4: India

4.1 Introduction

India is in many ways an obvious choice of country for this study. The institutional history of its Supreme Court, with its distinct, evolutionary phases and moments of both great strength and weakness, is well known. After the initial, hard-fought battle over the *zamindari* abolition laws, the Court famously failed to resist the suspension of detainees' constitutional rights during the 1975-77 Emergency, only to recover from that position to become 'one of the most powerful constitutional courts in the world'.[1] Significantly, the Court's post-1977 revival is generally agreed to have been the result, not just of propitious political circumstances, but also of the judges' own deliberate efforts. According to the now familiar story,[2] two judges in particular, P.N. Bhagwati and V.R. Krishna Iyer, used the window of opportunity provided by the Congress Party's electoral defeat in 1977 to begin reconstructing the Court's role. Motivated by a combination of sincere ideological beliefs and a desire to restore their personal judicial reputations, they fashioned a series of doctrines that saw the Court expand its influence in national politics to the point where it is today seen as the epitome of the 'good governance court'.[3] While there are concerns that the Court might perhaps have become too powerful,[4] there is little doubt that judicial review in India is now well institutionalised. It is also clear that the way law and politics interact at the constitutional level is very different from previous periods, and that the Court's post-1977 doctrines have had a great deal to do with this.[5] In short, the Indian experience appears to provide a textbook example of this

[1] Manoj Mate, 'Public Interest Litigation and the Transformation of the Supreme Court of India' in Diana Kapiszewski et al (eds), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge UP, 2013) 262, 262. See also Pratap Bhanu Mehta, 'India's Judiciary: The Promise of Uncertainty' in Devesh Kapur & Mehta (eds), *Public Institutions in India: Performance and Design* (Oxford UP, 2005) 158, 159 n 2.

[2] The leading work on the first 35 years of the Court's life is Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (Oxford UP, 1999). Another important work focusing on the pre-1980 period is Upendra Baxi, *The Indian Supreme Court and Politics* (Lucknow: Eastern Book Co, 1980). See also S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (Oxford UP, 2002).

[3] Nick Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 *Washington University Global Studies Law Review*1.

[4] See 4.5 below.

[5] The classic treatment is Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 *Third World Legal Studies* 107.

study's main concern: the dynamic interaction of law and politics in processes of constitutional change and stabilisation.

The downside of textbook examples, of course, is that they tend to be overdetermined. A more exacting test of a theory, it is said, is the outlier case or, better still, a large-N study that isolates just the particular causal connection of interest.[6] So, too, in this instance, the Indian Supreme Court's trajectory has been so strong and enduring that there are likely several plausible explanations for it, each of them compatible with a different theory of judicial empowerment.[7] Nevertheless, there is something to be said for low-hanging fruit: the sociological process this study investigates is complicated enough as it is without declining to exploit the most obvious example on offer. Also, like the other countries studied, India was not the original inspiration for the typology presented in Chapter 2. While it may be an obvious choice, the Indian case thus still provides a genuine test of that typology's explanatory reach. More than this, refracting the Indian story through the prism of the typology promises to serve both of the main aims of this study: (1) enriching scholarly debates about the constitutional politics of the particular countries chosen for analysis; and (2) harnessing the intellectual energy of those debates to support more general propositions about the politico-legal dynamics of judicial review.

There are two reasons in particular why this is so. First, retelling the Indian story helps to focus attention on an issue that is present in the local literature but not emphasized as much as it should be: the way in which the transformation of the Supreme Court's role has been a transformation, not just of the functions it performs in India's democracy, but also of Indian constitutional culture. Indeed, those two transformations could be said to have fed off each other, so that it is impossible to understand what has happened in India other than as a process of dynamic legal and political interaction. That way of seeing things in turn helps to explain why the current situation, in which the Court has become a virtual one-stop shop for all manner of social and economic problems, has proved to be so stable. In the conditions of Indian politics over the last forty years, law's 'empire' (to use Ronald Dworkin's term[8]) has expanded in line with declining public confidence in the capacity of representative

[6] See Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford UP, 2014) 262-77.

[7] See, for example, Manoj Mate, 'Elite Institutionalism and Judicial Assertiveness in the Supreme Court of India' (2014) 28 *Temple International & Comparative Law Journal* 360, 363 (explaining the Supreme Court's 'selective assertiveness' as a function of 'values of national political, professional, and intellectual elites').

[8] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard UP, 1986).

institutions to drive meaningful social and economic change. By positioning itself, first as the voice of the poor and the marginalised, and then as a more middle-class-friendly enforcer of good governance standards, the Court has become one of the most trusted public institutions in India. With each new corruption scandal the Court exposes, and each new human rights failure it remedies, the Court entrenches its position as the guardian of India's democracy. The stability of this situation, however, is somewhat pathological, marked as it is by a self-perpetuating cycle of dependency in which the Court's interventions in support of the democratic system obviate the need for the system to correct itself.

The further advantage of refracting the Indian case through the prism of the typology is that it helps us to see the evolution of constitutional politics in India in a new light – as a series of transitions between distinct politico-legal equilibria. The standard story thus distinguishes four main periods in the Supreme Court's institutional life: (1) an initial period from the Court's creation in 1950 to the controversial *Golak Nath* decision in 1967;[9] (2) an ensuing period of instability from the time of that decision to the end of the Emergency in 1977; (3) the first part of the Court's rehabilitation from 1978-1989 when Bhagwati and Krishna Iyer's influence was at its height; and (4) the period after 1989 to date, which encompasses India's turn to neo-liberalism and the fragmentation of electoral politics.[10] In the language of the typology, those periods may be reframed as a modal progression, first from the Legalist to the Quiescent Court, and then on to the Interventionist Court – the latter process spanning the third and fourth periods picked out by the standard story.[11] The ease and intuitive logic of that redescription illustrates the typology's explanatory reach. For students of Indian constitutional politics, it also again adds something new to the local debate – most importantly, an understanding of how it came about that the Supreme Court was so

[9] *I.C Golak Nath v. State of Punjab* AIR 1967 SC 1643.

[10] Other periodisations are, of course, possible. See Gobind Das, 'The Supreme Court: An Overview' in B.N. Kirpal et al (eds) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford UP, 2000) 16 (identifying seven periods from 1950 to 1998; Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998) 83 (dividing the Court's institutional history 'into two periods, one in which leading justices championed property rights but not due process and equality, and the second in which the reverse has been true').

[11] 'Spanning' because, as explained below, the shift from the social-egalitarianism of Bhagwati and Iyer to the liberal-environmentalism of the current Court must be seen as an ideological shift within the Interventionist Court mode rather than a fundamental constitutional transformation.

easily able to transform itself after 1989 from a pro-poor institution into an all-purpose enforcer of good governance standards.

The rest of this chapter makes the detailed case for these two claims. The sub-headings follow the standard periodisation, with the discussion in each case translating the familiar Indian story into the language of the typology. The chapter concludes with a summary of the general lessons learned, both from the perspective of the local Indian debate and also from the broader, comparative perspective of this study.

4.2 The establishment period: 1950-1967

The literature on the Indian Supreme Court's establishment period emphasizes two main issues of relevance to this study: (1) the existence during this time of a strongly legalist conception of the judicial function; and (2) the role played by India's first Prime Minister, Jawaharlal Nehru, in promoting respect for judicial independence.

As to the first issue, several scholars have noted the influence on Indian legal culture at the time of independence of 'the British legacy of Austinian positivism'.[12] This was a matter both of elite public attitudes towards the role of the judiciary and also of inherited legal-reasoning methods. After nearly a century of British colonial rule,[13] the judiciary was viewed as an important but largely subordinate actor in the governmental system. Its place was to interpret rather than make law. Although the passage of the 1950 Constitution, with its American-style Supreme Court and list of fundamental rights, challenged these attitudes,[14] they died hard. Until the *Golak Nath* decision in 1967,[15] the prevailing view was that

[12] Mate, 'Public Interest Litigation' 263-64, quoting Mark Galanter, *Competing Equalities: Law and the Backward Classes in India* (Berkeley: University of California Press, 1984) 484. See also Manoj Mate, 'The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases' (2010) 28 *Berkeley Journal of International Law* 216, 217; Burt Neuborne, 'The Supreme Court of India' (2003) 1 *International Journal of Constitutional Law* 476, 479; Sathe, *Judicial Activism in India* 1-3, 42-43; Rajeev Dhavan, 'Introduction' in Mark Galanter, *Law & Society in Modern India* (Oxford UP, 1998) xvii-xx.

[13] The British Crown took over the government of India from the East India Company in 1858, but a 'system of courts' was set up in Bengal from 1772. See Galanter, *Law & Society in Modern India*, 17-18.

[14] See Rajeev Dhavan, 'Borrowed Ideas: On the Impact of American Scholarship on Indian Law' (1985) 33 *American Journal of Comparative Law* 505, 511-512 (discussing the American influence on the drafting of the Indian Constitution and on styles of reasoning). See further 4.6 below.

[15] *I.C Golak Nath v. State of Punjab* AIR 1967 SC 1643.

Parliament was the ultimate custodian of the Constitution. It followed that if Parliament chose to amend the constitutional text this was a legislative amendment like any other – one that the courts needed faithfully to implement. On this view of things, the role of the judiciary had not fundamentally changed in 1950. While the Constitution had given the Supreme Court the power of judicial review, that power was subject to Parliament's power of constitutional amendment in Article 368. Given the Congress Party's overwhelming majority in the Lok Sabha and the state parliaments, the procedural preconditions for the exercise of that power were easily met.[16] In functional terms, therefore, it was as though the pre-1950 position had been retained in a different form, with Parliament's power to amend the Constitution taking the place of the Westminster doctrine of parliamentary sovereignty.[17]

Likewise, when it came to methods of legal reasoning, judges who had been trained in England or in the English tradition saw their duty as being to give effect to sovereign political commands.[18] In constitutional interpretation, that meant close adherence to the text of the provision and the intention of the legislature. In the best-known example of this approach, *A.K. Gopalan v. State of Madras*,[19] the Supreme Court held that Article 21's guarantee against deprivation of 'life or personal liberty except according to procedure established by law' meant exactly that, but also no more than that: no one could be detained except on the authority of a duly enacted law, but beyond this there was no requirement that the law should conform to the principles of natural justice.[20] The main reason given in *Gopalan* for this position, apart from the text of Article 21 itself, was the history of the provision's enactment – in particular the fact that, while known to the Constituent Assembly, the wording of the American due process clause had been deliberately avoided.[21] For judges trained in the

[16] Article 368 of the Constitution provides for amendment by simple majority of each House and two thirds of those present. For amendments affecting the states, the agreement of a majority of the states is also required. Congress won 364 of the 489 seats in the Lok Sabha in the 1952 general election, 371 of 494 in 1957 and 361 of 494 in 1962. Over the same period, it held comfortable majorities in the upper house and in most of the states.

[17] See Baxi, *Indian Supreme Court and Politics*, 3 (referring to Mahajan J's view that if the legislature could amend an ordinary law in response to a judicial decision 'it could also do the same with regard to the Constitution'). In *A.K. Gopolan v State of Madras* 1950 SCR 88, 320 Das J held that 'our Constitution has accepted the supremacy of the legislative authority'.

[18] See Rajeev Dhavan, *The Supreme Court of India: A Socio-Legal Critique of its Juristic Techniques* (Bombay: Triphathi, 1977) 26 (noting that 40% of Supreme Court judges at that point had been educated in England).

[19] 1950 SCR 88.

[20] Ibid.

[21] Ibid 111.

English positivist tradition that was conclusive of the matter: the people's representatives had chosen their words carefully and their duty was to be faithful to that choice.

On its own, it is possible to understand *Gopalan* in another way – as a function of the judges' ideological attitudes. The detainee (or 'detenu' as it is put in India) was a member of the Communist Party and thus not the most sympathetic of litigants. *Gopalan* also fits a consistent pattern of executive-mindedness on the part of the Supreme Court in national security cases.[22] But the reasoning methods on display in *Gopalan* are evident in other early decisions, too. In *Romesh Thappar v. State of Madras,* for example, the Court interpreted the public-security qualification on free speech in Article 19(2) as applying only to legislation addressing 'serious and aggravated forms of public disorder'.[23] That decision severely restricted the scope of government intrusions on press freedom in the name of public security – the opposite outcome in ideological terms to the decision in *Gopalan*. In another case, *State of Madras v. Srimathi Champakam Dorairajan*, the Court struck down a law reserving medical college places according to caste as an infringement of the right not to be discriminated against on this ground in Article 29(2). Here, the deciding factor was the provision in Article 37 that the Directive Principles of State Policy – on which the reservations policy had relied – were non-justiciable, and thus, the Court held, subordinate to the fundamental rights.[24] As with the outcome in *Romesh Thappar*, this decision cannot easily be attributed to ideological bias or a general attitude of deference to executive authority. Rather, it was a case of the Court's seeking out a clear textual basis for its decision and then using traditional English statutory interpretation methods to justify the result.

So much for the legal-cultural context in which the early Court operated. The second issue stressed by the literature is the role played by Nehru in moderating executive-judicial conflict. Granville Austin, the Indian Constitution's most celebrated historian, thus quotes Nehru as saying: 'the independence of the judiciary has been emphasized in our Constitution and we must guard it as something precious'.[25] Nehru, Austin continues, 'rejected the idea of a packed court of individuals of the government's "own liking for getting decisions in its own

[22] See Dhavan, *The Supreme Court of India*, 206-278; Epp, *The Rights Revolution*, 74; Neuborne, 'The Supreme Court of India', 504-506.

[23] *Romesh Thappar v. State of Madras* (1950) SCR 594, 601.

[24] *State of Madras v. Srimathi Champakam Dorairajan* 1951 SCR 525, 530.

[25] Austin, *Working a Democratic Constitution*, 124 (quoting a letter written by Nehru to his chief ministers on 18 December 1950).

favour"'.[26] Instead, '[h]e wanted first-rate judges, not subservient courts'.[27] While that attitude did not guarantee that there would be no conflict between the judiciary and the executive during Nehru's lifetime,[28] it did mean that such conflict as there was was mostly dealt with in a mutually respectful way. Thus, for example, after the Supreme Court in *Bela Banerjee* struck down the resettlement of refugees from East Pakistan for failure to pay the affected landholders adequate compensation,[29] there was no attack on the Court's independence. Rather, Parliament, as it had done before in other cases, simply amended the Constitution.[30] The Court, in turn, respected Parliament's constitutional power to do that.

The story of the early Court's property rights decisions,[31] and the constitutional amendments they provoked, has been told on numerous occasions.[32] No purpose would be served by repeating it. Here, the point is simply that, as bitter as this contest was, there was never any question, for as long as Nehru was Prime Minister, that the Supreme Court's power of judicial review would be removed altogether. Rather, each adverse decision was countermanded on its own terms, with the amendment generally going no further than was required to achieve the Congress Party's immediate policy goal. In this way the tussle over property rights actually reinforced rather than undermined the dominant conception of the judiciary's place in the constitutional scheme. If it was the judiciary's appointed role to hold the executive to the terms of the written Constitution, it was equally the political branches' role to re-express the people's will more clearly. Law and politics were in this sense, if not in harmonious balance, at least locked into a stable and mutually reinforcing relationship.

As was the case with the *Gopalan* decision,[33] it is possible to think of the Supreme Court's property rights decisions as a function of the judges' ideological attitudes. Certainly, the Court in the establishment period did all it could to regulate the way in which the state

[26] Ibid.

[27] Ibid.

[28] It is significant in this respect that *Golak Nath* was decided three years after Nehru's death in May 1964.

[29] *State of West Bengal v Bela Bannerjee* AIR 1954 SC 170.

[30] See Austin, Working a Democratic Constitution, 101-110 (discussing the Fourth Amendment, which ousted judicial review of the adequacy of compensation where property was acquired for public purposes).

[31] In addition to *Bela Bannerjee*, see *State of West Bengal v. Subodh Gopal* AIR 1954 SC 92; *Dwarkadas Srinivas v. Sholapur Spinning & Weaving Co* AIR 1954 SC 119 (1954).

[32] See, for example, HCL Merillat, 'The Indian Constitution: Property Rights and Social Reform' (1960) 21 *Ohio State Law Journal* 616; Sathe, *Judicial Activism in India*, 46-60; Neuborne, 'The Supreme Court of India', 487-89.

[33] *A.K. Gopolan v State of Madras* 1950 SCR 88.

governments went about abolishing the *zamindari* system, and it is reasonable to assume that their class position had a lot to do with this; legalist attitudes may have been sincerely held, but they were also instrumentally convenient for judges seeking to soften the impact of social reform. That being the case, is it not best to think of the Court during this period as an Interventionist Court, with legalism acting as a rhetorical façade and the Court protected from political attack, not by a deep-seated legal-cultural faith in the constraining power of law, but by Nehru's pragmatic appreciation for the legitimating effects of judicial review?

While not implausible, this understanding must overcome two significant hurdles. First, everyone agrees that an inherited culture of legalism held sway during the establishment period.[34] Unless one adopts the sceptical view that a commitment to the separability of law and politics is always either perverse or self-delusional, this must have meant that the judges' class-based ideological attitudes were at least somewhat tempered by their fidelity to law. To the extent that the judges' decisions were influenced by ideology, in other words, it was a complex ideology in which their legal-professional socialisation and class position would both have been prominent. From there, it is an open question which of these two influences played a greater role in particular decisions. Perhaps in property rights cases there was no great tension between these two aspects of the judges' ideological make-up. But a sweeping claim that the Supreme Court's case law as a whole gave expression to the judges' class-based ideological attitudes requires more substantiation.

The second hurdle that the alternative reading must overcome is the fact that the Supreme Court, until 1967, always did in the end defer to Parliament's power to amend the Constitution. This is a strong indication that the judges' legalist ideology was real and influential. As we saw in Chapter 2,[35] judges who espouse such a conception of their role cannot indefinitely resist a governing party that can plausibly lay claim to a fairly won democratic mandate. Unless democracy itself is compromised or threatened, the logic of legalism demands that judges live out their commitment to the separation of law and politics by giving effect to sovereign political commands. In the Indian case, the operation of this logic provides the best explanation for the Supreme Court's initial approach to the constitutionality of constitutional amendments. In both cases of this kind that came to the Court before 1967, a majority of the judges thus accepted that duly passed constitutional

[34] See the literature cited in note 12 above.

[35] See particularly pp. xx-xx.

amendments were essentially unreviewable. In the first such case, *Sankari Prasad*,[36] the decision was unanimous, with the Court holding that constitutional amendments were not 'law' for purposes of article 13(2), and thus not subject to the fundamental rights. In the second case, *Sajjan Singh*,[37] the Court divided 3-2, upholding *Sankari Prasad* on the basis that it was correctly decided and that there were in any event insufficient grounds to overturn a decision of such long-standing. The two dissenting judgments in this case have been attributed to Nehru's passing shortly before the matter came to the Court, with commentators suggesting that the judges concerned had some sort of prescient insight into the threats to democracy to come.[38] If so, the Court's vacillation in this case is not inconsistent with legalism but simply a function of disagreement on the Bench about the future legitimacy of the Congress Party's democratic mandate.

On this evidence, the law/politics interaction in India during the establishment period is best understood as following the conceptual logic of the Legalist Court. At a legal-cultural level, this period was characterised by a strong, inherited faith in the separation of law and politics. This broad set of public attitudes was complemented by a legal-professional ideology that equated sound decision-making with fidelity to the text of the Constitution and the history of its enactment. While there are some reasons to think that the judges' class interests played a role in the Court's property rights decisions, the judges were not free simply to write their ideological attitudes into law. Rather, each decision the Court took had to be supported, and was thus to some extent constrained, by adherence to accepted reasoning methods. Nor could the Court be said to have been quiescent, since on numerous occasions it enforced the Constitution to strike down legislation.[39] The political branches, in turn, respected the Court's power to do that, provided that it was used sparingly and not in a way that permanently blocked the Congress Party's social reform agenda. As is characteristic of this mode, the stability of this arrangement lay in each side's capacity to legitimate the other: the political branches, by enforcing the Court's decisions, or at least countermanding them only by way of constitutional amendment, and the judiciary, by maintaining a strict legalist stance that resulted in the striking down of some laws but, more importantly, lent legitimacy to the greater number of laws the Court upheld.

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[36] *Sri Sankari Prasad Singh Deo v. Union of India* AIR 1951 SC 458.

[37] *Sajjan Singh v. Rajasthan* AIR 1965 SC 845.

[38] See Sathe, *Judicial Activism in India*, 257.

[39] See Pratap Bhanu Mehta, 'The Rise of Judicial Sovereignty' (2007) 18 *Journal of Democracy* 70, 74 (noting that 128 pieces of legislation were struck down during the establishment period).

This seemingly stable equilibrium began to give way after the Supreme Court's decision in *Golak Nath*.[40] The events surrounding that decision and its impact on the evolution of India's constitutional politics are the subject of the next section.

4.3 From *Golak Nath* to *Shukla*: 1967-1977

The political background to the *Golak Nath* decision,[41] in which the Court for the first time asserted the primacy of the fundamental rights over Parliament's constitutional amendment power, was complex and can only be roughly summarised here. One of the main precipitating events, certainly, was Nehru's death in May 1964. As we have seen, he had been the Court's most important backer. A lawyer by training, Nehru respected the value of judicial independence, if not always the value of lawyers.[42] His socialist faith in the power of the plan was thus tempered by an appreciation for the way controversial social reforms may be legitimated by judicial review. In contrast, his daughter, Indira Gandhi, who became prime minister in 1966 after Lal Nahdur Shastri's brief tenure,[43] had a more conventional socialist understanding of the judicial role. For her, judges were part of the executive arm of government – committed cadres who through their ideological identification with the cause of social reform could help to implement the government's policies more effectively.[44] She was thus far more inclined than her father had been, both to ascribe adverse judicial decisions to ideological bias and also to seek to counteract those decisions by promoting judges who shared her political outlook.[45]

Gandhi's more instrumentalist understanding of the judicial role came to the fore later, in the controversy over the transfer and supersession of judges.[46] In the build-up to *Golak Nath*, it was not so much her attitude to the judiciary that mattered as her determination to accelerate the pace of social reform. Whereas Nehru's socialism had been

[40] *I.C Golaknath v State of Punjab* AIR 1967 SC 1643.

[41] *I.C Golaknath v State of Punjab* AIR 1967 SC 1643.

[42] See Alice Jacob, 'Nehru and the Judiciary' in Rajeev Dhavan & Thomas Paul (eds), *Nehru and the Constitution* (Bombay: Triphathi, 1992) 63, 63-65.

[43] Shastri died in office on 11 January 1966.

[44] See Austin, *Working a Democratic Constitution*, 174, 328, 516-17.

[45] Ibid.

[46] See discussion below.

chastened towards the end of his life by recognition of the limits imposed by an inefficient bureaucracy,[47] Gandhi's socialism was impervious to such considerations. For her in any case it was never really about the effectiveness of the plan. Rather, it was the effectiveness of the *platform* that mattered – the rhetoric of social reform that would inspire and give hope to a nation while at the same time ensuring her re-election to office.[48] Gandhi's ascendancy to the leadership of the Congress Party thus radicalised its social reform agenda even as it reduced the possibility that meaningful social reform would be carried out.[49] The inevitable result of that, in turn, was heightened tension over the extent to which the stability of the existing social order would be sacrificed, not just to the cause of social reform, but to a social reform programme that never had much chance of success.[50]

It was in this general atmosphere of uncertainty about the future that *Golak Nath* was decided.[51] The heart of the case was a challenge to the 1953 Punjab Security of Land Tenures Act, which the Constitution (Seventeenth Amendment) Act of 1964 had placed in the Ninth Schedule to the Constitution, and thus ostensibly immunised from judicial review. In ruling by the narrowest of margins (6-5) that it could, after all, review constitutional amendments for conformance to the fundamental rights, the Court not only overturned its earlier decisions in *Sankari Prasad* and *Sajjan Singh*.[52] It also upset the modus vivendi that had prevailed under Nehru. Before this decision, as we have seen, the relatively cordial relationship between the Court and Parliament had depended on the former's respect for the latter's amendment power in return for the latter's respect for the former's independence. Now, for the first time, the Court insisted that its power to enforce the fundamental rights was superior to any view that Parliament took of the circumstances in which those rights could be sacrificed to the exigencies of social reform. The fact that the prime mover behind this

[47] See Rajeev Dhavan, 'If I Contradict Myself, Well, Then I Contradict Myself … Nehru, Law and Social Change' in Rajeev Dhavan & Thomas Paul (eds), *Nehru and the Constitution* (Bombay: Triphathi, 1992) 45.

[48] Austin, *Working a Democratic Constitution*, 175 (describing the Congress Party's turn to a more radical socialism as a response to its poor performance in the 1967 general elections).

[49] Ibid 187-88 (describing the 'radicalization of the Congress Party and of government policy' under Gandhi).

[50] Ibid 291 (on Gandhi's failure to translate her power and popularity into 'social revolutionary accomplishments').

[51] Ibid 175, 198 (describing how the *Golak Nath* case was decided just a few days before the results of the fourth general elections, in which the Congress Party's majority in the Lok Sabha was reduced to 25 seats and in which it lost control of eight states, were announced).

[52] *Sri Sankari Prasad Singh Deo v. Union of India* AIR 1951 SC 458; *Sajjan Singh v. Rajasthan* AIR 1965 SC 845.

decision, K. Subba Rao CJ, almost immediately resigned from the Court to become the liberal Swatantra Party's candidate for President, did not help matters.[53] That additional twist meant that the Court had not just broken the tacit agreement that had supported its independence. It had also spectacularly lifted the veil on legalism's claim to politically neutral decision-making.

Ironically, *Golak Nath* was in other respects quite a calculated decision since the Court did not in the end invalidate the constitutional amendments in question. Rather, citing the American doctrine of 'prospective over-ruling',[54] it postponed the exercise of its newly declared power to future cases. Within four years of *Golak Nath*, however, the Court had handed down two further decisions that could not be described as calculated and which, in a compounding sequence of events, led to a further deterioration in judicial-executive relations. In the first of these, *R.C. Cooper v Union of India,*[55] the Court struck down Gandhi's flagship bank nationalization law as a violation of the state's duty to pay adequate compensation in Article 31(2). In the second, *Madhav Rao Scindia v Union of India*,[56] it was a presidential order depriving princes of their privy purses that was the object of the Court's attention. Depending on your view of the social contract embodied in the 1950 Constitution, these two decisions were either courageous acts of judicial resistance to profound threats facing India's democracy or flagrant acts of anti-democratic defiance. Either way, the significant point is that they both concerned the Congress Party's newly radicalised agenda. The deterioration in judicial-executive relations, in other words, was not just a function of a legalist court making itself vulnerable to charges of ideological bias, but also of a dominant, but increasingly threatened,[57] political party upping the social reform ante – all of this occurring in a context in which a charismatic figure (Nehru) was no longer available to keep the two sides in check.

The Gandhi-led Congress Party responded to the adverse decisions in *Golak Nath*, *R.C. Cooper* and *Madhav Rao* by introducing a series of constitutional amendments.[58] This

[53] See Austin, *Working a Democratic Constitution*, 202, Sathe, *Judicial Activism in India*, 257-258.

[54] *Golak Nath* 1967 (2) SCR 762, 808.

[55] AIR 1969 SC 1126.

[56] AIR 1971 SC 530.

[57] In the 1967 general elections, the results of which were released within days of the *Golak Nath* decision, the Congress Party's majority in the Lok Sabha was reduced to 25 seats. It also lost control of eight states. See , were announced P had improved its majority in 1971 general elections, even before defeating Pakistan. It Austin, *Working a Democratic Constitution*, 175.

[58] See the Twenty-Fourth, Twenty-Fifth and Twenty-Sixth Amendments to the Indian Constitution respectively.

had all happened before under Nehru. What was different on this occasion, however, was the directness of the assault, not just on the legal and policy effect of the decisions, but on the Supreme Court's powers. The Twenty-Fourth Amendment thus explicitly excluded constitutional amendments from Article 13's prohibition on the making of laws that infringed the fundamental rights.[59] The Twenty-Fifth Amendment targeted both the Court's power to adjudicate the adequacy of compensation and the primacy of the fundamental rights over laws purporting to give effect to the Directive Principles of State Policy.[60] On the most generous interpretation, these measures constituted an attempt to return the balance of constitutional power to its pre-*Golak Nath* position. Less generously, they were a determined move permanently to divest the Court of its capacity to oversee the constitutionality of social reform.

The validity of the Twenty-Fourth and Twenty-Fifth Amendments was challenged in the 1973 *Kesavananda* case.[61] For some commentators, this is the real 'watershed' moment in Indian constitutional politics because it was in this case that the Court for the first time upheld the 'basic structure' doctrine – the reading of Parliament's amendment power that to this day underwrites its custodianship of the Constitution.[62] The legitimacy of *Kesavananda*, however, was only consolidated after 1977. When first decided, the case was inextricably bound up with the deterioration in judicial-executive relations that had begun with the decision in *Golak Nath*. The history of Indian constitutional politics cannot therefore be neatly dichotomised into life before and after *Kesavananda*. Rather, there are three distinct chapters: the initial accommodation between the Court and the Congress Party encapsulated in *Sankari Prasad*,[63] the transitional period between *Golak Nath* and the end of the Emergency, and the new equilibrium that stabilised around *Kesavananda*, but which was in actual fact the product of later developments.

[59] Austin, *Working a Democratic Constitution*, 244.

[60] Ibid.

[61] *Kesavananda Bharati Sripadagalvaru v State of Kerala* AIR 1973 SC 1461 (also involving challenge to Twenty-Ninth Amendment).

[62] See Raju Ramachandran, 'The Supreme Court and the Basic Structure Doctrine' in B.N. Kirpal et al (eds) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford UP, 2000) 107, 108.

[63] *Sri Sankari Prasad Singh Deo v. Union of India* AIR 1951 SC 458.

The exact holding in *Kesavananda* has proven notoriously hard to state.[64] In outline, the decision was to the effect that the term 'law' in Article 13(2) did not include constitutional amendments and thus that *Golak Nath* should be overruled, but that amendments should nevertheless conform to the Constitution's 'basic structure'.[65] The key passage in this respect was the Court's discussion of the meaning of the word 'amend' in Article 368, which the majority argued could not possibly mean total abrogation or destruction of the Constitution.[66] Beyond this, however, the Court did not clearly say what the basic structure was or how it should be determined. For Sikri CJ, the basic structure included, but was not limited to, the 'secular' and 'federal' character of the Constitution, its 'supremacy', the 'separation of powers between the legislature, the executive and the judiciary' and the 'republican and democratic form of government'.[67] For Shelat and Grover JJ, 'the unity and integrity of the nation' and 'the mandate given to the state in the directive principles of state policy' were also important.[68] Hegde and Mukherjea JJ, for their part, suggested that the Preamble should be the guide.[69] Since all of these suggestions were said to be non-exhaustive, the end result was inconclusive. Far from undermining its contribution to the Court's post-1977 revival, however, the doctrinal fuzziness of *Kesavananda* has turned out to be a crucial part of its power. By declining to provide clarity on the content of the basic structure, the decision allowed later judges to deploy the doctrine in a flexible and judicious way.[70]

Kesavananda's usefulness in this respect only came to light later. When delivered, its immediate significance was that it failed to appease the Court's political opponents. Ever since *Golak Nath*, as we have seen, the Court's position had been deteriorating. This was a function not just of the controversial nature of that decision, but also of Gandhi's ability to take political advantage of it. When *Golak Nath* was decided, the Congress Party was three days away from its worst ever (to that point) electoral result – the 1967 elections, in which its

[64] See Mate, 'Public Interest Litigation' 268; Austin, *Working a Democratic Constitution*, 265-69; Zia Mody, *10 Judgements that Changed India* (Sobhaa Dé Books, 2013) 12-15.

[65] *Kesavananda* passim.

[66] See Austin, *Working a Democratic Constitution*, 265.

[67] *Kesavananda* AIR 1973 SC 1461, 1535.

[68] *Kesavananda* AIR 1973 SC 1461, 1603.

[69] Ibid para 661 p. 484.

[70] Writing in 2002, Sathe, *Judicial Activism in India*, 93, reported that the basic doctrine had been used only five times to that point to strike down constitutional amendments.

majority in the Lok Sabha fell to twenty-five seats.[71] Gandhi, however, skilfully used the outcry over *Golak Nath* and Subba Rao CJ's resignation to rebuild her public support.[72] She then went on to exploit the *Bank Nationalisation* and *Princely Purse* decisions in the same way.[73] So effective was this strategy (along with Gandhi's populist appeal more generally) that, at the next general elections in 1971, the Congress Party was able to win back nearly all the ground it had lost in 1967.[74] At the end of that year, the defeat of Pakistan in the 'liberation' of Bangladesh saw Gandhi's personal star rise even higher.[75] Thus is was that, when *Kesavananda* was decided, Gandhi was in a confident and commanding position. Even before the outcome of the case was known, she had hatched a plan to supersede the three next most senior justices in the appointment of Sikri CJ's successor.[76] The plan was put into action the day after the *Kesavananda* decision,[77] making it seem like an immediate reprisal when it fact it was the culmination of a process that had begun in 1967.

From their shocked response,[78] the three superseded judges – Shelat, Hegde and Grover JJ – seem to have been completely unaware of what was being planned. The entire Court, however, was acutely aware of the importance of the *Kesavananda* decision, having been put under intense pressure by the executive in the lead-up to and hearing of the case.[79] That pressure, it is fair to surmise, was what lay behind the decision to overrule *Golak Nath* and once again deploy the device of prospective overruling.[80] Neither of those measures proved sufficient, however. As Austin relates, 'within minutes of arriving home from a retirement party for Chief Justice Sikri', Justice Hegde J phoned Justice Shelat to give him the shocking news that they and Justice Grover had been bypassed in favour of the more politically compliant Justice A.N. Ray.[81]

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[71] Austin, *Working a Democratic Constitution* 198.

[72] Ibid.

[73] See text accompanying notes 55-56 above.

[74] Mate, Public Interest Litigation' 269 (noting that Congress won 350 out of 545 seats).

[75] See Ramachandra Guha, *India after Gandhi: The History of the World's Largest Democracy* (London: Macmillan, 2007) 461-63.

[76] Austin, *Working a Democratic Constitution* 278-80.

[77] Ibid 278.

[78] Ibid.

[79] Ibid 269-77.

[80] See *Kesavananda* order.

[81] Austin, *Working a Democratic Constitution*, 278. Ray J had dissented in both the *Bank Nationalisation* and the *Princely Purses* cases (ibid 282). The other three were all seen as oppositional. Hegde in particular was

As noted in Chapter 2,[82] attacks on the judiciary do not necessarily lead to a decline in judicial independence. It all depends on how weakened the Court already is at the time of the attack. Sometimes, too, the real effects of an attack may take time to become apparent. In the Indian case, the supersession of Hegde, Shelat and Grover JJ had two significant consequences, one immediate and the other longer-term. First, the supersession contributed to the generally threatening atmosphere in which the Emergency cases were decided. By demonstrating how career-damaging defiance could be, or just how futile it was to defy Gandhi when the consequence of such defiance was simply loss of influence on the Court, the supersession must have influenced the judges' assessment of the personal and institutional repercussions of resisting the Emergency. The second, longer-term significance of the supersession was that it led to the creation of the Bench that was eventually to rehabilitate the Court's reputation. Both Justices Bhagawati and Krishna Iyer were thus appointed in the immediate aftermath of *Kesavananda*.[83] In Bhagawati's case, his appointment came on the back of a career as a young and progressive Chief Justice of the Gujarat High Court with a particular interest in promoting legal aid for the poor.[84] Krishna Iyer, for his part, had been a member of the Law Commission appointed by Gandhi in 1971 to suggest ways in which the Constitution might be amended so as to implement the Directive Principles.[85] Like Bhagawati, he was a perfect example of the kind of committed judge Gandhi had in mind. Judges who share their political promoter's ideology, however, are often those most able to assert their Court's independence.[86] And so it proved in the Indian case. As explained in greater detail in the next section, Bhagwati and Krishna Iyer were key players in the Court's post-1977 revival. They were able to play this role, and continue playing it after Gandhi's return to office in 1980, precisely because they were her appointees – judges who could be understood to be implementing her pro-poor agenda. The great irony of the supersession is

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feared because of his decision in the *Gandhi Election Case* (ibid). At the same time, numerous High Court judges were forcibly transferred away from their home jurisdictions (ibid 137; Mate, 'Public Interest Litigation' 269).

[82] See particularly pp. xx-xx.

[83] Both were sworn in on 17 July 1973, within three months of the supersession. See George H. Gadbois, Jr, *Judges of the Supreme Court of India: 1950-1989* (Oxford UP, 2011) 194.

[84] Ibid 194 -95.

[85] Austin, *Working a Democratic Constitution*, 189.

[86] The same could be said, for example, of the members of the Chaskalson Court in South Africa.

thus that it at once weakened the judges' resolve in resisting the Emergency and supplied the ingredients for the Court's later revival.

The sequence of events leading up to the Emergency was again quite convoluted. The key point was that, despite her resounding 1971 election victory and the strong performance of the Congress Party in the state elections that followed in 1972, widespread popular opposition to Gandhi's rule began to develop in 1974.[87] The reason for this rapid deterioration in Gandhi's fortunes had to do partly with a downturn in India's economy following the 1973 oil crisis, and partly with her failure to address corruption within the Congress Party, particularly at state level.[88] In January 1974, a student uprising began in Gujarat against the chief minister, Chimanbhai Patel's rule.[89] This spread rapidly to Bihar and other northern states. In March 1974, the students asked Jayaprakash Narayan, an old Congress Party stalwart, but someone who had been out of active politics for a number of years, to head their movement. The protests rolled on for a further year under Narayan's leadership, culminating in a mass rally in Delhi on 6 March attended by 750 000 people.[90]

While all of this was going on, the Allahabad High Court had been hearing a challenge to Gandhi's 1971 election to the Lok Sabha that had been brought by her losing opponent, Raj Narain.[91] The alleged wrongdoing – the use of government vehicles and other state resources to assist her in her campaign – hardly seemed significant in light of the ease of Gandhi's victory. On 12 June 1975, however, Sinha J ruled in Narain's favour, thereby throwing the continuation of Gandhi's prime ministership into doubt.

As alarming as it was, the Allahabad High Court's decision was not immediately threatening to Gandhi since the Supreme Court (in the person of Krishna Iyer) quickly granted a stay of the order pending an appeal.[92] The situation in the country, too, though turbulent, was not in any sense out of control.[93] It therefore came as quite a shock when Gandhi, without consulting her cabinet,[94] moved to declare an internal state of emergency on 25 June 1975. The feeling that this was something of an over-reaction was compounded

[87] This discussion draws on Guha, *India after Gandhi* 477-88.

[88] Ibid 475.

[89] Ibid 477.

[90] Ibid.

[91] Austin, *Working a Democratic Constitution*, 314-319.

[92] Ibid 318.

[93] This was the official finding of the Shah Commission of Inquiry held into the Emergency (ibid 309).

[94] Ibid 309.

when, rather than waiting for the Supreme Court's decision in her election case, Gandhi attempted to put the outcome beyond doubt by persuading the Lok Sabha to pass a retrospective constitutional amendment ousting judicial review of the election of a sitting Prime Minister. The applicable election laws were also retrospectively amended at the same time.[95]

It is impossible to know how the Supreme Court would have decided Raj Narain's complaint in the absence of these amendments. The electoral fraud charges were, as noted, quite trivial and the Allahabad High Court's decision might have been overturned according to the law as it previously stood. In the event, the Court upheld Mrs Gandhi's election on the basis of the retrospectively amended election laws, but struck down the retrospective constitutional amendment on the ground that it was contrary to the rule of law, equality, and free and fair elections – principles that were variously said to be part of the Constitution's basic structure.[96]

The Court's decision in the *Gandhi Election Case*, as it became known, was not a clear-cut capitulation to power. By upholding the basic structure doctrine in the most difficult of circumstances, the Court tried to hold on to its role as custodian of the Constitution. Significantly, too, the judges who joined the majority on this point had all dissented in *Kesavananda*.[97] This sent a strong signal that *Kesavananda* would henceforth be respected as binding precedent – a point that was to prove important shortly afterwards when an attempt was made to pressurize the Court into reconsidering that decision.[98] Against this, however, the Court's handling of the second part of the *Election Case* – the challenge to the retrospective amendments to the election laws – is difficult to defend on legal grounds. Khanna J's decision to invalidate the constitutional amendment as a violation of fundamental democratic principles, but to allow the legislative amendment as somehow not a violation of these same principles, is particularly hard to fathom. As Baxi has argued, this part of the decision only makes sense if one assumes that Khanna J and the Court as a whole were

[95] By the Thirty-Ninth Amendment. For details, see Austin, *Working a Democratic Constitution*, 319-20.

[96] *Indira Nehru Gandhi v. Raj Narain* AIR 1975 SC 2299; 1976 (2) SCR 347. Discussed in Austin, Working a Democratic Constitution, 323-24; Baxi, *Indian Supreme Court and Politics*, 56-66 (noting that the majority judges in the Election Case had not supported the basic structure doctrine in Kesavananda).

[97] Baxi, *Indian Supreme Court and Politics* 56-57; Austin, *Working a Democratic Constitution*, 324; Ramachandran, 'The Supreme Court and the Basic Structure Doctrine', 116-117.

[98] Austin, *Working a Democratic Constitution*, 328-333.

attempting some sort of 'statesmanlike' act of institutional self-preservation.[99] Rather than a capitulation, then, the *Election Case* is probably best seen as a strategic compromise aimed at placating the Congress Party in the matter of Gandhi's election while preserving the Court's capacity to take a more robust stand against the Emergency at some later point.

The problem with *Shukla*,[100] and the reason it has become so notorious, is that this was the case in which the need to take a robust stand against the Emergency undoubtedly arose, only for the Court to fail to act. At its heart, the case concerned the constitutionality of a presidential order issued on 27 June 1975 – two days after the Emergency had been declared – suspending the right to approach a court for enforcement of the rights conferred by Article 14 (equal protection), Article 21 (no deprivation of life or liberty with due process) and Article 22 (right to be informed of grounds of detention) of the Constitution.[101] In the ten High Court cases collected in the appeal, seven had softened the impact of this provision by holding that it did not exclude the ordinary administrative law grounds for challenging a detention order.[102] Khanna J, in his famous dissent, took a different but equally convincing approach, arguing that Article 21 was not the sole repository of the right to personal liberty.[103] Rather, there were various statutory rights against arbitrary deprivation of liberty that had survived both the presidential order of 27 June and s 18 of the Maintenance of Internal Security Act (which purported to override all existing common law and natural rights). Since it did not apply to these rights, Khanna J concluded, the presidential order could not be said to have completely ousted the High Courts' power under Article 226 to issue writs of *habeas corpus*.[104]

While it is possible to find some holes in Khanna J's judgment,[105] the arguments he presented were at least as convincing as the majority's view that Article 21 subsumed all other rights to personal liberty. His decision therefore showed that there was a legally plausible path by which the Emergency might have been resisted. There are also reasons to think that, had the majority joined in Khanna J's judgment, there might well have been a

[99] Baxi, *Indian Supreme Court and Politics*, 64.

[100] *A.D.M. Jabalpur v Shivkant Shukla* (1976) 2 SCC 521.

[101] Baxi, *Indian Supreme Court and Politics*, 80.

[102] Ibid 79-80.

[103] Section 18 of the Maintenance of Internal Security Act was made applicable notwithstanding contrary common law and natural rights – but not statutory rights. See Baxi, *Indian Supreme Court and Politics*, 85.

[104] Ibid.

[105] Ibid 84-116.

groundswell of public support for the Court, sufficient to dissuade the Congress Party from attacking it.[106] It is for this reason that *Shukla*, together with the subsequently decided *Bhanudas* case,[107] in which the Court declined to review the legality or conditions of preventive detention, have been so roundly condemned. As received and reinterpreted,[108] *Shukla* stands as the prime example of a case in which a threatened constitutional court failed to take a stand on principle in circumstances where the principled stand was not only legally available, but may also have been the best option from a strategic point of view. Even if the Court had been attacked, *Shukla* was the sort of case where the issue of principle was so fundamental that the institutional repercussions of a stand on principle would arguably have been less severe than the repercussions – in terms of lost reputation – of capitulation.[109]

All of this is true, and yet the irony of the *Shukla* decision is that the Court did eventually recover from it. Not just that, but the Court's capacity to recover from it, as we shall see in the next section, was in part a function of the intense public reaction to the horror of the detentions that the Court's decision had allowed. As much as it deserves its reputation, therefore, *Shukla* is also testimony to the fact that constitutional courts can recover from even very severe blows to their standing – indeed, that judicial capitulation to executive pressure, precisely by allowing the executive to overplay its hand, may provide the basis, not only for a court's resurgence but for institutional growth beyond anything that might have been imagined.

[106] Austin, *Working a Democratic Constitution*, 343.

[107] *Union of India v. Bhanudas Krishna Gawde* AIR 1977 SC 1027.

[108] As with *Kesavananda*, discussions of the *Shukla* decision tend not to analyse the actual content of the different judgments. Baxi's close reading of Khanna J's judgment (*Indian Supreme Court and Politics*, 84-116 is exceptional in this regard.

[109] 'Arguably' because at the time *Shukla* was decided there was talk of the creation of a Superior Judicial Council with majority political membership and final powers of constitutional interpretation. See Austin, *Working a Democratic Constitution*, 333, 342-43. Had that proposal been adopted in consequence of an adverse decision in *Shukla* decision, it is possible that independent judicial review would have been destroyed altogether.

4.4 The Court's rehabilitation: 1977-1989

While the extent of its own responsibility for this process may be debated,[110] the Supreme Court's influence in national politics clearly declined between 1967 and 1977. Its decision in *Shukla* was symptomatic of this trend and a damaging blow to the Court's authority in its own right. The Court's pre-1967 property rights decisions had also been controversial, of course. But the Court had at least then plausibly been able to claim that its decisions were offered in good faith. This in turn had allowed it to influence the content of the *zamandari* abolition laws even as its decisions were being countermanded. During the Emergency, however, its capacity to influence policy in this way had been all but lost. Its professed legalism, far from enabling the Court to resist the Congress Party's assault on democratic rights, had been used to mask the abdication of its constitutionally mandated role. Law and politics, it seemed, were indeed separate, but only in the perverse sense characteristic of the Quiescent Court, where a claimed commitment to that ideal underpins a judicial reluctance to speak legal truth to political power.

In the course of the Court's institutional decline, the personal reputations of the judges had also been badly damaged. Bhagwati J, in particular, as a judge with social-egalitarian views who had been expected to defend the Constitution,[111] came in for a lot of criticism. In January 1978, a month before Beg was due to retire as Chief Justice, the *Times of India* published a statement on its front page by a group of concerned Bombay lawyers and public intellectuals claiming that neither Bhagwati nor Chandrachud, the judge next in line for the chief justiceship, was a fit and proper person for the job. Their decisions in *Shukla*, it was argued, had been 'arrive[d] at … in total [dis]regard to precedent, by reasoning manifestly unsound, and [dressed up] by expressions that will testify only to a marked inclination to rule in favour of the State.'[112] Such open and direct public criticisms of sitting judges had never before been heard.[113]

In the end, after receiving the support of his fellow judges, Chandrachud did succeed Beg as Chief Justice.[114] But the criticisms made of his and Bhagawati J's role in the *Shukla*

[110] As noted earlier, it is best to think of the Court's decline as a compounding sequence of events.

[111] Austin, *Working a Democratic Constitution*, 338.

[112] Ibid 438. See also Gadbois, *Judges of the Supreme Court of India* 254-255; Baxi, *Indian Supreme Court and Politics*, 191-98.

[113] Gadbois, *Judges of the Supreme Court of India*, 254.

[114] Ibid 255-56. See also Austin, *Working a Democratic Constitution*, 438-39.

decision lingered. In Baxi's influential assessment,[115] it was this experience that supplied the added judicial motivation for the Court's post-1977 revival.[116] Determined to restore his reputation, Bhagawati set about proving that he was a better judge than his performance under the Emergency had indicated. He was joined in this initiative by Krishna Iyer, who had not been party to the *Shukla* decision, but who was on the Court at the time and who was the person most frequently cited as proof of Indira Gandhi's preference for committed judges.[117] Together, Krishna Iyer and Bhagwati began fashioning a series of doctrines that broadened access to the Court and gave its case law a markedly pro-poor cast. In restoring their personal reputations in this way, Krishna Iyer and Bhagwati also restored the Court's reputation, and more particularly its public support.[118]

The Court's post-Emergency doctrines will be discussed in a moment. Before doing so, a few points about the political environment for judicial review after 1977 should be noted, for the Court's rehabilitation was not just about the expiation of judicial guilt. It was also a function of political factors that allowed the judges to influence the Court's trajectory in the way that they did. The first and most obvious of these was the persistence in India after 1977 of great inequalities in the distribution of wealth, discrimination along gender lines and social marginalisation according to caste and religion.[119] Neither Nehruvian socialism nor Gandhian populism had made much impact on these stubborn features of Indian society. If there was a constituency, then, whose support the Court needed to win, it was the huge underclass of people for whom the Constitution's promise of social and economic transformation had yet to be made real.

The second point is that, as much as the Court's reputation had been damaged by the Emergency, the executive's reputation had been damaged more. While unforgettably awful for those who had suffered its depredations, the Emergency had at least taught Indians an important lesson about the way political power may be abused and the consequent need for

[115] Baxi, 'Taking Suffering Seriously' 113, 121 n 67. See also Sathe, *Judicial Activism in India*, 106-107.

[116] 'Added' because the other part of the motivation was a sincere ideological commitment to pro-poor lawyering.

[117] Austin, *Working a Democratic Constitution*,

[118] There has been extensive debate in the literature about whether Bhagwati and Krishna Iyer JJ's actions in this respect were sincere or strategic. See Mate, 'Public Interest Litigation' 264; Mehta, 'India's Judiciary' 167; Baxi, 'Taking Suffering Seriously' 129. The consensus seems to be that it was a bit of both.

[119] See Guha, *India after Gandhi*, 605-632.

independent judges. The Court undoubtedly benefited from this 'never again' feature of the political context as its post-1977 case law progressed.

The final contextual factor worth mentioning is that the restoration of constitutional democracy in India was first and foremost an act of popular self-government. The Indian people not the Court voted Gandhi and the Congress Party out of office in March 1977. Although the Janata Party coalition that came to power at this time did not last very long,[120] it fulfilled its central mission of overturning the worst excesses of Emergency rule.[121] In particular, through the Forty-Third and Forty-Forth amendments to the Constitution (which the Congress Party supported), the Janata Party restored many of the key components of the Court's judicial review power.[122] It was this fundamental act of constitutional reconstruction that provided the initial impetus for the Court's rehabilitation. The doctrines the judges developed accelerated the Court's recovery, but they would have been useless without the political momentum provided by the people's clearly expressed desire to return to something like the constitutional status quo ante.

So much for the political environment in which the Court operated. How did the Bhagawati, Krishna Iyer and the other judges who shared their social-egalitarian vision navigate that environment to restore the Court's influence? This part of the story, too, has been told on many occasions.[123] In retelling it here, the aim of this section is to show that the Court's rehabilitation is best attributed, not to a conscious political strategy, but to the dynamic interaction of its doctrines and the political factors just mentioned. As argued in Chapter 2, it is reasonable to assume that judges in a mature legal tradition who find that their court has fallen into quiescence will seek to restore its position in and through the medium of law. To do anything else would be to forgo an important source of legitimacy. It is unlikely in any event that judges whose legal-professional socialisation inclines them to search for convincing legal reasons for their decisions would suddenly cease to be influenced by such considerations. Rather, we would expect an ethic of fidelity to law to inform the way they went about their task. And, indeed, this is what happened in India.

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[120] Austin, *Working a Democratic Constitution*, 393-481; Guha, *India after Gandhi*, 522-545.

[121] See Mate, 'Public Interest Litigation' 270; Mate, 'Elite Institutionalism' 368-70.

[122] Lavanya Rajamani and Arghya Sengupta, 'The Supreme Court' in N.G. Jaya (ed.), *The Oxford Companion to Politics in India* (New Delhi: Oxford UP, 2010) 80, 86.

[123] See, for example, Baxi, 'Taking Suffering Seriously'; Sathe, *Judicial Activism in India*.

The first steps were taken during the brief period of Janata Party rule from 1977-1979. In arguably the most significant case decided at this time, *Maneka Gandhi*,[124] the Court re-oriented its approach to Article 21, reading that provision's guarantee against deprivation of 'life or personal liberty except according to procedure established by law' as guaranteeing, not just any procedure, but a 'fair, just and reasonable' one.[125] The case came to the Court after the Janata Party government had seized Indira Gandhi's daughter-in-law's passport without affording her a hearing. In holding that a hearing was indeed required, the Court read the fundamental rights for the first time as an 'integrated scheme'.[126] On its own, the Court reasoned, Article 21 provided only a procedural guarantee.[127] When read together with Article 14 (equality) and Article 19 (fundamental freedoms), however, it was clear that any procedure through which a person was deprived of an aspect of their liberty needed to conform to the principles of natural justice.[128]

Maneka Gandhi in this way marked a fundamental break from the interpretive methods that had dominated the establishment period. As noted earlier, Article 21 had been deliberately drafted so as to exclude the American doctrine of substantive due process. In downplaying this drafting history, and emphasising instead the connection between Article 21 and Articles 14 and 19, the Court abandoned the textual originalism of *Gopalan* and nailed its colours instead to the mast of its own, ideologically inflected understanding of the Indian constitutional project.[129] From this time onwards it was clear, the Court's legitimacy would be tied, not to the plausibility of its claim to be faithfully implementing the written Constitution, but to the public's willingness to embrace its interventionist role in national politics.

The next step in this process was *Sunil Batra v. Delhi Administration*.[130] To students of Indian constitutional politics, this case is well known as the occasion on which Krishna

[124] *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

[125] Ibid para 40.

[126] Ibid para 3.

[127] This was the holding in *A.C. Gopalan v State of Madras* 1950 SCR 88 (discussed above).

[128] See Bhagwati J's judgment in *Maneka Gandhi* in particular.

[129] See P.N. Bhagwati, 'Judicial Activism and Public Interest Litigation' (1984) 23 *Columbia Journal of Transnational Law* 561, 566 (describing the Court's move away from formalism to 'substantive justice'). See also Mate, 'The Origins of Due Process in India' 246 (describing the rejection of legalism in the *Maneka Gandhi* case).

[130] *Sunil Batra v. Delhi Administration* AIR 1978 SC 1675; (1978) 4 SCC 494. See also *Sunil Batra v. Delhi Administration* AIR 1980 SC 1579; (1980) 3 SCC 448.

Iyer responded to a letter sent by a prisoner alerting the Court to the appalling conditions of detention at Tihar Jail. In accepting this communication as equivalent to a writ proceeding under Article 32, the Court launched its 'epistolary jurisdiction'[131] – one of the doctrinal innovations that later came to play a major part in encouraging public interest litigation. *Sunil Batra* is also significant, however, for extending *Maneka Gandhi*'s expansive approach to Article 21 to a socially ostracised, but nevertheless politically significant, class of beneficiaries – prisoners facing capital punishment. Even after being sentenced, the Court held, prisoners on death row should not be kept in solitary confinement unless absolutely necessary.[132] The conditions of their detention, this meant, had to be proportionate to the threat that they actually posed to their fellow inmates. Furthermore, all prisoners, whatever the nature of their alleged crimes, should be seen to have forfeited only those fundamental rights as were incompatible with their incarceration.[133] With that, the Court announced its intention to use Article 21 as the lynchpin of its efforts to hold the executive to account for its treatment of ordinary Indians, even – especially – those who found themselves on the wrong side of the criminal law.

The final Janata Party era case worth noting, *Minerva Mills*,[134] was in fact decided shortly after Congress had been returned to power in January 1980. Most of the arguments, however, were heard during the caretaker prime ministership of Charan Singh in the second half of 1979. That gave *Minerva Mills* the peculiar character of a case in which the government had to defend legislation that it had itself tried unsuccessfully to repeal.[135] The particular provisions at issue were sections 4 and 55 of the Forty-Second Amendment, which had sought to countermand the Court's ruling in *Kesavananda*.[136] In striking down both those provisions, the Court reclaimed the last of the powers it had lost under the Emergency.

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[131] See Baxi , 'Taking Suffering Seriously', 118, 120. See also discussion in R. Sudarshan, 'Courts and Social Transformation in India' in Roberto Gargarella et al (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, 2006) 153, 156.

[132] *Sunil Batra* (note 130 above).

[133] Ibid.

[134] *Minerva Mills v Union of India* AIR 1980 SC 1789.

[135] During the Janata Party government, Congress still controlled the upper house, thus preventing the repal of all the Emergency amendments. See Austin, *Working a Democratic Constitution* 498; Ramachandran, 'The Supreme Court and the Basic Structure Doctrine' 118-119.

[136] The former section had amended Article 31C to the effect that no law enacted to promote the Directive Principles could be held to violate Articles 14, 19, or 31, while the latter had provided that 'there shall be no limitation whatever on the constituent power of Parliament'.

The significance of *Minerva Mills* is thus the way the Court was able to use the final stages of the post-Emergency political moment to re-assert its custodianship of the Constitution.

With Gandhi back in office in January 1980,[137] the post-Emergency impetus behind the Court's rehabilitation fell away. Instead, Bhagwati and Krishna Iyer moved to position the Court as a partner in the implementation of the Congress Party's social transformation project. It is thus noteworthy that, in the first part of the 1980s, the Court rarely opposed the national government.[138] Rather, it expanded its role in ways that aligned with Gandhi's overarching policy goals. After her assassination in 1984, the Court became more assertive under Rajiv Gandhi's less ideologically strident, more inclined-to-appease prime ministership.[139] But in this instance, too, the Court's rehabilitation is best understood, not as a conscious political strategy but as a judge-led reworking of the Court's mission in the changing conditions of Indian politics.

There were three main facets to the Court's jurisprudence as it developed after 1980, each of them foreshadowed by the three Janata-era cases just discussed. The first consisted of a series of doctrinal innovations that facilitated new forms of Public Interest Litigation (PIL). The effect of the Court's decisions in this respect was indirect in as much as its doctrines invited certain types of case that progressively transformed its institutional role. The second facet, the expansion of Article 21 to encompass a range of social and economic rights, complemented the first by collapsing the distinction between the Directive Principles in Part 3 and the fundamental rights in Part 4 of the Constitution. This doctrinal shift allowed the Court to resolve the tension between these two historically antagonistic parts of the Constitution while at the same time giving the fundamental rights a pro-poor tilt. The third and final facet was more direct in the sense that it consisted of a series of doctrines through which the Court explicitly redefined the limits of its powers vis-à-vis the political branches.

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[137] See Austin, *Working a Democratic Constitution*, 485-497.

[138] See Mate, 'Public Interest Litigation' 265 (citing *R.K. Garg v. Union of India* (1981) 4 SCC 675 in which the Court adopted a deferential standard for the review of economic policy.

[139] In *Mohammed Ahmed Khan v. Shah Bano Begum* AIR 1985 SC 945, for example, the Court held that s 125 of the Code of Criminal Procedure, 1973 entitled a Muslim woman to maintenance on divorce, thus overriding the position in Muslim personal law according to which maintenance is payable only during the three-month *iddat* period. Rajiv Gandhi's Congress government responded by enacting the Muslim Women (Protection of Rights on Divorce) Act, 1986 in what was widely seen as an attempt to placate aggrieved Muslim leaders and secure their vote. See Mody, *10 Judgements that Changed India* , 49-73.

Included in this facet were cases dealing with the judicial appointments process and the basic structure doctrine.

It is not possible here to survey all the cases in which these three facets were developed. The Court's post-1977 case law has in any case already been the subject of a number of in-depth studies.[140] Instead, what the remainder of this section does is to highlight a few cases that illustrate the principal point of interest – the way in which the Court's doctrines, in dynamic interaction with the changing political environment, drove constitutional politics to a new equilibrium.

In the case of the Court's PIL case law, the main doctrinal innovations were the relaxation of the procedural rules governing access to the Court, a similar relaxation of the rules governing *locus standi*, and the development of a new remedy – continuing mandamus – that allowed the Court to retain supervisory control of cases. As to the first, we have seen already how the Court in *Sunil Batra* allowed a detainee to bring a case on behalf of a fellow prisoner by writing a simple letter. After 1980, this way of accessing the Court proliferated and became the main way in which human rights abuses were brought to the attention of the Court.[141] The function of this 'epistolary jurisdiction' in the Court's case law was always somewhat symbolic, however. Even after its introduction, only a tiny percentage of the many human rights abuses that the poor in India suffered every day were litigated, let alone redressed through litigation.[142] From the point of view of the Court's public support, however, this did not matter provided that the Court was seen to be, metaphorically speaking, open to the poor.

The Court's epistolary jurisdiction was complemented by a reform to the rules of *locus standi*, which saw it dispense with the requirement that an applicant be able to show that they had a personal interest in the case. The paradigm case of this sort was *Bandhua Mukti Morcha v. Union of India*,[143] in which the Court gave standing to a non-governmental organisation seeking to end the practice of bonded labour. There was nothing in Article 32(1), Bhagwati held, to suggest that the person who moved the Court to enforce a

[140] See Baxi, 'Taking Suffering Seriously'; Sathe, *Judicial Activism in India*.

[141] See *Veena Sethi v State of Bihar* (1982) 2 SCC 583; *People's Union for Democratic Rights v. Union of India* AIR 1982 SC 1473, (1982) SCC 253; *Dr Upendra Baxi v State of Uttar Pradesh* (1983) 2 SCC 308; *Ram Kumar Misra v. State of Bihar* (1984) 2 SCC 451.

[142] See Mark Galanter and J.K. Krishnan, '"Bread for the Poor": Access to Justice and the Rights of the Needy in India' (2004) 55 *Hastings Law Journal* 789.

[143] AIR 1984 SC 802; (1984) 3 SCC 161.

fundamental right had to be the person whose right was allegedly being violated.[144] Earlier, in *S.P. Gupta v President of India*,[145] the Court had given standing to a group of advocates to contest the transfer of High Court judges to other jurisdictions against their will. This case, too, had involved applicants who had not themselves suffered any harm. On this occasion, however, the fact that the advocates were 'officers of the court' had appeared to restrict the grant of *locus standi* to instances where the applicants could show that they had at least an indirect interest in the case.[146] In *Bandhua Mukti Morcha* this qualification was dropped, or rather the point was made that all citizens had an indirect interest in the violation of fundamental rights.

The final doctrinal innovation driving the rise of PIL was the development of the continuing mandamus remedy. This device was first deployed in *Hussainara Khatoon v. State of Bihar*,[147] a case in which the Court was approached by an advocate who had read about the plight of undertrial prisoners in the newspaper. According to the report, some of the prisoners had been in prison for longer than the maximum penalty attached to the crime for which they had been charged.[148] In response, the Court, again in the person of Bhagwati, held that the prisoners' right to a speedy trial under Article 21 had been violated. It then issued a series of directions on how the system for holding prisoners awaiting trial could be improved. This was done in the form of a number of interim orders, thus ensuring that the Court remained seized of the case, with the ability to monitor the implementation of its orders over time.[149]

Even this brief survey illustrates how the Court's PIL doctrines transformed, not just its role in the political system, but also the way law and politics interacted at the constitutional level. Whereas the Court's role before *Golak Nath* had been about enforcing the terms of the written Constitution – with its democratic legitimacy contingent on the plausibility of its claim to be doing that – its PIL jurisprudence turned it into a people's court, with its own unmediated access to the demos. In the process, the Court became the primary

[144] AIR 1984 SC 802 at 813. The only qualification on this was that the person bringing the action should not be a 'meddlesome interloper or busybody'. Ibid.

[145] (1981) Supp (1) SCC 87.

[146] Mate, 'Public Interest Litigation' 272.

[147] AIR 1979 SC 1360; 1980 1 SCC 81.

[148] Ibid.

[149] See Baxi, 'Taking Suffering Seriously' 116ff; Sathe, *Judicial Activism in India* 204; Mate, 'Public Interest Litigation' 273-74.

site for discussion of virtually every major policy issue facing the country.[150] From being an adversarial court in which it addressed only those issues put to it by counsel, it became an inquisitorial court with a brief to consider any matter it thought to be pertinent to the case.[151] Even this does not convey the full extent of the changes, since the Court's relaxed rules of access meant it could investigate matters more or less of its own volition. All that was required was a newspaper report and someone willing to act as the named litigant. To support it in its work, the Court thus began to appoint commissioners and experts whose task it was first to recommend solutions that could be included in the Court's orders and then to monitor them to ensure they were carried out.[152] Although careful always to say that its guidelines were issued pending legislation, the Court in effect took over several areas of public policy where the legislature, through lack of political will or inattentiveness, had failed to act.[153] With that, the distinction between politics, understood as the site of social contestation over material and ideological resources, and law, as the means through which political power is projected, collapsed.

This transformation process was further accelerated by the second major facet of the Court's case law: its expansion of Article 21 to embrace a range of implied social and economic rights, including rights to livelihood,[154] fresh water and air,[155] and health.[156] We have seen how this aspect of its jurisprudence started in the *Maneka Gandhi* and *Sunil Batra* cases.[157] Article 21 was also the source of the right to a speedy trial in *Hussainara Khatoon*.[158] In addition to these, one other case worth mentioning – because it so neatly encapsulates what went on – is *Olga Tellis*.[159] This was the case in which the Court held that

[150] Mehta, 'The Rise of Judicial Sovereignty' 79 ('it is'hard to think of a single [policy] issue … on which the courts of India have not left their mark').

[151] See Neuborne, 'The Supreme Court of India' 503.

[152] P.N. Bhagwati, 'Judicial Activism and Public Interest Litigation' (1984) 23 *Columbia Journal of Transnational Law* 561, 574-77.

[153] See Ashok H. Desai and S. Muralidhar, 'Public Interest Litigation: Potential and Problems' in in B.N. Kirpal et al (eds) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford UP, 2000) 159, 165 (giving a list of policy areas taken over by the Court).

[154] *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545; AIR 1986 SC 180.

[155] *M.C. Mehta v. India* AIR 1988 SC 1037.

[156] *Vincent v. India* AIR 1987 SC 990.

[157] See above.

[158] 1979 AIR 1360 SC.

[159] *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545; AIR 1986 SC 180.

pavement dwellers had the right not to be arbitrarily evicted from their shelters. Although nowhere mentioned in the Constitution, the Court reasoned, the right to shelter was conceptually entailed by the right to life in Article 21 given that: (a) the right to life was meaningless without the right to livelihood;[160] and (b) the evidence showed that the pavement dwellers concerned were unable to support themselves anywhere else.[161] The significance of *Olga Tellis* is thus the way it folds what was meant to be a non-justiciable directive principle of state policy (the right in Article 39(a) to 'an adequate means of livelihood') into Article 21. At the same time, *Olga Tellis* shows how this doctrinal shift was vitally dependent on the Court's preparedness to interpret the right to life in substantive political terms, with reference to the social and economic conditions in which it was being enforced.

The final facet of the Court's post-Emergency case law concerned cases in which the Court directly defined its powers vis-à-vis the political branches. The most significant example of this type was *S.P. Gupta*.[162] We have looked at the *locus standi* aspect of this case already. Its relevance now is the substantive issue raised: the respective roles of the executive and the Chief Justice in the appointment and transfer of High Court judges. During the Emergency, fifty-six High Court judges had been transferred without their consent to other jurisdictions in what was widely believed to be a form of punishment.[163] The transfers had stopped after being successfully challenged in the Gujarat High Court.[164] With Gandhi's return to power in 1980, however, a new version of the problem arose: the use of Article 224, which provides for the appointment of temporary 'additional judges', as a routine way of testing whether prospective High Court judges were suitable for permanent appointment.[165] In the view of many, 'suitability' in this context meant, not the judges' professional competence, but their demonstrated loyalty to Congress. In March 1981, in the midst of the public outcry over this issue, the Law Minister, Shiv Shankar, caused an even greater stir by addressing a circular to the Governor of Punjab and the Chief Ministers of other states. In it, he requested them to ask the additional judges serving in their respective High Courts to indicate whether they consented to being transferred to another High Court on expiry of their two-year term. Apart from the impression this created that the judges were malleable

[160] Ibid.

[161] Ibid.

[162] *S.P. Gupta v. President of India* (1981) Supp (1) SCC 87.

[163] Mody, *10 Judgements that Changed India*, 166.

[164] Ibid 167.

[165] Ibid 167.

instruments of Congress policy, the circular had not been sent to the Chief Justice, in apparent contradiction of Article 222.

Hearing various challenges to the circular together, the Supreme Court in *S.P. Gupta* handed down a complex judgment that appeared to trade the doctrinal advances made in respect of the *locus standi* aspect of the case for a more deferential approach to the appointments question.[166] While emphasising that transfers could not be used to punish judges, a 4-3 majority of the Court stopped short of holding that a judge's consent was a necessary precondition for transfer.[167] The same majority held that, while the Chief Justice had to be consulted before a transfer was made, his opinion was simply one of several that needed to be sought and did not amount to a veto.[168] Finally, the Court held that additional judges did not have a right to be permanently appointed, although there was a 'weightage' in favour of that happening.[169]

The decision in *S.P. Gupta* is significant for what it reveals about Bhagwati's influence on the Court and the extent to which the re-orientation of the Court's role could be said to have been consciously directed. In the months preceding this decision, Bhagwati had been involved in a public falling out with Chandrachud over the latter's alleged failure, in his capacity as Chief Justice, to organise a judicial conference to discuss the issues raised by the *Minerva Mills* case.[170] Bhagwati had at the same time himself been heavily criticised for writing a letter to Indira Gandhi congratulating her on her re-appointment and bemoaning the slow progress made with her judicial transformation programme.[171] In *S.P. Gupta*, Bhagwati was the senior judge, but 'violate[d] his own strictures' by declining to hold a conference.[172] The end result of this was a sprawling, 600-page decision in which each of the seven judges wrote separately. If there was a trade-off in *S.P. Gupta*, then, it cannot be attributed to a coordinated strategy on the part of the judges, and certainly not to one that Bhagwati himself directed. Nevertheless, the unintended consequences of the decision were extremely advantageous for the Court. By ceding control of the judicial appointments process to the executive, *S.P. Gupta* bought the Court the time it needed for its PIL and Article 21 doctrines

[166] Sathe, *Judicial Activism in India* 264. See also Mate, 'Public Interest Litigation' 272-73.

[167] Mody, *10 Judgements that Changed India* 171; Austin, *Working a Democratic Constitution* 527.

[168] Mody, *10 Judgements that Changed India* 171.

[169] Austin, *Working a Democratic Constitution* 527.

[170] *Minerva Mills v. Union of India* (1981) 1 SCR 206; (1980) 2 SCC 591; AIR 1980 SC 1789.

[171] Austin, *Working a Democratic Constitution* 501.

[172] Ibid 505 and 527.

to take effect. When the judicial appointments question returned to the Court in 1993,[173] it was accordingly in a much stronger position to assert a controlling role in the process.

A similar effect can be observed in relation to the Court's basic structure doctrine jurisprudence. After the major work done in restoring *Kesavananda* in *Minerva Mills*,[174] this part of the Court's case law fell into relative inactivity. The only other decisions in this area before 1989 were *S.P. Sampath Kumar v. Union of India*[175] and *P. Sambamurthy v. Andhra Pradesh*.[176] Neither of these decisions was particularly significant. *Kumar* concerned Article 323A of the Constitution, an Emergency-era amendment ousting the writ jurisdiction of the High Courts in respect of the decisions of administrative tribunals. The Court dealt with this challenge by protecting the independence of the tribunals themselves rather than insisting that the High Courts' writ jurisdiction be preserved. In *Sambamurthy*, the Court struck down a minor constitutional amendment allowing state governments to alter the orders of administrative tribunals. Like *S.P. Gupta*, therefore, these cases point to the way the Court's power grew on the back of the indirect effects of its PIL and Article 21 jurisprudence, rather than by direct assertion.

4.5 The modern era: 1989-2015

The Supreme Court's current phase, which began around 1989, has been marked by a distinct change in the ideological orientation of the Bench. In place of the social-egalitarian views that drove much of its case law in the post-Emergency period, Supreme Court judges today are far more likely to hold mainstream liberal or even conservative attitudes. This is evidenced both in the Court's approach to the constitutionality of economic reforms, where it has upheld a range of fairly harsh neo-liberal measures, and also in its increased concern for environmental rights.[177] The basic form of the law/politics interaction in India, however, has remained unchanged: the Court's legitimacy is still founded on its public support, and the Court still frequently intervenes in public policy to address alleged failures of the democratic

[173] See discussion of the *Second and Third Judges Case* in 4.5 below.

[174] See also the contemporaneously decided case of *Waman Rao v. Union of India* (1981) 2 SCC 362; AIR 1981 SC 271 (discussed in Ramachandran, 'The Supreme Court and the Basic Structure Doctrine' 122-23).

[175] (1987) 1 SCC 124). See Mate, 'Elite Institutionalism' 383.

[176] (1987) 1 SCC 362 discussed in Sathe, *Judicial Activism in India* 88-89.

[177] See discussion below.

system. Rather than signalling progress towards a new equilibrium, therefore, the changes witnessed since 1989 are best viewed as an ideological shift within the Interventionist Court mode.

The primary purpose of this section is to substantiate this understanding of the current phase. In doing so, the section provides support for the conjecture in Chapter 2 that the Interventionist Court mode, when associated with a deep-seated transformation in constitutional culture rather than short-term strategic or political factors, will likely be impervious to shifts in judicial ideology. The secondary purpose is to investigate the claim, now quite often heard in the local literature, that the Court's role in national politics, however crucial it might have been in the 1980s in shoring up deficiencies in democratic politics, has today become dysfunctional. Here, the section will seek to show how the problems identified by Indian scholars may be attributed to certain inherent features of the Interventionist Court mode.

That there has been some sort of change in the way the Supreme Court operates after 1989 is now generally accepted.[178] That date is said to be significant for two main reasons. First, it marks the advent of coalition politics – the last year in which the Congress Party (and indeed any party, until 2014) was able to govern India on its own. Second, 1989 is identified as the start of a major shift in economic policy, from the state socialism that characterised the period of Congress Party dominance to the free-market strategies that every national government since 1991 has pursued.

Until the Bharatiya Janata Party's victory in 2014, no political party in India had been able to win an overall majority in the Lok Sabha for some thirty years.[179] Instead, from the end of Rajiv Gandhi's prime ministership in 1989, India has been governed by two main coalitions: the United Progressive Alliance, with Congress at its centre, and the National Democratic Alliance, headed by the BJP. Each of these coalitions consists of a range of regional and caste-based parties, with smaller parties sometimes shifting between the two. Though the BJP in 2014 was able to win an absolute majority in the Lok Sabha in its own right, it decided to keep the NDA coalition together. The main reason for this is that, with

[178] See Mate 'Public Interest Litigation' 263; Prashant Bhushan, 'Supreme Court and PIL: Changing Perspectives under Liberalisation' (2004) 39 *Econ & Pol. Weekly* 1770; Robinson, 'Expanding Judiciaries' 43; Surya Deva, 'The Indian Constitution in the Twenty-First Century: The Continuing Quest for Empowerment, Good Governance and Sustainability' in Albert H. Y. Chen (ed.), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge UP, 2014) 343.

[179] The last time this occurred was in 1984, with Rajiv Gandhi's victory following his mother's assassination.

just 30% of the national vote, the BJP's capacity to hold on to its majority and win future elections is dependent on the pre-election deals it strikes with its alliance partners. Likewise, Congress's chances of returning to power are dependent on this kind of support.[180]

The shift to neo-liberal economic strategies began in all earnest under Narasimha Rao's Congress Party Prime Ministership in 1991.[181] Before this, however, V.P. Singh, a former member of Rajiv Gandhi's cabinet who was elected as Janata Dal Prime Minister on an anti-corruption ticket in 1989,[182] had shown the electoral importance of sound economic credentials. No party has proposed centralised control of the economy since then. The underlying cause of this consensus, of course, was the triumph of free-market capitalism at the end of the Cold War. The endurance of free-market policies across all subsequent national governments, however, has been a function of the political dynamic attending the BJP's entrance into politics in 1980.[183] Unable to govern on its own without regional support,[184] the BJP has moderated its Hindu nationalism by stressing its economic record in the states it has governed. This was particularly true of the 2014 elections, but it has been part of the BJP's strategy all along.[185] While the Congress Party still emphasises its commitment to economic intervention on behalf of marginalised groups, it has in practice been forced to compete on the BJP's terrain.

The impact of these two developments on constitutional politics in India has been much as one would expect. The fragmentation of electoral politics has meant that the Court's independence is no longer tied to its ability to manage it relationship with a single political party. Rather, the Court operates in the political space opened up by robust electoral

[180] On the dependence of central parties on regional and caste parties, see Deva 'The Indian Constitution in the Twenty-First Century' 345, 349.

[181] Mate, 'Elite Institutionalism' 368.

[182] Guha, *India after Gandhi*, 596-597.

[183] On the rise of the BJP and the Hindutva movement generally, see Martha Nussbaum, *The Clash Within: Democracy, Religious Violence, and India's Future* (Cambridge, MA: Harvard UP, 2007).

[184] In the 2014 elections, the BJP won an absolute majority of seats in the Lok Sabha but only 31% of the popular vote. Its parliamentary majority was depended on pre-election voting deals with minor parties. See Eswaran Sridharan, 'Behind Modi's Victory' (2014) 25 *Journal of Democracy* 20; Ashutosh Varshney, 'Hindu Nationalism in Power' (2014) 25 *Journal of Democracy* 34.

[185] Ibid. See also Alfred Stepan, 'India, Sri Lanka, and the Majoritarian Danger' (2015) 26 *Journal of Democracy* 128, 137.

competition.[186] In practical terms, this has meant that the Court's judicial review power has been protected, not by the difficulty of amending the Constitution (for that still occurs on a regular basis[187]), but by the difficulty of amending the Constitution in a way that would fundamentally undermine its independence. After the BJP's election victory in 2014, this part of the dynamic may be set to change.[188] In the twenty-five years before that, however, the Court was able to exploit the fragmentation of electoral politics to expand its powers, most notably in the area of judicial appointments.[189]

Likewise, the change in economic policy after 1989 has had the predictable effect that the judges appointed to the Court after 1989 have tended to hold either mainstream liberal or conservative views. With both major coalitions occupying the centre of the political spectrum, and elite opinion following the global trend to neo-liberalism, the attitudes of the judges towards such issues as the role of the state in the economy, the relative importance of public- versus private-sector corruption, and the balance between environmentalism and economic development have inevitably drifted rightwards, too. As demonstrated below, this shift is detectable both in the content of the Court's case law and also in the sometimes very revealing remarks judges have made about the issues before them. This ideological re-orientation, however, has not affected the Court's reasoning style or its interventionist approach to public policy. Rather, the Court has used the procedural rules, doctrines and remedial powers it developed for purposes of its PIL jurisprudence to serve its new good governance agenda. While not entirely abandoning its commitment to the poor and the marginalised,[190] the Court has tended to favour the interests of the middle class over the interests of less privileged groups when the two conflict.[191]

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[186] See the discussion in Chapter 2, pp. xx-xx on the so-called 'political fragmentation' thesis. Mehta, 'The Rise of Judicial Sovereignty' 75 argues that the main reason the basic structure doctrine has not been challenged since 1980 is India's 'fragmented political system'. He suggests this might change in the event that a single party 'gain[s] enough parliamentary heft to wield the amendment power'.

[187] Deva, 'The Indian Constitution in the Twenty-First Century' 352 reports that there were 19 constitutional amendments from January 2000 to January 2012.

[188] See the discussion at the end of this section of the Constitution Ninety-Ninth Amendment Act and various other measures taken to improve judicial accountability mechanisms.

[189] See the text accompanying n 221 below.

[190] See, for example, *Unni Krishnan v State of AP* (1993) 1 SCC 645 (on the right to basic education).

[191] See Mate, 'Elite Institutionalism'; Balakrishan Rajagopal, 'Pro-Human Rights but Anti-Poor? : A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective' (2007) 18 *Human Rights Review* 157, 168.

This shift in the judges' ideological orientation is evident in two main areas of law: the review of economic policy decisions and environmental rights. Before 1989, the Court's deferential approach in the first area was driven by the judges' ideological identification with the Congress Party's social welfare objectives.[192] Today, the same doctrines that the Court developed to defer to those objectives are used to defer to neo-liberal economic restructuring programmes. *In BALCO Employees Union v. Union of India*,[193] for example, the Court applied the rational-basis review standard that it had developed in the 1981 *Garg* case[194] to condone the procedure followed in the privatisation of a state-owned aluminium corporation. The case started when a union representing employees at the corporation and the government of the state in which its main business was situated challenged the sale of a 51% controlling share in the corporation to a private party. The principal allegations were that the business had not been properly valued, that the employees had not been properly consulted or provided for, and that the corporation, given that its business was situated on tribal land, ought to have been sold to the state government concerned.[195] The Court dismissed all of these arguments on the grounds that the decision to privatise the corporation, given its poor economic performance, was rational.[196] While that approach was consistent with the Court's approach in *Garg*, and indeed with the review standard that many other constitutional courts would have applied,[197] the Court was not being asked to second-guess the decision to privatise BALCO itself, but rather to oversee the manner in which the decision was carried out. The Court's failure to see that distinction, together with some rather dismissive remarks it made about the intervener in the case,[198] have been cited as proof of its underlying free-market bias.[199]

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[192] See for example, *R.K. Garg v. Union of India* (1981) 4 SCC 675.

[193] AIR 2001 SC 350; 2002 2 SCC 343. See Bhushan, 'Supreme Court and PIL; 1770-71; Mate, 'Elite Institutionalism' 390-393.

[194] (1981) 4 SCC 675.

[195] Mate, 'Elite Institutionalism'.

[196] Ibid.

[197] The US Supreme Court and South African Constitutional Courts, for example.

[198] Dr B.L. Wadhera, a political scientist, who had often participated in PIL cases in the past, applied to join the case. The Court declined Dr Wadhera's application for lack of a sufficient connection to case. In the course of its judgment, the Court criticised the abuse of PIL procedures (Mate, 'Elite Institutionalism'377).

[199] See also *Delhi Science Forum v. Union of India* (1996) 2 SCC 405; AIR 1996 SC 1356 (challenge to the Rao Congress government's adoption of the National Telecom Policy) and *Centre for Public Interest Litigation vs*

The second set of cases that illustrates the Court's rightwards drift has to do with its enforcement of environmental rights, and particularly its entrance into such policy areas as pollution control and forest management. While the Court decided some important environmental rights cases in the 1980s,[200] this aspect of its case law became more prominent in the 1990s.[201] That on its own does not signify anything, of course. The poor have as much interest in clean air and water as anyone else, and the rising number of cases was a function of the way environmentalist groups took advantage of the Court's PIL doctrines to prosecute their cause. Environmental rights, however, often come into conflict with the interests of the poor and the working class, and it is the way the Court has dealt with this tension that has caused some to conclude that it is biased towards the middle class.

One prominent example of this was the *Delhi Vehicle Pollution Case,*[202] which concerned the impact of the widespread use of diesel fuel on the quality of the air in New Delhi.[203] After calling for various reports on this issue in the 1980s, the Court started to ratchet up the intrusiveness of its orders in the early 1990s, until in 1998 it finally mandated the conversion of all public transport buses in New Delhi to Compressed Natural Gas (CNG) within a set time-frame.[204] The order caused massive disruption to the public transport system, with 75% of the bus fleet stranded on pain of being found in contempt.[205] While it could be argued that the Court's firm stance was required to drive a necessary conversion to greener technologies, the time-frame the Court set caused great hardship to poor commuters, while leaving middle-class car drivers (who accounted for the bulk of the pollution) largely

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Union of India 2000 8 SCC 606 (dismissing claim for an independent investigation into the decision to sell off developed offshore gas and oilfields to a private joint venture).

[200] See, for example, the *Taj Trapezium Case* (*M.C. Mehta v Union of India* Writ Petition 13381 of 1984.

[201] In addition to the cases discussed in the text, see *Tarun Bharat Sangh v. Union of India* AIR 1992 SC 514; *Virender Gaur v State of Haryana* (1995) 2 SCC 577; *T.N. Godavarman Thirumulkpad v Union of India* (1997) 2 SCR 642; *Andhra Pradesh Pollution Control Board v. M.V. Nayudu* 1999 AIR SC 812.

[202] *M.C. Mehta v. Union of India* Writ Petition 13029 of 1985. Though launched in 1985, this case only really gained momentum in the 1990s and thus it is reflective of the Court's new approach.

[203] This discussion draws on Armin Rosencranz and Michael Jackson, 'The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power' (2003) 28 *Columbia Journal of Environmental Law* 223 and Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation Equity, Effectiveness and Sustainability' (2007) 19 *Journal of Environmental Law* 293.

[204] *M.C. Mehta v. Union of India* (1998) 9 SCC 589.

[205] Rajamani, 'Public Interest Environmental Litigation' 300.

unaffected. There is also evidence that the change to CNG led to increased public transportation costs, once again mostly affecting the poor.[206]

A similar lack of concern for the poor is evident in the *Almira Patel* slum clearance case.[207] The central issue in this case was the build-up of solid waste in New Delhi, which the Court attributed to the increasing number of slum settlements. Easily accessible data, however, showed, as one would expect, that low-income groups generate significantly less solid waste per capita than high-income groups.[208] The solid-waste build-up should thus properly have been seen as a function of inadequate municipal services and the harsh conditions in which slum-dwellers are forced to live. Apart from its insensitivity to this point, the Court's judgment revealed a startling lack of understanding for the plight of slum dwellers, likening the provision of alternative accommodation to them to rewarding a 'pickpocket'.[209] While these remarks are the most egregious example of anti-poor bias on the Supreme Court, the fact that the judge who made them rose to such a prominent position says something about the attitudes prevalent on the Bench as a whole.[210]

Despite these evident changes in the social philosophy of the judges who staff the Supreme Court, there has been no major change in the way law and politics interact at the constitutional level. The Court remains a forceful player in national politics and it continues to combine legislative, executive and judicial functions in a way that defies traditional categorisation.[211] Its reasoning style, too, has not changed significantly. Indeed, as discussed in a moment, the Court's tendency to ignore precedent in favour of ad hoc decision-making has, if anything, become more entrenched. At the wider level of Indian constitutional culture, there appears to be no going back to the era when the Court's legitimacy was founded on a plausible claim to the political neutrality of its role. Rather, the idea that judges' social philosophy plays a part in their decisions is now widely discussed and accepted.[212] For all

[206] Ibid 308-309.

[207] *Almira Patel v Union of India* (2000) 2 SCC 166 (discussed in Rajamani, 'Public Interest Environmental Litigation' 302 and Mody, *10 Judgments that Changed India* 89).

[208] Rajamani, 'Public Interest Environmental Litigation' 302.

[209] As quoted in Rajamani, 'Public Interest Environmental Litigation' 302-303. See also Mody, *10 Judgments that Changed India* 89.

[210] For a discussion of this issue, see Rajagopal, 'Pro-Human Rights but Anti-Poor?' 167-68.

[211] See the discussion of the *Vishaka* case below.

[212] See, for example, Rajabopal, 'Pro-Human Rights but Anti-Poor?'167 ('The social philosophy of the individual judges often determines the outcomes of cases in India (as elsewhere))'; Rajamani, 'Public Interest Environmental Litigation' 301-302.

these reasons, it makes sense to think of the latest phase in the Court's institutional life as amounting, not to a transition to a new equilibrium, but to an ideological shift within the Interventionist Court mode.

That understanding of the current phase provides support for the conceptual elaboration of this mode in Chapter 2. As conjectured then, when the Interventionist Court is the product, not of fortuitous political conditions, but of a long period of institutional and cultural development, it becomes relatively impervious to shifts in judicial ideology. That is because the essential feature of this mode in its developed form is an acceptance at the level of constitutional culture of the inevitability of ideologically driven decision-making. The Indian case confirms that this rule holds even where the original transformation of the constitutional culture occurs at the instance of a particular judicial ideology. In just the same way that the US Supreme Court's interventionist role developed on the back of the Warren Court's liberal-progressivism,[213] so too did the Indian Supreme Court's interventionist role depend on the particular ideological commitments of the post-1977 generation of judges. Once these two ideologically-driven transformations had achieved their effects, however, the constitutional cultures in both cases stabilised and adapted to further changes in judicial ideology without changing their fundamental form. In the American case, the Warren Court's liberal-progressivism gave way to the Burger, Rehnquist and Roberts Courts' conservative counter-reaction, but at the level of constitutional culture the political elite's acceptance of ideological decision-making became, if anything, more entrenched.[214] Much the same thing appears to have happened in India after 1989. The post-Emergency Court's social-egalitarianism has given way to the modern Court's liberal-environmentalism without any change to the form of the law/politics interaction. Indeed, in both cases, rather than threatening its fundamental form, changes in judicial ideology have ended up confirming the independence of the Interventionist Court mode from the particular ideological commitments driving judicial decision-making.

Stable as it is, the current balance of constitutional power has been subject to two interrelated lines of critique. One has to do with the quality of the Court's jurisprudence, the

[213] Of the many treatments of this topic, see in particular Mark V. Tushnet (ed.), *The Warren Court in Historical and Political Perspective* (1993); Morton J. Horwitz *The Warren Court and the Pursuit of Justice* (1998); Lucas A. Power Jr. *The Warren Court and American Politics* (2000).

[214] There is a vast literature on this. See, for example, James L. Gibson and Gregory Caldeira, 'Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?' (2011) 45 *Law & Society Review* 195 (arguing that ideological decision-making on the USSC is now legitimate in the eyes of the American public).

other with the impact of the Court's interventionist role on India's democracy. Lavanya Rajamani and Arghya Sengupta, for example, have described the Court's current case law as 'marked by rhetoric, imprecision and intellectual fuzziness'.[215] Pratap Bhanu Mehta, for his part, has charged the judges with engaging in a 'jurisprudence of exasperation',[216] by which he means the substitution of expressions of judicial dissatisfaction with the general state of affairs in India for a coherent constitutional vision. For Mehta, it seems, the problem is not so much the proliferation of mainstream liberal views on the Bench as the absence of any kind of 'coherent public philosophy'.[217]

Mehta and others have pointed to the institutional origins of this problem in the operation of three-judge benches on a multi-member court.[218] This compartmentalisation of the Bench, together with the sheer number of cases decided,[219] means that it is virtually impossible for any one judge to keep track of what the others are doing. Freed from the strictures of precedent, judgments tend to focus on doing individualised justice in the case at hand. Under these conditions, it is not surprising that judicial decision-making has been driven by the judges' personal world views. That those views tend to be socially and economically conservative is, in turn, an almost inevitable side-effect of the fact that judges are drawn from the upper echelons of the legal profession. After the *Second and Third Judges' Cases*,[220] in which the Court took over control of the judicial appointments process from the executive, the Supreme Court has essentially had the power to reproduce itself. The predictable result of this has been the re-orientation of the Court's case law in line with the ideological attitudes of the Supreme Court bar.

The second line of critique relates to the impact of the Court's interventionism on the overall health of the democratic system. The nub of this point is the way the Court has taken

[215] See Rajamani and Sengupta, 'The Supreme Court' 80.

[216] Pratap Bhanu Mehta, 'Can a Jurisprudence of Exasperation Sustain the Court's Authority' *Telegraph*, October 17, 2005.

[217] See Mehta, 'Rise of Judicial Sovereignty' 72.

[218] See Mehta, 'India's Judiciary: The Promise of Uncertainty' 173; Mate, 'Elite Institutionalism' 367; Nick Robinson, 'Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts' (2013) 61 *American Journal of Comparative Law* 173. The total number of judges on the Supreme Court at the time of writing was 31.

[219] At the end of 2011, there were 56,383 cases pending in the Supreme Court (Deva, 'The Indian Constitution in the Twenty-First Century' 351).

[220] *Supreme Court Advocates-on-Record Association v. Union of India* (1993) 4 SCC 441; *In re Special Reference No. 1 of 1998* (1998) 7 SCC 739; AIR 1999 SC 1.

over legislative and executive functions – thus going beyond the ordinary separation of powers. The best-known example of this was the Court's decision in *Vishaka v. State of Rajasthan*,[221] in which it issued detailed guidelines on the prevention of sexual harassment based on the Convention on the Elimination of All Forms of Discrimination against Women. More than ten years later, the Lok Sabha passed the Protection of Women against Sexual Harassment at the Workplace Act.[222] This statute might very well not have been enacted without the Court's decision. But the question remains whether the Court should have taken on what amounted to a legislative function.

Beyond the standard normative objections to this practice, there are questions about whether the Court actually has the capacity to sustain the kind of interventions it has attempted, particularly where it has taken over whole areas of regulation, such as the management of forests.[223] These cases inevitably take up immense amounts of time and resources. The Court has sought to counteract this by employing experts and commissions. But it is not merely a resources problem. It is also, as Balakrishnan Rajagopal has observed, the fact that the Court, in playing the role of 'an instrument of governance', rather than an 'institution of justice', inevitably gets drawn into 'the logic of the state'.[224] This tends to reduce the usefulness of the Court to social movements and facilitates its getting sucked into whatever ideological model of development is currently being pursued.[225]

Allied to this problem is the incapacitating effect on the political branches of the Court's interventions. One of the criticisms of the *Delhi Vehicle Pollution Case*, for example, is that the Court 'usurp[ed] the authority of the existing pollution control authorities to fulfil their duties independently'.[226] The pretext for Court's intervention was that the legislature was prevented from moving away from diesel by its allegiance to certain interest groups. The Court's intervention in the matter, however, raised problems of its own – not the least of which was a classic Fullerian polycentricity problem of reconciling the many competing interests involved in the policy choice.[227] As much as the Court's decisions succeeded in getting around legislative inaction, its proposed solution was not necessarily

[221] AIR 1997 SC 3011; (1997) 6 SCC 241 SC.

[222] Deva, 'The Indian Constitution in the Twenty-First Century' 358.

[223] The leading case is *Tarun Bharat Sangh v. Union of India* AIR 1992 SC 514.

[224] Rajagopal, 'Pro-Human Rights but Anti-Poor?' 159.

[225] Ibid 166.

[226] Rosencranz and Jackson, 'The Delhi Pollution Case' 225.

[227] Lon L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.

better than the one the legislature would have arrived at. As Jackson and Rosencranz argue, 'Some of the roadblocks to CNG implementation could have been avoided, or at least minimized, had the conversion been originally mandated through the normal legislative process … [T]he Court's action seems likely to impede capacity building in the pollution control agencies, and thereby to compromise the development of sustained environmental management in India.'[228]

Clearly, where the Court enters a policy area and exercises supervisory jurisdiction it runs the risk that it may prevent the democratic branches from performing their role properly. Although that kind of intervention could still qualify as a legitimate exercise of judicial power on Waldronian grounds,[229] from a more sociological perspective, it is doubtful whether it contributes in the long run to the overall health of the democratic system. Almost by definition, curial intervention of this sort *prevents* restoration of proper democratic functioning by becoming a kind of crutch on which the democratic system learns to depend. To a certain extent, this sort of dependency-effect can be addressed by wise decision-making – by judges choosing remedies that prompt rather than usurp democratic action.[230] In general, however, it is fair to say that this has not been the Indian Supreme Court's approach. Rather, the Court has tended to supplant the role of the democratic branches in those policy areas in which it has chosen to intervene.[231]

The Indian experience in this way provides support for the normative worry about the Interventionist Court mode that was tentatively offered in Chapter 2. As argued then, the problem with this mode at a conceptual level is that the Court's detachment from the rhetoric of legal constraint is a detachment in the end from democratic accountability. The political conditions and constitutional-cultural adaptations that support the Court's forceful interventions in policy under this mode free it from the need to link its decisions to past democratic commitments. Rather, the Court's legitimacy is tied to popular satisfaction with the substantive outcomes of the cases it decides. While such a system can prove very stable, it almost inevitably comes at the price of the proper functioning of democratic politics.

In the Indian case, the negative impacts of the Court's interventionism on the quality of democracy have until now gone largely unchecked because the Court's decisions have

[228] Rosencranz and Jackson, 'The Delhi Pollution Case' 254.

[229] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346 (arguing that judicial review is morally justified where democracy is dysfunctional in some way)

[230] See Katharine G. Young, 'Constituting Economic and Social Rights' (Oxford UP, 2012).

[231] See, for example, the *Vishaka* case discussed above.

proven popular and the political branches have lacked the means to do anything about it. There are some signs, however, that this situation may be changing. At the level of elite public discourse, there is growing discontent with the Court's interventionist style. One sign of this has been the long-running attempt to improve judicial accountability mechanisms. The attempt started with the Judges (Declaration of Assets and Liabilities) Bill of 2009, which was tabled in the Rajya Sabha, but then withdrawn following 'fiery debate'.[232] The Court was sufficiently shaken, however, to decide of its own accord to put details of the judges' assets and liabilities on its website.[233]

Since then, the Assets and Liabilities Bill has been subsumed under the Judicial Standards and Accountability Bill 136 of 2010. In addition to the provision on declaration of assets, the Standards Bill proposes the establishment of a National Judicial Oversight Committee and a Complaints Scrutiny Panel for the Supreme Court and each High Court.[234] As of 2015, this Bill had still not been passed, and it seems now to have been overtaken by the debate around judicial appointments. But it enjoys cross-party support (having been introduced by the UPA and further prosecuted by NDA) and it thus seems inevitable that it will eventually be passed.

In the fast-moving Indian story, the latest indication of discontent with the Supreme Court's role is the passage of the Constitution (Ninety-Ninth Amendment) Act, 2014, which provides for the establishment of a National Judicial Appointments Commission. The Commission is set to replace the collegium system established through the *Second and Third Judges' Case*s. It is that system that has come to symbolise the Court's power, but which also lies at the centre of allegations that it has become overweening. Under the proposed new regime, Supreme Court judges will be appointed by a Commission consisting of the Chief Justice, two other Supreme Court judges, the Union Minister in charge of Law and Justice and two eminent persons appointed by a cross-party committee, at least one of whom must be from a socially marginalised group.[235] While not an attack on the Court's independence as

[232] Rajamani and Sengupta, 'The Supreme Court' 93.

[233] *The Times of India*, 'Supreme Court judges to disclose assets' Aug 27, 2009.

[234] See Deva, 'The Indian Constitution in the Twenty-First Century' 360-61; Nilesh Sinha, 'Just Deserts or Honor at Stake? India's Pending Judicial Standards and Accountability Bill', Int'l J. Const. L. Blog, February 2, 2013, available at: www.iconnectblog.com/2013/02/just-deserts-or-honor-at-stake-indias-pending-judicial-standards-and-accountability-bill.

[235] See Article124A(1) introduced by article 3 of the Amendment Act.

such,[236] the establishment of the Commission obviously signals some high-level discontent with the Court's role.[237]

4.7 Comparative lessons

The manner of the Indian Supreme Court's post-1977 rehabilitation casts doubt on what was earlier said to be a possible general rule of judicial empowerment. In Chapter 2, it will be recalled, the conjecture was that constitutional judges working in a mature legal tradition who wanted to transform their Court's role in national politics would likely proceed quite cautiously, mindful that too sudden a break with accepted reasoning methods would expose them to charges of political decision-making. That conjecture was based on earlier work on South Africa, where the Constitutional Court over the first ten years of its life had been seen to keep faith with a fairly formalist reasoning style, notwithstanding the apparent invitation in the 1996 Constitution to develop a 'post-liberal' understanding of its mandate.[238] Elsewhere in this study, too, there is some support for the 'stickiness' of extant legal-reasoning methods. As we will see in Chapter 6, the Australian High Court's attempt in the 1980s to take on a more robust role in enforcing core political values was partly frustrated by the difficulty of abandoning the legalist methods on which the mid-century acceptance of its review function had been premised. The manner of the Indian Supreme Court's rehabilitation after 1977, however, suggests that these two experiences may be tied to their particular circumstances. Not only did the post-1977 generation of judges not proceed cautiously; the posited counter-reaction also did not occur. On the contrary, as we have seen in this chapter, the more substantive reasoning style adopted in *Maneka Gandhi* gained traction and helped to drive the transition to a new equilibrium.

Nevertheless, it is still possible to use the Chapter 2 framework, not just to explain the Indian Supreme Court's post-1977 rehabilitation, but to do so convincingly, in a way that enhances comparative understanding of how these processes work. The argument begins with

[236] It is probably not, as has been alleged, a sinister sign of the BJP's intention to use its majority to rein the Court in as the amendment had cross-party support and also the support of 50% of the states.

[237] A constitutional challenge to the Ninety-Ninth Amendment is currently under consideration by the Supreme Court.

[238] See Karl E. Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 12 *South African Journal on Human Rights* 146.

attention to the precise circumstances in which *Maneka Gandhi* was decided – the immediate aftermath of the Emergency, when memories of the Court's legalism-driven refusal to resist the suspension of *habeas corpus* were still fresh. Seen in that context, the case presented the Court with a time-sensitive opportunity to refashion both its review function under Article 21 and also the way it went about justifying its decisions. In strategic terms, one could say that the judges, realizing that the public mood was behind the Court's playing a more interventionist role, calculated that the legal legitimacy costs of a change in reasoning style would be off-set by a concomitant rise in public support. But that way of putting things, as is often the case with the strategic approach, relies too much on a conscious awareness of these factors. Better, then, simply to say that *Maneka Gandhi* was decided at a time in the evolution of India's constitutional politics when the inherited tradition of legalism had been discredited, and when the Court was accordingly free to develop a new reasoning style.

That explanation still leaves the question of why the Court adopted the particular style that it did. There is some evidence that the judges who sat in *Maneka Gandhi*, including Bhagwati and Krishna Iyer, were more exposed than their predecessors had been to American influence.[239] That would account for the use of reasoning methods typically associated with the U.S. Supreme Court. It is also possible that a more substantive style was better suited to re-orienting the Court's doctrines in the social-egalitarian direction that Bhagwati and Krishna Iyer wanted them to go. By facilitating a contextual reading of the Constitution, the approach adopted in *Maneka Gandhi* supported the Court's later expansion of the right to life in Article 21.[240] That effect only came later, however, and it is thus again hard to say that Bhagwati and Krishna Iyer consciously intended it. The immediate doctrinal challenge in *Maneka Gandhi* was to get around the *Gopalan* decision. The simpler explanation is thus that the substantive style was chosen because it allowed the Court to distinguish that case and treat the fundamental rights as an 'integrated scheme'.[241]

Whatever actually prompted the change in reasoning style, the important point is that it quickly became authoritative. In case after case, the Court used the methods it had adopted in *Maneka Gandhi* to devise new doctrines. In the process, legalism gave way to its exact

[239] Dhavan, 'Borrowed Ideas'; Manoj Mate, 'The Origins of Due Process in India' 253ff.

[240] That change might equally well have been effected by endorsing the amendment to Article 31C in *Minerva Mills*, of course, but Bhagwati was there alone in upholding that provision. See Austin, *Working a Democratic Constitution* 503-504 (explaining how Bhagwati first declined to join the rest of the judges in issuing the order in *Minerva Mills*, and then wrote a separate opinion dissenting on the Article 31C point).

[241] *Maneka Gandhi* (note 124 above).

opposite – a conception of the judicial function as necessarily political. The really interesting question in view of this experience is not why the Court switched to a more substantive style, but why the new style took hold so quickly and helped to trigger such a fundamental transformation in Indian constitutional politics.

The answer to this question, this chapter has suggested, lies in the way the Court's doctrines interacted with the political environment in which they were developed. Of all the commentators on the Court's rehabilitation, Manoj Mate has gone the furthest towards explaining this process. Drawing on Alec Stone Sweet's work on the judicialisation of politics in Europe, he has described the way in which the Indian Supreme Court's PIL doctrines enabled it to 'accrete power in a cyclical, path-dependent "chakra"'.[242] By 'strategically' developing its PIL jurisprudence, Mate argues, the Court was able to build its public support. This in turn allowed it to increase its participation in 'governance' to the point where it became 'indispensable to ruling elites'. Whether indispensable or not, he concludes, the Court's public support made it 'increasingly difficult to attack'.[243]

Mate's analysis is convincing, save for his attribution to the judges of a conscious awareness of the cyclical process they were triggering.[244] While certainly sensitive to the Court's institutional situation, the judges who contributed to the construction of the Court's PIL doctrines could not possibly have known how they would influence its trajectory. Their primary motivation, in any case, was not to restore the Court's reputation for its own sake but to interpret the Constitution in a way that made it relevant to the poor. That motivation was a composite of their personal ideological convictions and their sincere beliefs as judges that the interpretation they were offering, though somewhat detached from the constitutional text, was a plausible understanding of the Indian constitutional project. The fact that their doctrines built the Court's public support was a side-effect of their determination to pursue this interpretation rather than its primary goal. This is why it is somewhat misleading to describe the Court's PIL case law as amounting to a form of 'judicial populism'.[245] That may be an

[242] See Mate, 'Public Interest Litigation' 284, referring to Martin Shapiro & Alec Stone Sweet, *On Law Politics and Judicialization* (Oxford University Press, 2002) 184-208. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000).

[243] Mate, 'Public Interest Litigation', 286.

[244] Ibid 285 ('Judicialization allows courts to act strategically in expanding their role in governance and policy making through the gradual and incremental process of case-by-case dispute resolution').

[245] See Upendra Baxi, *The Indian Supreme Court and Politics* 121-248; Baxi, 'Taking Suffering Seriously' 107, 111-113.

accurate description of Indira Gandhi's political style, but judges like Bhagwati and Krishna Iyer were committed to improving the situation of the poor as an end in itself.

In other circumstances, the power-accreting trajectory that the Court's PIL doctrines triggered might have triggered a political backlash. The Court was, after all, transparently taking over functions traditionally reserved for the legislature and the executive. Bhagwati and Krishna Iyer, however, were pursuing the agenda that Indira Gandhi in a sense had appointed them to pursue. She thus had no reason to rein them in. During the crucial period between 1981 and 1984, she was in any case preoccupied with various demands for greater regional autonomy, including the violent political uprising in the Punjab that eventually claimed her life.[246] The power-accreting trajectory the Court's PIL doctrines triggered accordingly met with little resistance. In an 'iterative process',[247] those doctrines increased its public support, which in turn emboldened the Court to expand them and intervene ever more assertively in public policy.

To Mate's observations on this point must be added the profound effect that the Court's rehabilitation had on India's constitutional culture. As the Court's new reasoning style became entrenched and worked its external effects, public attitudes to the relationship between law and politics changed. What had seemed unthinkable before – the ideologically motivated intervention by the Court in matters of public policy – now seemed to be an essential part of its legitimate role in making the Constitution meaningful to ordinary Indians. In this way, the change in *Maneka Gandhi* triggered, not just a power-accreting trajectory, but also a fundamental transformation in the way law and politics interacted at the constitutional level. With the Court's independence safeguarded by the twin effects of its public support and the Congress Party's disinclination to attack it, the Court was free to pursue a substantive justice approach. As the 1980s progressed, this approach became accepted as the natural order of things, making it independent of both short-term political factors and also changes in the ideology that informed the Court's decisions.

Kesavananda was the centrepiece of this new, culturally embedded equilibrium. While *Minerva Mills* had affirmed the basic structure doctrine, *Kesavananda* was always the more important of the two cases. Its particular power, as noted previously, was that it was vague about the exact content of the doctrine. This meant that it could serve as a kind of shorthand for the Court's wide-ranging role. With its legitimacy no longer tied to its strict

[246] See Guha, *India after Gandhi* 552-570.

[247] Mate, 'Public Interest Litigation' 285.

adherence to the written Constitution, the Court was free to intervene in any public policy issue that could plausibly be said to implicate the Constitution's vision for a just society. Unlike the constitutional balance that had prevailed under Nehru, this was not a case of mutual legitimation. Rather it was a case of the dysfunctionality of democratic politics giving the Court the space to operate, and the Court's interventions coming to serve, both the judges' interest in influencing public policy and the public's interest in having a powerful Court that could make up for some of the failings of representative institutions.

While undoubtedly an improvement on the situation that had prevailed under the Emergency, the problem with this new politico-legal equilibrium was that it depended on the Court's popular appeal. That aspect by definition undermined the mediating role of the people's representatives and more formal lines of democratic accountability.[248] With the ordinary restraints of the traditional separation of powers gone, and the political branches unable to rein the Court in because of its public support, the Court's power grew essentially unchecked. Worse than this, the Court's interventions in public policy had a distorting effect in as much as they diverted attention away from the underlying causes of the democratic dysfunctions the Court was addressing.

These perverse side-effects of the new equilibrium have only worsened with time. As the Court's post-1989 case law shows, its continued interventions in public policy have undermined the capacity of representative institutions to play their proper role in the constitutional system. This is particularly true of the Court's environmental rights decisions, where the Court has taken over whole areas of governance, but it is also true of other areas of law as well. As vital as the Court's role appears to be in curing democratic deficiencies, the Court's interventions have also produced democratic problems of their own. The recent attempts to reform the judicial appointments process and to institute better mechanisms for judicial accountability should be seen in that light. While there is always the possibility that such mechanisms might be used to curtail judicial independence, they appear to be a necessary correction aimed at returning the Indian constitutional system to a more appropriate balance. The Court needs to embrace them in that spirit, and work towards a new theorisation of its legitimate role in Indian national politics.

[248] See Mehta, 'The Rise of Judicial Sovereignty' 80.