Module Detail	
Subject Name	**Political Science**
Module Name/Title	**THE JUDICIARY IN INDIA**
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Objectives	• **To understand and evaluate the working of Indian Judicial System.** • **To explain the evolution and rise of the Supreme Court in India.** • **Role of judicial activism towards public interest litigation and in what way it contributed to shape the nature and contours of judicial activism in India.** • **To explain various problems and challenges faced by the judiciary and reform initiatives to address them.**
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THE JUDICIARY IN INDIA

Niranjan Sahoo

Introduction

From being a reliable guardian and protector of constitution, an able propagator of rights of poor and faceless citizens to an institution of last recourse for millions of citizens to activism on issues that often get little or no attention from the executive, the judiciary in India has come full circle since its inception in 1950. The judiciary which has so far played extremely stellar role in having emerged as institution of last resort as executive and legislative branches have failed to perform their constitutional roles, has in many occasions intruded into the constitutional spaces of other organs. Such activism of judiciary has brought tensions in established constitutional 'separation of powers' and therefore criticism. In addition to this, there are equally critical issues/concerns with regard to reforms in terms of appointments of judges, accountability, corruption, pendency, issues of access

and affordability of justice for ordinary citizens and so on. In short, the judiciary is on spotlight both for right and wrong reasons.

Structure and Composition

Soon after his appointment as the Chief Justice of India in June 2013 Justice Altamas Kabir described Indian judiciary among the most powerful in the world in a speech in Sri Nagar.[1] Unlike the US and other federal countries, the judiciary in India is a single integrated system. The framers of the Constitution consciously opted for an integrated judicial system to 'eliminate all diversities in a remedial procedure.'[2] Under the arrangement, the Supreme Court is the highest court of the land, followed by the High Courts at the state levels which cater to one or more number of states. Down the High Court there are subordinate courts comprising of the District Courts at the district level. This apart, there exist various quasi-judicial bodies such as Tribunals and Regulators to resolve disputes.[3] The Indian Judicial System it follows 'common law system'. In a common law system, law is developed by the judges through their decisions, orders, or judgments. Unlike the British legal system which is entirely based on the common law system, where it had originated from, the Indian system incorporates the common law system along with the statutory law and the regulatory law.[4]

Independence

The makers of the constitution were aware that many of democratic ideals would remain meaningless if they would not be backed by an independent and impartial judicial system (Austin 1966; 1999). No subordinate or agent of the Government could be trusted to be just and fair in judging the merits of a conflict in which the Government itself was a party. Thus, in a bid to establish complete independence of the judiciary, the Constitution has first erected a barrier that separates the executive from the judiciary. The judicial independence is further ensured by laying down rigid qualifications

[1] He said: 'Today the Indian judiciary is one of the most powerful judiciary in the world, because there is a power of judicial review. We are empowered under Article 32 of the Constitution to enforce or implement any fundamental rights.' see: http://articles.timesofindia.indiatimes.com/2013-06-17/india/40027178_1_indian-judicial-system-justice-kabir-cji (accessed on)

[2] Dr. B.R Ambedkar explained in the Constituent Assembly that 'The Indian federation, though a dual polity, has no dual judiciary at all. The High Courts and the supreme Court constitute one single integrated-judiciary having jurisdiction and providing remedies in all cases under the constitutional law, the civil law or the criminal law. This is done to eliminate all diversities in a remedial procedure.' CAD, VII, p 36.

[3] To cite a few familiar names, they include Central Administrative Tribunal (CAT), Armed Forces Tribunal (AFT), Competition Appellate Tribunal (COMPAT), Debt Recovery Tribunal (DRT) and Telecom Disputes Settlement Appellate Tribunal (TDSAT). See Basu 2012).

[4] For details, see this useful source of law (Society of Indian law Firms), link: http://www.silf.org.in/16/Indian-Judicial-System.htm

for the appointment of judges, in their tenure security and other conditions of service. For instance, judges are appointed almost for life and their conditions of service cannot be altered to their disadvantage, once they are appointed (Austin 1966; Pylee 1980). Similarly, their removal has been made extremely difficult case with two-third majority vote of the parliament.[5]

The Supreme Court

The Supreme Court of India (SC) is elaborated in Part V, Chapter IV of the Constitution as the highest court of the land, the highest court of appeal and the guardian of the Constitution. Therefore, any law passed by this apex body is binding on all the law courts in the country. By virtue of being the highest court of law, the SC controls and supervises the entire judicial edifice of the country to ensure the realisation of the high judicial standards (Pylee 1980). Articles 124 to 147 of the constitution lay down the composition and jurisdiction of the SC. Essentially it is an appellate court which takes up appeals against judgements of the provincial High Courts (HC). It also takes writ petitions in cases of serious human rights violations of if a case involves serious issue that requires urgent resolution (Mohanty 2009).

Composition

While the original constitution (1950) had provisioned for a Chief Justice and 7 other judges for the SC, over the years with word loads increasing the numbers have steadily gone up. Now there are 30 judges apart from the Chief Justice. The Chief Justice is appointed by the President of India, largely on seniority basis. Other judges (including High Courts) are chosen by a collegium comprised of the Chief Justice and 4 senior judges of the Supreme Court. The collegium system was established by the Supreme Court in a series of judgements popularly known as three *Judges* case.[6] In terms of composition, the SC has somewhat maintained regional and ethnic representation as it has good share of judges belonging to religious and ethnic minorities. For instance, Justice K.G. Balakrishnan was the first *dalit* to be appointed as Chief Justice of Indian in 2000.

[5] A judge of the Supreme Court cannot be removed from office except by an order of the President passed after an address in each House of Parliament backed by a majority of total membership of that House and by a majority of not less than two-thirds of members present and voting, and presented to the President in the same. See Basu 2012.

[6] Earlier, judges of Supreme Court were appointed by the president in consultation with the Chief Justice. However, based on three judgments viz. S.P. Gupta vs. Union of India (1981), *Supreme Court Advocates-on Record Association vs Union of India* (1993) and *In Special Reference of 1998,* the court framed the principle of judicial independence by which no other branch of the state including the legislature and the executive would have any say in the appointment of judges. For more see, http://www.indiankanoon.org/doc/543658/

Powers and Jurisdictions

As the highest court, the SC has been granted a wide range of powers and functions. The SC has original, appellate and advisory jurisdictions to perform the role of the defender of the Constitution.

Original Jurisdiction

Under Article 131, the original jurisdiction of the SC extends to any dispute arising between Union and one or more States and between two or more states. Original jurisdiction, thought, restricts to question of law or fact brought before the court by any party mentioned above. In this regard, cases or disputes primarily involving the enforcement of fundamental rights (Article 32) come under the ambit of original jurisdiction. Under Article 32 of the Constitution, the court is empowered to issue orders, directions or writs in the nature of *habeas corpus* (बंदी प्रत्यक्षीकरण)[7], *mandamus* (परमादेश)[8], prohibition (निषेधाज्ञा)[9], *quo warranto* (अधिकार पृच्छा)[10] and *certiorari* (उत्प्रेषण लेख)[11] to enforce Fundamental Rights (Mohanty 2009). However, the SC does not have any original jurisdiction or power over disputes arising out of any treaty, agreement, covenant or similar instruments which had been agreed upon or executed before the commencement of the constitution.

Appellate Jurisdiction

The SC is the highest appellate court in the country and by virtue of this it can hear appeals against the judgement of the High Courts in both civil and criminal cases involving substantial question of law which involves the interpretation of constitution (Article 132). This jurisdiction of the SC is

[7] A writ of *habeas corpus* is a summons with the force of a court order. On a complaint from an individual, it is addressed to the custodian (a prison official for example) demanding that a prisoner be taken before the court, and that the custodian present proof of authority, allowing the court to determine whether the custodian has lawful authority to detain the prisoner. If the custodian is acting beyond his or her authority, then the prisoner must be released.

[8] Latin, We comand. A writ or order that is issued from a court of superior jurisdiction that commands an inferior tribunal, corporation, Municipal Corporation, or individual to perform, or refrain from performing, a particular act, the performance or omission of which is requiredby law as an obligation.

A writ or order of mandamus is an extraordinary court order because it is made without the benefit of full judicial process, or before a casehas concluded. It may be issued by a court at any time that it is appropriate, but it is usually issued in a case that has already begun.

[9] Writ of Prohibition is an order from a superior court to a lower court or tribunal directing the judge and the parties to cease the litigation because the lower court does not have proper jurisdiction to hear or determine the matters before it.
A writ of prohibition is an extraordinary remedy that is rarely used. In common languate it is known as stay order.

[10] Quo Warranto is a Latin word meaning by what warrant. It is a prerogative writ requiring the person to whom it is directed to show what authority they have for exercising some right or power they claim to hold.

[11] Certiorari is a Latin word meaning 'to be informed of, or to be made certain in regard to'. As an appellate proceeding, it is about re-examination of actions of a trial court, by an appeals court. It is a decision by the Supreme Court to hear an appeal from a lower court.

intact both in the cases where a High Court certifies or otherwise. If the court is satisfied that case involves (criminal and civil) an interpretation of constitution, the SC can issue special leave to appeal (Pylee 1980). This apart, the Supreme Court has wide ranging appellate jurisdiction over all courts and Tribunals in the country. Under Article 136, the court can use its discretion to grant special leave to appeal from any judgement, decree, sentence or order in any cause or matter passed by any court, tribunal in India (Mohanty 2009).

Advisory Jurisdiction

The advisory jurisdiction ranges from specific advises sought by the President of India function of the SC is also very important. If there arises any ambiguity regarding the interpretation of a clause of the constitution or certain constitutional problem arises, the President can refer the same to the SC for its expert opinion. To spell the exact wordings of Article 143 'If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the SC upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.' However, the opinion of the Court is not binding on the President.[12]

Miscellaneous Powers

Apart from three key jurisdictions as mentioned above, the SC has many miscellaneous powers. Notably, it is a court of records, meaning that the records of its decisions and proceedings are preserved and published. Further, the decisions of the SC are binding on all the courts of the country. Importantly, the highest court has powers to review its own judgment or order. More importantly, the SC is provided with the power of judicial review.[13] This apart, the SC is authorised to make rules for regulating the practice and procedure of the Court with the approval of the President. Further, the court has power to appoint *amicus curie* (friend of the court) to argue the case of the accused who is unrepresented. Finally, the court has power to extend free legal aid to person belonging to poorer sections (Austin 1999; Mohanty 2009).

Growth and Evolution of Judicial Powers: An Overview

[12] For details on powers of SC, see Basu 2012; Austin 1999; Pylee 1980.

[13] The power of judicial review stems from a combined reading of Articles 13, 32 and 142 of the constitution. For instance, Article 13 (2) states that "The State shall not make any law which takes away or abridge the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void." For more clarity see Pylee 1980; Basu 2012.

While formulating structures and various provisions for the supreme court, Alladi Krisnaswami Ayyar, a key member of the Drafting Committee had remarked that "The future evolution of the Indian constitution will thus to large extent rest upon the work of the Supreme Court and the direction given to it by that Court." To a great extent, the Indian judiciary ably led by the Supreme Court has lived up to the expectations of the framers of the Constitution. Below is a brief overview of evolution and growth of judiciary as an independent organ of the government.

First Phase: A Positivist Court

The judiciary (meaning the higher courts) has evolved in different phases in its response to legislative and executive branches of the government. The judiciary in its early years was understated yet potent, using restricted confines of the judicial space to act as an effective check on legislative pronouncements. This check exercised through the power of judicial review, was used judiciously by the judiciary in the early years. At least three key aspects of early years of judiciary stand out. First, it strictly adhered to the constitutional text. Second, it refused to support lofty ideologies of the government of the day. Third, at the same time, it conceded parliament to have plenary power to amend constitution (Rajamani and Sengupta 2010). Thus, although the judiciary declared *zamidari* abolition as illegal and violation of right to property in *Kameshwar Prasad vs. State of Bihar*, it refrained from using the provision of judicial review when parliament quickly brought out first amendment to constitution which placed the provision (inserted Article 31B) out of the purview of judicial review. Similarly in *State of Madras vs. Champakam Dorairajan*, it the court struck down government's decision to have reservations in educational institutions based on caste as violation of right to equality (Article 14), it did not oppose parliament's right to bring a constitutional amendment to justify such affirmative action on the basis of caste.

The court did follow near similar approach in Seventeenth Amendment in 1964 that arose as a result of its verdict in *Sajjan Singh case*.[14] In all these, the Court seems to have followed a positivist interpretation of constitution in the first fifteen years of its functioning. To quote Rajamani and Sengupta (2010), "The Court kept its head above the hurly-burly of custodian politics, in the first fifteen years of India's Independence, it was a controversial institution, its decisions generating fierce and bitterly contested public debates. This was no surprise given the matters it was called upon to adjudicate. Civil liberties, free speech, caste discrimination, and most notably land reforms were matters central to the ideals, aspirations, and lived realities of people in the new republic." It

[14] AIR 1965 SC 845

perceived itself as an institution discharging a function that the drafters of the Constitution envisaged for it.

Second Phase: Bending Backward

The second phase that began with famous *Golak Nath*[15] verdict was rather tumultuous and politically charged. The judiciary which was perceived apolitical institution in character and essence notwithstanding its dealing with many politically sensitive issues such as abolition of *zamidari*, reservation policy which often caused direct confrontation with parliament, entered the political water with its expansive interpretation of Fundamental Rights in *Golak Nath*. The SC in this case reconsidered the constitutionality of the Seventeenth Amendment and by a majority verdict declared the said amendment illegal. Thus, it overruled *Sankari Prasad* and *Sajjan Singh* cases that it had avoided to confront with the parliament. The Court held that the amending power of the parliament to be subject to fundamental rights tests. In short, with one stroke the SC denied parliament its legislative sovereignty and restored its power of judicial review even on matters related to right to property. The court went farther in *R.C. Cooper vs. Union of India*[16] when it struck down much touted bank nationalization scheme as illegal. This prepared a stage for direct confrontation between judiciary and parliament. To restore its supremacy, the Parliament passed Twenty-fourth Amendment which overturned *Golak Nath*.

The Twenty-fourth Amendment (along with Twenty-fifth and Twenty-ninth Amendments) led the Court to delivering historic *Kesavananda Bharti vs. State of Kerala*[17] judgment that saw the judiciary limiting parliament's sovereign power to amend the constitution. All thirteen judges bench of the Supreme Court in a majority verdict (7 judges supported) held that while parliament was supreme to amend constitution, under Article 368 it cannot alter the 'basic structure' of the constitution (Basu; 2012; Austin 1999). This act of judiciary, however, opened up further resistance and opposition from the parliament particularly the ruling congress government at the centre. The government reacted very strongly by superseding three senior most judges to appoint Justice AN Ray as Chief Justice of India. The ensuing confrontation reached its peak in *Raj Narain case*[18] involving the validity of Mrs. Indira Gandhi's election. The Allahabad High Court which set aside Mrs. Gandhi's election and subsequent declaration of Emergency in June 1975, set the stage for rapid

[15] AIR 1967 SC 1643

[16] AIR 1969 SC 1126.

[17] AIR 1973 SC 1461

[18] *Smt. Indira Nehru Gandhi vs. Shri Raj Narain,* (1975 (Supp.1) SCC 1)

marginalization of judiciary. National Emergency and the supersession of judges which led to rapid politicization judiciary, actively contributed to judicial surrender to the executive in the controversial *ADM Jabalpur vs. Shivkant Shukla*[19] that backed government's act of suspending right to life under Article 21 of the Fundamental Rights. The SC overturned the decisions of several High Courts that had declared suspension of *habeas corpus* illegal and took a stand that supported government's claims.

The judiciary which fought all these decades to defend and protect Fundamental Rights maintained that "the right to life and personal liberty were bounties given to citizens by the state and hence could be withdrawn in times of Emergency."[20] Thus, with one judgment the judiciary which had assiduously nurtured a positivist, apolitical and independent course, lost it to the diverse tactics of executive branch which exercised further supremacy with Forty-second Amendment that took away most critical judicial powers including the power of judicial review. The judiciary which had earned accolades and respects in the previous decades became prey to politicization, turned unpopular and lost much acquired legitimacy (Rajamani and Sengupta 2010).

Third Phase: Era of Judicial Supremacy

With the defeat of ruling government in 1977 and new Janata government claiming powers at the Centre, situation turned favourable for the judiciary to undo its mistakes and restore lost ground that it had gradually ceded to the executive over the years. The judiciary which was viewed to have made abject surrendering to the government tried to do the 'repentance' acts by taking on an activist course through many of its subsequent judgments. Post-Emergency, the most immediate response from the judiciary was to quickly undo the damage it had done in *Habeas Corpus* case (known as *ADM Jabalpur*). In the famous *Maneka Gandhi vs. Union of India*[21], the judiciary went on to widen the ambit of Article 21 by linking it to grounds of procedural and substantive fairness. In this case, the court opened up a new dimension of right to life and personal liberty when it laid down that Article 21 was not only a guarantee against the executive action unsupported by law, it is also a restriction on law making. It also struck down the key provisions of Forty-second Amendment that had kept judicial review out of the ambit of constitutional amendments in *Minerva Mills*.[22] However, these verdicts were just the beginning of a new era by judiciary was recovering from the shock of its

[19] (1976) 2 SCC 521

[20] See a coherent analysis, see Rajamani and Sengupta 2010.

[21] (1978) 1 SCC 248.

[22] *Minerva Mills vs. Union of India*, AIR 1980 SC 1789.

Emergency bungling. In a gradual manner, the judiciary fashioned an era of judicial activism in the later decade through expansive interpretation of fundamental rights by creative use of a new instrument called public interest litigation (PIL). By actively embracing PIL route, "the Supreme Court of India for the first time became Supreme Court for Indians."[23]

Public Interest Litigation and Judicial Activism

Public interest litigation (PIL)[24] which had gained considerable popularity in America and other western democracies as an emancipatory tool to defend the rights of third parties mostly disadvantaged minorities, poor and marginalized, was embraced by Indian judiciary in early 1980s to expand 'access' to justice. PIL fostered judicial innovation and doctrinal creativity that a post-Emergency judiciary was looking out desperately to salvage its image (Sahoo 2002; Rajamani and Sengupta 2010). The starting point of PIL revolution was with landmark *S.P. Gupta vs. President of India and others*.[25] Delivering the judgment, Justice P.N. Bhagwati, the key architect of PIL relaxed the *locus standi*, and opened up the doors of the judiciary to public spirited citizens – both those wishing to espouse the cause of the poor and oppressed and those wishing to enforce performance of public duties (Sathe 2001; Rajamani and Sengupta 2010). While delivering the judgement, Justice Bhagwati made it clear that "any member of the public acting *bona fide* and having sufficient interest in instituting an action for redressal of public wrong or public injury could move the court. The court will not insist on strict procedures when such a person moves a petition on behalf of another or a class of persons who have suffered legal wrong and they themselves cannot approach the court by reason of poverty, helplessness or social backwardness."[26] In other words, with *S.P. Gupta*, the court changed the old concept of *locus standi* by allowing people who had a stake, direct or indirect, in the outcome of a suit, to be represented in the judicial proceedings.

Beyond relaxing the *locus standi,* the judiciary went ahead and allowed public participation in the judicial process even as it recognized the group rights to participate in legal proceedings. In doing so, the judiciary granted workers, residents and general public the right to appeal the courts against violation of their collective rights. For instance, the court in the *National Textile Workers Union vs.*

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[23] See Baxi 1985; 2000.

[24] PIL grew in America in response to the failure of regulatory agencies to fulfill their constitutional obligations. The people did not have access to represent their grievances. Groups like minorities, women, children and destitute having grievances were taken up by various public interests groups. The groups furnished formal legal representation to such groups in the court. The US Supreme Court granted recognition to these groups to represent the interests of indeterminate class of persons, apart from relaxing the rules of standing. See Khosla 2008.

[25] (1981) Supp (1) SCC 87

[26] AIR, 1982 SC 1473

P.R. Ramakrshnan[27] held that although the Companies Act did not provide for participation of workers in the winding up of proceedings of a company, they had stakes in the outcome of the action proposed to be taken. In another important case *Sunil Batra vs. Delhi Administration*[28], the court relaxed the adversial procedures to the extent that it recognized the right to a prisoner to move the court complaining of alleged torture of another prisoner. In the same breadth, the judiciary treated the letters written to it as writ petitions as it would expand 'access to justice' (Sahoo 2002). The court made further innovation in public interest cases by granting interim relief to the victims, specifying the amount of compensation and supervising the process of their implementation.[29] The Court's active promotion of PIL encouraged thousands of public spirited individuals, lawyers, citizen forums and NGOs to file litigations on behalf of underprivileged and helpless individuals and groups. Hundreds of litigations were filed on all kind of issues ranging from human rights violation, women rights, child rights, bonded labour, environmental pollution and even constitutional and governance issues.[30]

In every sense, PIL heralded the era of judicial activism[31] in India. This is not to deny the roles of other instruments in aiding the activism of the court. Through PIL, the court creatively expanded substantive rights (i.e., Fundamental Rights especially Article 21) to cover unarticulated but implicit rights such as right to live with human dignity, the right to livelihood, the right to education, the right to health and medical care of workers, and the right to healthy environment (Baxi 2000; Rajamani and Sengupta 2010). In the process of performing such roles, which many name as 'judicial activism' (Sahoo 2002; Khosla 2009), the judiciary seems to have taken up or assumed the functions of other organs of the government. Scholars and practitioners cite such judicial tendencies of taking up the roles of other organs to inaction or failures of these branches to perform their constitutional roles which brought judiciary into the scene (Baxi 2000; Sathe 2001). However, there are equal numbers of scholars who point this to the ambition of a handful of ambitious judges to usurp the powers of executive and legislature at a time when the governance regimes are fragile and

[27] AIR 1983 SC 75

[28] AIR 1980, SC 1579

[29] For more see *Bandhua Mukti Morcha Case*, Supra Note 11.

[30] Using PIL as an instrument, thousands of people petitioned court to compel the executive branch to do what its duties or to prevent it from doing something forbidden by the law. In response, the court liberalised the traditional *mandamus* and directed the government agencies to perform their constitutional duties. For instance, the court directed CBI to investigate cases of human rights violations, government hospitals to provide medical aid, municipalities to provide compensations to victims of negligence, etc. for more see Sahoo 2003.

[31] The term judicial activism was originated in the US especially in the judgements of Warren Court. The Warren Court took an activist stance to redefine individual rights, civil liberties vis -a vis- the Congress. For more a detailed analysis of the history and understanding of "judicial activism", *see* Keenan D. Kmiec, 2004. Also see Sathe 2001.

weak.[32] Regardless of its origin, court's activism through PIL route has got into take various avatars: mainly law making and executive.

Court in Executive Shoes

In hundreds of PIL based judgements, the court has entered itself unto the shoes of executive branch. Beyond delivering verdicts, the court virtually has gone into executive spheres when it granted compensation to the victims,[33] passed orders to rehabilitate bonded labourers,[34] issued directions to rickshaws to rickshaw pullers and to prevent them from unemployment,[35] issuing guidelines to check environmental pollution.[36] In a significant judgement in *Vineet Narain vs. Union of India*[37], court used 'continuing mandamus' to give government a series of policy directions including conferment of statutory status to Central Vigilance Commission, manner of their selection, tenure and other nitty-gritty of executive job (Rajamani and Sengupta 2010). All these acts suggest that the judiciary has intruded into the areas, which were usually known as domains of executive. The fact is, in all these cases, judiciary is apparently telling the executive branch to implement their own laws on bonded labour, minimum wages, equal remuneration, contract labour and so on (Baxi 1985).

Judicial law making role

Through PIL backed judicial activism, the court often assumed law making role meant exclusively for the legislative branch. For instance, in *Hussainara*[38], the court went to the extent of redrafting the prison jurisprudence. Similarly, in *Azad Rickshaw*, the court directed reforms need to be infused in the existing laws. In a significant judgement in *Vishaka vs. State of Rajasthan*,[39] in the absence of law the Court took the reasonability of laying down guidelines on sexual harassment in the workplace apart from providing procedures and mechanisms for investigation and redress. The court justified such act under Article 32 of the Constitution (constitutional remedies). The Court emphasized that this would be treated as the law declared by this court under the article 141 of the

[32] For a detailed analysis, see Sathe 2003; Godbole, 2001; Shourie 2004.

[33] *Rudal Shah vs. State of Bihar*, AIR 1983, SC 1086.

[34] *Bandhua Mukti Morcha vs. State of Haryana*, AIR 1984

[35] *Azad Rickshaw pullers Union vs. State of Punjab*, AIR 1981 SC 14

[36] *M.C. Mehta vs. Union of India,* AIR 1986, SC 955.

[37] (1997) 1 SCC 226.

[38] *Hussainara Khatoon vs. State of. Bihar*, AIR 1979 SC 1377.

[39] (1997) 6 SCC 241

Constitution.[40] In short, in a number of PIL related judgments, the court has assumed law making role, often raising uncomfortable constitutional questions.

To sum up, the implantation of PIL into justice delivery process and its further improvisation by the court in numerous cases ranging from human rights violations, rights of disadvantaged, environment, redress for executive inaction to constitutional questions restored public faith on judicial institution and eventually made it one of the most powerful judiciaries in the world. Yet, PIL and host of other instrumentalities that the court has been employing in increasing number of instances have led to growing tensions among key branches of the government, thereby raising serious constitutional questions of separation of powers. Scholars and critiques monitoring the judicial story feel that in growing number of issues, the court is usurping powers of other constitutional branches, something rarely visualized by the constitution makers (Shunmugasundaram 2007; Mehta 2007). That Court is adjudicating matters beyond its jurisdictions and often dabbling in policy making (Mehta 2007, Rajamani and Sengupta 2010). From cases ranging to decide technical issues such as nature of environmental pollution to political questions such as dissolution of state Assembly (Article 356) to anti-defection laws, judicial overreach has been spread in all spheres of state policies.

Judicial Accountability

PIL aided judicial activism which has led to an unprecedented growth of judicial powers, is ironically an institution with very little formal accountability. By creating a 'basic structure' conditionality (to effectively restrict legislature's power to amend constitution), by including judicial review into the new clause, by expansive interpretation of traditional rights and by investing itself with the power to select the judges, the judiciary has made itself a supra institution. In every sense, the court has moved closer to becoming an 'imperium in imperio' (Rajamani and Sengupta 2010). For all practical purposes, there exists no oversight over judicial exercise of constitutional roles. The only way in which the executive used to retain some control i.e., appointment of judges, have been taken away by the judiciary after its controversial judgement in three *Judges* case. In fact, India is only country in liberal democracies where the judges alone appoint judges to the higher judiciary (Menon 2008). Similarly, with impeachment provision remaining extremely arduous process (has been exercised successfully only once in the last 68 years), judiciary increasingly look above the democratic processes (Mehta 2007). The most striking fallout of such unaccounted powers is reflected in many

[40] Ibid.

individual judges often going out of rule book and decide cases and make remarks that can clearly bring down the reputation and legitimacy of judiciary. Most worrisome trend is growing trends of corruption[41] among the judicial fraternity which have been openly acknowledged by the Chief Justices and senior members of the Bar.[42] In fact, alarmed by the lack of accountability and other vices gripping judiciary, the government has put up a Judicial Accountability Bill to address many of the maladies currently afflicting judiciary. In short, there exist little or no institutional mechanisms to enforce accountability and responsiveness among the judges of higher judiciary.

Judicial Reforms

Notwithstanding its activist streak and far reaching contributions in terms of expending new frontier of rights and justices via PIL, this critical constitutional instrument of last resort is in deep crisis today. Not only are the courts in India sitting over mountain of litigations, judicial decisions becoming inconsistent often contradicting each other[43], expensive and time consuming and far beyond the reach of average citizen, let alone the poorest and marginalised as the court have been trying to do through PIL.

By government's own admission, there are 32 million cases pending in all tiers of the judiciary.[44] While about 66,569 cases are currently pending with the Supreme Court, 42 lakh with High Courts and 2.8 crore with subordinate courts. According to estimation by PRS Legislative, a parliamentary watchdog, pendency has increased by 148% in the SC, 53% in High Courts and 36% in subordinate courts in the last 10 years.[45] Added to this is very low conviction rate (6%). Disposal rate is just over 17%. According to a recent McKinsey study, if Indian courts continue operating at their current rates, they would take more than 300 years to clear their judicial backlog. The reasons for pendency according to the Union Law Minister are multifarious (i) increase in institution of fresh cases; (ii) inadequate number of judges and vacancies; (iii) inadequate physical infrastructure and staff; and (iv) frequent adjournments.

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[41] To a RTI query, the justice department of the Law Ministry of India revealed in 2012 that in one year it had sent 75 complaints of corruption against serving judges of the Supreme Court and High Courts to the Chief justice of India.

[42] Recently V.N. Khare, a former Chief justice of India acknowledged that corruption has become rampant especially at the lower level of judiciary. The same was accepted by the newly appointed Chief Justice during his press interaction. See news report from *The Hindu*, 30 June 2013. Link: http://www.thehindu.com/opinion/interview/judiciary-not-untouched-by-corruption/article4866406.ece

[43] For a coherent analysis on inconsistency, see Rajamani and Sengupta 2010; Mehta 2007.

[44] See the Supreme Court India directory. Here is the link: http://supremecourtofindia.nic.in/ncms27092012.pdf

[45] http://www.prsindia.org/administrator/uploads/general/1310014291~~Vital%20Stats%20-%20Pendency%20of%20Cases%20in%20Indian%20Courts%2004Jul11%20v5%20-%20Revised.pdf.

Linked to pendency is ever increasing number of vacancies at various courts. According to a recent estimate, there 3,422 unfilled vacancies in the district and subordinate courts and 276 in the High Court (out of sanctioned strengths of 895).[46] More startling is that as many seven high courts in the country are without full-time chief justices, largely because the existing collegiums have not time to make recommendations.[47] In short, even the collegiums system of appointment by the judiciary has not kept pace with the demands of the time.

Growing instances of corruption is something which bothers the judiciary as much it has to other branches of the government. Once viewed above corruption, the judicial branch is news for corruption and favouritism. According to Transparency International judicial corruption survey, some 77% of Indians believe judiciary to be corrupt.[48] Nearly 3600 crores goes in terms bribing lawyers and judges to get justice and avoid long dragging of cases and frequent adjournments. Several sensational cases of corruption and misuse of official position by some judges have grabbed the attention of press and public, thereby sullying the image of judiciary in the recent years.

The most important issue, however, is the issue of access to justice. For countless citizens especially poor and marginalised, access to justice remain a distant dream. Many special schemes such as Lok Adalat and free legal aid have remained of symbolic in nature (Menon 2008). According to many reports and studies, justice delivery system in India remains cumbersome, time and money consuming for most citizens, let alone the poor.[49]

Last but not the least, the judicial process is yet to embrace modern information technology in a big way. It is evident from global experiences that application of communication technologies and automation of judicial process is revolutionising justice delivery process and the aspects of speed and efficiency. However, except for the higher courts to some extent, much of the judicial system at lower level function with old and inefficient process. The judiciary in India is lacking both physical as well as knowledge infrastructure to meet the gargantuan expansion of workload and public expectations.

In response, both judiciary and the government have undertaken a slew of measures to overhaul an ailing justice delivery system. The government has set up a number of commissions and committees to study and suggest remedial measures. The most recent have been the elaborate

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[46] See Pavan K. Varma. 'Courts also need a Lokpal', *The Times of India*, May 16, 2013.

[47] See PRS Legislative report on Pendency, 2011.

[48] See the press report here: http://www.infochangeindia.org/governance/news/77-of-indians-believe-judiciary-is-corrupt-ti-survey.html

[49] 170th Report of the Law Commission of India; Second ARC report 2008.

suggestions made by the Report of Second Administrative Commission and 170th Report of the Law Commission of India. Against a growing outcry about a dysfunctional justice system, the SC and several High Courts have initiated number of initiatives to reduce pendency, expand infrastructure facilities, improve governance process and be more accessible to citizens. For instance, the SC set up a National Court Management Systems Scheme in May 2012 to address the issues of efficiency and governance. Under the scheme, a National Framework of Court Excellence has been instituted which will set "measurable standards" of performance for courts addressing the issues of quality, responsiveness and timeliness. Similarly, the Court has set up an E-Committee to devise and implement a National Policy on computerization of judicial administration in order to expedite delivery of justice in civil and criminal cases.[50] On pendency issue, the idea of Fast Track Courts which have reduced pendency of nearly 20 lakh criminal cases. In Tamil Nadu, Andhra Pradesh and Gujarat, such courts have been proved to be quite effective in disposal of cases involving minor offences which are clogging our criminal justice system. Delhi High Court has recently started evening courts initially for cases under Section 138 of Negotiable Instruments Act, involving small amounts.[51] Most important development, however, is allocation of substantial financial resources for judiciary by the 13th and 14th Finance Commissions.

These apart, there have been slew of other proposals of huge promise doing the round of judicial reforms. While the judiciary has proposed for Alternative Methods of Delivery of Justice to dispose cases more rapidly through out of court settlements, the Union government has come out with several key bills on appointments, accountability, judicial conduct and so on. Also, there is a pending proposal for the constitution of All India Judicial Services. In short, a number of ideas and proposals are being mooted and actively debated to reform judiciary in India.

[50] See *The Indian Express* story, December 27, 2012, link: http://www.indianexpress.com/news/yearender-2012-judicial-reforms-flavour-of-2012/1050916/3

[51] For details, see Chief Justice K.G. Balakrishnan's lecture, see link: http://indiacurrentaffairs.org/judicial-reforms-in-india-addressed-by-k-g-balakrishnan-honble-mr-chief-justice-of-india/