

CHAPTER 7

GLANCE AT GOVERNANCE AT THE INDIAN JUDICIAL SYSTEM

“Courts exist for the convenience of the litigants and not in order to maintain any particular system of law or any particular system of administration”

-M.C.Chagla¹

When an organization's efficiency is extensively damaged, any efforts for its restoration and revival must start with an understanding of its structural designs and components. It is said that any 'judicial system which delays disposal of cases or resolution of disputes over decades can be said to have outlived its utility'². Structure has a direct nexus to utility. Reform of legal and judicial system depends critically on a sound understanding of its existing structure and level of efficiency.³

Having so far acknowledged the systematic failures resulting in arrears and delays, the researcher now proceeds to outline the organizational setup of the Indian judicial system, constitutional and statutory framework for establishing the courts, the powers and jurisdiction of the Courts, as also, and more importantly, the functions, constitutional protection and status of the Judges presiding at all levels.

7.1 Indian Judiciary – Constitutional Background

India, given its size and population, is unable to have a centralized administration of justice such as that in England. And yet the system it does have is also very different

¹ Former Chief Justice of Bombay High Court, quoted by the Supreme Court of India in the case of State of Maharashtra Vs Naraina, AIR 1983 SC 46, at P56

² Law Commission of India, 131st report (1988, 16)

³ World Bank Report, Chapter 6 (Judicial System) (2002, 120)

from that found in the United States. With the exception of a federal Supreme Court sitting in New Delhi (composed of a chief justice and twenty six judges appointed by the President of the Republic on the basis of the mandatory recommendation by the five Judges Collegium of the Supreme Court⁴), there are only state or territorial courts.⁵

The development of the judicial system during the British Rule, like that of the laws, took place in the three Presidencies of Bombay, Madras and Calcutta, separately. In course of time, with the formation of a common Central Government and a Central Legislative Council, a uniform and well organized judicial system came to be established for the whole country, which the country inherited, on its becoming independent on 15th August, 1947.⁶

Administration of justice and organization of courts was a provincial subject under the Government of India Act, 1935. The Constitution of India, which came into force on 26.1.1950, adopted the above scheme by providing in Entry 3 of List II (State list) of the Seventh Schedule the subject of "administration of justice; constitution and organization of all courts excepting Supreme Court and the High Courts". Subsequently, by the forty-second Constitutional Amendment in 1977, Entry 3 was deleted from the List II-State List and it was carried in the List III (Concurrent List) as Entry 11-A. It was so done keeping in view the recommendations of the Law Commission of India that All India Judicial Service should be set up, for manning the subordinate courts.

⁴ Judges' Association case – *Check* (2000) 10 SCC 484

⁵ Rene David and John E.C.Brierly, *Major Legal Systems in the World Today*, 1985, p. 514; Cf. Dore, *op. cit.*, pp. 397 et seq. as to the organization of judicial administration in the states. Apart from the lower courts there are District Courts for civil matters, Sessions Courts for criminal matters and, above them, High Courts. The territorial jurisdiction of these High Court exceptionally includes several states or territories.

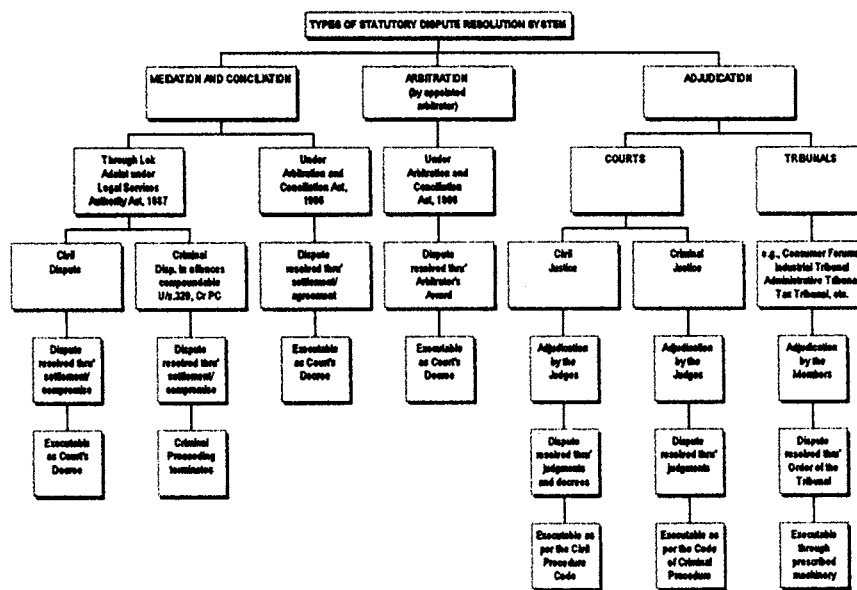
⁶ M.Rama Jois, *Legal and Constitutional History of India*, Vol. II, p. 103, 1984

Prior to independence, the District Judge used to be invariably a member of the Indian Civil Service. This position continued till the Indian Civil Service came to be abolished around 1946-47. Criminal justice at that time was handled by Magistrates who belonged to the executive. Under the Constitution, the concept of “Rule of Law” came to be accepted and developed. Article 50 prescribed the guideline for separating the judiciary from the executive in the public services of the State. This position is outcome of the recognition of the fact that the judiciary is a class separate from the executive.

7.2 Dispute Resolution Mechanisms available in India

In India, within our Constitutional setup, effective provisions have been made for resolution of disputes through mediation, conciliation, arbitration and above all, by adjudication through a well planned and matured judicial system. For achieving these goals, appropriate legislations have been enacted by the Parliament and State legislatures.

For an easy understanding, we can refer to this chart:



Types of Statutory Dispute Resolution System
Figure 7.1

The present work, does not examine the effectiveness of various alternative dispute resolution systems evolved in this country since its goal is to find out the causes of gradual failure of the adjudicatory process at the subordinate level entrusted to the constitutionally established judicial system and to devise remedies for the same so that the wheels of justice may start moving in consonance with the expectations of the justice seekers, of this country, particularly from the poor strata of the rural society.

7.3 Judicial Structure under the Constitution of India

Supreme Court

Article 124 of the Constitution of India provides for establishment and constitution of Supreme Court of India. It has been empowered to exercise appellate as also original jurisdiction including that of judicial review by issuing prerogative writs and directions throughout the territory of India. Article 141 of the Constitution provides that, "law declared by the Supreme Court shall be binding on all the courts within the territory of India. Article 142 mandates that the Supreme Court in exercise of its jurisdiction may pass such decree or pass orders as is necessary for doing complete justice in any cause or matter pending before it and its decrees and orders shall be enforceable throughout the territory of India.

The constitutional scheme makes it clear that in India there is no concept like that of Federal Courts or State Courts in the manner it exists in USA. The Supreme Court of India exercises the widest possible jurisdiction in relation to interpretation of law irrespective of the fact whether the law emanates from the State Legislature or the

Parliament and can adjudicate on any dispute arising anywhere in the Indian territory irrespective of whether its is civil, criminal or administrative. By reading Articles 32, 141, 142 and 144 of the Constitution of India conjointly, the Supreme Court of India, in case of need, has been in effect exercising power of law making by issuing ‘necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role.’⁷

High Courts

Under the constitutional scheme, (Article 214) there has to be a High Court for each State. Under Article 231 of the Constitution, there can be common High Court for two more States. Under Article 215 of the Constitution, every High Court is a Court of Record and has all the powers of such a court including the power to punish for contempt of itself. Article 226 defines the powers of the High Court to issue various prerogative writs, orders and directions. Apart from these, High Court can also exercise appellate and revisional jurisdiction under the Codes of Civil Procedure and Criminal Procedure. Apart from the similar said jurisdiction, under a special enactment under Article 227 of the Constitution, every High Court has been invested power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises its jurisdiction.

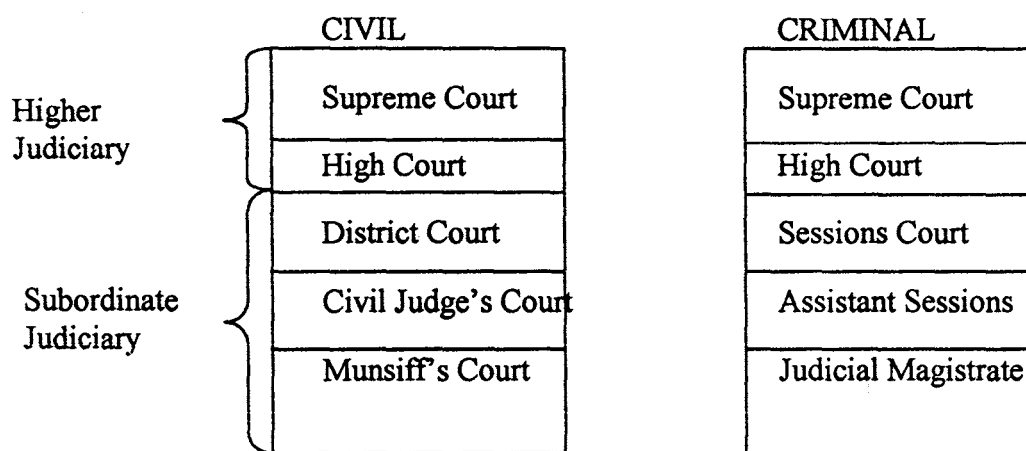
7.4 Sub-Ordinate Judiciary

Control over the subordinate courts under the Constitution mechanism is vested in the

⁷ See *Vineet Narain v. Union of India*, AIR 1998 SC 889, pr.51

High Court. Under Article 235 of the Constitution, the control over district courts and courts subordinate thereto including the posting and promotion of, grant of leave, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge is vested in the High Court. Under Article 236(b) of the Constitution, the expression 'judicial service' means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

The Indian judiciary, on our constitutional pattern, has five layers.



Layers of Judiciary
Figure 7.2

Law of precedents:

With respect to the law of precedents and law-making through judicial process, the sole constitutional power has been assigned to the Supreme Court under Article 141⁸ of the Constitution of India. Such a provision with respect to High Court is conspicuously

⁸ 141. Law declared by Supreme Court to be binding on all courts. – The law declared by the Supreme Court shall be binding on all courts within the territory of India.

missing in the Constitution. However, the Supreme Court, through a catena of decisions, has declared that the law declared by the High Courts would be binding on the courts and Tribunals which function within the territorial jurisdiction of such High Court.⁹ As far as views of co-ordinate Benches of a High Court are concerned, the Supreme Court has very clearly laid down that the views of one Bench is binding on co-ordinate Benches¹⁰ and that earlier decisions of Supreme Court cannot be overruled even by a co-equal Bench of that Court.¹¹ However, in case of conflict between views of co-ordinate Benches, the right course of action would be to refer the matter to a larger bench so as to settle the law.¹² In India, there is thus a hierarchy within the Court itself, whereby decision of a larger Bench binds smaller Benches. On that basis, a larger Bench can overrule the decision of a smaller Bench.¹³

7.5 Administrative Hierarchy

In my opinion, it is wrong to say that the hierarchy in the Indian Judicial System is like a pyramid, which is flat at the bottom. Such a concept can be taken to be true only in respect of judicial hierarchy up to the State Level. But the Apex Court of the country, namely, the Supreme Court of India cannot be said to be a part of such pyramid like hierarchy. The Supreme Court of India has been conceived by the Constitution makers as a canopy enveloping the State's judicial hierarchy, which are independent establishments having no relationship with each other in adjudicatory or administrative mechanism and

⁹ *East India Commercial Co. v. Collector of Customs*, AIR 1962 SC 1893, pr.29

¹⁰ *Aarti Gupta v. State of Punjab*, (1988)1 SCC 258, pr.6, *Ranganath Misra*, J.

C.S.T. v. Pine Chemicals Ltd., (1995)1 SCC 58, *Jeevan Reddy*, J.

¹¹ *Indian Oil Corporation Ltd. v. Municipal Corpn.*, (1995)4 SCC 96

¹² *Union of India v. Godfrey Philips India Ltd.*, (1985)4 SCC 369, pr. 12, *Bhagwati*, C.J.

¹³ *A.R. Antulay v. R.S.Nayak*, (1988)2 SCC 602 (9-judges bench), prs. 43,44 (*per Mukherji*, Oza and

each of them are independent subject to appellate jurisdiction of the Supreme Court.

It has also to be borne in mind that under the Constitutional scheme though district and subordinate courts are subject to the control and superintendence of their respective High Courts, the High Courts have not been made subject to any administrative superintendence by either Supreme Court or any other constitutional authority i.e. neither executive nor the legislature. As a matter of fact, the Supreme Court does not have any administrative power over any part of the hierarchy of the Indian Judicial Structure.

7.6 Nature of Judicial System (Adversary or Inquisitorial or Accusatorial)

According to me, if we examine the Indian justice delivery system in the context of our social and cultural heritage, the procedural laws, both CPC and CrPC and the Laws of Evidence, we will find that our system is neither truly adversarial nor inquisitorial in the strict traditional English or European context.

So far as the English system is concerned, Lord Denning, in the case of Jones v National Coal Board, has said that:

“In the system of trial that we have evolved in this country, the Judge sits to hear and determine the issue raised by the parties, not to conduct an investigation or examination on behalf of the society at large, as happens, we believe in some foreign countries.”

According to me, the above is not true of the Indian judicial system. A Judge in the Indian system has to be regarded as failing to exercise his jurisdiction and thereby discharging his judicial duty if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He

has to always keep in mind that every trial is a voyage of discovery in which *truth is the quest*. In order to bring on record the relevant fact, he has got to play an active role, no doubt within the bounds of the statutorily defined procedural law.

Our Supreme Court, in the case of Ram Chandra v State of Haryana,¹⁴ has said that

“... .. there is an unfortunate tendency for a judge presiding over a trial to assume the role of referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortion flowing from combative and competitive elements entering the trial procedure.”

In the case of Mohanlal v Union of India¹⁵, while envisaging a situation where the best available evidence is not brought before the Court for one or the other reason by either of the parties, the Supreme Court has said that:-

“In such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions - whether discretionary or obligatory – according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done.”

7.7 Judicial Service and Constitutional Status of Judges in India

The judicial service is not a service in the sense of ‘employment’. The Judges are not

¹⁴ AIR 1981 SC 1036, Para 2

¹⁵ 1991 Supp (1) SCC 271

employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public office in the same way as members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise State power are the Ministers, the Legislators and the Judges, and not the members of their staff who implement or assist in implementing their decisions. The council of ministers or the political executive is different from the secretarial staff or the administrative executives, which carries out the decisions of the political executive. Similarly, the Legislators are different from the legislative staff. So also the Judges from the judicial staff. The parity is between the political executive, the Legislators and the Judges and not between the Judges and the administrative executive. In some democracies like the USA, members of some State judiciaries are elected as much as the members of the legislature and the heads of the State. The Judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of the other services. The members of the other services, therefore, cannot be placed on par with the members of the judiciary, either constitutionally or functionally.¹⁶

7.8 Independence of Judiciary: A Recognized Basic Structure of the Indian Constitution

Rule of Law and judicial review are the basic features of the Indian Constitution. As its

¹⁶ All India Judges' Association v. Union of India, (1993) 4 SCC 288

integral constitutional structure, independence of the judiciary is an essential attribute of the Rule of Law. Judiciary must, therefore, be free from pressures or influence from any quarter. The Constitution has secured to them their independence. The concept of 'judicial independence' is a wider concept taken within its sweep independence from any other pressure or prejudice. It has many dimensions, namely, fearlessness of other centers, economic or political, and freedom from prejudices acquired and nourished by the class to which the judge belongs, Indian judiciary, therefore, is taken as "most essential to protect the liberty of the citizens".¹⁷

During the British rule, the District Officer acted both as the Administrative Officer and the Magistrate, the Executive, Legislature and the Judiciary in his area; he made the regulations and then sat as the Magistrate to interpret and enforce the same. The history of the judicial system in India if traced from 1912 would show that strong demands were raised for separation of judiciary from the executive.¹⁸ The Joint Parliamentary Committee¹⁹ had stressed the necessity of securing the independence of subordinate judiciary.²⁰ It opined that it is the subordinate judiciary in India which is brought most closely into contact with the people, and it is no less important, perhaps indeed even more important, that their independence should be placed beyond question than in the case of

¹⁷ High Court of Judicature of Bombay v. Sri Shirishkumar (1997) 6 SCC 339, pr. 13

¹⁸ State of West Bengal v. Nripendra Nath, AIR 1966 SC 447, pr. 8; See also Chandra Mohan v. State of U.P., AIR 1996 SC 1987, pr. 14 at p.1993

¹⁹ (1933-34) JPC Rcp, Vol. I, p. 201, pr. 337

²⁰ *ibid*, "This subject is not mentioned in the White Paper, but there are aspects of it which seem to us of such importance that we think it right to state our opinion upon them. The Federal and High Court Judges will be appointed by the Crown and their independence is secure; but appointments to the Subordinate Judiciary, must necessarily be made by authorities in India who will also exercise a certain measure of control over the Judges after appointment, specially in the matter of promotion and posting. We have been greatly impressed by the mischiefs, which have resulted elsewhere from a system under which promotion from grade to grade in a judicial hierarchy is in the hands of a Minister exposed to pressure from members

the superior Judges. The Constituent Assembly, while drafting the Constitution of the independent India took notice of this foundational requirement and included Article 50 in the Chapter on Directive Principles of State Policy that the State shall take steps to separate the judiciary from the executive in the public services of the State. This provision occurring in a Chapter which has been described by Granville Austin²¹ as “the conscience of the Constitution” and which embodies the social philosophy of the Constitution and its basic underpinnings and values, plainly reveals without any scope for doubt or debate, the intent of the constitution-makers to immunize the judiciary from any form of executive control or interference.²²

The Indian Supreme Court in *S.P.Gupta v. Union of India*²³ held that if there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law, and that under the Constitution it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. Judicial review is one of the most potent weapons in the armoury of law. The judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse of abuse of power by the executive. It is, therefore, absolutely essential that the judiciary must be free from executive pressure or influence which has been secured by making elaborate provisions in the Constitution with details.

of a popularly elected Legislature. Nothing is more likely to sap the independence of a magistrate than the knowledge that his career depends upon the favour of a Minister...”

²¹ Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, 1966, p. _____ (chk)

²² *Union of India v. Sankalchand*, AIR 1977 SC 2328, pr. 52, p. 2356

²³ 1981 Supp SCC 87, pr. 27

The independence of judiciary is not limited only to independence from executive pressure or influence; it is a wider concept, which takes within its sweep independence from any other pressure and prejudices.²⁴

Article 235²⁵ of the Constitution of India vests the administrative control over the subordinate judiciary in the hands of the High Court. The Supreme Court, in Registrar (Administration), High Court of Orissa v. Sisir Kanta Satapathy²⁶, while discussing the extent of control of the High Court over the subordinate judiciary, said that though the High Court retains the power of disciplinary control over the subordinate judiciary, including the power to initiate disciplinary proceedings, suspend subordinate judges pending enquiries and impose punishment on them, yet as far as the question of dismissal, removal, reduction in rank or termination of services of the judicial officers is concerned, the High Court becomes only the recommending authority and cannot itself pass the order. The formal order, the Supreme Court held, to give effect to such a decision has to be passed by the State Governor on the recommendation of the High Court.

Article 227 of the Constitution sets out the High Court's judicial control over the subordinate courts. The history of this Article suggests that the framers of our

²⁴ C. Ravichandran Iyer v. Justice A. M. Bhattacharjee, (1995) 5 SCC 457, pr. 10, p. 469

²⁵ 'The control over district Courts and Courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district Judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.'

²⁶ AIR 1999 SC 3265

Constitution believed that they were restoring to the High Courts the power, which had been taken away by Sec. 224(2) of the Government of India Act, 1935.²⁷ The history of Article 227 and its scope were considered by the Supreme Court in *Waryam Singh v. Amarnath*.²⁸ *Das, J.* observed that the material part of Art. 227 substantially reproduced the provisions of S.107, Government of India Act, 1935, except that the Article also to tribunals has extended the power of superintendence. The Court further observed that Sec. 107 gave the power of **judicial superintendence** to the High Court apart from and independently of the provisions of other laws conferring revisional jurisdiction on the High Court. In *Nibaran Chandra Bag v. Mahendra Nath Ghughu*²⁹, the Supreme Court held that Art. 227 merely conferred the power of superintendence to be used to keep subordinate courts or tribunals within the bounds of their authority and that the power did not justify an interference with concurrent findings of fact.

7.9 Protection of Judges from Prosecution

One of the ways of ensuring judicial independence has been to provide protection from prosecution to the judges of the subordinate judiciary. Though such protection was not available under any statute, keeping in view its need, on appropriate occasions, the Supreme Court of India has been giving directions laying down guidelines to ensure that the judges of the subordinate judiciary are not subjected to or dragged into any unwarranted criminal prosecutions by the State and/or its officials out of vengeance. The earliest of the cases which came before the Supreme Court of India in this regard was

²⁷ Seervai, *Constitutional Law of India*, Volume 3, N.M.Tripathi Private Ltd., 1996. pg.2973

²⁸ AIR 1954 SC 215

²⁹ AIR 1963 SC 1895

K. Veeraswami v. Union of India.³⁰ The Supreme Court, with reference to the Judges of the superior courts, observed.³¹

“59. There is, however, apprehension that the executive being the largest litigant is likely to misuse the power to prosecute the Judges. That apprehension in our over-litigious society seems to be not unjustified or unfounded Any complaint against a Judge and its investigation by the CBI, if given publicity will have a far-reaching impact on the Judge and the litigant public. The need therefore, is a judicious use of taking action under the Act. Care should be taken that honest and fearless judges are not harassed. They should be protected.

* * *

60. ... We therefore direct that no criminal case shall be registered under Section 154 CrPC [Criminal Procedure Code] against a Judge of the High Court, Chief Justice of High Court or Judge of the Supreme Court unless the Chief Justice of India is consulted in the matter. Due regard must be given by the Government to the opinion expressed by the Chief Justice. If the Chief Justice is of opinion that it is not a fit case for proceeding under the Act, the case shall not be registered.”

In Delhi Judicial Service Association v. State of Gujarat³², a police officer arrested, assaulted and handcuffed a Chief Judicial Magistrate, tied him with a thick rope and

³⁰ (1991) 3 SCC 655

³¹ *Ibid-p.* 707-709, prs. 59 and 60

³² (1991) 4 SCC 406

made a public exhibition of it by sending him in the same condition to the hospital for medical examination on an alleged charge of having consumed liquor in breach of the prohibition law enforced in the State. The Supreme Court found that due to stern action taken against the police by the Chief Judicial Magistrate in certain cases, there was confrontation between the local police and the Magistracy concerned. It was against this factual background that the above incident took place. Expressing its displeasure, and punishing the errant police officers, the Supreme Court proceeded to lay down certain guidelines to be followed in the case of arrest and detention of a Judicial Officer:³³

- “(A) A Judicial Officer should be arrested for any offence under intimation to District Judge or the High Court Judge as the case may be.
- (B) In case of necessity for immediate arrest of a Judicial Officer only a technical or formal arrest may be effected.
- (C) The fact of such arrest should be immediately communicated to the District and Sessions Judge of the concerned district and the Chief Justice of the High Court.
- (D) The Judicial Officer so arrested shall not be taken to a police station, without the prior order or directions of the District and Sessions Judge of the concerned district, if available.
- (E) Immediate facilities shall be provided to the Judicial Officer for communication with his family members, legal advisers, and Judicial

³³ p. 411-12

Officers, including the District and Sessions Judge.

(F) No statement of a Judicial Officer who is under arrest shall be recorded nor shall any panchnama be drawn up or any medical tests conducted except in the presence of the legal Advisor of the Judicial Officer concerned or another Judicial Officer of equal or higher rank, if available.

(G) Ordinarily there should be no handcuffing of a Judicial Officer.

The above guidelines are not exhaustive but these are minimum safeguards, which must be observed in case of arrest of a Judicial Officer. These guidelines should be implemented by the State Government as well as by the High Courts.”

In U.P. Judicial Officers’ Association v. Union of India,³⁴ the question arose as to meaning of judicial independence in relation to the judicial services and the means by which it should be ensured and protected. The Supreme Court observed that ‘incidental to the requirement of maintaining such independence of the judiciary, it is of importance that members of the judicial services should not work under apprehensions of retaliatory action by the Police and the Executive whatever form such action might assume’.³⁵ The Supreme Court, in such view of the matter, made an interim order that no crime or criminal case shall be registered against a judicial officer in respect of anything allegedly done or purported to be done in the discharge of his duty or in his capacity as holder of such judicial office without prior permission of the Chief Justice of the High Court

³⁴ (1994) 4 SCC 687

³⁵ *ibid* pr. 1

concerned.³⁶ This interim order came to be reaffirmed and made part of the final order by the Supreme Court in *U.P. Judicial Officer's Association v. Union of India*.³⁷ In addition, the Supreme Court further held that when any criminal conduct is attributed to a judicial officer in discharge of his duties or in purported exercise or discharge of his duties, no crime of investigation should be registered pursuant to any FIR without the permission of the Chief Justice of the concerned High Court.

It transpires from the above ruling of the Supreme Court of India, that in spite of lack of appropriate statutory mechanism available to protect the judges of the subordinate courts from frivolous prosecution, sufficient guidelines have been laid down by the Court so as to make the judicial officers at the lowest level feel safe and to ensure judicial independence.

7.10 Protection to the Court Staff

In India, the constitutional concept of independence of judiciary is not confined to the judges in the subordinate judiciary but has also been extended to the staff working in subordinate Courts. In *Union of India v. Pratibha Bonnerjee & Anr.*,³⁸ the Supreme Court of India stated that, "from the scheme of the Constitution it is obvious that the Constitution-makers were evidently keen to ensure that the judiciary was independent of the Executive. The Constitution has tried to insulate the Judiciary from outside influence both from the Executive and the Legislature. Articles 223 to 237 in Chapter VI in Part IV of the Constitution dealing with the courts below the State High Court also show that the

³⁶ *ibid* pr. 2

³⁷ JT 2002 (8) SC 133

³⁸ (1995)6 SCC 765

J. K. Prasad
Adv.

Constitution-makers were equally keen to insulate even the *subordinate judiciary*. Not only the Judges but even the *staff members* are insulated from executive influence as is evident from Article 229.³⁹

The above is the extent and sweep of institutional independence of the judiciary in India, which has been accepted as one of the basic features of our Constitutional scheme.⁴⁰

7.11 EXPLODING THE MYTHS

7.11.1 Litigious Population

Litigious population would refer to a social phenomenon where the people in a society are found to be prone to approach the courts at any little instance or excuse they may find. The mental inclination in such societies would be to litigate whenever possible and involve oneself in the process of litigation. During British time, an

Annual Rate of Filing - International comparison*	
Country	1987-1996
Germany	123.0
Sweden	111.0
Nepal	2.6
Ethiopia	1.7
India	12.9

* Christian Wollschlager, Exploring Global Landscapes of Litigation Rates, in SOZIOLOGIE DES RECHTS: FESTSCHRIFT FÜR ERHARD BLANKERBURG ZUM 60. GEBURTSTAG (Jurgen Brand and Dieter Stempel, eds. 1998)

Annual Rate of Filing
Figure 7.3

impression was created that the Indian population is extremely litigious.⁴¹ However, the

³⁹ This was reiterated by the Supreme Court in *High Court of Judicature at Bombay v. Shirishkumar Rangrao Patil & Anr.*, (1997) 6 SCC 339

⁴⁰ *S.P.Gupta v. Union of India* (1981 Supp. SCC 87 at p.223) : *Shri Kumar Padma Prasad v. Union of India*, (1992) 2 SCC 428 at p.446, 456

⁴¹ References to many expressions of this view among British administrators are found in Marc Galanter, *The Aborted Restoration of 'Indigenous' Law in India*, in *LAW AND SOCIETY IN MODERN INDIA*, 38-39 (Marc Galanter ed., 1989). For a contemporary example, see M. Jagannadha Rao, *Need for More ADR Centres and Training for Lawyers and Personnel*, in *ALTERNATIVE DISPUTE RESOLUTION: WHAT*

same was found to be fallacious.⁴² Marc Galenter⁴³ has discussed this aspect to some extent where while referring to an Asian Development Bank comparison of legal institutions in six⁴⁴ Asian nations, the use of courts by the Indian people was found to be comparatively low. Galenter also referred to the study of late Professor Christian Wollschlager who presented a comparison of the per capita rate of filing of civil cases in some 35 jurisdictions for the ten year period between 1987-1996 (see Box). Since no national figures were available for India, Professor Wollschlager included in his comparison figures on Maharashtra, one of India's most industrialized states. Maharashtra ranked thirty-second of the thirty-five jurisdictions.⁴⁵ A study by Robert Moog⁴⁶ on the litigation rates in Uttar Pradesh from 1951 to 1976 further gives an insight to the hollowness of this widely-spread notion. He found that per capita civil filings in all district level courts in Uttar Pradesh had fallen dramatically from the early days of Independence, when there were 1.63 per thousand persons in 1951 to 1976 when there were only 0.88 per thousand. Though there might be some reservations,⁴⁷ yet we do find

IT IS AND HOW IT WORKS 103 (P.C.Rao and William Sheffield eds., 1997) (noting that "[l]ike the Americans and others, we [Indians] too are a litigious society."); See also Hiram Chodosh, Stephen Mayo, A.M.Ahmadi and A.M.Singhvi, *Indian Civil Justice Reform: Limitation and Preservation of the Adversarial Process*, 30 JOURNAL OF INTERNATIONAL LAW AND POLITICS 1 27 (1997-98)

⁴² Robert Moog, *Indian Litigiousness and the Litigation Explosion*, 33 ASIAN SURVEY 1136, 1138-39 (1993)

⁴³ Marc Galenter, *Debased Informalism: Lok Adalats and Legal Rights in Modern India*, March 16, 2002

⁴⁴ China, Korea, Japan, India, Malaysia, Taiwan

⁴⁵ However, Marc Galenter frames certain qualifications to the comparison. First, a smaller proportion of India's population (and presumably that of Maharashtra, India's second largest state) is adults that is the case in the developed countries at the top of the list. Second, societies differ in what matters they assign to lawyers, courts and alternative institutions; the nomenclature and record-keeping of these alternatives may defeat any attempt to include them. Thus, in Maharashtra the count included matters litigated in courts but did not include cases brought to tribunals of various sorts. Third, in India civil court delays and court fees may induce some potential claimants to divert their efforts to criminal courts. Galenter also questioned as to how representative the finding of Maharashtra is against the overall Indian scenario.

⁴⁶ Robert Moog, *Indian Litigiousness and the Litigation Explosion*, Asian Survey, vol. 33, No. 12 (1993), 1136, 1138

⁴⁷ Marc Galenter, *Fifty Years On, Supreme But Not Infallible, Essays in the Honour of the Supreme Court of India*, Oxford University Press (Noting that such a fall might reflect the decrease in adults as a portion of the total population and diversion into tribunals, as well as the effect of land reforms.)

that the data contravene the dominant perception of India as increasingly litigious.⁴⁸

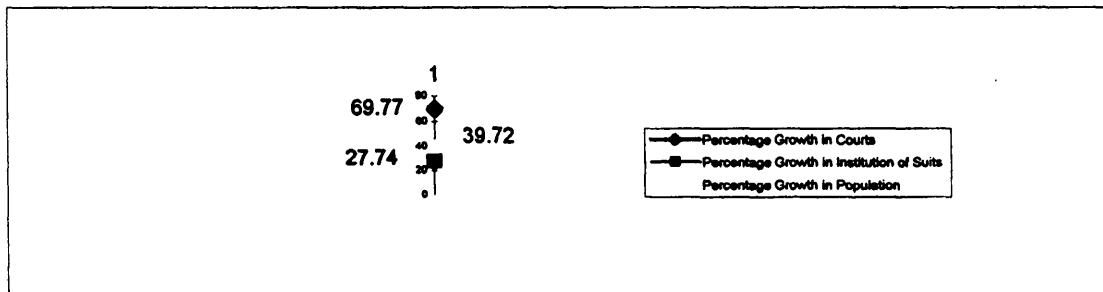
The researcher's own assessment is that the general notion of Indian people being litigious in nature is a myth. This myth took force from the fact that the Indian courts are clogged with docketed loads. One of the reasons devised was that the Indian courts are unable to cope up with the caseload is because the people here are litigious in nature and approach the court for any little instance of dispute or difference. However, it would help us if we analyse the data not from an international comparative approach but rather comparing within the system, data, in a given period, relating to increase in number of courts, increase in population and increase in institution of suits. If we consider this theory of 'Indian people being litigious' as true, then as a natural consequence, as the population grows, the number of suits being instituted should increase. Further, increase in number of courts that is to say availability of court halls at a nearer distance, would also instigate a litigious person to file more number of cases. Therefore, the overall effect of increase in the number of courts and increase in the population should, if we accept this theory, lead to a greater increase in the institution of suits. If that happens, the theory stands proved. The data however reflects otherwise.

Table 7.1

Year	Population	No. of Courts	Institution of Suits	<i>Institution (per thousand)</i>
1977	683,329,097.00	6,266	9,673,946	14.15
1996	954,730,223.40	10,638	12,357,227	12.94

⁴⁸ *ibid*

The Table given above shows the nation-wide data relating to the number of courts being constituted, the institution of suits and population in the years 1977 and 1996. In 1977 where there were 6,266 courts in the country, it increased to 10,638 courts in 1996. During the same period the number of suits instituted rose from 9,673,946 to 12,357,227. The population growth was 683,329,097 to 954,730,223.40. However, we notice that that institution per thousand has actually dropped from 14.15 to 12.94 which reflects that though the population is increasing and though the number of courts are on the rise, yet, there has actually been a decrease in the number of institution of suits per thousand during the period 1977-1996. This amply signifies that the population in India is not litigious in nature and cannot be said to be infested with a mindset of forcing themselves into litigation at every instance.



Population, No of Courts and Institution of Suits

Figure 7.4

The above data can also be reflected well in the figure shown above. As is clear from the figure from 1977 to 1996, there has been an increase of 69.77% of courts in the country. On the other hand, there has been 39.72% increase in the population. However, in contrast, there has only been a 27.74% growth in the institution of suits in the country. Had the Indian people been litigious, the increase in number of suits should have been much more specially keeping in mind that not only the population has increased but the

number of courts as well has increased during the given period. This defies the logic that the Indian people are litigious.

To be able to understand the problem of arrears in the subordinate judiciary in India and to be able to devise an effective solution, one should not be impressed upon by the theory that the Indian people are litigious and therefore, the courts, even if increased, will always be clogged with the caseloads. The reasons for such arrears are many and this is definitely not one of them. The myth that 'Indian people are litigious' cannot stand the test of statistical analysis and objective assessment.

7.11.2 Litigation Explosion

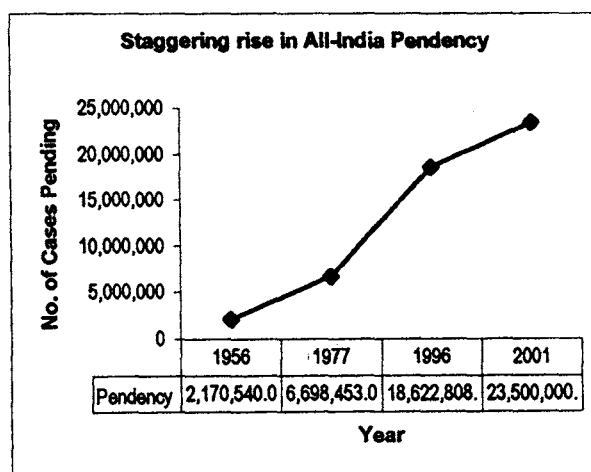
The present statistics⁴⁹ indicate that the Indian courts are quite congested in terms of caseload. The problem at hand has been very often described as '*litigation explosion*'⁵⁰ or '*docket explosion*'. It, on the face of it, implies that there has been a sudden outburst of litigational tendencies in India and the courts are abruptly burdened with cases in excess of their bearing capacity. It is suggested by the researcher that the use of the word '*explosion*' in the context of present litigational or court docket scenario is not very apt, particularly in the Indian context. The employment of the word '*explosion*' is in itself based on a myth that the number of cases has suddenly sprung up before the subordinate courts. The statistics will show that the increase of load on dockets of Indian courts had been a gradual process over the years in the post-independence era. There was no

⁴⁹ See Bibek Debroy, *Losing a World Record*, Far Eastern Economic, Feb. 14, 2002 (noting that there are '23 million pending court cases – 20,000 in the Supreme Court, 3.2 million in the High Courts and 20 million in the subordinate courts'.)

⁵⁰ Hiram Chodosh *et al*, *Indian Civil Justice Reform: Limitation and Preservation of the Adversarial Process*, 30 ILP 1 27 (1997-98)

suddenness in it. It was not that there was a sudden shoot-up in the institution of cases in the Indian courts which the courts were unable to handle and which took the form of what could be called as 'litigation explosion'. It was not that suddenly the Indian population was pouring into the court premises with their grievances for adjudication. The fact is that gradually with every month and year passing, number of undisposed cases were adding up to the arrears-stock of the Court. The Courts were taking more and more time to dispose of cases and were unable to keep pace with the yearly institution of the cases. As a consequence, the number of cases pending before a court gradually increased over the years and in recent times, took the form of a sizeable docket-overload. The fence viewers of the system found it convenient to term the phenomenon as 'explosion'.

In the researcher's view, the proper word would be 'overloading of dockets' resulting from accumulation of arrears or piling of undisposed cases because of progressive increase in 'gaps'. As the 'gap', that is the difference between the expected time for disposition of a case and the actual time taken, increased, the arrears piled up and dockets were overloaded. For whose fault and for what reasons, this overloading has occurred in the successive years, was required to be identified with more in-depth analysis and needed to be triumphed over with clear and decisive intendment to devise solutions and apply the same simultaneously with



All India Pendency
Figure 7.5

necessary care and caution, with a clearly devised, designed and implementable policy.

A quick glance at the increase of pending cases over the years at the national level would reveal that the cases have been accumulating gradually. The chart above shows that in the year 1956 the all-Indian pendency was 2.1 million. This rose to 6.6 million in 1977. After 20 years, in 1996, it rose to 18.6 million and finally in 2001, the total number of cases pending before the Indian courts stand at a staggering 23 million. However, as the curve in the Chart indicates, the rise in the pendency has been a gradual one. It did not shoot up at any single instance. Whatever might be reason for such a rise in the pendency is a different matter, but the data reveals that such a rise cannot in any way be termed as an 'explosion'. It was not that suddenly in recent years, the figures shot up. Thus, it is necessary that we do away with this myth that there has been a 'litigation explosion' in India which is one of the causes of accumulation of cases before the Indian courts.

7.11.3 Faulty Procedural Law

This area has already been covered in Chapter ___. It was said that outmoded procedural laws provide abundant scope for delaying tactics⁵¹ in the courts. It would suffice to say that the procedural laws in the India has already been adequately embodied by subsequent legislative amendments, specially the recent 1999 and 2002 amendments to the Code of Civil Procedure to provide a momentum to stage advancements in civil litigation. As of today, in the researcher's opinion, no fault for the failure of the justice system in India and overloading of dockets can be attributed to the Legislature or the

⁵¹ Marc Galanter, *Fifty Years On, Supreme But Not Infallible, Essays in the Honour of the Supreme Court of India*, Oxford University Press

legislative mechanism. Adequate provisions have been provided in our procedural laws for smooth progress of a case. Now, it is up to the courts to take the initiative and take control of the case progression and see to it that no impediments are permitted to obstruct the easy flow of the case.