Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective

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I. INTRODUCTION

The Supreme Court of India today wields a degree of power that many foreign legal observers would find extraordinary and unusual. Scholars of comparative law sojourning in India today will encounter an active and powerful judiciary that would have left even Alexis de Tocqueville wide-eyed. Remarkably, the Indian Court in January 2007 recently reaffirmed, that under the Indian Constitution, constitutional amendments may be held *unconstitutional* as violative of the "basic structure" of the Constitution. The Court's initial assertion of the basic structure doctrine in the late 1960s and early 1970s, was a response to the central government's efforts to insulate land reform and other economic legislation from judicial review, through the addition of a new section—the Ninth Schedule—to the Indian Constitution.

American jurists would also be intrigued to learn that the Indian Court has taken on an active and central role in the governance of the Indian polity through its interventions in Public Interest Litigation (PIL) cases, and in some cases, has virtually taken over functions that were once the domain of Parliament and the Executive. Within the past two decades, the Indian Court wrested control over judicial appointments from the Executive,[1] and assumed a leading role in policymaking in the areas of affirmative action, environmental policy, education, and development. However, as this article illustrates, both of these aspects of judicial power in India share curious similarities to parallel developments in the United States, France, and Israel.

The Indian judiciary's foray into governance has even prompted critique from within the Supreme Court itself. In December 2006, Justice Markandey Katju issued a strong cautionary warning about the Court's expanding role in governance in the *Aravali Golf Course* case, noting:

> If the judiciary does not exercise restraint and overstretches its limits, there is bound to be a reaction from politicians and others. The politicians will then step in and curtail the powers, or even the independence of the judiciary. If there is a law, judges can certainly enforce it, but judges cannot create a law and seek to enforce it. Judges must know their limits and must not try to run the government. They must have modesty and humility, and not behave like emperors. There is a broad separation of powers under the Constitution and no organ of the State—the legislature, the executive, and the judiciary—should encroach into each other's domain. We are compelled to make these observations because we are repeatedly coming across cases where judges are unjustifiably trying to perform executive or legislative functions.[2]

Following the ratification of the Indian Constitution in 1950, few Indian scholars could have predicted the scope of the Court's activity and power today. Although the early Court was activist in the area of property rights and affirmative action, few Indians could have imagined that the Court would ultimately emerge as the supreme arbiter of the

1. *See* Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 2 Supp. S.C.R. 659 [hereinafter *Second Judges' Case*].

2. Divisional Manager, Aravali Golf Club v. Chander Hass, (2007) 12 S.C.R. 1084, 1091, 1098. Although the ruling by this two-judge panel could not overturn decades of PIL doctrine, it temporarily induced a state of chaos and confusion in some High Courts, as judges were uncertain whether or not it was appropriate to entertain PIL cases. However, a week after the ruling, Chief Justice Balakrishnan in a later case argued that the ruling was not binding on other panels or courts. B. Sinha & S. Prakash, *Judicial Over-reach Ruling Is Not Binding, Says CJI*, HINDUSTAN TIMES, Dec. 14, 2007, *available at* http://www.hindustantimes.com/news/india/judicial-over-reach-ruling-is-not-binding/article1-263027.aspx.

constitutionality of amendments, or that the Court would become so engaged in such a vast array of policy areas. So how do we explain the Court's extraordinary role in Indian politics and governance in 2007?

This article examines two critical "moments" in the expansion of judicial power in India: the assertion of the basic structure doctrine and the development of the PIL regime in the post-Emergency Indian Court. The Indian Supreme Court asserted two key functional roles in these moments: (1) the role of a constitutional guardian[3] in asserting its role in preserving the basic structure of the Constitution, and (2) as a champion of the rule of law and responsible governance in developing PIL. Though both moments were significant in the empowerment of the Indian Supreme Court, I argue that development of PIL was the critical turning point in the transformation of the Indian Supreme Court. Through PIL, the Court became an auditor and active participant in the governance of the Indian polity.

What makes the expansion of judicial power in India so remarkable is that the Indian Court has overcome important political and structural constraints to emerge as an important institution of governance in modern India. Although the Indian Supreme Court was armed with the power of judicial review, appellate jurisdiction over the state High Courts, advisory jurisdiction through presidential reference of issues, and original jurisdiction based on Article 32—which allows for direct suits in the Supreme Court to enforce the Fundamental Rights provisions,[4] and empowers the Court to issue writs to enforce these rights[5]—three key aspects of India's political structure and historical legacy limited the Court's development early on. First, under the original design of the Constitution of the framers, the Constituent Assembly, the Court was intended to be a junior, subservient institution, whose decisions could easily be overridden by the Parliament through the constitutional amendment process by simple majorities. Second, the Constituent Assembly placed important limits on the power of the Indian Court, including eliminating a due process clause from the final draft of Article 21 to prevent the Court from reviewing the socialist Congress regime's redistributive, collectivist, and economic policies as

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3. *See* T.R. ANDHYARUJINA, JUDICIAL ACTIVISM AND CONSTITUTIONAL DEMOCRACY 10–15, 22–23 (1992).

4. *See* INDIA CONST. arts. 13 (judicial review), 14–31 (fundamental rights provisions).

5. INDIA CONST. art. 32, §§ 1, 2 ("Remedies for enforcement of rights conferred by this Part—

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* whichever may be appropriate, for the enforcement of any of the rights conferred by this Part").

well as from reviewing the government's provisions for preventive detention.[6] Third, the British legacy of Austinian positivism (brought to India because so many of India's early jurists were schooled or trained in England or schooled in Indian law schools versed in British traditions) meant that India's early jurisprudence would be limited by more formalist modes of constitutional interpretation.[7]

Part II of this article traces the origins and development of the Basic Structure doctrine, from the battle over property rights in late 1960s through the Court's landmark decision in *Kesavananda Bharati* in 1973, and then proceeds to examine the development of the doctrine to the present. Part III examines the development of the PIL regime in the post-Emergency Indian Supreme Court from 1977 onward, and then analyzes transformation and change in the Court's role in PIL cases. Part IV then seeks to assess the relative importance of these two "moments" and paths in the context of the development of judicial power in India, and then situates the two moments and paths in a comparative context. Part V examines these moments and paths from the lens of "credible commitments" theory, and assesses their relative strengths and weaknesses as legitimation strategies. Part VI concludes.

II. THE BASIC STRUCTURE DOCTRINE AND THE CONSTITUENT POWER OF AMENDMENT

Following India's independence and the drafting and ratification of the Indian Constitution in 1950, both the Supreme Court and state High Courts openly challenged state-level land reform that sought to abolish the zamindari (landholder) regime, through which zamindars had effectively become landlords under British colonial rule. Wealthy landholders thus

6. For an analysis of the Indian Supreme Court's jurisprudence in the area of preventive detention laws and personal liberty, *see* Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Preventive Detention, and Personal Liberty Cases*, 28 BERKELEY J. INT'L L. 216 (2010).

7. According to Arthur Von Mehren, a renowned scholar of comparative law, the emphasis on formalism in early Indian judicial decisions inevitably results in a "static conception of the law." *See* Mark Galanter, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA 484 (1984) (citing Arthur Taylor Von Mehren, *Law and Legal Education in India: Some Observations*, 78 HARV. L. REV. 1180 (1965)). Similarly, George Gadbois, another scholar who has studied the Indian Judiciary observed that the Indian legal system is characterized by "procedural nitpicking," "hair splitting legalisms," "literal interpretation," "narrow, technical, and mechanical" approaches expressing "concern for form, not for policy or substance." *See id.*

did battle with state and national elites, intent on redistributive land reform policies in the High Courts and Supreme Courts. The courts invalidated land reform policies on the grounds that they did not provide adequate compensation to landholders. In response to these early decisions, the government amended the Constitution, introducing a series of amendments to Article 31 (property rights) in response to judicial decisions invalidating land reform policies.[8] In the First Amendment, the government added Article 31(A) and Article 31(B) to the Constitution. Article 31(A) "placed all laws enacted for the purpose of abolishing the proprietary and intermediate interests in agricultural lands above challenge in the courts" on the grounds that they violated any of the fundamental rights provisions of the Constitution.[9] Article 31B insulated any laws placed in the Ninth Schedule of the Constitution from judicial review.

In a series of decisions in 1954, the Court ruled that even economic regulations that caused restrictions on property rights constituted an abridgment of the property right, and thus triggered the compensation requirement.[10] In these decisions, the Court interpreted the term "compensation" in Article 31 as requiring fair and adequate compensation.[11] In response, the government passed the Fourth Amendment, which sought to limit compensation only to those cases where the state actually acquired property, and stipulated that it was the state—the government—not the courts, who would have the final say in determining the amount of compensation required. In addition, the Amendment expanded the number of categories of legislation contained in Article 31A that were immune from challenge for abridging the fundamental rights provisions contained in Articles 14, Article 19, or Article 31, and also added seven additional acts to the Ninth Schedule.[12] The battle over

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8. Article 31 of the Constitution set forth protections for private property, and in its original form, stipulated that:

> (1) No person shall be deprived of his property save by authority of law; (2) No property, movable or immovable including any interest in or in any company owning any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given. INDIA CONST. art. 31, § 1, cl. a–e.

9. S.P. Sathe, *Supreme Court, Parliament, and the Constitution*, 6 ECON. & POL. WKLY. 1821, 1824 (1971) (discussing INDIA CONST. art. 31A).

10. *See* State of West Bengal v. Bela Banerjee, A.I.R. 1954 S.C. 170; State of West Bengal v. Subodh Gopal, A.I.R. 1954 S.C. 92; Srinivas v. Sholapur Spinning & Weaving Co., A.I.R. 1954 S.C. 119.

11. Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 110 (B.N. Kirpal et al. eds., 2000).

12. *See* Sathe, *supra* note 9, at 1824–25.

property rights continued into the 1960s, and the government responded to the invalidation of two state land reform measures by passing the Seventeenth Amendment, which sought to expand the term "state" in Article 31 to encompass a broader array of land units, and also added an additional forty-four laws into the Ninth Schedule to immunize them from judicial review.[13] The battle between the judiciary and the government over property rights culminated in two landmark decisions—*Golak Nath v. State of Punjab*[14] in 1967, and *Kesavananda Bharati v. State of Kerala* in 1973.

A. Golak Nath v. State of Punjab (1964)

At issue in *Golak Nath* was whether the Parliament's power to amend the Constitution under Article 368 was unlimited. In *Sankari Prasad v. Union of India*,[15] a challenge to the First Amendment, the petitioners argued that the new amendment violated Article 13(2), which prohibited the government from passing any "law" that infringed upon the fundamental rights provisions, and that an amendment was included in the definition of law.[16] However, the Court rejected this argument, holding that "there [was] a clear demarcation between ordinary law made in exercise of legislative power, and constitutional law made in exercise of constituent power."[17] Similarly, in *Sajjan Singh v. State of Rajasthan*,[18] the Court adjudicated a challenge to the constitutionality of the Seventeenth Amendment. In upholding the Amendment, the Court reaffirmed its earlier decision in *Shankari Prasad*.[19]

The Court in *Golak Nath* overruled these earlier judgments by a 6 to 5 ruling, and ruled that Parliament cannot enact constitutional amendments that violate the fundamental rights provisions of the Constitution.[20] Writing for the majority, Chief Justice K. Subba Rao held that Article

13. The Supreme Court invalidated the Kerala Agrarian Relations Act of 1961, and the Madras Land Reforms Act of 1961, on the grounds that the state governments had defined the term "estate" as excluding "ryotwari estates," the subject of the local land reform regulations. *See* Krishnaswami v. Madras, A.I.R. 1964 S.C. 1515; Kunhikonam v. Kerala, A.I.R. 1962 S.C. 723.
14. Golak Nath v. State of Punjab, (1967) 2 S.C.R. 762, 762.
15. Sankari Prasad v. Union of India, (1952) 1 S.C.R. 89.
16. *Id.* at 91–92.
17. *Id.* at 106.
18. Sajjan Singh v. State of Rajasthan, (1965) 1 S.C.R. 933, 933–34.
19. *Id.* at 934.
20. *Golak Nath*, (1967) 2 S.C.R. at 762.

368 did not actually confer the power to amend the Constitution, but rather set forth the procedures for amendment.[21] He went on to hold that amendments enacted under Article 368 were ordinary "laws" under Article 13, and thus could be subject to judicial review.[22] The Court also ruled that it was within Parliament's power to convene a new Constituent Assembly for purposes of amending the Constitution.[23] Finally, in a strategic move, the Court invoked the doctrine of "prospective overruling," which meant that the ruling would only apply to future amendments, and that the First, Fourth, and Seventeenth Amendment though deemed to be unconstitutional, would remain in effect.[24]

Although *Golak Nath* ultimately did not have the effect of invalidating the three amendments, the Court in *R.C. Cooper v. Union of India* did seek to mitigate the effect of the Fourth Amendment, which stipulated that the adequacy of compensation in takings would be non-justiciable.[25] In *R.C. Cooper*, the Court invalidated the Bank Nationalization Act passed by Indira Gandhi's Congress government, on the grounds that the Act provided only illusory compensation, and constituted hostile discrimination by imposing restrictions only on certain banks.[26] The Court went on to rule that that it could hold that regulations were not "reasonable" under Article 31(2) of the Constitution where those regulations failed to provide adequate compensation. In another challenge to the Gandhi government, the Court in *Madhav Rao Scindia v. India*[27] invalidated the Gandhi government's efforts to abolish the titles, privileges, and privy purses of the former rulers of the princely states.

In response to these rulings, Indira Gandhi dissolved the Lok Sabha early (for the first time in India's political history), and openly campaigned against the Court, promising to make basic changes in the Constitution to provide for social equality and poverty alleviation.[28] Following a landslide win, Gandhi's government enacted three amendments to override the Court's rulings. It enacted the Twenty-Fourth Amendment, which sought to overrule *Golak Nath* by affirming and reasserting Parliament's unlimited power to amend the Constitution under Article 368, including the fundamental rights provisions, and declared that such amendments were not ordinary "laws" under Article 13, and thus could not be subject

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21. *See id.* at 763.
22. *See id.* at 764.
23. *See id.*
24. *See id.* at 765. *See also* Sathe, *supra* note 9, at 17.
25. R.C. Cooper v. Union of India, A.I.R. 1970 S.C. 564, 608.
26. Sathe, *supra* note 9, at 18.
27. Madhav Rao Scindia v. India, A.I.R. 1971 S.C. 530, 658.
28. Sathe, *supra* note 9, at 18.

to judicial review by the Court.[29] The government also sought to override the *R.C. Cooper* decision by enacting the Twenty-Fifth Amendment, which sought to make compensation associated with land acquisition laws non-justiciable, sought to give primacy to the Directive Principles in Article 39 over the Fundamental Rights provisions in Article 14, Article 19, and Article 31, and stipulated that laws enacted by the Central and state governments to give effect to the Directive Principles could not be challenged in Court. Finally, the Twenty-Ninth Amendment was enacted to add two Kerala land reform laws to the Ninth Schedule.

B. Kesavananda Bharati v. State of Kerala (1973)

In *Kesavananda*,[30] a thirteen-judge bench of the Court heard a series of challenges to the Twenty-Fourth, Twenty-Fifth, and Twenty-Ninth Amendments. In a 1,002 page decision consisting of eleven separate opinions, the Court overruled its earlier decision in *Golak Nath* in holding that Parliament could amend the fundamental rights provisions,[31] but also held that under Article 368, Parliament could not enact constitutional amendments that altered the "basic structure" of the Indian Constitution.[32]

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29. *Id*.
30. Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461.
31. *See* Ramachandran, *supra* note 11, at 114.
32. At the time of the decision, there was a great deal of confusion regarding the actual "ratio" or rationale underlying the majority decision in *Kesavananda*, as only six justices held that the power of constitutional amendment was not unlimited, given that there were implied limitations on it, while six other justices held that the power of amendment was unlimited. *See* ANDHYARUJINA, *supra* note 3, at 26. The end of the opinion, however, contained a summary of the "view of the majority" that was signed by nine of the twelve justices that asserted that Parliament could not alter the basic structure through the amending power under Article 368. *See id.* (citing *Kesavananda Bharati*, A.I.R. 1973 S.C. at 1461–62). The "tie-breaking" opinion was Justice Khanna's, though this was on very narrow grounds. Khanna, while also holding that there "were no implied limitations on the amending power" also held that "the words 'amendment of the Constitution'" in Article 368 "cannot have the effect of destroying or abrogating the basic structure of framework of the Constitution." *Kesavananda Bharati*, A.I.R. 1973 S.C. at 1463. However, the six other justices that held that there were implied limitations on the amendment power did not base their rationale on interpretation of the term "amendment" in Article 368. Consequently, several leading scholars noted that there was no real majority rationale supporting the basic structure doctrine, and because the Court never sought to consider all of the judgments to derive a ratio. *See* ANDHYARUJINA, *supra* note 3, at 26–27 (citing 2 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 2635 (3d ed.)). *See also* H.M. Seervai, *Fundamental Rights Case at the Cross Road*, 75 BOM. L. REP. 47 (1973).

The seven-judge majority upheld the Twenty-fourth and Twenty-Ninth amendments in their entirety, and part of the Twenty-Fifth Amendment. However, the Court held that the second section of the Twenty-Fifth Amendment was invalid and violated the basic structure of the Constitution, because that section improperly delegated the power of amendment to the state legislatures, and allowed for the abrogation of the basic features of the Constitution by allowing for the government to take away the fundamental rights contained in Articles 14, 19, and 31. As noted above, that part had added Article 31C to the Constitution, which provided that "no law containing a declaration that is for giving effect to" the directive principles under Articles 39(b) and (c) "shall be called in question in any court on the ground that it" does not give effect to such principles".[33]

The justices offered differing views of what might comprise the basic structure of the Constitution. Chief Justice Sikri held that the basic structure included five features:

> (i) Supremacy of the Constitution, (ii) Republican and democratic form of government, (iii) Secular character of the Constitution, (iv) Separation of powers between the legislature, the executive and the judiciary, (v) Federal character of the Constitution. The above structure is built on the basic foundation, i.e. the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed.[34]

In addition to the foregoing features, Justice Shelat believed "the unity and integrity of the nation" and "the mandate given to the state in the directive principles of state policy" were also basic features of the Constitution.[35]

What was particularly striking about the *Kesavananda* decision was that it represented a direct political challenge by the Court to the electoral mandate of Gandhi's Congress regime, which had won 350 out of 545 seats in the 1971 elections. In its manifesto, Gandhi's Congress party sought a mandate "for the reassertion of Parliamentary Supremacy in the matter of amendment of fundamental rights," a direct reference to the Court's decision in *Golak Nath*.[36] In fact, in its decision, the Court went so far as to question the electoral mandate of the Congress party, noting that "[t]wo-thirds of the members of the two Houses of Parliament need not represent even the majority of the people in this country. Our electoral system is such that even a minority of voters can elect more than two-thirds of the members of either House of Parliament."[37] The

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33. Ramachandran, *supra* note 11, at 114.
34. *Kesavananda Bharati*, (1973) 4 S.C.C. 225, 316–17 (Sikri, C.J.)
35. *Kesavananda Bharati*, (1973) 4 S.C.C. at 454 (Shelat, J.).
36. UPENDRA BAXI, THE INDIAN SUPREME COURT AND POLITICS 22 (1980) [hereinafter BAXI, THE INDIAN SUPREME COURT AND POLITICS].
37. *Kesavananda Bharati*, (1973) 4 S.C.C. at 481.

controversial decision did not sit well with Indira Gandhi, and she proceeded to supersede the next three senior justices in the *Kesavananda* majority by selecting A.N. Ray as the next Chief Justice. In terms of its historic importance, most scholars of Indian constitutional law today have recognized and noted the significance of this moment in India's political and constitutional history, though the immediate reaction to the decision was more hostile.[38]

C. Indira Nehru Gandhi v. Shri Raj Narain (1975)

The basic structure doctrine was invoked by the Court during the Emergency Rule regime of Indira Gandhi in the case of *Indira Nehru Gandhi v. Shri Raj Narain*.[39] The case involved a challenge to the Thirty-Ninth Amendment, enacted in response to a decision of the Allahabad High Court that set aside Indira Gandhi's election on the grounds that her campaign had committed a "corrupt practice."[40] The Amendment added six new clauses to Article 329(A). The High Court's decision, coupled with growing national agitation among opposition leaders calling for Gandhi's ouster, led Gandhi to declare an Emergency on June 25, 1975, in addition to appealing the High Court's decision to the Supreme Court.[41] Part of the Thirty-Ninth Amendment was enacted to retroactively validate Indira Gandhi's election by superseding the applicability of all previous election laws and immunizing all elections involving the Prime Minister or Speaker of the Lok Sabha from judicial review.[42]

The Five-judge bench in *Indira Nehru Gandhi*, which consisted of four justices (Chief Justice Ray, Justice M. Beg, K.K. Mathew, and Y.V. Chandrachud) ultimately accepted and applied the basic structure doctrine, with four out of the five justices voting to invalidate Clause Four of

38. *See, e.g.*, Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment*, 1 S.C.C. (Jour) 45 (1974) (observing that the *Kesavananda Bharati* decision represented the "constitution of the future"). Although most other scholars now have accepted the legitimacy of the basic structure doctrine leading scholars of constitutional, including Tripathi, Seervai, and Andhyarujina, were originally critical of the decision. *See* ANDHYARUJINA, *supra* note 3, at 10; P.K. Tripathi, *Kesavananda Bharati v. State of Kerala—Who Wins?* (1974) 1 S.C.C. (Jour) 3; Seervai, *supra* note 32.

39. Indira Nehru Gandhi v. Shri Raj Narain, (1975) 2 S.C.C. 159.

40. Ramachandran, *supra* note 11, at 115.

41. Other factors cited by Gandhi in declaring an internal Emergency included widespread national agitation and unrest and labor strikes nationwide.

42. Ramachandran, *supra* note 11, at 116.

Article 329(A).[43] Justice Khanna held that the clause violated the basic structure of the Indian Constitution, by contravening the "democratic set-up" of the Constitution and the "rule of law," given that democracy requires that "elections should be free and fair."[44] In contrast, Justice Chandrachud invalidated the clause on the grounds that it violated the basic structure in that it represented "an outright negation of the right to equality," and as "arbitrary, and calculated to damage or destroy the rule of law."[45] Justices Ray and Matthew held that Article 329A was invalid "because constituent power cannot be employed to exercise judicial power."[46]

D. Minerva Mills v. Union of India (1980)

While the *Kesavananda* decision may have represented one of the boldest assertions of judicial authority to date in India, it ultimately imperiled judicial power by directly leading to the supersession of the three most senior justices and elevation of a pro-government justice, A.N. Ray, to Chief Justice, and indirectly leading to the declaration of Emergency Rule, in which the Court's powers were dramatically curbed. With respect to the development of the basic structure doctrine, the truly pivotal "moment" may indeed be the Court's twin decisions in *Minerva Mills* and *Waman Rao*, in which the Court reasserted the basic structure doctrine against Indira Gandhi's newly elected government (Gandhi defeated the Janata coalition in January 1980) by invalidating several Emergency amendments that had limited or curbed the Court's jurisdiction and powers of judicial review.

In *Minerva Mills v. Union of India*,[47] the Court heard a challenge to the Sick Textiles Nationalization Act of 1974, which had been added to the Ninth Schedule of the Constitution through the Thirty-Ninth Amendment thus, immunizing the Act from judicial review. Pursuant to the Act, the National Textiles Corporation had taken over textiles mills in Karnataka, on the grounds that these mills were being "managed in a manner highly detrimental to the public interest."[48] The petitioners challenged the Thirty-Ninth Amendment, passed during the Emergency, which had barred judicial review of constitutional amendments by

43. *Id*.
44. BAXI, THE INDIAN SUPREME COURT AND POLITICS, *supra* note 36 at 57 (citing *Indira Nehru Gandhi*, (1975) Supp. S.C.C. 1, 90–92).
45. *Id.* (citing *Indira Nehru Gandhi*, (1975) Supp. S.C.C. 1, 257–58).
46. *Id.* (citing *Indira Nehru Gandhi*, (1975) Supp. S.C.C. 1, 90–92).
47. Minerva Mills Ltd. v. Union of India, (1986) 4 S.C.C. 222.
48. Ramachandran, *supra* note 11, at 118.

amending Articles 368(4) and 368(5) of the Constitution.[49] The Court ultimately invalidated two provisions of the Forty-Second Amendment,[50] Section Four, which subordinated the fundamental rights in Article 14 and Article 19 to the directive principles, and Section Fifty-Five, which provided that the validity of any constitutional amendments promulgated following the enactment of the Forty-Second Amendment could not be challenged in any court, on any ground, and that the constituent power of Parliament to amend the Constitution was an unlimited one.[51] Writing for the majority, Chief Justice Chandrachud reaffirmed the basic structure doctrine of *Kesavananda*, and found that both Sections were unconstitutional in that they sought to expand the amending power to enable the government to repeal or abrogate the Constitution, given that "a limited amending power is one of the basic features of our Constitution, and therefore, the limitations on that power cannot be destroyed."[52] In holding that Section Four was invalid, Justice Chandrachud observed that Part III and Part VI of the Indian Constitution, which refer to Fundamental Rights and Directive Principles, respectively, were of equal importance, and that this "harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution."[53] Justice P.N. Bhagwati, in his concurring opinion, held that both a limited amending power, as well as the power of judicial review of government actions, were part of the basic structure of the Constitution.

In *Waman Rao v. Union of India*, the Court reaffirmed the basic structure doctrine, holding that all amendments enacted after the *Kesavananda* decision of April 24, 1973, including laws added to the Ninth Schedule, were subject to judicial review under the basic structure doctrine. Applying the basic structure doctrine, instead of relying solely on precedent, the Court upheld Article 31(A) and Article 31(C), added by the First Amendment and the Fourth Amendment, on the grounds that these Amendments were enacted to effectuate the Directive Principles contained

49. *Id.*
50. This represented a bold assertion of judicial power, given that the petitioner had not challenged the validity of Forty-Second Amendment in this matter. *See* ANDHYARUJINA, *supra* note 3, at 22.
51. *See* The Constitution (Forty-Second Amendment) Act, 1976, §§ 4, 55, *available at* http://indiacode.nic.in. *See also Minerva Mills*, (1980) 3 S.C.C. at 642–48, 652–57, 660.
52. *Minerva Mills*, (1980) 3 S.C.C. at 643.
53. *Id.* at 654.

in Article 39(b) and Article 39(c).[54] The Court also upheld the un-amended portion of Article 31(C) (the *Minerva Mills* decision struck down the amended version as consistent with the basic structure doctrine and ruled that, "laws passed truly and bona fide for giving effect to directive principles contained in Clauses (b) and (c) of Article 39" would fortify, not damage, the basic structure). As one leading scholar and senior advocate observed, the Court's decisions in *Minerva Mills* and *Waman Rao* "gave the Court the opportunity to regain the role of 'sentinel' which had suffered significant erosion during the Emergency."[55] Since 1980, the Court's application of the basic structure doctrine, while no doubt significant, has been sporadic and limited, though its intervention stands out in two key areas.

E. Administrative Tribunals and the Basic Structure Doctrine

From the early 1970s through the 1980s, the governments of Indira Gandhi and Rajiv Gandhi also sought to reform the judicial system through the enactment of the Thirty-Second and Forty-Second amendments, creating a system of administrative tribunals to deal with the growing number of disputes involving government services. In 1973, the government introduced the Thirty-Second Amendment, adding Article 371(D) to the Constitution. In 1987, the Court in *P. Sambamurthy v. Andhra Pradesh*[56] invalidated Clause Five of Article 371(D), on the grounds that the provision required that orders of administrative tribunals be confirmed by the relevant state government. Because the tribunals were set up to adjudicate disputes regarding government services and did not allow High Court appeals, the Court held that failure to make these tribunals as independent as High Courts violated the basic structure.

Section 46 of the Forty-Second Amendment introduced Article 323, which authorized Parliament to establish a system of administrative tribunals with jurisdiction over matters involving service of government employees and disputes involving a broad array of government policies. A closer look at Article 323(B) demonstrates that the Gandhi Emergency regime was keen on reigning in the courts through the creation of a

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54. *See* Ramachandran, *supra* note 11, at 121. Sections (b) and (c) of Article 39 (Directive Principles) provide that:

> The State shall, in particular, direct its policy towards securing—
>
> (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
>
> (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. INDIA CONST. art. 39, paras. b, c.

55. Ramachandran, *supra* note 11, at 121.

56. Sathe, *supra* note 9, at 88–89.

parallel system of administrative courts with jurisdiction over such key areas as land reform, industrial and labor disputes, and elections.[57] In 1985, the government of Rajiv Gandhi enacted the Administrative Tribunal Act of 1985.

The Act was challenged in *S.P. Sampath Kumar v. Union of India*, on the grounds that Article 323(A) violated the basic structure of the Constitution. While ruling that judicial review is part of the basic structure of the Constitution, the Court in *Sampath Kumar* actually upheld the Administrative Tribunal Act, since the new administrative courts had the power of judicial review and were "no less efficacious than" the High Courts.[58] However, the Court re-interpreted the Act so as to save its validity, ruling that the Act's appointment provisions, which provided for executive control over appointment of the Chairman, Vice-Chairman, and Members of the Administrative Tribunal would be unconstitutional since judicial independence is a basic essential feature of the Constitution. The Court thus held that its decision would apply prospectively (thus upholding existing appointments under the Act), and that the Act would be saved if the government adopted an appointment process in which the government was required to consult with the Chief Justice and defer heavily to the Chief Justice's recommendations. However, in 1997, the Court in *L. Chandra Kumar v. India*[59] overruled its decision in *S.P. Sampath Kumar*. The Court in *L. Chandra Kumar* held that Article 323(A)(2)(d) contravened the basic structure in that it allowed Parliament to exclude the jurisdiction of High Courts under Article 226 over the administrative tribunals, and only allowing appeals to the Supreme Court.[60] The Court's decision represented a reassertion of judicial authority over the administrative tribunal system.

F. Secularism: S.R. Bommai v. Union of India (1994)

In 1992, a coalition of Hindu rights organizations launched a campaign that ultimately resulted in the demolition of the Babri Masjid (which was alleged to have been built at the site of a former Rama temple) also resulting in the acquiescence and support of the BJP government in Uttar Pradesh, which led to heightened communal violence throughout India.

57. Ramachandran, *supra* note 11, at 122–23.
58. Sathe, *supra* note 9, at 88–89.
59. L. Chandra Kumar v. Union of India, (1997) 3 S.C.C. 261.
60. *See* Sathe, *supra* note 9, at 88–89.

In response, the President dismissed the BJP governments in Madhya Pradesh, Rajasthan, and Himachal Pradesh. In *Bommai*, the Court proceeded to uphold these dismissals under Article 356 of the Constitution on the grounds that the President's actions were necessary to save the basic structure of the Constitution, since the state governments were not functioning in accordance with secularism, which the Court ruled to be part of the basic structure of the Constitution.[61] According to S.P. Sathe, *Bommai* was "the most important and politically significant decision of the Court since *Kesavananda Bharati*" because the Court extended the doctrine of review under the basic structure doctrine to "the exercise of power by the President" under Article 356 of the Constitution.[62] The Court thus expanded its power to include the review and scrutiny of political decisions relating to state elections and politics.[63]

Through the development and entrenchment of the basic structure doctrine, the Court helped assume a "guardian"[64] role in protecting and preserving basic features of the Constitution from being altered by political majorities. In its decisions adjudicating the constitutionality of administrative tribunals, the Court asserted the basic structure in order to safeguard judicial independence. Furthermore, its decisions in *S.R. Bommai* and its progeny have enabled the Court to play an active role in defending secularism and policing federalism in cases involving the central government's emergency powers of dissolution. Additionally, the Court in *I.R. Coehlo* recently reasserted the basic structure doctrine in holding that the Court could review the validity of all amendments inserted into the Ninth Schedule after the *Kesavananda* decision in accordance with the basic structure of the Constitution and the fundamental rights provisions.[65] The basic structure doctrine thus ultimately proved to be a powerful bulwark against the excesses of majoritarian politics in India. In essence, the Court's assertion of this doctrine enabled the Court to apply the "brakes" on radical constitutional change, reassert and safeguard judicial review, and reinforce core structural features of the Indian constitution—secularism and federalism.

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61. *See id.* at 96–98.
62. *See id.* at 152.
63. *Id.* The Court in *Bommai* examined the manifesto and political ideology of the BJP party in determining that the BJP governments would not act in accordance with "the principle of secularism." *Id.* at 176; S.R. Bommai v. Union of India, (1994) 3 S.C.C. 1 at 137–38, 147, 151–53, 172–75, 290–93 (Verma, J., asserting that no "judicially manageable standards" exist for scrutinizing Presidential actions under Article 356 and that such controversies "cannot be justiciable").
64. *See* ANDHYARUJINA, *supra* note 3.
65. *See* I.R. Coehlo v. State of Tamil Nadu, (1999) 2 Supp. S.C.R. 394, 396–98.

III. PUBLIC INTEREST LITIGATION AND THE INDIAN SUPREME COURT

Although the Court's decisions in *Kesavananda* and *Minerva Mills* represented key moments, the Court's expanded role in governance today can be traced to the development of PIL. Through PIL, the Court asserted itself as a champion of the rule of law in checking and ameliorating government illegality and statutory noncompliance.[66]

A. The Historical Context

Following Congress' Prime Minister Indira Gandhi's dissolution of the Lok Sabha and sudden call for elections on January 18, 1977, a broad-based coalition of opposition parties united to form the Janata Party coalition to challenge Indira Gandhi's Emergency regime. The Janata coalition defeated Indira Gandhi in the March 1977 elections, campaigning on a manifesto that called for an end to Emergency rule, the repeal of restrictions on the media, repeal of the draconian preventive detention laws allowing for preventive detention, warrantless search and seizure, wiretapping, and rescinding the anti-democratic Forty-Second Amendment.[67] The victory by the Janata Party marked the first time that a party other than Congress took control of the Central government.

Two key developments ultimately helped facilitate the extraordinary expansion of the Court's role in governance in the post-Emergency period. First, increased media attention focused on state repression of human rights and governance failures, and heightened media coverage of early PIL cases in these areas, led to a surge in public interest litigation claims filed with the Court. Second, the Court reinterpreted Article 32 in order to widen standing to expand access of the Court to the poor and marginalized as well as third-party public interest groups, and also expanded its equitable and remedial powers to enable it to assert an enhanced monitoring and oversight function.

66. *See* ANDHYARUJINA, *supra* note 3, at 29–30.

67. 1 MADHU LIMAYE, JANATA PARTY EXPERIMENT: AN INSIDER'S ACCOUNT OF OPPOSITION POLITICS: 1975–1977, at 153–57, 205–15, 295 (1994).

B. The Media and PIL

According to Upendra Baxi, the news media played a critical role in the immediate post-Emergency years by focusing national attention on government lawlessness and repression of human rights. National newspapers, such as the *Indian Express*, published investigative reports on the excesses of the Emergency period. In addition, these papers highlighted atrocities committed by state and local police, the abhorrent condition of prisons, and abuses in the systems of protective custody, such as mental homes for women and children. This shift in media attention "enabled social action groups to elevate what were regarded as petty instances of injustices and tyranny at the local level into national issues, calling attention to the pathology of public and dominant group power." In commenting on the importance of the media in bolstering PIL, Baxi observed:

> All this enhanced the visibility of the court and generated new types of claims for accountability for wielding of judicial power and this deepened the tendency towards judicial populism. Justices of the Supreme Court, notably Justices Krishna Iyer and Bhagwati, began converting much of constitutional litigation into SAL, through a variety of techniques or juristic activism.[68]

During the Janata years, the Court pioneered a new activist jurisprudential regime in the area of fundamental rights that would ultimately provide the substantive doctrinal foundation for the Court's expanded role in governance. As illustrated in Chapter 3, the Court in *Maneka Gandhi* turned away from the more restricted approach to interpretation of the fundamental rights delineated in its earlier decision in *Gopalan v. State of Madras*(1950).[69] In *Maneka*, the Court dramatically broadened the scope of the right to life and liberty in Article 21[70] by effectively reading the concept of due process into that provision, and broadened the scope of rights based scrutiny of government actions under Article 14[71] and the seven "fundamental freedoms" contained in Article 19.[72]

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68. *See* Baxi, *Taking Suffering Seriously*, *infra* note 73, at 114.
69. (1950) S.C.R. 88.
70. INDIA CONST. art. 21 (providing that "[n]o person shall be deprived of life or personal liberty except according to procedure established by law.").
71. INDIA CONST. art. 14 ("Equality before law—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.").
72. INDIA CONST. art. 19 ("Protection of certain rights regarding freedom of speech, etc.—
(1) All citizens shall have the right—
(a) to freedom of speech and expression;
(b) to assembly peaceable and without arms;
(c) to form associations or unions;

PIL was an extension of the legal aid movement that had been launched during the Emergency, from 1975-1976, by Indira Gandhi, and represented a significant component of Indira Gandhi's social-egalitarian Twenty-Point Programme.[73] Supreme Court Justices, V.R. Krishna Iyer and P.N. Bhagwati, both appointees of the Indira Gandhi regime, were both leading advocates in the government for policies and programs expanding legal aid.[74] Both judges helped lead efforts prior to, and during, the Emergency to expand legal aid and access to justice by organizing legal aid camps in villages, encouraging high court justices to adjudicate grievances in villages, and established camps and people's courts.[75]

C. The Expansion of Standing Doctrine

The landmark case that helped solidify the practice of expanded *locus standi* into doctrine was *S.P. Gupta v. Union of India* (*Judges' Case*).[76] The *Judges' Case* was a critical decision in that the Court asserted an expanded view of *locus standi*—standing—in a matter dealing with a challenge to a salient and sensitive area—control over judicial transfers and appointments. In the *Judges' Case*, the Court adjudicated a consolidated group of claims filed by senior advocates challenging the Gandhi Government's assertion of the power to transfer state high court judges without their consent. The government challenged the *locus standi* of the petitioners, arguing that they lacked standing because they did not suffer a legal harm or injury as a result of the transfers, and that only the judges themselves could bring claims.

(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India;
(f) *to acquire, hold, and dispose of private property* [repealed by 44th Amendment]; and
(g) to practice any profession, or to carry on any occupation, trade or business.").

73. Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 1985 THIRD WORLD LEGAL STUD. 107, 113 [hereinafter Baxi, *Taking Suffering Seriously*].

74. *Id.* As Chief Justice of the Gujarat High Court, Bhagwati chaired the state legal aid committee of that state, which issued recommendations for broadening legal aid and access to justice. *See* GOV'T OF GUJARAT, REPORT OF THE LEGAL AID COMMITTEE (1971). Similarly, Justice Krishna Iyer chaired a central government panel that called for restructuring the legal system. *See* Expert Committee on Legal Aid, *Report on Processual Justice to the People*, *in* VIRENDRA KUMAR, 11 COMMITTEES & COMMISSIONS IN INDIA 1971–73, at 195 (1988).

75. *See* Baxi, *Taking Suffering Seriously*, *supra* note 73, at 113–14.

76. S.P. Gupta v. Union of India, (1982) 2 S.C.R. 365.

The Court rejected the government's standing objections, ruling that the advocates had a strong interest in maintaining the independence of the judiciary, and that the challenged transfers dealt directly with the issue of judicial independence. As Justice Bhagwati notes in his opinion:

> The profession of lawyers is an essential and integral part of the judicial system and lawyers may figuratively be described as priests in the temple of justice . . . They are really and truly officers of the court in which they daily sit and practice. They have, therefore a special interest in preserving the integrity and independence of the judicial system and if the integrity or independence of the judiciary is threatened by any act of the State or any public authority, they would naturally be concerned about it, because they are equal partners with the Judges in the administration of filing the writ petition.[77]

The Court thus proceeded to hold that independence of the judiciary is part of the "basic structure" of the Constitution.

In upholding the petitioners' standing to bring the suits, the Court proceeded to lay out a new, expanded conception of standing for PIL claims, based on an activist interpretation of Article 32. The Court took note of earlier exceptions to standing rules under both United States, British, and Indian common law,[78] including Indian case law in which the Court had recognized broadened standing to bring suits against the government for statutory or constitutional failures.[79]

While broadening the standing doctrine and allowing the advocates' claims, the Court's ultimate decision in the *Judges' Case* was quite deferential to the Executive, with five out of the seven justices voting to uphold the primacy of the Executive in matters of judicial transfers and judicial appointments.[80] The majority of the Court, in ruling on the merits of the claims, held that, even though the term "consultation" under Article 124(2) and Article 222(1) required that the Executive consult with at least one Justice of the Supreme Court and of the High Court in addition to the Chief Justice of India, it did not mean that the Executive was required to follow the opinion or advice of these judges.

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77. *Id.* at 533 (Bhagwati, J.).

78. *See id.* at 515, 529 (citing Queen v. Bowman, (1898) 1 QB 663 (holding that any member of the public had right to be heard in opposition to an application for a license); A-G *ex rel.* McWhirter v. Indep. Broad. Auth., (1973) Q.B. 629 ("The McWhirter case") (holding that McWhirter had sufficient interest and standing to bring action against Broadcasting Authority for threatening to show film that did not comply with statutory requirements as television as television viewer).

79. *See, e.g.*, Mun. Council, Ratlam v. Vardhichand, (1981) 1 S.C.R. 97 (holding that local residents had standing under Section 133 of the Code of Criminal Procedure to bring suit against municipality to force them to carry out statutory duty of constructing a drain pipe to carry sewage on a certain road).

80. UPENDRA BAXI, COURAGE, CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES 38 (1985) [hereinafter BAXI, COURAGE, CRAFT AND CONTENTION].

The Court's decision in the *Judges' Case* was thus a classic *Marbury* move in that the Court sought to expand its own jurisdiction by expanding standing for PIL, but gave the government what it wanted by deferring to the supremacy of the Executive in transfers and appointments. Indeed, as Upendra Baxi notes, the Court's decision appeared to be more strategic than motivated by doctrine, in fashioning "a strategy of 'something for everybody'" by giving both the Bar and the government victories.[81] But the key point here is that the Court asserted the doctrine of expanded standing in a matter of high national salience when it had been previously invoked only in matters of lesser importance. The government clearly won the battle. However, the Court arguably won the war for expanded judicial power by establishing and legitimating broadened standing for the Bar and other groups to bring a steady stream of claims against the government in the public interest.

What is groundbreaking about the *Judges' Case* is that it openly and explicitly redefined the role of courts as a mechanism by which individuals could challenge the failures of government in terms of statutory non-enforcement, violations of the Constitution, or breach of public duty. As Justice Bhagwati noted in his opinion:

> We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of the constitutional objective.[82]

The Supreme Court thus assumed a new oversight and accountability function through which it has expanded its power in reviewing the actions of national and state government entities. Justice V.R. Krishna Iyer describes this new function succinctly in his opinion in another early PIL decision, *Fertilizer Corp. Kamgar Union v. Union of India*,[83] observing that law "is a social auditor and this audit function can be put into action only when someone with real public interest ignites this jurisdiction."[84]

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81. *Id.* at 39.
82. *S.P. Gupta*, (1982) 2 S.C.R. at 530–1.
83. Fertilizer Corp. Kamgar Union v. Union of India, A.I.R. 1981 S.C. 344.
84. *S.P. Gupta*, (1982) 2 S.C.R. at 530–31.

D. The Expansion of Equitable and Remedial Powers

From 1977 through the 1980s, the Court dramatically expanded the scope of its equitable and remedial powers in PIL by taking on cases involving government illegality and state repression of human rights.[85] One critical procedural innovation that distinguished PIL from ordinary civil litigation in India involved the scope of the Court's remedial power in such cases. In one of the first PILs, *Hussainara Khatoon v. State of Bihar*,[86] the Court broke new ground in developing the procedural innovation of "continuing mandamus." In *Hussainara*, the Court responded to a writ petition filed by a journalist based on a series of articles published in the *Indian Express* about the problem of undertrials in the state of Bihar and other states. Undertrial prisoners were prisoners who had served extensive pre-trial detention terms in jail because they were unable to afford bail. In many cases, these prisoners had been in jail longer than the actual sentence that would have accompanied a conviction for the crime they were accused of committing.[87] The writ was based on a series of articles in the *Indian Express* documenting the plight of the undertrials in Bihar.[88]

The litigation broke new ground on several fronts. First, the Court allowed Hingorani to bring the habeas petition on behalf of the undertrial prisoners, effectively relaxing the standing requirement.[89] Second, the Court issued relief in the form of orders and directives, without issuing dispositive judgments, in order to retain jurisdiction over the matter. This enabled the Court to monitor the progress of the litigation. In a series of orders, the Court laid down new guidelines for reforming the administration of bail.[90] These new guidelines stipulated that the government was required to inform all undertrials of their entitlement to bail, and that the government would have to release undertrials if their period of incarceration exceeded the maximum possible sentence for the offences for which detainees had been charged.[91] The Court ordered the release of the undertrials that had been mentioned and identified in the news article.[92]

Through the innovation of continuing mandamus developed in *Hussainara*, the Supreme Court in subsequent cases retained jurisdiction

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85. *See* Rajeev Dhavan, *Law as Struggle: Public Interest Litigation in India*, 36 J. INDIAN L. INST. 302 (1994).
86. A.I.R. 1979 S.C. 1360.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. Oliver Mendelsohn, *The Supreme Court as the Most Trusted Public Institution in India*, 23 J.S. ASIAN STUD. 103, 110 (2000).
92. *See* Baxi, *Taking Suffering Seriously*, *supra* note 73.

over public interest litigation matters by issuing orders and directives without issuing final dispositive judgments.[93] Clark Cunningham referred to this procedural innovation as "remedies without rights,"[94] which was invoked in many subsequent governance cases—"*Hussainara* thus set a pattern which the Supreme Court has followed in many public interest cases: immediate and significant interim relief prompted by urgent need expressed in the writ petition with a long deferral of final decision as to factual issues and legal liability."[95] Since 1980, the procedural innovation of continuing mandamus allowed the Court to expand its power by allowing subsequent benches to retain jurisdiction over PIL matters for many years so as to monitor and oversee the implementation of the Court's directives and orders.[96]

1. Epistolary Jurisdiction

During the Janata years, the Court also began loosening standing requirements by treating letters from individuals, journalists, or third parties as legal petitions under Article 32,[97] initiating what Upendra Baxi has termed "epistolary jurisdiction."[98] In *Bandhua Mukti Morcha v. Union of India*[99] (*B.M.M.*), a three-justice bench of the Court consisting of Justice P.N. Bhagwati, R.S. Pathak, and A.S. Sen initiated a PIL in response to a letter petition filed by Swami Agnivesh, the head of a social reform group committed to ending the practice of bonded labor in

93. *Id*.
94. Clark Cunningham, *Public Interest Litigation in the Indian Supreme Court: A Study In Light of the American Experience*, 29 J. INDIAN L. INST. 494, 511–15 (1987).
95. *Id.* at 512.
96. An example of this is the ongoing *Godavarman* "forest bench" case. *See* Godavarman Thirumulkpad v. Union of India, (2008) 8 S.C.R. 152, 154. Although this PIL was first filed in 1995 to address deforestation in one protected forest in South India, the Court has broadened and extended its jurisdiction in this case to effectively take over the day-to-day management and governance of all of India's forests, including issues related to mining and tribal use of forest lands.
97. Article 32 of the Indian Constitution reads:
"Remedies for enforcement of rights conferred by this Part—
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."
98. *See* Baxi, *Taking Suffering Seriously*, *supra* note 73, at 116–18.
99. Bandhua Mukti Morcha v. Union of India, (1984) 2 S.C.R. 67.

India, Bandhua Mukti Morcha. *B.M.M.* was filed as a "letter complaint,"[100] building on the Court's adoption of new epistolary jurisdiction procedures announced in the First Judges' case, in which the Court held that:

> Where the weaker sections of the community are concerned, such as under trial prisoners languishing in jails without a trial, inmates of the Protective Home in Agra, or Harijan workers engaged in road construction in the district of Ajmer, who are living in poverty and destitution, who are barely eking out a miserable existence with their sweat and toil, who are helpless victims of an exploitative society and who do not have easy access to justice, this Court will not insist on a regular writ petition to be filed by the public-spirited individual espousing their cause and seeking relief for them.
>
> This Court will readily respond even to a letter addressed by such individual acting pro bono publico. It is true that there are rules made by this Court prescribing the procedure for moving this Court for relief under Article 32 and they require various formalities to be gone through by a person seeking to approach this Court. But it must not be forgotten that *procedure is but a handmaiden of justice* and the cause of justice can never be allowed to be thwarted by any procedural technicalities . . . . Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing and the problems of the poor are coming to the forefront.[101]

In their letter, B.M.M. alleged that: (1) large numbers of migrant laborers from other states were working in inhumane conditions in stone quarries located in Faridabad (a town outside of Delhi), including toxic dust, the lack of potable drinking water, and other basic amenities; and (2) that many of these workers were "bonded laborers"—which referred to laborers who were forced to work little or nominal wages for an employer because of a debt incurred by the laborer or their ancestors, and relinquished their freedom to work for another employer.[102] The system of bonded labor antedated Indian independence and led the Constituent Assembly to include Article 23 in the Constitution, which outlawed all forms of forced or bonded labor. Unfortunately, the Article was not given effect or implemented until 1976, when the government finally enacted the Bonded Labour System (Abolition) Act, but this legislation was still unsuccessful in eradicating the practice nationwide.[103]

B.M.M. thus sought relief from the Court for *enforcement and implementation* of constitutional provisions and statutory law, in light of the government's failure to reign in the bonded labor system in Faridabad and failure to address the persistence of inhumane working and living conditions in the stone crushing quarries.[104] Specifically, the state of Haryana was alleged to have violated Article 23 of the Bonded

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100. *See id.* at 96.
101. S.P. Gupta v. Union of India, (1982) 2 S.C.R. 365, 520–21.
102. *B.M.M.*, (1984) 2 S.C.R. at 94–96.
103. *Id.* at 91–92.
104. *Id.* at 96.

Labour System (Abolition) Act of 1976, the Mines Act, which provided that all quarry workers were entitled to certain wages and benefits, and the Inter-State Migrant Workmen Act of 1979,which also provided that migrant workers were entitled to a broad range of benefits.[105]

2. Nonadversarial Fact-finding

The Court in *B.M.M.* also broke new ground by adopting non-adversarial fact-finding methods and appointing two advocates and a doctor as commissioners, who were charged with visiting certain quarries to interview and identify bonded laborers and investigate the working and living conditions.[106] The report issued by these three individuals confirmed that many of the quarry workers were bonded laborers and that the working conditions were indeed poor—many workers and their families had tuberculosis because of the dust pollution, were forced to draw and drink water from a dirty river, had inadequate housing, and many children lacked adequate clothing.[107]

The respondent in *B.M.M.*, the State of Haryana who was represented by the Solicitor General of Haryana, and one of the mine owners represented by private counsel, challenged B.M.M.'s standing to bring the suit. In addition, the respondents challenged the Court's power to appoint commissioners, and also argued that the reports of the commissioners and the doctor had no evidentiary value and were inadmissible as they were only based on ex parte statements that had not been subjected to cross-examination.[108]

The Court rejected the respondents' standing objections by affirming that third parties could bring suits in the public interest pursuant to the Court's ruling in the *S.P. Gupta* decision. Justice Bhagwati thus held that "[w]here a person or class of persons to whom legal injury is caused by reason of violation of a fundamental right is unable to approach the court for judicial redress on account of poverty or disability or socially economically disadvantage position, any member of the public acting bona fide can move the court for relief under Article 32."[109]

105. *Id.* at 67.
106. *Id.* at 96, 99.
107. *Id.* at 97.
108. *Id*. at 100.
109. *Id.* at 105.

Moreover, the Court rejected the respondents' objections to the commissioners' reports, as the Court observed that Article 32(1) did not mandate adversarial proceedings for suits brought in enforcement of the fundamental rights, given that the Article stipulates that, "The right to move the Supreme [C]ourt by *appropriate proceedings* for the enforcement of the rights conferred by this Part is guaranteed."[110] Bhagwati noted that the framers of the Indian Constitution, in using the term "appropriate proceedings:"

> . . . [D]eliberately did not lay down any particular form of proceeding for enforcement of a fundamental right nor did they stipulate that such proceeding should conform to any rigid pattern or strait-jacket formula as, for example, in England, because they knew that in a country like India where there is so much of poverty, ignorance, illiteracy, deprivation and exploitation, any insistence on a rigid formula of proceeding for enforcement of a fundamental right would become self-defeating because it would place enforcement of fundamental rights beyond the reach of the common man . . . .[111]

Bhagwati thus held that the Court was free under Article 32 to depart from the "Anglo-Saxon system of jurisprudence" in adopting novel, non-adversarial procedures that included court-led fact finding through appointed commissions.

In terms of motives, the Indian Supreme Court's activism in developing PIL was driven by the social-egalitarian policy values of senior justices of the Indian Supreme Court. In interviews conducted in association with this project, both Justices Bhagwati and Justice Krishna Iyer stated that they were both motivated by aspirational motives—a desire to advance the cause of social justice and human rights—in advancing the PIL regime. Justice Bhagwati stated that he was motivated by a sincere desire to uplift the poor by activating the public interest jurisdiction of the Court after witnessing the extreme poverty of individuals who came to the Gujarat district court during his tenure as Chief Justice of the Gujarat High Court in the 1960s.[112] As a Justice of the Supreme Court, Bhagwati toured the country and held several open meetings, noting:

> I saw stark naked poverty, and the utter helplessness of the people, they came and attended their meetings and looked upon me with awe, but they never tasted the fruits of this whole system of justice—justice was far[,] far removed from them—then I realized that justice I was administering in the courts was hollow justices—never reached the large masses of my own people. . .I realized I needed to address the three As which prevent them from accessing justice—the lack of awareness, lack of availability of machinery, and the lack of assertiveness . . . So I said I must evolve a method by which they can come to court and what was

110. *Id.* at 105–07.
111. *Id.* at 107.
112. *See, e.g.*, Interview with P.N. Bhagwati, Former Supreme Court Chief Justice, New Delhi, India (Jan. 2007).

> preventing them was our whole doctrine of locus standi or standing. Because any NGO or other person could not bring a litigation on their behalf under the system as it then prevailed.[113]

Justice Krishna Iyer also noted that his early efforts to develop PIL were informed by his desire to expand popular access to justice, and by his past experience in the area of prison reform. Krishna Iyer recounted his own past experience as a young lawyer who was thrown into jail (under the existing preventive detention laws) for defending Communists and other dissident groups in the 1950s. Later, as a minister in the Communist state government of Kerala, Krishna Iyer spearheaded prison reform as one of his main goals.[114]

In addition, the Court's activism and assertiveness in early PIL cases was driven by senior Justices' desire to bolster the institutional legitimacy of the Court. The Court thus sought to atone for its acquiescence to the Gandhi regime during the Emergency rule period in the *Shiv Kant Shukla* decision.[115] In *Shiv Kant Shukla*, the Court upheld the regime's suspension of access to the courts by political detainees (through habeas petitions), and thus overturned the actions of several high courts.[116] These high courts had decided to hear several habeas petitions of detainees, notwithstanding the declaration of Emergency rule. Baxi suggests that the Court's activism in PIL was partly "an attempt to refurbish the image of the Court tarnished by a few Emergency decisions and also an attempt to seek new, historical bases of legitimization of judicial power."[117] Baxi observed that during the late 1970s and early 1980s, the Court was "seeking legitimacy from the people and in that sense (loosely) there are elements of populism in what it is now doing."[118]

E. The Expansion of the Governance Role of the Indian Supreme Court

In the post-Emergency era, the Indian Supreme Court dramatically expanded its role in governance. This section analyzes the Court's involvement in three significant issue areas: (1) environmental policy;

113. *Id.*
114. *Id.*
115. BAXI, COURAGE, CRAFT AND CONTENTION, *supra* note 80, at 36–37.
116. *See* A.D.M Jabalpur v. Shukla, (1976) Supp. S.C.R. 172, 175. *See also* Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476, 482 (2003).
117. BAXI, COURAGE, CRAFT AND CONTENTION, *supra* note 80, at 36.
118. BAXI, THE INDIAN SUPREME COURT AND POLITICS, *supra* note 36, at 126.

(2) judicial appointments and administration; and (3) corruption and accountability. It also examines the Court's continued involvement in other areas including education, human rights, affirmative action, and development policy.

1. Environmental Law

In the 1980s, the Indian Supreme Court began adjudicating a wide range of environmental cases, and has continued to play an important role in environmental law. Since the late 1980s, environmental advocates such as M.C. Mehta, described by some as a "One Person Enviro-Legal Brigade," have brought numerous claims that have been heard by the Court, including the *Shriram Oleum Gas Leak Case*,[119] the *Delhi Pollution Case*,[120] the *Taj Mahal Pollution Case*,[121] and the *Delhi Vehicular Pollution and Traffic Regulation Cases*.[122] In these cases, the Court developed a new doctrine of tort law, and also developed and used new remedial powers to enforce existing statutory laws dealing with environmental degradation. For example, in the *Shriram Oleum Gas Leak Case*, the Court adopted the doctrine of strict liability in cases involving industries engaged in hazardous or dangerous activities.[123] The Court has also developed the "polluter pays" principle or doctrine to reign in the deleterious effects of unchecked industrialization in cases involving the discharge of toxic effluents.[124] In another case dealing with pollution caused by tanneries in Tamil Nadu,[125] the Court developed the "precautionary principle" in holding that the state authorities "must anticipate, prevent and attack the causes of environmental degradation" in dealing with pollution to promote sustainable development in harmony with the environment.[126] In addition, the Court has construed the right to life in Article 21 broadly, so as to include the right to clean air and good air in dealing with the carcinogenic effect of diesel exhaust.[127]

The Court has exercised broad remedial powers, closing factories or other commercial plants that are found to be in violation of environmental statutes, and has also developed the practice of maintaining these cases

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119. *See* M.C. Mehta v. Union of India, (1986) 1 S.C.R. 312, 312.
120. *See* M.C. Mehta v. Union of India, (1996) 3 Supp. S.C.R. 49, 56, 77.
121. *See* M.C. Mehta v. Union of India, (1997) 3 S.C.C. 715.
122. *See* Ashok Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, *in* SUPREME BUT NOT INFALLIBLE. *supra* note 11, at 172 nn.92 & 94.
123. M.C. Mehta v. Union of India, (1986) 1 S.C.R. 312 at 337–38.
124. *See* Desai & Muralidhar, *supra* note 122, at 172–73 n.11.
125. Vellore Citizens Welfare Forum v. Union of India, (1996) 5 S.C.C. 647.
126. *See* Desai & Muralidhar, *supra* note 122, at 172 n.100 & 107.
127. *See* M.C. Mehta v. Union of India, (1998) 2 Supp. S.C.R. 24, 24–25.

on the docket to enable monitoring of such cases to ensure compliance.[128] In perhaps one of the most famous pollution cases, the Court, after monitoring the situation for over three years, ordered that 292 industries either switch to natural gas as an industrial fuel or relocate from the Taj Mahal "Trapezium" area.[129] In the Delhi Vehicular Pollution cases, the Court ordered that auto rickshaws, buses and other vehicles convert to Clean Natural Gas to help reduce pollution in Delhi.[130]

As Cunningham observes, beginning in *Hussainara Khatoon* in 1979, in which the Court helped to end the practice of "protective custody" through orders mandating the release of thousands of prisoners in Bihar, the Court in PIL cases has granted relief through interim orders:

> *Hussainara* thus set a pattern which the Supreme Court has followed in many public interest cases: immediate and comprehensive interim relief prompted by urgent need expressed in the writ petition with a long deferral of final decision as to factual issues and legal liabilities . . . . Most recently in the *Shriram Fertilizer Gas Leak* case the court ordered the plant to be closed, set up a victim compensation scheme, and then ordered the plant reopening subject to extensive directions, all within ten weeks of the gas leak, without first deciding whether it had jurisdiction under article 32 to order relief against a private corporation.[131]

Through this use of "continuing mandamus" the Court retains jurisdiction and control over particular matters to monitor and oversee the implementation of its directives and orders.

In environmental and other matters, the Court has often assumed the role of a quasi-administrative agency through the designation of special investigatory or monitoring committees.[132] In dealing with the issue of deforestation, the Supreme Court in the *T.N. Godavarman*[133] cases designated a High-Powered Committee to serve as an investigative, fact-finding arm of the Court and to oversee the implementation of the Court's orders. The Court and the Committee have become intensely involved in the oversight and administration of forests since *Godavarman*, prompting

128. *See id*.
129. M.C. Mehta v. Union of India, (1996) 10 S.C.R. 1060, 1060–61.
130. *See* S.C. Writ Pet. (Civil), M.C. Mehta v. Union of India (Apr. 5, 2002) (No. 13029/1985), *available at* http://www.elaw.org/resources/text.asp?ID=1102. *See also* Armin Rosencranz and Michael Jackson, *The Delhi Pollution Case: The Limits of Judicial Power*, 28 COLUMBIA J. OF ENVTL. LAW 223 (2003).
131. Cunningham, *supra* note 94, at 512.
132. The Court asserted its power to engage in investigative fact-finding and appoint commissions for this purpose in the bonded labor case. *See B.M.M.*, (1984) 2 S.C.R. at 80, 84–85.
133. Godavarman, *supra* note 96, at 154.

one leading scholar to suggest that the Court and this Committee have "virtually become the Ministry of Forests."[134] In *Godavarman* and other PIL cases, the Court has also developed the concept of the writ of "continuing mandamus" to keep a matter pending to allow the Court and its advisory committees to continue monitoring government agencies.[135] As T.R. Andhyarujina has observed, the courts in India today "not only correct unreasonable conduct of the State but lay down norms of reasonable conduct for the State. These rules of conduct and schemes are akin to those made by administrative agencies themselves."[136]

2. Judicial Independence

PIL ultimately proved to be a path to complete judicial independence for the Court. In 1993, the Court in *Supreme Court Advocates-on-Record Assn v. Union of India*[137] (*Second Judges' Case*) again dealt with the issue of the Executive's power of judicial appointments. In response to a PIL filed by a Supreme Court advocate in *Subhash Sharma v. Union of India*, seeking relief in the filling up of vacancies of judges in both the Supreme Court and High Courts, that panel ruled that the "correctness of the majority view in *S.P. Gupta*" should be considered by a larger bench. In the *Second Judges' Case*, the Court ultimately overturned *S.P. Gupta*, holding that the Chief Justice of India (in consultation with a collegium of two senior Justices), not the Executive, had primacy and the final say in judicial appointments and transfers. In reaching its decision, the Court relied on two key rationales.

First, the Court rejected the rationale in *S.P. Gupta* that the Executive should have primacy because it is more accountable to the people as an elected branch, and in an interesting manner, utilized the Court's changed role as a basis for the primacy of the Chief Justice.[138] Writing for the majority, Justice J.S. Verma noted that the notion of executive accountability regarding appointments "is an easily exploded myth, a bubble which vanishes on a mere touch. Accountability of the Executive to the people in the matter of appointments of superior judges has been assumed, and it does not have any real basis," because the Executive does not discuss appointments with Parliament in light of the fact that

134. Armin Rosencranz & Sharachchandra Lele, *Supreme Court and India's Forests*, ECON. & POL. WKLY., Feb. 2, 2008, at 11.

135. *See* Vineet Narain v. Union of India, (1997) 6 Supp. S.C.R. 595, 604 (ordering and monitoring investigation by the Central Bureau of Investigation into the Jain-Hawala political corruption case).

136. *See* ANDHYARUJINA, *supra* note 3, at 34.

137. *Second Judges' Case*, (1993) 2 Supp. S.C.R. at 659.

138. *Id.* at 694.

political parties do not make judicial appointments a key issue in their election manifestos.[139] In contrast, Justice Verma noted that it is the Chief Justice of the Supreme Court and High Courts that are, in practice, more accountable to the Bar in the matter of appointments and proper functioning of the courts, noting:

> On the other hand, in actual practice, the Chief Justice of India and the Chief Justice of the High Court, being responsible for the functioning of the courts, have to face the consequence of any unsuitable appointment which gives rise to criticism leveled by the ever vigilant Bar. That controversy is raised primarily in the courts. Similarly, the Judges of the Supreme Court and the High Courts, whose participation is involved with the Chief Justice in the functioning of the courts, and whose opinion is taken into account in the selection process, bear the consequences and become accountable.[140]

The Court in the *Second Judges' Case* thus recognized an important shift in its institutional function by securing accountability in governance matters, including the administration of the judiciary itself and the Bar's important role as a vigilant "constituency" of the Court.

The second rationale for the Court's holding was based on the recent practice of deferring to the Chief Justices of the Supreme Courts and High Courts by the Executive in the process of appointments and transfers. The Court thus transformed actual practice into doctrine in the *Second Judges' Case*, "locking in" judicial independence through a bold and unprecedented assertion of judicial independence.[141] Through PIL, the Court has continued to assert its independence and control over judicial administration in a series of decisions dealing with state level appointments and administration.[142]

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139. *Id.* at 694–95.
140. *Id.*
141. *See In re* Special Reference No. 1 of 1998, (1998) 2 Supp. S.C.R. 400, 423–25 (the "*Third Judges' Case*") (revisiting its decision in the *Second Judges' Case* to rule that the Chief Justice must consult with a collegium of the four (instead of two) senior-most justices on the Court). *See also* Desai & Muralidhar, *supra* note 122, at 188 n.81.
142. *See* All India Judges Association v. Union of India, (2002) 4 S.C.C. 247 (dealing with pay scales of High Court judges and subordinate judiciary); All India Judges Association v. Union of India, (1994) 4 S.C.C. 727 (issuing directions dealing with the provision of residential accommodation to all judicial officers, libraries, vehicles and recommending the establishment of an All India Judicial Service); All India Judges Association v. Union of India, (1994) 4 S.C.C. 288 (prescribing minimum qualifications for appointment in state courts).

3. Corruption and Accountability

The *Vineet Narain* case is a prototypical example of the Court's assertion of expanded equitable powers in action in the area of corruption and government accountability. In that case, the Court asserted power over the Central Bureau of Investigation (CBI) in light of the CBI's failure to investigate and prosecute several prominent politicians who had been named in the "Jain diaries" discovered by journalist Vineet Narain. Narain helped expose a scam involving the illegal financing of terrorist groups through a series of illicit transactions. Politicians and corrupt bureaucrats were also implicated in the scam. The Court effectively began taking over monitoring and control of the CBI's investigation, noting that, "the continuing inertia of the agencies to even commence a proper investigation could not be tolerated any longer." The Court also observed that since"merely issuance of a mandamus directing the agencies to perform their task would be futile," the Court was compelled to "issue directions from time to time and keep the matter pending requiring the agencies to report the progress of the investigation . . . so that the court retained seisen of the matter till the investigation was completed and the chargesheets were filed in the competent court for being dealt with thereafter, in accordance with law."[143]

The Court invoked Article 32 and Article 142 to issue directives and guidelines which effectively delinked the CBI from political control to ensure it more autonomy. The Court thus invoked the novel equitable power of "continuing mandamus" to assert a continuing jurisdiction over the case, enabling the Court to monitor the CBI:

> There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognised and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role. It is in the discharge of this duty that the IRC was constituted by the Government of India with a view to obtain its recommendations after an in-depth study of the problem in order to implement them by suitable executive directions till proper legislation is enacted. The report of the IRC has been given to the Government of India but because of certain difficulties in the present context, no further action by the executive has been possible. The study having been made by a Committee considered by the Government of India itself as an expert body, it is safe to act on the recommendations of the IRC to formulate the directions of this Court, to the extent they are of assistance."[144]

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143. *See* Desai & Muralidhar, *supra* note 122, at 172; *Vineet Narain*, (1997) 6 S.C.R. at 598, 640–41.

144. *Vineet Narain*, (1997) 6 S.C.R. at 598, 640–41.

The Court dramatically reorganized and altered the structure of the CBI and the Enforcement Directorate, ordering them to directly report to the Court, in light of evidence of political tampering with the investigation. In fact, the Court established a new oversight body—the Central Vigilance Commission—to monitor the CBI. Finally, the Court, in a bold move, invalidated the "single directive" protocol, which required that the CBI receive prior authorization from a government official before proceeding with an investigation against high ranking government officials. Again, the government acquiesced to the Court in this case. The result of the Court's intervention into the CBI's investigation was the filing of 34 chargesheets against 54 persons, including leading cabinet ministers and other government officials. Ultimately, the Congress government of Prime Minister Rao suffered defeat in the elections of May 1996, as a result of the Court's intervention.

4. Other Areas: Education, Human Rights, and Affirmative Action

The Court has continued to build on its expansive rights jurisprudence to recognize new rights and even legislate on key issues. In the *Mohini Jain*[145] and *Unni Krishnan*[146] cases, the Court recognized that the right to education flowed out of the right to life by directly reading the directive principles of social policy into the fundamental rights provisions. In the *Vishaka*[147] decision, the Court held that sexual harassment violated the rights of gender equality and the right to life and liberty under Articles 14, Article 15, and Article 21 of the Constitution, and held that until Parliament adopted a law implementing the Convention on the Elimination of All Forms of Discrimination Against Women (to which India was a signatory), the Court would adopt the guidelines of the Convention and thereby make them enforceable.[148] The Court also recognized that the right to food was part of the right to life in Article 21 and therefore, justiciable in the *P.U.C.L. v. Union of India* litigation. The Court further recognized that the government had a positive duty to help prevent

145. Mohini Jain v. State of Karnataka, (1992) 3 S.C.R. 658, 661, 668–69.
146. Unni Krishnan v. State of Andra Pradesh, (1993) 1 S.C.R. 594, 603.
147. Vishaka v. State of Rajasthan, (1997) 3 Supp. S.C.R. 404, 407, 410.
148. *See* Desai & Muralidhar, *supra* note 122, at 178.

malnutrition and starvation.[149] The Court recently ordered that the Indian government pay 1.4 million rupees to help combat starvation and malnutrition through implementation of the Integrated Child Development Services plan.[150]

In the last two decades, the Court has increasingly taken on difficult and thorny political and policy issues that the central government is either unable or unwilling to resolve. In one of the most controversial decisions in recent memory, the Court in *Indra Sawhney v. Union of India*[151] helped to diffuse and mitigate agitation and strife across Northern India among upper castes following V.P. Singh's decision to implement the recommendations of the Mandal Commission in 1990, which called for 27% reservations for the Other Backward Classes (OBCs) in the civil services. The case was brought as a PIL writ petition by Indra Sawhney, a journalist. The major political parties and the two succeeding governments refused to take positions on the divisive issue, and deferred to the Court to resolve the controversial and complex issue.[152] Ultimately, the Court upheld the validity of the reservations, but also held that these reservations could not exceed fifty percent of the posts available, that there should be no reservations in the area of promotions, and that the creamy layers among the OBCs "should be gradually made ineligible for reservation."[153] In addition to reservations, the Court has also played a greater role in dealing with corruption and political disputes within Parliament, often adjudicating thorny "political questions."[154] PIL thus provides a way for political elites to avoid resolving political "hot potatoes."[155]

One explanation for the dramatic expansion of the Court's role in governance through PIL is bureaucratic failure, corruption, and general unresponsiveness on the part of the government.[156] The Indian judiciary has thus assumed a role that is somewhat similar to the phenomenon of "adversarial legalism" described by Robert Kagan in the United States, though unlike the U.S., the initial push for public interest litigation was

149. People's Union for Civil Liberties v. Union of India, (2007) 1 S.C.C. 728, 728 (ordering state governments and union territories to implement the Integrated Child Development Scheme).

150. People's Union for Civil Liberties v. Union of India, (2007) 1 S.C.C. 719.

151. Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 447, 507, 512.

152. *See* Sathe, *supra* note 9, at 273–74.

153. *Id.* at 423–33, 570–73, 687–703, 720–56, 766–72.

154. *See* ANDHYARUJINA, *supra* note 3, at 36; Raja Ram Pal v. Lok Sabha, (2007) 1 S.C.R. 317 (upholding the Court's expulsion of MPs in cash-for-query scandal and the Court's power to review exercise of parliamentary privileges).

155. *See* Mark A. Graber, *The Non-majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. IN AM. POL. DEV. 35 (1993).

156. *See* ANDHYARUJINA, *supra* note 3, at 36.

initially triggered by the Supreme Court, and not legal advocacy organizations.[157] Through the PIL regime, the Court asserted itself to "push" the government to take action to remedy governance failures, such as the failure to enforce environmental or corruption laws. The Court thus has assumed an "accountability" function that indirectly assists the government by attempting to hold the executive branch accountable to the command of statutory and constitutional law in governance matters.

IV. COMPARING THE TWO "MOMENTS" AND PATHS

A. Moments and Legitimation Strategies

The basic structure decisions, and the development of PIL, each represent two qualitatively different types of moments or paths that have been an important part of the Court's empowerment story. Both represent different legitimization strategies for consolidating and building power. The *Golak Nath* and *Kesavananda* decisions represented a response to the Gandhi government's efforts to limit the Court's ability to review land reform and nationalization laws related to property rights, while the PIL regime was motivated both by key justices' own social-egalitarian worldviews and values, and by the justices' desire to regain legitimacy lost during the emergency "by widening the scope of judicial power in quite a socially visible manner."[158]

However, each strategy or approach is fraught with different types of risk. The risk associated with an aggressive "constitutional entrenchment" strategy such as the assertion of the power to invalidate constitutional amendments in the basic structure decisions is the possibility of non-compliance or outright retaliation. The Court triggered direct backlash in response to its basic structure decisions, as the Gandhi regime ultimately attacked the Court through the appointment process, and curbed judicial power following the declaration of Emergency rule in 1975. The PIL-judicialization of governance strategy also carries some risk in that it might lead the government to reign in the Court where it intervenes in politically sensitive matters. In fact, in April of 2007, Prime Minister Manmohan Singh was highly critical of the Court in his remarks at a conference of Chief Ministers and High Court Chief

157. *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (2001).
158. *See* BAXI, THE INDIAN SUPREME COURT AND POLITICS, *supra* note 36, at 124.

Justices, noting that the Court has been overreaching into the domain of the other branches.[159] And Justice Katju's critique on the Court's expanded role PIL also reflects increasing levels of concern within the Court itself, and among jurists and lawyers, about the Court's activism and expanded role in governance.

But the PIL strategy also allows courts to act strategically in expanding their roles in governance and policymaking through the gradual and incremental process of case-by-case dispute resolution, by occasionally accommodating the political interests or agenda of political elites, and while simultaneously broadening jurisdiction and its own remedial powers. Additionally, the PIL movement has the added advantage of broadening the Court's base of support beyond its earlier base of elite claimants, and an "inertial" path-dependency effect whereby the Court becomes "embedded" in many aspects of governance and problem-solving, making the Court indispensable to ruling elites and elites dependent on the Court. It thus becomes increasingly difficult to attack a Court that has become a significant institution of governance, and one that secures accountability from the Executive and Administrative branches.

B. Toward a Typology of Judicial Moments and Functions

1. The Basic Structure Doctrine and Constitutional Entrenchment Moments

The assertion of the basic structure doctrine in India represented an exemplar of what I refer to as a "constitutional entrenchment" moment. The Court's basic structure decisions in *Kesavananada* and later cases illustrate how courts may assert limits on governments to prevent them from amending the Constitution in a way that violates certain entrenched constitutional norms or principles. The Indian Court's basic structure decisions solidified the Court's "super" anti-majoritarian function in imposing limits on the abilities of majorities to do violence to the core principles underlying the Indian Constitution.

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159. Manmohan Singh, Prime Minister, Administration of Justice on Fast Track, Speech Delivered at the Conference of Chief Ministers of States and Chief Justices of High Courts (April 8, 2007), *in* (2007) 4 S.C.C. J-9, J-12 (observing that, "At the same time, the dividing line between judicial activism and judicial overreach is a thin one. As an example, compelling action by authorities of the State through the power of mandamus is an inherent power vested in the judiciary. However, substituting mandamus with a takeover of the functions of another organ may, at times, become a case of overreach. . . [s]o is the case with public interest litigation. PILs have great utility in initiating corrective action. At the same time, PILs cannot become vehicles for settling political or other scores. We need standards and benchmarks for screening PILs so that only genuine PILs with a justiciable cause of action based on judicially manageable standards are taken up.").

It should be noted that my conceptualization of a constitutional entrenchment moment is distinct from Bruce Ackerman's conception of a "constitutional moment".[160] For Ackerman, a constitutional moment describes a process by which constitutional change is achieved outside the formal channels of the amendment process, yet avoids the problem of revolutionary legitimacy that taints periods of constitutional revolution and change that violate the norm of legality.[161] Constitutional moments for Ackerman thus consist of exceptional periods in which "higher lawmaking" is driven by transformative political movements that ultimately and permanently alter the constitutional framework by pushing for constitutional reform that is ratified by subsequent elections, and ultimately codified in judicial decisions.[162]

In contrast to Ackerman's conception of a constitutional moment, constitutional entrenchment moments differ in that they involve court-led processes to either entrench or redefine constitutional frameworks. I suggest that there are two types of constitutional entrenchment moments in the literature on comparative law: "protective entrenchment" and "constitutive entrenchment" moments. In protective entrenchment moments, courts assert themselves by "pressing the brakes" against efforts by political majorities to make dramatic changes to the core substantive commitments and guarantees embodied in a nation's constitution. The assertion of the basic structure doctrine in India fits this typology.

The U.S. Supreme Court's decision in the *Slaughter-House Cases* is another example of a protective entrenchment moment. In contrast, constitutive entrenchment moments describe judicial decisions in which high courts entrench ordinary laws or rights provisions into constitutional norms or law, effectively creating new constitutional provisions. The

160. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3, 8–16, 33–57 (1991). It should also be noted here that Jack Balkin and Sanford Levinson have advanced a model of constitutional change that is distinct from Ackerman's model. Balkin and Levinson have argued that constitutional change and transformation is driven by a process of "partisan entrenchment." According to this model, the party regime in control of the Presidency and executive branch in the United States effectuates constitutional change through the appointment of judges to the federal courts who share the partisan or policy values and goals of the President's party. These judges then help advance the partisan or policy agenda of the party through judicial decisions. *See* Jack M. Balkin and Sanford, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066 (2001).

161. *See* Sujit Choudhry, *Ackerman's Higher Lawmaking in Comparative Constitutional Context*, 6 INT'L J. CONST. L. 193, 205–07 (2008) (citing ACKERMAN, *supra* note 160, at 16).

162. ACKERMAN, *supra* note 160, at 14.

Israeli Supreme Court's decision in the *Bank Hamizrachi* [163] case is an example of this latter type of entrenchment.

a. The United States: The Slaughter-House Cases—Protective Entrenchment

The *Slaughter-House Cases*[164] involved a challenge by New Orleans butchers against a Louisiana state law granting a livestock and slaughter-house company a monopoly in New Orleans. The butchers argued that the state law interfered with their ability to practice their trade and vocation, and thus violated the Thirteenth and Fourteenth Amendments. The U.S. Supreme Court was faced with the critical task of interpreting the scope and meaning of the post-Civil War amendments, including the Fourteenth Amendment. In ruling against the petitioners, the U.S. Supreme Court in *Slaughter-House* interpreted the Fourteenth Amendment narrowly, and refused to recognize broad privileges and immunities at the national level (while noting that state privileges and immunities were more extensive and broad), because doing so would entail a radical restructuring of the original design of federalism as set forth by the framers in the Constitution.

Given the lack of clear textual support for such a reading, the Court narrowly construed national privileges and immunities in light of original and historical intent. Justice Miller's opinion, in laying out the argument for a narrow reading of the privileges and immunities clause of the Fourteenth Amendment, seems to embody shades of the type of basic structure doctrine set forth in *Kesavananda*:

> But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.[165]

The obvious difference between the *Slaughter-House Cases* and *Kesavananda*, is that while the former dealt with federalism and the scope of individual rights, the latter purported to articulate a much broader conception of a basic structure doctrine with significant implications for

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163. CA 6821/93 United Mizrachi Bank v. Migdal. Agric. Coop. 49(4) PD 221 [1995] (Isr.).
164. *See* Slaughter-House Cases, 83 U.S. 36, 36 (1872).
165. *Id.* at 78.

the separation of powers. Additionally, the *Slaughter-House* court did not invalidate the Fourteenth Amendment, though in construing the Amendment narrowly, the decision, in the words of Justice Swayne's dissent, "turned what was meant for bread into stone."[166] Another key difference that illustrates that there is likely broad variation in constitutional entrenchment moments is that the *Slaughter-House* Cases were largely rights-diminishing decisions, while *Kesavananda* laid the foundation for the protection of the fundamental rights provisions. Ultimately, Justice Chandrachud in the *Minerva Mills* decision ruled that the fundamental rights protections in Article 14, Article 19, and Article 21 of the Indian Constitution, which dealt with equality, the seven freedoms, due process, life and liberty, respectively, formed a "golden triangle" that was basic to the Indian Constitution, along with the Directive Principles of State Policy decision in *Minerva Mills*.

b. Israel: The Bank Hamizrachi Case— Constitutive Entrenchment

Another example of constitutional entrenchment can be found in the Israeli Supreme Court's decision in the *Bank Hamizrachi* case, in which an eight judge majority led by Justices Barak and Justice Shamgar (with one dissenting vote) asserted the power to review ordinary legislation for conformity with the new Basic Laws, which effectively entrenched all of Israel's Basic Laws, and transformed Israel's unwritten constitution to a written one.[167] As Reichmann illustrates, the Israeli Court in *Hamizrachi* adjudicated a challenge to a law enacted to provide relief to the moshavim (agricultural settlements with some degree of collective ownership) in the settling of claims with creditors. While Justice Barak and the majority of the Court ultimately entrenched the Basic Laws to give them constitutional status, the Court upheld the moshavim relief law on procedural grounds, given that the law met the requirements of the "limitation clause" of the Basic Law: Human Dignity and Liberty, which

166. *Id*. at 129.

167. *See* Amnon Reichman, Jumpstarting a Constitution, Or the Power and Limits of Legacy, The Israeli Constitutional Revolution as a Tale of Law and Politics (Nov. 15, 2007) (unpublished manuscript) (presented at the Andrew W. Mellon Sawyer Seminar, The Dilemmas of Judicial Power in Comparative Perspective, Center for the Study of Law and Society) (on file with author).

allowed for laws limiting the rights therein that were enacted for a "proper purpose."[168]

Unlike the decisions in *Kesavananda* and the *Slaughter-House Cases*, the *Hamizrachi* decision did not reject efforts by a political regime to trigger constitutional change. Instead, the Israeli Court entrenched the Basic Laws enacted by a prior political regime into a new constitutional framework. Ran Hirschl argues that the 1992 constitutional revolution in Israel that brought about the enactment of the Basic Laws was driven by a coalition of secular political, business, and legal elites who sought to entrench protections for property and individual rights.[169] As the power of these groups began to diminish, they sought to affect a transfer of power to the judiciary through the entrenchment of these rights.

2. Public Interest Litigation and the Judicialization of Governance

PIL has been aggressively utilized by the Indian Court to reign in government agencies or bodies that either tolerate, or even violate themselves, the violation of constitutional rights provisions, or fail to enforce and implement both statutory and constitutionally mandated policies. The Court has thus gradually gained power as it has become increasingly involved in monitoring, overseeing, and even directing government activity in matters of environmental policy, land planning, development, education, affirmative action, health care, and other areas.

The Court's power and role in governance has dramatically increased over time through an iterative process in which an increasing number of public interest groups, and public-minded individuals and advocates, have taken advantage of loosened standing to challenge governance failures across a wide range of policy domains. In this sense, PIL has enabled the Court to gradually accrete power in a cyclical, path-dependent "chakra" that is similar to Stone Sweet's analysis of the empowerment of the French Constitutional Council from 1974 onward.[170]

In fact, as Stone Sweet illustrates, the judicialization of governance in France was facilitated by complementary constitutional entrenchment *and* judicialization of governance moments. In 1971, the Council effectively entrenched and incorporated a new bill of rights in invalidating, for the

168. *Id.* at 12.

169. Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71, 89–90 (2004).

170. ALEC STONE SWEET, *Constitutional Politics in France and Germany*, *in* ON LAW, POLITICS, & JUDICIALIZATION 184–207 (Martin Shapiro & Alec Stone Sweet ed., 2002).

first time, a piece of legislation.[171] And in 1974, the Constitution was amended to enable any sixty senators or deputies to refer a piece of proposed legislation to the Council.[172] As a result, the Council's caseload dramatically increased and consisted mostly of opposition references challenging the majority government.[173] Stone Sweet argues that the entrenchment of rights and expansion of standing created a steady stream of referrals that "produced a self-sustaining process of judicialization."[174] These referrals facilitated the construction of a new body of constitutional law "to justify annulment in terms of an authoritative interpretation of constitutional rules," which in turn "provoked more referrals" from opposition parties.[175]

The expansion of standing helped facilitate a similar process of judicialization in India, although the Indian Court's role expansion was largely driven by the government's failures to enforce existing statutory law, and by governance failures. By broadening standing doctrine to invite a broad array of public interest governance claims in the late 1970s and early 1980s, the Indian Court was able to transform itself from an institution that adjudicated the claims of landed and upper class elites, to dealing with a much broader array of claims from new public interest groups and actors challenging the government and private actors across a wide array of policy and issue domains. This phenomenon was aided by the lack of responsible government and by corruption and bureaucratic failures that further increased the demand for judicial intervention and oversight of administrative bodies.[176] Over time, the Court's expanded role in adjudicating these claims resulted in the creation of a new corpus of constitutional rights and equitable remedies that ultimately solidified the Court's own power, and enabled it to assert limits on the government's power in controversial areas like affirmative action.[177]

However, as Pratap Bhanu Mehta observed, it is not entirely clear whether this iterative cycle has actually created a stable body of law that

171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *See* KAGAN, *supra* note 157.
177. *See* ALEC STONE SWEET, *Judicialization and the Construction of Governance*, *in* ON LAW, POLITICS, & JUDICIALIZATION, *supra* note 168, at 69–71, 78–82.

generates predictable results in all areas.[178] Instead, Mehta suggests that the Court's excessive interventions through PIL have prompted critiques that the Court's decisions are too arbitrary, or too pragmatic, and not guided by predictable standards from both outside and even from within the Court (as evidenced by the *Aravali Golf Club* decision.)[179] This is supported by Cunningham's analysis of the Court's practice of creating ad hoc "remedies without rights" through interim orders.[180] The Indian Court's expanded role as an institution of governance suggests an important insight—that courts may be less constrained by legal doctrine and precedent, and more constrained by policy/political factors, in adjudicating governance disputes than ordinary claims.

Still, what is clear is that through PIL, the Court has altered accountability norms and administrative structures through the creation of investigative bodies and oversight commissions that have supplanted the role of ministries. As the Court has become more "embedded" as a political actor through the judicialization of governance, it has become more difficult for the government to reign in the Court, though as Justice Katju and Mathur's decision indicates, the judiciary runs the risk of political backlash where its decisions start appearing as though they are entirely driven by policy or other non-legal considerations.

V. REVISITING MADISON'S DILEMMA: LIMITED GOVERNMENT, EFFECTIVE GOVERNANCE

In a sense, constitutional entrenchment and the judicialization of governance represent judicial responses to the twin threats of tyranny and the total breakdown of governance in a polity. James Madison identified these two threats to constitutional democracy in *Federalist 51*, in which he wrote: "In framing a government which is to be administered by men over men, the great difficulty lies in this: *you must first enable the government to control the governed; and in the next place oblige it to control itself*."[181]

178. Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. DEMOCRACY 70, 72, 80–82 (2007) (observing that: "The second irony is that even as the Supreme Court has established itself as a forum for resolving public-policy problems, the principles informing its actions have become less clear. To the extent that the rule of law means making available a forum for appeals, one can argue that the Court has done a decent job. To the extent that the rule of law means articulating a coherent public philosophy that produces predictable results, the Court's interventions look less impressive.").

179. *See id.*

180. *See* Cunningham, *supra* note 94.

181. THE FEDERALIST NO. 51 (James Madison).

A. The Credible Commitments Problem

Constitutional entrenchment moments reflect efforts by courts to force political regimes to honor the original "credible commitments"[182] made in the original constitutional framework. As North and Weingast argue, it is in the interest of sovereign political regimes to limit their own power through the entrenchment of rights in order to make credible their commitment to lenders, investors, and citizens.[183] In enacting constitutions that establish independent judiciaries with judicial review, Daniel Farber observed that political regimes send a "signal" to private capital, as well as to the citizenry, of their commitment to protecting basic economic rights and individual freedoms.[184] By imposing limits on its own powers, political regimes secure increased levels of capital investment and greater levels of participation and compliance from citizens.[185] In contrast, regimes that fail to impose limits on their own power can face financial ruin and even revolution.[186]

Although it may be in their interest to honor those original credible commitments laid out in written constitutions, political regimes in different polities have often *failed* at honoring many of these commitments, often as a result of immediate fiscal pressures or shortfalls.[187] In other instances, political regimes have turned away from commitments that were deemed to be flawed or inherently undemocratic or unjust. In the context of constitutional entrenchment moments, then, I suggest that there are two critical dynamics that have often led to credible commitment failures or movements to turn away from original commitments in constitutional democracies: (1) the existence of *competing* commitments, often expressed in conflicting provisions of a constitution; and (2) the emergence of transformative social or political movements that seek to

182. *See* Douglas C. North & Barry Weingast, *Constitutions and Commitments: The Evolution of Public Institutions Governing Public Choice in Seventeenth Century*, 49 J. ECON. HIST. 803 (1989), *reprinted in* THE ORIGINS OF LIBERTY: POLITICAL AND ECONOMIC LIBERALIZATION IN THE MODERN WORLD 16, 17, 43–47 (Paul W. Drake & Mathew D. McCubbins eds., 1998).

183. *See* David S. Law, *The Paradox of Omnipotence: Courts, Constitutions, and Commitments*, 40 GA. L. REV. 407, 411 (2006) (citing ORIGINS OF LIBERTY, *supra* note 178, at 20–21).

184. *See* Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 103–16 (2002).

185. *Id.*

186. ORIGINS OF LIBERTY, *supra* note 182, at 20–21.

187. Law, *supra* note 193, at 415 n.6 (citing ORIGINS OF LIBERTY, *supra* note 182, at 16, 20–21).

ameliorate core failings in the original commitments enshrined in constitutions, such as a state of political or social inequality.

1. Competing Commitments

Like many world constitutions, the Indian Constitution embodies *competing* commitments to different goals and values. The Constituent Assembly, in framing the Indian Constitution, was thus faced with the daunting task of constructing a constitution that could lay a foundation for ameliorating systemic caste-based and economic inequality, while providing basic protections for economic rights and civil liberties and freedoms. The Indian Constitution sought to balance the Nehruvian aspirational vision of an egalitarian society contained in the Directive Principles of Social Policy, against the Fundamental Rights, a set of negative rights or limits on government power.[188] The former articulated the "humanitarian socialist precepts" at the heart of "the Indian social revolution," though these principles were originally designated as non-justiciable.[189] The Fundamental Rights, in contrast, set forth explicit, justiciable negative rights, and was modeled in great part on the American Bill of Rights.[190]

Gary Jacobsohn highlighted the transformative, yet conflicted nature of the Indian Constitution, when he wrote that "the Indian Constitution, while by no means free of internal tension, is committed to a specific sociopolitical agenda involving major reform of an essentially feudal society."[191] In analyzing this unique "disharmonic political" context in India, Jacobsohn alludes to the potential for crisis embedded within this constitutional framework—that political regimes may inevitably elevate one group of competing commitments over the other, even at the risk of undermining the original framework. And this potential was realized during Gandhi's attempts to curb judicial review in her attempts to enact and fully implement her government's agenda of land reform. Thus, the Gandhi regime ultimately justified subordinating the fundamental rights, and ultimately the Constitution's provision for judicial review in order to enact policies that it deemed essential to fulfilling the promise of the social-egalitarian aspirations of the directive principles. The Indian Court in *Kesavananda,* and later *Minerva Mills* and *Waman Rao*, asserted the basic structure doctrine in order to re-establish some type of equilibrium

188. *See* GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 50–83 (1966).
189. *Id.* at 75.
190. *Id.* at 55.
191. Gary Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763, 1768 (2004).

and balance between the directive principles and fundamental rights that had been endangered by the Gandhi regime.

Two additional examples of the problem of competing commitments involve federalism in India and the United States. In India, the rise of the Hindu right forced the Indian Court to adjudicate a federalism dispute in the *Bommai* case. But in *Bommai*, the Indian Court invoked the basic structure doctrine in holding that the central government could invoke its emergency powers to suspend state governments that had failed to safeguard and protect secularism. In essence, the Court held that federalism could be subordinated to another competing commitment—secularism. In adjudicating the scope of the Equal Protection Clause, and the Privileges of Immunities Clause of the United States Constitution, the United States Supreme Court in the *Slaughter-House Cases* was forced to reconcile another set of competing commitments—strong federal protection of equality and citizenship-based substantive rights, and a core structural commitment to a federal system of government.

2. Transformative Political and Social Movements

A second threat to credible commitments in the original constitutional framework of polity can come from transformative social or political movements that seek to ameliorate core defects in the framework, such as social or political inequality. The enactment of the Fourteenth Amendment to the Constitution of the United States marked the culmination of one phase of an ongoing struggle to confront slavery and the foundational problem of social and political inequality in American society. This is consistent with Ackerman's conception of a "constitutional moment," in which social or political movements lead to changes in the core commitments enshrined in constitutions.

B. The Judicialization of Governance and the Legitimacy of Courts

Although policing the limits of government power is a vital function of courts, as Madison observed, the primary concern of a government must be to ensure that it can control the governed, or put another way, to ensure that it can govern effectively. As demonstrated in this article, and in previous scholarship, courts can play a valuable role in the monitoring and oversight of the implementation of enacted statutes and policies. As David Law observes, courts can also play a vital function in coordinating

public behavior in the policing of government behavior.[192] This expanded role in governance has significant implications for the legitimacy of courts as institutions.

In enhancing accountability and expanded opportunities for participation in governance, I suggest here that judicialization of governance moments, on balance, provides a superior vehicle for bolstering the legitimacy of courts than constitutional entrenchment moments. Judicialization allows courts to act strategically in expanding their role in governance and policymaking through the gradual and incremental process of case-by-case dispute resolution, by occasionally accommodating the political interests or agenda of political elites, while simultaneously broadening jurisdiction and its own remedial powers. Additionally, as the Indian case demonstrates, judicialization of governance can broaden a court's base of support beyond its earlier base of elite claimants. Through an iterative process, judicialization produces an "inertial" path-dependency effect whereby the Court becomes "embedded" in many aspects of governance and problem-solving, making the Court indispensable to ruling elites, and elites dependent on the Court. As a result, the Court also builds popular support nationally as it enhances its credibility as an institution. It thus becomes increasingly difficult to attack a Court that has become a significant institution of governance, and one that secures accountability from the Executive and Administrative branches.

This article illustrates that it is in the realm of governance that courts can play their most significant role. In India, France, and the United States, courts have helped bolster the legitimacy and stability of political regimes by providing an alternative forum and mechanism through which individuals, civil society and public interest groups, and others can seek to ameliorate government illegality and governance failures. In a sense, by enhancing governance, courts also force regimes to keep their credible commitments to basic fundamental rights, and can, in the long run, aid regimes in securing investment, citizen participation, and overall compliance. By playing a critical role in promoting accountability and effectiveness in governance, courts can play an indispensable role in maintaining political and social stability, and protecting democracy. Where political or structural fragmentation, or corruption and graft, undermine the ability of governments to perform even the most basic of functions, this paper suggests that governance concerns must necessarily trump concerns about constitutional change, though systemic governance failures may eventually trigger constitutional transformation.

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192. *See* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L. REV. 723 (2009).

VI. CONCLUSION: REFLECTIONS ON JUDICIAL POWER IN INDIA

The history of the empowerment of the Indian Supreme Court offers important insights about the relative importance of constitutional entrenchment and the judicialization of governance, especially in light of the ubiquitous nature of these moments. While the basic structure doctrine is critical in that it allowed the Indian Court to set limits on the power of the Indian government to recast the Constitution to circumvent judicial decisions, this paper suggests that the Court's decision in *The First Judges' Case* and other early PIL decisions, represented the "moment that mattered" when examining the enormous expansion of the Court's role in governance today. Justice Katju and Justice Mathur's critique of PIL in the *Aravali Golf Club Case* of December 2007, highlights the expansion of the Court's role and the judicialization of governance that was triggered by the PIL revolution, as well as the existence of conflicting role conceptions among justices of the Court today about the Court's present role and status as an institution of governance.

While the *Aravali Golf Club* case has no doubt ignited a renewed debate about the expansion of the Court's governance role, it seems unlikely that the frustrations of two justices on a smaller panel will be able to wholly reverse or undo the development of PIL. In a recent and appropriately entitled article, *It is Too Late to Put a Lid on PILs*, leading scholar and Senior Advocate, Rajeev Dhavan, issued a compelling rejoinder to the critique of PIL in the decision:

> Justice Katju's broadside attack is on PIL cases of schooling, drinking water, beds in hospitals on public land, misuses of ambulances, creating a world class burns board, Delhi air pollution, begging in subways, CNG buses, legality of constructions in Delhi, size of speed breakers, overcharging by autorickshaws and so on. He feels these trespass into executive policy . . . . What is a matter of worry is that Justice Katju has called into question the entire human rights and social justice jurisprudence evolved by the Supreme Court over the last 30 years . . . . Justice Katju fails to distinguish between "judicial activism" (which is permissible) and "judicial excessivism" (which is not). Judicial activism is inevitable. India has a forward- looking activist Constitution to impart human rights and social justice for all. Judges cannot shy away from fulfilling this dream for all people by inventing new legal techniques to ensure it. Without these techniques, the Constitution would become supine.[193]

193. Rajeev Dhavan, *It is Too Late in the Day to Put a Lid on PIL*, MAIL TODAY (India), Dec. 17, 2007, at 10.

Dhavan here captures the true importance of the PIL revolution in the development of the Indian Supreme Court since the post-Emergency era, and indeed offers guidance in adjudicating between the relative importance of the two transformative "moments" explored in this paper.

Judicialization of governance worldwide highlight a dynamic source of judicial power in a polity such as India—a broadened constituency of public interest litigant groups that have helped to make the Indian Court a relevant institution in the center of the governance "chakra." More than thirty years after the end of Emergency rule, the Indian Court has resurrected and reinvented itself as an independent and active judiciary, one that has now embedded itself in almost every facet of governance imaginable. Building on its first major governance decision in the *Judges' Case*, the Court through PIL recast itself as a champion of the rule of law, and in the process, emerged as a powerful institution of governance.