

## JUDICIAL CONSTITUTIONALISM, THE INDIAN JUDICIARY AND THE WAY FORWARD

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### ABSTRACT

*The concept of constitutionalism is credited to John Locke, an English philosopher popularly known as the “Father of Liberalism”, and it entails the idea of limiting the powers of any wing of a government in a democracy within the ambit of its Constitution and the ideals cherished by it. The judiciary undertakes constitutionalism primarily by using the power of judicial review. In recent times, the rise of populist leaders throughout the world has seen the elected governments trying to alter their constitutions, with the judiciary being the only stumbling block to counteract such manoeuvres. However, this problem can be remedied if the judiciary itself is interfered with, and turned from an obstacle into an ally for these leaders. Naturally, for a judiciary to truly fulfil its duty as the guardian of the constitution, it has to be independent. With this in mind, the author reviews the implications of judicial constitutionalism, and judicial review in the face of the populist wave of representatives, evaluate the legacy of the independence of judiciary in India and finally emphasize that the judiciary is the most significant monitor of conduct of the government and it needs to step up, now more than ever.*

**Keywords:** Constitutionalism, Indian Judiciary, Constitutional erosion, Watchdog

### INTRODUCTION

*“Long years ago we made a tryst with destiny, and now the time comes when we shall redeem our pledge, not wholly or in full measure, but very substantially. At the stroke of the midnight hour, when the world sleeps, India will awake to life and freedom. A moment comes, which comes but rarely in history, when we step out from the old to new, when an age ends, and when the soul of a nation, long suppressed, finds utterance...”*

These are the first few lines of Pt. Jawaharlal Nehru’s speech “Tryst with Destiny”, which he delivered on the eve of 15<sup>th</sup> August 1947, when India achieved independence from British rule, after a century of subjugation. Nehru assumed the office of Prime Minister of India, and

he served the country in that capacity till his death in 1964, winning every contested election along the way. There can be no doubt about the fact that our first Prime Minister was integral in shaping the basis of governance in India, and cementing the doctrine and popularity of parliamentary democracy in the nation, which was a national goal for him<sup>1</sup>. India was a curious outlier in the Commonwealth countries that achieved freedom from British rule, as the vast majority of British colonies either did not emerge as democratic states or quickly succumbed to the temptations of authoritarian rule. States like Kenya in East Africa, Malaysia, or even Sri Lanka, which remains nominally a democratic state but, in reality, has become an ethno-cracy, privileging the majority community. India's twin, Pakistan, has undergone long periods of military rule and has not seen democratic consolidation even when brief democratic openings have appeared<sup>2</sup>.

For a democracy to succeed, it is essential for its institutions to be independent and maintain a system of checks and balances. In constitutional democracies such as India, the three institutions central to this model of governance are the legislative, the executive and the judiciary. This model of division of responsibilities and limiting each organ from exercising the core function of the other is called "separation of powers." Although this model finds no mention in the Indian Constitution, a 13 judge bench of the Indian Supreme Court, in the landmark case of *Keshavananda Bharati*<sup>3</sup> in 1973 held that separation of powers is a basic structure of the Constitution, and the basic structure "*is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed.*" The basic structure doctrine, a principle propounded by Justice HR Khanna establishes that it cannot be altered by the way of Constitutional Amendment. The model of separation of powers is especially indispensable for independence of judiciary.

Through this article, the author wishes to throw light on judicial constitutionalism through judicial review and its implications around the world, and examine the history pertaining to the independence of judiciary in India, highlighting instances of alleged hobnobbing between

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<sup>1</sup> Bhikhu Parekh, *Nehru and the National Philosophy of India*. Economic and Political Weekly, 26(1/2), 35-48. (1991).

<sup>2</sup> [Sumit Ganguly, \*The Story of Indian Democracy\*, Foreign Policy Research Institute \(June 1, 2011\), <https://www.fpri.org/article/2011/06/the-story-of-indian-democracy/>.](https://www.fpri.org/article/2011/06/the-story-of-indian-democracy/)

<sup>3</sup> *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr* (1973) 4 SCC 225.

the legislature and the judiciary, and finally emphasise the need for the courts to act as monitors in the current day and age.

## JUDICIAL REVIEW UNDER JUDICIAL CONSTITUTIONALISM AND ITS WORLDWIDE IMPLICATIONS IN THE RECENT PAST.

Constitutionalism can be defined as the doctrine that governs the legitimacy of government action, and it implies something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules<sup>4</sup>. In other words, constitutionalism checks whether the act of a government is legitimate and whether officials conduct their public duties in accordance with laws pre-fixed/ pre-determined in advance<sup>5</sup>. When the judiciary performs these checks, such actions can collectively be termed as judicial constitutionalism.

Judicial constitutionalism is ostensibly a subset of democratic constitutionalism. It is pertinent to note that the most important development in democratic constitutionalism has been the global expansion of judicial review<sup>6</sup>, a feature which comes within the ambit of the judiciary. As noted by Prof. WC Chang, “*All over the world, courts are given the power to review constitutionality of legislative and executive enactments on the basis of separation of powers and checks and balances and, more importantly, of ensuring constitutional supremacy. Because of judicial review power, judges have a final say to policy-making under a constitutional polity. In many jurisdictions, aside from judicial review power, courts are also given ancillary powers including the powers of impeachment, resolving election disputes or dissolving political parties based on the constitution*”<sup>7</sup>.

The exercise of the power of judicial review to curb attempts at parliamentary supremacy has been at the forefront in India, especially in the period of 1970-1975, where more than a 100

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<sup>4</sup> Hilaire Barnett, *Constitutional and Administrative Law 5* (London: Cavendish Publishing Limited, 3rd edi., 2000 (1995).

<sup>5</sup> Maru Bazezew, *Constitutionalism*, Vol. 3 No. 2, Mizan LR, 358 (2009).

<sup>6</sup> Doreen Lustig and J. H. H. Weiler, *Judicial Review in the Contemporary World—Retrospective and Prospective*, 16(2) Int'l J. Const. L. 315, 315–316 (2018). See also Mauro Cappelletti, *Judicial Review in Comparative Perspective*, 58 (5) Calif. L. Rev. 1017, 1020 (1970).

<sup>7</sup> Wen-Chen Chang et al., *Constitutionalism in Asia: Cases and Materials* 337–341, Hart Publishing (2014).

laws passed by the Indian parliament were held unconstitutional by the Supreme Court<sup>8</sup>. In the midst of this, in the aforementioned Keshavananda Bharati case in 1973, judicial review was also held to be part of the basic structure of the Constitution, which was reiterated in *Minerva Mills*<sup>9</sup> as well as *S.P. Sampath Kumar* case<sup>10</sup>.

In view of the power of judicial review, according to Prof. Chang “*courts have become the most authoritative guardian of constitutions, and constitutionalism inevitably becomes court-centric or judicial in nature*<sup>11</sup>.”

Therefore, judicial constitutionalism poses quite a threat “*to elected politicians who seek the power of governance through democratic elections. Even with sweeping electoral victory, these elected politicians do not have the final or most authoritative say to policy-making under judicial constitutionalism*<sup>12</sup>.”

Thus, even the politicians who enter office with a popular mandate and an overwhelming majority still face a roadblock in the form of judiciary, as they cannot pass legislations which contravene the constitution. Judicial constitutionalism is the final wall that has the power to undo unconstitutional bills.

This is the stage where frustrations sets in for the elected legislature. The primary purpose of the separation of power is for each body to keep a check on the other, act as watchdogs for the other two pillars of democracy, and the Indian Supreme Court through judicial review lived up to that role for a long period of time. For the legislature, the solution to this challenge is obvious; make feasible changes to procedural judicial appointment, to try and curve it in their favour. With the rise of populist leaders across the world since the middle of the past decade<sup>13</sup>, it has been observed that there has been an increasing governmental interference aimed at influencing the judicial makeup of a country, which in itself is touted as another emerging trend. For example, in Turkey in the month of April this year, President

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<sup>8</sup> [Anand Nandan](https://timesofindia.indiatimes.com/blogs/les-avis/parliamentary-supremacy-and-judicial-review-indian-perspective/), *Parliamentary Supremacy and Judicial Review: Indian Perspective*, The Times Of India (Sept. 15, 2018, 03:14 pm), <https://timesofindia.indiatimes.com/blogs/les-avis/parliamentary-supremacy-and-judicial-review-indian-perspective/>.

<sup>9</sup> *Minerva Mills v. Union of India* (1980) 3 SCC 625.

<sup>10</sup> *S.P. Sampath Kumar v. Union of India* 1987 SCR (3) 233.

<sup>11</sup> Wen-Chen Chang, *Back into the political? Rethinking judicial, legal, and transnational constitutionalism*, *International Journal of Constitutional Law*, Volume 17, Issue 2, Pages 453–460 (2019).

<sup>12</sup> Chang, “Back into the political?..” *supra* at 456.

<sup>13</sup> [Annalisa Merelli](https://qz.com/1774201/the-global-state-of-right-wing-populism-in-2019/), *The state of global right-wing populism in 2019*, Quartz, (Dec. 30, 2019), <https://qz.com/1774201/the-global-state-of-right-wing-populism-in-2019/>.

Erdogan appointed Basri Bağcı as a member of the Constitutional Court. Bağcı is largely observed to be partisan to the ruling Justice and Development Party (AKP), and was also earlier deemed ‘unqualified’ to be a member of the European Court of Human Rights<sup>14</sup> (EctHR). Confrontational politics or even political scandals in judicial appointment processes, and postponed or rejected judicial appointments on purely political or ideological grounds were heard time and again across many jurisdictions especially in Asia<sup>15</sup>, and more recently in Taiwan<sup>16</sup>. Japan saw the chief of its Cabinet Legislation Bureau, which advises the Prime Minister on constitutionality of legislations was retired, and sent to the Supreme Court<sup>17</sup>.

A change in institutional designs is how legislature often tries to subvert judicial independence. Such tactics have been frequently employed, cumulatively causing constitutional erosion. Prof. Scheppele explains<sup>18</sup> this as “*For example, a sudden, sharp increase in the number of justices at a national top court or constitutional court, so-called court-packing, allows the present political majority to appoint a great many of “their men or women” to the bench. To prolong or shorten the tenure of justices, to lower or extend retirement age, or simply to appoint younger or older justices on the bench is another tactic.*”

Similar tactics were attempted by the incumbent government in Israel when the Netanyahu government introduced a proposal to adopt legislative override of judicial declaration of unconstitutional legislation. This was coupled with their attempts at installing conservative judges in the higher judiciary<sup>19</sup>. As has been observed by Prof. Chang, judicial constitutionalism inevitably turns political<sup>20</sup>.

Judicial interference, when successful paves the way for constitutional alteration, as the guardianship of the constitution is effectively compromised. Once the system of checks and

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<sup>14</sup> Nordic Monitor, *President Erdogan appoints Basri Bağcı, deemed ‘unqualified’ to be an ECtHR judge, as new member of Constitutional Court*, Nordic Monitor, (Apr. 4, 2020), <https://www.nordicmonitor.com/2020/04/erdogan-appointed-jurist-deemed-unqualified-by-the-echr-as-new-member-to-turkeys-constitutional-court/>.

<sup>15</sup> Chang, “Constitutionalism” *supra* at 369.

<sup>16</sup> Jiunn-rong Yeh, *The Constitution of Taiwan: A Contextual Analysis* 162, Hart Publishing (2016).

<sup>17</sup> Yasuo Hasebe, *The End of Constitutional Pacifism?*, 26 (1) *Washington Int’l L. J.* 125, 128 (2016).

<sup>18</sup> Kim Lane Scheppele, *Autocratic Legalism*, 85 *Uni. Chi. L. Rev.* 545, 549–554 (2018).

<sup>19</sup> Gil Hoffman, *Supreme Court President Pleads with Netanyahu not to Endanger Democracy*, The Jerusalem Post, (Apr. 29, 2018), <https://www.jpost.com/Israel-News/Benjamin-Netanyahu/Supreme-Court-president-pleads-with-Netanyahu-not-to-endanger-democracy-553060>.

<sup>20</sup> Chang, “Back into the political?..” *supra* at 457.

balances is disturbed, the legislature has a no-holds-barred opportunity to bring forth changes that will suit them in the long run. This has already been the case in a few European countries. Hungary and Poland both have seen their governments enact constitutional changes that narrow political competition in the future<sup>21</sup>.

Prof. Chang further elaborates on these methods, stating<sup>22</sup> *“The political majority may amend the constitutional amendment rule—making it easier or more rigid—and then put into place institutional designs and substantive rules favorable(sic) to their power entrenchment. Is such a package of constitutional amendments constitutional or not? Worse yet, such a difficult constitutional question may be further entertained by constitutional courts or supreme courts, which may or may not rule on unconstitutional constitutional amendment absent explicit constitutional authorization. If courts rely on some implicit limits to constitutional change or even establish so-called “basic structure” to which the power of constitutional amendment must yield, the confrontation will not stay just between political majority and minority, but will extend further between political branches and the judiciary.”* The example of Taiwan is taken up to elaborate the retaliation concept, where in the Constitutional revision of 1999 the voting rule in the amendment procedure was made less rigid, which was found unconstitutional by the Constitutional Court in *JY Interpretation No. 499*<sup>23</sup>, as a result of which retaliatory measures were taken against the justices<sup>24</sup>. For judicial constitutionalism, the judiciary has to be independent in the widest sense – including the freedom from adverse consequences in cases of rulings against the incumbency.

## INDEPENDENCE OF JUDICIARY IN INDIA –THE PAST AND THE PRESENT

For judicial constitutionalism, and as a subset judicial review to be effectively enforced, the mandatory requirement is the independence of judiciary, which should be removed from politics as far as possible. Inversely, the momentous risk that judicial constitutionalism faces is generally governmental influence over the institution. In simpler words, if members of the

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<sup>21</sup> Yaniv Roznai, Tom Ginsburg and Aziz Z. Huq: *How to Save a Constitutional Democracy*, 46 *Journal of Law and Society* 666–672 (2019).

<sup>22</sup> Chang, “Back into the political?..” *supra* at 459.

<sup>23</sup> JY Interpretation No 499, March 24, 2000 (Constitutional Court, Taiwan), [https://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=499](https://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499).

<sup>24</sup> Yeh, *Constitution of Taiwan*, *supra* at 45.

judiciary are seen to be partisan to the members of the ruling government, it can be inferred that judicial constitutionalism stands, at least on some level, compromised, the veracity of which is to be determined when reviewing orders and rulings and the interplay of perceived bias and actual outcome. There have been several occasions in the history of Independent India where more than credible doubts can be raised about said independence.

The 14<sup>th</sup> Law Commission in its report<sup>25</sup> on 'Reforms of the Judicial Administration' in 1958 noted that "*Far from avoiding the precincts of Government House, judges have come to treat invitations from Government House as 'commands'. Newspapers tell us of Chief Justices and judges being 'granted' interviews by Ministers. Though a few judges still maintain the old isolation, a large majority sees nothing incorrect in freely mixing with the Executive.*"

During the emergency when Indira Gandhi was prime minister, a law was passed which suspended Habeas Corpus, for the objective of preventive detention. The 1975 law was challenged, the case<sup>26</sup> heard by five senior-most judges of the apex Court. The law was upheld with 4 judges in majority, and the only dissenting view being of Justice H.R. Khanna. Intriguingly, all 4 judges in the majority went on to serve as CJIs, but the senior-most of them, Justice Khanna was denied promotion<sup>27</sup>. As noted by the press at that time, the judiciary at that time was denounced to have surrendered its power tamely<sup>28</sup>.

In the past, more ostensible breaches of this separation model have also been seen. Perhaps the most noticeable event is the curious case of the late Baharul Islam, who was a Supreme Court judge and a Rajya Sabha member. Islam was an advocate who was an Indian National Congress Member of Parliament in the Rajya Sabha. He resigned in the year 1972, and went on to become a judge at the Gauhati High Court (then Assam and Nagaland High Court). He retired in the month of March in 1980, after completing his tenure of nearly 9-months as the chief justice of the Gauhati High Court. In a surprising move, he was appointed as a Supreme Court judge in December of 1980, and during his tenure as a Supreme Court justice, the most significant event was when he absolved the then Bihar chief minister Jagannath Mishra, leader of the Congress government in the state in his role regarding the urban cooperative

<sup>25</sup> [Law Commission of India, Reforms of the Judicial Administration, Report No. 14, 1958, http://lawcommissionofindia.nic.in/1-50/report14vol1.pdf](http://lawcommissionofindia.nic.in/1-50/report14vol1.pdf) (Last visited May 10, 2020).

<sup>26</sup> ADM Jabalpur v. Shivkant Shukla, A.I.R. 1976 S.C. 1207.

<sup>27</sup> [Kunal Ghosh, A Nascent Caste on the Horizon: the Judicial Dynasties, Mainstream Weekly, \(Nov. 21, 2016\), http://www.mainstreamweekly.net/article6839.html.](http://www.mainstreamweekly.net/article6839.html)

<sup>28</sup> *Id.*

bank scandal<sup>29</sup>. Islam resigned from the Supreme Court in 1983 to contest Lok Sabha elections on a Congress ticket, and was later elected as a member of the Rajya Sabha<sup>30</sup>. In such circumstances, very feasible doubts are raised on the independent characterisation of the judiciary.

A similar situation was seen in the case of ex-CJI Ranganath Misra. Misra was the sole member of the Justice Ranganath Misra Commission of Inquiry appointed by the Rajiv Gandhi government, which spearheaded the investigation into the 1984 anti-Sikh riots. In his report, he indicted 19 members of the Congress party, later charged by the People's Union for Civil Liberties for abetting the riot, and noticeably left out the Congress Party<sup>31</sup>. The Citizen's Justice Committee, formed in 1985 to aid and assist the commission in their investigation withdrew their cooperation after on the 31<sup>st</sup> of March 1986, because it disagreed with the commission's practice of holding secret proceedings, none of which were made public<sup>32</sup>. The late Justice Tarkunde, a member of the CJC on the status of the investigation carried out by the commission said<sup>33</sup> *"This has been a one sided investigation. We were never really given a chance to participate in it as we had been promised."* Soli Sorabjee, also a member of CJC stated they were not allowed to cross-examine anybody, in the key interviews being conducted behind closed doors<sup>34</sup>. Ranganath Misra went on to become the 21<sup>st</sup> Chief Justice of India, retiring towards the end of 1991. Peculiarly enough, Misra was nominated to the Rajya Sabha on a Congress Party ticket in 1998, and remained a member till the year 2004.

It is undeniable that since the advent of democracy in India, the legislature and the judiciary have had elements of inter-dependence, as opposed to the envisioned independence.

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<sup>29</sup> Sudhanshu Ranjan, *Collegium 2.0*, Asian Age, (Nov. 3, 2015, 11:09pm), <https://www.asianage.com/columnists/collegium-20-012>.

<sup>30</sup> Chaitanya Kalbag, *Justice Baharul Islam tenders his resignation from SC Bench to President Zail Singh*, India Today (Jan. 31, 1983), <https://www.indiatoday.in/magazine/indiascope/story/19830131-justice-baharul-islam-tenders-his-resignation-from-sc-bench-to-president-zail-singh-770402-2013-07-25>.

<sup>31</sup> Harinder Baweja, *Rajiv's government set up one-member Justice Ranganath Misra Commission of Inquiry*, India Today (Jan. 31, 1990), <https://www.indiatoday.in/magazine/special-report/story/19900131-rajivs-government-set-up-one-member-justice-ranganath-misra-commission-of-inquiry-812267-1990-01-31>.

<sup>32</sup> PTI, *"Judicial inquiry into November 1984 riots"*. BBC Summary of World Broadcasts, July 31, 1985.

<sup>33</sup> Inderjit Badhwar, *Justice Mishra Commission report on 1984 anti-Sikhs riots may find few takers*, (Apr. 30, 1986) <https://www.indiatoday.in/magazine/indiascope/story/19860430-justice-mishra-commission-report-on-1984-anti-sikhs-riots-may-find-few-takers-800825-1986-04-30>.

<sup>34</sup> *Id.*



In the recent past, a similar development<sup>35</sup> was when 4 of the senior Supreme Court judges in 2018 held an “extraordinary press conference” as they felt that unless several problems in the working of the Supreme Court are not fixed, ‘democracy will not survive’. In a letter addressed to the then Chief Justice of India, Dipak Mishra, the four judges raised ‘a litany of problems’. The letter contained a ‘scathing criticism and unvarnished self-reflection of the Supreme Court’. The primary issues raised were the allocation of cases, a duty of the CJI, a mention of several judicial orders passed by the court “*which has adversely affected the overall functioning of the justice delivering system and the independence of the high courts besides impacting the administrative functioning of the office of the Chief Justice of India. There have been instances where cases having far reaching consequences for the nation and the institution have been assigned by the chief justices of this court selectively to the benches ‘of their preference’ without any rationale basis for such assignment.*” In the press conference itself, Justice Gogoi told journalists that the press conference was prompted by issues surrounding the death of special CBI Judge B.H. Loya<sup>36</sup>. It is pertinent to note that Justice Loya, who was served in a special court of the CBI, and was presiding over the Sohrabuddin encounter case, where a senior BJP member among others was accused in the CBI charge-sheet<sup>37</sup>. There was an eventual acquittal, after Loya passed away in mysterious circumstances. Interestingly, in April 2018, the Supreme Court dismissed the plea seeking probe into Judge Loya’s death<sup>38</sup>.

In summary, there have been many instances which would lead a prudent man to believe that justifiable doubts exist with regard to the legislature and the judiciary acting as watchdogs, particularly the higher judiciary. Several instances have risen up where inferences have been drawn of the higher judiciary being in cahoots with the legislature, which is evidently

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<sup>35</sup> PTI, *Supreme Court crisis: All not okay, democracy at stake, say four senior-most judges*, The Hindu Business Line, (Jan. 12, 2018) <https://www.thehindubusinessline.com/news/supreme-court-crisis-all-not-okay-democracy-at-stake-say-four-seniormost-judges/article10028921.ece>.

<sup>36</sup> The Wire Staff, *Loya Case the Tipping Point, Four SC Judges Say Democracy Is in Danger*, The Wire, (Jan 12, 2018), <https://thewire.in/law/sc-justices-hold-historic-press-conference-triggered-loya-case>.

<sup>37</sup> FPJ Web Desk, *What is the Justice Loya case and how is Amit Shah involved?*, Free Press Journal, (Dec. 3, 2019, 20:32 pm), <https://www.freepressjournal.in/india/what-is-the-justice-loya-case-and-how-is-amit-shah-involved>.

<sup>38</sup> TOI, *SC dismisses PIL seeking probe into judge Loya's death*, Times of India, (Apr. 19, 2018, 17:47 pm) <https://timesofindia.indiatimes.com/india/sc-dismisses-pil-seeking-probe-into-judge-loyas-death/articleshow/63826836.cms>.

political interference. Former Chief Justice Kapadia had rightly said<sup>39</sup> “*Judiciary should be independent not just from politics but also from public sentiment and judges should deliver justice as per law and not according to the opinion of the majority.*”

Political inroads into the judiciary have also had an effect on the Indian public, especially the notorious and highlighted instances of this practice. As Madan B Lokur, currently the Chief Justice of Fiji and formerly a Justice of the Supreme Court of India noted, the judiciary is increasingly facing a lack of trust by the public<sup>40</sup>. In his article, he wrote about the independence of the judiciary, stating<sup>41</sup> “*The most controversial aspect of justice delivery is the appointment of judges, and has been so for many decades. Independent India started off with independent judges who took independent decisions. Many of these decisions were not to the liking of the establishment and plans were made to bring them to heel. But the judges stood like a rock, leading to the establishment theorising on a committed judiciary. To some extent, the establishment succeeded in making inroads into the independence of the judiciary, but the judiciary struck back and arrogated to itself the sole authority to recommend judges for appointment. This was an act of self-preservation and perhaps needed at the time.*”

On the appointment of judges, he notes the delay of the incumbent government in the process, stating that the government had been stalling the appointment of judges, something acknowledges by the Supreme Court itself. Lokur further delineates this problem, saying “*This is a display of misplaced power. It impacts on the seniority of a candidate recommended for appointment as a judge of the high court and we have witnessed, in the Supreme Court as well. We have seen the government stalling the appointment of a judge to the Supreme Court and also in the appointment of a chief justice of a high court. Transfer of judges is another weapon in the armoury of the government and is suggested by the government for reasons that would not stand scrutiny even in the court of a munsif, but the Supreme Court has been unable to stand its ground.*”

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<sup>39</sup> HT Correspondent, Judiciary must be free of politics, public opinion: CJ, Hindustan Times, (Jan. 15, 2012, 01:27 AM), <https://www.hindustantimes.com/mumbai/judiciary-must-be-free-of-politics-public-opinion-cji/story-u0i75AYeUEzMF0xRVh9ihK.html>.

<sup>40</sup> Madan B. Lokur, *India's Judiciary Is Facing An Increasing Lack Of Trust By Public*, Outlook India, (Jan. 13, 2020), <https://www.outlookindia.com/magazine/story/india-news-indias-judiciary-is-facing-an-increasing-lack-of-trust-by-public/302545>.

<sup>41</sup> *Id.*

It is indisputable that for any democratic institution to perform its duties, it has to make an effort to reduce the sway of the legislature as much as pragmatically possible. For the judiciary, attempts at subversion often strike at the heart of its being, and render it incapable of delivering true and upright judgements. Taking into account the Indian judiciary's history as delineated above, there may arise palpable fears that the judiciary may be vulnerable to outsider attempts at disturbing its core functioning, in the future. The courts need to take cognizance of such ventures to meddle in its affairs and engage with them head-on, rather than remaining a mute spectator.

## **THE COURTS AS MONITORS –WHY IT IS IMPERATIVE FOR THE JUDICIARY TO STEP UP, NOW MORE THAN EVER.**

According to the Global Democracy Index, in 2019, India fell 10 places and dropped down to the 51<sup>st</sup> spot out of 165 countries<sup>42</sup>. The reasons for this fall are largely acknowledged as “erosion of civil liberties”, attributed to the revocation of Article 370<sup>43</sup> coupled with the enactment of the Citizenship Amendment Act. Kashmir was put under a lockdown, which is ongoing with an internet cutoff for nearly 7 months since the imposition<sup>44</sup>. Now more than ever, there is a fundamental need for the judiciary to act vigilant and stick to the doctrine of constitutionalism to protect the needs of the vulnerable, especially those under state-imposed restrictions. The judiciary has an essential duty to act as a monitor of government conduct, and it is the most effective monitor that can be. Courts can collect information about government misconduct more efficiently than a system of direct monitoring by the people. Their advantages lie in the fact that they do not attempt to patrol the halls of government for acts of misconduct, but instead respond to complaints brought to them by the people who are directly affected by government misconduct<sup>45</sup>. In India, there is a larger scope for this, under the ambit of public interest litigation, and it makes justice accessible to socially disadvantaged groups of people. Courts are also specialists and experts in the interpretation and application of law. That expertise is essential to the task of determining whether the government is acting within constitutional limits. The precise content and meaning of constitutional restrictions upon government power are necessarily the product of

<sup>42</sup> [Democracy Index 2019, The Economist, https://www.eiu.com/public/topical\\_report.aspx?campaignid=democracyindex2019.](https://www.eiu.com/public/topical_report.aspx?campaignid=democracyindex2019)

<sup>43</sup> INDIA CONST, art. 370

<sup>44</sup> [https://internetshutdowns.in/.](https://internetshutdowns.in/)

<sup>45</sup> David S. Law, *A Theory of Judicial Power and Judicial Review*, vol. 97, Georgetown L.J. p.723 (2009).

interpretation and application<sup>46</sup>. Media houses, who may be more aware of the ground reality of any place cannot by themselves know if government is applying legally reasonable restrictions or taking the appropriate steps. The decisions that courts take in this day and age also significantly raise legal awareness in the general population. One of the characteristics of judicial review is the gatekeeping function that courts perform in the ordinary course of adjudication. Courts do not sound the alarm every time a lawsuit is filed against the government; instead, they exercise judgment and reject suits that lack merit, thereby relieving the people of any need to follow every allegation of government misconduct<sup>47</sup>. Further, high court decisions about the constitutionality of government conduct, in particular, tend to be widely available at little or no cost, whatever the country<sup>48</sup>. Constitutional adjudication, by its nature, shares this appeal to a broader audience. Additionally, a constitutional court directly benefits the media by defending and celebrating freedom of speech. In doing so, however, the court helps itself as well. It preserves the ability of the media not only to publicize judicial decisions, but also to detect and report misconduct in the first place. It is important to highlight that only the judiciary can effectively act as a government watchdog in a manner that other monitoring agencies can't. Judges possess a combination of legal skill and experience that renders them better qualified than the average journalist or politician to assess the lawfulness of government conduct<sup>49</sup>.

The Indian judiciary has a long and decorated history of employing judicial review to strike down patently illegal acts which governments have often tried to pass. There have also been a fair share of eyebrow-raising rulings that make the ordinary man question the institution. Generally though, the period immediately after the Emergency has seen the judiciary engaging in activism and popular constitutionalism, of which the evolution of PIL can be called a by-product. Indeed, at times its activism has attracted questions, where citizens have questioned if the overzealous approach of the judiciary has led them to overstep into the boundary of the legislature<sup>50</sup>. However, in a scenario where both the institutions have

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<sup>46</sup> Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1142 (2008).

<sup>47</sup> Law, "A Theory of Judicial Power and Judicial Review", *supra* at 748.

<sup>48</sup> *Id.*

<sup>49</sup> Randall Calvert & James Johnson, *Interpretation and Coordination in Constitutional Politics*, Lessons In Democracy 99, 112–17, 130–32 (Ewa Hauser & Jacek Wasilewski eds., 1999).

<sup>50</sup> Livemint, *The judiciary is shifting the balance of power*, (May 2016, 03:41 am), <https://www.livemint.com/Opinion/IPqfldPjTc9t4aBYupFZKK/The-judiciary-is-shifting-the-balance-of-power.html>.

demonstrably exercised their powers beyond the demarcated lines in a democracy, it is far more preferable to have the judiciary wield its activist role. Judicial independence is necessary if courts are to protect individuals and minorities from government persecution and tyrannous majorities alike<sup>51</sup>. In the context of majoritarian parties forming governments, they ought to have little reason to support judicial independence: to the extent that courts do what they are supposed to do, they antagonize the majority, which might therefore be expected to resent judicial independence<sup>52</sup>. Courts cannot perform their duties unless they are warranted freedom from the government. Generally in democracies, governments are formed after a particular party which specifically adheres to an ideology is elected to office. Therefore, only independent courts can be relied upon to provide credible information about the government's behaviour, the citizenry have a compelling reason to support judicial independence<sup>53</sup>. To supervise a government formed by elected members who are fundamentally adherent to a certain type of politics, it is imperative that the courts be independent of such politics, and be willing to exercise their powers in order to safeguard the citizens of the country.

## CONCLUSION

India has evolved a lot as a democracy since its inception nearly 70 years ago. There have been manifest contraventions of its "separation of powers" model that is now considered to be part of basic structure of its Constitution. With the rise of populist leaders all across the world, there has been a visible rise in instances of the legislature arm-twisting the judiciary. India too has seen its share of cases where the independence of the judiciary has been doubted and surmised upon. In such a scenario, it is of utmost importance that the judiciary acts prudently to preserve the sanctity of itself, and thereby also safeguard the interests of the nation at large.

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<sup>51</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* Cambridge: Harvard University Press, (1980).

<sup>52</sup> Johnson, Calvert, "Interpretation and Coordination in Constitutional Politics", *supra* at 140.

<sup>53</sup> Arthur Lupia & Mathew D. McCubbins, *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* Cambridge University Press, (1998).