

# THE INDIAN JUDICIARY UNDER THE CONSTITUTION

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It is not surprising that the most important issue in the recent discussion in India on amendments to the Constitution has been the scope of judicial review of legislation and of executive action. For, the judiciary occupies a pivotal position under the Indian Constitution. As India's first Attorney-General and one of its most distinguished jurists, Mr. M. C. Setalvad, points out in the Hamlyn Lectures "an impartial and independent judiciary was gradually built up in the British times. The Constitution of India continued and strengthened this tradition by incorporating into itself what may be called an integrated judicial system designed to function impartially beyond the range of executive influence and irremovable except by Parliament under circumstances prescribed by the Constitution. A judicial system of this nature was essential in order to preserve and maintain the ideals of democracy and freedom and of the Rule of Law embodied in the Constitution"<sup>1</sup>.

While it is debatable whether India's political structure is federal with unitary features or unitary with federal features, it is incontestable that its judicial structure is unitary. Both Union and State laws are interpreted in a single judicial system. There is no division of judicial work between Union courts and State courts. At the apex of the hierarchy of courts is the Supreme Court of India with jurisdiction wider than that of any federal Supreme Court. The Constitution confers on it original jurisdiction in disputes between the Union and the States, and between the States inter se "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" (Art. 131) and original jurisdiction for the enforcement of the fundamental rights. Indeed, the citizen's right to move the Supreme Court directly for this purpose is itself a fundamental right (Art. 32). The Supreme Court is, besides, the highest court of appeal in cases involving "a substantial question of law" as to the interpretation of the Constitution. (Art. 132), civil cases which involve "a substantial question of law of general importance" which in the opinion of the High Court, the highest court in a State, "needs to be decided by the Supreme Court" (Art. 133), and in criminal cases if the High Court "has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or 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; or certifies that the case is a fit one for appeal to the Supreme Court" (Art. 134).

Furthermore, the Supreme Court may "in its discretion" grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the country, except a court or tribunal constituted under any law relating to the Armed Forces (Art. 136).

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<sup>1</sup> M. C. Setalvad, *The Common Law in India*; Hamlyn Lectures 12th series; Stevens & Sons Ltd., London; 1960; p. 200.

Next in the hierarchy come the High Courts. "There shall be a High Court for each State" the Constitution ordains (Art. 214). Their jurisdiction is the same as it was before the Constitution came into force on January 26, 1950 (Art. 225); that is, plenary in all matters as an appellate court under the Code of Civil Procedure and the Code of Criminal Procedure. The Constitution confers on High Courts the power of superintendence over all courts and tribunals within the State (Art. 227) and ensures that no court below it may decide any "substantial question of law" as to the interpretation of the Constitution (Art. 228). But the most striking provision is Article 226 which empowers every High Court "to issue to any person or authority, including in appropriate cases any Government" directions, orders, or writs "including writs in the nature of habeas corpus, mandamus, prohibition, quo warrants and certiorari" for the enforcement of the fundamental rights "and for any other purpose". Thus while the Supreme Court's original jurisdiction in this respect is confined to enforcement of the fundamental rights "the High Courts" jurisdiction is wider inasmuch as it can issue writs "for any other purpose". This consists in the main of enforcing sheer legality. The citizen's fundamental right guaranteed by the Constitution may not be affected but an executive officer or an administrative tribunal might ignore statutory provision or requirements of natural justice and violate his legal rights, apart from the fundamental rights.

The writs named in Art. 226 are the well known prerogative writs issued by the High Court of Justice in England. The ancient writ of habeas corpus is designed to test the legality of an imprisonment; mandamus ensures that the mandate of the legislature is carried out and statutory duty performed; quo warrants is issued when a public office is held without legal warrant; prohibition is issued when a tribunal proceeds to exercise jurisdiction not vested in it while certiorari is issued to quash the decision of a tribunal which has acted without jurisdiction or committed an error of law apparent on the face of the record. The High Courts have exercised what is popularly known as their writ jurisdiction under Art. 226 freely though within limits defined in a series of rulings of the Supreme Court. A rich body of administrative law has thus built up. It provides the citizen with a speedy, efficacious and inexpensive remedy against administrative excess or breach of law by the administration.

As Mr. Setalwad emphasised in the Hamlyn Lectures, only a judiciary firmly protected from all pressures could be adequate to perform the wide and weighty functions which the Constitution imposes upon the Indian judiciary. Judges of the Supreme Court as well as of the High Courts are appointed by the President in consultation with the Chief Justice of India. In the case of High Court Judges the Chief Justice of the High Court and the Governor of the State are also consulted. Judges of the Supreme Court and the High Courts are irremovable except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal "on the ground of proved misbehaviour or incapacity." (Art. 124 [4])

These bare provisions of the Constitution on the judicial set-up reveals a certain outlook, a deliberate design. India's leaders saw at first hand during the struggle

for freedom the high quality of administration of justice during British rule, barring occasional lapses. There were some notable trials involving political opponents of the British Raj which British judges conducted with manifest impartiality<sup>1a</sup>.

The framers of India's Constitution were statesmen of vision and lawyers of high calibre. They knew, both, the achievements and the lapses of the judiciary during the Raj and were determined to set up an independent non-political judiciary. The Constituent Assembly appointed a special committee on the Supreme Court, consisting of five of the most distinguished jurists in the country. They were Mr. S. Varadachariar, Sir Alladi Krishnaswami Ayyar, Sir B. L. Mitter, Dr. K. M. Munshi, and Sir B. N. Rau. They said, in their Report dated May 21, 1947, "We do not think that it will be expedient to leave the power of appointing judges of the Supreme Court to the unfettered discretion of the President of the Union<sup>2</sup>." They recommended two methods of making such appointments. These were not accepted. But while the particular methods prescribed by the committee were rejected, its plea that the President should not have "unfettered discretion" in regard to appointments to the higher judiciary was accepted. The obligatory consultation with the Chief Justice of the Supreme Court was designed as a check on the President's power.

Introducing in the Assembly, on July 15, 1947, the Report of the Assembly Committee on the Principles of a model provincial Constitution, Sardar Vallabhbhai Patel said: "The Committee has given special attention to the appointment of Judges of the High Court. This is considered to be very important by the Committee and as the judiciary should be above suspicion and should be above party influences, it was agreed that the appointment of High Court judges should be made by the President of the Union in consultation with the Chief Justice of the Supreme Court, the Chief Justice of the Provincial High Court and the Governor with the advice of the Ministry of the provinces concerned. So there are many checks provided to ensure fair appointments to the High Court<sup>3</sup>." Mr. Jawaharlal Nehru later introduced the Report on the Principles of the Union Constitution and he was satisfied with the Supreme Court Committee's Report<sup>4</sup>.

In the Constituent Assembly various amendments were moved in order to restrict the President's power to appoint judges, such as consulting a Standing Committee of Parliament or confirmation by a two-thirds majority of Parliament. They were rejected. It was felt that the requirement of consultation, with the Chief Justice was a good check. The final and most authoritative exposition on the basis of which the Assembly adopted the relevant provisions was by the Chairman of the Drafting Committee, Dr. B. R. Ambedkar. His exposition in the Assembly on May 24, 1949 deserves to be quoted in extenso. He said "There can be no difference of opinion in the House that the judiciary must both be independent of the executive and must also be competent in itself. And the question is how these two objects could be secured. There are two different ways in which this matter is

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1a See the author's "Indian Political Trials" Sterling Publishers, New Delhi 1976.

2 Constituent Assembly Debates Vol. IV, p. 731.

3 C. A. D. Vol. IV, p. 579.

4 C. A. D. Vol. IV, p. 710.

governed in other countries. In Great Britain the appointments are made by the Crown, without any kind of limitation whatsoever which means by the executive of the day. There is the opposite system in the United States where, for instance, appointments to offices of the Supreme Court as well as chief offices of the State shall be made only with the concurrence of the Senate in the United States. It seems to me, in the circumstances in which we live today, where the sense of responsibility has not grown to the same extent to which we find it in the United States, it would be dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day. Similarly, it seems to me that to make every appointment which the executive wishes to make subject to the concurrence of the Legislature is also not a very suitable provision. Apart from its being cumbersome, it also involves the possibility of the appointment being influenced by political pressure and political considerations. The draft article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the article is that there should be consultations of persons who are *ex hypothesi*, well qualified to give proper advice in matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment<sup>5</sup>.”

This is the rationale behind the elaborate Constitutional provisions on judicial appointments. It might be mentioned that when the draft of the new Constitution was ready for detailed discussion a conference of the Judges of the Federal Court and the Chief Justices of the High Courts was held in March 1948. It prepared a memorandum containing their unanimous views on matters affecting the judiciary<sup>6</sup>. Judicial review of legislation is beset with controversy. No sooner had the Supreme Court started functioning under the Constitution in 1950 than criticism was heard of its performance. In one of the earliest cases, Chief Justice Patanjali Sastri pointed out that the Constitution contained express provisions for judicial review of legislation. “If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader’s spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the ‘fundamental rights’, as to which this court has been assigned the role of a sentinel on the *qui vive*. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set up are out to seek clashes with the legislatures in the country<sup>7</sup>.”

By 1958 the controversy had gone far enough for the Law Commission to remark that “In the opening years of the Republic views were expressed by important persons which led to an impression in the public mind that judges, law courts and lawyers were superfluous institutions which hindered the progress of the social welfare State, which is the ideal of our Constitution. These views were repeated in some of the States by persons of lesser importance. Thus, instead of appreciating

5 C. A. D. Vol. VIII, p. 258.

6 The Framing of India’s Constitution; Select Documents; Edited by B. Shiva Rao; New Delhi, 1968; Vol. IV, p. 195.

7 V. G. Row vs. State of Madras AIR 1952, S. C. 199.

the more important role, which law and those administering it must play in a democratic social welfare State the public came to look down upon law, lawyers and those holding judicial offices and regard them as obstacles to the progress of the nation. Indeed not infrequently, judicial pronouncements were treated with scant respect and commented upon in assemblies and public platforms<sup>8</sup>.”

The Commission criticised the manner in which judicial appointments were being made. “It is widely felt that communal and regional considerations have prevailed in making the selection of the Judges. The idea seems to have gained ground that the component States of India should have, as it were, representation on the Court. Though we call ourselves a secular State, ideas of communal representation, which were viciously planted in our body politic by the British, have not entirely lost their influence. What perhaps is still more to be regretted is the general impression, that now and again executive influence exerted from the highest quarters has been responsible for some appointments to the Bench<sup>9</sup>.” It cannot, however, be said that the judges were altogether blameless. Mr. M. C. Setalvad’s memoirs mention the failing of some of the retiring judges undignifiedly “trying to secure some suitable employment<sup>10</sup>.” This is partly due to ambition and partly to the low scale of judicial salaries which has been the subject of legitimate criticism<sup>11</sup>.

The Supreme Court’s ruling in *Golak Nath’s* case decided in 1967 to the effect that the word “law” Art. 13 (2) covers a constitutional amendment so that Parliament had no power even by constitutional amendment under Art. 368 to take away or abridge any of the fundamental rights was unfortunate. It was followed by two other rulings, in the banks nationalisation case<sup>11a</sup> and the case of the former Indian Princes’ Privy Purse in which again the Court ruled against the Union. The correctness of these rulings in law is, with respect doubtful. In 1973 the full court of the Supreme Court overruled *Golak Nath’s* case in the case of *Keshavananda Bharati* but held that Article 368 which empowers Parliament to amend the Constitution by a special procedure, “does not enable Parliament to alter the basic structure or framework of the Constitution.” The Court split narrowly, by 7 to 6. On April 25, 1973 the day after the judgment was delivered the President broke a nearly quarter century’s convention by superseding three seniormost judges and appointing Mr. Justice A. N. Ray as Chief Justice of India. Hitherto, the seniormost Judge had always been appointed Chief Justice. The Bar protested vigorously against this action. The superseded judges resigned<sup>12</sup>.

This sad precedent was followed when in May 1974, Mr. Justice R. S. Narula was appointed Chief Justice of the Punjab and Haryana High Court superseding the senior-most judge, Mr. Prem Pandit, who resigned in protest.

The Proclamation of Emergency issued by the President on June 26, 1975 on the ground that “the security of India is threatened by internal disturbances” opened a new chapter in the country’s constitutional development. A far more onerous and delicate responsibility was cast on the judiciary. The High Courts were able to

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8 Reform of Judicial Administration; 14th Report, Law Commission of India; Ministry of Law Government of India, New Delhi; 1958; Vol. I, p. 78.

9 Ibid page 34.

10 M. C. Setalwad; *My Life: Law and Other Things*; Tripathi, Bombay; 1970; p. 509.

11 H. M. Seervai, *Constitutional Law of India*; Tripathi Bombay; 1976. Vol. II, p. 1374.

11a See Bryde “*Verfassung und Recht in Übersee*” (1970), p. 195.

12 Only the bare outline the events from 1967 to 1973 are given here. For details vide Mr. S. S. Sen’s article “*Constitutional Storm in India*” “*Verfassung und Recht in Übersee*” (1974), pp. 33–43.

set aside executive actions as being contrary to the law though the fundamental rights had been suspended by the Presidential Orders made under the Constitution. The eminent journalist Mr. Kuldip Nayar's wife won her habeas corpus petition for his release in the Delhi High Court in September 1975. The Bombay High Court allowed a petition filed by a former Judge of the Court Mr. N. P. Nathwani and some other lawyers for a declaration that they had a right to hold a meeting of lawyers to discuss the civil liberties and the rule of law<sup>13</sup>. The Court also struck down the censor's decisions in another case while upholding some others<sup>14</sup>. The Gujarat High Court struck down some parts of the Censorship Order made under the Defence and Internal Security of Indian Rules, 1971<sup>15</sup>. All these rulings are under appeal to the Supreme Court.

On April 28, 1976 the Supreme Court by a majority of four to one held that a petition for habeas corpus is not maintainable in view of the fact that the right to move the Court for the enforcement of the fundamental right guaranteed by Art. 21 ("Now person shall be deprived of his life or personal liberty except according to procedure established by law") was suspended<sup>16</sup>.

In May 1976 the President in consultation with the Chief Justice of India and in exercise of powers conferred on him under Art. 222 of the Constitution ordered the transfer of 16 High Court Judges including two Chief Justices<sup>17</sup>. The Government claimed that the orders were made to ensure that at least one-third of the Judges of each High Court were drawn from other States as recommended by the States Reorganisation Commission in 1955. Its critics contended that this would adversely affect the independence of the judiciary. Meanwhile far reaching constitutional changes were recommended by a committee appointed by the President of the Congress Party to study and propose constitutional changes. The Committee headed by the former Foreign Minister Mr. Swaran Singh submitted its final proposals on May 22, 1976<sup>18</sup>. The salient features affecting the judiciary are:

"At present, the constitutional validity of a law, whether Central or State, may be challenged in any High Court or in the Supreme Court. The Committee is of the opinion that the Constitution should be suitably amended so as to provide that the constitutional validity of a Central law and any rule, regulation or by-law made thereunder may be challenged only in the Supreme Court . . ."

„The number of judges of the Supreme Court who are to sit for the purpose of deciding any case involving a question of constitutional validity of a law shall be not less than seven, and the decision of the court declaring a law invalid must have the support of not less than two-thirds of the number of judges constituting the bench."

"The number of judges of a High Court for the same purpose shall be not less than five, and the decision of the court declaring a law invalid must be supported by not less than two-thirds of the number of judges constituting the bench. In a High Court where the total number of judges is less than five, the full court shall sit and the decision as to the validity of a law should have the support of the whole court."

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13 N. P. Nathwani vs. Commissioner of Police. 78 Bombay Law Reporter 1.

14 Binod Rao vs. M. R. Masani 78 Bom. 125.

15 C. Vaidya vs. D'Penha S. C. A. No. 141 of 1976 decided on March 22, 1976.

16 Addl. Dist. Magistrate, Jabalpur vs. Shivkant Shukla AIR 1976, S. C.

17 The Hindu; May 30, 1976.

18 For text vide The Times of India May 23, 1976.



The committee recommended the amendment of Article 226 by the deletion of the words “and for any other purpose”. The existing power of the High Courts to issue writs for the enforcement of fundamental rights will continue. A new clause is to be inserted in Article 226 to the effect that the power conferred by clause (1) of that article to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court “in cases in which there has been a contravention of any provision of the Constitution other than any fundamental rights or the contravention of any provision of a statutory law where such contravention has resulted in a substantial failure of justice.

The exercise of this power should, however, be subject to the proviso that where an alternative remedy is available under the Constitution or any provision of a statutory law, no such direction order or writ shall be issued.”

The Committee recommended that tribunals should be set up to decide service matters, industrial and labour disputes, and disputes relating to revenue, land reforms, ceiling on urban property, and procurement and distribution of food grains and other essential commodities. The right to apply to the Supreme Court for special leave to appeal, under Art. 136 of the Constitution, from the decision of any such tribunal should remain. But the Committee recommended not only that the writ jurisdiction of the Supreme Court, under Art. 32, and of the High Courts, under Art. 226, shall be excluded, but also that the High Courts should cease to have the powers of superintendence over tribunals which they exercise under Art. 227. The Committee, creditably, made a substantial concession in its recommendation on Art. 226 in deference to public opinion. For, in its Interim Report published on April 13, 1976 it simply recommended deletion of the words “for other purposes“ in Art. 226.

The final proposals have been approved by the general body of the Congress, the All India Congress Committee. Constitutional amendment along these lines will considerably narrow the scope of judicial review and, to that extent, the power and authority of the Courts.

The test for judging any proposals for constitutional amendment was well formulated in a study of the Supreme Court’s performance from 1950 to 1959 by an American scholar Prof. George H. Gadbois, Jr. published in 1969 “Compared with most of the developing countries where Courts are fragile institutions performing functions only peripheral to the functioning of the political systems, in India the higher judiciary is exceptionally well institutionalized and strong, and has played an important part in sustaining constitutional democracy<sup>19</sup>.” Will the Indian judiciary be able to perform this role effectively?

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19 Selection, Background Characteristics, and Voting Behaviour of Indian Supreme Court Judges 1950–1959 in *Comparative Judicial Behaviour*. Edited by Glendon Schubert and David J. Danelski; Oxford University Press; 1969; p. 221.