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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

CONTRIBUTION OF JUDICIARY IN BUILDING A SYSTEM OF LIMITED GOVERNMENT IN INDIA

AUTHORED BY - POURNA VIJAY

ABSTRACT

“..... Man is not free unless government is limited. There's a clear cause and effect here that is as neat and predictable as a law of physics: As government expands, liberty contracts”. These words of former US President Ronald Reagan well explains the predominance of Limited Government. The plight of countries with totalitarian governments such as North Korea, Iran etc. further elucidates the imperativeness to maintain or embrace Constitutionalism or limited Government. Thus, it can be concluded that Limited government ensures greater social welfare, justice, development, socio-economic-political stability.

As the title suggest, this paper primarily deals with the role of Judiciary in ensuring Limited Government in India. At present, Indian judiciary is considered to be one the most powerful and assertive one, however this wasn't the situation in the initial years of independence. Thus the paper attempts to analyse and understand the factors that contributed to the growth of Indian Judiciary.

INTRODUCTION: INDIAN CONSTITUTION AND CONSTITUTIONALISM

Constitutionalism or a limited government is one in which the powers of the state are limited by law. In India, our Constitution is the main source of Limited Government. The Constitution has embedded a set of principles to preserve and nurture limited Government. Popular sovereignty, a condition when the will of the people is the "supreme authority in the state" is one such cardinal idea embedded in our Constitution to ensure limited government. Popular sovereignty assumes the existence of some form of popular consent, and it is for this reason that every definition of republican government

implies a theory of consent¹. In *Virendra Singh v State of Uttar Pradesh*², the Supreme Court observed that, “Every vestige of sovereignty was abandoned by the Dominion of India and by the states and surrendered to the people of India”. The practice of democracy through ‘Universal Adult Franchise as reflected under the Preamble, Article 326 furthers popular sovereignty³. Thus, India has very well assimilated the concept popular sovereignty to ensure limited government or Constitutionalism.

Power Corrupts, absolute power corrupts absolutely; this is the basis of the Montesquieuan principle of Separation of Power. Separation of power is yet another constitutional safeguard to ensure a realm of limited, democratic government. Indian constitution has clearly defined and demarcated the functions of each organ. Article 50 separates Judiciary provides for separation of Judiciary from executive. Articles 121 and 211, provides that the legislatures shall not discuss the conduct of a judge of the Supreme Court or High Court. They can do so only in case of impeachment. Article 361 immunes the President and Governor from Judicial proceedings. Under Article 105 and Article 194, similar immunity is provided to MPs and MLAs with respects to any said or votes given by him in the legislature. However, India doesn't practice absolute Separation of power. There is enough check mechanism to ensure powers are not being abused. For instance, the though speaker of the house is considered to be the supreme authority to settle on the matters regarding house, speakers decision can be subjected to Judicial review if the speaker has rendered an erroneous decision or if it in violation of any established principles. The constitutionality of administrative and legislative acts can be reviewed by courts. Moreover, parliament is the deciding body when it comes to impeachment of judges. Separation of power which is a basic feature of the constitution⁴, thus ensures limited government in India.

In order to decentralise governance and uphold constitutionalism, the makers of our constitution have meticulously incorporated aspects of federalism. A Federal system is where powers are divided between central and regional government and both are independent in their spheres.⁵ The 7th schedule

¹ [Ludvig Beckman](https://doi.org/10.1080/13698230.2019.1644583), Popular sovereignty facing the deep state. The rule of recognition and the powers of the people (16 Jul 2019) <https://doi.org/10.1080/13698230.2019.1644583>

² *Virender Singh v State of Uttar Pradesh*, AIR 1955 SCR 415

³ 2. Constituent Assembly Debate 322-23 (1947)

⁴ *Kesavandabharati v State of Kerala*, A.I.R. 1973 S.C. 1461

⁵ [Ambar Kumar Ghosh](https://www.orfonline.org/research/the-paradox-of-centralised-federalism/#_ednref4), *The Paradox of 'Centralised Federalism': An Analysis of the Challenges to India's Federal Design*, ORF Occasional Paper No. 272, Observer Research Foundation.(2020),https://www.orfonline.org/research/the-paradox-of-centralised-federalism/#_ednref4

has classified the subject matters into three lists- State Lists, Union List and Concurrent List. Parliament enjoys ultimate legislative power over matters enlisted in Union List. Likewise concerned states legislate over matters in state list, however under specific scenarios, such as when Rajya sabha passes a resolution, when other states make a request etc, this power gets transferred to Parliament. And, both parliament and state legislatures enjoys legislating power over concurrent list.

Power is further decentralised through the 73rd and 74th constitutional amendment of 1992 which added Panchayat (part IX) and Municipalities part (IX-A). The local self-governance since was in existence since 1959, however it was constitutionalised through the 73rd and 74th amendment. The constitution now provides for a three tyre rural and urban governance system. Local governments have made the villages and municipalities more independent and developed.

The Diceyan concept of Rule of Law is yet another consecrated principle which provides that government should always be based on the principles of law and not of men. Supremacy of Law, Equal Protection of Law and Equality before Law are the fundamental ideas featured in Rule of law. Framers of Indian Constitution were not only familiar with the postulates of Rule of Law as propounded by Dicey but also with the manipulated version of that was applied in India. Thus, so as to avoid any tyranny, they have meticulously incorporated the concept of Rule of Law in the Constitution. The part 3 plays a predominant role in maintaining rule of law as it endows the citizens with a set of rights and imposes consequential responsibilities, limits on the state. Article 14, Article 19, Article 21- the golden triangle of the Constitution, provides the principle of equality before the law and equal protection by law as explained by Dicey. The principle that no person can be convicted for any offence except for the law present in the country at the time of commission of the offence, prohibition of double jeopardy, and self-incrimination enshrined under Article 20 also furthers Rule of Law. Art.13 (1) of the Constitution makes it clear that “All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of Part 3, shall, to the extent of such inconsistency, be void”. Further, Article 13 (2) restrains the state from making any laws that contravenes Part 3.

Further, to foster constitutionalism, Indian constitution has established a well-integrated and

independent Judicial system with Supreme Court at the apex level, followed by the High Courts, below High courts there are numerous subordinate Courts. The Constitution has conferred the Supreme Court and High Courts with a set powers and functions to ensure judicial independence. Article 124 to 147 deals with organisation, independence, powers, and functions of Supreme Court. Similarly, Article 214 to 231 deals with the High Courts. Article 50 directs the state to take steps to separate Judiciary from Executive. Article 13, 32, 226 confer the higher judiciary the power of Judicial Review. As per Article 129, the Supreme Court is a court of Record and it has the power to punish for its contempt. Apart from the Appellate jurisdiction conferred under 132, 133, 134,136 the SC enjoys Original jurisdiction (Article 131) in certain matters. As per 141, the law declared by Supreme Court is binding on all courts, and only Supreme Court can review its decision. Article 142 endows the Supreme Court pass such degree or orders to serve absolute justice. Article 143 confers Advisory Jurisdiction on Supreme Court. The mode of appointment of judges, the secured tenure of judges, the power to punish for its contempt, drawing of expenses from the consolidated fund, etc furthers judicial independence.

Thus, since its inception Indian constitution is devised or fraught with norms to uphold constitutionalism in spirit and practice.

ROLE OF JUDICIARY IN ENSURING LIMITED GOVERNMENT

In this section, the author will be dealing with the contribution of judiciary in building a system of limited government or Constitutionalism. According to Stephen Gardbaum, constitutional systems can be situated along a spectrum that ranges from systems based on "political constitutionalism" on one end, to systems based on "legal constitutionalism" on the other. Generally, a system of following Political Constitutionalism features Legislative or Parliamentary supremacy, example United Kingdom. Legal Constitutionalism on the other hand exhibits Judicial Supremacy, the US, Germany have adopted this system. Now if we look at Indian scenario, The Indian Constitution on the other hand contains features of both Legal constitutionalism and Political Constitutionalism.

In bringing Constitutionalism or limited government, Courts act in three capacities or perform three functions, namely Constitutional Guardianship, Institutional Guardianship, and Governance Optimizers. Constitutional Guardianship is characterised by Court entrenching constitutional norms,

ethos, rights etc by asserting and exercising greater Judicial Review over constitutional amendments, administrative actions etc. Institutional Guardianship court seeks to advance its power and independence. Governance Optimizers connotes the role that constitutional courts play in intervening, overseeing, and restructuring the domains of governance and regulation⁶. The following are few notable instances of Judicial acts and interferences to ensure and advance Constitutionalism.

What is the nature of amending power of the Parliament? Does Parliament enjoy Unlimited power to amend or are there any limitations? This is one of the first crucial legal issue that came before the Supreme Court in 1951, and in the course of answering this question, Judiciary formulated one of its greatest contributions of all time- 'The Basic Structure Doctrine'.

Post independence, state governments enacted various land reforms and acquisition acts to destruct Zamindari System and as a result the Fundamental Right to property⁷ was infringed. This gave rise to multitude of litigations in various High Courts. In order to put an end to all these litigations and to establish an egalitarian society, the Parliament via First amendment inserted Article 31 A, 31 B and 9th schedule. 31A and 31B proposed limitation on Article 31 and empowered the state to acquire people's property. And 9th schedule shielded its contents from Judicial Review. Government thus placed all these land reforms legislation under 9th schedule.

Thus First amendment, owing to its violative effect on Fundamental right was challenged in the case of *Shankari Prasad v UOI*⁸. Court ruled in favour of the Union and held that parliament enjoys unlimited amending powers and Fundamental Rights can be amended. The issue again came up in the case of *Sajjan Singh vs State of Rajasthan*⁹, wherein Court reiterated the view expressed in *Shankari Prasad*. These decisions were reconsidered in *I C Golaknath v State of Punjab*¹⁰, wherein Supreme Court reversed the view and held that the constitutional amendment is 'law' within the meaning of Art.13 of the Constitution and therefore subject to Judicial Review. Moreover, it was observed that

⁶ Bluebook 21st ed. Manoj Mate, *Judicial Supremacy in Comparative Constitutional Law*, 92 TUL. L. REV. 393 (2017)

⁷ Article 31 – of the Indian Constitution provided the citizens of India with Right to property. It stated that no person can be deprived of his or her property save by the authority of law. Repealed by 44th amendment of 1978. Right to property is now a legal right under Article 300A

⁸ *Sri Sankari Prasad vs. Union of India*, AIR 1952 SC 458

⁹ *Sajjan Singh v State of Rajasthan*, AIR (1965) 1 SCR 933;

¹⁰ *Golaknath v state of Punjab*, AIR 1967 SC 1643

any amendment or act violative of Fundamental Rights are void. In response to Golaknath's ruling Parliament enacted 24th amendment which added Article 13(4) and Article 368(3) to avoid Judicial Review of amendments made under Article 368. And this was challenged in the famous case of *Kesavanandabharathi v State of Kerala*¹¹, wherein the court overruled Golaknath case and held that Parliament can amend the Fundamental rights, however any amendment which tampers the core or basic features of the constitution are not permissible. Basic Structure acts as an umbrella and controls the power of legislature.

The Judiciary nurtured and widened the concept of Basic Structure through its later decisions. *Indira Gandhi v Raj Narain*¹², this was in fact the very first case in which the dictum of Kesavandabarathi was applied. In order to save her election, Indira Gandhi via 39th constitutional amendment inserted Article 329A, and Clause 4 of 329A barred Judicial Review on elections of President, Prime Minister, Vice-President and the Speaker of Lok Sabha. Supreme Court asserted¹³ that Judicial Review forms a basic feature of the constitution, barring judicial review violates equality and Rule of law. Moreover, the apex court further added, by transferring a pure judicial function to the hands of parliament, Separation of Power Doctrine is violated.

In 1976, Parliament inserted Clause 4 and 5 to Article 368 which conferred unlimited amending powers to parliament and barred Judicial Review. This was challenged in the Case of *Minerva Mills v UOI*¹⁴, and the court upheld the supremacy of the constitution, struck down the amendment of the ground of violation of basic structure. Similar views were reiterated in the case of *I R Coelho v State Tamil Nadu*¹⁵, whereby Court settled all controversies and clutters related to 9th schedule and furthered the concept of Basic structure by upholding Rule of law, Judicial Review.

During 1970s, owing to multiple emergencies and such other socio -political reasons,

¹¹ kesavananda Bharti V. State of Kerala, AIR 1973 SC 1461

¹² Indira Gandhi v Raj Narain, AIR Supp. (1) SCC 1

¹³ Justice Khanna held that the provision in the amendment adding Article 329A violated the basic structure of the Indian Constitution by contravening the "democratic set-up" of the Constitution and the "rule of law" because democracy requires that "elections should be free and fair. Justice YV Chandrachud also voted to invalidate the provision on the grounds that it violated the basic structure in that it represented "an outright negation of the right of equality" and was "arbitrary and . . . calculated to damage or destroy the rule of law." Further, Justice Matthew held that the provision adding Article 329 in the Thirty-Ninth Amendment was invalid "because constituent power cannot be employed to exercise judicial power.

¹⁴ Minerva Mills v Union of India,

¹⁵ I R Coelho v State Tamil Nadu, AIR (2007) 2 SCC 1.

democratic ideas were highly diminished. Even the hands of judiciary were fettered from delivering justice by curtailing the Writ jurisdiction of the High Courts and Supreme Court via 42nd amendment and the same was restored via 44th amendment in 1975. Thus there were some vehement efforts (especially post emergency) from the side of Judiciary to control Government by entrenching and enhancing the ideas of liberty, freedom etc. The very first move in this regard can be the path breaking interpretation of ‘Life and Liberty’ in *Maneka Gandhi v UOI*¹⁶. The Supreme Court turned away from its restrictive interpreting approach adopted *A K Gopalan V State of Madras*¹⁷ and expanded the scope of Fundamental Rights. The Court while interpreting Article 21, incorporated the concept of ‘Due process of Law’, which in turn augmented the scope of Judicial Review and created a new standard of “non-arbitrariness¹⁸” to Executive actions. The Court embedded the Natural Justice principle in Administrative or Executive action to prevent unfair and unreasonable exercise of executive power. Maneka Gandhi’s decision in fact marked the beginning of a new phase of Indian Judiciary. This decision consequentially brought numerous other executive actions under judicial scrutiny. In the later days or years Courts were flooded with petitions on ‘arbitrary arrest’, ‘illegal search and seizure’, ‘wilful violation of human rights of prisoners and under trial prisoners by Jail authorities’, etc. A flow of petitions of this sort can also be attributed to yet another revolutionary move by the Supreme Court. The Judiciary adopted the system of Public Interest Litigation wherein conventional norms of filing petitions were relaxed to enlarge public access to justice. In 1979, Senior Advocate Pushpa Kapila Hingorani, filed a petition before the Supreme Court, seeking the release of thousands of under trial prisoners ailing in the jails of Bihar. The Court intervened and released 40000 prisoners and laid down several directions to protect the rights of under trial prisoners. And this historic decision came to be known as *Hussainara Khatoon v Home Secretary, Bihar*¹⁹, the first ever PIL case²⁰. Moreover, Court in this case developed yet another procedural innovation, called ‘Continuing Mandamus’, which allowed the Court to indefinitely retain jurisdiction over PIL matters by issuing orders and directives without issuing final dispositive judgments and to

¹⁶ *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248

¹⁷ *A. K Gopalan v. State of Madras*, (1950) S.C.R. 88

¹⁸ Manoj Mate, *The Rise of Judicial Governance in the Supreme Court of India*, 33 B.U. INT’L L.J. 169 (2015).

¹⁹ *Hussainara Khatoon v Home Secretary, Bihar*, A.I.R. 1979 S.C. 1377

²⁰ Krishnadas Rajagopal, *Starting the PIL Revolution*, THE INDIAN EXPRESS (Jan 26 2010) <http://archive.indianexpress.com/news/starting-the-pil-revolution/571616/>

monitor the enforcement of its decisions more effectively²¹. Hussainara Khatoon decision was a trend setter, in the later years myriads of PILs were filed. Prof. Upendra Baxi suggested that the Court's gradual approach to expanding power through lower profile PIL cases was part of a larger strategy in which the Court endeavoured to maintain a sense of institutional comity with the Lok Sabha and the Executive, while expanding the frontiers of fundamental rights, standing doctrine, and the Court's own powers²².

Post 1980, there were vehement efforts from Judiciary to enhance the principle of Federalism. Since 1970s, the Union legislative and executive had grossly infringed the rights and privileges of states. Invoking Article 356 to topple the state government was a common trend in those days. In 1977, Janata Party came into power at centre and threatened to impose Presidential Rule in congress ruled states if the government refuse to resign. The alleged directive was challenged before the Supreme Court in the case of *State of Rajasthan v Union of India*²³, wherein court gave a narrow interpretation and held that "The court cannot, in these circumstances, go into the question of correctness or adequacy of the facts and circumstances on which the satisfaction of the Central Government is based" However, the Court reversed this observation in *A.K. Roy vs. Union of India*²⁴, and ruled that the constitutional position under which the Rajasthan case was decided, "cannot any longer hold good". Further a comprehensive observations were made in the case of *S R Bommai v UOI*²⁵ to avoid instances of exploitation of unitary features by the Union. It was held, "the exercise of power by the President under Article 356 (1) to issue proclamation is subject to the judicial review at least to the extent of examining whether the conditions precedent to the issuance of the proclamation have been satisfied or not. This examination will necessarily involve the scrutiny as to whether there existed material for the satisfaction of the President that a situation had arisen in which the Government of the State could not be carried out in accordance with the provisions of the constitution".

Article 213, confers the power to pass ordinance on Governor. The very objective is to meet the

²¹ MATE, *Supra* note 14

²² MATE, *Supra*, note 26

²³ State of Rajasthan vs Union of India, AIR 1977 SCC (3) 603

²⁴ A.K. Roy vs. Union of India, All India Reporter, AIR 1982, SC 710.

²⁵ S R Bommai v UOI, AIR 1994 SC 1918

contingencies when the state assembly is not in session. However, ordinance making power were being abused by re-promulgating the same ordinance for multiple times. In the case of *Dr. D.C. Wadhwa & Ors vs State Of Bihar & Ors*²⁶, Supreme Court held that 're-promulgation of ordinance is a fraud on constitution', and it violative of Separation of Power, Supremacy of Constitution. Same view was reiterated in *Krishna Kumar Singh V. State Of Bihar*²⁷.

The intervention from other organs, especially in the matters of Judicial appointments had deteriorated judicial independence, transparency etc. In the initial years, Court adopted a passive and restrictive approach, however post 1990 judiciary decided assert its independence to promote the constitutional ethos. A High Court judge was transferred to another High Court without his consent and the same was challenged in the case of *Union of India vs Sheth*²⁸. The Supreme Court ruled that 'the president could transfer high court judges without their consent'. Moreover, court observed that as per Article 222, it is mandatory for the executive to consult the Chief Justice of India in matters of Judicial appointments and transfers, however the executive is not required to abide by the recommendation of the chief justice of India.

Again, in 1981, Indira Gandhi Government came into power and carried out a series of controversial transfers and appointments under the newly introduced appointment and transfer policy²⁹. And this resulted in *S P Gupta v Union of India*³⁰ or the 'First Judges' Case. Here, again the Court adopted a deferential approach and upheld the executive primacy in judicial appointments and transfers. Scholars have observed that, concern about Institutional preservation and the fear of political override and backlash impeded judiciary from asserting its independence. The executive primacy continues in the later years as well, and the independence of judiciary reduced significantly. There were some serious attempts to delay appointments, block appointments of pro-PIL, pro- egalitarian judges etc. All these culminated in *Supreme Court Advocates on Record Association v Union of India*,³¹ (Second

²⁶ Dr. D.C. Wadhwa & Ors vs State Of Bihar & Ors, AIR 1987 SCR (1) 798

²⁷ Krishna Kumar Singh v State of Bihar, AIR 2017 (2) SCJ 136

²⁸ Union of India v Sheth, AIR (1978) 1 SCR 423

²⁹ As part of this new policy, the government stated that each state high court "should have one-third of its judges and its chief justice from outside the State and that such a task should be accomplished by transferring judges from one High Court to another." Law Minister Shiv Shankar issued a circular to state chief ministers noting that the policy would be used to help "further national integration and to combat narrow parochial tendencies bred by caste, kinship and other local links and affiliations."

³⁰ S P Gupta v UOI, AIR 1981 SCC 87

³¹ Supreme Court Advocates on Record Association v Union of India, AIR (1993) 4 SCC 441

Judges Case) wherein the Court reconsidered the decision of First Judges Case. The Court overruled the First Judges' case and held that Chief Justice of India have primacy and final say in appointment and transfer of judges and the CJI shall make recommendation only after consulting two other senior most judges of Supreme Court. The Court observed that "preserving judicial independence was essential for protecting the rule of law and good governance and that judicial primacy in appointments would help in achieving these goals". In the later years, Executive tried to overturn this decision, in 1996 the ruling party had even introduced the 86th amendment Bill to overturn Second Judges Case decision, however the Bill was withdrawn³². In 1998, BJP alleged that, while appointing, the CJI Justice Punchhi has not consulted with two senior judges of Supreme Court. This resulted in a Presidential reference to the Court (Third Judges Case³³), asking for clarification on the procedures of appointment, wherein court held that 'chief justice must consult with 4 senior most judges'. Though CJI's discretion was reduced, Court upheld judicial supremacy and independence. The executive continued with its efforts regain supremacy in judicial appointments and in 2014, 99th Constitutional Amendment replaced the Collegium System with National Judicial Appointment Commission (NJAC)³⁴. The Supreme Court in Supreme Court Advocates-on-Record Association v. Union of India³⁵ invalidated the 99th amendment and resurrected the Collegium. The court reasoned that, 99th amendment destroys judicial independence and is violative of Basic structure doctrine. The Supreme Court once again reiterated, the importance of judicial independence to control and correct governmental corruption and mal-governance.

*L. Chandra Kumar v Union of India*³⁶ is another celebrated judgement whereby court re-entrenched its power of Judicial Review. Here, the Court held Article 323A and 323 B cannot exclude Courts from exercising Judicial Review. Tribunals cannot be equated with courts, they are supplementary to courts. Moreover Tribunals are constituted as a means to end, and further Judicial Review is possible. In *Veeraswamy v Union of India*³⁷, to safeguard judicial independence and prevent unilateral

³² The Bill was initially supported by the BJP, the BJP changed its position "at the eleventh hour and the bill had to be withdrawn.

³³ AIR (1998) 7 SCC 739,

³⁴ NJAC consisted of the chief justice of India, the two senior-most Supreme Court judges, the law minister, and two "4eminent people" who would be selected by a panel composed of the chief justice of India, the prime minister, and the leader of the opposition.

³⁵ Supreme Court Advocates-on-Record Association v. Union of India, AIR (2016) 5 SCC 1

³⁶ L.Chandra Kumar v UOI (1997) 3 SCC 261

³⁷ Veeraswamy v Union of India

interference of executive, Court ruled that “No FIR can be registered against High Court and Supreme Court Judges without consulting Chief Justice of India. Likewise, if the accusation is against CJI, then president shall be consulted.

*Central Public Information Officer, Supreme Court v Subhash Chandra Agarwal*³⁸ is a significant judgement that augmented judicial transparency and accountability by bring CJI’s Office and asset declarations of judges under the purview of Right to Information. The 2018 decision in *Swapnil Tripathi v Supreme Court of India*³⁹ is yet another decision that furthered judicial transparency, accountability, public faith etc by recognising live stream of court proceedings.

The Vohra Committee report of 1993 asserted the practice of rampant corruption among top level executives and central government. It highlighted "the nexus between the criminal gangs, police, bureaucracy and politicians" in various regions of India⁴⁰. Supreme Court observed that, all these episodes of corruption have reduced public confidence in Central Government and other legal institutions. Earlier, the Central Bureau of Investigation (CBI) could initiate investigate against high-ranking government officials only on obtaining prior authorization from concerned Ministries. The Supreme Court found this system to violative of Rule of Law and struck down the same in the case of *Vineet Narain v Union of India*⁴¹. Further, the court ordered to confer statutory status to Central Vigilance Commission (CVC) and brought CBI under the superintendence of CVC. In 2003, the Union government enacted a new Central Vigilance Act.

Judiciary has made such remarkable contribution to augment government transparency in legislative elections in recognizing that voters had a fundamental right to information⁴² In *UOI v Association for Democratic Reforms*⁴³, the Supreme Court upheld made it mandatory for the election candidates to disclose information regarding their criminal activities and financial assets of candidates. The Central

³⁸ Central Public Information Officer, Supreme Cour v Subhash Chandra Agarwal, AIR 2019 SCC OnLine SC 1459.

³⁹ Swapnil Tripathi v Supreme Court of India, AIR (2018) 10 SCC 628

⁴⁰ MINISTRYOFHOMEAFFAIRS, VOHRA COMMITTEEREPORT § 3.3 (1993).

⁴¹ Vineet Narain v UOI, (1998) 1 SCC 226

⁴² MATE, *Supra* note 14

⁴³ UOI v Association for Democratic Reforms, AIR (2002) 5 S.C.C. 294

Government overturned this decision by inserting section 33B⁴⁴ to Representation of People's Act. The Court struck down the same in *PUCL v UOI*⁴⁵ on the ground that "Section 33B exceeded Parliament's legislative authority under Article 19(1)(a)".

AN ANALYSIS OF JUDICIAL PERFORMANCE

In the Initial 20 years, the Judiciary had not explored its potential. It adopted a textual interpretation approach⁴⁶ and therefore, less powerful. In the year 1973, the Supreme Court came up with one of its greatest contributions- 'the Basic Structure Doctrine'. This remarkable formulation widened the power Judiciary, and consecrated various principles. However, due to political interferences, Judicial independence was minimal during this phase. In 1980s, Judicial effort was to liberalise the procedural impediments to ease the process of seeking Justice. The next phase, post 1990 - 2015, marks the most assertive phase Indian Judiciary. Post 1990, Indian Economy underwent a drastic change, and moreover, owing to the differences and tussles between coalition partners the political environment was highly volatile. In order to stabilise the scenario the Courts assumed new roles and thus adopted a result oriented approach. Judiciary overruled many of its prior decisions and slightly moved away from the Precedent doctrine to advance its goals⁴⁷. Yet another feature of this period is Judicial entrenchment of its independence and furtherance of social, economic justice. During this phase, Judiciary Contributed immensely to advance constitutionalism, however judicial overreach was also at its zenith during this period. On analysis it is found that, Judiciaries of other countries (especially Latin American countries, South African countries, Easter European countries, and South Asian Countries) had also adopted a similar assertive or active phase in 1990s and this attributed to the failure of Soviet-style communism's redistributive vision, the failure of American-style capitalism to provide a satisfactory alternative model of economic justice, the assimilation of local concepts of justice into these judiciaries' jurisprudence etc⁴⁸.

⁴⁴ Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election which is not required to be disclosed or furnished under this Act or the rules made thereunder.

⁴⁵ *PUCL v UOI*

⁴⁶ Chintan Chandrachud, The Four Phases of Constitutional Interpretation, *The Hindu*, (26 Jan , 2020)

⁴⁷ *Id* at 54

⁴⁸ Nick Robinson, Expanding Judiciaries: India and the Rise of the Good Governance Court, 8 WASH. U. GLOBAL STUD. L. REV. 1 (2009), https://openscholarship.wustl.edu/law_globalstudies/vol8/iss1/2

Scholars have developed certain theories to explain Courts behaviour or response in past 7 decades.

Regime Theory

As per Regime Theory, Courts play a relatively subservient role and acts in consonance with political views and goals of the Party in power. Post Keshavandabharati's decision, there were huge reshuffling and transfer of judges so as to place pro- Gandhi judges. Thus, during this period (1973-77) the Courts adopted a Regime based approach.

The Strategic Model

Here, Judges consider existing external political constraints, opportunities, public opinion etc and accordingly modified their political and institutional values to strike a balance. In other words, judges will “trim their sails” in order to ensure a greater likelihood of compliance with their decisions to avoid political override by the legislative or executive branches. Here, the Courts fear about the political backlashes. The First Judge case⁴⁹ is a classic example of Strategic Model.

The Legal Institutional Model

According to this model, judicial behaviour is determined by institutional norms, jurisprudential traditions, and other institutional factors. Proponents of the institutionalist model argue that judges are motivated not only by their own policy views and understanding of existing doctrine, but also by their concern for maintaining or strengthening the legitimacy of courts as institutions. Howard Gillman suggests, judges “may sometimes view themselves as stewards of institutional missions, and . . . this sense of identity [may] generate motivations of duty and professional responsibility which sometimes pull against their policy preferences and partisan commitments⁵⁰.”

Thus, it can be undoubtedly said that Judiciary has played a great role in limiting the powers of state, however there were instances where judiciary had failed to uphold constitutional ethos.

CRITICISM AGAINST JUDICIARY

A set of people were quite critical about many of judicial acts or intervention. They criticized the Court for judicial overreach and grabbing legislative and executive power. An MP asserted that “In

⁴⁹ S P Gupta v UOI, AIR (1981) Supp. S.C.C. 87

⁵⁰ MATE, *Supra* note 26

the name of giving justice, judiciary is trying to run the Government of the country from the court”. Unlike the legislators, the judges are not elected by people. Moreover, the Courts are not answerable to anyone for a decision rendered, a pronouncement even if erroneous or wrong continues to be binding until it is overruled.

Some of the often cited cases of judicial overreach are *S R Bommai v Union of India*⁵¹ where court held that, ‘the Presidential Proclamation dissolving a State Legislative Assembly is subject to judicial review and that if the court strikes down the proclamation, it has the power to restore the dismissed State Government to office’. In 2015, the Allahabad High Court an order stating that children of public functionaries/ bureaucrats in Uttar Pradesh should be enrolled only in government schools. The decisions in Second Judges Case, Third Judges case and the NJAC case are often criticized for upending executive primacy in judicial appointments. Robert Moog asserted that, Court in advancing constitutionalism has led to ‘deinstitutionalisation’ of other institutions. Moreover, Courts action have reduced public confidence in government and political bureaucracy. Moog observed that “as these other institutions declined, the Court expanded its role by filling the void left by the weakening government institutions⁵²”.

CONCLUSION

Thus it can be concluded that Judiciary has played a pivotal role in controlling the power and ensuring Constitutionalism. As hinted in the previous section, Courts were least assertive and innovative in first two decades. Imagine what would have been the plight if Judiciary had continued in the submissive mode. It would have devastated Indian democracy. Thus Judiciary should continue to be assertive by observing proper deference in appropriate matters. Non observance of judicial deference would disturb the power balance, and will be counterproductive.

What are the factors that impede judicial performance in controlling government? As discussed earlier, executive and legislature has always tried to curtail judicial independence and judicial performance through direct and indirect means. Apart from these various internal flaws and tussles within judiciary has hindered judicial effectiveness. For instance, the current deadlock in choosing

⁵¹ *Supra* note 33

⁵² MATE, *Supra* note 26

the next the CJI, the unprecedented event of 2018 where 4 Judges of SC came up before media to raise concerns on working of Judiciary etc. All these instances depicts the lack of proper coordination and understanding among judges. Apart from this, political inclination of judges, allegations against judges have significantly reduced public confidence and efficiency of judiciary.

US Supreme Court Judge Robert Jackson once said, “We are not final because we are infallible, but we are infallible only because we are final”- Judges should imbibe this notion and should strive to be perfect.

