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India's Unlikely Democracy

THE RISE OF JUDICIAL SOVEREIGNTY

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The Indian Supreme Court's chief duty is to interpret and enforce the Constitution of 1950. Running to more than a hundred-thousand words in its English-language version, this document is the longest basic law of any of the world's independent countries. It contains, at latest count, 444 articles and a dozen schedules. Since its original adoption, it has been amended more than a hundred times, and now fills about 250 printed pages. It is fair to say that the Supreme Court, operating under the aegis of this book-sized liberal constitution, has by and large played a significant and even pivotal role in sustaining India's liberal-democratic institutions and upholding the rule of law.¹ The Court's justices, who by law now number twenty-six, have over the years carved out an independent role for the Court in the matter of judicial appointments and transfers, upheld extensive judicial review of executive action, and even declared several constitutional amendments unconstitutional. The Court upon which they sit is one of the world's most powerful judicial bodies, and yet precisely because of this its career has been and remains shadowed by irony and controversy, with implications for democracy that are both positive and problematic.

A simple issue-wise scorecard of the Court's contribution to maintaining liberty and the rule of law might begin by noting that the Court has generally upheld basic freedoms associated with liberal democracy, albeit with some glaring exceptions. The Court has a relatively weak record when it comes to questioning executive action in cases of preventive detention. While the Court has generally upheld the right to free expression, it has given the state more leeway in

banning books—particularly those held to offend religious sensibilities—that officials fear may threaten public order. During the period of emergency rule declared at the instigation of Prime Minister Indira Gandhi from June 1975 to March 1977, the Supreme Court shrank from its duty and—in a now universally condemned decision—chose supinely to concur with the executive’s suspension of the writ of *habeas corpus*.

Besides protecting the basic liberties that put the “liberal” in India’s liberal democracy, the Court has helped to ensure the polity’s democratic character by safeguarding the integrity of the electoral process. The Court has acted to curb the central government’s tendency to misuse Article 356 as a pretext to sack elected state governments and install “president’s rule” instead. Supreme Court interventions have also promoted democratic transparency by making political candidates meet fuller norms of disclosure.

The Supreme Court’s record in promoting decentralized governance is mixed. On the one hand, the Court has ensured the integrity of Indian federalism by pronouncing that the central government cannot dismiss a state government without a high threshold of public justification. On the other hand, courts across the country have been less receptive to the claims of lower tiers of government against state governments. The Supreme Court has so far proven unable to clarify the law in this area. While the social and economic rights that the Constitution lists were not at first deemed justiciable, the Supreme Court has managed over the years to apply a more substantive conception of equality that justices have used to uphold rights to health, education, and shelter, among others. To one degree or another, the executive branch has responded by at least trying to make provisions for the guarantee of these rights.

The Court’s greatest judicial innovation—and the most important vehicle for the expansion of its powers—has been its institution of Public-Interest Litigation (PIL). In PIL cases, the Court relaxes the normal legal requirements of “standing” and “pleading,” which require that litigation be pressed by a directly affected party or parties, and instead allows anyone to approach it seeking correction of an alleged evil or injustice. Such cases also typically involve the abandonment of adversarial fact-finding in favor of Court-appointed investigative and monitoring commissions. Finally, in PIL matters the Court has expanded its own powers to the point that it sometimes takes control over the operations of executive agencies.

The PIL movement has allowed all kinds of public-interest matters to be heard, and given hundreds of poor people a route by which to approach the Court. While PIL cases to date have had mixed success at shrinking poverty or correcting injustices, the provision of a forum to which citizens marginalized by the corruptions of routine politics can

turn has arguably given serious moral and psychological reinforcement to the legitimacy of the democratic system.

In the Shadow of Irony

The Indian Supreme Court's undeniable contributions to democracy and the rule of law, to say nothing of its reachings for power in service of these aims, are shadowed by three profound ironies. First, even as the nation's most senior judicial panel engages in high-profile PIL interventions, routine access to justice remains extremely difficult. India's federal judicial system has a backlog of almost twenty million cases, thousands of prisoners are awaiting trial, and the average time it takes to get a judgment has been steadily increasing. There is a saying in India that you do not get punishment after due process—due process *is* the punishment.

The second irony is that even as the Supreme Court has established itself as a forum for resolving public-policy problems, the principles informing its actions have become less clear. To the extent that the rule of law means making available a forum for appeals, one can argue that the Court has done a decent job. To the extent that the rule of law means articulating a coherent public philosophy that produces predictable results, the Court's interventions look less impressive.

The third irony is that the Court has helped itself to so much power—usurping executive functions, marginalizing the representative process—without explaining from whence its own authority is supposed to come. In theory, democracy and constitutionalism can reinforce each other, but in practice their relationship is complex and even problematic. The question of where one begins and the other ends has taken on global significance in light of the widely observed trend toward “post-democracy,” according to which representative institutions are losing power to nonelected centers of decision making the world over. In India, unelected judges have effectively replaced the notion of the separation of powers among three governmental branches with a “unitarian” claim of formal judicial supremacy. The concept of the rule of law is supposed to legitimate this claim, but whether judicial supremacy—either as such or as exercised by the Indian Supreme Court—actually upholds the rule of law remains an open question.

In order to understand how this situation has come about, it is helpful to know that in India, the power of judicial review is more or less explicitly spelled out in the 1950 Constitution,² and that this Constitution has a dual goal. On the one hand, as a basic law in the liberal tradition, it seeks to check the power of government and to safeguard individual rights and liberties. On the other hand, it is the work of framers who believed, with good cause, that their country needed a state with the capacity to intervene massively in society in order to over-

come structural injustices grave enough to threaten liberal democracy itself. So the Constitution allows the courts to intervene in the cause of what might be loosely termed “social reform.” Moreover, judges have gradually widened the definition of rights held to be constitutionally “justiciable.” Hence the scope of judicial intervention can include everything from civil liberties to urban planning. This constitutional practice, which licensed the courts to intervene, was bound to generate a promiscuity that would be the cause of some resentment.

That resentment has a history. In the early postindependence years, the Supreme Court tried to block land-reform legislation, virtually denied that the Constitution requires substantive due process, and gave serious scrutiny to government regulation of publications.³ The government’s response was typically to seek a change in the letter of the Constitution, which helps to explain why India’s basic law is so heavily amended.⁴ During the late 1960s and early 1970s, the judiciary struck down major planks of Indira Gandhi’s development agenda, including her scheme for nationalizing the banks. This era also saw the Court make its first strong claim that Parliament may not, even via amendment, override the fundamental rights elaborated in Part II of the Constitution. Later, the Court would extend and revise this claim to argue that the legislature may not, through amendment, override the “basic structure” of the Constitution—a structure of which the judiciary has insinuated itself as the custodian. Yet when Prime Minister Gandhi declared her State of Emergency on 25 June 1975, suspended Article 21 of the Constitution (which provides that no person shall be deprived of personal liberty except according to the procedure established by law), and had hundreds of people detained by executive order, the Supreme Court overruled nine High Courts and upheld her actions. That decision is now unanimously regarded as one of the worst in Indian judicial history.⁵

Despite Indira Gandhi’s court-packing schemes and other efforts to exert arbitrary executive influence over judicial appointments, the courts emerged from her premiership stronger than ever. For during those years judges framed far-reaching interpretations that would lay a constitutional basis for future judicial bids to curb the powers of the two other branches. The Supreme Court, moreover, managed to legitimize itself not only as the forum of last resort for questions of governmental accountability, but also as an institution of governance. The Court’s PIL initiatives—an innovation influenced by Gandhi’s populist political style—allowed judges to make policy and demand that executive officials carry it out by closing businesses on environmental grounds, building new housing for slum dwellers, and even maintaining particular college courses.

The second big moment for the judiciary was securing its own independence in matters of filling the Supreme Court. The Constitution’s

Article 124 is ambiguous on judicial appointments, calling for consultation between the executive and the judiciary but leaving it unclear who has the final say. While the original idea seems to have been to steer a middle ground between the British practice of executive appointment and the U.S. practice of legislative confirmation, in practice the appointments system became increasingly messy and allowed the executive to “pack” the judiciary.

In a decision in *The Third Judges’ Case* (1993), the Supreme Court held that the power to name new judges to the highest bench rests primarily with the chief justice and the next four most-senior justices of the Supreme Court itself.⁶ Extensive consultations with the executive are required, but in the end the Court’s highest-ranking jurists have the lion’s share of the appointment power. As critics have pointed out, this process gives the public no sense of the criteria used in naming justices and no forum in which the merits of prospective Supreme Court judges can be openly weighed and debated. Thus the Court may have secured its autonomy at a cost to its transparency and perhaps its legitimacy as well.

The Rule of Laws or the Rule of Men?

Although most studies of Indian politics pay almost no attention to the courts, disputes between the judiciary and the other two branches have been as important a fact about Indian political life as any. Judges have struck down hundreds of state and national laws. During the first 17 years of the Supreme Court’s existence, when it was supposedly in its restrained period, it struck down 128 pieces of legislation. Of the first 45 constitutional amendments, about half were aimed at curbing judicial power. The most recent amendment, number 104, is designed to reverse the result of the *Inamdar* case,⁷ in which the Court ruled unconstitutional the central government’s effort to control who is admitted to half of all the seats in private institutions of higher education every year, and to set the fees that these schools could charge.

If the frequency of amendments meant to reverse Supreme Court decisions is significant, so is the legislative assumption that amendments are needed at all. Court decisions may infuriate Parliament, in other words, but Parliament thinks that they cannot simply be ignored. Even during the 1975–77 emergency, the government took care to curtail the authority of the courts by formally legal means. This deference has ensured that even constitutional amendments have not been able to alter the basic structure of the Constitution and the *formal* allocation of powers within it.

The foregoing suggests that there is a profound inner conflict at the heart of Indian constitutionalism. The question, “Who is the Constitution’s final arbiter?” admits of no easy answer. The Court has

declared itself to be the ultimate judge, and has even assumed the power to override duly enacted constitutional arrangements. Yet in a polity where parts of the Constitution can be amended by as little as a majority vote of each of the two houses of Parliament, there is no reason to suppose that a court decision regarding the constitutionality of a particular matter will suffice to remove it from the political agenda. In India, Parliament and the judiciary have been and are likely to remain *competitors* when it comes to interpreting the Constitution. It is by no means settled who has the final word. The decisions of each are episodes in an iterative game of action-response-rejoinder that can be played out any number of times. Parliament can pass a law, the courts can strike it down, Parliament can try to circumvent the courts by amending the Constitution, the courts can pronounce that Parliament's amendment power does not apply to the case, and so on.

It is true that the 1990s saw no full-scale parliamentary assault on the courts' interpretation of what the "basic structure" doctrine requires, but that was an accidental side effect of a fragmented political system in which no one party could achieve dominance in Parliament. Should any party gain enough parliamentary heft to wield the amendment power, the judicial-legislative tussle will almost certainly resume, and it is impossible to predict what the outcome will be, either in the nearer or the longer term.

In the event of a political consensus, such as the one that backs reservation quotas designed to aid members of the so-called Other Backward Castes, the judiciary can be readily overruled. (Parliament has passed no fewer than five amendments meant to thwart judicially imposed restrictions on how the reservations policy is implemented, and the judges have had to go along.) But it is possible that in the near future this kind of overturning of judicial decisions through constitutional amendment will itself become subject to judicial scrutiny. In India, the supremacy of any branch of government is not simply a result of a one-time-only act of constitutional design, but must be secured through an ongoing struggle.

Furthermore, the Court's institutional task is not only to resolve this or that current conflict over constitutionality, but also to preserve the legitimacy of constitutional review as such over the long haul. Indian jurists have, for the most part, been keenly aware of the dilemmas that can lurk here. Justices seem routinely to anticipate the effects of particular decisions on the Court's popular authority. This makes the Court's major decisions, however the Court itself chooses to present them, something other than purely straightforward applications of high constitutional principles or values. Most judgments, in fact, are the result of a delicate and *political* process of balancing competing values and political aspirations; they seek to provide a workable *modus vivendi* rather than to articulate high values.

This is not the place to argue the point at length, but I would submit that most Supreme Court decisions can be read as accommodations or balancing acts of this sort. Even *Golak Nath*,⁸ arguably the strongest Court ruling to date vindicating the sanctity of fundamental rights, made a retrospective exception for three constitutional amendments relating to property rights that the decision might otherwise have invalidated. Similarly, *Kesavananda*,⁹ while making a statement whose strong drift was that Parliament cannot amend the “basic structure” of the Constitution, was nonetheless deliberately vague about exactly what counts as part of that “basic structure.” The *Mandal* decisions on affirmative action showed the Court balancing different pressures rather than giving a principled argument. The justices enlarged the scope of affirmative action, but less than some states wanted. With few exceptions, the courts in general have tread very gingerly regarding certain classes of religious disputes. Judges go to unusual lengths to show that, while they may recommend the reform of certain religious practices, they are not antireligious. Jurists have interpreted Indian secularism itself as a kind of *modus vivendi* rather than as a set of clear principles.

Moreover, the courts have often shied away from taking firm stands on the hottest religious disputes. One such controversy, the *Babri Masjid* case, has languished in various courts for fifty years. When the executive sought an advisory opinion from the Supreme Court, the justices took two years to rule that the matter belonged at the appeals-court level. In more narrowly political matters as well, the Supreme Court has been wary of upsetting the apple cart. Thus the justices have used vague insinuations of corruption as the basis for upholding the political parties’ decision to end secret balloting when state legislators vote to send representatives to the Rajya Sabha (House of States), the upper chamber of the Indian Parliament. One may look in vain for a constitutional principle in this judicial bow to political consensus.¹⁰

In short, the Court’s concern for its own authority has led it to read the political tea leaves with care. The judicialization of politics and the politicization of the judiciary turn out to be two sides of the same coin. It is no accident that Indian constitutional law has been relatively unstable, or that the same courts which appear assertive in some areas seem weak in others: strong enough to spark the passage of many constitutional amendments meant to confound judicial rulings, but so easygoing that no major politician has ever been charged in any of the numerous corruption cases that the Supreme Court has been supervising for years. The legitimacy and power that India’s judiciary does enjoy most likely flow not from a clear and consistent constitutional vision, but rather from its opposite. The Supreme Court in particular has given enough players enough partial victories to leave them feeling as if they have a stake in keeping the game of political give-and-take going. This, more

than any ringing defense of principle, is the Court's signal contribution to Indian democracy.

The Uncaused Cause?

It is hard to say what are the necessary and sufficient conditions under which independent judicial review will arise and take hold. It used to be a common argument that successful constitutional judicial review is caused and required by strong federalism. Federalism requires a "referee" to protect complex boundary arrangements, the logic ran, so each unit of a federation will, despite incentives to deviate, support the creation and maintenance of some central institution designed to identify and stop noncompliance by others. The logic of this argument was never very persuasive. Why would it necessarily be the case that a state involved in a dispute with the central government would support the creation of another arm of the central government to resolve the dispute? As it turns out, the nature of the federal arrangement in India has turned on *how* judicial power is exercised, and judicial review has often eroded rather than strengthened federalism. In the case of India, one could argue that the nature of judicial scrutiny of the center's intervention in the states has influenced the character of federalism itself.

When it comes to defining the federal character of the Indian polity, legislatures and executives have largely followed the judiciary's lead. One-party dominance in New Delhi has often been fingered as the culprit in the weakening of federalism during the 1970s and 1980s, but a simpler explanation points to the courts. The Supreme Court's 1977 advisory opinion permitting the dissolution of nine state governments in favor of so-called president's rule weakened Indian federalism, and before long additional state legislatures had been dissolved. The Court's 1994 ruling in the *Bommai* case made it clearer than before that there must be "substantial constitutional" reasons for dismissing a state government, and has led the central government to be warier about imposing presidential rule on the states.¹¹ Thus it seems that the character of judicial review can determine the nature and scope of federalism rather than the other way round.

An analogous argument can also be made about the "separation of powers" hypothesis. This suggests that, as with a robust division of powers among different levels of government (central and state), a strong separation of powers among the various branches of government will encourage judicial power and independence.¹² The general presumption has been that in parliamentary systems, where the executive rises directly from the legislature, judicial review will be weak. Yet strong judiciaries replete with doctrines of judicial review are appearing in such parliamentary countries as Australia and Canada, neither of which has traditionally had a strong separation of powers. This has been hap-

pening, moreover, even in polities where there has been no change in the formal distribution of powers.

The actions of judges themselves, and not federalism or the separation of powers, most cogently explain changes over time in the exercise of judicial power. Court rulings are the main means for institutionalizing judicial review. In India as elsewhere, it is not simply the formal allocation of powers but an evolving constitutional jurisprudence that has enhanced the powers of judicial review. I am not sure we have or can have a general theory of the conditions under which constitutional law will evolve in the direction of wider powers of judicial review. In democratic societies especially, it seems that the degree of independence which a judiciary asserts is itself a creation of judicial power. The thought that “judicial review causes itself” is probably as good as any answer to the puzzle of judicial power.

The history of judicial power and its exercise in India suggests that the separation-of-powers doctrine is a highly misleading metaphor. It is still invoked all the time, of course, but in reality it offers neither an accurate empirical description of how actual courts work, nor a plausible conceptual account of any government. Policy making has become a routine part of the judicial role in many contexts, and adjudication likewise now belongs in many countries and in many ways to the realm of administrative functioning. The traditional distinction that holds legislatures to be forums for the balancing of interests and courts to be forums of principle is far less obvious than it seems: India’s judges do as much balancing as India’s lawmakers do. The Supreme Court, strikingly, has given up any formal pretense to the doctrine of the separation of powers, and one would be hard pressed to name a single recent case in years where the Supreme Court simply said: This does not lie within our jurisdiction or domain of competence. Even in instances where the Constitution *specifically* prohibits the courts from inquiring into the proceedings of Parliament and the several state legislatures (Articles 122 and 212), the courts have disregarded the ban.

On the conceptual level, the plausibility of the separation-of-powers metaphor breaks down as soon as one asks: “Who polices the boundaries between different branches of government?” Each branch will want to patrol the borders on its own terms, rendering any idea of “separation” merely rhetorical. Indeed, I would submit that “independence” is not something that inheres in any branch of government; instead, claims to independence are a political resource that is deployed in specific contexts.

A resonant phrase contrasts the rule of law with the rule of men. In more prosaic legal terms, the Supreme Court of India is given to pronouncements that all the branches of government are “under the Constitution,” suggesting that all legitimate power has its source in a legal or constitutional order that somehow regulates the conduct of men. But

who decides what this legal and constitutional order requires in any given case? The answer is: some group of men! This is a way of saying that there is no such thing as a rule of law which is not also a rule of men, for men will decide what law is. If this is the case, then the separation-of-powers doctrine implodes. It is not something that can be deduced from a formal legal order. Instead, it will be subject to the vagaries of the contending wills of men, or in short, politics.

The Legitimacy of Judicial Intervention

India is not the only democracy where judges have been coming to play an unprecedented governing role. The expansion of the authority enjoyed by unelected bodies has been a staggering worldwide trend in recent years. From waste management, clean air, and education policy to property rights and religious liberty as well as many administrative matters—it is hard to think of a single issue relevant to politics or policy on which the courts of India have not left their mark. The Supreme Court has set itself up as the final arbiter of the Constitution, scrutinizing even amendments made to that document by Parliament.

The weakness of the political process provides fertile soil for judicial activism, and judges keen to compensate for their failure to defend democratic principles during the 1975–77 emergency have avidly taken up the task of preserving the republic. In many instances, the executive has almost invited the judiciary to play a leading role. State governments often seek judicial dispensation as a source of political cover when unpopular decisions have to be made. But such power as the Indian courts have acquired mostly confirms the dictum that power flows to those who choose to exercise it. In decision after decision, be it the authority to review constitutional amendments or the mode of appointing judges, the Supreme Court has created its own powers.

Judicial activism can mean many things: scrutiny of legislation to determine constitutionality, the creation of law, and the exercise of policy prerogatives normally reserved for the executive. But whatever its form, judicial activism raises two questions: Is it legitimate? And is it effective? The democrat in all of us is rightly suspicious when a few people (mostly older and mostly male, as it happens) assume such broad powers over our destiny without much accountability. At least, we ruminate, we can throw the politicians out once in a while, but judges are mostly shielded from accountability. And yet our impatience with a debilitating political process whose usual results are inaction or unsatisfying compromises makes us thankful for an assertive judiciary. At least the judges and their decrees can protect our rights, clean our air, call our politicians to account, and so forth. It is hard not to feel the pull of both sides of the argument. And it must be an unenviable task for judges to steer a middle course between usurping too much power on

the one hand, and doing too little to sustain the fundamental values of constitutional democracy on the other.

But the prickly question remains: What legitimizes judicial activism and makes it an exertion not of mere power, but of just authority? One

Representative institutions are, after all, the essence of democracy, and judges do not stand in the same relation to us as legislators.

possible answer is that judicial activism is justified to the extent that it helps to preserve democratic institutions and values. After all, transient majorities in Parliament can barter away our democratic rights, and representative institutions are so often burdened with the imperatives of money, power, and inertia that to call their decisions democratic and in the public interest is often something of a joke. If judges use their power to restore integrity to the democratic process, to make

our rights (including social and economic ones) more meaningful, and to advance the public interest, then an assertive judiciary can be both a shield and a sword of sorts for democracy. This is the most plausible defense of an assertive judiciary.

The trouble is, however, that there is no reason to assume that judges any more than politicians will always protect our liberties. A student of the Indian scene need only recall the judiciary's "no show" during the state of emergency and hands-off approach to preventive detention since then. Less dramatically but still seriously, the courts in ruling after ruling have been diluting the impact of two democratizing amendments (numbers 73 and 74) by insisting that unelected bureaucrats have more power than local elected officials. And can anyone who cares about the democratic legitimacy of the decisions that govern us look on unconcerned as judges decree the right level of air pollution, the appropriate amount of school fees, the height of dams, or the types of fuel that local buses and trains can burn? Judges are often guilty of both populism and adventurism. Representative institutions are, after all, the essence of democracy, and judges do not stand in the same relation to us as legislators. It may be that we cannot trust representative institutions, but it would be stretching logic to pretend that the guardianship which the courts exercise over policy is synonymous with democracy.

But faced with the messy abdications of politics, should we not simply dispense with self-indulgent qualms about democratic authority and be more pragmatic? Does not judicial activism do good? Does it not produce outcomes that we desire? How one answers these questions depends in part on what one thinks of as the public interest. Defenders of the judiciary often focus on the few success stories that result from judicial decisions. Yet there is a glaring lack of concrete, empirical data on the effects of court interventions. Courts can proclaim new rights as

much as they want, but the proclamation of rights by itself does not produce results.

This is not to deny the few instances so far in which the Supreme Court's intervention has done real and even remarkable good. Court rulings have had a lot to do with progress toward making schooling an implementable constitutional right, for example, and judicial monitoring has improved school-meal programs with good effects on both nutrition and education. But these were both instances where government and society were willing to meet the Court more than 90 percent of the way. In the case of other rights—the right to health, for instance—judicial declarations have had little effect. Courts may achieve certain results such as lowering air pollution, but whether they achieve those results in a cost-effective manner is another question. And whatever the costs of such decisions, do we have reason to believe that courts distribute them fairly?

Court interventions could be judged successful if they were fostering a constitutional culture wherein certain fundamental values and aspirations become authoritative constraints on the behavior of governments and citizens alike. But the judiciary's own overreaching and arbitrariness are making it hard for courts to be what the U.S. political theorist Ralph Lerner once called "republican schoolmasters,"¹³ who teach voters and officials to internalize respect for the rule of law as a goal rather than to see the law as a mere tool for manipulation. Indeed, the more the judiciary expands its ambit of intervention, the more judges become subject to the charge that their actions are arbitrary.

There are many other reasons to doubt that the Courts alone can be bringers of social change. The judiciary itself is in deep disrepair. The civil-justice system gives the impression of being an arena where the law is subject to discretionary manipulation rather than being a conduit of justice. Its massive case backlog alone is shocking. The Supreme Court's efforts to foster a more robust constitutional culture suffer from the Court's penchant for seeking hazy accommodations among competing interests rather than settling issues on clear, decisive principles. Perhaps the U.S. jurist Learned Hand was right when in 1942 he wrote:

You may ask what then will become of the fundamental principles of equity and fair play which our Constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know—that a society so riven that the spirit of moderation is gone, no Court can save; that a society where that spirit flourishes no Court need save; that a society which evades its responsibility by thrusting upon the Courts the nurture of that spirit, that spirit will in the end perish.¹⁴

The eminent Indian legal scholar Upendra Baxi once memorably called judicial activism a dire cure for a drastic disorder: “chemotherapy for a carcinogenic body politic.”¹⁵ And certainly judges have an important role to play in strengthening our democracy. But they will have to exercise great discretion and resist the intoxication which comes from the view that judges are the last, best hope of the republic. As Judge Hand also observed, during a great world war in which freedom was at stake and just a few short years before India began its life as an independent republic: “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.”¹⁶

NOTES

1. India’s courts by and large fit into a single three-tiered system, with the Supreme Court at the apex. Each state has a High Court, with District Courts below it. The Supreme Court, established in 1950 as a successor to the Federal Court, has broad powers. Under Article 131, it exercises original jurisdiction in cases involving the government and appellate jurisdiction in a variety of cases. Under Article 132, it rules on cases involving constitutional interpretation; under Article 133, it exercises jurisdiction over civil cases that involve a substantial question of law with general importance. In addition, it is an appellate court for some criminal cases, has the power to grant special leave to appeal, has writ jurisdictions over questions of fundamental rights, and has the authority to issue advisory opinions. The High Courts act as courts of first and second appeals in civil matters; in addition, they have extensive writ jurisdiction and act as superintendents for subordinate courts.

2. The warrant for judicial review comes from a combined reading of Articles 13, 32, and 142. Article 13(2) provides that “The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.” Articles 32 and 226 give any person the right to move the Supreme Court or the High Court, respectively, for the enforcement of fundamental rights guaranteed in Part III of the Constitution. Finally, Article 142 provides that the Supreme Court “may pass such decree or make such order as is necessary for doing complete justice in any cause or matter,” and such decree or order is “enforceable throughout the territory of India.” Article 142, especially the phrase “complete justice,” has given the judiciary a virtual license to intervene in any matter whatsoever. In addition to these textual enablers, the Court has over the years created its own powers in a number of domains.

3. At the same time, however, the Court’s thwarting of the government was not absolute: The justices tended to uphold the state’s preventive-detention orders.

4. Different parts of the Constitution can be amended in three ways: 1) by a simple majority of all members of Parliament present and voting; 2) by a two-thirds majority of Parliament subject to a quorum requirement of 50 percent; and 3) by two-thirds vote of Parliament as above, followed by ratification via a two-thirds vote of at least half the state legislatures. In each case, presidential assent is required before an amendment can become law.

5. *ADM Jabalpur v. Shivakant Shukla* AIR 1976 SC 1207.

6. See *S.P. Gupta v. Union of India and Others (First Judges Case)* AIR1982 SC149; 1981 Supp(1)SCC87; *Supreme Court Advocates-On-Record Association*

and *Anr. v. Union of India* AIR1994; SC268; (1993) 4 SCC 441.

7. *P.A. Inamdar and Others v. State of Maharashtra* AIR 2005 SC 3226; (2004) 8 SCC 139.

8. *Golak Nath and Others v. State of Punjab and Anr.* AIR 1967 SC 1643.

9. *Keshavanda Bharati and Others v. State of Kerala* AIR 1973 SC 1461; (1973) 4 SCC 225.

10. *Kuldip Nayar v. Union of India and Others* W.P. (C) Nos. 217, 262, 266, and 305 of 2004 JT 2006 (8) SC 1 (not yet published in AIR or SCC).

11. *S R Bonmai v. Union of India* (1994) 3 SCC 1.

12. For a statement of this view, see John Ferejohn, "Law, Legislation and Positive Political Theory," in J.S. Banks and Eric Hanushek, eds., *Modern Political Economy: Old Topics, New Directions* (Cambridge: Cambridge University Press, 1995), 208.

13. Ralph Lerner, "The Supreme Court as Republican Schoolmaster," *Supreme Court Review 1967* (Chicago: University of Chicago Press, 1967), 127–80.

14. Learned Hand, "The Contribution of an Independent Judiciary to Civilization," in Irving Dillard, ed., *The Spirit of Liberty: Papers and Addresses of Learned Hand*, 3rd ed. (New York: Alfred A. Knopf, 1960), 181.

15. Upendra Baxi, "Introduction" to S.P. Sathe, *Judicial Activism in India* (Oxford: Oxford University Press, 2001), 3.

16. Learned Hand, "The Spirit of Liberty," in Dillard, *The Spirit of Liberty*, 190.