
UNIT 10 LEGAL SYSTEM AND JUDICIARY

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10.1 INTRODUCTION

Modern nation-state functions through a set of institutions. Parliament, the judiciary, executive apparatus such as bureaucracy and the police, and the formal structures of union -state relations as well as the electoral system are the set of institutions constituted by the idea of constitutionalism. Their arrangements, dependencies and inter-dependencies are directly shaped by the meta politico-legal document- i.e., Constitution.

The legal system derives its authority from the Constitution and is deeply embedded in the political system; the presence of judiciary substantiates the theory of separation of power wherein the other two organs, viz. legislature and executive stand relatively apart from it. Parliamentary democracy works on the principle of 'fusion of power,' and in the making of law, there is direct participation of the legislature and the executive, it is the judiciary that remains independent and strong safeguarding the interests of the citizens by not allowing the other organs to go beyond the Constitution. It acts, therefore, as a check on the arbitrariness and unconstitutionality of the legislature and the executive. Judiciary is the final arbiter in interpreting constitutional arrangements. It is in fact the guardian and conscience keeper of the normative values that are 'authoritatively allocated by the state.' The nature of the democracy and development depends much on how the legal system conducts itself to sustain the overall socio-economic and political environment.

10.2 GENESIS OF JUDICIARY IN INDIA

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. The development of the judicial system can be traced to the growth of modern-nation states and constitutionalism.

During ancient times, the concept of justice was inextricably linked with religion and was embedded in the ascriptive norms of socially stratified caste groups. Caste panchayats performed the role of judiciary at the local level, which was tied up with the religious laws made by the monarchs. Most of the Kings' courts dispensed justice according to '*dharma*', a set of eternal laws rested upon the individual duty to be performed in four stages of life (*ashrama*) and status of the individual according to his status (*varna*). The King's power to make laws depended on the religious texts and the King had virtually no power to legislate 'on his own initiative and pleasure'. Ancient state laws were largely customary laws and any deviation from it or contradiction from *dharma* was rejected by the community.

In medieval times, the dictum 'King can do no wrong' was applied and the King arrogated to himself an important role in administering justice. He became the apostle of justice and so the highest judge in the kingdom. Perhaps, the theory of institutionalism guided justice, manifesting gross arbitrariness and authoritarianism.

10.2.1 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. British efforts were made 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 judgement other than a declaratory judgement' 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 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.

10.2.2 Constituent Assembly: the Background

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 questioning. 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'.

10.3 STRUCTURE OF JUDICIARY

Under our Constitution there is a single integrated system of courts for the Union as well as the States, which administer both union and state laws, and at the head of the 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.

10.3.1 The Supreme Court

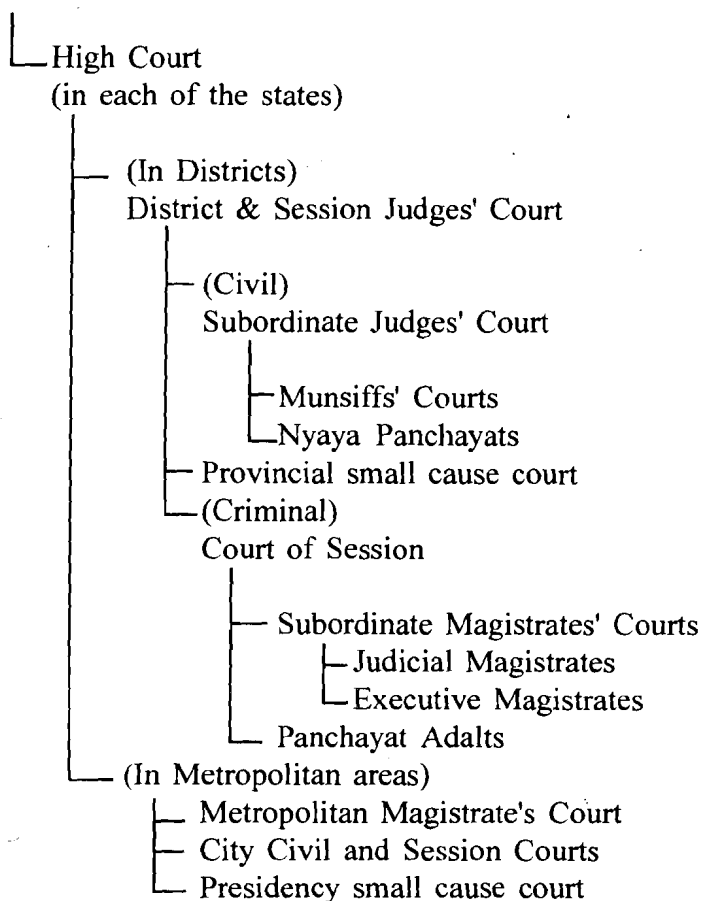
The Supreme Court is the highest court of law in India. It has appellate jurisdiction over the high courts and is the highest tribunal of the land. The law declared by the Supreme Court is binding on all small courts within the territory of India. It has the final authority to interpret the Constitution. Thus, independence and integrity, the powers and functions and judicial review are the issues of utmost importance concerned with the Supreme Court.

10.3.1.1 Composition and Appointments

The Supreme Court consists of the Chief Justice of India and not more than twenty-five other judges. 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, organisation, jurisdiction and 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.

THE JUDICIARY

Supreme Court of India



A person shall not be qualified for appointment as a judge of the Supreme Court unless he is:

- a) a citizen of India, and
- b) either
 - i) a distinguished jurist; or
 - ii) has been a High Court judge for at least 5 years, or
 - iii) has been an Advocate of a High Court for at least 10 years.

Once appointed, a judge holds office until he attains 65 years of age. He may resign his office by writing addressed to the President or he may be removed by the President upon an address to that effect being passed by a special majority of each House of the Parliament on grounds of 'proved misbehaviour' and 'incapacity'. The salaries and allowances of the judges are fixed high in order to secure their independence, efficiency and impartiality. The Constitution also provides that the salaries of the judges cannot be changed to their disadvantage, except in times of a financial emergency. The administrative expenses of the Supreme Court, the salaries, allowances, etc., of the judges are charged on the Consolidated Fund of India.

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.

10.3.1.2 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 judgements. Article 141 declares that the law laid down by the Supreme Court shall be binding on all courts within the territory of India. 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.

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 judgement 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

- i) cases involving interpretation of the Constitution - civil, criminal or otherwise
- ii) civil cases, irrespective of any Constitutional question, and
- iii) Criminal cases, irrespective of any Constitutional question.

Article 132 provides for an appeal to the Supreme Court by the High Court certification, the Supreme Court may grant special leave to the appeal. 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 judgement, decree sentence or order in any case or matter passed or made by any court or tribunal.

d) Review Jurisdiction

The Supreme Court has the power to review any judgement pronounced or order made by it. Article 137 provides for review of judgement 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 judgement 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.

10.3.2 High Courts

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). Every High Court shall consist of a Chief Justice and such other judges as the President may from time to time deem it necessary to appoint. Provisions for additional judges and acting judges being appointed by the President are also given in the Constitution. The President, while appointing the judges shall consult the Chief Justice of India, the Governor of the State and also the Chief Justice of that High Court in the matter of appointment of a judge other than the Chief Justice. 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 misbehaviour or incapacity in the same manner in which a judge of the Supreme Court is removed.

10.3.2.1 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:

- a) a session judge, or an additional session judge where the sentence is of imprisonment exceeding 7 years

- b) 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.

10.3.3 Subordinate Courts

The hierarchy of courts that lie subordinate to High Courts are referred to as subordinate courts. It is for the state governments to enact for the creation of subordinate courts. The nomenclature of these subordinate courts differs from state to state but broadly there is uniformity in terms of the organisational structure.

Below the High Courts, there are District Courts for each district, and 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 labour laws, etc. Below the subordinate courts, at the grass root level are the Panchayat Courts (Nyaya Panchayat, Gram Panchayat, Panchayat Adalat, etc.). These are, however, not considered as courts under the purview of the criminal courts jurisdiction.

District Courts can take cognisance of original matters under special status. The Governor, in consultation with the High Court, makes appointments pertaining to the district courts. Appointment of persons other than the District Judges to the judicial service of a state is made by the Governor in accordance with the rules made by him in that behalf after consultation with the High Court and the State Public Service Commission.

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

10.4 JUDICIAL REVIEW AND PUBLIC INTEREST LITIGATION (PIL)

Judicial Review means the power of the judiciary to pronounce upon the Constitutional validity of the acts of public authorities, both executive and legislature. In any democratic

society, judicial review is the soul of the system because without it democracy and the rule of law cannot be maintained. Judicial review in India is an integral part of the Constitution and constitutes the 'basic structure' of the Constitution. The whole law of judicial review has been developed by judges on a case to case basis. Consequently, the right of seeking judicial review depends on the facts of each individual case; however, there cannot be a review of an abstract proposition of law.

Though 'judicial review' does not find mention in our Constitution, this power has been derived by the judiciary from various provisions. Firstly, judiciary power to interpret the constitution and especially the limits on Fundamental Rights vis-à-vis Article 13(2) that 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 invested 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. However, Constitutional Amendment review by judiciary in relation to Fundamental Rights and its legal validity has been a contentious political issue. 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. (Article 13)

Before Golaknath case (1967) the courts held that a Constitutional Amendment is not law within the meaning of Article 13 and hence, would not be held void if it violated any fundamental right. In Golaknath case it was settled that

- i) all amendments be law [13(3)]
- ii) Fundamental Rights are transcendental and immutable, so cannot be amended, nonetheless to amend Fundamental Rights a new Constituent Assembly needs to be convened, and
- iii) Constitutional Amendment is an ordinary legislative power.

In 1971, Parliament, by the 24th Constitutional Amendment, reversed the Golaknath judgements by declaring Constitutional Amendments made under Article 368, not to be 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.

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. 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 (PIL) is a socio-economic movement generated by the judiciary to reach justice specially 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 not the enforcement of the right of one person against the other but to reach justice to the deprived sections of the society. The court is not exercising any extra-constitutional jurisdiction and is now firmly rooted in Article 14, i.e., protection against all arbitrariness and lawlessness in administrative actions, and Article 21 that provides for protection of *life* embodying everything that goes for a dignified living, including rightful concern for others and Directive Principles applying to weaker sections.

The granting of the right to PIL has led to plethora of litigations in the courts, indicative of the development of democratic rights by the judiciary. S.P.Sathe has suggested that the Supreme Court has been working under these patterns:

- i) interpretational thrusts with a view to extending 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.
- ii) Interpretational strategies with a view to facilitate social change, which would promote greater protection of the minorities, weaker sections of the society and political and religious dissenters.
- iii) Innovating new methods for increasing access to justice (like PIL and Lok Adalats)

10.5 JUDICIAL REFORMS - AGENDA

The judiciary must find ways and means to clear burgeoning pending cases. In this judiciary, as an organisation, needs specialisation and differentiation in order to solve the cases. Lok Adalats and tribunals must be made more effective. Judiciary must appoint judges on merit basis and all adhocism must go. As the Tenth Law Commission has suggested, Constitutional Courts and the zonal courts of appeals may be constituted. A working democracy requires an independent judiciary well co-ordinated by an effective executive and a responsible legislature.

10.6 SUMMARY

In a democracy, the legal system and the judiciary are important constituents within the larger political milieu. The modern judiciary in India derives its sources from the Constitution, and acts as a check on the arbitrary decisions of the legislature and the executive. The Constituent Assembly foresaw the significance of Judiciary as a guardian of rights and justice. While the Supreme Court is the highest court of law in India, whose decisions are equally binding on all, the High Courts and the Subordinate Courts

ensure justice at the state and district levels respectively. The provision for judicial review and public interest litigation ensure that the rule of law is maintained, thereby providing for a dignified living and rightful concern for all. Thus, the unit broadly analyses the structure, process, behaviour and interaction of the judiciary within a broad framework to achieve the goals of development and democracy.

10.7 EXERCISES

- 1) Briefly explain the origin and evolution of judiciary in India.
- 2) Why is the Supreme Court considered as the highest court of law in India? Explain its purview of jurisdiction.
- 3) Write short notes on:
 - a) Jurisdiction of High Courts
 - b) Subordinate Courts
 - c) Judicial Review
- 4) "Judiciary is the most effective organ for safeguarding the rights and interests of the citizens". Do you agree?