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1.1.2. CONSTITUTIONAL LAW

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Ms. Sonia JM Shad

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A. Powers

Readings:

- Tarunabh Khaitan- Reforming the legislative process (EPW 2011)
- Sandipto Dasgupta-Parliamentarianism Not Presidentialism (EPW 2018)
- Tarunabh Khaitan-The Supreme Court as a Constitutional Watchdog (2019)
- Expanding Judiciaries: India And The Rise Of The Good Governance Court, Nick Robinson, Washington University Global Studies Law Review

B. Constitutional protection to animals:

Readings:

- Chapter 3, Laws Relating to Animal Welfare, Vivek Mukherjee, NALSAR
- Granting Animals Rights Under the Constitution: A Misplaced Approach? An analysis in light of Animal Welfare Board v. A. Nagaraja, Jessamine Therese Mathew & Ira Chadha-Sridhar, 7 NUJS L.REV. 349(2014)
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Case Studies

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C. Justice under the constitution.

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Reforming the Pre-Legislative Process

TARUNABH KHAITAN

Reforms are required to ensure that public debate and deliberation precede rather than merely follow legislative enactments. They may strengthen the State's capacity to draw upon the expertise and experiences of Indian citizens, and may, ultimately, help us take a few more steps towards evolving into a robust deliberative democracy.

Tarunabh Khaitan (*tarunabh@gmail.com*) is at Christ Church College, University of Oxford, Oxford, UK and teaches law.

The recent public demonstration of urban middle India's anger against corruption and the debate on the merits of the Jan Lokpal Bill that followed highlighted a serious democratic deficit in our lawmaking process. As an ad hoc fix for this particular issue, a joint committee comprising government representatives and from sections of civil society was formed to come up with a draft anti-corruption legislation. However, we should take this opportunity to consider structural changes which will institutionalise public participation in the pre-legislative process in India more generally and nudge ourdemocracy towards greater deliberation.

For the founders of the Indian Constitution to constitutionalise representative democracy in the context of post-war ideological uncertainties and in the face of doubts over the political wisdom of India's illiterate poor was audacious. While ideological uncertainties continue to exist in some quarters, the founding faith in the political wisdom of Indians, on the whole, stands vindicated. For all its aspirational foresight, however, a constitution must always be seen as providing a minimum threshold – a floor – over which successive generations must build, rather than as an upper limit – or a ceiling – for our progressively evolving political aspirations. Representative democracy, entitling citizens to choose their representatives to make decisions on their behalf every five years, may have been audacious in 1950; but it is thoroughly insufficient in 2010. Mind you, I do not doubt its importance or continued relevance for a moment. It is, however, the proverbial floor, and to build on it has been long overdue.

It is in this context that we must recognise the increasing academic, political and even judicial interest in deliberative democracy, essentially a system of political decision-making that relies on public deliberation to make policy. It is worth noting that "deliberation" is a step beyond mere consultation, and draws upon the notion of "public reasons" from the Rawlsian tradition: the idea that decisions must be justified by reasons that can be acceptable to others. Inasmuch as access to information is an essential precondition for deliberation, the Right to Information Act (RTI) 2005 was an important, if small, first step towards our evolution from a representative to deliberative democracy.

Intrinsically Good

Deliberative democracy based on public reasons is good intrinsically as well as instrumentally. Its intrinsic good lies in the fact that participants are treated as free and equal, that they have the right to have a say in decisions that affect them, and that they are shown respect by being offered reasons acceptable to them by other participants. It is good instrumentally because participation and deliberation lead to better decisions, while, laws passed secretively and hurriedly tend to be bad laws.[1] Often, governments use the opaque process to hurry through laws they know will be unpopular.[2] The text of the Prevention of Torture Bill was kept secret until it was introduced in the Lok Sabha, which passed it in the budget session in 2010 after a brief debate late in the evening (in which not a single member of Parliament from the main opposition parties participated). Instead of providing a comprehensive mechanism for dealing with torture in India, not only does it fall way short of its stated objective of enforcing international obligations under the Convention Against Torture, it effectively establishes an impunity regime for public servants accused of torture.[3] It was only after civil society made representations to some members of the Rajya Sabha that the latter referred the bill to a select committee, whose report has recommended extensive amendments to the shoddy initial draft.[4] Getting it right the first time around would have been so much better.

Sometimes we end up with unpopular laws even if the government's intentions are benign. Acts made without consultation often meet strong protests by groups who are affected by it after they have been duly passed by Parliament. The Code of Criminal Procedure (Amendment) Bill, 2008 was one of the eight bills that the Lok Sabha passed in a matter of a few minutes in December 2009. Even though the content of the Act was, on the whole, benign, it ran into deep trouble with the lawyers' associations for a variety of reasons.[5] The government exercised its veto over the duly enacted parliamentary Act by refusing to bring it into force and returning to Parliament to meet some of the objections. One cannot blame the lawyers for protesting after the law was enacted, for it is only at this stage that they become aware of its provisions. If they had been consulted while the law was being formulated, resort to the exercise of a de facto veto by the executive would have been unnecessary.[6]

All of the above examples are instances where the lack of deliberation was made up for by subsequent (legitimate and illegitimate) interventions. In most cases, poorly deliberated laws manage to make their way into the statute books and continue to blight our lives for decades thereafter. This problem arises because our lawmaking processes and institutions suffer from two major drawbacks:

– bodies that are constitutionally authorised to make laws, although representative, are not deliberative enough, and

– current institutional structures do not facilitate the participation of the people at large in the pre-legislative process. It is assumed that their interests will be voiced by their chosen representative effectively, comprehensively and sincerely.

The work being done by PRS Legislative Research in Delhi has highlighted some of the issues concerning the first drawback. The winter session of Parliament in 2010, where hardly any legislative business was conducted, is an extreme example. But even in a more typical year in 2009, they have found that[7]

– Only 16% of the total parliamentary time was spent on legislative business.

– 27% of the total Bills passed in the year by Lok Sabha were discussed for less than five minutes.[8]

– Only five bills passed by the Lok Sabha were debated for more than three hours.

From the limited data available with respect to state legislatures, C V Madhukar of the PRS claims that they tend to fare worse than the national Parliament on all aspects of deliberation.[9] While the time devoted to legislative business by our legislatures is worrying, there are other features of their institutional design which make deliberation difficult. Although standing as well as ad hoc parliamentary committees often do good legislative work, they usually take up detailed consideration of bills only after these bills have been specifically referred to them for scrutiny.[10] Not all bills are automatically scrutinised by these committees: extremely significant and controversial legislation like the Special Economic Zones Act, for example, was not sent to a parliamentary committee before its passage. Standing committees that perform legislative functions are a relatively recent innovation in India and the overall verdict on their role in scrutinising legislation must be reserved. Ad hoc committees, however, are dissolved after they have scrutinised the assigned bill, and thereby fail to generate any institutional memory or capacity. In any case, committee proceedings themselves remain opaque, making an evaluation of their performance difficult. Furthermore, there is no constitutional requirement for legislative involvement in India's accession to international law instruments. Finally, paragraph 2(1)(b) of the 10th Schedule of the Constitution takes away an MP's freedom to vote freely, thereby ensuring that MPs primarily represent their political parties rather than their constituents.[11] Many of these concerns have been well documented in our public discourse.

Absence of Mechanisms

It is the second drawback – the absence of mechanisms to enable civil society to deliberate over laws before they reach and are passed by legislatures – which has received relatively less attention. Lawmaking in India is a process shrouded in mystery. A typical bill is drafted in secret by the concerned government ministry (sometimes in consultation with other ministries), and this secret draft is approved by the cabinet for introduction before a house of Parliament (or the state legislature, as the case may be).[12] Usually, it is only upon its introduction in the house that the contents of the bill are made public.

The legislative process, as it currently stands, does not even require informing the people of the content of putative laws until the very last minute, let alone consulting them. Making the contents of draft bills public rests on the magnanimity of the ministry concerned; this despite the legal duty under section 4(1)(c) of the Right to Information Act to "publish all relevant facts *while formulating* important policies or announcing the decisions which affect public" (emphasis added).

It is the content of this precise duty which was in question before the Central Information Commission in two important cases. At first glance, it seems obvious that draft bills fall within the purview of s 4(1)(c). Thus, in the case of *Venkatesh Nayak vs Chief Secretary, Government of Delhi*,[13] the commission directed the respondent government

> to develop a credible mechanism in all departments for proactive and timely disclosure of draft legislations/policies and amendments thereto or to existing laws/policies in the public domain, as required under Section 4(1)(c) of the RTI Act, during the process of their formulation and before finalisation.

It may be noted that the commission made this "direction" using the recommendatory powers available to it under section 25(3)(g)[14] read with section 25(5)[15] of the RTI Act. It is submitted that in order to implement the proactive publication duty under section 4 of the Act, the commission should have used its mandatory power under section 19(8)(a)(iii) of the Act instead. Under this provision, the central or state information commission has the power to

> require the public authority to take any such steps as may be necessary to secure compliance with the provisions of this Act, including – ...by publishing certain information or categories of information.

It remains to be seen whether the government of Delhi treats this order under section 25 of the Act as a direction or a recommendation. Even if it was a direction, this case was addressed only to the government of Delhi, and it is quite unlikely that it will be voluntarily followed by other governments of other states.

The issue came up again before the commission in *Venkatesh Nayak vs Department of Personnel and Training*.[16] In this case, the commission considered the defence that section 8(1)(i) of the RTI Act exempts "cabinet papers including records of deliberations of the Council of Ministers, Secretaries and their officers" from disclosure. Since all draft bills need the approval of the cabinet before they can be placed before the legislature, this provision posed an apparent hurdle to their public disclosure. The CIC held that exemption under section 8(1)(i) would not apply to deliberations leading to the formulation of a policy framework until such time as the draft was submitted by the relevant ministry to the cabinet secretariat. Thus when a cabinet note is finally approved for submission to the cabinet through the cabinet secretariat, section 8(1)(i) will apply. In addition, section 8(1)(c) exempts all information "the disclosure of which would cause a breach of privilege of Parliament or the State Legislature". No one is quite sure what the scope of legislative privilege in India really is, but it seems that once approved by the cabinet for placing before the legislature, section 8(1)(c) will exempt the draft bill from disclosure under the RTI Act. Such bills will therefore become available to the public only after they are actually introduced in a house of the legislature.

The upshot of these decisions is that during the period between its submission to the cabinet secretariat and its introduction in a house of a legislature, a draft bill cannot be made public under the RTI Act. To put these hurdles in perspective, it is worth noting that they relate merely to accessing information, which is but the first stage in a meaningfully deliberative lawmaking process. Even this much, at the moment, appears to be a distant dream.

What we have, therefore, is an absence of participation of the demos in the lawmaking process, and increasingly non-deliberative, if representative, bodies entrusted with the task of lawmaking. It is with some urgency, therefore, that we must attend to the need to further democratise lawmaking in India. It was with this urgency in mind that the National Campaign for the People's Right to Information commissioned a report from the Oxford Pro Bono Publico to understand how other democracies have dealt with the problem of democratic deficit in the pre-legislative process. The report was written by Oxford graduate students from India, South Africa and Switzerland under my supervision.[17]

Survey of Institutions Elsewhere

The students surveyed jurisdictions as diverse as international law, South Africa, Canada, the United Kingdom, the United States, Switzerland, and the European Union to find processes that facilitated public participation in lawmaking and made several suggestions in light of their insights from comparative law. Their suggestions included provision for a strong constitutional foundation for public participation in the pre-legislative process in line with the robust South African constitution. Chastened by the mistakes made elsewhere, they warn against agency capture of any pre-legislative process by elite groups with disproportionate influence. Some of their key suggestions are contained in the following paragraph:

> The best ways of facilitating public participation are through publication and consultation. All instruments, at each stage (draft and final) must be published in the Official Gazette, which should be available in the paper form and electronically, ideally free of charge.[18] Important legislative measures should be preceded by Green and White papers. Consultations ought to be decentralised....If the legislation is particularly complex, explanatory notes should supplement the bare text. Reasonable time frames ought to be set. It is also important for the government to explain the reasons for its final act/rule/decision, by responding to 'key' or 'major' criticisms and providing explanations for the rejection of 'significant' plausible alternatives (ibid: 69).

Admittedly, comparative law has its limitations. These suggestions have been presented not as prescriptions but with a view to present alternatives and open up the debate in India. At any rate, the process of reforming the pre-legislative process must itself be public and consultative. Furthermore, any proposals have to be considered alongside the need to reform the legislative process itself to improve deliberation by legislators.

It will also be necessary to ensure that the requirements of deliberation do not make enactment of legislation too difficult. Deliberation is important, but a democracy also requires final authorisation of decisions within reasonable time. Creative solutions, such as a requirement that a legislature cannot be prorogued until it has dealt with (i e, accepted, rejected or deferred for further consideration) government's legislative agenda for a session, or providing for a minimum number of days every year when legislatures must conduct effective business must be considered alongside these recommendations. It will also be necessary to make provisions for doing away with the deliberative process in exceptional circumstances when time is of essence. When urgent legislation is necessary, some of the consultative (but not publication) requirements may, for example, be waived by the legislature through a resolution to that effect, before it can take up the urgent bill for consideration. Legislation passed without pre-legislative consultation may be brought before the legislature for a mandatory review after a specified time-limit.

These or other reforms may ensure that public debate precedes rather than (merely) follows legislative enactments. They may strengthen the state's capacity to draw upon the expertise and experiences of Indian citizens. They may, ultimately, help us take a few more steps towards evolving into a robust deliberative democracy.

NOTES

1 See Cohen and Sabel (1997:313). Generally this view was also echoed by the Select Committee on Modernisation of the House of Commons in the United Kingdom thus: "There is almost universal agreement that pre-legislative scrutiny is right in principle, subject to the circumstances and nature of the legislation. It provides an opportunity for the House as a whole, for individual backbenchers, and for the Opposition to have a real input into the form of the actual legislation which subsequently emerges, not least because ministers are likely to be far more receptive to suggestions for change before the Bill is actually published. It opens Parliament up to those outside affected by legislation. At the same time such pre-legislative scrutiny can be of real benefit to the government. It could, and indeed should, lead to less time being needed at later stages of the legislative process... Above all, it should lead to better legislation and less likelihood of subsequent amending legislation". Select Committee on Modernisation of the House of Commons, "First Report: The Legislative Process", 23 July 1997, HC 190 1997-98, para 20 (available at http://www.publications.parliament.uk/pa/cm199798/cmselect/cmmodern/190i/md0102.htm).

2 See, for example, Siddharth Varadarajan, "This Is No Way To Write a Law", *The Hindu*, 25 August 2010 (available at http://hindu.com/2010/08/25/stories/2010082553621200.htm).

3 See generally, Tarunabh Khaitan, "A Bill Designed to Fail", *The Hindu*, 19 May 2010 (available at http://www.thehindu.com/opinion/op-ed/article433182.ece).

4 Report of the Select Committee on the Prevention of Torture Bill, 2010, Rajya Sabha, 6 December 2010 (available at http://prsindia.org/uploads/media/Torture/Select%20Committee%20Report%20Prevention%20of%20Torture%20Bill%202010.pdf).

5 See generally, Tarunabh Khaitan, "Arresting Facts", 17 January 2010, *The Indian Express* (available at http://www.indianexpress.com/news/arresting-facts/411767/0).

6 Currently, Parliament routinely vests in the executive government the power to bring any Act into force on a day it may deem fit. There are a numerous enactments, including section 3 of the 44th Constitution (Amendment) Act 1978, which are still to be brought into force after decades of being enacted. Data compiled by PRS Legislative Research indicates that of the 497 central acts passed by Parliament between 1995 and 2008, as many as 190 left the enforcement of the Act to the discretion of the government. Of these 190 Acts, 5% were not brought into force in their entirety, while a further 9% were only partially enforced at the time of the study! "Commencement of Central Acts (1995-2008)", 3 February 2010. PRS Legislative Research (available at http://www.prsindia.org/administrator/uploads/general/ 1265278737~~NOTIFICATION%20NOTE-complete.pdf).
Such frequent exercise of this veto has very serious consequences for our scheme of separation of powers. This executive usurpation of legislative role is especially problematic in a context where a combination of the Westminster model, anti-defection laws, power to promulgate ordinances and coalition politics have already resulted in remarkably weak legislatures. While the discourse on the judicial usurpation of legislative power in India is a familiar one, the gradual empowerment of the executive at the cost of the legislature is not a story told often enough.

7 Data provided by PRS Legislative Research, available at http://www.prsindia.org/index.php?name=Sections&id=5&parent_category=&category=60&action=bill_details&bill_id=989

8 In the monsoon session of the Lok Sabha in 2010, the Indian Medical Council Bill was passed without any discussion, prompting a novel protest from the opposition parties. See, "When Lalu Became Prime Minister", *The Indian Express*, 20 August 2010 (available at http://www.indianexpress.com/news/when-lalu-became-prime-minister/662888/0).

9 C V Madhukar, "Bad Housekeeping", *The Indian Express*, 18 December 2010 (available at http://www.indianexpress.com/news/bad-housekeeping/726359/)

10 It may be noted that most standing committees that perform legislative functions in India are departmentally-related, i e, their work is organised on the basis of subject matter (such as defence, labour or railways). It may be useful to also have standing committees that scrutinise legislation on the basis of whether it satisfies certain objective constitutional, human rights or other standards, whatever the subject matter. Examples of such committees include the Joint Committee on Human Rights and the House of Lords' Constitution Committee in the United Kingdom.

11 Constitution of India, 10th Schedule, section 2. Disqualification on ground of defection – Subject to the provisions of paragraphs 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House – ...if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within 15 days from the date of such voting or abstention.

12 Even the main opposition parties are rarely consulted during the drafting process. See, Suman Jha, "Government Not Keeping Opposition on Board", *The Indian Express*, 15 April 2010 (available at http://www.indianexpress.com/news/govt-not-keeping-oppn-on-board-complains-bjp/606522/0).

13 Decision no CIC/SG/C/2010/000345+000400/8440, decided on 7 July 2010 (available at http://indiankanoon.org/doc/622425/).

14 This provision allows Information Commissions to make "recommendations for reform, including recommendations in respect of the particular public authorities, for the development, improvement, modernisation, reform or amendment to this Act or other legislation or common law or any other matter relevant for operationalising the right to access information."

15 This provision states that "If it appears to the Central Information Commission or State Information Commission, as the case may be, that the practice of a public authority in relation to the exercise of its functions under this Act does not conform with the provisions or spirit of this Act, it may give to the authority a recommendation specifying the steps which ought in its opinion to be taken for promoting such conformity."

16 Complaint no CIC/WB/C/2010/000120, decided on 30 August 2010 (available at http://www.indiankanoon.org/doc/93879/).

17 See "A Comparative Survey of Procedures for Public Participation in the Lawmaking Process: Report for the National Campaign for People's Right to Information", April 2011, available at http://denning.law.ox.ac.uk/news/events_files/A_Comparative_Survey_of_Public_Participation_in_the_Legislative_Process.pdf

18 Copies of the Official Gazette, which contains all official notifications from government, are currently available only on payment of a fee! See, http://egazette.nic.in/

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Parliamentarism, Not Presidentialism
Development and Democracy in India

SANDIPTO DASGUPTA

To opt for a parliamentary over a presidential form of government is arguably the most significant, yet under-analysed, decision made by the Indian constitution-makers. The conventional view is that parliamentarism was an obvious choice given the British colonial inheritance. However, parliamentarism, far from being obvious, was a counter-intuitive choice given the postcolonial agenda of state-led planned development, historically demanding an empowered executive branch most suited to presidentialism. As opposed to the maximalist and plebiscitarian tendencies of presidentialism, parliamentarism was a way to mediate the potentially conflictual cohabitation of mass democracy and planned development.

Sandipto Dasgupta (*sandipto.dasgupta@gmail.com*) teaches political science at Ashoka University, Sonipat, Haryana.

Arguably one of the most significant choices made by the Indian constitution-makers, in terms of the effects it has had on the subsequent development of the political and institutional life of the country, was to have a parliamentary, as opposed to a presidential, system of government. Yet, this aspect of our constitutional system has received far less scholarly or analytical attention from scholars compared to matters like judicial review, fundamental rights, or even the much later innovation of the basic structure doctrine. On the other hand, it has also been a frequent target of critique. Presidentialism has been offered as a solution to what those critiques view as the fractious dysfunctionality and inefficiency of the Indian political system. This article suggests that the choice of a parliamentary form of government should be viewed as a central piece of the kind of social and political order that the founders of the postcolonial regime sought to institute.

Rather than abstract institutional analysis, one needs to situate parliamentary democracy within the concrete historical context of the postcolonial sociopolitical vision. It was a crucial mediating institutional mechanism for the two most significant, and potentially destabilising, elements of that new order: deliberate state-led socio-economic transformation (often referred to in contemporaneous parlance as planned development), and mass democracy with a universal adult franchise. Analysing the choice of parliamentary government on these terms helps us situate parliament as the mediating terrain whereby developmentalism and democracy could facilitate and stabilise each other.

This, it should be clarified, is not an article that is making a causal claim. That is, it does not marshal archival findings to make definitive claims regarding the true "motives" or "intentions" of the constitution-makers regarding parliamentarism. Rather, the goal is to situate the choice of parliamentarism within the context of the larger project of transition from a colonial to a postcolonial regime, and suggest an analytical framework that could provide insights on the significance of the choice of a parliamentary rather than a presidential form of democracy.

Legacy of British Rule?

To have a parliamentary system of government was one of the first major decisions taken by the Indian constitution-makers regarding the nascent order they were charged with shaping. In one of the early joint meetings of the Union and Provincial Constitution Committees, in June 1947, the decision was taken that "it would suit the conditions of this country better to adopt a parliamentary system of Constitution, the British type of

Constitution, with which we are familiar" (Patel 1947). The last part of the statement suggests the reason for this decision, making it sound seemingly obvious that the Indians decided to go with the system they knew best, the one practised by the colonial rulers whom they were replacing. The simplicity of this explanation—an analytically trivial accident of history—is perhaps why that decision remains curiously under-analysed despite its centrality to the country's constitutional and political life.

It is indeed true that most postcolonial countries, at least initially, adopted the institutions of their former colonial rulers (Przeworski 2010: 64), though many former British colonies in Africa would later shift from a parliamentary to a presidential system. Indeed, it would be hard to deny that the example of the British system did provide a blueprint for the Indian constitution-makers. There was to be a President in India as a constitutional head of state, but, just like the British monarch, they would be bound to act on the advice of the cabinet. They would not have any say in the selection of the cabinet. Rather, the cabinet had to enjoy the support of the majority of the parliament at all times.

But, a simple story of institutional mimicry is complicated by the fact that, for many of the constitution-makers and Congress leaders, if British colonialism did indeed inspire the adoption of a parliamentary system of government, it was from an aspiration of breaking from it rather than mere affinity for the British form of government. Whatever hallowed place the parliament and legislatures occupied in the British constitutional imagination, the colonial government was a model of unfettered executive authority. The Viceroys enjoyed immense, nearly autocratic, power, and the functionaries of the Indian Civil Service—the famed steel frame of the empire as Lloyd George called them—were the face of the colonial government for most Indians for all practical purposes (Burra 2010). Even reformed late-colonial legislative bodies were powerless in both de facto and de jure terms.

The notion of "familiarity," supposed to explain why Indians adopted the parliamentary form of their colonial tutors, is complicated by the fact that at a practical level most of the Indian elites were acquainted with this distinctly anti-parliamentary, anti-legislature, state form. Indeed, those amongst the constitution-makers who were the most experienced in the matters of the state, gained such experience through either the executive branch as civil servants (N G Ayyangar, or B N Rau who, though not a member of the Constituent Assembly, was one of the most influential persons involved in the making of the Constitution), or ministers (G B Pant or K M Munshi), or through the judicial branch as successful lawyers (A K Ayyar). It was this familiarity that explained some of the continuities that the postcolonial regime shared with its colonial predecessor, including the fact that the Constitution borrowed heavily from the Government of India Act, 1935.

Parliamentarism, on the other hand, was a break from the putative "constitutional" structure of colonial rule. And, nationalist leaders, during the last decades before independence, explicitly framed it as such. Their consistent demand during the negotiations—all unsuccessful, to different degrees—over the series of Government of India Acts had been to demand an executive that was accountable to the legislature. Seen from this angle, the simple and, therefore, analytically trivial, explanation of parliamentarism as an expected legacy of British colonialism becomes more complicated. While the influence of the British constitutional system as an exemplary model in the minds of the Indian nationalist leaders should not be discounted, moving beyond the simplicity of the mimicry argument helps us focus on the other—and far more significant—aspect of the choice made by the those tasked with building a postcolonial regime.

Planned Social Transformation

To understand that aspect, we need to first acknowledge that the constitution-makers were not operating with a tabula rasa, choosing a parliamentary against presidential form on the basis of some abstract principles or comparing their theoretical merits or demerits. Their decision was situated within a historically specific set of challenges that confronted the founders of the postcolonial Indian regime. For the purpose of the topic that concerns us in this article, the two central themes of that problematic were state-led socio-economic transformation and mass democracy.

Decolonisation was not merely a political, but also an economic question. From the late 19th century, colonialism was viewed in the nationalist circles as not only robbing Indians of political self-determination, but as actively impeding the development and growth of the Indian economy (Spengler 1971; Goswami 2004). By the late 1930s, there was a consensus amongst the major political and economic actors in India—with the highly significant but ultimately marginalised exception of M K Gandhi—that there needs to be a concerted and planned effort to develop the Indian economy with the active support and direction of the state (Dasgupta 2017). In the more well-known instances of state-directed economic transformation, for example, in Germany under Bismarck, or the Soviet Union under Stalin, such programmes had been undertaken under conditions of either no or highly restrictive democratic participation.

In postcolonial India, on the other hand, the aspiration was to realise it under a condition of mass democracy with universal adult suffrage. The significance of parliamentarism in the Indian constitutional design could be understood at this aspirational intersection of social transformation and democracy. As the rest of the article would argue, the question was not to somehow engineer merely a non-conflictual coexistence between mass democracy and planned development. Rather, they were viewed as mutually constitutive of each other's viability. Each of these two novel elements in India's political and socio-economic life introduced by the transition from colonial to postcolonial order, each marking a major break from the colonial past, required the other. Parliamentarism was a way of facilitating this constitutive process, thereby engendering a particular notion of both social transformation and democracy.

Shaping the Social Transformation Agenda

Understood from the point of view of a major and necessary agenda of socio-economic transformation, the choice of the parliament with its many parties and many voices is far from an obvious one. One could argue that the inherent institutional unity of the presidential system was far better equipped to handle the complex task of managing a planned transformation. Historically, such state-led transformations have tended to be helmed by a powerful single leader, a plebiscitary President, or at the very least have led to the expansion of executive authority. Therefore, let us first consider what led the constitution-makers to reject the option of a presidential form of government.

For the constitution-makers, presidentialism could take one of two forms. The first was that of a unitary presidential government, unencumbered by a legislature with any meaningful powers to check it. Such a system provided the benefit of coherent centralised decision-making coupled with the necessary powers to translate those decisions into actions effectively and without institutional delays. At the same time, it resembled two recent experiences which the constitution-makers wanted to avoid: the viceregal autocracy under colonial rule and the dictatorships of the mid-20th century.

While the Indian constitution-makers' views on the subject were conditioned through their reaction to recent historical memories, recent studies have shown that there might be a more general truth to an adverse relationship between a powerful presidency and the endurance of democracy vis-à-vis parliamentarism (Przeworski et al 1996). However, it was not just an attachment to "democracy" as an abstract value that turned the constitution-makers away from systems that would engender an omnipotent leader. It was the acknowledgement that such a leader might in the end be less able to perform the task of stably helming the project of social transformation under a condition of universal franchise, a point that I will return to later in this article.

A second and more democratic version of presidentialism was identified by the Constituent Assembly as the "American system," that is, as one of the co-equal branches within a system of separation of powers. While this avoided the danger of executive autocracy, the problem with this form was precisely what the proponents of separation of powers had sought to achieve in the 18th century: slowing down the decision-making and implementation of state actions. The possibility of a divided government brought about by a stand-off between the legislature and the executive was too much of a risk under a condition where the urgency and ease of state intervention was imperative. As A K Ayyar (1948) stressed, India "cannot afford, under modern conditions, to take the risk of a perpetual cleavage, feud, or conflict or threatened conflict between the Legislature and Executive." In other words, if the first version of presidential government ran the danger of creating a leader who was too strong, the second version veered towards creating a head of government who was too constrained.

These objections seem straightforward enough in abstract terms. However, left just at an abstract level, they also seem contradictory, leading to the constitution-makers seeming confused about their preference for too strong or too constrained an executive. But, their deliberation on this topic was not framed as an abstract theoretical choice on the spectrum of weak to strong executive power, but grounded in a particular view as to how the developmental agenda could be mediated through a constitutional structure. The crucial characteristics of "effectiveness" and "constraint" that they were in search of only become comprehensible within that particular framework.

In the transitional moment of decolonisation, there was no immediate definable crisis, nor was there a plan of action to be enforced post-haste. To put it in another way, it was not a condition of emergency. Rather, the situation in India was "dynamic and fluid," to use Jawaharlal Nehru's words, with potential sources of instability which required a continual process of deliberate interventions. Such a process called for adjustments, calculations, and negotiations regularly and relatively swiftly. A parliamentary system was much better adapted to such moves. In his comparison between presidential and parliamentary systems, B R Ambedkar (1948) noted that, while presidentialism might provide more "stability," parliamentarism provides more "responsibility;" the reason being that in a presidential system, "the assessment of the responsibility of the Executive is periodic. It is done by the Electorate" (Ambedkar 1948). A President for a fixed term can only be forced to make changes to their agenda through elections after a fixed period. The stability of the President—the security of the fixed term—is bought at the cost of potential rigidity, with no inherent mechanism that can force them to make adjustments to changing situations, the only constitutional recourse being periodic electoral reversals. As Juan Linz (1990) has written, "Flexibility in the face of constantly changing situations is not presidentialism's strong suit."

In contrast, Ambedkar (1948) argued, under a parliamentary system, "the assessment of responsibility of the Executive is both daily and periodic." This "daily" assessment "is done by members of Parliament, through questions, Resolutions, No-confidence motions, Adjournment motions and Debates on Addresses" (Ambedkar 1948). Parliamentary processes have inbuilt mechanisms for negotiations, bargaining, formation and shifting of coalitions, feedback, and even removal of executive functionaries. Most importantly these mechanisms are available for use almost continuously and are suitably low key, not requiring the mobilisation of nationwide elections to achieve their aims. For the task of complex management of the transformational agenda, without generating a great degree of popular political volatility and tension, such mechanisms were both more "effective" and "necessary" (Ambedkar 1948).

Beyond the flexibility for regular course correction that it offered, an executive institutionally accountable to the parliament stabilised the democratic agenda in yet another way. Each member of Parliament, in a first-past-the-post system, played a dual role as the representative of a territorially particular constituency as well as a member of the legislative body tasked with determining law and policy for the entire country. Ideally, their ties to the constituency would make them the spokesperson for various regional or group demands. The need of the executive to enjoy the continual support would force it to tailor its agenda to either satisfy the plurality of such demands or at the least ensure consent. This created an inherent mechanism for garnering a substantial level of input, accountability, and consensus regarding the transormational agenda, thereby increasing its stability and legitimacy.

Shaping Democratic Practice

If the parliamentary form was viewed as the mechanism by which the social transformational agenda could be shaped, it was also meant to facilitate the reverse, that is, shaping the nature of the nascent mass democratic process and the way demands were articulated regarding that transformational agenda. The most common theme of concern regarding the institution of universal franchise was not that of majoritarianism or property, which one would expect from a history of Western democratisation. Rather, it was that of education (Misra 1949; Rao 1949; Rasul 1949). At an obvious level, one can view this as a reference to a population of which more than three-quarters did not know how to read and write, let alone have had a formal education.

But, it was not merely the logistical challenges of conducting elections under those conditions to which the Constituent Assembly was referring. Rather, what education meant in this context was proper training in how to be a citizen of a constitutional democracy. "We have to consider whether the sudden expansion of the franchise that will be brought about by adult franchise will be helpful to the development of democratic ideas and that sense of discrimination and restraint on which the successful exercise of democracy depends," worried the liberal H N Kunzru (1949). "This system would only succeed if effective measures are taken immediately to educate the people of India for citizenship," warned Begum Aizaz Rasul (1949). Parliamentarism, from another perspective, could be viewed as the institutional arrangement which sought to create a mechanism for such education. This point is also best illustrated in contrast with the presidential system.

Some Constituent Assembly members suggested that while the President's powers might be limited, they should still be elected by a popular vote. Nehru strongly opposed this proposal. The explicit basis of his opposition was a rather unconvincing logistical point that it would be "an extraordinary expense of time, and energy, and money" to hold yet another election simultaneously with the parliamentary elections (Nehru 1947). But, in making his case to the Constituent Assembly, he offered a glimpse of a much more important anxiety. Having a President elected by the whole population, but still denying them any "real powers" might become an "anomaly" (Nehru 1947). The worry was that a directly elected President can claim a competing source of legitimacy to the parliament, if not immediately, then in due time. Under normal circumstances, this would bring back the problem of divided governments that the Constituent Assembly sought to avoid. In extraordinary circumstances, which was not an implausible scenario given the variegated social condition undergoing a transformation (or the failure of the transformation to meet its promise), that competing claim could overwhelm the parliament's own legitimacy.

Carl Schmitt's contrast between the nature of the presidency and the parliamentary claims to legitimacy, illustrated at the eve of the crisis of the Weimar constitution, could serve as an illustration of this danger. "A presidential election" wrote Schmitt (2008), "would be more significant than any of the many elections in a democratic state." As opposed to a cabinet that holds the confidence of only a "shifting and unreliable coalition" in parliament, "the president, by contrast, has the confidence of the entire people not mediated by the parliament splintered into parties" (Schmitt 2008). In the foreseeable situation, with popular frustration with the nature and pace of transformation, a people "impatient to govern themselves" could seek to do so through the person of a plebiscitarian President (Ambedkar 1949). The President, by virtue of being elected by the entire population, could posit themselves as the exemplary representative of the people, above and against the institutional mechanisms of the constitution. Above and against the fractious social sphere, they could claim to embody the unity of the nation in their person and their person alone.

The dangers of a plebiscitarian presidency were particularly acute in the Indian condition for two reasons: one was with the dynamics of institutional power, and the other with political theology. With regards to the former, the President would have been in control of both the administrative apparatuses of the state. These were the main protagonists of the transformational agenda. Their control of that would make them an obvious focal point of that agenda, and make the presidential election a far more meaningful one than the parliamentary one. To borrow a distinction suggested by Karl Marx in the slightly different context of *The Eighteenth Brumaire of Louis Bonaparte* (1852), the President would enjoy the "actual powers" of the state as opposed to the "moral power" of the parliament. With regard to the second reason, the role of the parliament was to carefully craft a unified whole out of the diversity through constitutional means and complex negotiation.

Unity as Identity

Given the obvious difficulty of that task, the President could make a much more simplified claim of unity as identity, where the unity of the nation could be embodied in their singular person. Furthermore, in the place of a managed revolution mediated by the constitution, they could claim to embody the revolution denied. With the project of managed transformation failing to keep to its original ambitious promise two decades after the making of the Constitution, Indira Gandhi would make a plebiscitary claim using elements of both these themes: promising a more efficient process of transformation while her acolytes proclaimed that "Indira is India."

These sorts of plebiscitary claims would have been directly contrary to the aspiration of development mediated by the Constitution, whereby the institutional architecture erected by the Constitution would subsume and mediate the transformational aspirations. It would tear apart the merging of transformational ambitions and constitutional structure that the Constituent Assembly was attempting to craft, giving rise to possible claims that the former could only be satisfied outside the confines of the latter. Against such a possibility, it had to be made absolutely clear, as A K Ayyar (1948) did, that "the word 'President' used in the Constitution merely stands for the fabric responsible to the Legislature." In rejecting the provision for a directly elected president and giving them any meaningful power, the constitution-makers sought to foreclose a plausible, but undesirable, path for such a claim inherent to the design of the Constitution itself.

Instead of a competing and potentially plebiscitary outlet, the constitution-makers sought to ensure that the political energy unleashed by universal franchise and heightened by talks of social transformation would be focused exclusively on the parliament. As Nehru (1947) explained, the absence of a presidential election was "to emphasise the ministerial character of the Government that power really resided in the Ministry and in the Legislature and not in the President as such." There should be no scope of doubt in the minds of the people that the real power for effecting the transformational agenda lies with the legislature, and the consequent battles needed to be fought on that particular terrain and on its specific terms. As those terms had an inherent space for negotiation, bargaining, and coalition formations, it meant that political contestations would be shaped accordingly, rather than through all-or-nothing extra-institutional gambits. The hope was that this would work both in terms of institutional incentives as well as a pedagogy of democratic contestation. The latter was analogous to Nehru's hope, expressed elsewhere, that development planning would help people structure and discipline their thinking about economic transformation.

The language of development and the institutional form of parliament were the two—not perfect, but deemed the most effective—ways in which varied forms of dissensions and dissatisfactions arising out of the social sphere could be organised, and subsequently be managed, controlled, and addressed. Its value lied in its ability to avoid two different kinds of dangers: the inability of social unrest finding any path to the ears of the administrators and thereby growing into an extraconstitutional insurrection, or the claim of absolute embodiment of the whole nation by any single individual or coterie.

The Congress as a Party

Our analysis of the parliamentary nature of the constitutional structure would be incomplete without considering how the specific nature of the Congress as a political party made possible this particular institutional arrangement for social transformation under a condition of mass democracy. The Congress was not a party that was dependent on the charisma of any single individual or the allegiance of a single class. Its widespread local organisational network, tested techniques of electoral mobilisation, and its fragile, but nevertheless unparalleled, legitimacy as the party of the nationalist movement meant that it could credibly hope to build a coalition amongst different groups around the process of a deliberate social transformation. The legislature was the ideal institutional space for such coalitional ends, both in terms of managing and maintaining them, as well as providing the space for different groups to participate in them, even if contingently or partially.

In another hindsight-induced reflection, one can refer to Sudipta Kaviraj's observation that while Indira Gandhi won elections with a larger share of the votes than Nehru, the latter was able to garner a far wider social base for his government and, hence, had a more effective capacity for manoeuvring than what the former could manage through her plebiscitarian mandates (Kaviraj 1986).

Along with the particular nature of the Congress as a party that was uniquely suitable for a parliamentary form, its confidence in garnering a certain level of popular support, at least in the medium term, without having to worry about a serious opposition force, was also significant. At the time of independence, the most significant challenge to the Congress could come from its left, from the ideologically diverse and organisationally dispersed groups, ranging from agrarian socialists to the Communist Party of India. None of them could provide a credible challenge to the Congress's electoral capability, and the Congress remained confident of being able to incorporate (or at least successfully negotiating with) the potential constituencies of those parties within its fold. This confidence would have been crucial to the perusal of a parliamentary form of government, which, while allowing oppositional parties a relatively easier access to state power, also opens up possibilities of co-options. A more serious or immediate challenge to the Congress's status as the presumptive party of governance could have made presidentialism more attractive as it offers better immediate security against the opposition's access to power, while at the same time providing more of a reason for them to pursue an openly confrontational path and make co-optation harder.

Conclusions

This analysis of the choice of parliamentary government made by the Constituent Assembly is not meant as a broad defence of that choice in particular, or the constitutional structure itself in general. Instead, it is an invitation for an assessment of the parliamentary form of government that is grounded in the particular socio-historical constellation of the transition from the colonial to the postcolonial order. Such a historicisation allows us to evaluate competing claims of a presidential versus a parliamentary form of government in India, not through some abstract institutional cost–benefit analysis, but in the context of the developmentalist project that constituted the postcolonial regime formation. It allows us, in other words, to connect the institutional arrangements established by the Constitution with concrete sociopolitical developments.

By way of a conclusion, we can mention two such paths of analysis that such a historicisation of the parliamentary form of democracy facilitates. The first is to consider the relationship of parliamentary democracy as an important factor in explaining the trajectory of socio-economic development in postcolonial India. For example, one can critique the envisaged relation between social transformation and democracy mediated by Parliament, as outlined in this article, by showing how the project of meaningful social transformation was thwarted precisely by the ability of local elites to control the paths to electoral power. This point has been made in the works of Ronald Herring (1983) and Atul Kohli (1987), in their different ways, vis-à-vis land reform, arguably the most significant of all social transformative agendas in the initial decades after independence.

In a similar vein, one could analyse how the assumption that a robust democratic process that will successfully translate popular aspiration to the corridors of the state could not be achieved merely through an institutional arrangement, required an engaged political movement which the Congress had no intention of providing in the initial years, and, not unrelatedly, had no ability to lead in the more recent past. One could also suggest that the paths of co-optation engendered by the parliamentary system compromised the ability or willingness of the left (understood broadly) to voice an organised and unified vision of an alternative social order. Each of these claims would need to go further than the role of a parliamentary form of government, since no institutional arrangement can carry that much explanatory weight. However, it illuminates the ways in which institutional choices shape and constrain the trajectory of subsequent political developments.

The second path of analysis brings us back to the ascending fortune of presidentialism—both in terms of arguments as well as actual political practice—with which this article began. The choice of parliamentarism at the moment of postcolonial transition can be comprehended as being grounded in a certain project of creating a coherent whole out of the actually existing divisions in Indian society. The Congress elite had sufficient confidence in their own legitimacy and organisational capability to facilitate flexible paths of contestation and negotiations between diverse interests through which a "developmental" project could be crafted to realise a unified postcolonial Indian polity.

The waning fortunes of the parliamentary form—not just in name but in spirit—can be linked to the exhaustion of the initial postcolonial developmentalist project. The limits of such a negotiated and coalitional developmentalist project to realise its ambitious social transformative agenda was apparent after the first two decades of independence (Kaviraj 1988). It is in view of this limit that one can understand Indira Gandhi's challenge to the coalitional model of parliamentary government (and, for that matter, that of the Congress party organisation). Instead, she posited herself in the model of the plebiscitarian leader, seeking to represent the masses over and above the multiplicities of parliamentary representation. The voters were invited to vote for her, no matter which individual candidate appeared on the ballot. Her rhetoric was still that of developmentalism. The difference being, as opposed to the constitution-makers, she claimed that the aspirations of postcolonial development could only be addressed by a strong centralised leadership unencumbered by the fractious logic of coalitions and negotiations.

What Indira Gandhi inaugurated was a form of presidentialism by proxy. The institutional arrangements still remained that of a parliamentary democracy, but both the political rhetoric and the operations of the government functioned on the basis of a personalised claim of unitary representation. No other political figure, since her, has been able to reproduce this at the national level. Many did so at the provincial level, especially as heads of regional parties, from Bengal, to Tamil Nadu, to Andhra Pradesh. At the national level, in the decades following Indira Gandhi, the implicit coalitional logic of parliamentary democracy was actually made explicit. Only history allows us sufficient hindsight to make an accurate judgment. But, one can argue that the current government has succeeded in reproducing presidentialism by proxy at the national level. There is a claim of Prime Minister Narendra Modi making a sort of unitary personalised claim of representation that goes above and beyond both the diverse constellation of Parliament and even his own party.

There is, however, a significant distinction between Indira Gandhi and Narendra Modi. The political ideology of the BJP—and the right-wing current in Indian politics more broadly—is more inherently sympathetic to the presidential form. As simple political mathematics would show, even at the current apex of its political fortunes, the BJP does not enjoy the kind of wide social base that the Congress did at the moment of the postcolonial transition. Neither does their language of legitimation, that of Hindu nationalist solidarity, have an inherent need for the logic of coalitions and negotiations that the language of postcolonial developmentalism adopted by the Congress did (as discussed earlier in this article).

In the context of these two distinctive features, there is more of an inherent affinity between the political vision of the BJP, and a model of representation that allows for a less differentiated unity, rather than a coalitional one. The aspiration is to transform, through the magic of representation, the extensive diversity of Indian social life into a resolute unity. The institutional form most suitable to such representational transformation is presidentialism, with the personal unity of the leader claiming to embody the unity of the nation. Hence, both the subtle shifts to a de facto presidential practice of politics, as well as claims for constitutional change to a presidential form of government at this moment should be understood as an extension of this political vision.

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The Supreme Court as a constitutional watchdog

TARUNABH KHAITAN

DEMOCRACIES seek to insulate judges from external pressures, whether political, monetary or otherwise. Unlike other state institutions, judges are not accountable either to the electorate or to other institutions. They do not have to stand for elections, nor are they answerable to anyone for their judicial decisions. This insulation is designed to ensure that they remain free and fearless in delivering their judgements in accordance with the law.

A lack of institutional accountability, however, does not mean an absence of all checks on the judiciary. The key manner in which judges are held accountable is by the requirement of clear, public, legal reasons that their judgements must contain to justify the outcomes they have reached in a given case. Furthermore, a judge must usually arrive at her judgement after hearing the parties to the case in public. In her judgement, she must record these arguments and explain why she is accepting some of arguments and rejecting the others. Her reasons have to be legal – she needs to cite all relevant constitutional provisions, statutes, rules, principles, past cases, and sometimes academic commentary and judgements of foreign courts, and *then* decide the merits of the arguments of both sides *under law*.

A Member of Parliament, by contrast, is not obliged to give any public reason for why she voted for a bill or against it. Her reasons may be legal: for example, she may think that the bill is unconstitutional. But she may also be motivated by other factors – that a majority of her constituents want her to act that way, or that her party asked her to vote so, or that her religion demands that she oppose the bill, or for no reason at all. Reason giving is good for public institutions – all such institutions must give public, non-sectarian reasons for their decisions. However, only judges are *obliged* to do so – in writing – simply by virtue of their holding judicial office.

It is based on these public, legal reasons recorded in judgements that a judge may be criticized by the legal

* I am grateful to Gautam Bhatia and Anuj Bhuwania for their helpful comments. Any mistakes, however, remain mine.

academy or the bar, and her judgement may be set aside by an appellate court if her reasons are found wanting. Reason-giving is a key mechanism for judicial accountability in a democracy – it is the only internal check that makes it palatable for citizens to submit to the authority of the judiciary. Any court that routinely and systematically fails to give adequate, and legally justifiable, reasons for its judicial decisions is in serious danger of jeopardizing its legitimacy.

Given all that is expected from a reason-giving court, it shouldn't surprise us that adjudication is a thoughtful, demanding, time-consuming, process. It does not admit to muddling through. It requires careful deliberation, rather than instinctive reactions or quick rule of thumb decisions. It is for this reason that proper case management, which ensures that the judicial workload remains feasible, is not simply a matter of efficiency, but goes to the root of the integrity and the legitimacy of the adjudicatory process. If an overburdened court starts doing a bad job of legal reasoning, the very point of an insulated, protected, institution like the judiciary comes into question.

A lower court failing to properly reason its judgements is bad enough – sometimes the very lives of the litigants are at stake. For an appellate court to do so is worse – not only do the litigants suffer, but when an appellate court decides a case, its ruling joins the body of the law of the land, with bad implications for innumerable future cases for which it acts as a precedent. What is even worse is if this institution also has, as its main purpose, the protection of key constitutional norms such as human rights, democracy, the rule of law, separation of powers, and other such values, its distraction by other – less weighty – matters imposes a heavy opportunity cost on the system. Some jurisdictions create two separate courts, one with the role of the final appellate court and another to act as a constitutional court. The Indian Constitution does not. Instead, it combines the two functions in the same institution – the Supreme Court of India ('SCI').

It is in this context that we should see the debate over judicial delays in India, including the high levels of pendency in the SCI. The problem of delay is seen largely as an infrastructural problem, including the inadequacy of the number of judges available. The recent enactment to further increase the number of judges on the SCI from 31 to 34 judges is a familiar attempt to fix the problem. There is considerable truth in this diagnosis, but it ignores other – structural – issues which also need attention. The question of the appropriate number of judges necessary in the apex court must be addressed alongside a re-evaluation of the different functions the SCI has, its past and recent record in discharging those functions, and its overall quality as an adjudicating body.

In this paper, I will argue that as an apex court, the SCI has adopted a skewed approach to its appellate and constitutional functions, spending a far greater proportion of its institutional resources on its appellate function and far less time and judicial energy in performing its constitutional defence role. Furthermore, as a judicial body, it adopts a largely cavalier attitude to reason-giving, which makes the law uncertain and exacerbates the problem of pendency. Far greater judicial discipline and fidelity to the law is necessary to address the growing crisis of legitimacy of the SCI.

Compared to other apex courts in liberal democracies, the SCI is highly eccentric, and arguably the world's most powerful apex court. Its power to seriously impact the lives of a billion-plus Indians (and others, through its significant influence over other judiciaries in the global South)[1] is greatly enhanced by the following features: first, the SCI is a uniquely interventionist 'good governance court', known for its proverbial indifference to the separation of powers. Actively intervening in affairs of policy, it has made decisions of far-reaching import in the areas of housing, environment, food security, corruption, transparency, sexual harassment, urban pollution, forest rights, and economic policy.[2]

Second, the Constitution gives it the power to strike down unconstitutional parliamentary statutes and executive acts. The SCI, through judicial interpretation, has also acquired the power to strike down constitutional amend-

1. A. Thiruvengadam, 'Global Dialogue Among Courts', in C. Raj Kumar and K. Chockalingam (eds.), *Human Rights, Justice, and Constitutional Empowerment.* Oxford University Press, 2007; A. Thiruvengadam, 'Revisiting the Role of the Judiciary in Plural Societies (1987): A Quarter-Century Retrospective on Public Interest Litigation in India and the Global South', in S. Khilnani et. al. (eds.), *Comparative Constitutionalism in South Asia.* Oxford University Press, 2012.

2. See N. Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court', *Washington University Global Studies Law Review* 8(1), 2009, p. 1; M. Khosla, 'Making Social Rights Conditional: Lessons from India', *ICON* 8, 2010, p. 739; S. Shankar, *Scaling Justice: India's Supreme Court, Social Rights, and Civil Liberties.* Oxford University Press, 2012, p. 149 and p. 154; V. Gauri and D. Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World.* CUP, 2008; L. Rajamani and A. Sengupta, 'The Supreme Court of India: Power, Promise, and Overreach', in N. Jayal and P.B. Mehta (eds.), *The Oxford Companion to Politics in India.* Oxford University Press, 2010; B.N. Kirpal et. al. (eds.), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India.* Oxford University Press, 2001; A. Thiruvengadam and P. Joshi, 'Judiciaries as Crucial Actors in Southern Regulatory Systems: A Case Study of Indian Telecom Regulation', *Regulation and Governance*, May 2012, p. 1.

ments if they violate the constitutional 'basic structure'.[3] These are remarkable powers for an unelected court. Third, the SCI is fiercely protective of its institutional primacy in judicial appointments. On a strained interpretation of the Constitution, it gradually appropriated the power to appoint its own judges during the 1980s and the 1990s. In 2015, it struck down a constitutional amendment seeking to transfer the appointment power to a committee comprising judges, politicians and members of civil society on the ground that it interfered with judicial independence.[4]

These features should make it abundantly clear that the SCI is an important court. One would expect such a key judicial institution to be scrupulous in its adherence to the norms of judicial propriety. Unfortunately, however, that is not the case when it comes to reason-giving. Unlike many other apex courts, not all judges of the SCI sit to decide each and every case together. Instead, individual cases are allocated to smaller benches of various sizes. A vast majority of its cases are decided by benches with two or three judges. Relatively speaking, a handful of cases go to a five-judge bench. A bench larger than five judges is convened only if the correctness of an older case is under consideration, which can be overruled only by a bench larger in size than the one that originally decided the case. The maximum number of judges who have sat on a case until now has been 13.

The SCI's approach to legal reasoning and interpretation – especially in judgements delivered by small benches of two or three judges – is astonishingly undisciplined. Relevant, even binding, precedent is far too often simply ignored. Relevant legislative or even constitutional provisions are sometimes not even discussed in the judgement. Arguments made by parties are sometimes not recorded in the judgements, and occasionally – it has been alleged – even misrecorded.

An excellent recently published empirical study shows that a vast majority of the SCI's judgments neither cite previous cases, nor are they cited by later cases.[5] All too frequently, the actual prayers of the litigants are ignored, and the court gives orders that no party before it prayed for – sometimes against persons who weren't even heard by the court.[6]

The SCI often acts as a *panchayat* of wise men (for most of our judges are, alas, men) rather than as a court of law.[7] In addition, the constitutional injunction that important constitutional issues must be heard by a bench of at least five judges is more or less ignored in practice.[8] The strain was dramatically felt in 2013, with an astonishingly poorly reasoned judgement of a two-judge bench of the SCI – issued several months after the conclusion of the hearings, and on the last day before the retirement of the presiding judge – that overturned a High Court decision and recriminalized homosexual acts between consenting adults.[9] It took another five years for a five-judge SCI bench to overrule its previous ruling, while describing the reasoning of the 2013 bench as 'perverse',[10] 'highly unsustainable',[11] 'retrograde',[12] and 'fallacious'.[13]

One can, no doubt, criticize the judgements of a court based on its effects on parties, or the justice of the outcome, or on ideological grounds.[14] The problem with the SCI's inability to reason properly does not flow from such thickly normative criticism (not that such criticism is illegitimate). Instead, it is a *thinly* normative criticism of the institution based on rules that apply to it simply by virtue of being the type of institution it is.

An analogy would be if we were to evaluate an (anthropomorphized) knife. In a thickly normative sense, a knife is a 'good' knife if it cuts bread or vegetables, whereas a 'bad' knife cuts people. In the thin sense, however, a 'good' knife is one that is simply fit for the purpose of cutting – whether it has the right sort of blade (sharp, serrated etc), whether it has a handle to hold it safely and so on. The SCI's inability to reason properly in all the

3. *Kesavananda Bharati* v. *State of Kerala* (1973) 4 SCC 225; S. Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*. Oxford University Press, 2011.

4. *Supreme Court Advocates-on-Record Association and Another* v. *Union of India* (2016) 5 SCC 1.

5. A. Green and A. Yoon, 'Triaging the Law: Developing the Common Law on the Supreme Court of India', *Journal of Empirical Legal Studies* 14(4), 2017. See also, G. Bhatia, 'The Aadhaar Judgment and the Constitution – I: Doctrinal Inconsistencies and a Constitutionalism of Convenience', *Indian Constitutional Law and Philosophy*, 28 September 2018 at https://indconlawphil. wordpress. com/2018/09/28/the-aadhaar-judgment-and-the-constitution-i-doctrinal-inconsistencies-and-a-constitutionalism-of-convenience/ (last accessed 14 Feb 2015).

6. A. Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India*. CUP, Delhi, 2017.

7. C. Chandrachud, 'Constitutional Interpretation', in S. Choudhry et. al. (eds.), *The Oxford Handbook of the Indian Constitution*. Oxford University Press, 2016.

8. Article 145, Constitution of India. See also, N. Robinson, 'Bigger Bench Please', *Indian Express*, 8 June 2012 at http://www.indian-express.com/news/bigger-bench-please/959194/ (last accessed 14 February 2015).

9. T. Khaitan, '*Koushal* v. *Naz:* Judges Vote to Recriminalise Homosexuality', *Modern Law Review* 78(4), 2015, p. 672.

10. *Navtej Singh Johar* v. *Union of India* (2018) 10 SCC 1 at p. 637.

11. Id., p. 184.

12. Id., p. 637.

13. Id., p. 268.

14. See, for example, M. Suresh and S. Narrain (eds.), *The Shifting Scales of Justice: The Supreme Court in Neo-Liberal India*. Orient Blackswan, Delhi, 2014.

cases it decides is 'bad' in this thin sense – it fails, by its own institutional logic, to act as a fit and proper judicial institution. It functions as a 'bad' knife which is too blunt to cut properly, or too rusty to handle safely. Failure to address this lacuna, sooner or later, is going to seriously compromise the legitimacy of the institution.

What, then, explains the SCI's abysmal record – especially when sitting in benches of two or three judges – as a reason-giving court? While there are some legitimate questions about the quality and merit of some of its judges, that is not the only problem. After all, the same judges, when sitting in benches of larger sizes, often become quite capable of producing reasoned judgements. The inability to *consistently* at least attempt to give good reasons stems from factors that are, at least in large part, institutional and systemic, rather than personal.

The key structural factor that impedes the SCI from acting as a judicial institution is its superlatively large docket by the standards of any court, let alone an apex court. In a recent representative year (2013), 76,742 new cases were instituted before the SCI. It disposed of a total of 77,085 cases during that year, and 66,349 cases remained pending at the end of the year to be carried over to future years.[15] Given India's billion-plus population, the per capita litigation before the SCI may well be very small. However, in absolute terms, the number of cases passing through a single judicial body (now with a sanctioned maximum strength of 34 judges, including the Chief Justice) is staggering.

The docket of the SCI comprises 'admission matters' and 'regular hearing matters'. Admission matters are those cases which the SCI must decide whether to admit for a regular hearing. These constitute the bulk of the docket of the court, which spends two of every five working days every week determining admission matters. The remaining three days of the working week are spent on regular hearings. In 2011 alone, the SCI decided some 47,000 admission matters, of which 9,070 were admitted for regular hearing.

Anecdotally, members of the Bar claim that the admissions process in the SCI is pretty arbitrary. Each SCI admissions bench (of two or three judges) typically decides between 30 and 60 admissions matters in a day, with hearings often lasting less than a minute for a case. Judges do not give any reason for accepting or rejecting a petition (the scale makes that a very difficult task indeed). The prospects of a proper application of even the best of human minds in such a fast moving assembly line of cases is anybody's guess. Practicing lawyers claim that the judges inevitably draw upon proxies to decide whether to admit a case, most important of which is the presence of a senior advocate in an admissions matter. If true, the clear implication is that whether a case will be admitted for regular hearing or not depends on whether a litigant can afford a senior advocate to make her case before the court.

The problem of the voluminous docket is, in large part, the making of the SCI itself. In particular, it is down to the court's remarkably liberal invocation of its 'special leave' jurisdiction, which allows appeals from any court or tribunal in the country to be placed directly before the Supreme Court (under Article 136 of the Constitution). In practice, most of these appeals come from High Court judgements. The special leave jurisdiction was intended by the Constitution-framers as a residual jurisdiction that was to be invoked only in the most exceptional cases.

Robinson shows that in 2011, 84.6% of the court's admission docket sought to invoke this special jurisdiction! Readers should note that there is a separate constitutional procedure for invoking the SCI's 'writ' jurisdiction, which concerns alleged breaches of constitutionally guaranteed rights; not to mention certain constitutionally and statutorily guaranteed specific appeal rights. The right to directly approach the SCI for a fundamental rights violation is itself guaranteed as a fundamental right under Article 32. Robinson shows that only 1.8% of the admission docket in 2011 included cases which sought the protection of a constitutionally guaranteed fundamental right under the SCI's writ jurisdiction.

The share of writ petitions in the admissions docket in 1985, by contrast, was 41%.[16] So, the exponential increase in the SCI's workload has very little to do with the protection of fundamental rights. Rights cases make up only a tiny part of the docket of the court today (in admissions as well as regular hearing dockets). The bulk of the court's time is taken up by its supposedly exceptional special leave jurisdiction, which usually does not concern constitutional matters.

The SCI spends most of its time dealing with legally and constitutionally less important disputes, often admitted for regular hearing by overworked and time-poor judges. A large scale empirical study that I am currently finalizing for publication categorically confirms that senior advocates have a massive docket-distorting role during admission hearings in the SCI. An excellent study by

15. The Supreme Court of India, Annual Report, 2014, at 79.

16. N. Robinson, 'A Quantitative Analysis of the Indian Supreme Court's Workload', *Journal of Empirical Legal Studies* 10(3), 2013, p. 570 and p. 584.

Rahul Hemrajani and Himanshi Agarwal, recently published in the *Indian Law Review*, finds that the SCI spends a mere 93 seconds, or 1.55 minutes, to decide the median civil SLP.[17] It shouldn't surprise us that the SCI judges are left with no time to carefully consider and express their reasons for giving their judgements, except in the few highly salient cases involving a bench of five or more judges. Smaller benches not only spend most of their time on less important cases, they also do a bad job in these cases (at least in terms of reasoning to justify the outcome). And while larger benches tend to be relatively better at reasoning, habits learnt while sitting on smaller benches can often be seen afflicting their quality too. The expansive special leave jurisdiction imposes a heavy opportunity cost on cases concerning fundamental rights and other constitutional values, whose protection is the primary responsibility of the apex court.

What's worse, a massive docket leading to poor reasoning across the board creates a vicious cycle. Poorly reasoned cases, often in ignorance of established precedents, create legal uncertainty. In most legal systems, there is a bulk of settled law which give a clear answer to how a court is likely to decide the dispute. In systems where courts strictly follow precedent, lawyers advise their clients that going to court is likely to be a waste of time, encouraging them to settle the matter out of court in light of the law. Only those cases end up in courts whose outcomes are uncertain, or when a litigant mounts a rare challenge to seek to overturn settled law (the likelihood of success in such cases is slim, and the process typically very expensive).

In India, however, poorly reasoned decisions create multiple, mutually contradictory, precedents. The share of settled law to unsettled law can often be skewed in favour of the latter, and every badly reasoned judgement adds to this corpus of unsettled law. Indeed, if a court is likely to ignore precedent anyway, the very distinction between settled and unsettled law is erased, and all law becomes unsettled. Thus, the system, by making judicial outcomes extremely unpredictable, incentivizes parties to try their luck and litigate rather than settle out of court. An ever-intensifying vicious cycle of too many cases leading to poorly reasoned judgements, in turn leading to too many cases, is created. It is inevitable that the system will, sooner or later, implode.

The system also diverts the court's attention away from key constitutional matters. For example, an elected government of the National Capital Territory of Delhi wasted almost its entire term of office of five years, waiting for the SCI to clarify the scope of its powers vis-à-vis those of the centrally appointed Lieutenant Governor. The democratic cost of such a staggering delay in a matter as fundamental to constitutional governance as this is unconscionable.

The problem of the staggering and ever-expanding docket is well recognized. In 2010, a two-judge bench of the SCI itself lamented the absence of guidelines governing its special leave jurisdiction, and called for the constitution of a five-judge bench to issue some guidelines.[18] Sadly, in 2016, the five-judge bench refused to issue any guidelines – beyond reiterating that the jurisdiction is meant to be exceptional.[19]

It is often said – correctly – that a restrictive approach to the SCI's special leave jurisdiction will lead to grave injustice to litigants, because High Courts, lower courts, and tribunals often get things wrong. This exceptional jurisdiction of the apex court has therefore become a band aid, trying to fix a much deeper malaise that runs deep into the system. Part of the responsibility lies with the failure of the academy – we saw that, in a democracy, the main accountability seeking mechanism for the judiciary is criticism based on internal – legal – grounds. The main source of this criticism is the legal academy, although the bar and the media also share the responsibility.

Our legal academy has failed miserably in holding the judiciary to account. Whatever scholarly attention the courts get is focused mainly on the SCI, and even that restricted largely to its larger benches. Absent the only possible check on their functioning, lower courts and High Courts often get away with astonishingly poor adjudicatory standards (honourable exceptions, no doubt abound). In general, however, it shouldn't surprise us that the courts that get criticized the most also tend to perform better than others.

A recently launched academic-led, peer reviewed, law journal called the *Indian Law Review* is a good beginning to build a tradition of robust academic criticism in law.[20] Some new law blogs are also doing excellent work in assessing judicial work. And yet, even these initiatives far under-supply the needs of the Indian legal system. The problem, in part, is the failure of most of our national law institutes – despite

17. R. Hemrajani and H. Agarwal, 'A Temporal Analysis of the Supreme Court of India's Workload', *Indian Law Review* 3(2), 2019, p. 125, 148. On the role of senior advocates, see generally, M. Galanter and N. Robinson, 'India's Grand Advocates: A Legal Elite Flourishing in the Era of Globalization', *International Journal of the Legal Profession* 20(3), 2013, p. 241.

18. *Mathai* v. *George* (2010) 4 SCC 358.

19. *Mathai* v. *George* (2016) 7 SCC 700.

20. *Indian Law Review*, https://tandfonline.com/loi/rilw20 (last accessed 26 February 2019).

being deemed to be universities – to graduate into genuine research universities with a robust agenda for nurturing postgraduate scholarship. So, failures of the academy allow an unjust system of adjudication to flourish. The special leave jurisdiction of the SCI is then seen as the only corrective. The problem, however, is not just that this supposedly corrective tool fails to measure up to the task, such use actually exacerbates the crisis of the Indian legal system.

The debate has been conducted as one between *justice* (demanding a more interventionist SCI with an expansive special leave jurisdiction) on the one hand and *efficiency* (requiring a narrower approach) on the other. Thus framed, most of us would instinctively think that justice must trump efficiency. What I have tried to show in the preceding discussion is that the debate is not so much about justice *versus* efficiency. Rather, it is about going through the motions of doing justice in every single case *versus* a careful and attentive attempt to actually secure justice in a smaller number of highly salient cases.

Of course, to the litigants, their cases will always be the most salient. However, the apex court must only be concerned with cases which have a broader impact, beyond the litigants themselves, or if fundamental rights are involved. The High Courts may well be doing a bad job in many cases that end up being admitted for appeal by special leave, but we have no way of ascertaining – given the poor quality of reasoning and arguments at all levels – that the SCI is substantially better at the job either.

There is no short cut to addressing the crisis of the Indian legal system, and a mere increase in the number of judges, without attendant structural reform, will not fix it. The SCI must accept that in trying to be seen to be doing justice in every case by relying on an extremely permissive special leave jurisdiction, it is in fact damaging the system further. Injustice in a particular case might be more easily apparent than the systemic cost of the judicial failure to reason properly, but that only makes the latter more difficult to identify and address. Pretending that the band aid suffices, when it is only worsening the wound, allows us to ignore the need for urgent surgery.

A systematic solution to fix at least some of the ailments afflicting the SCI is its institutional bifurcation into a constitutional division with a seat in Delhi, and four appellate divisions sitting in different regions of the country. Each appellate division will need to have at least three benches of two or three judges each, and the constitutional division will need at least one five-judge bench and two three-judge benches. On a conservative count, this will require a further increase in the sanctioned strength of the SCI to at least 39 judges. This increase will be worthwhile only if it is accompanied with a clear jurisdictional demarcation and admission guidelines. What follows is one proposal for how this might work – some of these proposals will require a constitutional amendment, others can be done through lesser means. Whatever the mechanism, broad public consultation before any reform is a *sine qua non.*

The following list includes categories of cases which are essential to constitutional defence. They should be admitted simply by showing that they have a reasonable prospect of success and, upon admission, should only be heard by a bench of five or more judges in the constitutional division:

i) a case involving an actual or potential threat to the established constitutional order or to a fundamental constitutional value (such as democracy, liberty or secularism);

ii) a case involving a substantial question of law as to the interpretation of the Constitution, or an order or Rule issued under the Constitution, including any case certified under Article 134A of the Constitution;

iii) a reference from the President under Article 143 of the Constitution;

iv) a case involving a challenge to a constitutional amendment, or to an order or rule issued under the Constitution;

v) a case involving a challenge to the constitutionality of any provision in a primary legislation (i.e. Acts of Parliament or state legislatures, and Ordinances);

vi) a case involving a challenge to the invocation or exercise of any emergency power under Part XVIII of the Constitution (for example, the dismissal of a state government under Article 356);

vii) a case involving a dispute between two or more federal units (centre versus state/union territory, state/union territory versus state/union territory), including any case under Article 131 of the Constitution;

viii) a case involving a dispute between two or more high constitutional functionaries or involving the discharge of their functions or affecting their functional and institutional independence, including:

a. the President, the Vice President, the Prime Minister, Leaders of Opposition, Governors, Chief Ministers, ministers;

b. speakers/chairs or deputy speakers/chairs of legislative chambers;

c. constitutional or quasi-constitutional officers – like the Attorney General or the Comptroller & Auditor General (or their deputies); or

d. commissioners/governors/chairpersons/directors (or their deputies) of constitutional or quasi-constitutional institutions such as the Election Commission, the Information Commission, the National Human Rights Commission, the Reserve Bank, the Central

Bureau of Investigation, the Lokpal, the National Statistics Commission, equality commissions for various marginalized groups, the University Grants Commission, the Finance Commission, media regulators and other 'fourth branch' institutions;
ix) a case involving a point of law on which there is a disagreement between two or more appellate division benches of the SC,[21] or between two or more smaller benches of its constitutional division' or
x) a case in which the death penalty might be imposed or confirmed (for as long as the death penalty remains constitutional).

The remaining constitutional cases, listed below, can be heard by three-judge benches of the constitutional division:
i) a writ petition seeking the enforcement of a fundamental right under Article 32 of the Constitution;
ii) a writ appeal from a judgment of a High Court under Article 226 of the Constitution, if it involves the enforcement of a constitutional right;
iii) a case involving a challenge to the constitutionality of any executive act or omission that does not fall within the previous list of cases fit for larger benches; or
iv) a case involving a question of constitutional law, which cannot be decided without the constitutional law question being answered.

Finally, the appellate division should admit a petition seeking special leave to invoke its discretionary appellate jurisdiction only if:
i) the petitioner has a reasonable prospect of succeeding if the case is admitted;
ii) the High Court or tribunal refused to grant a request to certify that its judgment was fit for appeal to the Supreme Court; and
iii) at least one of the following conditions is satisfied:
a. the case is of sufficient public importance;
b. the case involves a dissenting opinion in one of the lower courts;
c. the case involves a disagreement between the lower courts;
d. the case involves an error of law on the face of the record;
e. the case raises a novel legal issue;
f. the case conflicts with precedent established in a previous judgment of the Supreme Court or a High Court; or
g. refusing the special leave petition may interfere with a person's life or personal liberty.

Make no mistake: many badly, even unjustly, decided cases will fall through the cracks under this new regime, especially in civil cases that do not concern a person's life or personal liberty. This cost to justice can be somewhat ameliorated by requiring that judges must *always* record their reasons in writing whenever issuing a judicial order. This includes accepting or rejecting a special leave petition. Giving reasons is a key judicial function, and has been taken far too lightly by the Indian judiciary.

The SCI would therefore do well to heed Philip Stanhope's important lesson: *whatever is worth doing at all is worth doing well.* In particular, it needs to strike a better balance between its dual role as a court of final resort and a constitutional court. The court's zealousness in trying to fix everything under its first role imposes an opportunity cost on its second function, and makes it perform even its appellate function badly. A failure to redress the balance might extract too heavy a price from Indian constitutional democracy.

21. This is, strictly speaking, an appellate rather than a constitutional function. But for pragmatic reasons, it is preferable to have one final court rather than two. A separate final court of appeal that sits over the appellate divisions will be too expensive and may dilute the authority of the constitutional division.

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EXPANDING JUDICIARIES: INDIA AND THE RISE OF THE GOOD GOVERNANCE COURT

NICK ROBINSON*

ABSTRACT

In recent years, courts have risen in power across the world, and the Indian Supreme Court has rightly been pointed to as an example of this global trend. In many ways the Indian Court has become a court of good governance that sits in judgment over the rest of the Indian government. This Article argues that the Court has expanded its mandate as a result of the shortcomings (real, perceived, or feared) of India's representative institutions. The Indian Supreme Court's institutional structure has also aided its rise and helps explain why the Court has gained more influence than most other judiciaries. This Article examines the development of India's basic structure doctrine and the Court's broad right to life jurisprudence to explore how the Court has enlarged its role. It argues

* J.D. (2006), Yale Law School. Currently Yale Law School Robert L. Bernstein Fellow at Human Rights Law Network, New Delhi. I would first like to thank Anu Agnihotri and Rohit De, who, early on in this project, were my two primary teachers of the Indian legal system. Sudhir Krishnaswamy and Dr. Elizabeth provided valuable comments on this Article and arranged to allow me to present an earlier draft at the National Law School in Bangalore, where the Article benefited greatly from the engagement of participants. Arudra Burra, Pratap Bhanu Mehta, Jayanth Krishna, Avani Mehta Sood, Vikram Raghavan, and Jeff Redding gave invaluable feedback on this Article. Extensive information about the Indian Parliament was provided by PRS Legislative Services. The Article also gained critically from discussions with Peter Schuck, Bruce Ackerman, and Dieter Grimm. I gained valuable insights about the working of the Indian Supreme Court that are reflected in this Article while clerking for five months for Chief Justice Y.K. Sabharwal, from 2006 to 2007. However, none of this Article should be seen as an insider account, as it is based on publicly available information. The opinions presented are mine alone, as are the errors. Last, but not least, I would like to thank the generosity of the Yale Fox Fellowship Program, which allowed me to take the time in India to research and write this Article.

that the Court justified these two doctrines with not only a wide reading of the Indian Constitution, but also an appeal to broad, almost metaphysical, principles of "civilization" or good governance. The Article finishes by examining parallel interventions in other parts of the world, which suggest India's experience is part of, and helps explain the larger global phenomenon of, the rise of rule through good governance principles via courts.

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I. INTRODUCTION

Judicial review is a relatively recent development. Only after the United States Supreme Court's 1803 decision in *Marbury v. Madison*[1] was judicial review firmly adopted by any country, and outside the United States the concept was at first slow to catch on.[2] It was not until the run up to World War II that judicial review became common. Since then, not only has the number of courts with the power to perform judicial review increased, but so, too, has the diversity of ways in which these courts use this power. These innovations have corresponded with a marked rise, especially recently, in the influence of courts around the world, from Latin America to South Africa and the European Union. Scholars, including Ran Hirschl, Charles Epp, Tom Ginsburg, Daniel Brinks, and Varun Gauri, have only begun to study this transformation of judicial power.[3]

The Indian Supreme Court has rightly been pointed to as an example of this global trend of the strengthening judiciary. There are few issues of political life in India with which the higher judiciary is not in some way involved, often critically.[4] The Supreme Court has come to sit as what amounts to a court of good governance over the rest of the government—some say seriously realigning India's constitutionally envisioned separation of powers. This Article examines how this transformation took place. It argues that the Court has expanded its role, often in ways it is ill-equipped to handle, in an attempt to combat the perceived governance

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1. 5 U.S. 137 (1803).

2. In his famous description of the three branches of government, Montesquieu spoke of the necessity of an independent judicial branch to protect personal liberty. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 151–52 (Prometheus Books 2002) (1748). However, the judiciary Montesquieu envisioned was not empowered with judicial review; rather, it simply enforced the law without the biases or conflicts of interest of the executive or legislative branches. *Id.* The Privy Council's jurisprudence was an important precursor to judicial review in British colonies, including the United States and later India, but the Council acted more as an administrator of colonial rule (ensuring the colonies did not step too far from British law) than as a check on the true source of colonial power—the British Parliament. In 1903 Australia became only the second country to have judicial review. Its judicial review, though, was created through a combination of constitutional and legislative provisions, and was not explicitly guaranteed in the constitution itself. *See* AUSTL. CONST. art. 76; Judiciary Act, 1903, art. 30. The Australian Constitution also lacked a bill of rights. In 1920, Austria became the third country to adopt judicial review. Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1930, arts. 137–48.

3. *See generally* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2007); CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); VARUN GAURI & DANIEL BRINKS, COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (2008).

4. Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. DEMOCRACY 70, 78 (2007).

shortcomings of India's representative institutions. Specifically, this Article tracks the Court's development of two new tools—the basic structure doctrine and its expanded right to life jurisprudence—to address these apparent failings of representative governance. To justify its new interventions, the Supreme Court has appealed not just to a broad interpretation of the Indian Constitution, but indeed to broader (almost transcendent) principles of "civilization" or good governance. The model of the good governance court and its rise in India suggests a useful prism through which to view the recent global expansion of judicial power, especially in developing countries.

The Indian Supreme Court's current broad role in Indian political life was not planned. In the Indian Constitution, the Court's powers closely resemble those of the rather restricted U.S. Supreme Court. Given the lack of well-articulated alternative models of judicial review at independence, this similarity is not surprising. The original, narrow judicial role of the Court, however, sits in incongruity with the Constitution's transformative vision for Indian society.

In contrast to the American Constitution, which largely solidified the economic and social status quo even while bringing momentous political changes, India's Constitution was born with an eye towards multiple transformations.[5] The Indian Constitution not only solidified the gains won in the country's struggles for independence against Britain, but also attempted to spark and shape social and economic revolutions within India, partly out of fear that the failure to do so would lead to political revolution.[6] The Constitution stripped the nobility of its powers and created a framework to empower lower castes and tribal groups. It laid down Directive Principles, which, although not judicially enforceable, imposed a duty on the government to improve the welfare of its citizens

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5. The Fourteenth Amendment belatedly added a more socially transformative role to the U.S. Constitution, but the courts did not actively press this vision until the 1950s. The U.S. Constitution makes no mention of government intervention for economic upliftment or redistribution. Indeed, at India's independence the U.S. Supreme Court had only just accepted that the federal government even had the authority to create many of the pillars of the modern welfare state.

6. Dr. Ambedkar, Chairman of India's Constitutional drafting committee, famously warned that when India's Constitution came into effect,

> we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. . . . How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril.

The Honourable Dr. B.R. Ambedkar, Remarks at the Meeting of the Constient Assembly of India (Nov. 25, 1949), *available at* http://parliamentofindia.nic.in/ls/debates/vol11p11.htm.

through the broad powers of the modern administrative state.[7] In essence, the Indian Constitution—like many constitutions that would follow it, particularly in the developing world[8]—attempted to create an ongoing, controlled revolution by laying an architecture in which massive social and economic transformation could take place within the limits of a liberal democracy. It is this vision of a controlled revolution that the Court has since reshaped itself to promote.

The first section of this Article examines several criticisms of India's Parliament—frustration with its incompetence, fear of its ability to subvert liberal democracy, and exhaustion at its seeming abdication of the responsibilities of governing—to provide a causal context to explain why and how the Supreme Court expanded its role. It argues that Parliament's inability to successfully promote the Constitution's broad vision of a controlled revolution has led the Supreme Court to take on a larger mandate. This section also briefly details some of the perceived deficiencies of India's other representative institutions (executive- and state-level). It then highlights how the shortcomings of India's representative institutions (real, perceived, or feared) have helped spawn various unelected bodies that attempt to bypass or check these perceived limitations.

In the second section, this Article turns to the Supreme Court itself to add an institutional explanation for the Court's rise in power. The Court's institutional structure, which resembles that of South Asia's other vibrant and expansive supreme courts, has been under-explored in previous writings about the Indian legal system. Its structure, though, has helped foster the Court's broader good governance role and helps explain why it has been able to expand this role further than most courts elsewhere.

This Article then focuses on two doctrines that played a decisive role in the Supreme Court's transformation. The third section describes how, largely as a result of emergency rule under Indira Gandhi, the Court developed and solidified the basic structure doctrine during the 1970s and 1980s. This doctrine holds that amendments to the Constitution cannot damage its basic structure, which the Court has found includes such tenets as its democratic and secular nature and certain fundamental rights.

The fourth section of this Article turns to the 1980s and 1990s, during which time the Court expanded its interpretation of the right to life provision of the Constitution.[9] It did so to help empower poorer sections of

7. INDIA CONST. arts. 36–51.
8. *See infra* Part VI.C.
9. INDIA CONST. art. 21. Note that the "right to life" in India means something quite different

society and to fill the governance vacuum left by an often ineffective and fractured Parliament. In this process, the Court developed public interest litigation ("PIL") which had relaxed standing and procedural requirements as well as broad new remedies. This right to life jurisprudence eventually created a system of judicial or constitutional governance in which the higher courts took on many tasks traditionally associated with the country's representative institutions.

By striking down threatening constitutional amendments and promoting welfare interests with remarkable zeal, the Indian Supreme Court departed dramatically from its American judicial model. Although these doctrines seemingly represent different extremes of judicial intervention, sections three and four of this Article contend that they are both largely justified by the Court on two grounds. First, the Court successfully claimed that it could, and should, enforce the vision of a controlled revolution embodied in the Indian Constitution. Second, the Supreme Court appealed to wide, almost metaphysical, norms of "civilization" or good governance that should guide modern democratic governments. The third and fourth sections then examine accountability and capacity criticisms of the Court's broadened role. Despite the sometimes uneasy coexistence between good governance and more classical democratic principles these criticisms highlight, the Court's new doctrines have so far proved relatively stable and even gained the Court greater legitimacy.

The fifth section of this Article puts the Court's expanded right to life jurisprudence and basic structure doctrine into global perspective. Viewing parallels of these Indian doctrines in other countries through an American lens, they seem like outliers or discrepancies that with time will evolve towards the older American standard. Seen through an Indian judicial lens–from the standpoint of a judiciary that started in an American mold and evolved away from it—examples of similar judicial innovation become signs of a larger shift. This Article suggests that this shift may represent a broader global rise in rule through good governance principles via courts. It also proposes that the factors that propelled the evolution of the Court in India may help explain the strengthening of the judiciary elsewhere.

Before beginning, two points of context that cannot be fully explored within the narrow agenda of this Article should be mentioned here to help

from the "right to life" in contemporary American discourse. *See infra* Part V for an explanation of Indian jurisprudence on the subject.

properly situate the rise of the good governance judiciary in India (and elsewhere). First, the growth of the Supreme Court's power parallels another current global trend that is also present in India: the rise of unelected bodies (from central banks to electricity commissions) that check or bypass the perceived shortcomings of representative institutions.[10] Implicit in the justification of these unelected bodies is the idea that there exist certain principles of good governance that can successfully guide them. Direct input by representative bodies in their decisions is not necessary, and can even be detrimental. Seen in this light, the widening of the Indian Supreme Court's powers is only one example within a broader rise of good governance rule through unelected bodies.

Second, the Court's (and other unelected bodies') increasingly wide application of good governance principles harkens back to political traditions that, throughout history, have placed broad good governance obligations on rulers. The ability of rulers to meet these duties helped determine whether they were considered "good" kings or "just" emperors.[11] With the evolution of modern democracy, citizens directly elected the government that they believed most furthered their vision of good governance. Rule by the will of the people through representative institutions was prioritized over, or understood to be synonymous with, good governance. The Indian judiciary may promote principles that it argues underlie modern democratic "civilization," but in so doing it has often overridden or circumvented the country's representative institutions. In taking these actions the Court has helped revitalize an older political normative tradition that emphasizes broad, idealized duties of good governance. These duties exist outside the sanction of a country's representative institutions, and indeed outside that of any institutionalized

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10. Unelected bodies have gained increasing control over many policies that affect peoples' lives in the United States and Europe. FRANK VIBERT, THE RISE OF THE UNELECTED: DEMOCRACY AND THE NEW SEPARATION OF POWERS 4, 6 (2007).

11. Many traditions have placed duties on rulers. The basis for this may be religious; utilitarian; natural; or related to a sense of justice, honor, or reciprocity. Thomas Hobbes found that "it is . . . [the sovereigns'] *duty* to obey right reason in all things so far as they can; right reason is the natural, moral and divine law." THOMAS HOBBES, ON THE CITIZEN 143 (Richard Tuck & Michael Silverthorne eds. & trans., Cambridge Univ. Press 1998) (1647). *See generally* THE ORIGINAL ANALECTS: SAYINGS OF CONFUCIUS AND HIS SUCCESSORS (E. Bruce Brooks & A. Taeko Brooks eds. & trans., 1998); MARCUS TULLIUS CICERO, THE OFFICES 106 (Thomas Cockman trans., London, J. M. Dent 1909) (1699). The *dharmasastra* and religious texts laid out the duties of good governance of early Hindu rulers. *See generally* THE LAWS OF MANU 128–96 (Wendy Doniger & Brian Smith trans., Penguin Group 1991) (1794) (describing the duties of a ruler); Mahendra P. Singh, *Constitutionalization and Realization of Human Rights in India*, *in* HUMAN RIGHTS, JUSTICE, AND CONSTITUTIONAL EMPOWERMENT 26, 38–40 (C. Raj Kumar & K. Chockalingam eds., 2007) (commenting that some Indians still embrace a dharma-centered view of the law).

sovereign. In appealing to principles more extensive than simply democracy, the good governance court opens a new space of intervention and legitimacy. This space is certainly not settled, yet neither is it still in its infancy, and we can begin to trace the democratic and political impact of these interventions.

II. THE PEOPLE AND THEIR REPRESENTATIVE INSTITUTIONS

To understand how and why the Supreme Court widened its reach in India, we must first turn to the country's representative institutions. It is the power of these bodies that the judiciary traditionally monitors with its review authority. Which people these institutions represent and how these bodies attempt to address their problems have a defining effect on how courts operate in a country. This section will focus on India's Parliament, as it is the most powerful and central of India's representative institutions.

A. India's "Social Question"

In the opening paragraphs to *Democracy in America*, Tocqueville wrote that he was struck by Americans' "equality of condition" and how this equality (amongst those who voted), more than anything else, shaped the governance of the then young United States.[12] In contrast, since independence, India's situation has much more closely resembled that of eighteenth-century France than eighteenth-century America. India faced the same "social question" of millions of poor citizens needing economic upliftment that Hannah Arendt argued ultimately doomed the French Revolution.[13] By almost continuously remaining a democracy since independence, India has defied the wisdom of thinkers, from Aristotle to Arendt, who argue that a stable democracy requires a large middle class electorate and little poverty.[14] India's poor have not doomed the country's democracy, but they have dramatically shaped its representative institutions and judiciary.

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12. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA VOL. ONE 3, 252–53 (Henry Reeve trans., Francis Bowen & Philip Bradley revised, A.A. Knopf 2008) (1840). Notably, Tocqueville glossed over slavery and many other inequalities of early America, but his point that amongst those Americans who were allowed to vote there was a high degree of, and often relatively equal, material wealth is still valid.

13. HANNAH ARENDT, ON REVOLUTION 59–114 (1965).

14. *Id.*; ARISTOTLE, POLITICS 170 (Benjamin Jowett trans., InteLex 2000) (cir. 350 B.C.).

Poverty in India is widespread and deep. The Indian government developed its current standard for measuring poverty in the early 1970s.[15] At that time, nearly 55% of the population was considered below the national poverty line.[16] In 1999–2000 this figure was down to nearly 26%.[17] However, these current numbers do not provide an accurate picture, given the relatively low level at which the government has set the poverty line. According to the World Bank, in 1999–2000, nearly 35% of Indians lived on less than one dollar a day, and almost 80% of Indians lived on less than two dollars a day.[18] The first government census in 1951 found that just 18% of the population was literate.[19] Though the literacy rate has grown steadily since then, it still officially stood at only about 65% in 2001.[20]

Despite its poverty, India generally has a high voter turnout, averaging around 60% in general elections.[21] Indeed, turnout seems to be higher amongst poorer and less educated groups in India.[22] This fact can be seen in the rural-urban divide in voting patterns, as urban areas on average have more educated and wealthier populations. In the 2004 general election, voter turnout was over 58% nationwide.[23] For Delhi it was 47%.[24] The other five largest metro areas averaged a voter turnout rate 11.84% lower than the average for their state.[25]

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15. PAUL BRASS, THE POLITICS OF INDIA SINCE INDEPENDENCE 292 (2006).

16. MINISTRY OF FINANCE, GOVERNMENT OF INDIA, UNION BUDGET & ECONOMIC SURVEY 2001–2002, POVERTY tbl. 10.4 (2002), *available at* http://indiabudget.nic.in/es2001-02/chapt2002/chap102.pdf.

17. *Id.*

18. WORLD BANK, 2006 WORLD DEVELOPMENT INDICATORS, tbl. 2.7 (2006), *available at* http://devdata.worldbank.org/wdi2006/contents/table2_7.htm.

19. MINISTRY OF FIN., GOVERNMENT OF INDIA, UNION BUDGET & ECONOMIC SURVEY 2001–2002, LITERACY AS SEEN IN THE 2001 CENSUS tbl. 10.1 (2002), *available at* http://indiabudget.nic.in/es2001-02/chapt2002/chap106.pdf.

20. *Id.*

21. Jean Drèze, *Democracy and the Right to Food*, *in* HUMAN RIGHTS AND DEVELOPMENT, *supra* note 11, at 45, 51.

22. Ashutosh Varshney, *Is India Becoming More Democratic?*, 59 J. ASIAN STUD. 3, 20 (2000).

23. ELECTION COMMISSION OF INDIA, STATISTICAL REPORT ON GENERAL ELECTIONS, 2004 TO THE 14TH LOK SABHA, Vol. I, 10 (2004), *available at* http://www.eci.gov.in/SR_KeyHighLights/LS_2004/Vol_I_LS_2004.pdf.

24. *Id.*

25. Overall the average voter turnout in the 2004 General Elections for the six largest metropolitan areas was 52.7%, compared to the overall Indian voter turnout rate of 58.07%. To compute the difference in turnout rate between the five largest metropolitan areas besides Delhi and their respective states, Election Commission statistics were averaged for the districts of each area and then compared to the state's voter turnout rate. The state data and averages for the metropolitan areas are, respectively: Maharashtra 54.38% and Mumbai 47.16%, resulting in a difference of 7.22%; West Bengal 78.04% and Calcutta 66.79%, resulting in a difference of 11.25%; Tamil Nadu 60.81% and Madras 47.6%, resulting in a difference of 13.21%; Karnataka 65.14% and Bangalore 51.84%,

Many of India's elite (and ordinary citizens) question the quality of the parliament elected by India's poor and uneducated "teeming millions," as one member of the constitutional assembly described the majority of Indians.[26] This argument has two primary variants. First, there is a belief that a parliament elected by the masses will be corrupt and ineffective at furthering the interests of the poor people who elect it and the country as a whole.[27] Because so many voters are destitute, they do not have the education or resources to determine what political platform would best represent their needs.[28] They are, therefore, easily "misled" by caste, communal, or patronage politics, all of which are rife in India. Further, even if the public did know what policies are best, it simply does not have the resources to effectively monitor politicians or otherwise engage with the political system to keep abuses in check and its desires prioritized.[29]

Second, there is a fear that Indians will elect a parliament that promises to quickly right the nation's social injustices through mass redistribution of property. Such a platform could lead to violence, an undermining of liberal democracy, and even the breakup of the country.

B. Overridden Constitutional Constraints

Although the Constitution was designed to check the more radical tendencies of Parliament and help calm fears created by having an economically poor electorate, Parliament has traditionally treated amending the Constitution like legislating by other means. The

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resulting in a difference of 13.3%; Andhra Pradesh 69.95% and Hyderabad 55.73%, resulting in a difference of 14.22%. The rural-urban divide is even greater than the difference between turnout rates in the metropolitan area and its respective states indicates, since the metropolitan area is also included in the average voter turnout rate for the state. This data is based on information found *id.* at 10 and in ELECTION COMMISSION OF INDIA, STATISTICAL REPORT ON GENERAL ELECTIONS, 2004 TO THE 14TH LOK SABHA, VOL. II, 36, 164–65, 233–38, 344–46, 485–87 (2004), *available at* http://www.eci.gov.in/StatisticalReports/LS_2004/Vol_II_LS_2004.pdf.

26. Mr. B. Das, Remarks at the Constituent Assembly of India Debates (Aug. 30, 1947), *available at* http://parliamentofindia.nic.in/ls/debates/vol5p11a.htm.

27. *See* Drèze, *supra* note 21, at 51.

28. *Id.*

29. *Id.* "Because underprivileged sections of the population are excluded from active participation in democratic politics, their aspirations and priorities are not reflected in public policy." *Id.* See Varshney, *supra* note 22, at 13–14 for a brief overview of the literature on "Authoritarian Democracy" (the idea that the poor's socio-economic position means they will likely be controlled by economic elites in a democracy). *See also* Mukulika Banerjee, *Sacred Elections*, 42 ECON. & POL. WKLY. 1556 (Apr. 28, 2004) (discussing patronage politics and ritualistic traditions in Indian elections); ARUN SHOURIE, THE PARLIAMENTARY SYSTEM 220–24 (2007) (discussing how the common man was easily misled and explaining that it was rational for him to remain ignorant of his political situation).

Constitution has had ninety-four amendments between 1950 and 2007, averaging 1.65 amendments per year.[30] There were only seventeen years during this fifty-seven-year period when no amendments were added to the Constitution,[31] and the pace and volume of amending has only increased since independence.[32]

Part of the reason why there have been so many amendments is that the Indian Constitution, more than most, details the administration of governance.[33] This feature has its roots in the political elite's underlying distrust of a popularly elected Parliament, which goes all the way back to India's founding.[34] Dr. B.R. Ambedkar, a leading Dalit politician and chairman of the Constitutional Drafting Committee, was famous for criticizing the Congress Party leadership for being Brahmin-dominated and contemptful of the common man.[35] Yet, when introducing the draft Constitution to the Constituent Assembly, even he reasoned that "[d]emocracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic. In these circumstances it is wiser not to trust the Legislature to prescribe forms of administration. This is the justification for incorporating them in the Constitution."[36] If in Tocqueville's America the people were the word of God, in India there was far more skepticism of their wisdom.

Perhaps amending the Constitution would have been made more difficult (most amendments only require a two-thirds vote of Parliament) if the Constituent Assembly felt it had more representational legitimacy. The Assembly was elected indirectly by the state legislative assemblies, which themselves were elected under the Government of India Act,[37] a 1935 British statute that did not provide for universal suffrage.[38] Some

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30. The first decade of the Constitution's history saw the fewest number of amendments (seven) with amendments being added with the lowest frequency (amendments were added in only four years of the 1950s). This data is compiled from a list of India's Constitutional amendments from independence until 2007. The Constitution (Amendment) Acts, *available at* http://indiacode.nic.in/coiweb/coifiles/amendment.htm (last visited Oct. 4, 2008).

31. *Id.*

32. *Id.*

33. *See* B.R. AMBEDKAR, THE ESSENTIAL WRITINGS OF B.R. AMBEDKAR 473–94 (Valerian Rodrigues ed., 2002).

34. *Id.* at 485.

35. *Id.*

36. *Id.*

37. The Government of India Act, 1935, 26 Geo. 5 & 1 Edw. 8, c.2 (Eng.).

38. H. McD. Clokie, *The New Constitution for India*, 30 AM. POL. SCI. REV. 1152, 1158–61 (1936); Sunil Khilnani, *The Indian Constitution and Democracy*, *in* INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES 64, 71 (Zoya Hasan, E. Sridharan & R. Sudarshan eds., 2002) (highlighting the representation deficit in the Constituent Assembly).

Assembly members questioned their ability to bind what would be a parliament elected more directly by the people.[39] Dr. Ambedkar accepted that the Assembly was not as representative of the people, but pointed out that the Indian Constitution was easier to amend than that of other countries.[40] Tellingly, he also justified the Assembly's constituent power by arguing that any future parliament elected on the basis of adult suffrage would be likely to have less wisdom than the Constituent Assembly.[41]

C. Poor Parliamentary Governance

Not only are many Indians afraid of the specter of an unchecked Parliament, but they also view the institution as often abandoning its governance functions. Even Members of Parliament ("MPs") agree with this view and state that as a result the public trusts the higher judiciary more than Parliament to govern.[42]

It is difficult and dangerous to try empirically to show how well the Indian Parliament has governed, but the perception of incompetence and simple abdication of responsibility is widespread. There are also some telling statistics. In 2006, for instance, almost sixty-five percent of MPs said nothing in the Lok Sabha (Parliament's lower house) on a legislative issue, while forty percent of bills received less than one hour of debate.[43]

To be fair, anti-defection laws in India mean that MPs cannot deviate from their party in votes on legislation, giving them a disincentive to engage in legislative issues.[44] Further, because there are 552 members of

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39. *See* Khilnani, *supra* note 38, at 71–72.

40. Ambedkar, *supra* note 33, at 493.

41. Dr. B.R. Ambedkar, Remarks at the Meeting of the Constituent Assembly of India Vol. IX (Sept. 17, 1949), *available at* http://parliamentofindia.nic.in/ls/debates/vol9p37c.htm ("I am quite frank enough to say that this House, such as it is, has probably a greater modicum and quantum of knowledge and information than the future Parliament is likely to have."). *Id.*

42. Abhishek Manu Singhvi, *Judicial Activism Is Like an Unruly Horse*, INDIAN EXPRESS, May 4, 2007, *available at* http://www.indianexpress.com/story/29975.html. As Jayanth Krishnan has pointed out, there has never been a survey of the public's perception of the upper judiciary. Therefore, although academics, members of the bar, English language newspapers, and elites may claim that the upper judiciary is more trusted than Parliament or the executive, it is unclear if this perception is shared by the larger Indian public. Jayanth K. Krishnan, *Scholarly Discourse, Public Perceptions, and the Cementing of Norms: The Case of the Indian Supreme Court and a Plea for Research*, 9(2) J. APP. PRAC. & PROCESS 1, 15 (forthcoming 2008), *available at* http://ssrn.com/abstract=1003811 (last visited Sept. 17, 2008).

43. SOCIAL WATCH INDIA, CITIZENS' REPORT ON GOVERNANCE AND DEVELOPMENT 2007, 30–31 (2007).

44. C.V. Madhukar, *House This for Debate?*, INDIAN EXPRESS, Jan. 3, 2007, *available at* http://www.indianexpress.com/news/house-this-for-debate/19938/.

the Lok Sabha,[45] it is difficult to find time for every representative to speak on each bill. Additionally, an MP's staff budget is currently barely enough for a single secretary to help with research on bills.[46] However, that sixty-five percent of Members of Parliament had nothing to say[47] does seem to indicate a high level of apathy on legislative issues amongst many MPs.

Parliament sessions are also filled with frequent political posturing that disrupts the legislative process. From the fall of 2004 to the fall of 2006, only approximately twenty percent of "in session" time was spent on actually debating legislation.[48] At the end of the budget session in the spring of 2007, an exasperated Prime Minister Singh chastised Parliamentarians "to reflect and [think] whether [the frequent disruptions] enhance[] the standing of Parliament in the eyes of the people . . . ."[49]

Adding to these difficulties, India has one of the highest population-to-representative ratios in the world. Each member of the up to 552 member strong Lok Sabha represents on average two million people (the upper house, or Rajya Sabha, is limited to 250 members, most of whom are elected by state and territorial legislatures, although twelve are appointed by the President).[50] With such large constituencies, it is difficult and time-consuming for a Member of Parliament to attend to all the demands of the citizens he or she represents.

In one of the more frequently cited examples of perceived parliamentarian neglect, the Supreme Court laid down guidelines in 1997 to protect women against sexual harassment in the workplace because none had ever been enacted by Parliament.[51] The Court found that having no law violated women's fundamental rights and wrote its own guidelines for the country with inspiration from the Convention on the Elimination of

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45. *See* Lok Sabha, http://loksabha.gov.in/ (last visited Nov. 15, 2008) (stating that under the Constitution the Lok Sabha may have up to 530 members representing the states, twenty members representing the Union Territories, and two nominated members representing the Anglo-Indian community).

46. *See* Lok Sabha, Amenities for Members of Parliament, http://164.100.24.209/newls/membersbook/AMENITIES.htm (last visited Oct. 4, 2008); Madhukar, *supra* note 44.

47. *Supra* note 43 and accompanying text.

48. Madhukar, *supra* note 44.

49. Sandeep Dikshit, *Parties Should Address Contentious Issues Through Dialogue*, THE HINDU, May 18, 2007, *available at* http://www.hindu.com/2007/05/18/stories/2007051816861400.htm.

50. *See* Lok Sabha, *supra* note 45. The population of India in 2008 was estimated to be approximately 1.15 billion people. *See* India, The CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/in.html (last visited Nov. 15, 2008). When the population of India is divided by the number of Lok Sabha members the population-to-representative ratio comes out to about two million to one.

51. Vishaka v. State of Rajasthan, (1997) 3 Supp. S.C.R. 404, 414–17.

All Forms of Discrimination Against Women ("CEDAW"), which India had ratified.[52] Although the Court said the guidelines it crafted could be overridden by legislation, Parliament has passed no legislation to do so in the more than ten years since.

India's Parliament has a reputation for not only underperformance, but also corruption and even criminality. In December 2005, a television station ensnared eleven MPs in a sting operation in which it paid them money to ask questions in Parliament on the behalf of a fictitious body.[53] In 2008, before a major trust vote, opposition members waved money inside the Lok Sabha, claiming that they had been offered bribes to abstain during the vote.[54] Criminals have even begun to become politicians themselves. In 2006, the National Social Watch Coalition reported that criminal cases were pending against almost twenty-five percent of members of the Lok Sabha.[55] Half of these were for charges that could carry a sentence of five or more years in prison.[56]

All of these factors contribute to large sections of the public seeing Parliament as having largely abdicated its governing responsibilities. In this climate, the Supreme Court has been able to more easily assert that it has the power and duty to take on many of Parliament's responsibilities.

D. A Fractured Parliament

Parliament's highly splintered composition has further aided the Court's rise. No political party—even Congress during its years of dominance—has ever received more than fifty percent of the popular vote in India.[57] Districts are won on the basis of who receives the most votes, and a majority is not required.[58] In the current Lok Sabha, sixty percent of members did not gather more than fifty percent of the votes in their district.[59] Such an electoral set-up helps fuel the numerous regional-,

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52. *Id.* at 412.

53. When the story broke to great public outcry (although perhaps not surprise), Parliament expelled these members. The bribes ranged from only a bit over $300 to around $1200. SOCIAL WATCH INDIA, *supra* note 43, at 42–43.

54. *India Media Condemn Vote 'Taint,'* BBC.com, July 23, 2008, http://news.bbc.co.uk/2/hi/south_asia/7520726.stm.

55. Amelia Gentleman, *A Cancerous Growth in India's Body Politic*, INT'L HERALD TRIB., Apr. 26, 2007, at 2, *available at* http://www.iht.com/articles/2007/04/26/news/letter.php.

56. *Id.*

57. The results of each parliamentary election can be found on the Election Commission of India's website, Election Commission of India, http://www.eci.gov.in/StatisticalReports/ElectionStatistics.asp (last visited Nov. 15, 2008).

58. SHOURIE, *supra* note 29, at 21–28.

59. *Id.* at 28.

caste-, and tribal-based parties that permeate and fracture Indian politics as they compete for only the forty, or even thirty, percent of the vote they need to win.[60] It also means that even parties that have won well over half of Parliament's seats have not necessarily been given a mandate from over half of India's population.

Despite never winning more than half of the national popular vote, the Congress Party was the dominant party in the decades after independence. Until 1967, it not only had a majority of seats in the Lok Sabha, but also had over the two-thirds seats required to amend the Constitution (a super-majority it would later reclaim in the elections of 1971, 1980, and 1984).[61] Yet since 1989 there have been only coalition governments, with no party winning a majority of seats on its own.[62] The current Manmohan Singh-led government is comprised of an uneasy alliance of fourteen coalition parties.

E. Executive- and State-Level Governance

The executive, whose ministers are composed of different members of the ruling coalition, has also been susceptible to the problems that plague Parliament more generally. The executive often becomes preoccupied with keeping political alliances together in the center, or even with simply trying to keep the country together. In 2006, the Ministry of Home Affairs reported active, armed resistance against the government in nineteen of twenty-eight states.[63] The executive's focus on attempting to control or appease fractured political alliances while combating violent threats to the state has left it with less time to focus on the nuts and bolts of governing. Moreover, several ministers have been involved in high-profile corruption and criminal scandals.[64]

State-level representative institutions are also plagued by many of the same problems found at the center. These shortcomings have prodded the higher judiciary to expand its public interest litigation jurisprudence to take on a broader role in areas traditionally overseen by state government.

60. BRASS, *supra* note 15, at 18–19, 34.

61. *Id.* tbl. 3.2.

62. *See* SHOURIE, *supra* note 29, at 56.

63. *See* GOV'T OF INDIA MINISTRY OF HOME AFFAIRS, ANNUAL REPORT 2006–2007, annexes II, III, IV, *available at* http://www.mha.nic.in/ (follow "Annual Report" hyperlink; then follow "Annual Report 2006–2007" hyperlink) (last visited Sept. 17, 2008).

64. *See, e.g.*, Nirnimesh Kumar, *Shibu Soren Sentenced to Life*, THE HINDU, Dec. 6, 2006, *available at* http://www.hindu.com/2006/12/06/stories/2006120604630100.htm; *Fernandes: Popular but Controversial Minister*, BBC.COM, Mar. 15, 2001, http://news.bbc.co.uk/1/hi/world/south_asia/1223625.stm.

From independence until 1967, the Congress Party largely ruled the states without serious political challenge, and its internal power structure helped smooth center-state relations.[65] Since 1967, however, and particularly after Congress's massive defeat at the center in 1977, there has been widespread fracturing of political power at the state level, leading to governing and legitimacy problems similar to those found in the center.[66] Differences in ruling parties at the state and center have often led to strained relations. Further, corruption and capacity challenges are often worse at the state level. For example, in Uttar Pradesh about forty percent of the legislative assembly faced criminal charges in 2008.[67]

F. The Corresponding Rise of the Court

The Emergency in the 1970s, as we will see, undercut the political legitimacy of Parliament and the executive, as well as their claims to constitutional supremacy. It is their poor governance record, though, along with the fracturing of the electorate, that has continued to weaken and distract India's representative institutions. Since the Indian military, although highly respected, has traditionally been under strong civilian control,[68] and the President is largely a figurehead, the Supreme Court, as one of the few truly unified national institutions, has been able to increase its governance role relatively unchallenged.[69] In this climate of both fear of Parliament's power and exhaustion at its perceived misgovernance, the Supreme Court has reshaped the American judicial model it inherited into one that, it has argued, is better suited for India's social and political situation. As Chief Justice Balakrishnan stated in 2008:

> It is often argued that the Supreme Court should maintain restraint and should not violate the legitimate limits in the exercise of its powers. However, this argument fails to recognize the constant failures of governance taking place at the hands of the other organs

65. T.V. Sathyamurthy, *Impact of Centre-State Relations on Indian Politics: An Interpretative Reckoning 1947–1987*, *in* STATE AND POLITICS IN INDIA 232, 241 (Partha Chatterjee ed., 1997).

66. *Id.* at 250.

67. Piyush Srivastava, *Only 160 UP MLAs Face Criminal Cases*, MAIL TODAY (INDIA), June 28, 2008.

68. BRASS, *supra* note 15, at 62.

69. India's nationalist leaders highly valued the idea of an independent judiciary. This historical tradition may also partially explain why the judiciary's expansion of its own power was not more seriously challenged by the other branches or the public. *See* Gerald E. Beller, *Benevolent Illusions in a Developing Society: The Assertion of Supreme Court Authority in Democratic India*, 36 W. POL. Q. 513, 515 (1983).

of State, and that it is the function of the Court to check, balance and correct any failure arising out of any other State organ.[70]

G. The Growth of Unelected Bodies

The rise of the Supreme Court is part of a larger trend present in India and across the globe that takes decision-making power away from representative institutions and transfers it to independent or quasi-independent unelected bodies. Bruce Ackerman and Edward Rubin have pointed to the rise of these institutions more generally as a reason why we should discard our traditional conception of three branches of government.[71] The rise of such bodies in India was likely aided by a Supreme Court that has not found a strict separation of powers in the Indian Constitution.[72] The prominence of these unelected institutions may herald the rise of a post-democratic era in which the expanding power of unelected bodies and their legal and technocratic restrictions render democratic engagement largely impotent to effect fundamental political change. Democracy is left in name, but only as a shell that gives legitimacy to unelected institutions and unassailable laws and principles that guide the polity.

From the beginning, India's founders were concerned that the politics, conflicts of interest, and corruption of the country's representative institutions could seriously hamper the young nation. To alleviate some of these fears, the Constitution set up a series of independent unelected bodies. These constitutionally-mandated bodies included a commission to supervise elections,[73] a comptroller and auditor general to check the government's accounts for legal irregularities,[74] a finance commission to apolitically allocate tax revenue between the center and the states,[75] and public service commissions at the union and state levels to oversee

70. Shri K.G. Balakrishnan, Chief Justice of India, Address at Kerala Legislative Assembly, Golden Jubilee Celebrations 2007–08, Seminar on "Legislature, Executive, and Judiciary" (Apr. 26, 2008).

71. *See generally* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000); EDWARD RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE (2005).

72. Rai Sahib Ram Jawaya Kapur v. State of Punjab, (1955) 2 S.C.R. 225, 235 ("The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity . . . .").

73. INDIA CONST. art. 324.

74. *Id.* art. 148.

75. *Id.* art. 280.

recruitment and promotion to government posts.[76] The relatively independent Reserve Bank of India, which was created by the British in 1934, continued to regulate the money supply after independence and, after 1994, took on expanded powers to regulate the country's financial sector.[77]

More recently, after its decision to liberalize the economy in the early 1990s, Parliament created a new set of independent or quasi-independent regulatory bodies. These entities include the Security and Exchange Board of India,[78] the Telecom Regulatory Authority,[79] the Insurance Regulatory and Development Authority,[80] the Competition Commission,[81] and central and state electricity authorities.[82] The development of these bodies signaled a shift away from not only direct Parliamentary control over the economy through nationalized industries, but also Parliament's control over its regulation. In creating these institutions, Parliament was deeply influenced by advice from international development agencies (which themselves are another set of unelected bodies with a significant ability to control and shape governance decisions). It was hoped that if these Indian regulatory authorities had independence from the political process they would be less likely to grant "market-distorting" subsidies or be captured for political purposes, while reducing corruption and providing better services.[83] In reality, these agencies are often not as independent as they are made out to be. Their actions are generally reviewed by Parliament, many of them can be reconfigured or outright disbanded through further legislation, and they must respond to many of the same political pressures as Parliament in order to retain their legitimacy with the public.

However, the formation of these independent and quasi-independent bodies, both at India's independence and since, resulted from the

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76. *Id.* art. 315.

77. Reserve Bank of India, About Us, http://www.rbi.org.in/scripts/AboutusDisplay.aspx (last visited Sept. 17, 2008).

78. The Securities and Exchange Board of India Act, No. 15 of 1992, *available at* http://indiacode.nic.in/ (search Act Year "1992").

79. The Telecom Regulatory Authority of India Act, No. 24 of 1997, *available at* http://indiacode.nic.in/ (search Act Year "1997").

80. Insurance Regulatory and Development Authority Act, No. 41 of 1999, *available at* http://indiacode.nic.in/ (search Act Year "1999").

81. The Competition Act, No. 12 of 2003, *available at* http://indiacode.nic.in/ (search Short Title "Competition Act").

82. The Electricity (Amendment) Act, No. 57 of 2003, *available at* http://indiacode.nic.in/ (search Short Title "Electricity").

83. Navroz K. Dubash, Can Global Administrative Law Shape Local Political Opportunity Structures? A Study of Indian Electricity Regulators, Presented at Workshop on Global Regulatory Governance, Organized by Ctr. for Policy Research, New York Univ., New Delhi (Jan. 5–6, 2008).

perceived limits in the decision-making and governing abilities of representative institutions. Their mere creation is an affirmation of the idea that there are certain good governance principles by which these bodies can be guided—that a trained economist at a reserve bank has standards for determining when to expand the monetary supply, that an electoral commissioner has the ability to judge a fair election, that an electricity regulator can determine how quickly to allow electricity rates to rise, and that these decisions are not made better with direct representational input. Indeed, the development of these bodies seems to support the argument that there are large areas of governance over which there is little, or should be little, democratic debate. These areas are better off being governed by selective bodies directed by good governance principles than by representational institutions.

The Supreme Court is different from these other unelected bodies. It has a far broader Constitutional mandate, it has review functions over many of the non-representative institutions, and it occupies a more illustrious place in the Indian popular imagination. The Supreme Court's growing powers, though, should be seen in this context. What we are witnessing is not a simple struggle between the judiciary and representative bodies. Rather, it is a reconfiguration of decision-making authority more generally, as various unelected bodies use good governance principles to take on a more central role in governing.

III. THE BACKSTOP SUPREME COURT

It is not just the perceived limitations of the ability of India's representative institutions to govern that have allowed the Supreme Court to take on its broader good governance function. The Court's distinctive institutional design has also made it well-equipped to expand its powers in light of these institutions' apparent shortcomings.

The Indian judiciary is described by such scholars as Pratap Bhanu Mehta, Marc Galanter, and Jayanth Krishnan as a two-tier system.[84] The High Courts and Supreme Court, which comprise the upper judiciary, are seen as relatively competent and trustworthy.[85] Meanwhile, the lower judiciary, which is made up of district, session, family, rent, and other

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84. Pratap Bhanu Mehta, *India's Judiciary: The Promise of Uncertainty*, *in* PUBLIC INSTITUTIONS IN INDIA: PERFORMANCE AND DESIGN 158 (Devesh Kapur & Pratap Bhanu Mehta, eds., 2005); Marc Galanter & Jayanth Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy in India*, 55 HASTINGS L.J. 789, 789 (2004).

85. *Id.*

courts, is viewed as highly corrupt, plagued by seemingly insurmountable backlogs, and much less skilled.[86] This characterization may underplay the more positive traits of the lower judiciary, such as its responsiveness to on-the-ground realities, and overplay the upper judiciary's competence or trustworthiness. It is a description, though, that has been embraced by many—arguably including the upper judiciary itself.

The Constitution conferred wide jurisdiction on the Supreme Court to rectify any miscarriage of justice in the lower courts.[87] The Court was originally manned by eight justices, who were required to sit on at least a five-justice bench to hear constitutional matters, but could sit on smaller benches to hear other appeals.[88] To attempt to address the perceived shortcomings of the lower courts, the upper judiciary has generally made appeal very easy. This ease of appeal, in combination with poor case management, delay in appointing new justices, and procedural inefficiencies in the upper judiciary, has led to chronic case overload in the Supreme Court, beginning shortly after independence and lasting to the present day.[89] To remedy this problem, a series of constitutional amendments added fourteen more justices to the Court between the 1950s and 1980s.[90]

Today, the Supreme Court has a sanctioned strength of twenty-six justices.[91] For the most part, the justices sit in ten to twelve courtrooms and hear cases in benches of two, except the Chief Justice whose bench is comprised of three. A larger bench is assembled when the Court hears a constitutional matter.[92] In a typical week, two-justice benches will hear arguments on Mondays and Fridays regarding whether pending cases should be admitted and placed on the calendar for a full hearing.[93] A single

86. *Id.*

87. LAW COMMISSION OF INDIA, ONE HUNDRED TWENTY-FIFTH REPORT ON THE SUPREME COURT—A FRESH LOOK 7 (1988), *available at* http://lawcommissionofindia.nic.in/101-169/Report 125.pdf.

88. INDIA CONST. art. 145, § 3.

89. LAW COMMISSION OF INDIA, *supra* note 87, at 7.

90. Other solutions, such as the creation of separate constitutional and appellate benches, were suggested but ultimately not implemented. *Id.* at 5.

91. SUPREME COURT OF INDIA, PRACTICE AND PROCEDURE: A HANDBOOK OF INFORMATION 17 (2005), *available at* http://www.supremecourtofindia.nic.in/HBPAPSCOI/index.html.

92. SUPREME COURT OF INDIA, SUPREME COURT OF INDIA ANNUAL REPORT 2005–2006 64–65 (2006), *available at* http://www.supremecourtofindia.nic.in/sciannualreport/annualreport2005-2006/sciannualreport2005-2006.htm [hereinafter SUPREME COURT OF INDIA ANNUAL REPORT].

93. *Id.* at 55. Oral argument for submissions continues in part out of a populist sense that all should be able to be heard before the highest court in the country, in part because justices do not trust lawyers to submit complete and well-crafted written briefs, and in part because the political power of the bar helps ensure that lawyers get as many billable appearances in front of the Court as possible.

bench will go through dozens of cases on a Monday or Friday. According to statistics for between 2005 and 2007, about twelve percent of these cases are admitted as regular matters to be heard between Tuesday and Thursday.[94] The rest are dismissed, often with only minimal oral argument. Better case management has meant that the Court has recently increased the number of cases it processes in a year.[95] The Court disposed of 46,210 pending matters in 2005, an increase of thirty percent from five years earlier.[96]

The increase in the number of the Court's benches may have originally been intended to oversee a less-trusted lower judiciary. This increase, though, allowed the Court to hear the wide array of public interest litigation cases it would take on beginning in the 1980s. The expansion of judicial interventionism in matters traditionally associated with legislative and executive competence would, ironically, be sped up by the institutional design of the Supreme Court, which was meant to combat the (lower) judiciary's own failures.

With its multitude of benches sitting on a daily basis, the Court acts almost as a secondary government, issuing orders in cases that affect almost every aspect of Indian public life. The Court has ordered that taxis and buses be switched to natural gas in Delhi, regulated encroachment on and preservation of public forests, and implemented guidelines for school bus safety, along with many other details of governance.[97] The High Courts take on governance functions similar to those of the Supreme Court in their respective jurisdictions, thereby multiplying the higher judiciary's reach (in March 2007, there were 604 judges in the nation's nineteen High Courts).[98]

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94. This twelve percent figure is arrived at by dividing the number of regular hearing matters instituted during 2005–2007 by the number of admission matters disposed of during that period. The data is taken from Supreme Court of India, Year-wise, Subject Category-wise Disposal of Admission Matters During 2005–2007, and Year-wise, Subject Category-wise Institution of Regular Hearing Matters During 2005–2007 (on file with author).

95. SUPREME COURT OF INDIA, *supra* note 92, at 57.

96. *Id.* Recently, this increase in efficiency has been offset by an increase in the number of cases filed before the Court each year. *Id.*

97. Amin Rosencranz & Michael Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 COLUM. J. ENVTL. L. 223, 233 (2003); T.N. Godavarman Thirumulpad v. Union of India, (2006) 1 S.C.C. 1; Joy Purkayastha, *SC Guidelines Are Given the Go-by*, INDIAN EXPRESS, Apr. 21, 1998, *available at* http://www.indianexpress.com/res/web/pIe/ie/daily/19980421/11151174.html.

98. Press Release, Rajya Sabha, Press Info. Bureau, Gov't of India, State Government and High Court Urged to Fill up Vacant Posts of Judges (Mar. 12, 2007), *available at* http://pib.nic.in/release/release.asp?relid=25801. Some High Courts frequently have public interest litigation brought before them (such as New Delhi or Mumbai), while others are less frequently petitioned (such as Assam).

To give a sense of the pervasiveness of the Supreme Court's role in Indian public life, it is helpful to compare how the legislature, executive, and Supreme Court are covered in the Indian press. In every year from 2003 to 2007, more articles in *The Hindu* (a leading Indian newspaper) mentioned the Supreme Court than either Parliament or Prime Minister Manmohan Singh. A search of *The Hindu* online includes all of its metro editions. As a result, the words "High Court" retrieve more hits than even the Supreme Court, showing the high profile of the upper judiciary in Indian political life more generally.

In contrast, a search of the *New York Times* during this same time period reveals more articles mentioning Congress or President Bush than the Supreme Court by at least a two-to-one or three-to-one margin, respectively. The U.S. circuit courts are relatively rarely mentioned in comparison.[99] It is likely that a survey of other English dailies in India would achieve similar results. A survey of Hindi and other local language

99. Number of articles that contain select government institution keywords in *The Hindu* and *New York Times* between 2003 and 2006:

TABLE 1: *THE HINDU* SEARCH RESULTS

	Supreme Court	Parliament/ Congress	Manmohan Singh/Bush	High Court/ Circuit Court
2007	4960	4220	3810	6500
2006	4300	3980	3970	5880
2005	3070	2750	2600	4830
2004	2630	2440	1460	3680
2003	634	493	29	860

TABLE 2: *NEW YORK TIMES* SEARCH RESULTS

	Supreme Court	Parliament/ Congress	Manmohan Singh/Bush	High Court/ Circuit Court
2007	2130	5620	7640	97
2006	2960	6570	10500	116
2005	3900	6150	10900	153
2004	2420	4810	12700	98
2003	1800	4010	8840	111

This data was gathered on March 7, 2008, by searching for the terms "supreme court," "parliament," "Manmohan Singh," and "high court" at news.google.com for each respective year of *The Hindu*, and the words "supreme court," "congress," "Bush," and "circuit court" for each respective year of the *New York Times*. There are pitfalls to this methodology. Searches for "supreme court" pick up hits not only of the Indian Supreme Court in *The Hindu*, but also foreign supreme courts that are reported in the paper. A similar problem arises in the United States, with the additional problem that news stories on U.S. state supreme courts are also caught in such a search of the *New York Times*. The number of hits for "parliament" in *The Hindu* also includes articles written about foreign parliaments. Despite these and other methodological problems, this survey paints a broad picture about reporting on the judiciary versus the other branches of government in India and the United States.

papers, read predominantly by poorer sections of society, would probably not report on the higher judiciary with as great a frequency as the English dailies. Still, there would likely be proportionally many more articles about the upper judiciary than in the U.S. media.

The perception that the Supreme Court is frequently more active in India's daily governance than Parliament is also buttressed by the Court's calendar. The Indian Supreme Court heard arguments on 190 days in 2007.[100] This number does not include the days a vacation bench sits while the full Court is away from mid-May to early July.[101] As a comparison, the U.S. Supreme Court heard arguments on only thirty-eight days in its 2006-2007 term.[102] In contrast to the Indian Supreme Court, Parliament sat for only seventy-six days in 2006,[103] with high absentee rates both in sessions and committee meetings.[104] The Supreme Court's active calendar allows it not only to take on many cases, but has also helped it to become a regular fixture in Indian public consciousness.

The Court, though, does not spend much of its time dealing with large constitutional law questions or even public interest litigation concerning governance matters. Instead, it allots a large part of its schedule to surprisingly routine matters that come before it simply because the lower courts are not trusted. The Supreme Court breaks down all cases before it into forty-five categories.[105] In 2007, the most regular hearing matters disposed of by the Court were criminal matters (20% of its docket), followed by civil service (14%), indirect tax (13%), ordinary civil (12%), and land acquisition (7%) matters.[106] Public interest litigation, which garners much public attention, constituted only 1% of the Court's regular hearing matters.[107] Strikingly, five-, seven-, and nine-justice bench

100. Supreme Court of India, Calendar 2007, http://www.supremecourtofindia.nic.in/new_s/cal-2007.htm (last visited Sept. 19, 2008).

101. *Id.*

102. Supreme Court of the United States, Calendar, October Term 2006, http://www.supremecourtus.gov/oral_arguments/06termcourtcalendar.pdf (last visited Oct. 4, 2008).

103. Lok Sabha, Bulletin-1 Year: 2006, http://loksabha.nic.in (follow "Business" hyperlink; then follow "Bulletin-I" hyperlink; then follow "Archive" hyperlink; then follow "2006" hyperlink) (last visited Oct. 4, 2008).

104. SOCIAL WATCH INDIA, *supra* note 43, at 33; Parliament has decreased the number of days on which it sits from the 1960s and 1970s, when it sat for over 130 days. K.C. Pant, *A 'Loose' Doctrine*, *in* THE SUPREME COURT VERSUS THE CONSTITUTION: A CHALLENGE TO FEDERALISM 178, 186 (Pran Chopra ed., 2006).

105. *See* Supreme Court of India, http://www.supremecourtofindia.nic.in/subcat.htm (last visited Oct. 4, 2008).

106. This data is taken from Supreme Court of India, Year-wise, Subject Category-wise Disposal of Regular Hearing Matters During 2005–2007 (on file with author).

107. *Id.*

matters, which require the Supreme Court to decide important questions of constitutional law, are also a statistically minor part of the Supreme Court's overall disposal rate in raw numbers (about 0.5%).[108] As of June 2008, there were 28,497 cases still awaiting admission hearings.[109] Moreover, 19,358 cases had been admitted but were awaiting regular hearing.[110]

Because the Supreme Court is so engaged by the thousands of rather ordinary cases that come before it, as well as by high profile public interest litigation matters, it is difficult for the Court to find time to decide larger constitutional matters. Not only is a larger bench required for these matters, but oral arguments for a major constitutional law case can last days, if not weeks. During this time, the justices on the constitutional bench cannot undertake the Supreme Court's other routine workload or supervise ongoing cases that have a direct impact on daily governance.

Although these backlog and scheduling problems obviously have negative effects on the development of constitutional jurisprudence, this situation does (even if not by design) allow the Court to delay hearing certain cases. This has meant the Court has frequently been able to delay hearing some (although certainly not all) controversial questions until the political climate is more favorable. Thus, several basic structure doctrine cases have taken years, and sometimes decades, to reach the Court.

Meanwhile, the role of seniority as an organizing mechanism in the Supreme Court has allowed individual justices to more easily press their vision for public interest litigation. To an outsider, it may seem strange that most of the Court's benches are comprised of two justices, which could easily result in a tie. However, even though the entire Supreme Court will hear hundreds of cases a week, it is common that not a single split decision will result. When there is a difference of opinion, the junior justice typically acquiesces to the opinion of the senior. This emphasis on seniority in decision-making on two- and three-justice benches made it easier for a handful of likeminded senior justices to craft an expansive right to life jurisprudence, since most of these cases come before the smaller benches. The power of any individual Supreme Court justice, though, is curtailed by a mandatory retirement age of sixty-five.[111]

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108. *Id.*

109. Supreme Court of India, Monthly Statement for the Month of June 2008, http://www.supremecourtofindia.nic.in/new_s/pendingstat.htm (last visited Oct. 4, 2008).

110. *Id.*

111. INDIA CONST. art. 124(2).

The Chief Justice is also determined by seniority. He (so far it has only been males) is the justice who has sat on the Court longest. The Chief Justice has a remarkably powerful position within the Indian judiciary. Not only does he appoint administrative staff for the Court,[112] but he also has a heavy hand in assigning Supreme Court justices to different cases and appointing Supreme Court and High Court justices. No Chief Justice can develop control over the Court for long despite his wide influence, though, because the average term is rather short. From independence to Chief Justice Sabharwal's retirement in 2007, the average term has been 602 days, or slightly under two years. The median term has been 414.5 days.[113]

The Chief Justice picks the justices who will sit on various cases, including larger constitutional benches. This power gives the Chief Justice potential influence over the Court's decision. Over the past ten years, the Chief Justice has never been in dissent on a five-, seven-, or nine-justice bench matter on which he has sat.[114]

The judiciary is basically self-selected, which provides insulation from outside political forces. Under the Constitution, the President appoints High Court members to the Supreme Court, but must do so in consultation with the Supreme Court, and in particular with the Chief Justice.[115] In the 1990s, the Supreme Court reinterpreted the Constitution to hold that a small collegium of senior justices headed by the Chief Justice would pick its own membership, and the role of the executive became more of a formality.[116] This self-selection process is an example of the deep distrust the judiciary displays towards the elected branches, even as it raises questions about the judiciary's own accountability.

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112. SUPREME COURT OF INDIA, *supra* note 91, at 17–20.

113. The large difference between the mode and mean can be accounted for in large part by Chief Justice Chandrachud's exceptionally long tenure as Chief Justice in the 1970s and 1980s for more than seven years, which is about three years longer then the next longest occupant of the office. The mean and mode were determined by using the dates of appointment to and retirement from the office of Chief Justice. Supreme Court of India, Supreme Court Former CJIs, http://www.supremecourtofindia.nic.in/new_s/f_cji.htm (last visited Oct. 4, 2008).

114. This ten-year analysis of Chief Justice opinions was based upon an examination of cases retrieved under the various Chief Justices' names from a search on Manupatra, an Indian legal database (on file with author). Although there is a high frequency of unanimous decisions on these benches, there have also been vigorous dissents and concurrences by other justices, and some of the opinions were likely compromise positions. Most of these opinions were not written by the Chief Justice. Further, the justices on the Supreme Court might have more uniform judicial opinions than in other supreme courts because their selection is largely apolitical and done through the Indian Supreme Court itself. Therefore, the phenomenon of Chief Justice majorities may be explained by a higher likelihood that the Chief Justice simply shared the opinions of the other justices on the Court.

115. INDIA CONST. art. 124.

116. Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) Supp. 2 S.C.R. 659, 777–78; *see also In re*: Presidential Reference, A.I.R. 1999 S.C. 1.

Supreme Court justices are almost entirely picked from amongst the High Court justices, while High Court justices are generally picked from distinguished members of the bar and the lower judiciary. Since all the justices are lawyers, they are generally either from the middle class or wealthy. Lower castes, scheduled tribes, and women are all significantly underrepresented in the higher judiciary.[117] The justices' backgrounds arguably shape the perspective of their decisions and their understanding of what good governance entails.

The Indian Supreme Court, at first glance, may not seem well equipped to advance a jurisprudence in which the higher judiciary undertakes such frequent and extensive interventions to further a broad conception of good governance. The Court oversees a chronically ill lower judiciary, which has resulted in a backlog of cases and has anachronistic filing and oral argument rules and procedures.[118] Yet, because of its multiple smaller benches, its emphasis on seniority, its ability to process thousands of cases, and the insulation of its justices from the other political branches, it is uniquely well situated to assume these wider powers. Its institutional structure has allowed it to take on a far ranging role in Indian society, politics, and public consciousness.

To be sure, the Court's ability to reshape the balance of powers in India was fostered by both its own institutional structure and culture and the shortcomings of the country's representative institutions. It was ultimately specific doctrines, though, like the basic structure doctrine and an expanded right to life jurisprudence, that widened the Court's power. These doctrines were not necessarily inevitable, but were created by particular histories and the arguments and decisions made by individual justices. This Article will now turn to these doctrines to see how the Court used its distinctive institutional design to respond to the governance failures (real, perceived, or feared) of India's representative institutions.

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117. V. Venkatesan, *Judiciary and Social Justice*, FRONTLINE (India), Oct. 14–27, 2000, *available at* http://www.hinduonnet.com/fline/fl1721/17210960.htm (discussing caste disparities in the upper judiciary). Ruma Pal was the third woman to ever sit on the Supreme Court. She retired on June 3, 2006. As of publication, there are no female justices on the Supreme Court. In *Supreme Court Advocates-on-Record Ass'n*, Justice Pandian provided statistics on the discrepancies and warned: "Our democratic polity is not only for any self perpetuating oligarchy but is for all people of our country." (1993) Supp. 2 S.C.R. 659, 868 (Pandian, J., concurring).

118. *See supra* text accompanying notes 109–10.

IV. THE FIGHT FOR "THE VERY SOUL" OF THE CONSTITUTION,[119] OR THE BASIC STRUCTURE DOCTRINE

The German Constitution famously bars amendments to Article One (human dignity) and its democratic and federal form of government.[120] Bruce Ackerman calls constitutions like Germany's foundationalist.[121] They appeal to both a natural rights philosophy and the country's historical experience to set fundamental rights and certain governing structures beyond democratic debate.[122] He compares such foundationalist constitutions to dualist ones like that of the United States.[123] In dualist democracies, certain key principles—like fundamental rights—are entrenched in the constitution.[124] The constitution acts as a check on everyday governance, but the people can change any of its principles if they organize the super-majority necessary for constitutional amendment.[125]

India is relatively unique in that its Constitution was drafted to be within the American dualist tradition, but has been interpreted by the Supreme Court as being essentially foundationalist. Despite this seeming incongruity, it is today widely accepted by Parliament and the public (although with sometimes vocal dissent) that the Constitution has a certain basic structure that cannot be amended.

The basic structure doctrine was created in large part out of the immediate political circumstances in which the Court and the country found themselves. 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.[126]

119. Dr. B.R. Ambedkar, Remarks at the Constituent Assembly of India Debates (Dec. 9, 1948), *available at* http://parliamentofindia.nic.in/LS/debates/vol7p23.htm (stating that the guarantee of judicial review to protect fundamental rights was at "the very soul of the Constitution and the very heart of it.").

120. Grundgesetz für die Bundesrepublik Deutschland [GG] [Federal Constitution] arts. 1, 20, 79.

121. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 15 (1991).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 12–15.

126. *See infra* Part V.B.

Despite these justifications, the Court has faced accountability and capacity criticisms directed at the basic structure doctrine. Before delving into the judicial underpinnings of and debates surrounding the doctrine, though, a bit of background is needed to understand the political context in which the doctrine developed.

A. Historical Background

It is easy to forget today that there were many competing visions for the future of India in the lead-up to independence. Subhas Chandra Bose, a leader in the pre-independence Congress Party, favored a stronger, more authoritarian state, modeled on the fascist governments of the 1930s and 1940s.[127] On the other extreme, Mahatma Gandhi advocated a more decentralized and self-sufficient society.[128]

Neither Bose's nor Gandhi's vision would gain much traction during the Constitution's drafting. Instead, one of the most entrenched debates at the Constituent Assembly—and one that would provide the historical seeds of the basic structure doctrine—was between the similar, but competing ideologies of Jawaharlal Nehru and Sardar Vallabhbhai Patel.[129] Nehru and Patel were the two most powerful political leaders of the Congress Party at the end of British rule.[130] Indeed, Nehru became the country's first Prime Minister only upon Gandhi's request that Patel step aside (Patel had been supported by more members of Congress to lead the party at independence).[131]

Patel was a proponent of many of the principles of laissez-faire economics.[132] Nehru, on the other hand, believed in large-scale property redistribution and nationalization to correct past social injustices and lay the groundwork for a prosperous economy.[133] This position was popular amongst the poverty-stricken electorate, and even today polls indicate that the overwhelming majority of Indians believe that there should be a limit on possessing a certain amount of land and property.[134]

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127. LLOYD I. RUDOLPH & SUSANNE HOEBER RUDOLPH, IN PURSUIT OF LAKSHMI 69 (1998).

128. *Id.* at 69–70.

129. *Id.* at 69.

130. *Id.* at 68–74.

131. *Id.* at 71–72.

132. *See id.* at 71.

133. *Id.* at 70–72; *see also* Sudipta Kaviraj, *A Critique of the Passive Revolution, in* STATE AND POLITICS IN INDIA, *supra* note 65, at 43, 57–58.

134. In a survey done around the 2004 national elections, almost sixty-eight percent of people somewhat or fully agreed that there should be a ban on possessing land and property above a certain limit. Ctr. for the Study of Developing Societies, Nat'l Elections Studies (NES) 2004 Marginals for All

According to Dr. Ambedkar this difference in economic perspective came to a head in the drafters' debates over property rights.[135] Nehru wanted no compensation for property seized by the government, while Patel demanded full compensation.[136] The right to property in the final version of the Constitution was a compromise between the two, with ambiguity surrounding both when property could be taken and what compensation would be paid.[137]

Patel's early death in 1950 ensured not only that Nehru would never again be seriously challenged for the post of Prime Minister, but also that he could more easily push his original vision of the right to property. When early judicial decisions signaled that the courts would limit the government's ability to expropriate property, Nehru's government acted swiftly. In 1951, it passed the first amendment to the Constitution which created articles 31A and 31B.[138] These articles would provide the origin of the dispute that would ultimately create the basic structure doctrine.

Article 31A stated that any acquisition of property by the state through law could not be called into question under the rights to property, equality, freedom of speech, or freedom to practice one's profession.[139] Article 31B created the Ninth Schedule, a list of laws inserted in the back of the Constitution.[140] Laws that were placed into this schedule through constitutional amendment could not be found invalid by the judiciary on the basis of any of the fundamental rights.[141] In the First Amendment, thirteen land reform laws were placed into this protected schedule. Although the First Amendment only protected land reform laws, the Ninth Schedule could, on its face, be used to protect any law placed into it from fundamental rights review.

After the passage of these two articles, a showdown between Parliament and the judiciary became almost inevitable. Parliament had amended the Constitution to shield not only expropriation laws, but potentially any law from fundamental rights review. With the very idea of meaningful judicial review under attack, the Court's potential responses were limited. It could acquiesce to the amendment, admitting that it could

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Questions, Results to Question 30A, *available at* http://www.csdsdelhi.org/nes2004/ques.htm (last visited Oct. 4, 2008).

135. Dr. B.R. Ambedkar, Rajya Sabha Debates (Mar. 19, 1951) *in* Parliamentary Debates, 1950–52.

136. *Id.*

137. *Id.*

138. INDIA CONST. arts. 31A–B.

139. *Id.*

140. *Id.*

141. *Id.*

be stripped of its power of judicial review, and hope a later Parliament would remove the offending articles, or, alternatively, it could search for a way to defend judicial review.

The first attempt by the Court to salvage its review power came in 1967 in *Golak Nath v. State of Punjab*, which challenged articles 31A and 31B.[142] This case arose two years after Nehru's death. Since the other principle architects of the Constitution, such as Patel and Dr. Ambedkar, were already dead, only a few of the original founders were left to challenge the Court's pronouncements on the Constitution. Further, the decision was announced only days after the Congress Party suffered a major setback at the polls. The party retained a majority in Parliament, but for the first time since independence it no longer had the two-thirds majority needed to pass a constitutional amendment on its own.

In *Golak Nath*, the Court found that none of the fundamental rights could be amended.[143] In a bit of inventive wordplay, it held that amendments should be understood as "law" under the Constitution.[144] Since the fundamental rights voided any "law" that was inconsistent with them, any attempt to amend them was void.[145]

The Court's decision in *Golak Nath* led to widespread outcry from both Parliament and the public. By placing all of the fundamental rights beyond amendment, the Court had also placed its more conservative interpretation of the right to property beyond amendment. The 1971 elections saw Congress and Indira Gandhi campaign on a populist platform against the *Golak Nath* decision and regain their two-thirds majority in Parliament. The government quickly passed amendments that directly challenged the Court's declaration that the fundamental rights could not be amended and further shielded laws from fundamental rights review.[146]

This constitutional showdown came to a head in *Kesavananda Bharati v. State of Kerala*.[147] 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,

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142. I.C. Golak Nath v. State of Punjab, (1967) 2 S.C.R. 762, 819.

143. *Id.* at 815.

144. *Id.* at 899.

145. *Id.*

146. INDIA CONST. art. 13(4): inserted by the Constitution (Twenty-fourth Amendment) Act, 1971 (stating that amendments can be applied to fundamental rights section of the Constitution); *Id.* art. 368(1) and (3): inserted by the Constitution (Twenty-fourth Amendment) Act, 1971 (stating that Parliament can amend any provision of the Constitution); *Id.* art. 31C: inserted by Constitution (Twenty-fifth Amendment) Act, 1971 (saving laws from certain fundamental rights review that the legislature declares furthers Directive Principles).

147. A.I.R. 1973 S.C. 1461.

the Court overruled *Golak Nath*.[148] 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.[149] The opinion was heavily fractured (there were five 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.[150]

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 an Emergency, suspending several fundamental rights and rounding up political opponents.[151] Five months into this low point of Indian democracy, the Court decided *Indira Nehru Gandhi v. Raj Narain* ("*Indira Gandhi*").[152] The case did not end the Emergency or remove Prime Minister Gandhi from power, but it did show the Court was willing to be an independent voice. A high court had earlier ruled that Indira Gandhi had committed corrupt practices in her election campaign and disqualified her from holding office for six years.[153] In response, her government amended the Constitution to say that any challenge to the election of the person who is, or becomes, Prime Minister can be made only through a tribunal created by law. The judiciary would have no power to challenge such a law or the decision of the tribunal.[154]

The Supreme Court struck down this amendment under the basic structure doctrine as violating the separation of powers and judicial

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148. *Id.* at 1565.

149. *Id.* The Court limited its directions to striking down only part of article 31C, which had been added to the Constitution in 1971. This article protected laws from judicial scrutiny that the legislature declared furthered directive principles under the rights to property, equality, or freedom of expression/freedom to practice one's own profession. It further held that the Court could not question the legislature's finding that the law in question furthered a Directive Principle. Although the judgment was severely fractured, the Court struck down the article's language that the judiciary could not judge whether the law in question furthered a Directive Principle. *Id.* at 1566.

150. *See, e.g.*, *id.* at 1534–35.

151. S. P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 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). *Id.*

152. A.I.R. 1975 S.C. 2299.

153. *Id.* at 2313.

154. *Id.* at 2340 (citing INDIA CONST. art. 329(A)).

review, both core principles of the Indian Constitution.[155] However, in a politically pragmatic maneuver that also followed an existing line of precedent, the Court found Indira Gandhi's election valid by upholding legislation that had retroactively removed the legal basis for her original conviction.[156]

In response to the decision, Indira Gandhi's government passed an amendment shortly thereafter declaring that there is no limit to Parliament's constituent power, foreshadowing what could have become another constitutional standoff.[157] Public opinion, though, was shifting against the Prime Minister. The abuses of the Emergency and Indira Gandhi's subsequent loss in the polls when the Emergency ended in 1977 would be seared into the Indian collective conscious.[158] Parliament had discredited itself, and the Court's basic structure doctrine seemed an increasingly sensible control.

In 1978, the new government stripped the right to property of its fundamental rights status in the Constitution and moved it to another section (fittingly, further in the back).[159] The Court did not challenge this development, thereby eliminating one of the primary points of perpetual conflict between the judiciary and Parliament.

The Supreme Court has decided several cases involving the basic structure doctrine since *Indira Gandhi*. Most recently, in January 2007, the Court in *I.R. Coelho v. State of Tamil Nadu*[160] further developed its interpretation of article 31B, which created the Ninth Schedule to protect particular laws from fundamental rights review. Although originally only thirteen land reform laws were placed in the Ninth Schedule, more than 280 laws have now been added to it through constitutional amendment.[161] Most of these laws concern land reform, but many do not, including some laws that relate to caste-based reservations and security laws from Indira Gandhi's era. In a unanimous decision (a signal of the current health of the basic structure doctrine) the Court reasserted in *Coelho* that many, if not

155. *Id.* at 2355, 2385, 2469.

156. *Id.* at 2321–24.

157. INDIA CONST. art. 368(4) and (5): inserted by the Constitution (Forty-second Amendment) Act, 1976.

158. *Indira Gandhi*, *in* ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com (search "Indira Gandhi"); *see also* R.C. Rajamani, *Emergency: Memories of the Dark Midnight*, HINDU BUS. LINE INTERNET EDITION, June 25, 2005, www.thehindubusinessline.com/2005/06/25/stories/2005062501140900.htm.

159. Article 31 was removed and article 300A was inserted under the Constitution (Forty-fourth Amendment) Act, 1978.

160. (2007) 1 S.C.R. 706.

161. INDIA CONST. art. 31B.

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.[162]

B. Judicial Justification

The missteps and weaknesses of Parliament and the executive have allowed the Supreme Court to successfully assert that India's Constitution should be interpreted to have an unamendable basic structure. This victory was made possible by such factors as Parliament's routine use of amendatory power, the loss of the founding voice of Nehru, the miscalculations of Indira Gandhi, and the weaknesses of a politically fractured Parliament. Further, the Constitution contained so many political and historical compromises that an attempt to rewrite the whole document would be dangerous for any parliament. The Court's success did not come immediately, but rather with false starts like *Golak Nath*, when it misjudged the political salience of land reform laws.

Yet the basic structure doctrine's current triumph is not just a result of the judiciary's evolving political fortunes, but also of the Court's justifications for the doctrine. The Court taps into an understanding that constitutional rule based solely on "we the people," and certainly "we the constitutional amendment," may present great danger to a liberal democratic view of good governance, and can even be viewed as illegitimate. The Supreme Court asserts two justifications for this argument. First, it maintains that the Constitution, and the history out of which it was created, implicitly control Parliament's amendatory power.[163] Second, it claims that Parliament's amendatory power is trumped by removed and almost metaphysical civilizational norms that form the necessary skeleton of good governance.[164]

The Court in *Kesavananda Bharati* used the founding's unique place in Indian political history to make a series of intentionalist arguments in support of the basic structure doctrine.[165] Justices argued that the word "amendment" could not possibly have been intended by the founders to mean the ability to destroy the fundamental features of the Constitution.[166] They also argued that the preamble was meant to express India's story to

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162. Coelho, (2007) 1 S.C.R. 706.
163. Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461.
164. *Id.*
165. *See, e.g.*, *id.* at 1499–1535.
166. *Id.* at 1498–99.

that point in history and the people's true will. Therefore, the principles reflected in the preamble were intended to be beyond amendment.[167] Finally, the justices cast doubt on the ability of later constitutional amendments to communicate the people's will, given that amendment in India is easier than in most other countries.

The Court grounded the basic structure doctrine in the tangible historical moment of the creation of the Constitution. As Gary Jeffrey Jacobsohn has pointed out,[168] there is something rather Burkean about this claim that rights, judicial review, democracy, and other elements of the basic structure doctrine are part of the story of the nation that should not be changed quickly, and that this constitutional narrative should instead be safeguarded by the nation's justices.

If the Court's actions have some Burkean justification, though, Edmund Burke himself would probably not have agreed with the Court's approach. As Bruce Ackerman has observed, India's Constitution was born out of the Congress Party leading the nation's long and popular struggle for independence.[169] At the end of this successful struggle, the Party became a "credible vehicle for popular sovereignty."[170] It used this temporary charismatic authority to make the Constitution an enduring symbol of national unity that would outlast the Party's own political fortunes.[171] The Court does not argue, however, that there are no other constitutional moments in Indian history with sufficient authority to change these fundamental principles articulated by the Constituent Assembly (although this argument is plausible).[172] Rather, it argues that no future constitutional moments (short of a new constitutional convention) could change these fundamental features of the Constitution. In finding that the Constitution's creation is the only pure constitutional moment and certain features of it cannot change with the people's desires or the needs

167. *Id.* at 1534.

168. Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT'L J. CON. L. 460, 483 (2006).

169. Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 782–83 (1997).

170. *Id.* at 782.

171. *Id.* at 782–83.

172. There has arguably been no other major constitutional moment in India's history besides the founding. No moment when the people of India came together to cast the future of the country in a markedly different direction. Potentially, one such moment was the rejection of Indira Gandhi at the polls after the Emergency, but if anything this action just expressed a desire to return to the previous constitutional order. Because no party has ever claimed over fifty percent of the vote in national polls, it is difficult to consider any party's victory in India's independent history as a constitutional ultimatum of much depth.

of the times, the Court privileges this historical moment more than Burke likely would.

The Court justifies the basic structure doctrine not only with the historical moment of the founding, but also with a conception of what a properly ordered society should be. It, therefore, makes a good governance argument. Even if the Court does not acknowledge it explicitly, this second justification allows the Court to potentially take into account the changing needs of the country in the future. It also provides a justification for the doctrine that is decidedly different from the reasoning one would find in the American liberal tradition—that is, the idea that a constituent body's enactments must not merely conform to the will of the people, but also to the norms of good governance. The Court roots its conception of such a correctly structured society in the Constitution, the practices of democratic and civilized nations as documented through history, and the requirements of bringing order to a country like India.

As already noted, in *Indira Gandhi*, the Court challenged Parliament's ability to pass an amendment barring the judiciary from reviewing the election of the Prime Minister. The five-justice bench produced five opinions, but each struck down some provisions of the questionable amendment under the basic structure doctrine. The Court invoked broader principles of civilization or good governance for two purposes. First, the justices wished to justify that judicial review of the amending process (i.e., the basic structure doctrine) is part of a modern amendment process. Second, through the same logic, the justices argued that judicial review itself is such a closely held norm of modern civilization that it must be part of the Constitution's basic structure, and so Parliament cannot protect election outcomes from judicial review through amendment.

Justice Beg's opinion in *Indira Gandhi* supports the basic structure doctrine with an argument that is both pragmatic in its fear of sovereignty resting solely in the people's representative institutions, and idealistic in its embrace of the Constitution. He found that "[o]ur concepts of sovereignty must accord with the needs of the people of our country."[173] Justice Beg continued:

> [T]he concept of the Supremacy of the Constitution is, undoubtedly, more suited to the needs of our country than any other so far put forward. It not only places before us the goals towards which the nation must march but it is meant to compel our Sovereign Republic, with its three organs of Government to proceed in certain

173. Indira Nehru Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299, 2440.

> directions. . . . Can we deny [the Constitution] that supremacy which is the symbol and proof of the level of our civilisation?[174]

In explaining the necessity of a separation of powers in the amendment process, and by implication within the Constitution more generally, Justice Mathew's opinion in *Indira Gandhi* contrasts a "less civilized" pre-British Indian sovereign:

> A sovereign in any system of civilized jurisprudence is not like an oriental despot who can do anything he likes, in any manner he likes and at any time he likes. That the Nizam of Hyderabad had legislative, judicial and executive powers and could exercise any one of them by a firman has no relevance when we are considering how a pro-sovereign—the holder of the amending power—in a country governed by a constitution should function.[175]

In his concurring opinion, Justice Chandrachud finds that even despots recognize the legitimacy that comes with judicial checks on their power. He then echoes Justice Mathews's remarks that this is certainly true in a modern democracy as well:

> The most despotic Monarch in the modern world prefers to be armed, even if formally, with the opinion of his Judges on the grievances of his subjects. . . .
>
> I find it contrary to the basic tenets of our Constitution to hold that the Amending Body is an amalgam of all powers—legislative, executive and judicial. "Whatever pleases the emperor has the force of law" is not an article of democratic faith. The basis of our Constitution is a well-planned legal order . . . .[176]

Justice Beg, in his interpretation of the basic structure doctrine in *Indira Gandhi*, discusses the different checks on sovereign power that have existed throughout history to show that judicial review is an integral part of good governance.[177] Amongst several examples, he writes:

> The ideal King, in ancient India, was conceived of primarily as a Judge deciding cases or giving orders to meet specific situations in accordance with the Dharma Shastras. It also appears that the actual exercise of the power to administer justice was often delegated by

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174. *Id.* at 2440–41.
175. *Id.* at 2382.
176. *Id.* at 2471–72.
177. *Id.* at 2430–31.

> the King to his judges in ancient India. Indeed, according to some, the theory of separation of powers appears to have been carried so far . . . that the King could only execute the legal sentence passed by the Judge. . . . In the practical administration of justice, we are informed, Muslim caliphs acknowledged and upheld the jurisdiction of their Kazis to give judgment against them personally.[178]

In the earlier and landmark *Kesavananda Bharati*, Justice Khanna attempts to reject the argument that there are "limitations which must be read in the Constitution . . . because they are stated to be based upon certain higher values which are very dear to the human heart and are generally considered essential traits of civilized existence."[179] Yet, even he winds up trying to identify these "essential traits of civilized existence" when he describes why the right to property should not be included in the basic structure of the Constitution. He notes that since what constitutes the right to property has changed "from time to time," this right does not have as great a claim to being part of the basic structure.[180] Further, he looks to broader governance norms to explain why the right to property may at times need to be supplemented to development needs, and so should not be considered part of the basic structure:

> The modern states have . . . to take steps with a view to ameliorate the conditions of the poor and to narrow the chasm which divides them from the affluent sections of the population. . . . Quite often in the implementation of these policies, the state is faced with the problem of conflict between the individual rights and interests on the one side and rights and welfare of vast sections of the population on the other. The approach which is now generally advocated for the resolving of the above conflict is to look upon the rights of the individuals as conditioned by social responsibility.[181]

Although Justice Khanna rejects the idea that the right to property falls under the basic structure doctrine, justices often invoke the fundamental rights of the Constitution as being part of or at least related to its basic structure. Sometimes the justices rely on a natural rights argument to make this claim. Justice Reddy in *Kesavananda Bharati* finds that "the framers of our Constitution could not have provided for the freedoms inherent as a

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178. *Id.* at 2430.
179. Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461, 1866.
180. *Id.* at 1881.
181. *Id.* at 1877.

part of the right of civilised man to be abrogated or destroyed."[182] Justice Gibbs, in the same case, seems to find at least some fundamental rights "inalienable."[183] More often, though, justices do not claim that fundamental rights are natural or inalienable, but instead that they are necessary for good governance in a modern democracy. In this way, later judicial reasoning on the relationship of fundamental rights to the basic structure doctrine echoes Justice Palekar's view in his dissent in *Kesavananda Bharati*:

> The absolute concepts of Liberty and Equality are very difficult to achieve as goals in the present day organized society. The fundamental rights have an apparent resemblance to them but are really no more than rules which a civilized government is expected to follow in the governance of the country whether they are described as fundamental rules or not.[184]

In *Minerva Mills v. Union of India*,[185] a leading basic structure doctrine case from 1980, Chief Justice Chandrachud takes a similarly utilitarian stance when he finds that "[f]undamental rights occupy a unique place in the lives of civilized societies . . . ."[186] He argues that certain rights are "elementary for the proper and effective functioning of a democracy. They are universally so regarded, as is evident from the Universal Declaration of Human Rights."[187] He then uses the Privy Council as an example of how "[m]any countries in the civilised world have parted with their sovereignty in the hope and belief that their citizens will enjoy human freedoms."[188] He finds that although the emphasis of the Directive Principles on a social and economic revolution is important, what makes a "real democracy" is that it "will endeavour to achieve its objectives through the discipline of fundamental freedoms . . . ."[189]

International human rights agreements are also relied upon as examples of more universal norms of good governance. In arguing that the basic structure doctrine should allow for more emphasis on social redistribution, Justice Bhagwati in *Minerva Mills* points out that:

182. *Id.* at 1756.
183. *Id.* at 1536.
184. *Id.* at 1814 (Palekar, J., dissenting).
185. (1981) 1 S.C.R. 206.
186. *Id.* at 255.
187. *Id.* at 257.
188. *Id.* at 257–58.
189. *Id.* at 259.

> [t]here are also two International Covenants adopted by the General Assembly for securing human rights, one is the International Covenant on Civil and Political Rights and the other is the International Covenant on Economic, Social and Cultural Rights. Both are international instruments relating to human rights. It is therefore not correct to say that Fundamental Rights alone are based on human rights while Directive Principles fall in some category other than human rights.[190]

In *Coelho* in 2007, Chief Justice Sabharwal approvingly paraphrased Amartya Sen's argument that "the justification for protecting fundamental rights is not on the assumption that they are higher rights, but that protection is the best way to promote a just and tolerant society."[191]

Whether invoking natural, moral, historical, or utilitarian grounds, the Court justifies the principles of the basic structure doctrine by appealing to core elements of what it argues is needed for good governance. Modern democratic civilization, and its mandates, are made a bar to Parliament's constituent powers.

C. *Accountability and Capacity Concerns*

The criticisms of the Court's basic structure doctrine can largely be divided into accountability and capacity concerns. Some argue that the doctrine is inherently undemocratic because the Supreme Court (an unelected institution) blocks amendments that a super-majority of the people's representatives support.[192] Further, critics like Pran Chopra argue that the basic structure doctrine undermines the Constitution itself by weakening the stature of Parliament.[193] By taking power out of the hands of the people, it is more likely someone else will do the same.[194]

Proponents of the basic structure doctrine, though, argue that the doctrine is necessary to protect the requirements of a democratic order.[195] For people who fear the abuses of an unchecked Parliament, the doctrine

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190. *Id.* at 320.

191. I.R. Coelho v. State of Tamil Nadu, (2007) 1 S.C.R. 706, ¶ 24.

192. *See, e.g.*, Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN THE HONOUR OF THE SUPREME COURT OF INDIA (B.N. Kirpal et al. eds., 2000); Subhash Kashyap, *The 'Doctrine' Versus the Sovereignty of the People*, *in* THE SUPREME COURT VERSUS THE CONSTITUTION, *supra* note 104, at 99.

193. Pran Chopra, *The Supreme Court Versus the Constitution: An Introduction in Ten Questions*, *in* THE SUPREME COURT VERSUS THE CONSTITUTION, *supra* note 104, at 22, 36.

194. *Id.* at 53.

195. Fali Nariman, *The 'Doctrine' Versus 'Majoritarianism,'* *in* THE SUPREME COURT VERSUS THE CONSTITUTION, *supra* note 104, at 79, 81–89.

helps create confidence in the democratic process. It may therefore help prevent the rise of a non-democratic order that promises stability and the protection of certain basic rights.

The Court, however, has not been that effective in stopping the abuses of Parliament. Although the Court stood up to Indira Gandhi during the Emergency, it let her remain in power, and it might not have been able to oust her if it desired. Further, during the Emergency the Court explicitly supported Indira Gandhi's sweeping view of her emergency powers.[196] As some critics of the basic structure doctrine like to point out, it was the people who voted her out.[197] The democratic system worked. However, this was only after a miscalculation on her part that she would win the election and thus could end the Emergency. She was also voted overwhelmingly back into power by the people in 1980. So the electoral check was certainly not perfect either.

Finally, the basic structure doctrine was born of perceived necessity. Without it the Court might have suffered a continuing erosion of its power of judicial review. Certainly, other democracies have had no judicial review, but if there is a benefit to a judicial constitutional check, then the doctrine has helped ensure that this benefit continues to be felt.

For many Indians it has come down to a question of what they fear more: a controlling Supreme Court that may develop confining interpretations of the Constitution, or the specter of an unchecked Parliament running over the core provisions of the Constitution. So far, the basic structure doctrine's opponents have not had enough support to seriously threaten it.

The doctrine's insistence on good or "civilized" governance is not an isolated case of the Court embracing additional powers. Instead, the doctrine is part of a broader trend in Indian liberalism, as the Court's expansive right to life jurisprudence shows.

V. THE RIGHT TO LIFE: RULE THROUGH RIGHTS

The Constitution's Directive Principles lay out goals for the Indian state, such as a living wage, primary education for all, and international

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196. Additional Dist. Magistrate of Jabalpur v. S.S. Shukla, (1976) Supp. S.C.R. 172. In this case, the question presented was whether the suspension of article 21 only affected personal liberty in those cases in which the law that created the personal liberty emanated from article 21, or whether it affected all personal liberty no matter its legal source. *Id.* at 218–19. The Court found that the suspension of habeas corpus rights was constitutional and equally suspended all personal liberty rights, whether or not that liberty was derived from article 21. *Id.* at 245–46.

197. Chopra, *supra* note 193, at 51.

peace and security.[198] The Constitution, though, explicitly made these principles nonjusticiable. This decision reflected Dr. Ambedkar's view that all rights should have clear remedies, and that constitutions should not be filled with "pious declarations" of unenforceable rights.[199]

Although the Constitution did not on its face give the Supreme Court a mandate to enforce social and economic rights like those in the Directive Principles, the Court gradually interpreted this to be its role. This evolution, sparked by the Emergency, built momentum in the face of mass poverty across the country and was allowed to expand in the governance vacuum created by the country's representative institutions. Like the basic structure doctrine, the Court largely justified these interventions on two grounds. First, it interpreted an active role for itself under the Constitution's vision for controlled social and economic revolution. Second, the Court appealed to principles of civilization or good governance that necessitated and explained its interventions.

Through the Court's right to life jurisprudence, it took on many details of governance, like ordering more stringent enforcement of traffic regulations or banning smoking in public places.[200] Indeed, the Court took on so many functions that its right to life jurisprudence came to encompass more than just protecting life, but also promoting good governance more broadly.

This role is highlighted well by *M.C. Mehta v. Union of India*,[201] the Taj Mahal case of 1997. This case brought to the attention of the Supreme Court that coal-fired industries around the Taj Mahal were tarnishing its white marble and polluting the lungs of nearby residents (although presumably no more than in other areas in India with coal-based industries). Citing the need to protect this wonder of civilization, the Court invoked its right to life jurisprudence and ordered that none of the polluting industries could operate in the immediate area. The Court had seemingly found the right to life in an inanimate object. Indeed, this case highlights that what is at stake for the Court in many of its right to life cases is not so much the right to life as good governance more generally (of which the protection of life and its basic necessities is only one part).

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198. INDIA CONST. arts. 36–51.

199. Dr. B.R. Ambedkar, Remarks at the Constituent Assembly Debates (Dec. 9, 1948), transcript available at http://parliamentofindia.nic.in/LS/debates/vol7p23.htm.

200. *Supreme Court Bans Smoking in Public Places*, REDIFF.COM, Nov. 2, 2001, http://www.rediff.com/news/2001/nov/02sc.htm.

201. (1996) Supp. 10 S.C.R. 973.

A. Background

Article 21 of the Constitution is relatively short: "No person shall be deprived of his life or personal liberty except according to procedure established by law."[202] In the Court's early history, the article was interpreted narrowly to give it little judicial bite.[203] The Emergency, though, led the Court to reexamine the article, beginning a process of reinterpretation that would balloon its meaning over the next two decades.

Despite the Court's proclamations regarding a supreme constitution in *Indira Gandhi*, the judiciary had largely failed to check the Prime Minister's civil rights abuses during the Emergency.[204] Not surprisingly, article 21's initial expansion was aimed at helping better secure these civil rights. In 1978, the Court added a reasonableness, or non-arbitrariness, requirement to article 21. In doing so, it created natural justice or substantive due process in Indian jurisprudence.[205] The next few years saw article 21 used to outlaw cruel or unusual punishment,[206] relax pre-trial bail requirements,[207] restrict the conditions under which a debtor can be imprisoned,[208] create rights against custodial violence[209] and inordinate delays in criminal trials,[210] and provide legal aid.[211]

The Supreme Court embraced this more populist direction in part to regain the legitimacy it had lost during the Emergency and in its early decisions, which often sided with wealthy property owners. The Court was also caught up in the post-Emergency euphoria, a sense of excitement at the return of liberal democracy that swept the major institutions of Indian government at this time.[212] Further, the urban middle class, which had been targeted during the Emergency, now desired to see a strong independent judiciary to check the state's power. The press, which had

202. INDIA CONST. art. 21.

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

204. For example, at least forty thousand political opponents of the government were held during the Emergency. EPP, *supra* note 3, at 76.

205. Maneka Gandhi v. Union of India, (1978) S.C.R. 623, 649–52.

206. Inderjeet v. State of Uttar Pradesh, (1979) S.C.R. 255, 256 (noting that a cause of action exists if a mandatory minimum sentence "is too cruel to comport with Art. 21").

207. Hussainara Khatoon v. Home Sec'y, State of Bihar, A.I.R. 1979 S.C. 1369, 1372–73.

208. Jolly George Verghese v. Bank of Cochin, (1980) S.C.R. 913, 921–22.

209. Sheela Barse v. State of Maharashtra, (1983) S.C.R. 332, 342.

210. *See* State of Rajasthan v. Sukhpal Singh, (1984) S.C.R. 53, 57, 60.

211. *Hussainara Khatoon*, A.I.R. 1979 S.C. at 1373–75.

212. Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, *in* THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES 36 (Neelan Tiruchelvam & Radhika Coomaraswamy eds., 1987).

been reticent to report on Indira Gandhi's abuses, increasingly covered not only civil rights abuses, but also other social problems with new vigor.[213]

Beginning in the mid-1980s, and then much more quickly in the 1990s, the Court expanded its article 21 jurisprudence even further to try to tackle not only the problems of the criminal justice system and government repression, but also social injustices more broadly. A litany of rights were read into the right to life, including the rights to fresh air and water,[214] land for tribal populations,[215] protection from environmental degradation,[216] shelter,[217] health,[218] education,[219] and food and clothing.[220] This new interventionism was born at a time when Parliament and the country's other representative institutions were increasingly politically fractured and viewed as abdicating their governance responsibilities.

The growth of article 21 jurisprudence also led to the development of a new form of legal practice, called public interest litigation. The Court relaxed its standing requirement, allowing any public-minded person to petition the Court on behalf of anyone he or she perceived as being deprived of his or her rights.[221]

It also loosened its filing requirements. For example, when a journalist wrote the Court in 1982, complaining that certain female suspects were tortured in police custody, the Court treated the letter as a petition and gave directions to ensure protection of these women and other prisoners in similar situations.[222] This action by the Court spawned a practice of persons writing letters asking the Court to intervene on pressing social issues. In 2006, the Supreme Court received almost twenty thousand such letters from across the country.[223] These letters are screened on predetermined criteria by the PIL division of the Registrar and by the

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213. *Id.* at 37.

214. M.C. Mehta v. Union of India, (1996) Supp. 10 S.C.R. 973; Andhra Pradesh Pollution Control Board v. M.V. Nayudu, 1999 A.I.R. S.C. 812.

215. Banwasi Seva Ashram v. State of Uttar Pradesh, (1987) 1 S.C.R. 336, 342.

216. Tarun Bharat Sangh v. Union of India A.I.R. 1992 S.C. 514.

217. Olga Tellis v. Bombay Mun. Corp., (1985) Supp. 2 S.C.R. 51, 83.

218. Consumer Educ. & Research Ctr. v. Union of India, A.I.R. 1995 S.C. 922; Vincent v. Union of India, (1987) 2 S.C.R. 468, 477–78 (reemphasizing the right to health, but noting its limitations).

219. Mohini Jain v. Karnataka, (1992) 3 S.C.R. 658, 661; Unni Krishnan v. A.P., A.I.R. 1992 S.C. 716.

220. Shantistar Builders v. Narayan Khimalal Totame, A.I.R. 1990 S.C. 630.

221. Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802, 813–14; S. P. Gupta v. President of India, (1982) 2 S.C.R. 365.

222. Sheela Barse v. State of Maharashtra, (1983) 2 S.C.R. 337, 342. For another example of a letter being accepted as a petition, see Upendra Baxi v. State of Uttar Pradesh, (1983) 2 S.C.C. 308.

223. SUPREME COURT OF INDIA ANNUAL REPORT 2005–2006, *supra* note 92, at 44.

Registrar him- or herself. After this initial filtering, only about one percent of these letters are placed before the Court as admission matters.[224]

This new public interest litigation often touched on large and complex social issues. In response, the Court shifted from an adversarial to a more inquisitorial judicial model. To aid in research, the Supreme Court created commissions to gather data and present recommendations on the issues presented in a complaint.[225] The Court also began to exercise continuing jurisdiction over cases, issuing preliminary interim orders and then periodic follow-up orders.[226]

Judicial intervention in social and economic rights cases is relatively common around the world, but the level of intervention found in India is rather dramatic. There are five different types of positive interventions that courts around the world use to enforce social and economic rights, all of which are also found in India: (1) courts may simply articulate that a right exists without necessarily enforcing it, (2) the judiciary may apply an anti-retrogression principle to prevent the government from unreasonably withdrawing entitlements it currently provides (a technique seen in *Goldberg v. Kelly* in the United States),[227] (3) courts may require that the government provide a reasonable plan for the progressive realization of a social and economic right (this type of intervention is epitomized in the South African model of enforcement),[228] (4) the judiciary can give a one-time order to implement a government program that furthers a social and economic right (many courts in Latin America have followed this path),[229]

224. *Id.*

225. The Court has appointed district magistrates, district judges, professors, journalists, officers of the court, and even practicing advocates to direct investigations into the alleged complaints and then report to the Court. Soli J. Sorabjee, *Protection of Fundamental Rights by Public Interest Litigation, in* PUBLIC INTEREST LITIGATION IN SOUTH ASIA: RIGHTS IN SEARCH OF REMEDIES 30–31 (Sara Hossain, Shahdeen Malik, & Bushra Musa eds., 1997).

226. Clarence Dias, *The Impact of Social Activism and Movements for Legal Reform in South Asia, in* PUBLIC INTEREST LITIGATION IN SOUTH ASIA, *supra* note 225, at 8.

227. Goldberg v. Kelly, 397 U.S. 254 (1970); *see also* Charles Reich, *The New Property*, 73 YALE L.J. 733, 783–85 (1964); U.N. Office of the High Comm'r for Human Rights [OHCHR], Comm. on Econ., Soc. and Cultural Rights, *General Comment 3 to the International Covenant on Economic, Social, and Cultural Rights* (Dec. 14, 1990) (barring retrogressive measures to fulfillment of social and economic rights).

228. Gov't of the Republic of S. Afr. v. Irene Grootboom 2000 (11) BCLR 1169 (CC) at ¶ 99(2)(a) (S. Afr.); Minister of Health v. Treatment Action Campaign and Others 2002 (5) SA 721 (CC) at ¶ 38 (S. Afr.); International Covenant on Economic, Social, and Cultural Rights, art. 2, Dec. 16, 1966, 993 U.N.T.S. 3.

229. Decision T-505 of 1992, Eduardo Cifuentes Muñoz, J. (unanimous), Diego Serna Gomez c. Hospital Universitario del Valle "Evaristo Garcia" (Colom. 1992) (Colombian Supreme Court case ordering that AIDS treatment must be provided to those who need it); Decision 456 of 2002, Glenda López c. Instituto Venezolano de Seguros Sociales (2001) (Venezuelan Supreme Court case ordering that ARVs (antiretroviral drugs) must be provided in a consistent manner); Asociación Benghalensis v.

and (5) courts may monitor and give orders concerning the implementation of a government program over a period of time. Options (4) and (5) entail an added level of intrusion depending on whether the court orders the implementation of a pre-existing program, the creation of a new element to a government scheme, or an entirely new scheme. Additionally, the level of intrusion varies depending on whether the court orders the scheme for one person or an entire class of persons.

The Indian Supreme Court has extended its power even further than these basic categories might suggest. For example, the Court has set up quasi-executive authorities to implement its orders. One such court-created authority protects and regulates all coastal areas in the country. It can independently punish those violating of the Court's directions and receives a continuous budget from the government.[230]

B. *Judicial Justification*

Like the Moghal emperors of earlier times, who hung bells outside their palace that commoners could ring to bring their sufferings to the emperor's attention, the Court has taken on an expansive role in hearing the governance grievances of Indians.[231] The Court has justified its broadened right to life jurisprudence through a wide interpretation of its powers under a constitution that pledges social and economic upliftment. It also has invoked principles of good governance that all civilized societies must further. Although at times separate justifications, the two are inter-linked as each supports, and in some ways defines, the other's content (i.e., general principles in the Constitution are made more specific with reference to civilizational norms, while some of these broader norms are often further defined in Constitutional provisions).

To find constitutional justification for its expanded article 21 interventions, the Court increasingly cited the Constitution's preamble. The preamble states that India is a socialist state that seeks social, economic, and political justice, works for equality of status and

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Ministerio de Salud y Acción Social, Estado Nacional [L.L. 2000-B] 126 (Argentinian Supreme Court case ordering that anti-retroviral drugs be provided in a timely and consistent manner).

230. S. Jagannath v. Union of India, (1996) Supp. 9 S.C.R. 848.

231. As Justice Chandrachud comments in *Indira Gandhi*, "The Moghal Emperor, Jehangir, was applauded as a reformist because soon after his accession to the throne in 1605, he got a golden chain with sixty bells hung in his palace so that the common man could pull it and draw the attention of the Ruler to his grievances and sufferings." Indira Nehru Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299, 2471.

opportunity, and promotes fraternity to assure individual dignity.[232] The Court also frequently appealed to the Directive Principles for constitutional justification, indirectly making many of the Directive Principles justiciable through its right to life jurisprudence.[233] In *M.C. Mehta v. State of Tamil Nadu*, in which the Court abolished some forms of child labor, Justice Hansaria found that since all organs of government are directed to apply the Directive Principles, the Court should also consider them when deciding "matters of great public concern."[234] In *Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir*,[235] Justice Bagwati explained the relationship between the Directive Principles and the judiciable fundamental rights in public interest litigation:

> The Directive Principles concretise and give shape to the concept of reasonableness envisaged in [the fundamental rights] . . . . By defining the national aims and the constitutional goals, they set forth the standards or norms of reasonableness which must guide and animate governmental action. Any action taken by the Government with a view to giving effect to any one or more of the Directive Principles would ordinarily . . . qualify for being regarded as reasonable, while an action which is inconsistent with or runs counter to a Directive Principle would incur the reproach of being unreasonable. . . .
>
> What according to the founding fathers constitutes the plainest requirement of public interest is set out in the Directive Principles and they embody *par excellence* the constitutional concept of public interest.[236]

The increasing invocation of the Directive Principles and the preamble to justify the Court's broadening interventions sits side-by-side with appeals to public interest or civilization to support and define its right to life jurisprudence. In *Chameli Singh v. State of Uttar Pradesh*,[237] the Court

232. The Court is typical in finding, "The preamble and Article 38 [the right to petition the Supreme Court] of the Constitution of India—the supreme law, envisions social justice as its arch to ensure life to be meaningful and liveable with human dignity." Consumer Educ. & Research Ctr. v. Union of India, A.I.R. 1995 S.C. 922, 938.

233. M.C. Mehta v. India, (1996) Supp. 10 S.C.R. 266; Chameli Singh v. State of Uttar Pradesh, (1995) Supp. 6 S.C.R. 827, 834; L.I.C. of India v. Consumer Educ. & Research Ctr., (1995) Supp. 1 S.C.R. 349.

234. M.C. Mehta v. State of Tamil Nadu, (1996) Supp. 9 S.C.R. 726, at 739.

235. (1980) 3 S.C.R. 1338.

236. *Id.* at 1341. This concept of the relationship between the Constitution's provisions, such as the Directive Principles, and public interest is pushed even further in the earlier cases.

237. (1995) Supp. 6 S.C.R. 827.

found that the "[r]ight to live guaranteed in any civilised society implies the right to food, water, decent environment education, medical care and shelter. These are basic human rights known to any civilised society."[238] In *Consumer Education & Research Centre v. India*,[239] the Court held that the right to life provides that the state must provide facilities to its people for a minimum standard of "health, economic security and civilised living. . . ."[240] In *LIC of India v. Consumer Education Research & Centre*,[241] a case dealing with equity issues in the insurance industry, the Court explained, "Every action of the public authority or the person acting in public interest or its acts give rise to public element [sic], should be guided by public interest."[242] It went on to find that "[t]he appellants or any person or authority in the field of insurance owe a public duty to evolve their policies subject to such reasonable, just and fair terms and conditions accessible to all the segments of the society for insuring the lives of eligible persons."[243]

The Court again invoked these broader meta-governance standards in *Shantistar Builders v. Narayan Khimalal Totame*,[244] when it said:

> Basic needs of man have traditionally been accepted to be three—food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view.[245]

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238. *Id.* at 834. In *Consumer Educ. & Research Ctr. v. Union of India*, the Court noted, "Law is the ultimate aim of every civilised society as a key system in a given era, to meet the needs and demands of its time." A.I.R. 1995 S.C. 922, 938. It went on to explain that in India these demands mean that:

> Social security, just and humane conditions of work and leisure to workman are part of his meaningful right to life and to achieve self-expression of his personality and to enjoy the life with dignity, the State should provide facilities and opportunities to them to reach at least minimum standard of health, economic security and civilised living while sharing according to the capacity, social and cultural heritage.

Id.

239. *Id.*
240. *Id.*
241. (1995) Supp. 1 S.C.R. 349.
242. *Id.* at 366.
243. *Id.* at 382.
244. A.I.R. 1990 S.C. 630.
245. *Id.* at 633.

The Court has several other times also picked up on this theme that the right to life means something more than mere animal existence.[246] As the Court explained in *Chameli Singh*, "The ultimate object of making a man equipped with a right to dignity of person and equality of status is to enable him to develop himself into a cultured being."[247]

The Court often contrasts itself against government authorities that seem unwilling or unable to look after the people's welfare, including even enforcing preexisting law. As Justice Iyer laments in a case in which he orders a city to improve its sewage system, "the crying demand for basic sanitation and public drains fell on deaf ears."[248] In the face of such neglect, Justice Iyer remarks, "one wonders whether our municipal bodies are functional irrelevances, banes rather than booms and 'lawless' by long neglect, not leaders of the people in local self-government."[249] In *Bandhua Mukti Morcha v. Union of India*,[250] the Court implicitly reprimands the government in stressing, "We must not be content with the law in books but we must have law in action."[251] Again in *M.C. Mehta v. Union of India*, the Court directs, "Rule of law is the essence of Democracy. It has to be preserved. Laws have to be enforced."[252]

Like the basic structure doctrine, pursuant to which Justice Beg observed that "[o]ur concepts of sovereignty must accord with the needs of the people of our country,"[253] the Court has found that its right to life jurisprudence is a product of the particular social and economic demands of India. In *LIC of India*, the Court explains:

> [W]hen new challenges are thrown open, the law must grow as social engineering to meet the challenges and every endeavour should be made to cope with the contemporary demands to meet socio-economic challenges under rule of law and have to be met either by discarding the old and unsuitable or adjusting legal system to the changing socio-economic scenario.[254]

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246. *See* Consumer Educ. & Research Ctr. v. Union of India, A.I.R. 1995 S.C. 922; Chameli Singh v. State of Uttar Pradesh (1995) Supp. 6 S.C.R. 827, 833 ("In any organised society, right to live as a human being is not ensured by meeting only the animal needs of man.").

247. *Chameli Singh*, (1995) Supp. 6 S.C.R. 827, 834.

248. Municipal Council, Ratlam v. Shri Vardichand et al., (1981) 1 S.C.R. 97, 100.

249. *Id.* at 106.

250. A.I.R. 1984 S.C. 802, 834.

251. *Id.* at 144.

252. (2006) 2 S.C.R. 264, at 269.

253. Indira Nehru Gandhi v. Raj Narain, A.I.R. 1976 S.C. 2299, 2440.

254. L.I.C. of India v. Consumer Educ. & Research Ctr., (1995) Supp. 1 S.C.R. 349.

To remain relevant to an economically desperate population with an often unresponsive government, the Court has reasoned that it must expand its mandate. The Court's broad interpretation of its powers under the Constitution and its invocation of minimum core requirements of civilized governance are central to justifying these larger social interventions.

C. Accountability Concerns

Some critics of the Supreme Court's expansive right to life jurisprudence argue that the Court, as the theoretically least accountable branch of government, should restrain from attempting to undertake such broad good governance interventions. More recently, the justices themselves have become increasingly vocal in expressing these concerns. Justice Katju, a leading proponent of reigning in the Court's expansionist view of its powers, declared in 2007:

> Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like Emperors. . . . [I]t is not the business of this Court to pronounce policy. [The Court] must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic.[255]

As Justice Katju suggests, the Court has generally placed few limitations on when it will intervene in right to life matters. The Court normally refrains from interfering in economic policy[256] and tends not to make decisions that require explicit budgetary allocation (even if its orders often require significant new government spending). Further, the Court will sometimes declare, like Justice Katju, that it does not make policy (although many of the Court's decisions have either directly influenced or, arguably, created policy). Although these restrictions are sometimes laid out by the Court, what is remarkable to many foreign (and domestic) observers is how few limits, or even justifications, are given by the Court in its right to life interventions.

255. Divisional Manager, Aravali Golf Club v. Chander Hass (Dec. 6, 2007), *available at* http://indiankanoon.com/doc/47602/.

256. BALCO Employees Union v. Union of India, (2001) Supp. 5 S.C.R. 511, at 539.

Take *People's Union for Civil Liberties v. Union of India*[257] (the "Right to Food Case")—the ongoing right to food case—for example. In sweeping and detailed interim orders in November 2001, the Supreme Court directed all state governments to fully implement eight different centrally sponsored welfare schemes.[258] The Court ordered full implementation of the enormous public distribution system,[259] which provides subsidized grain to poor people across the country.[260] It directed that all states provide a cooked mid-day meal in their schools, under what had previously been a voluntary national program.[261] The Court also ordered the implementation of programs that gave money to destitute seniors, poor pregnant women, and impoverished families when their primary breadwinner dies.[262] The Court required implementation of the Integrated Child Development Scheme ("ICDS"), which provides services such as immunization, supplementary nutrition, and pre-school education to young children and their mothers.[263] It also directed that there should be an ICDS disbursement center in every settlement.[264] In addition to these eight programs dealt with in the November order, the Court later directed that the government's work-for-food scheme be expeditiously implemented.[265] To supervise all these directions, the Supreme Court appointed two commissioners to investigate grievances, monitor the order's implementation, and make recommendations to the Court.[266] The

257. People's Union for Civil Liberties (PUCL) v. Union of India (Writ Petition [Civil] No. 196 of 2000).

258. People's Union for Civil Liberties (PUCL) v. Union of India, Order of Nov. 28, 2001 (on file with author) [hereinafter Order of Nov. 28, 2001]. The orders stemming from the PUCL Right to Food Case are also available in SOCIO LEGAL INFO. CTR., RIGHT TO FOOD (Colin Gonsalves, P. Ramesh Kumar & Kumar Srivastava eds., 2005).

259. The order involved both the Public Distribution System ("PDS") and *Antyodaya Anna Yojana*, which is a component of the PDS aimed at the poorest of the poor. Specifically, the Court directed that the states identify the millions of poor families that still do not receive their benefits and give them access to subsidized grain by January 2002. Order of Nov. 28, 2001, *supra* note 258, at 1–2.

260. *Id.*

261. *Id.* at 3–4.

262. *Id.* at 4, 6–7.

263. *Id.* at 5–6.

264. *Id.* at 5. This direction was expanded in later orders to guarantee an ICDS center on demand, and directed the government to have 1.4 million ICDS centers by December 2008. Right to Food Campaign Website, ICDS: Key Directions in Supreme Court Orders, http://www.righttofoodindia.org/icds/icds_orders.html (last visited Oct. 4, 2008).

265. People's Union for Civil Liberties (PUCL) v. Union of India, Order of May 8, 2002, 1–3, *available at* http://www.hrln.org/admin/issue.php?id=14&pil=1&pilid=18 (follow "Supreme Court Order 08-05-02" hyperlink).

266. *Id.* at 4; People's Union for Civil Liberties (PUCL) v. Union of India, Order of Oct. 29, 2002, *available at* http://www.hrln.org/admin/issue.php?id=14&pil=1&pilid=18 (follow "Supreme Court Order 29-10-02" hyperlink) [hereinafter Order of Oct. 29, 2002].

state governments were instructed to appoint nodal officers and assistants to supply these commissioners with needed information.[267]

The Court's orders in the Right to Food Case enmeshed it in many of the country's major welfare schemes, yet the Court did not provide any explicit constitutional justification for its intervention until almost two years after its initial November 2001 orders. In finally justifying its intervention the Court said:

> The anxiety of the Court is to see that the poor and destitute and the weaker sections of the society do not suffer from hunger and starvation. The prevention of the same is one of the prime responsibilities of the Government—whether Central or the State. Mere schemes without any implementation are of no use.[268]

In not further explaining when and why it will take action—beyond broad appeals to the right to life or the necessities of good governance—the Court seems to imply that there has been a generalized governance failure and that specific judicial interventions do not require elaborate justification. Yet, more precise justifications could arguably help calm some of the accountability fears the Court faces, or at least better explain the Court's actions.

As the Court in the Right to Food Case points out, "Mere schemes without any implementation are of no use."[269] Many of the Supreme Court's orders in right to life cases are simply an attempt to implement preexisting legislation that the state is not putting into practice itself. In these situations, the Court can claim that it is just enforcing the law Parliament has already passed. This argument would give the Court more democratic credibility when acting in these instances. The Court is simply saying that Parliament or the state legislative bodies must live up to their word. Still, Indian courts have to make decisions about what legislation will and will not be enforced as constitutional rights. The courts also sometimes make orders that basically create new policy.

John Hart Ely famously argued that courts should be more willing to intervene when there is a greater chance that the democratic process has broken down, for instance when a minority group is being discriminated

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267. *Id.* at 5.

268. People's Union for Civil Liberties (PUCL) v. Union of India, Order of May 2, 2003, 4–5, *available at* http://www.hrln.org/admin/issue.php?id=14&pil=1&pilid=18 (follow "Supreme Court Order 02-05-03").

269. *Id.*

against.[270] If this reasoning is applied to social and economic rights (something Ely did not have in mind), it could justify the Court acting if, for example, AIDS patients were not given reasonable medical treatment from the government (a case currently before the Court). Arguably, HIV-positive persons are discriminated against by the general public. Further, AIDS patients might already be so ill when they discover they are HIV-positive that they cannot engage in the democratic process to change opinions about AIDS or lobby for better treatment.

Situations like the Right to Food Case, though, seem to point to an even broader democratic breakdown that the Court is attempting to combat in its right to life jurisprudence. What is striking about food security is that it affects a majority of India's population. Most Indians are either malnourished themselves or know someone close to them who is.[271]

In instances like the Right to Food Case, in which there is arguably no stigmatized minority, the Court could claim its interventions combat democratic breakdowns on potentially two grounds. First, it might assert that Indian citizens do not know what they can or should demand from their government. Scholars like Mahendra Singh have argued that many Indians conceive of rights against the state differently.[272] Either culturally they do not believe it is their role to demand more social programs from the state, or they do not know that such programs should form a baseline of what they should expect from the state.[273] For example, many Indians who are malnourished may not even conceive of themselves as such. Through this lens, the Supreme Court's orders can be seen as creating and enforcing proper norms for the public.

Alternatively, Indian citizens may know there is a problem that affects their right to life, like widespread malnourishment, and believe the government should do something about it. However, the political process has been unable to successfully implement desired programs. Caste or

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270. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

271. According to the third National Family Health Survey ("NFHS") (2005–2006), forty-six percent of all Indian children under three are underweight, while fifty-six percent of all adult women are anemic and thirty-three percent have a below normal body mass. Ministry of Health and Family Welfare, Gov't of India, 2005–2006 National Family Health Survey (NFHS-3) National Fact Sheet India (Provisional Data), *available at* http://www.nfhsindia.org/pdf/IN.pdf (last visited Oct. 4, 2008).

Undernourishment in India is only slowly improving with time, and some indicators, like anemia in women or the wasting of children (i.e., children becoming too thin for their height), have gotten marginally worse in the last decade, despite rapid economic growth during this period.

272. Mahendra Singh, *supra* note 11, at 39–40; *see also* MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 113–14 (2000) (discussing how poverty can create entrenched preferences that conflict with "universal norms").

273. *See* NUSSBAUM, *supra* note 272.

communal lines that dominate Indian politics may end up overshadowing voter preferences on many vital policies.[274] The Court could justify its intervention in these cases by saying that it is simply assuring that programs that Indians desire, and that are vital for the health of the population, are properly created and implemented.

Either in holding Parliament to its laws, protecting stigmatized minorities, setting baselines for an unaware public, or supporting their overshadowed preferences, the Court can argue that it is acting in the interest of Indian society, particularly the poor and marginalized. Although these explanations may help justify the Court's actions—and even lend them some democratic credibility—it still is not a representative body. Indeed, the Court's actions can arguably discourage Parliament and other elected bodies from taking on difficult issues since they know that the judiciary will likely take some action if they do not.[275] In filling this governance vacuum, the Supreme Court may make the other branches less accountable and government officials less responsible for decisions that are now out of their hands.[276]

Further, there is no guarantee that the Supreme Court's actions will only help the poor or further democratic interests.[277] Indeed, some contend that the Court's right to life jurisprudence has become a means for furthering individual, middle class, or elite interests. Prime Minister Manmohan Singh has warned that public interest litigation can be used as "a tool for obstruction, delay and sometimes even harassment."[278] In 1996, a bill was introduced into Parliament (though it never passed) claiming that public interest litigation was often misused. It proposed that if a PIL

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274. *See generally* RUDOLPH & HOEBER RUDOLPH, *supra* note 127, at 20, 57–59. Programs like agricultural price subsidies do gain the parties' attention, but that is because they have a clear impact on their voters' economic outlook and also benefit wealthy land owners who often control the political parties. Jason Lakin & Nirmala Ravishankar, Working for Votes: The Employment Guarantee in India 24 (paper presented at the American Political Science Association Annual Meeting Philadelphia, PA, Aug. 31–Sept. 3, 2006, *available at* http://www.allacademic.com/meta/p151215.html).

275. AVANI MEHTA SOOD, CTR. FOR REPRODUCTIVE RIGHTS, LITIGATING REPRODUCTIVE RIGHTS: USING PUBLIC INTEREST LITIGATION AND INTERNATIONAL LAW TO PROMOTE GENDER JUSTICE IN INDIA 29 (2006).

276. JUSTICE B.N. SRIKRISHNA, SKINNING A CAT 35 (2005); JEREMY RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY 248 (1989) (making this point in the U.S. context).

277. William Landes & Richard Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875, 893 (1975) (arguing that there is no reason to think courts would work as an interest group for the weak and marginalized in only the U.S. context).

278. Manmohan Singh, Prime Minister of India, Speech at the Conference of Chief Ministers & Chief Justices of High Courts: Has the Pendulum Swung to the Other Extreme? (Mar. 11, 2006), *available at* http://www.outlookindia.com/full.asp?fodname=20060311&fname=manmohan&sid=1&pn=1.

petition failed or was shown to be *mala fide*, the petitioner should be imprisoned and pay damages. The bill also criticized the courts for prioritizing PIL over other cases that had been pending for years.[279] In 2005, the Court itself stated, "The judiciary has to be extremely careful to see whether behind the beautiful veil of public interest an ugly private malice, vested interest or publicity seeking is not lurking."[280]

Some have criticized the Court for not adequately taking into account the needs of the poor in right to life cases, such as when the Court removed encroachers from public forests or closed small-scale polluting industries.[281] While earlier right to life cases furthered more socialist principles embodied in the Directive Principles, critics contend that recent cases are more law and order- or middle class-oriented. These criticisms highlight that the Court's increased interventionism is not necessarily focused on furthering the interests of the poor. Instead, it is concerned with making a governance system work that is too often neglected by the country's representative bodies. Some interventions may more clearly favor the poor while others do not. Whether the Court follows a neo-liberal, socialist, pro-poor, pro-middle class, or other ideology may change from bench to bench or decade to decade, yet its push to further principles of good governance in these interventions does not.

The Court, of course, cannot follow any good governance approach it likes. The government's willingness to implement its orders constrains the Court's behavior. Its ability to appeal to India's constitutional vision or standards of civilization also shapes the actions it takes. Public opinion is critical. There may be an emerging belief that the Court has overstretched and is impairing governance, or on the contrary, that it is not being activist enough to protect the common man's interests. Yet, public opinion is a notoriously ill-defined concept, and it is, of course, not a representative body that can make concrete decisions. As for now, however, the public has rather quietly allowed the Supreme Court to take on many of the roles of its representative bodies. This situation may arise out of a lack of information about the Court's current role, an inability to organize to challenge it, or acquiescence to or even welcome acceptance of the Court's

279. Ashok Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, *in* SUPREME BUT NOT INFALLIBLE—ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 159, 180 (B.N. Kirpal et al. eds., 2000).

280. *SC Cautions Against Use of PIL*, indlaw.com, Dec. 22, 2004, *available at* http://indlaw.com/769197157EDB544BB0639CB6077F572A.

281. Desai & Muralidhar, *supra* note 279.

actions. Regardless of the explanation, the Court's innovations in public interest litigation have achieved a considerable degree of stability.

D. Institutional Capacity Concerns

The Indian judiciary has been criticized for having a comparative disadvantage to representative institutions with respect to balancing the competing needs of society, gathering information necessary to make policy decisions, and implementing and monitoring its orders.[282] Indeed, the Supreme Court has encountered systematic enforcement problems with many of its orders in public interest litigation.[283] Although the Court has hinted at a willingness to sanction government officials in public interest litigation if they fail to comply with its orders,[284] it almost never actually holds them in contempt. Some have criticized the judiciary for being more interested in grandiose proclamations that make for good reading in the newspaper than actually implementing their orders. Further, the policies at issue in much public interest litigation are overseen by a bureaucracy that is understaffed, under-trained, under-resourced, and, not surprisingly, often corrupt. Even if the central and state governments had the political will to fully implement these programs, they would find it difficult to do so.

Despite these obstacles, the Court's orders in public interest litigation have had some impact, frequently considerable. Sometimes the central and state governments do comply, or earnestly attempt to comply, with the Court's directions.[285] The Court's orders can also help educate government officials about their obligations and provide another voice demanding they fulfill these responsibilities.[286]

Even when the Court's decisions have little immediate impact, the Court frequently fosters a political space in which its orders can eventually be implemented or other policy changes can occur. As Schultz and

282. As Supreme Court Justice B.N. Srikrishna has written, "Sheer expediency or the urge for immediate justice in an abstract sense is hardly a justification for taking on problems with myriad fine details that the court is ill equipped to handle." SRIKRISHNA, *supra* note 276, at 35.

283. As Commissioner Saxena put it in the Right to Food Case, there has been "routine violation" of the orders by the respondent governments. Almost all of the deadlines the Court gave to the states in the Right to Food Case to fully or partially implement its orders were missed. SOCIO LEGAL INFO. CTR., *supra* note 258, at 169.

284. Order of Oct. 29, 2002, *supra* note 266.

285. Shantistar Builders v. Narayan Khimalal Totame, A.I.R. 1990 S.C. 630 (commenting on the effectiveness of orders).

286. People's Union for Civil Liberties (PUCL) v. Union of India, Order of Nov. 18, 2004, *available at* http://www.hrln.org/admin/issue.php?id=14&pil=1&pilid=18 (follow "Supreme Court Order 18-11-04" hyperlink).

Likewise, in a series of cases beginning in the 1970s, the Court articulated a right of the public to government information.[293] The Court's decisions were one of the primary impetuses for the far-reaching Right to Information Act, which came into law in 2005.[294]

The involvement of civil society in making court orders tangible brings other problems, though. Government officials complain that they spend too much time in court dealing with cases from diverse petitioners, rather than actually running government programs. Cases can drag on for years as petitioners and the government respond to each other's often complex cases before even the first interim order is given. Many petitioners realize that they do not have the capacity to adequately represent an issue only after they have brought a case. Court action, especially an unfavorable court order, can also impede or demoralize other civil society responses.

Further, once a social program is declared a right, even for an interim period, it becomes difficult for a ministry, the Parliament, or even the Court to modify it if reforms are needed.[295] The Court's orders can also inadvertently cause the government to prioritize certain programs over others.[296]

Justices have acknowledged that there may not be judicially manageable standards to deal with all of these issues,[297] but they still intervene out of perceived necessity. They argue that they are encouraging government to take on its duties, and are thereby promoting respect for the rule of law.[298] At the very least, they can act as an "alarm clock" to alert Parliament that a social problem has gotten out of hand and needs

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Education a Fundamental Right, 2 INT'L J. CONST. L. 148 (2004).

293. Bennett Coleman & Co. v. Union of India, A.I.R. 1973 S.C. 106; State of Uttar Pradesh v. Raj Narain, (1975) 3 S.C.R. 333; People's Union for Civil Liberties (PUCL) v. Union of India, (2004) 2 S.C.C. 476.

294. The Right to Information Act, 2005, No. 22 of 2005; India Code (2005), v. 22.

295. Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 915–16 (2001) (discussing how, in the United States, welfare reform gutted several federal policies for the American poor, even though many argue that welfare reform has ultimately helped poor people more than it has hurt them).

296. For example, the government vaunted a proposed thirty-five percent increase in the school education budget for 2007–2008 to improve the country's weak primary and secondary school system. A large part of this increase, though, went to fund only implementation of the mid-day meal, which had been ordered by the Supreme Court, leaving the budget for many other aspects of the school system about the same or slightly decreased. Jayati Ghosh, *Short Shrift to School Education*, FRONTLINE (India), Mar. 10–23, 2007, *available at* http://www.hinduonnet.com/fline/fl2405/stories/20070323002304000.htm.

297. Avani Mehta Sood, *Gender Justice Through Public Interest Litigation: Case Studies from India*, 41 VANDERBILT J. TRANSNAT'L L. 833, 848 (2008).

298. *Id.* at 846.

attention.[299] Courts are, after all, well designed to give orders relatively clearly and quickly compared to legislative processes that might take decades to, or never, materialize.[300] Judicial tests of relevance also tend to be rigorous, and the judicial process is not as subject to exogenous political influences as that of other branches.[301]

Courts may have weaknesses when they take on social questions, but they also have strengths. The Court's responsiveness, or perceived responsiveness, to many social issues often sits in stark contrast to Parliament's inaction. Despite the manifold criticisms over its interventionism, the Supreme Court is still often viewed as more competent than the representative branches of government. The Court's recurring inability to follow through on many of its orders has, so far, seemingly had only a marginal impact on the legitimacy of its interventions.[302]

VI. HAS THE GOOD GOVERNANCE COURT GONE GLOBAL?

The story of the rise of a good governance judiciary in India is certainly unique. The shortcomings of India's representative institutions, the Supreme Court's institutional structure, the development of the basic structure doctrine, and the Court's right to life jurisprudence have all combined to create a distinct jurisprudential history. Yet, in other ways, the Indian Supreme Court and the circumstances of its rise are not so special. In other countries, we see many of the elements that have fostered such extensive review powers in India. Indeed, in a broader global trend, we find analogous forms of judicial review developing elsewhere.

Justice Albie Sachs of the South African Constitutional Court has argued that in the nineteenth century, the executive achieved control over society, in the twentieth century parliament gained control over the executive, and in the twenty-first century the judiciary will establish principles and norms to control both parliament and the executive.[303] Clearly, India could be pointed to as an example of this proposed historical narrative. As Justice Sachs suggests, there are others as well. This section

299. *Id.*

300. As Donald Horowitz writes with regard to the United States: "In the judicial process, questions get answers. It is difficult to prevent a judicial decision. No other public or private institution is bound to be so responsive." DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 22 (1977).

301. *Id.*

302. SOOD, *supra* note 275, at 29.

303. Albie Sachs, *Social and Economic Rights: Can They Be Made Justiciable?*, 53 SMU L. REV. 1381, 1387 (2000).

examines judicial corollaries similar to the Supreme Court's expanded right to life jurisprudence and basic structure doctrine that have surfaced beyond India's borders.

It is outside the scope of this Article to examine how these doctrines arose in other countries. Instead, this section merely attempts to show that courts outside India are taking on similarly expanded mandates that further a broad platform of good governance. The Indian experience may also suggest a useful framework to understand why these other courts have gained power; more useful, at least, than the U.S. experience. In India, the Court's expansive doctrines were largely judge-made, and certainly were not constitutional inevitabilities. In other countries, though, these doctrines are often clearly embodied in constitutions.[304] Whether included in constitutions or judge-made, the repeated appearance of these doctrines, or versions of them, suggests that judicial review is transforming in countries outside of the United States. This change may be driven by political forces similar to those present in India (such as widespread poverty, an overriding desire for stability, or perceived shortcomings in representative institutions) that are not as ubiquitous in the United States. Critics of expanded review powers for judiciaries, whether in India or elsewhere, should grapple with why these courts have adapted such a role in the first place, before making any blind call to curtail their powers.

This Article has focused on only two strands of the Indian Supreme Court's jurisprudence, although other aspects are also part of its rise in power. Similarly, this comparative section will deal only with corollaries to these two strands, although the global rise of courts has many other sides.[305]

A. The Right to Life and Social and Economic Rights

The Indian Supreme Court's expanded interpretation of the right to life arguably falls under the rubric of social and economic rights jurisprudence. This conflation may not be precisely correct, however, because the Court's interpretation of the right to life extends outside of what many, including the United Nations, consider classic social and economic rights (for example, its orders concerning the enforcement of traffic regulations or zoning). Some of these issues of comparison, though,

304. *See, e.g., infra* notes 310–11 and accompanying text.

305. Ran Hirschl's book, *Towards Juristocracy*, for example, deals mostly with the judiciary's new role in dealing with matters like the Quebec secession issue in Canada or what a Jewish state is in Israel. HIRSCHL, *supra* note 3.

likely arise out of the relative youth of social and economic rights jurisprudence.

Although India began implementing its expanded right to life jurisprudence in the 1980s, it was not until the 1990s that the world saw routine and often highly interventionist enforcement of social and economic rights. The idea of social and economic rights is, of course, not new. The Universal Declaration of Human Rights and Franklin Roosevelt's New Deal are two of several previous important embodiments of a commitment to these rights.[306] What changed was that courts increasingly enforced social and economic rights. Particularly active were courts in the new democracies of the developing world in Latin America, the country of South Africa, and the states of Eastern Europe. The higher judiciaries in other South Asian countries also actively enforced these rights. Most of these countries had constitutions that provided a transformative social and economic vision to uplift mostly poor populations.

Why this global explosion of judicial intervention happened when it did is still relatively under-explored. Important factors likely included 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, and the export of an American post-war judicial activism that centered on addressing deep-rooted social issues.[307]

Whatever the larger historical causes might have been, these courts and constitutions in the developing world, like in India, were attempting to be more relevant to their populations. In South Africa, for example, there was an anti-bill of rights movement within the anti-apartheid movement.[308] These critics feared that a bill of rights would only help entrench the socio-economic position of whites.[309] To help assuage these fears, social and economic rights were added to the South African Constitution, so that its bill of rights could better advance the claims of the country's dispossessed.[310] Social and economic rights were also embraced in

306. For more on President Roosevelt's "Four Freedoms Address" and "Second Bill of Rights Address," as well as greater discussion about Roosevelt's commitment to the recognition of social and economic rights in the United States and abroad, see CASS SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004).

307. For a general analysis of the global rights revolution see EPP, *supra* note 3.

308. *Id.* Albie Sachs, *The Judicial Enforcement of Socio-economic Rights: The Grootboom Case*, *in* DEMOCRATISING DEVELOPMENT: THE POLITICS OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA 134–35 (Peris Jones & Kristian Stokke eds., 2005).

309. *Id.*

310. *Id.*

countries like Colombia, which gave its courts a more active role in upholding these rights when it redrafted its Constitution in the early 1990s.[311] Increasing the Court's relevance to ordinary people in Colombia was, perhaps, especially important after the judiciary had interpreted the Constitution in a formalistic manner in previous decades, allowing many civil rights abuses to go unanswered.[312]

Many courts that have embraced social and economic rights in the developing world have seemingly increased their legitimacy as a result. Decisions in these cases are often popular amongst the public and, at the same time, difficult for the government to challenge (for example, it is hard for any politician to say he or she does not want clean rivers or good schools). For a young judiciary struggling to affirm its credibility, social and economic rights can be used—consciously or not—as a tool to gain more legitimacy and increased authority over other branches of government.

The countries of South Asia, outside of India (Pakistan, Bangladesh, Sri Lanka, and Nepal),[313] have seen the implementation of social and economic rights in a manner perhaps most akin to India. The courts in these countries, and their respective constitutions, are heavily influenced by each other and the history out of which they arose. For example, each of these countries has a highest court with multiple benches, which arguably creates a structure more conducive to overseeing social and economic rights cases. Additionally, these countries all have populations in extreme poverty, which puts greater pressure on the court to develop a more economically relevant concept of justice.

In Nepal, public interest litigation was explicitly made part of the 1991 Constitution, and the court often interferes in social issues in a manner similar to that in India.[314] Bangladesh also has developed a public interest litigation jurisprudence, with the judiciary intervening in matters like ordering that iodine be added to salt for consumers' health or that two-stroke engines be removed from Dhaka to fight pollution.[315] In Pakistan,

311. Justice Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, 543–44 (2004).

312. *Id.*

313. Bhutan only recently transitioned from being a monarchy, so it is too early to see how the courts there will interpret their mandate.

314. CONST. OF NEPAL, art. 88(2).

315. Sayed Kamaluddin, *BD Judiciary Showing Increasing Assertiveness*, PAKISTAN DAWN, Apr. 4, 2002, *available at* http://www.dawn.com/2002/04/04/int10.htm; Bangladesh Legal Aid & Servs. Trust (BLAST), PIL & Advocacy, http://www.blast.org.bd/ litadvocacy.html (last visited Oct. 4, 2008).

while taking up several cases of public interest litigation, the Supreme Court and High Courts have expanded their interpretations of the right to life under the Pakistani Constitution and the elements of standing in a manner similar to that seen in India.[316] More recently, public interest litigation in Pakistan has helped situate the Court as a proponent of the interests of the public in its larger political battles with the executive and the military.[317] Sri Lanka has generally less developed public interest litigation, but the Court still intervenes in basic governance matters, such as outlawing loudspeakers at night (in which it followed precedent from India).[318]

Latin American courts are also very interventionist with regard to protecting social and economic rights. In just one area of social concern, courts in Argentina, Venezuela, Columbia, Bolivia, Brazil, and Costa Rica have all ordered the government to provide AIDS drugs to those who need them.[319] Sometimes these orders were for the entire population, while in other cases the Court ordered drugs for a specific person or class of persons.[320] Courts in Latin America have also taken interventionist stands on many other social and economic rights. For example, in Colombia the

316. A useful discussion and analysis of PIL in Pakistan can be found in WERNER MENSKI, AHMAD RAFAY ALAM, & MEHREEN KASURI RAZA, PUBLIC INTEREST LITIGATION IN PAKISTAN (2000).

317. *Judicial Activism Behind Reference to CJP*, THE NATION, May 3, 2007, *available at* http://www.nation.com.pk/daily/may-2007/3/localnews2.php; Imaduddin Ahmed, *When Kites Turn Lethal*, INT'L HERALD TRIB., Feb. 21, 2007, *available at* http://www.iht.com/articles/2007/02/21/opinion/edahmed.php.

318. Pradeep Kariyawasam, *Noise Pollution: Let's Follow Our Neighbor*, THE ISLAND, Dec. 12, 2007, *available at* http://www.island.lk/2007/12/12/opinion1.html.

319. Decision T-505 of 1992, Eduardo Cifuentes Muñoz, J. (unanimous), Diego Serna Gomez c. Hospital Universitario del Valle "Evaristo Garcia" (Colom. 1992) (Colombian Supreme Court case ordering that AIDS treatment must be provided to those who need it); Decision 456 of 2002, Glenda López c. Instituto Venezolano de Seguros Sociales (2001) (Venezuelan Supreme Court case ordering that ARVs must be provided in a consistent manner); Asociación Benghalensis v. Ministerio de Salud y Acción Social, Estado Nacional [L.L. 2000-B] 126 (Argentinian Supreme Court case ordering that ARVs be provided in a timely and consistent manner); N.N. v. Moreira Rojas Corte Suprema de Justicia de Bolivia, n. 2002-05354-10-RAC (Jan. 8, 2003) (Bolivian Supreme Court case ordering that the government cannot stop ARV treatment to a patient once it has begun providing it); Garcia Alvarez v. Caja Costarricense de Seguro Social (1997), Exp. 5778-V-97, No. 5934-97 (Sala Constitutcional de la Corte Suprema de Justicia de Costa Rica) (Costa Rican Constitutional Court decision ordering the Nacional Healthcare System to provide ARVs free of charge); Florian F. Hoffman & Fernando R.N.M. Bentes, *Accountability for Social and Economic Rights in Brazil*, *in* COURTING SOCIAL JUSTICE, *supra* note 3, at 100, 113–15 (describing the successful mobilization of civil society in bringing about a national HIV/AIDS policy through frequent HIV/AIDS treatment litigation).

320. One finds frequent cases involving access to AIDS drugs around the world. *See, e.g.*, *supra* note 229. Likely reasons include the presence of active, relatively well-organized, and often middle class HIV-positive populations, in combination with what were originally very high costs of AIDS therapy. Castro v. Instituto Mexicano del Seguro Social, Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], April 2000) (Mex.).

Constitutional Court has ordered that public transportation be made available to poor sections of society, and that the government provide welfare programs to those who have been internally displaced.[321]

In South Africa, the Constitutional Court has taken a more reserved yet still forceful approach by declaring that the government must take reasonable steps to address social and economic problems. The Court has found that the government has not made reasonable provision of housing within its available resources and ordered it to remedy this situation.[322] In other countries in Africa, such as Nigeria, the judiciary has also made fledgling but substantial social and economic right interventions.[323]

In Eastern Europe, the courts of the region's new democracies have occasionally enforced a rather interventionist social and economic rights jurisprudence as well. One such instance is the Constitutional Court of Hungary's finding that a reduction of benefits in the country's welfare scheme was unconstitutional.[324]

Daniel Brinks and Varun Gauri have compared judicial interventions in favor of social and economic rights in Brazil, South Africa, India, Nigeria, and Indonesia, focusing particularly on the right to health.[325] They find that these interventions are more extensive in robust democracies (i.e., Brazil, South Africa, and India) and are more limited in countries where a democracy, and its judiciary, have come under more severe stress and challenge (i.e., Nigeria and Indonesia).[326] They argue that judiciaries that set norms for government social interventions do not necessarily compete directly with representative institutions.[327] Instead, they largely supplement or spur the actions of these representative institutions.

Yet, even in this way, these judiciaries provide a good governance check on the institutions and the administrative states they oversee. It is too early to know what global judicial norms may evolve out of this process, but courts have now clearly become a part of social and economic policy setting and enforcement across the world.

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321. Cepeda-Espinosa, *supra* note 311, at 613–14.

322. Gov't of the Republic of S. Afr. v. Irene Grootboom 2000 (11) BCLR 1169 (CC) at ¶ 99(2)(a) (S. Afr.).

323. GAURI & BRINKS, *supra* note 3.

324. Constitutional Court of Hungary Decision 43/1995 of June 30, 1995, on Social Security Benefits.

325. GAURI & BRINKS, *supra* note 3.

326. *Id.*

327. *Id.*

B. The Basic Structure Doctrine, Un-amendable Constitutions, and New Structural Checks on Democratic Institutions

In India, the basic structure doctrine serves a purpose similar to un-amendable provisions or principles in a constitution. After World War II, several constitutions were created with un-amendable provisions. Germany is the most prominent example,[328] but there are others as well. These countries adopted varying approaches. The constitutions of Greece and Portugal provide a relatively long list of un-amendable provisions.[329] Others protect only one or two key principles. The Constitutions of Italy and France, for example, simply safeguard their republican form of government against amendment.[330]

Perhaps not surprisingly, Pakistan is the country that has most closely flirted with an approach that looks most similar to the Indian basic structure doctrine. Even after the *Kesavananda Bharati* decision in India, the judiciary in Pakistan rejected the idea of there being any substantive limits on amendments to the Constitution.[331] However, in 1997, the Pakistani Supreme Court reopened this question when deciding whether an amendment that allowed the President to dissolve the National Assembly was valid.[332] Although it did not strike down the amendment, the seven-justice bench, speaking through Chief Justice Ali Shah, found that the salient features of the preamble of the Constitution (which had been the preamble of all four of Pakistan's constitutions) must be retained and not altered.[333] These unchangeable features were "federalism; parliamentary democracy and Islamic provisions including independence of judiciary."[334] Suddenly, Pakistan seemed to have a basic structure doctrine as well. Yet, the very next year, another seven-justice bench found that there was no basic structure doctrine, apparently overruling this new precedent.[335] Since then, the Court has leaned both ways, at times professing a basic structure doctrine while at other times eschewing it.[336] It has yet to be seen whether the Court will ultimately solidify or discard this doctrine.

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328. *See supra* note 120 and accompanying text.

329. 1975 Syntagma [SYN] [Constitution] 110, 2, 4–5, 13, 26 (Greece); CONST. OF PORTUGAL, art. 288.

330. 1958 CONST. 89 (Fr.); COST., art. 139 (Italy).

331. FAZAL KARIM, JUDICIAL REVIEW OF PUBLIC ACTIONS: A TREATISE ON JUDICIAL REVIEW, 1254–76 (2006).

332. Mahmood Khan Achakzai v. Fed'n of Pakistan PLD 1997 SC 426.

333. *Id.* ¶ 56.

334. *Id.*

335. Wukala-Muhaz v. Fed'n of Pakistan PLD 1998 SC 1263.

336. For a discussion of this case law as well as an analysis of the current state of the basic

Through a judge-made basic structure doctrine or un-amendable constitutional provisions, courts are being given a new structural role, acting as a review body, not only for laws, but also constitutional amendments. This role is part of a larger trend of creating new structural checks on representative bodies through courts more generally.

In Thailand, the 2007 Constitution, which was drafted by a military junta and passed by democratic referendum, prohibits amendments that "chang[e] the democratic regime of government with the King as Head of State or chang[e] the form of State."[337] This passage is a typical un-amendable constitutional provision, but the Constitution goes even further by giving the judiciary new powers to control representative bodies. The upper judiciary has an almost controlling hand in appointing half of the Senate.[338] The Senate, along with the King, in turn approves the heads of quasi-independent bodies, such as the ombudsman, public prosecutor, and state audit commission.[339] The Senate and these quasi-independent bodies all act to check the power of the House of Representatives and executive.[340]

In Iran, the Constitution makes both its Islamic and democratic character un-amendable, as well as the objectives of the Republic (which include many social and economic goals), but here, too, the Constitution goes even further.[341] The Guardian Council in Iran must approve all laws passed by Parliament and can veto them if they violate either Islamic law or the Constitution.[342] The Council also supervises elections and has the power to ban candidates from running.[343] In this way, the Council acts like a mixture of a constitutional court, an upper chamber or Parliament, and an

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structure doctrine in Pakistan at present, see FAZAL KARIM, JUDICIAL REVIEW OF PUBLIC ACTIONS: A TREATISE ON JUDICIAL REVIEW (2006).

337. SOMDET PHRA PARAMINTHARAMAHA BHUMIBOL ADULYADEJ [INTERIM CONSTITUTION] B.E. 2549 (2006), ch. 15 (Thail.).

338. *Id.* § 113.

339. Chang Noi, *From People's Charter to Judge's Charter*, THE NATION, Apr. 30, 2007, *available at* http://www.nationmultimedia.com/search/page.arcview.php?clid=11&id=30033003&date=2007-04-30; CONST. OF THE KINGDOM OF THAIL., ch. 113 (also providing for extensive directive principles to guide Parliament's lawmaking). The quasi-independent bodies include the Ombudsman, *id.* art. 242; Election Commission, art. 229; National Counter Corruption Commission, art. 246; State Audit Commission art. 252; Public Prosecutor, art. 255; National Human Rights Commission, art. 256.

340. The judiciary reportedly did not want this more political role, as it feared it would become contaminated by the political process, but ended up this way regardless. *Draft Constitution: Judges Oppose Appointments' Role*, THE NATION, May 2, 2007, *available at* http://nationmultimedia.com/2007/05/02/politics/politics_30033161.php.

341. Qanuni Assassi Jumhuri'i Isla'mai Iran [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 177(5) [1980].

342. *Id.* art. 94.

343. *Id.* art. 99.

election commission. The latter two are new roles that this judicial institution was given to check Iran's representative institutions. This judicial setup helps maintain the power of the Supreme Leader, as half of the Council is appointed by the Supreme Leader, while the other half is appointed by the head of the judiciary (who is also appointed by the Supreme Leader).[344]

In Bangladesh, where the two principal political parties are viciously distrustful of each other, the Constitution directs a retired Chief Justice or another retired member of the higher judiciary to head a caretaker government during elections.[345] This function marks a new institutional role for the judiciary, or more accurately the retired judiciary, to check the representative branches.

These new institutional arrangements in Thailand, Iran, and Bangladesh vividly illustrate how courts have risen in power, often out of an anxiety surrounding, or distrust of, representative institutions. Iran and arguably Thailand are also clear examples of how the broad role judiciaries now play can be used by elites to maintain power, or at least to ensure that representative institutions do not run too far afoul of their interests. At the same time the basic structure doctrine in India, and its fledgling arrival in Pakistan, can more easily be seen as cases of courts interfering to ensure the survival and operation of democratic institutions. It is unlikely that we have seen a final synthesis of how judiciaries regulate representative institutions and their constituent functions.

C. The Spread of Good Governance Courts

Courts are providing new checks on representative institutions. These checks, as the Indian example has highlighted, develop out of an economic and political context. In response to the needs of a poor population and the perceived shortcomings of the government's representative institutions, the Indian Supreme Court crafted an expansive right to life jurisprudence.

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344. *Id.* arts. 91, 157.

345. If no retired member of the higher judiciary is available or willing, an impartial citizen is appointed. CONST. OF BANGLADESH, art. 58B–C. In 2006, the primary opposition party in Bangladesh protested that the former Chief Justice who was to oversee the caretaker government was not impartial. After the Chief Justice refused to take on the position, the President was eventually sworn in to head the caretaker government. Amid violent protests in 2007, the President declared a state of emergency, which led to the military backing of a caretaker government. This may signal an end to the retired judiciary's role in caretaker governments in the future. *See Bangladesh President to Lead Caretaker Government*, PEOPLE'S DAILY ONLINE, Oct. 30, 2006, http://english.people.com.cn/200610/30/eng20061030_316328.html; Simon Robinson, *Bangladesh's State of Emergency*, TIME, Jan. 25, 2007, *available at* http://www.time.com/time/ magazine/article/0,9171,1582121,00.html.

Out of a distrust of Parliament's constituent power, and the confirmation of those fears during the Emergency, the Court created the basic structure doctrine. These two doctrines are largely foreign to the American judicial experience, on which the Indian Supreme Court was originally modeled. India's experience provides a potential explanation for why judiciaries in other countries have been given or have created similar expanded powers.

This Article has argued that, in India, this broadening of the Court's powers has been justified by principles of good governance or civilization. It is outside the limits of this Article to examine whether similar justifications were put forward elsewhere. Regardless, the courts described in this section are implementing more elements of what could be considered meta-governance–aspects of governance that are claimed to be non-negotiable. This appears to be part of a global shift to check representative institutions with increasingly broad principles of good governance.

VII. CONCLUSION

One should not mistake the rise of the good governance judiciary in India as the rise of judicial rule. Instead, it marks a new form of coexistence between democratic and good governance principles in ruling; one in which, as we have seen, the judiciary must face considerable enforcement and legitimacy concerns. This coexistence is likely to evolve substantially in the coming years, creating lessons for other courts with similar good governance roles.

First, representative institutions in India may begin to crowd out the Court by asserting themselves more strongly or increasing their (real or perceived) competence. Such changes could occur naturally within these institutions' current formation, or alternatively through their restructuring. There have been several high-profile suggestions to strengthen the credibility and cohesion of India's representative institutions that would affect their relationship with the judiciary. The National Commission to Review the Working of the Constitution has proposed that Parliament seats should be won by a clear majority of the vote to combat political fragmentation and create more legitimacy.[346] Alternatively, Arun Shorie has suggested weakening the powers of Parliament and, instead, creating a

346. Chopra, *supra* note 193, at 47 (mentioning proposal by National Commission to review the working of the Constitution to award Parliament seats to candidates receiving a minimum of fifty percent of the votes plus one instead of just the highest share of total).

strong President to offset the power of a strong Supreme Court.[347] Others have argued that India needs more local democracy and autonomy so that citizens have a vested and meaningful stake in decisions that affect their lives.[348]

Second, no matter how the more representative institutions evolve, the Court could end up limiting its own authority. Justices on the Court may advocate a narrower role for themselves because of outside pressure or their own personal understandings of the Court's role. They could also unintentionally reduce their authority by making highly publicized bad governance or unpopular decisions. There is already a growing perception of corruption on the Court, which could further weaken the Court's image and power.[349] Further, the public may grow tired of the judiciary's right to life decisions only being partially followed or not at all. The Court's institutional capacity deficit could eventually lead to perceived over-stretch and a legitimacy crisis.

Third, the Court is facing a fracturing of its own authority. The judiciary, like Parliament, has seen an increase in the creation and use of other bodies that attempt to bypass its own shortcomings. Wealthier litigants have used arbitration to try to circumvent the delays of the courts.[350] Also, to reduce backlogs, the Supreme Court itself has promoted the use of *lok adalats*, local informal courts, from which one cannot appeal, that largely settle disputes between poorer litigants.[351] Shariat Courts are being promulgated to deal with many personal law issues within the Muslim community without having to take cases to the national judiciary.[352] The development of independent electricity and telecommunications authorities has also seen the rise of independent tribunals that take disputes in these areas out of the realm of lower courts

347. SHOURIE, *supra* note 29. The desire to create a strong President to overcome the fractured nature of politics in India has a long tradition in Indian politics. *See* BRASS, *supra* note 15, at 344–45.

348. Peter Ronald DeSouza, *The 'Second Wind' of Democracy in India*, in INDIA'S LIVING CONSTITUTION 370 (Zoya Hasan, E. Sridharan, R. Sudarshan eds., 2002) (providing a brief overview of past efforts to decentralize Indian democracy as well as commenting on the decentralization resulting from amendment 73 to the Indian Constitution).

349. Venkitesh Ramakrishnan, *Speaker Expresses Surprise over CJI's Reported Stand on Hearing Teesta Setalvad*, THE HINDU, Feb. 25, 2008.

350. LAW COMM'N OF INDIA, ONE HUNDRED AND SEVENTY SIXTH REPORT ON THE ARBITRATION AND CONCILLIATION (AMENDMENT) BILL, 2001 (2001), *available at* http://lawcommissionofindia.nic.in/arb.pdf (last accessed Nov. 15, 2008) (describing development of legal framework for arbitration in India).

351. *See, e.g.*, V. Venkatesan, *Hold More Local Adalats, CJI Tells High Courts*, THE HINDU, May 4, 2008.

352. These independent Islamic courts have even been challenged in the Indian Supreme Court as creating a second judiciary. *See Plea Against Shariat Courts Admitted*, THE HINDU, Apr. 6, 2007.

and High Courts. Human rights commissions, such as the National Human Rights Commission or the Child Rights Commission, have been created in part because the judiciary has failed to check abusive government policies through public interest or ordinary litigation. Currently, the Supreme Court has the power to review the decisions of these bodies or otherwise monitor them (at least theoretically), but their proliferation points to broader inadequacies within the judiciary itself. How these bodies evolve, and whether they gain more independence, will likely affect how the Court interprets its good governance role.

Finally, other government bodies besides the legislature, executive, or judiciary, may gain authority. Already, the rise of some of the unelected bodies in India, such as the Election Commission and the Securities and Exchange Board, has been discussed.[353] These and other unelected bodies will likely play an important future governance role in India. India may also see the rise of more elected bodies. For example, water user associations, which are representative bodies of local land owners, have proliferated in India in an attempt to decentralize decision-making over government irrigation projects.[354] Other elected or unelected bodies, either local or national, could arise to play a central role in governing.

India, like many countries, is a country grappling to govern itself. To aid in this undertaking, the Indian Supreme Court has evolved significantly from its largely American model to enforce principles of good governance to check the perceived deficiencies of the country's representative institutions. In attempting to describe this transformation, this Article leaves many questions to be answered. Is the rise of a good governance Court healthy for Indian democracy? Are the good governance principles that the Court articulates shaped by elite biases, veiled class interests, transcendent necessities of reason, or other forces? This descriptive analysis, though, tips us off to needed analysis. That courts in other parts of the world and unelected bodies more broadly have increasingly functioned to enforce good governance principles demonstrates that the world's democracies are in a particularly dynamic state. Given India's growing importance as the world's largest democracy, how the country balances representative and good governance reasoning in its institutions of political authority is likely to have a wide impact on how democracy evolves around the world.

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353. *See supra* Part II.G.

354. VIDEH UPADHYAY, A RIGHTS BASED APPROACH TO WATER USER ASSOCIATIONS IN INDIA (2006), *available at* http://www.ielrc.org/activities/workshop_0612/content/d0620.pdf (providing a general description of the emerging role of water user associations in regulating irrigation in India).

Laws Relating to Animal Welfare:

By: Mr. Vivek Mukherjee

Assistant Professor NALSAR University of Law

Edited by : Mr. N. G. Jayasimha

Advocate, Bombay High Court,

Ms. Shreya Paropkari

Advocate, Hyderabad High Court and Consultant, Humane Society International/India

Chapter 3
Constitution and the Legislative Process in India

Constitutional Protections for Animal Welfare

The Constitution of India is seen as the *supreme lex* of India and is a Quasi Federal Constitution. It lays down the framework delineating the fundamental political code, procedures, structures, powers and duties of government institutions, setting out the rights that are guaranteed to the citizens, the directive principles of state policy, and the duties that the citizens have towards each other. It is a living document and the interpretation of its provisions constantly evolves with the changing time and circumstances, it is also the very basis for the sanctity of the various other laws of the country. It is a lengthy, elaborate document containing 395 articles (divided into 22 parts) and 12 schedules. The Indian constitution recognizes the lives and the importance of welfare of animals and makes it a fundamental duty of the citizens of India to treat all animals with dignity and respect.

1. Article 51A(g): to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures
2. Article 48: Organisation of agriculture and animal husbandry The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle
3. Article 48A: Protection and improvement of environment and safeguarding of forests and wild life The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country

4. Under the State List, seventh schedule, it is provided that the state has the power and authority to "Preserve, protect and improve stock and prevent animal diseases, and enforce veterinary training and practice" (14).
5. Under the Concurrent List, it is provided that the central and state both have the power and the authority to "Prevent cruelty to animals" (17) and "Protection wild animals and birds" (17B).
6. Article 243G: the Panchayati Raj institutions have the responsibility and the authority to deal with matters that are relating to "Animal Husbandry, dairying and poultry" "Markets and fairs" "Fisheries". (11^{th} Schedule of the Constitution)
7. Article 243 W: The municipalities have the responsibility and authority to deal with matters that are relating to "Cattle pounds; prevention of cruelty to animals" & Regulation of slaughterhouses and tanneries. (12^{th} Schedule of the Constitution)

Furthermore, there exist the following provisions under the Constitution of India that provide the Supreme Court with jurisdiction and authority to make its decisions the law of the land, and for it to be followed by all courts as well as authorities. Thus, ensuring that decisions given by the court in the ambit of Animal Welfare are followed properly by all courts ensuring its enforcement and by all authorities to ensure its implementation.

1. Article 141: The law declared by the Supreme Court shall be binding on all courts within the territory of India.
2. Article 144: All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court

Thus, the constitution provides for a wide protective framework to ensure the welfare of Animals in the country. It also ensures that appropriate bodies take on the burden to take care of the Animals and make appropriate laws to carry out the protections envisioned under the Constitution.

Legislative Process In India

The law-making body in India is the Parliament, whose basic function is to make laws, repeal and amend them. All legislative proposals are first brought before the Parliament in the form of a Bill. A Bill can be introduced by a Minister (called *a Government Bill*) or a Member other than a Minister as well (called a *Private Member's Bill*). This Bill then needs the approval of both the Houses of Parliament (the Rajya Sabha and Lok Sabha) and the President to become an Act.

In case of Government Bill, the Minister who is introducing the Bill has to give a 7 days' notice of his/her intention to move for leave to introduce the Bill. This Bill is then circulated to the House at least two days before the day on which the Bill was proposed to be introduced.

While generally a Bill can be introduced in either House of the Parliament a Money bill can be introduced only in the Lok Sabha. If a question arises whether the Bill is a Money Bill or not, the decision of the speaker is final. Further, there are special features of a Constitution Amendment Bills as well. These bills can be introduced in either house of the parliament however, a majority of the total membership of the House and a majority of not less than two-thirds of the members present and voting is required for the adopting the effective clauses and passing of the Bill.

A Bill undergoes 3 readings in each house (Lok Sabha and Rajya Sabha) before it is sent to the President for assent. If a situation arises wherein a bill passed by one house is rejected by the other, the President may, unless the Bill has lapsed, call for a joint meeting of the two houses. The Constitution allows for this procedure however, it places no obligation upon the President to resolve the matter.

The house which is in possession of the Bill undertakes the task of obtaining the assent of the President. For instance, in the case of a Money bill or when a Bill is passed after a joint sitting, the Lok Sabha Secretariat gets the assent. After obtaining the assent of the President the Bill becomes an Act.

Article 21 of the Constitution of India

Article 21 of the constitution reads as follows, "*No person shall be deprived of his life or personal liberty except according to procedure established by law.*"

Article 21 refers to the "right to life" and embodies various aspects of life.[1] It essentially confers on every person the fundamental right to life and personal liberty.[2] Bhagwati, J stated that Article 21, "embodies a constitutional value of supreme importance in a democratic society." Further, Iyer, J. has characterised the Article as follows, "as the procedural *magna carta* protective of life and liberty."[3]

The text of Article 21 was narrowly interpreted **before** the case of ***Maneka Gandhi v. Union of India*** (hereinafter referred to as "Maneka").[4] This was a case which dealt with Articles 14, 19 and 21 of the constitution. The facts are simple. The petitioner, Maneka Gandhi, was denied a passport under the Passports Act, 1967. She contended that the right to travel abroad is a "personal liberty" which is guaranteed under Article 21 except for the procedure established by law. She stated that as there did not exist any procedure under the aforementioned Act for the impounding of a passport, the action was violative of Articles 14, 19 and 21. The court held, *inter alia,* that the right is not merely physical in nature and includes the right to live with dignity. Further, the term 'personal liberty' was given an expansive definition and the court stated that the attempt of the court should be to expand the ambit of the rights using tools

[1] M P JAIN, INDIAN CONSTITUTIONAL LAW 976 (7th ed. 2014).
[2] DD Basu, pg 219. (need to check edition and volume)
[3]
[4] 1978 AIR 597.

of judicial construction.[5] It was also laid down that the phrase 'procedure established by law' would not simply mean any procedure but it should satisfy some requisites of being fair and reasonable.

Since this landmark case, the Apex court has given a very liberal interpretation to the protection of personal liberty and dignity. It is for this reason that this case was lauded as being a highly creative judicial pronouncement. After *Maneka*, the Supreme Court has broadened the scope of Article 21 entirely and have used this to imply and embody various other fundamental rights.

Thus, since *Maneka*, Article 21 has been interpreted in a multidimensional manner. The Article has become all-encompassing and the Supreme court has guaranteed the following rights under it: right to food and shelter,[6] right against solitary confinement, right against hand cuffing, right against delayed execution, right against public hanging, right to get doctors assistance and the right to education.[7]

<u>Application to Animals</u>

The Supreme Court has adopted a rather expansive reading of the rights which can fall under Article 21. This has enabled it to bring within its ambit various rights that animals must be granted as well. This section seeks to discuss and touch upon some important observations made with regards to animal rights and Article 21.

The most important case in this regard is that of *Animal Welfare Board Of India Vs A. Nagaraja & ors*.[8] The facts of the case are rather simple. This case was an appeal against a Division Bench decision of the Madras High court which allowed for Jallikattu to be conducted if certain conditions were complied with. The Animal Welfare Board of India (AWBI) appealed against this decision and sought to enforce its notification which barred bulls from being exhibited or trained as performing animals.

The Supreme Court ruled in favour of the AWBI, by holding Article 51(g) of the constitution (discussed later in the chapter) as the "magna carta of animal rights" and further, by safeguarding the "life" of animals under Article 21. The following was observed,

"Every species has a right to life and security, subject to the law of the land, which includes depriving its life, out of human necessity. Article 21 of the Constitution, while safeguarding the rights of humans, protects life and the word "life" has been given an expanded definition and any disturbance from the basic environment which includes all forms of life, including

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[5] M P JAIN, INDIAN CONSTITUTIONAL LAW 1244 (7th ed. 2014).

[6] Shantisar Builders v. Narayanan Khimalal Totame, (1990) 1 SCC 520.
[7] Unni Krishnan and others V. state of AP, 1993 AIR 217.
[8] Civil Appeal No. 5387 of 2014.

animal life, which are necessary for human life, fall within the meaning of Article 21 of the Constitution. So far as animals are concerned, in our view, "life" means something more than mere survival or existence or instrumental value for human-beings, but to lead a life with some intrinsic worth, honour[,] and dignity."

Other than this, various High courts have, in the recent past replied upon the aforementioned case and Article 21 to highlight the importance of safeguarding the life and dignity of animals.

<u>Article 48 of the Constitution</u>

Article 48 reads as follows, "*The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle*."

As the text suggests, this Directive Principle places an obligation on the State to organise agriculture and animal husbandry on modern and scientific lines. Further, the State must also take steps for preserving and improving the breeds, and prohibiting slaughter of cows, calves and other milch and draught cattle.[9] Such a restriction is not a violation of Article 19(1)(g), as it is subject to reasonable restrictions.[10]

This particular Article was drafted in November, 1948 and there was tension regarding the religious angle. During the Constituent Assembly debates, there was much debate with regards to moving this particular provision to Part III, the Fundamental Rights section. However, this was denied as it was stated that fundamental rights deal with human beings only and not animals.

Case Law

Primarily, two cases become important to understand the ambit of this Article. In the case of ***Quareshi v. State of Bihar,***[11] the Supreme court stated that the directive only applies to cows, calves and other animals which have the potential of yielding milk or have the capacity to work as drought. Hence, according to this judgement, the article did not envisage a prohibition on the slaughter of *all* cows or cattle.

However, this was overruled by the case of ***State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat,***[12] which held that Article 48 envisions a *total* ban on the slaughter of cows and their progeny. The court observed that cattle which has served the human species must be treated with compassion in its old age, even though it is "useless".[13]

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[9] M P JAIN, INDIAN CONSTITUTIONAL LAW 217 (7th ed. 2014).
[10] Abdul Hakim Quareshi v. State of Bihar, AIR 1961 SC 448.
[11] AIR 1961 SC 448.
[12] (2005) 8 SCC 534.
[13] DD BASU, SHORTER CONSTITUTION OF INDIA 651 (14 ed. 2013).

Article 48A of the Constitution

Article 48A reads as follows, *"Protection and improvement of environment and safeguarding of forests and wild life The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."*

This Article was added by the 42nd amendment and places an obligation upon the State to protect and improve the environment and to safeguard the forests and wildlife of the country. This particular Article deals with the three interrelated subjects of "environment, forests and wildlife." This Article mandates the State to protect and improve the environment, and further, to safeguard the forests and wildlife of the country. As this Article is a part of the Directive Principles, it is not judicially enforceable, however, it becomes enforceable by the ever-expanding interpretation of Article 21.[14]

The counterpart of this Article for citizens is Article 51A which has been discussed later.
In the case of ***MC Mehta v. Union of India***,[15] the Supreme Court stated the following with regards to this Article,

> *"Articles 39, 47 and 48-A by themselves and collectively cast a duty on the State to secure the health of the people, improve public health and protect and improve the environment."*

Further, whenever an issue with regards to maintain the ecology is brought before the court, this particular Article must be borne in mind.[16]

Article 51A(G) & 51A(H)

The Article reads as follows:

"It shall be the duty of every citizen of India:
(a) to abide by the Constitution and respect its ideals and institutions, the national Flag and the National Anthem;
(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;
(c) to uphold and protect the sovereignty, unity and integrity of India;
(d) to defend the country and render national service when called upon to do so;
(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
(f) to value and preserve the rich heritage of our composite culture;

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[14] DD Basu, Shorter Constitution of India 652 (14 ed. 2013).
[15] AIR 2002 SC 1696.
[16] Sachidanand Pandey and Ors. vs. The State of West Bengal and Ors., 1987 AIR 1109.

(g) to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures;
(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;
(i) to safeguard public property and to abjure violence;
(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement."

Article 51A was contained in Part IV A (Fundamental Duties) of the Constitution was also added as a part of the 42nd Amendment in 1976. This was added in accordance with a recommendation of the Swaran Singh Committee and brings our Constitution in consonance with the Article 29(1) of the Universal Declaration of Human Rights. Fundamental Duties are not enforceable by courts however, are often resorted to in cases of interpretation of constitutional and other matters.[17]

Article 51(g) particularly places an obligation upon the citizens to protect and improve the natural environment and to have compassion for all *living creatures.* It makes it the fundamental duty of all citizens to have compassion for living creatures, which includes concern for their suffering and well-being.[18] While, Article 51(h) seeks to develop scientific temperament and humanism. These provisions, as has been mentioned earlier, have been regarded as the magna carta of the animal rights jurisprudence in India.[19]

These Articles are to be read with Articles 48 and 48A of the Constitution. The Supreme court in the case of ***State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and Others***,[20] held that the intention of the parliament while enacting Article 51A was to ensure that the spirit of Articles 48 and 48-A are honoured.

Article 141

The article reads as follows, "*The law declared by the Supreme Court shall be binding on all courts within the territory of India."*

This Article embodies the doctrine of *stare decisis,* which is a special feature of English law. The doctrine rests upon the principle that the law must be definite, fixed and known and must have been decided by a court of competent jurisdiction.[21] The reason for adopting this doctrine is quite simple: consistency.[22] The Supreme Court has observed that consistency is the cornerstone for the administration of justice as it helps create confidence in the system and enables the development of law.[23] Thus, this rule is one based on convenience and judicial propriety or as some judges call it, judicial discipline.

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[17] DD BASU, SHORTER CONSTITUTION OF INDIA 659 (14th ed. 2013).
[18] Animal Welfare Board of India vs A. Nagaraja & Ors, (2014) 7 SCC 547.
[19] *Ibid.*
[20] (2005) 8 SCC 534.
[21] DD BASU, SHORTER CONSTITUTION OF INDIA 1024 (14th ed. 2013).
[22] State of Andhra Pradesh v. A.P. Jaiswal, AIR 2001 SC 499.
[23] *Ibid.*

As per the hierarchy of courts in India, the Supreme Court is the highest court in the country and the final court of appeal.[24] As the text of Article 141 lays down all the courts and tribunals[25] are bound to follow the decisions of the Supreme court. Thus, in this regard, the judgements delivered by the Supreme court become a source of law itself.[26]

However, what is binding is the operative part of the judgement or the *ratio decidendi.* The *ratio decidendi* is to be determined after reading the judgement is its entirety[27] and must be distinguished from the relief finally granted. Mere observations or the *obiter dicta* is not the ratio of the judgment and is hence, binding upon the lower judiciary.

Article 144

Article 144 reads as follows, "***All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court.***"

According to this Article all authorities, whether civil or judicial, are under an obligation to act in aid of the Apex Court. The court has the power to hold any authority in contempt if they disregard or disobey the order of the court.[28]

In toto, Articles 32, 141, 142 and 144 are of utmost importance as they allow for the Apex court to issue directives and fill gaps till the legislature steps in.[29] Articles 141 and 144 are complementary in nature as the former states that the law declared by the SC will be binding upon all other courts while the latter necessitates the courts to aid in the enforcement of law.[30] Further, this is even more effective as Article 144 in particular covers not only courts (which is covered by the principle of stare decisis embodied in Article 141) but also civil authorities. Thus, in this regard, Article 144 places an obligation upon the relevant authorities not only to follow the law but also all of the orders, decrees and directions passed by the Supreme Court.[31]

Article 300A

Article 300A reads as follows, ***"Persons not to be deprived of property save by authority of law- No person shall be deprived of his property save by authority of law."***

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[24] DD BASU, SHORTER CONSTITUTION OF INDIA 1020 (14th ed. 2013).
[25] Union of India v Kantilal Pandya, (1995) 3 SCC 17.
[26] M P JAIN, INDIAN CONSTITUTIONAL LAW 291 (7th ed. 2014).
[27] Sathappan v. Andhra Bank Limited, (2004) 11 SCC 672.
[28] M P JAIN, INDIAN CONSTITUTIONAL LAW 288 (7th ed. 2014).
[29] Vineet Narain v. Union of India, (1998) 1 SCC 226.
[30] DD BASU, SHORTER CONSTITUTION OF INDIA 1068 (14th ed. 2013).
[31] M P JAIN, INDIAN CONSTITUTIONAL LAW 287 (7th ed. 2014).

This falls within Chapter IV of Part XII of the Constitution and deals with the right to property. This Article was introduced by the Forty fourth amendment when Articles 19(1)(f) and 31 were deleted. The following two words need interpretation:

1. *Property:* this word connotes everything ranging which is capable of ownership, corporeal or incorporeal, tangible, intangible, visible or invisible and everything else that has real or persona value and goes to make up property. [32]
2. *Deprived of his property:* this phrase must be seen from the particular context or fact situation.[33] this deprivation usually occurs due to acquisition or taking possession for a public purpose.

Animals: Persons or Property?

In the case of ***Animal Welfare Board of India v. A. Nagaraja***,[34] the Supreme court stated the following with regards to the status of animals,

> *"Animals are world-wide legally recognised as 'property' that can be possessed by humans. On deletion of Article 19(1)(f) from the Indian Constitution, right to property is more a fundamental right in India, this gives the Parliament more a leeway to pass laws protecting the rights of animals. Right to hold on to a property which includes animals also, is now only a legal right not a fundamental right. We have also to see the rights of animals in that perspective as well."*

They also discussed the legislations from countries such as Switzerland, Austria, Slovenia which have included animal welfare in their constitutions to balance the animal's owners' *right to property* and the right to rights of the animals to be free from unnecessary damage or pain. Thus, under the current framework, animals are regarded as the property of the owners.

However, even though the SC recognised that animals are universally treated as property, it was stated that since the right to property is not a fundamental right and merely a constitutional right, it provides the parliament with enough flexibility to safeguard the rights of animals. [35]

Constitutional Morality

Constitutional Morality is essentially a strict adherence to the substantive content, and forms of the constitution.[36] In the Indian context, this term is often traced back to the Constituent Assembly debates where Ambedkar had invoked George Grote (an English political radical

[32] ARVIND P DATAR, COMMENTARY ON THE CONSTITUTION OF INDIA 1652
[33] Datar page 1655.
[34] (2014) 7 SCC 547.
[35] Vishrut Kansal, *The Curious Case of Nagaraja in India: Are Animals Still Regarded as "Property" With No Claim Rights?*, 256-267 Journal of International Wildlife Law & Policy (2016).
[36] Pratab Bhanu Mehta, *What is constitutional morality? Available at:* https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm.

and historian), to defend the inclusion of the structure of the administration. For Ambedkar, this term refers to the conventions, protocols and roles that need to be kept in mind when the constitution gives an authority discretionary power or is silent about an issue.[37] In a nutshell it is a strict observance of the core principles of the constitution. However, the principle also strives towards ushering a pluralistic and inclusive society.[38] The following was stated about the importance of the principle by Andre Beteille, an Indian sociologist,

> *"In the absence of constitutional morality, the operation of a constitution, no matter how carefully written, tends to become arbitrary, erratic and capricious. It is not possible in a democratic order to insulate completely the domain of law from that of politics. A constitution such as ours is expected to provide guidance on what should be regulated by the impersonal rule of law and what may be settled by the competition for power among parties, among factions and among political leaders. It is here that the significance of constitutional morality lies. Without some infusion of constitutional morality among legislators, judges, lawyers, ministers, civil servants, writers and public intellectuals, the Constitution becomes a plaything of power brokers"*[39]

Judgements and Directions of the Supreme Court

1. N. Nair v. Union of India[40]:

The Indian circus federation challenged the notification issued by the government of India which sought to ban the training and exhibition of five animals: bears, monkeys, tigers, panthers and dogs. The Circus federation contended that this violated their right to occupation under Article 19(g) of the constitution and was hence, liable to be struck down on account of being illegal and unconstitutional. The court ruled in favor of the government due to the following reasons:

- It was said that the notification does not violate the petitioners right to carry on trade or occupation as the words 'trade' and 'business' as used in 19(1)(g) do not permit the carrying on of activities which inflict pain and suffering on animals.

- The court evaluated the directive principles and stated that the notification was in public interest and in keeping with the values furthered by Articles 48A and 51(g) of the Constitution and hence, also permissible under Article 19(1)(g).

  The following was also stated with regards to the rights animals possess,

[37] Pratab Bhanu Mehta, *What is constitutional morality? Available at:* https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm.
[38] Navtej Singh Johar v. Union of India, (2018) 1 SCC 791.
[39] Andre Béteille, *Constitutional Morality*, 43 EPW 35-42 (2008).
[40] AIR 2000 Ker 340.

"Though not homosapiens. they are also beings entitled to dignified existences and humane treatment sans cruelty and torture. In many respects, they comport better than humans, they kill to eat and eat to live and not live to eat as some of us do, they do not practice deception, fraud, or falsehood and malpractices as humans do, they care for their little ones expecting nothing."

"In our considered opinion, legal rights shall not be the exclusive preserve of the humans which has to be extended beyond people thereby dismantling the thick legal wall with humans all on one side and all non-human animals on the other side. While the law currently protects wild life and endangered species from extinction, animals are denied rights, an anachronism which must necessarily change."

2. **People For Ethical Treatment Of Animals V. Union of India**

This is an important judgment rendered by the Bombay High court which necessitated a certification by the Animal Welfare Board of India for any film meant for public viewing stating that the provisions of the Performing Animals (Registration) Rules, 2001 have been complied with.[41]

In consonance with the Prevention of Cruelty to Animals Act, 1960 and Performing Animals (Registration) Rules, 2001 and also Bombay High Court Judgement in WP No. 2490/2004, PETA Vs. UoI&Ors. Dated 22.08.2005, CBFC requires the applicants to furnish a No Objection Certificate (NOC) from the AWBI for certification of films in which performing animals have been used. Sub Rule 3 (bb) of Rule 21 (3) introduced in 1997 of the Cinematograph (Certification) Rules, 1983 stipulates:

> "Every such application shall be accompanied by a declaration made in writing by the producer of the film declaring that no cruelty was caused to the animals used during shooting of the films produced in India".

Section 5 B of the Cinematograph Act, 1952 prescribes principles for guidance in certifying films. The guidelines issued thereunder, stipulates among other things, the following in respect of use of animals in films –

"Scenes showing cruelty to or abuse of, animals are not presented needlessly".

For issuing a NOC, AWBI screens the submitted application in two stages under "Performing Animal (Registration) Rules, 2001

Stage 1- Pre-shooting Permission:-

[41] People for Ethical Treatment of Animals (PETA) vs. Union of India (UOI) and Ors.

The applicant has to apply in a prescribed format, giving details of the story line, sequences where animals are to be used, complete justification for using animals, fitness certificate and relevance of using animal for obtaining pre-shoot permission.

Stage 2 - No Objection Certificate (NOC):-
After obtaining the pre-shoot permission, the applicant has to adhere to the conditions/guidelines and after completion of the shooting of the film, the producer has to send two CDs of the film to AWBI for viewing.

Based upon the screening report, AWBI either issues or denies a NOC to the applicant.

3. **KARNAIL SINGH V STATE OF HARYANA [42]:**

The Punjab and Haryana High Court has ruled that all animals are *legal persons* entitled to legal rights like human beings. Justice Rajiv Sharma's order states,

> "*The entire animal kingdom, including avian and aquatic, are declared legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person. All citizens throughout Haryana are hereby declared persons in loco parentis (responsible for a child in parents' absence) as the human face for the welfare/protection of animals.*"

The list of directions issued by Justice Sharma in this order are as follows:

- The State Government is directed to ensure that the draught animals do not carry loads exceeding prescribed limits while driving vehicles.
- The State Government is directed to ensure that no animal shall carry weight or load in excess of the weights prescribed.
- The weight should be halved if the route travelled involves an ascent exceeding the limit prescribed by the Court.
- No more than four persons, excluding the driver and children below 6 years of age, are allowed to ride an animal drawn vehicle.
- No person is permitted to keep or cause to be kept in harness any animal used for the purpose of drawing vehicles where the temperature exceeds 37°C (99°F) during the period between 11 am and 4 pm. in summers and when the temperature is below 5°C between 5 am to 7 am and between 10 pm to 5 am in winter season.
- The use of spike stick or bit, harness or yoke with spikes, knobs or projections or any other sharp tackle or equipment is banned throughout the State of Haryana to avoid bruises, swelling, abrasions or severe pain to the animal.

[42] https://barandbench.com/animals-legal-persons-punjab-haryana-high-court/karnail-singh-v-state-of-haryana-punjab-and-haryana-hc-may-2019/

- All the Municipal Bodies shall issue certificates of unladen weight of vehicles to avoid cruelty to animals.
- The owners of bullock carts, camel carts, horse carts, tonga are ordered to put fluorescent reflectors in the front and back of the carts. The animals shall also be covered with stripes of fluorescent reflectors for their identification at night.
- All the Municipal Bodies throughout the State of Haryana are directed to provide shelter of suitable size to horses, bullocks and camels driving vehicles.
- Appropriate rules of the *Transport of Animals Rules, 1978* and the *Haryana Motor Vehicles rules, 1993*are to be complied with while transporting animals. These rules concern the making the vehicle suitable for transporting the animal through the provision of padding, anti-slipping material etc. It also entails limiting the number of cattle transported per vehicle (no more than six cattle), restrictions on overcrowding the vehicle with other merchandise, ensuring that there is an attendant with the animal being transported, ensuring that the cattle faces the engine to prevent their being frightened or injured, providing first aid etc.
- The State Government is directed to appoint Veterinary Officers as per Section 3 of the *Prevention and Control of Infectious and Contagious Diseases in Animals Act, 2009* (2009 Act) and also to declare controlled areas and free areas to prevent, control or eradicate any scheduled disease by notification.
- The State Government is directed to enforce the provisions of the 2009 Act to prevent the animals from infectious and contagious diseases in letter and spirit.
- No animal including cows, buffaloes, calves, horses, ponies, mules, donkeys, foal, goats and sheep, kids and lambs, pigs, piglets shall be transported on foot beyond the period specified in Rule 12 of the *Prevention of Cruelty to Animals (Transport of Animals on Foot) Rules, 2001* (2001 Rules)
- The animals shall be transported on foot only when the temperature is between 12°C to 30°C. The animals should be provided water every two hours and food in every four hours. The animals should not be made to walk more than 2 hours at a stretch.
- The State Government is directed to ensure that every animal to be transported should be healthy and in good condition. A certificate of veterinary doctor in respect of each animal to be transported is made compulsory as per the 2001 Rules.
- No new born animal of which the navel has not completely healed, diseased, blind, emaciated, lame, fatigued, or having given birth during the preceding seventy-two hours or likely to give birth during transport are ordered not to be transported on foot. There should be watering arrangements enroute during transport of such animals on foot. There should be sufficient feed and fodder arrangements during transportation of animals.
- The animals while transported shall not be tied by its nose, or legs or any other part of the body except by its neck. The animals, if at all, are to be tied during transportation shall be tied with rope covered with suitable cushioning.
- The State Government is directed to ensure that no animals shall be transported on foot on hard cement, bitumen- coated or metalled roads, steep gradients or hilly and rocky terrain, irrespective of weather conditions (summers and winter), as per Rule 30 of the 2001 Rules
- The State Government is also directed to constitute societies for prevention of cruelty to animals in each district

- The cost of transporting the animal to an infirmary or pinjrapole, shall be paid by the owner of the animal.
- The Director Animal Husbandry to the State of Haryana is directed to ensure proper treatment of stray cattle and animals, throughout the State of Haryana by the duly qualified doctors. The State of Haryana has already established infirmaries at 45 places.
- All the Veterinary doctors throughout the State of Haryana are directed to treat the stray animals brought to them by the citizens, in case, it is not possible to bring the sick animal/cattle to the Veterinary doctor, he/she shall personally visit and attend the stray cattle/animal without delay.
- All the Municipal bodies / Panchayati Raj Institutions, throughout the State of Haryana are directed to make sufficient provisions for housing the stray cattle and to provide them food/fodder and water.
- Since the carts driven by animals have no mechanical devices, they should be given the "*Right of Way*". All the Police Officers throughout the State of Haryana are directed to ensure compliance of this direction to avoid inconvenience to the animals.
- The State of Haryana is directed to ensure that no person shall use or cause to be used any animal for drawing any vehicle or carrying any load for more than nine hours in a day in the aggregate; for more than five hours continuously without a break or rest for the animal. No animal can be used to draw vehicles in any area where the temperature exceeds 370 C (990F) during the period between 12 noon and 3 pm, as per Rule 6 of the Prevention of Cruelty to Draught and Pack Animals Rules, 1965.
- The State of Haryana is directed to enforce the provisions of *Prevention of Cruelty to Animals (Aquarium and Fish Tank Animals Shop) Rules, 2017; Prevention of Cruelty to Animals (Dog Breeding and Marketing) Rules 2017;* and the *Prevention of Cruelty to Animals (Pet Shop) Rules, 2018*, in letter and spirit.

4. NARAYAN VS UNION OF INDIA & OTHERS[43]:

This judgement was rendered by the Uttrakhand High court. The petitioner sought to restrict the movement of horse carts or tongas to/from Nepal and wanted the implementation of provisions for vaccination, medical check-ups of infected horses. The Uttrakhand High Court, *inter alia,* gave the following directions:

- The entire animal kingdom including avian and aquatic are declared as legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person. All the citizens throughout the State of Uttarakhand are hereby declared persons in loco parentis as the human face for the welfare/protection of animals.
- The State Government is directed to ensure the medical examination of all the animals including horses entering from Nepal to India as well as horses moving from Indian border to Nepal to check infectious and contagious diseases by setting the veterinary check-posts on the border.

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[43] http://www.indiaenvironmentportal.org.in/content/457750/order-of-the-uttarakhand-high-court-regarding-protection-and-welfare-of-animals-04072018/

- The State Government is directed to ensure that throughout the State of Uttarakhand, that no person in charge of any vehicle drawn by any animal allows more than four persons, excluding the driver and children below 6 years of age to ride the vehicle.
- The use of spike stick or bit, harness or yoke with spikes, knobs or projections or any other sharp tackle or equipment is banned throughout the State of Uttarakhand to avoid bruises, swelling, abrasions or severe pain to the animal.

5. **People for Animals v Md. Mohazzim (Delhi High Court)**[44]

The case was initiated in 2004 when the Delhi police seized some birds and animals belonging to the respondent and filed a case alleging that he was in contravention of Prevention of Cruelty (Capture of Animals) Rules, 1979. These rules stated that birds and animals cannot be captured except by specific methods which are prescribed. While recalling the five fundamental freedoms accorded to animals in the case of *A. Nagaraja v Animal Welfare Board of India,* the court ruled for the petitioner. The following was observed,

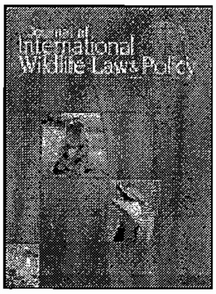
> *"After hearing both sides, this Court is of the view that running the trade of birds is in violation of the rights of the birds. They deserve sympathy. Nobody is caring as to whether they have been inflicting cruelty or not despite of settled law that birds have a fundamental right to fly and cannot be caged and will have to be set free in the sky. Actually, they are meant for the same. But on the other hand, they are exported illegally in foreign countries without availability of proper food, water, medical aid and other basic amenities required as per law. Birds have fundamental rights including the right to live with dignity and they cannot be subjected to cruelty by anyone including claim made by the respondent. Therefore, I am clear in mind that all the birds have fundamental rights to fly in the sky and all human beings have no right to keep them in small cages for the purposes of their business or otherwise. The petition requires consideration."*

SELF ASSESSMENT QUESTIONS

1. How many readings does a Bill go through in each house?
   a. One
   b. Two
   c. Three
   d. Four
2. Answer the following in brief:
   a. What is the doctrine of *stare decisis?* Which Article embodies this doctrine?

[44] 2015 SCC Online Del 9508.

  b. In what way has the expansive reading of Article 21 benefitted the animal rights jurisprudence.
  c. Are Directive Principles enforceable? If not, how have courts used them to further animal rights?
  d. Discuss the importance of Directive Principles in enhancing the animal rights jurisprudence.
3. Discuss the interplay of the DPSP's and Fundamental Duties and how they have aided the courts to expand animal rights.
4. The following would be binding upon all courts and tribunals as per Article 144:
  a. Every judgment of the Supreme Court
  b. The *ratio decidendi* of cases decided by the Supreme Court
  c. The *obiter dicta* of cases decided by the Supreme Court
  d. Both (b) and (c)
5. Distinguish between Article 141 and 144.
6. Can animals be classified as property under Article 300A? Discuss with case law.
7. Is the interpretation of Article 48 adopted by the Supreme Court in the case of *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat* unsecular in nature? Or should it be lauded as an achievement from the animal rights perspective? Discuss in groups.



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The Curious Case of Nagaraja in India: Are Animals Still Regarded as "Property" With No Claim Rights?

Vishrut Kansal

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The Curious Case of *Nagaraja* in India: Are Animals Still Regarded as "Property" With No Claim Rights?

Vishrut Kansal

1. Introduction

The Prevention of Cruelty to Animals Act 1960 ("PCA") was enacted in India "to prevent the infliction of unnecessary pain or suffering" on animals.[1] "Animal," as defined in Section 2(a) of the PCA, means "any living creature other than a human being" and, thus, includes all non-human living beings, whether wild or domesticated, notwithstanding their sentience.[2] Section 3 of the PCA obliges every person in care or custody of any animal "to ensure the well-being of such animal."[3] Therefore, persons who own or possess animals are statutorily obligated to ensure well-being of their personal property (animals). Similarly, Article 51A (g) and (h) of the Constitution of India ("Constitution") impose a fundamental duty on every citizen to protect wildlife, develop humanism, and exhibit compassion for living creatures.[4] Now, whether we humans owe these constitutional and statutory duties to animals directly is a question that, in turn, requires appraising whether an animal is merely property or may have trappings of a juristic person. Recognizing our duties as arising directly towards animals would mean recognition of the latter's rights,[5] which in turn would imply recognition of their legal personhood, howsoever limited in scope.[6] Thus recognition of animals' rights within the current constitutional and legislative framework of India is bound to raise significant jurisprudential and practical issues—whether interests of animals are to be given equal moral and legal consideration as that of humans, and whether humans can still be allowed to own and use animals as mere property.

CONTACT Vishrut Kansal vishrutkansal@nujs.edu W.B. National University of Juridical Sciences, Kolkata, India.

[1] The Prevention of Cruelty to Animals Act 1960, No. 59 of 1960, India Code (1982), *available at* http://bamu.ac.in/dept/zoology/1.%20Prevention%20of%20cruelty%20to%20animals%20act.%201960.pdf.

[2] *Id.* sec. 2(a).

[3] *Id.* sec. 3. The PCA was interpreted in *Animal Welfare Board of India v. A. Nagaraja*, (2014) 6 SCALE 468, *available at* https://indiankanoon.org/doc/39696860/. The court concluded that: "To experience the suffering, [against which PCA offers protection] the animal needs an awareness of its environment, the ability to develop moods that coordinate a behavioral response, and the capacity to change adverse situation or avoid them." *Id.* at para. 30.

[4] India Const. art. 51A.

[5] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16, 49 (1913). Rights are judicial correlatives of duties.

[6] See *infra* for a discussion on legal personhood.

Albeit daring, this need to rethink animal rights jurisprudence has increasingly been recognized in India.[7] In April 2013, the Ministry of Environment and Forest ("MoEF") of the Government of India declared that all cetaceans (especially dolphins) are highly intelligent and sensitive and, as such, should be seen as "non-human persons" with their "own specific rights."[8] In light thereof, MoEF, through the Central Zoo Authority, issued direction to all the state governments under Section 38H(4) of the Wildlife Protection Act 1972 ("WPA")[9] to reject any proposal of establishing a dolphinarium (a "zoo" as defined in Section 2(39) of the WPA) and to prohibit keeping cetaceans captive for entertainment purposes. The MoEF circular did not indicate to what rights, apart from right against captivity, cetaceans may be entitled. To this end, reference may be drawn to the Declaration of Rights for Cetaceans: Whales and Dolphins ("Declaration") that was adopted in the Helsinki Conference held on May 22, 2010 under the guidance of eminent philosopher Dott. Paola Cavalieri.[10] Founder-signatories to the declaration (who now form the Declaration Steering Committee popularly called "the Helsinki Group") also included Dr. Sudhir Chopra, India's first environmental law officer.[11] The declaration affirms that cetaceans are not to be regarded as property but as persons with a right to life, liberty, and well-being (including the right to protection of, and to not be removed from, their natural environment; to freedom of movement within their natural environment; and to their cultural integrity).[12] However, this status of a "non-human person" is evidently restricted only to dolphins and other cetaceans. Absent any legislative/executive mandate, other animals continue to be mere beneficiaries of our animal-welfare legislation without any enforceable rights of their own.

Against this policy background, the Indian Judiciary had routinely acknowledged every species' right to life as inherent.[13] Interestingly, however, hardly any judicial pronouncement ever dwelled on reconciling animals' inherent right to life with their property status. Additionally, the judiciary never considered elevating such a right to the status of a statutorily and/or constitutionally guaranteed right. This was perhaps because treating animals as mere beneficiaries of humane treatment and not entitled to the same as a claim-right preempted the need to rethink Indian animal-rights jurisprudence.

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[7] *Abdulkadar Mohama Azam Sheikh v. State of Gujarat* (2011) manu. 0504 (Gujarat H.C.), *available at* https://indiankanoon.org/doc/440140/.

[8] CENTRAL ZOO AUTHORITY OF THE MINISTRY OF ENVIRONMENT AND FOREST, POLICY ON ESTABLISHMENT OF DOLPHINARIUM, Circular No. 20-1/2010-CZA(M)/2840 (2013), *available at* http://envfor.nic.in/assets/ban%20on%20dolphanariums.pdf.

[9] The Wildlife (Protection) Act of 1972, No. 52 of 1972, INDIA CODE (1993), *available at* http://envfor.nic.in/legis/wildlife/wildlife1.html. As per Section 38H of the WPA, every zoo requires prior approval and recognition from the Central Zoo Authority to be established and to start its operations. Section 38H(4), Central Zoo Authority grants recognition to zoos only when it is in the interest of protection and conservation of wildlife. *Id.* sec. 38H.

[10] The Helsinki Group, *Declaration of Rights for Cetaceans: Whales and Dolphins* (2010), *available at* http://www.cetaceanrights.org/pdf_bin/helsinki-group.pdf.

[11] *Id.*

[12] *Id.*

[13] Centre for Environment Law, *WWF-I v. Union of India* (2013) 8 SCC 234, *available at* https://indiankanoon.org/doc/27900105/.

However, in the recent landmark judgment of *Animal Welfare Board of India v. A. Nagaraja*,[14] the Supreme Court of India daringly observed that animals, albeit capable of being owned as property, have an inherent right to life and dignity, recognized in the PCA as well as the Constitution.[15] This article argues that *Nagaraja*, despite being a disingenuous attempt at ending speciesism, is an unconventional judicial construct that recognizes and elevates animal rights to a constitutionally guaranteed status, all the while respecting the conventional constraints of the Indian property-rights framework.

2. Animals—property or persons?

In the 17th century, Frenchman René Descartes expounded that animals are God-made automata lacking any soul or consciousness.[16] This contradicted popular belief in religions such as Hinduism that all life forms, including animals, possess souls.[17] In the 18th century, Immanuel Kant argued that animals, albeit conscious and sentient, exist merely as instrumental means to human ends because of a lack of rationality and self-awareness.[18] Jeremy Bentham argued that animals, despite being so "degraded into the class of *things*," ought to be treated humanely because of their human-like sentience and capacity to suffer.[19] Bentham's theory marked the origin of the *humane-treatment principle* that now underlines animal-welfare and anti-cruelty laws across the world: because animals are sentient, humans are legally obligated to not inflict on them any unnecessary pain or suffering.[20] Such laws do not question the property status of animals, which may still be treated as movable property capable of being possessed, used, sold, bequeathed, or given away.[21] In so ostensibly trying to balance interest of property with its owner, such laws are, according to Gary Francione, meaningless—human interest would always trump animal interest for a conventional use of animal property by the human owner that maximizes social utility and economic benefit (say, for food, experiments, sacrifices, etc.), without even inquiring into whether it is, in fact, necessary to use it as such.[22] Francione believes that taking animal rights seriously requires giving equal consideration to interests of animals and humans.[23] Francione's approach is what Peter Singer propounded as the "principle of equal consideration of interests," that is, interests of animals and humans are worthy of equal consideration because both share like

[14] *Animal Welfare Board of India v. A. Nagaraja* (2014) 6 SCALE 468, *available at* https://indiankanoon.org/doc/39696860/.
[15] *Id.*
[16] RENE DESCARTES, DISCOURSE ON THE METHOD OF RIGHTLY CONDUCTING THE REASON, AND SEEKING TRUTH IN THE SCIENCES (Project Gutenberg Ebook 2008) (1637), *available at* http://www.gutenberg.org/files/59/59-h/59-h.htm.
[17] BHAGAVAD-GITA, *Chapter 2: The Eternal Reality of the Soul's Immortality*, http://www.bhagavad-gita.org/Gita/chapter-02.html (last visited June 8, 2016); *see also* Iskcon, *Reincarnation and Samsara*, THE HEART OF HINDUISM, http://hinduism.iskcon.org/concepts/102.htm (last visited June 8, 2016).
[18] IMMANUEL KANT, LECTURES ON ETHICS 240 (Louis Infield trans.1963).
[19] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 225 (Batoche Books 2000) (1781), *available at* http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/bentham/morals.pdf.
[20] Gary L. Francione, *Animals: Property or Persons?, in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 108, 118–119 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004), *available at* http://law.bepress.com/rutgersnewarklwps/art21.
[21] *Id.* at 122.
[22] *Id.* at 123–126.
[23] *Id.* at 130.

capacity to suffer.[24] Contrary to Francione's belief, the principle of equal consideration will allow humans to use animals for purposes that maximize utility—the interest of few animals, despite being equal in consideration to that of humans, will be trumped in favor of interest of the larger human race.[25] Tom Regan thus argued in favor of giving equal consideration to individuals themselves (notwithstanding their interests)—animals, just like humans, are "subject-of-a-life" having intrinsic worth and cannot be regarded merely as means to our ends.[26] He disregarded utilitarianism that allows humans to use animals as means for maximizing individual or social utility, thus advocating against experimentation on animals (albeit advancing human science), factory farming (albeit for economic benefit), and so forth, that disregard their inherent value.[27]

Tom Regan's life-centric philosophy, which considers all subjects-of-life, notwithstanding human or nonhuman, as equally having intrinsic value, was, to some extent, adopted by the Supreme Court of India ("SCI") in the *Centre for Environment Law, WWF-I v. Union of India* case.[28] Favoring eco-centrism over anthropocentrism, the SCI examined the need to relocate endangered Asiatic lions in light of their "species best interest":

> Anthropocentrism is always human interest focused, thinking that non-human has only instrumental value to humans, in other words, humans take precedence and human responsibilities to non-human are based [on] benefits to humans. Eco-centrism is nature-centered, where humans are part of nature and non-humans have intrinsic value. In other words, human interest does not take automatic precedence and humans have obligations to non-humans independently of human interest. Eco-centrism is, therefore, life-centered, nature-centered where nature includes both humans and non-humans.[29]

In this case, however, the SCI was concerned with examining the best interests of a wildlife species that, unlike domesticated or tamed animals, cannot be subject to private ownership.[30] The SCI's aforesaid observation, albeit couched in an expansive tone, thus loses its magnanimity if sought to be applied to animals other than wildlife that can still be held as property for use by humans.

Some, such as Steven M. Wise, argue that fundamental to transmuting Tom Regan's animal rights jurisprudence into a socio-legal construct is recognition of all sentient animals as juristic persons (and not the subject matter of private ownership).[31] Others, such as David Favre, advocate the concept of "living property" to acknowledge animals' capacity to possess and exercise legal rights, despite continuing with their property status, thus eliminating the need of an unprecedented

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[24] PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS (1975).

[25] Scott D. Wilson, *Animals and Ethics*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, http://www.iep.utm.edu/anim-eth/ (last visited January 21, 2016).

[26] Tom Regan, *The Case for Animal Rights*, *in* IN DEFENSE OF ANIMALS 13, 22 (Peter Singer ed., 1985), *available at* http://www.animal-rights-library.com/texts-m/regan03.pdf.

[27] *Id.* at 18–21.

[28] Centre for Environment Law, *WWF-India v. Union of India* (2013) 8 SCC 234, *available at* https://indiankanoon.org/doc/27900105/.

[29] *Id.* at para. 39.

[30] *Id.* (echoing the "public trust" doctrine as laid down in *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388).

[31] Steven M. Wise, *Legal Personhood and the Nonhuman Rights Project*, 17 ANIMAL L. 1 (2010).

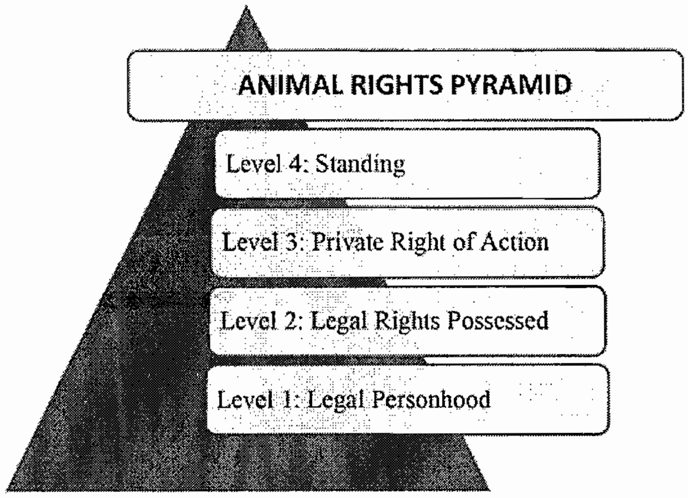

Figure 1. Animal Rights Pyramid. Source: Steven M. Wise.[32]

overhaul in legal framework to accommodate interests of animals.[33] In either case, understanding the concept of personhood assumes prior significance. For Wise, legal personhood to animals is basic to legal recognition and enforcement of their rights[34] (Figure 1).

In accordance with Max Radin,[35] Wise holds that legal personhood can be defined as legal recognition of the capacity to possess any of four Hohfeldian[36] legal rights: (i) claim (rights), (ii) privilege (liberties), (iii) power, and (iv) immunity.[37] Once this capacity is legally recognized (viz. constitutionally, statutorily, judicially,[38] etc.), the nonhuman entity becomes a juristic person. This juristic person may possess myriad legal rights, which usually include power to assert these legal rights either itself or through a third person.[39] If the juristic person itself possesses this power to sue (viz. through constitution, statute, common law, etc.), the issue of *locus standi* does not arise.[40] The issue of standing assumes importance only if a third person is attempting to seek judicial resolution of a justiciable controversy affecting the legal rights of the juristic person.[41]

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[32] *Id.*

[33] David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. Rev. 1021 (2010).

[34] Wise, *supra* note 31.

[35] Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643 (1932).

[36] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

[37] Wise, *supra* note 31.

[38] For judicial recognition of legal personhood of slaves, see *Somerset v. Stewart*, 98 Eng. Rep. 499 (1772) (holding that human slavery was incompatible with the common law of England), *available at* http://www.commonlii.org/int/cases/EngR/1772/57.pdf; *see also* STEVEN M. WISE, THOUGH THE HEAVENS MAY FALL: THE LANDMARK TRIAL THAT LED TO THE END OF HUMAN SLAVERY (2006) [hereinafter WISE, THOUGH THE HEAVENS MAY FALL]. For judicial recognition of legal personhood of idols, see *Pramatha Nath Mullick v. Pradyumna Kumar Mullick* (1925) 27 BOMLR 1064, *available at* https://indiankanoon.org/doc/290902/; Kartick Maheshwari & Vishnu Vardhan Shankar, *Stone Gods and Earthly Interests: The Jural Relations and Consequence of Attributing Legal Personality to Hindu Idols*, 16 NAT'L L. SCH. OF INDIA U., BANGALORE 46 (2004).

[39] Wise, *supra* note 31.

[40] *Id.*

[41] *Id.*

In the *Centre for Environment Law*,[42] the SCI discussed National Wildlife Action Plan 2002–2016 and pronounced in terms thereof that all species have a "right to live." Absent imposition of any correlative duty, this recognition of animals' right to life was neither in the nature of a Hohfeldian right nor intended to confer upon animals any juristic personality. This is because SCI, in the same vein, had held that Article 21 of the Constitution, which safeguards humans' right to life, casts a fundamental obligation on all humans to conserve and to protect the environment, of which all species are an integral part.[43] Evidently, therefore, humans' constitutional duty to conserve and protect animals was not a jural correlative of any apparent claim right of the animals themselves, but corresponded to other humans' right to a wholesome environment under Article 21 of the Constitution. Notwithstanding the constricted scope of the issues involved, it is safe to assume that this part of the ratio is applicable to all animals and not just wildlife, more so with the recent landmark judgment of *Animal Welfare Board of India v. A. Nagaraja*.[44]

3. Animal Welfare Board of India v. A. Nagaraja (2014)

In *Nagaraja*, the issue before the SCI was whether the practice of *jallikattu* (taming of bulls by youth), historically prevalent in the state of Tamil Nadu, violated Sections 3 and 11 of the PCA, along with Article 21 and clauses (g) and (h) of Article 51A of the Constitution, by allegedly inflicting barbaric cruelty on bulls/bullocks.[45]

The MoEF and *jallikattu* organizers advocated that the conduct of *jallikattu* strikes a harmonious balance between immense historic and cultural significance of the event (and consequential public interest) and welfare of animals in ensuring that no unnecessary pain or suffering is inflicted on them.[46] On the other hand, reports filed by the Animal Welfare Board of India ("AWBI") indicated that *jallikattu* occasioned rampant abuse of Sections 3 and 11 of the PCA by inflicting unnecessary pain and suffering in disregard of the well-being of animals, just to invoke their flight or fight responses, through:

- Mutilation of bull's ears (splitting external ear pinna) and deliberate twisting or pulling of its tail, causing the dislocation/amputation or fracture of tail vertebrae;
- Forceful insertion of nose rope and, frequent twisting, tightening, yanking, and pulling nose ropes, resulting in nose injuries;
- Forcing bulls to stand in unnatural postures, restraining their slightest movements, denying their basic needs of food, water, sanitation, and shelter, and not protecting them from mobs that shouted, harassed, and frightened them;

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[42] Centre for Environment Law, *WWF-I v. Union of India* (2013) 8 SCC 234 (India), *available at* https://indiankanoon.org/doc/27900105/.
[43] *Id.*
[44] *Animal Welfare Board of India v. A. Nagaraja* (2014) 6 SCALE 468 (India) [hereinafter *Nagaraja*], *available at* https://indiankanoon.org/doc/39696860/.
[45] *Id.* at para. 2.
[46] *Id.* at paras. 8–9.

- Rubbing chemical irritant solutions into sensory organs such as eyes and nose and forcefully administering liquor to bulls;
- Forcing bulls to move sideways at slow paces for considerable hours over vast distances; and
- Poking, beating, whipping, stabbing, chasing, or deliberately agitating bulls with pointed wooden spears, knives, sticks, or whips.[47]

Favoring the eco-centric approach of "species' best interest" over anthropocentrism,[48] the SCI observed that the PCA is a welfare legislation (aimed at ensuring animals' well-being) that must be liberally construed from the standpoint of animals' welfare, "subject to just exceptions, out of human necessity."[49] The SCI held that the PCA must be liberally construed as prohibiting all situations including even those that are not expressly listed in the PCA, in which animals may be subjected to unnecessary pain or suffering.[50] Interpreting Section 3 of the PCA, the SCI held that both its limbs, that is, (a) ensuring the well-being of an animal in care or custody, and (b) preventing infliction of unnecessary pain or suffering on such animal, are to be cumulatively satisfied.[51] Deriving support from the World Health Organization of Animal Health (OIE), the SCI observed that "well-being" under Section 3 of the PCA means a state of being "healthy, comfortable, well nourished, safe, able to express innate behaviour[,] and … [relief] from unpleasant states such as pain, fear[,] and distress."[52] The SCI defined "pain" as a biological trait informed by a specific stimulus to avoid or change the instant situation, and "suffering" as being in "pain, distress, or acute or unduly prolonged discomfort."[53] For determining whether such pain or suffering was "unnecessary," considerations include

> whether the suffering could have reasonably been avoided or reduced, whether the conduct which caused the suffering was in [due] compliance with any relevant enactment … whether the conduct causing the suffering was for a legitimate purpose, such as, the purpose for benefiting the animals or the purpose of protecting a person, property[,] or another animal[,] etc.[54]

Taking note of AWBI reports, the SCI observed that *jallikattu* was an avoidable/unnecessary human activity that occasioned the infliction of pain and suffering on bulls in violation of Sections 3 and 11 of the PCA.

Most importantly, the SCI interpreted Sections 3 and 11, PCA, Articles 21 and 51A(g) of the Constitution, and the OIE Guidelines as recognizing the intrinsic worth and inherent right of every species to a peaceful life, protecting their well-being, honor, dignity, privacy, and security, and conferring correlative duties on all humans, including person-in-charge/custodian of animals, to safeguard

[47] *Id.* at paras. 15–34.
[48] *Id.* at para. 12; *see Centre for Environment Law*, 8 SCC 234, at para. 49 (stating that "[t]he cardinal issue is … the preservation of an endangered species for which we have to apply the 'species best interest standard[.]' Our approach should not be human-centric or family-centric but eco-centric").
[49] *Nagaraja*, at para. 12.
[50] *Id.* at paras. 26–57.
[51] *Id.* at paras. 27–28.
[52] *Id.* at para. 53.
[53] *Id.* at para. 30.
[54] *Id.* at para. 28.

the same.[55] The SCI held that the five internationally recognized freedoms of animals, as incorporated in Chapter 7.1.2 of the OIE Guidelines, to which India is a signatory, must be read into Sections 3 and 11 of the PCA, along with Article 51A(g) of the Constitution.[56] These five freedoms are: "(i) freedom from hunger, thirst[,] and malnutrition; (ii) freedom from fear and distress; (iii) freedom from physical and thermal discomfort; (iv) freedom from pain, injury[,] and disease; and (v) freedom to express normal patterns of behaviour."[57]

In addition to holding Article 51A(g) of the Constitution as the "magna carta of animal rights,"[58] the SCI made a radically significant contribution to animal-rights jurisprudence by construing Article 21 of the Constitution as safeguarding the "life" of animals:

> Every species has a right to life and security, subject to the law of the land, which includes depriving its life, out of human necessity. Article 21 of the Constitution, while safeguarding the rights of humans, protects life and the word "life" has been given an expanded definition and any disturbance from the basic environment which includes all forms of life, including animal life, which are necessary for human life, fall within the meaning of Article 21 of the Constitution. So far as animals are concerned, in our view, "life" means something more than mere survival or existence or instrumental value for human-beings, but to lead a life with some intrinsic worth, honour[,] and dignity.[59]

SCI held that the aforesaid rights and freedoms of animals are subject to the "doctrine of necessity" as incorporated in Sections 11(3) and 28, PCA.[60] Despite advocating eco-centrism, the SCI allowed human necessity to prevail and the property status of animals to continue. Observing that animals are universally recognized as property, the SCI stated that the reduction of right to property from an erstwhile fundamental right to a mere legal right in India allows the Indian Parliament sufficient flexibility to safeguard the rights of animals, despite their property status.[61] This explains how MoEF could pass the earlier mentioned circular disallowing cetaceans, especially dolphins, to be held in captivity, while still allowing domestication and petting of other animals, including draught and cattle animals.

4. Analysis of *Nagaraja* through the animal rights pyramid approach

Level 1: Legal personhood

In essence, the SCI in *Nagaraja* propounded that animals, albeit capable of being owned and possessed as property, have intrinsic worth and inherent rights that need to be respected while using them for economic purposes or otherwise. Recognizing

[55] *Id.* at para. 46.
[56] *Id.* at paras. 52–54.
[57] *Id.* at para. 54.
[58] *Id.* at para. 56.
[59] *Id.* at para. 62.
[60] *Id.* at paras. 31–33.
[61] *Id.* at para. 55. The 44th Constitutional Amendment Act 1978, Article 19(1)(f) and Article 31, which recognized the right to property as a fundamental right, were repealed. In their place, Article 300A was inserted, which recognizes the right to property as a legal/constitutional right, unenforceable as a fundamental right.

animals' inherent right to live, especially in the context of wildlife that cannot be held as property, was a relatively uncontroversial stance for the SCI to advocate in the *Centre for Environment Law* case.[62] However, much like David Favre's unconventional concept of animals as living property,[63] *Nagaraja* set forth a radical stance of recognizing a large spectrum of rights, immunities, liberties, and interests of animals without absolution of their universally recognized property status. In so recognizing all animals' right to life, immunity against unnecessary pain and suffering, five liberties, and interest in their continued existence, the SCI implicitly recognized their juristic personality in a Hohfeldian sense.[64] As Favre argues, recognition of juristic personhood of animals, with limited legal rights, does not contradict their living property status. *Nagaraja* differs from Favre's approach in only one aspect—Favre advocated explicit recognition of legal personhood of only some animals, but not all (on the basis of social acceptance and political paradigm)[65]—an approach contradicting Tom Regan's philosophy that all animals have inherent rights.[66] While some may argue that recognition of legal rights of non-sentient beings is meaningless and philosophically untenable,[67] *Nagaraja* applies to all animals, akin to Regan's philosophy. After all, non-sentience of an animal cannot be a valid justification for violation of any of its inherent rights, such as the right to life and security.

Level 2: Legal rights possessed

The SCI remarked in *Nagaraja* that, elevating the OIE-recognized five freedoms of animals to the status of fundamental rights would require Parliamentary intervention.[68] This suggests that the SCI left it upon the Parliament to internalize within the Constitution an animal-rights framework in the same manner as humans' fundamental right to life under Article 21—that, animals must also have a fundamental right to life and personal liberty, subject to its deprivation for human necessity in accordance with the law. Currently, Sections 11(3) and 28, PCA incorporate this doctrine of human necessity as the only exception to animals' inherent rights recognized under Sections 3 and 11 of the PCA. The ingenuity of *Nagaraja* is that—even if the Parliament does not accord fundamental rights to animals—the SCI's interpretation of Articles 51A(g) and 21 of the Constitution elevates animals' inherent rights to constitutionally protected status. The SCI held that Article 51A(g) is the "magna carta of animal rights," guaranteeing animals all their inherent rights, liberties, and immunities, such that even repeal of PCA will not abrogate any animal rights otherwise recognized in Sections 3 and 11, PCA.

[62] Centre for Environment Law, *WWF-India v. Union of India* (2013) 8 SCC 234, *available at* https://indiankanoon.org/doc/27900105/.
[63] *See* Favre, supra note 32.
[64] Wise, *supra* note 31.
[65] Favre, *supra* note 32, at 1033.
[66] Regan, *supra* note 26.
[67] *See* KANT, *supra* note 18; BENTHAM, *supra* note 19; Francione, *supra* note 20; SINGER, *supra* note 24.
[68] *See Nagaraja*, at paras. 54–56.

With regard to Article 21, the SCI was bound by its conventional interpretation of the term "person" as human beings. As a corollary, Article 21 safeguards the right to life of humans alone and could not have been judicially extrapolated to directly safeguard the right to life of nonhumans, viz. animals, without a constitutional amendment in that regard. Nevertheless, building on the earlier jurisprudence of our right to life under Article 21 as including the right to a healthy and wholesome environment,[69] SCI interpreted Article 21 as also safeguarding our right to basic environment, including within it all forms of life, including animal life.[70] And such animal life, as per the SCI, means a life with intrinsic worth, dignity, and honor.[71] In essence therefore, SCI held that humans have a fundamental right under Article 21 to live in an environment where animals are treated with dignity and honor. Conversely, disrespect of inherent rights, liberties, and immunities of animals by a person, state, or any other entity violates our own fundamental right to life under Article 21. This is because humans live in a symbiotic ecosystem where adverse impact on any species, including animals, in turn impinges on our fundamental right to live in a wholesome environment.

Level 3: Private right of action

The *Centre for Environment Law* case[72] did not provide any guidance as to who shall be reposed with duty correlative to animals' right to life—whether it is the state, individuals themselves, or both. SCI had relied on "public trust doctrine" only in relation to wildlife that is held by the state as a trustee. Whether the state will have a corresponding obligation towards all animals and, if so, to what extent was left unaddressed. *Nagaraja*, however, unequivocally asserted that Sections 3 and 11 repose corresponding duties on all persons, including the person-in-charge/caretaker/owner/custodian of the animal, in addition to AWBI and the state.[73] In fact, the SCI stated that it is the duty of the judiciary to protect rights of animals as *parens patriae*[74]—leaving no doubt that the judiciary must be proactive in safeguarding the rights of animals under Section 3 and 11, under the PCA, with regard to Articles 51A(g) and 21 of the Constitution.

Animals themselves lack any power to sue the person or entity disrespecting their inherent rights, liberties, and/or immunities. However, it is possible within the current juridical framework of India that a third party may assert these rights, etc., on behalf of the animals. Police, Magistrate, and Courts have been given sufficient powers under the PCA to ensure its compliance. In case of killing or maiming an animal,

[69] *Subhash Kumar v. State of Bihar* (1991) AIR 420 (India); *M.C. Mehta v. Union of India* (1992) 3 SCC 256 (India); *Virender Gaur v. State of Haryana* (1995) 2 SCC 577, 580 (India).

[70] *Nagaraja*, at para. 62.

[71] *Id.*

[72] Centre for Environment Law, *WWF-India v. Union of India* (2013) 8 SCC 234, *available at* https://indiankanoon.org/doc/27900105/.

[73] *Nagaraja*, at para. 32.

[74] "Court has also a duty under the doctrine of *parens patriae* to take care of the rights of animals, since they are unable to take care of themselves as against human beings." *Id.* at para. 26.

a First Information Report (FIR) may also be lodged against the accused under Sections 428 and 429 of the Indian Penal Code 1860. In absence of any viable alternative remedy, a writ petition (through Public Interest Litigation (PIL) or otherwise) may be filed in the High Courts against violation of the PCA.[75] Article 226 of the Constitution gives power to the High Courts to issue to any person writs for any purpose, including enforcement of the PCA.[76]

Although Part IVA, Fundamental Duties, is judicially unenforceable in itself, the SCI, in *Sachidanand Pandey v. State of West Bengal*, stated that

> whenever a problem of ecology is brought before the Court, the Court is bound to bear in mind Article 48A ... and Article 51A(g) .... When the Court is called upon to give effect to the Directive Principle and the fundamental duty, the Court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy-making authority.[77]

The SCI in *Nagaraja* has called Article 51A(g) the "magna carta of animal rights," which is to be read with rights guaranteed to animals under Sections 3 and 11, PCA. If a person disrespects these inherent rights, liberties, or immunities of an animal, then it will be a violation of both, PCA as well as Article 51A(g). The SCI and/or High Courts, under their duty to act as animals' *parens patriae*, ought to take into cognizance such violation and issue appropriate writ. Now, writ jurisdiction of High Courts is available for purposes other than asking for enforcement of Fundamental Rights also, such that a petitioner may approach the respective High Court merely for enforcement of the PCA with regard to Article 51A.[78]

However, writ jurisdiction of the SCI under Article 32 is available only against infringement of a fundamental right. As stated above, *Nagaraja* propounds that Article 21 safeguards our fundamental right to live in an environment where animals are treated with dignity and honor. If animals are being treated without respect for their intrinsic worth, honor, and dignity, then our fundamental right to basic environment is being violated. Therefore, as an alternative to filing a writ petition under Article 226, one may arguably file a writ petition under Article 32, requesting the SCI to issue an appropriate writ to protect animal rights under PCA and Article 51A(g).

In *Compassion Unlimited Plus Action (CUPA) v. UoI and Ors.*,[79] the SCI allowed, *ad interim*, a writ petition filed under Article 32 by the CUPA, AWBI, People for the Ethical Treatment of Animals ("PETA"), and the Federation of Indian Animal Protection Organizations ("FIAPO") in the following terms:

> [L]earned Attorney General, in his turn, has submitted that the writ petitions are not maintainable under Article 32 of the Constitution of India as the fundamental rights of the Animal Welfare Board and other petitioners are in no way affected. The said issue shall be debated at a later stage, for earlier a writ petition was entertained and as we perceive the

[75] *See* Prani Raksha Sangh v. State of Madhya Pradesh (2011) 56 MPHT 169 (Madhya Pradesh H.C.).
[76] *See id.*
[77] (1987) AIR. 1109, SC 2 (India).
[78] INDIA CONST. art. 226; *see* Prani Raksha Sangh v. State of Madhya Pradesh (2011) 56 M.P.H.T. 169 (Madhya Pradesh H.C.).
[79] (2016) W.P. (Civil) No. 24, slip op., *available at* http://supremecourtofindia.nic.in/FileServer/2016-01-12_1452599675.pdf.

> Board and the others have really not approached the Court for protection of their fundamental rights, but the rights of the animals in the constitutional and statutory framework.[80]

While the matter is sub judice,[81] the aforementioned observation of the SCI indicates its inclination to accept an Article 32 writ petition for protection of animal rights.

Level 4: Standing

The SCI and High Courts have conventionally allowed third parties, such as public-spirited citizens and nongovernmental organizations (NGO), to file a PIL (under Article 32 and 226, respectively) seeking enforcement of the fundamental right to wholesome environment under Article 21 of the Constitution.[82]

In *Prani Raksha Sangh v. State of M.P. and Ors.*, Madhya Pradesh High Court allowed a PIL filed by a society requesting issuance of a writ of prohibition against illegal slaughtering of animals.[83] Stating that a PIL is "broad-based and people-oriented and envisions access to justice," the High Court observed that the petitioner society, being deeply involved in animal-welfare activities, was not a busybody and had a *locus standi* for safeguarding animal rights under the PCA.[84] Even in the CUPA order (above),[85] the SCI allowed a PIL filed by an NGO (CUPA), AWBI, PETA-India, and FIAPO for protection of animal rights under PCA and Article 51A(g). Therefore, all public-spirited citizens, including NGOs working for animal welfare, have *locus standi* to seek judicial enforcement of animals' rights.

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[80] *Id.* at 11.
[81] *Id.*
[82] *See* Rural Litigation and Entitlement Kendra v. State of U.P. (1985) AIR 652 (India); Indian Council for Enviro-Legal Action v. Union of India (1996) A.I.R. 1446 (India); M.C. Mehta v. Union of India (2001) A.I.R. 1948 (India); Vellore Citizens' Welfare Forum v. Union of India (1996) A.I.R. 2715 (India); *see contra* Subhash Kumar v. State of Bihar (1991) AIR 420 (India).
[83] *See* Prani Raksha Sangh v. State of Madhya Pradesh (2011) 56 MPHT 169 (Madhya Pradesh H.C.).
[84] *Id.*
[85] (2016) W.P. (Civil) No. 24.

GRANTING ANIMALS RIGHTS UNDER THE CONSTITUTION: A MISPLACED APPROACH? AN ANALYSIS IN LIGHT OF *ANIMAL WELFARE BOARD OF INDIA* V. *A. NAGARAJA*

Jessamine Therese Mathew & Ira Chadha-Sridhar[*]

In May 2014, the Supreme Court of India delivered a sensational judgment banning certain bull-fighting practices. The Court, in its analysis, sought to bring animals under the protection of the rights discourse by stating that Article 21 of the Constitution of India could be applied to animal life. The Court stated that the term 'life' must be expansively interpreted. As animals form a crucial part of human beings' environment, their rights must also be protected under Article 21. This paper seeks to address the deeper implications of this judgment by examining the viability of such an approach. It argues that bringing animals within the ambit of rights is not only incompatible with the traditional jurisprudence of rights, but may also be an ineffective method of addressing the larger issue of protecting animals. It recommends a shift to a duty-based approach towards animal welfare which is more likely to succeed in ensuring the safe and humane treatment of animals by humans.

I. INTRODUCTION

India first embarked on its endeavours to promote animal welfare and ensure animal safety with the enactment of the Prevention of Cruelty to Animals Act in 1960 ('the PCA Act'). Since then, there has been a sustained movement towards animal welfare in the country. This is evidenced by the setting up of the Animal Welfare Board in 1962 and the rising prominence of animal welfare organisations. There has been significant progress as a result of these events, which is seen in the development of various laws and policies like those on the treatment of performing animals[1] and the ban on animal testing of cosmetics[2]. The judiciary's intervention with regard to the issue of animal

* 3rd and 2nd year B.A./LL.B. (Hons.) students at The West Bengal National University of Juridical Sciences. We would like to thank Ms. Nivedita Saksena for her invaluable comments on earlier versions of this article. We would also like to thank Mr. H.R. Vasujith Ram and Ms. Jahnavi Visvanathan for all their ideas and support. All errors, however, remain solely ours.

1 The Performing Animals Rules, 2005.

2 Govt. of India, Ministry of Health and Family Welfare, F. No. - X.11014/11/2013-DFQC (October 13, 2014).

welfare and protection has also increased with the expansion and evolution of debate. In general, Indian courts have adopted liberal and welfare-oriented stances towards these issues. In 2000, the Kerala High Court, in *N.R. Nair* v. *Union of India*[3] ('N.R. Nair'), considered the question of extending fundamental rights to animals and emphasised that legal rights should not be "the exclusive preserve of humans which has to be extended beyond people thereby dismantling the thick legal wall with humans all on one side and all non-human animals on the other side".[4] This view was further developed by the Supreme Court in *Animal Welfare Board of India* v. *A. Nagaraja*[5] ('A. Nagaraja').

In what has been described as a landmark judgment,[6] the Supreme Court of India created history by banning *jallikattu* (a bull-fighting festival celebrated in Tamil Nadu) and bullock-cart races in Maharashtra and Punjab. Delivered by Radhakrishnan J. and Ghose J., the judgment held that animal life could be included within the ambit of the right to life under Article 21 of the Indian Constitution (albeit to the extent that human rights were not harmed).[7] It further held that the provisions of the PCA Act were indicative of animals' rights to "live in a healthy and clean atmosphere" or "not to be beaten, kicked".[8] The judgment also briefly pondered upon the notion of the legislature granting animals constitutional rights so as to protect their "dignity and honour" and suggested that an amendment to that effect be made by the Parliament.[9] This approach towards animal protection has been adopted outside of Indian jurisprudence as well, with a Court in Argentina, in the context of an orangutan's habeas corpus petition, stating that it is "necessary to recognise the animal as a subject of rights".[10] Despite further stating that it has adopted a "dynamic rather than a static interpretation of the law",[11] the Court did not substantiate its basis for its view on the rights of animals.

We believe that a rights-based interpretation of animal welfare legislation is misplaced. This is fundamentally because it has been consistently upheld by Indian courts that Article 21 of the Constitution of India is a source

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3 N.R. Nair v. Union of India, AIR 2000 Ker 340.

4 *Id.*, ¶13.

5 Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547.

6 People for the Ethical Treatment of Animals, *Supreme Court Bans Jallikattu, Bull Races and Bullfights*, May 7, 2014, available at http://www.petaindia.com/blog/sc-bans-jallikattu-bull-races-fights/ (Last visited on February 21, 2015).

7 Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547, ¶62.

8 *Id.*, ¶62.

9 *Id.*, ¶77.

10 Orangutan Sandra s/ appeal s/ HABEAS CORPUS, Federal Criminal Court of Appeals, Cause No. 68331/2014/CFCI, December 18, 2014 (Argentina) (a translated version of judgment can be accessed at http://a.fastcompany.net/asset_files/-/2014/12/24/Argentina-Habeas-Corpus.pdf (Last visited on March 7, 2015)); *see also* Reuters, Richard Lough, *Captive orangutan has human right to freedom: Argentine court rules,* December 21, 2014, available at http://www.reuters.com/article/2014/12/21/us-argentina-orangutan-idUSKBN0JZ0Q620141221 (Last visited on February 26, 2015).

11 Orangutan Sandra, *id.*, ¶2.

of protection for *human* rights and *human* dignity.[12] By protecting non-human animal life through Article 21, the Supreme Court has defied earlier notions of who the possessors of this right are. Beyond the concept of possessors of rights, the larger question revolves around the effectiveness of a rights-based approach towards animal protection. Through this paper, we will argue that adopting a rights-based approach towards securing animal welfare, as endorsed by the Supreme Court, is not tenable. As an alternative, we suggest that a duty-based approach would prove to be more effective in protecting animals.

Part II will briefly summarise the A. Nagaraja case, upon which the paper is based. In Part III, it will be argued that animals cannot possess rights in the way that humans do within the realm of human society and will identify the possible problems that would arise should rights be created in favour of non-human animals. Against this, it will be argued that even in the realm of animal welfare and protection, a rights-based approach will be inadequate and that there should be another method of securing such welfare. Following this analysis, in Part IV, we will present an alternate approach wherein the focus will be on the duty of humans individually and the State as the collective voice of its citizens towards non-humans. We will first assess the source of such a duty and then examine the benefits. Finally, Part V will offer concluding remarks.

II. ANIMAL WELFARE BOARD OF INDIA V. A. NAGARAJA: A BRIEF SUMMARY

Delivered on May 7, 2014, A. Nagaraja deals with the "rights of animals under the Constitution of India as well as Indian laws, culture, tradition, religion and ethology".[13] The judgment was specifically in the context of the bull-taming sport '*jallikattu*', which is "played" in Tamil Nadu as well as the practice of bullock-cart racing in Maharashtra. The case was primarily analysed with reference to the PCA Act, 1960, along with the Tamil Nadu Regulation of Jallikattu Act, 2009 ('the TNRJ Act').

The AWBI, statutorily set up under the PCA Act for the promotion of animal welfare, argued for the abolition of the foregoing practices on grounds that it violated various provisions of the PCA Act, namely §3,[14] §11(1)

[12] Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597; State of A.P. v. Challa Ramakrishna Reddy, (2000) 5 SCC 712 : AIR 2000 SC 2083; Kartar Singh v. State of Punjab, (1994) 3 SCC 569, ¶448 (in which it has been stated, "... each expression used in this Article enhances human dignity and values...").

[13] Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547, ¶1.

[14] The Prevention of Cruelty to Animals Act, 1960, §3 reads, "It shall be the duty of every person having the care or charge of any animal to take all reasonable measures to ensure the well-being of such animal and to prevent the infliction upon such animal of unnecessary pain or suffering."

(a) and (m)[15] and §22[16]. It further asserted that neither of the two practices had any historical, cultural or religious significance in the two states where it was carried out. Due to its lack of significance, welfare legislation like the PCA Act would override the same as it is a Parliamentary legislation.[17] Further, it argued that the TNRJ Act was repugnant to the provisions of the PCA Act and hence, cannot be given effect by the State without Presidential assent under Article 254 of the Constitution of India. As the bulls are forced to undergo great pain and suffering, this practice clearly violated §3, §11 (a) and (m), read with Article 51A(g) and Article 21 of the Constitution.

In response to these arguments, a collective of bull race organisers, argued that these sports had been "played" for the last three centuries and were, therefore, an integral part of the custom and tradition of the culture. In the course of their pleadings, they asserted that extreme care and protection was often taken to ensure that there was no pain or injury caused to the animals that participated in the event. An economic angle to their submissions was also presented in the contention that this practice was a great source of revenue for the State as it attracted a large number of spectators, who were inclined to pay to watch.[18] They finally put forth the argument that sporting events can only be regulated by the State and not banned. This purpose was clearly covered by the TNRJ Act serves this purpose and clarifies the apprehensions that arise out of this case. The State of Tamil Nadu also presented arguments in this case and stated that every effort would be made to ensure that the bulls chosen for *jallikattu* were not subjected to cruelty. It also argued that §22 of the PCA Act would not apply as there is no sale of tickets for the events. The State of Maharashtra made no representations and the Court interpreted this to mean that it was in favour of a ban on such practices.

Thus, the main issues that arose for consideration were: *first*, whether *jallikattu* and bullock-cart racing are harmful to the bulls and violate

15 The Prevention of Cruelty to Animals Act, 1960, §11 (1) (a) and (m) read,

"If any person (a) beats, kicks, over-rides, over-drives, over-loads, tortures or otherwise treats any animal so as to subject it to unnecessary pain or suffering or causes, or being the owner permits, any animal to be so treated; (m) solely with a view to providing entertainment confines or causes to be confined any animal (including tying of an animal as a bait in a tiger or other sanctuary) so as to make it an object or prey for any other animal [...] he shall be punishable, in the case of a first offence, with fine which shall not be less than ten rupees but which may extend to fifty rupees and in the case of a second or subsequent offence committed within three years of the previous offence, with fine which shall not be less than twenty-five rupees but which may extend, to one hundred rupees or with imprisonment for a term which may extend, to three months, or with both".

16 The Prevention of Cruelty to Animals Act, 1960, §22 reads,

"No person shall exhibit or train (i) any performing animal unless he is registered in accordance with the provisions of this Chapter; (ii) as a performing animal, any animal which the Central Government may, by notification in the official gazette, specify as an animal which shall not be exhibited or trained as a performing animal."

17 Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547, ¶4.

18 Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547, ¶5.

provisions of the PCA Act; *second*, whether the practice could be justified, culturally or historically; *third*, whether bulls had a right to life under Article 21. The Court held that *jallikattu*, and other sports involving bulls, was indeed harmful to their being. It carefully analysed the nature of a bull's response to external stimuli or danger and found that bulls' natural response is that of 'flight' as opposed to 'fight'. However, as these sports take place in closed or restricted environments, bulls are not able to exercise their natural responses, resulting in considerable harm.

With respect to the question of the cultural significance of these practices, the Court endorsed the argument of AWBI and held that the PCA Act overrides this culture or tradition. The Court reasoned that even if it had been a cultural practice, it must now give way to the provisions of the PCA Act. Finally, the Court extensively examined the "rights" of animals under Article 21. The definition of "life" under the said Article was extended to include animal life, which would further expand to mean a life of dignity, worth and honour. Reading provisions of the PCA Act along with Articles 21 and 51A(g) of the Constitution, it was held that animals also have a right against human beings not to be tortured and against the infliction of unnecessary pain or suffering. Therefore, the Court reasoned that animal dignity must be protected, and to that effect, the TNRJ Act is invalid and such sports are illegal. It further emphasised on the absence of an international framework for the protection of animal rights, and held that practices harming animals must be banned.

III. THE LEGAL CAPACITY TO POSSESS RIGHTS – WHERE DOES IT COME FROM?

In A. Nagaraja, the Court placed non-human animals within the paradigm of rights. This section of the paper will scrutinise this aspect of the judgment. While applying rights to entities under the State, it is seen that they are not universally applied to every object or entity that exists but are restricted to those which possess certain characteristics. The existence of these characteristics form the basis for what has been defined as "capacity for rights"[19] by Joseph Raz. In his analysis of the same, he specifically refers to the idea of granting animals rights. According to him, rights can only be accorded to beings which have an "ultimate, non-derivative value" rather than an "instrumental value". The value of non-human animals to humans is merely instrumental as they are largely only brought into human society for their use and not for their intrinsic value. He goes on to propose that as animals have no individual "interests" in the manner that humans do, *i.e.*, interests which have an ultimate, non-derivative value in themselves. By virtue of their lack of mental development as compared to humans, they are incapable of forming interests which would then constitute the basis for rights. Any interest that an animal has would

[19] Joseph Raz, *On the Nature of Rights*, 93 (370) Mind 194, 204 (1984).

be only "instrumental" (meaning that it exists only for the benefit of humans) and not "ultimate".[20] However, it may be incorrect to infer that animals have absolutely no interests simply because they do not possess a level of mental development that humans are thought to have. Most animals, especially mammals, do demonstrate a certain amount of interest in maintaining their basic welfare by making sure of their food and sleep. Therefore, this value-oriented assessment of the capacity for rights is inadequate as it does not truly address *why* non-human animals are incapacitated to possess rights.

In order to analyse the same, it is necessary to look at other indicators which point towards the inability or incapacity of animals to possess rights. These indicators should not rely on the 'intrinsic value' of animals but, rather, concentrate on certain qualifying criteria for the possession of rights and consequently, on the abilities of non-human animals to satisfy them. The oft-sung anthem of the animal 'rights' movement is a quote by Jeremy Bentham wherein he argues for the rights of non-human animals by emphatically stating, "[t]he question is not can they reason? Nor, can they talk? But, can they suffer?"[21] Most animal welfare organisations and movements have chosen the central theme of this emphatic statement, i.e., the capacity for suffering, as a reason to grant animals protection through rights.[22]

However, the idea that the ability to feel pain and suffering automatically warrants inclusion within the ambit of the rights discourse is flawed as it fails to acknowledge the very nature of a right. While it is undoubtedly true that the ability to suffer is a commonality between human and certain non-human animals, rights are hardly based on this sole notion of suffering and its alleviation.[23] When trying to extend rights to animals, it is relevant to note whether the common characteristics between animals and humans are also in conformity with the ascription of rights that are granted to or possessed by humans in a society. If such commonalities are not apparent, the analogy that is sought to be made between the two ceases to have any meaning.[24]

A. THE RELATION BETWEEN LEGAL PERSONHOOD AND RIGHTS

The central question that arises while attributing constitutional or legal rights to non-human animals is whether they can be said to be legal

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[20] *Id.*

[21] JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 144 (1789).

[22] People for the Ethical Treatment of Animals, *About PETA*, available at http://www.peta.org/about-peta/why-peta/why-animal-rights/ (Last visited on February 20, 2015).

[23] TOM REGAN, *The Radical Case for Animal Rights* in ENVIRONMENTAL ETHICS (L. Pojman eds., 1994).

[24] Jens David Ohlin, *Is the Concept of a Person Necessary for Human Rights?*, 105 (1) COLUMBIA LAW REV. 209, 222 (2005).

persons. This notion of connecting animals to personhood has been a relatively untouched one, with some even writing off the need to equate animals with the idea of a person for their security of welfare.[25] However, this view is dangerous as it neglects to consider an essential part of the animal rights and welfare debate: whether or not animals are entitled to rights on a conceptual and principled level. With specific reference to the Indian scenario, it is vital to discuss this notion of personhood, which also finds specific reference under Article 21.The conjoint reference to personhood and Article 21 was also made in A. Nagaraj to grant animal rights.

Similar to the idea of a 'right', the concept of a 'person' itself is one that has been engulfed in serious philosophical debate. There has never been a consensus on who or what exactly constitutes a person or what this entity's defining characteristics would be.[26] Philosophical considerations on the topic present a person to be a free and rational agent "whose existence is an end in itself",[27] to a more abstract "bundle or collection of different perceptions" with the feeling of self-identity that may exist being only a "persistent illusion".[28] While it is ordinarily and in common parlance used to represent any human being,[29] there have been different identities and capabilities granted and ascribed to a person in the context of legal order. In Western jurisprudence (primarily in Roman law), a person has been defined as a rights-holder,[30] whereas in Indian philosophy and jurisprudence, the focus has been on the individual's ability to be bound by obligations.[31] It is in this context of rights and obligations that the concept of personhood will be assessed here.

The most obvious qualifiers for legal personhood in a rights-based context can be found within the analysis of the nature of rights itself, particularly within a Hohfeldian analysis of jural relations.[32] In his matrix, the correlative of a right would be a duty and a person's right would be satisfied only by another person's duty to not infringe upon that right. As a right requires a correlated duty, the natural inference that follows is that every person who

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25 Nathan Nobis, *On David Degrazia's "On the Question of Personhood beyond Homo Sapiens "*, available at http://www.morehouse.edu/facstaff/nnobis/papers/DeGrazia_comments.htm (Last visited on 22 February, 2015) (The author notes that "the question about whether any animals are persons is a harmful distraction for animal advocacy...I think very little, if any animal advocacy, should be done in terms of whether animals are persons or not").

26 *See generally* THE IDENTITIES OF PERSONS (A.O. Rorty ed., 1976) (which presents many conflicting views on the issue).

27 IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 28-29 (1785), available at http://www.earlymoderntexts.com/pdfs/kant1785.pdf (Last visited on February 26, 2015).

28 DAVID HUME, *Of Personal Identity* in A TREATISE OF HUMAN NATURE 132-133 (1888) available at http://www.earlymoderntexts.com/pdfs/hume1739book1.pdf (Last visited on February 26, 2015).

29 ENCARTA WORLD ENGLISH DICTIONARY 1407 (Special Indian ed., 1999).

30 Max Radin, *Fundamental Concepts of the Roman Law*, 13 CAL. L. REV. 207, 222 (1925).

31 A.C. PARANJPE, SELF AND IDENTITY IN MODERN PSYCHOLOGY AND INDIAN THOUGHT 60 (1998).

32 Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 23 (1) YALE L.J. 16 (1917).

seeks to claim a right must also be able to perform the corresponding duty that a right entails. This, in part, relates to the capacity of the entity in question to perform this duty. Thus, in a Hohfeldian sense, a 'person' is an entity who is able to perform the correlated duty to a right and ensure the protection of another person's right. For example, a person who is granted the right to life has a duty not to endanger the lives of others. In a practical sense, it would be impossible to expect non-human animals that possess a lower level of human-defined intellect and rationality to perform these duties. While as humans we may try to protect the lives of different species, it is not expected of a snake not to bite or for a tiger not to hunt. Further, the claimant of a right must also be able to have rights claimed against them, i.e., rights must be able to be enforced against a person for them to truly be entitled to them.[33]

This means that the non-performance of a duty by a person may be punishable if it violates the right of another person. It is obvious that no non-human animal will ever satisfy or be expected to satisfy this requirement. Although, there were once courts which allowed cases against beetles for causing crop failure or which exiled a ram to Siberia for goring a man to death,[34] it is highly unlikely that modern day judicial systems would allow such claims or enforcing such punishments. This thought was echoed in a New York Appellate Court decision to dismiss a petition demanding the human right of bodily liberty for a captive chimpanzee. The Court held that rights could belong only to persons because only they could "be held legally accountable for their actions".[35] Therefore, an analysis purely based on the nature of rights and the concept of personhood related to rights, renders animals incapable of possessing them.

In response to such a line of thought, the response has been to compare animals to persons with disabilities and human infants or children, who cannot participate in society or perform duties in the same way that less disabled humans and adults can.[36] Proponents of this school of thought argue that if the ability to perform duties or the level of rationality is what qualifies an entity to be a person, persons with disabilities and infants or children would also be excluded from the purview of personhood.[37] Aside from the dangers of

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33 *Id.*

34 *See* Cristina Pelayo, *Uncommon Law: The Trial of Otiorhynchus Sulcatus*, 26 (2) LITIGATION 59 (1999).

35 The People of the State of New York ex rel. The Nonhuman Rights Project, Inc., on Behalf of Tommy v. Patrick C. Lavery, No. 518336, 2014 WL 6802767 (N.Y. App. Div. Dec. 4, 2014); *See also* David Grimm, *Chimpanzee 'personhood' fails on appeal*, SCIENCE MAG, December 4, 2015, available at http://news.sciencemag.org/plants-animals/2014/12/chimpanzee-personhood-fails-appeal (Last visited on February 26, 2015).

36 Edd Doerr, *Ape and Essence*, 54 (4) THE HUMANIST 44.

37 *See generally* BENTHAM, *supra* note 21; PETER SINGER, ANIMAL LIBERATION: A NEW ETHIC FOR OUR TREATMENT OF ANIMALS (1995); PAOLO CAVALIERI AND PETER SINGER, THE GREAT APE PROJECT: EQUITY BEYOND HUMANITY (1993).

comparing non-human animals to disabled humans or infants,[38] such a view disregards the basis for rights within a human society: the capacity to reason and to act upon such reason to make decisions to interact and exist within that society. With respect to infants and children, the reason why they must be brought within the ambit of rights is that they will prospectively become rational and reasonable members of society following a developmental process, *i.e.*, there is great potential for all children to develop and perform the duties that society demands of them in order to entitle them to rights.[39]

On the other hand, while assessing the abilities of more disabled humans *vis-à-vis* that of less disabled humans[40] who are able to display greater signs of rationality or reasoning, it must be established as to whether there exists a non-arbitrary manner of differentiating between non-human animals and more disabled humans. This non-arbitrary distinction lies in the fact that under normal developmental circumstances, individuals who are disabled would be 'normally' functioning humans who would be able to contribute effectively to society. However, under normal developmental circumstances, no animal would be considered rational (as judged by human standards of rationality).[41] The essence of this argument lies in the fact that there may be different points in a person's life where they may not be able to perform duties as mandated by the State or by society, but with changes in technology and society itself, this inability may be neutralised and transform into an ability. The fact that such an inability or disability exists at different points does not diminish the inherent capacity for performance of such duties.

The referred argument is best illustrated against the backdrop of the evolution of medical science. The vast array of cures and therapies to remedy illnesses extends not only to physical illnesses or disabilities but also to mental illnesses. Even though a person may be born with severe disability (like mental retardation or blindness), there are ways in which their condition may be improved (through intensive therapy or surgery), even to the extent that their disabilities are removed completely and they are capable of being compared to less disabled persons who possess the mental and cognitive capacity to perform their mandated duties. The potential of there being a change or reduction in their disability is what brings them within the ambit of a rights-based

38 *See* Nora Ellen Groce & Jonathan Marks, *The Great Ape Project and Disability Rights: Ominous Undercurrents of Eugenics in Action*, 102 (4) AMERICAN ANTHROPOLOGIST 818 (2000) (The authors have argued that comparing animals and highly disabled humans could result in a dehumanisation of the disabled. This altered perception could lead to a reduction in the already precarious rights of the disabled, exacerbating the incidence of rights violations against individuals who are in most need of such protection).

39 Alan Gewirth, *The Basis and Content of Human Rights*, 13 GA. L. REV. 1143, 1157 (1978).

40 *See generally* Malavika Prasad, *Towards A No-Force Paradigm in Mental Health Law*, 5 NUJS L. REV. 7 (2012) (for an analysis on disability and the concept of "normal").

41 Shawn Klein, *The Problem of Animal Rights*, Navigator Magazine, September 9, 2004, available at http://news.heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/15656.pdf (Last visited on February 20, 2015).

discourse. However, animals will never possess this inherent capacity for reason and rationality, which is what renders them ineligible for rights within a human-created rights framework.

Another way in which non-human entities have achieved legal personhood is through the recognition of the State.[42] This is a form of legal fiction which is ordinarily and most commonly followed through the creation of juristic persons. For instance, this has been done wherein companies[43] and religious idols[44] have been recognised as juristic persons. However, this itself is an idea that is not entirely compatible with the theory of rights as belonging to individual persons which, however, requires separate analysis and is beyond this scope of this paper.[45]

Aside from an analysis originating from the nature of rights, a three-pronged test has been laid down to determine the capacity of an entity to possess legal rights under the State.[46] The *first* prong is that the entity must be able to institute legal action on its behalf. *Second*, the court must take the entity's injury into account while deciding upon relief. *Third*, any relief granted by the court must prove to be beneficial to the entity. Under our current legal system, it cannot be said that any of these three criteria is satisfied towards granting personhood to animals.

With respect to the first criterion, an animal cannot institute a suit on its own behalf. In all animal welfare cases, it is an organisation, group or human individual that institutes a suit against an offender. Although it is possible for other bodies or organisations to institute suits on behalf of groups of human individuals as well,[47] this does not negate the ability, capacity or potential of individuals to be cognisant of a violation of their own rights and to file suits against offenders.

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42 *See* THOMAS ERSKINE HOLLAND, ELEMENTS OF JURISPRUDENCE 82 (N.R. Madhava Menon ed., 2004).

43 Saloman v. A. Saloman & Co Ltd., 1897 AC 22.

44 Pramatha Nath Mullick v. Pradyumna Kumar Mullick, AIR 1925 PC 139; Bishwanath & Another v.Radha Ballabhji, AIR 1967 SC 1044 : (1967) 2 SCR 618; Ram Jankijee Deities v. State of Bihar, (1999) 5 SCC 50 : AIR 1999 SCW 1878.

45 *See* Daniel N. Hoffman, *Personhood and Rights*, 19 (1) POLITY 74 (1986); *See also* Dale Rubin, Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals, 28 QUINNIPIAC LAW REV. 523 (2009) (for a criticism of the extension of personhood to corporations).

46 Christopher D. Stone, *Should Trees Have Standing? – Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 458 (1968).

47 *See* Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India, (1981) 1 SCC 246 : AIR 1981 SC 298; People's Union for Democratic Right v. Union of India, (1982) 3 SCC 235 (where the idea of a group filing Public Interest Litigation suits on behalf of individuals was analysed).

With respect to the other two criteria, while it is not impossible for courts to take animal injury into account, the remedying of such an injury is often not done in continuance of the best interest of the animal but in consonance with accepted human interests.[48] These cases are decided not with specific focus on the plight of the animals *per se* but on how much the creation of this plight and the plight itself deviates from acceptable *human* standards. This is because it is impossible to ever truly determine what the best interests of the animal are and whether any remedy granted has, in actuality, been beneficial. For example, while animal testing for the purposes of cosmetics has been outlawed in India, medical testing is still an accepted practise.[49] When assessing such a situation from the perspective of identifying the impact caused to the animal, both scenarios may have an equally disastrous consequence, resulting in death or permanent damage to the animal in question. However, since human standards of ethics and instincts of survival deem medical testing to be a far more worthy cause than cosmetic testing, it is deemed an appropriate practise. This demonstrates how the laws and regulations that are to protect animals are in effect passed against the backdrop of human interests and standards.

B. THE PROBLEM WITH A RIGHTS-BASED APPROACH TO ANIMAL WELFARE AND PROTECTION

Recognising non-human animals as legal persons and according them rights would result in several problems and conflicts within the existing rights regime. The primary problem with such an approach is that a conflict between human rights and animal rights would automatically arise. Granting animals rights, especially under the Constitution, would entitle them to a range of benefits. These benefits could possibly damage the way in which human life is benefitted through the ascription of rights to humans (for example, there may arise a conflict between human religious rights and animal rights). However, the language of rights has evolved such that the word itself can evoke feelings of "moral and metaphysical meaning" and have been used in a largely rhetorical sense.[50] Rights are important only in the context of the benefits that may be claimed through their existence. Once they are granted, rights are rarely irrevocable and unchangeable and often expand to include elements that were never initially intended.[51] Any creation of rights for animals would automatically

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48 David R. Schmahmann & Lori J. Polacheck, *The Case Against Animal Rights*, 22 B. C. Envtl. Aff. L. Rev. 747, 755 (1995).

49 The Prevention of Cruelty to Animals Act, 1960, §14.

50 Iredell Jenkins, *The Concept of Rights and the Competence of Courts*, 18 Am. J. Juris. 1, 7 (1973).

51 An example of this would be how Art. 21 of the Indian Constitution has been expanded far beyond the mere right to life. *See, e.g.*, Sunil Batra (2) v. Delhi Admn., (1980) 3 SCC 488 (where it was used for prisoners' rights); Olga Tellis v. Bombay Municipal Corpn., (1985) 3 SCC 545 (where it was extended to the right to livelihood); Neeraja Chaudhary v. State of H.P., (1984) 3 SCC 243 (where it was used to release bonded labourers); Mohd. Ahmed v. Union of India, 2014 SCC OnLine Del 1508 (where it was used to define the right to health in India).

create a duty on the part of humans to protect the rights of animals in an absolute sense, even to the extent that human welfare itself may be neglected, and not just to improve the treatment or welfare of animals. It has been said that a conflict of rights can only result in the prevailing of human rights,[52] but the possibility of the effects of the evolution of such jurisprudence could prove worrisome to human welfare and social order.

Although under the benefit theory of rights[53] it may be argued that "rights in a weak sense" could be created for animals wherein the right exists only to the extent of the benefit that humans choose to extend unto animals.[54] However, it is practically impossible to precisely distinguish between what a 'strong' and a 'weak' right intends to protect, especially in the event of a conflict between human rights and animal rights.[55] Even if this could be done, it would possibly defeat the concept of a right as universally applicable and enforceable entitlements.

Along with the possibility of conflict, the primary drawback of adopting a rights-based approach towards animal welfare lies in the possibility of it never taking effect in the manner intended. It must not be forgotten that rights are, in essence, only instruments to realise the actualisation of human want or for the attainment of a further human goal. Rights are, therefore, more of a functional characteristic than an inherent characteristic of existence and governance. Any right that is created or sanctioned by the State is done so as to allow people to develop to their full potential and to enhance their lives. The inference that may be drawn from this is that every right, whether a claim, a privilege, an immunity or a power is only granted to a person for the purpose of furthering their own good. Rights are valued only when they effectively accomplish the reason for which they were created. In this light, a test was proposed by eminent jurist Iredell Jenkins to identify whether a proposed right will achieve the desired balance of good over possible harmful effects.[56] Jenkins proposes three questions to test the effectiveness of granting a particular right. The *first* is whether the end that is envisaged by this right is a "real and legitimate human value".[57] *Second*, he asks whether the right will be an effective means to this end. *Finally*, will the implementation of the claimed right further good rather than harm?

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[52] P.J. Fitzgerald, Salmond on Jurisprudence 63 (2004).

[53] Jeremy Bentham, *Of Laws in General* in The Works of Jeremy Bentham (1970) (Bentham developed a benefit theory of rights wherein he argued that if the performance of a duty that bestows upon another a benefit, then the other party possessed a right to have that duty performed).

[54] Michael Wilkinson, *Animal Rights: A Test Case for Theories of Rights*, 1998 UCL Jurisprudence Rev. 144, 145 (1998).

[55] Andrew Johnson, *A Blind Eye to Animal Rights?*, 64 (248) Philosophy 255, 258 (1989).

[56] Jenkins, *supra* note 50, 3.

[57] *Id.*

When the subjects on which the rights are conferred are animals, these questions form a substantial part of whether rights should be granted to animals or not. The *first* question itself refers to a legitimate human value, as the only end to conferring any right. There has been much discourse on whether the protection of animals is a matter of human concern and we believe that it is and it will continue to be so, either for as long as humans and non-humans share an ecosystem and environment or until humans cease to use animals for their collective or individual benefit. This point is elaborated further in the following sections of the paper. However, just because it is a legitimate human value, it does not mean that the value can only be placed on a rights pedestal or that a rights-based view will enable humans to better realise that value. This is where the second question becomes important.

The *second* question refers to the most suitable means to arrive at a particular end. If the desired end is unanimously agreed to be the protection of animals, there is more than one method of achieving this end. Granting rights to animals, rather than legislating towards their welfare would be an impractical means of achieving the final goal as it is impossible for animals to ever identify a rights violation and seek their own protection. Therefore, creating rights for them will not be the most effective means of securing and enforcing their protection. A rights-based approach would not lay down the exact manner in which animals are to be protected and, and for the reasons listed above, it would create a system of entitlements that would be almost impossible to adequately address.

Finally, if the harms and benefits of granting animals rights were to be analysed, it would be difficult to conclude that adopting such an approach would further animal welfare. This is partly due to the possibility of conflict between human and animal rights, the result of which will almost always be the victory of human rights and a subjugation of the 'rights' of animals. As will be explained in the subsequent section, there are more effective ways of protecting animals rather than forcibly bringing them within the domain of rights.

At its core, all laws relating to animal welfare and protection seek only to better their status and reduce the capacity of humans to harm them. With such an objective underlying the legislative framework relating to non-human animals and taking the nature of animals as less rational beings (as judged by humans) into consideration, a rights-based approach would not aid in the same. The focus must not be shifted by creating an unstable system of forced entitlements backed by the force of law. To sustainably protect animals, there is a need to shift the approach to animal welfare from a rights-based to approach to a duty-based approach.

IV. LOCATING ANIMAL WELFARE IN A DUTY-BASED APPROACH WITHIN THE THEORY OF JUSTICE

An analysis of animal-based legislation across temporal and spatial scales reveals several approaches towards animal welfare.[58] For the purpose of theoretical clarity, these approaches can be broadly classified into the rights-based approach and the duty-based approach. The previously addressed argument, that animals cannot possess 'rights' in a legal sense, negates the viability of the 'rights-based approach'. This part of the paper finds an alternative to the right-based approach in the duty-based approach.

Non-human animals have been the subject of extensive philosophical debate.[59] The debate largely rests on the Aristotelian characterisation of nature as an 'infinity of beings'.[60] A hierarchy of species with indistinct and doubtful boundary lines had been constructed as the basis for further analysis. Aristotelians believe that there is a 'natural good' in all non-human animals in terms of their productivity in the ecosystem and argue that this good should be used solely for human benefit.[61] It was later, with the strong influence of Darwin's treatise,[62] which highlighted the evolutionary similarities between human beings and animals, that the question of granting animals 'moral rights' became prominent. Bentham furthered this understanding, by asserting that animals' capacity for suffering formed the basis for their rights.[63] Although earlier argued in this paper that this suffering alone is not a sufficient or appropriate basis for granting rights, it still becomes relevant as the focus of animal welfare legislation and animal protection, because it is this suffering that the mechanisms of law must prevent. This notion of sentiency and suffering became the basis for protecting the interests of non-human animals as it invoked compassion in the human species towards their non-human counter-parts.[64] Sentiency can be approached on one hand as the basis for allocating rights to animals, and on the other, as the reason to legislate towards their welfare through a duty.

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58 Elisa Aaltola, *Animal Ethics and Interest Conflicts*, 10 (1) Ethics and the Environment 19 (2005).

59 *See generally* Immanuel Kant, Lectures on Anthropology (*translated by* Robert B. Louden, Allen W. Wood ed., 2012); Charles Darwin, The Descent of Man (1902); Jeremy Bentham, Introduction to The Principles of Morals and Legislation (1879); Peter Singer, Animal Liberation (1995).

60 Aristotle, Aristotle: 'Historia Animalium': Volume 1, Books I-X: Text (D.M. Balme ed., 2002).

61 *Id.*

62 Charles Darwin, The Descent of Man (1902).

63 Bentham, *supra* note 21.

64 *See* Peter Singer, Practical Ethics (1979).

The following parts of the paper begin by examining the root of the duty that human beings owe to non-human animals. Various types of duties advocated by several jurisprudential canons are demarcated. The paper argues that human beings owe the highest of such duties to non-human animals. Finally, it is contended that it is not the abstract concept of 'animal rights', but this urgent duty that should be the focus of legislation and courts of law in India.

A. THE SOURCE OF THE DUTY – BENEVOLENCE OR JUSTICE?

A duty-based approach rests on the premise that human beings owe a duty towards non-human animals. Within the Indian context itself, The PCA Act, the primary legislation for animal protection, codifies certain acts that are obligations that humans owe to non-human animals.[65] Therefore, it seems to propose a duty-based approach towards the issue of animal welfare. The fundamental question that arises subsequently is: where does this duty emanate from? In this regard, Martha Nussbaum's work, 'Beyond Compassion and Humanity' is crucial as a contemporary compilation of various ethical approaches towards the welfare of non-human animals. This sub-part examines Nussbaum's approach in the context of several theoretical schools, and tests the viability of locating non-human animals within a complex 'theory of justice'.[66]

Nussbaum begins her theoretical analysis by narrating an incident wherein Pompey, the Roman leader of 55 B.C.E., stages a combat between humans and elephants, woven into a spectacle, for the entire Roman town to watch.[67] The elephants, attempting to invoke pity in the hearts of the guests, mourn through gestures at their plight. The "agonised trumpetings" of the elephants, often quoted as part of Cicero's famous letter to M. Marius, became a symbol for extensive ethical discussion. It was believed that it was the commonality of the feeling of suffering that the elephants had with the human race that inspired sympathy and moral concern. It is this sympathy and evolved compassion that were considered the source of any legal or moral duty that human beings owed to non-human animals.[68]

Aristotelians argued that all of nature is a continuum, and that all living things were worthy of respect, even wonder.[69] Conversely, Western

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65 The Prevention of Cruelty to Animals Act, 1960, §3.

66 MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE 327 (2009).

67 *See* PLINY (THE ELDER), THE NATURAL HISTORY OF PLINY (*translated by* H.G. Bohn, 1857); MARCUS TULLIUS CICERO, CICERO: EPISTULAE AD FAMILIARES: VOLUME 1, 62-47 B.C. (D.R. Shackleton ed., 2004).

68 Anders Schinkel, *Martha Nussbaum on Animal Rights*, 13 (1) ETHICS AND THE ENVIRONMENT 42, 42 (2008).

69 NUSSBAUM, *supra* note 66, 328.

religious traditions asserted that the human beings were given dominion over plants and animals.[70] Religious canons have also deeply influenced philosophical thought, particularly with respect to non-human animals. These religious canons further assert, that we owe our duty to non-human animals due to the sympathy we feel for them. Nussbaum argues that this version of Aristotelianism compatible with Christianity demarcated a sharp divide between human beings and other species, re-enforcing the idea of dominion and duties towards animals emanating solely through benevolence.[71] Traditional schools of thought, hence, viewed our obligations towards non-human animals as duties stemming from charity and benevolence. Nussbaum suggests the most significant alternative to this approach: the source of human duty towards non-human animals is not a misplaced idea of charity, but a concrete theory of justice that forms the content of the subsequent portion of the paper.

1. Evaluating the Viability of Nussbaum's Entitlement-Based Approach

Locating human duty towards non-human animals within a theory of justice is a complex task. According to Nussbaum, this theory is based on the premise that animals have an entitlement (as distinguishable from a right) to a 'dignified existence'. This approach was specifically borrowed from the influential N.R. Nair judgement in 2000.[72] In Nussbaum's approach, this dignified existence comes with several 'entitlements'. This paper, in the subsequent analysis, argues that an inclusive theory of justice does not stem from these entitlements, but from positive and direct duties towards non-human animals.

Nussbaum outlines ten capabilities that animals have, and considers granting them 'entitlements' on the basis of these capabilities.[73] This exercise reveals several inconsistencies. Nussbaum's entitlements are based on the capabilities of animals to realise their full potential, a controversial extension of the capability approach[74] which extends across the species barrier. This approach reveals that these 'entitlements', are not inherent or enforceable like 'rights' and are subject to conditions like human beings ability to grant these

[70] *Id.*

[71] *Id.*

[72] N.R. Nair v. Union of India, AIR 2000 Ker 340.

[73] Nussbaum, *supra* note 66, 392-400 (She highlights the following on which animal capabilities are based: Life, Bodily Health, Bodily Integrity, Senses, Imagination and Thought, Emotions, Practical Reason, Affiliation, Association with other Species, Play and Control Over One's Environment).

[74] Amartya Sen, The Idea of Justice 231-238 (2009) (The capabilities approach focuses on the existence individuals' ability to perform activities they have reason to value. The central components of this approach are the actual functionings that constitute a person's life and the alternate combinations of functionings or capabilities that person has the potential to achieve. The theory places importance on the agency of the individual and stresses that an individual's achievements must, therefore, be evaluated in terms of the goals they desire to accomplish).

entitlements, human need and demand. This excessive conditionality associated with the entitlements renders them problematic. The life of a non-human animal, which is considered to be its primary capability, is inherently subject to human need. The killing of an animal, under Nussbaum's rendition of the capabilities approach is permitted when there is a 'plausible reason' for the killing, like obtaining necessary food, harm caused to crops, other people or animals, the killing of an animal.[75] It is hard to see how an entitlement of animals to continue their lives is compatible with a justification of killing them for food.[76] As has been argued by Anders Schinkel, in his critique of Nussbaum's work, this situation gives rise to the phenomenon of 'doubling', a term used to describe Nazi doctors who carried out cruel experiments on Jews while living ethically decent family lives at home.[77] A society in which human beings are to treat animals with respect, admiration, wonder and dignity on one hand, and are entitled to kill them for advancement of their needs on the other, arguably results in a 'moral schizophrenia', which results not in progress, but in dangerous inconsistency.

Additionally, there is an evident theoretical contradiction in Nussbaum's analysis regarding killing of animals for human benefit, as she justifies[78] these exceptions within the utilitarian tradition, which she has criticised extensively.[79] She reasons that the capabilities approach is superior to utilitarianism because it respects each individual creature, refusing to rely solely on the aggregate.[80] While her central argument seems to be that every individual animal is worthy of respect because of their capabilities, she does not adequately address the use of non-human animals by humans for achieving their own ends. Nussbaum's justification under utilitarianism, therefore, results in a major (and possibly dangerous, as it allows for a way in which the indiscriminate limiting of an animal's capability may be justified) discrepancy, reducing the value of her alternative approach.

This entitlement-based approach is borne out of a deep criticism of the Kantian contract that states that only human beings can possess entitlements and rights because of their ability to participate in a social contract with the state. Nussbaum criticises the Kantian contract for its rigid distinction between species and its insistence that only members of a single species can participate in a given social contract. However, in an attempt to reconcile 'difficult situations' of using animals for food or experimentation, Nussbaum's approach endorses the premise of the Kantian contract. She states that human beings can, and must, use animals as a source of food, thereby assenting to the

75 Schinkel, *supra* note 68, 58.
76 *Id.*
77 *Id.*
78 NUSSBAUM, *supra* note 66, 402-403.
79 *Id.*, 344.
80 *Id.*, 345.

superiority of the human species, which also forms the basis of the Kantian contract. The arrival at an eventual 'universal consensus'[81] towards the use of animals is an unsubstantiated and ambiguous solution to the issue. The theory of entitlements is hence, unsuccessful in rationalising the fundamental question that has plagued thinkers and jurists: how can the concept of human benefit be reconciled with a theory that grants non-human animals rights?

2. Locating Nussbaum's Theory of Justice in a Duty-Based Approach

Despite its discrepancies, Nussbaum's analysis regarding a theory of justice remains persuasive, especially in the context of certain duties that human beings owe to non-human animals. The source of such a duty, particularly in the Indian context, could also arise from ancient teachings and beliefs that were based on a different perception of the relation between man and the universe. Unlike the West (deeply influenced by Christian texts), where man was essentially understood to be the centre of the universe,[82] Eastern religions and cultures reflected a view which endorsed that humans were only a part of a larger universe.[83] Ancient Indian concepts of how to treat animals were far more complex and compassionate than the human-centric approach of the West. There were even times where the killing of animals was completely prohibited.[84] This model of law and order largely rested on the duty-based approach of humans, towards both other humans and non-human animals which was further based on principles of *dharma*.[85] This line of philosophical thought is also seen in Jainism where Jains recognised the intrinsic value of life, specifically non-human life, and sought to protect it, not through a system of entitlements but through a system of positive duties.[86] Furthermore and possibly in a bid to reconstruct these ideals, the Indian Constitution uniquely recreates the idea of a duty with no corresponding right through the insertion of the Directive

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[81] *Id.*, 389.

[82] The Bible, Genesis 1:27-28 (New King James Version, 1982) (This demonstrates how God created man and woman to have dominion over every other creature on earth:

"Then God said, 'Let Us make man in Our image, according to Our likeness; let them have dominion over the fish of the sea, over the birds of the air, and over the cattle, over all[a] the earth and over every creeping thing that creeps on the earth.' [...] Then God blessed them, and God said to them, 'Be fruitful and multiply; fill the earth and subdue it; have dominion over the fish of the sea, over the birds of the air, and over every living thing that moves on the earth.'"

[83] Deryck O. Lodrick, Sacred Cows, Sacred Places: Origins and Survival of Animal Homes in India 55-56 (1981).

[84] Susan L. Goodkin, *The Evolution of Animal Rights*, 18 Colum. Hum. Rts. L. Rev. 259, 283 (1986).

[85] S.K. Purohit, Ancient Indian Legal Philosophy 235 (2001).

[86] *See* Arthur L. Basham, *Jainism and Buddhism* in Sources of Indian Traditions 45 (1958).

Principle of State Policy[87] and the Fundamental Duties.[88] These provisions are not enforceable in the way that a right ordinarily is in India. Nonetheless, they provide guiding principles for governance, jurisprudence and legislation.

Evidently, there is theoretical, historical and even constitutional consensus that human beings owe a *duty* to non-human animals, due to their co-existence within a common ecosystem and mutual benefit derived from our surroundings.[89] Further, as an intellectually evolved species, human beings also owe a duty to act towards the holistic welfare of non-human animals.[90] However, the source of this duty is disputed, amongst traditional thinkers like Bentham and contemporary thinkers like Nussbaum, which leads to uncertainty regarding approaches to animal welfare.

In this regard, the concept of 'dignified existence', as a source of human duty that has been suggested by the N.R. Nair judgment, forms an interesting and persuasive suggestion. On analysis of the Aristotelian and utilitarian traditions and Nussbaum's capability approach, it revealed that it is indeed this dignified existence that is the essence of human duty towards non-human animals. This dignified existence premises itself on the fact that non-human animals have traits within themselves that deem them entities with dignities of their own that deserve to be respected. The 'dignified existence' of non-animals, although a seemingly obscure intervention of legal and philosophical notions, complies with the Aristotelian naturalism, with Ancient Indian notions of life and with theories of painless killing. Like these philosophical doctrines, the concept of 'dignified existence' also supports the idea of continuity within nature, and an inherent duty towards non-human animals to prevent the infliction of pain on them. Further, Nussbaum regards the dignity of animals, as used similarly in the context of N.R. Nair, as the basis of animal welfare and the conscious source from which human beings should derive their duty.[91] Nussbaum's approach relies on this judgement as an ideal, regarding it as the basis for granting animals 'entitlements' based on their capabilities. This vital decision harmonises these theoretical canons and arrives at a distinct and simple source of our duty: the recognition and commitment to the 'dignified existence' of the animal.[92]

Therefore, the source of the duty that human beings owe to non-human animals must be viewed as arising not from what we *give* non-human animals through charity, but as what we *owe* to these species because of their

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[87] The Constitution of India, 1950, Arts. 36-51 (Art. 48A specifically deals with protection of animal life under the Constitution).

[88] The Constitution of India, 1950, Art. 51A (Cl. (g) is specific to caring for the natural environment and animals).

[89] NUSSBAUM, *supra* note 66, 372.

[90] *Id.*, 373.

[91] *Id.*, 335-336.

[92] *Id.*

inherent faculty. However, to state that animals have several rights on the basis of their capabilities located within a theory of justice, leads to theoretical inconsistencies regarding the use of non-human animals for survival and benefit. It is consequently concluded that the source of human duty towards non-human animals is the commitment to ensure the 'dignified existence' of animals. The emphasis should not be on the inconsistent concept of the entitlement of the animal but on the concrete duty of human beings.

B. THE NEED FOR A DIRECT AND POSITIVE DUTY

By subscribing to an approach that negates the viability of granting animals 'rights' based on their capabilities, it does not imply that the current laws relating to animal welfare are effective, or even sufficient. The idea of an absolute duty was first suggested by Austin, through his positivist analysis of rights and duties, as a duty that exists within the human species, without the creation of a correlative right.[93] The creation of a correlative right considered the determination of a legal person as a pre-requisite.[94] There are several situations in which human beings owe 'absolute duties' to indeterminable legal entities, or entities that are not capable of possessing rights. Duties can be positive or negative, direct or indirect.[95] The majority of legislation in relation to animal welfare across jurisdictions is the codification of negative and often indirect duties that we owe to non-human animals.[96] However, the need of the hour is the codification of direct and positive duties into legal provisions, and the enforcement of the same.

The distinction between positive and negative duties bases itself on the distinction between what an individual is supposed to refrain from doing, and what an individual is obliged to do.[97] Nussbaum herself posits that "traditional morality" holds that it is wrong to harm another by aggression or fraud, but that letting people perish of hunger or disease is not morally problematic.[98] It follows from this that we have a strict duty not to commit bad acts, but no corresponding duty to act towards their cessation.[99] This distinction brings with it a hierarchy between positive and negative duties.

Positive duties are considered to be of higher ethical and legal value, as evidenced by the fact that the majority of early legislation in the world,

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93 JOHN AUSTIN, JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW 113 (R. Campbell ed., 2002); Roscoe Pound, *Legal Rights*, 26 (1) INTERNATIONAL JOURNAL OF ETHICS 92, 94 (1915).

94 Pound, *id.*, 162.

95 Marcus G. Singer, *Negative and Positive Duties*, 15 (59) THE PHILOSOPHICAL QUARTERLY 97 (1972).

96 *See, e.g.*, Act on Welfare and Management of Animals, 1972 (Japan); Animal Welfare Act, 1966 (USA); Animal Welfare Act, 2006 (UK).

97 Pound, *supra* note 93, 98.

98 NUSSBAUM, *supra* note 66, 336.

99 *Id.*

whether criminal or civil, was the codification of negative duties as opposed to positive ones.[100] With the evolution of legal systems, positive duties were codified with varied implications and reactions from society. However, the process of codifying positive duties or making individuals act in a particular manner leads to the endorsement of certain normative behaviour, and causes disputes within a society that is differently morally charged. The codification of positive duties leads to the codification of certain responsibilities that citizens have towards the State, sometimes at the cost of the individual's agency.[101] With the advent of the liberal tradition, the supporters of positive legal duties began being labelled as 'moralists' for restricting human freedom by imposing a normative ideal, rather than enhancing it.[102] These disputes, however, are irrelevant when the same standard is imposed with respect to non-human animals, and the need for positive duties towards non-human animals is urgent.

A positive duty towards the welfare of non-human animals does not restrict the moral freedom of an individual directly. It merely ensures that the duty that humans owe to non-human species is optimally served. These positive duties are essential with regards non-human animals because a large number of them live directly under human control, imposing a direct responsibility of nutrition and care of the animals on human beings.[103] Such animals may live in farms and zoos, or may be domesticated. With technological advancement, human intervention within the world of non-human animals is massive, and the aspect of intervention brings with it a corresponding duty to protect animal habitats. Further, the human race can maintain the 'balance of nature' by preserving several species and saving them from extinction, creating a real duty of material aid and medical assistance towards these species.[104]

It is regretful that the large part of animal-based legislation globally merely codifies negative duties that human beings owe to animals. In India, the PCA and the proposed Animal Welfare Act, 2011, codify our duties towards animals to refrain from causing harm, but none to facilitate their 'dignified existence' within the ecosystem. The European Union is a pioneer regarding legislation for the welfare of non-human animals. The German Animal Welfare Act, 1998, was enacted to protect the lives and well-being of animals, based on the responsibility of human beings for their fellow creatures.[105] Article 20A, German Basic Law, after an amendment of 2002 states that animals, like humans, have the right to be respected by the state and to have their dignity protected. This provision, however, reflects

[100] Singer, *supra* note 95, 93.

[101] Common examples would be of taxation, conscription, and specific to India, the Flag Code of India, 2002, which prescribes imprisonment for burning an India flag.

[102] Singer, *supra* note 95, 93.

[103] NUSSBAUM, *supra* note 66, 365.

[104] *Id.*, 368; Daniel B. Botkin, *Adjusting Law to Nature's Discordant Harmonies*, 7(1) DUKE ENVIRONMENTAL LAW & POLICY FORUM 25, 26 (1996).

[105] Animal Welfare Act, 1998 (Germany).

a general duty or responsibility of the state towards animals, and no specific, enforceable right is created.[106] Article 80 of the Swiss Constitution, holds that the State will positively regulate the keeping and care of animals; experiments and intervention on live animals; the use of animals; the importation of animals; animal trade and transportation of animals and the killing of animals.[107] We contend that similar laws enforcing positive duties of human beings towards non-human animals are required within the Indian legal context.

The second pertinent distinction is between direct and indirect duties that the human race owes towards non-human animals. The school of thought advocating indirect duties locates non-human animals within a larger ecological spectrum.[108] The environment, in all its diversity, must be properly maintained to maximise human benefit, and cater optimally to human development. Hence, the ultimate end of any duty which human beings owe to non-human animals is a duty towards the human race itself.[109] Direct duties are those duties that we owe to animals because *they* are beings worthy of a 'dignified existence'.[110] An emphasis on this commitment towards a duty to non-human animals because of their inherent nature as productive beings is crucial to highlight the seriousness of any duty owed by the human race. As shown above, there is a gradual change in the manner in which laws have denoted not indirect but to direct duties, based on the inherent nature of the animal.

C. THE BENEFITS OF A DUTY-BASED APPROACH OVER A RIGHTS-BASED APPROACH

While acknowledging that a duty and a right are co-related concepts, there are a range of duties that are not associated with corresponding rights. Further, there are different mechanisms for enforcing a right and a duty, and legislation always emphasises one over the other.

Rights in general perform the task of regulating the autonomous management of one's life. Since they can play this role only for beings capable of being self-managers, rights constitute a form of moral protection that is simply out of place for creatures other than human beings, as has been argued under Part II of this paper.[111] This, however, does not mean that the law will deny animals protection, or will not legislate towards their welfare. In fact, a stronger duty obligation may arguably, be imposed upon the human race, in this scenario.

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[106] GRUNDGESETZ, The Constitution of the Federal Republic of Germany, 1949, Art. 20A.

[107] BUNDESVERFASSUNG DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT, The Federal Constitution of the Swiss Confederation, 1874, Art. 80.

[108] NUSSBAUM, *supra* note 66, 373.

[109] *Id.*

[110] *Id.*

[111] Wilkinson, *supra* note 54, 148.

The fundamental premise of the rights-based approach is to create, in people or the State, a sense of entitlement which they may effect against the State or other bodies who violate their rights.[112] However, as has been argued, this view cannot be sustained in the context of animal entitlements or welfare as it is inefficient and unlikely to yield desired results, especially due to the difficulty in truly enforcing the approach against aggressors. At the same time, a duty-based approach will create a positive and direct obligation upon humans and the State to protect non-human animals and as such, will be a more sustainable model upon which animals may be granted protection. As opposed to the rights-based approach, which relies on the possessors' ability to ask for their rights and make various State and non-state actors accountable, a duty-based approach has no such requirement. Additionally, the absence of a rights-based entitlement model could allow for greater dilution of the doctrine of standing and permit humans to ask for the performance of duties on behalf of non-humans in a less controversial sense of procedure. In India, as has been seen in animal welfare case law, this could take the form of Public Interest Litigation suits.[113]

In employing jurisprudential theory while legislating, the terms 'rights' and 'duties' are often used interchangeably, which often leads to ambiguity. In actuality, reference is made specifically to one of the two concepts. Having established that animals cannot possess 'rights' within the legal meaning of the term, it is evident that the duty towards non-human animals must be the focus of legislations. This reduces problems of enforceability, and increases conceptual clarity regarding any dispute that is presented before a court of law.

In A. Nagaraja, the Supreme Court essentially seeks the codification of a direct and positive duty towards non-human animals to combat the inherent speciesism that pervades our legal thought. However, the Court is inconsistent in its approach by its usage of Article 21 to further its arguments. The Court argues that animals have a right that goes beyond mere survival or existence or instrumental value for human-beings, but to lead a life with some intrinsic worth, honour and dignity. It furthers this claim by saying that animals possess rights to the extent of human rights' protection. This approach is abstruse and problematic. By invoking Article 21 in such a manner, the Court has relied on the age-old rationale, disregarded even by traditional moralists, that non-human animals should be protected solely for the eventual benefit of

[112] *See* Jakob Kirkemann Boesen & Tomas Martin, *Applying a Rights-Based Approach: An Inspirational Guide for Civil Society*, available at http://www.acfid.asn.au/aid-issues/files/applying-a-rights-based-approach-2013-an-inspirational-guide-for-civil-society (Last visited on February 23, 2015).

[113] Ramesh Sharma v. State of H.P., 2014 SCC OnLine HP 4679, ¶12 (on animal sacrifice); Suo Motu v. The State of Karnataka, (2012) 5 Kar LJ 313 (on the mysterious death of wild elephants); *See* DNA News Network, *PIL in Bombay High Court Seeks Ban On Cock Fighting*, December 29, 2014, available at http://www.dnaindia.com/india/report-pil-in-bombay-high-court-seeks-ban-on-cock-fights-2047718 (Last visited on February 26, 2015).

the human race. This contradicts the Court's own stance that animals should be treated with 'dignity' because of a certain intrinsic value they possess. This inconsistency within the judgement leads to a lack of clarity that could have been easily avoided by recognising the necessity of direct and positive duties with regard to the welfare of non-human animals.

V. CONCLUSION

In interpreting provisions of legislative acts and laws, it is important for courts to maintain ideals that correspond to the foundations of what constitutes jurisprudential theory. To this end, the judgment in A. Nagaraj has erred in its findings. Not only will adopting a rights-based approach towards securing animal welfare be inconsistent with basic notions of who the possessors of rights are but it is also an impractical way of addressing the problem at hand, *i.e.*, the protection of animals under the law. Granting rights to animals is unlikely to have the desired effect as questions of standing as well as conflicts with existing human rights are likely to arise. Thus, the correct approach is one which is already exists in Indian jurisprudence and constitutional law, that which creates a direct and positive duty upon humans. This approach ensures that courts are able to interpret animal welfare and protection laws in the language of compassion and dignity as well as avoid addressing clashes between animal and human rights.

<u>Courts and its endeavor to do *Complete Justice*</u>

By: Dr. Justice B.S. Chauhan
Judge, Supreme Court of India

Fiat justitia, ruat caelum. **— Let justice be done, though the heavens may fall.**

`There is an orderliness in the universe, there is an unalterable law governing everything and every being that exists or lives. It is no blind law; for no blind law can govern the conduct of living beings.` Today, when we live in an age where the legal systems are highly developed that governance of rights and liabilities depend upon law and its principles rather than equity, we still find the basis of such laws from the concept of Justice. Justice has been the central theme of all the civilisations in the world. It was the central theme of the American Declaration of Independence when the colonies resolved to throw out a long standing government when it failed to protect the dues of a man.

What is Justice, asked Plato.[1] Justice is a proper, harmonious relationship between the warring parts of the person or city. According to the Hobbes and Rousseau's Model of Sovereignty, Justice is a process of giving and protecting the rights and liberties of a person. "The aim of justice is, as the Romans used to say, to give each his due, and in order for each to be given what is his....`give`, in this sense, means to protect the right of possession. Each man gets `what belongs to him` in the course of voluntary exchanges that constitute the economic process, and, by virtue of the operation of the market, each receives for his contribution, precisely the amount that will impel him to increase the supply of the most urgently demanded commodities..."[2]

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[1] Plato, The Republic, Book-I, 331 BC.

[2] Faustino Ballve, Essentials of Economics: A Brief Survey of Principles and Policies, 1963.

Justice is the act by which the Society/Court/Tribunal gives to a man what he is entitled to, as opposed to protecting against injury or wrong. Justice is the rendering of what is right and equitable towards one who has suffered a wrong. Therefore, while tempering the justice with mercy, the Court has to be very conscious that it has to do justice in exact conformity to some obligatory law for the reason that human actions are found to be just or unjust as they are in conformity with or in opposition to the law.[3]

Justice is an illusion as the meaning and definition of 'justice' varies from person to person and party to party. Party feels having got justice only and only if it succeeds before the court, though it may not even have a justifiable claim. There are times when a arty may continue with adversarial litigation just to satisfy his ego that justice is when he wins the case, without realizing that at times, even if he eventually wins, he may not get to enjoy the fruits of the litigation for they would have dried and died long back.

It is in these situations that the court has to play a role of a mediator rather than a conventional adjudicator and ensure that complete justice is done. The Founding Fathers of the Constitution, cognizant of the realities of life, wisely engrafted rights, duties and practical procedures in the nation's Constitution for a democratic way of life. While Chapters dealing with the rights and liabilities have been included, the drafting committee also engrained chapters on their enforceability by including institutions of Union and State judiciary within the Constitution itself. Articles 32, 136, 142, 226, etc of the Constitution strengthen the desires of imparting complete justice. These provisions are part of discretionary jurisdiction of the courts and have often been invoked in matters requiring the court to intervene and ensure that rights and entitlements of persons are duly protected.

Of these, Articles 136 and 142 are more important and often go together. Article 136 provides a discretion to the Supreme Court to grant a special leave to appeal against any judgment, decree, determination, sentence or order of a court. Such right to appeal is not an automatic right and only if the Court is of the opinion that the matter is such as requires the interference by the apex court is the leave granted. The scope of Article 136 has been well

[3] Delhi Administration v. Gurudeep Singh Uban AIR 2000 SC 3737 & Girimallappa v. The Special Land Acquisition Officer M and MIP & Anr. AIR 2012 SC 3101; and Union of India & Ors. v. Ex-GNR Ajeet Singh (2013) 4 SCC 186.

explained in the case of **N. Suriyakala v. A. Mohandoss & Ors.,**[4] wherein the court held that *"Article 136 was never meant to be an ordinary forum of appeal at all like Section 96 or even Section 100 CPC. Under the constitutional scheme, ordinarily the last court in the country in ordinary cases was meant to be the High Court. The Supreme Court as the Apex Court in the country was meant to deal with important issues like constitutional questions, questions of law of general importance or where grave injustice had been done. If the Supreme Court entertains all and sundry kinds of cases it will soon be flooded with a huge amount of backlog and will not be able to deal with important questions relating to the Constitution or the law or where grave injustice has been done, for which it was really meant under the constitutional scheme. After all, the Supreme Court has limited time at its disposal and it cannot be expected to hear every kind of dispute."* The court in ***Tirupati Balaji Developers (P) Ltd. & Ors. v. State of Bihar & Ors.,***[5] held that Article 136 which is worded in the widest-possible terms. A plenary jurisdiction exercisable on assuming appellate jurisdiction subject to grant of special leave against any kind of judgment or order made by any court or tribunal and in any cause or matter has been embodied and vested in the Supreme Court. It is an extraordinary jurisdiction vested by the Constitution in the Court with implicit trust and faith and extraordinary care and caution has to be observed in the exercise of this jurisdiction. Article 136 does not confer a right of appeal on a party but vests a vast discretion in the Supreme Court meant to be exercised by the considerations of justice, **call of duty and eradicating injustice.** In ***State of Maharashtra v. Champalal Punjaji Shah,***[6] the court held that the Supreme Court should not hesitate to interfere in cases where the decision of the lower court will lead to miscarriage of justice. In ***Gopal & Ors. v. State of T.N.,***[7] the court held that unless there is any infirmity or any illegality in the order of the lower court or that it would lead to failure of justice, the court should not interfere by exercising its discretionary jurisdiction under Article 136.

The essential question herein is what happens when the Supreme Court does exercise its jurisdiction under Article 136 and grants leave to appeal. Does the jurisdiction from that point becomes one of statutory appeal thereby vesting the right and obligation to deal the matter in as

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[4] (2007) 9 SCC 196; and Manish Goel v. Rohini Goel, AIR 2010 SC 1099
[5] AIR 2004 SC 2351
[6] AIR 1981 SC 1675
[7] AIR 1986 SC 702

such or the case would continue to be one under the discretionary jurisdiction of the court? The answer is quite obvious and the latter is to be upheld. In a series of cases, the Supreme Court has held that even where leave to appeal has been granted under Article 136, the matter does not travel beyond the discretionary jurisdiction of the court, though it may thereby invoke the appellate jurisdiction of the court, and in such a case, the court can even refuse to interfere even if it has granted leave. In ***Kunhayammed & Ors. v. State of Kerala & Anr.,*** [8] the court held that `*when leave to appeal is granted the appellate jurisdiction of the Court stands invoked; the gate for entry in the appellate arena is opened. The petitioner is in and the respondent may also be called upon to face him, though in an appropriate case, in spite of having granted leave to appeal, the Court may dismiss the appeal without noticing the respondent.*` In a number of decisions including those of the constitution bench, the apex court has held that leave once granted can always be revoked on the application of the other party if the same is shown to be not a fit case.[9]

In light of the above, it can be said that the functioning of the apex court is largely governed by its endeavor to ensure that justice is done. It does not function as a conventional court intending to decide matters between parties following the rigors of procedure, though is not marked by complete absence of it. Rather, the Supreme Court's functioning may be termed as more of a supervisory jurisdiction ensuring that any decision of a court or tribunal has not lead to injustice to any of the parties. It is for this very purpose that the apex court was entrusted with great plenary power in the form of Article 142 which says that the Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing *complete justice* in any cause or matter pending before it.

It is to be noted that this article uses the word `complete justice` rather than the term `justice`. This is because complete justice travels much beyond the concept of giving justice to a party. Complete justice strives at imparting justice not just for one side alone, but for all. Even if a party has wronged another, the court cannot become an instrument to perpetuate wrong upon him. The expression `complete justice` engrafted in Article 142 is of wide amplitude "couched

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[8] AIR 2000 SC 2587

[9] See Hari Narain v. Badri Das AIR 1963 SC 1558; Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Addl. Collector of Customs & Ors. AIR 1964 SC 1140

with elasticity to meet myriad situation". Complete justice is justice according to law and the Supreme Court would be well within its power to even mould the relief so sought by the parties to ensure that no illegality is perpetuated.[10] The main purpose of Article 142 and the endeavor to do *complete justice* has been explained by this court in **Manohar Lal Sharma v. Principal Secy & Ors.** [11] wherein the apex court held that `the Supreme Court has been conferred with very wide powers for proper and effective administration of justice. The Court has inherent power and jurisdiction for dealing with any exceptional situation in larger public interest which builds confidence in the rule of law and strengthens democracy. The Supreme Court as the *sentinel on the qui vive*, has been invested with the powers which are elastic and flexible and in certain areas the rigidity in exercise of such powers is considered inappropriate. ` In **Shahid Balwa v. Union of India & Ors.,**[12] the court said that Article 136 read with Article 142 of the Constitution of India enables this Court to pass such orders, which are necessary for doing complete justice in any cause or matter pending before it and, any order so made, shall be enforceable throughout the territory of India. The power to do *complete justice* under Article 142 is in the nature of a corrective measure whereby equity is given preference over law to ensure that no injustice is caused.[13]

Equipped with such great discretionary powers, the Supreme Court has often taken up the task of ensuring that honest parties are not the ultimate suffers and that the guilty/or the wrong is ultimately punished. Power under Article 142 is very wide and can be used to pass any order which the court thinks is necessary for doing *complete justice* between the parties. There can be no straight jacket formula for its exercise nor there can be any fetters or limited scope of application for the powers under Article 142 is plenary in nature. It seeks to ensure that no injustice is caused by the rigors of law or due to the perversity of findings recorded by the courts below or such cases. It acts as an equity jurisdiction without losing the characteristics of being an action in *accordance with law*. Article 142 is used as a tool to balance the conflicting interests of the parties and to ensure that ultimately, the righteous succeeds. It is an inherent power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration

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[10] Secretary, State of Karnataka & Ors. v. Umadevi (3) & Ors. AIR 2006 SC 1806
[11] (2014) 2 SCC 532
[12] (2014) 2 SCC 687
[13] Supreme Court Bar Association v. Union of India & Anr., AIR 1998 SC 1895

of justice and for preventing any manifest injustice being done. However, the power is to be exercised only in exceptional circumstances for furthering the ends of justice and not in a casual and a mechanical manner. The purpose of Article 142 is to do effective, real and substantial justice, coextensive and commensurate with the needs of justice in a given case in order to meet any exigency that may arise.[14] However, it is not to be exercised in a case where there is no basis in law which can form an edifice for building up a superstructure. Keeping these principles in mind, the apex court has not hesitated to exercise its power under Article 142, though fully aware of the restraints in judicial decision making process, in order to do *complete justice*.

The court in ***Commissioner of Income Tax, Shimla v. Greenworld Corporation, Parwanoo,***[15] ordered fresh income tax assessment. It held that is was necessary for doing *complete justice* that an order passed on dictates of superior without following the due process be quashed as being a nullity. In ***Damodar S. Prabhu v. Sayed Babalal H,***[16] the court framed the following guidelines relating to compounding of Sec. 138 Negotiable Instruments Act 1881 proceedings:

> *"(a) That directions can be given that the writ of summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.*
>
> *(b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the court deems fit.*
>
> *(c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.*
>
> *(d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount."*

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[14] Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors. AIR 2004 SC 3467
[15] (2009) 7 SCC 69
[16] AIR 2010 SC 1907

In relation to framing the guidelines, the court said that it was aware that framing such guidelines may amount to judicial law making, thereby breaching the perimeters of its jurisdiction, however, in order to do *complete justice* the court would be justified in framing such guidelines in cases where there is compete legislative vacuum. The same rationale was used in issuing directions/guidelines in the **Vineet Narain**[17] and **Vishkha**[18] cases as well as the Amarnath Shrine case.

In **Satbir v. Surat Singh & Ors.,**[19] the court held that ordinarily this Court does not interfere with an order of acquittal recorded by the High Court; but if the High Court arrives at its findings overlooking important facts and relying upon few circumstances which do not in any way impair the probative value of the evidence adduced during trial, this Court would be failing in its duty to do *complete justice* if it does not interfere with such order of acquittal. The Court re-appreciated the evidence and critically examined the judgment of the High Court and its reasoning before finally allowing the appeal and convicting the accused persons. The court in exercise of its power under Article 142 sat as if exercising jurisdiction as a Court of Appeal, which it does not do under Article 136 even where leave has been granted.

In **Monica Kumar (Dr.) & Anr. v. State of U.P. & Ors.,**[20] this court held that:

"*.....We are conscious of the well-settled law laid down by this Court in the above referred decisions and many more that in case of persons against whom prima facie case is made out and charge-sheet is filed in the competent court, it is that court which will then deal with the case on merits in accordance with law and the High Court should not, except in extraordinary circumstances, exercise its jurisdiction under Section 482 CrPC so as to quash the prosecution proceedings after they have been lodged.*

45. *Under Article 142 of the Constitution this Court in exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any "cause" or "matter" pending before it. The expression "cause" or*

[17] AIR 1998 SC 889
[18] AIR 1997 SC 3011
[19] AIR 1997 SC 1160
[20] AIR 2008 SC 2781

"matter" would include any proceeding pending in court and it would cover almost every kind of proceeding in court including civil or criminal. Though there is no provision like Section 482 of the Criminal Procedure Code conferring express power on the Supreme Court to quash or set aside any criminal proceedings pending before a criminal court to prevent abuse of process of the court, but the inherent power of this Court under Article 142 coupled with the plenary and residuary powers under Articles 32 and 136 embraces power to quash criminal proceedings pending before any court to do complete justice in the matter before this Court. If the Court is satisfied that the proceedings in a criminal case are being utilised for oblique purposes or if the same are continued on manufactured and false evidence or if no case is made out on the admitted facts, it would be in the ends of justice to set aside or quash the criminal proceedings. Once this Court is satisfied that the criminal proceedings amount to abuse of process of court, it would quash such proceedings to ensure justice. This Court's power under Article 142(1) to do "complete justice" is entirely of different level and of a different quality. What would be the need of "complete justice" in a cause or matter would depend upon the facts and circumstances of each case and while exercising that power the Court would take into consideration the express provisions of a substantive statute. Any prohibition or restriction contained in ordinary laws cannot act as a limitation on the constitutional power of this Court. Once this Court has seisin of a cause or matter before it, it has power to issue any order or direction to do "complete justice" in the matter.

The court noticing that the series of complaints and criminal prosecutions were filed for the purpose of seeking vengeance, in the interest of doing complete justice, all such cases were quashed even in those cases where a charge-sheet had been filed.

In **E.K. Chandrasenan v. State of Kerala,**[21] the court held that Article 142 empowers the Supreme Court to pass any order which it deems necessary in order to do complete justice.

[21] AIR 1995 SC 1066

The court said that power under article 142 can be resorted to for initiating *suo moto* proceedings of enhancement of sentence in criminal cases even in those cases where the accused had approached the Supreme Court challenging his conviction.

In **Sandeep Subhash Parate v. State of Maharashtra & Ors.**,[22] the Supreme Court was dealing with a matter wherein the appellant had completed his Engineering degree after obtaining admission on the basis of a false caste certificate. Though the court was of the opinion that such practices should not be allowed, however, it invoked its power under Article 142 to do *complete justice* given the fact that the student had already completed his education and his time and efforts would go waste if he would now be denied a degree. Therefore, the court in order to do *complete justice* directed the student to pay a cost and in return, the college was to issue him a degree, despite cancelling the certificate issued to him.

The Constitution Bench of the Supreme Court in **Secretary, State of Karnataka & Ors. v. Umadevi (3)& Ors.**,[23] allowed regularization of irregularly appointed persons in exercise of its power under Article 142 simply because they had worked on the post/department for more than 10 years without any challenge. However, the court clarified it to be a one time measure and not a rule. A similar decision was rendered by the court in the case of **H.C. Puttaswamy & Ors. v. Hon'ble Chief Justice of Karnataka & Ors.**[24]

Thus, as can be seen from the above instances, the courts have used Article 142 as a tool for doing *compete justice*. The apex court has always risen to the occasion to ensure that supremacy of law prevails, yet its strict adherence does harm to no one. The power under Article 142 can be likened to the `equity jurisdiction` of the court exercising power in order to ensure that no injustice is caused to a person. There have been cases where the court has played a balancing act and sought to do justice by protecting even those who had faulted. The power under Article 142 has been well explained by this court in its Constitution Bench judgment in **Supreme Court Bar Association** (Supra) wherein the court held that "*these powers are of very wide amplitude and are in the nature of supplementary powers. This power, exists as a separate and independent basis of jurisdiction, apart from the statutes. It stands upon the foundation, and*

[22] AIR 2006 SC 3102
[23] AIR 2006 SC 1806
[24] AIR 1991 SC 295

the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law." However, the court clarified that *it needs to be remembered that the powers conferred on the court by Article 142 being curative in nature cannot be construed as powers which authorise the court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to '"supplant" substantive law applicable to the case or cause under consideration of the court.*

This brings us to an important discussion as to whether powers under Article 142 can be used in a manner which supersedes even the express or implied provisions and requirements of a statute. No doubt that powers under Article 142 are of wide amplitude and can be exercised by this court in the manner it deems fit so as to ensure that no injustice is caused to a party, but the question is, can the power be exercised in a manner that renders a statutory provision a mere dead letter or of no worth before such an equity clause? The answer is an obvious NO. The apex court through a large number of its rulings held that statutes cannot be completely given a go-by while exercising a discretionary and equity jurisdiction. In **M.S. Ahlawat v. State of Haryana & Anr.,**[25] the court held that under Article 142, the court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. While reviewing its earlier order, the court corrected its order punishing the petitioner under Section 195 of Code of Criminal Procedure, 1973 holding that the requirements of the provisions cannot be ignored in exercise of powers under Article 142. Similarly, in **M.C. Mehta v. Kamal Nath & Ors.**[26], the court while dealing with the issue whether a punishment could be imposed by the apex court while hearing a Writ Petition for causing pollution when such an act is covered by Prevention of Water Pollution Act and Prevention of Air Pollution Act, held that Article 142 could not be invoked in contravention of statutory provisions. In the **Supreme Court Bar Association** case (Supra), while deciding the

[25] AIR 2000 SC 168
[26] AIR 2000 SC 1997

issue whether the court can also suspend or remove an advocate for committing contempt of the court by exercising power under Article 142 when such a power has been vested with the Bar Council, the court held that indeed statutory provisions cannot curtail the constitutional powers of the court; however, at the same time these powers are not to be exercised when the exercise of such power is going to be in direct conflict with a statutory provision. The court refused to interfere in light of the fact that statutory proceedings could be initiated.[27]

In **J. Jayalalithaa & Ors. v. State of Karnataka & Ors.,**[28] this Court held that the court should not exercise its powers under Article 142 of the Constitution when such an exercise would be contrary to law. The court relied on its earlier judgment in *A.B. Bhaskara Rao v. CBI*, wherein this Court held that the powers under Article 142 of the Constitution cannot be exercised by this Court in contravention of any statutory provisions, though such powers remain unfettered and create an independent jurisdiction to pass any order in public interest to do complete justice. The court refused to pass any orders while directing the authority to consider the case under the relevant Rules and to pass orders in accordance with law. In **Manish Goel v. Rohini Goel** (supra), it was noted by the Court that `*Though the power under Article 142 of the Constitution is a Constitutional power and hence cannot in any way, be controlled by any statutory provisions, the Supreme Court would not pass any order under Article 142 of the Constitution which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject. That is, the Supreme Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case. This power of the Court is to be used sparingly in cases which cannot be effectively and appropriately tackled by the existing provisions of law or when the existing provisions of law cannot bring about complete justice between the parties.*` Even in **Government of West Bengal v. Tarun K. Roy & Ors.**,[29] the court refused to exercise its power under Article 142 noting that such a course would be in direct conflict with statutory provisions.

[27] See also: Manohar Lal Sharma (Supra)
[28] (2014) 2 SCC 401
[29] (2004) 1 SCC 347

The law on Article 142 was well summed up in **Laxmidas Morarji v. Behrose Darab Madan,**[30] wherein the court held that:

> *"Article 142 being in the nature of a residuary power based on equitable principles, the Courts have thought it advisable to leave the powers under the article undefined. The power under Article 142 of the Constitution is a constitutional power and hence, not restricted by statutory enactments. Though the Supreme Court would not pass any order under Article 142 of the Constitution which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject, at the same time these constitutional powers cannot in any way, be controlled by any statutory provisions. However, it is to be made clear that this power cannot be used to supplant the law applicable to the case. This means that acting under Article 142, the Supreme Court cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case. The power is to be used sparingly in cases which cannot be effectively and appropriately tackled by the existing provisions of law or when the existing provisions of law cannot bring about complete justice between the parties."*

A similar view was taken in the case of ***Modern School v. Union of India & Ors.,***[31] wherein this court held that when any legislation is operating in the field, the courts should not be loathe to impose any further restrictions. This Court normally does not pass an order even in exercise of its jurisdiction under Article 142 of the Constitution of India which would be contrary to the law. Once the legislature has laid down an educational scheme, the jurisdiction of the court is merely to interpret the same. It cannot and should not issue any other or further direction. It would not supplant a statutory provision by issuing any direction except in some exceptional cases. The need of the day, therefore, is strict implementation and enforcement of the statute. The administration, in the event, it comes to the conclusion that the rules are required to

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[30] (2009) 10 SCC 425
[31] AIR 2004 SC 2236

be amended, is free to do so; but only because there are a few cases of mismanagement, the same by itself should not be considered to be an indicia that all institutions are being run in an unprofessional or unethical manner thereby asking courts to pass necessary orders.

Thus, to conclude, the Supreme Court has been given wide discretionary power to do *complete justice* between the parties under Article 142 of the Constitution. It can pass any order which it deems fit in the facts and circumstances of the case. However an order which the Court passes in order to do complete justice between the parties must not only be consistent with the fundamental rights guaranteed under the Constitution, but should also be consistent with the substantive provisions of the relevant statute. In other words, this Court cannot altogether ignore the substantive provisions of a statute. This Court should be slow in exercising this great discretionary power and it should not pass any order which would amount to supplanting the substantive law. Further, the court must exercise judicial restraint in relation to invoking Article 142 and it should not exercise the power on the ground of sympathy or on mere asking. This is because this great plenary power is also a discretionary and extra-ordinary power which is not to be exercised in a mechanical manner. There must be strong and cogent reasons for exercising this discretionary jurisdiction for the powers under Article 142 are meant to be exercised in order to further the needs of justice and to fill in lacuna or vacuum in law and not as part of regular exercise of jurisdiction of the court.

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WRITS AND REMEDIES

GOPAL SUBRAMANIUM

I. INTRODUCTION

UBI jus ibi remedium—where there is a right, there is a remedy—is a defining principle of the common law. In *Ashby v White*, Holt CJ of the King's Bench famously observed that 'If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy.'[1] Unlike the American Constitution, where the power of judicial review emerged after the Supreme Court's decision in *Marbury v Madison*,[2] the Indian Constitution explicitly provides courts with the power to issue writs and grant remedies. It would be meaningless, the Indian founders believed, to confer rights without providing effective remedies for their enforcement. Articles 32 and 226 were and continue to be regarded as integral to the Constitution. Indeed, for BR Ambedkar, Article 32 was 'the very soul of the Constitution and the very heart of it…'[3] Gajendragadkar J expressed a similar sentiment when he observed:

> The fundamental right to move this Court can … be appropriately described as the corner-stone of the democratic edifice raised by the Constitution… The key role assigned to the right guaranteed by Article 32 and the width of its content are writ large on the face of its provisions, and so, it is in our opinion unnecessary and even inappropriate to employ hyperboles or use superlatives to emphasise its significance or importance.[4]

This chapter focuses on Articles 32 and 226. Both these provisions have been held to be part of the basic structure of the Constitution—they cannot be taken away, even by way of a constitutional amendment.[5] It is through these provisions that rights are protected under the Indian Constitution, and it is ultimately through them that the Supreme Court has come to acquire the role it has within Indian democracy.

II. JURISDICTION

An important feature of Article 32 is that it does not merely guarantee the protection of fundamental rights, but it is itself located in Part III of the Constitution. In other words, it is not found alongside other Articles of the Constitution that define the general jurisdiction of the Supreme Court. Further, it is also clear from the expression 'in the nature of' employed in clause (2) of Article 32 that the power conferred by the said clause is in the widest terms and is not confined to issuing the high-prerogative writs specified in the said clause, but includes within its ambit the power to issue any directions or orders or writs which may be appropriate for enforcement of fundamental rights.[6] Therefore, even when the conditions for issue of any of these writs are not fulfilled, the Supreme Court would not be constrained to 'fold its hands in despair and plead its inability to help the citizen who has come before it for judicial redress …'[7]

The Supreme Court's powers were clarified by its decision in *Nilabati Behera*.[8] Here, the Court affirmed its previous decisions in *Khatri (II) v State of Bihar*[9] and *Khatri (IV) v State of Bihar*,[10] wherein the Court had held that it was not helpless to grant relief in a case of violation of the right to life and personal liberty, and it should be prepared 'to forge new tools and devise new remedies for the purpose of vindicating the most … precious fundamental right …'[11] It was also indicated that the procedure suitable in the facts of the case must be adopted for conducting the inquiry needed to ascertain the necessary facts, for granting relief for enforcement of the guaranteed fundamental rights. In his concurring judgment in *Nilabati Behera*, Anand J made the following observations with regard to Articles 32 and 226:

> This Court and the High Courts, being the protectors of the civil liberties of the citizen, have not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Articles 32 and 226 of the Constitution to the victim or the heir of the victim whose fundamental rights under Article 21 of the Constitution of India are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers to the fundamental rights of the citizen, notwithstanding the right of the citizen to the remedy by way of a civil suit or criminal proceedings. The State of course has the right to be indemnified by and take such action as may be available to it against the wrongdoer in accordance with law—through appropriate proceedings.[12]

Article 226 is wider in scope than Article 32. The High Courts are authorised under Article 226 to issue directions, orders, or writs to any person or authority, including any government to enforce fundamental rights and 'for any other purpose'. The difference in the language of Articles 32 and 226 gives a clear indication that their nature and purpose are different. The right guaranteed by Article 32 can be exercised only and only for the enforcement of fundamental rights conferred by Part III of the Constitution, and the same must also be evident from the pleadings. On the other hand, the right conferred by Article 226 can be exercised not only for the enforcement of fundamental rights, but 'for any other purpose' as well, that is, for enforcement of any legal right conferred by a statute, etc.[13] The differing jurisdiction of the Supreme Court and High Courts was recently noted in the following terms by the Supreme Court:

> Under the constitutional scheme as framed for the judiciary, the Supreme Court and the High Courts both are courts of record. The High Court is not a court 'subordinate' to the Supreme Court. In a way the canvas of judicial powers vesting in the High Court is wider inasmuch as it has jurisdiction to issue all prerogative writs conferred by Article 226 of the Constitution for the enforcement of any of the rights conferred by Part III of the Constitution and *for any other purpose* while the original jurisdiction of the Supreme Court to issue prerogative writs remains confined to the enforcement of fundamental rights and to deal with some such matters such as Presidential elections or inter-State disputes which the Constitution does not envisage being heard and determined by High Courts.[14]

Wide as the High Court's power might be under Article 226, it can only be deployed in cases where there is a pre-existing right. As the Supreme Court recently observed:

> The primary purpose of the writ is to protect and establish rights, and to impose a corresponding imperative duty existing in law. It is designed to promote justice (ex debito justitiae) and its grant or refusal is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or establish a legal right but to enforce one that stood already established.[15]

The Supreme Court and the High Courts have concurrent jurisdiction for enforcement of the fundamental rights. An important question in this context is whether a petitioner must approach the High Court under Article 226 before he can approach the Supreme Court in Article 32. This has been the view taken by some decisions of the Supreme Court.[16] For instance, in *Kanubhai Brahmbhatt v*

State of Gujarat,[17] the Court argued that if it '[took] upon itself to do everything which even the High Courts can do, this Court will not be able to do what this Court alone can do under Article 136 of the Constitution, and other provisions conferring exclusive jurisdiction on this Court'.[18] In addition, it also cited fears of a growing backlog of cases: 'If this Court entertains writ petitions at the instance of parties who approach this Court directly instead of approaching the concerned High Court ... the arrears pertaining to matters in respect of which this Court exercises exclusive jurisdiction ... will assume more alarming proportions.'[19] Finally, it also pointed to the need to inspire institutional confidence in the judiciary as a whole: 'Faith must be inspired in the hierarchy of courts and the institution as a whole, not only in this Court alone.'[20] Such an interpretation, however, possibly detracts from the Supreme Court's role in protecting the rights guaranteed by Part III of the Constitution.[21]

A second important question that arises is whether Article 226 might be read as not merely confined to governmental institutions and statutory public bodies. The text of the entire provision read alongside Article 12, however, makes it clear that writs and directions under Article 226 can be issued only against authorities and persons having 'authority of the State'. Over time, however, the judicial approach has replaced the focus these provisions place on the body performing the functions with the kind of functions that are being performed. That is to say, the question has become, and increasingly so with the rise of public–private partnerships, whether the function being performed is of a public nature. As early as the decision in *Praga Tools Corporation v CA Imanual*, the Court noted that 'it is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body'.[22] In *Andi Mukta Sadguru*, the Court clarified that 'the form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body ... judged in the light of positive obligation owed by the person or authority to the affected party.'[23] The law was summarised by the Supreme Court in *G Bassi Reddy v International Crops Research Institute*: 'A writ under Article 226 can lie against a "person" if it is a statutory body or performs a public function or discharges a public or statutory duty.'[24] The Court, however, has not provided much elaboration upon what a public function or public duty is, though the language used typically focuses upon whether the functions are similar to those performable by the State in its sovereign capacity.

An important recent decision in this respect is *Board of Control for Cricket in India v Cricket Association of Bihar*,[25] where the Court cited its decision in *Zee Telefilms Ltd v Union of India*[26] with approval to hold that the Board of Control for Cricket in India (BCCI) was amenable to writ jurisdiction under Article 226. Specifically, the Court examined the 'nature of duties and functions' which the BCCI performed and found that they were 'clearly public functions ...' since the State 'not only [allowed] an autonomous/private body to discharge functions which it could in law take over or regulate but even lends its assistance to such a non-government body to undertake such functions which by their very nature are public functions ...'[27]

The final issue relating to Article 226 is that of cause of action and territoriality. Article 226 as it originally stood did not make reference to cause of action. It was amended by the Constitution (Fifteenth Amendment) Act 1963 and after Clause (1), a new Clause (1-A) was inserted:

> 226. (1-A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

By the Constitution (Forty-second Amendment) Act 1976, Clause (1-A) was renumbered as Clause (2). As per this amendment, the High Court within whose jurisdiction the cause of action arises would also have the power to issue relevant directions, orders, or writs. Thus, cause of action was made an additional ground to confer jurisdiction on a High Court under Article 226. For a cause of action claim to succeed, the facts disclosed must bear a nexus to the relief that is sought.[28] The Supreme Court has held that the seat of the government or authority will not interfere with a High Court's powers so long as the cause of action arises within the territory in which its jurisdiction applies.[29] For instance, in *Om Prakash Srivastava v Union of India*, the Court phrased the test as follows: 'in order to maintain a writ petition, a writ petitioner has to establish that a legal right claimed by him has prima facie either been infringed or is threatened to be infringed by the respondent within the territorial limits of the Court's jurisdiction…'[30] However, in *Kusum Ignots*, the Supreme Court observed that:

> We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens.[31]

This paragraph was reiterated in *Ambica Industries*, and the Court observed: 'indisputably even if a small fraction thereof accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter though the doctrine of *forum conveniens* may also have to be considered'.[32] This observation leaves some doubt and ambiguity relating to the powers of the High Court. The rule of forum conveniens is not to be found as part of the text of Article 226(2). Mere convenience to prosecute in another forum ought not to oust the jurisdiction of another forum that is otherwise competent.

III. Writs

The Supreme Court in *Rupa Ashok Hurra v Ashok Hurra*[33] clarified the nature of writ jurisdiction in India and its differences with English law. It noted that there were 'two types of writs' in English Law.[34] The first, 'judicial procedural writs … issued as a matter of course' (a writ of summons, for example), were not in use in India.[35] The second, 'substantive writs' (*quo warranto*, *habeas corpus*, mandamus, certiorari, and prohibition), 'were frequently resorted to in Indian High Courts and the Supreme Court'.[36] Delving further into the history of writs in English law, the Court noted that they were 'discretionary … but the principles for issuing such writs are well defined'.[37] The three 'prerogative writs' of certiorari, mandamus, and prohibition were succinctly summarised:

> Historically, prohibition was a writ whereby the royal courts of common law prohibited other courts from entertaining matters falling within the exclusive jurisdiction of the common law courts; certiorari was issued to bring the record of an inferior court into the King's Bench for review or to remove indictments for trial in that court; mandamus was directed to inferior courts and tribunals and to public officers and bodies, to order the performance of a public duty.[38]

Noting the expansion of writ jurisdiction under the Constitution to all the High Courts and the Supreme Court from just the three Chartered High Courts[39] in the colonial era, the Court clarified that while the High Courts in India were 'placed virtually in the same position as the Courts of King's

Bench in England', it was a 'well-settled principle that the technicalities associated with the prerogative writs in English law have no role to play under our constitutional scheme'.[40]

The first writ we shall examine, the writ of mandamus, has historically been understood as a writ that can be employed to safeguard justice in a wide variety of cases. The Indian Supreme Court has taken a very broad view of this writ. In *Comptroller and Auditor-General of India v KS Jagannathan*,[41] the Court referred to Halsbury's *Laws of England* to affirm the writ's wide applicability.[42] It observed that 'in a proper case, in order to prevent injustice resulting to the parties concerned, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion'.[43] In a later decision, the Court held that mandamus is a very wide remedy, which must be easily available 'to reach injustice wherever it is found'.[44] Technicalities should not come in the way of granting that relief under Article 226.[45] One innovative use of the writ of mandamus has been the idea of 'continuing mandamus', through which the Court, often in public interest litigation cases, decides to monitor a case or investigation and passes orders and directions from time to time.[46] It was first used in *Vineet Narain v Union of India*,[47] where the Court considered a writ petition that alleged a failure on the part of investigative agencies in a case involving prominent politicians and bureaucrats. The Court described its response to the petition as a 'continuing mandamus': '[keeping] the matter pending while the investigations were being carried on, ensuring that this was done by monitoring them from time to time and issuing orders in this behalf'.[48] In *Manohar Lal Sharma v Principal Secretary*, the Court considered whether Section 6-A of the Delhi Special Police Establishment Act, which required the approval of the Union government before an investigation under the Prevention of Corruption Act, could 'bind the exercise of plenary power by this Court of issuing orders in the nature of a continuing mandamus under Article 32 of the Constitution…'[49] Rejecting this construction, the Court held that Section 6-A had to be 'meaningfully and realistically read, only as an injunction to the executive and not as an injunction to a constitutional court monitoring an investigation under Article 32 …'[50]

Since a writ of mandamus lies only when the person entrusted with a duty has failed to perform his duty, it is a requirement in law that, prior to approaching the Court, the petitioner must make an unambiguous demand that the authority must perform its duty. The chief function of the writ of mandamus is to compel the performance of public duties prescribed by statute and to keep statutory authorities and officers exercising public functions within their jurisdictions. The writ can even be issued against a private person so long as the duty sought to be enforced is a statutory duty. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the writ is sought. Finally, a writ of mandamus cannot be issued to the legislature to enact a particular legislation. The same is true as regards the executive when it exercises the power to make rules which are in the nature of subordinate legislation.

Habeas corpus, by contrast, is a writ against illegal detention: 'The principal aim of the writ is to ensure swift judicial review of alleged unlawful detention on liberty or freedom of the prisoner or detenu.'[51] The underlying objective of the writ was expressed in the following terms by the Supreme Court in *Sapmawia v Deputy Commissioner*:

> The writ of *habeas corpus* is a prerogative writ by which the causes and validity of detention of a person are investigated by summary procedure and if the authority having his custody does not satisfy the court that the deprivation of his personal liberty is

according to the procedure established by law, the person is entitled to his liberty. The order of release in the case of a person suspected of or charged with the commission of an offence does not per se amount to his acquittal or discharge and the authorities are not, by virtue of the release only on habeas corpus, deprived of the power to arrest and keep him in custody in accordance with law for this writ is not designed to interrupt the ordinary administration of criminal law.[52]

The third writ to be examined, certiorari, is a call by a superior court to an inferior court for records of its proceedings. A notable test for when certiorari may be issued was posited by Atkin LJ in *R v Electricity Commissioners*, in which he observed that 'wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs'.[53] In *R v London County Council*, Scrutton LJ separated the four independent conditions in this text, and the existence of each condition was held as necessary to determine the nature of the act in question.[54]

One important consideration in the exercise of certiorari jurisdiction is the existence of a finality clause that seeks to bar the jurisdiction of an appellate court. In *Kihoto Hollohan v Zachillhu*,[55] the Court, referring to Wade's *Administrative Law*,[56] clarified the scope of certiorari in such cases. The test was 'whether the impugned action falls within the jurisdiction of the authority taking the action or it falls outside such jurisdiction'.[57] A finality clause, or 'ouster clause' as the Court preferred, would limit judicial review to 'actions falling outside the jurisdiction of the authority taking such action' but would '[preclude] challenge to such action on the ground of an error committed in the exercise of jurisdiction vested in the authority because such an action cannot be said to be an action without jurisdiction'.[58] In other words, an ouster clause would 'oust certiorari to some extent', 'if the inferior tribunal has not acted without jurisdiction and has merely made an error of law which does not affect its jurisdiction and if its decision is not a nullity for some reason such as breach of rule of natural justice'.[59]

Another important issue is the limit on certiorari jurisdiction: can it be issued to coordinate or superior courts? This was answered concisely by the Court in *Rupa Ashok Hurra*:

A High Court cannot issue a writ to another High Court. One Bench of a High Court cannot issue a writ to another Bench of the same High Court. The writ jurisdiction of a High Court cannot be invoked to seek issuance of a writ of certiorari to the Supreme Court. Although, the judgments/orders of High Courts are liable to be corrected by the Supreme Court in its appellate jurisdiction, the High Courts are not constituted as inferior courts. Even the Supreme Court would not issue a writ under Article 32 to a High Court. Similarly, neither a smaller Bench nor a larger Bench of the Supreme Court can issue a writ under Article 32 of the Constitution to any other Bench of the Supreme Court.[60]

The next writ under consideration is prohibition, whose origins lie in common law courts prohibiting other courts from entertaining matters that fall within their jurisdiction. The Indian Supreme Court has held that this writ will be issued 'to prevent a tribunal or authority from proceeding further when the authority proceeds to act without or in excess of jurisdiction; proceeds to act in violation of the rules of natural justice; or proceeds to act under a law which is itself *ultra vires* or unconstitutional'.[61] A writ of prohibition will not lie unless there is an error of jurisdiction as opposed to an error of law. In practice, however, courts are less willing to grant writ of prohibition unless the exercise of jurisdiction is grossly exceeded, and prefer to relinquish the jurisdiction in favour of appellate proceedings rather than exercising writ jurisdiction.[62]

It is important to note that prohibition restrains a tribunal or court from continuing ahead in excess of jurisdiction, whereas certiorari requires the record or the order of the court to be sent up to the

High Court to have its legality inquired into, and if necessary to have the order quashed. The scope of prohibition was clarified by the Supreme Court in *Isha Beevi v Tax Recovery* Officer: 'in order to substantiate a right to obtain a writ of prohibition from a High Court or from the Supreme Court, an applicant has to demonstrate total absence of jurisdiction to proceed on the part of the officer or authority complained against'.[63] In *S Govinda Menon v Union of India*,[64] it has been held that 'If there is a want of jurisdiction, then the matter is *coram non judice* and a writ of prohibition will lie to the Court or inferior Tribunal forbidding it to continue proceedings therein in excess of its jurisdiction.'[65] In addition:

> The jurisdiction for grant of a writ of prohibition is primarily supervisory and the object of that writ is to restrain courts or inferior tribunals from exercising a jurisdiction which they do not possess at all or else to prevent them from exceeding the limits of their jurisdiction. In other words, the object is to confine courts or tribunals of inferior or limited jurisdiction within their bounds. It is well settled that the writ of prohibition lies not only for excess of jurisdiction or for absence of jurisdiction but the writ also lies in a case of departure from the rules of natural justice.[66]

The final writ is *quo warranto* and involves the usurpation of a public office. The Supreme Court has held that this writ can only be issued when the person holding the public office lacks the eligibility criteria or when the appointment is contrary to the statutory rules.[67] The law distinguishes between eligibility and suitability, and the writ of *quo warranto* is available when a person who is ineligible is appointed to a public office.[68] There is a major distinction between *quo warranto* and the other substantive writs. This distinction lies in the requirement of standing to sue.[69] The concept of locus standi is not applicable to the petitioner approaching the court for issuance of a writ of *quo warranto*. The basic purpose of a writ of *quo wattanto* is to confer jurisdiction on the constitutional courts to see that a public office is not held by a usurper without any legal authority, and therefore, the same can be brought to the court's notice by any person. 'The procedure of *quo warranto* confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right.'[70] Even the doctrine of laches has no application against a person seeking a writ of *quo warranto*.[71]

IV. CONSTITUTIONAL REMEDIES: PROCEDURAL ASPECTS

1. *Res Judicata*

A decision on an issue raised in a writ petition under Article 226 or Article 32 of the Constitution would also operate as *res judicata* between the same parties in subsequent judicial proceedings.[72] The only exception is that the rule of *res judicata* would not operate to the detriment or impairment of a fundamental right.[73] Founded in public policy,[74] a general principle of *res judicata* applies to writ petitions filed under Article 32 or Article 226.[75] It is necessary to emphasise that the application of the doctrine of *res judicata* to the petitions filed under Article 32 does not in any way impair or affect the content of the fundamental rights guaranteed to the citizens of India. It is relevant to note that the Supreme Court has permitted a party to pursue one of the two parallel remedies, provided that both are not being pursued at the same time.[76]

2. Questions of Fact

In *Gunwant Kaur v Municipal Committee, Bhatinda*, the Supreme Court held that, in a petition under Article 226:

> Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary.[77]

When a manifest error has resulted in the failure of justice or there has been a miscarriage of justice, interference under Article 226 would be called for.[78] In *Sant Lal Gupta v Modern Cooperative Group Housing Society Ltd*,[79] the Court elaborated on this when considering the exercise of certiorari jurisdiction by the Delhi High Court: 'The writ of certiorari under Article 226 ... can be issued only when there is a failure of justice and it cannot be issued merely because it may be legally permissible to do so.'[80] In the interest of justice, the power can also be exercised to summon a deponent for cross-examination where a conclusion cannot be arrived at on the basis of affidavits.[81] In *ABL International v Export Credit Guarantee Corporation of India Ltd*, the Supreme Court held that 'when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution',[82] and therefore, it was not necessary to relegate a party to the civil courts. The tenor of the Court's judgment emphasises that it was necessary to examine whether the claim of 'disputed question' is a bona fide dispute or was it being raised to avoid judicial scrutiny.

3. Political Questions

Taking note of *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No 2)*,[83] the Supreme Court has held that 'the contemporary English view is that in principle even such "political questions" and exercise of prerogative power will be subject to judicial review on principles of legality, rationality or procedural impropriety' is applicable in India as well.[84] In *State of Rajasthan v Union of India*,[85] Bhagwati J has summarised the legal position as under:

> [M]erely because a question has a political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination... So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so.[86]

However, the jurisdiction of a court may not be available in purely political questions[87] such as those involving the continuation of a state of emergency.[88]

V. CONCLUSION

An important development relating to constitutional remedies in India that has not been explored by this chapter is public interest litigation. This development has both procedural aspects—that is, the dilution of the principle of locus standi and increased access to justice—and substantive features, such as the recognition of a range of enumerated rights within the right to life in Article 21. The developments have been covered elsewhere in this Handbook, but it is important to note that the liberal interpretation given to the standing requirements in Articles 32 and 226 have been the central medium through which this development has occurred.

One question which often arises in the context of the Court's power is what remedies might be issued with respect to the legislature. The expansion of the meanings of statutory or constitutional provisions by judicial interpretation is a legitimate judicial function; the making of a new law, which the courts in this country have sometimes done, may not be a perfectly legitimate judicial function unless it aims to fill a legal vacuum.[89] The courts have acknowledged that they are not equipped with the skills, expertise, or resources to discharge the functions that belong to the other coordinate organs of the government (the legislature and the executive). Their institutional equipment is wholly inadequate for undertaking legislation or administrative functions. The courts have held that they cannot issue writs against the legislature.[90] In *Union of India v Association for Democratic Reforms*, the Supreme Court observed that:

> At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.[91]

In *Supreme Court Employees' Welfare Association v Union of India*,[92] it was held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law that it has been empowered to do under the delegated legislative authority.

Over time, two features of the Indian legal system have played a key role in the weakening of constitutional remedies in India. First, the growth of tribunals in India has seriously impacted the traditional writ jurisdiction of the High Courts. While the Supreme Court rightly observed, in *Union of India v R Gandhi*, that if tribunals are vested with the powers of High Courts they must also be given the same degree of independence and capacity as such courts, this is yet to be realised in practice.[93] The second important feature that has plagued the realisation of remedies is the very capacity of the judicial system. With a judicial system burdened by backlogs, delays, and inefficiency, the timely recognition of rights violations, the awarding of remedies, and above all their enforcement, all remain a major challenge in India.

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[1] (1703) 2 Ld Raym 938, 953.

[2] 5 US 137 (1803).

[3] *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 953, 9 December 1948.

[4] *Prem Chand Garg v The Excise Commissioner* AIR 1963 SC 996 [2].

[5] *Raja Ram Pal v Speaker, Lok Sabha* (2007) 3 SCC 184 [413].

[6] *TC Basappa v T Nagappa* AIR 1954 SC 440.

[7] *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161 [13].

[8] *Nilabati Behera v State of Orissa* (1993) 2 SCC 746.

[9] (1981) 1 SCC 627.

[10] (1981) 2 SCC 493.

[11] *Khatri (II)* (n 9) [4].

[12] *Nilabati Behera* (n 8).

[14] *Tirupati Balaji Developers (P) Ltd v State of Bihar* (2004) 5 SCC 1 [8].

[15] *Rajasthan State Industrial Development & Investment Corporation v Subhash Sindhi Cooperative Housing Society* (2013) 5 SCC 427 [24].

[16] *PN Kumar v Municipal Corporation of Delhi* (1987) 4 SCC 609; *Louise Fernandes v Union of India* (1988) 1 SCC 201; *Confederation of All Nagaland State Services Employees' Association v State of Nagaland* (2006) 1 SCC 496; *Central Bank Retirees' Association v Union of India* (2006) 1 SCC 497.

[17] (1989) Supp (2) SCC 310.

[18] *Kanubhai Brahmbhatt* (n 17) [3].

[19] *Kanubhai Brahmbhatt* (n 17) [3].

[20] *Kanubhai Brahmbhatt* (n 17) [3].

[21] *Daryao v State of Uttar Pradesh* AIR 1961 SC 1457 [8]; *Prem Chand Garg* (n 4) [12]–[15]; *Raja Ram Pal* (n 5) [651].

[22] *Praga Tools Corporation v Shri CA Imanual* (1969) 1 SCC 585 [6].

[23] *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v VR Rudani* (1989) 2 SCC 691 [20].

[24] (2003) 4 SCC 225 [28]. See also *VST Industries Ltd v VST Industries Workers' Union* (2001) 1 SCC 298.

[25] (2015) 3 SCC 251.

[26] (2005) 4 SCC 649.

[27] *Board of Control for Cricket in India* (n 25) [34].

[28] *Union of India v Adani Exports Ltd* (2002) 1 SCC 567; *National Textile Corpn Ltd v Haribox Swalram* (2004) 9 SCC 786.

[29] *Oil and Natural Gas Commission v Utpal Kumar Basu* (1994) 4 SCC 711 [5]; *Navinchandra N Majithia v State of Maharashtra* (2000) 7 SCC 640; *Mosaraf Hossain Khan v Bhagheeratha Engg Ltd* (2006) 3 SCC 658.

[13] *State of West Bengal v Committee for Protection of Democratic Rights* (2010) 3 SCC 571 [57]. See also *Dwarka Nath v Income Tax Officer* AIR 1966 SC 81.

[30] (2006) 6 SCC 207 [8].

[31] *Kusum Ingots & Alloys Ltd v Union of India* (2004) 6 SCC 254 [30].

[32] *Ambica Industries v Commissioner of Central Excise* (2007) 6 SCC 769 [41].

[38] *Rupa Ashok Hurra* (n 33) [6] citing *Halsbury's Laws* (4th edn, 1998) vol 1, para 109.

[52] (1970) 2 SCC 399 [11].

[60] *Rupa Ashok Hurra* (n 33) [7].

[66] *S Govinda Menon* (n 64) [5].

[33] (2002) 4 SCC 388.

[34] *Rupa Ashok Hurra* (n 33) [6].

[35] *Rupa Ashok Hurra* (n 33) [6].

[36] *Rupa Ashok Hurra* (n 33) [6].

[37] *Rupa Ashok Hurra* (n 33) [6].

[39] The High Courts of Bombay, Calcutta, and Madras.

[40] *Rupa Ashok Hurra* (n 33) [6].

[41] (1986) 2 SCC 679.

[42] *Comptroller and Auditor-General of India* (n 41) [19].

[43] *Comptroller and Auditor-General of India* (n 41) [20].

[44] *Sasi Thomas v State* (2006) 12 SCC 421 [26]; See also *Secretary, ONGC Ltd v VU Warrier* (2005) 5 SCC 245.

[45] *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust* (n 23) [22].

[46] *Vineet Narain v Union of India* (1998) 1 SCC 226. See also *Research Foundation for Science, Technology and Natural Resource Policy v Union of India* (2012) 7 SCC 769.

[47] *Vineet Narain* (n 46).

[48] *Vineet Narain* (n 46) [7].

[49] (2014) 2 SCC 532 [95].

[50] *Manohar Lal Sharma* (n 49) [98].

[51] *State of Maharashtra v Bhaurao Punjabrao Gawande* (2008) 3 SCC 613 [25].

[52] [1924] 1 KB 171, 205.

[54] [1931] 2 KB 215.

[55] (1992) Supp (2) SCC 651.

[56] HWR Wade, *Administrative Law* (6th edn, Oxford University Press 1988) 720–21.

[57] *Kihoto Hollohan* (n 55) [101].

[58] *Kihoto Hollohan* (n 55) [101].

[59] *Kihoto Hollohan* (n 55) [101].

[61] *Standard Chartered Bank v Directorate of Enforcement* (2006) 4 SCC 278 [25].

[62] *Thirumala Tirupati Devasthanams v Thallappaka Ananthacharyulu* (2003) 8 SCC 134 [14]: 'A writ of prohibition must be issued only in rarest of rare cases. Judicial discipline of the highest order has to be exercised whilst issuing such writs. It must be remembered that the writ jurisdiction is original jurisdiction distinct from appellate jurisdiction. An appeal cannot be allowed to be disguised in the form of a writ.'

[63] (1976) 1 SCC 70 [5].

[64] AIR 1967 SC 1274.

[65] *S Govinda Menon* (n 64) [5].

[67] *Rajesh Awasthi v Nand Lal Jaiswal* (2013) 1 SCC 501 [31]. It was held that 'a citizen can claim a writ of *quo warranto* and he stands in the position of a relater. He need not have any special interest or personal interest. The real test is to see whether the person holding the office is authorized to hold the same as per law.'

[68] In *Mahesh Chandra Gupta v Union of India* (2009) 8 SCC 273 [71], it has been held that 'In cases involving lack of "eligibility" writ of quo warranto would certainly lie. One reason being that "eligibility" is not a matter of subjectivity. However, "suitability" or "fitness" of a person to be appointed a High Court Judge: his character, his integrity, his competence and the like are matters of opinion.'

[69] *State of Punjab v Salil Sabhlok* (2013) 5 SCC 1 [88] held that a public internet litigation for a writ of *quo warranto* in respect of an appointment to a constitutional position would not be barred.

[70] *University of Mysore v CD Govinda Rao* AIR 1965 SC 491 [6]. See also *BR Kapur v State of Tamil Nadu* (2001) 7 SCC 231.

[71] *Central Electricity Supply Utility of Odisha v Dhobei Sahoo* (2014) 1 SCC 161 [22].

[72] *Ishwar Dutt v Land Acquisition Collector* (2005) 7 SCC 190

[73] *Ashok Kumar Srivastav v National Insurance Company Ltd* (1998) 4 SCC 361 [11].

[74] The basic idea in the rule of res judicata has sprouted from the maxim *nemo debet bis vexari pro una et eadem causa* (no man should be vexed twice over for the same cause).

[75] *Amalgamated Coalfields Ltd v Janapada Sabha Chhindwara* AIR 1964 SC 1013.

[76] *Orissa Power Transmission Corporation Limited v Asian School of Business and Management Trust* (2013) 8 SCC 738.

[77] (1969) 3 SCC 769 [14].

[78] *DN Banerjee v PR Mukherjee* AIR 1953 SC 58 [5]; *Bijili Cotton Mills (P) Ltd v Presiding Officer, Industrial Tribunal II* (1972) 1 SCC 840 [21]; *Sawarn Singh v State of Punjab* (1976) 2 SCC 868 [13]; *Kartar Singh v State of Punjab* (1994) 3 SCC 569 [459]; *Air India Statutory Corporation v United Labour Union* (1997) 9 SCC 377 [59]; *Roshan Deen v Preeti Lal* (2002) 1 SCC 100 [12]; *Union of India v SB Vohra* (2004) 2 SCC 150 [13]; *Govt of AP v Mohd. Nasrullah Khan* (2006) 2 SCC 373 [11]; *State of Uttar Pradesh v Rakesh Kumar Keshari* (2011) 5 SCC 341 [29].

[79] (2010) 13 SCC 336.

[80] *Sant Lal Gupta* (n 79) [28].

[81] *Barium Chemicals Ltd v Company Law Board* AIR 1967 SC 295 [26]; *Babubhai Muljibhai Patel v Nandlal Khodidas Barot* (1974) 2 SCC 706 [11].

[82] (2004) 3 SCC 553 [53].

[86] *State of Rajasthan* (n 85) [149].

[83] [2008] UKHL 61.

[84] *BP Singhal v Union of India* (2010) 6 SCC 331.

[85] (1977) 3 SCC 592.

[87] *SR Bommai v Union of India* (1994) 3 SCC 1 [258]:

> Justiciability is not a legal concept with a fixed content, nor is it susceptible of scientific verification. Its use is the result of many pressures or variegated reasons. Justiciability may be looked at from the point of view of common sense limitation. Judicial review may be avoided on questions of purely political nature, though pure legal questions camouflaged by the

[49] (2014) 2 SCC 532 [95].

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[63] (1976) 1 SCC 70 [5].

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[65] *S Govinda Menon* (n 64) [5].

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[77] (1969) 3 SCC 769 [14].

[78] *DN Banerjee v PR Mukherjee* AIR 1953 SC 58 [5]; *Bijili Cotton Mills (P) Ltd v Presiding Officer, Industrial Tribunal II* (1972) 1 SCC 840 [21]; *Sawarn Singh v State of Punjab* (1976) 2 SCC 868 [13]; *Kartar Singh v State of Punjab* (1994) 3 SCC 569 [459]; *Air India Statutory Corporation v United Labour Union* (1997) 9 SCC 377 [59]; *Roshan Deen v Preeti Lal* (2002) 1 SCC 100 [12]; *Union of India v SB Vohra* (2004) 2 SCC 150 [13]; *Govt of AP v Mohd. Nasrullah Khan* (2006) 2 SCC 373 [11]; *State of Uttar Pradesh v Rakesh Kumar Keshari* (2011) 5 SCC 341 [29].

[79] (2010) 13 SCC 336.

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[86] *State of Rajasthan* (n 85) [149].

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political questions are always justiciable. The courts must have judicially manageable standards to decide a particular controversy. Justiciability on a subjective satisfaction conferred in the widest terms to the political coordinate executive branch created by the constitutional scheme itself is one of the considerations to be kept in view in exercising judicial review. There is an initial presumption that the acts have been regularly performed by the President.

[88] *Bhut Nath Mete v State of West Bengal* (1974) 1 SCC 645.

[91] *Union of India v Association for Democratic Reforms* (2002) 5 SCC 294 [19].

[89] See *Common Cause v Union of India* (2008) 5 SCC 511.

[90] *Union of India v Deoki Nandan Aggarwal* (1992) Supp (1) SCC 323; *Union of India v Prakash P Hinduja* (2003) 6 SCC 195.

[92] *Supreme Court Employees' Welfare Association v Union of India* (1989) 4 SCC 187.

[93] *Union of India v R Gandhi* (2010) 11 SCC 1 [106].

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Public Interest Litigation in India

Overreaching or Underachieving?

Varun Gauri

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Abstract

Public interest litigation has historically been an innovative judicial procedure for enhancing the social and economic rights of disadvantaged and marginalized groups in India. In recent years, however, a number of criticisms of public interest litigation have emerged, including concerns related to separation of powers, judicial capacity, and inequality. These criticisms have tended to abstraction, and the sheer number of cases has complicated empirical assessments. This paper finds that public interest litigation cases constitute less than 1 percent of the overall case load. The paper argues that complaints related to concerns having to do with separation of powers are better understood as criticisms of the impact of judicial interventions on sector governance. On the issue of inequality, the analysis finds that win rates for fundamental rights claims are significantly higher when the claimant is from an advantaged social group than when he or she is from a marginalized group, which constitutes a social reversal, both from the original objective of public interest litigation and from the relative win rates in the 1980s.

This paper—a product of the Human Development and Public Services Team, Development Research Group—is part of a larger effort in the department to understand the relationship between the rule of law and development. Policy Research Working Papers are also posted on the Web at http://econ.worldbank.org. The author may be contacted at vgauri@worldbank.org.

Public Interest Litigation in India: Overreaching or Underachieving?

Varun Gauri[1]

[1] The author would like to thank Afroza Chowdhury, Kabir Duggal, Kaushik Krishnan, and Yamini Jaishankar for excellent research assistance. This paper has also benefited from very helpful comments from Vikram Raghavan, Arun Thiruvengadam, and the participants in a session of the Law and Social Sciences in South Asia conference in New Delhi. The views presented in this paper are those of the author alone and do not necessarily represent the views of the World Bank or its Executive Directors.

The global reputation of Indian courts, and perhaps their national reputation as well, as judicial innovators and as defenders of the interests of the disadvantaged and downtrodden, rests largely on Public Interest Litigation (PIL), a new set of procedures for expanding access to justice that were developed some 30 years ago. Assessments of PIL in India range from the laudatory to the cynical, but recent scholarship has developed a widely held narrative that runs like this.[2] PIL or "social action litigation," as some call it, originated in the late 1970s when the judiciary, aiming to recapture popular support after its complicity in Indira Gandhi's declaration of emergency rule, encouraged litigation concerning the interests of the poor and marginalized, and to do so loosened rules and traditions related to standing, case filing, the adversarial process, and judicial remedies. The Supreme Court issued a number of landmark social justice cases in the 1980s and early 1990s, including key rulings on the rights of prisoners, bonded laborers, pavement dwellers, and children. The frequency of PIL cases in the Supreme Court and the High Courts increased as claimants and their lawyers learned how to take advantage of the more liberal procedures associated with PIL. By the middle to late 1990s, the range of issues the courts were addressing had expanded to include complex environmental concerns, such as urban pollution and solid waste disposal, as well as explicitly political issues, such as official corruption and elections. At the same time, some claimants and their lawyers learned to "dress up" private disputes as PIL. Human rights activists began to grow disenchanted with courts' failure to enforce sweeping directives. Recently, many have questioned the appropriateness of judicial intervention in the legislative and executive spheres, as well as the constitutionality of the court's efforts to implement many of its expansive orders.[3]

Drawing on that narrative, concerns regarding the value and impact of PIL now take a number of forms. These will be described in more detail below, but in general terms, they can be categorized into two groups – questions related to the separation of powers, and a set of queries regarding judicial attitudes. The first group of concerns asks whether courts should be involved in environmental, social, and economic matters at all: Are not the legislative and executive branches better equipped to address these matters, and does not "judicial activism," precisely because the courts do not and cannot enforce many of their broad directives in these areas, erode the legitimacy of the courts? Are not PIL cases draining substantial resources from an already overburdened legal system in which ordinary civil cases can languish in courts for many years? Since many PIL cases

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[2] Elements of this broad narrative are supported in (Upendra Baxi, 1980);(R. Dhavan, Sudarshan, & Khurshid, 1985); (Sathe, 2002); (Cassels, 1989) (A. K. Thiruvengadam, 2009).

[3] PIL has sparked concerns regarding judicial encroachment and the separation of powers that actually go back to the early days of the Indian Republic. Soon after Independence, the Congress government enacted the First Amendment, creating a schedule of laws deemed beyond judicial review, out of concern that the judiciary would find planned land reforms unconstitutional, a belief soon to be substantiated in a set of cases in which the Supreme Court did just that. This back and forth over land reform, and over the Ninth Schedule, continued for decades. Famously, the Court held that Parliament did not have the power to amend the Constitution if such amendments abridged the fundamental rights guaranteed in the Constitution (*Golaknath v Punjab*, 1967) and or altered the "basic structure" of the Constitution itself (*Kesavananda Bharati v Kerala*, 1973), to which the Indira Gandhi government responded by departing from the seniority tradition in judicial appointments and attempting to dissolve the *Kesavananda* majority. On "judicial sovereignty" in India, see (Mehta, 2007).

are patently frivolous and many others never enforced, is not PIL a device for the judiciary to expand its own powers and autonomy under the mantle of a popular social justice agenda? A separate set of questions involves the beneficiaries of PIL: Do PIL cases continue to benefit the poor and disadvantaged, or have not lifestyle issues and middle class concerns become predominant in PIL cases? Are not judges manifestly less disposed to the interests of the poor and marginalized than they were two decades ago, during the "heroic" years when PIL originated?

These queries regarding PIL are fundamentally normative claims, and are based on principled understandings of the role of judges and courts in India's democracy. At the same time, the validity of some of them rests on facts, albeit complex ones. For instance, the challenge related to separation of powers raises questions about judicial capacity – critics charge that courts cannot monitor and supervise complex "polycentric disputes" (Fuller & Winston, 1978, p. 304), whereas others respond that they can, or at least as well as parliaments can (A. K. Thiruvengadam, 2009). The relative effectiveness of judicial supervision, if observed accurately and at scale, could help resolve this disagreement, at least for a subset of cases and in certain contexts. Similarly, whether or not PIL cases still address the concerns of the poor, and whether decisions are as supportive of their interests as in the past, are empirical questions. To date, the debate over PIL has largely been abstract (with some exceptions, to be described below). It has helped generate a set of normatively significant questions, but at this stage of the research cycle, empirical work may be more pressing. This paper contributes to that task by assessing PIL with empirical data.

The next section of this paper analyzes the argument that PIL constitutes a case of judicial overreach. The contention that PIL weakens policy formulation and implementation in the legislative and executive branches is typically "dressed up" as a separation of powers concern, but a more apt framework involves an assessment of the impact of PIL on sectoral governance, which is fundamentally an empirical matter, not a doctrinal one. The following section describes the charge that PIL favors middle class interests rather than the concerns of the poor and marginalized. That section than presents estimates , based on original data taken from Supreme Court records an online legal database, to assess that claim.

Public Interest Litigation: Is the Judiciary Overreaching?

An old-fashioned view of legal rights holds that most social and economic matters do not involve genuine rights because they require positive actions, not merely restraint, and have no single, identifiable duty holder. Positive obligations, moreover, entail significant expenditures that are the purview of the other branches of government. Courts, therefore, should steer clear of the social, economic, and environmental concerns at the heart of PIL. More contemporary views (Holmes & Sunstein, 1999; Shue, 1996) hold that "for their fulfillment all rights require restraint, protection, and aid from the entity from whom rights are claimed, and that a reasonably effective and well funded state is a *sine qua non* for all rights."(Gauri, 2004)

Most of the criticisms of PIL in the Indian courts have not taken this somewhat old-fashioned form, perhaps because in a country where the scale of needs is so large it is hard to say that social and economic priorities are less commanding than civil and political ones. They have rather argued that the social and economic domain should be largely the prerogative of the other branches of government, which are better equipped to analyze, formulate, and implement complex policies, and that much of PIL is inappropriate judicial "activism" or "adventurism." For instance, in an assessment of the activities of the Supreme Court in the *Delhi Vehicular Pollution* and *Municipal Solid Waste Management* cases, Rajamani admonishes that "policy, environmental and social, must emerge from a socio political process and must be considered in a legitimate forum not a judicial one." (Rajamani, 2007) Citing cases in which courts formulated explicit guidelines, such as cases related to vehicular pollution, the management of the Central Bureau of Investigation, adoption by foreign nationals, custodial torture, and sexual harassment, Desai and Muralidhar note that "while in some cases, the Court has expressed its reluctance to step into the legislative field, in others it has laid down detailed guidelines and explicitly formulated policy" (Desai & Muralidhar, 2000). In their 2003 article, Rosencranz and Jackson welcome the environmental and health impact of the Supreme Court's 2001 decision requiring the Delhi government to convert its commercial vehicles to a fleet running on compressed natural gas (CNG), but then plead for leadership on the part of the regulatory and legislative authorities: "Some of the roadblocks to CNG implementation could have been avoided, or at least minimized, had the conversion been originally mandated through the normal legislative process." (Armin Rosencranz & Jackson, 2003, p. 21) Thiruvengadam documents a spate of similarly motivated criticism of PIL as an incursion into lawmaking from sitting and former judges on India's Supreme and High Courts, including comments from Justice Hidyatullah in 1984, Justice Srikrishna in 2005, and, perhaps most intemperately, Justice Kaju in 2008, who said PIL "has developed into an uncontrollable Frankenstein." (A. K. Thiruvengadam, 2009, p. 22)

A motivation for some of this criticism is a suspicion that the courts have used their post-Emergency popularity, to which PIL has significantly contributed, to expand their own powers and shield themselves from scrutiny and accountability. To some, it appears as though the courts may be spending time on frivolous and ineffectual PIL cases at the expense of the real administration of justice, and choose to do so because PIL burnishes their popularity. Reported instances of frivolous PIL include prayers to rename India "Hindustan," rename the Arabian Sea "Sindhu Sagar," and replace the national anthem for one offered by the petitioner (and partly sung before the Chief Justice) (A. Thiruvengadam, 2007). At the same time, the systems of civil and criminal justice suffer enormous delays and arbitrary pre-trial detentions.

These concerns are echoed widely enough that there is now visible a clear backlash against this perceived usurpation of powers by the courts, including a bill tabled in the Rajya Sabha in 1996 to regulate PIL, a 2007 statement by the Prime Minister warning against judicial overreach (Shankar & Mehta, 2008), recent calls from the bench to set parameters for PIL (*Times of India*, December 12 2007), and efforts to establish the National Judicial Council, a body to investigate complaints against judges. Some of these complaints involve corruption: there have been allegations that some 20% of judges are corrupt (Rajeev Dhavan, 2002). Related complaints include the use of the law of privileges and contempt on the part of courts to shield themselves from criticism, resistance to efforts to require sitting judges to disclose their financial assets, and the uncomfortably close relationship between some members of the judiciary and the Bar. (U Baxi, 2006) Roy goes so far as to assert that judicial accountability is so low that "we live in a sort of judicial dictatorship." (Roy, 2007)

A few comments about separation of powers are in order. First, policy formulation by the courts or its agents is, to some extent, inevitable. Judicial review of any sort requires ongoing commentary on laws and policies, including guidelines regarding their proper content. Because dispute resolution entails an elaboration and application of the normative structures of society as the necessary ground for the dispute resolver's decision, judges inevitably involve themselves in rule making, which is a form of lawmaking whether in common law or civil law jurisdictions. (Stone Sweet, 1999) Courts have not traditionally been significant actors in the area of social and economic policy; and resistance to public interest litigation and the court directives it prompts in these areas may stem more from the novelty of the phenomenon than from anything like a real "judicial dictatorship." Reluctance on the part of the Indian judiciary to be held accountable for performance and probity is certainly problematic – from the point of view of democratic theory it limits the power of the people to review public action. The expansion of judicial power in the area of social and economic concerns, on the other hand, catalyzes legislative and executive activity more often than it paralyzes it. That is because, as an empirical matter the world over, public interest litigation typically spurs judicial dialogue with the other branches: rarely do courts issue all or nothing demands, backed with common law contempt power or its civil law counterparts,[4] in a way that requires the state to restructure its policy framework. "Courts' decisions do not so much stop or hijack the policy debate as inject the language of rights into it and add another forum for debate." (Brinks & Gauri, 2008, p. 304) As Fredman puts it, PIL allows the judicial forum to become, potentially, a space for democratic deliberation among equal citizens, rather than a place of interest group bargaining, which prevails in the legislature. (Fredman, 2008, p. 149)

In addition, an important use of public interest litigation is to make public and scrutinize hidden or obfuscatory information, including cost of potential social programs, which the state and corporate entities on occasion have reasons to exaggerate or hide. In India, PIL during droughts in Rajasthan and Orissa in 2001 disclosed the extent of unreleased government grain stocks, and subsequent PIL disclosed that state governments could in fact afford to widen several statutory food and nutrition programs, including the midday meals scheme in schools, despite official protests to the contrary. In the Delhi vehicular pollution debate, the Delhi Health Minister claimed that air pollution did not

[4] These would include the *astreinte* in France; the *amparo* in Mexico and Venezuela; the *tutela* in Colombia; and the *mandado de segurança* in Brazil.

increase the risks of heart or lung disease, the Delhi government said that the timely installation of CNG stations would be impossible, the Ministry of Petroleum and Natural Gas argued that CNG bus conversion would not be sustainable in the long run, producers of commercial vehicles stated that the conversion to CNG was not economically cost-effective, and other argued that CNG is explosive. The court, largely by empowering certain technical committees, played a significant role in helping to ascertain accurate information on these issues. It was, moreover, not an instance of judicial fiat but rather a judicial-executive branch collaboration: "Government experts essentially became advisors to the Court as it drove policy implementation forward." (Bell, 2004, p. 35)

The argument that PIL constitutes judicial overreach, resulting in poor or inefficient decision making, is not really a separation of powers claim. The balance of power among government organs, as Madison conceived it, was not primarily about a strict separation of powers but "the partial interpenetration of relatively autonomous and balanced powers." (O'Donnell, 2003) In other words, the separation of powers was not conceived as a design for the promotion of efficient decision making by preventing undue encroachment from one institution upon the prerogatives of another, but rather a check on the ability of any group or faction to dominate government from its enclave in a specific organization. The doctrine of separation of powers seeks to accomplish this precisely by opening certain governmental tasks to competing competences and concurrent powers of review. Despite occasionally hyperbolic claims on the part of critics, Indian judges and their professional social classes are not using the courts as a staging ground to threaten the Indian state. There have been specific rulings, such as *Kesavananda Bharati* or *Advocates-on-Record*, or the ruling on the Jharkhand legislative procedures, in which courts assumed powers not delineated in the Constitution. Even in those cases, it arguable that in so doing the Court restored a constitutional balance because the executive and legislature had themselves been engaging in extra-constitutional activities.

These criticisms regarding separation of powers are better cast as concerns related to the impact of judicial intervention on sectoral governance. Does judicial involvement through PIL improve state performance in a given sector? Is forest policy, for example, more equitable, efficient, and effective as a result of court involvement? That is an empirical question, but most treatments of the issue do not take the empirical challenge seriously. (A. Rosencranz & Lélé, 2008) believe that the Supreme Court's intervention following the *TN Godavaraman vs Union of India* case (1996) "hurts the process of governance," but adduce little evidence about the capacity and authority of central and state executive agencies prior to and after the court's assumption of powers. Writing in 2003 on the Delhi vehicular pollution case, Rosencranz and Jackson speculated that strengthening the pollution control boards (PCBs), rather than Supreme Court action, "would seem to provide the most effective long-term solutions [to air pollution in India]" and worried that "the Court's action seems likely to impede capacity building in the pollution control agencies, and thereby to compromise the development of sustained environmental management in India." (Armin Rosencranz & Jackson, 2003, p. 21, 23) This is a fundamentally an empirical claim, and one can examine whether PCBs are weaker now than they were before the Court got involved in the Delhi pollution case. A cursory review suggests that it is not obvious that they are weaker – the budget of the

Central Pollution Control Board has nearly tripled since the year of the Court's order in 2002, and a number of efforts are underway to strengthen them and fill staffing vacancies in central and state PCBs.[5] Another problem with criticisms like these is that they compare an ideal or hypothetical legislative intervention to a real judicial one when it is often the real-world failings of the other branches that prompted litigation in the first place. Thiruvengadam describes the deliberative failings of India's Parliament, noting that of the total 36 Bills passed in 2008, "16 were passed in less than 20 minutes, most without any debate whatsoever." (A. K. Thiruvengadam, 2009, p. 32)

Why do analysts tend to describe issues of sectoral governance with the language of the separation of powers? The motivation stems in part from a belief, sometimes inarticulate, that governance should look similar the world over. In this case, courts, in order to be courts properly understood, must limit their tasks to interpreting laws, rather than writing or enforcing them. But it is a mistake to speak of "courts" as such. The task of judicial institutions depends on the way they interact with the other institutions of their society. It is less useful to assess judicial activity against a preconceived institutional design than to evaluate, using "normative benchmarks," the (positive or negative) contribution of courts to the key tasks of governance in any specific sector. (Trebilcock & Daniels, 2008) In the same way that careful studies of the institutional foundations of economic growth in East Asia have challenged the rule of law orthodoxy, showing that successful market-sustaining institutions need not take the specific form that courts, corporate boards, and bureaucratic agencies have taken in, say, the Untied States or the United Kingdom (Ginsburg, 2003), studies of public interest litigation should recognize that courts may play a variety of roles in different settings. There is less institutional convergence in the world than believed, and it is important "not to confuse institutional function and institutional form" (emphasis in original). (Rodrik, 2003)

What, then, are the normative benchmarks that should be used to assess the contribution, or lack thereof, courts toward sectoral governance? Those depend on the sector, of course – they would look different in health than in forestry. But, generalizing, one can identify three key elements of governance for the broad category of tasks in government service delivery: the capacity and authority of the organizations charged with delivery or oversight, the availability of information and transparency regarding service delivery, and state accountability for performance. An empirically minded assessment of PIL in India, then, would take the form of a series of case studies based on those normative benchmarks. The case studies would focus on these questions:

1. Did the capacity and authority of institutions tasked with addressing the social problems increase or decline as a result of PIL?

[5] The sanctioned budget was Rs 1592.58 lakhs 2001-02, and 4500.00 lakhs for 2007-08. These budgets are available at http://www.cpcb.nic.in/upload/AnnualReports/AnnualReport_6_annualreport2001-02.pdf and http://www.cpcb.nic.in/upload/AnnualReports/AnnualReport_34_final-report-06-07-A.pdf

2. Was accurate information on sectoral concerns more widely available before or after judicial intervention?

3. Were mechanisms of accountability, including legal and hierarchical oversight, markets and the power of actors to pursue their own interests, and social assessments of the motives of public officials, functioning more effectively before or after judicial intervention?

Does Public Interest Litigation Benefit Marginalized Individuals and Groups?

The purpose of Indian public interest litigation, like most social causes, was likely over-determined; but most historians agree that it was partly an effort on the part of the courts to speak to the poverty, social exclusion, and powerlessness that the majority of citizens in India continue to suffer. Several commentators suspect, however, that this objective for PIL has not been realized, or indeed has been lost. These criticisms take two forms. The first focuses on *beneficiary inequality*: the concern that the middle classes have more organizational and financial resources than the poor, which facilitate easier access to courts, and results in more benefits from PIL for them than the poor. In some countries, the Bar develops a pro bono practice that, to some extent, mitigates this inequality of access, but this has not emerged in a significant way in India. Compounding this problem, NGOs and social movements in India are wary of courts, and largely do not utilize litigation strategies to achieve their objectives (Krishnan, 2003; Shankar & Mehta, 2008).

The second is *policy area inequality*: this is the concern that judges, because of their social class and ideological dispositions, are more alert to the concerns of the middle classes and the wealthy. This is evident, critics argue, in the demonstrable urban and middle-class bias of their rulings. Baxi believes that the interests of global economic elites now color the thinking of the Indian judiciary, resulting in rulings that benefit those global elites, such as decisions in the cases involving WTO accession, Union Carbide's liability for toxic emissions in Bhopal, and the construction of the Narmada dam. (U Baxi, 2006) Similarly, Rajagopal believes that the Indian courts have adopted the statist and development mindsets associated with the Indian state itself, and that the universal privileging of civil and political rights over socioeconomic rights has affected the thinking of the Indian judiciary (Rajagopal, 2007). In a related vein, Ramanathan writes that "increasingly, the constituency on whose behalf the enhancement of judicial power has been strengthened began to emerge as the casualty of the exercise of that power." (Ramanathan, 2002)

These claims tend to be based on a set of exemplary cases, rather than a systematic review of PIL case law and implementation. It is also important to realize that judges, and the courts that they constitute, are creatures of their environment, and that patterns of judicial recruitment and appointment will almost always ensure that courts reflect the dominant political trends of their countries (Dahl, 1957). Some argue that the Indian courts are an exception to this rule, having obtained as much, if not more, autonomy regarding judicial appointments than any other courts in the world. But that constitutional autonomy is constrained by the Indian civil service traditions under which courts operate, as well as the social dependence of judges on the Bar and on political and economic elites. "Leaders of the Indian Bar," writes Baxi, "whether elected or otherwise, have always wielded historically disproportionate influence over the Justices." (U Baxi, 2006) In addition to the embedding of judges in their social and political milieu, strategic factors also limit judicial autonomy: courts in every country depend on the other branches of government for their political survival, so they will, by and large, take care that their decisions garner sufficient support from key political actors (Epstein & Knight, 1998; Gauri & Brinks, 2008b). In short, because ideological orientations in the larger Indian political economy have drifted rightward over the past two decades or so, it is to be expected that the courts have followed. Assessments of the extent to which PIL supports the poor, then, need to develop an implicit benchmark of what can be expected of courts in the specific contexts in which they operate.[6]

There are a set of empirical questions on PIL answers to which might guide these assessments:

4. What share of PIL cases have claimants who are not poor, and has this share changed over time?

5. How many PIL cases have NGOs or CSOs as counsel or supporters, and has this changed over time? This is important because NGO- or CSO-led cases typically involve collective claims that have a greater likelihood of generalizing benefits to an entire class of similarly situated people, such as the poor or scheduled castes, scheduled tribes, and other backward classes (SC/ST/OBC).

6. What is the win-loss rate for PILs, and for PILs of different types? Do these win-loss rates vary with the social class of the claimants?

To fill in *some* of the information needed for a more complete assessment of PIL in India, four different samples of PIL and Fundamental Rights cases at the Supreme Court level were examined: (i) cases that, according to the Supreme Court registrar's office, the Court has itself classified as PIL from 1988-2007 (some 2800 "cases" overall); (ii) all Supreme Court cases in the Manupatra database that involved Fundamental Rights and that addressed concerns regarding women and children rights, whether or not explicitly admitted as PILs (86 cases); (iii) all Supreme Court cases in the Manupatra database that involved Fundamental Rights and were related to issues regarding SC/ST/OBCs, whether or not explicitly admitted as PILs (180 cases); (iv) all Supreme Court cases in the Manupatra database that the Supreme Court explicitly called a PIL (44 cases).

[6] For an extended discussion of inequality in social and economic rights litigation, see (Brinks & Gauri, 2008)

For the set of cases involving women and children's rights, these search terms, among others, were used: "women" and "children" and "abuse"; "violence" and "women" and "neglected children"; "juvenile justice" and "Article 21"; "trafficking" and "women" and "Article 21"; "labour" "children" and "Article 14" ; "custodial violence" and "children"; "education" "fundamental right" and "Article 14"; "gender and fundamental right"; "prison rights and children"; "rape" and "Article 21"; "emancipation" and "women and children." The SC/ST/OBC search used the terms "scheduled caste" or "scheduled tribe" or "other backward classes" in conjunction with cases that addressed Fundamental Rights and constitutional concerns. Note that the data from the Supreme Court were a listing of orders related to PIL cases, and not necessarily a list of cases per se. But an examination of the names of the cases revealed that of the 2,800 separate orders, instances of duplicate or once repeating nearly identical plaintiff and defendant names occurred fourteen times, triplicates once, and quadruplicates once. Still, because of uncertainty regarding the basis for the listings, this paper refers to this list as constituting "cases" rather then cases per se. The Manupatra database captures about 80-85% of Supreme Court cases.[7] While this results in something less than complete compendium of Court decisions and orders in the selected topic areas, there is no evidence that the database censors certain categories of cases in a systematic fashion. There is no evidence, in other words, of significant sample bias.

Figure 1 shows the number of PIL "cases" instituted per year, whether brought to the court for admission ("admission matters" in the Court's terms) or argued on the merits ("regular matters"), from 1997-2007, based on data from the Supreme Court itself. The figure shows that there has been a slight upward trend in PIL matters over the last ten years. It also shows that there are some 260 "cases" instituted per year, on average. This compares to about 60,000 "cases" per year overall, based on data publicly available in the Supreme Court's "Court News" publication. So, on average, some 0.4% of "cases" before the Court involve PILs. This suggests that PIL does not drain significant Court resources from the administration of day to day justice, contrary to the claims of some critics; but it also suggests that the outsize reputation of the Supreme Court's PIL work belies its modest scale. And, contrary to popular conceptions, the large majority of the 260 or so PIL "cases" instituted in the Supreme Court each year are brought through formal channels; of the tens of thousands of letters and handwritten petitions that the Supreme Court receives from ordinary people each year, only a handful are converted into cases.[8]

The Court instituted a classification system for PILs in 1988. This might be used to determine whether the concerns cited in PILs have changed over the years, and if the "cases" that appear before the Court have shifted to the concerns of the middle classes. Table 1 shows the breakdown by "case" type and year. Unfortunately, the large majority of "cases" fall in the category of "other," so the classification scheme is not useful for tracking changes in PIL composition over time. Noteworthy, however, is the increase in "cases" related to election commissions, and the relatively low share of "cases" involving

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[7] Reported by Nick Robinson, based on personal communication with Manupatra staff, January 14, 2009. Also see the similar figure in (Shankar & Mehta, 2008)

[8] Interviews with officers of the PIL section, Supreme Court, New Delhi, January 13, 2009.

bonded labor and criminal justice, two of the concerns crucial in the early justifications for PIL.

Have increasing numbers of cases involved middle class concerns? It is difficult to say for PILs more generally because an identifiable record of PIL cases is not available. To address this question, the paper used the set of Fundamental Rights cases described above. Fundamental Rights cases, at least those related to women and children's rights and SC/ST/OBC concerns, may in fact underestimate the orientation of PILs to the middle classes because they exclude issues like urban quality of life that have been the concern of recent prominent litigation.

Figure 2 shows the number of cases in categories related women and children's rights or to SC/ST/OBC issues, or which the SC explicitly called a PIL, as reported in Manupatra, in which the claimant was likely to have been, on the basis of a review of the written opinion, a member of the "advantaged classes." For purposes of the coding, a member of the advantaged classes included a professional (doctors, teachers, members of the armed services, etc), a landowner or business person, or someone otherwise in the global middle class (including formal sector workers and civil service employees not designated as workers or laborers). Those not in the advantaged classes included those belonging to a scheduled caste or scheduled tribe or a member of the other backward classes (unless otherwise designated a member of an advantaged class), peasants, laborers, and those detained in the criminal justice system. Where groups or publicly minded individuals made claims in courts, and where there was no obvious plaintiff, the coders attempted to identify the general social class of the individuals whose interests were being advocated or defended. In 48 of the 310 cases in the sample (some 23%), the social class of the claimant(s) could not be discerned from the written opinion; or, and this was the more frequent problem, the social class was diffuse. Examples of this included cases concerning environmental protection of rivers and forest, challenges to the constitutionality of judicial action, and challenges to the statutory definition of rape. For these cases, the calculations and figures below considered the observation to have a missing value for social class. For every case, an effort was made to identify the individual or class of individuals on whose behalf the case was instituted – in some instances the lawyer or some other publicly minded individual is listed as the plaintiff/complainant in official records, but the claimant was coded was the person or class of persons whose interests the case was seeking to advance (e.g., child bonded laborers).

Figure 2 plots the number of cases involving Fundamental Rights in the categories described above, and the number of cases in which the claimant was a member of the advantaged classes. Simple OLS estimates are used to identify trend lines, which are inserted in the figure. The trend lines show that the number of claimants from advantaged classes has increased at almost the same rate as the overall number of Fundamental Rights cases in these categories. This suggests that class bias concerns that stem from the organizational advantages of the advantaged class are not as pronounced as some have feared.

Another way to examine this problem of inequality in organizational resources is to look the share of Fundamental Rights cases in which the rights violation originated in the BIMARU states. Figure 3 plots the share of cases originating in the BIMARU states. (In 14% of the cases, the location of the rights violation was national or otherwise impossible to pinpoint.) Figure 3 shows that although that number of cases originating in rights violations in the BIMARU states has been increasing, it remains below the share of the national population residing in those states (some 40%). This suggests that inequalities related to middle class legal mobilization, though real according to this measure, are declining.

Finally, the data allow a third way to examine the issue of middle class legal mobilization advantage – one can identify for each year the share of cases initiated by or involving an NGO or cooperative group. Cases that involve an NGO or cooperative are more likely to involve the concerns of the poor than the middle class, and are also more likely to result in generalized benefit than cases brought on behalf of individual private claimants by private lawyers (Gauri & Brinks, 2008a). Overall, 15% of cases were filed by cooperatives, groups, or NGOs, while 80% were filed by individual litigants (4% of cases were unclear). Figure 4 shows that the annual number of cases filed by a cooperative/group and reported in Manupatra has been more or less flat since the 1970s, with a median number of about one per year, and has not grown as fast as cases involving Fundamental Rights filed by individuals. This suggests that although the absolute number of Fundamental Rights claims brought on behalf of disadvantaged classes has been increasing, as shown in Figure 2, this increase is not due to greater mobilization by NGOs/CSOs; rather, it appears to have been the result of increased mobilization by private individuals.

To examine policy area inequality, which is related to the content of judicial rulings on the cases that reach them, we examined win-loss rates, both in general and for subsets of claims from advantaged classes, disadvantaged classes, members of SC/ST/OBC, and the middle and upper castes. Figures 5 and 6 show that claimants in cases involving women's and children's rights were more likely to win than claimants in cases involving SC/ST/OBC matters. Overall, the win rate for claimants in Fundamental Rights cases involving women and children's rights was 84%, compared to 51% for cases involving SC/ST/OBC, and 72% for the explicit PIL cases. In addition, the trend line for the win rate of claimants in SC/ST/OBC cases was sloped downward. That suggests that judges may now be less favorably disposed to SC/ST/OBC claims than they were in the past.

But it is hard to tell whether this indicative trend is a function of the change in the composition of the claimants or a change in judicial attitudes; in other words, it is possible that judges are as favorably disposed to SC/ST/OBC concerns as they were in the past, and that win rates in SC/ST/OBC cases have declined only because most claimants in these cases are now members of the advantaged classes. So the cases were further disaggregated on the basis of the social class of the claimant. Overall, 67% of claimants in SC/ST/OBC cases were themselves members of SC/ST/OBC; but this falls to 60% for cases admitted after 2000, indicating a recent increase in claims related to

SC/ST/OBC by members of the middle and upper castes. For women's and children's rights cases, overall 72% of claimants were members of the advantaged classes.

Figure 7 graphs the win rates in all Fundamental Rights cases for claimants who were and were not members of advantaged classes. It shows that the average annual win-rate for claimants from advantaged classes was below the win rate of claimants who were not from advantaged classes until the late 1980s. Now claimants from advantaged classes have higher win rates than claimants not from advantaged classes. For example, advantaged class claimants had a 73% probability of winning a Fundamental Rights claim for cases in which an order or decision was rendered from years 2000-2008, whereas the win rate for claimants not from advantaged classes for the same years was 47%. For the 1990s, rates were 68% and 47%, respectively. But in the years prior to 1990, claimants not from advantaged classes enjoyed higher success rates than those from advantaged classes. The differences for the 1990s and 2000s are significantly different from each other, based on a simple chi-square test and a simple probit estimation (see Tables 2a and 2b). Similarly, when one divides the claimant into those that are identified as members of SC/ST/OBC and those that are not, the same pattern emerges: Figure 8 shows that claimants who are not SC/ST/OBC now have a higher win rate than those who are. Even in the subset of cases involving SC/ST/OBC concerns, claimants who were not from SC/ST/OBC began to have higher average annual win rates than those who were starting around 1990 (see Figure 9).[9]

These findings are consistent with the claim that judicial receptivity in the Supreme Court to Fundamental Rights claims made on behalf of poor and excluded individuals has declined in recent years. There are other explanations, however. The decline in the win rates for marginalized individuals could be attributed to the fact that cases brought on their behalf are weaker, on the merits, than they used to be, perhaps as a result of changes in statutes, decisions to litigate more challenging cases, or weaker legal representation. Each of these possibilities warrants careful scrutiny. Still, the data demonstrate not only a decline in the win rate for marginalized individuals but a simultaneous increase in the win rate for advantaged individuals. Though not impossible, it is unlikely that that the quality of legal representation has simultaneously increased for the advantaged and decreased for the marginalized, and sufficiently to explain the significant reversal in win rates. Similarly, it is conceivable but not likely that advantaged clients started to select a less challenging set of cases at the same time that marginalized claimants did the reverse. The data here constitute a prima facie validation of the concern that judicial attitudes are less favorably inclined to the claims of the poor than they used to be, either as the exclusive result of new judicial interpretations or, more likely, in conjunction with changes in the political and legislative climate.

Conclusions

A number of criticisms of PIL have been voiced in recent years, including concerns related to separation of powers, judicial capacity, and inequality. While critics

[9] The social class of the claimant was not discernible in 1% of the cases related to SC/ST/OBC, 34% of cases related to women's and children's rights, and 45% of explicit PIL cases.

have been persuasive when pointing to particular cases, the sheer number of cases, as well as the variation in tendencies over time and among court benches, have made reaching a general conclusion difficult. This paper has argued that complaints related to separation of powers concerns are better understood as criticisms of the impact of judicial interventions on sectoral governance, and that structured case studies of sectoral governance are necessary to assess those criticisms. On the issue of inequality, this paper contributes to an overall assessment by systematically examining the relative magnitude, case composition, and geographical origins of, as well as legal representation and the claimant's social class in, PIL and Fundamental Rights cases that reached the Indian Supreme Court.

The analysis of PIL "cases" shows that they do not appear to consume a significant share of the resources of the Supreme Court; they constitute less than 1% of the overall case load. The subject matter of PIL cases and orders remains difficult to discern because over 70% of them are classified as "other," which is problematic from the point of view of judicial transparency. Concerns regarding inequality appear to be validated by some of the quantitative data on Fundamental Rights cases. On the one hand, although the number of Fundamental Rights cases related to women and children's rights and to the concerns of scheduled caste/scheduled tribe/other backward classes, as well as cases explicitly called a "PIL" in the Court's written opinions, appear to have increased; and the rate of increase has been similar for claimants belong to both marginalized and advantaged population segments. The share of cases from BIMARU states also appears to be climbing. On the other hand, a very low share of the cases are brought by cooperative entities, such as NGOs, which is a useful predictor of the likelihood that benefits will generalize to the larger population. Most striking, win rates for Fundamental Rights claims are now significantly lower when the claimant is from an advantaged social group than when he or she is from a marginalized group. That constitutes a social reversal both from the original objective of public interest litigation and from the relative win rates in the 1980s.

Table 1

Fundamental Rights cases in the Indian Supreme Court, % of Cases Submitted by Subject Matter

Subject	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Child Labour Matters Including Neglected Children		0.4						0.49		0.73	
Air Pollution Matters, i.e. Industrial, vehicular, Power Stations etc.	2.58	2.8	2.58	2.34	5.32	8.3	5.78	2.44	2.89	2.19	2.88
Water Pollution: Industrial, Domestic, Sewage, Rivers and Sea	1.94	6.4	2.58	4.3	2.84	0.72	2.22	1.46	18.18	2.19	1.44
Noise Pollution: Industry & Vehicular	0.65	1.2	0.43		0.35	1.81	1.33		0.83	1.46	
Ecological Imbalance: Protection and Conservation of Forests throughout the Country, Protection of wild life, Ban on Felling of Trees and Falling of Under Ground Water Level	8.39	3.2	3.43	2.73	3.19		4.44	5.85	7.85	16.06	12.98
Bonded Labour Matters	2.58	0.4	1.29			4.33					0.48
Matters relating to Custody Harassment, Jails, Complaint of Harassment, Custodial Death, Speedy Trial, Premature Release, Inaction by Police etc.	3.87	2	1.72	1.56	0.35		0.44			0.36	0.96
Matters relating to Harassment of SC/ST/OBC and Women	0.65	0.4			1.42	0.36	0.89	0.49		0.36	0.48
Matters relating to Unauthorized Constructions including Encroachments, Sealing, Demolitions, Urban Planning	3.23	3.6	1.72	5.47	2.84		1.33	0.98	2.07	2.92	1.44
Matters relating to Election Commissions	1.29	1.6	1.72	0.39	1.42	3.25	0.44	7.8	3.72	3.28	5.77
Scam Matters	1.94		0.43	0.39		0.36		0.98	0.83	0.36	0.48
Others	72.9	78	84.12	82.81	82.27	80.87	83.11	79.51	63.64	70.07	72.6
Natural and Man Made Disasters Including Riots											0.48

Numbers are in Percentages

Table 2a: Win rates in selected Fundamental Rights before the Indian Supreme Court, Claimants from Advantaged and Disadvantaged social classes

Social class	1961-1989	1990-1999*	2000-2008*
Advantaged	57.9%	68.1%	73.3%
Disadvantaged	71.4%	47.1%	47.2%

* probability of $\chi^2 < 0.05$

Table 2b: Probit estimation of win rates for advantaged classes in Fundamental Rights cases before the Indian Supreme court, by decade

	1961-1989	1990-1999	2000-2008
Advantaged class	-0.37	0.54*	0.69*
	(0.29)	(0.25)	(0.32)
Constant	0.57*	-0.07	-0.07
	(0.21)	(0.15)	(0.21)
Observations	80	114	66
Pseudo R^2	0.02	0.03	0.05

Standard errors in parentheses; * significant at $p < 0.05$

Figure 1

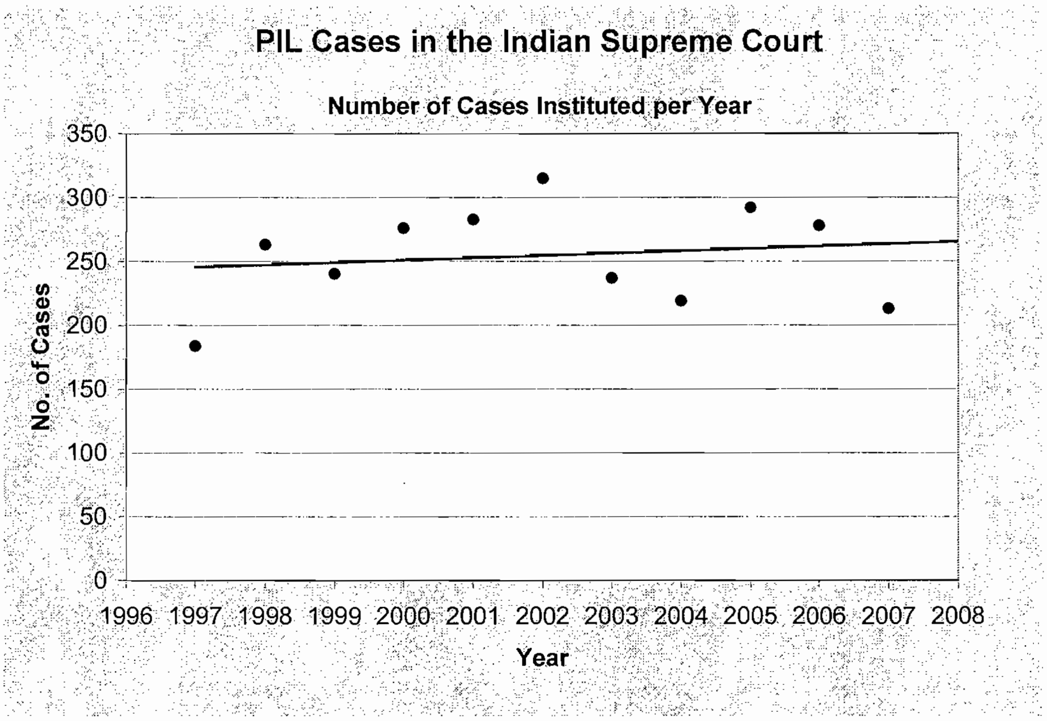


Figure 2

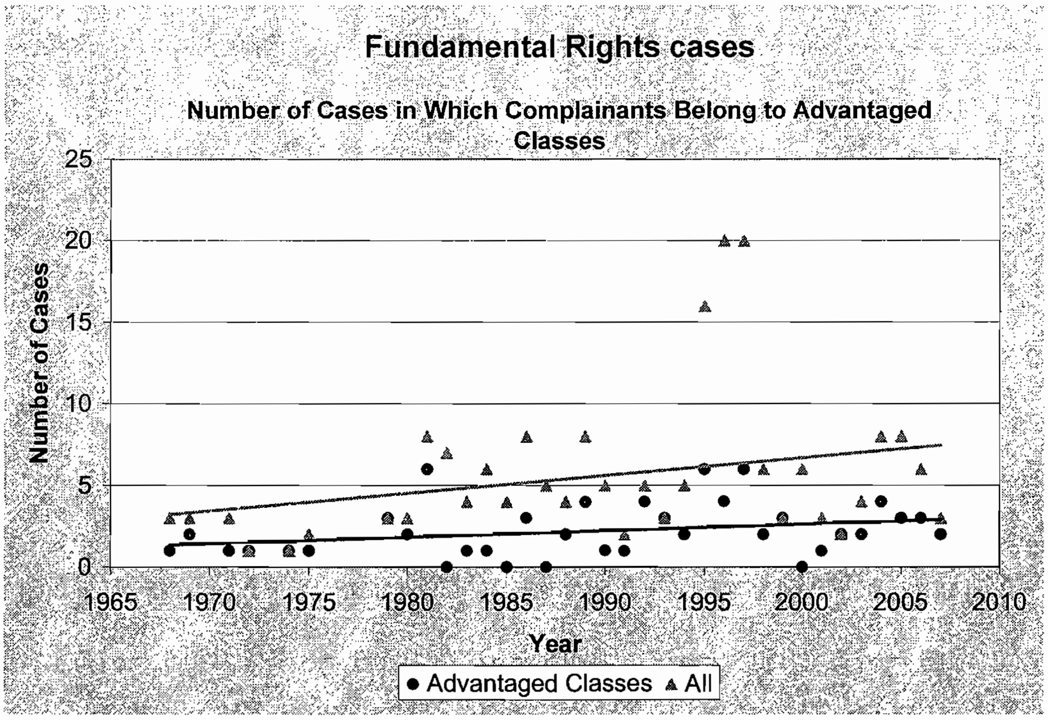


Figure 3

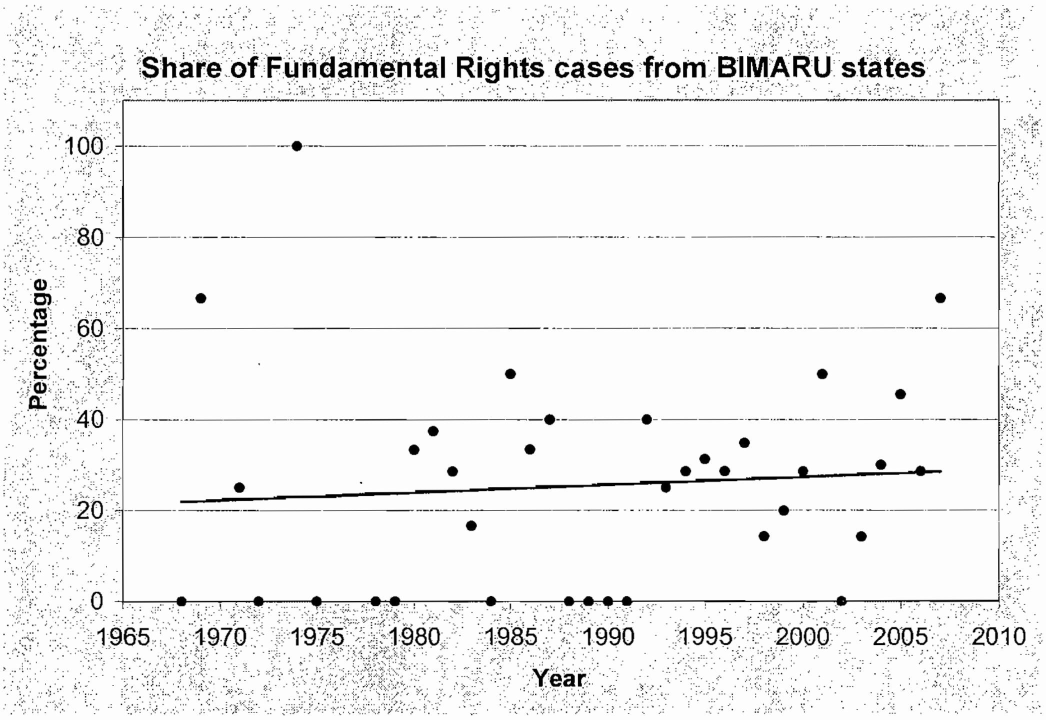


Figure 4

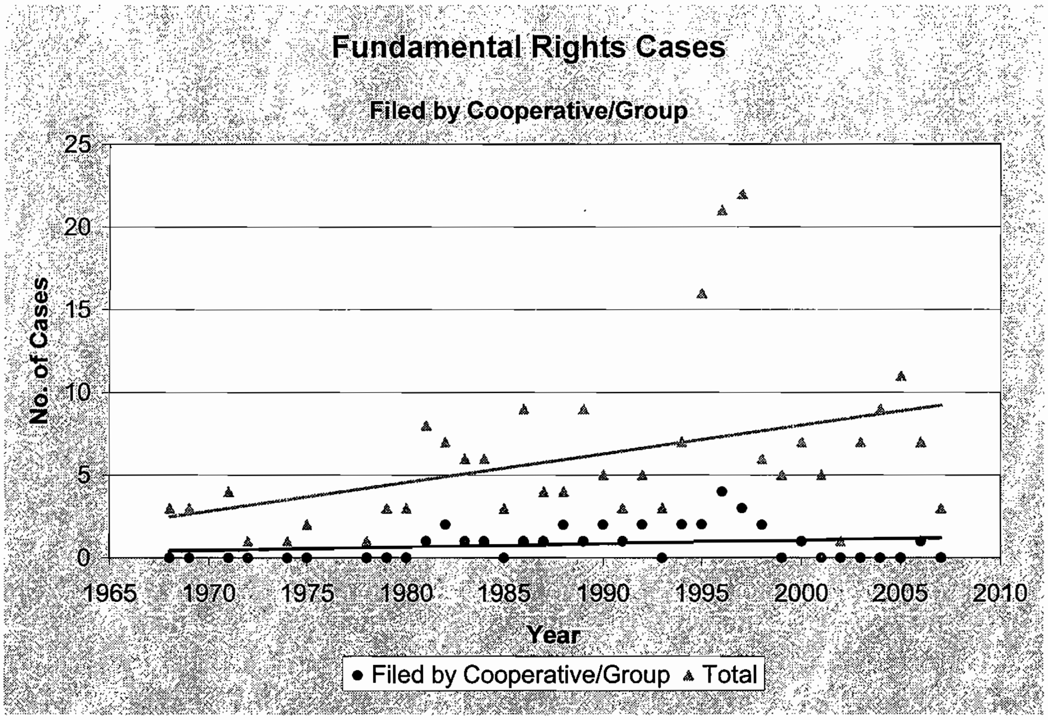


Figure 5

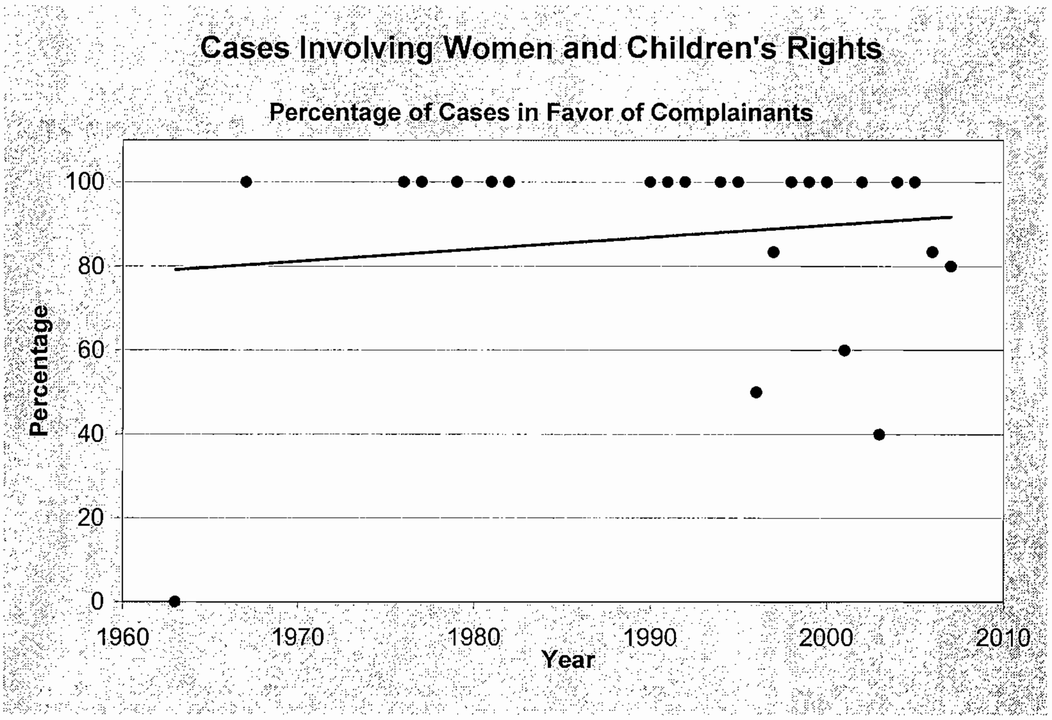


Figure 6

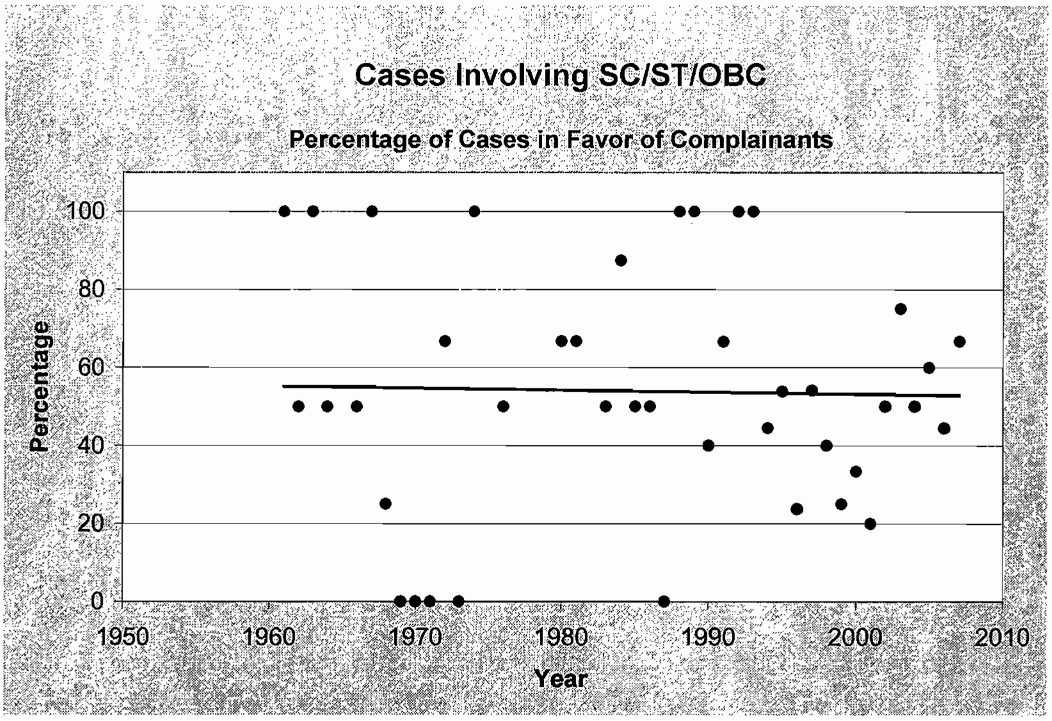


Figure 7

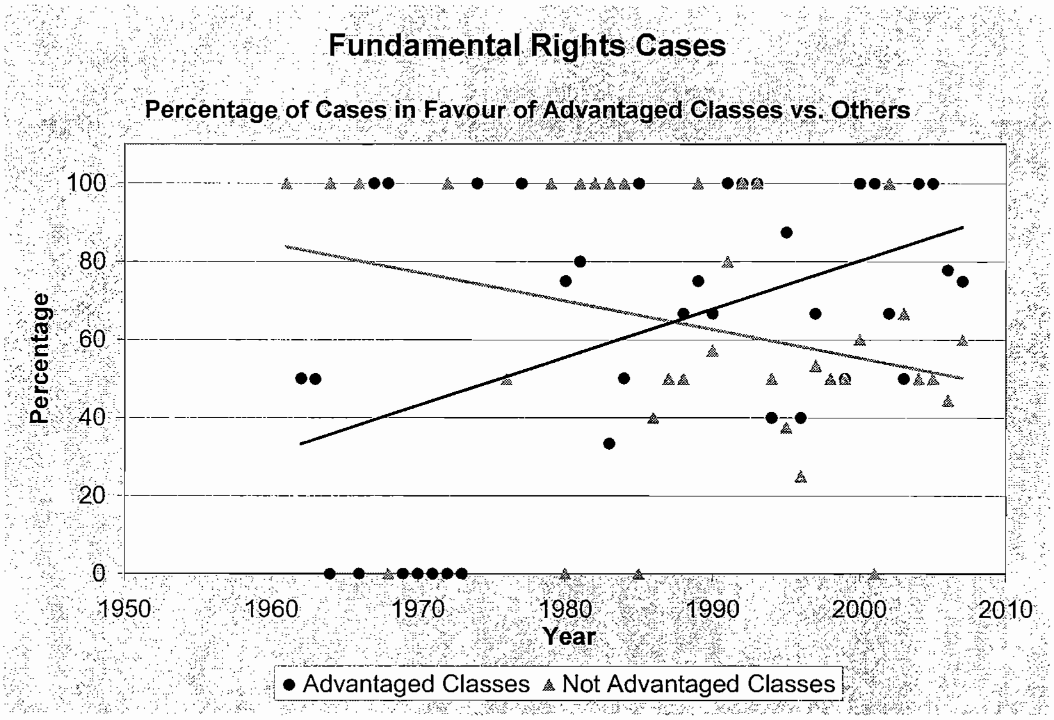


Figure 8

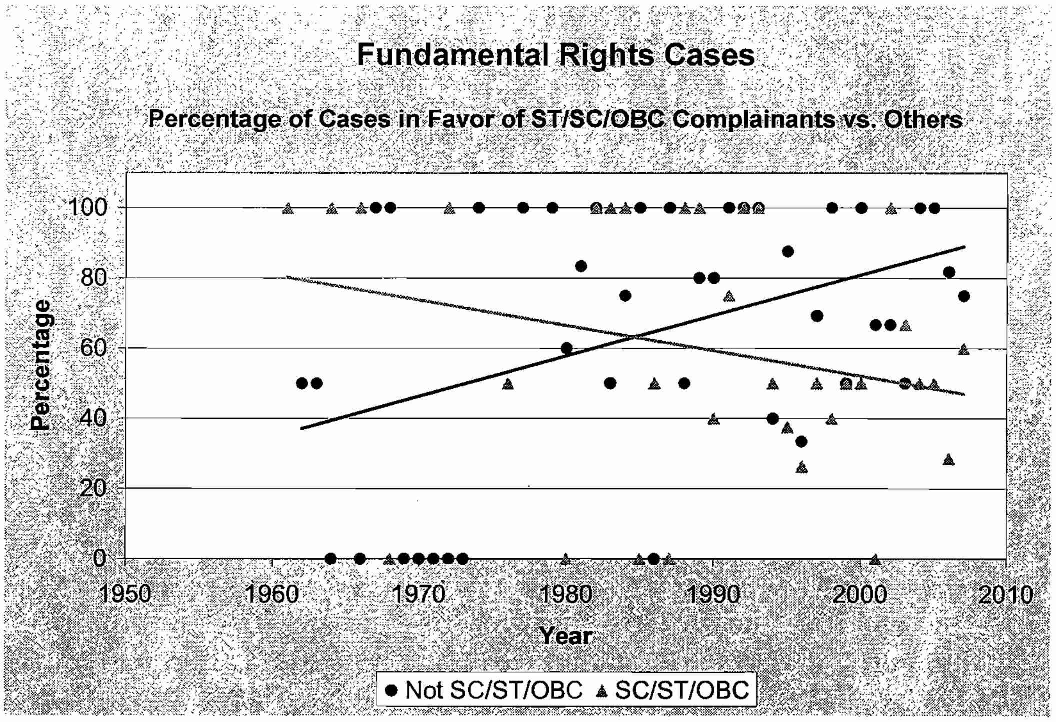
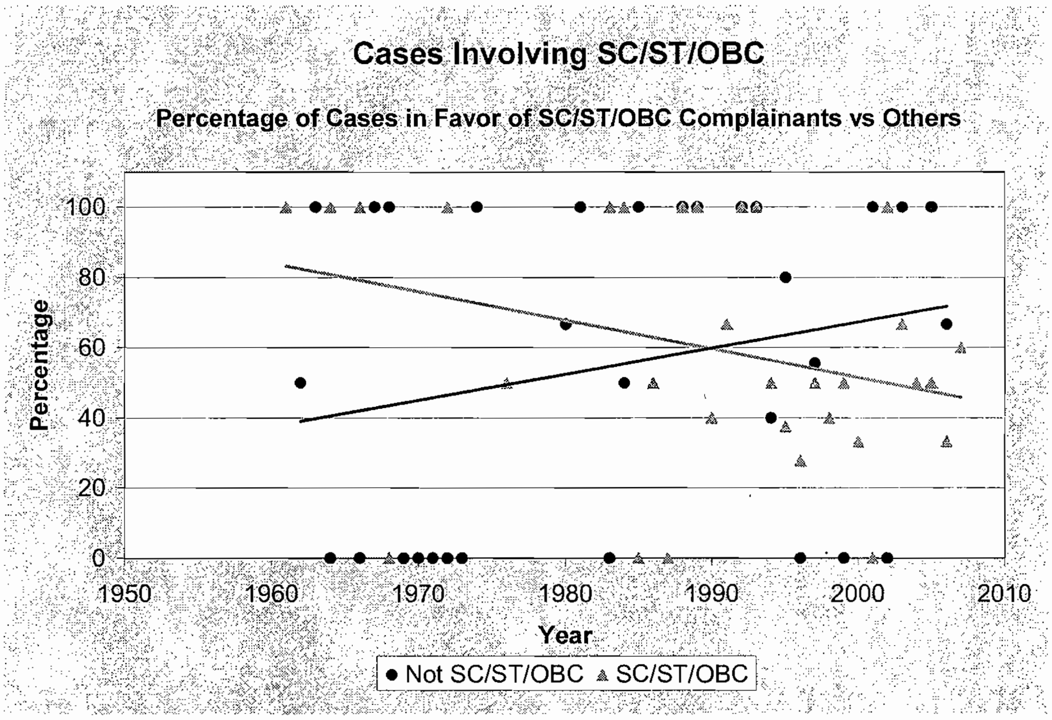


Figure 9


Cases Involving SC/ST/OBC
Percentage of Cases in Favor of SC/ST/OBC Complainants vs Others
Percentage
100
80
60
40
20
0
1950
1960
1970
1980
1990
2000
2010
Year
Not SC/ST/OBC
SC/ST/OBC

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