

# Courts in India: Need to Strengthen Access to Justice and Judicial Accountability



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## The Indian Judicial System – An Overview



In a democracy like ours, the role of judiciary is crucial. Judiciary is a faithful keeper of the constitutional assurances. An independent and impartial judiciary can make the legal system vibrant. In the parliamentary democracy like ours, while there is participation of the legislature and the executive in formulation of laws, but once a law is passed it is for the judiciary to safeguard the interests of the citizens to operate within the adopted laws. It, therefore, acts as a check on the arbitrariness and unconstitutionality of the legislature and the executive. Judiciary is the

final arbiter in interpreting constitutional arrangements. The nature of the democracy and development both depend greatly on how the legal system conducts itself to sustain the overall socio-economic and political environment.

Justice K. Subba Rao explains the functions of the judiciary:

- It is a balancing wheel of the federation;
- It keeps equilibrium between fundamental rights and social justice;
- It forms all forms of authorities within the bounds;
- It controls the Administrative Tribunals.

The legal system derives its authority from the Constitution and is deeply embedded in the political system. Judiciary is the third pillar of Indian democracy, alongside the legislature and the executive branches. It is an independent body and its power is separated from those of the Executive and Legislative bodies of the Indian Government. Credibility of judicial process ultimately depends on the manner of doing administration of justice.

The judicial system in India is based on the British Legal System that was prevalent in the country during pre-independence era. The official language of the High Courts and the Supreme Court is English.

### Courts' Structure

The judicial system of India is stratified into various levels. At the top is the Supreme Court, which is followed by High Courts at the state level, District Courts at the district level and Lok Adalats at the Village and Panchayat Level. The judicial structure takes care of maintenance of law and order by considering cases related to both civil and criminal offences.

India has a quasi-federal structure with 29 States further sub-divided into about 601 administrative Districts. The Judicial system however has a unified structure. The Supreme Court, the High Courts and the lower Courts constitute a single Judiciary. Broadly there is a three - tier division.

#### Oldest Legal Dispute

The mahant of a temple filed a suit in Pune in 1205 AD. The case was decided in 1966 – 761 years later!  
– The Guinness Book of records

Each District has a District Court and each State a High Court. Each State has its own laws constituting Courts subordinate to the District Courts. Besides, a number of judicial Tribunals have been set up in specialized areas. The significant Tribunals are: Company Law Board; Monopolistic and Restrictive Trade Practices Commission; Securities Appellate Tribunal; Consumer Protection Forum; Board for Industrial and Financial Reconstruction; Customs and Excise Control Tribunal; Tax Tribunal; etc. These Tribunals function under the supervisory jurisdiction of the High Court where they are located.

### The Judiciary

The Indian judiciary has a reputation of being independent and non-partisan. Judges are not appointed on political considerations. They enjoy a rather high status in society.

### The Bar

India has a unified all India Bar and an advocate enrolled with any State Bar Council can practice and appear in any court of the land including the Supreme Court of India. However for doing any acting work in the Supreme Court a qualifying examination (called an 'Advocate on Record' exam) needs to be cleared. Foreign lawyers are not permitted to appear in Courts (unless qualified), though they can appear in arbitrations.

### Practice and Procedure

The influence of the British Judicial System continues in a significant way even after 65 years of independence. The official language for Court proceedings in the High Court & the Supreme Court is English. Lawyers don a gown and a band as part of their uniform and Judges are addressed as "My Lord". The procedural laws of the land as well as most commercial and corporate laws are modeled on English laws. English case law is often referred to and relied upon both by lawyers and judges. As in England, a certain class of litigation lawyers is designated as "Senior Advocates" (equivalent to QCs). They do not deal with clients directly and take instructions only through solicitors. Certain lawyers however, follow a mixed practice i.e., both plead and act in relation to court matters.

There is a great tradition and emphasis on oral arguments. Counsels are seldom restrained in oral arguments and complex hearings may well take days of arguments to conclude. Specialization is relatively a new phenomenon. Most lawyers have a wide-ranging practice.

### Arbitration

In 1996, arbitration got an impetus with the enactment of the Arbitration and Conciliation Act. This is based on the UNCITRAL Model Rules. India is also a party to the New York Convention (on enforcement of arbitration awards) allowing arbitral awards to be enforced by the Courts in almost any country around the world. Prior to 1996, Arbitrations in India were governed by Arbitration and Conciliation Act of 1940. In 1996, it was replaced by a more effective act, called Arbitration and Conciliation Act of 1996.

With the enactment of the new law, arbitration has gained in popularity and is fast becoming the preferred route for settlement of commercial disputes. Now the arbitral awards are recognized as final and binding, unless impeached on the grounds set out under

Section 34. Perhaps the most important change relates to 'enforcement of awards' – no decree is necessary under the 1996 Act for enforcement of award.

India does not have a separate Arbitration Lawyers Bar. Generally, court lawyers are engaged for arbitrations that are conducted over the weekends or after court hours. Often retired High Court or Supreme Court Judges are appointed as arbitrators. The Indian Council of Arbitration, promoted by the Ministry of Commerce is a leading Institute for administration of arbitrations.

### High Burden of Pending Cases

There is an alarmingly high arrear of pending cases, not only with the lower courts, but also with the Supreme Court. Delay in disposal of cases frustrates the very purpose of justice. Justice delayed is certainly justice denied. It also creates frustration and results in loss of confidence among the general mass. The number of pending cases is simply mind boggling – about 3.2 crore, of which about 40 lakhs are pending in High Courts, about 57,000 in the Supreme Court, and about 2.65 crore in lower courts.

## History of Modern Judiciary in India



With the advent of the British colonial administration, India witnessed a judicial system introduced on the basis of Anglo-Saxon jurisprudence. The Royal Charter of Charles II of the year 1661 gave the Governor and Council the power to adjudicate both civil and criminal cases according to the laws of England. However, the Regulating Act of 1773 established for the first time the Supreme Court of India in Calcutta, consisting of the Chief Justice and three judges (later reduced to two) appointed by the Crown acting as King's court and not East India Company's court. Later, Supreme Courts were established in Madras and Bombay. The Court held jurisdiction over "His Majesty's subjects". In this period, the judicial system had two distinct systems of courts, the English system of Royal Courts, which followed the English law and procedure in the presidencies and the Indian system of Adalat/Sadr courts, which followed the Regulation laws and Personal laws in the provinces.

Under the High Court Act of 1861, these two systems were merged, replacing the Supreme Courts and the native courts (Sadr Dewani Adalat and Sadr Nizamat Adalat) in the presidency towns of Calcutta, Bombay and Madras with High Courts. However, the highest court of appeal was the judicial committee of the Privy Council. The British made efforts to develop the Indian legal system as a unified court system. Indians had neither laws nor courts of their own, and both the courts and laws had been designed to meet the needs of the colonial power.

The Government of India Act of 1935 (section 200) set up the Federal Court of India to act as an intermediate appellant between High courts and the Privy Council in regard to matters involving the interpretation of the Indian Constitution. It was not to 'pronounce any judgment other than a declaratory judgment' which meant that it could declare what the law was but did not have authority to exact compliance with its decisions. The Federal Court's power of 'judicial review' was largely a paper work and therefore a body with very limited power. Despite the restrictions placed on it, the Federal Court continued to function

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till 26th January 1950, when independent India's Constitution came into force. In the meantime, the Constituent Assembly became busy drafting the basic framework of the legal system and judiciary.

### Ministry of Law and Justice

Ministry of Law and Justice is the oldest limb of the Government of India dating back to the nineteenth century when the Charter Act 1833 was enacted by the British Parliament. For the first time, the Act vested legislative power in a single authority, namely the Governor General in Council. By virtue of this authority and the authority vested under him under section 22 of the Indian Councils Act 1861 the Governor General in Council enacted laws for the country from 1834 to 1920. After the commencement of the Government of India Act 1919 the legislative power was exercised by the Indian Legislature constituted there under. The Government of India Act 1919 was followed by the Government of India Act 1935. With the passing of the Indian Independence Act 1947 India became a Dominion and the Dominion Legislature made laws from 1947 to 1949 under the provisions of section 100 of the Government of India Act 1935 as adapted by the India (Provisional Constitution) Order 1947. Under the Constitution of India which came into force on the 26th January 1950 the legislative power is vested in Parliament.

### Composition of the Ministry

Ministry of Law And Justice comprises of the Legislative Department and the Department of Legal Affairs. The Department of Legal Affairs is concerned with advising the various Ministries of the Central Government while the Legislative Department is concerned with drafting of principal legislation for the Central Government. India Code which consists of laws enacted from the previous century and which are in force in the territory of India are available on the net

### Background of the Constituent Assembly

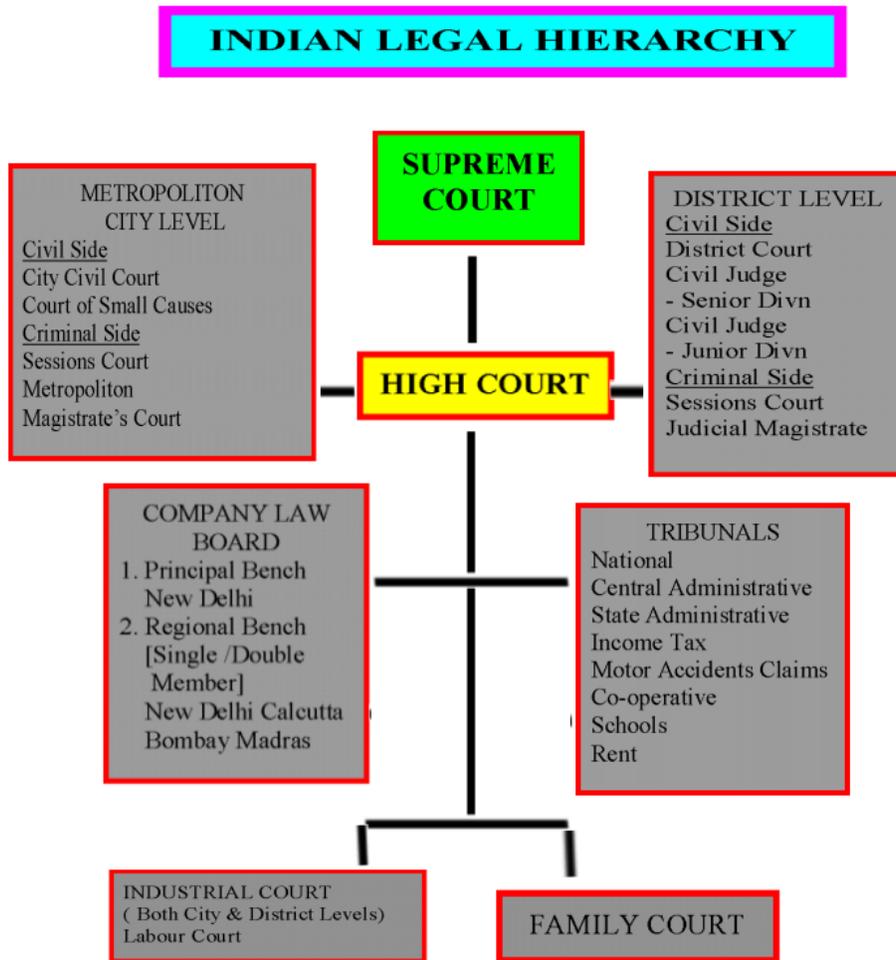
The members of the Constituent Assembly envisaged the judiciary as the bastion of rights and justice. They wanted to insulate the courts from attempted coercion from forces within and outside the government. Sapru Committee Report on judiciary and the Constituent Assembly's ad hoc committee on the Supreme Court report formed the bulk of the guidelines for judiciary.

A.K. Ayyar, K. Santhanam, M.A. Ayyangar, Tej Bahadur Sapru, B.N. Rau, K.M. Munshi, Saadulla and B.R. Ambedkar played important roles in shaping the judicial system of India. The unitary judicial system seems to have been accepted with the least resistance. The Supreme Court was to have a special, countrywide responsibility for the protection of individual rights. Ambedkar was perhaps the greatest apostle in the Assembly of what he described as "one single integrated judiciary having jurisdiction and providing remedies in all cases arising under the Constitutional law, the Civil, or the criminal law, essential to maintain the unity of the country."

## The Structure of Indian Judiciary

Indian judiciary is a single integrated system of courts for the union as well as the states, which administers both the union and state laws, and at the head of the entire system stands the Supreme Court of India. Below the Supreme Court are the High Courts of

different states and under each high court there are 'subordinate courts', i.e., courts subordinate to and under the control of the High Courts.



### THE SUPREME COURT OF INDIA



The Supreme Court of India is the highest court of the land as established by Part V, Chapter IV of the Constitution of India. According to the Constitution of India, the Supreme Court is the guardian of the Constitution and the highest court of appeal. It came into power on 28th January 1950; just two days after the Constitution of India came to effect.

In the initial stages, it had its office in a part of the Parliament House. It is located only in the capital city of Delhi. It has appellate jurisdiction over the high courts and the entire judicial system of the country is controlled by it. The law declared by the Supreme Court is binding on all small courts within the territory of India. It has the final authority to interpret the Constitution. Thus, independence and integrity, the powers and functions and judicial review are the issues of utmost importance concerned with the Supreme Court.

It is a court of record which means that the records of its decisions and proceedings are preserved and published. Articles 131 to 140 deal with the powers of the Supreme Court.

The decisions of the Supreme Court are binding on all the courts of India. All authorities, civil or judicial are under obligation to follow such orders. The Supreme Court also has powers to review its own judgment or order. The Supreme Court, under Article 142 of the Constitution, has the constitutional mandate to pass such order as may be necessary for doing complete justice in any case before it. It plays an important role of safeguarding the fundamental rights of citizens which includes access to fair justice without fear or favor. Under Articles 129 and 142 of the Constitution the Supreme Court has been vested with power to punish for contempt of Court including the power to punish for contempt of itself.

The largest bench of the Supreme Court of India is called the Constitution Bench and comprises of 5 or 7 judges, depending on the importance attached of the matters before it, as well as the work load of the court. The apex court comprises only of various benches comprising of the Divisional benches of 2 and 3 judges, and the Full benches of 3 or 5 judges.

The Judges of the Supreme Court are free to exercise their power as and when required. The process of removal of the Supreme Court judges is quite an interesting but lengthy process. An order from the President is mandatory in case of removal of the judges. A two-thirds majority has to be obtained from both the houses of the parliament for the removal of the judges.

### Composition and Appointments

Article 124 of the Constitution provides for the establishment and the composition of the Supreme Court. The Chief Justice of India and not more than 25 other judges make up the Supreme Court of India. There can be ad hoc judges for a temporary period due to lack of quorum of the permanent judges. However, Parliament has the power to make laws regulating the constitution, organization, jurisdiction, powers of the Supreme Court. The Constitution makes it clear that the President shall appoint the Chief Justice of India after consultation with such judges of the Supreme Court and of High Courts as he may deem necessary. And in the case of the appointment of other judges of the Supreme Court, consultation with the Chief Justice, in addition to judges is obligatory.

### Judges' Appointments and Their Independence

Once appointed, a judge holds office until he attains 65 years of age. He may resign his office by writing to the President or he may be removed by the President after a resolution to that effect is passed by a 2/3 majority of each House of the Parliament on grounds of 'proved misbehavior' and 'incapacity'.

In order to shield the judges from political controversies, the Constitution empowers the court to initiate contempt proceedings against those who impute motives to the judge in the discharge of their official duties. Even the Parliament cannot discuss the conduct of a judge except when a resolution for his removal is before it.

### Jurisdiction of the Supreme Court

The Supreme Court has vast jurisdiction and its position is strengthened by the fact that it acts as a court of appeal, as a guardian of the Constitution and as a reviewer of its own judgments. Article 141 declares that the law laid down by the Supreme Court shall be binding on all courts within the territory of India. Under the Arbitration and Conciliation Act,

1996, International Commercial Arbitration can also be initiated in the Supreme Court. Its jurisdiction is divided into four categories:

#### a) Original Jurisdiction and Writ Jurisdiction

Article 131 gives the Supreme Court exclusive and original jurisdiction in a dispute between the Union and a State, or between one State and another, or between group of states and others. It acts, therefore, as a Federal Court, i.e., the parties to the dispute should be units of a federation. No other court in India has the power to entertain such disputes.

Supreme Court is the guardian of Fundamental Rights and thus has non-exclusive original jurisdiction as the protector of Fundamental Rights. It has the power to issue writs, such as Habeas Corpus, Quo Warranto, Prohibition, Certiorari and Mandamus. In addition to issuing these writs, the Supreme Court is empowered to issue appropriate directions and orders to the executive. Article 32 of the Constitution gives citizens the right to move to the Supreme Court directly for the enforcement of any of the Fundamental Rights enumerated in part III of the Constitution.

Certain writs are allowed to be instituted in the apex court directly, against the orders of the Courts of the Court Martial, and the Central Administrative Tribunals.

#### b) Advisory Jurisdiction

Article 143 of the Constitution vests the President the power to seek advice regarding any question of law or fact of public importance, or cases belonging to the disputes arising out of pre-constitution treaties and agreements which are excluded from its original jurisdiction. This jurisdiction does not involve a lis, the advisory opinion is not binding on the government, it is not executable as a judgment of the court and the court may reserve its opinion in controversial political cases as in the Babri Masjid case.

#### c) Appellate Jurisdiction

The Supreme Court is the highest court of appeal from all courts. Its appellate jurisdiction may be divided into

1. Cases involving interpretation of the Constitution - civil, criminal or otherwise,
2. Civil cases, irrespective of any Constitutional question, and
3. Criminal cases, irrespective of any Constitutional question.

The appellate jurisdiction is mentioned in Articles 132(1), 133(1) or 134 of the Constitution. The Supreme Court has been conferred with power to direct transfer of any civil or criminal case from one State High Court to another State High Court or from a Court subordinate to another State High Court.

Under Article 132 the decision of any High Court can be questioned in the Supreme Court of the country, but only after the matter is deemed to be important enough on the point of law or on the subject of the constitution, and is certified as such by the relevant High Court. In the absence of any certificate from the High Court, a person may, with the leave of the apex court, appeal to this court, by filing a Special Leave Petition before the court. The Supreme Court has the provision of accepting or rejecting the case at its own discretion.

Article 133 provides for an appeal in civil cases, and article 134 provides the Supreme Court with appellate jurisdiction in criminal matters. However, the Supreme Court has the special appellate jurisdiction to grant, in its discretion, special leave appeal from any judgment, decree sentence or order in any case or matter passed or made by any court or tribunal. There are also provisions of pardoning criminals and canceling their lifetime imprisonment or death sentence by the Supreme Court.

#### d) Review Jurisdiction

The Supreme Court has the power to review any judgment pronounced or order made by it. Article 137 provides for review of judgment or orders by the Supreme Court wherein, subject to the provisions of any law made by the Parliament or any rules made under Article 145, the Supreme Court shall have the power to review any judgment pronounced or made by it.

However, the Supreme Court jurisdiction may be enlarged with respect to any of the matters in the Union List as Parliament may by law confer. Parliament may, by law, also enlarge or can impose limitations on the powers and functions exercised by the Supreme Court. Since Parliament and the Judiciary are created by the Constitution, such aforesaid acts must lead to harmonious relationship between the two, and must not lead to altering the basic structure of the Constitution. Moreover, all these powers can also be suspended or superceded whenever there is a declaration of emergency in the country.

#### Role of Attorney General in Indian Judiciary

The Attorney General is the chief legal advisor of the Indian government and its primary lawyer in the Supreme Court. He is a person qualified to be appointed as a judge of the Supreme Court. He is appointed by the President of India under Article 76(1) and holds the office during the pleasure of the President. He is responsible for giving legal advice to the government and performs other assigned duties. He is consulted only after the Ministry of Law has been consulted.

He appears on behalf of government of India in all cases in the Supreme Court where the government is a party. He also represents the government in any reference made by the President to the Supreme Court under article 143. He can accept briefs but can't appear against the government. He also can't defend an accused in the criminal proceedings. He can accept directorship of any company only with government's permission.

The Attorney General has the right to be present in all Courts and participate in the proceedings of the Parliament. He is assisted by a Solicitor General and four Additional Solicitor Generals.

#### HIGH COURTS

The High Courts are the principal civil courts of original jurisdiction in the state. There shall be High Court for each state (Article 214), and every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself (Article 215). However, Parliament may, by law, establish a common High Court for two or more states and a Union Territory (Article 231).

There are 21 high courts in India. These courts have jurisdiction over a state, a union territory or a group of states and union territories. They decide on both civil as well as criminal cases. Established in the year 1862, the Calcutta High Court is the oldest court in India. High courts which handle a large number of cases of a particular region, have permanent benches (branches of the court) established there. A high court is generally the last court of regular appeals and is the uppermost court in that state. Most of the cases handled by the High Courts are passed on from the district or lower courts and also from the writ petitions in terms of Article 226 of the Constitution of India.

The High Courts are also termed as the courts of equity, and can be approached in writs not only for violation of fundamental rights under the provisions of Article 32 of the Indian constitution, but also for any other rights under Article 226 of the Constitution, and under its powers to supervise over all its subordinate courts falling within the physical jurisdiction of the same under Article 227 of the Constitution. In fact, when apparently there is no effective remedy available to a person in equity, it can always move the High Court in an appropriate writ.

A judge of a High Court shall hold office until the age of 62 years. A judge can vacate the seat by resigning, by being appointed a judge of the Supreme Court or by being transferred to any other High Court by the President. A judge can be removed by the President on grounds of misbehavior or incapacity in the same manner in which a judge of the Supreme Court is removed.

### Jurisdiction of High Courts

The jurisdiction of the High Court of a state is co-terminus with the territorial limits of that state. The original jurisdiction of High court includes the enforcement of the Fundamental Rights, settlement of disputes relating to the election to the Union and State legislatures and jurisdiction over revenue matters. Its appellate jurisdiction extends to both civil and criminal matters. On the civil side, an appeal to the High Court is either a first appeal or second appeal. The criminal appellate jurisdiction consists of appeals from the decisions of:

1. A sessions judge or an additional sessions judge where the sentence is of imprisonment exceeding 7 years.
2. An assistant session judge, metropolitan Magistrate or other judicial Magistrate in certain certified cases other than 'petty' cases.

The writ jurisdiction of High Court means issuance of writs/orders for the enforcement of Fundamental Rights and also in cases of ordinary legal rights. High Court also has the power to superintend all other courts and tribunals, except those dealing with armed forces. It can also frame rules and issue instructions for guidance from time to time with directions for speedier and effective judicial remedy. High Court also has the power to transfer cases to itself from subordinate courts concerning the interpretation of the Constitution. However, the Parliament, by law, may extend the jurisdiction of a High Court to, or exclude the jurisdiction of a High Court from, any Union Territory. High Courts' power of original and appellate jurisdiction is also circumscribed by the creation of Central Administrative Tribunals, with respect to services under the Union and it has no power to invalidate a Central Act, rule, notification or order made by any administrative authority of the Union.

### Subordinate Courts

There are courts subordinate to High Courts. These are set up by the state governments. The nomenclature of these subordinate courts differs from state to state but there is a broad uniformity in terms of the organizational structure.

Under the High Courts, each district has a District Court which has appellate jurisdiction in the district. Under the district courts, there are the lower courts such as the Additional District Court, Sub Court, Munsiff Magistrate Court, Court of Special Judicial Magistrate of II class, Court of Special Judicial Magistrate of I class, Court of Special Munsiff Magistrate for Factories Act and labor laws, and so on. At the grass root level below this court system, there are Panchayat Courts (Nyaya Panchayat, Gram Panchayat, Panchayat Adalat, etc.). However, these are not considered as courts under the purview of the criminal courts jurisdiction.

District Courts can take cognizance of original matters under special status. The Governor, in consultation with the High Court, makes appointments pertaining to the district courts. Appointments to the judicial service, apart from the District Judges, are made by the Governor according to the rules made by him after consultation with the High Court and the State Public Service Commission.

The High Court exercises administrative control over the district courts and the courts subordinate to them in matters like posting, promotions and granting of leave to all persons belonging to the state judicial service.

### Advocate General

There is an Advocate General for each State, appointed by the Governor, who holds office during the pleasure of the Governor. He must be a person qualified to be appointed as a Judge of High Court. His duty is to give advice to State Governments upon such legal matters and to perform such other duties of legal character, as may be referred or assigned to him by the Governor. The Advocate General has the right to speak and take part in the proceedings of the State Legislature without the right to vote.

### Lok Adalats

Lok Adalat is a non-adversarial system and resolve disputes through the conciliatory method. The statutory status is provided by the Legal Services Act, 1987. Lok Adalats are held periodically by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Legal Services Committee, or Taluk Legal Services Committee. These are usually presided over by retired judges, social activists, or other members of the legal profession.

The focus in Lok Adalats is on compromise. When no compromise is reached, the matter goes back to the court. However, if a compromise is reached, an award is made and is binding on the parties. It is enforced as a decree of a civil court. An important aspect is that the award is final and no appeal can be filed against the order of the Lok Adalat, not even under Article 226 because it is a judgment by consent. All proceedings of a Lok Adalat are deemed to be judicial proceedings and every Lok Adalat is deemed to be a Civil Court.

Cases that are pending in regular courts can be transferred to a Lok Adalat if both the parties agree. A case can also be transferred to a Lok Adalat if one party applies to the court and the court sees some chance of settlement after the other party has been given an opportunity of being heard.

There are neither court fees nor any rigid procedural requirements (i.e. no need to follow regular processes as stated by either the Civil Procedure Code or the Evidence Act) which speeds up the process. Parties can directly interact with the judge, which is not allowed in regular courts. If the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat.

The Lok Adalats can easily settle Civil Cases, Damage and Matrimonial Disputes, Land Disputes, Partition/Property Disputes, Labour Disputes, etc because the scope for compromise is high in these cases. Lok Adalats are particularly effective in settlement of money related claims.

They are a boon to the litigant public, where they can get their disputes settled fast and free of cost.

## Judicial Review

The Judiciary plays a very important role as a protector of the constitutional values that the founding fathers have given us. It tries to undo the harm that is advertently (or inadvertently) done by the actions of legislature and the executive and also tries to provide every citizen what has been promised by the Constitution under the Directive Principles of State Policy. All this is possible thanks to the power of judicial review. The significance of judicial review is to ensure that democracy is inclusive and that there is accountability of everyone who wields or exercises public power. It is a vital mechanism to protect the fundamental rights of citizens in our democracy.

Though the phrase 'judicial review' does not find mention in our Constitution, this power has been derived by the judiciary from various provisions. Firstly, the judicial power to interpret the constitution and especially the limits on Fundamental Rights vis-à-vis Article 13(2) suggests that any law contravening the Fundamental Rights would be declared void. It is the duty of the Supreme Court to safeguard and protect the Fundamental Rights of people and thus, it is vested with the power of judicial review under Article 32 and to interpret the Constitution.

The Supreme Court's power of judicial review extends to Constitutional Amendments also which is a contentious political issue. The parliament can amend the Constitution under Article 368 but such amendments should not take away or violate Fundamental Rights and any law made in contravention with this rule shall be void.

In the Golakhnath case (1967) the Supreme Court had stated

1. All amendments to be law [13(3)]
2. Fundamental Rights are transcendental and immutable, so they cannot be amended. Nonetheless to amend Fundamental Rights a new Constituent Assembly needs to be convened, and

3. Constitutional Amendment is an ordinary legislative power.

However, in 1971 the Parliament, by the 24th Constitutional Amendment, reversed the Golaknath judgments by declaring Constitutional Amendments made under Article 368, not to be taken as 'law' within the meaning of Article 13 and the validity of the Constitutional Amendment Act shall not be open to question on the ground that it takes away or affects Fundamental Rights [Art.368 (3)].

In 1972, the Parliament passed the 25th Constitutional Amendment Act allowing the legislature to encroach on Fundamental Rights if it was said to be done pursuant to giving effect to the Directive Principles of State Policy. The 28th Amendment Act ended the recognition granted to former rulers of Indian states and their privy purses were abolished.

But then in the famous Keshavnanda Bharati case, 1973, the court held that the Parliament could amend even the Fundamental Rights, but it was not competent to alter the 'basic structure' or 'framework' of the Constitution.

#### A Landmark Verdict

In the Keshavananda Bharati case (argued by late Nani Palkhivala challenging the Kerala Land Reforms Act 1963 and the amendment to the Act made in 1969), the Supreme Court for the first time held that any law, including a Constitutional Amendment, which altered the basic structure of the Constitution could be struck down. It gave the judiciary enormous powers to write or rewrite the Constitution through interpretation. Many people also feel that it paved the way for increasing dominance of the judiciary over the executive and the legislature.

The 42nd Amendment Act (1976) declared that Article 368 was not subject to judicial review by inserting clause (4) and (5) in Article 368. However, in 1980 in Minerva Mills case, court struck down clause (4) and (5) from Article 368 and maintained that 'judicial review' is the basic feature of the Indian Constitutional system which cannot be taken away even by amending the constitution. The Supreme Court, since then, has been defining the 'basic structure' case by case.

### Public Interest Litigation

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

This concept is unique to the Supreme Court of India only and perhaps no other Court in the world has been exercising this extraordinary jurisdiction. A Writ Petition is dealt with like any other Writ Petition and processed accordingly. Letters addressed to the Chief Justice of India are dealt with in accordance with the guidelines framed for the purpose.

The PIL is a socio-economic movement generated by the judiciary to reach justice especially to the weaker sections of the society. The idea came from 'atio popularis' of the Roman jurisprudence, which allowed court access to every citizen in matters of public wrongs. The purpose of PIL is to take justice to the deprived sections of the society and not the enforcement of the right of one person against the other.

According to S P Sathe, the PILs are expected (1) to promote greater protection of the minorities, weaker sections of the society and political and religious dissenters, (2) to extend judicial control over other organs of the state to ensure liberty, dignity, equality and justice to the individual and greater accountability of the governing institutions, and (3) to promote new methods (like Lok Adalats) to increase access to justice.

The granting of the right to PIL has led to plethora of litigations in the courts, indicative of the emphasis on democratic rights by the judiciary.

### Who Controls the Process of Justice

It is a matter of academic discussion as to who really controls the process of Justice, whether the courts or the governments. As far as the criminal cases are concerned, all the investigations are done by the police or some government agency which reports to the government. Prosecutors are appointed by the government also. Courts are concerned with the trial. Thus two important aspects which constitute justice – Investigation and prosecution – are totally in the hands of Government.

The Government also provides funds for the smooth functioning of the courts. By regulating the flow of funds, the Government controls the capacities of courts directly. Better equipped courts with better and sufficient staff can deliver justice faster and more efficiently. Justice being a concurrent subject, both the Central and State governments are responsible for providing funds. Thus, the government indirectly controls even the process of trial through its control on funding.

The Central allocation of the tenth five year plan (2002-2007) for justice was a mere Rs.700 Crore. Compare it with the government's decision of spending Rs.727 crore on the purchase of five aircrafts for the use of VIPs. Setting up of fast track courts, family courts, consumer courts, special courts for ST/ST cases, has speeded up the procedure of justice. As such it has been the decision of the government; it can sure speed up delivery of justice if it decides to focus on it.

No doubt the courts are duty bound to provide fair and expeditious justice, there are bottlenecks. The increasing workload of the courts raises the matter of writing and publishing of judicial proceedings, decision and orders. The existing practice of writing and reporting judicial proceedings, decisions and orders needs to be reviewed carefully in order to enhance the efficiency of the courts.

#### Government Initiative to Expedite Pending Cases

Although the issue of pending cases and case disposal falls strictly under the purview of the Supreme Court, the union government has set up a "National Mission for Justice Delivery and Legal Reforms" to facilitate expeditious disposal of cases by harnessing Information Communication Technology (ICT). In order to computerize the justice delivery system, the

government is implementing e-Courts Project for the district and subordinate courts and up-gradation of ICT infrastructure in superior courts at an estimated cost of Rs 935 crore.

A pendency reduction drive was launched (during July-December 2011) by the department of justice. It is targeting to computerize 12,000 courts by March 31, 2012 and 14,249 courts by March 2014. 39.23 cases have been transferred to fast track courts which have already disposed off 33 lakh cases.

Since January 2009, about 284 posts in different categories have been created or revived. Moreover, a committee of three senior officers was constituted to study the working of the Registry of the Supreme Court.

Other ways to reduce pendency are by increasing the periods for which judges sit, cutting down the number of court holidays, allowing morning and evening shifts in courts, encouraging the use of Gram Nyayalayas and alternative dispute resolution mechanisms.

## Contempt of Court



Fair and reasonable criticism of public institutions, including the judiciary, is a normal part of democratic process when people's liberties are assured by the constitution. People have the right to discuss the conduct of all public functionaries. However, willful disobedience of the court in any manner that lowers the authority of the court or interferes with or obstructs administration of justice must be checked. It is expected that the laws would ensure this. But you have to be careful if you live in India, particularly if you are talking about the conduct of judges. Reason: They have put themselves above all.

You give an interview to media and allege some judge of corruption; soon you and the media channel will get slapped with "contempt of court" charges. Yes, Tarun Tejpal, Managing Editor of Tehelka and Prashant Bhushan, Supreme Court lawyer can testify for the ground reality. The "Learned" and "Honorable" at the top of Indian judiciary expect the lesser mortals to stay within the sacred boundary of submissiveness and take their dictates like divine messages. Some years ago, Booker Prize Winner Arundhati Roy was sent to jail and fined for criticizing the court's verdict.

### The Contempt Law

The Contempt of Courts Act, 1971 codifies the law that many feel often stifles free and honest expression. No one has any objection to provisions that recognize disobeying court orders, interfering with judicial proceedings, or obstructing the administration of justice as contempt of court and they are easy to understand. The problem originates from the additional provision – scandalizing or lowering the authority of the court – that leaves considerable room for discretion. The Act of 1971 does not clarify what is meant by scandalizing the court.

There are two types of contempt of court: Civil and Criminal. It can be direct (if performed in front of the judge) or indirect. Contempt of court in any form is taken very seriously in India.

#### 1. Civil Contempt of Court

This refers to an individual's failure to obey a court order. The lawbreaker may purge it by adhering to the order. Suppose you show disrespect court rules and proceedings by speaking out rudely or irreverently during a trial proceeding. The judge may find that person in contempt of court if the latter does not sit down and be silent.

## 2. Criminal Contempt of Court

This is thwarting the activities of a court of law from being carried on smoothly. When a person does not provide proof when subpoenaed, or yells at the judge or threats member/s of jury or lawyer during a trial, the said person may be accused of contempt of court.

Courts certainly need power to ensure proper functioning and fair trial and see that no one tries to influence the witnesses and court officials. This is the objective of the contempt law. But the manner in which the law is generally practiced implies that this objective is lost and is replaced by the "grand idea" of protecting, sustaining, and enhancing the royal-ness of the courts and top legal hierarchy.

### Why not "Contempt of Citizens!!"

An Activist in Gujrat raised this question: "The Indian judiciary enjoys absolute power because of the provision of contempt of court. But given the enormous delay in delivery of justice, why not provide a law that makes delays "contempt of citizens."

Certainly a good question for the Indian government and the judiciary to think about.

### "Truth" as Defense

But the law as it has emerged from judicial decisions does not allow even truth to be a valid defense against the charge of contempt. Moreover, the courts have sought to make a distinction between criticism made by a former judge and law minister which may be permissible and criticism by other citizens which must be "checked." This is anti-democratic and violates the freedom of expression, right to equality, and non-discrimination clauses.

In 2002, the National Commission to Review the Working of the Constitution (NCRWC) recommended that 'truth' be allowed as defense in matters of Contempt of Court. It certainly made sense in the Indian context, particularly because the emblems in High Courts prominently display the motto "Satyameva Jayate" and in the Supreme Court "Yatho dharma statho jaya."

There is nothing earth-shaking in this recommendation because in countries like UK and Australia truth as defense against the charge of contempt by scandalizing had been available for several decades. In fact, other countries have advanced to far more tolerant regime. In UK, Courts rarely use this power; in the US, contempt is initiated only when there is 'clear and present danger' to the administration of justice.

### The contempt law today

The recommendation, however, eventually resulted in an amendment in the contempt law in 2006. The government added a rider though, by putting the clause: "The Court may permit, in any proceedings for contempt of court, justification by truth as a valid defense if it is satisfied that it is in public interest and the request for invoking the said defense is

bona fide." Presence of the words "in public interest" put an additional burden on the person accused of contempt and virtually defeats the objective of the proposed legislation.

In the law as it now stands, while a person accused of contempt can seek his defense in "truth", he must get the permission of court for this defense after satisfying it that this truth will be in public interest and that he is acting bona fide (ie, with reasonable care and caution).

Summary: Rather than counting on the phrases of the contempt law clauses, the interest of the general public and also judiciary will be better served if it develops tolerance for criticism of its actions and conduct. That will also connect it with the common man and strengthen democracy.

## Information Technology in Judiciary

### Potential of e-Judiciary in India

Use of Information Technology has the great virtue of simplifying procedures and bring transparency in our sluggish judiciary. This is the best approach to take the judiciary closer to ordinary people. Former President, A P J Abdul Kalam, had suggested the creation of e-judiciary by establishing "Judicial e-Governance Grid" from the district courts to the Apex Court in order to cover the entire judicial system in the country.

e-Judiciary is a judicial system that uses the Internet and electronic documentation from the time the case is registered until the time judgment is rendered; the records of proceedings and judgment can be accessed for future reference.

### Video Conferencing

Judicial remand extension of undertrials is now done through video conferencing in Delhi, Hyderabad, and Bangalore. Likewise the trial of stamp paper accused Telgi who is lodged in Pune jail is conducted simultaneously in courts in different states. Mumbai terror accuse Kasab's trial is another example.

The increasing backlog of cases is a serious threat to our judicial system. In the Indian context, this is a clear violation of 'Right to Speedy Trial' as conferred by Article 21 of the Constitution of India. The Supreme Court has realized this and an e-committee has been formulated. This committee has initiated steps for the computerization process of the Supreme Court and other courts.

Presently, the Supreme Court has undertaken 'e-courts' efforts in three phases as a Mission Mode Project under the National e-Governance Plan (NeGP) to link about 15,000 courts from the District Court to the Supreme Court through a Wide Area Network.

### Indian Courts on Internet

<http://indiancourts.nic.in/>

The 'Indiancourts' is a bouquet of Web Sites of the Supreme Court and all the High Courts and their Benches in India. It provides a single point access to information related to the

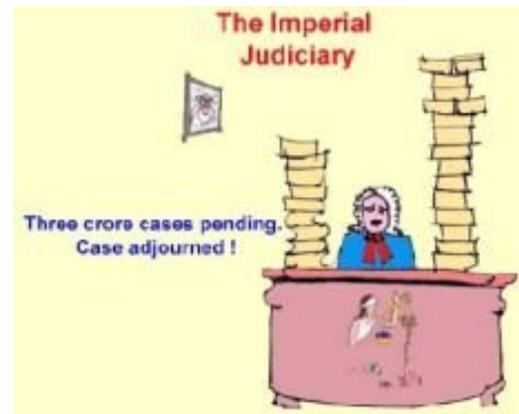
Supreme Court and any High Court in India. The Web Sites of the Supreme court and High Courts provide Litigant centric dynamic information like Judgments, Causelists, Case-status, etc. as well as static Information such as History, Jurisdiction, Rules, Past and present judges, etc. Ever since NIC took up computerization in Supreme Court in 1990, many digital applications have been added that are relief to common masses i.e. litigants.

## Pending Cases and Undertrials

At the end of 2011, around 3.2 crore cases were pending in high courts and subordinate courts across the country while 56,383 cases were pending in the Supreme Court. Of the total of 3.2 crore cases 74% cases were less than five years old. Likewise, 20,334 out of the 56,383 pending cases in the apex court were less than one year old. About 40 lakh cases are pending in high courts and 2.65 crore cases in the subordinate courts.

The following website provides latest information on pending cases in the Supreme Court:

<http://supremecourtfindia.nic.in/pendingstat.htm>



### Undertrials

"When the under-trial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated." – The Supreme Court

In addition, about 2.5 lakh under-trials are languishing jails, of which over 2,000 are in jails for over five years. Undertrials also out-number convicted inmates. For instance, recent data indicates that over 70 percent inmates in Asia's largest prison, Tihar in Delhi, are undertrials.

"73.5 percent (8,911 out of 12,124 which also include 410 omen) inmates of Tihar Jail are undergoing trial, which is much above the national average of 66.4 percent undertrials in Indian jails." – Director General (Prisons) – Tihar Jail, Neeraj Kumar

### Some Facts and Figures

Here are some facts and figures showing the status of Indian legal system:

- Every year around 380 murders take place in Delhi. But the Sessions Courts are equipped to dispose of only 250 murder cases every year. This means a backlog of 130 cases.
- In subordinate courts, a judge on an average disposes about 1300 cases every year.
- The average disposal of all Indian high courts is about 2400 cases per year. Compare it with the national average of disposal of cases per judge per year in major high courts: Kerala, 3,103; Madras, 2,979; Calcutta, 2,919; Punjab and Haryana, 2,900; Karnataka 2,817 and Andhra Pradesh, 2,625.

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- On an average, the 21 high courts dispose off around 188 cases everyday.
- The Madras High Court is fastest in terms of speedy disposal: average 648 cases daily. It is followed by the Allahabad High Court (Lucknow and Kanpur benches put together) which disposes of 445 cases everyday.

### Judicial Strength

There are roughly about 14,600 judges as against the sanctioned strength of about 17,600 (including 630 High Court Judges and 31 SC judges). In India there are 10.5 judges for every million people – compare it with Bangladesh 12 judges, Australia with 41.6, Hungary with 70, Canada with 75.2, and the USA with 107 judges per million. Needless to say, there is plenty of scope for improvement in Indian judiciary.

## Rise of Judicial Activism in India

Who should judge the judges? Can judicial accountability be gained without the judiciary losing its independence? Will there ever be a judiciary friendly to the common man?

### Judiciary – The Most Powerful Institution in India!



Historically, the justice system is depicted by an image where a blindfold man is depicted holding a balance. Metaphorically, all it means is that no personal opinion should come in the way of justice and the verdict should be absolutely objective and unbiased. It was expected that the judiciary would interpret laws and give verdicts strictly from the legal view point. Therefore, judges were traditionally expected to maintain a dignified distance from the masses to keep away from being influenced. However, the image of judiciary has undergone sea

change in recent times.

Things have changed now. Lately, the judiciary has begun to entertain many issues that were always considered administrative or governance related. Hence, often politicians and bureaucrats are left fuming. But to a large extent they have only themselves to blame. They have earned a lot of disapproval and distrust in recent years that has created a scenario where the judiciary is readily accepted as the system that could fill the vacuum.

The trend of coalition governments since 1991 has often led to situations where governments repeatedly failed to assert for fear of displeasing some coalition partner or because the decision was politically unpopular. Sometimes situations were allowed to be created where the matter landed in the Supreme Court through PILs or other mechanisms, so that the government did not appear a party to the decision.

As a result, the judiciary has acquired a larger than life image and is often seen playing the role that is strictly administrative or executive. Many people now recognize judiciary as the only institution that can checkmate the evil designs of the bureaucracy and the politicians and also pronounce decisions that governments feel uncomfortable to take themselves. The mushrooming PILs are another indication of changed socio-legal environment in the

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**Need to Strengthen Access to Justice and Judicial Accountability**

country. Let us see how the judiciary has come to accumulate so much power and dwarf the executive and even legislature.

### Tracing the Footsteps of Judicial Activism

The Constitution established the High Courts and the Supreme Court as watchdog institutions, independent of the executive and the legislature, to not merely dispense justice, but also to ensure that the executive and the legislature did not exceed the authority conferred upon them by the Constitution. Thus, the Judiciary was given the powers to interpret the laws and the Constitution, and also to strike down executive action which violated any law or the fundamental rights of citizens.

It also has the authority to examine whether laws framed by Parliament conformed to the Constitution and declare them void if they violated it. It is here that through “creative interpretation” of the “basic structure” of the Constitution, in 1973 the Supreme Court acquired the power to strike down even constitutional amendments. Many laws and some constitutional amendments have been struck down by the Courts since then.

Then by an even more inventive interpretation of the provision regarding appointment of judges by the government, it took over the power of appointment of judges. Thus judges of the High Court and Supreme Court are now appointed by a collegium of senior judges of the Supreme Court. The judiciary has thus become like a self-perpetrating oligarchy. There is no transparency in the system nor are there sensible criteria in judge’s appointments.

Through all this, the superior courts in India have emerged as perhaps the most powerful courts in the world, exercising virtually unlimited and unchecked powers. In these circumstances, it is absolutely vital that judges of the superior judiciary be accountable for their performance and their conduct – whether it be for corruption or for disregard of constitutional values and the rights of citizens.

### Impeachment – An Ineffective Removal Procedure

Unfortunately, neither the Constitution nor any other law has created any institution or system to monitor the performance of judges or examine complaints against them. Impeachment is the only constitutional way to remove erring judges of High Courts and the Supreme Court. To initiate the process signatures of 100 MPs of Lok Sabha or 50 MPs of Rajya Sabha are needed. If the motion is admitted by the Speaker of the LS or the Chairperson of the RS, an Inquiry Committee of 3 judges is constituted to hold a trial of the judge.

Only if the Committee finds the judge guilty, the motion is tabled in each house of the parliament where it must be passed by a 2/3 majority of each house. What a royal status our Honorable judges enjoy in a democracy where most the poor of the world live!

Experience has shown that it is an unpractical procedure and consequently it is almost impossible to remove a Supreme Court or High Court Judge even if there is documentary evidence of serious misconduct. Another reality is that MPs and political parties are very reluctant to take on a sitting Judge might be presiding over some cases against them. Yet another reality is that the judges often behave like a trade union and do not take kindly to brethren being accused of misconduct. It is, therefore, virtually impossible to get an impeachment off the ground unless the matter has become a big public scandal.

### A Historic Non Impeachment!!

The impeachment motion against Justice V Ramaswami was signed by 108 MPs in 1991. An year later, the inquiry Committee found Justice V Ramaswami "guilty of willful and gross misuses of office... while serving as the Chief Justice of the Punjab and Haryana High Court". However, Ramaswami survived the impeachment process as Parliament got divided along regional lines, southern MPs strongly supported him. Only 196 members of Parliament, less than the required two-thirds, voted for his ouster. The Judge remained in office till he retired, though he was not assigned any judicial work by the then Chief Justice.

### Impeachment Motion Could not be Tabled!

A charge sheet was prepared by the Committee on Judicial Accountability in 1998, when Justice Punchhi was a judge of the Supreme Court. It was signed by 25 MPs of Rajya Sabha. However, before it could get the signature of the requisite number of 50 MPs of Rajya Sabha, Justice Punchhi was appointed Chief Justice of India. After this, it became virtually impossible to get the Notice of Motion signed by any MPs. Consequently, Notice of Motion could not be presented to the Speaker.

The important lesson is: It is very difficult to have the MPs sign impeachment motion unless three conditions are satisfied. One, the charges must be very serious; two, they must be provable by documentary evidence which is annexed to the Notice of Motion; three, the charges must have received substantial publicity in the media.

Unless all three conditions are satisfied, MPs are afraid and reluctant to sign a charge sheet against a sitting judge. It is normally exceedingly difficult to get documentary evidence to prove charge against sitting judge, particularly in the absence of a statutory investigation by an agency having powers of investigation. Moreover, majority in the main stream media is afraid to publicize charges against the sitting judge for fear of contempt.

However, in Ramaswami's case, the above three conditions were satisfied. Documentary evidence was available against Ramaswami because of the report of the Accountant General who audited the purchases made by Ramaswami as Chief Justice of Punjab and Haryana High Court. Yet, he could not be impeached because political considerations took over.

It is now generally accepted that the present impeachment process is cumbersome, time consuming and tends to get politicized. It is not a practical remedy to discipline judges. It needs to be reformed urgently.

### Contempt of Court – A Gag Against Judiciary's Criticism

Even if there is documentary evidence against a Judge, it is rarely discussed in the media due to the widespread fear of contempt of court. Our Contempt Law allows any judge of the High Court and Supreme Court to charge any one with criminal contempt and send him to jail, on the ground that he/she has "scandalized the Court or lowered the authority of the Court". What "scandalizes or lowers" the authority of a Court is also left to the subjective interpretation of individual Judges. In Arundhati Roy's case, a bench of 2 judges of the Supreme Court charged her with contempt and sent her to jail merely because she criticized the Court in her affidavit.

Earlier the Supreme Court had disallowed truth as defense against Contempt of Court, though the parliament has amended the Contempt of Courts Act to expressly allow truth as a defense. However, it does not stop judges from slapping the contempt charge at will.

### No Prosecution without Permission of the Chief Justice

In 1991 in a case involving Justice Veeraswami (the father-in-law of Ramaswami), who was Chief Justice of the Tamil Nadu High Court and was caught with assets vastly

disproportionate to his income, the Supreme Court by another ingenious judgment laid down that no judge of a superior court could be subjected to a criminal investigation without the written permission of the Chief Justice of India.

Since then, this judgment has been used to prevent the investigation and prosecution of many judges against whom there was documentary evidence of corruption, fraud, misappropriation, etc. This also emboldened the judges and over the years they have got used to the feeling that they are above law and will get by with any wrongdoing. All this makes for an alarming picture of lack of accountability of the higher judiciary in India. They have successfully interpreted every fine-line of the Constitution to make themselves almost invincible.

No wonder many legal luminaries see an unaccountable judiciary with enormous powers as a dangerous institution and a serious threat to Indian democracy. The recent spate of judicial scandals reported by the media only underline a recent report of Transparency International: its corruption perception index (CPI) depicted the judiciary to be the second most corrupt institution in India after the Police.

All this suggests the urgency of judicial reforms to bring in transparency and accountability without compromising independence.

### Judiciary Against "Right To Information!"

As of now, the Right to Information Act seems to be the only available tool through which citizens can probe at least some of the activities of the judiciary. Needless to say, it is not happy being under RTI's purview. If the amendments suggested by SC are enacted by Parliament, it will only be a blow on the health of Indian democracy.

### Arbitrary Appointments

Here is a tale of absolute arbitrariness in judge's appointment. It is hard to believe that it happened in the Supreme Court.

#### The Case of Justice Ashok Kumar

Justice Ashok Kumar was appointed as an additional judge in April 2003. But considering adverse reports regarding his integrity, a Collegium of three senior judges of the Supreme Court unanimously decided not to confirm him as a permanent judge in August 2005. Despite this, he was given extensions as additional judge and then was even confirmed in February 2007 on the Chief Justice's recommendation who made his decision without consulting other members of the Collegium of judges.

It was in complete violation of several judgments of the Supreme Court. It was clearly laid down that in appointment of judges, the Chief Justice cannot act alone and must go with the majority view of the Collegium. The memorandum of procedure laid down by the law ministry also made it abundantly clear that in such matters the Chief Justice must consult the Collegium of senior judges, as well as those other judges who have come from the same High Court in which the proposed appointment is to be made.

Therefore, Justice Ashok Kumar's appointment was clearly contrary to the Constitution, and the law laid down by the Supreme Court itself. There is further twist to this tale of arbitrariness. When senior Supreme Court advocates challenged Justice Ashok Kumar's confirmation as a permanent judge, the Court gave a bizarre verdict: It berated the previous Chief Justices for having given extensions to Justice Ashok Kumar as additional judge, but found nothing wrong with his confirmation!

## Health of Indian Judicial System



Thanks to Anna Hazare's crusade against corruption, the phrases such as "judicial reforms" and "judicial accountability" have also become buzz words among the common masses of the country. Recent corruption cases such as the 2G scam, the CWG scam, the cash-for-vote scam, Adarsh Society Scam, etc have not only focused the spotlight on the conduct of politicians and public dignitaries but also on the shortcomings in the Indian judiciary's functioning.

Legal experts, social activists, business magnates, and all those who have ever come in direct contact with Indian judiciary have always been

unequivocal on the need for a clearly defined legal and regulatory framework and efficient disposal of cases. Clearly the legal apparatus and infrastructure have failed to keep pace with the rising population, changing societal structure, increasing number of laws, and increasing technological activities.

While rapid advancements in information and communication technologies have drastically changed the lifestyles of people, yet the judiciary appears rather cut off from the current ground realities. No surprise if the prevailing system of administration of justice appear totally out of place and out of time. It is still ridden with old fashioned form, procedure, and technicalities that please no one, except perhaps the vested interests who take comfort in the status quo. A section of politicians and judges are certainly in this group who find a dysfunctional judiciary very cozy.

There is no doubt that the judiciary is in dire need of speedy and effective reforms: ranging from appointing of judges, to instituting a transparent and non-partisan structure of inquiry free from legislative and judicial interference, to punishing corrupt judges.

### Corruption in judiciary as rampant as elsewhere

The judicial system is no less corrupt than any other institution of the government; it is well known to those who have had to deal with it. Its extent appears less because there are no in-house system of accountability – whatever mechanisms exist, they are ineffective. The media is also unwilling to talk about it because of the fear of contempt.

The Supreme Court has also compounded the matter by removing judges even from the ambit of criminal investigation. Thus one cannot even register an FIR against a judge taking bribes without the prior permission of the Chief Justice of India. Thus, the judiciary has become highly self protective and taken the form of a closed and opaque box.

### Removal of judges difficult

One thing is very clear about our Legal system – it lacks in-house self correcting mechanisms. Why? Because judges can't judge their own brothers objectively and in the

unlikely event of any judge being found guilty, the cumbersome parliamentary impeachment procedure almost assures that they are never removed.

In the last three years, there have been many incidents of the judiciary misusing its official position for personal gain. These allegations have created concern amongst those who believe only a strong judiciary can protect our democracy and human rights. Currently, the only punishment is removal from office, a cumbersome and impractical process. Since it is rarely necessary to remove a judge, many feel that a minor penalty is often deemed enough.

The very recent impeachment proceeding of Calcutta high court judge Soumitra Sen (found guilty on charges of misappropriation of money and misrepresentation of facts) has highlighted the need for an honest debate on judicial reforms. He is the only judge to have been ever impeached by any house of the parliament. His impeachment motion was passed by the Rajya Sabha but he resigned before the Lok Sabha took up the motion – and escaped removal through impeachment. As mentioned earlier in early nineties, Supreme Court judge V Ramaswami had faced similar proceedings in Parliament. But the Congress bailed him out by abstaining from supporting the impeachment motion.

Sen is just one among many tainted Supreme Court and high court judges, who have contributed to the steady erosion of credibility and faith in the judiciary. There are other names that sometimes find mention in the media. The reasons are very clear: the system of judge's appointment is self serving and their removal process is highly cumbersome.

Why can't a joint parliamentary committee perform the ritual of removing a judge?

### Rising pile of pending cases

The backlog of millions of cases in all categories of courts is the most damning evidence of the inadequacy of the legal apparatus. However, it is only a symptom and the remedy must go to address the root causes.

Raising number of judges, setting up more courts, and simplifying procedures are always discussed religiously but when it comes to implementation – it is always too late and too inadequate. The victims are the ordinary or poor people when they have to deal with courts which are mostly foreign lands for them. The rich, of course, can buy expensive lawyers and manipulate things in their favor in the procedural quagmire of Indian judicial system.

International investors and corporations take this as one of the big hurdles of doing business in India. Indian businessmen resort to all means other than courts for settlement of disputes. Courts are considered only as a last resort or as an means to harass the opposite party.

### Undertrials and their hardships

The majority of undertrials spend more time in jail during trials than the maximum sentence that can be imposed upon them. Even if they don't, the expenditure and agony of defending themselves during this long ordeal in courts is more painful than serving the sentence that could be imposed.

This agony of undertrials in the judicial system provides an easy way for the police and powerful people, who can have the police at their side, to harass, intimidate and silence inconvenient persons – particularly the political activists.

### Alienation of the Poor

The alienation of the common man in India with the judicial system leads to his feeling that the court-room is an alien-land where procedures and technicalities, rather than truth and morality, rule. It is difficult for an ordinary man to get past the complicated procedures or the middleman exploiting their ignorance to make money.

### No connection with society

Judiciary is an integral part of the society and its interaction with the local populace is healthy thing. In fact, its linkages with the society must be strengthened and nurtured. In many countries the system of jury ensures the involvement of common citizens in judicial decision-making.

But things are different in India. The Indian judiciary still is as an extension of the colonial regime. The British set up the system as a symbol of imperial power and the court procedures were meant to make the natives servile. The historic aloofness should have changed in last six decades, but the judicial officers have failed to come closer to the ground to meet the common man.

### No interaction with academia

In almost all democratic countries of Europe there has been a long tradition of interaction of the judiciary with the academic brains. That serves to provide feedback and guidance to both. In fact, universities offer fertile ground to cultivate and grow fresh ideas and have the potential to act as think tanks.

Situation in India is quite the reverse: Our nose-in-the-air legal presiding officers would still rather study the judgments of British Courts than develop a working relationship with Indian academic community. Their high handed ancient attitude has failed to evolve any meaningful relationship between the judiciary and the academic community; it has weakened both these important institutions in India.

The pathetic state of the legal education can be seen everywhere. Getting into a law curriculum is still the last option for students; after all other gates are closed. It is not unusual to meet qualified practicing lawyers who cannot even draft an application. They have to count on the typists sitting in the court premises to draft all documents for them. And a couple of years staying in the system gives them enough “experience” that enables them to rise to become senior advocates or even judges. No wonder they have to maintain their aloofness from the outside world!

Disconnected from the ordinary people as well as universities where law graduates are prepared, our legal system perhaps wants to preserve itself like potatoes in the cold storage!

### Why should judges appoint judges?

Indian Constitution makes Indian judiciary sort of a self-regulatory body. The Supreme Court and High Courts exercise powers of superintendence and also lay the procedures for conduct of business in the courts. The powers of the Supreme Court are almost unlimited. Article 141 of the Constitution has given Supreme Court powers to act even as a legislative body.

With its “creative interpretations” of the Constitution the judiciary has placed itself above all and gone beyond the reach of politicians. This has disturbed the fine balance between the executive, legislature and the judiciary.

As things stand, the judiciary has used its power only to insulate itself both from criticisms and accountability. It has failed to evolve any internal system of intellectual growth of its Honorable members. Although some of the finest brains can be found in the legal fraternity, there is no systematic mechanism to either attract high quality talent to the legal profession or to nurture the legal profession in India. Its distance from the academia only compounds the problem further.

Repeatedly voices have been raised from various quarters that the appointment of judges should be vested with an independent authority that has representation not only from judiciary but also from other segments of the society. Let us see when and how this serious distortion is remedied.

#### Power of contempt

On top of all this immunity to the judiciary is the power of contempt of Court, which has become potent weapon to stifle public criticism or even honest evaluation of the judiciary. While deterring people from making unwarranted attacks on judiciary, the Contempt of Courts Act, 1971, has also stifled debate. That’s why judiciary’s conduct is hardly discussed or debated in the media.

And now the judiciary is even seeking to remove itself from the purview of the Right to Information Act. After having loudly pronounced that the citizens have a right to know everything that goes on in every public institution, the Supreme Court asks the government to effectively exempt it from the purview of the Act by removing the jurisdiction of the Central Information Commission over the Registrar of the Court.

Many High Courts have still not appointed public information officers required by the Act. The Delhi High Court has framed rules which prohibit the release of non judicial information about the court, such as purchases and appointments. All this has ensured that the judiciary becomes a law unto itself, totally non transparent, and accountable to none.

#### Government and judiciary not serious about judicial reforms

Successive law commissions appear to have devoted considerable time in analyzing the reasons behind the lethargy of the system, rather than showing seriousness about making it easily accessible to the poor or on the issue of judicial accountability – both very crucial. Law commissions have been largely manned by retired judges who have displayed little creativity or fresh problem solving thinking in their reports. Their patchwork solutions have only diverted attention from the root causes that need radical restructuring of the judiciary.

Moreover, neither government nor judiciary has shown seriousness towards what the law commissions' recommend. It appears that both are content with the present out-of-date and unaccountable judicial system. For good reason too: the judges are happy with the lack of accountability and the government is happy with an institution that can't hold them to account for its actions in real terms.

Remedy: An independent permanent judicial commission empowered with appointments, investigation of improper conducts, prosecution, and removal of erring judges.

## Government Initiative to Streamline Justice Delivery

### National Mission for Justice Delivery and Judicial Reforms

A "Mission Mode Program for reduction of pendency of arrears in courts" was launched in Kolkata on the occasion of the 150<sup>th</sup> year of the Calcutta High Court, the oldest in the country. A Mission Mode approach to infrastructure development of subordinate judiciary is among the major initiatives under the National Mission for Justice Delivery which is approved by the Government. Inadequacy of infrastructure in subordinate courts has been one of the bottlenecks in the speedy delivery of justice. Therefore, in the financial year 2011 – 12, the allocation for centrally sponsored infrastructure development was increased fivefold from Rs. 100 Cr to Rs. 500 Cr. The funding pattern was also changed from 50:50 to 75:25 for the states; the ratio 90:10 for the NE states will continue.

The government has decided on a number of measures to speed up justice delivery:

1. The Government accepted the recommendations of the Thirteenth Finance Commission to provide a grant of Rs. 5000 crore to the States for improving the justice delivery system over a five year period 2010-15. Of which Rs 1,000 crore was released to the States during the year 2010-11. It should the States set up morning / evening / shift / special magistrates' courts, appoint court managers, establish ADR centers and provide training to mediators / conciliators, and organize more Lok Adalats to reduce pendency. The grants also provide for training of judicial officers, strengthening State Judicial Academies, training of public prosecutors and maintenance of heritage court buildings.
2. It wants to implement the e-court project by focusing on computerization and up-gradation of ICT infrastructure in superior courts at an estimated cost of Rs 935 crores. The aim is to computerize 12,000 courts by 31st March, 2012 and 14,249 courts by 31st March, 2014.
3. The Thirteenth Finance Commission, while recommending a grant of Rs. 5000 crore, suggested that 2<sup>nd</sup> year installment of grant be released only after formulating State Litigation policy. The would-be State Litigation policy aims to make governance more efficient so that the cases involving government are reduced, which will allow courts more time to speedily dispose of other pending cases.

Note that several thousands of cases are pending in courts where government employees, both serving and retired, have challenged decisions of their departments with regard to promotions and benefits. There are other set of cases where the common man has made government departments like PWD, DDA and police parties in their litigations.

4. Give boost to establishment of Gram Nyayalayas in order to take justice to the marginalized under the Gram Nyayalayas Act, 2008. Therefore, the current year allocation has been increased from Rs. 40 crore to Rs. 150 crore. So far 151 Gram Nyayalayas have been notified by the states.
5. It has requested all Chief Justices of High Courts to fill up vacancies of judges in the High Courts and Subordinate Courts in order to reduce pendency of cases.
6. The government also proposes to bring a Right to Justice Bill on the lines of Right to Education Act to ensure the right to justice is not denied to the common man.
7. The Judicial Standards and Accountability Bill, 2010. According to the Bill, judges of the Supreme Court and High Courts would be subject to scrutiny of a high-level oversight committee – which will be headed by a former Chief Justice of India and include the Attorney General – and those facing serious charges of misconduct may be asked to step down.

### The Judicial Accountability Bill

The Judicial Standards and Accountability Bill, 2010 aims to set judicial standards and make judges accountable for their lapses. At present, there is no satisfactory legal mechanism for dealing with complaints against judges. The Bill will replace the Judges Inquiry Act while retaining its basic features. Introduced recently in the parliament it proposes the following steps but fails to provide an effective deterrent against corruption in judiciary.

- It proposes to raise the retirement age of high court judges from 62 to 65 years.
- Judges will have to declare their assets and liabilities, and also that of their spouse and children.
- It lays down judicial standards and provides for accountability of judges and expedient mechanism for investigating into individual complaints against judges of the Supreme Court and High Courts and to regulate the procedure for such investigation. It contemplates setting up of a national oversight committee, to be headed by a former Chief Justice of India, with which the public can lodge complaints against erring judges, including the Chief Justice of India and the Chief Justices of the High Courts.
- If the charges are found to be serious, the committee can request the judge concerned to resign. If the judge does not do so, the oversight committee will forward the case to the President with an advisory for his removal.
- It also proposes to form a panel to incorporate a provision to have in-camera proceedings of the committee which will scrutinize complaints against judges.
- The Parliamentary Standing Committee on Personnel, Law and Justice has recommended a provision to "restrain" judges from making "unwarranted comments" against other constitutional bodies or persons in courts.
- It will require judges not to have close ties with any member of the Bar, especially those who practice in the same court.

## Roadmap to Judicial Reforms

A healthy democracy requires an efficient judiciary working independently alongside an effective executive and a responsible legislature. Looking at the lack of transparency and simplicity in our judicial system, it is time for “We, the people of India” to assert ourselves. After all, the issues of judicial reforms and accountability cannot remain the sole preserve of politicians, bureaucrats, judges and advocates.

Given the state of current affairs, what is urgently needed is judicial reforms in general and judicial accountability in particular. However, in order to achieve that a critical examination of the judicial system is needed. It requires intense all-inclusive debate in the media without the fear of contempt of the courts.

- **Lower Judiciary:** While the activities of higher judiciary affect the common people indirectly, the lower judiciary under the High Courts impacts them directly. It is here that we need to upgrade and expand infrastructure and simplify procedures. Increasing use of information and communication technology in lower courts will have a very positive effect by way of eliminating arbitrariness and corruption of petty court officials.
- **Introduce shift system and cut down the number of holidays in all levels of judiciary.**
- **Encourage Use of Video Conferencing:** A lot of crowding in courts and the hassle of transporting undertrials from jails to courts can be saved if e-communication facilities link courts with jails.
- **Reduce Government Litigations:** A lot of cases pertain to government departments where their employees seek legal recourse. By making its administration efficient government can save a significant time of the courts.
- **All India Judicial Service:** The Government of India should also examine the feasibility of creating an all India Service for judicial officers in the same manner as that of IAS and IPS officers. It will also attract talent in judiciary services.
- **Interaction with Universities:** Judiciary must have an ongoing interaction with academia both to attract talent and to cultivate fresh ideas. The law curriculum needs modernization and up-gradation.
- **National Judicial Commission:** Take away the right of appointment and monitoring judges’ conduct from the high judiciary and assign it to an independent National Judicial Commission (NJC), which must be created as a statutory body like the Election Commission.
- **The Judicial Commission must not be monopolized by existing or retired judges – and must include respected members from the legislature and academia, independent thinkers, and activists.** It should be empowered to appoint judges as well as probe complaints of their misconduct and initiate criminal proceedings wherever required without anyone’s consent.
- **Role of NGOs and activists:** They must exert pressure both on the government and the judiciary to speed up judicial reforms at all levels. Anna Hazare’s movement has generated a massive momentum; it must not be allowed to die down.

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