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The Rise of Judicial Governance in the Supreme Court of India

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ABSTRACT

This article analyzes how the Supreme Court of India, through its activism and assertiveness, has emerged as arguably the most powerful court among democratic polities. Over the past four and a half decades, the Court dramatically expanded its role in the realm of rights and governance, asserting the power to invalidate constitutional amendments under the basic structure doctrine, control judicial appointments, and govern in the areas of environmental policy, monitoring and investigating government corruption, and promoting electoral transparency and accountability. In this article, I argue that the Court's shift toward greater, yet selective, assertiveness in India's governance can most adequately be explained by a new theoretical approach—elite institutionalism. This theory posits that the unique institutional and intellectual atmosphere of the Court shaped the institutional perspectives and policy worldviews that drove activism and selective assertiveness in governance. Elite institutionalism expands the scope of regime politics and institutional theories by situating judicial decision-making within the larger intellectual context of Indian judging. The identities of justices on the Indian Supreme Court are a subset of their overall intellectual identity and worldviews, which they share with professional and intellectual elites in India. This article illustrates how "elite meta-regimes" of opinion—the collective values and currents of professional and intellectual elite opinion on sets of constitutional or political issues—shaped justices' worldviews. The broader shifts in the Court's activism and assertiveness reflected a shift from the meta-regime of "social justice" to one of "liberal reform."

INTRODUCTION

This article argues that the activism and assertiveness of the Supreme Court of India in governance has been motivated and influenced by the elite intellectual worldviews of justices. In order to explain the Court's activism and heightened assertiveness in governance, this article offers a new theoretical approach—elite institutionalism—that focuses on how the elite intellectual worldviews and values of judges, coupled with institutional

factors, help to shape judicial decision-making. Drawing on a qualitative analysis of politically significant decisions in the realm of governance, this article explores how an understanding of the professional and intellectual identities of judges may assist us in discerning the forces that drive judicial activism in constitutional courts around the world. In so doing, this article challenges conventional accounts of judicial decision-making that are largely based on studies of the U.S. judiciary.[1]

Among global constitutional courts, the Supreme Court of India is arguably one of the most assertive and powerful high courts in matters of governance and policy-making. In a series of battles with the Indira Gandhi Congress government in the 1970s, the Court asserted and entrenched the power to invalidate constitutional amendments that violate the basic structure doctrine and following the end of Emergency rule, the Court in the 1980s developed a new non-adversarial form of public interest litigation ("PIL") aimed at correcting governance failures and human rights abuses.[2] In the 1990s, the Court in a series of PIL decisions took control over

[1] This article draws heavily from Manoj Mate, The Variable Power of Courts: The Expansion of the Power of the Supreme Court of India in Fundamental Rights and Governance Decisions, Chapter 5 (2010) (Ph.D. dissertation, U.C. Berkeley), *available at* https://escholarship.org/uc/item/3f1640wm#page-4. For an analysis on the Court's selective activism and assertiveness in politically significant fundamental rights decisions, see Manoj Mate, *Elite Institutionalism and Judicial Power: Fundamental Rights and the Supreme Court of India*, 28 TEMP. INT'L & COMP. L.J. (forthcoming 2015).

[2] The Court originally asserted the basic structure doctrine in Kesavananda Bharati v. State of Kerala, A.I.R. 1973 S.C. 1461 (India), and affirmed it seven years later in Minerva Mills v. Union of India, (1986) 4 S.C.C. 222; A.I.R. 1986 S.C. 2030, 2031. *See* Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment*, (1974) 1 S.C.C. (Jour.) 45 (noting that the decision represented the "constitution of the future"); UPENDRA BAXI, COURAGE, CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES (1985) [hereinafter BAXI, COURAGE, CRAFT AND CONTENTION]; *see also* SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE IN INDIA (2009); Manoj Mate, *Priests in the Temple of Justice: The Indian Legal Complex and the Basic Structure Doctrine*, *in* FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY: THE POLITICS OF THE LEGAL COMPLEX 112 (Terence C. Halliday et al. eds., 2012) (arguing that lawyers, legal scholars, and political elites played a role in articulating and advancing the ideas behind the basic structure doctrine adopted by the Indian Court). For analysis of the Court's development of PIL, see UPENDRA BAXI, THE INDIAN SUPREME COURT AND POLITICS (1980) [hereinafter BAXI, THE INDIAN SUPREME COURT]; Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 1985 THIRD WORLD LEGAL STUD. 107, 128 (1985) [hereinafter Baxi, *Taking Suffering Seriously*]; Manoj Mate, *Public Interest Litigation and the Transformation of the Supreme Court of India*, *in* CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE (Diana Kapiszewski et al. eds., 2013); Manoj Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT'L L.J. 175 (2010).

judicial appointments from the executive,[3] and asserted an active role in challenging and investigating government corruption in *Vineet Narain v. Union of India*, and the Court has continued to play a key role in challenging government corruption in subsequent cases including the *2G Telecom Scam* and the *Coal Block Scam* cases.[4] The Court has also asserted an active role in environmental policy and development decisions, including major river and air pollution cases, deforestation, and large-scale hydroelectric dam projects. For example, in *T.N. Godavarman Thirumulkpad v. Union of India*, the Court assumed the functions of the ministry of forests in enforcing the Forest Act and regulating activity in India's forests,[5] and in the *Narmada Dam* litigation, the Court has issued orders relating to the construction of the dam and the environmental and human impacts of that project.[6] More recently the Court has also recognized rights to food, education, and information and through its decisions, helped pressure the government to enact new legislation and implement administrative and regulatory frameworks for effectuating these rights.[7] Post-2000, the Court expanded the constitutional right to information and ordered the promulgation of a new mandatory informational disclosure regime for all Parliamentary and state legislative

[3] *See* Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 4 S.C.C. 441 (asserting primacy over judicial appointments and interpreting Article 222 of the Indian Constitution to require that the Executive secure the concurrence of the Court in the judicial selection process).

[4] Vineet Narain v. Union of India, (1998) 1 S.C.C. 226 (issuing directives blocking the Prime Minister's office from controlling the Central Bureau of Investigation inquiry into the Jain Hawala scandal, and directions to the Central Bureau of Investigation); Subramanian Swamy v. Union of India, (2012) 3 S.C.C. 1 (cancelling 122 telecom licenses); Manohar Lal Sharma v. Principle Secretary, (2014) 9 S.C.C. 516 (India) (cancelling approximately 200 licenses for coal blocks for mining granted since 1993). For a recent analysis of anti-corruption initiatives in India in a comparative perspective, see C. RAJ KUMAR, CORRUPTION AND HUMAN RIGHTS IN INDIA: COMPARATIVE PERSPECTIVES ON TRANSPARENCY AND GOOD GOVERNANCE (2011). Jain Hawala was one of the largest and most significant scandals in India's political history. It concerned an $18 billion bribery and corruption scam that involved businessmen, bureaucrats, and over 100 top political leaders.

[5] T.N. Godavarman Thirumulkpad v. Union of India, (1997) 2 S.C.C. 267, 269-70; *see* Rajeev Dhavan, *It is Too Late in the Day to Put a Lid on PIL*, MAIL TODAY, Dec. 17, 2007, http://www.rtiindia.org/forum/2277-judicial-activism.html.

[6] Narmada Bachao Andolan v. Union of India, A.I.R. 2000 S.C. 3751.

[7] *See* Mohini Jain v. State of Karnataka, (1992) 3 S.C.C. 666 (India) (holding that the right to education was a fundamental right); People's Union for Civil Liberties v. Union of India, (2007) 1 S.C.C. 719 (recognizing a right to food and ordering implementation of the Integrated Child Development Scheme ("ICDS") to improve health and nutrition and expand access to food for children); Ass'n for Democratic Reforms v. Union of India, (2002) 5 S.C.C. 294; People's Union for Civil Liberties v. Union of India (2003) 4 S.C.C. 399.

candidates.[8]

The Supreme Court of India is a large court, consisting of a Chief Justice and thirty justices that sit in bench panels of two or three judges in most cases, and in panels of five or more judges in constitutional benches. However, many of the court's politically significant decisions analyzed in this article have been decided by two or three judge panels.[9] This structure magnifies the influence of the particular, elite values of each of the individual justices on each case. In addition, the justices on the Court are now appointed through a professionalized model of selection as a result of two important decisions: *Supreme Court Advocates-on-Record Ass'n v. Union of India* (the "*Second Judges' Case*");[10] and *In re Special Reference No. 1 of 1998* (the "*Third Judges' Case*").[11] As of the writing of this article, the Indian Parliament had already enacted a new constitutional amendment in August 2014 that would create a National Judicial Appointments Commission ("NJAC") charged with the selection of Supreme Court and High Court judges, replacing the current participatory-consultative collegium model.[12] The NJAC would consist of the Chief Justice, two of the next senior-most Supreme Court judges, the Union Law Minister, and two "eminent persons" to be selected and appointed by the Prime Minister, the Leader of the Opposition in the Lok Sabha, and the Chief Justice of India.[13] The amendment has been ratified by a few states, and is still is awaiting ratification from more than fifty percent of state legislatures.[14]

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[8] People's Union for Civil Liberties v. Union of India, (2003) 4 S.C.C. 399; Ass'n for Democratic Reforms v. Union of India, (2002) 5 S.C.C. 294.

[9] *See* Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AM. J. COMP. L. 101 (2013); *History*, SUPREME COURT OF INDIA, http://supremecourtofindia.nic.in/history.htm (last visited Oct. 5, 2014).

[10] *See* Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 4 S.C.C. 441, 709-10 (holding that Article 222 of the Indian Constitution requires that the Executive must have the concurrence of the Chief Justice and of a collegium of senior justices for the approval of judicial appointments).

[11] *In re* Special Reference No. 1 of 1998, (1998) 7 S.C.C. 739, 772 (India); *see* Ashok H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, *in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 159, 188 (B.N. Kirpal et al. eds., 2000).

[12] *Parliament Approves Historic Bill to Overturn Collegium System*, INDIAN EXPRESS, Aug. 14, 2014, http://indianexpress.com/article/india/politics/rajya-sabha-passes-judicial-appointments-bill/99/#sthash.pycKK25t.dpuf.

[13] Arvind Datar, *A Fatally Flawed Commission*, HINDU, Aug. 17, 2014, http://www.thehindu.com/opinion/op-ed/national-judicial-appointments-commission-a-fatally-flawed-commission/article6326265.ece.

[14] *States Told to Ratify Judicial Appointments Commission Bill*, DECCAN HERALD, Nov. 19, 2014, http://www.deccanherald.com/content/442534/states-told-ratify-

Referencing existing theories of public law, this article argues that regime politics (or regime theory) and legal institutionalist models fail to provide a complete and compelling account of the expansion of judicial power in India. The article builds on existing theories, emphasizing a new variable—the values of political, professional, and intellectual elites that influence judges' worldviews and role conceptions and the way in which professional and political elites and the media evaluate assertive high court decisions. The article will refer to the analysis of this additional variable as the theory of "elite institutionalism." The article argues that this theory of elite institutionalism provides the most compelling explanation of the Indian Supreme Court's more recent activist tendencies.

Elite institutionalism focuses on how the unique institutional and intellectual atmosphere of courts shapes the perspectives of judges and drives (or discourages) judicial activism. The identity of judges as members of the Supreme Court and judicial branch, and their professional alignment with the Court as an institution influence the judges' values and motivations. Elite institutionalism, however, supplements existing institutionalist theories by situating judicial decision-making within the broader intellectual and political context of high court judging. The theory seeks to explain how the broader national currents of political, professional, and intellectual elite opinion shape judicial activism and assertiveness. This article argues that judges' sense of their institutional mission and judicial role is merely a part of judges' overall intellectual identity, which high court judges, at least in India, tend to share with other professional and intellectual elites. By elites, this article refers to legal elites (including judges, advocates, public interest lawyers, government officials, and lawyers in the law ministry, law commission, and other government agencies), political elites (including government officials and leaders within the Executive Branch, Parliament, and leaders of national and regional parties), and intellectual elites (including legal scholars and intellectuals, journalists, and others in the news media). I illustrate in this article how the institutional context interacted with broader meta-regimes of political, professional, and intellectual elite worldviews and currents in shaping judicial worldviews, and driving activism and assertiveness.

The foundations of the Court's expanded power in governance began in the post-Emergency Era (1977 to present) during which the Court, through a new activist approach to constitutional interpretation, dramatically expanded the scope of core fundamental rights in Articles 14, 19, and 21 of the Indian Constitution.[15] Post-1990, the Court became more assertive in challenging the Central Government's authority in governance cases.

judicial-appointments.html.

[15] *See* Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248.

Building on the substantive framework of the rights embodied in Articles 14, 19, and 21, the Court took over governance[16] and policy-making functions that were once in the exclusive domain of the Central Government bureaucracy, the Executive (Prime Minister and Council of Ministers), and Parliament.[17]

During the late 1970s and early 1980s, under the leadership of Justices P.N. Bhagwati, V.R. Krishna Iyer, and other activist justices, the Court transformed its role in governance through a new activism championing the causes of social justice and human rights for the poor and oppressed classes of India.[18] In a series of decisions, the Court reinterpreted Article 32 of the Indian Constitution to expand standing doctrine for PIL claims against government illegality and governance failures.[19] These decisions led to a large influx of PIL claims in the 1980s. Responding to these procedural innovations and reforms, public interest lawyers, NGOs, journalists, and human rights advocates began to file PIL suits in order to remedy human rights violations and governance failures. In addition, the Court also relaxed its formal pleading and filing requirements and developed equitable and remedial powers and procedures that enabled it to assert new monitoring, oversight, and policy-making functions.[20] From 1977 to 1989, the Court assumed an active role in challenging bureaucratic agencies, and state and local governments in cases involving the repression of human rights, social injustice, and environmental degradation. During this period, however, the Court was less assertive in challenging the actions and policies of the executive and legislative branches of the Central

[16] This article defines governance decisions as those decisions in which the Court asserted a policymaking, executive, or oversight function, compelling the government to act to fulfill constitutional or statutory obligations.

[17] In line with previous public law scholarship, this article examines three dimensions of judicial power: judicial activism, assertiveness, and authority. This article defines activism as the extent to which judges broadly interpret the constitutional and statutory texts and/or deviate from original intent or prior doctrine to support substantive outcomes. This article defines assertiveness as the degree to which courts challenge the validity of legislation and executive orders and other policies, *and* the extent to which the Court asserts or takes over policy-making or governance functions. A third facet of judicial power, judicial authority, refers to the extent to which courts are able to secure compliance or acquiescence with Court decisions from the government. *See* DIANA KAPISZEWSKI, HIGH COURTS AND ECONOMIC GOVERNANCE IN ARGENTINA AND BRAZIL (2012).

[18] BAXI, THE INDIAN SUPREME COURT, *supra* note 2, at 122-23.

[19] The Court expanded standing doctrine and court access in S.P. Gupta v. Union of India, (1981) Supp. S.C.C. 87 (upholding executive primacy in judicial appointments).

[20] The Court significantly relaxed formal pleading and filing requirements in PIL cases. *See* Bandhua Mukti Morcha v. Union of India, (1984) 3 S.C.C. 161 (issuing orders and directives aimed at ending bonded labor and improving the working and living conditions of laborers).

Government in governance cases.

Post-1990, the Court significantly expanded its power in governance and directly challenged the power of the elected branches of the Central Government. Under the leadership of a new group of activist justices including Chief Justice M.N. Venkatachaliah (1993-1994), A.M. Ahmadi (1994-1997), J.S. Verma (1997-1998), and A.S. Anand (1998-2001), the Court became more assertive in challenging the power of the Central Government in governance. In this "post-economic reform" era, the Court began to champion good governance, which included protecting judicial independence, fighting corruption, promoting accountability, and arguably advancing a middle-class agenda in environmental protection, development, and human rights.[21]

Part I of this article provides a descriptive analysis of shifts in the post-Emergency Court's activism and assertiveness from 1977 to 1989 and the post-1990 period. Part II examines how existing public law theories fail to provide a complete account of these dynamics. Part III examines how the thesis of elite institutionalism may supplement existing public law theories in providing a compelling account of the shift toward greater activism and assertiveness in India.

I. THE EXPANSION OF JUDICIAL POWER: JUDICIAL GOVERNANCE IN THE POST-EMERGENCY ERA (1977 TO 2007)

A. Activism and Deference in the 1980s: The Birth of Public Interest Litigation

During the Post-Emergency period (1977 to 2007), the Supreme Court of India embarked on a path of extraordinary activism, expanding the scope of fundamental rights under the Indian Constitution and developing a regime of public interest litigation. At this time, however, the Court was not as assertive in challenging Central Government policies. Instead, the Court

[21] *See* RAJEEV DHAVAN, THE SUPREME COURT OF INDIA: SOCIO-LEGAL CRITIQUE OF ITS JURISTIC TECHNIQUES (1977) ("In the end we must regard the attitude of the Supreme Court judges as typical of the decision-making habits of middle-class metropolitan Indians: technically unpredictable, not uninfluenced by imitative cosmopolitan habits, conditioned by native instinct to a depth not yet predictable by the psychologist or documented even by the novelist, the dramatist or the fiction-writer, and suffering from an over-sensitive opinion of their lonely and unparalleled position."); BAXI, THE INDIAN SUPREME COURT, *supra* note 2, at 248; *see* GEORGE H. GADBOIS, JR., JUDGES OF THE SUPREME COURT OF INDIA: 1950-1983-5 (2011) [hereinafter GADBOIS, JR., JUDGES OF THE SUPREME COURT]; George H. Gadbois, Jr., *Indian Judicial Behavior*, 5 ECON. & POL. WKLY. 149 (1970) [hereinafter Gadbois, Jr., *Indian Judicial Behavior*]; *see also* George H. Gadbois Jr., *Indian Supreme Court Judges: A Portrait*, 3 LAW & SOC'Y. REV. 317 (1968-1969) [hereinafter Gadbois, Jr., *Indian Supreme Court Judges*].

primarily limited its assertiveness to human rights and governance matters that involved state and local government actors and bureaucratic agencies.

The extraordinary scope of the Court's power in governance can be traced to the Court's expansive activism in the immediate post-Emergency era (1977 to 1989). The election of the Janata Party ("BJP") coalition in 1977 signaled the restoration of liberal democracy and constitutionalism in India; the Janata moved to officially end Emergency rule and to repeal and reverse laws and decrees enacted by Gandhi during the Emergency and to restore the protection of fundamental rights.[22] The Janata government repealed the Maintenance of Internal Security Act, and also repealed restrictions on media that had allowed for government censorship.[23] The new government also enacted the 43rd and 44th Amendments to the Constitution, which repealed aspects of the 42nd Amendment that had been enacted by Gandhi's Emergency regime.[24]

As part of this new shift, the Supreme Court of India adopted a new activist approach that expanded the scope of fundamental rights in decisions such as *Maneka Gandhi v. Union of India*, turning away from the more restrictive approach to the interpretation of fundamental rights in its earlier decision, *Gopalan v. State of Madras*.[25] In *Maneka Gandhi*, the Court dramatically expanded the scope of judicial review, reading due process protections into the Constitution and creating a new standard of "nonarbitrariness."[26] In addition, the Court subjected laws that impinged upon fundamental rights to a higher tier of judicial scrutiny under the due process protections of Article 21 of the Indian Constitution, the nonarbitrariness standard of Article 14, and "reasonableness" review in Article 19.[27]

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[22] *See* Sunita Aron, *Amethi: Gandhis to Face First Real Fight*, HINDUSTAN TIMES, May 4, 2014, http://www.hindustantimes.com/elections2014/state-of-the-states/amethi-headed-for-firsts-this-election-season-as-cong-feels-heat/article1-1215273.aspx.

[23] UJJWAL KUMAR SINGH, THE STATE, DEMOCRACY, AND ANTI-TERROR LAWS IN INDIA 65 (2007).

[24] SUCHINTYA BHATTACHARYA, CONSTITUTIONAL CRISIS AND PROBLEMS IN INDIA 60 (2003).

[25] *Compare* Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248, *with* Gopalan v. State of Madras, (1950) S.C.R. 88, 90 (India) (upholding the Preventive Detention Act of 1950 and refusing to recognize the substantive due process component of Article 21); *see* Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 BERKELEY J. OF INT'L L. 216 (2010) (analyzing personal liberty and preventive detention cases to illustrate how Indian judges sought to advance universalist, as opposed to particularist, legal norms and setting forth a theoretical approach for understanding how judicial borrowing can be understood as a dynamic process that changes over time in developing constitutional systems).

[26] Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248.

[27] Article 21 of the Indian Constitution provides: "Protection of Life and Personal

In order to make these fundamental rights accessible to the vast majority of the Indian population, the Court, led by Justices V.R. Krishna Iyer, P.N. Bhagwati, Chief Justice Chandrachud, and others, embraced a new phase of procedural activism in PIL. The Court's activism consisted of three key innovations. First, the Court expanded popular access to the Court by liberalizing formal pleading and filing requirements and broadening standing for PIL suits. Second, the Court innovated new judicial, non-adversarial procedures of investigation and fact-finding. Finally, the Court expanded the scope of its equitable and remedial powers.

1. The Expansion of Popular Access: The *Judges' Case*

Between 1978 and 1981, the Court gradually laid the foundations for an expansion in the doctrine of standing for public interest claims in a series of decisions that liberalized formal pleading and filing requirements. Most of these early decisions involved prisoners' rights, bail and the right to legal aid, and state violations of human rights. The activism in these early decisions reflected the social-egalitarian policy values of the senior judges of the Court, including Justices V.R. Krishna Iyer, P.N. Bhagwati, D.A. Desai, Chief Justice Y.V. Chandrachud, and others.

In 1981, a seven-judge constitutional bench of the Court in *S.P. Gupta v. Union of India* (the "*Judges' Case*") formally incorporated the liberalization of standing for PIL claims into law.[28] The case involved a challenge to the

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Liberty—No person shall be deprived of life or personal liberty except according to procedure established by law." INDIA CONST. art. 21. Article 14 of the Indian Constitution provides: "Equality before law—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." *Id.* art. 14. Article 19 of the Indian Constitution provides:

> Right of Freedom—(1) All citizens shall have the right—(a) to freedom of speech and expression; (b) to assembly peaceable and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; (f) *to acquire, hold, and dispose of private property* (repealed by 44th Amendment); and (g) to practise any profession, or to carry on any occupation, trade or business.

Id. art. 19 (emphasis added).

[28] S.P. Gupta v. Union of India, (1981) Supp. S.C.C. 87, 90. Justice P.N. Bhagwati and Justice V.R. Krishna Iyer both played a leading role in the development of PIL, including the liberalization of standing doctrine and expansion of the scope of fundamental rights. *See* Fertilizer Kamgar Union v. Union of India, (1981) 1 S.C.C. 568, 585 (Krishna Iyer, J., concurring) ("Law as I conceive it, is a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction."); Justice Krishna Iyer advanced the cause of human rights and social justice in his opinions in several landmark decisions. *See, e.g.*, Sunil Batra v. Union of India, (1978) 4 S.C.C. 494 (holding that torture and mistreatment of prisoners' abrogated prisoners' fundamental rights and recommending broad-ranging prison reforms). For more on Justice V.R. Krishna Iyer's

Gandhi government's mass transfer of High Court judges.[29] In the *Judges' Case*, the Court adjudicated several writ petitions brought by a High Court judge and several advocates that challenged the transfer of several High Court judges on the grounds that the Government had bypassed the required consultation procedures and transferred many judges without their consent.[30] The Government challenged the *locus standi* of the petitioners who were advocates, arguing that these parties had not suffered a legal harm or injury as a result of the transfers, and that only the judges themselves could bring claims.[31] The Court rejected the Government's standing objections, ruling that the advocates had a strong interest in maintaining the independence of the judiciary.[32] The Court then proceeded to articulate a new, expanded conception of legal standing based on exceptions to the laws of standing in U.S., British, and Indian common law[33] and Indian case law.[34]

While broadening the standing doctrine and allowing the advocates' claims, the Court's ultimate decision in the *Judges' Case* endorsed the Executive's actions with five out of the seven justices voting to uphold the

influence on other justices on the Court in the development of PIL, see Anil Divan, Op-Ed., *A Unique Blend of Judicial Virtues*, HINDU, Nov. 15, 2014, http://www.thehindu.com/opinion/op-ed/comment-on-justice-krishna-iyer/article6600153.ece.

[29] *Id.* at 90.

[30] *Id.*

[31] *Id.*

[32] *See id.* at 220 (Bhagwati, J.) ("The profession of lawyers is an essential and integral part of the judicial system and lawyers may figuratively be described as priests in the temple of justice. . . . They are really and truly officers of the court in which they daily sit and practice. They have, therefore a special interest in preserving the integrity and independence of the judicial system and if the integrity or independence of the judiciary is threatened by any act of the State or any public authority, they would naturally be concerned about it, because they are equal partners with the Judges in the administration of filing the writ petition.").

[33] *See id.* at 206-07, 216 (citing Queen v. Bowman, [1898] Q.B. 663 (Eng.)) (holding that any member of the public had the right to be heard in opposition to an application for a license); *see also* Attorney-General *ex rel.* McWhirter v. Indep. Broad. Auth. ("The McWhirter Case"), [1973] Q.B. 629 (Eng.) (holding that McWhirter had standing to sue the Independent Broadcasting Authority for threatening to show a film that did not comply with the statutory requirements as a television viewer); K. Ramadas Shenoy v. Chief Officers, Town Mun. Council, Udipi, (1974) 2 S.C.C. 506 (India) (holding that a ratepayer may question a municipality's granting of a cinema license to an individual); Vardarajan v. Salem Municipal Council, A.I.R. 1973 Mad. 55 (India) (recognizing the right of a ratepayer to challenge the misuse of funds by a municipality).

[34] Mun. Council, Ratlam v. Vardichan, (1980) 4 S.C.C. 162 (India) (holding that local residents had standing under Section 133 of the Code of Criminal Procedure to bring suit against the municipality to force it to carry out its statutory duty of constructing a drain pipe to carry sewage on a certain road).

primacy of the Executive in matters of judicial transfers and judicial appointments.[35] Although the majority held that Article 124(2) of the Indian Constitution required that the Executive consult with the Chief Justice, at least one Supreme Court justice, and one High Court judge, the Court interpreted the term "consultation" under Articles 124(2) and 222(1) to mean that the Executive was not obligated to follow the opinions or advice of these judges.[36] Also, according to scholars interviewed for this article, although several judges emphasized the importance of judicial independence in their opinions, the Court's desire to advance that goal was inhibited by concerns about political backlash that the Court might have faced in response to a more assertive decision.[37]

The Court's decision in the *Judges' Case* was a strategic *Marbury-v.-Madison*-type decision in that the Court sought to expand its own jurisdiction in PIL cases but ultimately upheld the Government's position and the challenged policies and actions.[38] Significantly, the Court in the *Judges' Case* redefined the role of courts as forums in which public interest litigants could challenge the Government's failure to enforce statutes, violations of the Constitution, or breaches of public duty.[39] As Bhagwati noted in his opinion:

> We would, therefore, hold that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realization of the constitutional objectives.[40]

The Supreme Court thereby asserted an expanded oversight and accountability function, through which it would subsequently expand its power in reviewing the actions of national and state government entities. Following this decision, the Court witnessed a dramatic increase in the number of public interest claims that were filed in the 1980s.[41]

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[35] Baxi, *Taking Suffering Seriously*, *supra* note 2, at 128.

[36] S.P. Gupta v. Union of India, (1981) Supp. S.C.C. 87.

[37] Interview with Senior Advocate 2, in New Delhi, India (Feb. 2007).

[38] *Compare* S.P. Gupta v. Union of India, (1981) Supp. S.C.C. 87, *with* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[39] *See* S.P. Gupta v. Union of India, (1981) Supp. S.C.C. 87.

[40] *Id.* at 218.

[41] The Supreme Court Registrar officially started tracking the total number of letter and writ PIL petitions in 1985. In that year, the Court received over 24,000 letter petitions, and an average of over 17,000 letter petitions between 1985 and 2007. Since 1985, the Court has

The Court also expanded the scope of its equitable and remedial power in a series of human rights cases that it decided during the late 1970s and early 1980s. For instance, in *Hussainara Khatoon v. State of Bihar*, a three-judge panel allowed attorney Kapila Hingorani to bring a habeas petition on behalf of thousands of "undertrial" prisoners in the state of Bihar.[42] Undertrial prisoners were prisoners who had served time in jail awaiting trial because they were unable to afford bail.[43] Hingorani filed the petition based on a series of articles published in the *Indian Express* about the plight of undertrial prisoners in Bihar and other states.[44] In many cases, these prisoners had been in jail longer than the sentences that would have accompanied a conviction for the crime that they were accused of committing.[45]

The Court in *Hussainara* broke new ground in developing the procedural innovation of "continuing mandamus," in which it issued relief in the form of orders and directives without dispositive judgments to retain continuous jurisdiction over the matter.[46] This enabled the Court to monitor the enforcement of its decisions more effectively.[47] In a series of orders (*Hussainara I* through *VI*), the Court laid down new guidelines for reforming the administration of bail.[48] These new guidelines required the government to inform all undertrials of their entitlement to bail, and release undertrials if their period of incarceration exceeded the maximum possible sentence for the offenses for which they had been charged.[49] Additionally, the Court ordered the release of the undertrials that had been identified in the *Indian Express* article.[50] The Court helped to end the practice of "protective custody" through orders mandating the release of thousands of prisoners in Bihar.[51]

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logged an average of 159 PIL writ petitions per year. *See* SUPREME COURT OF INDIA, ANNUAL REPORT 2006-2007 52-53 (2007).

[42] Hussainara Khatoon v. State of Bihar, A.I.R. 1979 S.C. 1377 (India).

[43] Baxi, *Taking Suffering Seriously*, *supra* note 2, at 118.

[44] *Id.* at 116.

[45] *Id.* at 118.

[46] *See id.* at 122.

[47] *See id.*

[48] Clark Cunningham, *Public Interest Litigation in the Indian Supreme Court: A Study in Light of the American Experience*, 29 J. INDIAN L. INST. 494, 511 (1987).

[49] *Id.* at 512.

[50] Baxi, *Taking Suffering Seriously*, *supra* note 2, at 115-17.

[51] Many of the Court's decisions in PIL cases also point to an important limitation on PIL social rights decisions of the Supreme Court and High Courts—that the Court's orders in these decisions only cover claimants that are encompassed within the scope of the litigation. Many of these decisions have failed to lead to the enactment of comprehensive legislation or regulations by the government. *See* Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, 8 INT'L J. CONST'L L. 739 (2010). However, in other contexts, the

Through the innovation of continuing mandamus, the Court indefinitely retained jurisdiction over PIL matters by issuing orders and directives without issuing final dispositive judgments. Clark Cunningham referred to this procedural innovation as "remedies without rights,"[52] which was invoked in many subsequent governance cases: "*Hussainara* thus set a pattern which the Supreme Court has followed in many public interest cases: immediate and comprehensive interim relief prompted by urgent need expressed in the writ petition with a long deferral of final decision as to factual issues and legal liability."[53] An example of this is the ongoing *Godavarman* case.[54] Although this PIL was first filed in 1995 to address deforestation in one protected forest in South India, the Court has since expanded its jurisdiction to include the day-to-day management of all of India's forests, including issues related to mining and tribal use of forest lands.[55]

2. The Role of the News Media and Public Interest Groups

As noted earlier, the Indian Supreme Court's PIL activism was driven in large part by both the social-egalitarian values of Justices Bhagwati and V.R. Krishna Iyer,[56] and by a desire among these and other judges in the post-Emergency era to bolster the institutional legitimacy of the Court.[57] In addition to this internal push within the Court, PIL was also bolstered by increased media coverage of poor conditions in state institutions (including prisons) and the repression of human rights in the post-Emergency period.[58] The media also began greater coverage of the Court's role in PIL cases, which helped to raise public awareness of the Court's actions. According to Upendra Baxi, the news media played a critical role in focusing national attention on government lawlessness and the repression of human rights during the immediate post-Emergency years.[59] National newspapers such

Court's decisions have helped pressure governments to enact legislation involving the right to education, food, and employment. *See* Sanjay Ruparelia, *A Progressive Juristocracy? The Unexpected Social Activism of India's Supreme Court* (Kellog Inst., Working Paper No. 391, 2013), *available at* https://kellogg.nd.edu/publications/workingpapers/WPS/391.pdf.

[52] Cunningham, *supra* note 48, at 511.

[53] *Id.* at 512.

[54] *See* T.N. Godavarman Thirumulkpad v. Union of India, (1997) 2 S.C.C. 267.

[55] *See id.*

[56] *See* Baxi, *Taking Suffering Seriously*, *supra* note 2, at 113; Interview with V.R. Krishna Iyer, former Supreme Court Justice, in Kochi, India, (Feb. 2007); Interview with P.N. Bhagwati, former Supreme Court Justice, in New Delhi, India (Jan. 2007).

[57] BAXI, THE INDIAN SUPREME COURT, *supra* note 2, at 152-55; Baxi, *Taking Suffering Seriously*, *supra* note 2, at 111.

[58] *See* Baxi, *Taking Suffering Seriously*, *supra* note 2, at 114.

[59] *See id*.

as the *Indian Express* published investigative reports on governmental excess in the Emergency period.[60] These reports also highlighted atrocities committed by the state and local police, the abhorrent condition of prisons, and abuses in the system of protective custody (mental homes for women and children).[61] Indeed, this heightened media attention on the Court's role in fundamental rights and governance can be traced back to the immediate post-Emergency period. Leading scholars such as Baxi and S.P. Sathe observed that newspapers for the first time since independence began to devote significant coverage to the human rights abuses and suffering in India.[62] In addition, the leading national daily newspapers also provided extensive coverage of the investigation of the Shah Commission, which had been charged by the Janata regime to investigate the corruption of the Gandhi regime.[63]

In its early years, public interest organizations such as the People's Union for Civil Liberties, the People's Union for Democratic Rights, Bandhua Mukti Morcha, Common Cause, and others began to use PIL to bring claims involving prisoners' rights, bonded laborers, unorganized labor, homeless street dwellers, and other exploited or disadvantaged groups.[64] Baxi argued that the "nexus" between the media and social advocacy groups in PIL cases further reinforced the populist nature of the Court's activism and assertiveness. This shift in media attention "enabled social action groups to elevate what were regarded as petty instances of injustices and tyranny at the local level into national issues, calling attention to the pathology of public and dominant group power."[65] Discussing the role of the media in bolstering PIL, Baxi observed:

> All this enhanced the visibility of the court and generated new types of claims for accountability for wielding of judicial power. And this deepened the tendency towards judicial populism. Justices of the Supreme Court, notably Justices Krishna Iyer and Bhagwati, began converting much of constitutional litigation into SAL, through a variety of techniques of juristic activism.[66]

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[60] *See id.*

[61] *See id.*

[62] *See id.*; S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (2002).

[63] Analysis of news coverage in the *Indian Express,* the *Hindu,* the *Times of India,* and the *Statesman* newspapers revealed that each of these newspapers published stories on the Shah Commission's investigation, including Indira Gandhi's testimony before the Commission, on their front pages for several weeks.

[64] *See* SATHE, *supra* note 62, at 208-09.

[65] Baxi, *Taking Suffering Seriously*, *supra* note 2, at 114.

[66] *See id.* at 115.

The Court utilized PIL to take on central government agencies and state and local government actors in a series of cases involving human rights and the environment.[67] The Court's increased activism in these decisions that did not involve high-stakes or politically controversial issues could be understood as a strategic approach on the part of the justices of the Court. Baxi suggested that the Court's gradual approach to expanding power through lower profile PIL cases was part of a larger strategy in which the Court endeavored to maintain a sense of institutional comity with the Lok Sabha and the Executive, while expanding the frontiers of fundamental rights, standing doctrine, and the Court's own powers.[68] The distinction between activism and assertiveness is therefore a crucial one in terms of the Indian Court's post-Emergency-era power.

This dynamic is well illustrated in the Court's intervention in environmental cases. During this period, senior advocates such as M.C. Mehta brought numerous environmental PILs, including the *Delhi Pollution Case*,[69] the *Ganges River Pollution Case*,[70] and *the Taj Mahal Pollution Case*.[71] In these and other cases, the Court held that the right to life in Article 21 of the Indian Constitution included the right to clean air, clean water, and a healthy environment, and that pollution and industrial hazards infringed upon this right.[72] The Court was active in developing new standards and legal rules to enable the Court to enforce existing environmental laws. For example, the Court effectively developed new doctrines of tort law, adopted the doctrine of strict liability, and invoked equitable and remedial powers to enforce existing statutes dealing with environmental degradation.

The Court in these cases sought to compel the Central and state governments to take actions to implement a set of environmental regulations governing air and water pollution that Parliament had enacted in the early to mid-1980s. In 1985, the Central Government of Rajiv Gandhi created the Ganges River Authority, which was charged with developing a

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[67] *Id*.

[68] *Id.* at 129.

[69] M.C. Mehta v. Union of India, (1996) 4 S.C.C. 750.

[70] M.C. Mehta v. Union of India, (1987) 4 S.C.C. 463.

[71] M.C. Mehta (Taj Trapezium Matter) v. Union of India, (1997) 2 S.C.C. 353; *see also Landmark Cases*, M C MEHTA ENVTL. FOUND., http://mcmef.org/landmark_cases.html (last visited Oct. 5, 2014).

[72] *See, e.g.*, M.C. Mehta v. Union of India, (1987) 4 S.C.C. 463, 463; *see also* Armin Rosencranz & Michael Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 COLUM. J. ENVTL. L. 223, 231 (2003) (examining the role of the Supreme Court of India in regulating pollution and ordering the adoption of clean natural gas technology in Delhi).

"Ganges Action Plan" for cleaning the river and reducing pollution.[73] The Plan called for the construction of new sewage treatment plants along the river and its main tributaries.[74]

In 1986, the government enacted the Environmental (Protection) Act of 1986, which empowered the Central Government to promulgate regulations to govern polluting industries, and shut down those facilities that failed to comply with those new environmental regulations.[75] The Act built on earlier laws enacted by Parliament in the 1970s and early 1980s that established Pollution Control Boards ("PCBs") at the Central and state government level under the Department of Environment.[76] In addition, the Act created a new Ministry of Environment and Forests ("MoEF") to replace the Department of Environment, and charged the MoEF to promulgate and implement environmental regulations nationwide.[77] In 1987, additional amendments to the Act empowered the PCBs to shut down non-complying polluting operations.[78]

In the *Ganges River Pollution Cases*, the Court adjudicated PILs brought by senior advocate M.C. Mehta, which challenged the Central and state governments' failure to implement the Ganges Action Plan and curb pollution of the Ganges River by various tanneries.[79] The Court issued directives that ordered the tanneries to adopt new pollution-reducing technology to curb pollution of the Ganges River, and to close those tanneries that did not adopt these new technologies, and also held that polluters must compensate those affected by damage caused by pollution.[80] In addition, the Court held that polluters must compensate those affected by environmental damage.[81] In this and other environmental cases, the Court also developed constitutional doctrine and new standards to support its efforts to enforce existing environmental laws.[82] The Court reiterated in several environmental cases in the 1980s and 1990s that the right to life in

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[73] *Ganga Action Plan*, MADHYA PRADESH POLLUTION CONTROL BD., http://www.mppcb.nic.in/gap.htm (last visited Oct. 5, 2014).

[74] *See PM Manmohan Singh to Review Ganga Action Plan*, TIMES OF INDIA, Oct. 16, 2008, http://www.timesofindia.indiatimes.com/india/PM-Manmohan-Singh-to-review-Ganga-Action-Plan/articleshow/3605102.cms.

[75] *See* Rosencranz & Jackson, *supra* note 72, at 226.

[76] *See id.* at 227-28.

[77] *See id.* at 226-27.

[78] *See id.* at 228.

[79] M.C. Mehta v. Union of India, (1987) 4 S.C.C. 463; M.C. Mehta v. Union of India, (1988) 1 S.C.C. 471; M.C. Mehta v. Union of India, (1997) 2 S.C.C. 411.

[80] *See supra* note 79.

[81] M.C. Mehta v. Union of India, (1988) 1 S.C.C. 471.

[82] S*ee* Rosencranz & Jackson, *supra* note 72, at 231-32 (citing Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh, A.I.R. 1989 S.C. 359).

Article 21 included the right to clean air, clean water, and a healthy environment, and invoked its equitable and remedial authority to adopt new tort law and strict liability doctrines.[83]

The Court was also active in taking on the issue of vehicular pollution in Delhi. In 1985, advocate M.C. Mehta filed a PIL challenging the government's failure to enforce existing environmental laws so as to mitigate the problem of air pollution in Delhi.[84] In the *Vehicular Pollution Cases*, the Court interpreted the Directive Principles and the right to life in Article 21 broadly so as to include the right to clean air in dealing with the effect of diesel pollution in New Delhi.[85] Initially, the Court ordered the Central and Delhi state governments to file affidavits on the status of government policies and actions, establish fact-finding commissions to analyze air quality in Delhi, and issue recommendations for improving air quality.[86] In two orders issued in 1986 and 1990, the Court found that heavy vehicles such as trucks and buses were the main sources of air pollution in Delhi, and ordered the Delhi Administration to file an affidavit detailing the measures that the government had taken to regulate vehicle emissions.[87] As illustrated in the next section, during the post-1990 era, the Court became even more assertive in challenging the Central Government bureaucracy than it was in the *Ganges River Case*, the *Vehicular Pollution Case*, and other environmental cases.

B. The Post-1990 Era: The Court Takes Over Governance

In the post-1990 era, as India shifted away from the one-party dominance of the Congress Party to a more fragmented system, the Indian Supreme Court became more assertive in directly challenging the Executive and Parliament. The Court broadened its jurisdiction and adjudicated a broader array of governance issues, asserting an expanded role in policy-making and governance.[88]

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[83] *Id.*; *see* Charan Lal Sahu v. Union of India, A.I.R. 1990 S.C. 1480.

[84] M.C. Mehta v. Union of India (Writ Petition [Civil] No. 13029 of 1985); M.C. Mehta v. Union of India, (1991) 2 S.C.C. 353.

[85] M.C. Mehta v. Union of India, (1991) 2 S.C.C. 353.

[86] M.C. Mehta v. Union of India, (1987) 4 S.C.C. 463.

[87] S*ee* Rosencranz & Jackson, *supra* note 72, at 231-32.

[88] In interviews, two experts suggested that there were two main phases in the Court's governance jurisprudence. These experts stated that at first, during the 1980s, PIL was still being "developed as a tool" for expanding access to the legal system and providing judicial recourse for the poor and disadvantaged, and the focus was largely on two kinds of issues: human rights, including prisoner's rights, the rights of the mentally ill, and bonded labor, and environmental protection. In the second phase, the post-1990 era, these experts suggested that the Court shifted its emphasis to issues of corruption and accountability and public servants, though the Court continued to play an active role in human rights and

The Court's activism in the post-1990 era represented a continuation of trends in the 1977 to 1989 era, such as the expansion of many of the procedural innovations developed in PIL cases in that earlier period. In both periods, the Court was concerned with good governance and protecting the rule of law. The Court's activism in PIL in the 1980s was motivated by the judges' desire to advance causes of social justice and to address malgovernance in state governments, local governments, and bureaucratic agencies. Judicial activism in the post-1990 era stemmed from a desire to address the Executive and Parliament's critical governance failures in the following areas: judicial administration, corruption, accountable environmental policy, and human rights.

1. Judicial Appointments

In 1993, the Court in the *Second Judges' Case* revisited whether the *Judges' Case* had properly interpreted the Constitution's provisions on judicial appointment.[89] The case was referred to a nine-judge constitutional bench by an earlier bench in *Subhash Sharma v. Union of India*.[90] The petitioners in the *Second Judges' Case* alleged that the Executive had failed to properly discharge its duty to fill judicial appointments in the High Courts in a timely manner, and failed to select the most qualified judges.[91] According to the petitioners, these failures prevented the High Courts from functioning efficiently.[92] The constitutional bench was asked to adjudicate two key issues: (1) whether the Chief Justice had primacy (vis-à-vis the Executive) in the judicial appointments and transfers process under Article 124 for the Supreme Court and under Article 217 for High Courts; and (2) whether fixation of judge strength[93] in the High Courts was a justiciable matter under Article 216 of the Indian Constitution.[94] In a 7-2 verdict, the Court overturned the *Judges' Case*,[95] holding that the Chief Justice of India, rather than the Executive, had primacy in judicial appointments and

environmental policy cases. Interview with Supreme Court Advocate 1, in New Delhi, India (Feb. 2007); Interview with Supreme Court Advocate 2, *supra* note 37.

[89] Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 4 S.C.C. 441.

[90] Subhash Sharma v. Union of India, 1991 A.I.R. 631 (1990); *see* S.P. Gupta v. Union of India, (1981) Supp. S.C.C. 87, 91.

[91] Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 4 S.C.C. 441, 468.

[92] *Id.*

[93] The fixation of judge strength refers to the requirement that the government must ensure that vacancies on the High Courts are filled in an efficient and expeditious manner.

[94] Article 216 provides: "Every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint." INDIA CONST. art. 216.

[95] S.P. Gupta v. Union of India, (1981) Supp. S.C.C. 87.

transfers.[96] The Court also ruled that the fixation of judge strength in the High Courts was a justiciable matter under Article 126.[97]

In rejecting its decision in the *Judges' Case*, the Court adopted an interpretation of the constitutional provisions that governed the selection of judges in line with their own desire to advance judicial independence, integrity, and efficiency. In his lead opinion for himself and four other justices, Justice Verma relied on evidence of original intent in rejecting the Court's judgment in the *Judges' Case* which held that the power of judicial appointment was solely within the Central Government itself, and that the executive (the President acting in accordance with the advice of the Prime Minister and Council of Ministers) had primacy in this process.[98] Drawing on analysis of historical intent of the judicial appointment process preceding the adoption of the Constitution and of original intent, Justice Verma held that the framers of the Indian Constitution envisioned a "participatory consultative" process in which the Executive must consult with the Chief Justice and senior justices. Justice Verma further held that because the framers of the Constitution rejected the earlier pre-Constitution model of appointments in which the executive had almost total primacy, the Chief Justice's opinion should be accorded the greatest weight and primacy, unless the Executive disclosed reasons to the Chief Justice that the appointment was not suitable.[99] Justice Verma held that the Chief Justice of India was "best equipped" to assess the qualifications and suitability of candidates for appointment in a consultative process in which the Chief Justice would also help secure and protect judicial independence.[100] In his decision, Verma also held that the Chief Justice must consult with and ascertain the views of at least two senior justices of the Court.[101] In embracing a consultative model of appointments based on the primacy of the Chief Justice, Justice Verma's opinion stressed the preservation of judicial independence and integrity.[102] In his separate opinion, Justice Pandian held that a more independent judiciary and professionalized system of appointments based on merit would help reduce judicial favoritism and

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[96] Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 4 S.C.C. 441, 468.

[97] *Id.* at 574-75, 584-85 (Pandian, J.).

[98] *Id.* at 692 (Verma, J.).

[99] *Id.* at 692-93.

[100] *Id.* at 692. Interestingly, Justice Verma identified several key attributes of "able, independent and fearless judge(s)," including "legal expertise, ability to handle cases, proper personal conduct and ethical behavior, and firmness and fearlessness." *Id.* at 696.

[101] Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 4 S.C.C. 441, 468, 702.

[102] *Id.* at 680-83, 698-99.

nepotism.[103] In his dissent, Justice Ahmadi argued, however, that the text of the Constitution and the original intent of the framers did not support an interpretation of the Constitution conferring primacy on the Chief Justice in appointments and transfers, and that effectuating such a change would require the enactment of a constitutional amendment.[104]

The Court in the *Second Judges' Case* recognized an important shift in its institutional function toward encouraging accountability in governance matters, including in the administration of the judiciary itself.[105] Despite this clear assertion of authority over the Executive in judicial appointments, the government acquiesced to the decision.

In 1998, the BJP government and Chief Justice M.M. Punchhi clashed over the judicial appointments power. The BJP government opposed several of Chief Justice Punchhi's appointments, and the government's Law Ministry alleged that during the eight months of Chief Justice Punchhi's tenure,[106] the Chief Justice had not, in making appointments, properly consulted with two of his colleagues as the *Second Judges' Case* required.[107] The Chief Justice denied this allegation, arguing that the Law Ministry could not inquire into the judicial appointments consultations.[108] In response, the BJP government brought a presidential reference to the Court in the *Third Judges' Case*, asking for clarification on the appointments procedure.[109] The Attorney General contended that the Chief Justice should be required to consult with a collegium of four judges, instead of two, as a check on the Chief Justice's considerable discretion in making appointments.[110] Significantly, however, the Government noted in its pleadings that it was "not seeking a review or reconsideration of the judgment in the Second Judges case and that the Union of India [should] accept and treat as binding the answers of this Court to the questions set out in the Reference."[111] In the *Third Judges' Case*, the Court ruled that the Chief Justice must consult with a collegium of the four—instead of the two—senior-most justices on the Court, which limited the Chief Justice's

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[103] *Id*. at 574-75, 584-85 (Pandian, J.).

[104] *Id.* at 626-29 (Ahmadi, J. dissenting).

[105] *See* Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 4 S.C.C. 441.

[106] M.M. Punchhi replaced Chief Justice Verma as Chief Justice in January 1998. *See Profile of Justice M.M. Punchhi*, SUPREME COURT OF INDIA, http://www.supremecourtofindia.nic.in/judges/bio/mmpunchhi.htm (last visited Oct. 5, 2014).

[107] T.R. ANDHYARUJINA, JUDICIAL ACTIVISM AND CONSTITUTIONAL DEMOCRACY IN INDIA 12 (1992).

[108] *Id.*

[109] *In re* Special Reference No. 1 of 1998, (1998) 7 S.C.C. 739, 772 (India).

[110] *Id.* at 763.

[111] *Id.* at 762.

appointment power, but still preserved judicial primacy in appointments and transfers.[112] Significantly, the government did not question the primacy of the judiciary in the appointments process in the *Third Judges' Case*.[113]

2. Corruption

The Court in the mid-1990s also more assertively intervened in corruption cases involving high-level officials in the Central and state governments. In *Vineet Narain v. Union of India,* the Court adjudicated a PIL that challenged the failure of the Central Bureau of Investigation ("CBI") to investigate and prosecute several prominent politicians who had been implicated in the Jain Hawala scandal.[114] These politicians had been named in the "Jain diaries" that had been discovered during an investigation into illegal financing of terrorist groups through a series of illicit transactions that involved politicians and corrupt bureaucrats.[115] The Court began taking over monitoring and control of the CBI's investigation, noting that "the continuing inertia of the agencies to even commence a proper investigation could not be tolerated any longer."[116]

The Court relied on Articles 32 and 142 of the Indian Constitution to issue a set of directives to make the CBI more autonomous by delinking it from political control. Article 32 allowed the Court to depart from traditional adversarial proceedings, and Article 142 authorized the Court to pass a "decree or order as may be necessary for doing complete justice between the parties."[117] Justice Verma found that the Court's power to issue directives which carried the force of law had been recognized in a series of cases and was capable of filling "the vacuum till such time the legislature step[ped] in to cover the gap or the executive discharge[d] its role."[118] Justice Verma also justified the Court's assertiveness based on an interpretation of Article 14 of the Indian Constitution, which guaranteed the right of equality.[119] According to Justice Verma, the Court was obligated to issue directions under Article 32 and 142 to implement the rule of law.[120]

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[112] *Id.* at 764-70, 772.

[113] *Id.* at 762.

[114] Vineet Narain v. Union of India, (1998) 1 S.C.C. 226, 226.

[115] Rajesh Ahuja, *8 Jain 'Hawala' Case Accused Plead Guilty*, HINDUSTAN TIMES, May. 19, 2013, http://www.hindustantimes.com/india-news/newdelhi/8-jain-hawala-case-accused-plead-guilty/article1-1062401.aspx.

[116] *See* S. Muralidhar, *Public Interest Litigation*, 33-34 ANN. SURV. OF INDIAN L. 525, 537 (1997-1998) (citing Vineet Narain v. Union of India, (1998) 1 S.C.C. 226, 237).

[117] INDIA CONST. arts. 32, 142.

[118] Vineet Narain v. Union of India, (1998) 1 S.C.C. 226, 227.

[119] *Id*.

[120] *Id.*

Justice Verma's activist interpretation of Articles 14, 32, and 142 in this case helped to lay the foundation for broadening the scope of the Court's power in future PIL cases.

Invoking these articles, the Court asserted the power of continuing mandamus, which provided the Court with continuous jurisdiction to monitor the CBI. In addition, the Court issued a series of directives that dramatically reorganized the structure of the CBI and the Enforcement Directorate, ordering both to report directly to the Court, in an effort to curb and limit external interference from the Executive. The Court also ordered that the Central Vigilance Commission ("CVC") be conferred with statutory status, and expanded the CVC's authority to include oversight and "responsibility of superintendence over the CBI's functioning" and required that the CBI report to the CVC on the status and progress of investigations.[121] Justice Verma's opinion also arguably reflected broader elite frustrations with the decline in the integrity of governmental institutions.

Finally, the Court, in a bold move, invalidated the "single directive" protocol, which required that the CBI receive prior authorization from officials in the Prime Minister's Office before proceeding with an investigation against high-ranking government officials.[122] The Court's intervention into the CBI's investigation resulted in the filing of chargesheets against fifty-four persons, including leading cabinet ministers and other government officials.[123] Ultimately, the Congress Party government of Prime Minister Rao was defeated in the elections of May 1996 that year, partly as a result of the Court's intervention.[124] In 2003, the BJP government enacted a new Central Vigilance Act.[125] The Act conferred statutory status on the Central Vigilance Commission in compliance with the Court's directives in *Vineet Narain*.[126] However, the Act also brought back the single directive provision in direct contradiction of the Court's decision.[127] In 2005, the Act was challenged in *Dr. Subramanian Swamy v. CBI*, and the Court referred the matter to a larger constitutional bench.[128] The matter is still pending adjudication today.[129]

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[121] *Id.* at 246-51.

[122] *Id.* at 239.

[123] Vineet Narain v. Union of India, (1998) 1 S.C.C. 226, 230-31.

[124] Kenneth Cooper, *14 More Politicians Charged in Indian Scandal*, WASH. POST, Feb. 23, 1996; John Zubrzycki, *India's Corruption Scandal Casts a Shadow Over Elections*, CHRISTIAN SCI. MONITOR, Mar. 26, 1996, http://www.csmonitor.com/1996/0326/26062.html.

[125] The Central Vigilance Commission Act, No. 45 of 2003 (India).

[126] *See id.*

[127] *See id.*

[128] Dr. Subramanian Swamy v. Director, CBI & Ors., (2005) 2 S.C.C. 317 (India).

[129] *Id.*

3. Accountability and the Right to Information

Beginning in the mid-1990s, the national media and civil society groups played a key role in exposing corruption in the Central Government. In response to public pressure, the Congress Party government led by Prime Minister P.V. Narasimha Rao appointed a committee headed by N.N. Vohra to investigate government corruption. In 1994, the Vohra Committee issued a report that highlighted the close nexus between criminals, politicians, and bureaucrats in India.[130] In the mid-1990s, several reform groups joined together as part of the National Campaign for the People's Right to Information ("NCPRI"). The Campaign was organized by Aruna Roy, Shekhar Singh, and other groups, such as the Mazdoor Kisan Shakti Sangathan (a workers' and farmers' advocacy organization).[131] This movement pushed for right-to-information legislation and reforms aimed at promoting governmental accountability. The movement also sought to create a new accountability agency called the "Lokpal," an ombudsman authority that would have jurisdiction over investigating and prosecuting corrupt government officials.[132] Groups in the NCPRI also pushed for regulations requiring the disclosure of the financial and criminal records of candidates for Parliament and the state legislatures.

In 1997, the Election Commission of India signaled that it would take an active role in combatting corruption in Indian elections, and announced that it would take steps to "break the nexus between crime and politics."[133] According to the Election Commission, forty out of the 545 members of Parliament, and 700 of the 4,072 members of legislative assemblies had a criminal background.[134] Responding to growing agitation over perceived corruption and criminality, the Central Government ordered the Law Commission of India to review the Representation of the People Act of 1951 in order to "make the electoral process more fair, transparent, and

[130] Krishna K. Tummala, *Combating Corruption: Lessons Out of India*, 10 INT'L. PUB. MGMT. REV. 34, 42 (2009).

[131] Suchi Pande, *The Invisible History of People's Movements*, TELEGRAPH, Mar. 13, 2014, http://www.telegraphindia.com/1140313/jsp/opinion/story_18068459.jsp#.VCOWBV6411. The NCPRI movement also included activism and litigation by Anna Hazare, Arvind Kejriwal, Harsh Mander, Nikhil Dey, the Association for Democratic Reforms, People's Union for Civil Liberties, and Parivartan.

[132] S. L. Pedgaonkar, *Globalization and Democracy: Lessons from Anna Hazare Movement*, 2 J. POL. & GOVERNANCE 270, 273 (2013), *available at* http://www.jpg.net.in/Journal%20of%20Politcis%20&%20Governance%20Vol.%201%20No.%204/JPG-June_2013.pdf#page=270.

[133] *EC Focus on Crime-Politics Ties*, INDIAN EXPRESS, Aug. 21, 1997, http://archive.indianexpress.com/Storyold/10279.

[134] *The Unholy Nexus*, INDIAN EXPRESS, Aug. 22, 1997, http://archive.indianexpress.com/Storyold/10370.

equitable and to reduce the distortions and evils that [had] crept into the Indian electoral system" and to recommend reforms.[135] In a 1999 report, the Law Commission recommended that candidates with prior criminal convictions be prevented from running for seats in the Lok Sabha.[136] The report also recommended that all Lok Sabha candidates be required to disclose prior criminal records, and a statement of the financial assets of the candidate and the candidate's family.[137] The BJP government did not implement these recommendations.

The NCPRI movement also included litigation in the High Courts and the Supreme Court. In 1999, the Association for Democratic Reforms filed a PIL claim in the Delhi High Court, seeking directives to implement the recommendations of the Law Commission report, and orders requiring the Election Commission to implement the proposed disclosure requirements.[138] In a significant decision, the Delhi High Court held that citizens had a fundamental right to receive information regarding the criminal activities and financial assets of candidates.[139] The Delhi High Court then ordered the Election Commission to issue new disclosure requirements regarding candidates' criminal records, financial assets, and educational background for Lok Sabha and State Legislative Assembly.[140] The BJP government appealed this decision to the Supreme Court, and the Congress Party also intervened in the action. On appeal, the People's Union for Civil Liberties joined the action, filing a PIL writ petition in support of heightened disclosure requirements.[141]

The Court upheld most of the Delhi High Court's decision with some minor modifications in the disclosure requirements, and issued directions to

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[135] Union of India v. Ass'n for Democratic Reforms, (2002) 5 S.C.C. 294, 300.

[136] LAW COMM'N OF INDIA, ONE HUNDRED SEVENTIETH REPORT ON REFORM OF THE ELECTORAL LAWS (1999), *available at* http://www.lawcommissionofindia.nic.in/lc170.htm.

[137] *Id.*

[138] Union of India v. Ass'n for Democratic Reforms, (2002) 5 S.C.C. 294.

[139] *Id.*; *see* Manoj Mate, *High Courts and Election Law Reform in the United States and India*, 32 B.U. INT'L L.J. 267 (2014).

[140] *Id.* at 322.

[141] The PUCL thus sought a directive to be issued to the Election Commission:

> (a) to bring in such measures which provide for declaration of assets by the candidate for the elections and for such mandatory declaration every year during the tenure as an elected representative as MP/MLA; (b) to bring in such measures which provide for declaration by the candidate contesting election whether any charge in respect of any offense has been framed against him or her; and (c) to frame such guidelines under Article 141 of the Constitution by taking into consideration the 170th Report of the Law Commission of India.

See id.; *see also* Ronojoy Sen, *Identifying Criminals and Crorepatis in Indian Politics: An Analysis of Two Supreme Court Rulings*, 11 ELECTION L.J. 216, 218 (2012).

the Election Commission to promulgate these revised disclosure requirements.[142] The Commission issued disclosure requirements in conformity with the Court's decision soon thereafter.[143]

The Government responded by attempting to restrict and override the Court's decision, and, in August 2002, the Government enacted the Representation of the People (Amendment) Ordinance. Section 33B of this new law was meant to overturn the Supreme Court's earlier decision in *Association for Democratic Reforms*. Section 33B provided:

> Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election which is not required to be disclosed or furnished under this Act or the rules made thereunder.[144]

The new law also included a weakened version of the disclosure requirements in the Court's 2002 order, requiring candidates to disclose cases in which they were either acquitted or discharged of criminal offenses, their assets and liabilities, and their educational qualifications.[145] Following the Court's decision, the People's Union for Civil Liberties ("PUCL") filed a PIL shortly thereafter challenging the validity of the new law, arguing that it violated the voters' right to information under Article 19(1)(a) of the Constitution to know the antecedents of a candidate.[146]

In *PUCL v. Union of India* ("*PUCL*"), the Court struck down Section 33B of the Act as unconstitutional, and held that Section 33B exceeded Parliament's legislative authority under Article 19(1)(a).[147] While acknowledging that the amended Act (but for Section 33B) was a step in the right direction, the Court observed that the new legislation did not require disclosure of criminal cases involving acquittal or discharge, assets and

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[142] The Court, in modifying the High Court's proposed disclosure requirements, effectively followed the recommendations contained in the Election Comission's submissions to the Court. The Court thus removed the disclosure requirement of information regarding the capacity and capability of the political parties on the ground that it was up to the parties themselves to "project capacity and capability" directly to the voters. Union of India v. Ass'n for Democratic Reforms, (2002) 5 S.C.C. 294, 294.

[143] Editorial, *Ruling for Reform*, HINDU, Mar. 15, 2003, http://www.thehindu.com/thehindu/2003/03/15/stories/2003031500361000.htm.

[144] Representation of the People (Amendment) Ordinance, § 33B (2002) (India).

[145] *Id.*

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

[147] *Id.*

liabilities, or candidates' educational qualifications.[148] However, the Court also held that the Election Commission must revise its previous instructions stipulating that candidates would be disqualified for non-compliance with the disclosure requirements, or for filing a false affidavit with the Election Commission.[149] The Court in *PUCL* issued a new order directing the Election Commission to issue new guidelines. In April 2003, the Election Commission issued those new guidelines in line with the Court's 2003 decision.

Overall, both of the Supreme Court's decisions met with strong approval among leading intellectual elites. The *Times of India*, the *Hindu*, the *Indian Express*, the *Hindustan Times,* and the *Statesman* all issued editorials supportive of the recommendations of the Law Commission's 170th Report and of both Supreme Court decisions.[150] In addition, the broader right-to-information movement enjoyed strong national support.[151] Ultimately, the Court's orders were implemented in the 2003 and 2004 elections.

The Court's assertiveness in the *Association for Democratic Reforms* and *PUCL* cases was potentially problematic for the Court from a strategic point of view because the Court challenged the government and major political parties on an intensely salient issue. Because each of the political parties had large numbers of elected officials with criminal records, or were allied with state and regional leaders who had been convicted of corruption or other charges, the Court's decisions in 2002 and 2003 were politically controversial and potentially destabilizing to the entire political class in India, including the ruling BJP regime. Yet, the Court still challenged the government again in *PUCL*, despite backlash after *Association for Democratic Reforms*.

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[148] *Id.*

[149] The Court held that the Election Commission's orders should be reversed on this point because it accepted the government's argument regarding the difficulty of returning officers (Election Commission officers in the field) to make determinations as to the integrity of the affidavits submitted by candidates in such a compressed time period. The affidavit could only be challenged after the election in a High Court under the new guidelines. Rajindar Sacchar, Editorial, *Avoid Confrontation*, HINDU, Apr. 14, 2003, http://www.thehindu.com/thehindu/2003/04/14/stories/2003041400441000.htm.

[150] Mate, *supra* note 1, at 191.

[151] Jayaprakash Narayan, *Time to Respond to the People*, HINDU, Aug. 27, 2002 ("Never before during peacetime have people at large been united so strongly on any issue over the past 50 years. Several surveys, opinion polls and ballots showed that an overwhelming majority of the people—95 percent or more—are in favor of full disclosure of criminal records and financial details of candidates. The parties too exhibited an impressive unity of purpose in thwarting disclosures.").

4. Human Rights

The post-1990 Court also asserted an interstitial policy-making and legislative function to address crucial governance failures in human rights, environmental policy, police custodial violence, and police reform—areas in which the Central Government failed to legislate or provide guidelines. For example, in *Vishaka v. State of Rajasthan*, the Court promulgated new regulations governing sexual harassment.[152] The Court held that sexual harassment violated the right of gender equality and the right to life and liberty under Articles 14, 15, and 21 of the Constitution. Further, the Court ruled that, until Parliament adopted a law implementing the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), to which India was a signatory, the Court's regulations would be in line with CEDAW and thereby make CEDAW enforceable.[153]

In *PUCL v. Union of India*, the Court recognized that the right to food was an element of the right to life in Article 21 and therefore justiciable, and that the government had a positive duty to help prevent malnutrition and starvation.[154] Since 2001, the Court has issued a series of orders directing state governments to implement Central Government welfare programs, including national grain subsidies for the poor, a mid-day meal program in schools, and the Integrated Childhood Development Services plan ("ICDS"). The ICDS included immunization, nutrition, and pre-school education programs.[155] The Court appointed commissioners to help oversee these orders, and recently ordered that the Indian Government pay 1.4 million rupees to combat starvation and malnutrition through the implementation of the ICDS.[156] Compliance with these orders has been inconsistent across states.

The Court has also actively asserted a role in addressing issues of police custodial violence and police reform. In response to PILs documenting widespread cases of custodial violence and killing by police, the Court in the *D.K. Basu* cases, established a set of national guidelines to govern how the police take suspects into custody and interrogate suspects, and then issued orders to state governments to implement these guidelines.[157] Compliance with these orders has been poor, as the state has faced significant resistance from state governments and police bureaucracies. In

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[152] Vishaka v. State of Rajasthan, (1997) 6 S.C.C. 241 (India).

[153] *See* Desai & Muralidhar, *supra* note 11, at 178.

[154] People's Union for Civil Liberties v. Union of India, (2007) 1 S.C.C. 719, 728 (ordering state governments and union territories to implement the Integrated Child Development Scheme).

[155] *See* Robinson, *supra* note 9, at 177.

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

[157] D.K. Basu v. State of West Bengal, (1997) 1 S.C.C. 416 (India).

the *Prakash Singh Case*, the Court issued guidelines for national police reform, and ordered the creation of a National Police Commission to oversee the implementation of these guidelines.[158] Again, however, the Court has faced significant resistance from state governments and bureaucracies in the implementation of these directives.[159]

5. Environmental Policy

In addition, the Court continued its activism in the areas of air and water pollution and exercised broad remedial powers, closing factories and commercial plants found to be in violation of environmental laws. To enable the monitoring of these cases to ensure compliance, the Court maintained them on the docket.[160] After monitoring the situation for three years, the Court in the *Taj Mahal Pollution Case* ordered 292 industries either to switch to natural gas as an industrial fuel, or relocate from the Taj Mahal "Trapezium" area.[161] The Court was able to secure strong compliance with its orders in the *Taj Mahal Case*.

In the *Delhi Vehicular Pollution Cases*, the Court issued a series of orders requiring that buses and other vehicles convert to clean natural gas to help reduce pollution in Delhi.[162] In 1991, the Court ordered the establishment of a high powered committee to make assessments and recommendations regarding measures to reduce pollution, including levels of sulfur and other pollutants.[163] In 1998, the Court issued a far-reaching order mandating the conversion of the Delhi Transport Corporation's fleet of diesel-fueled buses to compressed natural gas ("CNG"), and setting a timeline for such conversion.[164] Four years later, in April 2002, the Court expressed its frustrations with the failure of government agencies to implement those orders, and issued a new order directing the immediate conversion of the buses.[165] Despite persistent resistance in the early 1990s,

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[158] Prakash Singh & Ors. v. Union of India & Ors., (2006) 8 S.C.C. 1.

[159] *See* Maja Daruwala & Navaz Kotwal, *A Case for Police Reform*, HINDU, Dec. 23, 2012, http://www.thehindu.com/news/national/a-case-for-police-reform/article4229841.ece.

[160] M.C. Mehta (Taj Trapezium Matter) v. Union of India, (1997) 2 S.C.C. 353; People's Union for Civil Liberties v. Union of India, (2007) 1 S.C.C. 719.

[161] M.C. Mehta (Taj Trapezium Matter) v. Union of India, (1997) 2 S.C.C. 353, 354, 386 (ordering factories to shift to cleaner fuels or relocate to arrest degradation to the Taj Mahal caused by pollution).

[162] M.C. Mehta v. Union of India, (1999) 6 S.C.C. 9; M.C. Mehta v. Union of India, (2002) 4 S.C.C. 356.

[163] M.C. Mehta v. Union of India, (1991) 2 S.C.C. 353, 358-59.

[164] Michael Jackson & Armin Rosencranz, *The Delhi Pollution Case: Can the Supreme Court Manage the Environment?*, 33 ENVTL. POL'Y & L. 88, 88 (2003) (citing M.C. Mehta v. Union of India, (1998) 6 S.C.C. 63).

[165] M.C. Mehta v. Union of India, (2002) 4 S.C.C. 356; Ruth Greenspan Bell, Kuldeep

the Court secured some compliance in this case from the Central and Delhi Governments, and as of August 2014, Delhi had the largest fleet of CNG buses in the world.[166] This was due in part to the emergence of a strong movement for clean air led by a coalition of advocacy groups, and aided by extensive media attention to the problem of pollution in India.[167]

The Court's expanding role in compelling governmental action and compliance has in some cases displaced the role of Central Government agencies, especially in environmental law. In the *Godavarman* litigation, the Court adjudicated a PIL challenging the central and state governments' failure to prevent rampant deforestation across India.[168] In a 1996 order, the Court banned logging by the timber industry nationwide, including a complete ban on tree cutting in the three states and parts of four other forested states in the northeast region of India, and began an effort to reform the system of licensing and regulation of forest-based industries including mining.[169] In a series of orders, the Court created the Centrally Empowered Committee ("CEC"), which was charged with monitoring and overseeing the Court's orders regarding use of forest lands. In November 2001, the Court requested that the Ministry of Environment and Forests create guidelines for compensatory afforestation to allow states to grant some diversions of forest land, while maintaining a stable level of forest cover nationally.[170] In response to the MoEF's failure to implement many of the Court's orders, the Supreme Court, in October 2002, issued new guidelines for the management of the forests.[171] These guidelines included issuing orders requiring that states pay the "net present value" ("NPV") of forest land diverted for public projects, and for mining and private companies.[172] In addition, the Court ordered the creation of a central fund for all money collected by NPV fees that would be used for afforestation

Mathur, Urvashi Narain & David Simpson, *Clearing the Air: How Delhi Broke the Logjam on Air Quality Reforms*, 46 ENV'T 22, 30 (2004).

[166] *Delhi Transport Corporation Plans Budget Hotels at Its Terminals to Augment Revenue*, NDTV.COM (Aug. 17, 2014), http://www.ndtv.com/article/cities/delhi-transport-corporation-plans-budget-hotels-at-its-terminals-to-augment-revenue-577024.

[167] Lavanya Rajamani, *Public Interest Environmental Action in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, 19 J. ENVTL. L. 293, 298-99 (2007).

[168] T.N. Godavarman Thirumulkpad v. Union of India, (1997) 2 S.C.C. 267, 270; Rajamani, *supra* note 167, at 298-99.

[169] Armin Rosencranz, Edward Boenig & Brinda Dutta, *The* Godavarman *Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests*, 37 ENVTL. L. REP. 10032, 10033-34 (2007); Armin Rosencranz & Sharachchandra Lélé, *Supreme Court and India's Forests*, ECON. & POL. WKLY., Feb. 2, 2008, 11-14.

[170] Rosencranz, Boenig & Dutta, *supra* note 169, at 10033.

[171] *Id.*

[172] *Id.*

and also ordered that the MoEF establish a Compensatory Afforestation Management and Planning Agency ("CAMPA") in order to manage the funds collected.[173] Although the Court has had some success in reducing deforestation nationwide, it has also faced significant resistance from some state governments in the implementation of many of its directives and orders.[174]

The Central Government has formally accepted many of these earlier rulings and orders, but over the past several years, it has attempted to rein in the Court in this area through the creation of its own commission, the Forest Advisory Council, and by advancing proposals to create rival government "green courts."[175] In 2010, the Central Government created the National Green Tribunal ("NGT") with jurisdiction over cases involving environmental protection and forest conservation.[176]

II. EXISTING PUBLIC LAW THEORIES AND THE INDIAN CASE

A. Theories of Judicial Power

1. Regime Politics Approaches

Our modern understanding of judicial decision-making has in large part been shaped by the dominant "regime politics" (or regime theory) model.[177] According to this approach, judges and courts seek to advance the political agenda of the governing coalition and the party regime that appointed or promoted judges to high courts.[178] The regime politics model and other models fail to provide a complete account of what this article refers to in the public law literature as the "puzzle of judicial power," which seeks to understand the conditions under which judges are able to successfully challenge the policies and actions of the government. Thomas Keck has framed this puzzle as follows: Why, under certain conditions, are judges and courts able to successfully challenge political regimes, and assert and promote their own independent constitutional visions or jurisprudential

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[173] *Id.* at 10033-34; Godavarman v. Union of India, (2006) 1 S.C.C. 1, 19-26, 40-45.

[174] Geetanjoy Sahu, *Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence*, 4 LAW, ENV'T & DEV. J. 1, 16 (2008).

[175] M. Rajshekhar & Urmi Goswami, *SC Urged to Push Govt for Setting up a Green Authorit*y, ECON. TIMES (India), (Nov. 27, 2010, 5:12 AM), http://articles.economictimes.indiatimes.com/2010-11-27/news/27583976_1_forest-policy-forest-land-forest-purposes.

[176] *See* Gitanjali Nain Gill, *A Green Tribunal for India*, 22 J. ENVTL. L. 461 (2010).

[177] *See* Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Martin Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294 (1965).

[178] *See* Dahl, *supra* note 177, at 285.

traditions instead of conventional partisan or policy commitments?[179]

2. Legal-Institutionalist Approaches

The legal-institutionalist model offers one possible answer to this puzzle by suggesting that institutional norms, jurisprudential traditions, and other institutional factors help explain why judges decide cases independently of the partisan commitments of the regime in power.[180] Proponents of the institutionalist model suggest that judicial activism may be motivated by a sense of institutional mission or identity[181] or institutional duty.[182] According to this view, judges "may sometimes view themselves as stewards of [particular] institutional missions, and . . . this sense of identity [may] generate[] motivations of duty and professional responsibility" which sometimes contradict their policy preferences and partisan commitments.[183] However, our understanding of how an institutional mission or identity shapes judicial activism is still limited. Further, our understanding of the source of judges' policy worldviews and values, as opposed to their institutional identity or the partisan agenda of the regime, is also poor. This is especially true of judicial systems in which the appointment process primarily emphasizes professional merit, and not the ideological preferences of judges.

In systems where judicial decision-making has more independence from the partisan preferences of the regime in power, the traditional liberal-conservative ideological spectrum fails to provide a satisfactory explanation for judges' own professional and intellectual identities and worldviews. A major shortcoming of the institutionalist model, then, is that it does not provide a clear picture of how the institutional context interacts with judges' broader professional and intellectual elite identity. The regime politics model also fails to provide an account that goes beyond the

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[179] Thomas A. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511, 513, 518 (2007). Georg Vanberg offers a slightly different framing of the issue as the puzzle of judicial independence. *See* GEORG VANBERG, *Establishing and Maintaining Judicial Independence*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2009).

[180] *Id.*

[181] *See* Keith E. Whittington, *Once More unto the Breach: Post Behavioralist Approaches to Judicial Politics*, 25 L. & SOC. INQUIRY 601, 620-23 (2000); *see also* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 146 (1993).

[182] *See* Keck, *supra* note 179, at 515, 529.

[183] *Id.* at 515 (quoting Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65 (Cornell W. Clayton & Howard Gillman eds., 1999)).

influence of political elites in the governing coalition on the Court. Put simply, this literature fails to provide us with a complete picture of judges' identities as legal professionals and their role in that community. Moreover, existing institutional scholarship does not closely examine the identity of judges as members of a broader political and intellectual elite community. In short, political science literature has failed to open up the black box of judicial decision-making to enable us to truly understand how judges' identities as legal professionals and elite intellectuals affect and shape their worldviews.

3. Strategic Approaches

Another major gap in the literature on public law theories of judicial power relates to our understanding of the conditions under which courts are able to exert authority—that is, to secure high levels of compliance from the government with their activist decisions. As for the political opportunity structure, existing models have sought to explain why judges may be more willing to challenge political regimes, by examining the relative strength or weakness of the Court vis-à-vis the political regime, considering the following factors:

1. the extent to which assertive court decisions fall within (or transgress) the "tolerance interval" bounded by ruling political authorities' strong policy preferences;[184]
2. the degree to which political authorities are divided, and hence cannot easily create a consensus to defy or retaliate against court decisions they regard as undesirable;[185] and
3. the level of popular support for courts.[186]

These are important elements of the political opportunity structure faced by an activist court. However, in focusing mainly on public opinion and the "tolerance intervals" of the ruling regime, the literature has failed to pay significant attention to the role of elite opinion, legal professionals and the bar, and other elite constituencies in bolstering the authority of courts. More importantly, these models have failed to examine the role of elite constituencies in strengthening the assertiveness and authority of the Court against political backlash.

In addition to drawing on public law theories, this article also seeks to

[184] Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Governmen*t, 35 LAW & SOC'Y REV. 117, 128-29 (2001).

[185] Robert D. Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 INT'L REV. L. & ECON. 295, 295-97, 307 (1996).

[186] *See id.*

build on existing scholarship on the Supreme Court of India to advance our understanding of the Court as an institution. Much of the scholarship on the Court has been a product of Indian legal scholars and experts.[187] Among this group, Upendra Baxi, Rajeev Dhavan, and S.P. Sathe, analyze the political context of decisions and provide a partial account of the motives driving judicial-decision making of the Indian Supreme Court.[188] Among other scholars who have analyzed the development of courts and judicial activism in India,[189] only a few have sought to explain how judges' own background, worldviews, motivations, and other conditions affect judicial decision-making.[190]

George Gadbois, for instance, analyzed biographical data on the justices of the Supreme Court in the 1970s and 1980s and found that most judges come from elite class, caste, and educational backgrounds.[191] Gerald Beller suggested that the Court's "ability to act as an autonomous institution [was] linked to important cultural and structural properties of the Indian polity."[192] Beller concluded that the Court's activism in the pre-Emergency era could explained by two factors. First, he suggested that most leaders in the independence movement were legal professionals affiliated with High Courts under British rule, and as a result, "[t]he tendency to define the goals

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[187] *See*, *e.g.*, ANDHYARUJINA, *supra* note 107; BAXI, COURAGE, CRAFT AND CONTENTION, *supra* note 2; BAXI, THE INDIAN SUPREME COURT, *supra* note 2; RAJEEV DHAVAN, THE SUPREME COURT OF INDIA: A SOCIO-LEGAL CRITIQUE OF IS JURISTIC TECHNIQUES (1977) [hereinafter DHAVAN, A SOCIO-LEGAL CRITIQUE]; RAJEEV DHAVAN, THE SUPREME COURT OF INDIA AND PARLIAMENTARY SOVEREIGNTY: A CRITIQUE OF ITS APPROACH TO THE RECENT CONSTITUTIONAL CRISIS (1976) [hereinafter DHAVAN, THE SUPREME COURT OF INDIA AND PARLIAMENTARY SOVEREIGNTY].

[188] *See* BAXI, COURAGE, CRAFT AND CONTENTION, *supra* note 2; BAXI, THE INDIAN SUPREME COURT, *supra* note 2; DHAVAN, THE SUPREME COURT OF INDIA AND PARLIAMENTARY SOVEREIGNTY, *supra* note 187; SATHE, *supra* note 62.

[189] *See* Cunningham, *supra* note 48, at 496-97; *see also* MARK GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA (1984); MARK GALANTER, LAW AND SOCIETY IN MODERN INDIA (Rajeev Dhavan ed., 1989).

[190] *See, e.g.*, Gerald E. Beller, *Benevolent Illusions in a Developing Society: The Assertion of Supreme Court Authority in Democratic India*, 36 W. POL. Q. 513, 513-15 (1983); Bhagwan Dua, *A Study in Executive-Judicial Conflict*, 23 ASIAN SURV. 463, 465 (1983); Gadbois, Jr., *Indian Judicial Behavior*, *supra* note 21; Robert Moog, *Elite-Court Relations in India: An Unsatisfactory Arrangement*, 38 ASIAN SURV. 410 (1998); Robert Moog, *Activism on the Indian Supreme Court*, 82 JUDICATURE 124, 124, 126 (1998) [hereinafter Moog, *Activism on the Indian Supreme Court*]; Robert Moog, *Judicial Activism in the Cause of Judicial Independence*, 85 JUDICATURE 268, 269 (2002) [hereinafter Moog, *Judicial Activism*].

[191] *See* GADBOIS, JR., JUDGES OF THE SUPREME COURT, *supra* note 21; Gadbois, Jr., *Indian Judicial Behavior*, *supra* note 21; *see also* Gadbois Jr., *Indian Supreme Court Judges*, *supra* note 21.

[192] Beller, *supra* note 190.

of political groups in legal-constitutional language became deeply inbred within Indian political culture."[193] Second, Beller posited that professionalized methods of judicial recruitment and appointment reinforced judicial autonomy and traditions of judicial independence.[194] In contrast to Beller's institutional-cultural account of judicial assertiveness in the pre-Emergency era, Bhagwan Dua argued that from 1977 to 1983, the post-Emergency Court was strategically deferential to the Gandhi regime in politically controversial decisions; this reflected the justices' concern for institutional survival, given the regime's history of defying the Court.[195]

Robert Moog's recent scholarship on the Indian Supreme Court analyzed the Court's judicial decision-making and its political context in the post-Emergency era.[196] In a series of short articles, Moog examined the expanding role of the Court in governance,[197] and the assertion of judicial control over appointments, transfers, and administration.[198] Picking up on a theme emphasized by many Indian legal scholars, Moog attributed the Court's expanding role in governance to "deinstitutionalization" and declining confidence of the public in the government and political bureaucracy.[199] As these other institutions declined, the Court expanded its role by filling the void left by the weakening government institutions.[200] Moog suggested that the Court's assertiveness in the area of judicial appointments was in part a reaction to earlier government attacks on the Court during the Gandhi years (1967 to 1976 and 1980 to 1984) and concern about the Court's future independence.[201] However, Moog called into question regime politics and other theories, suggesting that the political context may not always account for variation in judicial independence:

> The impression is of varying levels of judicial independence largely dictated by the good will of more powerful external actors. But must this be the case? Is it necessary that a judiciary be provided with a proper environment to become functionally independent, or can courts themselves influence the perpetuation or development of that environment beyond mere jaw-boning?[202]

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[193] *Id.*

[194] *Id.* at 519.

[195] *See* Dua, *supra* note 190, at 464-65.

[196] *See* Moog, *Activism on the Indian Supreme Court*, *supra* note 190, at 125; Moog, *Judicial Activism*, *supra* note 190, at 269.

[197] Moog, *Activism on the Indian Supreme Court*, *supra* note 190, at 125-26.

[198] Moog, *Judicial Activism*, *supra* note 190, at 269-70.

[199] Moog, *Activism on the Indian Supreme Court*, *supra* note 190, at 124, 126.

[200] *Id.* at 126.

[201] Moog, *Judicial Activism*, *supra* note 190, at 269.

[202] *Id.*

More recently, Shylashri Shankar has argued that the Court's selective assertiveness in social rights and preventive detention cases can be explained by the judges' embrace of their role as "embedded negotiators."[203]

B. Applying Existing Theoretical Approaches to the Indian Case

How can the broader shifts in the Court's activism in post-Emergency era governance be explained? As this Part illustrates, existing public law theories provide a good starting point for analyzing these dynamics, but fail to provide a complete account.

1. Regime Politics/Regime Theory

The "regime politics" model suggests that judges decide cases to advance the partisan agenda or policy preferences of the governing coalition that appointed them.[204] Arguably, the Court's assertiveness in many areas of governance may be viewed as consistent with the regime politics model. The Court, in the immediate post-Emergency period, was led by a group of judges selected by the Gandhi regime during the 1970s based on their social-egalitarian worldviews.[205] This was a product of the Gandhi regime's departure from the professionalized "consultative" model that had governed appointments from 1950 through the early 1970s.[206] Prior to the 1970s, the appointment process emphasized professional merit, though some other factors, such as regional considerations (representation on the Court from most of the states) and religious background (assuring some

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[203] SHYLASHRI SHANKAR, SCALING JUSTICE: INDIA'S SUPREME COURT, ANTI-TERROR LAWS, AND SOCIAL RIGHTS 15 (2010) (finding that judges act as embedded negotiators whose decisions are affected by one or more of the following factors: the content of laws, institutional experience/norms, political configurations, and public concerns).

[204] *See* TERRI PERETTI, IN DEFENSE OF A POLITICAL COURT 84 (1999); Cornell W. Clayton & David A. May, *A Political Regimes Approach to the Analysis of Legal Decisions*, 32 POLITY 233, 242-43 (1999); Dahl, *supra* note 177, at 284-88; Howard Gillman, *Regime Politics, Jurisprudential Regimes, and Unenumerated Rights*, 9 U. PA. J. CONST. L. 107, 108 (2006-2007); Keck, *supra* note 179, at 513; Shapiro, *supra* note 177, at 297. Alternative conceptions of the regime politics model posit that judges may decide cases in alignment with national public opinion or the political regime in power. *See* Dahl, *supra* note 177; Keck, *supra* note 179 (surveying scholarship in this area). In addition, other scholars suggest that the concentration or fragmentation of political power also can affect the scope of judicial assertiveness and authority. *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 18, 261 (2003); Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 OR. L. REV. 95, 97-98, 101, 124-25, 150-54 (2009).

[205] Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476, 481-82 (2003).

[206] *Id.* at 484.

degree of religious diversity) were considered.[207] During the 1950s and 1960s, the Chief of Justice of India was selected on the basis of his seniority on the Supreme Court.[208]

Beginning in 1971, the Gandhi regime began selecting judges that were perceived to share the political ideology and constitutional worldview of Gandhi.[209] In addition, the Gandhi regime challenged the seniority norm, bypassing the three senior judges who were all in line to become Chief Justice as a result of their support of the basic structure doctrine as part of the majority of the *Kesavananda* decision.[210] Gandhi then arguably packed the Court by replacing these three judges with Justices P.N. Bhagwati, V.R. Krishna Iyer, and, later, P.K. Goswami.[211]

The social-egalitarian populism of PIL was arguably consistent with Indira Gandhi's own political values and agenda.[212] In addition, the Court sought to support the political regime by bolstering the compliance of the Central Government bureaucracy, and state and local governments, with constitutional mandates and statutory law.[213] PIL in the 1980s served the interests of the Central Government, in that the Court began to perform the role of an "agent," reining in lawlessness and arbitrariness of state and local governments and the bureaucracy, rather than challenging the Central Government's policies directly.[214] The Court has continued to play this role in the post-1990 era, as illustrated by its support of the Central Government's development policies, and its assertiveness in police reform and other human rights cases.[215]

In other areas of governance and policymaking, however, the post-1990 Indian Supreme Court began to challenge party regimes in the Central Government, and assert authority that had previously been held by the Executive or Parliament.[216] The regime politics model fails to provide a

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[207] *Id.*; *see* Upendra Baxi, *Some Reflections on the Nature of Constituent Power*, *in* INDIAN CONSTITUTION, TRENDS AND ISSUES (Jacob et al. eds., 1978); Gadbois, Jr., *Indian Supreme Court Judges*, *supra* note 21, at 317-18.

[208] Neuborne, *supra* note 205.

[209] *See* GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 269-70 (2003); Baxi, *supra* note 207; *see also* Neuborne, *supra* note 205.

[210] AUSTIN, *supra* note 209, at 278-80.

[211] *Id.* at 264; Interview with Supreme Court Advocate 2, *supra* note 37.

[212] Lloyd I. Rudolph & Susanne Hoeber Rudolph, *Redoing the Constitutional Design: From an Interventionist to a Regulatory State*, *in* THE SUCCESS OF INDIA'S DEMOCRACY 131, 134 (Atul Kohli ed., 2001).

[213] *See* Baxi, *Taking Suffering Seriously*, *supra* note 2, at 129 & n.70.

[214] *See id.* at 129.

[215] *See* Mate, *supra* note 1.

[216] *See id.*

compelling account of this development.[217]

The Court's activism in these governance cases reflected the assertion of the judge's own institutional and policy values, which differed from the partisan or policy agenda of the political regime. This shift toward greater assertiveness of the judges' independent institutional values was reinforced by a shift away from the Gandhi regime's politicization of judicial appointments.[218] Following the Court's decision in the *Second Judges' Case* in 1993, the Court asserted control over the judicial appointments process by granting primacy to the Chief Justice and a collegium of senior judges.[219] As a result, the politicized nature of judicial appointments gradually faded away in the 1990s.[220] But it should be noted here that the shift in the Court's assertiveness occurred in the early 1990s *before* the change to an apolitical, professionalized model of appointments had dramatically altered the Court's composition.

2. The Strategic Model

According to the strategic model, judges temper their own political and institutional values in judicial decision-making with calculations about external political constraints or opportunities.[221] Scholars who have advanced variants of the strategic model of judicial decision-making have argued that judges will consider several external factors in making decisions including the policy preferences of the elected branches, the intensity of those preferences and "tolerance intervals" of the elected branches,[222] as well as public opinion.[223] Strategic approaches posit that judges will "trim their sails" in order to ensure a greater likelihood of compliance with their decisions to avoid political override by the legislative

[217] It should be noted here that one conception of regime politics theory also focuses on the level and concentration of party power in government and suggests that higher levels of party or political fragmentation may create hospitable conditions for judicial assertiveness. However, while party or political fragmentation may indeed be a necessary condition for judicial assertiveness, it is not sufficient to explain the motivations or worldviews that drive and shape the nature of activism and assertiveness.

[218] Neuborne, *supra* note 205, at 482.

[219] *Id.* at 484.

[220] *Id.* at 482.

[221] *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUDGES MAKE 10 (1998); GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA 21-36 (2005); Baxi, *Taking Suffering Seriously*, *supra* note 2, at 123 & n.70; Mate, *supra* note 1.

[222] HELMKE, *supra* note 221; Epstein et al., *supra* note 184, at 128-30.

[223] *See* JEFFREY K. STATON, JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO 3-7, 13-15 (2010); Jeffrey K. Staton, Judicial Activism and Public Authority Compliance: The Role of Public Support in the Mexican Separation-of-Powers System 14 (Aug. 2002) (unpublished Ph.D. dissertation, Washington University) (on file with U.M.I.).

or executive branches.[224]

Baxi argues that the Court, motivated by institutional preservation considerations, *did* act strategically in the late 1970s and early 1980s in deferring to the Central Government.[225] In *Union of India v. Sheth* and the *Judges' Case*, the Court deferred to the Janata and Gandhi governments with respect to the Executive's ultimate power of judicial transfers and appointments.[226] Furthermore, the Court deferred to the political regime in economic policy and national security.[227] At the same time, the Court strategically asserted a new governance-accountability function in monitoring government lawlessness and arbitrariness, as illustrated by the Court's decisions in *Hussainara* and *Bandhua Mukta Morcha v. Union of India*.[228] As Baxi astutely observed, the

> . . . steady growth of SAL appears to me[229] as a master strategy[:] [g]ive the [E]xecutive not even a pretense of complaint on the distribution of political power in the constitutional scheme . . . [h]aving accomplished this much, go Concorde-speed in undoing injustices and unmasking tyrannies . . . . Leave to politicians their opium-dreams of the omnipotence of their power and influence, but bit by bit prevent them from single-minded excesses of power.[230]

During the 1977 to 1989 period, the Court's "strategic retreat" arguably

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[224] *See* HELMKE, *supra* note 221.

[225] *See* Baxi, *Taking Suffering Seriously*, *supra* note 2, at 127-29.

[226] *See id.*; Union of India v. Sheth, A.I.R. 1977 S.C. 2328; S.P. Gupta v. Union of India, (1981) Supp. S.C.C. 87, 90-91.

[227] *See* S.P. Gupta v. Union of India, (1981) Supp. S.C.C. 87; Mate, *supra* note 1.

[228] Hussainara Khatoon v. State of Bihar, A.I.R. 1979 S.C. 1377 (India); Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802.

[229] Baxi preferred the use of term Social Action Litigation ("SAL") to the term PIL to emphasize the important differences between these movements in India and the United States. According to Baxi, SAL in India represented the judiciary's response to state repression and government lawlessness, while American PIL "sought to represent interests without groups; such as consumerism or environment," focused on "civic participation in governmental decision-making," and "involved innovative uses of the law, lawyers, and courts to secure greater fidelity to the parlous notions of legal liberalism and interest group pluralism in an advanced industrial capitalistic society." Baxi, *Taking Suffering Seriously*, *supra* note 2, at 109. The Indian version of PIL stood in marked contrast from the decentralized model of American "adversarial legalism." *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001). PIL in India was "judge-led" or "judge-induced," related to the "active assertion of judicial power to ameliorate the miseries of the masses" and was more hierarchical and centralized in terms of fact-finding, equitable remedies, and Court jurisdiction—PIL writs could only be filed in the Supreme Court and state High Courts pursuant to Articles 32 and 226 of the Indian Constitution. Baxi, *Taking Suffering Seriously*, *supra* note 2, at 111.

[230] *Id.* at 129.

reflected both the justices' desire to protect and consolidate the Court as an institution, and the recognition of how the broader strategic political environment could affect the integrity of the Court.[231] As illustrated earlier in this Part, the Court was under intense political pressure prior to its decision in the *Judges' Case*, as the Gandhi government attempted to exert control over the Court through judicial transfers and appointments powers.[232] The Court's strategic retreat in the *Judges' Case* illustrates how the Court's institutional motivations were nested within and interrelated to strategic decision-making. However, the strategic model fails to provide a compelling *motivational* account of the Court's activism and assertiveness.

3. The Legal-Institutionalist Model

The legal-institutionalist model provides a plausible account of the Court's shift toward greater assertiveness in the 1977 to 1989 and post-1990 eras. As noted earlier in this article, according to this model, institutional norms, jurisprudential traditions, and other institutional factors influence judicial behavior.[233] Proponents of the institutionalist model argue that judges are motivated not only by their own policy views and understanding of existing doctrine, but also by their concern for maintaining or strengthening the legitimacy of courts as institutions.[234] As Howard Gillman suggests, judges "may sometimes view themselves as stewards of [particular] institutional missions, and . . . this sense of identity [may] generate[] motivations of duty and professional responsibility which sometimes pull against their policy preferences and partisan commitments."[235] The Court's assertiveness in early PIL cases was driven not only by the social-egalitarian values of the leading justices on the Court, but also by the justices' desire to increase support for the judiciary.[236] As Baxi has persuasively argued, the Court sought to atone for its acquiescence to the Gandhi regime during the Emergency rule period in the *Shiv Kant Shukla* decision.[237] In *Shiv Kant Shukla*, the Court upheld the regime's suspension of access to the courts by political detainees through habeas petitions, and overturned the actions of several High Courts who decided to

[231] Mate, *supra* note 1, at 52.

[232] *Id.* at 136.

[233] Whittington, *supra* note 181, at 608; *see* Mate, *supra* note 1, at 52.

[234] BAXI, THE INDIAN SUPREME COURT, *supra* note 2, at 126.

[235] *See* Keck, *supra* note 179, at 515.

[236] *See generally* BAXI, THE INDIAN SUPREME COURT, *supra* note 2, at 122-23, 126; S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL'Y 29, 43, 50-51 (2001); Interview with Supreme Court Advocate 2, *supra* note 37; Interview with Supreme Court Advocate 3, in New Delhi, India (Feb. 2007).

[237] *See* Baxi, *Taking Suffering Seriously*, *supra* note 2, at 113; S.P. Sathe, *supra* note 236, at 43, 50-51.

hear detainee petitions.[238] Baxi suggests that the Court's activism in PIL was partly "an attempt to refurbish the image of the Court tarnished by a few Emergency decisions and also an attempt to seek new, historical bases of legitimation of judicial power."[239] Baxi observed that during the late 1970s and early 1980s, the Court was "seeking legitimacy from the people. . . ."[240] The institutional model may also provide insight into the Court's activism in the *Second* and *Third Judges' Cases*, in which the Court asserted control over judicial appointments and transfers. According to an analysis of these decisions, and interviews with experts, the decisions were motivated by the justices' concerns regarding continued politicization of the judicial process by the government in the decade following the Court's decision in the *Judges' Case*, and the adverse impact of that politicized process on judicial independence, the integrity of judges, and the functional efficiency of high courts.[241] Similarly, institutional motives may account for the Court's desire to intervene to uphold the rule of law in other contexts, including government corruption, accountability, human rights, and environmental policy.

However, the institutionalist model does not entirely account for the Court's activism in governance, because it fails to explain the sources of judges' policy values in those domains. A major shortcoming of the institutionalist model is that it does not provide a clear picture of how the institutional context interacts with the judges' broader professional and intellectual elite identity in shaping judicial activism. This article therefore suggests that the institutionalist model must be expanded to account for these other variables.

III. ELITE INSTITUTIONALISM AND THE EXPANDED POWER OF THE COURT IN GOVERNANCE

This article argues for broadening the reach of existing theories of judicial decision-making by examining how the unique institutional environment and intellectual atmosphere of courts shape the institutional perspectives and policy worldviews that may drive (or discourage) judicial activism and assertiveness. The identity of judges as members of the Supreme Court and judicial branch, and their professional alignment with the Court as an institution are a source of the judges' values and motivations. However, elite institutionalism supplements existing institutionalist theories by situating judicial decision-making within the larger intellectual milieu and broader political context of high court judging.

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238 *See* Neuborne, *supra* note 205, at 482.

239 Baxi, *Taking Suffering Seriously*, *supra* note 2, at 113.

240 BAXI, THE INDIAN SUPREME COURT, *supra* note 2, at 126.

241 Interview with Supreme Court Justice 5, in New Delhi, India (Feb. 2007).

It seeks to understand how the broader national currents of political, professional, and intellectual elite opinion shape judges' judicial policy worldviews and judicial activism and assertiveness. This article argues that judges' sense of their institutional mission and judicial role is merely a part of judges' overall intellectual identity and policy worldviews. High Court judges, at least in India, engage with other professional and intellectual elites, including lawyers, academics, government officials, media elites, business leaders, NGO activists, and other groups in India through discourse in academia, law, journalism, and other fora, as well as in informal settings. As judges are actively part of these elite networks, and participate in the formation of political and intellectual discourse on major national issues, the broader social justice and liberal reform meta-regimes of India's political and intellectual elite shape judicial perspectives, and drive judicial activism.[242]

Elite institutionalism provides the most compelling account of the motivations that have driven judicial activism and assertiveness in India. It illustrates how both the institutional context (including judges' education, professional training, and socialization) and the professional and intellectual elite atmosphere of courts are not only a source judges' institutional values and policy worldviews, but also motivate and constrain judicial decision-making. An examination of these factors also helps to fill an important gap in the regime politics model by looking beyond the views of political regimes, exploring how the ideas of broader circles of the professional and intellectual elite have shaped judicial activism and assertiveness in India.

Elite institutionalism adds precision to institutionalist and regime politics models. Judicial activism may be motivated in part by the identity of judges as members of the judicial branch and their professional alignment with the Court as an institution. Judicial activism and assertiveness will often be motivated by judges' general desire to protect the core constitutional values that are central to the function of courts, to bolster the institutional legitimacy of courts, and to expand the jurisdiction of courts. This idea is consistent with "historical new institutionalist" scholarship, which suggests that judges may be motivated by a unique "institutional mission," that flows from their membership within the judicial branch.[243] Historical new institutionalist literature also acknowledges that certain

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[242] *See* SUDIPTA KAVIRAJ, THE IMAGINARY INSTITUTION OF INDIA: POLITICS AND IDEAS (2010); *cf.* JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1992).

[243] *See* GILLMAN, *supra* note 181; Howard Gillman & Cornell W. Clayton, *Introduction* to SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 1, 6-7 (Cornell W. Clayton & Howard Gillman eds., 1999); Keck, *supra* note 179; Rogers Smith, *Political Jurisprudence, the New Institutionalism, and the Future of Public Law*, 82 AM. POL. SCI. REV. 89 (1988).

institutional norms and existing jurisprudence play an important role in judicial decision-making. Judicial decision-making is also influenced by inherited jurisprudential traditions or "jurisprudential regimes."[244] However, as illustrated in this article, these institutional factors do not account for the ideational and normative influences on judicial decision-making. Elite institutionalism adds a key variable to existing institutionalist theories, suggesting that the institutional context of the judiciary interacts with the broader intellectual climate and values of political, professional, and intellectual elites to shape judicial activism and assertiveness.

As previously stated, the regime politics model posits that judges act to advance the policy agendas of the governing coalitions or party regimes and the political leaders who appointed them. Elite institutionalism, however, seeks to broaden regime politics theory by suggesting that judges are not solely influenced by the ideas and policy agendas of these parties and political leaders. Rather, the ideas of others within the judges' own legal, professional, and intellectual community concerning the proper role of judges and courts also influence judicial decision-making.

Thus, in order to understand the scope of judicial activism, one must go beyond institutionalist and regime politics theories and delve into the source of judges' intellectual world views and policy values. Judicial activism occurs in the context of what this article refers to as "elite meta-regimes." Elite meta-regimes refer to the broader consensus of political, professional, and intellectual elites on particular social issues. These meta-regimes capture the intellectual currents of these elite actors during specific periods of time in India's recent history. Analysis of elite meta-regimes provides a more complete approach to understanding the scope of judicial activism in India.

The Indian Supreme Court's activism and assertiveness is also shaped by its unique structure. The Supreme Court of India is a large court, consisting of thirty justices that decide cases in panels of two, three, five, or more judges.[245] Because a significant percentage of politically significant decisions, such as the *Kaushal* case, are decided by panels of only two or three justices, judges are able to specialize in certain areas of the law and promote policy innovations as judges wield more influence on smaller bench panels.[246] As a result, the structure of the Indian Supreme Court helps to magnify the particular values of individual justices.

Furthermore, Indian Supreme Court justices are currently appointed through a professionalized system of appointments in which a collegium of

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[244] *See* Mark Richards & Herbert Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002).

[245] SUPREME COURT OF INDIA, *supra* note 9.

[246] Robinson, *supra* note 9, at 186.

senior judges play a leading role in selection[247] as a result of earlier decisions in the *Second Judges' Case*[248] and the *Third Judges' Case*.[249] Under this system, the Chief Justice and senior justices confer with the government and also recommend justices for appointment to open seats on the Indian Supreme Court, and the Prime Minister and Cabinet generally defer to these recommendations. As a result, justices are selected largely on the basis of non-political considerations, including professional merit, regional considerations, and caste.

Elite institutionalism, however, may play a role in explaining judicial behavior only under certain conditions. One such condition is the extent or degree to which judges and courts interact with other political, professional, and intellectual elites. This level of interaction may be related to the larger institutional structure of courts, including mechanisms for judicial education, recruitment, appointment, and promotion. Procedural and institutional norms within a court can affect this level of interaction. This may include procedural rules or doctrine that provide greater access for judges to a wider array of policy and interest groups beyond lawyers. It may also include traditions in which judges are more receptive to citing extra-judicial sources, such as news articles and academic scholarship.[250] A robust news media can serve as an important mechanism for facilitating the public interaction with and broadcast of various elite opinions both to and from courts. Judges may also interact with elites through academic and legal conferences and participation on government commissions.

A. Elite Meta-Regimes: From Social Justice to Liberal Reform

Here, this article argues that the Court's assertiveness in certain domains

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[247] This system will likely be changed soon, as the Parliament recently enacted the Constitution (One Hundred and Twenty First Amendment Bill), proposing a 99th Amendment to the Indian Constitution that would create a new National Judicial Appointments Commission to replace the current "collegium" model with a new advisory commission. The Bill must now be approved by at least fifteen state legislatures in order for the bill to be presented to the President of India for final approval and enactment. Smriti Kak Ramachandran & Anita Joshua, *L*[*ok*] *S*[*abha*] *Passes National Judicial Appointments Commission Bill*, HINDU, Aug. 14, 2014, http://www.thehindu.com/news/national/ls-passes-national-judicial-appointments-commission-bill/article6312661.ece.

[248] *See* Supreme Court Advocates-on-Record Ass'n v. Union of India, (1993) 4 S.C.C. 441, 709-10.

[249] *In re* Special Reference No. 1 of 1998, (1998) 7 S.C.C. 739, 772 (India) (revisiting its decision in the *Second Judges'* Case and ruling that the Chief Justice must consult with a collegium of the four, instead of two, senior-most justices on the Indian Supreme Court); *see* Desai & Muralidhar, *supra* note 11, at 170.

[250] *See* P. S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 282-83 (1987).

of governance has been influenced by the judges' intellectual worldviews and policy values. These values often align with the worldviews of the political, professional, and intellectual elites that help shape judicial perspectives. Indian Supreme Court judges have generally come from upper-middle class backgrounds and have a significant level of professional education.[251] The appointment process for Supreme Court judges has primarily emphasized professional criteria (although the Gandhi regime did depart from this system during the 1970s and early 1980s).[252] As previously illustrated, the justices of the Court interact with political elites and many other elite groups on a regular basis, including the media, legal advocacy and policy groups, legal scholars and academics.

The development and endorsement of PIL by Indian Supreme Court judges, and the heightened judicial assertiveness of the post-1990 Court in the areas of judicial appointments, corruption, environmental policy, human rights, and development in the post-1990 era can be understood by examining the judges' alignment with the worldviews of elite meta-regimes.[253] The Court's activism in governance in the post-Emergency era progressed through two phases: a "social-egalitarian/social-justice regime" in the 1980s, and a "liberal reform" regime in the post-1990 era.

1. The Meta-Regime of Social Justice

In addition to the institutional motivations for judicial activism highlighted by Baxi in the previous Parts of this article, the Court's activism and assertiveness reflected the broader meta-regime of social justice that dominated the political and intellectual discourse of the time both within the Court and other professional circles and among certain political leaders both within and outside of the government.[254] This meta-regime reflected the broader desire among political and intellectual elites for radical reforms within the legal and constitutional system to ameliorate inequality in Indian society.

The Indian Supreme Court's activism in developing PIL in the 1980s

[251] *See* Gadbois, Jr., *Indian Supreme Court Judges*, *supra* note 21.

[252] *See id.* at 318.

[253] Within the existing public law literature, there are two other concepts that are related, yet distinct from the concept of regimes of judicial activism. The first is Richards and Kritzer's description of "jurisprudential regimes" which are legal/doctrinal constructs that shape subsequent decision-making by judges. *See* Richards & Kritzer, *supra* note 244. The other is Mark Tushnet's description of a "constitutional order" which refers to "the set of institutions through which a nation makes its fundamental decisions over a sustained period, and the principles that guide those decisions." Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 31 (1999).

[254] *See generally* Baxi, *Taking Suffering Seriously*, *supra* note 2.

arguably reflected a larger populist ethos of social egalitarianism within the Gandhi-led Congress Party, legal and professional elites, activists, and other elite classes.[255] PIL reflected the ideals of the legal aid movement that had been launched during the 1970s under the regime of Indira Gandhi, and represented a significant component of Gandhi's Twenty-Point Programme.[256] Supreme Court Justices V.R. Krishna Iyer and P.N. Bhagwati, both appointees of the Gandhi regime, were leading advocates for expanding legal aid programs.[257] As Chief Justice of the Gujarat High Court, Bhagwati chaired the state legal aid committee, which issued recommendations for broadening legal aid and access to justice.[258] Similarly, Justice Krishna Iyer chaired a Central Government commission that issued a report calling for the restructuring the legal system.[259]

Furthermore, both Iyer and Bhagwati helped lead efforts prior to and during the Emergency era to expand legal aid and access to justice by encouraging High Court justices to adjudicate grievances in villages and establishing legal aid camps and people's courts (lok adalats).[260] In May 1976, Iyer and Bhagwati were appointed as co-chairs of the Judicare Committee. The Committee was charged with developing recommendations for reforming India's legal aid system, and it produced a comprehensive report on legal aid in 1977.[261] Among its recommendations, the report called for the development of PIL as a mechanism for expanding access to justice and promoting reform.[262] However, both the Janata government in 1977, and the post-1980 Gandhi Congress government failed to implement these recommendations.

In interviews, Justice Bhagwati stated that he was motivated by the desire to uplift the poor by expanding the public interest jurisdiction of the Court, after witnessing the extreme poverty of *adivasis* (lower caste individuals) and other groups who came to the Gujarat district court during his tenure as

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[255] *See* Mate, *supra* note 1, at 21.

[256] Gandhi's Twenty-Point Program largely focused on economic policies, and included proposals for the provision of land reforms, rural housing, the abolition of bonded labor, fighting tax evasion and smuggling, expanding worker participation in the industrial sector, and combating rural indebtedness. *See* Baxi, *Taking Suffering Seriously*, *supra* note 2, at 113.

[257] *See id.*

[258] *See* GOV'T OF GUJARAT, REPORT OF THE LEGAL AID COMMITTEE (1971).

[259] *See* GOV'T OF INDIA, MINISTRY OF LAW, JUSTICE AND COMPANY AFFAIRS, REPORT OF THE EXPERT COMMITTEE ON LEGAL AID: PROCEDURAL JUSTICE TO THE PEOPLE i, 241, 243 (1973).

[260] *Id.* at 137.

[261] *Id.*

[262] *Id.* at 241, 243.

Chief Justice of the Gujarat High Court in the 1960s.[263] As a Justice of the Supreme Court, Bhagwati toured the country and held several open meetings, noting:

> I saw stark naked poverty, and the utter helplessness of the people, they came and attended their meetings and looked upon me with awe, but they never tasted the fruits of this whole system of justice—justice was far, far removed from them—then I realized that justice I was administering in the courts was hollow justice—never reached the large masses of my own people . . . I realized I needed to address the three As which prevent them from accessing justice—the lack of awareness, lack of availability of machinery, and the lack of assertiveness. . . . So I said I must evolve a method by which they can come to court and what was preventing them was our whole doctrine of *locus standi* or standing because any NGO or other person could not bring a litigation on their behalf under the system as it then prevailed.[264]

Justice Iyer also recounted his own experience as a young lawyer who was thrown into jail (under the existing preventive detention laws) for defending communists and other dissident groups in the 1950s.[265] Iyer had firsthand experience as a prisoner, and later, as the Minister for law, power, prisons, irrigation, and social welfare portfolios in the communist state government of Kerala, Iyer spearheaded prison reform as one of his main objectives.[266] In an interview, Justice Iyer noted that "for others, PIL was about law. For me, PIL was about life."[267] Bhagwati and Iyer's endorsement of PIL was consistent with the views of Indira Gandhi, whose regime was responsible for promoting them to the most powerful court in the nation.

Although PIL was consonant with Gandhi and the Congress Party's social-egalitarian reform agenda, the larger ethos of social egalitarianism that animated the Indian Supreme Court's activism in PIL also had roots within India's broader professional and intellectual push for legal reform. One illustration of this dynamic was a conference in 1984 entitled "Role of Law and Judiciary in Transformation of Society: India-GDR Experiments." At the conference, Justices of the Supreme Court, including Justices Bhagwati, Desai, and O. Chinnappa Reddy, as well as Energy Minister Shiv

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[263] *Id.*

[264] Interview with former Supreme Court Chief Justice P.N. Bhagwati, in New Delhi, India (Jan. 2007).

[265] *Id.*

[266] Interview with former Supreme Court Justice V.R. Krishna Iyer, in Kochi, India (Feb. 2007).

[267] *Id.*

Shanker, High Court judges, senior advocates, legal scholars, and judges from the German Democratic Republic presented speeches and papers on the role of the judiciary in transforming society.[268]

At the conference, participants addressed the need to reform the legal system in order advance the cause of social justice on behalf of the poor and oppressed in India. Energy Minister Shiv Shanker, who had played a key role in advising Indira Gandhi on judicial appointments in the 1970s, advocated for the need for judicial activism that fulfilled the social-egalitarian goals of the Directive Principles, arguing that the Directive Principles should not be subordinated to fundamental rights.[269] Shiv Shanker proceeded to argue that judges in the pre-Emergency era did not adopt radical activism based on social equality and social justice because of the elite characteristics of judges and lawyers:

> Reasons for an approach which in effect neutralizes desirable alterations of *status quo* may perhaps be grounded more deeply in the very system which we inherited and adopted in 1950 at the commencement of the Constitution and elitist class character of those who manned it. I have a feeling that our judiciary has unwittingly allowed itself to be unduly obsessed by static jurisprudential concepts, procedural technicalities and rules of construction born and grown in foreign soil and appropriate to other developed societies. They did not consciously give a thought to chartering a new course of evolving a jurisprudence which was truly Indian in keeping with the essential radical spirit of our own Constitution and the revolution of rising expectations.[270]

Those at the conference recognized that a broader shift had taken place in the prevailing social and economic ideology of the country. In his remarks at the conference, Justice Bhagwati noted that the "law which we are now administering is the . . . law of a social welfare state which is moving in the direction of socialism, law which is designed to serve the interest of the weaker sections of the community including peasants and workers."[271] Bhagwati later outlined his social-egalitarian goals in the Indian Judiciary, observing that

> . . . the entire culture of the judicial process has to be [geared] to the goal of social justice which is the objective of the Constitution and irrespective of whether the politicians fulfill this objective or not, it

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[268] D.A. DESAI, ROLE OF LAW AND JUDICIARY IN TRANSFORMATION OF SOCIETY: INDIA-GDR EXPERIMENTS 4 (1984).

[269] *Id.* at 13-26.

[270] *Id*. at 16.

[271] *Id.* at 27.

> has to be fulfilled by the courts. . . . Social justice is a constitutional fundamental right and a socialist order, an economic imperative.[272]

Other panelists at the conference spoke about the role that the judiciary could play in promoting equality and social change.[273]

Writing in 1980, Upendra Baxi summarized the larger shift toward support for the meta-regime of social justice within the judiciary as follows:

> The Court is thus emerging as a populist, elite group. Such groups emerge in developing "Third World" countries where intellectuals feel "frustrated and humiliated" at the backwardness and injustice in society. The Court is such a group of middle-class intellectuals who can aim to achieve, through the exercise of the judicial power, a cure for the backward and static colonial character of the Indian legal system.[274]

Baxi here implicitly recognized that the Court's unique brand of judicial populism was rooted in the judges' worldviews as professional and intellectual elites.[275] In addition, Baxi argued that the Court's populism was part of a larger quest for institutional legitimation in the post-Emergency period.[276] But as suggested here, the character of the Court's populist activism was shaped by justices' own worldviews, which were influenced by a broader community of professional and intellectual elites in India.

2. The Liberal Reform Regime (1990 to 2007)

The social-egalitarian worldviews of judges and other professional and intellectual elites gradually faded away in the post-1990 era as India shifted from socialist-statist to neoliberal free-market policies.[277] Although professional and intellectual elites generally supported the new economic reforms, they grew increasingly frustrated with governance failures and corruption in the Central Government. In part, the decline in responsible governance can be traced to macro-level political shifts in India. In the post-1990 era, India shifted from a Congress-Party-dominant system to a system of heightened political fragmentation in which opposition parties, including the BJP, leftist, and regional caste-based parties all grew more

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[272] *Id.* at 31.

[273] *Id.*

[274] BAXI, THE INDIAN SUPREME COURT, *supra* note 2, at 248.

[275] *Id.*

[276] *Id.* at 121-26; Baxi, *Taking Suffering Seriously*, *supra* note 2, at 113.

[277] SURESH TENDULKAR & T.A. BHAVANI, UNDERSTANDING REFORMS: POST-1991 INDIA 1 (2007).

powerful.[278]

Scholars of Indian politics have suggested that since 1989, there has been an overall weakening of many of the nation's political institutions—a phenomenon that Atul Kohli, Joel Migdal, and Rajni Kothari have referred to as deinstitutionalization.[279] Lloyd and Susanne Rudolph, and Oliver Mendelsohn have suggested that the power of weakened coalition governments in the Central Government was further diminished by systemic corruption, as illustrated by the Jain Hawala scandal that took down the Congress Party coalition government of Prime Minister Narasimha Rao in 1996.[280] This led to a decline in public trust and confidence in the Executive and Parliament, and provided the Court with the opportunity to reform the political system and establish itself as the most trusted institution in Indian politics.[281] Further, Robert Moog suggested that the weakening of these institutions, coupled with growing distrust, meant that the political branches posed less of a threat to the courts, and "ironically, [grew] more reliant on them as a possible source of legitimacy."[282]

Within the Court, there was a profound shift in institutional conceptions about the proper role of judges in upholding the rule of law and promoting good governance. A new group of activist judges, including Chief Justices Venkataramiah, J.S. Verma, A.S. Ahmadi, and Justice Kuldip Singh, embraced a much more assertive vision for the Court in governance matters.[283] In part, this reflected the Court's defense of the robust activist framework of the fundamental rights and procedures developed by the Court during the 1980s.[284] As illustrated in many environmental policy and human rights cases, the Court justified its assertiveness based on the

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[278] *See* PRADEEP CHHIBBER & KEN KOLLMAN, THE FORMATION OF NATIONAL PARTY SYSTEMS: FEDERALISM AND PARTY COMPETITION IN CANADA, GREAT BRITAIN, INDIA, AND THE U.S. 205 (2005); CHRISTOPHE JAFFRELOT, DR. AMBEDKAR AND UNTOUCHABILITY: FIGHTING THE INDIAN CASTE SYSTEM 154 (2005).

[279] *See* Rajni Kothari, *Interpreting Indian Politics: A Personal Statement*, *in* CRISIS AND CHANGE IN CONTEMPORARY INDIA 159 (Upendra Baxi & Bhikhu C. Parekh eds., 1995); JOEL MIGDAL, STRONG SOCIETIES AND WEAK STATES (1988); Atul Kohli, *State-Society Relations in India's Changing Democracy*, *in* INDIA'S DEMOCRACY 306, 317 (Atul Kohli ed., 1988).

[280] Oliver Mendelsohn, *The Supreme Court of India as the Most Trusted Public Institution in India*, 23 J.S. ASIAN STUD. 103, 103-04, 114 (2000); Rudolph & Rudolph, *supra* note 212, at 131 n.10.

[281] Mendelsohn, *supra* note 280, at 114.

[282] Moog, *Judicial Activism*, *supra* note 190, at 270.

[283] *See* Rajeev Dhavan, *Judges and Indian Democracy: The Lesser Evil*, *in* TRANSFORMING INDIA 314, 334 (Francine Frankel et al. eds., 2000).

[284] *See* Interview with Supreme Court Advocate 1, *supra* note 88; Y.K Sabharwal, *Meeting the Challenge of Terrorism-Indian Model* 4-5 (2006), *available at* http://www.supremecourtofindia.nic.in/new_links/Terrorism%20paper.doc.

Directive Principles, and the right to life under Article 21 and other fundamental rights provisions of the Indian Constitution.[285]

In the post-1990 era, the Court became more assertive in safeguarding and protecting the rule of law in cases where the Executive or Parliament had failed to satisfy their constitutional obligations. For instance, Justice Verma's opinion in *Vineet Narain*, recognized this dynamic:

> It is the duty of the executive to fill the vacuum by executive orders . . . and where there is inaction even by the executive . . . the Judiciary must step in, in exercise of its constitutional obligations . . . till such a time as the legislature acts to perform its role by enacting proper legislation to cover the field.[286]

Many of the other governance decisions analyzed in this article invoked this rationale in justifying assertiveness in other domains.

Several scholars have argued that Justice Verma's unique characteristics as a courageous and resolute judge also helped drive the Court's assertiveness in *Vineet Narain*.[287] However, as Mendelsohn argued, Verma was joined by two other judges on the bench, and the *Vineet Narain* decision had been preceded by other activist and assertive decisions in the 1990s, such as the environmental PIL decisions of Justice Kuldip Singh and his "green bench."[288] Mendelsohn thus suggested that a more complex explanation that accounted for both institutional factors, as well as public opinion, explained the Court's heightened assertiveness in this period:

> Deeper explanations therefore have to be sought in the institutional history of the Supreme Court, the Bar, constitutional politics and public opinion. Perhaps the most powerful explanation is to be found in the idea of *an institutional momentum built up by previous judicial activism*, together with *an intensification of pubic distaste at high-level corruption and its political practitioners*. When the Supreme Court intervened, it rekindled a sense of probity and public morality that many had despaired of ever revisiting.[289]

Mendelsohn's insightful observation supports this article's broader elite institutionalist theory. The Court in *Vineet Narain* was responding to the

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[285] *See, e.g.*, M.C. Mehta v. Union of India, A.I.R. 1988 S.C. 1037.

[286] Vineet Narain v. Union of India, (1998) 1 S.C.C. 226, 227.

[287] *See, e.g.*, Mendelsohn, *supra* note 280, at 115.

[288] Justice Singh's most famous PIL decisions included the Taj Trapezium matter, in which the Court forced industries surround the Taj Mahal in Agra to either shift to cleaner, non-polluting fuels, or relocate to an area far from the Taj, and the Ganges River matter, in which Singh's bench ordered industries that had been polluting in the Ganges to adopt cleaner technologies or be shut down. *Id.* at 113.

[289] *See id.* at 115 (emphasis added).

frustration of professional and political elites and of the electorate to efforts by Congress and United Front governments to block the CBI's investigations into the affairs of high-ranking government officials, and to control the CBI to serve the political interests of the regime in power.

This internal institutional shift in the judges' own role perceptions was complemented by the ideas and worldviews of the elite meta-regime of "liberal reform."[290] This meta-regime encompassed the set of policy values and ideas of political, professional, and intellectual elites that included support for far-reaching systemic reform of India's political system, and policies advancing the cause of good governance and accountability. The liberal reform meta-regime also encompassed a shift in professional and intellectual opinion from backing socialist-statist policies in the 1970s and early 1980s, to support for policies of economic liberalization championed by coalition governments beginning in 1991. In the post-1990 era, the judges on the Court reflected these broader shifts in also endorsing the Congress and BJP governments' policies of economic reform and liberalization in fundamental rights cases challenging those policies.[291] Although not all justices shared the same views on these issues, certain groups of justices coalesced around support for particular issues and goals, including pursuing an anti-corruption agenda, promoting environmental policy, and championing other reforms.

The meta-regime of liberal reform thus encompasses several issue "clusters," including support among elites for far-reaching systemic reform of India's political system, protecting the environment, promoting good governance, and protecting the rule of law and human rights. This shift in opinion was a response to the decline in responsible governance in the executive branch and Parliament, the Central Government bureaucracy, and state and local governments.

Judges in this period were influenced by the intellectual worldviews associated with the meta-regime of liberal reform through several mechanisms. First, the Court was influenced by the briefs and arguments of leading PIL lawyers and senior advocates, NGOs, and public interest groups that filed the majority of the governance claims that the Court adjudicated. Second, judges' perspectives were also influenced by the news media coverage of the issues involved in the cases before them, and by public advocacy by political and intellectual elites in the media. Throughout the post-1990 era, journalists, leading lawyers, intellectuals, legal commentators, and retired judges played an active role in shaping elite

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[290] *See* Prashant Bhushan, *Supreme Court and PIL: Changing Perspectives under Liberalization*, 39 ECON. & POL. WKLY. 1770, 1772 (2004).

[291] *See, e.g.*, BALCO Employees Union v. Union of India, A.I.R. 2000 S.C. 350; *see* Mate, *supra* note 1.

and public opinion on key issues adjudicated by the Court through the articles that they published in the national newspapers.[292] Most elite advocates and commentators have strongly supported the Court's activism and assertiveness in governance, though a small but growing minority of elites has criticized the Court for judicial overreach and encroachment on the powers of the other branches.[293]

Third, the Court has been influenced by the recommendations of government, court-appointed fact-finding commissions and other government agencies. This is illustrated by the Court's decision in *Vineet Narain* (in which the Court effectively adopted the recommendations of the Independent Review Commission ("IRC") for reform of the CBI in the Court's orders and directives), and in several other decisions in which the Court has relied on the expert advice of government commissions and specialized committees.[294]

Along with other professional and intellectual elites, judges became increasingly concerned with corruption and governance failures, and became more active in preventing the erosion of the rule of law. Judges began to challenge the power of the Executive in judicial appointments, the monitoring of CBI investigations into high-level government officials, the administration of India's forests and clean air and clean water regulations, and police reform.[295] In the process, the Court moved to the forefront of reform movements on a host of issues. Legal correspondent Manoj Mitta highlighted this shift in a 1995 article on the Court's activism in *India Today*: "By subjecting the political process to a judicial scrutiny more intense than ever before, the Supreme Court, in the process, has also begun to set a fresh agenda for political reform."[296]

Indeed, an analysis of the justices' own opinions in governance cases, as well as their own speeches and writings, highlights how the judges' perceptions of their own activist role aligned with the broader ideas of the liberal reform meta-regime. Chief Justice Verma, who helped drive the Court's assertiveness in decisions like the *Second Judges' Case*, *Vineet Narain*, and *Godavarman* defended the need for judicial intervention as follows: "So if judicial intervention activates the inert institutions and

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[292] Baxi, *Taking Suffering Seriously*, *supra* note 2, at 115.

[293] *See, e.g.*, ANDHYARUJINA, *supra* note 107, at 9; *see also* Divisional Manager Aravali Golf Course v. Chander Hass, (2008) 1 S.C.C. 683 (Katju, J. dissenting) (criticizing the Indian Supreme Court's recent PIL decisions for overreaching into a vast array of domains).

[294] *See, e.g.*, T.N. Godavarman Thirumulkpad v. Union of India, (1997) 2 S.C.C. 267, 269.

[295] Rudolph & Rudolph, *supra* note 212, at 137 n.31.

[296] Manoj Mitta, *Supreme Court: Setting the Agenda*, INDIA TODAY (Feb. 15, 1996, 3:34 PM), http://indiatoday.intoday.in/story/supreme-court-puts-the-screws-on-political-parties/1/280831.html.

covers up for the institutional failures by compelling performance of their duty . . . then that saves the rule of law and prevents people from resorting to extra-legal remedies."[297] In an interview conducted with the *Indian Express* shortly after he stepped down and retired from the Court, Verma observed:

> There is no lasting solution in the courts but in society. A lot needs to be done. It can't be changed overnight. A beginning has to be made and I don't think anyone has any doubt that not only a beginning (has been made) but a long stride has been taken. It was the people's perception—which cannot be called unreasonable—that there was inaction on the part of the executive and the legislature. It's a perception shared by the judiciary.[298]

Other judges have also justified the Court's assertive role in governance on similar grounds. In a speech delivered in 1996, then Chief Justice Ahmadi argued that the Court's assertiveness in governance was necessary given the decline in the functioning of the Executive Branch and Parliament.[299] In fact, Ahmadi suggested that the Court's activism was not a case of over-reach, but rather a natural by-product of a minority of citizens raising important constitutional and policy issues that were not being addressed by the elected branches of the Central Government.[300]

These perspectives reflected the worldviews of many Senior Advocates of the Court, as well as much of the professional and intellectual elite commentators in the news media. In 1996, Senior Advocate and environmental activist M.C. Mehta observed that "[t]he Indian political system has collapsed. . . . Only the Supreme Court is functioning anymore."[301] Even critics of judicial activism have recognized why the Court became more assertive in the post-1990 era. Senior Advocate Nani Palkhivala observed that while it was not within the traditional role of the Court to assert itself in executive and legislative matters, the justices felt

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[297] Avani Mehta Sood, *Gender Justice through Public Interest Litigation: Case Studies from India*, 41 VAND. J. TRANSNAT'L L. 833, 846 (2008) (citing an interview with J.S. Verma).

[298] *Judicial Activism Has Ushered in Hope*, INDIAN EXPRESS, Jan. 23, 1998 (article on file with author).

[299] Justice A.M. Ahmadi, *Dr. Zakir Husain Memorial Lecture on the Problems and Prospects of Indian Democracy: An Evaluation of its Working for Designing the Processes of Change for Peaceful Transformation*, (1996) 2 S.C.C. (Jour) 1, *available at* http://www.ebc-india.com/lawyer/articles/96v2a1.htm (last visited Nov. 22, 2013).

[300] *Id.*

[301] Peter Waldman, *Jurists' Prudence: India's Supreme Court Makes Rule of Law a Way of Governing*, WALL ST. J., May 6, 1996, http://search.proquest.com/docview/398496671?accountid=9676.

they had no choice but to intervene to fill a vacuum of responsible governance:

> The streets of Delhi are dirty. Who has to initiate a clean-up? The judiciary. Or the streets would remain dirty. There is a financial scandal. If you don't ask the investigative agencies to do it, they would remain uninvestigated. I don't remember a time when the country was so badly governed. . . . I don't think we had ever reached a state where there was such a lack of functioning by the executive and the legislature.[302]

CONCLUSION

The Indian Supreme Court dramatically expanded its power in governance in the post-Emergency period, building on a new activist approach that broadened popular access to the Court through the development of the PIL regime. As this article illustrated, the Court's expanded role reflected the influence of both the institutional context of judging, as well as broader shifts in the climate of elite worldviews that help frame and shape judicial worldviews and judicial decision-making. The broader shifts toward activism and greater assertiveness in governance were driven by changes in the institutional role-conceptions of judges, and by changes in professional and intellectual elite worldviews regarding the policy and legal issues adjudicated by the Court.

Elite institutionalism can bolster regime politics and institutionalist approaches by forcing us to look beyond the influence of political regimes and institutional factors on judicial decision-making to understand the broader ideational and normative factors that influence judges. Judges in India are not solely influenced by the partisan agenda or political ideology of the regimes that appoint them, and judges' worldviews may also be shaped by exposure to arguments and debates surrounding constitutional litigation, broader political and intellectual discourse within the media, and through their interaction with political, legal-professional, and intellectual elites in formal and informal fora and settings. Elite institutionalism thus seeks to move beyond the realm of regime politics and the institutional context of courts to understand how judges' worldviews and policy values are shaped by broader currents of elite intellectual and political discourse.

Elite institutionalism challenges conventional public law conceptions that view courts as counter-majoritarian institutions. As illustrated in this article, the assertiveness of the Indian Supreme Court in challenging the Central Government did not necessarily reflect a counter-majoritarian

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[302] Jha Padmanand et al., *Judiciary Takes Over*, OUTLOOKINDIA.COM (Mar. 6, 1996), http://www.outlookindia.com/printarticle.aspx?200931.

judiciary. Instead, the judges' activism was a product of the judges' own institutional and elite policy worldviews, and these worldviews were not always mutually exclusive of the worldviews of political elites in the government. Elite institutionalism thus suggests that judicial activism in courts around the world need not be viewed through the narrow lens of the counter-majoritarian versus majoritarian debate regarding the role of courts. Rather, this article contends that the roots of judicial activism and assertiveness can be better understood by looking to the institutional context, and the professional and intellectual elite atmosphere of judicial decision-making.