

Lawmaking Beyond Lawmakers: Understanding the Little Right and the Great Wrong (Analyzing the Legitimacy of the Nature of Judicial Lawmaking in India’s Constitutional Dynamic)

Shubhankar Dam*

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* LL.B. (Hons.); B.A., National University of Juridical Sciences, India. I am grateful to Ms. Jasmine Joseph, Ms. Rukmini Sen, and my colleagues Deepa Christopher, Swagata Raha, and Vivek Tewary for their comments on the earlier drafts of the Article.

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I. INTRODUCTION

Recent years have witnessed a novel culture¹ dominate the workings of the Indian judiciary. A process that began nearly twenty-five years ago has changed the internal dynamics of India's constitutional democracy.² Authored by the Indian Supreme Court, the novelties have refashioned the institutional order in a manner historically unknown to constitutional democracies.³ The new order has seen the emergence of the Court in stature, domestically and beyond. The "least dangerous" branch⁴ in history became India's most assertive organ.⁵ For some the judiciary is "the sanctuary of Indian humanity,"⁶ and for others it is "the world's most powerful court."⁷ The transition came about slowly but drastically, and much before the critics of judicial power could assert themselves,⁸ there was little left untouched by the passion of this novel culture.⁹

1. I use the term "culture" in its broadest sense to suggest a way of life, implying thereby the general functioning style of the Court.

2. See Clark D. Cunningham, *Most Powerful Court: Finding the Roots of India's Public Interest Litigation*, in LIBERTY, EQUALITY AND JUSTICE: STRUGGLES FOR A NEW SOCIAL ORDER 83 (2003), for an elaborate discussion of the case that is widely regarded as the beginning of the new order. See generally Upendra Baxi, *The Supreme Court Under Trial: Undertrials and the Supreme Court*, (1980) 1 S.C.C. 35.

3. *But see* ARCHIBALD COX, THE COURT AND THE CONSTITUTION 44-45 (1989) ("No other country has given its courts such extraordinary power. Not Britain, where an act of Parliament binds the courts. Not India, where there is a written constitution and a Supreme Court but where constitutional rights can be suspended by the government's declaration of an emergency.").

4. THE FEDERALIST NO. 78, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

5. See A.M. Ahmadi, *Judicial Process: Social Legitimacy and Institutional Viability*, (1996) 4 S.C.C. 1, 4-5.

6. See V.R. KRISHNA IYER, LEGALLY SPEAKING 167, 171 (2003).

7. See V.A. Bobdi, *The Rise of Judicial Power*, in LAW AND JUSTICE: AN ANTHOLOGY 70, 73 (Soli J. Sorabjee ed., 2003); see also Lord Bingham of Cornhill, *Law Day Lecture*, (2000) S.C.C. 29, 29 (stating that the Supreme Court of India has jurisdiction over "nearly one billion men, women and children who form the population of India").

8. T.R. ANDHYARUJINA, JUDICIAL ACTIVISM AND CONSTITUTIONAL DEMOCRACY IN INDIA 33-34 (1992). See generally D.C. Jain, *The Phantom of "Public Interest"*, (1986) 3 S.C.C. 30;

From an institution entrusted with the task of adjudicating disputes between parties, the Court has transformed itself into an institution enjoined to promote the ideals of socioeconomic and political justice¹⁰ envisioned by the Indian Constitution in its Preamble.¹¹ The Court's prior role as an "adjudicator" was an impression of the Anglo-Saxon practice from which it evolved.¹² The new order has seen a reappraisal of the judge's role.¹³ He is no longer an adjudicator but an activist, energetically contributing to the accomplishment of India's constitutional vision.¹⁴ In

S.K. AGRAWALA, *PUBLIC INTEREST LITIGATION IN INDIA: A CRITIQUE* (1985). In India, criticism of this novel culture in judicial writings has been almost nonexistent. There appears to be a surprising consensus in the judicial circles about the legitimacy of the exercise of such extended jurisdiction. In the United States, however, opposition to judicial lawmaking has often come from within the members of the robed profession itself. When the United States Supreme Court in *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota* decided that the judiciary, not the legislature, was the final arbiter in regulating railroad fares, freight rates, and other charges on the public, 134 U.S. 418, 458-59 (1890), Justice Bradley's dissent considered this an arrogation of authority that the Court had no right to make. *Id.* at 461. In *Pollock v. Farmers' Loan & Trust Co.*, Justice White's dissent accused his brethren of amending the Constitution by judicial fiat. 157 U.S. 429, 608, 612, 641 (1895). White argued that, to the extent that the Court added a third category—income tax—to the definition of direct tax, the Constitution stood amended, a process that should have been achieved directly rather than by a judicial decision. *Id.* at 641. Similarly dissenting in *Schick v. United States*, Justice Harlan charged his brethren with having "made, not declared, law." 195 U.S. 65, 99 (1904).

9. Public Interest Litigation has affected almost all aspects of Indian constitutional dynamics. For an elaboration of its effect on Part III of the Constitution of India (Fundamental rights), see *infra* notes 30-41 and accompanying text.

10. See Bingham, *supra* note 7, at 40. Lord Bingham observes: "Over recent years 'judging' is no longer what it used to be. Judges have now a dominant role in society . . . today, the highest Judiciary is also held in highest public esteem." *Id.* While many justifications for such functional transformation have been forwarded, one of the strongest came from former Supreme Court Judge, V.R. Krishna Iyer, who notes: "If a Judge is to bear true faith and allegiance to the Constitution, he must necessarily imbibe the social justice values of that paramount instrument." V.R. Krishna Iyer, *Democracy of Judicial Remedies—A Rejoinder to Hidayatullah*, (1984) 4 S.C.C. 43, 43.

11. The Preamble primarily refers to "JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and . . . FRATERNITY assuring the dignity of the individual." INDIA CONST. pmbl.

12. The Supreme Court within the framework of the Indian Constitution is the erstwhile Federal Court established by the Government of India Act, 1935. The Supreme Court of India succeeded the Federal Court in its practice, rules, and applicability of law when the Constitution came into force on November 26, 1949. See INDIA CONST. arts. 374-376.

13. See K.M. Sharma, *The Judicial Universe of Mr. Justice Krishna Iyer*, (1981) 4 S.C.C. 38, 38 ("The Judge is exalted as Lawgiver and Prophet in the Temple of Justice. He must have the wisdom of Solomon, the moral vision of Isaiah, the analytic power of Socrates, the intellectual creativity of Aristotle, the humanity of Lincoln and Gandhi, and the impartiality of the Almighty:").

14. See generally H.R. Khanna, *Law and Men of Law*, (1976) 1 S.C.C. 17, 21 ("Judges, it has been said, are men not disembodied spirits, they respond to human emotions. The great tide and currents which engulf the rest of mankind, in the words of Cardozo, do not turn aside in their course and pass the judges idly by:").

this new creation, the judge not only interprets laws but also makes and implements them, or at least tries to do so.¹⁵ Within this supra-constitutional denomination, the judge functions as a searchlight, constantly probing the actions of the legislature and executive, and often acting on their behalf. The tool of "Social Action Litigation," also known as "Public Interest Litigation," has largely achieved this functional recast.¹⁶

The functioning of the Court in this new avatar raises questions of importance, especially about the prospects and substance of India's representative democracy. What is the rightful place of a judiciary in a constitutional democracy? Why is the locus of this rightful place being redefined in an expansive manner? This Article critically analyzes the working of the judicial mind in its novel culture and raises three broad questions. First, what is this dominant novel culture of the Indian judiciary all about? In other words, how has the Court functionally reinvented its constitutional role? Second, what are the legitimacy issues arising from the exercise of this extended jurisdiction within the existing positivist framework? And third, what processes, political or otherwise, can make this novel exercise of jurisdiction legitimate? I argue that the reasons for the exercise of this extended jurisdiction may be found in the institutional inefficiencies of India's democratic polity rather than the usually suggested reason of functional deficiencies. I argue that between the political, quasi-social, and individual zones, in order to be legitimate, judicial legislation may be limited only to the zone of individual rights. Finally, I endeavor to impress that post-decisional legitimacy may be acquired in two ways. It may be per se legitimate, provided the judicial legislation is a formal enunciation of the existing order of "right-duty consciousness" under the constitution; or it may be legitimized by way of incorporation, if the same is reenacted by the formal lawmaking structures of our democratic polity.

In expounding on the above arguments, this paper is divided into four Parts. Part II provides an analytical impression of social action litigation in India. It discusses the various processes within the larger framework of the novel culture while emphasizing judicial lawmaking as the most polemical of all processes. Part III chronicles the jurisprudential debate on the legitimacy of judicial lawmaking in

15. See M.N. Rao, *Judicial Activism*, (1997) 8 S.C.C. 1, 3 (describing Public Interest Litigation as a "manifestation of judicial activism").

16. See H.S. Matteval, *Judiciary and the Government in the Making of Modern India*, (2002) 1 S.C.C. 17, for a brief history of the working of Public Interest Litigation. See also Gobinda Mukhoty, *Public Interest Litigation: A Silent Revolution?*, (1985) 1 S.C.C. 1.

constitutional democracies. It provides a general categorization of the arguments and counterarguments in existing literature while posing a possible middle ground. Part IV uses these arguments to analyze judicial lawmaking under the Indian Constitution and the scope of its legitimacy. In particular, Part IV endeavors to point out the insufficiency of judicial reasoning while arguing that the reasons for such legislation may be located in the institutional inefficiencies of Indian democracy. Part V attempts to provide a theoretical foundation to this argument. Based on an exposition of a “right-duty consciousness” under the constitution, this Article develops a construct for understanding the limitations on the power of judicial lawmaking.

II. THE NOVEL CULTURE: SOCIAL ACTION LITIGATION EXPLAINED

A. *The “Gains”:* Emergency and the Indian Democracy—Breaking New Ground

Emerging out of the dark days of Indian democracy,¹⁷ the Court was on a quest for an identity within the constitutional framework.¹⁸ The celebrated decision of *Maneka Gandhi v. Union of India* was a step in that direction.¹⁹ By redefining procedure established by law²⁰ as “fair, just and reasonable” law, the Court, by the stroke of a pen, shook itself from the limitations imposed upon it by the framers of the constitution.²¹ While this decision, important as it was, provided the Court with added ability to review legislative actions, functionally the Court continued within the narrow precincts of the Anglo-Saxon setup that it inherited.²²

17. See P.N. DHAR, *INDIRA GANDHI, THE ‘EMERGENCY’, AND INDIAN DEMOCRACY* 221-68 (2000), for a description of the executive functioning during the Emergency.

18. See GOBIND DAS, *SUPREME COURT IN QUEST OF IDENTITY* 104 (2000).

The tidiness and tranquility of the post-emergency era, the absence of any effective dominant political master and the rising expectations of the people created the appropriate ambience for the Court to initiate the thrust. The Court also sought to retrieve the ground it had conceded during the emergency. The Court resorted to constitutional advances, if not adventures.

Id.; see also GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* (1999).

19. *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597.

20. INDIA CONST. art. 21.

21. *Maneka Gandhi*, A.I.R. 1978 S.C. at 658. Justice Krishna Iyer has stated, “True our Constitution has not ‘due process’ clause or the VIII Amendment; but, in this branch of law, after Cooper and Maneka Gandhi the consequence is the same.” *Sunil Batra v. Delhi Admin.*, (1979) 1 S.C.R. 392, 428. It is important to bear in mind that the Constituent Assembly had, after considerable discussion, rejected the inclusion of a due process clause in Article 21. For discussions in the Constituent Assembly, see 7 CONSTITUENT ASSEMBLY DEBATES: OFFICIAL REPORT 842-57, 998-1001 (1948-49).

22. INDIA CONST. arts. 374-76.

In 1979, in a habeas corpus petition filed on the basis of a newspaper report on behalf of prisoners languishing in the remote jails of Bihar, the Court delivered a judgment holding the right to speedy trial as part of Article 21 of the Indian Constitution.²³ Between 1978 and 1981, four crucial events occurred that were to completely reinvent India's judicial functioning in many unknown ways. In 1980, the Court treated a postcard addressed to a judge of the Court as a writ petition.²⁴ In 1981, the Court in *Minerva Mills v. Union of India* held Part III and Part IV as "the core of commitment to social revolution" under the Indian Constitution and added, "To give absolute primacy to one over the other [would be] to disturb the harmony of the Constitution."²⁵ Finally in *S.P. Gupta v. Union of India*, the Court formally widened the principle of locus standi under the constitution, holding that *any* public-spirited individual can approach the Court for remedy when the victims are precluded from accessing the Court on specified grounds.²⁶

Two consequences of these events are worth mentioning. First, Article 21 became the repository of all socioeconomic rights mentioned in Part IV of the Indian Constitution, including rights not otherwise enumerated.²⁷ Second, public spirited individuals had a new constitutional role. The two consequences, when combined, formed a powerful coalition of a new rights order impacting India's constitutional dynamic in many unknown ways. The floodgates opened. Public interest litigation became the talk of the town and the tool of the judiciary. The Court was more eager than ever before to "democratize justice" and public-spirited individuals and organizations were more willing than ever to oblige the Court.

B. Action Begins: From Judges to "People's" Judges to "Popular" Judges

In the last two decades, social action litigation has so deeply affected constitutional law in India that judicial functioning today sans it is almost incomplete. The role that began with freeing prisoners awaiting trial from jails in remote districts of Bihar²⁸ has engulfed many areas of crucial importance in subsequent years.²⁹ Indeed, there is hardly any area

23. *Hussainara Khatoon (I) v. Home Sec'y, State of Bihar*, (1979) 3 S.C.R. 169, 180.

24. *Sunil Batra v. Delhi Admin.*, (1980) 3 S.C.C. 488, 562.

25. (1981) 1 S.C.R. 206, 255.

26. A.I.R. 1982 S.C. 149.

27. *See infra* notes 49-70 and accompanying text.

28. *Hussainara Khatoon (I)*, (1979) 3 S.C.R. at 169.

29. *See infra* notes 31-42 and accompanying text.

of constitutional importance that has remained untouched by the passion of social action litigation.³⁰ Its impact, however, has been particularly dominant in the evolution of law relating to “Fundamental Rights and Directive Principles.”³¹ While it may be difficult to enumerate all areas of constitutional law that may have benefited from Social Action Litigation, a broad categorization may be achievable. Social Action Litigation in the last two decades has concentrated in large measure on police functioning,³² jail reforms,³³ health care facilities,³⁴ matters affecting children including child labor and child adoption,³⁵ degradation of environment,³⁶ educational issues,³⁷ privacy concerns,³⁸ gender justice,³⁹ prostitution,⁴⁰ economic rights,⁴¹ and transparency in public life.⁴²

A closer analysis of Social Action Litigation as a judicial tool in promoting the constitutional vision reveals three functional phases. First was the “creative” phase wherein the Court employed Social Action Litigation to read rights into the constitution.⁴³ The second was the “lawmaking” phase wherein the Court legislated on areas of constitutional importance by developing new jurisprudence or importing

30. See SAMPAT JAIN, PUBLIC INTEREST LITIGATION 359-441 (2002) (discussing the areas that have been the subject matter of Social Action Litigation); see also P.M. BAKSHI, PUBLIC INTEREST LITIGATION 1-20 (1998).

31. See generally N.R. Madhava Menon, *The Dawn of Human Rights Jurisprudence*, (1987) 1 S.C.C. 1, 7.

32. See D.K. Basu v. State of W. Bengal, A.I.R. 1997 S.C. 610; People's Union for Civil Liberties v. Union of India, A.I.R. 1997 S.C. 568; Sheela Barse v. State of Maharashtra, (1983) 2 S.C.R. 337, 341; Prem Shankar Shukla v. Delhi Admin., (1980) 3 S.C.R. 855, 862.

33. See Charles Sobraj v. Superintendent, Cent. Jail, A.I.R. 1987 S.C. 1514; Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra, (1985) 2 S.C.R. 8, 17-18; Sher Singh v. State of Punjab, (1983) 2 S.C.R. 582, 587; Prabha Dutt v. Union of India, (1982) 1 S.C.R. 1184, 1186.

34. See State of Punjab v. Mohinder Singh Chawla, A.I.R. 1997 S.C. 1225; Paschim Banga Khet Mazdoorsamity v. State of W. Bengal, (1996) 4 S.C.C. 37; Parmanand Katara v. Union of India, (1989) 3 S.C.R. 997, 1005-06.

35. See M.C. Mehta v. State of Tamil Nadu, A.I.R. 1997 S.C. 699; Bandhua Mukti Morcha v. Union of India, A.I.R. 1997 S.C. 2218; Gaurav Jain v. Union of India A.I.R., 1997 S.C. 3021; Vishal Jeet v. Union of India, (1990) 2 S.C.R. 861; Gaurav Jain v. Union of India, (1990) 25 S.C.R. 173.

36. See B.L. Wadehra v. Union of India, (1996) 2 S.C.C. 594; Indian Council for Enviro-Legal Action v. Union of India, A.I.R. 1996 S.C. 1446; Vellore Citizens Welfare Forum v. Union of India, A.I.R. 1996 S.C. 2715; M.C. Mehta v. Union of India, (1987) 1 S.C.R. 819, 826.

37. See Unni Krishnan v. State of Andhra Pradesh, (1993) 1 S.C.R. 594, 622-23.

38. See *People's Union for Civil Liberties*, A.I.R. 1997 S.C. 568; R. Rajagopal v. State of Tamil Nadu, A.I.R. 1993 S.C. 264; Govind v. State of Madhya Pradesh, (1975) 3 S.C.R. 946.

39. See Madhu Kishwar v. State of Bihar, A.I.R. 1996 S.C. 1864; Vishakha v. State of Rajasthan, A.I.R. 1997 S.C. 3011.

40. See *Gaurav Jain*, A.I.R. 1997 S.C. at 3021.

41. See *Olga Tellis v. Bombay Mun. Corp.*, (1985) 2 S.C.R. Supp. 51, 62.

42. See *Vineet Narain v. Union of India*, A.I.R. 1998 S.C. 889.

43. See *infra* Part II.B.1.

principles from the international corpus of law.⁴⁴ Finally, the last was the “super-executive” phase of making policies and implementing them.⁴⁵

1. Rights, Rights, and More Rights: Fundamental Rights and the Novel Culture

The “creative” phase was dominated by the Court’s adventure to widen the spectrum of rights under the constitution. Frustrated by its inability to directly enforce socioeconomic rights guaranteed under Part IV of the constitution because of its nonenforceable nature,⁴⁶ the Court ingeniously expanded life and personal liberty under Article 21 to provide citizens with a larger Magna Carta from which to draw inspiration.⁴⁷ The guarantee of “life and personal liberty” under Article 21⁴⁸ has been expanded to include the right to live with human dignity,⁴⁹ the right to shelter,⁵⁰ the right to health,⁵¹ the right to work,⁵² the right to environment,⁵³ the right to clean air,⁵⁴ the right to clean water,⁵⁵ the right to privacy,⁵⁶ the right to information,⁵⁷ the right to speedy trial,⁵⁸ the right to fair trial,⁵⁹ the right to fair hearing,⁶⁰ the right against unnecessary handcuffing,⁶¹ the right against cruel punishment,⁶² the right to legal aid,⁶³ the right to medical aid in government hospitals,⁶⁴ the right to foreign

44. See *infra* Part II.B.2.

45. See *infra* Part II.B.3.

46. INDIA CONST. art. 37.

47. See *Minerva Mills v. Union of India*, (1981) 1 S.C.R. 206, 255. The expansion was achieved when the Court began interpreting enforceable provisions of Part III in the light of the unenforceable provisions of Part IV of the constitution.

48. INDIA CONST. art. 21.

49. See *Francis Coralie Mullin v. Adm’r, Union Territory of Delhi*, (1981) 2 S.C.R. 516, 529.

50. See *Avas Evam Vikas Parishad v. Friends Coop. Hous. Soc’y Ltd.*, A.I.R. 1996 S.C. 114, ¶ 6.

51. See *State of Punjab*, A.I.R. 1997 S.C. 1225.

52. See *Olga Tellis*, (1985) 2 S.C.R. Supl. 51, 73.

53. See *M.C. Mehta*, (1987) 1 S.C.R. 819.

54. See *Indian Council for Enviro-Legal Action*, A.I.R. 1996 S.C. 1446.

55. See *B.L. Wadehra*, (1996) 2 S.C.C. 594.

56. See *Govind*, (1975) 3 S.C.R. 946.

57. See *Dinesh Trivedi v. Union of India*, (1997) 4 S.C.C. 306.

58. See *State of Maharashtra v. Champalal Punjaji Shah*, (1982) 1 S.C.R. 299, 302.

59. See *Comm’r of Police v. Registrar Delhi High Court*, A.I.R. 1997 S.C. 95.

60. See *State of Maharashtra*, (1982) 1 S.C.R. at 302.

61. See *Prem Shankar Shukla*, (1980) 3 S.C.R. at 872.

62. See *Sunil Batra*, (1980) 2 S.C.R. at 563-65.

63. See *M.H. Hoskot v. State of Maharashtra*, (1979) 1 S.C.R. 192, 208.

64. See *Parmanand Katara v. Union of India*, (1989) 3 S.C.R. 997, 1005-06.

travel,⁶⁵ the right to education,⁶⁶ and even the right not to be driven out of the State.⁶⁷

2. The “Parliamentarian” Court: Glimpses of Judicial Lawmaking

More controversial, however, have been the Court’s “lawmaking” and “super-executive” phases. In the former, the Court legislated on matters of constitutional importance on the pretext of a legislative vacuum.⁶⁸ In *Laxmi Kant Pandey v. Union of India*, the Court formulated a compulsory procedure to be followed during inter-country adoption of Indian children.⁶⁹ In *M.C. Mehta v. State of Tamil Nadu*, the Court laid down a mechanism to ensure compliance with the Child Labour (Prohibition and Regulation) Act of 1986 with additional obligations for offenders and duties for statutory authorities.⁷⁰ Judicial “legislation” in the area of environmental law has also been particularly profound. In *M.C. Mehta v. Union of India*,⁷¹ the Court, while rejecting the application of the principle settled in *Rylands v. Fletcher*,⁷² held:

[A]n enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and nondelegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken.⁷³

In *Vishakha v. State of Rajasthan*, the Court laid down a twelve-point elaborate guideline to promote gender justice in work places.⁷⁴ The *Vishakha* judgment may largely be said to have institutionalized judicial lawmaking. It is an example of the application of lawmaking principles judicially evolved over time.

65. See *Satwant Singh Sawhney v. Ramarathnam*, (1967) 2 S.C.R. 525, 528.

66. See *Unni Krishnan*, (1993) 1 S.C.R. 594, 628-629.

67. See *Nat’l Human Rights Comm’n v. State of Arunachal Pradesh*, A.I.R. 1996 S.C. 1234, ¶¶ 13-14.

68. See *Vishaka*, A.I.R. 1997 S.C. 3011.

69. (1987) 1 S.C.R. 383, 387.

70. (1996) 6 S.C.C. 756.

71. (1987) 1 S.C.R. 819, 843.

72. (1861-73) All E.R. 1 (Ex. Ch.) (Eng.).

73. *M.C. Mehta*, (1987) 1 S.C.R. 819; see *Vellore Citizens Welfare Forum*, A.I.R. 1996 S.C. 2715 (holding the “polluter pays” principle, the principle of “sustainable development,” and the “precautionary principle” as part of Indian environmental jurisprudence, incorporating international environmental principles into the corpus of domestic law premised on the argument that the same had become part of customary international law and that there was nothing under domestic law that was contrary to it); see also *Indian Council for Enviro-Legal Action*, (1996) 3 S.C.C. 212.

74. A.I.R. 1997 S.C. 3011.

These examples, while illustrating the lawmaking adventures of the Court, also indicate a dual trend. The Court has attempted lawmaking in broadly two ways: by laying down elaborate guidelines on specific issues and, on other occasions, by incorporating concepts and principles from the corpus of international law. The effect of both methods, however, has been to add to the positivist content of domestic law.

3. The “Executive” Court: The Burial of Separation of Power

In its “super-executive” role, the Court attempted to run the nation from its headquarters in New Delhi, unconcerned about the constitutional ramifications of such endeavors. In the 1996 case, *T.N. Godavarman Thirumulpad v. Union of India*, and its 1997 successor,⁷⁵ the Court provided a thirty-point guideline, including the suspension of licenses to wood-based industries⁷⁶ and appointment of a “high powered” committee to oversee the strict and faithful implementation of the orders of the Court.⁷⁷ This judgment was only the first in a series of subsequent orders that the Court passed in an attempt to prevent forest cover degradation in the northeastern region of India.⁷⁸ In *Vineet Narain v. Union of India*, the Court developed the procedure of “continuing mandamus” making the principal investigating body in India accountable to the Court.⁷⁹ In *M.C. Mehta v. Union of India*, noting the harmful consequences of vehicular pollution on the general health of people, the Court ordered the implementation of directions to restrict plying of commercial vehicles, including taxis which were fifteen years old, and restriction on plying of goods vehicles during the daytime.⁸⁰ This was followed by a relentless spate of directives, including the order of conversion of a city bus fleet in New Delhi to a single mode of CNG⁸¹ and an introduction of Euro-I and Euro-II norms.⁸²

75. A.I.R. 1997 S.C. 1228; A.I.R. 1997 S.C. 1223.

76. A.I.R. 1997 S.C. 1228.

77. *Godavarman*, A.I.R. 1997 S.C. 1223.

78. Some of the other orders may be found in *Godavarman*, A.I.R. 1999 S.C. 97; A.I.R. 1999 S.C. 43; (1999) 1 S.C.C. 210; (1999) 5 S.C.C. 736; (2000) 5 S.C.A.L.E. 125; (2000) 1 S.C.A.L.E. 71; (1999) 5 S.C.A.L.E. 423; (2000) 1 S.C.A.L.E. 412.

79. (1998) 1 S.C.C. 226 ¶¶ 14-15; *id.* ¶ 8. *But see* INDIA CONST. art. 137. This decision was clearly in utter disregard of constitutional provision 137. Writs under Article 32(2) can be used only for the purpose of enforcing fundamental rights. Writs for any other purpose are subject to jurisdiction that Parliament may by law confer. Efficient functioning of investigative bodies is no enforcement of fundamental rights and neither is there any law by which Parliament has widened the writ jurisdiction of the Court. This makes the decision patently offensive to Article 137 of the Constitution.

80. (1998) 6 S.C.C. 63 ¶ 2.

81. *Id.* ¶ 3.

82. *M.C. Mehta*, (1999) 6 S.C.C. 12 ¶ 3.

C. Evaluation

None of the aforementioned phases falls within the framework of adjudication proper. Creating new rights, legislating, or attempting to implement laws does not fall within the profile of a traditional adjudication process. While the former is within the latitude of the legislature, the latter lies within the province of the executive. This novel culture of the judiciary is a far cry from the adjudicatory role under the traditional Anglo-Saxon jurisprudence.⁸³

Of these three controversial phases, judicial “legislating” is the most controversial. The “legislative” role within the canvas of Social Action Litigation strikes at the core of a constitutional democracy and raises important questions. A representative democracy is premised on the right of citizens to be governed by laws that reflect *their* will.⁸⁴ Can an unrepresentative judiciary claim immunity from this fundamental premise of democracy on the basis that its legislations are only to promote the constitutional vision and fill the existing legal vacuum?⁸⁵ Or is there a silent revolution restructuring the fundamentals of Indian democracy, a revolution that seeks to substitute democracy with meritocracy? Or are the principles by which one may analyze the existence of democratic institutions being redefined? If the Court prefers to reject any of these possibilities as ideal romanticism, questions arise that have not been adequately answered. In short, whatever the possibility, questions about the furor and future of Indian democracy remain unanswered.

83. See R.J. WALKER & RICHARD WARD, WALKER AND WALKER'S ENGLISH LEGAL SYSTEM (7th ed. 1994).

84. See generally CRAIG DUCAT, CONSTITUTIONAL INTERPRETATION 85 (8th ed., 2004). The author suggests:

To adequately justify the power of constitutional review, appointed, life-tenured judges must be shown to possess a unique quality—one so paramount that it transcends the importance of democratic accountability . . . they must be shown to possess a unique capacity to do justice. Failing this, the exercise of constitutional review by judges is defenseless against the simple and devastating retort, “Who elected you?”

Id.

85. See *id.* at 80.

III. "TO BE OR NOT TO BE": ARE JUDGES STRAINING DEMOCRATIC ETHOS?

A. *Understanding the Resistance*

Why is judicial lawmaking so often resisted?⁸⁶ "Much ink has been spilled" on addressing the issue.⁸⁷ Any possibility of consensus remains illusive. "Not only does the activity of judicial lawmaking remain mysterious, but a surprisingly large number of people, both within and without the legal community, question its legitimacy."⁸⁸ To provide even a possible sketch of each of them is an impossibility; to analyze the issue without any reference to them may take away from the academic value of this Article. I shall, therefore, attempt to generalize the existing literature into certain categories.

It may, however, be apt to state that I present arguments and analyses of the issue on the premise that organized people are the real sovereign in any democracy and not the constitution by which they are governed.⁸⁹ People are the ultimate repository of power, and it is their common agreement—whether understood in terms of a social contract that Hobbes, Locke, or Rousseau suggested or as a spontaneous, self-governing principle—that legitimizes the authority governing them.⁹⁰ To make the constitution the sovereign produces bizarre propositions that strike at the very basics of a democratic polity. While it is undeniable that a constitution is expected to serve a nation for many generations, the

86. For discussions of legitimacy of such judicial adventures in the context of the United States Constitution, see generally Richard H. Fallon, Jr., "*The Rule of Law*" as a Concept in *Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997) (describing the rule of law as complex and not clearly defined); Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603 (1985) (discussing the United States Supreme Court in the context of the United States Constitution); Robert A. Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93 (1983) (discussing the legitimacy of "noninterpretive review" by the United States Supreme Court).

87. JEROME FRANK, *LAW AND THE MODERN MIND* 35 (1970). Vast literature exists on this topic. See, e.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); RONALD DWORKIN, *LAW'S EMPIRE* 357-58 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]; H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 2000); see also O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641 (1923); Wolfgang Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 COLUM. L. REV. 821 (1961); Kent Greenwalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975).

88. Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 388 (1984).

89. But see B.R. Koppoo v. State of Tamil Nadu and Another, (2001) 6 S.C.A.L.E. 126 ¶ 74 (Pattanaik, J., concurring).

90. See generally GEORGE H. SABINE & THOMAS L. THORSON, *A HISTORY OF POLITICAL THEORY* (1973).

power to amend, repeal, or abrogate the same in favor of another cannot be taken away from the people.⁹¹ It is in this sense that I suggest that the people are the ultimate sovereign.⁹² Challenges to judicial legislation are often premised on the theory of separation of powers, the supremacy of the people's will, and representative democracy. These reasons do not exist independently; they supplement one another.

B. *The Conservative Argument*

The proponents of a conservative role for the judiciary based on the theory of separation of power argue that the province of the judiciary is not unlimited.⁹³ There exists a well-demarcated zone of constitutionally permissible activity, and for the judiciary to indulge in lawmaking is to overstep its limitations.⁹⁴ Lawmaking is strictly and squarely the province of the legislature, and the judiciary cannot lawfully encroach upon this exclusive territory.⁹⁵ The task of the judiciary is only to interpret the law and not to make law. Implied in this argument is a structural hierarchy in the three principal institutions: the legislature, the executive, and the

91. See 1 LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3d ed. 2000).

92. The Indian Supreme Court has, however, done exactly that. By reading a basic structure into the Constitution, the Court has suggested that there are certain core provisions that cannot be amended, repealed, or abrogated. See *Keshavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461.

93. Ronald Dworkin regards this "conservative-liberal" model of analyzing judicial attitude towards lawmaking as both fallacious and useless. See DWORKIN, *LAW'S EMPIRE*, *supra* note 87, at 357-58.

Popular imagination sorts justices into camps according to the answers they are thought to give to questions like these. It deems some justices "liberal" and others "conservative." . . . We know the fallacy in that description . . . it is useless as well as unfair to classify justices according to the degree of their fidelity to their oath.

Id. I, however, use the model to differentiate between justices *not* on the basis of their fidelity to their oath, but based on the extent judges may be willing to defer to the legislature the wisdom of interpreting abstract principles in the Constitution.

94. Upendra Baxi, however, argues that notions of the judiciary's role in the context of the theory of separation of powers are historically derived from the role judiciary have played in developed countries. To make the same applicable to developing countries is to make presumptions that may or may not be correct. See Upendra Baxi, *On the Shame of Not Being an Activist: Thoughts on Judicial Activism*, 11 *INDIAN B. REV.* 259, 265 (1984) ("An activist judge will consider herself perfectly justified in resorting to lawmaking power when the legislature just doesn't bother to legislate. Whatever may be said in the First World concerning this kind of lawmaking by judges . . . it is clear that in almost all counties of the Third World such judicial initiatives are both necessary and desirable and at least in the Indian experience it does not appear that legislators have resented much the judicial take over of their burdens, since it liberates them to attend to other tasks of *realpolitik*").

95. See HERMAN FINER, *THEORY AND PRACTICE OF MODERN GOVERNMENT* ch. 6 (1970), for an elaborate discussion of the theory of separation of powers and its application in the United States Constitution.

judiciary. The legislature sits on a higher pedestal than either of the other two given its proximity to the people, both by virtue of being their representative and consequently directly accountable to them. The executive and the judiciary, being appointed bodies rather than elected, do not share the pulse of the people, nor are they in any way politically accountable to them.

Champions of the “supremacy of people” theory premise their argument on the idea that law is a habitual submission to an authority, and the idea of consent is built into this analysis of what law is.⁹⁶ It is the consent of the people or a majority of the people that validates a law.⁹⁷ Legitimacy of a law is derived from the people’s will, and it is only the legislature that can validly represent the same.⁹⁸ To allow an unelected body like the judiciary to share the burden of lawmaking is to make the validity of laws based on considerations extraneous to that of the people’s will. These are the primary reasons usually employed to argue against any legislative role for judges in the working of a democratic constitution. In short, opposition to judicial lawmaking may be attributed to two groups: the structuralists, who argue on the basis of the theory of separation of power, and the supremacists, who argue that the will of the people is supreme and that judicial decisions cannot possibly reflect their will.

C. Democracy and not Majority: Critics’ Reply

Both of these arguments, however, work on unstated presumptions. First, they presume that a judge can always validly interpret and not make law, yet ensure that justice has been done in the case presented before him. One must appreciate that words do not speak for themselves. Words are highly indeterminate and mean only as much as they are interpreted to mean. More importantly, the interpretation of a word cannot always be divorced from its inherent moral content.⁹⁹ In the Indian Constitution, the command not to “deny to any person equality before law or the equal protection of the laws” in Article 14 or the “life or personal liberty except according to procedure established by law” in Article 21 requires the interpretation of the moral content of abstractions

96. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 172-73 (1999).

97. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 393 (Peter Laslett ed., 1988).

98. See *id.* at 388.

99. See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7-8 (2000).

involved in “equality,” “life,” or “personal liberty.”¹⁰⁰ Application of these abstract principles to concrete situations invariably requires making substantive value choices,¹⁰¹ which opponents of liberal judicial authority suggest constitutes lawmaking. To put it more plainly, interpretation of “equality” in a given instance then becomes what the judge thinks it is.¹⁰²

While it is true that not all provisions of the constitution involve the dilemma of interpreting abstract principles,¹⁰³ the problem is most pronounced in cases dealing with fundamental rights¹⁰⁴ and directive principles of state policy.¹⁰⁵ It may not be too difficult to now see why criticism of judicial lawmaking has tended to concentrate in matters related to these areas. But by denying judges this authority of a value choice we run the risk of making the rights of individuals subject to the will of the majority.¹⁰⁶ In other words, rights that I *may* have then become dependent on what the majority *thinks* I should have.¹⁰⁷ Also, denying

100. INDIA CONST. arts 14, 21; *see also* DWORKIN, *supra* note 99, at 7 (“The First Amendment refers to the ‘right’ of free speech, for example, the Fifth Amendment to the process that is ‘due’ to citizens, and the Fourteenth to protection that is ‘equal.’ According to the moral reading, these clauses must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government’s power.”).

101. *See* DWORKIN, *supra* note 99, at 8. This is what Dworkin refers to as the “moral reading” of the Constitution. *Id.* On the inescapability of judges making such choices, *see* LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 9 (1985).

102. *But see* DWORKIN, *supra* note 99, at 11. Dworkin refutes this possibility on the argument that history and integrity grant judges absolute power to impose their own moral convictions on the rest of us. “Even a judge who believes that abstract justice requires economic equality cannot interpret the equal protection clause as making equality of wealth, or collective ownership of productive resources, a constitutional requirement, because that interpretation simply does not fit American history or practice, or the rest of the Constitution.” *Id.*

103. *See* INDIA CONST. art. 56 (“The President shall hold office for a term of five years from the date on which he enters upon his office.”); *id.* art. 81(a) (“[T]he house of the People shall consist of not more than five hundred and thirty members.”).

104. *See, e.g., id.* art. 19(1)(d) (“All citizens shall have the right—to move freely throughout the territory of India.”); *id.* art. 24 (“No child below the age of fourteen years shall be employed . . . in any other hazardous employment.”).

105. *See, e.g., id.* art. 38(2) (“The State shall, in particular, strive to minimize the inequalities in income.”); *id.* art. 42 (“The State shall make provision for securing just and humane conditions of work.”).

106. *See* TRIBE, *supra* note 91.

107. *See id.* (“The fatal flaw of this ‘legislative solution’ argument is that it presumes that fundamental rights can properly be reduced to political interests. That may well be the case under a parliamentary government where the legislative will is supreme, but it ignores the choice of a fundamentally different form of government that was made for our nation two centuries ago. ‘The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy. Fundamental rights may not be submitted to vote; they depend on the outcome of no elections.’” (quoting *W. Va. Bd. of Educ. v. Barnette*)); *see also* WILLIAM W. JUSTICE, *A RELATIVIST CONSTITUTION IN JUDGES ON JUDGING* 152, 158 (David M. O’Brein ed., 1997).

judges this latitude in adjudicating would make them lifeless souls meant only to make a plumber-like mechanical application of law.¹⁰⁸

Second, proponents of conservative judicial power presume that the legislature always functions efficiently, requiring no correction by any independent organ. They presume that laws are enacted in ways that do not leave gaps or voids to be filled by judges.¹⁰⁹ This is hardly the case. A large part of the theory of interpretation of statutes deals with principles by which *casus omisses* may be corrected.¹¹⁰ Interpretation often requires reading into the statute nonexistent words or phrases to give it life and force. Legislative omissions,¹¹¹ or the legislative vacuum,¹¹² are matters that often confront judges. To deny them even the authority to temporarily provide succor to the injustice perpetrated is to undermine the position of judges in a constitutional democracy.¹¹³ If legislators are closest to the people in their representative capacity, then judges are no further in their duty to ensure that justice is secured.

Third, extra-judicial writings of judges have strongly forwarded a case of participation in the constitutional vision to refute conservative arguments of judicial usurpation of lawmaking power.¹¹⁴ It is argued that “if a judge is to bear faith and allegiance to the Constitution, he must necessarily imbibe the social justice values of that paramount instrument.”¹¹⁵ They regard the court as “a catalyst of social justice, a defender of the constitutional faith and the protagonist in the drama of human rights for the common man.”¹¹⁶ A judge for them is “a social engineer and people’s sentinel” who fulfills his obligations “not merely by adjudicating on the *lis* he tries but by catalysing moral-material transformation, not as a blinkered professional but as a dignified

108. See Iyer, *supra* note 10, at 44 (“Our judges are not monks or scientists, but participants in the living stream of national law.” (quoting United States Chief Justice Earl Warren)).

109. *But see* Seaford Court Ests. Ltd. v. Asher, 2 All E.R. 155, 164-65 (1949) (Eng. C.A.).

110. See generally William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985).

111. See CRAIES ON STATUTE LAW 94-95 (S.G.G. Edgar ed., 7th ed. 1971).

112. See *Vishakha*, A.I.R. 1997 S.C. 3011.

113. Sharma, *supra* note 13, at 54.

114. See D.A. Desai, *Constitutional Values and Judicial Activism*, 9 J. B. COUNCIL INDIA 258, 260 (1982) (“The role and function of judiciary must be examined not in isolation, not on any pre-conceived notions, not by the yard-stick of the Raj days, but as a third responsible and important segment of the Government of this country, how it would help in translating the promises of freedom struggle into reality.”).

115. See DWORKIN, *supra* note 87, at 43.

116. V.R. Krishna Iyer, *The Crisis of Contradiction Between the Elite in Power and the Constitution in Print—Are Judicial Robes Mere Dope or Real Hope*, in LEGALLY SPEAKING 146, 165 (2003).

surrogate constitutional daring to catalyze public opinion when evil forces hold to ransom progressive values.¹¹⁷ The idea presented in these writings is to create a constitutional space for the judiciary beyond the limited role of adjudication premised on a duty to fulfill constitutional aspirations.¹¹⁸

D. The Quest for a Middle Ground

None of the three reasons forwarded to counter the conservative argument against judicial lawmaking suggests any middle ground. While the conservatives aspire to uphold democratic values irrespective of the injustice that may be committed in some cases, proponents of liberal judicial authority supplant any notions of preserving the fundamental of democracy with concerns for justice as the ultimate goal.¹¹⁹ That a middle ground is required is to state the obvious. The debate over the nature and scope of judicial review is largely a debate of balancing principles of democratic governance with the necessity of ensuring the supremacy of the constitution.¹²⁰ While justice is undeniably a rightful aspiration in a constitutional democracy, judges cannot possibly disregard institutional limitations of the system in which they function. Therefore, to attempt to surmount every conceivable obstacle that a judge may face in his duty to ensure justice may be the very beginning of institutional collapse.

117. *Id.* at 165; V.R. Krishna Iyer, *Jurisprudence of Judicial Strictures*, in LEGALLY SPEAKING 259, 259 (2003).

118. Even the trials and dramas of political life affect judges in their functioning. See BENJAMIN N. CARDOZO, *THE NATURE OF JUDICIAL PROCESS* 168 (1921) (“The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.”).

119. At a broader level, this issue requires a much deeper investigation into the relationship between judicial institutions and democracy. In brief, I note here that, while judicial institutions do not necessarily stand in contradiction, there are limitations to the extent of power and the nature of disputes that can be resolved by the judicial process. Those limitations arise mostly from the primacy of organized people in a democracy. The role of the judiciary generally may be seen as undoing patent injustices when the deliberative process involving organized people denies some groups adequate representation.

120. The apparent dilemma in the context of the United States Constitution has been succinctly summarized by Robert Bork.

The United States was founded as what we now call a Madisonian system, one which allows majorities to rule in wide areas of life simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. The first would court tyranny by the majority; the second, tyranny by the minority.

Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 824 (1986).

Two questions arise. First, how do we reconcile the functional necessity of a judge to make moral interpretations to remain efficient with the need to ensure that he does not supplant the will of the majority with his ideas of what may be right and wrong under the constitution? Second, why has the judicial legislation been concentrated only in certain areas and not in others?

In the next Part, I shall replay these arguments to analyze the reasons why the Court embarked on this vigorous legislation mission.

IV. WHY DO JUDGES FILL GAPS?: IS THERE MORE TO THE LITTLE THAT IS SAID?

A. *The Verdict: "Filling the Gaps"*

Notwithstanding all criticisms of judicial lawmaking, the Court has continued to tread the forbidden path with a sense of refreshing vigor. Of the three possible reasons for a judge to indulge in lawmaking discussed in Part III of this Article, decisions of the Court suggest a clear recognition of the latter two: "fill the legislative vacuum" and "participate in the grand constitutional visions."¹²¹ In *Vishakha*, the Court explained its constitutional role as such:

The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles . . . represent[] the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary.¹²²

This reasoning was reaffirmed in *Vineet Narain v. Union of India*.¹²³ In explaining its powers, the Court observed:

There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141. . . . This power *has been recognized and exercised*, if need be, by issuing necessary directions *to fill the vacuum* till such time the legislature steps in to cover the gap or the executive discharges its role. . . . *Thus an exercise of this kind by the court is now a well settled practice which has taken firm roots in our constitutional jurisprudence. This exercise is essential to fill the void in the absence of suitable legislation to cover the field.*¹²⁴

121. *Vishaka v. State of Rajasthan*, A.I.R. 1997 S.C. 3011 ¶¶ 3, 11.

122. *Id.* ¶ 11.

123. (1998) 1 S.C.C 226.

124. *Id.* ¶¶ 42, 45 (emphasis added).

The Court pointed out the duty of the executive to fill the vacuum by executive orders. This duty is coterminous with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in and exercise its constitutional obligation under the aforesaid provisions to provide until such time as the legislature acts.¹²⁵

It is readily discernible that the grounds on which the Court premises its argument are at best incoherent. Article 32 gives the power to the Court to enforce rights guaranteed under Part III of the Constitution;¹²⁶ Article 141 states that the law declared by the Court shall be binding on all courts within the territory of India¹²⁷ while Article 142 confers upon the Court the power to pass “such decree or such order as is necessary for doing complete justice in any case, or matter pending before it.”¹²⁸ Can a joint reading of these three provisions possibly lead one to the conclusion that the Court must legislate when the legislature or the executive fails? If anything, it only allows one to reach the opposite conclusion. Article 141 makes law declared by the Court binding on “*all courts* in the territory of India.”¹²⁹ By indulging in lawmaking the Court has interpreted the words to mean that the law declared shall be binding on “*all* in the territory of India.” Can there be a worse example of judicial lawlessness in interpreting a constitutional provision? The only point I wish to highlight here is this: lawmaking power of the Court is not borne by the *text* of the constitution. The reason is more contextual than the Court would have us believe.

It is also commonly suggested that judges should not merely adjudicate on rights and wrongs, but have to be sentinels on the *qui vive*.¹³⁰ The social goals enshrined in the Preamble of our Constitution, the fundamental rights chapter, and the directive principles of state policy broadly and vaguely project our current legal philosophy. The judicial organ, being part of the state, shares the national objective and perspective of political and economic democracy.¹³¹ A large part of our jurisprudence has also developed on the presuppositions of a judicial role under a constitution inspired by the concepts of socioeconomic and political justice. The jurisprudence is remarkably inconsistent,

125. *Id.* ¶ 42.

126. INDIA CONST. art. 32.

127. *Id.* art. 141.

128. *Id.* art. 142.

129. *Id.* art. 141.

130. See V.R. KRISHNA IYER, JUDICIARY: OUR TRYST WITH DESTINY IN LAW AND THE PEOPLE 65, 66 (1972).

131. See *id.*

unpredictable, and, on many occasions, constitutionally unjustified.¹³² Judgments have often been powerful for their passion and rhetoric, but they are of little use as a text of constitutional law. The mantle of justice has somehow been judicially monopolized; observations of executive dysfunction and appeal to constitutional aspiration of social justice have been powerful tools.

The above reasoning does not capture the complete essence of the working of the judicial mind in legislating decisions. The reasons are more fictional than real, more contextual than textual. I would submit that the true reason is both institutional and historical, and not functional as the Court suggests it is. The novel culture of the judiciary is more a reaction to the very nature of our institutional polity than the manner in which it functions.

B. The Unsaid Argument (I): Institutional Inefficiencies of Indian Democracy

The Indian Constitution proclaims representative democracy as the institution of political governance,¹³³ now elevated to the status of basic structure.¹³⁴ But representative democracy as an institution of political governance suffers from institutional inefficiencies. The manner and considerations on the basis of which the right to franchise is employed become a crucial determinant of how efficiently political institutions may function in such a system of governance. The probability of inefficiency in governance is high when the right is exercised not on considerations of efficiency, capability, and experience, but on grounds wholly extraneous to good governance. This has more truth in India where exercising franchise is appreciated as an “assertion of primordial loyalties of caste, religion,” and ethno-linguistic connections.¹³⁵

132. One example of such inconsistency may be found in the decisions of the Supreme Court that discuss the status of the judiciary under Article 12 of the Constitution. The Court has consistently held that, for the purpose of Part III, the judiciary is *not* “the State” within the meaning of Article 12. But the Court has also consistently justified its activist role in implementing the mandate of Part IV by highlighting that the mandate is to the State and that the judiciary, being part of “the State,” is also obligated to contribute to its fulfillment. Interestingly, the definition of “the State,” *both* for the purposes of Part III and Part IV, is found in Article 12. *See* INDIA CONST. art. 12. If the Court is correct in saying that the judiciary is not “the State” under Article 12 for the purposes of Part III, it is difficult to explain the inconsistency in judicial decisions that have held that judiciary is state for the purposes of Part IV.

133. *See, e.g.*, INDIA CONST. arts. 79, 81.

134. *Keshavananda Bharati v. State of Kerala*, (1973) 4 S.C.C 225 ¶ 287.

135. *See* Jayaprakash Narayan, *The Crisis of Governance*, in DOES CIVIL SOCIETY MATTER? GOVERNANCE IN CONTEMPORARY INDIA 77, 97 (Rajesh Tandon & Ranjita Mohanty eds., 2003).

Politics in India is often described as personality politics.¹³⁶ Most generally, it connotes a towering figure around whom much of power dynamics revolve.¹³⁷ As voting trends in election history would suggest, often candidates have been elected not because they are efficiently the best, but because they charismatically appeal to the voters.¹³⁸ There are umpteen instances of really worthy candidates being defeated at the hustings even as known criminals and corrupt persons are elected to public office.¹³⁹ Elections are conducted on caste calculations, candidates nominated on caste considerations, and patronage distributed on caste basis and caste quotas.¹⁴⁰ More importantly, the caste factor precedes the elections, operates during the elections, and persists with a vengeance in cabinets, legislatures, and bureaucracies.¹⁴¹ The problem of caste considerations as the dominant role in electoral politics has magnified with the shift in voting concentrations from the educated to the uneducated section.¹⁴² While the last two decades have witnessed a decline in the proportion of illiterates, there has also been an increase in the propensity of the illiterates to vote.¹⁴³ This shift, therefore, ensures that caste loyalties remain a dominant force in voting patterns.

Charismatic appeal is often premised on caste loyalties. The overriding importance of charisma in deciding electoral preference

136. See Prakash Desai, *Personality Politics: A Psychoanalytic Perspective*, in CRISIS AND CHANGE IN CONTEMPORARY INDIA 245, 245 (U. Baxi & Bhikhu Parekh et al. eds., 1995).

137. *Id.* The determinant of this towering figure is predominantly based on caste equations. See, e.g., PAUL R. BRASS, THE NEW CAMBRIDGE HISTORY OF INDIA: PART IV.1: THE POLITICS OF INDIA SINCE INDEPENDENCE 97-98 (2d ed. 1994) ("At the local level, in the countryside, by far the most important factor in voting behavior remains caste solidarity. Large and important castes in a constituency tend to back either a respected member of their caste or a political party with whom their caste members identify.").

138. CRAIES ON STATUTE LAW, *supra* note 111, at 95 ("Massive irregularities in the polling processes make sure that the candidates who deploy abnormal money and muscle power have a distinct advantage. Most major parties nominate a 'winnable' candidates *without reference to their ability or integrity*. Criminals have a decisive or dominant influence on the outcome of elections in many parts of India and have often become party candidates and won on a large Scale."). This electoral phenomenon is in many regards an actualization of Max Weber's legitimacy based on charismatic authority theory. While the rational legal authority existed as a separate category, distinct and independent from the charismatic authority in Weber's assessment of various types of authority, the Indian system in many ways is a convergence of Weber's explanation of different types of authorities. See GEORGE RITZER, SOCIOLOGICAL THEORY ch. 5 (1997).

139. Narayan, *supra* note 135, at 77.

140. See SHYAM S. AGARWALA, RELIGION, CASTE AND POLITICS 161 (1998).

141. *Id.*

142. See generally Yogendra Yadav, *Understanding the Second Democratic Upsurge: Trends of Bahujan Participation in Electoral Politics in the 1990s*, in TRANSFORMING INDIA: SOCIAL AND POLITICAL DYNAMICS OF DEMOCRACY 137 (Francine R. Frankel et al. eds., 2000).

143. *Id.*

creates what I would regard as institutional inefficiencies.¹⁴⁴ Inefficient governance and a lackadaisical attitude in fulfilling the constitutional vision are directly attributable to the institutional inefficiencies that underlie the system of representative democracy. The novel culture of the nontraditional judge is, therefore, a *social* intervention to correct the inefficiency of the system. The intervention is not an imposition, but a product of the system itself.

However, if judicial legislation is seen as a correction of institutional inefficiencies of representative democracy in India, then the question arises: Why has the Court attempted legislation only in the last two and half decades? After all, it is undeniable that representative democracy in India has suffered from such inefficiencies ever since its birth, probably more in its earlier years. This question, I would submit, takes us back to my opening argument in Part I. The novelty of the judiciary must be appreciated in the background of the Emergency in 1975 and the inability of the Court to protect the political and civil rights of its citizens.¹⁴⁵ The instrument of Social Action Litigation and the reinvented judicial role is the result of this quest for an identity within the constitutional framework.¹⁴⁶ Understood in this context, the novel culture evolved only after 1975-77, not because Indian democracy did not suffer from institutional inefficiencies prior to it; rather it is only a part of the Court's wider campaign to regain legitimacy as the true protector of political and socioeconomic rights under the Indian Constitution.

C. *The Unsaid Argument (II): Do Judges Fill "Political Gaps"?*

It is also interesting to observe that judicial legislation to fill a legislative vacuum has been concentrated only in certain areas. Sexual harassment of women in the workplace, inter-country child adoption, police reforms, prison reforms, criminal justice reforms, child labor, and

144. See *contra* Sudipta Kaviraj, *The Nature of Indian Democracy*, in 1 SOCIOLOGY AND SOCIAL ANTHROPOLOGY 1447, 1447 (Veena Das ed., 2003). The author suggests that this is the most familiar form of argument against Indian democracy.

The successful operation of democracy requires that individual electors should vote on the basis of their considered individual judgment, and on the basis of their perception of their self-interest. Caste and community attachments, it is argued, would defeat a successful operation of democracy. The historical record of Indian democracy, however, shows that such objections are indecisive. Despite continued poverty, and the undeniable influence of caste and communities on political choice, the democratic system in India has functioned with vitality.

Id. It is interesting to note that despite these arguments, Kaviraj in his paper provides examples, many of which run counter to his argument of a democracy functioning with "vitality."

145. DHAR, *supra* note 17, ch. 10.

146. See *generally* DAS, *supra* note 18.

the environment are the major areas where the Court has concentrated its energy in legislating. Surely there are many other areas where a legislative vacuum exists, for example, the uniform civil code, a constitutional mandate under Article 44.¹⁴⁷ But judicial intervention has been far from forthcoming in the latter.¹⁴⁸ If the Court's argument for filling a legislative vacuum is indeed the complete reasoning, what explains this limited interest in accomplishing a constitutional vision? This diffused enthusiasm of the Court is best explained by the following hypothetical example.

1. *Vishakha* in a Political Context

Let us assume a state of affairs where terrorists are on a rampage throughout the country. There is a palpable feeling of fear and insecurity. Assassinations and kidnappings for ransom have become a routine affair. Bomb blasts in public places and violence seem to have taken over the country. Law and order are paralyzed, and an inexplicable fear has gripped the common psyche. Life and personal liberty are in imminent danger, and the state has failed to protect its people. It is evident that the normal law and order mechanisms and the penal provisions under the existing criminal law have failed. In the background of this state of affairs, let us assume that neither the relevant lawmaking body, state assemblies, nor the Parliament enact any special law to deal with this unusual situation, thereby failing in their constitutional duty to protect the life and liberty of the citizens. Let us also assume that a public-spirited citizen files a writ petition under Article 32. He alleges the inefficiency of the legislature and the executive in discharging their constitutional obligation by specifically pointing out the failure of existing law and the evident legislative vacuum. Would the Court in its novel role lay down guidelines to deal with the unusual situation until the appropriate bodies realize their constitutional obligation? Such a course of judicial conduct is highly improbable, if not absolutely impossible.

147. INDIA CONST. art. 44 ("The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.").

148. It may, however, be mentioned that the Court did once "direct" the Parliament to consider implementing the mandate of Article 44 in *Sarla Mudgal v. Union of India*, A.I.R. 1995 S.C. 1531, only to backtrack later in *Lily Thomas v. Union of India*, A.I.R. 2000 S.C. 1760. The decision of the Supreme Court "directing" the Parliament to consider a law on Uniform Civil Code was really an exception, the attitude largely being one of deference to the wisdom of the Parliament. See *Ahmedabad Women's Action Group v. Union of India*, A.I.R. 1997 S.C. 3614; *Maharshi Avadesh v. Union of India*, 1994 Supp. (1) S.C.C. 713; *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) 3 S.C.R. 844.

On the contrary, even the most liberal exponent of judicial power would cringe at the thought of exercising such power. But why so?

This hypothetical situation is no different from the contextual background in which the *Vishaka* writ petition was filed.¹⁴⁹ There was rampant sexual harassment of women in the workplace, seriously threatening their life and limb.¹⁵⁰ There was a constant threat of harassment, and the Parliament failed to enact a special law to deal with this unusual phenomenon.¹⁵¹ Into this legislative vacuum came the *Vishaka* judgment.¹⁵² If the Court's reasoning of an existing legislative vacuum was a sufficient explanation of the Court's functioning, it is difficult to explain why the Court intervened in the latter occasion but would refuse to do so in the previously mentioned hypothetical scenario. Is there an unwritten code about the areas of judicial intervention or an unsaid approach to it? This dichotomy in the working of the novel culture emphasizes the inadequacy of the Court's reasoning and real justification for such adventure.

2. Creating Zones of Legitimacy

The explanation for this functional dichotomy lies in the involvement of political issues, rather than being a part of the constitutional order of "right-duty consciousness." Issues involving the enactment of a special criminal law to deal with an unusual law and order problem or the existing vacuum of a uniform civil code lie within the political zone of legislative activity. Guidelines on sexual harassment of women in the workplace, inter-country adoption of children, the manner of arresting criminals, and the treatment of prisoners largely fall within the zone of individual rights. While the rationale, manner, and content of laws in the political zone are highly debatable, the same does not hold in the case of individual rights. Sexual harassment of women in the workplace is deplorable, and the rationale for a law dealing with the same is not debatable. The constitution proclaims equality of the sexes, and women have the right to a secure working environment.¹⁵³ Similarly, the need and the rationale for a legal regime to protect the interests of children during adoption is not debatable, nor is the role in regulating the conduct of jail authorities in dealing with prisoners. The constitution protects, inter alia, the rights of children and others, and the necessity for

149. *Vishaka*, A.I.R. 1997 S.C. 3011.

150. *Id.*

151. *Id.*

152. *Id.*

153. INDIA CONST. art. 39.

a law to protect the same cannot be questioned within the constitutional framework.¹⁵⁴

In contrast to this individual rights zone, the very rationale for a law in the political zone is often and highly debatable. While protecting life and limb of all persons is a State obligation, it does not necessarily follow that a special criminal law *must* be enacted to deal with the unusual law and order scenario of the state. There is no right to live in a society with a special criminal law to deal with an unusual law and order problem. But there *does* exist a right to live and work in a place that has an effective regulatory mechanism to deal with the menace of sexual harassment of women in the workplace. While the former falls strictly within the political zone, the latter is part of the constitutional order of “right-duty consciousness.”

Difficulties arise, however, with matters such as the environment and child labor. While there does exist a right to live in an unpolluted environment, the manner of regulating the environment is not as clearly articulated. In other words, the right to live in a clean environment is part of the constitutional order of “right-duty consciousness,” but it does not include the right to live in an environmental law regime that incorporates the principles of sustainable development, the precautionary principle, or the polluters’ pay principle. Similarly, while every child has a right to education, there does not exist a constitutional order of “right-duty consciousness” to education to the exclusion of any work that a child may be doing. Matters such as the environment and child labor clearly fall both within the zone of political and individual rights. This difference may be explained by the following diagram. In the following diagram, “A” represents the zone that may be strictly called political while “B” represents the zone of individual rights or the social zone. “C” represents the area overlapping both the political and the social zones.

A	C	B
Uniform Civil Code	Environment	Prisoners’ rights
Terrorism	Child Labor	Rights of Child in Adoption

It is interesting to note that the judicial legislative decisions have remained confined only to categories “B” and “C” in the above diagram. That is, first to matters pertaining to strictly individual’s rights or social issues, and second to quasi-political matters. This reiterates my earlier argument that this novel culture of the judiciary is in the nature of a *social* intervention, or at best a liberal-social intervention, to correct

154. *Id.*

institutional inefficiencies in a representative democracy.¹⁵⁵ Therefore, the Court's reasoning is that a legislative vacuum must be understood as one affecting rights in the constitutional order of "right-duty consciousness." However, the Court has erringly traveled beyond the limits of this "right-duty consciousness" in its overzealous drive to project its protector role. By lawmaking in matters pertaining to the environment¹⁵⁶ and electoral reforms,¹⁵⁷ the Court indicates its function in the quasi-political or completely political zone.

D. The Novel Culture: Glimpses of India's Hindu Past

Interestingly, in this novel culture, the Court is in fact closer to the conception of the justice system in the ancient Hindu legal system.¹⁵⁸ The role is novel only within the canvas of the English common law system but surprisingly traditional when analyzed from the perspective of the Hindu legal system.¹⁵⁹ In the ancient Hindu legal system, the judge was obligated to dispense justice not merely by formally adjudicating on applicable rules, but by promoting the higher content of justice embedded in dharma.¹⁶⁰ Judges in the ancient Hindu legal system were essentially part of the institution of justice rather than the institution of the law.¹⁶¹ Traveling beyond the existing framework of law, the judge could create or enunciate rules that were ideally suited to the dispute at hand rather than rigidly apply existing law.¹⁶² The Hindu judges often concentrated their energy in promoting the justice content of dharma.¹⁶³ This dharmic role of the judge was more to promote the macrocosmic universal Order (*Rta*) of the Vedic system within the justice delivery mechanism.¹⁶⁴ Judges in this legal system were far more integrated into

155. See *supra* Part IV.B.

156. *Indian Council for Enviro-Legal Action*, 3 S.C.C. 212; *Vellore Citizens Welfare Forum*, A.I.R. 1996 S.C. 3011.

157. *Union of India v. Ass'n for Democratic Reforms*, (2002) 5 S.C.C. 294.

158. WERNER MENSKI, *HINDU LAW: BEYOND TRADITION AND MODERNITY* 258-65 (2003).

159. *Id.*

160. See M. RAMA JOIS, *1 LEGAL AND CONSTITUTIONAL HISTORY OF INDIA* 495 (1984).

161. See *THE LAWS OF MANU* 153 (Wendy Doniger trans., 1991) ("[W]here justice is destroyed by injustice, and truth by falsehood, while the judges there look on, they are destroyed. When justice is destroyed, it destroys; when justice is protected, it protects. Therefore, justice may not be destroyed, or justice destroyed may kill us.").

162. This is a corollary that largely follows from the paramount importance attached to the institution of justice in the Hindu conception of judicial administration. See *generally* DAS, *supra* note 18.

163. See *THE LAWS OF MANU*, *supra* note 161, at 153.

164. See MENSKI, *supra* note 158, at 258.

the system of political governance than most modern constitutions envisage within their positivist canvass.¹⁶⁵

In this activist role, the workings of the Court have been closer to our cultural past than any other institution in modern India. The primary function of the modern-thinking Indian judge continues to involve the removal of social harms or injustices, not simply plumber-like mechanical application of statutory provisions in the positivist mold of enforcing the law.¹⁶⁶ However, this dharmic role of the judiciary, premised on our cultural past, cannot by itself claim legitimacy in an otherwise positivist structure of representative democracy. Given that judicial rulings in any of the three categories are laws properly understood, irrespective of their nature, they must satisfy the test of legitimacy. Without a certain test of legitimacy, judicial functioning within an otherwise positivist constitutional framework would continue to create an imbalance that, far from promoting the roots of representative democracy, would weaken it.

V. THE LEGITIMACY TEST: JUDICIARY AND THE UNIVERSAL CONSTITUTIONAL ORDER

Tying up the ends, therefore, I would submit that, irrespective of the zones in which the Court legislates, such legislation must be subject to the same legitimacy test as is applicable to formally enacted legislation. Legitimacy of such legislation is achieved at two levels. First, it must reflect the people's will, even if notionally. Second, it must be constitutionally permissible. While it is unlikely that a judicial legislative decision would be framed in a manner that violates constitutional provisions, it is imminently possible that such legislative decisions fail to satisfy the first requirement of legitimacy. The first condition, even if notional, is fundamental to an ordered democratic polity. Men are governed by laws by which they want themselves to be governed; legislators, as representatives of the political citizenry, are no more than a mere tool in enacting them.¹⁶⁷ As an unrepresentative body from the perspective of popular will, the judiciary cannot satisfy the first legitimacy criterion. Without a mechanism to test judicial legislative decisions against the popular consciousness, such functioning would fail the fundamentals of a democratic polity. Law as the reflection of popular consciousness would become the opinion of a meritorious few, and this

165. *Id.*

166. *Id.* at 258-64.

167. TRIBE, *supra* note 91.

presents a constitutional conundrum. Institutionalizing such a process of legislation in years to come may present Indian democracy with problems unthinkable today. While the Court's motive in cultivating such a novel culture may be benevolent, the unseen threats of such illegitimate functioning are many and profound. The importance of legitimizing such judicial legislation cannot be underestimated. What, therefore, can legitimize such nontraditional judicial authority in a constitutional democracy in the Indian context?

I would submit that the legitimacy of such judicial lawmaking lies in the internalization of legislation by the popular consciousness.¹⁶⁸ Internalization may be achieved by two methods. First, legislation may be per se valid if it reflects the constitutional order of "right-duty consciousness" and the judicial legislation is no more than a juridical *exposition* of the existing order. This is close to the concept of *Rta* in ancient India¹⁶⁹ and the role of judges as exponents of the already existing cosmic order.¹⁷⁰

Rta, like dharma, has no striking English equivalent.¹⁷¹ What is generally referred to as the dharmic order has its origin in the philosophy of *Rta*. Etymologically, *Rta* stands for "course" and originally meant "cosmic order," the maintenance of which was the purpose of the Vedic Gods.¹⁷² *Rta* later came to mean "right," as preserving the world not merely from physical order but also from moral chaos.¹⁷³ It is the "regular recurring rhythm,"¹⁷⁴ or the idea of an ordered universe that weaves a conspectus of right and wrong.

It stands for law in general and the immanence of justice. This conception must have been originally suggested by the regularity of the movements of sun, moon and stars, the alternations of day and of night, and of the seasons. The world [order] of experience is a shadow or reflection of the *Rta*, the permanent reality which remains unchanged in all the welter of mutation. What is, is an unstable show, an imperfect copy.¹⁷⁵

168. *See id.*

169. For a brief explanation of the concept of *Rta*, see 1 S. RADHAKRISHNAN, INDIAN PHILOSOPHY 78-80 (1999).

170. *See* ARVIND SHARMA, CLASSICAL HINDU THOUGHT: AN INTRODUCTION (1999).

171. *Id.*

172. *Id.*

173. *See id.*

174. Swami Ghananda, *Dawn of Indian Philosophy*, in THE CULTURAL HERITAGE OF INDIA 333, 334 (Suniti Kumar Chatterji et al. eds., 1937).

175. RADHAKRISHNAN, *supra* note 169, at 78-79.

“The world is no more a chaos representing the blind fury of chance elements, but is the working of a harmonious purpose.”¹⁷⁶ The actualization of this universal order within temporal structures of human existence requires the performance of rights, duties, and obligations at an individual, social, and national level.

While the philosophy of *Rta* in traditional Hindu literature has religious overtones,¹⁷⁷ its temporal significance as the universal order of rights and duties can be fundamentally instrumental in understanding the role of a judge in protecting this order. If we reconstruct the philosophical basis of Part III and Part IV of the Indian Constitution as a systemic endeavor to create a constitutionally ordered polity, the role of the judge may be much easier to appreciate.

That women must be respected, at home and in the workplace, is evident from a plain reading of the provisions of Part III and Part IV, especially Article 15(3)¹⁷⁸ and Article 43.¹⁷⁹ Therefore, when the Court legislates to prohibit sexual harassment of women in the workplace,¹⁸⁰ the Court does no more than articulate principles of the existing ordered polity.

Similarly, when the Court in *D.K. Basu v. State of West Bengal*¹⁸¹ held that

[a] person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable,¹⁸²

the Court was not legislating. This guideline was no more than an exposition of the existing right that arrested persons have under the charter of human rights. They merely add context to the existing abstract order of accused persons' human rights.

Similarly, the Court's legislation in the field of child adoption,¹⁸³ rather than making law, expounds on the constitutional order of children's rights. A child has a right to a secured upbringing; he or she does not

176. *Id.* at 80; see 1 AINSLIE T. EMBREE, SOURCES OF INDIAN PHILOSOPHY ch. 1 (1st ed. 1988).

177. See SHARMA, *supra* note 170, at 71-89.

178. INDIAN CONST. art. 15(3) (“Nothing in this article shall prevent the State from making any special provision for women and children.”).

179. INDIA CONST. art. 42 (“The State shall make provision for securing just and humane conditions of work and for maternity relief.”).

180. See *Vishakha*, A.I.R. 1997 S.C. 3011.

181. A.I.R. 1997 S.C. 610.

182. *Id.* ¶ 36.

183. See *Laxmi Kant Pandey*, (1987) 1 S.C.R. 383, 387.

lose the same when brought up by foreign parents.¹⁸⁴ By laying down a regulatory framework for inter-country adoption, the Court, rather than legislating, has attempted to fructify the larger abstraction of a safe childhood in a system of ordered existence.¹⁸⁵ So long as the Court legislates in expounding the existing constitutional order, such legislation is *per se* constitutional.

The constitutional order just *is*, but the implementation is a shadowed, fragmented version of the same. There is no one way or one means to its attainment. For example, a secured and happy childhood is an integral part of the order. However, the same would move out of the radius of expounding the existing order if the Court were to decide, for example, that inter-country adoption of Indian children is *not* permissible. In such cases, the Court, rather than explaining the existing order under the constitution, would be attempting to suggest the most appropriate manner of achieving an ordered existence. Similarly, if the Court concludes that arrests of all accused persons without a warrant are unconstitutional, it would be outside the radius of the existing constitutional order. Such decisions, I would submit, cannot claim *per se* protection. Such legislation must remain the sole prerogative of the traditional lawmaking institutions.

Second, internalization of legislation by the popular consensus may be achieved if the legislature codifies the judicial legislation into a statute. This criterion becomes important when the Court legislates on matters that fall strictly within the political zone or in the overlapping zone.¹⁸⁶ As argued earlier, the very nature of legislation in these matters is questionable. If, therefore, the Court in a Social Action Litigation proceeding lays down guidelines for a uniform civil code, it does not become legitimate until the formal lawmaking institution incorporates the same as part of our ordered existence.

While it may be easy to understand the legitimizing process in political matters, the issue becomes far more complicated with respect to the overlapping zone. Is judicial legislation in the overlapping zone *per se* legitimate, or does it require political incorporation? While it is true that the basic question of existence is irrelevant in matters falling in these

184. *Id.*

185. *See* INDIA CONST. art. 39(f) ("The State shall, in particular, direct its policy towards securing" that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and "that childhood and youth are protected against exploitation and against moral and material abandonment.").

186. *See supra* Part III.C.

zones, the choices by which the same can be regulated are too many and no less political.

In other words, while it is true that a constitutional order for a clean environment exists, the same does not extend to *how* the order should be maintained. The response to environmental degradation and the principles to be applied in regulating the same do not form part of the existing order. Therefore, when the Court, in *Indian Council for Environmental Action v. Union of India*, ruled sustainable development as the part of Indian environmental jurisprudence, the Court was legislating, rather than expounding an existing order.¹⁸⁷ The order is the right to live in a clean unpolluted environment; but to suggest that the principle of sustainable development is part of this ordered existence is to move beyond mere articulation of the order that *is*.

Similarly, the Court in *Supreme Court Advocates on Record Association v. Union of India* held that the opinion of the Chief Justice of India, for the purposes of Articles 124(2) and 217(1), so given, has primacy in the matter of all appointments.¹⁸⁸ Furthermore, no appointment can be made by the President under these provisions to the Indian Supreme Court and the Indian High Courts, unless it is in conformity with the final opinion of the Chief Justice of India.¹⁸⁹ The Court was “virtually *rewriting* the Constitution to assign a role to the Chief Justice in the whole conspectus of the Constitution.”¹⁹⁰ While the opinion of the majority may have been inspired by the need to uphold “the cardinal principle of the Constitution that an independent judiciary is the most essential characteristic of a free society,”¹⁹¹ the Court erred in equating a constitutional order of independent judiciary with that of the primacy of the Chief Justice. An independent judiciary is undeniably a part of the constitutional order that *is*; primacy of the Chief Justice in judicial appointment is just one of the ways of attaining the *is*.

To be legitimate, judicial legislation must undergo the process of incorporation. Without formal enactment, a decision of the Court remains no more than a mere suggestion deserving respectable consideration. In other words, matters that fall strictly within the political zone or in the overlapping zone will require formal incorporation before they can enjoy legitimacy within our framework of constitutional democracy. On the other hand, judicial legislation in the

187. (1996) 3 S.C.C. 212.

188. (1993) 4 S.C.C. 441.

189. *Id.*

190. *Id.* ¶ 510 (Punchi, J., dissenting).

191. *Id.* ¶ 53.

social zone will enjoy legitimacy per se, so long as the legislation expounds the existing constitutional order rather than creating a new one.

EPILOGUE: THE LITTLE RIGHT AND THE GREAT WRONG

Without a legitimizing process, judicial lawmaking in the guise of Social Action Litigation creates constitutional imbalances that challenge the representative foundations of our democratic polity. While judicial lawmaking may not be condemned per se as usurpation of legislative functions, it should not be uncritically celebrated either. The latter would amount to supplanting constitutional democracy with meritocracy. In creating an order defined by political, economic, and social justice, judges have an influential role. The role needs careful consideration and execution with circumspection. Unbridled execution of the influential role would strike a deathblow to democracy, whether majoritarian or communal.

The nature of the constitutional order within which a judge functions is crucial in determining the legitimate role of a judge. And if this is true, there can be no jurisprudential understanding of a judge's constitutional role that has universal appeal or application. It is both history and culture specific. Each constitution has its own history of prejudices and injustices, of failures and wrongful denials. The role of the judge under each constitution must take its context from the nature of democracy, its history, and its successes and failures as a political community. It is little wonder then that no understanding of a judge's "rightful" actions has been successfully demonstrated as being validly applicable to all constitutional jurisdictions.

In India's constitutional context, the underlying motive in correcting institutional inefficiencies is laudable. But the same has its limitations; recognizing them may serve democracy better than to absolutely disregard them. The endeavors are really to right the wrongs of Indian democracy, and judges are undeniably influential role-makers in this strive for actualizing the constitutional order that *is*. There is need to exercise caution in attempting to actualize, lest the little right causes a much greater wrong.