



## **JUDICIAL GOVERNANCE IN INDIA AND ITS IMPLICATIONS FOR SOCIAL JUSTICE, CHANGE AND DEVELOPMENT**

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### **ABSTRACT**

*A democratic society governed by a constitution, has a well-defined and established separation of power which lays the scope of exercise of power and duties by its different organs. There are three different branches of government namely, the legislature, the executive and the judiciary under the Indian Constitution even though it is not specifically mentioned in it. Theoretically, if these branches function in their limits keeping in mind the fundamental principle of separation of power, the governance would be smooth. However, there have been issues and challenges that these three branches have had to face, e.g., the parliamentary power to amend the Constitution, legislatures' law-making powers, appointment of judges to the Higher Courts, matters of public policy, etc. India's constitutional courts - the Supreme Court and state high courts play a very important role in defining and developing Indian federalism as the courts are not only the arbiter of disputes, but they give rulings over the interpretation of the Constitution. The judiciary is of vital importance when it comes to development of human rights and ensuring smooth functioning of the government institutions by infusing accountability. Many a times, judiciary not only examines the constitutionality of legislative acts and executive actions, but it has also ruled upon policy matters and general governance issues. This research paper aims not only to examine the role of Indian judiciary (particularly the Supreme Court) in governance, but it also deals with the constitutional aspects of such role and how judiciary from time to time involved in the policy and administrative decisions in the*

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*country, thereby giving itself a prominent role in the general governance. The judicial system has an important role to play ultimately in ensuring better public governance.*

**Keywords: Judicial Governance, Social Justice, Democracy, Basic Structure Doctrine, Fundamental Rights.**

## **INTRODUCTION**

*“There is no better test of the excellence of a government than the efficiency and independence of its judicial system” - Lord Bryce<sup>2</sup>*

Looking at this statement of Bryce, it can be inferred that the judicial system plays a vital role in any country as it not only ensures justice and protection of law to the people, but also ensures good governance by providing protection of the freedoms and the rights of the people which is a hallmark of an excellent governance. It also protects the Constitution by providing a viable interpretation of it, especially in case of any constitutional or administrative dispute among the different organs of the state. Also, the Judges have to play a significant role as representatives of people even though they are not elected by the people, but such role emanates from the very virtue of their constitutional office.

The values of democracy one can find, where the will of the people shall be the basis of the authority of government and people's basic rights should be protected by the rule of law.<sup>3</sup> By recognizing this, Indian constitutional framers through the Constitution of India provided parliamentary democratic political structure, which works on the principle of fusion of power and in the making of law, there is direct participation of the legislature and the executive, it is the judiciary that remains independent and strong safeguarding the interests of the citizens by not allowing the other organs to go beyond the Constitution. It acts, therefore, as a check on the arbitrariness and unconstitutionality of the legislature and the executive.<sup>4</sup>

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<sup>2</sup> James Bryce, *Modern Democracies*, 384 (1929).

<sup>3</sup> See M.P. Jain, *Outlines of Indian Legal and Constitutional History*, 54 (6th ed. 2006).

<sup>4</sup> See Koneru Anuradha, *The Role of Indian Judiciary In Promoting Good Governance*, available at <http://www.legalserviceindia.com/legal/article-599-the-role-of-indian-judiciary-in-promoting-good-governance.html>, last seen on 10/02/2022.

The concept of governance is as old as human civilization. It is *the action or manner of governing a state, organization, etc.*<sup>5</sup> It simply means the process of decision making and the process by which decisions are implemented. We generally relate governance as the business of the legislature and the executive. *Judicial governance* is a tricky term, for the reason that judiciary cannot be involved in general governance and public administration because under a broader separation of powers, judiciary has a different function related to providing protection of law to the people through civil and criminal justice delivery system. It is very difficult to define but in simple terms, Judicial Governance can be understood as an approach of the judiciary, particularly the constitutional courts (the Supreme Court and the High Courts – having power to interpret the Constitution and check constitution validity of laws) to overturn the legislative acts or administrative actions on the grounds of constitutionality by adopting an activist approach.<sup>6</sup> Judicial activism is an approach to the exercise of judicial review, or a description of a particular judicial decision, in which a judge is generally considered more willing to decide constitutional issues and to invalidate legislative or executive actions.<sup>7</sup> But at the same time it does not mean that a court observing judicial restraint cannot or will not involve in governance through judicial review. The role of judiciary has always been difficult as it faces opposition from the other branches of the government, legal scholars, civil societies, etc. where it tries to use its power of Judicial review, which is the most important aspect of this judicial governance. But at the same time, it is also being criticized if it refrains from ruling over the legislative or executive actions which seem to be violative of the constitution or any other law/statute.

Judicial governance is not just a matter of implementing and enforcing the constitution, rather it is a complex process which ensures the respect for laws, protects the rights of the citizens, avoids conflict between different organs of the state and most importantly upholds the rule of law. Different courts around the world have seen their role in judicial governance in different ways, depending particularly on the constitutional setup and evolution of their judicial powers. But the involvement of judiciary in governance has not only reinforced the need for enhancing the efficacy of the government institutions but has also challenged the accountability of the

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<sup>5</sup> See *Governance*, Lexico, available at <https://www.lexico.com/definition/governance>, last seen on 03/03/2022.

<sup>6</sup> See Anthony J. Scirica, *Judicial Governance and Judicial Independence*, 90 New York University Law Review (2015), available at <https://www.nyulawreview.org/issues/volume-90-number-3/judicial-governance-and-judicial-independence/>, last seen on 10/02/2022.

<sup>7</sup> See *judicial activism*, Encyclopædia Britannica, available at <https://www.britannica.com/topic/judicial-activism>, last seen on 02/02/2022.

executive powers and the parliament. Judiciary (the Supreme Court) in India has become the final arbiter in interpreting constitutional arrangements.<sup>8</sup>

India like numerous other countries, is seeing a rise in populism where the democratic systems and institutions are endangered due to majoritarianism. The central government of the day enjoys landslide majority in the legislature and the opposition is not as strong as it ought to be. Also, due to the parliamentary form of governance in India, there is no such robust system of checks and balances as in the countries like the United States, because the legislative and executive branch are very much dependent on each other due to the political and electoral reasons and the political executive in India consists of the members of legislature including the Prime Minister and the Cabinet. The judiciary's effort to infuse accountability in the functioning of government institutions and the growth and development of human rights jurisprudence have demonstrated the importance of judicial governance. Pratap Bhanu Mehta concedes the contingent rise of judicial authority but adds that *"there is a profound inner conflict at the heart of India's constitutionalism: the question, who is the Constitution's final arbiter, admits no easy answer. The Court has declared itself to be the ultimate judge, and has even assumed the power to override duly enacted constitutional amendments ..... In India, Parliament and Judiciary have been and are likely to remain competitors when it comes to interpreting the Constitution."*<sup>9</sup> In such a situation the role of Judiciary attains paramount importance in ensuring rule of law and maintaining the constitutional spirit.

## **ROLE OF JUDICIARY IN PROMOTING DEMOCRACY AND GOOD GOVERNANCE**

The judiciary is uniquely placed in the background of power structure within the system of governance. In India, the judges are not elected but clearly have the power and indeed the responsibility to check the exercise of powers and actions of elected representatives and appointed officials. The judiciary as an institution is vastly respected, notwithstanding huge

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<sup>8</sup> See Amit Anand & Ranjit Kumar Sinha, *SC says it is final arbiter of Constitution*, The Outlook (January 10, 2007), available at <https://www.outlookindia.com/newswire/story/sc-says-it-is-final-arbiter-of-constitution/442837>, last seen on 02/03/2022.

<sup>9</sup> Pratap Bhanu Mehta, *"India's Unlikely Democracy: The Rise of Judicial Sovereignty,"* Journal of Democracy 18, no. 2, 74-5 (2007).

challenges in ensuring access to justice, judicial process and issues of transparency and accountability. It is vested with the power to ensure that the rights and freedoms of the people are protected, and the powers exercised by the government in adopting policies are in accordance with the Constitution and other legislation.

Judiciary is the final arbiter in interpreting constitutional arrangements. It is the guardian of the normative values and rights that are allocated by the state, especially when the state itself violates those rights and values. In India, the major source for rights is the Constitution and it is mainly based upon the concept of ‘*rule of law*’. Simply speaking it restricts the arbitrary exercise of power by different organs of the state. To ensure the rule of law in all governmental activities, the judiciary has been provided with a special power known as ‘the power of the Judicial Review’ to monitor governmental actions and to put them within the limits of the Constitution. Judicial Review and its scope are discussed in detail in the succeeding sub-chapters.

### **Fight for the Basic Structure Doctrine**

Under the Indian Constitution, the Parliament and the State legislatures have the competency to make laws within their jurisdictions, but the power to amend the Constitution is only with the Parliament under Article 368<sup>10</sup>. However, this power of the Parliament is not absolute in nature and the judiciary has the power to declare any law that it finds unconstitutional, void. As per the Basic Structure Doctrine, any amendment or law that tries to change the basic structure of the constitution is invalid.

The Indian Constitution does not mention the term “Basic Structure” anywhere in it. The idea that the Parliament cannot introduce laws that would amend the basic structure of the constitution evolved gradually over time and through many judicial pronouncements. The main idea behind this, is to preserve the nature of Indian democracy and protect the rights and liberties of the citizens.

The basic structure doctrine was a judicial creation in large part out of the immediate political circumstances in which the Supreme Court and the country found themselves (*Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225). The Indian judiciary has exercised the judicial

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<sup>10</sup> The Constitution of India 1949, Art. 368. Power of Parliament to amend the Constitution and procedure therefor.

review power under various constitutional provisions to safeguard rights of the people from arbitrary action of the government and to uphold the democratic spirit of the Constitution.

The Supreme Court recognized Basic Structure concept for the first time in the historic case of *Kesavananda Bharati vs. State of Kerala*<sup>11</sup>. Decided in 1973 by an unprecedented thirteen justices, it is widely considered one of the most important Indian constitutional law cases. In the face of parliamentary and public pressure, the Court overruled *Golak Nath*.<sup>12</sup> However, in a bare seven to six majority, it also held that although the fundamental rights could be amended, a certain “basic structure” to the Constitution could not. The Court justified its intervention on two grounds. First, it found that although the founders did not explicitly restrict amendment of the Constitution, there were implicit limits. Second, the Court argued that certain principles of “civilization” or good governance exist that all modern democracies must follow. Through these two justifications, the Court claimed that representative bodies, even constituent ones, are not free to remake their constitutions however they wish; rather, they have a duty to do so only within acceptable limits.<sup>13</sup>

The opinion was heavily fractured (there were seven opinions for the majority), leading to uncertainty about what the basic structure included. The Justices in the majority, though, described the basic structure as containing such principles as judicial review, democracy, federalism, secularism, and many of the fundamental rights. Only six judges on the bench (a minority view) agreed that the fundamental rights of the citizen belonged to the basic structure and Parliament could not amend it.

Even with this more conservative ruling, it was certainly unclear whether the Court had a powerful enough argument or adequate political influence to enforce its decision. The Emergency, however, would change this calculus decidedly in the Court’s favor. In June 1975, Indira Gandhi’s government declared a National Emergency, suspending several fundamental rights and rounding up political opponents.<sup>14</sup> Five months into this low point of Indian

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<sup>11</sup> A.I.R. 1973 S.C. 1461.

<sup>12</sup> Ibid, at 1565.

<sup>13</sup> Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 Wash. U. Global Stud. L. Rev. p. 27 (2009), available at <http://openscholarship.wustl.edu/lawglobalstudies/vol8/iss1/2>, last seen on 11/03/2022.

<sup>14</sup> S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, p. 101 (2003). The Emergency suspended the right to petition courts for the enforcement of the fundamental rights guaranteed by articles 14 (equal protection of the laws), 21 (protection of life and personal liberty), and 22 (procedural rights of those detained).

democracy, the Court decided *Indira Nehru Gandhi vs. Raj Narayan*<sup>15</sup>, where the Supreme Court applied the theory of basic structure to protect democratic structure. In this case Court struck down clause (4) of Article 329A<sup>16</sup>, which was inserted by the constitution (39th Amendment) Act, 1975 on the ground that it was beyond the amending power of Parliament as it destroyed the 'basic feature' of the Constitution. The Supreme Court struck down the amendment on the ground that it violated the free and fair elections which was an essential postulate of democracy which in turn was a part of the basic structure of the constitution and held that these provisions were arbitrary and destroy the rule of law.

The Supreme Court has decided several cases involving the basic structure doctrine since *Indira Gandhi case*. In January 2007, the Court in *I.R. Coelho vs. State of Tamil Nadu*<sup>17</sup> further developed its interpretation of Article 31B, which created the Ninth Schedule to protect particular laws from fundamental rights review. In a unanimous decision the Court reasserted in *Coelho* that many, if not all, of the current fundamental rights were part of the basic structure of the Constitution, and that the laws in the Ninth Schedule would have to be tested by them.<sup>18</sup>

### **Safeguarding Fundamental Rights**

In modern times, it is widely accepted that the right to liberty is the hallmark of a free society and that it must always be safeguarded. The fundamental idea is to remove certain basic and fundamental values out of the reach of momentary political majorities. The concept of basic rights protects a person against oppression and injustice and against excesses by the State. Understanding that a government's role is to protect individual rights but acknowledging that governments have historically been the major violators of these rights, several measures have been devised to reduce this likelihood. Judiciary has an obligation and a Constitutional role to protect Human Rights of citizens. It not only protects the rights enumerated in Constitution but also has recognized certain unenumerated rights by interpreting the fundamental rights and widened their scope.

Protection of the dignity of a person is essential for peace in the society, as its violation can have grave impact on individual in particular and on society in general. Everyone is entitled to

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<sup>15</sup> AIR 1975 SC 2299.

<sup>16</sup> The Indian Constitution, 1949. Article 329A.

<sup>17</sup> (2007) 1 S.C.R. 706.

<sup>18</sup> Ibid.

some rights which are inherent to human existence. Such rights should not be violated on the grounds of gender, race, caste, ethnicity, religion etc., these are called human rights. Human rights are also known as basic rights, fundamental rights, natural rights or inherent rights.<sup>19</sup>

The most significant of the Human Rights is the exclusive right to Constitutional remedies under Articles 32 and 226 of the Constitution of India. The persons whose rights have been violated have right to directly approach the High Courts and the Supreme Court for judicial protection, redressal of grievances and enforcement of Fundamental Rights. In such a case the courts are empowered to issue appropriate directions, orders or writs. By virtue of Article 32, the Supreme Court of India has expanded the ambit of Judicial Review to include review of all those state measures, which either violate the Fundamental Rights or violative of the Basic Structure of the Constitution.<sup>20</sup> The right to move to the Supreme Court to enforce Fundamental Rights is itself a Fundamental Right under Article 32 of the Constitution of India.

The 1980s era saw a new dimension of protection of these rights by the judiciary after the Supreme Court relaxed the rules of standing and gave rise to the Public Interest Litigations. The post-1990 Court also asserted an interstitial policy-making and legislative function to address crucial governance failures in human rights, environmental policy, police custodial violence, and police reform - areas in which the Central Government failed to legislate or provide guidelines. For example, in *Vishaka vs. State of Rajasthan*, the Court promulgated new regulations governing sexual harassment.<sup>21</sup> The Court held that sexual harassment violated the right of gender equality and the right to life and liberty under Articles 14, 15, and 21 of the Constitution. In *PUCL vs. Union of India*, the Court recognized that the right to food was an element of the right to life in Article 21 and therefore justiciable, and that the government had a positive duty to help prevent malnutrition and starvation.<sup>22</sup>

Judiciary protects the rights of its citizens including prisoners. The Supreme Court by interpreting Article 21<sup>23</sup> of the Constitution protected and preserved the rights of the prisoners.

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<sup>19</sup> See Amartish Kaur, PROTECTION OF HUMAN RIGHTS IN INDIA: A REVIEW, 2 Jamia Law Journal, 21 (2017), available at [http://docs.manupatra.in/newsline/articles/Upload/82F6F397-6AE0-4253-940E-58C9B0BDEC32.%20Amartish%20Kaur\\_\\_Human%20Rights.pdf](http://docs.manupatra.in/newsline/articles/Upload/82F6F397-6AE0-4253-940E-58C9B0BDEC32.%20Amartish%20Kaur__Human%20Rights.pdf), last seen 02/03/2022.

<sup>20</sup> See *The Role of The Supreme Court of India in Enforcing Human Rights* (Chapter-VII), Shodhganga, available at [https://shodhganga.inflibnet.ac.in/bitstream/10603/8112/16/16\\_chapter%207.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/8112/16/16_chapter%207.pdf), last seen 02/02/2022.

<sup>21</sup> *Vishaka vs. State of Rajasthan*, (1997) 6 S.C.C. 241.

<sup>22</sup> *People's Union for Civil Liberties vs. Union of India*, (2007) 1 S.C.C. 719, p. 728 (ordering state governments and union territories to implement the Integrated Child Development Scheme).

<sup>23</sup> The Constitution of India 1949, Art. 21. Protection of life and personal liberty.

In the case of *Prem Shankar vs. Delhi Administration*<sup>24</sup> Supreme Court held that practice of using handcuff and fetters on prisoners violates the guarantee of human dignity. Similarly, Court in *Sheela Barse vs. State of Maharashtra*<sup>25</sup> dealt with an issue of mistreatment of women in police station and laid down various guidelines for the protection of rights of women in custodial/correctional institutions. Further in *Citizens for Democracy vs. State of Assam and others*<sup>26</sup>, Supreme Court held that handcuffing and tying with ropes is inhuman and in utter violation of human rights guaranteed under the international laws and the laws of the land. The Court has also actively asserted a role in addressing issues of police custodial violence and police reform. In response to PILs documenting widespread cases of custodial violence and killing by police, the Court in the *D.K. Basu case*, established a set of national guidelines to govern how the police take suspects into custody and interrogate suspects, and then issued orders to state governments to implement these guidelines.<sup>27</sup>

In addition, the Court continued its activism in the areas of air and water pollution and exercised broad remedial powers, closing factories and commercial plants found to be in violation of environmental laws. After monitoring the situation for three years, the Court in the *Taj Mahal Pollution Case* ordered 292 industries either to switch to natural gas as an industrial fuel, or relocate from the Taj Mahal “Trapezium” area.<sup>28</sup> The Court was able to secure strong compliance with its orders in the Taj Mahal Case. In the *Delhi Vehicular Pollution Cases*, the Court issued a series of orders requiring that buses and other vehicles convert to clean natural gas to help reduce pollution in Delhi.<sup>29</sup>

The recent judgments pronounced by the Supreme Court related to privacy rights, homosexuality and adultery, has again strengthen the democratic and civil spirit in the country and the legitimate expectation of the people in this grand institution has been well upheld by the Court. *Justice K.S. Puttaswamy (Retd.) vs. Union of India*<sup>30</sup>, is an unquestionable victory for the privacy rights. The ruling is the outcome of a petition challenging the constitutional validity of the Indian biometric identity scheme ‘Aadhaar’. The nine-judge bench vehemently

<sup>24</sup> (1980) 3 SCC 538.

<sup>25</sup> AIR 1983 SC 378.

<sup>26</sup> (1995) 3 SCC 743.

<sup>27</sup> *D.K. Basu vs. State of West Bengal*, (1997) 1 S.C.C. 416.

<sup>28</sup> *M.C. Mehta (Taj Trapezium Matter) vs. Union of India*, (1997) 2 S.C.C. 353, 354, 386 (ordering factories to shift to cleaner fuels or relocate to arrest degradation to the Taj Mahal caused by pollution).

<sup>29</sup> *M.C. Mehta vs. Union of India*, (1999) 6 S.C.C. 9; *M.C. Mehta vs. Union of India*, (2002) 4 S.C.C. 356.

<sup>30</sup> WRIT PETITION (CIVIL) NO. 494 OF 2012, available at <https://indiankanoon.org/doc/127517806/>, last seen 03/03/2022.

held that “*The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution*” and created a legal framework for privacy protections in India. The opinions of the judges covered a wide range of issues in clarifying that privacy is a fundamental inalienable right, intrinsic to human dignity and liberty. The Court overruled its own 41 years old judgment in *ADM Jabalpur vs Shivkant Shukla (1976)* where it was held that during Emergency, fundamental rights were not available to citizens and that they couldn’t even approach the high courts to file *habeas corpus* pleas. In the present case, the Court observed that the judgments rendered by all the four judges constituting the majority in *ADM Jabalpur case* are seriously flawed. Life and personal liberty are inalienable to human existence.

The concept of human rights is based on the central premise that all humans are equal. The human rights of lesbian, gay, bisexual, transgender and queer people (LGBTQs) are coming into greater focus around the world, with important advances in many countries in recent years, including the adoption of new legal protections. The LGBTQ people are very much discriminated in the society and even sometimes subjected to violence and persecution. The year 2018 brought a new beginning and hope for LGBTQs in India as the Supreme Court struck down a colonial-era law that criminalized homosexuality. In *Navtej Singh Johar & Ors vs. Union of India*, the constitutional validity of Section 377<sup>31</sup> of the Indian Penal Code, 1860 was challenged. The five-judge bench of Court unanimously held that Section 377, insofar as it applied to consensual sexual conduct between adults in private, was unconstitutional. With this, the Court overruled its decision in *Suresh Koushal vs. Naz Foundation*<sup>32</sup> that had upheld the constitutionality of Section 377. The Court relied upon its decision in *National Legal Services Authority vs. Union of India*<sup>33</sup> to reiterate that gender identity is intrinsic to one’s personality and denying the same would be violative of one’s dignity. The Court relied upon its decision in *K.S. Puttaswamy* and held that denying the LGBT community its right to privacy on the ground that they form a minority of the population would be violative of their fundamental rights.<sup>34</sup>

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<sup>31</sup> The Indian Penal Code Section, 1860, Section 377. Unnatural offences.

<sup>32</sup> (2014) 1 SCC 1.

<sup>33</sup> (2014) 5 SCC 438.

<sup>34</sup> See *Navtej Singh Johar v. Union of India*, Global Freedom of Expression, Columbia University, available at <https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/>, last seen 03/04/2022.

## **An Instrument of Accountability**

As the nature of democratic problems and issues shifted, the Supreme also shifted its role and functions. Corruption is a subject of intense debate and discussion in India, especially the deep-rooted corruption in politics and public offices. The major cause of concern is that corruption not only weakens the political body but also dilutes the democratic system, thereby widening the gap between privileged and unprivileged. It is damaging the utmost importance of the rule of law governing the society.

The Supreme Court in the mid-1990s has more assertively intervened in corruption cases involving high-level officials and politicians in the government. The Court became a major site of anti-corruption activism in India, with anti-corruption activists, media houses and NGOs bringing litigation to a strongly counter-majoritarian Court. In *Vineet Narain vs. Union of India*<sup>35</sup>, the Court decided a petition (Public Interest Litigation) that challenged the failure of the Central Bureau of Investigation (CBI) to investigate and prosecute several prominent politicians who had been implicated in the Jain Hawala scandal. The Court began taking over monitoring and control of the CBI's investigation, noting that "the continuing inertia of the agencies to even commence a proper investigation could not be tolerated any longer."<sup>36</sup> The Court relied on Articles 32 and 142 of the Indian Constitution to issue a set of directives to make the CBI more autonomous by delinking it from political control. Finally, the Court invalidated the "single directive" protocol, which required that the CBI receive prior authorization from officials in the Prime Minister's Office before proceeding with an investigation against senior government officials. The Court's intervention into the CBI's investigation resulted in the filing of charge-sheets against fifty-four persons, including leading cabinet ministers and other government officials.

Because of these circumstances, the Supreme Court began invoking the doctrine of *continuing mandamus*<sup>37</sup>, which involved directly supervising corruption investigations.<sup>38</sup>

Court-monitored investigations into big corruption cases have become an institutional feature

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<sup>35</sup> (1998) 1 S.C.C. 226.

<sup>36</sup> See S. Muralidhar, Public Interest Litigation, 33-34 ANN. SURV. OF INDIAN L. 525, 537 (1997-1998) (citing *Vineet Narain v. Union of India*, (1998) 1 S.C.C. 226, 237).

<sup>37</sup> Continuing mandamus is a process by which the court issues directions periodically, keeps the matter pending and monitors the process of implementation, available at <https://seclpp.wordpress.com/2019/03/29/continuing-mandamus-a-boon-or-bane/>, last seen on 03/03/2022.

<sup>38</sup> Pratap Bhanu Mehta, *The Indian Supreme Court and the Art of Democratic Positioning*, 233, 249 in *Unstable Constitutionalism: Law and Politics in South Asia*, (Mark Tushnet, Madhav Khosla, 1<sup>st</sup> ed.).

of anti-corruption litigation. The case of *Samaj Parivartan Samudaya vs. State of Karnataka*<sup>39</sup>, exemplifies this. In the southern state of Karnataka, several leaders of the political party in power, including the Chief Minister B. S. Yeddyurappa, were implicated in corrupt dealings. The issue before the Supreme Court was whether to expand the scope of a CBI investigation already underway into illegal mining in Karnataka and Andhra Pradesh to possible misuse of public office by Yeddyurappa's close relatives. The Court held that the basis for judicial intervention was to "ensure that the rule of law prevails over the abuse of process of law."<sup>40</sup>

Litigation relating to corruption before the Supreme Court of India has been the beneficiary of an extant trend in Indian jurisprudence and an emerging theme in Indian politics. From the 1980s the Supreme Court had relaxed rules of locus standi, as a result of which NGOs, concerned citizens, and even lawyers, if they were public-spirited, pointing out public wrongs could bring such matters to the attention of the Court. The development of public interest causes from social justice and human rights issues in the 1980s to concerns of the middle class in the 1990s and 2000s brought corruption cases before the Court more often and with considerable visibility.<sup>41</sup>

## **JUDICIAL REVIEW**

The Constitution is the supreme law. All the other laws of the land derive authority from the Constitution. H.L.A Hart puts it: the Constitution works as the touchstone for all the other laws. The validity of other laws is to be checked according to the Constitution. If the law in question is not in line with the principle enshrined in the Constitution, then the law is to be declared unconstitutional. The same parameter is also used for executive actions. The executives are also prohibited to make any decision, which violates the basic norms or the principles important for the identity of the Constitution. The task to check the Constitutionality of the laws and of the action is done by the judiciary.<sup>42</sup> If a law made by the legislature violates any provision of the Constitution, the Supreme Court and the High Courts have the power to declare such a law unconstitutional or ultra vires. This power of judiciary is known as Judicial Review.

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<sup>39</sup> (2012) 7 SCC 407.

<sup>40</sup> Ibid, at para 66.

<sup>41</sup> Ibid, at 12.

<sup>42</sup> Justice Dr. B S Chauhan, Judicial Review, available at [http://www.nja.nic.in/Concluded\\_Programmes/2018-19/P-1110\\_PPTs/8.Judicial%20Review.pdf](http://www.nja.nic.in/Concluded_Programmes/2018-19/P-1110_PPTs/8.Judicial%20Review.pdf), last seen on 01/04/2022.

Judicial review is the idea, which the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judiciary in the situation they are in conflict with the constitutional scheme or beyond the delegated administrative or legislative power of a country. Judicial review allows the Supreme Court or the Constitutional Court in a country to take an active role in ensuring that the other branches of government abide by the constitution.<sup>43</sup> In India, the Constitution has entrusted the Supreme Court with the vital responsibility of acting as the apex arbitrator of disputes, and the fountainhead of jurisprudence; it has been conferred diverse jurisdiction, powers and duties to secure justice and the objectives of the Constitution.

The Supreme Court of India has repeatedly affirmed the power of Judicial Review, by reasoning that such a power is implicit in a written Constitution, unless expressly excluded by the constitutional provisions. It has held, that the power of Judicial Review is available under the provisions of the Constitution that declares its supremacy. Laws can be struck down on two grounds: if they violate fundamental rights, or if the concerned legislature lacks ‘legislative competence’ (for instance, a Union law is made on a subject which falls within the state list, or a state law is made on a subject which falls within the Union list).<sup>44</sup>

The Supreme Court of India resorts to the troika provisions of the Indian Constitution, i.e. Articles 32, 226 and 142, to justify its power of Judicial Review.

Judiciary has generally refrained from interfering with the economic decisions of the government and observed that wisdom and advisability of economic policies are not amenable to judicial review. But the Supreme Court never shied away from interfering with the economic policies whenever the situation so demanded. In the case of ***R.K. Garg vs. Union of India***<sup>45</sup>, the Supreme Court considered the validity of the provisions of the Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981 and Special Bearer Bonds (Immunities and Exemptions) Act, 1981, and made the following observations: - “..... *What is necessary in order to pass the test of permissible classification under Article 14 is that the classification must not be “arbitrary, artificial or evasive” but must be based on some real and substantial*

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<sup>43</sup> See Judicial Review, Legal Information Institute, available at [https://www.law.cornell.edu/wex/judicial\\_review](https://www.law.cornell.edu/wex/judicial_review), last seen on 11/03/2022.

<sup>44</sup> See Raju Ramachandran, *Judicial supremacy and the collegium*, available at [http://india-seminar.com/2013/642/642\\_raju\\_ramachandran.htm](http://india-seminar.com/2013/642/642_raju_ramachandran.htm), last seen on 03/03/2022.

<sup>45</sup> AIR 1981 SC 2138.

*distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature ..... Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuse. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid ..... There may even be possibilities of abuse, but that too cannot itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions”.*

## **EXPANSION OF JUDICIAL POWERS: PUBLIC INTEREST LITIGATION**

The Supreme Court of India has developed the strategy of public interest or social action litigation, with the motivation of making the legal system more accessible to the poor and disenfranchised. In doing so, the Court redefined the doctrine of standing, or *locus standi*. *Locus standi* means a right to appear in a court or before anybody on a given question or a right to be heard.<sup>46</sup> Traditionally, the doctrine required a plaintiff to show that some personal legal interest had been invaded by the defendant and it barred a person who was merely interested as a member of the general public in the resolution of a dispute to be heard in the courts, he must have had a personal stake in the outcome of the controversy. The judiciary in a significant departure from the traditional outlines of the doctrine, has given a liberal interpretation of *locus standi* and with an activist mode the Supreme Court of India has held the view that any member of the public or social action group may approach the Court on behalf of a victim who is unable to do so, due to poverty, disability, or socially or economically disadvantageous position. The basic motivation behind the relaxation of the doctrine of standing is to promote the rule of law. Even the Judges themselves have in some cases initiated *suo moto* action based on newspaper articles or letters received.

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<sup>46</sup> *Locus standi*, MERRIAM-WEBSTER, available at <https://www.merriam-webster.com/dictionary/locus%20standi>, last seen 02/04/2022.

Public interest Litigation (PIL) means litigation filed in a court of law, for the protection of “Public Interest”, such as pollution, exploitation of casual workers, issues of neglected children, road safety, food adulteration, constructional hazards, etc. Black's law Dictionary (Sixth Edition), defines Public Interest as “*Something in which the public, the community at large has something pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interest of the particular localities, which may be affected by the matters in question. Interest shared by the citizens generally in affair of local, State or national government...*”<sup>47</sup>. Any matter where the interest of public at large is affected, can be redressed by filing a Public Interest Litigation in a court of law. It is not defined in any statute or in any act, rather it is a creation of judiciary through judicial activism to consider the intent of public at large. However, the person, NGO or advocate filing the petition must prove to the satisfaction of the court that the petition is being filed for a public interest and not just as a frivolous litigation for some personal or ulterior motives.

During the late 1970s and early 1980s, under the leadership of *Justices P.N. Bhagwati, V.R. Krishna Iyer*, and other activist justices, the Court transformed its role in governance through a new activism championing the causes of social justice and human rights for the poor and oppressed classes of India.<sup>48</sup> In a series of decisions, the Court reinterpreted Article 32 of the Indian Constitution to expand standing doctrine for PIL claims against government illegality and governance failures.<sup>49</sup> In addition, the Court also relaxed its formal pleading and filing requirements and developed equitable and remedial powers and procedures that enabled it to assert new monitoring, oversight, and policy-making functions.<sup>50</sup>

## **SOCIAL JUSTICE, LIBERAL REFORMS AND DEVELOPMENT**

In modern period, all countries adopting democratic polity and welfare state concepts have the administrative authorities vested with vast discretionary powers. The exercise of those powers often becomes subjective in the absence of specific guidelines. Hence the need for a control of

<sup>47</sup> See *Public Interest Litigation:- Its origin and meaning*, Legal Service India, available at <http://www.legalserviceindia.com/article/I273-Public-Interest-Litigation.html>, last seen on 02/03/2022.

<sup>48</sup> Upendra Baxi, *Courage, Craft and Contention: The Indian Supreme Court in The Eighties*, 122-23 (1985).

<sup>49</sup> The Court expanded standing doctrine and court access in *S.P. Gupta v. Union of India*, (1981) Supp. S.C.C. 87 (upholding executive primacy in judicial appointments).

<sup>50</sup> See *Bandhua Mukti Morcha vs. Union of India*, (1984) 3 S.C.C. 161 (issuing orders and directives aimed at ending bonded labor and improving the working and living conditions of laborers).

the discretionary powers is essential to ensure that rule of law exist in all governmental actions.

Citizens over the world overlook up to the nation-state and its organs for high quality performance. When good governance is guaranteed, citizens go about their personal business and pursuits with enhanced expectations. On the other side of the spectrum, bad or indifferent governance not only restricts opportunities of success, but it can even degenerate into sectarian conflicts and civil wars. In such an atmosphere personal accomplishment as well as social achievements get severely restricted. Good governance helps create an environment in which sustained economic growth becomes achievable. Conditions of good governance allow citizens to maximize their returns on investment. Good governance does not occur by chance. It must be demanded by citizens and nourished explicitly and consciously by the nation state.<sup>51</sup>

The role of judiciary is to achieve the dream of social justice as enshrined in the preamble of the Constitution of India. There are several inter-related aspects of securing justice including security of life and property, access to justice, and rule of law. The rule of law is expressed through the idea that no one is above the law. Beside the State, the Judiciary also plays a significant role in dispensing social justice while interpreting relevant statutory and Constitutional provisions,<sup>52</sup> adjudicating upon rights of parties involved, and providing remedies. Therefore, Judicial attempts to interpret law is in a manner which ensures the attainment of social justice without any deprivation of legal rights.<sup>53</sup>

In the Indian constitutional system, every person is entitled to equality before law and equal protection under the law. No person can be deprived of his life or personal liberty except according to the procedure established by law.<sup>54</sup> Thus, the state is bound to protect the life and liberty of every human being. In the majority opinion in *Keshvananda Bharti vs. State of Kerala*, “rule of law” and “democracy” were declared as the basic structures of the Indian constitution not amenable to the amendment process under article 368 of the constitution.

A necessary corollary of this phenomenon is called ‘judicial activism’. A large number of

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<sup>51</sup> Balmiki Prasad Singh, The Challenge of Good Governance in India: Need for Innovative Approaches, 6, available at <https://www.innovations.harvard.edu/sites/default/files/103461.pdf>, last seen on 11/02/2022.

<sup>52</sup> *S.P. Gupta vs. Union of India and Ors.*, [1982] AIR 149 (SC) 26.

<sup>53</sup> *Sadhuram Bansal vs. Pulin Behari Sarkar*, [1984] AIR 1471 (SC).

<sup>54</sup> The Constitution of India, 1949, Art. 14. Equality before Law, and Article 21. Protection of life and personal liberty.

Public Interest Litigations are filed in High Courts and the Supreme Court against the apathy of the executive. The public interest litigation is a form of such activism and is a strategic arm of the legal aid movement and is intended to bring justice within the reach of poor masses. It is a device to provide justice to those who individually are not in a position to have access to the courts.

The Supreme Court has recognized that both Directive Principles of State Policy and fundamental rights are complimentary to each other and are equally fundamental in the governance of the country and they must be read as an integral and incorporeal whole with possible overlapping with the subject matter of what is to be protected by its various provisions.<sup>55</sup> Therefore, fundamental rights have to be construed in the light of directive principles. The important decision which has been the pillar of reform both in civil and political liberties and socio-economic justice has been the decision in *Maneka Gandhi vs. Union of India*<sup>56</sup>, where it was held that the fundamental rights are not islands but have to be read along with the other rights. Hence reading article 21 with 14 and 19, it was held that "procedure established by law" under article 21 of the Constitution means not just any procedure but a just, fair and reasonable procedure. This decision also stressed on the fact that the words "personal liberty" must be given the widest possible amplitude.<sup>57</sup>

The social and political climate has radically changed in the country from what it was in 1950 and what it is in 2022. The governments can sometimes fail in their duty to ensure social justice and empowerment due to political compulsions, but the Courts in India at most of the times came to the rescue of poor and needy. One example is the Supreme Court's landmark Judgment in *Indira Sawhney & Ors. vs. Union of India and Ors.*<sup>58</sup>, while upholding the reservation of 27% of vacancies in the civil posts and services in the Government of India in favor of other backward classes (OBCs) provided for exclusion of socially advanced persons/sections among them commonly known as "the creamy layer". The Supreme Court further directed the Government of India to specify socio-economic criteria for exclusion of "the creamy layer" from the OBCs.

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<sup>55</sup> Excerpted from *Delhi Transport Corpn. vs. D.T.C. Mazdoor Congress*, AIR 1991 SC 101; *Kesavanada Bharti vs. State of Kerala*, (1973) 4 SCC 225.

<sup>56</sup> (1978) 1 SCC 248.

<sup>57</sup> See Gopal Subramaniam, *Contribution of Indian Judiciary to Social Justice Principles Underlying the Universal Declaration of Human Rights*, 50 Journal of the Indian Law Institute, No. 4, 593, 595 (2008), available at <https://www.jstor.org/stable/43952179>, last seen on 03/02/2022.

<sup>58</sup> AIR 1993 SC 477

Thus, we can say that the Indian judiciary has played a pivotal role in making India a welfare state and realizing the dream of Social Justice. The Supreme Court and the High Courts have acted as the Instrument of social Justice and have given adequate support to causes of weaker sections of Society. The Judiciary virtually enforced Directive principles through the doors of fundamental rights by the active instrument of Interpretative power. Nevertheless, social justice cannot be administered through the exercise of such power in supersession or contravention of applicable statutory or constitutional provisions.

### **CONCLUDING REMARKS**

The Supreme Court of India is arguably very assertive and powerful constitutional court in matters of governance and policymaking. There may be a plethora of regulations, rules and procedures but when disputes arise, they have to be settled in a court of law. There is no area where the judgments of Supreme Court have not played a significant contribution in the governance or good governance - whether it be environment, human rights, gender justice, education, minorities, police reforms, elections and limits on constituent powers of Parliament to amend the Constitution. This is only illustrative. Indian Judiciary has been pro-active in guarding the rights fundamental for human existence. The promotion and protection of Human Rights is depending upon the strong and independent judiciary.

As this research paper illustrated, Judiciary in India enjoys a very significant position since it has assumed the role of the guardian and custodian of the Constitution. It not only is a watchdog against violation of fundamental rights guaranteed under the Constitution and but protects all persons, Indians and aliens alike, against discrimination, abuse of State power, arbitrariness etc. The Court broadened its jurisdiction and adjudicated a broader array of governance issues, asserting an expanded role in policymaking and governance.

The Indian Supreme Court through its activism has many a times assumed the role of the Legislature; however, the criticism can be made that it has not only performed the limited role of a law giver, but that it has actually assumed the role of a plenary law-making body, like the Legislature. Put differently, it has been stated that the Supreme Court has clearly overstepped the limits of the judiciary and has ventured into the domains of the other branches of the government. An apt example to this is the *suo-moto* adoption of the Collegium System by the

Supreme Court, where the judges appoint themselves (and their successors) in the name of independence of judiciary. It has also been felt, that some remedies designed by the Supreme Court such as the '*continuous mandamus*' demonstrate the failure of the judiciary to observe judicial restraint, and that is undesirable because it is a failure to accord respect to other co-equal branches of the government.

After these observations the basic question that arises is whether the Supreme Court has followed the principle of separation of powers even as it has embraced judicial activism? The answer has to be a resounding 'Yes'. The Court has if not always, but at maximum of times abided by the Constitution. It has fulfilled its primary responsibility of upholding the Constitutional goals. It is the Court's constitutionally mandated duty to enforce the law, not for each minor violation but for those violations that result in grave consequences for the public at large.

Despite being inspired by the constitutional objective of socio-economic justice, the Court has been rather cautious in its activism. It is only when both the legislature and the executive have failed to provide legislation in an area, that the Court has found it to be the duty of the judiciary to intervene and, that too, only until the Parliament enacts proper legislation covering the area. Some of them are admittedly legislative in nature, but the same have been issued only to fill up the existing vacuum, till the legislature enacts a particular law to deal with the situation. Being pragmatic and prudent, the Court has withstood the test of time and proved to be an illustrious example of an active judiciary in a democratic set-up.

The judicial governance as followed by the Indian Judiciary has served as an invaluable tool in strengthening the Indian democracy. Employing it strategically and cautiously, the Supreme Court of India has profoundly enriched the fundamental rights jurisprudence. The activism of the Indian judiciary has indisputably enhanced the conception of liberty and has also helped the end the suffering of many an oppressed.

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