

[Working Paper Series: Judicial Independence and Democracy in Asia]

Indian Judiciary at a Critical Crossroad: Issues and Challenges

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1. Introduction

In a functioning liberal democracy, judicial independence is a non-negotiable feature. The judiciary remains the key agency to maintain checks and balances in the constitutional division of powers among the key branches of the government. This apart, an autonomous and independent judiciary plays a pivotal role in protecting citizens' rights from potential violations by the executive branch. Additionally, the judiciary serves as the key protector of the constitution and upholds the country's foundational norms and democratic values. In this regard, the judiciary in Indian has played a critical role in the young republic's eventful democratic journey in the last seven decades. Not only has it kept the executive branch within constitutional limits, but it has also done exceedingly well to expand many new rights and liberties for the vulnerable and dispossessed sections of the societies.

However, in recent years particularly since the rise of executive power under the current dispensation led by the right-wing Bharatiya Janata Party, the judiciary has come under intense pressure while exercising its constitutional role as protector of individual freedom and acting as a major check on the executive excesses. Today, however, this historic institution known for being a bastion of justice and freedom finds itself at an important crossroad. This comes in the backdrop of a majoritarian populist government that has exercised visible control over the judiciary. The long-established constitutional 'separation of powers' is under great stress today. There are concerns in appointments of judges, accountability, corruption, pendency, issues of access and affordability of justice for ordinary citizens, and questionable judgments in recent times. This paper attempts to do a quick scan of the evolution and key features of judicial power in India, its roles in shaping freedom and democracy, current challenges, and the way forward.

2. Judiciary: Structure and Independence

The Indian judiciary is one of the strongest in the world because of the wide-ranging powers it enjoys and how its foundation has been laid in its functional independence. Unlike the United States, India has an integrated judicial system. The Supreme Court is the highest court of the country, followed by the High Courts at the level of the state and then the district courts. Additionally, there are multiple

quasi-judicial bodies such as tribunals and mediation centers for alternate dispute resolution. 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 statutory law and regulatory law. The Constitution framers were clear with their vision of an independent judiciary. Laying down the foundation for clear appointments of judges, creating security of their tenures and clear conditions of service.

3. The Supreme Court

The Supreme Court¹ (SC) is the apex institution of justice in India. It was established by Part V, Chapter IV of the Constitution. Articles 124 to 147 of the constitution lay down the composition and jurisdiction of the SC. Essentially it is an appellate court that takes up appeals against judgments of the provincial High Courts (HC). It also takes writ petitions in cases of serious human rights violations if a case involves serious issues that require urgent resolution.

Composition

Originally, the Supreme Court had provisions for the appointment of a Chief Justice and 7 other judges. Over the years, as the amount of cases has increased along with the need for a larger body of judges to administer them. Today, the SC has 30 judges and the Chief Justice. The Chief Justice is appointed by the President of India, and in most instances, the qualifying criterion is the senior-most judge. 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 in 1998 as a counter mechanism to any executive intervention, in a series of judgments known as the *judges case*.

Powers and Jurisdictions

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 defender of the Constitution. The SC is the court of records, which means that all its decisions and court proceedings are preserved and published. The decisions of the SC are binding on all other courts. The court also has the power to review its older decisions. The SC has the power to extend free legal aid to persons belonging to poorer sections.

The Original Jurisdictions

The original jurisdiction of the SC extends to any dispute arising between Union and one or more states between and between two or more states. This is covered under Article 131 of the Constitution. Under Article 32 of the Constitution, the court is empowered to issue orders, directions, or writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto*, and *certiorari* to enforce Fundamental Rights. The limitation however is that the court does not have jurisdiction over agreements and treaties that were signed before the creation of the constitution.

The Appellate Jurisdiction

The SC is the highest appellate court in the country and by virtue of this, it can hear appeals against

¹ Vishnu Padmanabhan and Sriharsha Devulapalli, How the Supreme Court has evolved since 1950. *Livemint*, August 15, 2018. <https://www.livemint.com/Politics/iK7w9InnxqgsELzcf26HRN/How-the-Supreme-Court-has-evolved-since-1950.html>

the judgment of the High Courts in both civil and criminal cases involving substantial question of law which involves the interpretation of the constitution. The SC 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 judgment, sentence, or order in any matter passed by any court in India.

The Advisory Jurisdiction

Article 143 of the Constitution provides that if any ambiguity arises regarding the interpretation of a clause of the constitution or certain constitutional problems arise, the President can refer the same to the SC for its expert opinion.

4. Growth and Evolution of Judicial Powers: An Overview

First Phase: A positivist Court

The judiciary in its early years was confined to the assigned spaces within the constitution. The courts used the power of judicial review, actively against legislative pronouncements that were seen as problematic. Three major aspects of the judiciary stand out in the early period starting from 1950. Firstly, there was strict adherence to the constitutional texts. Secondly, the courts refused to support lofty ideologies of the government at the time, and lastly, the judiciary conceded that the Parliament should have powers to amend the Constitution. So even though the judiciary declared the abolition of democracy illegal and considered it a violation of the right of property in *Kameshwar Prasad vs. State of Bihar*, it restrained from using the provisions of judicial review when the parliament quickly brought out the 1st Amendment to Constitution in 1951 which placed the provision out of the purview of judicial review. Similarly in *State of Madras vs. Champakam Dorairajan*, the court struck down the government's decision to have reservations in educational institutions based on caste as a violation of the right to equality, it did not oppose the Parliament's right to bring a constitutional amendment to justify such affirmative action on the basis of caste. In these cases, and in many others for the first 15 years of the court's functioning, the judiciary followed a positivist interpretation of the Constitution. During this period², the courts got involved in many controversial disputes, and rightly so because these cases often were about civil liberties, free speech, caste discrimination, and most importantly, land reforms.

Second Phase: Bending Backward

Even though initially, the judiciary was largely perceived as apolitical even when it dealt with issues that were politically sensitive, such as the abolition of zamindari (landed class system), reservation policy often led to direct confrontation with the parliament. The courts truly entered this sphere with its expansive interpretation of fundamental rights in *Golak Nath Case*³.

The SC in this case reconsidered the constitutionality of the Seventeenth Amendment and by

² Nick Robinson, Expanding Judiciaries: India and the rise of Good Governance Court, Washington University Global Studies Law Review, Vol.8, Issue1, January 2009, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1067&context=law_globalstudies

³ See Pranav Ravindher, Case Analysis: Golaknath vs. State of Punjab, *India Law Portal*, June 10, 2020. <https://indianlawportal.co.in/case-analysis-golaknath-v-state-of-punjab/>

a majority verdict, declared the said amendment illegal. The Court held that the amending power of the parliament to be subject to fundamental rights tests. The court went further in *R.C. Cooper vs. Union of India* when it struck down the much-touted bank nationalization scheme as illegal. In the process, it overruled past judgments which weren't adversarial. This prepared a stage for direct confrontation between the judiciary and the Parliament. To restore its supremacy, the Parliament passed Twenty-fourth Amendment which overturned *Golak Nath*.

The Twenty-fourth Amendment (along with the Twenty-fifth and Twenty-ninth Amendments) led to the Court delivering the historic *Keshavananda Bharti vs. State of Kerala*⁴ 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 the Parliament was supreme to amend the constitution, under Article 368 it cannot alter the 'basic structure' of the constitution. Indira Gandhi's government, which enjoyed the absolute majority, reacted very strongly by superseding three seniors most judges to appoint Justice AN Ray as Chief Justice of India. The ensuing confrontation reached its peak in *Raj Narain case* 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 1975⁵, set the stage for rapid marginalization of the judiciary. The National Emergency and the supersession of judges which led to rapid politicization of the judiciary actively contributed to judicial surrender to the executive in the controversial *ADM Jabalpur vs. Shivkant Shukla*⁶ that backed the government's act of suspending the 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 the government's claims. The judiciary which had earned accolades and respect in the previous decades became an executive court, succumbed to political pressures, and lost the much-acquired legitimacy.

Third Phase: The Era of Judicial Supremacy

The judiciary which was viewed to have made abject surrendering to the government tried to do the 'repentance' Post-Emergency by taking on an activist course through many of its subsequent judgments. 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*⁷, 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 Supreme Court opened a new dimension of the 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 lawmaking. It also struck down the key provisions of the Forty-second Amendment that had kept judicial review out of the ambit of constitutional amendments in the case of *Minerva Mills*. Gradually the judiciary fashioned an era of judicial activism in the later decade through an expansive interpretation of fundamental rights by creative use

⁴ For an excellent read on the significance of this judgment see, Arvind P. Datar, "The case that saved Indian Democracy", *The Hindu*, April 24, 2013. <https://www.thehindu.com/opinion/op-ed/the-case-that-saved-indian-democracy/article12209702.ece>

⁵ Vandana Menon and Soham Sen, Illustrating the Emergency: The darkest timeline in Modern Indian History, *The Print*, June 26, 2018. <https://theprint.in/india/governance/43-years-of-emergency-a-timeline-of-events/74568/>

⁶ Case note by Chiranjeeb Mohanty, *Law Times Journal*, July 12, 2018. <https://lawtimesjournal.in/adm-jabalpur-vs-shivkant-shukla-1976-2-scc-521-case-summary/>

⁷ Case Analysis by Hemanta Varshney, *Law Times Journal*, August 30, 2018. <https://lawtimesjournal.in/maneka-gandhi-vs-union-of-india/>

of a new instrument called public interest litigation (PIL), largely drawing from the American experience.

Public Interest Litigation and Judicial Activism

The starting point of PIL revolution was with the landmark *S.P. Gupta vs. President of India and others*⁸ (1981). 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 the performance of public duties. The Supreme 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. The court's active promotion of PIL encouraged thousands of conscious individuals, lawyers, citizen forums, and civil society organizations to file litigations on behalf of underprivileged and helpless individuals and groups. Through PIL, the court creatively expanded substantive rights to cover unarticulated but implicit rights such as the 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 a healthy environment. This active interventionist idea ushered a new era in the courts, of active recognition of societal inequalities and issues of the marginalized but also at times overstepping the executive in policy creation and execution. There exists a plethora of literature⁹ on what the benefits or harms of this move may have been, however it was undisputed that it did start a culture of active participation in issues affecting the public.

Collegium System and Re-assertion of Judicial Independence

This phase also saw the judiciary masterfully using the opportunity (weak coalition governments) to put its stamp on appointments of judges. Apart from trying to maintain autonomy by insulating from the executive interferences in appointment, the decision was meant to consolidate judicial dominance. The judiciary did this in series of judgments (known as three judges cases). The first judges' cases were *S.P. Gupta v. Union Of India* in 1981, which arose after the President bypassed the consultation advice of the chief justice (CJ) and listened to the CJ of Delhi high court instead. This judgment was critiqued because it didn't recognize the independence of the CJ. The *Second judges case* came up in 1993 when the question arose through a PIL whether the CJ's views on appointment hold primacy. The second judgment held that the CJ's views should hold primacy in appointments. The third judges case came up in 1998, about the question of whether the consultation of the president should only be limited to the CJ, or should involve other judges too. The Supreme Court held that this should lead to the creation of a collegium system where other judges also are actively consulted for appointments. This was challenged during the National Democratic Alliance (NDA) government led by Narendra Modi in 2015. The new government passed the legislation to set up the National Judicial Appointments Commission (NJAC) with an intention to make judicial appointment a collective affair. Seeing this as an executive attempt to snatch the power of appointment from them, a five-member Supreme Court bench declared the new law unconstitutional¹⁰. Thus, the judiciary stood its ground to

⁸ Case analysis by Vikas Kumar, *India Law Portal*, July 2, 2020. <https://indianlawportal.co.in/s-p-gupta-v-uo/>

⁹ Dushyant Dave, The Supreme Court's greatest gift is the PIL and it is here to stay, whatever critics may say". *The Wire*, September 15, 2020. <https://thewire.in/law/supreme-court-pil-constitution-law>

¹⁰ See Utkarsh Anand, Supreme Court strikes down NJAC, revives collegium system, *The Indian Express*, October 17, 2015. <https://indianexpress.com/article/india/india-news-india/sc-strikes-down-njac-revives-collegium-system-of-appointing-judges/>

possible executive interference in affairs it thought its exclusive jurisdiction.

5. Challenges Facing the Judiciary

The judiciary which reached the pinnacle of its power and independence throughout the 1990s and late 2000s by delivering many landmark judgments that went on to expand personal liberties and rights of vulnerable and underprivileged populations apart from acting as a check on state excesses is currently witnessing a sharp decline. The major erosion in judicial power and its popular legitimacy has coincided with the arrival of a strong executive at the center led by the right-wing Bharatiya Janata Party (BJP)¹¹. It should be mentioned that the judicial power in India thrived during the period of successive coalition governments at the center characterized by ‘unstable’ and ‘weak’ executive. However, the BJP led by Narendra Modi broke that continuum when it achieved a single majority on its own in the 2014 general elections.

Emergence of an ‘Executive Court’

The arrival of a strong central government led by charismatic Narendra Modi, a nationalist and populist figure with centralizing tendencies has been systematically using all levers of state powers to influence and control independent democratic institutions such as the Election Commission, Information Commission, Central Bureau of Investigation, Lokpal (Ombudsman) among others. However, the most vociferously targeted institution has been the judiciary. While the judiciary stood up to the executive interference in the case of the National Judicial Appointments Commission brought out by the government to undermine judicial power over the appointment of judges in 2015, this was an exception. This is because the central government particularly the law ministry has used administrative and other pretexts to delay or nullify certain appointments made by the collegium comprising of senior justices and the Supreme Court has not shown the required leadership to stop such blatant interferences into judicial autonomy. So much so, the Chief Justice of India T.S Thakur in 2016 made an emotional appeal to the central government to speed up the processing of the collegium recommendations as the same was causing distress to the judiciary¹². This apart, in the growing number of instances the executive branch is interfering and using transfer options against individual judges who have spoken out or delivered judgments against the government.

Beyond interference in judicial appointments, the executive branch has been able to get judges (using post-retirement incentives or coercive tactics) to support its policies even when they violate constitutional principles. Recently, an investigative report by The Indian Express, an Indian Daily Newspaper, revealed that of the 10 recent judgments of the Supreme Court on free speech, six cases were in favor of the state¹³. And for the four cases that went in favor of the petitioner, the government either supported the petitioner or had no objection. In short, the once “assertive” judiciary speaks “the language of executive and has become indistinguishable from the executive”¹⁴. Through its judgments and orders

¹¹ See an excellent assessment by A.P. Shah, The Supreme Court, then and now, *Economic and Political Weekly*, Vol.55, October 2020. <https://www.epw.in/journal/2020/40/perspectives/supreme-court.html>

¹² Report by Krishnadas Rajagopal, *The Hindu*, April 24, 2016. <https://www.thehindu.com/news/national/CJI-Thakur%E2%80%99s-emotional-appeal-to-Modi-to-protect-judiciary/article14257126.ece>

¹³ See the report by *The Indian Express*, August 22, 2020. <https://indianexpress.com/article/india/10-free-speech-cases-this-year-in-supreme-court-6564796/>

¹⁴ Gautam Bhatia, Constitutionalism without the court, *Indian Constitutional Law and Philosophy*, August 1, 2020. <https://indconlawphil.wordpress.com/2020/08/01/iclp-turns-7-a-constitutionalism-without-the-court/>

the judiciary far from failing to act as a check on an unbridled executive power has become a facilitator of it.

Failing as the Constitutional Court

The courts toeing the executive lines and failing in checking state excesses can be found in its visible failures to uphold fundamental rights in staggering number of cases since 2014. In growing number of critical cases involving deeper constitutional questions and state excesses such as abrogation of Article 370¹⁵ which nullified statehood and special provisions accorded to India's only Muslim majority state (Jammu and Kashmir), the constitutional validity of discriminatory Citizenship (Amendment) Act (CAA), legality of controversial political funding law (electoral bonds) and scores of habeas corpus petitions¹⁶ involving illegal detention of activists, democracy defenders and political dissidents, the Supreme Court has delayed or sided with the executive branch. A weak and ineffectual judiciary has greatly facilitated and emboldened an already strong executive to threaten and usurp key constitutional principles governing India's democracy. Importantly, by failing on issues of Article 370, Citizenship law, the judiciary is increasingly ceasing as a counter-majoritarian court¹⁷.

Growing Pendency and Low Bench Strength

Beyond the visible decline of judicial power vis-à-vis strong executive, the judiciary is engulfed with multiple internal challenges: a mountain of pending cases at all levels, a staggering number of vacancies, inadequate and outdated judicial infrastructure to deliver timely justice in a vast county with a very low level of legal literacy. In particular, the most challenging aspect to judicial legitimacy is the pendency of cases which have increased significantly at every level of the judicial hierarchy in the last decade. As of November 2019¹⁸, there are over 3.5 crore cases pending across the Supreme Court, the High Courts, and the subordinate courts. Of these, subordinate courts account for over 87.3% pendency of cases, followed by 12.5% pendency before the 24 High Courts. In the High Courts, over 8.3 lakh cases have been pending for over 10 years. This constitutes 19% of all pending High Court cases. Similarly, in the subordinate courts, over 24 lakh cases (8%) have been pending for over 10 years. A recent McKinsey study¹⁹ suggests that if the 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.

As mentioned above, the heavy vacancy of judges across courts in India has affected the functioning of the judiciary, particularly the timely disposal of cases. Between 2006 and 2017, the number of vacancies in the High Courts increased from 16% to 37%, and in the subordinate courts from 19% to 25%. As of 2020, High Courts have 410 vacancies against a sanctioned strength of 1,079

¹⁵ Report by Shruti Mahajan, *Bar and Bench*, August 05, 2020. <https://www.barandbench.com/columns/supreme-court-dealt-with-cases-abrogation-of-article-370-jammu-and-kashmir>

¹⁶ Shreyas Narlas and Shruti Rajagopalan, Judicial Abrogation of Right and Liberties in Kashmir, *Article 14*, September 25, 2020. <https://www.article-14.com/post/the-judicial-abrogation-of-rights-liberties-in-kashmir>

¹⁷ A.P. Shah, "The only institution capable of stopping the death of democracy is aiding it", *The Wire*, September 18, 2020. <https://thewire.in/law/supreme-court-rights-uapa-bjp-nda-master-of-roster>

¹⁸ A report by *The Wire*, November 27, 2019, <https://thewire.in/law/pending-court-cases>

¹⁹ See The McKinsey Report, August, 2020.

<https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/India/Indias%20turning%20point%20An%20economic%20agenda%20to%20spur%20growth%20and%20jobs/MGI-Indias-turning-point-Executive-summary-August-2020-vFinal.pdf>

judges, and subordinate courts have 5,676 vacancies against a sanctioned strength of 22,704 judges. Thus, the inability to work on a full force often leads to a delay in decisions and pendency in cases. Added to this is the inadequate judicial infrastructure, particularly poorly constructed courtrooms, slow digitization of courts, lack of video-conferencing and online citizens portals, digital register of cases/petitions which hamper the justice delivery. The recent **India Justice Report**²⁰ found Indian judicial lagging on many critical parameters as mentioned above. While the country claims to be a technology superpower, as many as 40 percent of jails in India do not have video-conferencing facilities.

6. Way Forward

Among the vital independent institutions in democratic India, the judiciary occupies a place of pride. For most of its more than seven-decade existence, it has done well to defend individual liberty and protected fundamental rights, expanded the access to justice to marginalized and dispossessed population, resolved disputes between the Centre and States, and served as a check against the executive excesses. The only time when it lost its autonomy and credibility was during the 1970s when a strong executive branch under Prime Minister Indira Gandhi coerced and influenced the courts to do her government's bidding. The courts recognized the mistakes and quickly recovered the ground and reputation in the succeeding decades by becoming assertive and independent by delivering many pathbreaking judgments and judicial innovation. It emerged as a people's court and champion of civil liberty and democracy.

However, over the last seven years and under a government with a full legislative majority, the judiciary is under tremendous pressure to call the government's bidding. While some individual judges are still standing up to pressure from a strong executive hell-bent on bossing over every democratic institution, the judiciary, on the whole, is failing to check executive excesses on violation of personal liberty, defend and protect dissent and freedom of expression, abrogate or review legislations that are widely discriminatory and violate the basic structure of the constitution and so on. Overall, India is witnessing significant erosion of judicial freedom and constitutionalism impacting core aspects of democracy, rule of law, and human rights. However, of late, there are signals that the judiciary, particularly the higher courts, are slowly recognizing the slide and damage to its reputation. Recently several high courts and the Supreme Court are making steady efforts to revive public faith in the judiciary. A case in point is its recent handling of the COVID-19 petitions and state excesses²¹. ■

²⁰ India Justice Report 2019, *Tata Trusts*, <https://www.tatatrusters.org/upload/pdf/overall-report-single.pdf>

²¹ Krishnadas Rajagopal, "A paradigm shift in Supreme Court after Justice NV Ramana takes over as CJI", *The Hindu*, May 4, 2021. <https://www.thehindu.com/news/national/news-analysis-a-paradigm-shift-in-supreme-court-after-justice-nv-ramana-takes-over-as-cji/article34477835.ece>

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<https://indianexpress.com/article/india/10-free-speech-cases-this-year-in-supreme-court-6564796/>

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