Judicial Activism: The Indian Experience*

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I. HISTORICAL AND THEORETICAL BACKGROUND

Judicial activism has become a subject of controversy in India.[1] Recent and past attempts to hinder the power of the courts, as well as access to the courts, included indirect methods of disciplining the judiciary, such as supersession of the judges[2] and transfers of inconvenient judges.[3] Critics of judicial activism say that the courts usurp functions allotted to the other organs of government. On the other hand, defenders of judicial activism assert that the courts merely perform their legitimate function. According to Mr. Justice A. H. Ahmadi, the former Chief Justice of India, judicial activism is a necessary adjunct of the judicial function because the protection of public interest, as opposed to private interest, is the main concern.[4]

Courts cannot interpret a statute, much less a constitution, in a mechanistic manner. In the case of a statute, a court must determine the actual intent of the authors. In the case of a constitution, a court must sustain the constitution's relevance to changing social,

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1. S.P. Sathe, *Curbson the PIL: Evil Designs of the UF Government*, ECON. & POL. WKLY., Vol. XXXII Mar. 1, 1997, at 441.

2. JUDICIARY MADE TO MEASURE (N.A. Palkhivala ed., M.R. Pai 1973).

3. *See* India v. Sankalchand, A.I.R. 1977 S.C. 2328; *see generally* H.M. SEERVAI, THE EMERGENCY, FUTURE SAFEGUARDS AND THE HABEAS CORPUS CASE 119-29 (N.M. Tripathi ed., 1978).

4. A.M. Ahmadi, *Judicial Process: Social Legitimacy and Institutional Viability*, 4 S.C.C. J. v.1, 1-10 (1996).

economic, and political scenarios. In the words of Justice Benjamin Cardozo, a court must give to the words of a constitution "a continuity of life and expression."[5] An apex court, besides deciding the law that binds all courts subordinate to it,[6] also must make "vocal and audible" the ideals that otherwise might remain silent.[7] The original intentions of the founding fathers do not bind a constitutional court. Rather, the court is free to interpret the constitution in terms of what the framers would have intended under the circumstances that exist at the time of such interpretation. In the absence of such judicial activism, a constitution would become stultified and devoid of the inner strength necessary to survive and provide normative order for the changing times.

People's understanding of judicial activism depends on their conception of the proper role of a constitutional court in a democracy. Those who conceive the role of a constitutional court narrowly, as restricted to mere application of the pre-existing legal rules to the given situation, tend to equate even a liberal or dynamic interpretation of a statute with activism. Those who conceive a wider role for a constitutional court, expecting it to both provide meaning to various open textured expressions in a written constitution and apply new meaning as required by the changing times, usually consider judicial activism not as an aberration, but as a normal judicial function.

A. Judicial Process: Nature

We must first understand the nature of the judicial function in general, and of judicial review in particular. Austinian jurisprudence gives a very narrow view of the judicial function. Austin defined law as a command of the political sovereign with indivisible and absolute sovereignty, allowing only the legislature to make law. The function of the courts was restricted to declaring the pre-existing law or interpreting the statutory law. The English courts created the entire common law, but the common law is posited on the myth that the

5. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 92-94 (1927).
6. INDIA CONST. art. 141.
7. *See, e.g.*, CARDOZO, *supra* note 5.

judges merely found the law. Despite such a self-negating perception of their own role, the English judges not only made the law, but also changed it to suit the entirely new conditions created by the industrial revolution. *Rylands v. Fletcher*[8] and *Donoghue v. Stevenson*[9] are two common law examples of judicial law making. In these cases the English courts extended the common law concept of negligence, that had essentially evolved in an agricultural society, to meet the needs of an emerging industrial society. The judges, however, sustained the myth that they did not create any law.

In England, judicial review of administrative action existed, but the courts did not have the power to review the acts of Parliament, because Parliament was supreme. Professor Dicey's theory of Parliamentary sovereignty[10] represents an English constitutional incarnation of Austin's theory of sovereignty. The low profile of the judicial role in England was consistent with the theory of Parliamentary sovereignty. However, underneath the self-negation lay the creative effort of the courts to protect individual liberty and strengthen the rule of law. England has a long history of resistance to a written bill of rights because the English people are raised with the faith that the liberty of the subject is sacrosanct and the courts will allow its infraction only if supported by a provision of law. The following celebrated quote from Lord Atkin demonstrates such faith. The learned judge said: "In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice."[11]

The English people felt quite secure with an omnipotent Parliament because they had full faith in the strength of their democracy. Over the years, however, even in England, Parliamentary sovereignty has eroded considerably in practice as well as in law. For example, England has joined the European Convention on Human Rights and has accepted the jurisdiction of the European Court on

8. Rylands v. Fletcher, 1861-73 Eng. Rep. 1 (H.L. 1868).
9. Donoghue v. Stevenson, A.C. 562 (1932).
10. *See, e.g.*, ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1952).
11. Eshugbayi v. Govt. of Nigeria, 1931 A.C. 662 (appeal taken from Nigeria) (1931) All. E.R. 44, 49.

Human Rights. Further, the English courts have also recently held that a European Community law prevails over an act of the British Parliament.[12]

Judicial review entails scrutiny by the courts of the acts of other government organs to ensure that they act within the limits of the constitution. Judicial review exists not only in England, but in Canada, Australia, South Africa, New Zealand, Srilanka, Pakistan and Bangla Desh. Judicial review originated in England when the courts reviewed the acts of the executive to ensure they were within the limits of the statutes enacted by Parliament. The fundamental principles of individual liberty emerged from the decisions of the courts. The English courts did not hold the acts of Parliament invalid; however, in the British colonies, judicial review of legislative acts has always been in vogue. Colonial legislatures, unlike the British Parliament, were not supreme and their powers were circumscribed by the provisions of the constituent acts enacted by the British Parliament. The courts in India, therefore, began exercising judicial review of legislative acts with the first act of British Parliament in 1858. In *Empress* v. *Burah and BookBook Singh*, the Calcutta High Court enunciated the principle of judicial review:

> The theory of every government with a written Constitution forming the fundamental and paramount law of the nation must be that an Act of legislature repugnant to the Constitution is void; if void, it cannot bind the courts, and oblige them to give effect; for this would be to overthrow in fact what was established in theory and make that operative in law which was not law. [13]

When a court interprets a statutory provision it tries to give effect to the intention of the legislature. Because the legislature is supposed to express itself through the language of the statute, the court adopts an interpretation giving effect to the language. Nevertheless, language and words are not entirely unambiguous. Words have

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12. Regina v. Secretary of State for Transport, ex. parte Facortame, 1991 A.C. 603. *See* Sir William Wade, *Sovereignty-Revolution or Evolution?,* 112 L.Q. REV. 568 (1996); *see also* John Eekelaar, Note, 113 L.Q. REV. 185, 185-87 (1997).

13. Empress v. Burah and Book Singh, I.L.R. 3 (Cal.) 63, 87-88.

different meanings and sometimes the concepts behind the statutory language require interpretation. This may involve liberal interpretation or one of the more plausible methods of interpretation. When a judge interprets a constitution, which is an organic law, the scope of choice is much wider. A constitution often contains open textured and conceptual expressions. A court giving meaning to expressions such as "equality before the law and equal protection of law," "freedom of speech and expression," or "interstate trade and commerce" discourses on political philosophy; but, unlike philosophers, judges are constrained by the practical limits of the need to operationalize their philosophy. Judges participating in judicial review of legislative action should be creative and not mechanistic in their interpretations. According to Justice Cardozo, a written constitution "states or ought to state not rules for the passing hour but principles for an expanding future."[14] Judges who interpret a written constitution cannot merely apply the law to the facts that come before them. The scope of judicial creativity expands when a constitution contains a bill of rights. It is one thing to consider whether a legislature has acted within its powers and another to consider whether its acts, although within its plenary powers, are violative of any of the basic rights of the people. Therefore, judges who interpret a bill of rights must expound upon the philosophy and ideology that underlies the bill of rights.

When judges interpret the law or a constitution by not merely giving effect to the literal meaning of the words, but by trying to provide an interpretation consistent with the spirit of that statute or constitution, they are said to be activist judges. In this sense, the judges who developed the common law were also activist. For example, the doctrine of negligence in torts and the doctrine of public policy in contracts resulted from judicial activism under the common law. Moreover, statutory interpretation often involves choosing one interpretation from multiple possible interpretations. This choice of interpretations involves the choosing of principles, prioritizing value judgments, and also perceiving the correct role of the Judge. *Liversidge v. Anderson*[15] illustrates how these factors influence a

14. CARDOZO , *supra* note 5, at 83.
15. Liversidge v. Anderson, 1942 A.C. 206, 3 All. E.R. 338 (H.L. 1941).

court's interpretation. In *Liversidge*, Regulation XII B of the Defense of the Realm Act gave power to the Home Secretary to detain a person who was an enemy alien. The regulation provided that if the Home Secretary had reasonable grounds to believe that a person was of hostile origin, that person could be detained. Lord Atkin, dissenting, wrote that the words "reasonable grounds to believe" must be interpreted to make the satisfaction of the Home Secretary justiciable. The justices on the majority recognized the long-standing tradition of construing statutes in favor of the subject, but being honestly concerned about the situation created by the War, did not want to embarrass the executive while engaged in the prosecution of the War. Lord Atkin dissented, stating that they could nevertheless uphold the executive action if satisfied that the Home Secretary had acted on reasonable grounds. The division of interpretation was between the majority justices, who held that their function was to construe the statute literally and to equip the executive with the power necessary for meeting the challenge of war, and Lord Atkin who held that the judicial function included envisioning the long-term consequences an interpretation would have on individual liberty and democracy. Both the majority and the dissenting judges considered the political implications of their statutory interpretation. The majority justices were concerned about the survival of both England as a nation and democracy as a system, which were threatened by war. Lord Atkin was no less concerned about those issues, but felt that even in such critical times, the court must establish that "amidst the clash of arms the laws are not silent. They may be changed but they speak the same language in war as in peace."[16]

Of course, limits to judicial creativity in England exist as well. In England, Parliament is supreme, and the courts cannot void a law of Parliament. However, in 1610 Lord Coke attempted, in *Bonham*'s case,[17] to assert the power to void an act of Parliament if it was inconsistent with the common law. Lord Coke failed miserably in his attempt to secure such power for the courts, and no judge since has

16. 3 All E.R. at 361.

17. (1610) 8 Co. Rep. 1142; *see also* E.C.S. WADE & G. GODFREY PHILIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW 55, 64 (9th ed. 1978).

made such a claim. The courts, therefore, directed their judicial activism against the executive and only subtly and indirectly against Parliament—without challenging Parliament's authority to legislate. In administrative law, for example, the courts required administrative actions after hearing the affected party.[18] Courts subjected the exercise of administrative discretion to the strictest scrutiny.[19] Therefore, statutory efforts to oust the jurisdiction of the courts were frustrated by converting every error of law into an error of jurisdiction.[20] These common law methods of dealing with the ouster clauses do not hold a legislative act invalid, but rather construe it in a way that does not give effect to the legislature's intention to exclude the jurisdiction of the courts.[21]

Judicial review becomes much more controversial when it includes review of legislative acts. While England never had such judicial review, it was provided for in the constitutions that England made for its former colonies when they attained the status of dominions. Both Australia and Canada have judicial review of legislation.

India has had judicial review of legislation since its colonial period. The courts, however, observed maximum restraint in dealing with the acts of the legislatures. The Privy Council established that although the Indian legislature's powers were circumscribed by the restrictions of the constituent act, within its limited sphere it was as sovereign as the Imperial Parliament.[22] The courts struck down very few statutes during the colonial period. Professor Allen Gledhill observed that instances of invalidation of laws by courts were so rare that "even the Indian lawyer generally regarded the legislature as sovereign and it was not until the Government of India Act of 1935 came into force that avoidance of laws by judicial pronouncement

18. Ridge v. Baldwin, 1964 A.C. 40.

19. Padfield v. Ministry of Agriculture, Fisheries and Food, 1968 A.C. 997; [1968] 1 All E. R. 694.

20. Anismninic Ltd. v. Foreign Comnpensation Commission, [1969] 2 A.C. 147, [1969] 1 All E.R. 208.

21. *See* RAJEEV DHAVAN, THE SUPREME COURT OF INDIA 63-67 (N.M. Tripathi ed., 1977).

22. Queen v. Burah, [1878] 3 A.C. 889, [1878] 5 I.A. 178; *see also* S. P. SATHE, ADMINISTRATIVE LAW 33 (6th ed. 1998).

was commonly contemplated."[23] However, the courts continued to both construe the legislative acts strictly and to apply the English common law methods for safeguarding individual liberties.

B. Judicial Review in the United States

Judicial review of legislation became the most significant aspect of American constitutional law. Although the Constitution does not mention that the Supreme Court has the power to invalidate acts of Congress that are contrary to the Constitution, Chief Justice Marshall held in *Marbury v. Madison*[24] that such power was implied. This assertion of power was criticized severely. The critics argued that it amounted to usurpation of power by an unelected court and may serve to censor legislation enacted by an elected legislature. However, both Alexander Hamilton and Thomas Jefferson assumed that the Court would have the power to exercise judicial review. Hamilton defended the Court's power:

> [W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.[25]

While speaking on the inclusion of the Bill of Rights in the Constitution, Jefferson said:

> In the arguments in favour of a declaration of rights, you omit one which has great weight with me; the legal check which it puts into the hands of the judiciary. This is a body, which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity.[26]

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23. Alan Gledhill, *Unconstitutional Legislation*, *in* 9 INDIAN YEARBOOK OF INTERNATIONAL AFFAIRS 40 (Madras ed., 1952).

24. 5 U.S. (1 (Cranch) 137 (1803).

25. THE FEDERALIST No.78, at 102 (Alexander Hamilton) (1837).

26. SAMUEL EAGLE FORMAN, THE LIFE AND SELECTED WRITINGS of THOMAS JEFFERSON

Although the Supreme Court's assertion of power of judicial review became controversial, its legitimacy and desirability were eventually accepted. One writer acknowledged judicial review of legislative acts as a "product of American law"[27] and another author described the United States as the "home of judicial review."[28]

The question of whether the courts should have the power to decide issues of policy has always evoked a vehement debate. When the Court made a series of objections to President Roosevelt's regulation of the economy in the 1930s, the liberals deemed the Court reactionary. When the Warren Court expanded the rights of African Americans, the conservatives called the Court adventurist. After the decision of the Supreme Court in *Brown v. Board of Education*,[29] the conservatives threatened to impeach the Justices, and burnt effigies of Chief Justice Warren in protest.

Such responses result from the disapproval of judicial policies by different groups of people. The liberals disapproved of the Court's anti-State intervention policy during the 1930s while the conservatives supported that policy. On the other hand, the liberals approved of the Warren Court's concern for freedom of speech and religion because they supported desegregation and liberalization of the rights of the accused. Various American scholars have, however, raised objections to the decisions of the Warren Court on the ground that it tended to legislate.[30]

C. Judicial Review in India

Unlike the United States Constitution, the Indian Constitution expressly provides for judicial review in Article 13, clause (1), that says that all laws that were in force in the territory of India immediately before the adoption of the Constitution, in so far as they are inconsistent with the provisions containing the fundamental

462 (1900).

27. WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 7 (2d ed. 1929).

28. GEOFFREY MARSHALL, PARLIAMENTARY SOVEREIGNTY AND THE COMMONWEALTH 16 (1959).

29. 360 U.S. 201 (1964).

30. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

rights, shall, to the extent of such inconsistency, be void. Clause (2) of that article further says that the states shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of the aforementioned mandate shall, to the extent of the contravention, be void. The Constitution also divides the legislative power between the centre and the states and forbids either of them to encroach upon the power of the other. The courts decide whether a legislature or an executive has acted in excess of its powers or in contradiction to any of the constitutional restrictions on its power. Some members of the Constituent Assembly criticized the Constitution for being a potential lawyers' paradise. Others, like Dr. B. R. Ambedkar, defended the provisions of judicial review as being necessary.[31] According to Dr. Ambedkar, the provisions for judicial review, in particular the writ jurisdiction that gave quick relief against the abridgment of fundamental rights, constituted the heart of the Constitution; the very soul of it.[32]

The National Movement for Independence favored a constitutional bill of rights that would act as a bulwark against state authoritarianism and assuage the fears of the religious minorities. The Nehru Committee, which gave its report on Fundamental Rights in 1928, strongly recommended that the future constitution of India contain a declaration of fundamental rights.[33] The British government, however, rejected the Indian demand and did not incorporate a declaration of fundamental rights in the Government of India Act of 1935. The British Simon Commission rejected the proposal for a declaration of fundamental rights based on the traditional British distrust of such declarations observing:

> We are aware that such provisions have been inserted in many constitutions, notably in those of the European States formed after the War. Experience however has not shown them to be of any great practical value. Abstract declarations are useless,

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31. C.A.D. Vol. 7. 700.

32. C.A.D. Vol. 7. 953. *See* B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION 311 (N.M. Tripathi ed., 1968) [hereinafter SHIVA RAO].

33. SHIVA RAO, *supra* note 32, at 173.

> unless there exist the will and the means to make them effective.[34]

The Joint Committee on Indian Constitutional Reform reiterated that view:

> Either the declaration of rights is of so abstract a nature that it has no legal effect of any kind or its legal effect will be to impose an embarrassing restriction on the power of the Legislature and to create a grave risk that a large number of laws may be declared invalid by the courts because of the inconsistency with one or other of the rights so declared.[35]

Interestingly, the draft submitted by Mr. Atlee to the Committee recommended incorporation of a declaration of fundamental rights. Mr. Atlee later became the prime minister of England during Indian independence. Professor Ramswami suggested[36] that precise framing of the declaration would avoid large-scale invalidation of the laws by the courts.

D. Judicial Activism from 1950 to 1975

The supreme Court of India began as a positivist court and strictly followed the traditions of the British courts. In *A.K. Gopalan v. State of Madras*[37] the Court declined an invitation made on behalf of the petitioner, Mr. Gopalan, a communist leader who had been detained under a law of preventive detention, to read the provisions of the Constitution liberally so as to give effect to the spirit of the Constitution rather than remaining in the confines of its text. The Court gave a narrow construction to words such as "personal liberty" and "procedure established by legitimated law" contained in Article 21 of the Constitution. In matters of personal liberty as well as regulation of the economy, the Court observed judicial restraint and

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34. *Report of the Joint Committee on Indian Constitutional Reform*, part I, para. 366 (1934) (H. M. Stationary Office, London).

35. *Id*.

36. RAMASWAMI, FUNDAMENTAL RIGHTS (1946). Sir Maurice Gwyer, the Chief Justice of the Federal Court of India, agreed with the author's view in the Forward to Ramaswami's book.

37. A.I.R. 1950 S.C. 27.

legitimated the actions of the government. These were the days of the welfare state and the Court was supposed to legitimize the expanded sphere of the State and its powers. The Court and Parliament clashed only on the scope of the right to property. Parliament wanted to usher in a radical programme of changes in property relations and the Court had adopted the policy of interpreting the right to property expansively so as to impede such program. Since the Constitution allowed Parliament to amend the constitution, a decision of the Court could be circumvented. Since the Constitution could be amended by a majority vote of two-thirds of the members present and voting and an absolute majority of the total membership in each house of Parliament,[38] and the ruling party could easily muster such majority, the Court's decisions could not obstruct the property rights reforms.

While on the topic of the right to property the Court was humbled, it had started interpreting other provisions of the Constitution more meaningfully so as to expand the rights of the people. In 1962 in *Sakal Newspapers (Private) Ltd. India*,[39] it held that a law which prescribed the number of pages, price and space for advertisement of a newspaper violated the freedom of the press, which was included in freedom of speech guaranteed by Article 19(1)(a) of the Constitution. The Court held that unlike any other business which could be regulated in the interest of the general public as provided by Clause (6) of Article 19, the press could be restricted only on the specific grounds given in clause (2) of that Article, such as the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation, or incitement to an offence. The Court thus inferred the doctrine of preferred freedoms from the subtle distinction between Clauses (2) and (6) of Article 19. Similarly, the Court held that affirmative action programs in favor of discriminated classes of people enjoined by Clause (4) of Article 15 had to complement, and not contradict, the general provision contained in Article 15(1), which forbade discrimination on grounds such as religion, race, caste, sex or place of birth. Reserved seats in educational institutions or jobs in government service could be

38. INDIA CONST. art. 368.
39. A.I.R. 1962 S.C. 305.

reserved for discriminated classes without eliminating the right to equality. Therefore discriminated status should not be determined on the basis of caste alone, though it could be one of the factors for such a determination, and the total number of seats or jobs reserved should not exceed more than half of the total number of seats or jobs available.[40] This was judicial activism during the sixties.

During the late sixties, the Court seems to have become bolder, and it soon challenged Parliament's power to amend the Constitution. This brought about a major confrontation between the Court and Parliament. In 1967, the Court, by a thin majority of 6-5, held in *Golaknath v. Punjab*[41] that Parliament could not amend the Constitution to take away or abridge fundamental rights. This decision was severely criticized. Parliament retaliated by passing the Twenty-Fourth Amendment which explicitly stated that Parliament was not limited in its power of constitutional amendment. When that amendment was challenged, the Court, sitting in its largest strength of 13 judges held in *Kesavanand Bharati v. Kerala*[42] that although Parliament could amend every provision of the Constitution, it could not alter the basic structure of the Constitution. This decision seemed most unsustainable and contrary to the theory of judicial review. It seemed to wrestle supremacy to a non-elected court and against the elected Parliament. However, during the 1975 emergency, the ruling party passed such draconian amendments with the help of its brute majority and absence of any political opposition that the limitation upon Parliament's power of constitutional amendment acquired legitimacy. The Supreme Court struck down in *Indira Gandhi v. Raj Narain*[43] a constitutional amendment which sought to validate the election of the Prime Minister, earlier set aside by the Allahabad High Court on some technical ground deemed destructive of the basic structure of the Constitution. Could the power of constitutional amendment, which is legislative in nature, be used for settling a dispute between two private parties regarding an election? This was a manifest example of the possibility of abuse of such power if given

40. Balaji v. Mysore, A.I.R. 1963 S.C. 649.
41. A.I.R. 1967 S.C. 1643.
42. A.I.R. 1973 S.C. 1461.
43. A.I.R. 1975 S.C. 2299.

without any limits. That decision conferred legitimacy on the basic structure doctrine. That doctrine is posited on the hypothesis that the power of constitutional amendment could not be equal to the power of making a constitution. The power of constitutional amendment could not be used for repealing the entire constitution. The identity of the original constitution must remain in tact. This doctrine imposes a restriction on the power of the majority and is in that sense a counter majoritarian check on democracy in the interest of democracy.[44] That power made the Indian Supreme Court the most powerful apex court in the world. It also made it a political institution because the ultimate determination of a basic structure was bound to be a political judgment.

II. POST-EMERGENCY ACTIVISM: FUNDAMENTAL RIGHTS

The post emergency period (1977-98) is known as the period of judicial activism because it was during this period that the Court's jurisprudence blossomed with doctrinal creativity and processual innovations. Activism, however, can easily transcend the borders of judicial review and turn into populism and excessivism. Activism is populism when doctrinal effervescence transands the institutional capacity of the judiciary to translate the doctrine into reality, and it is excessivism when a court undertakes responsibilities normally discharged by other co-ordinate organs of the government.

Before the Court embarked upon activism, it had to overcome the negative image that it had acquired from its decision in *A.D.M. Jabalpur v. Shivakant Shukla*.[45]

A. The Fundamental Rights Case*: Judicial Surrender*

Although the Supreme Court of India became the most powerful apex court due to its power to invalidate even a constitutional amendment, its institutional weakness was ultimately revealed through its decision in *A. D. M. Jabalpur.*[46] Article 352 of the

44. *See* Ronald Dworkin, TAKING RIGHTS SERIOUSLY (Gerald Dvekworth & Co. 1977).
45. A.I.R. 1976 S.C. 1207.
46. *Id*.

Constitution provides for the proclamation of an emergency by the President "if he is satisfied that a grave emergency exists whereby the security of India or any part of the territory of India is threatened, whether by war or external aggression or internal disturbance."[47] This was the third proclamation made under Article 352 made since the commencement of the Constitution. The two previous proclamations were in response to wars with China in 1962 and Pakistan in 1971. Proclamations of emergency made under Article 352 suspend the fundamental rights guaranteed by Article 19: freedom of speech and expression; freedom to assemble peacefully without arms; freedom to form associations; freedom to move within the territory of India; freedom to reside and settle in any part of the territory of India; freedom to acquire, hold, and dispose of property; and freedom to practice any profession, or to carry on any occupation, trade or business. Any law made in derogation of those rights and any executive action taken under such a law is valid until the proclamation of emergency is revoked.[48] The President has the power to suspend the right to move any court for the enforcement of any fundamental rights during their suspension.[49]

During the 1975 emergency, the President issued an order under Article 359 of the Constitution suspending the right to move any court to enforce the fundamental rights guaranteed by Articles 14, 21 and 22 of the Constitution. In *Makhan Singh v. Punjab*,[50] which arose out of a similar order issued by the President during the first emergency declared in 1962, the Court held that while one could not assert his right to life or personal liberty guaranteed by Article 21 of the Constitution, one could ask the Court to examine whether an order was *ultra vires* or whether the authority acted *mala fide*. However, the 1975 emergency and the 1962 emergency differed greatly. Under the 1962 emergency, maximum care was taken to cause minimum abridgement of personal liberties. Alternatively, under the 1975 emergency, maximum care was taken to ensure that no vestige of liberty survived. The Attorney General, Niren De,

47. INDIA CONST. art. 352.
48. INDIA CONST. art. 358.
49. INDIA CONST. art. 359.
50. *See Makhan Singh*, A.I.R. 1964 S.C. at 381.

argued that during a proclaimed emergency, even if the executive killed a person or imprisoned a person, it would not invite the Court to examine the validity of such actions.

What did the suspension of the right to move any court for the enforcement of the fundamental right to life and liberty guaranteed by Article 21 mean? Did the rule that the executive could not take away an individual's liberty unless the law authorized such a taking of liberty emanate from Article 21? Or did it exist independently of that Article as a basic principle or rule of law? The respondents in *Makham Singh* wanted the Court to examine whether the acts of detention were in accordance with the provisions of the Maintenance of Internal Security Act (MISA) under which they had been ordered.

The basic rule of English jurisprudence is that no one can be deprived of his liberty unless he commits a distinct breach of law. This rule, laid down by the Privy Council in *Eshugbayi v. Govt. of Nigeria*,[51] was in fact anterior to the Constitution of India and survived after adoption of India's Constitution by virtue of Article 372 which states: "all the law in force in the territory of India immediately before the commencement of the Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."[52] Article 372 saves not only the "laws" but also saves the "law," which includes all law established through judicial decisions as well as through custom. When the Privy Council decided the *Eshyugbai* case, the constituent act of British India did not contain any declaration of fundamental rights. The principle stated in that case did not emanate from any "right" but from the concept of "liberty" in the Hohfeldian[53] sense, which was implicit in any lawful governance.

Hohfeld distinguished right from liberty, and power from immunity—which are often used interchangeably but are conceptually different. Right and duty are corelative concepts. If I have a right against you, you have a duty towards me. Jural opposite of right is no right and jural opposite of duty is no duty. No duty

51. 1931 L.R. 670 (C.A.).
52. INDIA CONST. art. 372.
53. WESTLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (Water Wheeler Look ed., 1966).

means liberty. I have liberty to do whatever pleases me because I have no duty to refrain from doing it, and no one has a right to prohibit me from doing so. Power means the capacity to create jural relations and to create rights and liabilities. The jural correlative of power is liability. If I have power over you, you have liability towards me. Courts have power to pass judgments that impose liabilities on those subject to its jurisdiction. Parliament has power to make laws. Parliament, however, cannot make a law that takes away or abridges a fundamental right, thus creating a disability. A minor cannot make a contract, and a person cannot sue another for recovery of a debt if the period of limitation has elapsed. These are disabilities. The jural opposite of power is disability and the jural opposite of liability is immunity. Trade unions cannot be sued for torts and the President or the Governor can not be personally liable in respect of any contract or assurance made or executed for the purposes of the Constitution or for the purposes of any enactment relating to the Government of India.[54] These are examples of immunities. Although the word "right' is often used to describe liberty, power, or immunity, Hohfeld explained the specific meaning of each word. Hohfeld described liberty as described above as an *apriori* condition of the rule of law. It does not owe its origin to any bill of rights and exists to the extent that it is not restricted by any law. People who encroach upon liberty must show their right to do so. *Eshyugbai*'s dicta referred to the concept of liberty and not to the concept of right in the Hohfeldian sense.

After suspension of the right given by Article 21, did "liberty" in the Hohfeldian sense survive under Article 372 of the Constitution? Was "liberty" of an individual not anterior to Article 21 of the Constitution?. Even courts in colonial India gave protection to liberty by insisting that the executive must act according to law. Was the liberty that Indian citizens possessed different from the liberty in English constitutional law, where supremacy of Parliament is a constitutional axiom? The questions posed were whether persons were detained according to law, whether the law authorizing the detention was valid, and whether the executive had applied its mind

54. INDIA CONST. art. 299 (2).

or whether it had acted *mala fide*. The court considered these questions in appeals filed against the decisions of the seven High Courts—Allahabad, Bombay, Delhi, Karnataka, M. P., Punjab and Rajasthan—in which Attorney General Niren De had argued to reject the petitions *in limine*. In the Supreme Court, the Attorney General argued that the Court may grant relief only if the order of detention was bad on its face. It would be facially invalid if it was passed by a person not authorized to pass it or was passed for a purpose outside those mentioned in the MISA. The majority held, 4-1, that no court could examine the actions of the executive. The four majority Justices who upheld the government's power eventually became the Chief Justices of India. The dissenter, Justice Khanna, paid the price for his judgment when he was superseded by a junior Justice and not appointed Chief Justice.

The decision in the *Jabalpur* case was severely criticized.[55] Even the judges following the black letter law tradition would not have rendered such a decision. The black letter law always gives maximum protection to individual liberty through various common law statutory interpretation devices. The English courts have always applied a rule of strict interpretation to statutes that impinged on individual liberties. When two interpretations are possible, the courts prefer the interpretation most favorable to the citizen.

In *Jabalpur*, the Supreme Court held that the basic principle of law, that people could not be divested of their liberties unless they committed a breach of the law, did not survive the proclamation of emergency. The Supreme Court had struck down a constitutional amendment as against the basic structure of the Constitution in the *Prime Minister Election* Case[56] just a few months before *Jabalpur*. The Court did not consider the respondents' argument that the above principle of law, part of the basic structure of the Constitution, could not be whittled down through Presidential orders issued under Article 359 of the Constitution. If the Court could void a constitutional amendment contrary to the basic structure of the Constitution, why could it not void an order of the President issued under Article 359 of

55. *See, e.g.*, SEERVAI, *supra* note 3; UPENDRA BAXI, THE INDIAN SUPREME COURT AND POLITICS 79-120 (1980).

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

the Constitution that resulted in the elimination of one of the most basic features of the Constitution? It was strange that the argument of fear, accepted in *Kesavanand Bharati* and realized in the *Prime Minister Election Case*, could not be invoked against the order of the President suspending access to courts for the enforcement of the rule of law. The complaisancy of the judges was obvious. Justice Chandrachud, while responding to the argument that the presidential order might give power to the government to arbitrarily shoot any person, said:

> Counsel after counsel expressed the fear that during the emergency, the executive may whip and strip and starve the detenu and if this be our judgement [sic], even shoot him down. Such misdeeds have not tarnished the record of Free India and I have a diamond-bright, diamond-hard hope that such things will never come to pass.[57]

Justice Beg, in going even further than Justice Chandrachud in approving of the emergency regime, said "Furthermore, we understand that the care and concern bestowed by the State authorities upon the welfare of detenus who are well housed, well fed and well treated, is almost maternal."[58]

While the judges were giving such an optimistic picture of the Indian democracy through their judgments, the emergency regime committed various atrocities. In the Kakayam police camp, an engineering student, P. Rajan, was arrested on February 29, 1976, and was murdered by police torture.[59]

B. The End of Emergency and Elections

In 1977, Prime Minister Indira Gandhi advised the President to dissolve the Lok Sabha and hold new elections. All of the non-Congress political parties, except for the Communist parties and some regional parties, formed a single political party called the Janata Party to fight the election. As a result, the Congress party lost heavily

57. *A.D.M. Jabalpur*, A.J.R. 1976 S.C. at 1349.
58. *Id.* at 1319.
59. SEERVAI, *supra* note 3, at 1.

and even Prime Minister Indira Gandhi was defeated in her own constituency. Since the Janata party was a conglomeration of various parties with contradictory ideologies and interests, it was bound to be short lived and, in fact, it ended within two years. However, during the short period of its rule, the Janata party amended the Constitution by expunging those draconian elements added to the Constitution in 1976 by the Forty Second Amendment.[60] In 1978, the Forty-Fourth Amendment changed the emergency in the following ways: (1) it substituted the words "armed rebellion" in place of the words "internal disturbance" in clause one of Article 352 to make the promulgation of emergency more difficult;[61](2) in Article 359, which enabled the President to suspend the right to move any court in respect to the fundamental rights as mentioned by him in his order, the words "except Articles 20 and 21" were added in order to preserve the rights given by those Articles.[62]

The Supreme Court realized that its decision in the *Jabalpur* cost it the social esteem that it enjoyed. Although in the *Prime Minister Election Case*, it managed to satisfy both the constituencies of the government and the people, it failed to satisfy the people's constituency in *Jabalpur*.

C. Post-Emergency Activism: Atonement for the Past or Self-Legitimization for the Future?

Post emergency judicial activism grew out of the realization that narrow construction of constitutional provisions like Article 21 in *A. K. Gopalan v. State of Madras*[63] was contradicting the Court's liberal stance in the basic structure cases.[64] If the Court had envisioned a

60. INDIA CONST. amend. 43 (Amendment Act, 1977); INDIA CONST. amend. 44 (Amendment Act, 1978). *See also* S. P. SATHE, CONSTITUTIONAL AMENDMENTS 170-71, app. (1989).

61. INDIA CONST. amend. 44, § 37(a)(i) (Amendment Act, 1978).

62. *Id*. § 40. Article 20 provides the following rights: (1) the right not to be punished for an act that was not an offence at the time the act was committed, and the right not to be subjected to a punishment higher than that prescribed when the act was committed; (2) the right not to be prosecuted and punished for the same offence more than once; and (3) the right not to be compelled to give evidence against oneself. INDIA CONST. art. 20. Article 21 conferred the right to life and personal liberty. INDIA CONST. art. 21.

63. A.I.R. 1950 S.C. 27.

64. *See supra* note 42.

more positive role for itself in Indian democracy through the basic structure doctrine, it could no longer continue to adopt a positivistic role while interpreting other provisions of the Constitution. Although the Indian judiciary was considered impartial and principled, its jurisprudence was essentially for property owners, princes, political leaders and, at the most, civil servants. The political opposition had also not been very sanguine of the Court's jurisprudence. From *Gopalan* to *ShivKant Shukla*, the dissenters had not received its sympathetic consideration. The legal positivism of the Court helped the political establishment over the political dissenters and the property owners over the economic reformers. The small man could not afford the luxury of the Court's judicial review.

The Court must have obviously realized that in the Indian democracy, high public esteem alone enabled the Court to withstand the intolerance of a hegemonic executive. During the emergency the Court had learned that it could not stand up against the executive on its own during the emergency. For the common people, the Court was an elitist institution which supported the political establishment. The Court's fight with Parliament over right to property appeared to the common people to be a mock fight between an elitist court and a majoritarian legislature. The Court is, after all, a weak institution.

Hamilton called the court system the weakest organ of government because it had control over neither the sword nor the purse. A court becomes strong only when it identifies itself with the disadvantaged minorities and they see the court as an independent institution, a bulwark against oppression and tyranny. A court gains strength only by carving a niche for itself in the minds of the people. A court must appear to the people as their protector. It must not only be, but also must appear to be impartial, principled, and capable of achieving results. According to Baxi, "judicial populism was partly an aspect of post-emergency catharsis. Partly, it was 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 legitimation of judicial power."[65] While Baxi calls the entire exercise "judicial populism," this writer makes a distinction between judicial

65. THE FEDERALIST, *supra* note 25, at 504 (Alexander Hamilton).

populism and judicial activism. Judicial populism is an aberration that takes place either when the Court is swayed by euphoria or when it overreaches itself. Judicial activism of the post-emergency period means liberal interpretation of constitutional provisions like Articles 21 and 14, and reconceptualization of the judicial process by making it more accessible and participatory. The Court used judicial activism in an attempt to reinstate the image of the Court and to increase its political power vis-a-vis other organs of government.[66]

Post-emergency judicial activism was probably inspired by the Court's realization that its elitist social image would not make it strong enough to withstand the future onslaught of a powerful political establishment. Therefore consciously or unconsciously, the Court began moving in the direction of the people. I would not, however, share Professor Baxi's optimism that the Court, for the first time, became the Court for the Indians, because even now the Court continues to be inaccessible to a large number of Indians and justice remains elusive to many because of its delays, expense and formalism. Nonetheless, in relative terms, the Court became much more accessible and its doctrinal law more people-oriented. For this, the Court adopted two strategies: (1) it reinterpreted the provisions for fundamental rights in a more liberal manner in order to maximize the rights of the people, particularly the disadvantaged; and (2) it facilitated access to the courts by relaxing its technical rules of *locus standi*, entertaining letter petitions or acting *suo moto*, and developing pro-active public law technology for the enforcement of human rights.

D. Article 21: Life, Liberty, and Due Process of Law

Article 21 of the Constitution was bound to be the first on the Supreme Court's agenda because its restrictive interpretation in *Gopalan*[67] and its total demise in *Jabalpur*[68] made the important fundamental right to life and liberty entirely dependent on the sweet

66. Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, *in* JUDGES AND THE JUDICIAL POWER 294 (Rajeev Dhavan, et al. eds. 1985).

67. A.I.R. 1950 S.C. 27.

68. *See Jabalpur,* A.I.R. 1976 S.C. at 1207.

will of the parliamentary majority. The Constituent Assembly had purposely rejected the expression "due process of law," which was the source of judicial activism in the United States, and instead adopted a more specific expression: "procedure established by law." The Supreme Court of India had interpreted these words very narrowly in *Gopalan.*

Article 21 of the Constitution says that "no person shall be deprived of his life or personal liberty except according to procedure established by law." In *Gopalan,* the Supreme Court held that the words "personal liberty" meant only freedom from arbitrary arrest and that the words "procedure established by law" meant such procedure as was prescribed by any statute. Article 19, which guaranteed the seven fundamental rights, included the right to move freely within the territory of India.[69] The State may impose reasonable restrictions upon that right "in the interests of the general public or for the protection of the interests of the Scheduled tribes."[70] Some argued that where people were detained under a law of preventive detention, their rights to move within the territory of India guaranteed by Article 19(1)(d) was restricted; therefore, the state should prove that the law of preventive detention was a reasonable restriction upon freedom in the interests of the general public as required by clause five of Article 19. The Court, however, held that only free persons had rights given by Article 19. Unless the state arrested a person for making a speech, holding an assembly, forming an association, or for entering a territory, the arrest had to be according to law and the validity of such arrest or detention could only be examined with reference to the person's right to personal liberty guaranteed by Article 21, and not with reference to any of the rights guaranteed by Article 19. The Court distinguished direct restrictions on any of the seven rights guaranteed by Article 19 and indirect restrictions on those rights consequent upon detention. Detention for preventing a person from exercising any of the freedoms guaranteed by Article 19(1) constituted a direct restriction on those freedoms, but detention for preventing the person from causing breach of public order or subverting the security of the state

69. INDIA CONST. art. 19, § 1(d).
70. INDIA CONST. art. 19(5).

caused an indirect restriction on those freedoms. For example, if a person is detained for theft or murder, the law authorizing detention (the Indian Penal Code) need not be examined from the standpoint of Article 19; however, if a person is detained for committing sedition or obscenity, the detention must also be valid under Article 19.[71] In the first case, the denial of liberty results in a restriction on the freedoms guaranteed by Article 19, however, in the second case, the denial of freedoms results in the denial of liberty.

The Court read Articles 19 and 21 as mutually exclusive. A similar interpretation prevailed in a case regarding the right to property guaranteed by Article 31 and the right to acquire, hold and dispose of property provided in by Article 19(1)(f). Article 31 stated that no one shall be deprived of his property except by authority of law, and Article 19(1)(f) guaranteed the right to acquire, hold, and dispose of property. The latter right was subject to the state's power to impose reasonable restrictions in the interest of the general public or for the protection of the interests of the scheduled tribes. The Court held that when a person was deprived of his property, the right to acquire, hold, and dispose of property did not attach because the right belonged only to a person who had property.[72] Article 31 only governed cases of total deprivation, whereas Article 19 governed restrictions on acquiring, holding, and disposing of property. Since the Court held that "deprivation" would invite liability to pay compensation, it thought that the protection of Article 19 was unnecessary. However, the 1955 amendment to the Constitution restricted payment of compensation to cases of acquisition of property by the state and provided that the Court would not determine adequacy of compensation. In this regard, the Court fell back upon Article 19 for greater protection of the right to property. In *K. K.*

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71. *See* Kedar Nath Singh v. State of Bihar, A.I.R. 1962 S.C. 955 (holding section 124-A of the I.P.C., which punishes the offense of sedition, to be a reasonable restriction on freedom of speech and expression); *see also Ranjit Udeshi v. State of Maharashtra*, A.I.R. 1965 S.C. 881 (holding section 292 of the I.P.C., which punishes the offense of obscenity, to be a reasonable restriction on the freedoms of speech and expression).

72. The right to hold and dispose of property was available only to a person who had property. If his property was taken away, he could only invoke Article 31. However, if he had property but its use was restricted, he could invoke Article 19.

Kochuni v. State of Madras,[73] the Court held that when a person is deprived of property through acquisition of the property by the state or otherwise, the law that authorized the acquisition or deprivation must be a reasonable restriction on the right to hold property given by Article 19(1)(f). Incidentally, Article 19(1)(f) was deleted from the Constitution in 1978 by the Forty-Fourth Amendment.[74]

The above interpretation of the relationship between Article 31 and Article 19(1)(f) of the Constitution did not extend to the relationship between Article 21 and Article 19(1)(d). *Gopalan* continued to operate in cases of personal liberty and freedoms guaranteed by Article 19. In *Kharak Singh v. State of U.P.*,[75] the Supreme Court gave broader meaning to the words "personal liberty" so as to include within their fold the right to privacy. The majority Justices held that the words "personal liberty" in Article 21 included not only mere protection from arbitrary arrest, but all other aspects of liberty not covered by Article 19. The minority disagreed with the exclusion of freedoms guaranteed by Article 19 from the scope of "personal Liberty." In *Satwant Singh v. Assistant Passport Officer*,[76] the Court held that the right to personal liberty included the right to go abroad and declared certain provisions of the Passport Act unconstitutional and void. The Court objected to the Act's failure to provide a procedure for regulating the grant or denial of passports. The Court said that travel abroad was a fundamental right within "personal liberty" subject to restriction or regulation by law. In response to *Satwant*, Parliament enacted the Passport Act of 1967, specifying who can obtain a passport, when a passport can be refused, and the application procedure for a passport.

A major breakthrough came in *Maneka Gandhi v. Union of India*.[77] Maneka Gandhi had her passport impounded and she challenged this action on the ground that it violated her personal liberty. Mrs. Gandhi had not been given a hearing regarding the impounding of her passport. The Supreme Court not only broadened

73. A.I.R. 1960 S.C. 1080.

74. INDIA CONST. art. 19(1), cl.(f) was superceded by section 2 of the INDIA CONST. amend. 44 (Forty-Fourth Amendment Act, 1978).

75. A.I.R. 1963 S.C. 1295.

76. Satwant Singh v. Asst. Passport Officer, A.I.R. 1967 S.C. 1836.

77. A.I.R. 1978 S.C. 597.

the meaning of the words "personal liberty," but also adopted the concept of procedural due process within the words "procedure established by law." The Court rejected the earlier view that "personal liberty" included all attributes of liberty except those mentioned in Article 19. In *Maneka Gandhi*, the Court recognized that when a law restricts personal liberty, a court should examine whether the restriction on personal liberty also imposed restrictions on any of the rights given by Article 19. The Court held that personal liberty includes "a variety of rights which go to constitute the personal liberty of man,"[78] in addition to those mentioned in Article 19, and that one such right included in "personal liberty" is the right to go abroad.

The Court also held that impounding Mrs. Gandhi's passport without giving her a hearing violated procedure established by law. The procedure must provide a just and fair hearing. The rules of natural justice, a term used for a fair hearing, are the essential requisites of fair procedure. These rules are: (1) no one should be a judge in his own cause; and (2) no one should be condemned unheard. The hearing must be a "procedure established by law" that provides an unbiased decision maker and a reasonable opportunity for the person whose personal liberty is at stake to make a defense. In *Maneka Gandhi*, the Court had to decide whether Mrs. Gandhi was entitled to a hearing before the impounding of her passport. The Court conceded that some situations require urgent action, making a prior hearing not feasible. In these exceptional situations when a prior hearing was not given, the authorities must give a post-decisional hearing. On the assurance of the Attorney General that a post-decisional hearing would be given to Mrs. Gandhi, the majority, barring Justice Beg, upheld the government's impounding of Mrs. Gandhi's passport. Justice Beg held that the government's action of impounding the passport was unconstitutional and void.

In *Maneka Gandhi*, the Court clearly overruled *Gopalan* on the following issues: (1) that the law authorizing deprivation of personal liberty must be valid not only under Article 21, but also under Article 19; (2) the words "life" and "personal liberty" had wider meanings

78. *Id*. at 622.

that would be broadened from time to time, and both were open textured expressions; and (3) the words "procedure" and "established by law" meant not only the procedure prescribed by law, but also such procedures considered just and fair in civilized society.

The most significant aspect of *Maneka Gandhi* was that the Court laid down a seminal principle of constitutional interpretation: There cannot be a mere textual construction of the words of the Constitution. Those words are pregnant with meanings that unfold when different situations arise. For example, the Constitution expressly mentions the right to freedom of speech and expression but does not mention the right to freedom of the press. The Supreme Court has, however, held that the right to freedom of speech includes the right to freedom of the press.[79]

Constitutional expressions are open-textured and it is for the reviewing court to develop nuances in the context of emerging situations. The Court reads the Constitution not merely as a statute but as an organic law of the nation. In *Francis Coralie Mullin v. Administrator Union Territory of Delhi*, Justice Bhagwati said:

> This principle of interpretation which means that a constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilised but remains flexible enough to meet the newly emerging problems and challenges, applies with greater force in relation to a fundamental right enacted by the Constitution.[80]

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79. The Court held that the right to freedom of speech also includes the right to receive information. This writer has submitted elsewhere that the right to receive information is only partly covered by the right to freedom of speech, because my right to receive information does not obligate the other person to provide me information. In my opinion, the right to know is also covered by the right to personal liberty and the right to procedure established by law and guaranteed by Article 21. *See* S.P. SATHE, THE RIGHT TO KNOW 47 (1991).

80. A.I.R. 1981 S.C. 746.

E. Personal Liberty

The words "personal liberty" acquired a new dimension when the Court debated prisoners' rights. Are prisoners entitled to any rights? Are they denuded of all the fundamental rights? Earlier, the Court had held that prisoners did not lose their right to freedom of speech during incarceration.[81] In *Charles Sobraj*[82] and *Sunil Batra*,[83] the Court held that prisoners were not denuded of their fundamental rights, like their right to equality or their right to life or personal liberty, beyond that taken away by the nature of the imprisonment itself. The Court held that even a prisoner was entitled to be treated according to the prison rules, and even the prison rules could not violate the prisoner's fundamental rights such as rights to equality, of life, and of personal liberty. For example, a prisoner certainly could not be subjected to inhumane torture during imprisonment. Prisoners are also entitled to other rights such as freedom of religion. Prisoners' exercise of the fundamental rights are restricted only in so far as they are under detention.

The right to personal liberty also includes various women's rights such as the right not to be asked information about menstrual cycles or pregnancies on job applications in the public sector,[84] the right to the sanctity of her body (rape was not only an offense under criminal law, but an onslaught on personal liberty),[85] the right to the presumption of chastity, and the right not to subject a child to a paternity test unless a prima facie case against the mother during the period of conception is established.[86]

F. Procedure Established by Law

The Court also liberally construed the words "procedure established by law" to include within it all those essential aspects of

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81. State of Maharashtra v. Prabhakar, A.I.R. 1966 S.C. 424.
82. Charles Sobraj v. Superintendent Central Jail, A.I.R. 1978 S.C. 1514.
83. Sunil Batra v. Delhi Administration, A.I.R. 1978 S.C. 1675; A.I.R. 1980 S.C. 1579.
84. Neera Mathur v. L.I.C., A.I.R. 1992 S.C. 392.
85. Bodhisatwa Goutam v. Subhra Chakraborty, A.I.R. 1996 S.C. 922; *see also* S. P. Sathe, *Gender, Constitution and the Courts*, *in* ENGENDERING LAW: ESSAYS IN HONOR OF LOTIKA SARKAR 117 (Amita Dhanda & Archana Parashar eds., 1999).
86. Goutam Kundu v. West Bengal, A.I.R. 1993 S.C. 2295.

procedure that constitute due process of law. The makers of the Constitution purposely avoided the use of that expression because they were apprehensive of importing the substantive due process concept into the Constitution. However, procedural due process provides the essentials of the rule of law. In *Gopalan*, the Court held that the procedure established by law meant the procedure prescribed by enacted law. Between the two meanings of the word "law", "lex" (enacted law) and "jus" (justice), the Court chose the former and rejected the latter. A person's liberty could be taken away by law and by such procedure as the law provided. A court had no power to question the fairness or justness of the law or the procedure. The Court later held that the procedure provided by the law must contain the essentials of fair procedure—the principles of natural justice. The word "established" did not mean "prescribed" but meant "institutionalized." Such institutionalization takes place after a long tradition and practice. The Court therefore acquired the power to decide whether proper procedure was prescribed by the legislature and followed by the executive.

The Court held that a person was entitled to an investigation and trial; therefore, the long detention of a person as an under-trial prisoner violated the "procedure established by law."[87] However, in each case the Court determines whether the time taken for investigation was considered delayed.[88] Sometimes the accused may cause the delay himself and cannot move to quash the prosecution due to delay. Such a result would amount to helping the accused evade the law.[89]

Although the Constitution provides that every arrested person may consult a lawyer of choice,[90] the Court previously held the provision was merely permissive and did not necessarily cast a burden on the state to provide free legal aid.[91] However, after the Forty-Second Amendment inserted a clause into the Constitution obligating the

87. Hussainara Khatoon v. State of Bihar, A.I.R. 1979 S.C. 1360.
88. Raghubir Singh v. Bihar, A.I.R. 1987 S.C. 149.
89. State of Maharashtra v. C. P. Shah, A.I.R. 1981 S.C. 1675.
90. INDIA CONST. art. 22(1).
91. Janardan Reddy v. Hyderabad, A.I.R. 1951 S.C. 217. For a comprehensive discussion, see R. Prasannan, *Counsel in the Criminal Process*, 10 J. INDIAN L. INST. 637 (1968).

state to provide free legal aid,[92] the Court adopted the provision requiring free legal aid as an essential aspect of the procedure established by law.[93] In *Prem Shankar Shukla v. Delph Administration* case, the Court also held that hand-cuffing prisoners violated the procedure established by law.[94]

Thus far, the Supreme Court has construed the three expressions in Article 21, "life," "personal liberty," and "procedure established by law," in an expansive manner in order to give individuals substantive due process of law as understood in the United States. Although the drafters of the Constitution purposely avoided including a due process clause, it has been brought into the Constitution through judicial interpretation.[95]

G. Original Understanding and Constitutional Interpretation

The Court has clearly departed from the original understanding of the Constituent Assembly. However, the original understanding of the drafters of the Constitution can never bind a constitutional court. In the United States, the Supreme Court's decision in *Brown v. Board of Education*[96] that mandated integrated schools prompted a great debate whether the decision was consistent with the original understanding of those who enacted the Fourteenth Amendment. Justice Oliver Wendell Holmes of the United States Supreme Court had expressed his thoughts on this subject thirty-two years before the *Brown* decision:

> When we are dealing with words that also are constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which

92. INDIA CONST. art. 39-A.

93. Suk Das v. Union Territory, A.I.R. 1986 S.C. 991; M. H. Hoskot v. Maharashtra, A.I.R. 1978 S.C. 1548.

94. Prem Shankar Shukla v. Delhi Administration, A.I.R. 1980 S.C. 1535.

95. The activism of the Supreme Court of India was similar to the activism of the United States Supreme Court during the 1950s and the 1960s in cases like *Mapp v. Ohio*, 328 U.S. 25 (1949), and *Gideon v. Wainwright*, 372 U.S. 33 (1963). In *Mapp*, the United States Supreme Court held that evidence collected through illegal searches was not admissible as evidence. In *Gideon*, the Court held that without legal aid to the accused, no conviction in a criminal case could be upheld.

96. 360 U.S. 201 (1954).

> could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realise or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.[97]

H. Article 21 and the Right to Honest and Efficient Governnance

Article 21 has become the means by which to create new rights and entitlements. Questions regarding the constitutional validity of death sentences, a person's liberty to die, whether personal liberty included the right to privacy, and whether freedom of speech included the right to information, were legitimate concerns of judicial activism because the Court was called upon to articulate the rights guaranteed by the Constitution. Similarly, a prisoner's right to humane treatment, a prisoner's right to a speedy trial, and an accused criminal's right to legal aid emanated from the fundamental rights guaranteed by Articles 21 and 22 and the directive principles of state policy contained in Article 39-A of the Constitution. Even in regard to such rights, the Court can merely declare them part of the normative order, but cannot articulate them in reality, which is evident from the fact that a large number of people have obtained neither the right to speedy trial nor the right to legal aid.

I. The Right to Equality: Article 14

Another site for judicial activism has been Article 14 of the Constitution, which guarantees the right to equality before the law and equal protection of the law. Equality before the law does not mean mathematical equality. Human beings, as well as objects or causes, need to be treated differently and such different treatment does not necessarily result in denial of equality before the law. Children, women, underprivileged classes, and the physically handicapped need different, as well as preferential, treatment.

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97. Missouri v. Holland, 252 U.S. 416, 433 (1920).

Equality before the law means that equals should be treated equally, but unequals should not be treated equally. Therefore the doctrine of equality does not prevent the legislature from reasonably classifying people for differing treatment. The theory of reasonable classification addresses a group of people differently if that group is distinct from others and if the criteria of choosing such a group is rationally related to the object of the law. Reasonable classification answers three questions: (1) who is treated differently; (2) why are they treated differently; and (3) what is the different treatment. The theory requires that "who" and "why" be rationally related. In legal language, they should have a nexus.

Professor P. K. Tripathi subjected the theory of classification to a searching analysis.[98] His objection was that the theory did not require an established relationship between either "why" and "what" or "who" and "what". It only required a nexus between "who" and "why". For example, the Income Tax Act levies income tax according to the income of a person on the principle that the higher a person's income, the more he will be taxed. The answer to the question "who is treated differently" is "those who have higher incomes. "Why are they treated differently?" The answer is that tax liability varies according to a person's ability to pay. Thus "who" and "why" are rationally related. However, the Court seldom asked "what is the different treatment" and whether it was necessary for achieving the purposes. In this example, a court would not ask whether persons with the highest income should be charged income tax at the rate of 30% or 40%. The Court left that to the legislature. Suppose, however, those with the highest incomes are taxed at a rate of 100%. Could it not be examined whether this amounts to expropriation? Such expropriation could also be violative of the right to equality. Thus, the "what" element has to be rationally related to the "why" and "who" elements. A court should insist that all three questions are interrelated, and should examine not only whether the criteria for distinguishing a group of people from others (who) are rationally related to the purpose of different treatment (why), but also whether so much of the amount and the type of different treatment (what) is

98. P. K. Tripathi, *Equality Under the Constitution of India—Some General Principles*, *in* SOME INSIGHTS INTO FUDNAMENTAL RIGHTS 45, 45-106 (University of Bombay 1972).

justified to achieve the purpose (why). The failure to do so results in formal equality at the expense of substantive equality. Professor Tripathi's objection was that "the nexus test as applied by the Court did not require an examination of the question of quantum of the disparity created by the statute".[99]

In *Balaji v. State of Mysore*,[100] Justice Gajendragadlkar had ignored the nexus formula and held that reservations for weaker sections of society enjoined by Article 15(4) of the Constitution should not exceed 50% of the total number of seats available for distribution. Otherwise, this would eclipse the right to equality itself. Article 15(1) provides the state shall not discriminate on the basis of religion, caste, sex, or place of birth. Article 15(4) was added to the Constitution in 1951 by the First Amendment, and provides that nothing in that Article or in Clause 2 of Article 29[101] shall prevent the state from making any special provision for the advancement of socially and educationally underprivileged classes of citizens or for the scheduled castes and the scheduled tribes. In this case, the Court did not merely examine the provisions of a statute to decide whether it offended the right to equality. The Court construed the two provisions of the Constitution contained in clause 1 and 4 of Article 15 and further examined the proportion of the protective discrimination for the underprivileged classes in light of the overriding right to equality given by Article 14. Articles 15 and 16 are species of, and must be in consonance with, Article 14. *Balaji* therefore declared that although caste may be one of the factors used for identifying the underprivileged, it may not be the sole criterion. This resulted from reading Clauses 1 and 4 of Article 15 together. It meant that protective discrimination in favor of socially and educationally underprivileged classes, particularly the scheduled castes and scheduled tribes, may not be considered discrimination on the basis of caste, even though caste is one factor for identifying underprivileged class. The Court had to make sure that classification

99. *Id*. at 67.
100. Balaji v. State of Mysore, A.I.R. 1963 S.C. 649.
101. It provides that no citizen shall be denied admission to any educational institution maintained by the state or receiving aid out of state funds on the ground of religion, race, caste, or language.

was not made exclusively on any of the grounds forbidden by Article 15(1), namely: religion, caste, sex, or place of birth. Further, the Court had to make sure that such special provisions for underprivileged classes did not make the right to equality guaranteed by Article 14 nugatory.[102] There the Court was not satisfied with merely examining whether the criteria of classification, namely social and educational underprivilege, was related to the achievement of advancing the interests of the underprivileged people, but whether so much reservation was not antithetical to the ideal of equality guaranteed by the Constitution. The Court did not say that such reservation was unnecessary to protect the interests of socially and educationally underprivileged classes of people. The Court said protective discrimination must be proportional to the totality of the opportunities available to the people in general. The Court thus applied a proportionality test for deciding whether so much reservation was desirable against the right to equality.

The Court adopted the proportionality approach in *Indra Sawhney v. India.*[103] The Supreme Court held that reservations should not exceed 50% of the total number of posts and that the relatively better off among the underprivileged classes should be excluded from reservation. This decision was given in response to a petition against the order of the V.P. Singh government to reserve 27% of the posts in government service for persons from underprivileged classes.

III. GROWTH OF PUBLIC INTEREST LITIGATION: ACCESS TO AND DEMOCRATIZATION OF THE JUDICIAL PROCESS

The Court liberalized its procedure with a view to facilitating access to the common man and increasing public participation in the judicial process as a means to control other bodies of government. This required radical change in the traditional paradigm of the judicial process. The traditional paradigm of the adversarial judicial process was designed for adjudication of disputes between private parties over contract, civil liability, property, or matrimonial matters. It was based on the following hypothesis: People are supposed to

102. The state shall not deny equality before the law and equal protection of law.
103. Indra Sawhney v. India, A.I.R. 1993 S.C. 477.

know the law and their rights, and the judicial process is the least desirable method of settling disputes and should be used only when other methods—like inter-party settlement, conciliation, or mediation—do not work. The traditional legal theory of judicial process envisioned a passive role for the courts. It postulated: (1) The courts merely found the law or interpreted it, but did not make it; (2) if the courts made the law, they did so only to fill in the gaps left by statute, and then only to the extent necessary for the disposal of the matter; (3) a court will not decide a question of law unless the decision is absolutely necessary for the disposal of the matter before it; (4) after a matter is dealt with by a court and it has given its decision, such a decision is binding on the parties and the same matter cannot be raised again before the same court or a court of concurrent jurisdiction;[104] (5) only a person who has suffered an injury or whose right is violated can approach the Court and initiate the judicial process; and (6) a person who has a cause of action and *locus standi* to raise an issue before a court of law must do so within a prescribed time limit provided by law. This paradigm postulates a litigant conscious of his rights and willing to vindicate them by resorting to the judicial process at the earliest point in time. In this paradigm of judicial process, only a person whose interest was prejudiced could have standing before the court and he must bring such an action within a reasonable time.

The above paradigm of judicial process was based upon the negative concept of judicial function. The paradigm also applied to public law adjudication. It suited the laissez faire economy and the minimum state concept which was prevalent during the Nineteenth century. Public law was an exception to the generality of private law, and the application of the same paradigm to the public law was considered compatible with this concept. The concept of judicial function, however, was bound to change when the Court undertook the function of judicial review. With judicial review, the courts prevented illegality by the government and thereby protected individual liberty. The above paradigm had to change when courts

104. An appeal to a higher court may, however, lie against the decision. The decision of the highest appellate court is final and binding on the parties. Questions regarding rights and liabilities decided therein cannot be raised again before any court. This is known as res judicata.

started resolving conflicts between liberty and authority and especially so when the concept of the state changed. With transition from laissez faire state to welfare state, the nature of judicial review changed and the courts could not remain passive. Unlike litigation involving private disputes, public law litigation involved greater public interest because its direct concern was the maintenance of the rule of law. Therefore, the courts had to gradually create a new paradigm of judicial process for public law adjudication.

A. Paradigm of Public Law Judicial Process

In England, the king's courts exercised the power of judicial review over all subordinate courts and administrative authorities to ensure they acted within the legal limits of their power. The courts had the power to issue prerogative writs such as habeas corpus, certiorari, mandamus, prohibition, and *quo warranto* for enforcing such limits. If a person was illegally detained or arrested, a writ of habeas corpus was issued to set him free. If a tribunal or an administrative authority acted illegally, it was stopped from proceeding by the writ of prohibition, or its decision could be quashed by a writ of certiorari. Mandamus was a writ issued for compelling an authority to do what it was legally bound or forbidden to do. If a person occupied a public office illegally or by usurpation, he could be asked to vacate it by a writ of *quo warranto*. Due to the efficacy of these writs, Dicey said that liberty of an individual emanated from the remedies provided by the courts.[105] For a long time, the courts followed the rules of private law adjudication while exercising the above jurisdiction. However, upon the realization that the larger public interest was involved in public law litigation, exceptions were made. In England, for example, an application for a writ could only be made by a person who had suffered an injury or whose rights had been violated. The writ of habeas corpus, however, could be sought by a friend or even a stranger on behalf of the person who was illegally detained. Subsequently, the rule of *locus standi* was liberalized with respect to other writs. The Law Commission of the United Kingdom suggested that *locus standi* be given to any

105. DICEY, *supra* note 10, at 195.

person who had "sufficient interest" in the matter, an idea incorporated in the Supreme Court Act of 1981.[106]

The Supreme Court of India's own paradigm of public law adjudication has been evolving by making a number of unorthodox innovations to traditional legal theory. The incorporation of a bill of rights in the Constitution and the vesting of special responsibility for protecting the rights of the people must have inspired the courts to be less technical and more informal. The law making function of the Court was never disguised. The traditional rules of prematurity, *locus standi* and *ratio decidendi*, were not strictly followed. These three concepts will be explained in the course of this discussion.

B. Prematurity

The rule of prematurity is that a court interprets a statute or discovers common law in so far as it is absolutely necessary for the disposal of a matter. If a matter can be disposed of without deciding the question of law, the court should do so. A court will not decide a question of law if the matter can be disposed of on a preliminary issue like lack of jurisdiction. A court will not decide the constitutionality of a statute if it is not absolutely necessary. This rule is known as the rule of prematurity, or "ripeness." The Court does not answer abstract or hypothetical questions. The Supreme Court of India has not been strict about the doctrine of prematurity.[107] In a country where a majority of the people are poor and unaware of their rights, the Court thought it was better to decide such questions about fundamental rights before any actual invasion occurs. The Court thought such premature decisions would also prevent the unnecessary prolonging of litigation. In *Basheshar Nath v. Commissioner of Income Tax*,[108] the Court considered whether fundamental rights could be waived, even though the matter under contest could have been decided on other grounds. From a strict positivist standpoint, reaching the broader question of waiver of fundamental rights was

106. WADE & FORSYTH, ADMINISTRATIVE LAW 680 (7th ed. 1997).

107. S. P. Sathe, *Avoidance of Premature Constitutional Questions by the Supreme Court*, *in* YEARBOOK OF LEGAL STUDIES 23, 23-47 (Madras ed., 1975).

108. Basheshar Nath v. Commissioner of Income Tax, A.I.R. 1959 S.C. 149.

unnecessary and undesirable. Seervai said: "But this case also furnishes an example of extreme undesirability of a court pronouncing on large constitutional questions which do not directly arise."[109]

The Court, however, addressed the question of waiver of fundamental rights because it wanted to protect people from themselves. In a rights conscious society, the doctrine of waiver was quite proper because there is a level playing field between citizens, all with equal rights. However, in a society where rights had been given to people who had been powerless and exploited for generations, such waiver could be dangerous and could make the entire bill of rights meaningless. The rights were not mere individual entitlements; they constituted the societal commitment to a new social order and therefore could not be left to their assertion by the individuals for whose benefit they had been guaranteed. A proactive judicial process was a condition precedent to the enforcement of fundamental rights.

C. Writ Jurisdiction of the Supreme Court and the High Courts

The Constitution confers power on the Supreme Court under Article 32 and on the High Courts under Article 226 to issue writs and orders in the nature of habeas corpus, mandamus, certiorari, prohibition, and *quo warranto*. The Supreme Court can issue these writs for the enforcement of fundamental rights. The High Courts can issue writs for enforcement of fundamental rights and for "any other purpose."[110] The Supreme Court held that "for any other purpose" meant for the enforcement of any statutory, as well as common law, right. Further, the Constitution is farsighted in its use of the phrase "in the nature of" because such a phrase liberates the Indian courts from the technical constraints with which the writs in England were hedged. In one of its earliest judgments, the Supreme Court made clear it would not stand on the formality of the petitioner having asked for a specific remedy. If the petitioner establishes a violation of his rights, the court will issue an appropriate remedy, irrespective of

109. H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 194 (2d ed. 1976)
110. INDIA CONST. art. 226(7).

what remedy has been requested.[111] The Constitution uses the words "in the nature of" by analogy to English writs. Indian courts can issue directions, orders, and writs other than prerogative writs. This helps the Indian courts to mold relief to meet the peculiar requirements of this country. It leaves to the courts a good deal of flexibility to deal with the problems at hand. It enabled courts in India to use private law remedies of injunction and stay orders given by the Code of Civil Procedure in the discharge of its public law function.[112] Process activism was therefore inherent in the provisions of the Constitution. The Supreme Court's observations of the Indian Constitution are broader than the prerogative writs in England.

Although the Constitution does not expressly say so, the Indian courts have made a distinction between the issuance of writs for the enforcement of fundamental rights and the issuance of writs for other purposes. The courts insist that the applicant exhausts alternative remedies before coming to court with a request for a writ "for other purposes."

D. Delay: Grounds For Refusal of Judicial Review

Although Article 32 confers a fundamental right to move the Supreme Court for the enforcement of fundamental rights, the Supreme Court held that such a right is not absolute. A person can lose this right if its assertion comes to court too late.[113] This decision was severely criticized in academic writings.[114] The law of limitation applies to ordinary suits and its purpose is to give finality to transactions. It is premised on the principle that no one should lose sleep over his rights and no person should be kept in indefinite uncertainty about his legal position. Although the law of limitation is not applicable to writ jurisdiction, courts have held that one must come to court for enforcement of his right within a reasonable period.

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111. T. C. Basappa v. T. Nagappa, A.I.R. 1954 S.C. 440.

112. *See* Sathe, *supra* note 107, at 353-55.

113. Tilokchand Motichand v. H. B. Munshi, A.I.R. 1970 S.C. 898.

114. Upendra Baxi, *Laches and the Right to Constitutional Remedies: Quis Custodiet Ipsos Custodes, in* CONSTITUTIONAL DEVELOPMENTS SINCE INDEPENDENCE 559 (Alice Jacob ed., Bombay: N.M. Tripathi 1975); Alice Jacob, *Denial of Judicial Relief Under Articles 32 and 226*, 16 J. INDIAN L. INST. 352 (1974).

However, in *Dr. Kashinath G. Jalmi v. the Speaker*,[115] the Court held that where public interest is involved, a court should hesitate to reject an application for a writ of *quo warranto* on the ground of delay. The Tenth Schedule of the Constitution, inserted by the Fifty-Second Amendment, contains provisions against the defection of a member of the legislature from one party to another. Under the Schedule, defection is defined as occurring when a member of the legislature incurs such disqualification rendered by the Speaker. The Speaker of the Legislative Assembly gave a ruling disqualifying certain legislators from membership on the ground of defection. Subsequently, the Speaker was removed and the Deputy Speaker acted as Speaker. In his capacity as Speaker, the Deputy Speaker reviewed the decision given by his predecessor and held that the members had not incurred such disqualification. A petition against the decision of the Deputy Speaker was made by Dr. Jalmi eight months after that decision. The High Court rejected the petition on the ground of delay. On appeal, the Supreme Court, held that the petition was not barred.

Justice J.S. Verma surveyed the case law on the subject and found that all of the decisions where petitions were rejected on the ground of delay were those in which enforcement of a personal right was sought. These decisions did not relate to the assertion of the right of the people against illegal occupation of a public office. The relief claimed in the instant case was not of any personal benefit to the petitioner, but rather a vacation of a public office held illegally by certain persons. Justice Verma pointed out that the principle of laches as a ground for dismissing a petition is based on the sound policy of protecting the public interest. Where, however, not entertaining a petition caused greater harm to the public interest than the harm caused by the entertainment of a delayed petition, the petition must be entertained. Therefore, a petition would not be thrown out on the ground of delay if the petitioner could prove that the perpetuation of an illegal occupation of public office would cause greater harm to the public interest than the harm caused by the entertainment of the delayed petition. When a person occupies a public office illegally, a

115. A.I.R. 1993 S.C. 1873.

petition seeking *quo warranto* against him is not in the interest of any individual, but is in the interest of the general public. Delay is a valid ground when an individual asserts this right against another individual, but it may not be a relevant ground for rejecting a petition when the public interest in occupation of a public office by the correct person is involved. A person who has illegally occupied such an office would benefit from the Court's refusal to entertain the petition on the ground of delay. Therefore, when a writ is sought for preventing an illegal occupation of public office, delay will not bar the petition.

The above case was the result of the recent jurisprudence of public interest litigation that had developed and the Court's newly developed paradigm of judicial process, which was consistent with the rights discourse it generated through judicial activism. The new paradigm envisions an affirmative, proactive role of the Court in facilitating access to justice for those who do not possess either knowledge or resources for invoking the judicial process on their own behalf, and in ensuring greater public participation in the judicial umpiring of the constitutional government. The new paradigm was for a court which had to protect the rights of the poor and illiterate of India and to ensure that the rule of law was observed by citizens, as well as rulers. The doctrinal activism the Court had developed needed support from procedural activism. Such activism sought: (1) the redressal of grievances of victimized sections of society brought within the purview of the Court; (2) procedural innovations with a view toward making justice informal, cheap, and expeditious; and (3) a more participatory, polycentric, and result oriented judicial process.

E. Locus Standi

One of the important methods by which courts saved themselves from spurious or vicarious litigation was by determining whether the person who petitioned the Court had *locus standi* to do so. So, who has the *locus standi*? Litigants must show that they are adversely affected by the impugned action or that their rights have been violated. Further, the issue raised must be a justiciable issue; an issue capable of resolution through the judicial process. This rule of private law adjudication is also applicable to public law adjudication. The

only exception is in the case of the writ of habeas corpus. This writ is issued to liberate a person from illegal detention. It may happen that the person held in such illegal detention is not in a position to move the court and therefore a stranger or the next friend is given *locus standi* to move the court for such a writ. Such a stranger or next friend may trigger the judicial process after showing that the impugned action or law resulted in denial of a person's liberty.

The rule of *locus standi* is based on sound policy. However, it presupposes that people are conscious of their rights and have the resources to fight against the violations of those rights. Even in England, the rule of *locus standi* has widened to allow persons with "sufficient interest" to challenge the government action. When the rules of *locus standi,* conceived for a more efficient functioning of the judicial process, inhibited genuine claims from reaching the courts, exceptions to the rule became necessary. According to S. A. de Smith:

> All developed legal systems have had to face the problems of adjusting conflicts between two aspects of the public interest- the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper to invoke the jurisdiction of the courts in matters that do not concern him.[116]

If public duties are to be enforced, and the public interest subserved by the enforcement of such public duties is to be protected, public-spirited persons or organizations must be allowed to move the courts and act in furtherance of the group interest even though they may not be directly injured in their own rights or interests. Both the United States and the United Kingdom have adopted this liberal view of *locus standi.*

The Supreme Court of India is the protector and guarantor of the fundamental rights of the people of India, the majority of whom are ignorant and poor. The liberalization of the rule of *locus standi* arose from the following considerations: (1) to enable the Court to reach

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116. S. A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 409 (4th ed. 1980).

the poor and disadvantaged sections of society who are denied their rights and entitlements; (2) to enable individuals or groups of people to raise matters of common concern arising from dishonest or inefficient governance; and (3) to increase public participation in the process of constitutional adjudication. This litigation came to be known as public interest litigation (PIL). PIL is, actually, a misnomer because all public law litigation is inspired by public interest. In fact, even private adjudication subserves public interest because it is out of public interest that people should honor contracts, should be liable for civil wrongs, and should honor rights in property or status. Whereas public interest is served indirectly by private litigation because the main focus is on the private interest of the litigants, public interest is served more directly by public law adjudication because the focus is on the unconstitutionality arising from either lack of power or inconsistency with a constitutionally guaranteed right. Public interest litigation is a narrower form of public law litigation.

The term public interest litigation is used in the United States, but public interest litigation in India differs from the American public interest litigation in substantial ways.[117] Baxi pointed out that the American public interest litigation was funded by government and private foundations and its focus was not so much on state repression or government lawlessness as on public participation in governmental decision making. He therefore insisted that the Indian phenomenon described as PIL should be described as social action litigation (SAL).[118] I am using the term PIL because of its acceptance and familiarity at the popular level. That term is now used in judgments of the courts and cells under that title have been set up in the Supreme Court as well as in various High Courts. The media also uses the term. PIL is different from the normal writ jurisdiction litigation in the following aspects: (1) the courts allow informality of procedure by entertaining letters written to judges or the court as petitions, or take cognizance of matters on their own (*suo moto*) and substitute inquisitorial processes in place of the adversary processes wherever necessary for the disposal of a matter; (2) the rules of *locus*

117. Clark D. Cunningham, *Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience*, 29 J. INDIAN L. INST. 494 (1987).

118. Baxi, *supra* note 66, at 289-90.

standi, meaning the rules regarding the eligibility of a person to invoke the jurisdiction of the courts, are relaxed; and (3) new reliefs and remedies are developed to do justice. In addition, PIL brought about a radical metamorphosis in the nature of the judicial process, imbibing in it polycentric, as well as legislative, characteristics. The conceptual difference between public law litigation, meaning constitutional law and administrative law litigation, and public interest litigation will be explained later after fully describing the evolution of the latter.

In *Sunil Batra v. Delhi Administration,* the Court responded to a letter written by Sunil Batra, a prison inmate, drawing attention to the miserable lot of a fellow prisoner who was subjected to unbearable physical torture by the prison authorities.[119] Batra scribbled the letter on a piece of paper and sent it to Justice Krishna Iyer of the Supreme Court. Justice Iyer responded to the letter, and from his response emerged the first judicial discourse on prisoners' rights.[120] On the other hand, while dealing with a petition filed by Advocate Kapila Hingorani regarding inordinately long periods of pre-trial detention suffered by some accused criminals, Justice Bhagwati obtained information about a large number of other people suffering from similarly long detention periods. These periods sometimes far exceeded the longest amount of imprisonment prescribed as punishment for the charged offense. Justice Bhagwati addressed the issue of pre-trial detention in *Hussainara Khatoon v. Bihar.*[121] The *Hussainara* Court held that the right to a speedy trial was covered under the procedure established by Article 21 of the Constitution and gave directions to courts and the governments regarding how to expedite trials.

Since then, several prisoners have written letters to individual judges, who in turn inquired into the matter. Because such prisoners rarely possess legal expertise, the facts in the letters require verification. Commissioners may be appointed to investigate the facts on behalf of the prisoners and submit reports to the Court. Such innovations in procedures were justified by Justice Bhagwati in

119. Sunil Batra v. Delhi Administration, A.I.R. 1978 S.C. 1675.
120. Sunil Batra v. Delhi Administration, A.I.R. 1980 S.C. 1579.
121. Hussainara Khatoon v. Bihar, A.I.R. 1979 S.C. 1360.

Bandhua Mukti Morcha v. India.[122] First, Justice Bhagwati explained the liberal rule of standing that the Court had articulated:

> There is no limitation in the words of clause (1) of Article 32 that the fundamental right which is sought to be enforced by moving the Supreme Court should be one belonging to the person who moves the Supreme Court nor does it say that the Supreme Court should be moved only by a particular kind of proceeding.[123]

Justice Bhagwati observed that wherever there was a violation of a fundamental right, any person could move the Supreme Court for the enforcement of such fundamental right. This was, however, qualified by the Court:

> Of course, the Court would not, in exercise of its discretion, intervene at the instance of a meddlesome interloper or busybody and would ordinarily insist that only a person whose fundamental right is violated should be allowed to activise the Court.[124]

Although this was the rule, exceptions were needed when actual victims required exceptions because they lacked either the knowledge of their rights or the resources for approaching the Court and some public-minded person or social action group moved the Court on their behalf. The Court could not close its doors to genuine complainants of violations of rights in order to keep "a meddlesome interloper" or a "busy body" out. Victims of oppression or exploitation may not be in a position to come to court on their own. They may be ignorant of their rights and ignorant of the remedy provided against denial of their rights. Therefore, another person motivated by altruistic considerations may approach the Court on behalf of the victim.

How does such an altruistic person move the Court? The Court said that he could do so by writing a letter "because it would not be right or fair to expect a person acting pro bono publico to incur expenses out of his own pocket for going to a lawyer and preparing a

122. Bandhua Mukti Morcha v. India, A.I.R. 1984 S.C. 802.
123. *Id*. at 813.
124. *Id*. at 251.

regular writ petition for being filed."[125] Thus, the Court seems to have been influenced not only by the desire to provide access to underprivileged persons but also to de-professionalize the system of justice. Two reforms were undertaken: (1) to allow a public-minded person to move the court on behalf of the victims of injustice who are poor, illiterate, or socially and educationally underprivileged; and (2) to allow activation of the Court through a letter instead of a formal petition drafted by a lawyer. Public interest litigation was therefore seen as an instrument of bringing justice to the doorstep of the poor and less fortunate people. Justice Bhagwati said in *P.U. D.R. v. India*:

> We wish to point out with all the emphasis at our command that public interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversarial character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief. Public interest litigation is brought before the Court not for the purpose of enforcing the rights of one individual against another as happens in the case of ordinary litigation, but is intended to promote and vindicate public interest which demands that violations of constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed.[126]

The Court observed that the court systems do not exist to serve only the rich, but also to serve the poor. It was only the privileged who had, so far, held the key to the doors of justice. For the first time, the "portals of the Court are being thrown open to the poor and the downtrodden."[127] In *Bandhua Mukti Morcha v. India*,[128] Justice

125. *Id*. at 814.
126. P.U.D.R. v. India, A.I.R. 1982 S.C. 1473, 1476.
127. *Id*. at 1478.
128. *See Bandhua Mukti Morcha*, A.I.R. 1984 S.C. at 802, 816.

Bhagwati pointed out that Article 32, Clause (2) required the Court to enforce the fundamental rights through "appropriate proceedings," proceedings that meet the ends of justice. Justice Bhagwati further stated how the procedural innovations that the Court adopted made justice more meaningful. He said:

> It is not at all obligatory that an adversarial procedure, where each party produces his own evidence tested by cross examination by the other side and the judge sits like an umpire and decides the case only on the basis of such material as may be produced before him by both parties, must be followed in a proceedings under article 32 for enforcement of fundamental right. . . . (I)t may be noted that there is nothing sacrosanct about the adversarial procedure.[129]

On letter petitions as well as *locus standi,* R.S. Pathak in *Bandhua Mukti Morcha v. Bihar* forcefully addressed another viewpoint. Regarding letter petitions, he said:

> I see grave danger inherent in a practice where a mere letter is entertained as a petition from a person whose antecedents and status are unknown or so uncertain that no sense of responsibility can, without anything more, be attributed to the communication. There is good reason for the insistence on a document being set out in a form, or accompanied by evidence, indicating that the allegations made in it are made with a sense of responsibility by a person who has taken due care and caution to verify those allegations before making them.[130]

Justice Pathak was apprehensive that an unverified communication received by the Court through the post might have been employed *mala fide,* as an instrument of coercion or blackmail against a person who holds a position of honor and respect in society.[131] He warned that the Court's judicial process should not be abused, and that it is necessary to follow formalities that ensure the extraordinary remedy provided by the Constitution is not used to

129. *Id.* at 815.
130. *Id.* at 840.
131. *Id.*

serve private partisan interests.

Justice Sen said in his concurring judgment that letters should be addressed to the Court. The Court seldom entertained anonymous letters. In most cases the petitioner was a known social activist—Sunil Batra[132] or Vasudha Dhagamwar[133]—or an organization—Bandhua Mukti Morcha[134] or the Peoples Union for Democratic Rights.[135] Further, Justice Sen said that letters should be addressed only to the Court generally and not to a specific judge. The practice of letters being addressed to individual judges was criticized. Letter petitions became rare and the Court appointed lawyers as amicus curie and asked them to draft a regular petition based on the letter. As a result, letters to individual judges also became rare. Questions regarding the validity of such informal procedures were referred from a two-judge bench comprised of Justice S.M. Fazl Ali and Ventkatramiah, to a larger bench for consideration.[136] The larger bench, however, never addressed the matter, perhaps because those questions had become academic.

When the Justices spoke against the adversary procedure, they did not foresee that any evidence would be believed without giving the opposing party an opportunity to respond. To that extent, the adversary procedure could not be eliminated. However, what the courts expected from the respondent, which was the state in most of the cases, was that instead of taking an adversarial position and merely denying the allegation, the respondent should help the court to find the truth. The litigation was not against the respondent but against the illegalities committed on its behalf. The state would benefit from such judicial inquiries because the state would know what it was lacking in administration and would be able to improve performance. In this sense Justice Bhagwati said, in *P.U.D.R. v. India*, that it was not an adversarial proceeding:

> Public interest litigation, as we conceive it is essentially a co-operative or collaborative effort on the part of the petitioner,

132. Sunil Batra v. Delhi Administration, A.I.R. 1978 S.C. 1675.
133. Kadra Pahadiya v. Bihar, A.I.R. 1981 S.C. 939.
134. *Bandhua Mukti Morcha*, A.I.R. 1984 S.C. at 802.
135. *P.U.D.R.*, A.I.R. 1982 S.C. at 1473.
136. Sudipt Mazumdar v. State of M. P., (1983) 2 S.C.C. 258.

> the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them. The State or public authority against whom public interest litigation is brought should be as much interested in ensuring basic human rights, constitutional as well as legal, to those who are in a socially and economically disadvantaged position, as the petitioner who brings the public interest litigation before the court.[137]

Further, the commissioners' reports are open to cross-examination by the respondents. They help the Court form a prima facie opinion. The Supreme Court is careful to appoint responsible persons as commissioners.[138] In public interest litigation, the Court has not intended the judges to take a neutral position as in adversary litigation, but to examine complaints of violations of human rights, subversion of the rule of law, or disregard of environment with greater care and through a proactive inquiry. They need not wait for the petitioner to prove everything letting the respondent take recourse to mere denials as is done in the adversary proceedings, but can order investigations and employ inquisitorial methods for finding the truth.

A good example of such cooperative or collaborative effort is the decision in *Azad Riksha Pullers Union v. Punjab.*[139] The Punjab Cycle Riksha, or Regulation of Rikshaws Act of 1975, provided that licenses to ply rikshaws could be given only to those owners who run the rikshaws. Licenses could not be given to those who owned the rikshaw but rented them to other persons. This Act threatened the unemployment of a number of rikshaw pullers who did not own their rikshaws, and threatened to leave many rikshaws owned by the non-driving owners idle. The Act was challenged on the ground that it would affect the right to carry on any trade, business, or occupation guaranteed by Article 19(1)(g) of the Constitution. Justice Iyer, instead of striking down the law, provided a scheme whereby the rikshaw pullers could obtain loans from the Punjab National Bank to

137. *See P.U.D.R.*, A.I.R. 1982 S.C. at 1477-78.
138. *Bandhua Mukti Morcha,* A.I.R. 1984 S.C. at 816.
139. Azad Riksha Pullers Union v. Punjab, A.I.R. 1981 S.C. 14.

acquire the rikshaws. The plan provided for the repayment of the loan over a period of time. The intention of the legislature to abolish the practice of renting the rikshaws from the owners was achieved without causing any suffering to the rikshaw pullers.

The liberal rule of *locus standi* helped the social action groups come to court on behalf of the underprivileged sections of society. Groups like Peoples Union For Civil Liberties, Peoples Union for Democratic Rights, Bandhua Mukti Morcha, Akhil Bharatiya Shoshit Karmachari Sangh, Banwasi Sewa Ashram and the Common Cause (a registered society), and individuals like M.C. Mehta, Sheela Barse, Sivsagar Tiwari Upendra Baxi had standing to move the Court on behalf of underprivileged people. Similarly, victims such as pre-trial prisoners,[140] prison inmates,[141] unorganized labor,[142] bonded labor,[143] pavement dwellers,[144] children prosecuted under the Juvenile Justice Act,[145] children of prostitutes,[146] and women in protective custody[147] received the Court's attention. Public interest litigation of the late 1970s and the early 1980s was dominated by petitions on behalf of oppressed people denied their human rights. The Court's liberal interpretation of Article 21 of the Constitution included human rights within the scope of the fundamental rights guaranteed by the Constitution. The liberal rules of access from which public interest litigation emanated enabled the courts to reach victims of injustice, who had until then been invisible. The procedural activism complemented the substantive activism previously surveyed in this Article.[148]

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140. Hussainara Khatoon v. Bihar, A.I.R. 1979 S.C. 1360.
141. *Sunil Batra*, A.I.R. 1978 S.C. at 1675.
142. *P.U.D.R.*, A.I.R. 1982 S.C. at 1473.
143. *Bandhua Mukti Morcha*, A.I.R. 1984 S.C. at 803.
144. Olga Tellis v. Bombay Municipal Corporation, A.I.R. 1986 S.C. 180; Sodan Singh v. New Delhi Municipal Corporation, (1998) 2 S.C.C. 727, 743.
145. Munna v. State of U.P., A.I.R. 1982 S.C. 806.
146. Gourav Jain v. India, A.I.R. 1997 S.C. 3021.
147. Dr. Upendra Baxi v. U.P., (1983) 2 S.C.C. 308.
148. *See supra* text accompanying notes 84-139.

F. Concept of Justiciability Extended

The PILs, raising the question of governance, asked the courts to compel the government to do its duty or to prevent the government from doing what it was legally forbidden to do. This is the function of the writ of mandamus. The difference between the traditional mandamus and the mandamus under PIL is that under PIL, the scope of mandamus increased. Mandamus was issued under traditional administrative law only to compel the state or a public authority to do what it was legally bound to do. If discretion was involved, the Court could not issue a writ of mandamus. Under PIL, however, mandamus is issued to mandate acts within the discretionary power of the government that do not fall within the purview of the traditional writ of mandamus. For example, mandamus was issued when the petitioner alleged a violation of human rights the CBI should investigate,[149] or when a petition sought directions from the Court to trust the CBI to inquire into the sexual exploitation of children and the flesh trade.[150] Mandamus was also issued when government hospitals failed to provide timely emergency medical treatment to persons in need, violating their right to life,[151] or when petitions against the management of hospitals for mental diseases had failed.[152] Mandamus was issued with petitions seeking to enforce public health and safety measures against municipal corporations,[153] petitions against non-functioning medical equipment in government hospitals,[154] and petitions against the mosquito menace that jeopardized the right to life.[155] A petition asking for education of the children of prostitutes[156] and a petition impugning a provision in the Jail Manual, that provided the body of an executed convict be

149. Paramjit Kaur v. Punjab, (1996) 7 S.C.C. 20; Secretary, Hailakandi Bar Association v. Assam, (1995) Supp.(3) S.C.C. 736.

150. Vishal Jeet v. India, A.I.R. 1990 S.C. 1412.

151. P. B Khet Mazdoor Samity v. West Bengal, A.I.R. 1996 S.C. 2426.

152. S. R. Kapoor v. India, A.I.R. 1990 S.C. 752; B. R. Kapur v. India, (1989) 3 S.C.C. 387; Rakesh Chandra v. Bihar, A.I.R. 1989 S.C. 348; Ra Kesh Chandra v. Birha, A.I.R. 1995 S.C. 208.

153. K. C. Malhotra v. M. P., A.I.R. 1994 M.P. 48.

154. People's Union for Civil Liberties v. India, A.I.R. 1997 Del. 395.

155. India v. S. J. Pandit, A.I.R. 1997 Ker. 152.

156. Gourav Jain v. India, A.I.R. 1997 S.C. 3021.

suspended for half an hour after death, on the ground that it violated the right to dignity included in the right to personal liberty.[157] Both responded with suitable mandamus and other orders. Petitions for improving the conditions of service of the members of the subordinate judicial service,[158] for filling vacancies of the judges of the Supreme Court and the High Courts,[159] for seeking a ban against judges taking up post retirement jobs in government or politics,[160] and for seeking directions from the Court to expedite the disposal of pending cases so as to reduce the period of pre-trial detention[161] are examples of PILS in judicial matters. Other examples include a petition by a Bar Association seeking contempt proceedings against the police for patronizing an organized political party[162] and a petition seeking permission of the Court to allow non-lawyers to appear in court during a lawyers' strike.[163] Wadhwa could raise questions under PIL about re-promulgation of the ordinances.[164] Common Cause, a registered society founded by Mr. H.D. Shourie, could raise questions about blood transfusions,[165] arrears in courts,[166] appointment of consumer courts,[167] and abuse of distribution power, as in the case of petrol pumps.[168] Shiv Sagar Tiwari could raise a question about arbitrary allotments of houses.[169] Finally, Vineet Narain could obtain orders from the Court to the CBI to fairly and properly conduct and complete investigations into alleged acts of corruption and breach of foreign exchange and to report to itself regarding the investigation.[170] He could also, by another petition, obtain directions as to how the

157. Pt. Parmanand Katara, Advocate v. Union of India, (1995) 3 S.C.C. 248.
158. All India Judges Association v. India, (1998) 2 S.C.C. 204.
159. Subhash Sharma v. India, A.I.R. 1991 S.C. 631.
160. Nixon M. Joseph v. India, A.I.R. 1998 Ker. 385.
161. Common Cause, a Registered society v. Union of India, A.I.R. 1996 S.C. 1619; Common Cause, a registered Society v. Union of India. A.I.R. 1997 (Supp.) S.C. 1539.
162. Supreme Court Bar Association v. State of U. P., (1995) Supp. (3) S.C.C. 602.
163. Common Cause, a Registered society v. Union of India, (1994) 5 S.C.C. 557.
164. D.C. Wadhwa v. Bihar, A.I.R. 1987 S.C. 569.
165. *Common Cause*, A.I.R. 1996 S.C. at 929.
166. *Common Cause*, A.I.R. 1996 S.C. at 1619; Common Cause v. India, A.I.R. 1997 S.C. (Supp.) 1539.
167. Common Cause, a Registered society v. Union of India, (1992) 1 S.C.C. 707.
168. Common Cause, a Registered society v. Union India, (1996) 6 S.C.C. 530.
169. Shivsagar Tiwari v. Union of India, (1996) 6 S.C.C. 558.
170. Vineet Narain v. Union of India, A.I.R. 1996 S.C. 3386.

CBI could be reorganized so as to ensure its independence as an investigation agency.[171] The Court took up the work of monitoring the investigation of corruption cases since the CBI and the revenue authorities had failed to investigate matters arising out of seizure of the Jain diaries, which contained detailed accounts of vast payments made to various high-ranking politicians. Chief Justice Verma, speaking for the Court, observed that "none stands above the law"[172] and that monitoring must be done so that the investigation progressed while ensuring that the Court did not direct or channel those investigations or in any manner prejudice the right of those accused to a full and fair trial. The Court made it clear that it took over monitoring only because the superiors to whom the investigating authorities were supposed to report were themselves involved or suspected to be involved in the crimes. The Court called this a continuing mandamus. A similar continuing mandamus was issued in the *Fodder Scam* case in Bihar. The Court issued guidelines detailing how, and to whom, the CBI authorities should report offenses under investigation.[173] A petition was filed by a member of Parliament in conjunction with NGOs prayers for disclosure of the Vohra committee's report on corruption.[174]

The Court addressed PILs complaining of non-implementation of a ban imposed by the Drugs and Cosmetics Act of 1940 on the import, manufacture, and sale of certain drugs.[175] The Court also considered the inadequacy of safety precautions in the army's ammunition test firing range near Itarsi in M.P., which resulted in the death of tribal people who strayed onto the range to collect metal scraps of ammunition.[176] Other debated issues include the shortage of hazardous and non-hazardous chemicals,[177] inhumane working conditions in stone quarries,[178] and serious deficiencies in the matter

171. Vineet Narain *et al*. v. Union of India, A.I.R. 1998 S.C. 889.
172. *Id*. at 896.
173. Union of India, v. Sushil Kumar Modi, A.I.R. 1997 S.C. 314.
174. Dinesh Trivedi, M. P. v. India, (1997) 4 S.C.C. 306.
175. Vincent Panikurlangara v. Union of India, A.I.R. 1987 S.C. 990.
176. Sudipt Mazumdar v. State of M.P., (1996) 5 S.C.C. 368.
177. M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 965.
178. Bandhua Mukti Morcha v. India, A.I.R. 1992 S.C. 38.

of collection, storage, and supply of blood by blood banks.[179]

The Communist Party of India appealed the decision of the Kerala High Court[180] regarding a writ petition filed by a citizen. The High Court held that the *bandh*, organized to close down all business on a particular day and enforced through coercion, violated the right to freedom of movement guaranteed by Article 19(1)(d) and the right to personal liberty guaranteed by Article 21 of the Constitution. The Supreme Court affirmed the judgment of the Kerala High Court.[181] Another petition contended that demonstrations and processions conducted in the city area caused obstruction of pedestrians' free movement and vehicular traffic.[182] In another petition it was alleged that the government failed to take action against those responsible for the communal riots held in Mumbai in December, 1992 and February, 1993. The Court did not find substance in these allegations.[183]

Other petitions were successful, including petitions seeking improvement in the management and control of road traffic,[184] petitions while successfully made for the construction of a new bridge, bridge formed the lifeline for villagers; replacing of a wooden bridge that collapsed due to the negligence of the authorities; the provision of separate schools with vocational training; and the provision of hostels with regular medical check-ups for the children of lepers.[185] In *M.C. Mehta v. India*,[186] the Court asked the Government of India and the Government of U.P. to file an affidavit explaining why a large part of the toll tax and the visitors fees received from tourists visiting the Taj Mahal should go to the Agra Development Authority, when the money logically should have been spent on the preservation of the Taj Mahal and cleaning the city of Agra.

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179. Common Cause, a Registered society v. Union of India, A.I.R. 1996 S.C. 929.
180. Bharat Kumar K. Palicha v. State, A.I.R. 1997 Ker. 291.
181. Communist Party of India v. Bharat Kumar, A.I.R. 1998 S.C. 184.
182. Peoples Council For Social Justice, Ernaculam v. State, A.I.R. 1997 Ker. 309.
183. Committee For the Protection of Democratic Rights v. Chief Minister of State of Maharashtra, (1996) 11 S.C.C. 419.
184. M. C. Mehta v. India, A.I.R. 1998 S.C. 186.
185. S. Rathi v. India, A.I.R. 1998 All. 331.
186. M.C. Mehta v. Union of India, A.I.R. 1998 S.C. 2605.

The Court held that employees of a private educational institution had standing to enforce their right to wages equal to the wages of employees of government institutions, because education is similarly a matter of public interest.[187] Similarly, a petition to remove an advocate general[188] and a petition challenging appointment of lecturers in a college[189] were held admissible. A student council was held not to have standing to challenge the Vice Chancellor's decision to allow certain students to appear for examination. Because the Court reasoned that the student council failed to show: (1) that it was authorized to file such litigation; (2) who or what granted such authorization; (3) whether the student council had sufficient funds to indulge in such litigation; and (4) what public purpose would be subserved by the suit.[190] When liberalization of *locus standi* takes place on such a large scale, consistency is often a problem. Unequal application of the rules of *locus standi* and justiciability result from subjective, personal inclinations of judges or the circumstances under which the petitions are heard.

G. Directions: A New Form of Judicial Legislation

Article 32 and Article 226 confer on the Supreme Court and the High Courts the power to issue "directions, orders or writs" for achieving the objectives of those articles. The courts have issued directions for varied purposes. In public interest litigation, the Supreme Court and the High Courts have issued directions for appointing committees or for asking the government to carry out a scheme. They may constitute specific orders to the parties to do or refrain from doing something.

For example, directions in the *Azad Riksha Pullers* case[191] asked

187. K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engineering, A.I.R. 1998 S.C. 295.

188. Ponnuswamy v. Tamil Nadu, A.I.R. 1995 Madras 78.

189. Meera Massy v. S.R. Malhotra, A.I.R. 1998 S.C. 1153. The lecturers were challenged because they did not fulfill the qualifications prescribed by a professor of the same college who had no personal animosity against those persons and who had a genuine interest in the standards of education.

190. Bhartiya Homeopathy College v. Students Council of Homeopathy Medical College, A.I.R. 1998 S.C. 1110.

191. A.I.R. 1981 S.C. 14.

the Punjab National Bank to advance loans to the rikshaw pullers and contained a whole scheme for the repayment of such loans. Directions in *Common Cause v. India*[192] provided for how blood should be collected, stored, given for transfusion, and how blood transfusions could be made safe. Directions were given to the government to disseminate knowledge about the environment through slides in cinema theaters or special lessons in schools and colleges.[193] The Supreme Court gave directions as to how children of prostitutes should be educated;[194] what the fee structure in private medical or engineering colleges should be;[195] preparing a scheme for the housing of pavement dwellers or squatters;[196] and how the CBI should be insulated from extraneous influences while conducting investigations against persons holding high offices.[197] When contract labor workers in the Food Corporation of India sought an extension of the Contract Labor Regulation and Abolition Act of 1970, the Court directed the concerned governments to organize committees, to make the necessary inquiries and to submit reports as to whether contract labor should be abolished in those corporations.[198]

In another case,[199] the Court was asked to conduct an inquiry into police officers of red light areas, and to remove all victims from the flesh trade and provide them with remedies. The Court could not undertake such a roving inquiry, but gave directions to the government. In *Kishen v. State of Orissa*, the Supreme Court gave directions to the government regarding measures to be taken for preventing deaths due to poverty and starvation.[200] These directions were in the nature of specific orders from the Court to the government and were administrative in character.

Some of these directions had legislative effect. Law making by the Supreme Court through directions has belied the legal theory

192. A.I.R. 1996 S.C. 929.
193. M. C. Mehta v. Union of India, A.I.R. 1992 S.C. 382.
194. Gaurav Jain v. India, A.I.R. 1990 S.C. 292.
195. TMA Pai Foundation v. State of Karnataka, A.I.R. 1995 S.C. 2431.
196. Sodan Singh v. New Delhi Municipal Corporation, A.I.R. 1998 S.C. 1174.
197. Vineet Narain v. Union of India, A.I.R. 1998 S.C. 889.
198. Food Corporation of India Workers' Union v. Food Corporation of India, A.I.R. 1985 S.C. 488.
199. Vishal Jeet v. Union of India, A.I.R. 1990 S.C. 1412.
200. A.I.R. 1989 S.C. 677.

regarding *ratio decidendi* and *obiter dictum.* Generally, any legal principle that becomes the basis of a decision, without which decision could not have been rendered, is called *ratio decidendi.* Such a legal principle, or *ratio*, is binding on that court and on all courts subordinate to it in litigation involving similar questions. The *ratio* is the law laid down by the court and that alone is binding on subordinate courts in future litigation. Any legal principle that the court elucidates but that is not necessary for the disposal of the case will not enjoy the status of a *ratio.* Such extraneous judicial observations on principles of law are known as *obiter dictum.* The *obiter dictum* is merely of persuasive value. It may be cited by lawyers, but will become a binding precedent only if it is accepted by a court as a *ratio* in another case. While a decision is binding on the actual parties (res judicata), the ruling (*ratio*) is binding on the courts while deciding future cases. The doctrine of stare decisis means that every lower court is bound by the decisions of the higher court. This principle also applies to various benches of the Supreme Court. Therefore, a bench of higher-strength judges of the Supreme Court is consulted if a previous decision of a different bench is to be reconsidered. The doctrine of precedent means that a court is bound by its own previous decision and the lower courts are bound by the decision of a higher court. Article 141 of the Constitution says that the law declared by the Supreme Court shall be the law of the land. In terms of strict legal theory, only the *ratio* constitutes the binding law. Nevertheless, the High Courts have held that they are bound even by the *obiter dicta* of the Supreme Court.[201] The *obiter dicta* of the Supreme Court in *Golaknath v. Punjab*,[202] stating that Parliament could not amend the Constitution so as to take away or abridge fundamental rights was not a *ratio.* The actual decision of the Court was that the impugned constitutional amendments forming the basis by which the petitioner's properties in that case had been taken were valid. Since the Court had applied the doctrine of "prospective overruling," all those constitutional amendments which the petitioner had challenged had been held to be valid. Thus, the actual Court's

201. *See* M. P. JAIN, INDIAN CONSTITUTIONAL LAW 176 (N.M. Tripathi, 2d ed. 1970) (1962).

202. A.I.R. 1967 S.C. 1643.

decision was not directly connected with the Court's futuristic mandate that Parliament shall not amend the Constitution so as to take away or abridge fundamental rights. That mandate was to be applicable only in the future. Since the traditional legal theory of positivism did not conceive any law making function to be performed by the courts, such a futuristic mandate was preposterous. Therefore in strict positivist terms, the *Golaknath* dicta was not the law. In reality, though, it was treated as law, not only by the Court itself but also by Parliament. Parliament took steps to amend the Constitution to overturn that *dicta*. The Court held in *Keshavananda Bharati*[203] that the *Golaknath* dicta was wrong.

The *ratio-obiter* distinction has become inconsequential in constitutional law litigation in general, and particularly in public interest litigation. In public interest litigation, the Court has begun legislating through issuing directions. These directions are overtly legislative and they are considered binding not only by the Supreme Court and lower courts, but also by the government and social action groups. In *Laxmikant Pandey v. India*[204] the Supreme Court provided guidelines as to what procedures should be followed and what precautions should be taken when allowing the adoption of Indian children by foreign parents. There was no law to regulate inter-country adoptions and such lack of legal regulation could cause incalculable harm to Indian children. Considering the possibility of child trade for prostitution as well as slave labor, legal regulation of such adoptions was essential. Therefore, Justice Bhagwati created a scheme for regulating both inter-country and intra-country adoptions. For the last twenty years, social activists have used these directions to protect children and promote desirable adoptions.

IV. LEGITIMACY

The Supreme Court of India has become the most powerful apex court in the world. Unlike the Supreme Court of the United States,

203. Kesavanand Bharati v. Kerala, A.I.R. 1973 S.C. 1461.

204. Laxmi Kant Pandey v. Union of India, A.I.R. 1987 S.C. 232; *see also* Sumanlal Chnotelal Kamdar v. Asha Trilokbhai Saha, A.I.R. 1995 S.C. 1892; Laxmikant Pandey v. Union of India, A.I.R. 1992 S.C. 118.

the House of Lords in England, or the highest courts in Canada or Australia, the Supreme Court of India may review a constitutional amendment and strike it down if it undermines the basic structure of the Constitution.[205] The realist school of jurisprudence uncovered the myth that judges merely declare or interpret pre-existing law. The realist school of jurisprudence stated that judges make law and the law is what the courts say it is. This "legal skepticism" was a reaction to Austin's definition of law as a command of the political sovereign. According to analytical jurisprudence, a court merely applies or interprets existing law. The American realist school of jurisprudence asserted that the judges made law, though interstitially. Jerome Frank, Justice Holmes, Justice Cardozo, and Justice Karl Llewellyn were the chief exponents of this school.[206] The Indian Supreme Court not only makes law, as understood in the sense of realist jurisprudence, but actually legislates. Judicial law making in the realist sense is what the Court does when it expands the meanings of the words "personal liberty," "due process of law," or "freedom of speech and expression."

The doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the pre-existing law. In reality, this distinction is impractical and does not exist. Construed broadly it merely means that one body of the state should not perform a function that essentially belongs to another body. While law-making through interpretation and expansion of the meaning of open textured expressions like "due process of law," "equal protection of law," or "freedom of speech and expression" is a legitimate judicial function, the Supreme Court's creation of entirely new laws through directions, as in the above mentioned cases, is not a legitimate judicial function.

After surveying Indian Supreme Court caselaw, we arrive at the conclusion that the Court has clearly transcended the limits of the judicial function and has undertaken functions which really belong to either the legislature or the executive. Its decisions clearly violate the limits imposed by the doctrine of separation of powers. A court is not

205. *Kesavanand Bharati*, A.I.R. 1973 S.C. at 1461.

206. DENNIS LLYOD, INTRODUCTION TO JURISPRUDENCE 644 (6th ed. 1994).

equipped with the skills and the competence to discharge functions that essentially belong to other coordinate bodies of government. Its institutional equipment is inadequate for undertaking legislative or administrative functions. It cannot create positive rights such as the right to work, the right to education, or the right to shelter. It does not have the equipment for monitoring the various steps that are required for the abolition of child labor. It cannot stop entirely the degradation of the environment or government lawlessness. Its actions in these areas are bound to be symbolic. Admitting all these aspects, therefore, judicial activism is welcomed not only by individuals and social activists, but also by the government and other political players, like the political parties and civil servants. None of the political players have protested against judicial intrusion into matters that essentially belonged to the executive. Some feeble whispers are heard, but they are from those whose vested interests are adversely affected. On the other hand, the political establishment is showing unusual deference to the decisions of the Court. Whether it is the limitation by the basic structure doctrine on Parliament's constituent power under Article 368 of the Constitution, or the limitations upon the President's power under Article 356,[207] the political establishment has considered itself bound to function within the limits drawn by the Supreme Court. Generally, the people believe that the government and other authorities must abide by the decisions of the Court. The general population and political players believe that in matters involving conflict between various competing interests, the courts are better arbiters than politicians. And by political players, I mean not only the central and the state governments and political parties, but also various constitutional authorities such as the President, the Election Commission, the National Human Rights Commission, and the statutory authorities including the tribunals, commissions and regulatory agencies.

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207. *See* S.R. Bommai v. India, A.I.R. 1994 S.C. 1918. Under Article 356 of the Constitution, the President can dismiss the government of the state when its charge is not carried out in accordance with the Constitution. Whether a government functions according to the constitution is a political question which had to be assessed by the President. In *Bommai*, the Supreme Court laid down legal parameters for judging the validity of the President's actions. Despite such legal parameters, the decision of the Court is bound to be political.

A. Legitimacy: Conceptualization

John Austin defined law as a command of the sovereign enforced through sanction. According to Austin, it is coercive power that distinguishes law from fashions, habits, or even customs. Austin did not make any distinction between good law and bad law. To him, even a bad law was law if it fulfilled the three characteristics of law: (1) it was a command; (2) it was issued by the sovereign authority; and (3) it was backed by a sanction. H.L.A. Hart, a critic of analytical jurisprudence, asks whether an order from a gunman demanding a bank teller to hand over his cash was law?[208] The order of the gunman was also backed by a sanction, *i.e.*, the fear of death. Was the gunman a sovereign? Austin defines sovereign as a person or authority that is subordinate to none and is obeyed by all. At the particular point of time when the gunman orders the bank teller to hand over the cash, he is obeyed by everyone who is under his threat and he is not required to obey anyone. The difference between the gunman and a political sovereign is that the gunman is not considered to be a lawful authority and his command is obeyed out of fear of death alone. According to Hart, the bank teller obeyed the gunman because he was "obliged" to do so. He did not have an obligation to obey. What is the difference between "being obliged to obey" and "having an obligation to obey?" The bank teller is obliged to obey but does not have an obligation to obey. Hart further says:

> It is, however, equally certain that we should misdescribe the situation if we said 'on these facts' that [the bank teller] 'had an obligation' or a 'duty' to hand over the money. So from the start it is clear that we need something else for an understanding of the idea of obligation. There is a difference, yet to be explained, between the assertion that someone *was obliged* to do something and the assertion that he *had an obligation* to do it.[209]

A sovereign is considered to be a legitimate authority. A legitimate authority is one who is obeyed not only because one "is obliged to do

208. H.L.A. HART, THE CONCEPT OF LAW 9 (2d. ed. 1970).
209. *Id*. at 80.

so" but also because one feels that he is "under an obligation to do so." Professor Hart was a linguistic philosopher and by drawing a distinction between "being obliged to act" and "having an obligation to act," he points out the difference between compliance with an order because of fear and compliance with an order because such an order is considered to be binding.

A gunman is obeyed only because there is fear of death. A sovereign may also be obeyed because there is fear of punishment, but that punishment is considered to be prescribed by a legitimate authority. It is the "obligation to act" that arises from the legitimacy of an order. A sovereign that is appointed or elected by law is considered legitimate. Legal validity is a prerequisite to legitimacy. When we say that a law is valid, we mean that it is made by an authority competent to make it and that it is made in accordance with the procedure prescribed therefor.

The difference between power and authority is similarly significant. The gunman has power, but no authority. The sovereign is supposed to have power and authority. Sometimes the sovereign lacks power, but possesses authority. For example, under the Constitution, the President of India has to act on the aid and advice of the Council of Ministers.[210] The President has power to return the advice once but if the cabinet persists in giving that advice, he must accept it and act in accordance with it.[211] Thus, the president may not have the power but he has the authority. The ultimate order must be in the name of the President; otherwise, it is not legitimate.

According to Max Weber, the most common form of legitimacy is "the belief in legality, i.e., the acquiescence in enactments which are formally correct and which have been made in the accustomed manner."[212] While validity is essentially a legal concept, legitimacy is a sociological concept. Validity is determined in terms of legality and it is also a prerequisite of legitimacy. However, a law maybe valid and yet lack legitimacy. For example, when Gandhi refused to obey a law he considered unjust, he delegitimated the colonial law and

210. INDIA CONST. art. 74.
211. INDIA CONST. art. 74 (proviso).
212. MAX WEBER, ON LAW IN ECONOMY AND SOCIETY 9 (Edward Shils & Max Rheinstein trans., Harvard University Press 1925).

sought to legitimize conscientious objection to an unjust law. Although the law was valid because it had been enacted by a competent authority, it was divested of its legitimacy in the eyes of a large number of Indians because of its unjust character. When Tilak was sentenced to six years of imprisonment for the offense of sedition, he stated that although he was guilty in a civil court, he was innocent in a higher court, a divine court. Unlike Gandhi, Tilak did not plead guilty to the charge of sedition but asserted that what he wrote or said did not amount to sedition. Gandhi's approach was based on morality (natural law) whereas Tilak appealed to the concept of the rule of law—the basis of English law.[213] Both, however, protested against the positive law which they saw as unjust. The justness of the law was determined by applying moral parameters. In legal theory, the concept of natural law has always acted as a moral scale for the evaluation of a positive law. Where a positive law manifestly runs counter to natural law, it loses its legitimacy. When German generals pleaded that they participated in the extermination of the Jews under orders of superiors given under valid German laws, the Nuremburg tribunal, set up by the Allies to try war criminals after the end of the Second World War, rejected that plea on the ground that their crimes against humanity could not be justified under any law. The tribunal therefore held that even a valid law could not give authority for such heinous crimes. The decision of the Nuremburg tribunal, though erroneous from the standpoint of legal positivism, was right according to a widely shared consensus which emerged after the War. That consensus lent legitimacy to the decision of the Nuremburg tribunal.

In India, although the declaration of emergency in 1975 and the subsequent curbs on liberty imposed through various orders of the President were legally valid, they obviously lacked legitimacy in the eyes of those who felt they were excessive. This was evidenced from the fact that even Mrs. Gandhi herself was not sure of the legitimacy of the emergency regime and therefore wanted to secure legitimacy for her rule through the elections that she announced in 1977.

Legitimacy therefore means: (1) legal validity; (2) a widely shared

213. S. P. Sathe, *Tilak's Philosophy of law, in* POLITICAL THOUGHT AND LEADERSHIP OF LOKMANYA TILAK 119 (N.R. Inamdar ed., 1983).

feeling among the people that they have a duty to obey the law; and (3) actual obedience of the law by a large number of people. Gandhi's passive resistance was based on challenging the latter two requirements. It was aimed at delegitimization of colonial law, which was unjust and unfair. At the same time, Gandhi avoided the growth of anarchy by volunteering to suffer punishment for his disobedience of the law. Submission to the punishment prescribed by the law tended to legitimate the rule of law, but also tended to delegitimate the colonial law. It also legitimated the right to peaceful protest against a law that was considered to be a bad law.

B. The Emergency: A Watershed in Indian Politics

The setting aside of the election of Mrs. Indira Gandhi's election by the Allahabad High Court was an event of great significance. It established that no one was above the law. Although she had been at the height of popularity in 1971 after she won the war against Pakistan that resulted in the liberation of Bangladesh, public disillusionment caused by the disparity between the promise and the performance of her government had set in. Although she had humbled the old establishment, known as the Syndicate, the de-ideologization of her party and the consequent increase in corruption had stirred public movement under the leadership of Jay Prakash Narain, a leader universally respected for his sacrifice and commitment. The decision of the Allahabad High Court gave further impetus to that agitation. There were demands that she should resign as Prime Minister. She had obtained a stay order from the Supreme Court, while again appealing the decision of the Allahabad High Court.[214] Mrs. Gandhi might have won the appeal because the Allahabad decision was based on technical illegality rather than substantive illegality. Nani Palkhivala, who had argued successfully against her government in the *Kesavanand Bharati, Bank Nationalization*, and *Privy Purses Cases* represented Mrs. Gandhi in the Supreme Court, where Justice Iyer granted her stay. Mrs. Gandhi, however, chose not to face the uncertainty of how the Supreme Court would finally decide her appeal. She had the Constitution amended to

214. Indira Gandhi v. Raj Narain, A.I.R. 1975 S.C. 1590.

make her election valid despite any judicial decision. The Thirty-Ninth Amendment of 1975 conferred validity on Mrs. Ghandi's election, notwithstanding the decision of any court to the contrary. The Supreme Court struck down that clause of the Thirty-Ninth Amendment as being violative of the basic structure of the Constitution.[215]

On June 25, 1975 the Gandhi government advised the President to declare emergency under Article 352 of the Constitution. Actually, an earlier proclamation of emergency made under that Article in 1971, during the war with Pakistan, had yet not been withdrawn. The second emergency was superimposed over the earlier emergency, the latter for combating internal disorder whereas the former was for confronting the threat of external aggression. During the second emergency, sweeping restrictions on individual liberty were imposed, which had not been imposed under the previous two emergencies. All the leaders of the opposition were arrested and imprisoned. Judicial review was severely restricted under various orders of the President issued under Article 359 of the Constitution and strict censorship was imposed on the press.

The Supreme Court struggled to keep itself alive and sustain the people's faith. In *Indira Gandhi v. Raj Narain*,[216] it was faced with three options. It could: (1) strike down the constitutional amendment and affirm the Allahabad High Court's judgment setting aside Mrs. Gandhi's election; or (2) uphold the constitutional amendment and the election of Mrs. Gandhi; or (3) strike down the amendment, but uphold the election of Mrs. Gandhi. The Court must have weighed the pros and cons of all the above options. Had the Court chosen the first option, it would have invited severe confrontation with the political establishment. The judges could not rule out the possibility of the Parliament considerably reducing the Court's power. Had the Court chosen the second option, it would have suffered in terms of public esteem. For an ordinary person, it would have appeared that the Court had completely surrendered itself before the hegemonic executive. Thus, the Court chose the third option, helping it save its power of judicial review over constitutional amendments while

215. Indira Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299.
216. *Id*.

avoiding immediate confrontation with the executive. The time of this decision was described by Seervai as the finest hour in the life of the Supreme Court.[217] But what it managed to save in *Indira Gandhi v. Raj Narain*, it lost in *A.D.M. Jabalpur v. Shivakant Shukla*.[218]

The end of the emergency, marked by the defeat of the Gandhi government and the rise of the Janata government, commenced the restoration of the Constitution to its pre-emergency position. The movement against emergency emphasized the sanctity of the Constitution and the rule of law. The anti-emergency discourse also included pro-Constitutional and pro-judicial review discourse. While criticizing the Supreme Court for its decision in *A.D.M. Jabalpur v. Shivakant Shukla*, the anti-emergency discourse emphasized that the power of declaring emergencies and the power of suspending judicial review, must be circumscribed by adequate safeguards and the independence of the judges must be established. Anti-emergency discourse legitimized the Constitution and condemned the constitutional amendments enacted during the emergency.[219] It was during the emergency that a consensus in favor of judicial review and the basic structure limitation upon Parliament's power of constitutional amendment emerged.[220] The Gandhi government had passed several amendments to the Constitution during the emergency. Some of these amendments changed the face of the Constitution. The Janata government promised to restore the Constitution to its original position. Almost all the opposition parties, even those who had been critical of the Constitution, rallied around the Constitution and vowed to protect it. The emergency's net gain was the legitimization of the Constitution. Although the Court had let down the cause of individual liberty in the *Jabalpur* case, the people generally believed that judicial review by an independent court was desirable for democracy. The *Jabalpur* decision was attributed to the panic psychosis created by the emergency and now there was greater support for judicial review by an independent judiciary. The basic structure doctrine that

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217. SEERVAI, *supra* note 3, at 4.

218. A.I.R. 1976 S.C. 1207. *See supra* text accompanying notes 49-63.

219. S. P. Sathe, *People and law: Towards Legitimation of the Constitution*, *in* THE RADICAL HUMANIST 22, 22-36 (1998).

220. *Kesavanand Bharati*, A.I.R. 1973 S.C. at 1461.

lacked support in 1973 acquired greater legitimacy because the emergency had revealed how the Constitution could be prey to the whim of a partisan majority. After the Supreme Court asserted the power to review a constitutional amendment in *Minerva Mills v. India*,[221] even the Gandhi government, which came to rule after the collapse of the Janata government, did not make any renewed effort to restore unlimited constituent power to Parliament.

C. The Return of Indira Gandhi Rule and the Expansion of Judicial Activism

The Supreme Court started its activism in 1978 and by the time the Gandhi government regained power, the Court had acquired the support of the people. The Court had started taking cudgels on behalf of the underprivileged, such as pre-trial prisoners,[222] prison inmates,[223] and accused criminals.[224] During the Gandhi government's tenure, the Court expanded its reach to unorganized labor,[225] and, in 1982, challenged the Gandhi government's attempt to transfer judges or appoint judges based on ulterior considerations. The *Judges'* case[226] was a clear declaration by the Court that it would address issues of governance, like independence of the judiciary, and reinterpret the existing laws so as to impose curbs on the power of the government. The *Judges'* case was significant not only for liberalizing the rule of *locus standi* but also for circumscribing the government's privilege to withhold disclosure of documents. The Indian Evidence Act gave the government the power to withhold disclosure of documents when disclosure, in its opinion, was against public interest. In previous decisions the Supreme Court had held that when the government claimed such a privilege, the only thing that a court could inquire was whether the matter contained in the document was related to the affairs of the state. The question whether disclosure

221. A.I.R. 1980 S.C. 1789. In this case, the Court struck down a clause of the Forty-second Amendment making a constitutional amendment immune from judicial review.
222. Hussainara Khatoon v. Bihar, A.I.R. 1979 S.C. 1360.
223. Sunil Batra v. Delhi Administration, A.I.R. 1978 S.C. 1675.
224. M. H. Hoskot v. Maharashtra, A.I.R. 1978 S.C. 1548.
225. P.U.D.R. v. Union of India, A.I.R. 1982 S.C. 1473.
226. S. P. Gupta v. President of India, A.I.R. 1982 S.C. 149.

of documents was in the public interest was not for the courts to decide.[227] In the *Judges'* case, the Court held that when a claim for such privilege was made, the Court could have the document in question brought before it and could examine it in camera and decide whether disclosure would harm the public interest. The Court also declared that the people had the right to information. The Court had linked the right to information with the right to freedom of speech and expression guaranteed by Article 19(1)(a).

In *Bandhua Mukti Morcha v. Bihar*,[228] the Court claimed the right to oversee the implementation of beneficial legislation which sought to abolish bonded labor. Though constitutionally forbidden, the practice survived because of inaction on the part of Parliament and the government.[229] Notably, during the emergency, the Court had started its activism on matters like legal aid and the abolition of bonded labor that were part of the twenty-point program of the emergency regime. The emergency regime seems to have been suffering from a guilt complex for imposing authoritarian order on the people. In an attempt to overcome that feeling, the emergency regime enacted, various progressive laws such as the Civil Rights Act of 1955, replacing the Untouchability Offences Act, the Bonded Labor Act of 1976, and the Urban Land Ceiling and Regulation Act of 1976. The Court began its activism with issues that the emergency regime had included on its agenda. When the Court took up these issues, it could no longer be said that the Court was the protector of property owners or that the Court came in the way of social change. Now the equation was reversed. The Court started insisting on the actual implementation of the social reforms that the executive had initiated through the above legislation. The government seemed to be on the defensive, but it could not blame the Court because the Court merely asked government to do what it had promised to do through its legislation. It was after such activism had stabilized that the Court turned its attention to issues of governance such as the transfer and appointment of judges.

During its post-emergency tenure, the Gandhi government

227. S. P. Sathe, *supra* note 107, at 509-10.
228. A.I.R. 1984 S.C. at 802, 810.
229. INDIA CONST. art. 23.

remained preoccupied with terrorism in Punjab and did not have time to take issue with the Court on matters such as the appointment and transfer of judges. Moreover, the Court had already given the government a free hand in appointing judges. The only limitation was that the government had to consult the Chief Justice of India. The Court spent a lot of ink on what it meant by meaningful consultation. The net effect was that after performing the formality of consultation, the government had the final say in the matter. The *Judges case*[230] was an accommodation sought by the Court with the government. While it made new law on various matters such as *locus standi* and government's privilege to withhold disclosure of documents, on the main subject of appointment of the judges it gave the final say to the government. Perhaps the Court knew how far to go and where to stop. In saying that the opinion of the Chief Justice was only one of the other opinions to be sought by the government, the majority had clearly trivialized the office of the Chief Justice. While giving final say to the government in the appointment of the judges, the Court made the power of judicial appointment subject to judicial review on the limited grounds of whether the government had followed the procedures required by Article 124 or Article 217. The Court could examine whether the government had meaningfully consulted the Chief Justice and other judges, but the final decision after such consultation belonged to the government. Even this little dent that the Court made in the power of judicial appointments must have been disliked by the political establishment. The Gandhi government, however, was not in a position to confront the Court. Although it had a majority of seats in the Lok Sabha, it was preoccupied with the terrorism in Punjab that ultimately resulted in the tragedy of Indira Gandhi's brutal assassination.

D. Rajiv Gandhi as Prime Minister

Indira Gandhi's sudden death caused a great void in Indian politics. The Congress party was not in a position to produce a leader in her place. Her son Rajiv Gandhi was chosen unanimously because the Congress party wanted a charismatic leader from the same family.

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230. S.P. Gupta v. India, A.I.R. 1982 S.C. 149.

In 1985 Rajiv Gandhi was elected with the maximum number of seats in the Lok Sabha. The Congress party, led by Rajiv Gandhi, reaped maximum advantage of sympathy created by the martyrdom of Indira Gandhi.

The Rajiv Gandhi government, despite the overwhelming majority it gained in the Lok Sabha, was not very effective. The first act of statesmanship of the new Prime Minster was to strike a deal with the Akali Dal in Punjab and to let an Akali Dal government come to power in Punjab. This peace enabled it to enact legislation against floor-crossing by members of legislatures. The Constitution was amended in 1985 by the Fifty Second Amendment Act to include defection from a party on whose behalf a member was elected to the legislature, to another party as a basis for expulsion from the legislature.

E. Independence of the Judiciary

Legitimacy of judicial decisions depends on a shared perception that they are independent and non-political. By "non-political" we mean that the judges are not committed to any political party or any ideology canvassed by one or more of the political parties. The word "non-political" must be distinguished from the word "apolitical." The view that judges must be apolitical contradicts views expressed by the judges themselves. Justice Patanjali Sastry said, as early as 1952, that while deciding the reasonableness of restrictions on fundamental rights, the social philosophy of a judge was bound to be reflected in his decisions.[231] A judge cannot be "apolitical" because, like any other citizen, he is bound to have political preferences and ideologies. However, a judge can be non-political in the sense that his decisions are based not on considerations of power, but rather on principles. The phrase "being political" is understood in a pejorative sense as being shrewd enough to understand the mechanics of power and adjusting one's decisions to considerations of acquiring power. A judge does not operate in this sense. A judge decides whether a persons' fundamental right is violated without any regard to whether recognition of such a fundamental right would have deleterious

231. State of Madras v. V.G. Row, A.I.R. 1952 S.C. 196, 200.

consequences for the power structure. However, the Court must make a political judgments about the scope of fundamental rights because ultimately it is also a judgment regarding the scope of the government's power. Such political judgment of the Court is not, however, governed by the politics of the power structure. For example, when the Allahabad High Court held that Mrs. Gandhi had used corrupt practices in her election and that therefore it should be set aside,[232] it was surely a political decision because it unseated a sitting prime minister—such a decision was political because it had political consequences. The judges did not make that decision because they wanted to unseat Mrs. Gandhi. However, what she did amounted to corrupt practices, as defined in the election laws, and therefore they held that her election was vitiated. Their social philosophy regarding how an election should be conducted might have influenced their decision. In this sense they were not apolitical. Yet they were non-political in the sense that they were impartial and objective. It is a political judgment as to when a court should intervene and when it should observe judicial restraint.

A judge need not be apolitical, but he must be independent, fearless, and impartial. Independence means freedom from any influence whether political, social, or economic. Fearless means a judge should not fear the consequences of his decisions. A judge should be neither susceptible to temptation nor subjected to intimidation. To an extent, judges acquire these qualities as a result of their upbringing and education. But they must also be people of character and integrity. There are, however, external factors that may adversely affect the character or integrity of a judge. The Constitution provides for some positive provisions in this regard. The Constitution states that a judge of the Supreme Court shall be appointed by the President after consultation with the Chief Justice and such other judges as he may see fit.[233] A judge of a High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor of the state, and in case of a judge other than the Chief Justice, the Chief Justice of the High Court.[234] A judge of the

232. Indira Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299.
233. INDIA CONST. art. 124, § 2.
234. INDIA CONST. art. 217, § 1.

Supreme Court shall serve until he attains the age of sixty-five years, and a judge of a High Court shall serve until he attains the age of sixty-two years.

A judge may resign or may be removed by order of the President. A presidential order for the removal of a judge can be passed only after an address by Parliament, supported by a majority of the total membership of that House and by a majority of no less than two-thirds of the members of that House present and voting, has been presented to the President in the same session for such removal on the ground of misbehavior or incapacity.[235] Whereas the President may be removed by impeachment for "violation of the Constitution," a judge is removable for "misbehavior and incapacity." "Violation of the Constitution" is a more general expression and can include violations for causes other than misbehavior or incapacity. For example, a President who disregards the advice of the Council of Ministers could be impeached for violation of the Constitution. A judge is removable on more specific grounds, namely misbehavior or incapacity. Such misbehavior or incapacity must be assessed by a quasi-judicial body. Thus, removal of the President may proceed on political grounds whereas removal of a judge may proceed only on legal grounds. For example, a judge may not be removed because his interpretation of the Constitution is considered preposterous by members of Parliament.

The question of whether a judge has misbehaved is to be assessed by a committee consisting of a judge of the Supreme Court of India, a Chief Justice of a High Court, and a jurist nominated by the Speaker.[236] If the committee does not find any substance in the allegations, the matter is dropped. If, on the other hand, the committee reports against the judge, the matter is put before Parliament and removal ultimately depends on a majority of votes in each House of Parliament. This assessment of misbehavior or incapacity is a quasi-judicial process whereas the final act of removal is entirely a political process. The political process, however, does not operate unless and until the charge of misbehavior is found to be valid by the committee.

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235. INDIA CONST. art. 124, § 4; art. 217 § 1b.
236. INDIA CONST. art. 3, § 2 (Judges Inquiry Act, 1968).

The Parliament determines the salaries of the Supreme Court and the High Courts judges. Schedule II of the Constitution specifies judges' salaries,[237] privileges, allowances, leaves of absence, and pensions.[238] It has, however, been provided that neither the privileges nor the allowances of a judge, nor his rights in respect of leave of absence or pension, shall be varied to his disadvantage after this appointment.[239]

It is significant that while the allowances, privileges, or rights of a judge cannot be varied to his disadvantage after his appointment, no such provision exists with respect to the salaries of judges. Parliament can lay down the salaries by law, but until it does so, they are as provided in the Constitution. Theoretically, Parliament can make law to reduce the salaries of the judges. Did the judges perceive such threat when they abdicated their authority in *A.D.M. Jabalpur v. Shivakant Shukla*? We have no evidence to say whether this was so, but such Parliamentary power could be dangerous to the independence of the judiciary. Today, the Court has become so politically strong, while Parliament has been diffused by coalitional alliances, that such a threat does not exist. Moreover, if Parliament ever tries to take such a sinister action, its act can be held invalid as being violative of the basic structure of the Constitution.

Until 1982, it was supposed that the government's discretion in appointing the judges was unfettered. The Law Commission had complained in its Fourteenth Report that appointments of judges occurred on partisan considerations.[240] However, the matter became critical only after the three judges were superseded in 1973 and the government claimed the right to transfer the judges at will. We previously saw in this article how such power of the government was challenged before the Supreme Court in *S.P. Gupta v. India*.[241] In that case, the Court imposed a constraint on the exercise of discretion by the government in so far as it was required to meaningfully consultate with the Chief Justice and other judges. The Court, however, left the

237. INDIA CONST. art. 125, § 1; art. 221, § 1.
238. INDIA CONST. art. 125, § 2; art. 221, § 2.
239. INDIA CONST. art. 125, § 2 (proviso); art. 221, § 2 (proviso).
240. LAW COMMISSION OF INDIA, REFORM OF JUDICIAL ADMINISTRATION REPORT, NO. 14, at 34 (1958) (The Ministry of Law, Government of India).
241. A.I.R. 1982 S.C. 149.

final power of appointment with the executive. In a later decision,[242] and more recently in an advice rendered on a reference by the President,[243] the Court has now said that the final decision will be that of the Chief Justice, and a collegium of judges whose advice the President is bound to accept. This situation is unstable because a veto power in the hands of the Chief Justice and his collegium could be detrimental to the independence of the judiciary. A proposal to have a judicial selection commission for the appointment, transfer, and removal of judges has been under consideration for a long time. This will, however, require a constitutional amendment.[244]

In view of the judicial activism, appointments to the Supreme Court and the High Courts should become more transparent. What are the criteria for such appointments? Formerly the judiciary was to play a mere technocratic role, and therefore such appointments were supposed to be based on professional competence only. However, in view of the facts that the Supreme Court has become the main censor of constitutional propriety and legality, has been required to decide questions with political ramifications like alleged violations of basic constitutional structure or the validity of the President's exercise of power under Article 356, and has expanded the scope of justiciability under public interest litigation, thereby bringing within its purview matters that traditional jurisprudence considered non-justiciable, should the same criteria applicable to a technocratic judiciary be applicable to an activist judiciary?

The traditional black letter law concept of independence of the judiciary was completely unrealistic. Recruitment to the apex court was never exclusively on the basis of merit. One reason is the difficulty in determining individual merit when equally qualified candidates exist. The composition of the Supreme Court is not entirely a matter of law, it is also a matter of politics. The apex Court of India is, of course, an Indian court and therefore must reflect the regional and ethnic composition of India. Care is taken to ensure that,

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242. S.C. Advocates-on-Record Assoc. v. Union of India, A.I.R. 1994 S.C. 268.

243. *In re* Art. 143 of the Constitution, A.I.R. 1999 S.C. 1.

244. S. P. Sathe, *Appointment of Judges—The Issues*, ECON. & POL. WKLY., Aug. 8, 1998, at 2155; *see* RAJEEV DHAVAN & ALICE JACOB, SELECTION AND APPOINTMENT OF SUPREME COURT JUDGES (1978).

to the extent possible, all regions and minorities are represented in the Supreme Court—done by purposefully drawing in talent from different regions and different religious groups. Even gender ought to be considered. The size of the Supreme Court was seven judges, excluding the Chief Justice, in 1950 when the Court was established. The number of judges, excluding the Chief Justice, rose to ten in 1956,[245] thirteen in 1960,[246] seventeen in 1977,[247] and twenty-five in 1986.[248] A cursory glance at the profiles of the judges reveals that out of the 136 judges appointed to the Court so far, thirteen have been Muslims, four Christians, two Sikhs, and two Parsis. Out of the 115 judges who were Hindus, twenty-four have identified themselves as Brahmins.[249] It is interesting that profiles of judges appointed in recent years do not reveal caste identities. Until now, only two judges—Vardarajan and K. Ramaswamy—have been appointed from the Scheduled Castes and Scheduled Tribes and only two women (Fatima Beevi and Sujata Manohar) have been appointed to the Court. The President of India, Dr. K.R. Narayanan, recently asked why more nominations of judges from the Scheduled Castes or Scheduled Tribes were not made. There was, as expected, a protest from the legal fraternity, and the Chief Justice reportedly commented that appointments to the Court would be made strictly on merit. Merit, in an unequal society, is a dubious concept. A constitutional court must be representative of all sections of society. We may not call it reservation, but some representatives from the most disadvantaged sections must be on the Court in order to make it a true national court. In the present Supreme Court, there are twenty-five judges, including the Chief Justice. Of these judges, two are Muslims, one is Parsi, and one is Christian. There is one female judge, but no judge from a Scheduled Caste or Scheduled Tribe. The legitimacy of

245. The Supreme Court (Number of Judges) Act, No. 55 (1956) (India).
246. The Supreme Court (Number of Judges) Amendment Act, No. 17 (1960) (India).
247. The Supreme Court (Number of Judges) Amendment Act, No. 48 (1977) (India).
248. The Supreme Court (Number of Judges) Amendment Act, No. 22 (1986) (India).
249. These figures were manually drawn from the profiles of the judges. Fewer and fewer judges have identified themselves as Bramhins since the 1980s. Therefore, the figures merely approximate the number of Bramhin judges. In some cases, a judge's caste or religion was identified from his name or other data given in his profile. This may have caused errors, but the major inference regarding the caste, religion, and gender composition should not be affected.

the Supreme Court depends upon the reflection of Indian pluralism in its composition. Women, as well as members of the Scheduled Castes and Scheduled Tribes, ought to be appointed to the Court in larger numbers.

We must therefore know how judges are selected. What are the criteria for their selection? Should only professional competence be considered, or should consideration include such factors as a lawyers' participation in legal aid, public interest litigation, or politics? Judges like Krishna Iyer, P.B. Sawant, and K.S. Hegde were active in politics before joining the judiciary, and produced judgments that were unbiased. In fact, all of the aforementioned stand out as examples of good judges. One of the reasons for the high legitimacy of the Supreme Court is that in the peoples' mind, it is a body aloof from politics. The judges are not apolitical, but they must be capable of deciding matters before them in a politically dispassionate manner. Their past political experience may be an asset if they act impartially as judges. Public interest litigation in India, unlike in the United States, has been sustained with the active help of the lawyers. Should such lawyers not be preferred for judicial appointments?

Another question that arises here is the question of 'to whom are the judges accountable,' How is such 'accountability' to be reinforced? Should there be scrutiny of the judgship nominations made by the President on the advice of the Chief Justice and his colleagues, or by a judicial service commission, by a House of Parliament? Should the age of retirement of the judges be raised? What should be done to remove a judge found with doubtful integrity? We have seen that the present provisions are inadequate in light of the fact that political parties do not take a well-reasoned stand. If a judge is of doubtful integrity, should he continue adjudicating given that his continuance would likely adversely affect the legitimacy of the Court? Although the Constitution bars judges from practicing as lawyers after retirement,[250] we know that they work as arbitrators. How compatible with their independence is such post-retirement engagement of judges as arbitrators? Further, judges

250. INDIA CONST. art. 124, cl.7.

are appointed to various bodies like the National Human Rights Commission or the National Commission under the Consumer Protection Act. How are such appointments made? Will a judge not compromise his independence by looking forward to such post-retirement appointments by the Government? True, none of these events has occurred and even the complaints about lack of integrity on the part of the Supreme Court judges have been rare. However, from a long-term view of the legitimacy of the Court and its decisions, these concerns will have to be considered. A judicial service commission, independent of the government, should be given the exclusive power to appoint retired judges to various commissions or tribunals.

V. CONCLUDING OBSERVATIONS

Judicial activism is not an aberration. It is an essential aspect of the dynamics of a constitutional court. It is a counter-majoritarian check on democracy. Judicial activism, however, does not mean governance by the judiciary. Judicial activism must also function within the limits of the judicial process. Within those limits, it performs the function of stigmatizing, as well as legitimizing, the actions of the other bodies of government—more often legitimizing than stigmatizing. The words remain the same, but they acquire new meaning as the experience of a nation unfolds and the Supreme Court gives continuity of life and expression to the open-textured expressions in the Constitution, to keep the Constitution abreast of the times.

The judiciary is the weakest body of the state. It becomes strong only when people repose faith in it. Such faith constitutes the legitimacy of the Court and of judicial activism. Courts must continuously strive to sustain their legitimacy. Courts do not have to bow to public pressure, but rather they should stand firm against public pressure. What sustains legitimacy of judic ial activism is not its submission to populism, but its capacity to withstand such pressure without sacrificing impartiality and objectivity. Courts must not only be fair, they must appear to be fair. Such inarticulate and diffused consensus about the impartiality and integrity of the judiciary is the source of the Court's legitimacy.

How is the Court's legitimacy sustained? The myth created by the black letter law tradition, that judges do not make law but merely find it or interpret it, sought to immunize the judges from responsibility for their decisions. Mythologization of the judges also contributed to sustaining legitimacy. Those myths or devices are of no help in sustaining the legitimacy of judicial activism. We must expose certain myths. Similarly, we must de-mythologize the judiciary by declaring that a constitutional court is a political institution. It is political because it determines the limits of the powers of other bodies of government. Being political need not mean being partisan or unprincipled. The Court is political in much the same way as the President of India is political in his appointment of a Prime Minister or in the exercise of his discretion.

Another de-mythologization is to admit that judges are human beings, and are as fallible as other human beings. If we have good judges, then we also have bad judges. Judges are sure to have their predilections and those predilections are bound to influence their judgments.

The advantage of such de-mythologization is that people accept that judges, like other human beings, are not infallible. The courts themselves have imposed restraints on their own powers in order to minimize the chances of vagaries arising out of subjective lapses or prejudices of the judges. The courts are bound to follow previous precedents; they are bound to follow the decisions of the higher courts; and they are bound to follow certain rules of interpretation. Further, decisions of courts are reasoned and are often subject to appeal or review. These restrictions ensure that any lapse will be minimum. Critiquing the judgments of the courts would further act to correct objectionable judgments. Through such restrictions, the courts sustain their legitimacy.