

Judiciary

Envisaged role & actual record

- Critically evaluate the functioning of SC & whether it has fulfilled the constitutional mandate
- Judiciary in India is often termed as paradoxical institution. Why?
- Discuss the areas of Judicial reforms.
- Make differentiation betⁿ Judicial Review & J. activism.
- Give arguments in favour & in against of J. activism.

The role envisaged by Constitution for Judiciary.

View of Nehru

- Constitution does not envisage a passive Judiciary as in many other countries of the world. Judiciary has to play an active role in the social revolution & towards achieving Constitutional goals.

U/A 12 & Art. 36 the term state now also includes Judiciary. Thus along with Parliament & Legislature, Judiciary also has a responsibility towards the realisation of Directive Principles.

As per Art. 39A, Judiciary in India is also under obligation to ensure that Justice is made available even to the least advantaged in the society.

Art. 39A also talks abt Principles of operation of legal system in the country.

- Equality of opportunity
- To ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Nature of Judiciary in India

Though India is a federation, but federal principles have not been adopted w.r.t. Judiciary. We have integrated system of courts rather than parallel courts as found in U.S.A. SC is the apex institution, the highest court of appeal in the country.

Jurisdiction of SC

- It enjoys vast Jurisdiction
 - Writ Jurisdiction U/A 32 FR
 - Original Jurisdiction U/A 131
 - deals with settlement of disputes of federal nature
 - Appellate Jurisdiction
 - In civil, criminal & constitutional matters
 - 1. Under art. 132 SC is established as the ultimate interpreter of the Constitution.
 - 2. U/A 133 & 134 it is an apex court of appeal in civil & criminal matters to achieve the uniformity of law throughout the country.
 - 3. U/A 136, it has special Leave Petition.
- It is a residuary power of SC.

4. U/A ¹⁴³ 133, it also has advisory jurisdiction.

Nature of power of SC

HC also

- SC is a court of record with power to punish for its contempt.

- Art. 142

Content: Power of SC to pass any order or decree which it thinks necessary for doing complete justice in any cause or matter pending before it.

Obligation of L & E U/A 142

It is obligation of Parliament to make law as well as executive to ensure that the order made by SC is enforced throughout the territory of India.

- Art. 142 (2)

In order to fulfil the order SC also has power to secure the attendance of any person, discovery or production of any document or investigation or it punish for its contempt.

- Art. 141

Law declared by SC is binding on all courts.

It is an unconventional feature because it recognises SC's power to declare law.

This fills the vacuum till the time

Legislature has not made law. Thus

constitutionally SC enjoys shares law

making function with Parliament & our

Constitution has a scope for Judicial Governance.

- Art. 140

Ancillary powers of SC

Constitution permits Parliament to give supplementary power if it is desirable to enable court

Judicial Review
Natural Justice

to exercise its jurisdiction more effectively subject to the condition it should not be inconsistent with the Constitution.

- Art 144

All authorities civil & judicial within the territory of India shall act in aid of SC

Constitution creates ~~freely~~^{freely} independent / autonomous judiciary.

- System of Appointment

As per ~~Even to~~ original Constitution, executive does not have complete freedom in appointment of judges. It is mandatory to consult the judges of SC & High Court & it is mandatory to consult CJI along with other judges in case of appointment of judges of higher judiciary.

- System of removal

Judges of higher judiciary can be removed only by bringing a resolution against a judge. Due procedure of law is to be followed.

- Salaries & allowances ^{of judges of higher judiciary} are non-votable expenditures

- U/A 145(1) SC has power to determine the internal procedures.

Evaluation of role played by judiciary

Envisaged role of judiciary, SC specifically.

- As a guardian of the Constitution.

SC by Doctrine of Basic Structure has fulfilled the obligation of the guardian of the Constitution.

- As a guaranter of FR

Initially SC's record was not very encouraging. Uptil Golaknath case its role was passive.

In Golaknath case it came for greater defence of FRs but judiciary was criticised.

The darkest hour was Habeas Corpus case.

Since the end of emergency, SC has become more assertive & active in protecting the FR of people in India. It has incorporated the Doctrine of Due Process of Law, Liberal interpretation of FR, the institutionalisation of PIL. It is because of active role of judiciary that some of the rights mentioned in ~~DRDs~~ have got statutory status. RTE has got Constitutional status.

- SC as a protector of federalism

Since SR Bommai case, SC has emerged as a protector of federalism. It has pronounced that federalism is a basic structure of the Constitution.

SC's judgement has played role in minimizing the misuse of Art. 356.

- SC as a custodian of Rule of Law

It has acted as a protector of Rule of Law by checking the arbitrary actions of those in power. SC's judgement in 2G spectrum case, Nandini Sundar case (Declaring Chhattisgarh govt's Salwa Judum ^{as unconstitutional}) are examples to check of judiciary coming forward to establish the rule of law.

Judiciary has also played role in dealing on problems

- related to money & muscle power in elections.
- As per different survey conducted SC & India & ECI have been the most favourite institutions among Indian citizens.

However it is also true that judiciary in India face many challenges & it itself is in the state of crisis. This is the reason Pratap Bhan Mehta calls judiciary as deeply paradoxical.

Paradoxes of Indian Judiciary

- It has taken steps to hold other institutions accountable but it has been reluctant to bring greater transparency & accountability within itself.
- It has accused govt. for its inactivism. But at the same time large no. of cases are pending in various courts.
- It aimed at checking the corruption in other branches of govt. But according to survey of Transparency International, Judiciary is 2nd most corrupt institution of govt. after police in India.
- It is also a paradox that despite judicial activism judiciary has not been successful in changing the nature of governance.

Problems in Indian Judicial System

- Corruption

Corruption of any branch of govt. is unacceptable & corruption in judiciary cannot be tolerated. To quote from Bible, "You are the salt of the Earth"

If salt loses its savour from where the Earth will be salted. It is said that if lamp of justice goes we cannot imagine the amount of darkness. In 2010, Delhi HC held that Judiciary of undisputed integrity is the bedrock of rule of law. Earlier corruption was limited to lower judiciary but now it has also reached to higher judiciary. Justice
Norman
Yadav
Case Gaziabad Provident Fund scam involves 7 Allahabad HC Judges, 12 subordinate court Judges, 1 retired SC Judge & 6 retired HC Judges.

Steps taken

- Constitutional provision

Procedure for removal of judges for proved misbehaviour & incapacity guided by Judges Inquiry Act 1968.

Judicial Standards & Accountability Bill

Purpose

- To deal with the problems of corruption in judiciary
- To give statutory basis for the code of conduct to be observed by judges.

Why this bill is needed?

- Existing constitutional provisions are not sufficient. Procedural requirements make it very difficult to pass a resolution against a particular judge.
- Ordinary person has no role in the process of removal of a corrupt judge.

16/12/14

Cultun
AL
Bhashian.

Romilly
Thapan.

- In the age of coalition politics & polarised party system it is difficult to bring such a motion against the judge.
- Recently there has been increasing no. of cases of misconduct by judges of higher judiciary.

Provisions of Judicial Standards & Accountability Bill

Judicial Standards

- Bill aims to establish a statutory basis for the judicial standards or principles of ethics. In 1997, SC by a resolution adopted certain principles to be observed by judges.
- e.g. every judge of SC has to inform about his assets & liabilities as well as assets & liabilities of his family members after joining the office to CJI.
- SC judge is not supposed to involve himself in speculative activities or any type of political activities.
- Members of the family if they are in legal profession should not be using his residence or should not be pleading in his court, etc.

Similar type of instructions were issued to the High Courts. This bill aims to transform this ethical code of conduct into enforceable code of conduct. Judiciary considers that it will impact its judicial independence. According to former Minister of Law, bill does not impact judicial independence, rather will strengthen the trust of people in judiciary.

Accountability mechanism

- This bill aims to create an Oversight Committee. It will have members from Judiciary as well as members from civil society. It will also create scrutiny panel in SC & HC.
- Investigation committee

allows common man to start removal

person $\rightarrow$ Oversight Committee $\rightarrow$ Scrutiny Panel

- disciplinary order communicate with Parliament. Parliament will bring resolution for removal.

Investigation Committee

- Questionable clauses

- Judiciary objects to the composition of oversight committee. It is not clear whether it is constitutionally permissible that the members of civil society can take disciplinary action against the members of Judiciary.
- Scrutiny panel shall consist of judges of some HC or judges of SC. There is a possibility that scrutiny panel will give its findings in favour of the judge.
- Composition of investigating committee is not given in the Bill.
- Bill also prescribes punishment for frivolous complaints that requires 5 yrs rigorous imprisonment & fine.

Bill requires many amendments & presently Law Commission

consider that it will not pass the test of constitutional validity. According to Delhi HC, as far as judiciary is concerned "sunlight is the best disinfectant".

Appointment of Judges of Higher Judiciary

Constitutional provisions

- For Judges of SC

Judges are appointed by President after consultation with such other Judges of SC & HC which President may think fit.

However it is mandatory to consult CJI in case of judges other than CJI.

View of Constituent Assembly

- In C.A. there was a proposal for appointment of judges by judges. Ambedkar held that veto powers cannot be given to executive as well as to judiciary.
- According to KM Munshi, what is needed is independent judiciary & not insulated judiciary.
- According to TT Krishnamachari, there cannot be 'Imperium in Imperio' (state within a state). There has to be a balance of power and interinstitutional equilibrium. H

Hence the system of appointment adopted by the constitution does not give veto to judiciary nor complete freedom to executive & a fine balance is achieved.

System in practice

- For appointment of CJI, seniority rule was followed. Though Law Commissioners in their reports have held that merit should be the 1st criteria.

Govt did not act on this recommendation until 1973. After Kesavananda Bharti case judgement, govt. appointed Justice AN Ray superseding the 3 senior most judges as CJI. Justice AN Ray was among those who gave dissenting opinion on Basic Structure.

interference
timing
was
wrong.

Again in 1977 Justice Baig was appointed superseding Justice Khanna. Both of them were associated with Habeas Corpus case. Justice Khanna has given dissenting opinion. Justi

Govt's actions were clearly guided by motive of impacting the dignity of judiciary.

Response of judiciary.

- UOI vs Sankal Chand ~~1977~~ 1977 case

Judiciary interpreted that the term consultation does not mean concurrence.

- SP Gupta vs UOI @ 1982 case

Again held that consultation is not concurrence & opinion of judiciary is not binding.

- SC advocates on Record vs UOI 1993 case

Petitioner demanded SC to lay down the procedure of appointment of judges.

Now judiciary held that opinion of CJI is binding on executive considering judicial independence as the principle in Constitution.

However opinion of CJI means not his individual opinion but opinion after consultation with 2 senior most Judges.

• Presidential reference 1999

9 Judges bench gave unanimous opinion. Before giving opinion judiciary took undertaking that govt shall abide by the opinion.

> Primacy to opinion of CJI

> Opinion of CJI is not his individual opinion. Rather opinion formed after consultation with 4 senior most Judges

> Opinion of all Judges has to be in writing.

> Name to be recommended by consensus

> If no consensus then by majority.

> If majority is against a person, name shall not be forwarded.

CJI+3

• If CJI is in minority & majority disfavours, person shall not be appointed.

> Even if 2 Judges oppose, CJI shall not insert

> No one shall be appointed if not in conformity with CJI

> Merit should be the 1st criteria & in case of equal merit seniority to be the criteria.

> If govt. does not find person suitable, CJI will put govt. point of view before the collegium.

> If after reconsideration collegium again recommends appointment must be made.

Problem in above system

- Against the principle of separation of Powers & interinstitutional equilibrium
- It makes Judiciary completely insulated.
- System is inefficient.
- SC already overburdened & hence it has not been possible for SC to perform its task efficiently. Large no. of posts in many HCs remain vacant, thus further delaying justice.
- In the past system has been accused for being non-transparent. Lawyers Association of Punjab & Haryana HC, T.N. HC have objected the appointment of certain judges.
- It is held that instead of merit other criterion has ~~been~~^{been} adopted like caste, religion, nepotism & the system has been completely non-transparent.

This is reason that earlier 120th C.A. Bill

& now 121st C.A. Bill has been brought.

Bill has been passed by both Houses of Parliament.

However ratification by states is pending.

Purpose of the Bill

- As a result of 3rd Judges case, Constitutionally mandate role of executive has been taken away.
 - It gives meaningful role to both Executive & Judiciary.
 - Made appointment broad based.
 - It will enhance confidence of people in Judiciary.
 - Other countries also have same system
- Recently U.K. has app also gone for Judicial Appointment Commission.

Feature Purpose of the Bill

- Make recommendations for appointment of CJI, Judges of SC & HC.
- Recommendation for transfer of Judges of HC.

Composition of the Bill

- CJI to be the Chairperson
- 2 Senior most judges
- Union Minister of Law & Justice
- 2 eminent persons nominated by a Committee headed by PM, other members are CJI & LOP.
- Commission has to ensure that recommended person is of ability & integrity.
- As per new Bill, one of the eminent person shall be from among the member of SC, ST community or OBC or minority or women.

Power of President to send the recommendation for reconsideration.

In earlier bill, President had no such power. But in present bill, President can send the recommendation for reconsideration once.

If commission makes unanimous recommendation again, President shall make the appointment.

Appointment of CJI

- It shall recommend senior most judge as CJI subject to the condition, Commission finds him fit to hold the office.

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For HC Judges, the recommendation of Chief Justice of concerned HC shall also be taken. Chief Justice of HC shall concern 2 senior most judges of the concerned HC & if required other judges also.

Views of Governor & CM shall also be taken before recommendation.

Appointment of Chief Justice of HC.

- Seniority criteria shall also be followed.

Veto powers of the members.

- If any 2 members do not agree, name shall not be recommended.

Judiciary has reservations about above provision.

Primacy of CJI goes, which is constitutional requirement.

- In case Union Law Minister & eminent person opposes, name shall not be recommended.

- Even if 3 judges want appointment can be stopped.

Other areas of reforms

Judicial case management

- Introduction of Judicial impact assessment
- The new litigation policy, that tries to change the existing scenario where govt. is very active litigant.
- Introduction of fast track courts, e-courts, mobile courts or Gram nyayalayas.

- Promotion of alternative dispute redressal mechanism like Lokadalats.
- Amendment in ~~Cxx~~ Criminal procedure code.
- Increasing legal awareness in the country.
- System of evening courts.

Conclusion :

There is a role of all stakeholders. The most imp. role is of the govt which has to create infrastructure, training facilities.

Role of Judiciary, lawyers as well as Civil Society.

Ministry
of
Law
&
Justice

Ranchayats / Local Self Govt /

Grass Root Democracy.

Judicial Activism, Review, Overreach

What is Judicial activism?

Concept of activism among institutions is based on chemistry. Electron getting extra energy jumping into the next orbit similarly when 1 organ of govt jumps onto other, it is called activism of that institution.

In India we have witnessed activism of Parliament, activism of executive, judicial activism, activism of ECI, activism of CAG.

Reason of judicial activism in India

Initially because of overactivism of other