to 26 in 1988. Parliamentary Act, 1956 was amended in 2009; consequently the number of Judges became 31. Latest amendment in Parliamentary act was incorporated in 2019; hence the present strength of Judges of the Supreme Court stands at 34. Number of Judges in the Supreme Court is not fixed, it depends upon the parliament. Number is increased with the growing workload of the Supreme Court. Presently about 69,000 cases are pending before the Supreme Court.

### **Seat of Supreme Court**

The Supreme Court shall have its seat in Delhi, according to Article - 130. The Supreme Court may sit in other places or places. Thus benches of the Supreme Court can be set up at any place in any part of India. More than one bench can also be created or provided that the Chief Justice of India may with the approval of the President. Law Commission, recommended for setting up other benches of the Supreme Court in other parts of India. But the Chief Justice of India has not agreed with the proposal. Multiple benches are helpful for better access to Justice but Chief Justice of India (CJI) shall maintain administration control over the benches.

### **Appointment of Judges**

The President shall appoint the Judge of the Supreme Court by warrant under his hand and seal. The President shall appoint Judges on the recommendation of the National Judicial Appointments Commission (NJAC). National Judicial Appointments Commission (NJAC). was created by the 99<sup>th</sup> Constitutional Amendment in 2014 by the Narendra Modi Government, Article - 124(A) is inserted. In practice Judges are not appointed by National Judicial Appointments Commission (NJAC). but Judges are appointed by Collegiums till today. Collegiums are not mentioned in the constitution. It involved conflict between the executive and Judiciary on our issue of appointment. Let us debate on the issue of appointment.

### **Original Constitution Scheme**

As per the original constitution, before the 99<sup>th</sup> amendment Article - 124(2) contained that, while appointing a Judge of Supreme Court, President shall consult the Judges of Supreme Court, President shall consult the Judges of Supreme Court and High Court which he deems fit. Appointment of other than Chief Justice of India (CJI), consultation with Chief Justice of India (CJI) is necessary. Senior most Judge of the Supreme Court became Chief Justice of India, according to evolved convention.

Appointment of Judges became disputed in 1973. First A. N. Ray, who occupied 4<sup>th</sup> position in the seniority list of Judges of Supreme Court, appointed as Chief Justice of India (CJI), these senior most judges of court namely Justice Jaishanker Manilal Shelat, Justice A. N. Grover, K. S. Hegde were superseded subsequently there senior most judges resigned from their office. There senior most Judges were penalised by the Government, because they supported the principle of Basic Structure in Kesavananda Bharati Case; although the government defended the superseding the seniority on the ground of merit in appointment. It is worth nothing that A. N. Ray always supported the stand of the government in various cases in Supreme Court including Kesavananda Bharati.

### **Primary of President**

Consultation of President with Judges is mandatory for appointment of Judges in Supreme Court. The opinion of the President ultimately prevails in case of conflict between President and

Judges of Supreme Court in the appointment. This is the verdict of the Supreme Court in S. P. Gupta Case (1982), it is popularly known as Judges 1<sup>st</sup> Case.

### **Importance to Judges by Collegium**

Supreme Court overruled Judges 1<sup>st</sup> case (1982) in Advocates on Record vs. Union of India (1993). It is popular as Judges 2<sup>nd</sup> case. Now the Supreme Court said that appointment is related to independence of Judiciary. This is a landmark case in the constitutional history of India, due to evolution of collegium. Collegiums comprise **Three Senior Most Judges** of the Supreme Court including Chief Justice of India (CJI). India became the first democratic nation, where Judges were appointed by Judges himself. Collegiums are an innovation of the Supreme Court in Judges 2<sup>nd</sup> Case. Although Chief Justice of India (CJI) became most powerful in collegiums, practically consultation does not mean consultation with Chief Justice of India (CJI) **only**.

### **Reform in Collegium**

Supreme Court expanded the collegium, which shall comprise Chief Justice of India and other four senior most Judges of Supreme Court. Supreme Court reformed the collegium in 1999 of Judges 3<sup>rd</sup> Case. More consultation with Judge Means Consultation with Collegium, Primacy of Judiciary was intact in the appointment of Judges. Now the President acts like a post office in the appointment of Judges. Decision of the collegium must be unanimous, if two Judges are having adverse opinions about any appointment recommendation shall not be sent to the President. But the opinion of Chief Justice of India (CJI) is mandatory in any decision of Collegium.

### **Drawbacks of Collegium System in India**

All the appointments in the Supreme Court are done by collegiums till today. But Judiciary itself pronounced that separation of power is the Basic Structure of the constitution. Executive is given a task to appoint according to the principle of separation of power. Judges appointed by Judges themselves goes against the basic norms of separation of power. Appointment of Judges by Judges amounts to encroachment of power of the Executive by Judiciary. This may be called Judicial Over reach.

Collegium works under the veil of secrecy. No transparency exists in the entire process of appointment. There is a lack of any objective parameter for appointment of Judges, like the number of qualitative decisions delivered by the Judges. Research paper or attendance of seminars is an example of objective criteria. Collegiums never told the reason, why some names were left out for appointment collegiums does not tell the factors behind picking up any Judges. Executive is responsible towards people. Judiciary is responsible towards none. Judiciary is a non-elected body, which cannot override the powers of the Executive. Appointment process by collegiums is known as **tyranny of the unelected**. Appointment is an administrative job, which needs a full secretariat and intelligence report too. Judiciary cannot handle this complicated process easily. Regional representation and social equation is also kept in mind while appointed by the Executive. Judiciary often neglects these factors.

### **National Judicial Appointments Commission (NJAC)**

Appointment by collegiums began in 1993 executive was never satisfied with this procedure. Executive or government hacked the number in parliament to amend the constitution. The May, 2014 election of 16<sup>th</sup> Lok Sabha was historical, landmark. BJP got the majority on its own. The 1984 election of 8<sup>th</sup> Lok Sabha was significant, when congress got landslide victory and congress 426 seats in Lok Sabha. After a span of almost 30 years, any party succeeded to get a majority in Lok Sabha. Government was determined to change the collegiums process of appointment, Government including Executive, Judiciary and political parties. National Judicial Appointments Commission (NJAC) is also looking for an appointment process that is socially inclusive. Thus the government process is socially inclusive. Thus the government brought the 99<sup>th</sup> amendment, inserted the Article - 124(A), 124(B) and 124(C) in the Constitution.

## Structure of National Judicial Appointments Commission (NJAC)

### (i) Ex-officio

National Judicial Appointments Commission (NJAC) is **comprises of-**

- Chairperson - CJI – (Ex - officio)
- Two senior Judges of Supreme Court next to CJI, as members (ex - officio).
- The Union Minister in charge of law and Justice – is also a member (ex - officio).

### (ii) Eminent Members

National Judicial Appointments Commission (NJAC) includes two eminent persons, nominated by a committee. Committee is **comprises of-**

- Prime Minister.
- Chief Justice of India.
- Leader of opposition in the House of people or leader of the single largest opposition party in the House of people.

Tenure of nominated person shall be for period of three years. They are not eligible for re-nomination. Among two persons, one of the eminent **persons belonging to-**

- Scheduled caste.
- Scheduled Tribe.
- Other backward classes.
- Minorities.
- Women.

Above mention structure display broad based appointment. However collegiums include only Judges. Social inclusion is not features of Collegium. National Judicial Appointments Commission (NJAC) fulfils representation of each sections of community specially marginalise sections of community under Article - 124(A).

## Function of National Judicial Appointments Commission (NJAC)

Commission shall recommend to President for **appointment of-**

- Chief Justice of India.
- Judges Supreme Court.
- Chief Justice of High Court.
- Other Judges of High Court.
- Recommended transfer of Chief Justice and other Judges of High Courts from on High Court to other High Court.
- Ensure that the person recommended is of ability and integrity under Article - 124(B).

National Judicial Appointments Commission (NJAC) looks for integrated method of appointment. National Judicial Appointments Commission (NJAC) shall work for the appointment of both Supreme Court as well as High Court.

## Power of Parliament to Make Laws

Function of National Judicial Appointments Commission (NJAC) does not include the procedure of appointment Judges. Seniority or merit may be a parameter is not manifested in the National Judicial Appointments Commission (NJAC) act. Parliament is empowered to enact a law, for writing down the procedure of appointment. Regulating the procedure for the discharge of its function, parliament shall make law. Constitution does not clearly spill out the quorum of decision making. Decision of National Judicial Appointments Commission (NJAC) shall be based on majority or by consensus. It is left out for parliament to determine under Article - 124(C).

## National Judicial Appointments Commission (NJAC) Ultra Vires

Supreme Court said that National Judicial Appointments Commission (NJAC) violates the principles of basic structure. Judicial independence is the Basic structure of the Constitution. Court is



of the view that appointment of Judges is not merely administrative issue, but it is related to judicial independence. In past too, appointment and transfer of Judges has been utilized against independence of Judiciary. Composition of National Judicial Appointments Commission (NJAC) is also objectionable, inclusion of Minister of Law and Justice. Presence of Political member undermines independence of Judiciary is happens to be a full fledges lawyer. Appointment of Judges of Lawyers appears an example of quid-pro quo. It simply means tit for tat, ministry of Law appoints Judges, thereafter Law Minister practiced under same Judges.

No special qualification is attached with two eminent persons; although they should have been associated with Law and Justice. Eventually Parliament shall laid-down the procedure for appointment of Judges. Thus Parliament can count seniority or merit, as a parameter for appointment of Judges. This will undermine the Judicial Independence, and pave the way for Political interference and pave the way for political interference in judicial appointment. Practically no appointment is done by National Judicial Appointments Commission (NJAC); consequently Judges are still appointed by collegiums.

The constitutional bench of the Supreme Court declared NJAC unconstitutional in 2015, citing that it violates the basic structure of the constitution. Former CJI **R.V. Ramana** said that it is a highly misconception in India that only judge are appointed by collegium, government can also rise the objection over recommendation. Supreme Court also accepted that collegium may not be perfect system for appointment of judges but it is least defected and better than NJAC.

### Reform in Collegiums

The Supreme Court declared that appointment through National Judicial Appointments Commission (NJAC) stands null and void. At the same time the Supreme Court admitted that appointment by Collegiums is not perfect, various anomalies exist in the Collegiums. Although Collegiums is less court agreed for reform in Collegiums since, 2015. But dispute exist over the following issues-

- **National Security:** Collegiums sends its recommendation to the ministry of Law and Justice. The Ministry receives the intelligence report about the person recommended by Collegiums. The Ministry does not share the intelligence report with collegiums. The Executive (Ministry) is entitled to withhold the appointment of any person on the ground to adverse intelligence report. The Judiciary agreed that the Ministry can block any recommendation on the name of adverse intelligence report. The Judiciary demanded the sharing of intelligence reports with collegiums.
- **Merit/Seniority:** Government always supports the appointment on the basis of merit. But the Judiciary has the opposite view, merit is a subjective notion. Judges pronounced an adverse decision against the government, may not be considered meritorious. Members of Bar Council of India belonging to the opposition party shall not be considered as meritorious. Judiciary is in favour of seniority. For maintaining regional representation and social inclusion, seniority may not be the sole factor.
- **Bench/Bar:** More than 95 percent of Judges Appointments in Supreme Court is drawn from the Chief Justice of High Court or a Judge of High Court. They are popularly known as members of benches (Judge). Executive emphasised that a certain percentage of BAR (advocate) members should be fixed for appointment as a Judges in Supreme Court. The members of the bar can be affiliated with political parties too, this is a concern for Supreme Court.
- **Transparency:** Government seeks the transparency in the functioning of Collegiums. Written explanation is needed as to why and what ground any Judge is chosen. Reason should be started behind the dropping of a particular person. Although the Judiciary said that Judiciary is a sensitive organism of the government. Principle of transparency may work against the independence of Judiciary. How collegiums can give written explanations, about non picking up about a sitting Judge of High Court.
- **Screening Committee:** Screening committee needs to be constituted for minute examination of names of persons, suitable for appointment. Committee should be composed of retired

Judges. Thereafter committee shall forward the name of candidates to Collegiums. Screening committee shall function under supervision of the ministry of law and Justice Judiciary is not willing to accept the proposal. Because it is an attempt to sideline the judiciary in the appointment of Judges.

Deadlock is not resolved yet over the appointments of Judges. Ravi Shankar Prasad said that the government will not act merely as a post office. Executive should have a say in the appointment of Judges. But independence of Judiciary is evitable for democracy, which cannot be compromised at any cost.

### **Qualification for Judge of Supreme Court**

Person shall not be qualified for appointment of Judge **unless**; (i) Citizen of India, he is a (ii) member of Bench has been for at least 5 years a Judge of High Court or two or more such court in succession. A Judge of the High Court is promoted to the Supreme Court. Now 25 High Courts exist in India. Normally the Chief Justice of the High Court is elevated as Judge of the Supreme Court. Apart from the Constitutional eligibility some other factors are kept in mind. Each High Court is given due representation. Representation of women, minorities is also given priority.

### **Member of BAR**

According to Article - 124(2) has been for at least 10 years as an advocate of the High Court or two or more such courts in succession. Provision shows that a practising advocate of the High Court can be appointed as Judges of the Supreme Court. Practising lawyer of Delhi High Court Indu Malhotra is appointed as Judge of Supreme Court in 2018. Santosh Hegde was appointed as Judge of the Supreme Court from Bar. R. F. Nariman was also appointed as Judge of the Supreme Court directly from the bar in 2014. Drawing members from the BAR raises the quality of Judiciary. But only a handful lawyers were piped up for office of Judge. It is surprising, but true, that successful lawyers do not want to become judges.

### **Place for Professor**

A person can become Judge, if the person is a distinguished Jurist in the opinion of the president. The term distinguished Jurist is wider, which includes both Judges as well as lawyers. Renowned Scholar of University may be included in the category of distinguished Jurist. Till today teachers of the University are not appointed as judges.

### **Chief Justice**

The Constitution does not provide any separate qualification for appointment of Chief Justice. The Constitution incorporates the qualification of Judges. But senior most Judges are appointed as Chief Justice, according to convention. The Indira Gandhi government neglected this connection twice. First time A. N. Roy was appointed as Chief Justice, he occupied 4<sup>th</sup> place in seniority. Again Justice Mohammad Hidayatullah was appointed as Chief Justice in 1977. Though, Justice H. R. Khanna was the senior most Judge of the Supreme Court. Justice H. R. Khanna was penalised for his dissenting Judgement in **ADM Jabalpur vs. Shivkant Shukla** case is more famously known as **Habeas corpus case**. Principle of seniority was again restored strongly by the collegiums. It is worth noting that the seniority of a Judge is decided according to the date of appointment in the Supreme Court. Seniority list of every High Court is counted separately. Appointment date of a Judge in the High Court is not considered a factor behind counting of seniority in the Supreme Court. Person may join the High Court earlier, but reach the Supreme Court later. Justice Jasti Chelameswar appointed Judge of High Court before the appointment of Justice Deepak Mishra, Justice T. S. Thakur. But Justice Jasti Chelameswar was appointed as Judge in the Supreme Court, after the appointment of Justice Mishra and Thakur, in Supreme Court.

### **Administrative Power**

The term Chief denotes administrative capacity. Value of the Judgement of Chief occupies the same weight like other Judges.

Chief Justice is responsible for **following administrative functions-**

- Chief Justice of India is master of roster; he is entitled to constitute benches of the Supreme Court. Chief Justice of India nominates the Judges in benches.
- Role of Chief Justice of India is primary in the functioning of collegiums too. Opinion of Chief Justice of India must be counted before recommendation for any appointment.
- Chief Justice of India also appoints various employees in the Supreme Court for running the registry of Supreme Court.
- Chief Justice of India applies various factors, while constituting the benches. Seniority may not be the sole factor. Judges are specialized in different fields like civil matters, criminal cases or issues related to service. Allocation of Benches is decided on the basis of expertise too.
- Role of Chief Justice of India is heading in matters of administrative reform, like of Supreme Court Implementation of E-governance in the court.

### Tenure of Chief Justice of India

The Constitution provides that Judges of the Supreme Court shall hold office, until he attains the age of 65 years. Retirement age is prescribed in the constitution, but age of entry is not mentioned in the constitution. Due to convention of seniority in the appointment of Chief Justice, Justice G. B. Patnaik held the office for only 41 days. Justice **S. Rajendra Babu** became CJI only for 30 days. Chief Justice is administrative head of the Supreme Court, thus there should be fixed tenure of Chief Justice of India. At least two years should be given to the chief justice to carry out some important administrative reforms. Seniority convention is an obstacle in that path. Raising the retirement age, 70 years can also enhance the tenure of Chief Justice.

### Removal of Judges

Under Article - 124(4) empower parliament to remove the Judges. Parliament requires a special majority of parliament to remove Judges. Special incorporates **two features-**

1. Majority of total membership of that house, which implies a majority of 543 members of Lok Sabha and 245 members of council of states respectively.
2. In addition to that each house of parliament needs not less than two-thirds of the members of the house present and voting, there, 2/3 of 543 (strength of house) same majority is needed of 245 of council of states.

Resolutions for removal of Judges should be passed in each house separately in the same session of parliament. The President shall remove the judge by an order, after resolution passed by parliament. Article - 124(4) also mention the ground of **removal of Judges-**

- Proved misbehaviour, thus merely an allegation is not sufficient to remove the Judge. Misbehaviour is broader term, which includes charge of corruption, sexual harassment.
- Incapacity: it is more physical in nature, due to illness.

Article - 124(4) tells about a brief provision for removal of Judges. Thus the same article empowers parliament to make a law for investigation and proof of the misbehaviour or incapacity. Parliament is entitled to regulate the procedure for removal by enacting law. Parliament enacted Judges Inquiry Act, 1968, which provides detailed procedure for removal of Judges.

### Judges Inquiry Act, 1968

- **Resolution in House:** Resolution for removal of Judge can be introduced in either house of parliament. Resolutions tabled in Lok Sabha require 100 members of Lok Sabha. If the resolution is tabled in (Rajya Sabha) council of state signature of 50 members are essential. Resolution can be presented either before the speaker, or chairperson of the council of state, but it should be addressed to the president. Speaker or chairperson of the council of state is entitled to reject the resolution. A resolution was presented to chairperson of council of state against former CJI Deepak Mishra in 2018. Venkaiah Naidu rejected the resolution outrightly. In case of acceptance of resolution, the speaker or chairperson shall constitute the committee. Committee is comprised of the **following members:**

- **Constitution of Committee:** (1) CJI or other Judges of the Supreme Court, (2) Chief Justice of any High Court, (3) Distinguished Jurist.

The committee shall inquire about the allegation or charges against Judge. If charges are inappropriate the resolution automatically lapses. But in case charges are found to be correct. Then further proceeding will continue. Committee will submit its report within 3 months. The Quorum of the committee consists of two members. After approval of committee resolution shall be discussed and voted out in each house of parliament. Judges are given an opportunity to defend him/her on the floor of the house. Judge can send a lawyer before the house to defend him. Acceptance of defence of the Judge is the discretion of the parliament.

### **Passage of Resolution**

Resolution should be passed by each house of parliament separately, which **includes two conditions-**

1. Majority of strength of House.
2. And 2/3 majority of present and voting.

Removal of Justice Ramaswamy, was the first instance of removal of a Judge of the Supreme Court in 1993. Resolution was introduced in Lok Sabha but it could not be passed by the House, due to lack of majority. Congress boycotted voting during resolution. Committee instituted by the chairperson found Soumitra Sen, Judge of Kolkata High Court, guilty in 2011. Justice debate began in parliament. P. D. Dinakaran, former Judge of Karnataka High Court resigned after the committee found him guilty. Till today Parliament did not pass a resolution of removal of the Judge.

### **Oath of Judge**

To bear true faith and allegiance to the constitution of India as by law established. Uphold the sovereignty and integrity of India. I will duly and faithfully and to the best of my ability, without fear or favour affection or ill will and that I will uphold the constitution and laws. Format of oath is described in the 3<sup>rd</sup> schedule of the Constitution. The President shall administer oaths and affirmation to Judges of the Supreme Court. The President can appoint anyone for administering the oath.

### **Independence of Judiciary**

The Supreme Court is the guardian of the Constitution. It preserves and protects the rule of law. Judiciary examines the validity of law made by parliament. The Judiciary also scrutinizes the function of the executive. Thus judiciary must be independent from parliament or Executive. Judiciary is not subordinate to parliament or Executive.

### **Removal**

Judges of the Supreme Court do not hold their office, during the pleasure of president. Parliament is entitled to remove the Judges from his office. Judges also enjoy fixed tenure that is 65 years.

### **Bar of Practice**

Article - 124(7) stipulates that a retired Judge shall not plead or act in any court or before any authority within territory of India. But Chief Justice P. Sathashivam was appointed as Governor of Kerala, immediately after retirement. Justice Ranjan Gogoi offered the membership of the council of states, just after his retirement. It implies that falling on the line of government results in an award. Independence of the judiciary can be influenced through the offer of post retirement jobs. Normally Judges are appointed as chairperson and members of the National Human Rights Commission too; although it is a quasi-judicial appointment. Debatable issue is whether appointment is prohibited or some cooling period of say 2 years should be applied.

### **Salaries**

The Chief Justice of the Supreme Court shall receive rupees 10,000 per month, as specified in the 2<sup>nd</sup> schedule of the constitution. Other Judges shall get rupees 9,000 per month prescribed in the 2<sup>nd</sup> schedule of the constitution. Article - 125 of the constitution allows parliament to determine salaries of Judges from time to time. According to parliament enacted Supreme Court Judges (salaries



and condition of service) Act, 1958 Act also amendment from time to time, latest amendment is brought about in 2018. The Chief Justice of India gets 2 lakh, 80 thousand per month. However, other judges of Supreme Court received 2 lakh, 50 thousand per month salaries of Judges does not require constitutional amendment but parliamentary act is sufficient.

### Charged Expenditure

Moreover salaries of Judges shall not be varied to his disadvantage after his appointment says Article - 125, salaries allowances, and pension payable to respect of Judges of Supreme Court shall be charged on consolidated fund of India. Thus parliament cannot propose cuts on salaries of Judges. The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect shall be charged and servants of the court shall be charged upon on the consolidated fund of India.

### Restriction on the Discussion in Parliament

Under Article - 121 no discussion shall take place in the parliament with respect to the conduct of any Judge of the Supreme Court or of the High Court, While discharging his duties. If a resolution is pending before parliament for removal of a Judge, discussion may be over the conduct of the Judge, Although Parliament discussed the conduct of then Chief Justice Deepak Mishra, without any process of removal parliament in 2018.

### Supreme Court control over officers

All officers and servants of the Supreme Court are appointed by Chief Justice and India. Conditions of services of officers and servants shall be prescribed by Chief Justice and other Judges, although it is subjected to any law made by Parliament. The Supreme Court is an independent organization which keeps check on the functioning of the legislature and executive. But the Supreme Court is not supreme.

### Types of Judges

Constitution describe about the **following types of Judges-**

- Acting Chief Justice,
- Ad Hoc Judges,
- Retired Judge.
- **Acting Chief Justice:** Chief Justice is unable to perform his duty due to absence of otherwise. Otherwise means illness, then the President may appoint a Judge of the Supreme Court for time being as an acting Chief Justice.
- **Ad Hoc Judges: President** appoints *ad hoc* judges due to lack of Quorum in the Supreme Court. National Judicial Appointment Commission Judge with previous consent of the President, these NJAC practically means collegiums. A Judge of the High Court qualified to be appointed as Judge of the Supreme Court shall be requested to attend sitting of the Supreme Court. Time for attendance in the sitting of the Supreme Court shall be decided by the Chief Justice of India. The Chief Justice of the Supreme Court shall consult the Chief Justice of the High Court, before requesting a particular Judge to participate in sitting on the Supreme Court. Ad hoc Judge shall enjoy Jurisdiction, power and privilege of Judge of the Supreme Court, while discharging his duties.

It is important to note that an ad hoc Judge is not appointed. He only attends the sitting of the Supreme Court. Quorum is **not defined** in the constitution or rules of the Supreme Court, But lack of Judges in various benches set up by the Supreme Court. Now the strength of the Supreme Court is 34 including CJI, first time Supreme Court got in full strength in 2019, after a long time. Thus ad hoc Judges have never been appointed to the Supreme Court so far.

- **Retired Judge**

National Judicial Appointments Commission (NJAC) with previous consent of the President, requests to sit and out as Judge of the Supreme Court. A person is eligible to sit as Judge must fulfil the **following conditions-**

- Held the office of the Supreme Court.
- Who has held the office of a Judge of the High Court?
- Duty qualified for appointment as a Judge of the Supreme Court.

While acting as a Judge, the President may by order determine power and privilege of Judge. Consent of that person is essential before he sits as Judge of the Supreme Court. Retired Judge shall deem to be a Judge of that Court. Permitting the sitting of retired Judges may be beneficial for disposing the pending cases before the Supreme Court. Till today ad hoc and retired Judges are not given an opportunity to act in the Supreme Court.

### Contempt of Court

Article - 129 says that the Supreme Court shall be a court of record. Which decision of the Supreme Court shall be considered as evidence for other courts existing in India. Decision of the Supreme Court is accepted as a model for other courts present in the territory of India. Verdict of the Supreme Court is binding on other organs of the government. Anybody or any organization refused to enforce or execute the decision of the Supreme Court. Court can punish that person for contempt of court, under Article - 129. Contempt of court is not defined in the Constitution Parliament enacted contempt of Court act, 1971.

- **Contempt according Parliamentary Act:** Parliament act defines **two types of contempt-**
  1. **Civil Contempt** means willful disobedience to any Judgement, decree, order writ of a court, willful breach of an undertaking given to a court.
  2. **Criminal Contempt:** means the publication (by words, spoken, written) of any matter or the doing of **any Court which-**
    - Scandalises tend to scandalize or land to lower the authority of any Court.
    - Interfering or tend to interfere with due course of any Judicial proceeding.
    - Obstructing the administration of Justice.
- **Power to Punish:** The Supreme Court can punish anyone in the case of contempt of court. Members of executive and legislative were punished from time to time. **Former Judge of Kolkata High Court C.S. Karnan was penalised in 2018**, in charge of contempt of Court. Chief of Bar Council of India V. C. Mishra received 3 years imprisonment by Allahabad High Court in 1995. Only the Supreme Court and High Court are empowered to exercise the power of contempt. District Court or subordinate Court is not given the power to punish the person. The High Court exercises the power of contempt on behalf of the District Court too.
- **Fundamental Rights and power of Contempt:** Freedom of speech and expression is the fundamentals among fundamental rights. Article - 19(1) allows the citizens to speak against Legislative, executive and Judiciary too. Institutions and organisations are merely a means for protecting the fundamental rights. Power under contempt of court discourages and undermines the fundamental rights.

Nevertheless, fundamental rights enriched in the Part - III of the constitution is not absolute, it is under various limitations contempt of court is one of them. People tend to criticise, election commission, CAG to suit their political goals. These institutions are unable to exercise the power of contempt. Power of contempt seems important, which protects the judiciary. Unnecessary, preserve the rule of law, people do not disobey the decision of the Supreme Court due to fear of contempt. Fair and reasonable criticism of decisions of the Supreme Court does not amount to contempt of court.

### Democracy and Contempt

Basic feature of democracy lies in debate and dissent. Anybody can criticize members of the executive and legislature. Judiciary should not be kept away from criticism. Criticizing will minimize the problem of corruption. It is helpful in promoting transparency. There is a need to redefine the contempt power of the court. Contempt should only be limited to obstruction in the administration of Judiciary. Nobody is allowed to interfere in the activities of court. But criticism of court must be permitted.

It is true that democracy enhances the spirit of freedom of speech and expression. But the Judiciary is a sensitive organization; which cannot be compared with other organisations. Decisions of

the Judiciary cannot satisfy each and every one. Whosoever is disagreeing with the decision of the Supreme Court raised baseless criticism. Freedom of speech and expression is not an instrument to fulfil his own interest. It is a medium of promotion of well-being of the entire community. Here in our country people tend to scandalize Judiciary on political grounds and their own ideological ambitions. This proves the necessity of power of contempt.

## **Jurisdiction/Powers of Supreme Court**

### **Original Jurisdiction**

Federalism is the basic structure of the constitution. Division of powers is the basic feature of federal form of government. The 7<sup>th</sup> Schedule of the constitution maintains division of power. Division of power is automatically of power. Division of power automatically leads to dispute between Union and states. The Supreme Court is the dispute settlement mechanism. Disputes between centre and State or between states, can only be resolved by the Supreme Court. Resolving the federal dispute is known as original Jurisdiction, because the State government or Union Government shall directly approach the Supreme Court. No other court is empowered to settle the federal dispute. Article - 131 of the constitution described about **original Jurisdiction of Supreme Court as-**

- Between the government of India and one or more states.
- Between the government of India and any states on one side and one or more other states on the other.
- Between two or more states.

Citizenship amendment Act, 1955, passed by citizenship, but various states together approached the Supreme Court against the act passed by parliament. Federalism is the basic structure of the constitution said by the Supreme Court in **S. R. Bommai Case in 1994**. There is one exception to the original jurisdiction of the Supreme Court under Article - 131. Any treaty agreement instrument, which is executed or entered into force before commencement of this constitution. If means agreement executed before 26<sup>th</sup> January, 1950.

### **Appellate Jurisdiction in Constitutional Issue**

Supreme Court is the highest court of appeal. Appellate power implies that a person shall not approach the Supreme Court directly. Entering into each Supreme Court against the decision of the High Court is appellate power. A Certificate of High Court is essential for going to the Supreme Court. Criminal or civil matters (case) pending before High Court involves a substantial question of law as to the interpretation of this constitution. Substantial question means, interpretation related to the constitution of various High Courts is conflicting with each other. Thus the Supreme Court gives a final verdict.

### **Appeal in Civil Matter**

Without certificate of High Court, no appeals lie before the Supreme Court. Appeal shall lie to the Supreme Court from any Judgement of the High Court. **High Court certificate is essential-**

- The case involves a substantial question of law of general importance.
- In the opinion of the High Court, the said question needs to be decided by the Supreme Court.
- Substantial question of law as to the interpretation of this constitution wrongly decided.

### **Appeal in Criminal Cases**

District Court acquitted any person. The High Court reserved the decision of the District Court and sentenced him to death. Appeal lies before the Supreme Court, from the High Court. No certificate is needed from the High Court. The High Court has withdrawn any case for trial before itself, from district Court. Accused person awarded death sentence by High Court. Again a person can appeal in Supreme Court without any certificate of High Court, Apart from appeal in Supreme Court without certificate of High Court. But in some cases an appeal is possible with a certificate of High Court. If the High Court certifies that case is fit for appeal. More than 90 percent cases of the Supreme Court come in the form of appellate power.

### **Special Leave Petition (SLP)**

It is the discretionary power of the Supreme Court, which grants appeal from Judgement passed by any court or tribunal in territory of India. Leave demotes permission, by Supreme Court for appeal in extraordinary matters under - 136. One limitation is imposed over Special Leave Petition (SLP) in Article - 136, because the Supreme Court can entertain or allow any Special Leave Petition (SLP) against a decision passed by the armed forces tribunal. It is worth nothing that Article - 32 is open for members of the armed forces too; a person can approach the Supreme Court against Judgement of armed forces tribunal under Article - 32.

Article - 136 is an exceptional or extraordinary power of the Supreme Court. Two judges' bench asked a constitutional bench to decide the kinds of cases in which discretion fewer than 136 should be exercised in 2010. The bench listed the following grounds for permitting the cases of Special Leave Petition (SLP) **under Article – 136-**

- Cases with substantial question law.
- Matters public or national importance.
- Validity of Central or state laws.
- Validity of constitutional amendments.
- Differences of opinion between two High Courts.
- If there had been a miscarriage of Justice.
- Violation of fundamental rights.

Admission of Special Leave Petition (SLP) is in creating unnecessary work load on Supreme Court. According to an estimate 34,500 SLPs were filed in 2014 and nearly all of them were admitted for hearing by the Court. Thus it is no more an extraordinary power. It looks like a regular power of the Supreme Court. The Supreme Court refused to provide any guideline for exercise of Special Leave Petition (SLP). The Constitution Bench of Supreme Court said in 2016, that there are still discretionary powers of the Supreme Court, which cannot be written, cannot be written or limited on any ground.

### **Innovation of Supreme Court**

Article - 142 of the constitution empowers the Supreme Court to pass an order for completion of Justice. The Supreme Court may pass any order related to matters pending before it. Various cases were disposed of by the Supreme Court, while exercising the power under Article - 142. This article has become the major instrument of judicial activism in recent days. Supreme Court gave an order for paying the compensation to the victims of Bhopal Gas Tragedy, Supreme Court cancelled the allocation of coal block in 2014. There should be no sale of liquor on the highways, court ordered. Court allocated 2.77 acre land to the trust for building of Ram Temple in Ayodhya, thus power of court is wider and comprehensive under Article - 142.

### **Protection of Fundamental Rights**

Article - 32 allows a person to move to the Supreme Court. Article - 32 is part of fundamental rights; it is an article which enforces other fundamental rights too. Article - 139 empowers Supreme Court, **to issue following writs-**

- Habeas Corpus
- Mandamus
- Prohibition
- Quo-Warranto
- Certiorari

Only the Supreme Court is the guardian of the constitution. Fundamental rights are part of the constitution. People can directly approach the Supreme Court for protection of fundamental rights. It is different from original jurisdiction and different from original jurisdiction. Writ jurisdiction is involved with conflict between Individual and state. However original Jurisdiction is related to the dispute between two agencies of states. Individual is not a part of original jurisdiction.



## Power of President to Consult Supreme Court or Advisory Power

This article speaks for the power of the President rather than Jurisdiction of the Supreme Court under Article - 143, President can get opinion from the Supreme Court. The President can obtain questions of Law or fact, which is having public importance. President shall also seek options about treaties and agreements between states before 1950. It is considered as the opinion of the Supreme Court, rather than Judgement of Supreme Court. The Opinion of the Supreme Court is binding over the government. It is not the adjudicative power of the Supreme Court. It is the persuasive or conciliatory power of the Supreme Court.

a. **Not Binding:** Opinion of the Supreme Court is not binding, upon government. Although Supreme is not bound to give opinion on each and every issue, said by Supreme Court in Ismail Faruqui case (1995). The Supreme Court refused to tender her opinion, whether a temple or mosque existed at the disputed side.

b. **Importance:** Opinion given by the Supreme Court is not binding on government.

**But -**

- It is binding on High Courts and other courts in India, because the Supreme Court is a court of record.
- Judgement of the Supreme Court inculcates public opinion to. Non-elected government does not want to lose in the Supreme Court in a legal battle. Thus government can seek legal opinion of Supreme Court in advance. Before enacting any law or making an order.
- From the constitutional view point opinion of the Supreme Court, carries persuasive value, but in practice government. Collegiums' system of appointment in Judiciary is an outcome of the opinion of the Supreme Court in Judges 3<sup>rd</sup> case in 1998. It becomes the permanent practice of Judiciary.

c. **History:** While giving an opinion to the President not less than 5 judges should be **on the bench-**

- The first reference under - 143 was made in Delhi Laws cases, 1951.
- Kerala Education Bill, 1958
- Berubari Case, 1960
- Special court reference case, 1978
- President Bill, 1974 was related to certain doubts related to Election of President:
- Keshav Singh Case, 1965
- Cauvery Water Dispute Act, 1991
- Ismail Faruqui Case, 1995
- Judges - III case Advocate on Record
- Jammu and Kashmir resettlement Act, 1982
- Election in Gujarat Legislative Assembly, 2002
- Punjab Termination of Agreement Act, 2004
- Allocation 2 - G spectrum.

## Classification

Power of President to consult Supreme Court can be **categorized as-**

- Important question of Public importance where the Supreme Court is entitled to refuse to give advice, to the President. Supreme Court said in Kerala Education Bill, (1958).
- Second clause of Article - 143 is related to agreement, treaty, concluded between union and state before commencement of the constitution.

The Supreme Court is bound to give her opinion over these issues; But in the last 70 years. No reference came before the Supreme Court related to the second part of the Article - 143.

## Guardian of Constitution

Power of interpretation of this constitution belongs to the Supreme Court, under Article - 145. While interpreting the constitution, the Bench should be composed of not less than 5 judges. The Constitution cannot incorporate each and every fact. Thus the Supreme Court fills in the blanks. The Constitution is a living document and changes according to changing circumstances. Meaning of

words changes in the changing context of time and space. Therefore the Supreme Court involved the doctrine of Basic structure for protecting the constitution. The Supreme Court protects fundamental rights. Ensure division of power and preserve the autonomy of the Supreme Court, election commission too.

### **Miscellaneous Powers**

Electoral disputes related to the President and vice-president shall be settled only by the Supreme Court. The Chief Justice of the Supreme Court or senior most judges of the Supreme Court can also act as acting President. Chairperson and members of UPSC shall be removed from their office only after recommendation of the Supreme Court.

### **Judiciary & Parliament and functioning of Democracy**

**Granville Austin** says that FR's & DPSP is the conscience of Indian constitution and Institutions are an instrument for realizing the ideal's & philosophy of constitution and conflict between judiciary & Parliament can hamper the functioning of democracy **in the following ways -**

1. Constitutional amendment can be struck down by Judiciary and laws made by Parliament can also delayed in execution because of Pendency in Judiciary.
2. Judicial activism and over-reach unnecessarily affect the execution of policy and confusion in administration.
3. Parliament and executive are responsible toward people and accountable too therefore people will decide about faith of government in every five years. Therefore, Judiciary should not enter in to domain of judicial legislation & policy making.
4. Vacancy in Judiciary are remain fulfillment due do conflict bet Parliament & Judiciary and It will effect of governance adversely.
5. Separation of Power is essence or basic structure of the constitution therefore Judiciary entitle to protect the FR's of interpret at the constitution and Parliament is capable to make law and policy making is exclusive domain of executive therefore We need harmony & balance.

### **Conclusion**

The Supreme Court is Supreme in terms of power and scope. The Supreme Court plays multiple roles from protection of fundamental rights to being guardian of the constitution.

## **High Court**

Union of India comprises 28 states; these shall be a High Court for each state, under Article - 214. Presently these are 25 High Courts in India, which means a High Court is not established in each state. Because Article - 231 of the constitution provides that by **parliament law-**

- (i) **Common High Court for two states**
  - Common High Court for two states like Punjab and Haryana High Court is both for Punjab and Haryana.
  - Bombay High Court exercise jurisdiction over Maharashtra and Goa.
- (ii) **More than States:** Guwahati High Court has jurisdiction over Assam, Nagaland, Mizoram and Arunachal Pradesh.
- (iii) **Extension of Jurisdiction of High Court to Union Territory:** Parliament by Law shall extend jurisdiction of the High Court over Union territory too. Jurisdiction of Punjab and Haryana High Court exercises jurisdiction over Chandigarh. Bombay High Court has jurisdiction over Dadra and Nagar Haveli, Daman and Diu. Now Dadra and Nagar Haveli, Daman and Diu are integrated as one Union Territory.

## **Benches and Circuit Benches**

There shall be a High Court for each state, according to Article - 214. But larger state Uttar Pradesh, Maharashtra and Madhya Pradesh have established their benches to. With the permission of the principal bench; a new bench can be set up in the state, which requires consent of the state including the governor. Circuit Bench is set up at smaller places. It is not a permanent bench but it works only for a few months in the calendar year. Circuit bench is set up in Port Blair, which comes under jurisdiction of Kolkata High Court. It also ensures Justice at doorsteps of the people.

It is interesting to be noted that Mumbai High Court has **three** benches in Aurangabad, Nagpur and Panji. Population of Maharashtra is 11 crore. Madhya Pradesh population stands up to 7 crore. Madhya Pradesh has two benches in Indore, Gwalior. However Uttar Pradesh keeps only one bench in Lucknow, although the population of Uttar Pradesh is nearing 22 crore. Long pending demand for a new bench in Meerut is waiting.

## **High Court in Union Territory**

Article - 214 says that jurisdiction of High Court can be extended on Union Territory. Same time Article - 241 permits parliament to form High Court for Union Territory Delhi is union territory which keeps its own High Court Newly created Union Territory Jammu & Kashmir and Ladakh share a common High Court.

## **Constitution of High Court**

The High Court shall consist of Chief Justice and such other judges as the President may from time to time deem it necessary to appoint, under Article - 216, strength of Allahabad High Court is 160, and strength of Sikkim High Court is merely 3. No parliamentary act is needed for raising the strength of the High Court. But notification of the President is necessary. After working out a new state, The High Court shall be constituted by the notification of the President, after request from the new state. New High Court is set up in Telangana.

## **Appointment of Judges**

Every Judges of the High Court shall be appointed by the President by warrant under his hand and seal. Recommendation of National Judicial Appointments Commission (NJAC) is needed before the appointment by the President. Practically it should be considered as a recommendation of collegiums. Collegium comprises Chief Justice of India plus 2 senior most judges of the High Court.

## **Conditions of Services**

A Judge of the High Court will act unless he/she attains 62 years of age. Retirement age of Judges should be increased to at least 65 years of age. A Judge of the High Court can resign to the president by writing under his hand the office of Judges shall also be vacated, when a Judge of High Court is appointed as Judge of Supreme Court. Judges shall also be transferred from one High Court to other High Courts. According to evolved convention before the transfer is Judge, consent of the Judge is required. Process of removal of Judges of the High Court is similar to that of Judges of the Supreme Court.

## **Qualification of Judges**

- Only citizens of India are qualified to become Judge.
- Held the Judicial office in the territory of India for at least ten years. Thus district judges are promoted as Judge of the High Court as Judge.
- Or has been an advocate of the High Court or two or more such court in succession for at least ten years. Members of the bar are also suitable for appointment as Judge.

## **Oath and Affirmation**

The Governor administers the oath and affirmation for Judges of the High Court. Governor or a person appointed by shall provide an affirmation format of oath is described in the third schedule, exactly likewise the Judge of the Supreme Court.

## Restriction and Practice

Permanent Judge held office, shall not plead or act in any court or before any authority in India. But he/she is allowed to plead before the Supreme Court and other courts, where he has not acted as Judge.

## Salaries of Judges

Salaries of Judges of the High Court are prescribed in the 2nd Schedule. Salary of the Chief Justice of the High Court is fixed as Rs. 9,000/ per month. It shall be 8,000 per month for other Judges. Article - 221, also empowers parliament to enact a law for determining salaries and pension of Judges of the High Court. Parliament enacted the High Court Judges (Salaries and Conditions of Service) Act, 1954. The Act has been amended various times. Recently it was amended in 2018. Now Chief Justice of the High Court receives 2.50 lakhs per month and other Judges get 2.25 lakhs per month. Allowances, pension or lease of judges shall not be varied to his disadvantage after his appointment. A Judge shall also receive compensatory allowance, may be determined by Parliament.

## Transfer of Judges

President shall transfer a judge of High Court on the recommendation of National Judicial Appointments Commission (NJAC). Practically, which means recommendation of collegiums. The Constitution does not prescribe the ground of transfer of Judges. Collegiums justified transfer **on the bases-**

- Better administration of Justice.
- Presentation of Local nexus between Judges and advocates.

Transfer of Judges of High Court first time came in limelight during national emergency during 1975-77. 16 judges were transferred during the emergency. Transfer of Judges became a tool for demoralizing a Judge went against the stand of the government. After the evolution of collegiums in 1993, misuse of transfer of Judges almost came to an end. Former judge of Karnataka High Court P. D. Dinakaran was transferred to Sikkim High Court, on the charge of corruption. Thus transfer is not the solution. Although transfer of Judges can improve or reduce the prospect to become Chief Justice of the High Court or elevation of Judges is determined according to seniority of Judges.

## Collegiums for transfer of Judge

Collegiums for transfer of Judges are constituted of Chief Justice of India and four senior most judges of Supreme Court. In addition to that 2 Chief Justice of High Court, Chief Justice of High Court, from where he/she is transferred and Chief Justice of receiving High Court.

## Types of Judges in High Court

- **Acting Chief Justice:** When the office of Chief Justice is vacant or Chief Justice is unable to perform duties of his office or office of Chief Justice is vacant then the president may appoint other judges as acting Chief Justice. Here acting denotes Judge for time being. The Office of Chief Justice may be vacant due to resignation or elevation for the Supreme Court as Judge. Judges may be unable to perform duties due some physical reason like illness. Swearing in ceremony is not needed for acting Chief Justice.
- **Additional Judge:** Additional Judges are appointed by the President of India, with consultation with National Judicial Appointments Commission (NJAC). Whenever business of the High Court increases due to arrears of work additional judges are appointed for 2 years. Person must be qualified to be appointed as Judge. According to evolved convention Additional Judges are appointed as permanent Judges. Most surprising fact is there are 403 vacancies of Judges in the High Court. Strength of all 25 of High Courts in India is 1079 appointing additional Judges without fulfilling the existing vacancies of High Court announced that they will not appoint additional Judges unless vacancies are fulfilled.
- **Acting Judge:** When a Judge of High Court other than Chief Justice is unable to perform his duties or office of Judge is vacant. The President with consultation of NJAC may appoint a



person as Judge. Until a permanent Judge resumes his/her office. Duly qualified person appointment as Judge of High Court.

- **Retired Judges:** Retired Judges are not appointed but they are requested to sit and act as Judge in the High Court. A person held the office of Judge in that High Court or other High Court to set and act as Judge. Allowances of the Judge shall be decided by the President. Person shall have all jurisdiction and power of Judge. But a person shall not be deemed to be a Judge of the high court. Till today retired Judges are not requested to sit and act as Judge. Reason is not explained in the constitution behind the request to Judge Sit and act as Judge.

### **Jurisdiction of High Court original Jurisdiction**

High Courts are primarily a Court of appeal. But few exceptions exist: Calcutta, Bombay and Madras High Court still exercise their original powers in Civil Cases too. It is worth noting that other High Courts of India do not have the original Jurisdiction in Civil Cases. Original refers that a person can approach the High Court directly. Elections dispute comes under the original Jurisdiction of High Court. But the High Court has nothing to do with federal disputes.

### **Writ Jurisdiction**

The High Court issues the writ under Article - 226. High Court **issues the following writs-**

- Habeas Corpus.
- Mandamus.
- Prohibition.
- Quo-Warrants.
- Certiorari.

The High Court issues the writs for protections of Fundamental Rights. In addition to that Article - 226 is also utilized for other purposes too. Because Fundamental Rights Article - 226 can be used for election disputes or for rights of property too. However the Supreme Court issues the same writs but only for protection of fundamental rights. Thus scope of 226 is wider than Article - 32. Like the Supreme Court, the High Court also issues Public interest litigation (PIL). The Writ power of the High Court is restricted to the territory of a particular state. The High Court cannot issue writs for the residents of other states. But the Supreme Court is entitled to issue writ for the entire territory of India.

### **Primarily Court of Appeal**

The High Court is primarily a court of appeal. Appeal in High Court comes against the Judgement of District Court. Appeal may be on the issue of fact as well on the basis of Law. Appeal may be over civil cases and on criminal cases too. No High Court has original jurisdiction criminal cases. Criminal cases in the High Court come only through appeal; if a person gets 7 years of imprisonment in a case by District Court. Appeal in criminal cases permitted.

### **Letters Patent Appeal**

Normally appeal means approaching higher courts from lower courts. But there may be appeal within a court too. Judgement of a single judge may be appealed to a division bench (two Judges) in the same High Court.

### **Power of Supervision**

High Court is court of record. Thus Judgement of the High Court is considered as evidence for district court and other subordinate courts. The High Court is also having the power to punish on the basis of contempt. The High Court also exercises administrative control over the district court, another subordinate Court. The High Court also controls administrative tribunals too. The High Court shall not have administrative control over armed forces tribunals. **Administration control implies-**

- Appointment and transfer of Judges.
- Disciplinary action against any Judges.
- The District Judge is not removed from office.
- District judge is appointed by the governor with consultation of the High Court.

- After formation of Telangana state, district Judges were divided by High Court.

It is worth noting that the Supreme Court does not have any administrative control of our High Court. But the High Court exercises administrative control over district and subordinate court.

### Central Laws and High Court

The Constitution provides a federal form of government which is based on division of power. But the Judiciary is not divided between union and state. Integrated Judiciary is the uniqueness of the constitution; the Representation of the People Act, 1951 (RPA) is enacted by parliament. Allahabad High Court ruled Indira Gandhi adopted corrupted practices for winning the Lok Sabha election from Raebareli (U. P.). Allahabad High Court said that Indira Gandhi violated Representation of the People Act, 1951 (RPA), thus nullifying her elections.

Subsequently the 42nd constitutional amendment was brought about and limited the power of the High Court. The High Court shall not examine the validity of Central Law (Law enacted by parliament). This provision was replaced by the 43rd constitutional amendment, thus no longer valid today. Similarly, laws of state government can be challenged in Supreme Court. Integrated Judiciary also implies that judges of the Supreme Court and High Court are appointed by the President; their removal process is also the same. Judgement of the High Court is appealed in the Supreme Court. Judges of the High Court are transferred in any state.

### Independence of High Court

The High Court is established in every state. But the High Court is not subordinate to the legislature of the state. Legislature of the state cannot enact a law which minimizes the Jurisdiction of the High Court. Judges of the High Court are appointed by collegiums. Judge of high enjoy fixed tenure in office, he/she acts as Judge till again the age of 62 years salaries of Judges and their administrative officers is charged on consolidated fund of state. However pension of Judge is charged on consolidated fund of India, Parliament and legislature of state cannot start debate over conduct of Judge.

### Summing Up

The High Court is not capable of exercising to settle the federal dispute. The High Court does not enjoy power of consultation too like the Supreme Court. But the High Court protects fundamental rights. It is a court of appeal in civil as well as in criminal cases too. The High Court is not guardian of the constitution but gives judgement over constitution but gives judgement over cases related to constitution too, according to the standards fixed by the Supreme Court.

### Judicial Review

Term judicial review is not mentioned in the constitution since, the constitution is written and every organ of the government is written in the constitution. Justice Marshall of USA said that where ever constitution is written judiciary automatically enjoy the power of Judicial Review. The Constitution is the Supreme law of the land. Thus law enacted by Parliament and legislature of the state cannot encroach the Supremacy of the Constitution. The Supreme Court is given the task to examine the validity of laws enacted by the state. Thus judicial review simply means reviewing the functions of legislature and Executive.

### Division of Power

Federal form of government is the **basic structure** of the constitution. The Seventh Schedule ensures division of power between union and state. No unit of government can encroach its limitation prescribed in the constitution. Judiciary examines the act made by parliament and the legislature of the state. The Citizenship Amendment act is challenged in Supreme Court.

### Fundamental Rights

Article - 13(2) of the Part - III of constitution confer the power of judicial review to Judiciary. Law made by parliament goes against the fundamental rights of the constitution. It shall be declared

null and void, by the Supreme Court or High Court. Power Judicial review is exercised by both the Supreme Court as well as by the High Court.

### **Limitation over organs of Government**

The Constitution is Supreme in India; each organ of the government is under various limitations. Legislature, Executive and Judiciary are subject to numerous restrictions, scope and quantity of these restrictions is reviewed by Judiciary. Act of the speaker is immune from the preview of Judiciary.

### **Rational Principles of Judicial Review**

Judicial review simply means examining the functions of the legislature and executive by Judiciary. The Supreme Court is given the responsibility of interpreting the constitution; initially the Supreme Court was committed to the **following principles-**

- **Text is important**

The Supreme Court relied over the text or words incorporated in the constitution. Court supported the principle of procedure established by law in Gopalan Case (1951), because it is written in the constitution. Therefore the Supreme Court protected the right to property in the Bela Banerjee Case (1954) Court said compensation means compensation at market rate.

- **Priority of Parliament**

The Constitution subscribes that no organ of government is Supreme in Indian Constitution. But parliament represents the will of the people, which is most important in democracy. Parliament is entitled to amend the constitution and determine power of other organs of the government. Supreme Court is priority of the parliament. Therefore, it accepted that parliament can amend the fundamental rights too, the court acknowledged this in the famous Shankari Prasad case (1950).

- **Narrower Meaning of Right to life**

The Supreme Court relied over text in the interpretation of the constitution. Supreme said the freedom of speech and expression under Article - 19 and right to life and personal liberty shall be suspended during national emergency. The Supreme Court said that a person can be deprived from his life and personal liberty, if the government enacted a law, the Supreme Court pronounced that view in ADM Jabalpur vs. Shiv Kant Shukla Case (1976).

- **Limited Scope**

The Supreme Court admitted that the act of Governor is not subject to judicial review. Thus the court refused to entertain cases related to misuse of Article - 356. Ordinances were kept away from judicial review. Court never tried to encroach on the amendment power of parliament. First constitutional rights, yet court approved the amendment in Shankari Prasad case (1951). 9<sup>th</sup> ambit of Judicial Review.

### **Evolving New Parameter of Judicial Review (Judicial Activism)**

#### **Context Became Important**

A kind of Harmonious relation existed between Executive and Judiciary, during the premiership of Nehru. But conflict between Executive and Judiciary was visible, when Indira Gandhi became Prime Minister. The Supreme Court and High Courts became pro-active in the post emergency of Indian Democracy. The Supreme Court said that the spirit of the constitution is more important than words written in the Constitution. That view was advanced by the Supreme Court in the landmark Kesavananda Bharati Case (1973).

Court is of the view that implied limitation is inherent in the amendment power of parliament under Article - 368. Spirit of the constitution includes philosophy and the soul of the constitution. Philosophy and soul makes context of the mind of the person who framed Indian constitution. Context is ever changing with time and space.

## **Liberal and Comprehensive Interpretation of Fundamental Rights and Personal Liberty**

Right to life is not merely living like animals. A right to life implies life with dignity that was said by the Supreme Court in the historical Maneka Gandhi Case (1978). Court observed that Article - 19 and Article - 21 are complementary with each other. This is the beginning of progressive approach of the Supreme Court. Liberal and progressive approach of the Supreme Court is visible in the Puttaswamy case recently in which the **right to privacy** is considered as an element of right to life.

## **Supremacy of Judiciary**

The Supreme Court has been applying the principles of due process of law. Earlier courts relied over the principle of procedure established by law. Nation of due process automatically enhances the power of the judiciary. Procedure of law must be reasonable, which is examined by the judiciary. Any law enacted by parliament or amendment of constitution can be struck down by Judiciary on the name of Basic structure of the constitution. Judiciary of India now became the most powerful Judiciary in the democratic nations across the world. Judges are appointed by Judges in India through collegiums.

## **Expanding the scope of Judicial Review**

Imposition of Article - 356 is subject to judicial review said by the Supreme Court in S. R. Bommai Case (1994). The Judiciary has also been examining the validity of constitutional amendment Kesavananda Bharati Case (1973). The 9th Schedule is no longer away from the scope of judicial review, according to the Supreme Court in I. R. Coelho Case (2006). In short each and every part, schedule and article of the constitution is under Judicial Scrutiny now.

This new evolving role of judiciary is branded as judicial activism by the critics. Generally judicial activism refers judicial intervention in the functions of legislature and executive. But the Judiciary never admitted that it is undermining the role of other organs of the government. Thus the term judicial activism is debatable and disputed.

### **1. New forms of Judicial Activism**

There was harmony between parliament & Judiciary when Nehru was prime minister but after Indira Gandhi onwards the conflict between parliament & Judiciary is clearly visible by 25<sup>th</sup> Amendment 1<sup>st</sup> time Indira Gandhi tried to suppress judicial review but SC propounded the concept of basic structure and defended judicial review.

Indira Gandhi gave slogan of committed judiciary and she also tried to attack over judicial independence and first time in 1973 she superseded there senior most judge of SC and appointed A. N. Ray as CJI of India.

## **Judicial Legislation**

According to the principles of separation of power, law making is the primary responsibility of the legislature. Thus the term judicial legislation appears paradoxical. Now the judiciary becomes the law making agency. For example Representation of the People Act, 1951 (RPA) is enacted by parliament. Clause - (4) of section - (8) of Representation of the People Act, 1951 (RPA) provides that a sitting MPs/MLA convicted by court for 2 years or more than two years shall not be disqualified. Person shall have an opportunity to appeal in the higher court. It is declared ultra-vires by the judiciary.

Moreover Representation of the People Act, 1951 (RPA) does not include the provision of NOTA; Supreme Court directed for incorporation of NOTA in Representation of the People Act (RPA) in the People's Union for Civil Liberties (PUCL) case in 2013. Further Supreme Court amended the SC/STs act of 1989 in Subhash Kashinath Mahajan Case. Supreme also banned the liquor shops within 500 meter of highways till now state legislature makes law for distribution of liquor. Various examples prove that judiciary is playing the role of legislature. Thus it is also an example of judicial activism.



### **Judiciary in Role of Executive (Judicial Overreach)**

Policy making is the major function of the executive. Executive also executes the law enacted by the parliament. But the judiciary plays the role of executive. The Supreme Court said the C. B. I. should directly report to the Supreme Court in Vineet Narain Case (1997) popularly known as Hawala Case. Nevertheless C. B. I. comes under Jurisdiction of P. M. The Supreme Court directed the government for carrying out reforms in civil services, T. S. R. Subramanian Case (2013). Similarly in 2006 Supreme Court gave direction for police reform in the famous Prakash Singh Case. The Supreme Court also took a hard step to reform BCCI and appointed Sunil Gavaskar as Chairperson of BCCI. Court cancelled the allocation of 2 - G too.

Right from cleaning of Ganga and Yamuna, Court is also intervened for cleaning of the Taj Mahal. Court suggested the government conduct free cost checking of corona in private hospitals. However policy making is the exclusive domain of the executive. Therefore it is categorized more harmful to judicial activism. Intervention in the issues related to policy making is judicial overreach or excessive activism.

### **Revival of one Party Dominance and Judicial Activism**

After May 2014 the era of coalition government come to an end after spend of 30 year's one party got majority in house of the people and logically there is a emergence of strong Prime Minister and executive consequently 99<sup>th</sup> constitutional amendment act was passed by parliament in order to replacing the collegium system of appointment of judges and NJAC was incorporated in constitution but supreme court declared 99<sup>th</sup> constitutional amendment as Null and Void. Ever since 2015 the confrontation is going on between executive and judiciary over an appointment of judges.

### **An Instrument of Social Revolution**

#### **Origin**

During the national emergency during 1975-77 Judiciary was under heavy criticism. Critics argued that the judiciary could not protect the rights of citizens. Thus the judiciary said it is also committed for social justice. Adjudication is not only a task of the judiciary in democracy. Addressing common grievances first time visible in the case of Mumbai Kamgar Sabha (1976), justice V. Rama Krishna Iyer tried to protect the interest of unregistered workers. First reported case of Public interest litigation (PIL) is Hussain Ara Khatoon vs. State of Bihar (1979). An advocate filed PIL pointing out the thousands of under trial prisoners in various Jails of Bihar PUDR Vs. Delhi Government Case (1982) popularly known as Asiad workers case, Supreme Court said that getting legs wages amount to violation of right to life.

#### **Significance**

Public Interest Litigation refers to concern of Public simply litigation is related to adjudication between the two parties. However, public implies the well-being of the entire community, especially the welfare of marginalised sections of society. First time Supreme Court defines the scope of PIL in S. P. Gupta Case. Supreme Court changed traditional concept of Locus standing (Procedure), which believes that only aggrieved person can approach standing and any third person is permitted to reach the court for protection of common cause. Thus, it is also known as social interest litigation. It is recognition of group rights, like rights of workers, children, women etc. Court can take Suo Motu action for protection of the interests of deprived sections of society. It is visualization of Article - 39(A) of constitution, which seek to attain the notion offer legal aid.

Justice is more important than procedure thus court changed adversarial public spirited person, NGO can approach Supreme Court for common cause. Report of newspaper or latter is also considered as written by the Supreme Court. How the door of the Supreme Court is open for marginalised section of society. Both Supreme Court and High Courts can issue PIL.

#### **Expanding Scope of PIL**

Prof. M. P. Singh said **First stage** of PIL deals with issues related to underprivileged sections of society. Asiad, workers case and Badhua Mukta. Moreha Case (1994) related to liberation of

Bonded Labourers. Primarily PIL was introduced for deprived sections of society. **The second stage** of evolution of PIL is associated with issues of environmental degradation in Supreme Court M. C. Mehta Case. The Supreme Court also instructed the Delhi Government to ply CNG fitted Buses in Delhi. **Later in the third phase** of development of PIL, issues of corruption flooded in Supreme Court Vineet Narayan Case became very popular. PIL were filed for electoral reforms, police reform, administrative reforms and numerous other cases too. The Supreme Court said persons contesting the elections should disclose their criminal history, financial liability and educational background. Judgement came in PUCL case 2002; citizens have the right to know about the candidates.

### **PIL and Judicial Overreach**

Due to widening scope of PIL conflict between executive and Judiciary further came in limelight. Court issues various orders related to administration, which is an exclusive domain of the Executive. It became an example of judicial overreach. Judiciary has crossed Luxman Rekha. Judiciary Legislation came due to PIL Judiciary Started playing the role of Executive, because Judiciary set up a special investigation team (SIT) for unearthing the black money. Rafale deal also became the matter of PIL.

### **Criticism**

Judgement of the Supreme Court is ultimately executed by the Executive. **Pratap Bhanu Mehta** says that Judiciary is working like executive. Thus conflict between judiciary and executive hampers the working of administration. Critics also havelled PIL as Paise Interest Litigation, any agency of the Government can be black mailed by some PIL activist. It also became publicity interest litigation too. Most of the advocates are affiliated with political parties, the file PIL for setting political scores. When lakhs of cases are pending before Supreme Court how speedy Justice is possible through PIL. Thus the real objective of the PIL is missed out, providing access to marginalized sections of society was the real motive of PIL.

### **Conclusion**

Now the Supreme Court and High Courts are very much vigilant about prevention of miscues of PIL. Reputed and authentic person allowed filing PIL. Some people receive penalty by courts in charge of misuse of PIL. But PIL pending in court from citizenship amendment (CAA) to PM cares fund launched Act by government after outbreak of Corona. Thus a specific guideline is the need of the hour.

### **Relationship between Executive and Judiciary**

Although three organs of the government are interrelated with each other, but relation between various agencies of the government is determined by various factors. We can classify changing relations in the following time framework.

### **Harmony between Executive and Judiciary**

Separation of power is an inherent feature of the constitution. Parliament is empowered to amend the constitution. Parliament brought about the first constitutional amendment for limiting the fundamental rights. Executive paid respect towards the judiciary. Judicial review never became an obstacle for obtaining the goal of social justice, during the premiership of Nehru. The Judiciary reviewed ordinary law, but never touched the validity of constitutional amendment.

### **Confrontation between Executive and Judiciary**

#### **Dominance of Executive**

From 1967 onwards conflict became a regular feature between Parliament (Executive) and judiciary. The Golak Nath Case was a turning point, when the first time the Supreme Court restricted the parliament to amend the fundamental rights. Then the Indira Gandhi government brought about the 25th Constitutional amendment. It was the first attempt to limit the power of judicial review. Senior Judges were superseded in appointment in the Supreme Court. But finally Supreme Court defended its power in form of principle of Basic feature in Kesavananda Bharati Case (1973).

## **Dominance of Judiciary**

Political System underwent tremendous changes after 1989. It was the beginning of coalition government or minority government at Union level. No party could have a majority in parliament resulting in the emergence of weak Prime Ministers. Apart from political instability, corruption and criminalization of politics eroded the legitimacy of the political system. The Judiciary emerged as saviour of interest to the people. Judiciary became the primary centre of the faith of the people. Thus the judiciary propounded PIL. It became more proactive for protecting the rights of citizens. Debate of Judicial activism and overreach also became into picture.

## **Turning Tide-Pre emergence of Strong Executive**

The spell of coalition government came to an end in May, 2014. After three decades any political party managed to get majority in Lok Sabha. Narendra Modi emerged as strong PM Just like Indira Gandhi was in 70s. Therefore government tried to overhaul the collegiums system of appointment of Judges. NJAC is put into place, instead of collegiums. Minister of Law and Justice Ravi Shankar Prasad said the government shall not act like a post-office in appointment of Judges.

## **Summed up**

The Constitution believes in harmony and cooperation among three organs of government. Independent and autonomous judiciary is the basic structure of the constitution. But supremacy of Judiciary is unwarranted.

## **Issues of Conflict**

Disagreement and dissent is the crux of democracy. But paralysis of government due to conflict is not a healthy feature of democracy. We can witness several issues of dispute between Executive and Judiciary.

## **Will of the People**

Although it is an undeniable fact that no organ of the government is Supreme, but will of importance in a democratic form of government. Will of the people is represented by the parliament. Supremacy of Parliament is essence of democracy, which responsible towards the people. Members of parliament and Executive blamed that Judiciary is disrupting separation of power. Arun Jaitley said that declaring NJAC as **ultra-vires** amounted to tyranny of the unelected. Judiciary is limiting the amending power of parliament. The Judiciary never accepted that it is active. Judiciary is of the view that it is guardian of the constitution. The Constitution is the manifestation of the highest will of the people. Majority in parliament does not empower any political party to destroy the basic structure of the constitution.

## **Social Justice**

Judiciary becomes an instrument of social justice, therefore discovering the PIL. Judiciary said that preamble incorporates an ideal of social Justice. Justice does not mean adjudicating the dispute between two parties only. Social justice is the responsibility of the executive. Government knows the technical, financial dimension of any decision. Judiciary unnecessarily intervenes in administrative issues, like instructing the government for setting up open Jails.

## **Basic Structure**

Parliament is given the power of amending the constitution under Article - 368. But the Judiciary deprived the parliament from amending the constitution. Judiciary can strike down any law or constitution of power. The judiciary argued that the constitution is a living document. Thus interpretation of the constitution automatically changes after changing time and circumstances. Judiciary does not belong to any political party. It is a neutral agency of settling the dispute. For maintaining rule of law and protecting the fundamental rights active judiciary is positive for democracy.

## **Conclusion**

Unique features of the constitution ensure, check and control by the judiciary over the Executive. Parliament is associated with political parties, thus the interest of a particular party is

projected as national interest. But judicial intervention in every administrative matter must be avoided. Justice J. S. Verma rightly said that the Judiciary should act like an alarm clock. It should not act like a watch.

## **Subordinate Judiciary**

Below the Supreme Court and High Court is the subordinate Court. Subordinate court is also known as district court district and below that district court is also known as subordinate Court. Subordinate court is considered a trial court, when a person is charged by state due to violation of Law. Every citizen is entitled to defend himself in court of law, though an advocate of his/her choice. Thus government of police frames the charge against the person. Judge ultimately decides about the validity of charges, under a complex procedure. Witness comes and they are examined by advocates evidence is also submitted against the individual. Therefore it is said as trial court.

### **Appointment**

District Judges are appointed by the Governor, with consultation of the High Court of that state. An advocate is practicing in court of law for 7 years or engaged in judicial function or pleader for 7 years. Judge is promoted and transfer of Judge is the capacity of Governor with consultation of the High Court. Judge is also removed by the Governor from his/her in consultation with the High Court. Their removal is not like removal of a Judge of Supreme Court or High Court.

### **Appointment of other Judges**

Appointment other than district judges is also done by the Governor. But the Governor gets the consultation of the High Court and state public service commission too. Exams for the appointment of other Judges conducted by the state public service commission, under supervision of the High Court subordinate judiciary, is under control of the state government.

### **Jurisdiction**

District Court is located in each and every district of India. Dealing with Civil Cases people is known as District Judge. Civil Cases means cases related property and matrimonial disputes. While dealing with criminal cases the same person acts like a session judge. Criminal cases are related with murder, etc. which affects entire community. District courts can award the highest penalty to people who say death sentences. But the district does not deal with the fundamental rights. District court is not empowered to entertain PIL. District court only deals with the issues of Indian penal code and civil procedure code.

### **Fast Track Court**

Procedure of trial of district court is complex, consequently before district court, across India. Pending of criminal cases is in against the right to life and personal liberty. It also encroaching human rights. The Supreme Court said speedy trial is a part of the right to life in Hussain Ara Case. Fast track Court was set up in India in 2002 after recommendation of the 11th Finance Commission. Fast track court is district court in nature, but it only deals with criminal cases. Judge and procedure are the same but no adjournment is permitted in case. Case in heard on a daily basis, thus it becomes fast. By passing the procedure may result in injustice in criminal cases. Therefore delay is not allowed in Fast Tract Court.

### **Tribunals**

Indian Judiciary comprises the Supreme Court, High Court and district court in the constitution. District court or subordinate court is composed of district Judges and other civil judges. Motion of tribunal was first incorporated in the constitution by the 42<sup>nd</sup> Constitutional amendment in



1976. New Part - 14(A) was added in the constitution and Article - 323(A) and 323(B) provides for the tribunals. Amendment is passed after the recommendation of Swaran Singh Committee.

### Meaning

Tribunals are not courts. Tribunal is composed of both administrative as well as judicial members. Tribunals are specialized in various fields like National Green Tribunal (NGT) only deals with issues related to the environment. Central Administrative Tribunal (CAT) adjudicates the cases related to administrative personnel. Tribunals are a combination of judiciary and other expert members. It is quasi-Judicial bodies, because it shares some features of judiciary tribunals and incorporates the tenets of administrative bodies too.

### Utility

Pending tens of thousands of cases in Judiciary is the biggest challenge for Indian Judicial System. Complex procedure is one of the major reasons behind delayed Justice. Tribunals work on the principles of Natural Justice than civil procedure code or evidence act. Timely disposal of cases is uniqueness of tribunals. Justice is more important than procedure. Tribunals do not prefer complexity of procedure. Tribunals are cost saving too. It saves the traditional judicial system from unnecessary workload. Now society became complex without inclusion of expert Judges and cannot deliver Justice.

### Beginning of Tribunals

Provision of administrative tribunals incorporated in Article - 323(A). Administrative tribunals include **Central Administrative Tribunal (CAT)** and **State Administrative Tribunal (SAT)**. Parliament made an act in 1985 for executive tribunals.

### Structure

Parliamentary act provides about the structure of Central Administrative Tribunal (CAT), Tribunal is composed of at least one judicial member and one administrative member Head Quarter of tribunal is Delhi. 17 regular benches and 21 circuit benches consist of 7 members plus chairperson. However Ahmedabad benches consisted of 2 people, including chairperson. Thus minimum strength must not be less than two; Entire strength of all benches. The Chairperson of Principal Bench is head of Central Administrative Tribunal (CAT), across India. Other 16 benches are headed by Vice-Chairpersons. They are appointed by the President with Consultation of CJI.

### Term of Conditions

The Judicial member of Central Administrative Tribunal (CAT) is or has been qualified to be appointed as Judge of the High Court. However administrative members should hold the office of rank of secretary for 2 years. They held office for 5 years age of chairperson shall 68 years or 5 years whichever comes earlier, vice chairperson and members shall held the office for 65 years, Chairperson and members shall be removed in the ground of misbehaviour or incapacity President shall remove than on the recommendation of Supreme Court. Their salaries shall not be reduced, after appointment.

### Jurisdiction

Central Administrative Tribunal (CAT) settles the dispute related to terms and conditions of services of following-

- Members of Indian Administrative.
- Indian Police Service.
- Personnel belonging to Central Service.
- Civil Servants working in the ministry of defence.

Issues of Suspension, promotion or arbitrary transfer can be challenged before Central Administrative Tribunal (CAT) for example Amitabh Thakur, IPS officer of UP Cadre was suspended by the UP Government. A member of Indian Revenue Service (IRS) was forcibly retired by the Government of India. He challenged the decision before Central Administrative Tribunal (CAT).

Although aggrieved people should first approach their own department according to services rules. Thereafter they are allowed to approach the Central Administrative Tribunal (CAT). Central Administrative Tribunal (CAT) works on the principles of natural Justice. Thus it does adopt a law enacted by parliament appealing against the decision of the court shall lie to the High Court. The Supreme Court changed the act of parliament. The Supreme Court said the decision of Central Administrative Tribunal (CAT) shall lie before the High Court under Article - 226. Subsequently an appeal for the Supreme Court is also open.

### **Limitations of Jurisdiction of Central Administrative Tribunal (CAT)**

- Members belonging to armed forces are part of the Central government. But matters related to terms and conditions of their services do not fall under Central Administrative Tribunal (CAT), Due to maintaining discipline in the armed forces. Although parliament passed Armed Forces Tribunal Act, 2007. Now matters related to armed forces lie before the Armed Forces Tribunal Act.
- Members serving under Lok Sabha secretariat and Rajya Sabha Secretariat do not come within the Jurisdiction of Central Administrative Tribunal (CAT) because of Privilege of Parliament. The Speaker is the sole authority to maintain control over their members serving the parliament.
- Personnel associated with the Supreme Court and high belong to Central services. But they are away from Jurisdiction of Central Administrative Tribunal (CAT).

Chief Justice exercises the administrative control over the member working to Supreme Court. It ensures independence of the Supreme Court.

### **Drawback**

Almost half of the vacancies of Central Administrative Tribunal (CAT) are unfulfilled. Central Administrative Tribunal (CAT) is working with half capacity. Nearly 50,000 cases are pending before Central Administrative Tribunal (CAT), illusory. It defeats the very purpose of establishment of Central Administrative Tribunal (CAT). Age of members and chairperson should be raised up to 70 years.

### **Varieties of Tribunals**

Article - 323(B) is also incorporated in the constitution by 42<sup>nd</sup> Amendment. It establishes the various **tribunals like -**

- Taxation.
- Foreign Exchange, import-Export across custom frontiers.
- Industrial and labour disputes.
- Ceiling on urban property.
- Land reform.
- Election to parliament and legislation of the state.
- Production, procurement or distribution of foodstuff.
- Rent regulation.

These tribunals can be set up by parliamentary Act. All the tribunals are set up gradually, but tribunals for settling the elections dispute is yet to be set up gradually. The Armed Forces Tribunal was established in 2007. NGT was set up in 2010 for adjudicating environmental matters. The Cyber appellate tribunal also came into existence in 2010. Tribunal related to real estate also came into practice after 217. Now we are witnessing the benches of tribunals in India, in every field of life.

## National Green Tribunal (NGT)

### Context

Conservation of Environment received the constitutional states by 42<sup>nd</sup> constitutional amendment. Article - 48(A) is inserted in the constitution which mandates that the state shall endeavor to protect and improve the environment and to safeguard the forest and wildlife of the country. Part of Fundamental duties also includes, protecting and improving the natural environment including forests, lakes, rivers and wildlife; and to have compassion for living creators under Article - 51(A) etc. Parliament passed various legislation for protecting and improving the environment and Wild life (protection) Act, 1972, Water (Prevention and Control of Pollution) Act, 1974, the Forest (Conservation) Act, 1989 etc.

The Supreme Court also expanded the meaning of right to life. Clean environment became an integral component of the right to life said by the Supreme Court in M. C. Mehta Case (1986). Subsequently numerous cases reached the Supreme Court related to environmental rights. In this context notion of NGT came into existence purpose of setting up **NGT is following-**

### Cases

- Reducing overdependence of the Supreme Court.
- Speedy disposal related to environmental issues.
- Removing obstacles in the path of development projects due to unnecessary delay in the Supreme Court.
- Specialized agency to address the problems of environmental degradation.
- Ensuring easy access for citizens in tribunal to protect the environment.

### Structure

NGT is a statutory body, set up by parliamentary act in 2010. **NGT is comprised of-**

- Chairperson.
- Minimum strength of a judicial member should not be less than 10, but should not be more than 20.
- Minimum strength of expert members should not be less than 10 and maximum strength should not be more than.

Principal Bench of NGT is located in New Delhi while regional benches are located in Pune, Bhopal, Chennai and Kolkata.

### Terms and Conditions

Chairperson shall not be qualified for appointment unless he/she is or has been a judge of the Supreme Court of India or Chief Justice of the High Court. Judicial member is or has been a Judge of the High Court. Expert members must have a degree in Master of Science with Doctorate or master of Engineering and have 15 years of experience in relevant fields. Chairperson or members shall not hold any other office during their tenure they shall not be eligible to get any employment or office within two years of ceasing the office. The Chairperson shall be appointed by the Central Government with consultation of Chief Justice of India. Members shall be appointment by committee set up by Union government. Chairperson and members shall hold their office for 5 years from the date on which they enter upon their office but not eligible for re-appointment. Judge of Supreme Court shall not hold the office after he attained the age of 70 years. Chief Justice of High Court of Judge of High Court shall not hold the office after he attained the age of 67 years.

### Autonomy of NGT

Chairperson and members of NGT shall be removed Central Government, after an inquiry conducted by Judge of Supreme Court. Salaries of Chairperson and members and members shall not be reduced during their tenure in office.

## Nature

NGT is not bounded by civil procedure code. Evidence act is not applied in the proceeding of NGT. It operates on the principle of natural Justice.

## Jurisdiction

NGT hears cases related to conservation of forest and environment. A person affected from environmental degradation may approach NGT. But third person is also entitled to approach NGT for protection of the environment. NGT can order the government to pay compensation to the victim due environmental hazards. Party or institution damaged by the environment is supposed to pay the compensation within 30 days. NGT banned the playing of 10 years old vehicles on the roads of Delhi. NGT also fined an art of living festival held on the bank of Yamuna NGT has the power of a Civil Court any person by depositing rupees 1000/- can reach in NGT.

## Appeal in Supreme Court

- According to act minimum strength should not be less than 20. But NGT is working with less than 10 members. Regional benches almost cease to operate.
- Governments do not want to recruit real specialized members instead looking for bureaucracies as a member. It minimizes the importance of environment issues.
- NGT is not capable of exercising the power of contempt. Nobody wants to pay compensation.
- NGT do not have their own buildings. There is a lack of staff and finances too. It makes NGT less effective.

## Tribunalization and Court

Now tribunals are working in each domain of life, but critics said that tribunals are undermining the importance of Judiciary.

## Separation of Power

Separation of power is the basic structure of Indian constitution. Check and balance is the supplementary features of separation of power. Tribunals go against the principles of separation of power. The Judiciary is supposed to exercise check over the activities of the executive. But tribunals made then partners of each other.

## Autonomy of Judiciary

Interestingly independent Judiciary is also counted as an important element of Basic structure. Major functions of Judiciary are now transferred to tribunals. Tribunals are not autonomous like Judiciary. Appointment is tribunals controlled by the ministries. Tribunals do not have control over their administrative staff. Members and chairperson can also be removed easily from their office. Their salaries are not charged on consolidated funds of India. All tribunals do not enjoy power of contempt too.

## Necessity of Tribunals

No system can be fool proof. We can count numerous defects in tribunals. But without tribunals governance becomes problematic. Advantage of tribunals can seem up as **follows**;

## Harmony

Separation of power does not mean the lack of cooperation among two organs of the government. Two branches of government are like two organs of a body. Thus organs a government is complimentary with each other. Tribunal combines executive with Judiciary strict separation makes government dysfunctional.

## Expertise

Justice becomes complex in the present age of the nuclear and cyber world. Judges are having knowledge in a particular branch of law; inclusion of experts in Tribunals makes Justice speedy and effective. Judges are not proficient in Environment or issues related to taxation.



### **Autonomy is Intact**

Any Bench of tribunals is always chaired by judicial members of the tribunals. Moreover any decision delivered by tribunals is subject to appeal before the Supreme Court. Thus ultimately the judiciary keeps control over tribunals.

## **Lok Adalat**

Judiciary is an independent and autonomous mechanism to settle the dispute. But the judiciary is too costly, beyond the reach of an ordinary citizen. But Judiciary is too costly, beyond the reach of an ordinary citizen. Procedure became more important than justice. Delayed Justice has been shaking the faith of the people in the entire judicial process. For making Justice people centric rather than Court Centric. Article - 39(A) was inserted in the part of DPSP by 42<sup>nd</sup> Amendment which promises about equal Justice and free legal aid. Justice is not denied to any citizen due to economic or other disabilities. The Supreme Court stressed upon that Article - 14, 21 and Article - 39(A) is complementary with each other. Equality before law becomes meaningless in absence of equal access to court. Without equal reach in the Judiciary right to life becomes empty. Justice P. M. Bhagwati and V. R. Krishna Iyer was the pioneer of Lok Adalat. First experiment began from Una Village of district Junagadh in Gujarat from 1982.

### **Statutory Status**

1987 Lok Adalat were granted the legal states, Parliament enacted the Legal services Authority Act. It came into force from 1995. The Legal Services authority Act incorporates the following features-

#### **Legal Aid**

- **Legal Aid:** For implementation of parliamentary act, National legal services authority (NALSA) is set up. NALSA is headed by the Chief Justice of India and other members. Every state shall set up state legal services authority. The District Legal Services authority is also established. It provides free legal assistance to SC/STs, Minorities and people living below poverty. Legal aid is available in any court throughout territory of India in Civil or Criminal cases.
- **Legal Literacy:** NALSA and SALSA provide awareness about various laws enacted by parliament about well-being of the marginalized sections of society. Laws related to a dowry, sexual harassment communicated to the people.
- **Lok Adalat:** Lok Adalat is the third component of Legal services authority act, 1987. Lok refers to people, court becomes people's court due to the following factors-
  - Free of cost adjudication.
  - It works on the principle of natural justice.
  - Civil procedure code and Evidence Act is not allowed in Lok Adalat.
  - Focus is over disposable of dispute.
  - Dispute is settled on the basis of persuasion negotiations and informal concession.
  - No appeal is allowed against the decision of Lok Adalat. It is final and binding over the parties.

### **Levels of Lok Adalat**

Lok Adalat are organised in Supreme Court, High Court and District Courts too. Same court and the same Judge are part of Lok Adalat. But procedures are kept away so it becomes a people's Court. NALSA and SALSA organize Lok Adalat in various Courts.

### **Permanent Lok Adalat**

Initially Lok Adalat wares ad hoc, because it sits once in a week. But legal services authority act, 1987 was amended in 2002. It provided information about permanent Lok Adalat. Its income

court is fully devoted to Lok Adalat 6 days in a week. Permanent Lok Adalat are set up at district level, permanent Lok Adalat are set up at district Level, Permanent Lok Adalat cannot set up at higher level; Because two High Courts or Supreme Court is beyond imagination.

### **National Lok Adalat**

Lok Adalat is held in each and every court across India. Dates of National Lok Adalat is finalised by NALSA. Generally three or four times in a year, National Lok Adalat is commenced.

### **Jurisdiction**

By and large Lok Adalat settles civil cases dispute related to rent, insurance, and electricity bills are solved by Lok Adalat. But some minor criminal cases, which can be compounded in nature, are also settled by the Lok Adalat. Procedure cannot be passed in criminal cases. Thus criminal cases are adverse by the fast track court. Civil cases pending before courts can be transferred to Lok Adalat with consent of both parties. Any matter at the pre-litigation stage can be settled by Lok Adalat. Judge or retired Judge sits in Lok Adalat. Apart from that, social activists are also members of Lok Adalat. Dispute should be perceived through social dimension, rather than from legalistic point of view.

### **Draw Back**

Property cases worth more than 10 lacs cannot be brought before Lok Adalat. Consent of both parties is essential. Nobody can compel to change an unreasonable stand of a person. Settling disputes through compromise, negotiation suits the rich section of society. Pendency of cases before Lok Adalat is also an issue. Lawyers have their own interest. It hampers the functioning of Lok Adalat.

### **Arbitration and Conciliation**

Lok Adalat and arbitration conciliation are two important components of Alternative refer to a different mode of dispute settlement. Traditional dispute settlement comprises the Supreme Court High Court and District Court. We can point out the drawbacks of traditional methods of **dispute resolution-**

- Delayed Justice.
- Complex procedure.
- Costly.
- Technical Formal.

It normally takes 25 years, when a case starts from district court and reaches up to apex court (Supreme Court). Civil procedure code, criminal procedure code, evidence act are an example of complex procedures. Freedom of advocate in court is not regulated yet. Top lawyer of the Supreme Court charges up to 50 lakhs for a case. It may go up manifold depending up to situation; courts adopt technical and formal rules, which causes delay of cases. Although speedy justice is an essential element of Good Governance, without a speedy Justice environment of investment also discouraged. In the Post-Liberalisation phase parliament passed Arbitration and Conciliation Act in 1996. For promoting alternative dispute settlement, parliament further amended the act in 2015 and 2019. Let's sum up the core elements of Act.

#### **1. Arbitration Council of India**

Arbitration simply means out of court settlement, by amendment of 2019, first time an institution shall be set up in India for promotion of arbitration. Arbitration council of India **comprised of-**

- A Chairperson who is either a judge of Supreme Court or Judge of High Court or Chief Justice of High Court or an eminent person with expert knowledge in conduct of arbitration. It means a person not belonging to the Judiciary may be qualified to be appointed as Chairperson.
- Practitioners or arbitration.
- One member as professor with experience in arbitration.
- One member is appointed by the Government.

## 2. Functions of Council

It is an independent body, for promoting arbitration. It is not made for resolving the disputes. But it will play the role of a think tank like UGC in the field of higher education.

### Functions of council include

- Framing policies for grading arbitral institutions and accrediting arbitrators.
- Making policies for the establishment, operation and maintenance of uniform professional standards for A.D.R.
- To make India a robust centre for domestic and international arbitration.
- Conduct examination and training.
- Hold training, workshops and courses in the area of arbitration in collaboration with Law firms, Law universities and arbitral institutions.

## 3. Appointment of Arbitrators

The Supreme Court and High Courts are given the responsibilities to appoint the arbitrators. The Supreme Court will appoint arbitrators in international commercial disputes. The High Court will appoint arbitrators in domestic commercial disputes.

### Confidentiality

Arbitrator is supposed to resolve commercial disputes between reliance and Facebook. Thus confidentiality will be maintained by the parties. Disclosure of information may harm the business prospects of a company.

### Time Limit

A statement of claim and defence will need to be completed within a period of six months. Arbitral awards should come within a period of 12 months after compilation of pleading. International commercial disputes should be resolved as expeditiously as possible. Matter should be disposed within 12 months from the date of completion of pleadings.

### Conclusion

Appointment of arbitrators by the Supreme Court in Ayodhya Case shows the importance of arbitration. It promotes speedy Justice. Hope fully Justice will prevail instead of procedures.

## Gram Nyayalayas

73<sup>rd</sup> Amendment of the constitution, decentralised the administration similarly Gram Nyayalaya the judicial system at grass root. Justice should be available to the doorsteps of the villagers. Parliament passed the act in 2008 for setting up Gram Nyayalaya. 25,000 village courts are supposed to be established, but till today merely 250 Gram Nyayalaya (Village Court) functioning in India.

### Structure

The State Government shall appoint a Judicial Magistrate (Nayyadhikari) with consultation of the High Court. One or more Gram Nyayalaya shall be established for every Panchayat at intermediate level. Where the intermediate level of Panchayat is absent a group of villages may be considered for establishment of Gram Nyayalaya. The State Government with consultation High Court will notify the Jurisdiction of village court. Panchayat at intermediate level is head quarter of Gram Panchayat.

### Mobile Court

Judicial Magistrate sits in the intermediate level (block) of Panchayat. But the Magistrate can hold a mobile court outside of headquarters. Thus Gram Nyayalaya is popularly known as a mobile court too.

### Working

Gram Nyayalaya proceedings are not bound by code of civil procedure (1908) or rule of evidence act (1872). It shall apply the principle of Natural Justice. Focus is to dispose of the matter

immediately, without sticking to complex procedures. It permits conciliation and compromises and the Court also promotes plea bargaining. Plea bargaining refers to the fact that a person admits his/her guilt they will receive less punishment.

### **Jurisdiction**

Jurisdiction of Gram Nyayalaya extends both in civil as well as in criminal domain too. Criminal cases in which imprisonment may be more than 2 years is not included in the Jurisdiction of Gram Nyayalaya.

### **Appeal**

Appeal is open against the decisions of Gram Nyayalaya. Appeals lie in district court in criminal and civil cases. Thus Gram Nyayalaya is different from Lok Adalat.

### **Drawback**

Natures of offence are not well defined in schedule - I of act like theft, concealment receiving and disposal of stolen property. Right to appeal against the decision of Gram Nyayalaya is self-defeating. Appeal allows the dispute to go further. It is not serving the purpose of Justice at the doorstep of the people. Administration of Justice is included in the concurrent list of the 7<sup>th</sup> Schedule. It means it is the responsibility of both the Union and state government. State government lacks the resources for implementation of Gram Nyayalaya.

State Governments are unable to fulfil the vacancies of Judges pending for a long time, then how they can establish a separate Gram Nyayalaya. Thus the vision of Gram Nyayalaya is yet to be realised.

### **All India Judicial Services**

The Constitution allows the parliament to create one or more All India Services. Provided that the council of state should be pass a resolution to that effect. Resolution should be passed by 2/3 of the members present and voting in council of state, under Article - 312. All India services shall be created for fulfilling the national interest.

### **Constitutional Provision**

Motion of All India Judicial Service was incorporated by 42<sup>nd</sup> constitutional amendment under Article - 312. All India Judicial Service shall not be created inferior to post of district Judge. But the 42<sup>nd</sup> constitutional amendment is yet to be implemented. Report of Various Law Commission also supported the creation of a new All India Judicial Service.

### **Advantage**

Till today a person who belongs to the Bar or has held a judicial office for 7 years, is appointed as district Judge. Creation of All India Judicial Services attracts more competent and efficient law graduates to join the district court. Apart from drawing the young talents, the selection process will become more transparent and uniformly across the nation. More than two crores cases are pending before the district courts. Creation of all India Services will be helpful for disposing pending cases too. Examination shall be conducted by Union Public Service Commission. Person appointed as district Judge will be promoted in High Court onwards. It will further improve the quality of Judiciary for realising the dream of All India Judicial Services following action is needed.

### **Constitution Amendment**

At present district Judge is appointed by the Governor with consultation of the High Court. Post inferior then district judge shall be appointed by the Governor with consultation of the High Court and state public service commission under Article - 233 and Article - 234. Appointment will be done by UPSC in All India Judicial Services. Thus the power of the state service commission and High Court is about to decline.

### **Federal Government**

District court and below the court is managed by the state government. All India Judicial Services reduce the power of the state government of administration and police personnel. Because



the Judiciary must be independent, it should not be subordinate to the executive. A committee is required to give advice to UPSC. Committee shall be composed of Judges of the High Court and other eminent persons. Committee will determine the pattern of examination syllabus of exams.

### **Language**

Task of Judges is extremely important. District court is a trial court, which records statements, the witness and record the evidence too. Therefore knowledge of language is inevitable for running the court. Regional language should be counted, while holding the All India Judicial Services.

### **Conclusion**

Present method of appointment of district judges lacks transparency. But judicial administration except the Supreme Court and High Court belong to the concurrent list. Cooperation between Union and State is essential for realising the dream of All India Judicial Services.

