UNIT
1

Judiciary

Learning Outcomes :

Students will be able to:

I. trace the history of the origin and development of Indian Judicial System in India;

II. know the structure of Judiciary in India;

III. explain the Jurisdiction of the Supreme Court of India;

IV. explain the Jurisdiction of the High Courts;

V. understand the working of Subordinate Courts;

VI. identify the Hierarchy of Judicial System in India;

VII. discuss the role of Tribunals in complementing and supplementing the role of judiciary in India

VIII. explain the concept of Judicial Review in India

IX. understand the scope of Judicial Review in India

A. STRUCTURE, HIERARCHY OF COURTS, AND LEGAL OFFICERS IN INDIA

The Constitution of India lays out the framework of the Indian judicial system. India has adopted a federal system of government which distributes the law enacting power between the Centre and the States. Yet the Constitution establishes a single integrated system of judiciary comprising of courts to administer both Central and State laws. The Supreme Court located in New-Delhi is the apex court of India. It is followed by various High Courts at the state level which function for one or more number of states. The High Courts are followed by district and subordinate courts which are popularly known as the lower courts in India. To supplement the functioning of the Courts, there exist specialised tribunals to adjudicate sector specific claims such as labour, consumer, service matter disputes.

A. I. i. Supreme Court of India

The Supreme Court of India came into being on 28 January 1950. It replaced both the Federal Court

of India and the Judicial Committee of the Privy Council which were at the apex of the Indian court system, under the colonial era. The Constitution of India as it stood in 1950 envisaged a Supreme Court with a Chief Justice and 7 Judges. The Parliament was granted the power to increase the number of judges in the coming years. At present, the total strength of the Supreme Court is 34 judges including the Chief Justice of India.

The Supreme Court (Number of Judges) Amendment Bill, 2019

- The Supreme Court (Number of Judges) Amendment Bill, 2019 was introduced in Lok Sabha on August 5, 2019. The Bill amends the Supreme Court (Number of Judges) Act, 1956.
- The Act fixes the maximum number of judges in the Supreme Court at 30 judges (excluding the Chief Justice of India). The Bill increases this number from 30 to 33.

Sources: https://prsindia.org/billtrack/the-supreme-court-number-of-judges-amendment-bill-2019

A.I.ii. High Courts

India consists of 25 High Courts at the state and union territory level. Each High Court has jurisdiction over a state, a union territory or a group of states and union territories. Below the High Courts exists a hierarchy of lower courts functioning as civil courts and criminal courts as well as the specialised tribunals. The Madras High Court in Chennai, Bombay High Court in Mumbai, Calcutta High Court in Kolkata and the Allahabad High Court in Allahabad are the first four High Courts in India. The Andhra High Court and Telangana High Court are the newest high courts, established on 1 January 2019 according to Andhra Pradesh Reorganisation Act, 2014.

A. I.iii. District and Sub-ordinate Courts

The Courts that function below the High Courts are popularly known as subordinate judiciary. They comprise of district and sub-ordinate courts. *Each state is divided into judicial districts presided over by a 'District and Sessions Judge'*. The judge is known as a 'District Judge' when he presides over a civil case and a 'Sessions Judge' when he presides over a criminal case. The district judge is also called a 'Metropolitan Sessions Judge' when he is presiding over a district court in a city which is designated as a metropolitan area by the State government. District judges may be working with Additional District judges, depending upon the judicial workload.

The district judge is the highest judicial authority below a High Court judge. The District Court also holds appellate jurisdiction and supervision over all sub-ordinate Courts below it. On the Civil side, the sub-ordinate Courts below the District Court include (in ascending order) - Junior Civil Judge Court, Principal Junior Civil Judge Court, Senior Civil Judge Courts (also called sub-Courts). Sub-ordinate Courts on Criminal side (in ascending order) include- Second Class Judicial Magistrates Court, First Class Judicial Magistrate Court and Chief Judicial Magistrate Court.

Apart from the sub-ordinate Courts, District Munsiff Courts also form a part of this hierarchy. They are the lowest in order of handling matters of civil nature and function below the sub-ordinate Courts. Usually, these are controlled by the District Courts of the respective district.

Their pecuniary limits, meaning the Court's ability to hear matters upto a particular claim for money, are notified by respective State Governments.

A.II. Salient Features of Indian Judiciary

a. India as a common law jurisdiction

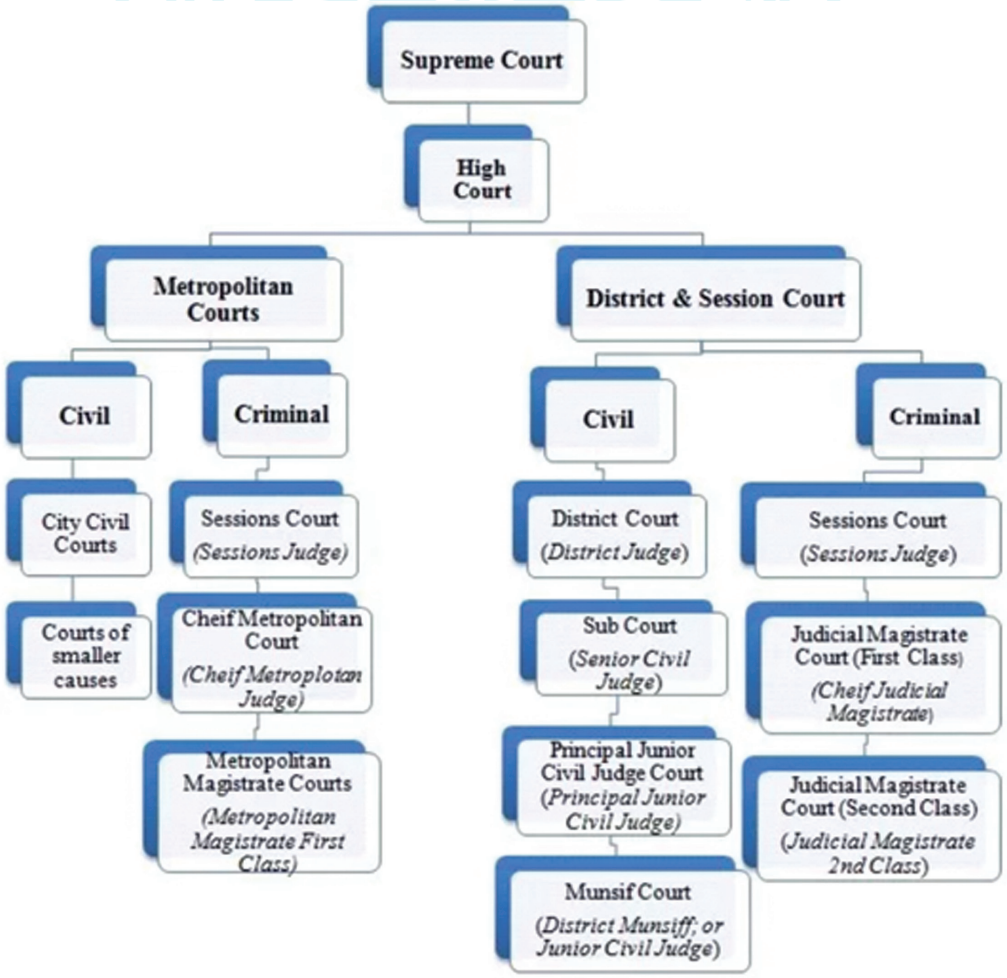
Taking its precedence from the British tradition of 'common law', India has adopted a similar model. Under this scheme of the common law system, the decisions, orders and judgments

developed by the judges in India help in the creation and development of laws and legal principles, which becomes binding precedents for all subordinate courts in the hierarchy. Therefore, courts play a vital role in creating laws, especially where gaps in law exist, and the legislature or executive have failed to enact laws. Thus, apart from administering civil and criminal justice, courts and judges serve a vital function in the federal set up of the country.

Opposed to this model, is a concept of civil law system followed in countries such as Germany, Russia, and Continental Europe. The main difference between common and civil law is with respect to the source of law. Under common law, judiciary can make laws through judicial decisions of courts; however under civil law, only the legislature or executive has the power to create laws and rules. This salient feature of Indian judiciary in following a common law model further strengthens the role of courts in India.

b. Adversarial model of dispute resolution

Courts in India follow the adversarial system of adjudication as opposed to the inquisitorial model followed in several civil law countries. In an adversarial model, the role of lawyers representing the party becomes vital. Lawyers of the opposing parties present their cases before a neutral judge who in turn provides a decision based on the merits of the case, as presented by the lawyers. In the inquisitorial system of law, on the other hand, judges are more pro-active in adjudicating the matter. Rather than acting as neutral judges, they have rights to inquire and probe into the matter, much like a police. Here the role of lawyers representing the party and the role of judge cumulatively becomes important in determining the manner in which a civil case or criminal trial proceeds.



A.III. Legal officers in India

Certain legal offices at the Union and State level exist to advise the executive wing of the government. These law officers derive their mandate either from the Constitution or other statutory enactments and rules.

a. Attorney General of India

The Attorney General is the first legal officer of the country. The Attorney General of India is appointed by the President of India under Article 76 of the Constitution, which states that he can hold the office during the pleasure of the President. The Attorney General must be a person qualified to be appointed as a Judge of the Supreme Court, possessing adequate legal practice or have served as a judge for a requisite duration as mandated by the Constitution. The first Attorney General of India was **M. C. Setalvad**.

Attorney General gives advice to the Government of India upon such legal matters, which are referred or assigned to him by the president. Also, he performs such other duties of a legal character that are referred or assigned to him by the president or conferred on him by or under the Constitution or any other law.

In the performance of his official duties, he has the right to audience in all courts in the territory of India. He has the right to speak or to take part in the proceedings of both the Houses of Parliament and their joint sittings but without a right to vote. He has the right to speak or to take part in the meeting of any committee of the Parliament of which he is named as a member but without a right to vote. He enjoys all the privileges and immunities that are available to a member of parliament.

In discharge of his functions, the Attorney General is assisted by a Solicitor General and four Additional Solicitors General. The position of the Solicitor General and Additional Solicitors General is not recognised in the Constitution. However they are governed through rules enacted by the Parliament.

b. Advocate General

Similar to the Attorney General of India, the position of Advocate General exists at the state level. An Advocate General is a senior law officer who acts as a legal adviser to the State Government. According to Article 165 of the Constitution, Advocate General is appointed by the Governor of the respective state. The Advocate General is the chief legal advisor of the State and performs duties of a legal character including representing the State before the courts either through himself/herself or through the law officers or pleaders appointed by the State. The qualification required for appointment as an Advocate General is similar to that of a judge of a High Court. The office of an Advocate General is held during the pleasure of the Governor, who also determines the nature of remunerations for the Advocate General.

Additional Advocate Generals are also appointed to assist the office of the Advocate General.

B. CONSTITUTION, ROLES AND IMPARTIALITY

The judiciary in India derives its powers and functions from the Constitution, which till date remains the fundamental legal text for the functioning of Indian democracy.

B.I.i Independence of Judiciary as a Constitutional Safeguard

Article 50 of the Indian Constitution lays the rule of independence of judiciary. This is understood as judiciary's autonomous status, separate from the executive or legislative wings of the government. Independence of judiciary helps in the maintenance of rule of law, ensuring good governance and creating a free and fair society. The independent status of the judiciary and roles to be performed by it; can be understood as two sides of the same coin. In this context, one must understand the reasons for granting a special status to the judiciary:

First, Judiciary's independence is linked to its role as the watch-dog in a democracy. It monitors and maintains the checks and balances over the other arms of the government. Thus judiciary emerges as a mediator when any organ of the government exercises 'excess power' which tends to violate the larger societal or individual interest.

For instance, the Indian Police has extensive powers for crime detection and gathering evidence for prosecution of criminals. It is common for the police to interrogate suspect criminals in-order to gather the best evidence of the crime. However such powers should not impinge upon the rights of the accused or the suspected criminal. An accused cannot be coerced into giving statement pointing to his/her guilt. This right has been constitutionally guaranteed to the accused under Article 20(3) of the Constitution, which states: "No person accused of any offence shall be compelled to be a witness against himself". Judiciary steps in when such delicate interests are at loggerheads. Similarly, when there is a thin line of difference as in case of a police exercising their power to gather witness, in the exercise of the 'legitimate' and 'excess' right of a state organ, the role of judiciary becomes vital.

Second, in-order to ensure that constitutionally guaranteed freedoms such as freedom to speak in public or peacefully assemble, are interpreted as per the true constitutional philosophy, judiciary has been kept free from any external pressures. This is particularly useful when judiciary is interpreting a case of conflict between say between the government (political party in power) and certain protesting people of the civil society who have peacefully articulate their opinions on social issues for example, crime against women.

Third, Judiciary acts as a guardian of fundamental rights which are constitutionally granted to every citizen in India. Independence of judiciary was carved out during the formation of Indian Constitution as India was transitioning from a feudal to a democratic order. It was done to fully translate the well-knit provisions of extensive rights guaranteed under the Constitution into the lives of average citizens. Our Constitution grants us unique rights such as:

- Civil and political rights- e.g. the right to life; right to freedom of discrimination based on religion, race, caste, sex or place of birth.
- Economic, social and cultural rights- e.g. freedom to practice any religion; protection of interests of minorities.

An independent and impartial Judiciary has empowered Indian citizens and performed this role. Illustratively, one may look into the role of Court in giving an expanded meaning to Article 21 of the Indian Constitution which talks about a general right to life and personal liberty. For example, within this freedom, the Supreme Court has held that a street vendor has a right to operate on streets as selling products on street is linked to his livelihood and daily living which is protected under Article 21. Similarly, the Supreme Court has also stated that those who are aged, disabled and destitute in India including men and women have a right to food, which is most essential for their survival. State has a corresponding duty to provide them with food. This right has been read into the general right under Article 21. Therefore, the Court is performing the role which it was granted at the time of the drafting of Indian constitution. Even though the drafters did not include specific rights such as livelihood and food, within the constitutional ambit of enforceable fundamental rights, they are now made available to the citizens of India as matters of rights. This has been possible only by the interpretation and rule making function of the courts in India.

Fourthly, Independence of judiciary is vital for the respect of due-process of law. Due process of law means that the State must respect all the legal rights that are owed to a person and confirm to the norms of fairness, liberty, fundamental rights etc. Only an independent judiciary can make this concept operational. In the domain of criminal law as well, independence of judiciary is linked to the granting of a fair trial to the accused. This becomes extremely important even when the accused are foreign nationals or persons who have committed crimes against the state, e.g. terrorists.

Therefore independence of judiciary remains a vital and core principle even in the modern democracy.

B.I.ii Provisions relating to the judges

Independence of judges is crucial to ensuring independence of judiciary. The following legal provisions

mandate judge's independence and impartiality:

i) Once appointed, judges are provided with a security of tenure till they reach a retirement age. This age remains 62 for the High Court judges and 65 for the Supreme Court judges. Judges are not allowed to practice as advocates in the same or equivalent courts, post their retirement. For example, a retired High Court judge can practice in the Supreme Court, but is prevented from practicing in the same or other High Courts. This ensures that ex-judges practicing at the bar do not influence the decision of the bench, with whom they may have presumed familiarity.

ii) Judges cannot be easily removed from their office except for proven misbehaviour and incapacity. The legal process is kept stringent to ensure security of tenure of the judges.

iii) The salaries and allowances of judges are fixed and not subject to vote of the legislature. Judges derive their salaries from the consolidated fund of India (for the Supreme Court) and consolidated fund of state (in case of High Courts). Their emoluments cannot be altered to their disadvantage except in the event of financial emergency.

iv) Even the judicial conduct of the judges has been kept immune from examination by other Constitutional organs. The conduct of judges of both the Supreme Court and High Courts cannot be discussed in Parliament or state legislature, except when a motion for removal of a judge is being presented to the President.

v) Supreme Court of India has been authorized to have its own establishment and to have complete control over it. It is further authorized to make appointments of officers and staff of the court and determine their service conditions.

Therefore one can conclude that independence of judiciary is a constitutionally conferred protection.

B.II. Role of Indian Judiciary

Indian judiciary comprises of the Supreme Court, High Court, Sub-ordinate Courts and other Tribunals. The role of these courts along with their composition, powers and procedures for functioning have been elaborated in the Constitution.

B.II.i. Different Roles of the Supreme Court of India

The Supreme Court of India primarily exercises the role of an adjudicator and interpreter. This is explained through different jurisdictions vested with the court.

A. Supreme Court's role as an adjudicator and interpreter can be understood through the original and appellate jurisdiction vested with the Court. Under Article 131 of the Constitution, the Supreme Court is granted original jurisdiction.

Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other; or

(c) between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends: Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagements, and or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.

Such disputes must involve some question of law or fact on which the existence or extent of legal rights can be adjudicated. For example, the dispute between the sharing of river or other

natural resources between two states in India can be directly brought to the Supreme Court under exercise of its original jurisdiction.

Article 32 of the Constitution further gives an extensive original jurisdiction to the Supreme Court for the enforcement of fundamental rights of the citizens, through issuing directions, orders and writs. This is popularly known as the 'Writ Jurisdiction' of the Court. Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari to enforce them. 1) habeas corpus, i.e., to order the release of person is unlawfully detained; 2) mandamus, i.e., to order to a public authority to do its duty; 3) prohibition, i.e., to prevent a subordinate court from continuing on a case; 4) quo warranto, i.e., to issue directive to a person to vacate an office wrongfully occupied; and 5) certiorari, i.e., to remove a case from a subordinate court and get the proceedings before it.

The appellate jurisdiction of the Supreme Court can be invoked by a certificate granted by the High Court. Appeal to the Supreme Court may be made against any judgement, decree or final order of a High Court in both civil and criminal cases. Like the exercise of original jurisdiction, these cases must involve a substantial question of law as to the interpretation of the Constitution. Substantial questions of law as highlighted above connote questions of law or fact on which the existence or extent of legal rights can be adjudicated.

Appeal in Constitutional Matters: Under Article 132 (1) of the Constitution of India, an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court whether in civil, criminal or other proceedings, if the High Court certifies under Article 134-A that the case involves a substantial question of law as to the interpretation of this Constitution.

Appeal in Civil cases: Article 133 provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court only if High Court certifies under Article 134-A - (a) that the case involves a substantial question of law of general importance; and (b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

Appeal in Criminal Cases: Article 134 provides that an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court. This appeal can be in two ways: without a certificate of High Court and with a certificate of the High Court. An appeal lies without the certificate if the High Court: (i) has on appeal reversed an order of acquittal of an accused person and sentenced him to death. (ii) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death.

Special Leave to Appeal: Under certain special circumstances, an appeal may lie directly to the Supreme Court from any Court in India under Article 136 of the Constitution. This is Special Leave Petition or Special Leave to appeal. According to Article 136, an appeal can be made to the Supreme Court directly from any order, decision, decree, judgment, etc given by any court or tribunal in India. This power of the Supreme Court is discretionary and Hon'ble Court may or may not allow special leave to appeal to any person.

B. Advisory Jurisdiction

Supreme Court's advisory jurisdiction may be sought by the President under Article 143 of the Constitution. This procedure is termed as "Presidential Reference" and is recognised as the 'Advisory jurisdiction' of the Court. Article 143 reads if at any time it appears to the President that - (a) a question of law or fact has arisen or is likely to arise and (b) the question is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he/she may refer the question for the advisory opinion of the Court and the Court may after such hearing as it thinks fit, report to the President its opinion thereon.

In re Kerala Education Bill case (1958), the Supreme Court laid down the following principles:(a) The Supreme Court has under clause (1) a discretion in the matter and in proper case and for good reason to refuse to express any opinion on the question submitted to it; (b) It is for the

President to decide what question should be referred to the Court and if he does not entertain any serious doubt on the other provisions it is not for any party to say that doubts arise also out of them; (c) The advisory opinion of the Supreme Court is not binding on courts because it not a law within meaning of Article 141.

But In re Special Court Bill case (1979), the Supreme Court held that its advisory jurisdiction are binding on all courts in the territory of India. It also held that the Supreme Court is under duty under Article 143 to give its advisory opinion if question referred to it are not vague and of a political nature.

C. Supreme Court as an activist:

The Supreme Court of India is considered the sentinel qui vie and protects the fundamental and constitutional rights of the people. There have been several instances where the Higher Courts have taken cognizance of any matter of social, political and economic importance on its own behest or on the basis of a letter or any submission before the court .

Public Interest Litigation: So far we have seen the constitutional imperatives that permit the Supreme Court to adjudicate and advice on disputes coming from the sub-ordinate courts, individuals exercising writ jurisdiction and the President of India. In the recent years, the Supreme Court has relaxed its locus standi (meaning the right of a party to appear and be heard by a Court) and has permitted public spirited citizens and civil society organisations to approach the Court on behalf of the victims for better administration of justice. On other accounts, the Court has on its own initiative started cases of public importance called suo moto actions. For instance it has summoned and reprimanded state authorities for their apathy and lack of diligence in running child care homes in the states. All, this has been possible through the judicial activism of the Supreme Court through Public Interest Litigation (JanhitYachika) (PIL). This extra-ordinary jurisdiction has been invoked either through writs or even by writing letters to Judges, whose modalities are maintained under the guidelines for PIL enacted by the Court.

The first ever PIL is listed as HussainaraKhatoon v. State of Bihar and dates back to 1979. A public interest activist lawyer filed this case on behalf of thousands of prisoners of the Bihar jail against the inhuman conditions of the prison. A Supreme Court bench headed by Justice P.N. Bhagwati declared the right for free legal aid and expeditious trial of these prisoners, which ultimately led to their release. Since then, PILs have encompassed several issues including socio-economic rights (freedom from bonded labour), legal entitlements (right to food; right to work), environment issues (clean air and water) and political reforms (disclosure of assets by members of the executive; disbursement of natural resources done by the government).

The progress of PIL has thus seemed to incorporate several issues. Yet common characteristics encompass these litigations. These characteristics include:

i) PILs can be termed as non-adversarial litigation that pits the interest of one party over the other. Rather than focusing on traditional litigation of adversary character, PILs are recognised as tools for social change.

ii) PILs are based on the tenets of citizen standing and representative standing which expands the rights of third-parties to approach the Court.

iii) PIL from its inception is modelled on remedial nature which aims at creating a dynamic, welfare-oriented model of judiciary. PIL thus incorporates the Directive Principles whose claims cannot be brought directly to the Courts, into the domain of fundamental rights under Part III of the Constitution, which can be invoked before the Courts as a matter of rights by the citizens of India. Therefore, PILs are creating new rights and laws within the realm of the state. These laws are also democratizing citizen's access to justice, thereby strengthening the democracy in India.

iv) PIL further strengthens the role of judiciary as a monitor and watch-dog agency. Fear of being dragged to the Court via PIL has improved the quality of several social institutions in the country such as jails, protective homes, mental asylums etc.

However, with the advent and growth of PILs, they have also been misused for private gains,

and led to frivolous litigation on unnecessary issues. They have also been criticized for judicial over-reach and stepping into the shoes of legislature.

Public Interest Litigations- A powerful tool for judicial activism

Given below are a few of many instances where the PIL admitted by the Hon'able Supreme Court added a new dimension to the Indian judicial system.

GANGES POLLUTION CASE:

Three landmark judgments and a number of Orders against polluting industries numbering more than fifty thousand in the Ganga basin passed from time to time. A substantial success has been achieved by way of creating awareness and controlling pollution in the river Ganges. In this case, apart from industries, more than 250 towns and cities have been ordered to put sewage treatment plants.

Six hundred tanneries operating in highly congested residential area of Kolkata have been shifted out of the City and relocated in a planned Leather Complex in the State of West Bengal. A large number of industries were closed down by the Court and were allowed to reopen only after these industries set up effluent treatment plants and controlled pollution. As a result of these directions millions of people have been saved from the effects of air and water pollution in Ganga basin covering 8 states in India.

VEHICULAR POLLUTION CASE:

Against vehicular pollution in India the Supreme Court delivered a landmark judgment in 1992. A retired Judge of the Supreme Court was appointed along with three members to recommend measures for the nationwide control of vehicular pollution.

Orders for providing Lead free petrol in the country and for the use of natural gas and other mode of fuels for use in the vehicles in India have been passed and carried out. Lead-free petrol had been introduced in the four metropolitan cities from April 1995; all new cars registered from April 1995 onwards have been fitted with catalytic convertors; COG outlets have been set up to provide CNG as a clean fuel in Delhi and other cities in India apart from Euro 2 norms. As a result of this case, Delhi has become the first city in the world to have complete public transportation running on CNG.

Oleum Gas Leak Case

This is a landmark judgment in which the principle of Absolute Liability was laid down. The fertilizer plant was situated very close to human habitation and the court held that the carrying on of a hazardous industry in such proximity to population could not be permitted and the factory was relocated. The deep pocket principle was also laid down in the instant case. This judgment also ushered in a period of dramatic legislative progress in India. The Parliament added an entirely new chapter to the 1948 Factory Act, incorporating sections almost verbatim from the Judgment. The Public Liability Insurance Act was passed and the policy for the abatement of Pollution Control was established. Moreover, the Environment Protection Act was passed and the Policy for the Abatement of Pollution Control was established.

Supreme Court's Guidelines for Public Interest Litigation

No petition involving individual/ personal matter shall be entertained as a PIL matter except as indicated hereinafter.

Letter-petitions falling under the following categories alone will ordinarily be entertained as Public Interest Litigation:-

1. Bonded Labour matters.
2. Neglected Children.

3. Non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of Labour Laws (except in individual cases).
4. Petitions from jails complaining of harassment, for (pre-mature release) and seeking release after having completed 14 years in jail, death in jail, transfer, release on personal bond, speedy trial as a fundamental right.
5. Petitions against police for refusing to register a case, harassment by police and death in police custody.
6. Petitions against atrocities on women, in particular harassment of bride, brideburning, rape, murder, kidnapping etc.
7. Petitions complaining of harassment or torture of villagers by co- villagers or by police from persons belonging to Scheduled Caste and Scheduled Tribes and economically backward classes.
8. Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture, antiques, forest and wild life and other matters of public importance.
9. Petitions from riot -victims.
10. Family Pension.

Cases falling under the following categories will not be entertained as Public Interest Litigation and these may be returned to the petitioners or filed in the PIL Cell, as the case may be:

(1) Landlord-Tenant matters.
(2) Service matter and those pertaining to Pension and Gratuity.
(3) Complaints against Central/ State Government Departments and Local Bodies except those relating to item Nos. (1) to (10) above.
(4) Admission to medical and other educational institution.
(5) Petitions for early hearing of cases pending in High Courts and Subordinate Courts.

In regard to the petitions concerning maintenance of wife, children and parents, the petitioners may be asked to file a Petition under sec. 125 of Cr. P.C. Or a Suit in the Court of competent jurisdiction and for that purpose to approach the nearest Legal Aid Committee for legal aid and advice.

Source: https://main.sci.gov.in/pdf/Guidelines/pilguidelines.pdf

'Suo moto' action: 'Suo motu' is a Latin term which means 'on its own motion'.

'Suo moto' power allows the Court to initiate legal action on their cognizance of a matter without any petition being filed, or interest being brought before them. Courts have initiated legal proceedings on their own based on media reports, telegrams and letters received by aggrieved people, taking a Suo Moto cognizance of the issue.

One of the most prominent forms of India's suo moto power is to punish for contempt of court under Article 129 of the Constitution of India and the Contempt of Courts Act 1971.

In 1994, a newspaper report on pollution in the Yamuna led the Court to take up the issue suo moto.

During Covid Pandemic, a 3- Judge bench of Hon'ble Supreme Court took suo motu cognisance of nonavailability of mid-day meals for children due to the closure of schools due to coronavirus spread and issued notices to all state governments and union territories. The Court noticed that non-supply of nutritional food to the children as well as lactating and nursing mothers may lead to large-scale malnourishment. Particularly, the children and the lactating and nursing mothers in rural as well as tribal area are prone to such mal-nourishment. Such mal-nutrition may affect their immunity system and as such, such children and lactating and nursing mothers would be more prone to catch the infection.

In order to take control of the situation, the Court, hence, issued directions to the competent authorities to do the needful.

The Court have increasingly used this power to intervene in instances of fundamental rights violations or to scrutinise government (in)action.

D. PROVISION OF LEGAL AID

If a person belongs to the poor section of the society having annual income of less than Rs. 18,000/- or belongs to Scheduled Caste or Scheduled Tribe, a victim of natural calamity, is a woman or a child or a mentally ill or otherwise disabled person or an industrial workman, or is in custody including custody in protective home, he/she is entitled to get free legal aid from the Supreme Court Legal Aid Committee. The aid so granted by the Committee includes cost of preparation of the matter and all applications connected therewith, in addition to providing an Advocate for preparing and arguing the case. Any person desirous of availing legal service through the Committee has to make an application to the Secretary and hand over all necessary documents concerning his case to it. The Committee after ascertaining the eligibility of the person provides necessary legal aid to him/her.

Persons belonging to middle income group i.e. with income above Rs. 18,000/- but under Rs. 1,20,000/- per annum are eligible to get legal aid from the Supreme Court Middle Income Group Society, on nominal payments.

E. AMICUS CURIAE- Amicus Curiae literally translated from Latin is "friend of the court".

If a petition is received from the jail or in any other criminal matter if the accused is unrepresented then an Advocate is appointed as amicus curiae by the Court to defend and argue the case of the accused. In civil matters also the Court can appoint an Advocate as amicus curiae if it thinks it necessary in case of an unrepresented party; the Court can also appoint amicus curiae in any matter of general public importance or in which the interest of the public at large is involved.

B.II.ii. High Courts and Lower Courts

The High Courts function as organs of judicial administration at the State-level. Similarly, the lower courts function as centres of civil and criminal justice at the district level. Lower courts as explained above comprise of district and sub-ordinate courts. Districts Courts are usually Courts of first instance, where litigants proceed for their disputes. These Courts have set territorial and pecuniary limits when accepting cases of civil nature. A similar hierarchy exists in the criminal courts at the sub-ordinate level. Once matters are adjudicated by these courts, they proceed to the High Courts on appeal. Thus sub-ordinate courts are mainly vested with the establishment of facts while the appellate courts deal with interpretation of statues the correct application of law. .

The High Courts have power to issue within their jurisdiction directions, orders, or writs including writs which are in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for enforcement of Fundamental Rights and for any other purpose.

This writ jurisdiction is similar to the Supreme Court of India. The role of High Court also becomes similar to the Supreme Court in the exercise of public interest litigation. Furthermore, each High Court has powers of superintendence over all Courts within its jurisdiction. It can call for records from such courts, make and issue general rules and prescribe forms to regulate their practice and proceedings and determine the manner and form in which book entries and accounts shall be kept.

LET US PONDER

What is a court of record?

A court whose judgments and proceedings are kept on permanent record and that has the power to impose penalties for contempt.

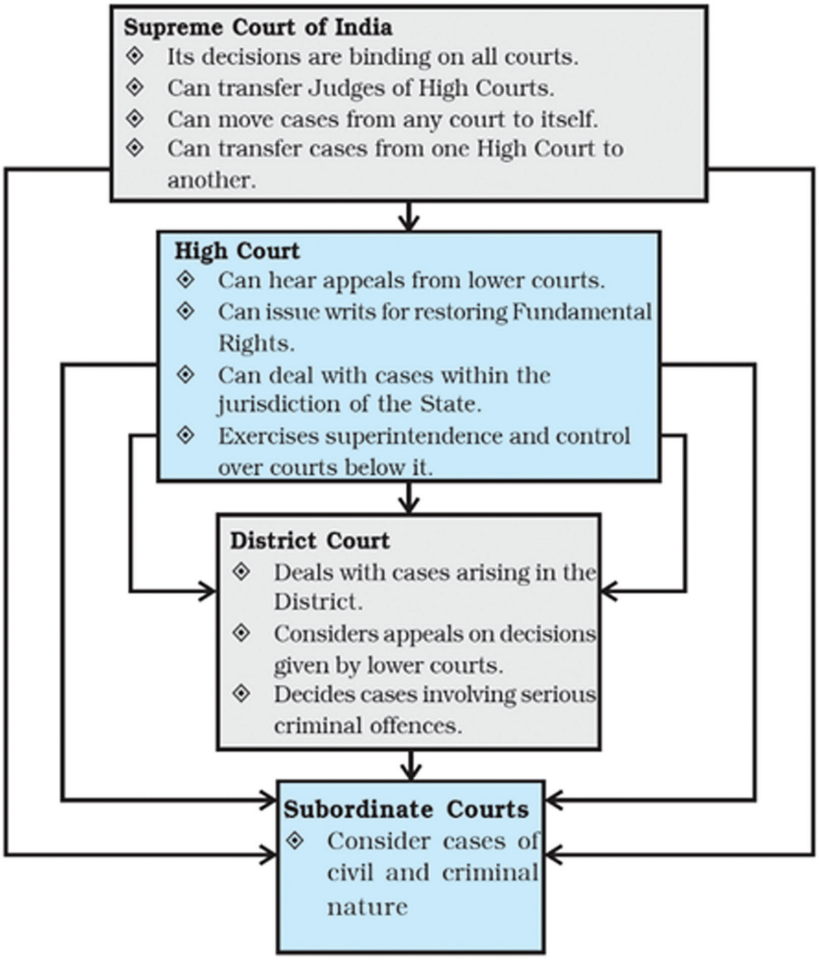
The Supreme Court and High Courts are called a court of record.

As a Court of Record, the Supreme Court has two powers:

- The judgements, proceedings and acts of the Supreme Court are recorded for perpetual memory and testimony. These records are admitted to be of evidentiary value and cannot be questioned when produced before any court. They are recognised as legal precedents and legal references.
- It has the power to punish for contempt of court, either with simple imprisonment for a term up to six months or with a fine or with both.

As a Court of Record, the High Court has two powers:

- The judgements, proceedings and acts of the High Courts are recorded for perpetual memory and testimony. These records are admitted to be of evidentiary value and cannot be questioned when produced before any subordinate court. They are recognised as legal precedents and legal references.
- It has the power to punish for contempt of court, either with simple imprisonment or with a fine, or with both.



Source: https://blog.ipleaders.in/judicial-system-in-india/

C. APPOINTMENTS, RETIREMENT AND REMOVAL OF JUDGES

C.I. Appointment of Judges Constitutional Mandate

The method of appointment of judges at the Supreme Court, High Court and District Courts has been enshrined in the Constitution of India. According to Article 124 of the Constitution, 'every judge of the Supreme Court shall be appointed by the President after consultation with such of the Judges of the Supreme Court and of the High Courts in the States, as the President may deem necessary'. The Article also provides that in case of appointment of a judge other than the Chief Justice of India, the Chief Justice must be consulted. The Article further provides for the qualifications required to become a judge at the Supreme Court. These qualifications include:

- Citizenship of India, and
- Has been for at least five years a Judge of a High Court or of two or more High Courts in succession; or
- Has been for at least ten years an advocate of a High Court or of two or more such Courts in succession; or
- Is a distinguished jurist in the opinion of the President

Similarly, the procedure for appointment of judges at the High Court has been enshrined in Article 217 of the Constitution. This Article prescribes that every Judge of the High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor of the State; and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court concerned. The qualifications of a High Court judge includes:

- Citizenship of India, and
- Has for at least ten years held a judicial office in India; or
- Has for at least ten years been an advocate in a High Court or of two or more such Courts in succession.

For the district and sub-ordinate Courts or the lower judiciary in India, the procedure for appointment is mentioned in Article 233 of the Constitution. Appointment of district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. The qualifications for appointment as District Judge include.

- Member of judicial service of the State; or
- Any person who has had a minimum of seven years of practice as a lawyer at bar.

C.I.i. Current Practice in the Appointment of Judges

Despite a clear Constitutional mandate, the appointment of Judges in practice remains a complex process. At present, the appointment at the Supreme Court and the High Court follows a collegium model, which is a judicial creation through case-laws, even though not constitutionally mandated.

The issue of appointment has often been linked to the independence of judiciary and there has been a constant tussle between executive and judiciary over the appointment of judges. As early as the 14th Law Commission Report under the chairmanship of M. C.Setalvad, India's first attorney general in 1958, noted that the appointment or rejection of appointment of judges by the executive, in contrary to what the judiciary suggested, creating rather awkward situations. The report highlighted that several appointments were being made on political, regional, communal or other grounds as a result of which the fittest of the lot were never appointed. The Commission thus suggested on strengthening the process of consultation between the executive and the judiciary.

Later, a series of three judicial decisions popularly known as the Three Judges Cases helped in the development of the modern collegium system. This development has been a result of a tumultuous

process, but in modern practice governs the rule for judicial appointments.

The first Judges case (1981) gave primacy to the Executive and stated that the CJI's recommendation to the President can be refused for cogent reasons. It gave vast powers to the Executive for the next 12 years, in making judicial appointments.

This however was modified in the second Judges case (1993)'. The Judgment held that the Chief Justice of India has primacy in the matter of appointments to the Supreme Court and the High Courts, and that an appointment 'has to be in conformity with the final opinion of the Chief Justice of India', while emphasizing the desirability of consultation of the Chief Justice with other Judges. The executive element in the appointment process was reduced to a minimum and political influence eliminated. This decision rendered by a nine-judge bench was however supported by only five judges on the bench and the four other judges did not concur with the majority opinion. The years that followed thus witnessed some confusion in the process of appointment as CJI made some unilateral appointments and the role of the President was reduced to a mere approval.

Later in 1998, the Supreme Court in a Presidential reference (1998 advisory decision) emphasized upon the role of 'consultation' and held that the process of appointment of Judges to the Supreme Court and the High Courts is an 'integrated participatory consultative process. The Chief Justice of India firms up his opinion after consultation with a plurality of judges; his opinion is formed by a body of senior Judges.

a. The Collegium System for Supreme Court Judges:

Under the collegium model for appointment of judges of the Supreme Court, the Chief Justice of India consults four senior most judges of the Supreme Court. The Chief Justice of India sends his recommendations to the Union Minister of Law and Justice, who then puts up the same to the Prime Minister. The Prime Minister will then advise the President.

b. The Collegium System for High Court Judges:

For High Courts, the collegium comprises of the Chief Justice of the High Court and two senior most judges of the High Court. The Chief Justice conveys his recommendations to the Chief Minister of the State and the Governor of the State, who in turn send their views directly to the Union Minster of Law and Justice. The complete material is then forwarded to the Chief Justice of India, who in consultation with a collegium of two Judges of the Supreme Court, would send his recommendations to the Union Minister of Law and Justice. The Union Minister of Law and Justice then puts up the same to the Prime Minister who will advise the President in the matter of appointment.

Appointment of the Chief Justice of India: The Chief Justice of India is the senior-most judge of the Supreme Court . Seniority is determined on the basis of the date of their appointment to the Supreme Court & if two Judges are appointed to the Court on the same day, the Judge who takes the oath first is the Senior Judge.

Seniority principle in appointment of CJI: According to this principle, the senior-most Judge of the Supreme Court is appointed as the Chief Justice of India. The principle is an unwritten convention called the' seniority principle' in legal, academic and judicial parlance. It aims to safeguard the judiciary's independence from any sort of political interference.

The Constitution of India under Article 124(2), grants power to the President Of India to appoint in consultation with the outgoing chief justice, the next chief justice, who will serve until they reach the age of sixty-five or are removed by impeachment. As per convention, the name suggested by the incumbent chief justice is almost always the next senior most judge in the Supreme Court. The suggestion is forwarded by the Union Law Minister to the Prime Minister, who then advises the President.

Appointment of Chief Justice of High Courts: The Chief Justice of the High Court is appointed as per the policy of having Chief Justices from outside the respective States. The Collegium takes the call on the elevation. High Court judges are recommended by a Collegium comprising the CJI and two senior-most judges. The proposal, however, is initiated by the outgoing Chief Justice of the High Court concerned in consultation with two senior-most

colleagues. The recommendation is sent to the Chief Minister, who advises the Governor to send the proposal to the Union Law Minister.

C.II. RETIREMENT AND REMOVAL OF JUDGES IN INDIA:

C.II.i. Retirement of judges

The retirement age for a Supreme Court judge is 65 years. Similarly, a High Court judge continues in his office, till the retirement age which is 62 years. The age of retirement of District Court judges is determined by their respective State Government under special service rules.

- The **Venkatachaliah Report (Report of the National Commission to review the working of the Constitution, 2002)** recommended that the retirement age of the Judges of the High Court **should be increased** to 65 years and that of the Judges of the Supreme Court should be increased to 68 years.
- The **Constitution (114th Amendment) Bill** was introduced in 2010 to increase the retirement age of High Court judges to 65. However, it was not taken up for consideration in Parliament and lapsed with the dissolution of the 15th Lok Sabha.

The Case in Western Democracies

- A **retirement age of around 70** for judges is commonplace in **most Western liberal democracies**. Some of them even opt for **tenures for life**. E.g.:
- In the Supreme Court of the **United States**, and in constitutional courts in **Austria and Greece**, judges are **appointed for life**.
- In Belgium, Denmark, Ireland, the Netherlands, Norway and Australia, the retirement age for **judges is 70 years**.

Rationale behind suggesting for the increasing the retirement age of Judges in India:

- The **judge-population ratio in India is among the lowest** in the world. It is also necessary to increase the number of judges in the pool to enable the judiciary to **deal with the enormous pendency of cases**.
- Moreover, legislations provide for retired High Court and Supreme Court judges to **man tribunals till the age of 70 as chairman and 65 as members**. There is no reason why these judges should be retired so early.
- One aspect which has not been factored in is that as the **Indian economy grows**, the ratio of litigation to population will increase exponentially. Advanced economies such as Australia, Canada, France, the U.S., the U.K., and Japan have much **higher litigation-to- population ratios**.
- Several senior lawyers with requisite expertise and experience decline to accept judge-ship due to the lower retirement age of 62, especially in the High Courts. By an enhanced age, this problem could be rectified as advocates would have greater incentive to forego their individual legal practice and function in the role of judges.
- Further, the relatively early retirement age in India is often linked to the declining quality of judicial service and the inability of a judge to properly effectuate the stipulated judicial work-load.

Positive Consequences

- This will have significant benefits. Senior serving judges will bring with them **years of experience**.
- It will ensure the continued presence of a **strong talent pool of experienced judges**.

- New judges can be appointed without displacing existing judges.
- It will address the **problem of mounting arrears**.
- It will be a buffer against **impending litigation explosion**.
- It will render **post-retirement assignments unattractive** and, as a consequence, **strengthen the rule of law and the independence of the judiciary**, both of which are crucial to sustain democracy.

Way Forward

- India faces the **perennial issue of backlog of cases**. Increasing the age of Judges will certainly help in addressing this issue. The retirement age of judges of the Supreme Court and High Courts could be increased, but with the **option of quitting before reaching the age of superannuation -- a practice prevailing in Zimbabwe**, where a top court judge is appointed to retire at 65 years but can opt to continue till 70.
- Moreover, merely increasing the retirement age of the Judges is **not a solution for problems** in Indian Judiciary. Other issues like lack of transparency **(particularly in the appointment of judges), under trials of the accused, lack of information and interaction among people and courts must also be addressed.**

Fill in the blanks.

1. The Judges of the High Court are appointed by the ..... .

   (Governor/President/Prime Minister)

2. At present there are ..... High Courts in India. (20, 21, 18)
3. The retirement age of the Judges of a High Court is ..... years. (60, 65, 62)

C.II.ii. Removal of Judges

Judges of the Supreme Court and the High Courts can be removed through a process called as 'impeachment'. The process for removal of the judges is the same for both the Supreme Court and the High Courts. Article 124(4) enshrines the guidelines for the removal of a sitting Supreme Court judge. The procedure for removal of the Supreme Court judge is guided by Article 124(4) of the Constitution of India and the Judges (Inquiry) Act, 1968. Article 218 of the Constitution of India provides for the impeachment of High Court judges.

The judges can be removed on two grounds, (i) Incapacity and (ii) Proven misbehaviour.

The procedure is explained below

Step 1. Notice of motion for removal of a judge

Removal proceedings against a Supreme Court or a High Court judge can be initiated in any of the houses of Parliament. For this:

1. A minimum of 100 members of Lok Sabha may give a signed notice to the speaker, or
2. A minimum of 50 members of Rajya Sabha may give a signed notice to the Chairman.

The speaker or chairman may consult individuals and examine relevant content related to notice and according to that, he or she may decide to either admit or refuse to admit it.

Step 2. Constitution of an Inquiry Committee

After the motion is admitted, the Speaker of the Lok Sabha or Chairman of the Rajya Sabha will form an Inquiry Committee as per Article 3(2) of the Judges (Inquiry) Act, 1968 to start investigating the

complaint. It will consist of the following members:

- A Supreme Court judge,
- A High Court Chief Justice, and
- A distinguished jurist, as per the opinion of the Speaker/Chairman.

If such notices have been admitted in both the Houses of Parliament, the Inquiry Committee will be formed together by the Speaker and the Chairman of the respective houses. In this scenario, the notice that has been on a later date will stand rejected. If such notices have been passed by both the Houses of Parliament on the same day, the Inquiry Committee will not be formed.

Step 3. Submission of the inquiry report

After concluding its investigation, the Inquiry Committee will put down its findings in a formal report and submit it to the Speaker or Chairman. If the report finds misbehaviour or incapacity which makes the judge guilty, the motion for removal has to be put to vote in both The Lok Sabha and Rajya Sabha. As per Article 124(4) of the Constitution, the motion is required to be adopted in each house by:

- A majority of the total membership of the House, and
- A majority of not less than two-thirds of members present and voting.

If the motion is adopted by this majority in one house, the motion will be sent to the other house.

Step 4. Order by the President

As per Article 124(4), after the motion is adopted in both the houses by the required majority, it is placed before the President of India, who will issue an order for the removal of the judge.

Removal of judges at District Level:

As to the removal of judges in the lower judiciary, a District Judge or an Additional District Judge can be removed from his office by the State Government in consultation with the High Court.

Number of Times Impeachment Proceedings were Initiated against a SC or HC Judge

Impeachment proceedings against SC or HC judges initiated a total of 5 times in Indian history.

1. V. Ramaswami J was the first judge against whom impeachment proceedings were initiated. In 1993, the motion was brought up in Lok Sabha but failed to secure the required two-thirds majority.
2. Soumitra Sen J of the Calcutta High Court resigned in 2011 after the Rajya Sabha passed an impeachment motion against him. He was the first judge to have been impeached by the Upper House for misconduct.
3. In 2015, 58 members of the Rajya Sabha moved an impeachment notice against J.B. Pardiwala J of the Gujarat High Court for his "objectionable remarks on the issue of reservation."
4. In 2017, Rajya Sabha MPs moved a motion to initiate impeachment proceedings against C.V. Nagarjuna Reddy J of the High Court for Andhra Pradesh and Telangana.
5. In March 2018, opposition parties signed a draft proposal for moving an impeachment motion against Dipak Misra CJI.
6. Amidst charges of corruption, land-grab, and abuse of judicial office, P.D. Dinakaran J, Chief Justice of the Sikkim High Court, against whom the Rajya Sabha Chairman had set up a judicial panel to look into allegations of corruption, resigned in July 2011, before impeachment proceedings could be initiated against him.

D. Tribunals

What are Tribunals?

- Tribunals are semi-judicial bodies involved in dispute resolution. They function as semi or quasi-judicial bodies as they consist of administrative officers or judges without a legal background. Yet they function in their judicial capacity and hear relevant legal matters and settle claims between the parties. They complement and supplement the role of courts in maintaining law and justice in the society.
- Tribunals were not part of the original constitution, it was incorporated in the Indian Constitution by 42nd Amendment Act, 1976. Article 323-A deals with Administrative Tribunals and Article 323-B deals with tribunals for other matters. Thus the 42nd Amendment Act ushered the era of 'tribunalisation of Indian judiciary'. Further, the enactment of Administrative Tribunals Act, 1985 took the constitutional objective further and set-up the Central Administrative Tribunal (CAT) and State Administrative Tribunals.

  The CAT was set up pursuant to the Act of the Legislature in 1985. The tribunals exercise jurisdiction of service matters of employees covered by it. The appeals against the orders of the administrative tribunals lie before the Division bench of the concerned High Court.
- Under Article 323 B, the Parliament and the state legislatures are authorised to provide for the establishment of tribunals for the adjudication of disputes relating to the following matters:
  - Taxation
  - Foreign exchange and export
  - Industrial and labour disputes
  - Land reforms laws
  - Ceiling on urban property
  - Elections disputes of members of Parliament and State legislatures
  - Production, procurement, supply and distribution of food stuffs and essential goods
  - Rent and tenancy issues
- Articles 323 A and 323 B differ in the following three aspects:
  - While Article 323 A contemplates the establishment of tribunals for public service matters only, Article 323 B contemplates the establishment of tribunals for certain other matters (mentioned above).
  - While tribunals under Article 323 A can be established only by Parliament, tribunals under Article 323 B can be established both by Parliament and State legislatures with respect to matters falling within their legislative competence.
- The tribunals are procedurally flexible and this flexibility increases their efficiency. For example, The Administrative Tribunals Act, 1985 allows the aggrieved persons to appear directly before the tribunals. The overall objectives of the tribunals are to provide speedy and inexpensive justice to the litigants. Since government is a major litigant in the courts and government related litigation has increased in the delay and pendency of litigation, such tribunals over the past two decades have significantly contributed in supplementing the role of the courts in adjudication of service disputes. The tribunals however are not meant to replace the Courts. This has been explained by the seven-judge bench of the Supreme Court in **L Chandra Kumar case [IT 1997 (3) SC 589]** where it was held that tribunals would not take away the exclusive jurisdiction of the courts, and their decisions could be scrutinised by the Division bench of the High Courts.
- Tribunals have been constituted under specific constitutional mandate enshrined in the

Constitution of India or through legal enactments, e.g. a law passed by the legislature. Their creation aims at increasing efficiency in resolving disputes and reducing the burden on courts. Examples of some of these tribunals include: Central Administrative Tribunal (CAT) for resolving the grievances and disputes of central government employees, and State Administrative Tribunals (SAT) for state government employees; Telecom Dispute Settlement Appellate Tribunal (TDSAT) for resolving disputes in the telecom sector in India; and the National Green Tribunal (NGT) for disputes involving environmental issues.

- Some of these tribunals function with regulators. Regulators are specialised government agencies that oversee the law and order compliance in the relevant government sectors. For example, one of the tribunals TDSAT functions alongside the regulator, TRAI (Telecom Regulatory Authority of India) in formulating laws and policy for resolving telecom disputes in India.

Did you know?

There are 19 Benches and 19 Circuit Benches in the Central Administrative Tribunal all over India. The Government of India has notified 215 organizations including Ministries and Departments of Central Government, under section 14 (2) of the Administrative Tribunals Act, 1985 to bring them within the jurisdiction of the Central Administrative Tribunal, from time to time. In addition, the Central Administrative Tribunal, Principal Bench is dealing with the matters of Govt. of National Capital Territory of Delhi.

The tribunal consists of a Chairman, Vice Chairman and Members.

The members of the tribunal are drawn both from judicial as well as administrative streams so as to give the tribunal the benefit of expertise both in legal and administrative spheres.

Source: http://wwwarchive.irzdiagoo.irz/krzowirzdia/profilephp ?id=36

E. COURTS AND JUDICIAL REVIEW

The powers of judicial review allow judiciary to safeguard the checks and balances and to ensure the separation of powers of the other two branches of the government. Courts have judicial review powers to declare any law as unconstitutional if it is enacted by breaching the demarcation.

This concept dates back to 1800 and the Landmark case of Madison V Marbury , Justice Willaims applied this principle for the first time and later became one of the most important judicial principles.

Madison V Marbury

Facts of the case

Thomas Jefferson defeated John Adams in the 1800 presidential election. Before Jefferson took office on March 4, 1801, Adams and Congress passed the Judiciary Act of 1801, which created new courts, added judges, and gave the president more control over appointment of judges. The Act was essentially an attempt by Adams and his party to frustrate his successor, as he used the act to appoint 16 new circuit judges and 42 new justices of the peace. The appointees were approved by the Senate, but they would not be valid until their commissions were delivered by the Secretary of State.

William Marbury had been appointed Justice of the Peace in the District of Columbia, but his commission was not delivered. Marbury petitioned the Supreme Court to compel the new Secretary of State, James Madison, to deliver the documents. Marbury, joined by three other similarly situated appointees, petitioned for a writ of mandamus compelling the delivery of the commissions.

Question

1. Do the plaintiffs have a right to receive their commissions?

2. Can they sue for their commissions in court?

3. Does the Supreme Court have the authority to order the delivery of their commissions?

Conclusion

The Court found that Madison's refusal to deliver the commission was illegal, but did not order Madison to hand over Marbury's commission via writ of mandamus. Instead, the Court held that the provision of the Judiciary Act of 1789 enabling Marbury to bring his claim to the Supreme Court was itself unconstitutional, since it purported to extend the Court's original jurisdiction beyond that which Article III, Section 2, established.

Marshall expanded that a writ of mandamus was the proper way to seek a remedy, but concluded the Court could not issue it. Marshall reasoned that the Judiciary Act of 1789 conflicted with the Constitution. Congress did not have power to modify the Constitution through regular legislation because Supremacy Clause places the Constitution before the laws.

In so holding, Marshall established the principle of judicial review, i.e., the power to declare a law unconstitutional.

Source: https://www.oyez.org/cases/1789-1850/5us137

Meaning: Judicial review is a principle or a legal doctrine or a practice whereby a court can examine or review an executive or a legislative act, such as law or some other governmental or administrative decision, and determine if the act is incompatible with the constitution. In some countries, like the United States, France and Canada, judicial review allows the court to invalidate or nullify the law or the act of the legislature or the executive if they are found to be contrary to the constitution. In the United Kingdom, judicial review powers are restricted; the courts do not have authority to nullify or invalidate legislation of the Parliament. Likewise, there may be other countries where courts may have different kind of restrictions and may review only one branch.

India, which is based on the parliamentary form of government, follows the system of separation of powers among the three branches of the government as prescribed in the Indian Constitution. The executive branch consists of the President, the Prime Minister and the bureaucracy. The legislative branch includes both houses of Parliament: the Lok Sabha and the Rajya Sabha. In the judiciary, the Supreme Court is the final authority for interpreting the constitution; judiciary is quiet independent of the other two branches. Constitution provides checks and balances so that no one branch exercises its supremacy over the others or misuse the powers provided to them. In this way, each branch puts a check on the other whenever there is an encroachment or conflict of powers among them and thereby preventing any concentration of powers in one branch.

E.1 Doctrine of Basic Structure

The doctrine of Basic Structure is an evolution of judiciary and has been regarded as an important element of Judicial review.

Basic Structure doctrine invalidates any constitutional amendments that destroys or harms a basic or essential feature of the Constitution, like secularism, democracy and federalism. Supreme Court has also held judicial review to be the basic structure or feature of the Constitution; as a result, it can nullify any constitutional amendment that abolishes or disregards judicial review in issues concerning to fundamental rights of citizens. This concept was introduced by judiciary in order to tide over the spate of amendments which were eroding into the basic elements of the Indian constitution. This doctrine comes into play when it is felt that the executive and legislature transgress the boundary defined by the Constitution underlying the spirit of separation of powers.

E.1.(i) Evolution of the Basic Structure Concept

The concept of the basic structure of the constitution evolved over time. We shall discuss the evolution of the concept with the help of some landmark judgement related to this doctrine.

Shankari Prasad Case (1951)

- In this case, the SC contended that the Parliament's power of amending the Constitution under Article 368 included the power to amend the Fundamental Rights guaranteed in Part III as well.

Golaknath case (1967)

- In this case, the court reversed its earlier stance that the Fundamental Rights can be amended.
- It said that Fundamental Rights are not amenable to the Parliamentary restriction as stated in Article 13 and that to amend the Fundamental rights a new Constituent Assembly would be required.
- Also stated that Article 368 gives the procedure to amend the Constitution but does not confer on Parliament the power to amend the Constitution. This case conferred upon Fundamental Rights a 'transcendental position'.
- The majority judgement called upon the concept of implied limitations on the power of the Parliament to amend the Constitution. As per this view, the Constitution gives a place of permanence to the fundamental freedoms of the citizens.
- In giving to themselves the Constitution, the people had reserved these rights for themselves.

Kesavananda Bharati case (1973)

- This was a landmark case in defining the concept of the basic structure doctrine.
- The SC held that although no part of the Constitution, including Fundamental Rights, was beyond the Parliament's amending power, the "basic structure of the Constitution could not be abrogated even by a constitutional amendment."
- The judgement implied that the parliament can only amend the constitution and not rewrite it. The power to amend is not a power to destroy.
- This is the basis in Indian law in which the judiciary can strike down any amendment passed by Parliament that is in conflict with the basic structure of the Constitution.

Indira Nehru Gandhi v. Raj Narain case (1975)

- Here, the SC applied the theory of basic structure and struck down Clause(4) of Article 329-A, which was inserted by the 39th Amendment in 1975 on the grounds that it was beyond the Parliament's amending power as it destroyed the Constitution's basic features.
- The 39th Amendment Act was passed by the Parliament during the Emergency Period. This Act placed the election of the President, the Vice President, the Prime Minister and the Speaker of the Lok Sabha beyond the scrutiny of the judiciary.
- The 39th Amendment was upheld by four of the five judges on the bench, but only after they overturned the portion of the amendment that aimed to limit the judiciary's ability to rule in the present election dispute.

Minerva Mills case (1980)

- This case again strengthens the Basic Structure doctrine. The judgement struck down 2 changes made to the Constitution by the 42nd Amendment Act 1976, declaring them to be violative of the basic structure.
- The judgement makes it clear that the Constitution, and not the Parliament is supreme.
- In this case, the Court added two features to the list of basic structure features. They were: judicial review and balance between Fundamental Rights and DPSP.
- The judges ruled that a **limited amending power** itself is a basic feature of the Constitution.

Indra Sawhney and Union of India (1992)

- SC examined the scope and extent of Article 16(4), which provides for the reservation of jobs in favour of backward classes. It upheld the constitutional validity of 27% reservation for the OBCs with certain conditions (like creamy layer exclusion, no reservation in promotion, total reserved quota should not exceed 50%, etc.)
- Here, 'Rule of Law' was added to the list of basic features of the constitution.

S.R. Bommai case (1994)

- In this judgement, the SC tried to curb the blatant misuse of Article 356 (regarding the imposition of President's Rule on states).
- In this case, there was no question of constitutional amendment but even so, the concept of basic doctrine was applied.
- The Supreme Court held that policies of a state government directed against an element of the basic structure of the Constitution would be a valid ground for the exercise of the central power under Article 356.

It can be concluded that the Supreme Court's judgments frequently mention the sovereign, democratic, and secular nature of the rule of law, the judiciary's independence, fundamental rights of citizens, etc. as crucial components of the Constitution. One certainty that emerged out of this tussle between Parliament and the Judiciary is that all legislations and constitutional amendments are now subject to judicial review, and laws that violate the fundamental framework are likely to be overturned by the Supreme Court. In essence, Parliament's ability to alter the Constitution is limited, and all constitutional amendments are ultimately decided upon, scrutinised and interpreted by the Supreme Court.

Thus, after the decisions of the Supreme Court in Kesavananda Bharati case, Indira Gandhi Election case and Minerva Mills case, it can be concluded that the Parliament's power to amend the Constitution is limited and in the exercise of its constituent power, the Parliament cannot violate the Basic Structure of the Constitution.

E.2 SCOPE OF JUDICIAL REVIEW IN INDIA

Judicial review is one of the essential features of the Indian Constitution; it has helped preserve the constitutional principles and values and the constitutional supremacy. The power of judicial review is available to the Supreme Court and the High Courts in different states in the matters of both legislative and administrative actions. With respect to judicial review on matters of executive or administrative actions, courts have employed doctrines such as 'proportionality', 'legitimate expectation', 'reasonableness', and the 'principles of natural justice'. Essentially, the scope of judicial review in courts in India has developed with respect to three issues: 1) protection of fundamental rights as guaranteed in the Constitution; 2) matters concerning the legislative competence between the centre and states; and 3) fairness in executive acts.

1. Individual and Group Rights

Article 13(2) of the Constitution of India provides that: "The State shall not make any law which takes away or abridges the rights conferred by this Part (Part III - Fundamental Rights) and any law made in contravention of this clause shall, to the extent of the contravention, be void." B. R. Ambedkar, the chairman of the Constitution drafting committee of the Constituent Assembly, has termed this provision as the 'heart of the Constitution'. This Article provides explicitly the powers of judicial review to the courts in the matters of fundamental rights. Furthermore, Article 32 offers the Supreme Court the power to enforce fundamental rights, and provides one the right to move the Supreme Court for the enforcement of those rights. From this article, the Supreme Court derives authority to issue directions or order or writs in the nature of: 1) habeas corpus, i.e., to order the release of person is unlawfully detained; 2) mandamus, i.e., to order to a public authority to do its duty; 3) prohibition, i.e., to prevent a subordinate court from continuing on a case; 4) quo warranto, i.e., to issue directive to a person to vacate an office wrongfully occupied; and 5) certiorari, i.e., to remove a case from a subordinate court and get the proceedings before it.

Like Article 32, Article 226 is a parallel provision for High Courts in states and allows one to institute similar writs in the High Courts for the enforcement of fundamental rights.

Courts, through its judicial review practice, have liberalized the doctrine of locus standi(right to appear before or petition the court) for the enforcement of fundamental rights of those who lack access to courts due to the reasons of poverty or social and economic disabilities. This method led to the development of Public or Social Action Litigation (PIL or SAL) whereby any public spirited person can petition or write letters to courts on behalf of the human rights violation victims or aggrieved parties.

2. Centre-State Relations

Judicial review has also been used in matters concerning the legislative competence with regards to the Centre-State relations. Article 246 of the Constitution provides that the Parliament has exclusive powers to make laws with respect to matters itemized in the 'Union List' (List 1 of the Seventh Schedule of the Constitution). It provides further that both the Parliament and the Legislature of any State have powers to make laws with respect to matters enumerated in the 'Concurrent List' (List III of the Seventh Schedule of the Constitution). With respect to the States, it provides that the Legislature of any State has exclusive power to make laws with respect to matters listed in the 'State List' (List II of the Seventh Schedule). This Article delivers clear division of law-making powers (division of powers) as well as room for intersection between the Centre and the State. Judicial review helps demarcate the legislative competencies and ensures that Centre does not exert its supremacy over the state matters and likewise states do not encroach upon matters within the ambit of the Centre.

3. Fairness in Executive Actions

In matters of executive or administrative actions, judicial review practice of courts have often employed doctrines like 'principles of natural justice', 'reasonableness', 'proportionality', and 'legitimate expectation'; discussed below are few examples.

There is a Latin phrase audialterampartem, which literally means 'listen to the other side'. This phrase is an established principle in the Indian law practice and was applied by the Supreme Court in several cases including the landmark decision of Maneka Gandhi v. Union of India. Her passport was confiscated by the governmental authorities without giving her any chance of prior hearing. Invoking its judicial review powers in administrative matters, the Supreme Court held that in the matter of confiscation of passport a hearing should have been given to

the petitioner in the interest of the principles of natural justice. Consequently, a hearing was given and the passport was returned to her. This is an example where the court adopted the principle of post decision-hearing, in situations of urgency where prior hearing is not feasible, and recognized that a chance of hearing cannot be debarred completely.

To conclude,

Judiciary in India enjoys a very significant position since it has been made the guardian and custodian of the Constitution. It not only is a watchdog against violation of fundamental rights guaranteed under the Constitution and thus insulates all persons, Indians and aliens alike, against discrimination, abuse of State power, arbitrariness etc. but borrowing the words of one of the founding fathers of the American Constitution, James Medison, "I would say that the Judiciary in India is truly the only defensive armour of the country and its constitution and laws. If this armour were to be stripped of its onerous functions it would mean, the door is wide open for nullification, anarchy and convulsion".

Exercise

1. Besides being an adjudicator and an interpreter, the Supreme Court performs another function under Article 143 of the Indian Constitution. Identify and explain this function of the Supreme Court of India.
2. The power of Judicial Review is available to the Supreme Court and High Courts of States in the matters of both administrative and legislative actions. How far has the Judicial Review principle been successful in ensuring the fairness in executive actions? Discuss by referring to a decided case law.
3. Can 'Impeachment' proceedings be initiated against this sitting judge? If yes, Explain the grounds and procedure for 'Impeachment'. How many times has this process been successful in the history of Indian Judiciary?
4. What are Tribunals? How do they play an instrumental role in rendering more effective dispute resolution mechanism?
5. Elucidate on the current practice for the appoint of members of Higher Judiciary in India.
6. List any 2 constitutional offices endowed with the function to advice and represent the government on legal matters.

Supplementary Reading Material

Case 1: HUSSAINARA KHATOON VS STATE OF BIHAR

BACKGROUND

A well- known landmark judgement case which gave wider interpretation of Article 21 and held that speedy trial is that the fundamental right of every citizen. This landmark case emphasized upon speedy trial and free legal aid for the effective administration of justice and equality among the citizens. Article 21 of the Indian Constitution states that "no person shall be bereft of his life and personal liberty except according to the procedure established by law". within the absence of speedy trial, justice can't be administered.

FACTS OF THE CASE

A writ petition habeas corpus was filed before the court under Article 32 of the Indian Constitution. This writ petition was also filed before the court. because it was for the release of 17 under trial prisoners. It depicted a sorrowful picture of the administration of justice within the state of Bihar. an outsized number of persons which even included mainly the categories like women, children, and other deprived categories of poor section and that they all were locked behind the bars and were seeking for the trial as well as their release. Thus, the State of Bihar was advised to file a revised chart which was focused in clearly mentions the year- wise break- from the under- trial prisoners after segregating the prisoners into two categories that is ones charged with minor offences and others who have been charged with major offences, but although this direction was not carried by the state. The petition acknowledged that the under- trial prisoners who have done minor offences as they were imprisoned for quite 10 years. Those people were considered to the poorest strata who weren't even able to afford an advocate and also, they were refused to grant bail.

ISSUES RAISED ARE

The issues raised in this case were:

1. Whether the supply of free legal aid be enforced by law?
2. Whether right to speedy trial come within the ambit of Article 21?
3. what's the essence of speedy trial under criminal justice?

PROVISIONS

- Article 21, of the Indian Constitution
- Article 39A, of the Indian Constitution

CONTENTIONS OF COUNSELS OF BOTH THE PARTIES

In the counter- affidavit the respondents submitted that many under trial prisoners, petitioners etc. herein confined within the Patna Central Jail, Muzaffarpur Central Jail and Ranchi Central Jail as they need been produced before the Magistrate and were given judicial custody again and again. However, the honorable court didn't find this averment to be true on the respondents who were not able to produce or present those dates on which these under- trial prisoners who were made to be remanded. To justify the increasing number of pending cases, many arguments and counter questions were raised before the honorable court. Respondents contended that it mainly occurred due to the happening of delay in receipt of opinions from the experts. There occurs delay in receipt of opinions from the experts. The court rejected this contention because State can always introduce and amend new and best alternative methods for the effective administration of justice. the opposite reason of their contention was their poverty, due to that they could not even seek for their bail, just like the rich men in the society. However, the honorable court rejected the contentions on the grounds that State can employ alternative methods for the identical .

JUDGEMENT

The court observed the above case and also directed that the under -trial prisoners whose name and

particulars were filed by Mrs. Hingorani should be released. it had been because imprisonment like false imprisonment were considered to be an illegal and also violative of their Fundamental Rights enshrined under Article 21 of the Indian Constitution. The court also mandated that in the time of charging bailable offences, they need to be produced before the Magistrate on remand dates. The government ought to name a legal advisor at their own expenses for making an application for bail. a quick trial is much required for securing justice. The court also ordered both the government as well as High Court to display the particulars regarding the location of the courts of magistrate and court of sessions in the State of Bihar along with the cases pending in each court on 31st December, 1978. They were also asked to state the rationale of pendency of cases. On next remand dates the under- trial prisoners should be produced before the court in order that the state government must ought to designate a lawyer of its own expense. The state cannot avoid its constitutional obligation to supply speedy trial to the accused by the way of pleading. Free legal service to the poor and therefore the needy people is an essential elementary factor of legal aid. Another direction by the honorable court was to supply the under- trial prisoners charged with bailable offences, free legal aid by the state, on their next remanded dates before the Magistrates. The court further observed that detaining them for any long would be illegal and is clearly against the elemental rights under Article 21 as these prisoners are behind the bars. Although nowadays human rights are being demanded for everyone in this world but are these under- trial prisoners not to be protected from such harm or even torture, in fact they too are human rights hence their rights must not be denied. Equal access to justice must be central point which has to be given due recognition.

RATIONALE BEHIND THE JUDGEMENT

As per Article 21 of the Indian Constitution states that "no person shall be bereft of his life or liberty except in accordance with the procedure established by law which ought to be reasonable, fair and just". Here the State cannot deny the constitutional rights even all the humans do have their own human rights to be preserved. Article 39A may be a constitutional directive that stress upon free legal service. it's depicted as an inalienable element regarding reasonable, just and fair procedure. within the absence of, it'll result in denial of justice among the poor sections of the society.

The court realized the plight of under- trial prisoners whose denial of rights. Court gave stress upon unable to interact a lawyer and disregarding human rights were the main issues which have focused and also to be solved. The court realized the denial and disregarding nature of private liberty. The court also found that the under - trial prisoners of whose list which was filed before the court, they need been in jail for a longer period. Even the period of time was too long enough than the prescribed time range that they could have been sentenced to jail if convicted.

The court recommend the State also as Central Government, by directing them to list out the entire number of cases, location of courts of magistrates and courts of session. Mainly the Articles include Article 14, Article 39A and Article 21. Honorable Supreme Court of India held that the State cannot deny the constitutional right of speedy trial and equal access to justice shouldn't be denied on any grounds. This, case motivated various lawyers to boost their voice against the denial of rights which are fundamental in nature.

CASE ANALYSIS

As per Article 21 speedy trial is taken into account as fundamental right and basic right. although the Article 3 of European Convention on Human Rights also provides that a person arrested and detained shall be entitled to a trial within a reasonable period. Speedy trial is constitutionally guaranteed right when it involves United States also. Just locking them behind the bar wouldn't serve justice. during this current scenario human rights have to be given primarily importance. But the rights available to prisoners are denied, it must even be ensured at right time. By the way of amendment procedures and also mentioning of an effective judiciary, justice are often served at the utmost level.

CONCLUSION

Justice served for several under- trial prisoners and who were released after this judgement. Even the importance of Public Interest Litigation (PIL) was also highlighted and got priority. Lawyers, scholars and other legal authorities expanded the scope of PIL. Voices were raised against the deprived categories of the society. it's very much possible that these prisoners may be acquitted or be imprisoned for a lesser time period but all this is only possible if they are subjected to free legal

aid. Just locking them behind the bars would no serve any justice to them. These prisoners too are humans and now the govt as well as judiciary should realize and recognize their rights. Hence the petitions served their purposes and stand disposed of leaving the further implementations to the supreme court.

Source: https://articles.manupatra.com/article-details/HUSSAINARA-KHATOON-V-Home-Secretary-STATE-OF-BIHAR

Case 2: MANEKA GANDHI V UNION OF INDIA

Case Summary – Maneka Gandhi (Petitioners) V Union of India (Respondents)

The landmark ruling in Maneka Gandhi versus Union of India, which stands as a bulwark of the Right of Personal Liberty granted by Article 21 of the Constitution, started when the passport of the petitioner in this case, was impounded by the authorities under the provisions of the Passport Act. This arbitrary act of impounding the passport eventually led to the pronouncement of a unanimous decision by a seven-judge bench of the apex court comprising M.H. Beg (CJI), Y.V. Chandrachud, V.R. Krishna Iyer, P.N. Bhagwati, N.L. Untwalia, S. Murtaza Fazal Ali and P.S Kailasam.

Brief Facts

The petitioner Maneka Gandhi's passport was issued on 1st June 1976 as per the Passport Act of 1967. On 2nd July 1977, the Regional Passport Office (New Delhi) ordered her to surrender her passport. The petitioner was also not given any reason for this arbitrary and unilateral decision of the External Affairs Ministry, citing public interest.

The petitioner approached the Supreme Court by invoking its writ jurisdiction and contending that the State's act of impounding her passport was a direct assault on her Right of Personal Liberty as guaranteed by Article 21. It is pertinent to mention that the Supreme Court in Satwant Singh Sawhney v. Ramarathnam held that right to travel abroad is well within the ambit of Article 21, although the extent to which the Passport Act diluted this particular right was unclear.

Issues Before the Court

- Are the provisions under Articles 21, 14 and 19 connected with each other or are they mutually exclusive?
- Should the procedure established by law be tested for reasonability which in this case was the procedure laid down by the Passport Act of 1967?
- If the right to travel outside the country is a part of Article 21 or not?
- Is a legislative law that snatches away the right to life reasonable?

Arguments of the petitioners:

- Through the administrative order that seized the passport on 4th July 1977, the State has infringed upon the Petitioner's Fundamental Rights of freedom of speech & expression, right to life & personal liberty, right to travel abroad and the right to freedom of movement.
- The provisions given in Articles 14, 19 & 21 should be read together and aren't mutually exclusive. Only a cumulative reading and subsequent interpretation will lead to the observance of principles of natural justice and the true spirit of constitutionalism.
- India might not have adopted the American concept of the "due process of law", nevertheless, the procedure established by law should be fair and just, reasonable, and not be arbitrary.
- Section 10(3)(c) of the Passport Act violates Article 21 insofar as it violates the right to life & personal liberty guaranteed by this Article.
- Audi Altrem Partem i.e. the opportunity of being heard is invariably acknowledged as a vital component of the principles of natural justice. Even if these principles of natural justice are not expressly mentioned in any of the provisions of the Constitution, the idea behind the spirit of

Fundamental Rights embodies the very crux of these principles.

Contentions of the respondents:

- The respondent stated before the court that the passport was confiscated since the petitioner had to appear before a government committee for a hearing.
- The respondent asserted that the word 'law' under Article 21 can't be understood as reflected in the fundamental rules of natural justice, emphasising the principle laid down in the A K Gopalan case.
- Article 21 contains the phrase "procedure established by law" & such procedure does not have to pass the test of reasonability and need not necessarily be in consonance with the Articles 14 & 19.
- The framers of our Constitution had long debates on the American "due process of law" versus the British "procedure established by law". The marked absence of the due process of law from the provisions of the Indian Constitution clearly indicates the constitution-makers' intentions.

Judgement

This immensely important judgment was delivered on 25th January 1978 and it altered the landscape of the Indian Constitution. This judgment widened Article 21's scope immensely and it realized the goal of making India a welfare state, as assured in the Preamble. The unanimous judgement was given by a 7-judge bench.

The Supreme Court held that the scope of personal liberty given under Article 21 of the Constitution of India is very wide. The right to travel abroad comes with the definition of personal liberty given under Article 21.

However, the court agreed that impounding the passport by the passport authorities under section 10(3) of the Passport Act is not unconstitutional because the passport authority has the power to grant suspension and cancel the passport, which can be important for national security.

But, here, in this case, Maneka Gandhi was not given an opportunity of being heard, and no valid reasons for impounding her passport were given to her by the passport authority. The maxim of **Audi Alteram Partem**, which means **let the other side be heard**, was not followed in this case. Maneka Gandhi was allowed 'post decisional hearing'.

Moreover, the Supreme Court stated that Article 14 (Right to Equality), Article 19 (Right to Freedom) and Article 21 (Right to Life and Personal Liberty) form the Golden Triangle of the Constitution. At any time, if a law deprives a person of his personal liberty, it has to meet the criteria as specified in Article 14 and Article 19. Therefore, the passport authority can impound the passport of any citizen only after giving valid reasons for the same.

Effects of the Maneka Gandhi Judgement

After this judgement, the doctrine of **'post decisional theory'** was evolved.

The court also ruled that the mere existence of law is not enough. Such law should also be just, fair and reasonable. So, a liberal interpretation given by the court for Article 21 results in making **"procedure established by law"** along with **"due process of law."**

"Procedure established by law" means that any law made by the legislature or any such body will be valid only if the correct procedure has been followed while making the law. "Due process of law" means that a government must protect and respect the legal rights of an individual.

(Adapted from: India Kanoon; Writinglaw.com; Legalservicesinid.com)