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## Expanding Judiciaries: India and the Rise of the Good Governance Court

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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*

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\* 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*<sup>1</sup> was judicial review firmly adopted by any country, and outside the United States the concept was at first slow to catch on.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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

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 Constituent 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.<sup>7</sup> In essence, the Indian Constitution—like many constitutions that would follow it, particularly in the developing world<sup>8</sup>—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.<sup>9</sup> It did so to help empower poorer sections of

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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

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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.<sup>10</sup> 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.<sup>11</sup> 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 HOBBS, *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 *dharmaśāstra* 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> At that time, nearly 55% of the population was considered below the national poverty line.<sup>16</sup> In 1999–2000 this figure was down to nearly 26%.<sup>17</sup> 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.<sup>18</sup> The first government census in 1951 found that just 18% of the population was literate.<sup>19</sup> Though the literacy rate has grown steadily since then, it still officially stood at only about 65% in 2001.<sup>20</sup>

Despite its poverty, India generally has a high voter turnout, averaging around 60% in general elections.<sup>21</sup> Indeed, turnout seems to be higher amongst poorer and less educated groups in India.<sup>22</sup> 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.<sup>23</sup> For Delhi it was 47%.<sup>24</sup> The other five largest metro areas averaged a voter turnout rate 11.84% lower than the average for their state.<sup>25</sup>

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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](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](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.<sup>26</sup> 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.<sup>27</sup> Because so many voters are destitute, they do not have the education or resources to determine what political platform would best represent their needs.<sup>28</sup> 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.<sup>29</sup>

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](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/lr/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.<sup>30</sup> There were only seventeen years during this fifty-seven-year period when no amendments were added to the Constitution,<sup>31</sup> and the pace and volume of amending has only increased since independence.<sup>32</sup>

Part of the reason why there have been so many amendments is that the Indian Constitution, more than most, details the administration of governance.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> 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."<sup>36</sup> 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,<sup>37</sup> a 1935 British statute that did not provide for universal suffrage.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup>

### 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.<sup>42</sup>

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.<sup>43</sup>

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.<sup>44</sup> Further, because there are 552 members of

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,<sup>45</sup> 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.<sup>46</sup> However, that sixty-five percent of Members of Parliament had nothing to say<sup>47</sup> 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.<sup>48</sup> 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 . . . ."<sup>49</sup>

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).<sup>50</sup> 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 parliamentary 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.<sup>51</sup> 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/newsl/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.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> Half of these were for charges that could carry a sentence of five or more years in prison.<sup>56</sup>

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.<sup>57</sup> Districts are won on the basis of who receives the most votes, and a majority is not required.<sup>58</sup> In the current Lok Sabha, sixty percent of members did not gather more than fifty percent of the votes in their district.<sup>59</sup> Such an electoral set-up helps fuel the numerous regional-

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](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.<sup>60</sup> 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 supermajority it would later reclaim in the elections of 1971, 1980, and 1984).<sup>61</sup> Yet since 1989 there have been only coalition governments, with no party winning a majority of seats on its own.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup>

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.

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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., Nimimesh 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](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.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup>

#### *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,<sup>68</sup> 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.<sup>69</sup> 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

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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.<sup>70</sup>

### *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.<sup>71</sup> 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.<sup>72</sup> 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,<sup>73</sup> a comptroller and auditor general to check the government's accounts for legal irregularities,<sup>74</sup> a finance commission to apolitically allocate tax revenue between the center and the states,<sup>75</sup> and public service commissions at the union and state levels to oversee

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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.<sup>76</sup> 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.<sup>77</sup>

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,<sup>78</sup> the Telecom Regulatory Authority,<sup>79</sup> the Insurance Regulatory and Development Authority,<sup>80</sup> the Competition Commission,<sup>81</sup> and central and state electricity authorities.<sup>82</sup> 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.<sup>83</sup> 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

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://india.code.nic.in/> (search Act Year "1992").

79. The Telecom Regulatory Authority of India Act, No. 24 of 1997, available at <http://india.code.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.<sup>84</sup> The High Courts and Supreme Court, which comprise the upper judiciary, are seen as relatively competent and trustworthy.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> To remedy this problem, a series of constitutional amendments added fourteen more justices to the Court between the 1950s and 1980s.<sup>90</sup>

Today, the Supreme Court has a sanctioned strength of twenty-six justices.<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup> 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/Report125.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.supremecourtindia.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.supremecourtindia.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.<sup>94</sup> 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.<sup>95</sup> The Court disposed of 46,210 pending matters in 2005, an increase of thirty percent from five years earlier.<sup>96</sup>

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.<sup>97</sup> 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).<sup>98</sup>

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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/plc/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.<sup>99</sup> It is likely that a survey of other English dailies in India would achieve similar results. A survey of Hindi and other local language

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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.<sup>100</sup> This number does not include the days a vacation bench sits while the full Court is away from mid-May to early July.<sup>101</sup> As a comparison, the U.S. Supreme Court heard arguments on only thirty-eight days in its 2006-2007 term.<sup>102</sup> In contrast to the Indian Supreme Court, Parliament sat for only seventy-six days in 2006,<sup>103</sup> with high absentee rates both in sessions and committee meetings.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> Public interest litigation, which garners much public attention, constituted only 1% of the Court's regular hearing matters.<sup>107</sup> Strikingly, five-, seven-, and nine-justice bench

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100. Supreme Court of India, Calendar 2007, [http://www.supremecourtindia.nic.in/new\\_s/cal-2007.htm](http://www.supremecourtindia.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/06termcourtcaldar.pdf](http://www.supremecourtus.gov/oral_arguments/06termcourtcaldar.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.supremecourtindia.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%).<sup>108</sup> As of June 2008, there were 28,497 cases still awaiting admission hearings.<sup>109</sup> Moreover, 19,358 cases had been admitted but were awaiting regular hearing.<sup>110</sup>

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.<sup>111</sup>

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108. *Id.*

109. Supreme Court of India, Monthly Statement for the Month of June 2008, [http://www.supremecourtindia.nic.in/new\\_s/pendingstat.htm](http://www.supremecourtindia.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,<sup>112</sup> 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.<sup>113</sup>

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.<sup>114</sup>

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.<sup>115</sup> 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.<sup>116</sup> 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 than 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](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.<sup>117</sup> 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.<sup>118</sup> 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,<sup>119</sup> OR THE BASIC STRUCTURE DOCTRINE

The German Constitution famously bars amendments to Article One (human dignity) and its democratic and federal form of government.<sup>120</sup> Bruce Ackerman calls constitutions like Germany’s foundationalist.<sup>121</sup> 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.<sup>122</sup> He compares such foundationalist constitutions to dualist ones like that of the United States.<sup>123</sup> In dualist democracies, certain key principles—like fundamental rights—are entrenched in the constitution.<sup>124</sup> 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.<sup>125</sup>

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.<sup>126</sup>

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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.<sup>127</sup> On the other extreme, Mahatma Gandhi advocated a more decentralized and self-sufficient society.<sup>128</sup>

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.<sup>129</sup> Nehru and Patel were the two most powerful political leaders of the Congress Party at the end of British rule.<sup>130</sup> 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).<sup>131</sup>

Patel was a proponent of many of the principles of *laissez-faire* economics.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup>

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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.<sup>135</sup> Nehru wanted no compensation for property seized by the government, while Patel demanded full compensation.<sup>136</sup> 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.<sup>137</sup>

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.<sup>138</sup> 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.<sup>139</sup> Article 31B created the Ninth Schedule, a list of laws inserted in the back of the Constitution.<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> 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.<sup>143</sup> In a bit of inventive wordplay, it held that amendments should be understood as "law" under the Constitution.<sup>144</sup> Since the fundamental rights voided any "law" that was inconsistent with them, any attempt to amend them was void.<sup>145</sup>

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.<sup>146</sup>

This constitutional showdown came to a head in *Kesavananda Bharati v. State of Kerala*.<sup>147</sup> Decided in 1973 by an unprecedented thirteen justices, it is widely considered one of the most important Indian constitutional law cases. In the face of parliamentary and public pressure,

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*.<sup>148</sup> However, in a bare seven to six majority, it also held that although the fundamental rights could be amended, a certain “basic structure” to the Constitution could not.<sup>149</sup> 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.<sup>150</sup>

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.<sup>151</sup> Five months into this low point of Indian democracy, the Court decided *Indira Nehru Gandhi v. Raj Narain* (“*Indira Gandhi*”).<sup>152</sup> 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.<sup>153</sup> 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.<sup>154</sup>

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.<sup>155</sup> 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.<sup>156</sup>

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.<sup>157</sup> 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.<sup>158</sup> 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).<sup>159</sup> 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*<sup>160</sup> 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.<sup>161</sup> 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](http://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.<sup>162</sup>

### *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.<sup>163</sup> 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.<sup>164</sup>

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.<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup> 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,<sup>168</sup> 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.<sup>169</sup> At the end of this successful struggle, the Party became a "credible vehicle for popular sovereignty."<sup>170</sup> 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.<sup>171</sup> 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).<sup>172</sup> 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.”<sup>173</sup> 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

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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?<sup>174</sup>

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.<sup>175</sup>

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 . . . .<sup>176</sup>

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.<sup>177</sup> 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.<sup>178</sup>

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.”<sup>179</sup> 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.<sup>180</sup> 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.<sup>181</sup>

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.”<sup>182</sup> Justice Gibbs, in the same case, seems to find at least some fundamental rights “inalienable.”<sup>183</sup> 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.<sup>184</sup>

In *Minerva Mills v. Union of India*,<sup>185</sup> 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 . . . .”<sup>186</sup> 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.”<sup>187</sup> 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.”<sup>188</sup> 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 . . . .”<sup>189</sup>

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:

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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.<sup>190</sup>

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."<sup>191</sup>

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.<sup>192</sup> Further, critics like Pran Chopra argue that the basic structure doctrine undermines the Constitution itself by weakening the stature of Parliament.<sup>193</sup> By taking power out of the hands of the people, it is more likely someone else will do the same.<sup>194</sup>

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

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.<sup>196</sup> As some critics of the basic structure doctrine like to point out, it was the people who voted her out.<sup>197</sup> 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

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.<sup>198</sup> 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.<sup>199</sup>

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.<sup>200</sup> 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*,<sup>201</sup> 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/vol17p23.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.”<sup>202</sup> In the Court’s early history, the article was interpreted narrowly to give it little judicial bite.<sup>203</sup> 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.<sup>204</sup> 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.<sup>205</sup> The next few years saw article 21 used to outlaw cruel or unusual punishment,<sup>206</sup> relax pre-trial bail requirements,<sup>207</sup> restrict the conditions under which a debtor can be imprisoned,<sup>208</sup> create rights against custodial violence<sup>209</sup> and inordinate delays in criminal trials,<sup>210</sup> and provide legal aid.<sup>211</sup>

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.<sup>212</sup> 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.<sup>213</sup>

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,<sup>214</sup> land for tribal populations,<sup>215</sup> protection from environmental degradation,<sup>216</sup> shelter,<sup>217</sup> health,<sup>218</sup> education,<sup>219</sup> and food and clothing.<sup>220</sup> 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.<sup>221</sup>

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.<sup>222</sup> 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.<sup>223</sup> 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.<sup>224</sup>

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.<sup>225</sup> The Court also began to exercise continuing jurisdiction over cases, issuing preliminary interim orders and then periodic follow-up orders.<sup>226</sup>

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),<sup>227</sup> (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),<sup>228</sup> (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),<sup>229</sup>

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.<sup>230</sup>

### *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.<sup>231</sup> 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.<sup>232</sup> 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.<sup>233</sup> 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.”<sup>234</sup> In *Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir*,<sup>235</sup> Justice Bagwati explained the relationship between the Directive Principles and the justiciable 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.<sup>236</sup>

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*,<sup>237</sup> 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.”<sup>238</sup> In *Consumer Education & Research Centre v. India*,<sup>239</sup> 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. . . .”<sup>240</sup> In *LIC of India v. Consumer Education Research & Centre*,<sup>241</sup> 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.”<sup>242</sup> 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.”<sup>243</sup>

The Court again invoked these broader meta-governance standards in *Shantistar Builders v. Narayan Khimalal Totame*,<sup>244</sup> 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.<sup>245</sup>

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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.<sup>246</sup> 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.”<sup>247</sup>

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.”<sup>248</sup> 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.”<sup>249</sup> In *Bandhua Mukti Morcha v. Union of India*,<sup>250</sup> 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.”<sup>251</sup> 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.”<sup>252</sup>

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,”<sup>253</sup> 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.<sup>254</sup>

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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.<sup>255</sup>

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<sup>256</sup> 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.

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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*<sup>257</sup> (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.<sup>258</sup> The Court ordered full implementation of the enormous public distribution system,<sup>259</sup> which provides subsidized grain to poor people across the country.<sup>260</sup> It directed that all states provide a cooked mid-day meal in their schools, under what had previously been a voluntary national program.<sup>261</sup> 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.<sup>262</sup> 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.<sup>263</sup> It also directed that there should be an ICDS disbursement center in every settlement.<sup>264</sup> 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.<sup>265</sup> 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.<sup>266</sup> The

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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](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.<sup>267</sup>

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.<sup>268</sup>

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.”<sup>269</sup> 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.<sup>270</sup> 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.<sup>271</sup>

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.<sup>272</sup> 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.<sup>273</sup> 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

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.<sup>274</sup> 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.<sup>275</sup> 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.<sup>276</sup>

Further, there is no guarantee that the Supreme Court's actions will only help the poor or further democratic interests.<sup>277</sup> 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.”<sup>278</sup> 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.<sup>279</sup> 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.”<sup>280</sup>

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.<sup>281</sup> 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.<sup>282</sup> Indeed, the Supreme Court has encountered systematic enforcement problems with many of its orders in public interest litigation.<sup>283</sup> Although the Court has hinted at a willingness to sanction government officials in public interest litigation if they fail to comply with its orders,<sup>284</sup> 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.<sup>285</sup> The Court's orders can also help educate government officials about their obligations and provide another voice demanding they fulfill these responsibilities.<sup>286</sup>

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

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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).



Gottlieb argue in the U.S. context, “[j]udicial decisions can change assumptions . . . through their power to grant legitimacy to certain claims and to redefine norms of institutional action.”<sup>287</sup> The Court changes citizens’ and civil society’s perceptions of their rights, and empowers them in new ways to demand these entitlements.<sup>288</sup> As a result, civil society movements in India often go to the courts when they begin a new political campaign.

A prime example of this dynamic is the Right to Food Campaign, a coalition of non-government organizations and individuals that promotes food security and the enforcement of the Supreme Court’s right to food orders.<sup>289</sup> The campaign concentrated its early efforts on enforcing the Court’s orders concerning the mid-day meal scheme. In large part because of the Court’s orders and the Right to Food Campaign’s synergetic efforts, a free mid-day meal is now given in almost all the public primary schools in India. The Court’s orders concerning implementing a work-for-food scheme, in combination with efforts of the Right to Food Campaign, played an important role in the creation of the National Rural Employment Guarantee Act (“NREGA”).<sup>290</sup> The NREGA, which became law in 2005 to much fanfare, guarantees employment to one member of every household in rural India for one hundred days per year at minimum wage rates or above.<sup>291</sup>

Similarly, in the early 1990s, two Supreme Court decisions held that the right to education was a fundamental right. These rulings helped increase pressure on the government to pass a constitutional amendment in 2002 that clearly stated that the right to education was a fundamental right for children between the ages of six and fourteen.<sup>292</sup>

287. David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg’s The Hollow Hope: Can Courts Bring About Social Change?*, 12 J.L. & POL. 63, 74 (1996).

288. Singh, *supra* note 11, at 35–44.

289. Right to Food Campaign, A Brief Introduction to the Campaign, <http://www.righttofoodindia.org/campaign/campaign.html> (last visited Oct. 4, 2008).

290. The National Rural Employment Guarantee Act, No. 42 of 2005, available at <http://india.code.nic.in/> (search Short Title “National Rural Employment Guarantee Act”).

291. Jean Drèze, a leader in the Right to Food Campaign, was one of the Act’s principal authors. The Act became law when the Congress Party returned to power in 2004. Several leaders in Congress saw NREGA as an important part of their party platform for helping the rural poor and lobbied for it within the party. Arguably, the Court’s orders in the Right to Food Case concerning implementation of the preexisting work-for-food scheme made it difficult for others in Parliament to oppose a job creation scheme like the NREGA. See K. Venkateshwarlu, *National Rural Employment Guarantee Act in Place*, THE HINDU, Feb. 3, 2006, available at <http://www.hindu.com/2006102/03/stories/2006020307241200.htm>; Lakin & Ravishankar, *supra* note 274, at 16.

292. A description of the process that created this constitutional amendment can be found in Vijayshri Sripathi & Arun K. Thiruvengadam, *India: Constitutional Amendment Making the Right to*

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

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.<sup>295</sup> The Court's orders can also inadvertently cause the government to prioritize certain programs over others.<sup>296</sup>

Justices have acknowledged that there may not be judicially manageable standards to deal with all of these issues,<sup>297</sup> 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.<sup>298</sup> 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.<sup>299</sup> 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.<sup>300</sup> 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.<sup>301</sup>

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.<sup>302</sup>

#### 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.<sup>303</sup> 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

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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.<sup>304</sup> 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.<sup>305</sup>

#### 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,

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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.<sup>306</sup> 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.<sup>307</sup>

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.<sup>308</sup> These critics feared that a bill of rights would only help entrench the socio-economic position of whites.<sup>309</sup> 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.<sup>310</sup> 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.<sup>311</sup> 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.<sup>312</sup>

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),<sup>313</sup> 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.<sup>314</sup> 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.<sup>315</sup> In Pakistan,

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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.<sup>316</sup> 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.<sup>317</sup> 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).<sup>318</sup>

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.<sup>319</sup> Sometimes these orders were for the entire population, while in other cases the Court ordered drugs for a specific person or class of persons.<sup>320</sup> 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 Constitucional de la Corte Suprema de Justicia de Costa Rica) (Costa Rican Constitutional Court decision ordering the National 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.<sup>321</sup>

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.<sup>322</sup> In other countries in Africa, such as Nigeria, the judiciary has also made fledgling but substantial social and economic right interventions.<sup>323</sup>

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.<sup>324</sup>

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.<sup>325</sup> 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).<sup>326</sup> They argue that judiciaries that set norms for government social interventions do not necessarily compete directly with representative institutions.<sup>327</sup> 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,<sup>328</sup> 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.<sup>329</sup> 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.<sup>330</sup>

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.<sup>331</sup> 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.<sup>332</sup> 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.<sup>333</sup> These unchangeable features were "federalism; parliamentary democracy and Islamic provisions including independence of judiciary."<sup>334</sup> 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.<sup>335</sup> Since then, the Court has leaned both ways, at times professing a basic structure doctrine while at other times eschewing it.<sup>336</sup> It has yet to be seen whether the Court will ultimately solidify or discard this doctrine.

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.”<sup>337</sup> 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.<sup>338</sup> 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.<sup>339</sup> The Senate and these quasi-independent bodies all act to check the power of the House of Representatives and executive.<sup>340</sup>

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.<sup>341</sup> 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.<sup>342</sup> The Council also supervises elections and has the power to ban candidates from running.<sup>343</sup> In this way, the Council acts like a mixture of a constitutional court, an upper chamber or Parliament, and an

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](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).<sup>344</sup>

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.<sup>345</sup> 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 afield 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.

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](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.<sup>346</sup> Alternatively, Arun Shorie has suggested weakening the powers of Parliament and, instead, creating a

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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.<sup>347</sup> 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.<sup>348</sup>

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.<sup>349</sup> 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 overstretch 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.<sup>350</sup> 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.<sup>351</sup> 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.<sup>352</sup> 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 CONCILIATION (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.<sup>353</sup> 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.<sup>354</sup> 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](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).

