political decision-making mechanisms of society. Ultimately, it is also the position that is most likely to safeguard their independence and credibility.

Courts who prefer the vision of social reformers invoke a set of values and preferences which they judge to be best for the country. It may be that, more often than not, they are right. In terms of the "merits"... the argument for expansive judicial review, weakened threshold rules and rules of standing, and broad grounds of review which permit replacing the discretion of the authority with that of the court, may seem extremely persuasive. However, this does weaken a true commitment to democracy as respect for the preferences of the people, and it does open the ground for the invocation of a variety of alternative sources of authority in justification of political actions.

As already mentioned, in Israel the latter danger is real and pressing. While some members of the religious establishment vehemently attack the court, they share the basic outlook under which the ultimate source of legitimacy and authority does not lie in the decision of the people through their representatives. They willingly invoke this ultimate source of authority to undermine the law and decisions made by legitimate political authorities. All courts, and all citizens committed to democracy, must fight this dangerous inclination towards the delegitimation of government, law-making and the courts in the name of religious values.

By the same token, courts themselves cannot justify their own lack of deference to... the political branches by invoking indestructible "basic values"....

Some may argue that my position weakens the resolve of courts to take clear normative positions and promote moral values. They may predict that consequently, the courts will tolerate, and thus indirectly legitimize, corruption and immorality. This may seem surprisingly inconsistent with my strong support of human rights and my rejection of moral relativism. However, there is a big difference between having strong moral convictions and fighting for them, and thinking that these convictions should be enforced by the courts on the society as a whole....

**COMMENTS AND QUESTIONS**

1. "Prudential" judging to avoid undue confrontation with political branches has been praised, condemned, and theorized by scholars. Is Gavison's argument one that sounds in prudential concern for the court's role? In commitments to democratic decision-making through the legislature?

2. If prudence, or practical wisdom, is a part of effective judging, what implications does that have for selection of judges?

3. For a conception quite different from Gavison's, see Akharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 16, 41, 150-51 (2002). President Barak, the then-Chief Justice of Israel, argued that the judge in a democracy like Israel must "give effect to democracy in accordance with democratic values and foundational principles" and human rights. Referring to the many cases involving challenges to military action that have come before the Israeli Supreme Court, he also urged that "[w]here is always law—domestic or international—according to which the state must act," even in war-time. See also his opinions in *Mizrahi Bank v. Beit Sourik Village* in this Chapter. Could a judge persuaded by Gavison's analysis rely (as Barak does) on proportionality as a basic principle of judicial review of government action and if so, in what contexts?

D. JUSTICIABILITY, JUDICIAL ACTIVISM, AND THE EFFECTS OF DIFFERENT FORMS OF JUDICIAL REVIEW ON LEGISLATIVE ROLES

This section will explore questions identified in Professor Gavison's article above, introducing some additional perspectives on the functions of "justiciability" doctrines in constitutional adjudication, on the effects of the "constitutionalization" of public or legislative debate on substantive policy and ensuring effects on commitments to democratic political processes. This section draws on experiences in India, Colombia, Russia, Pakistan and France; materials in the next chapter shed light on justiciability doctrines in Canada and Germany. (Students may want to review the Allen v. Wright decision excerpted in Chapter VI.)

As has been suggested before, comparative study "has the liberating effect of unsettling our own presuppositions, revealing the contingency of legal forms and exposing vast ranges of what is legally possible." Jamie Cassels, *Ritter Knowledge, Vibrant Action: Reflections of Law and Society in Modern India*, 1991 Wis. L. Rev. 109 (reviewing Marc Galanter, *Law and Society in Modern India* (1989)). Do India's and Colombia's experiences suggest that procedural aspects of U.S. law, and justiciability limitations on the Court's jurisdiction, are "false constraints"? Or do the experiences of Pakistan (recently) and Russia (1991–93) with judicial activism suggest that they (or some of them) may be "true" necessaries? Or is each of these experiences so entwined in the particular histories of the respective nations that they shed little light on U.S. approaches?

As you read the next set of materials, recall Professor Tushnet's elaboration of the argument that judicial review will result in "democratic debilitation." Recall also Thayer's claim that when "the correction of legislative mistakes comes from the outside, ... the people ... lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. ... [T]he tendency of a common and easy resort to ... judicial review is to dwarf the political capacity of the people and to deaden its sense of moral responsibility." J. Thayer, JOHN MARSHALL 103–07 (1901). Consider in this regard Alec Stone's study of the effects of the Conseil Constitutionnel in France which, he argues, has had an unhealthy effect of "judicializing" discourse in the legislative branch. Is this an example of such "debilitation," or is it a counterexample of constitutional invigoration of legislative discourse?

Consider, as well, whether decisions of the U.S. Supreme Court have had such an effect. Is it unhealthy for the legislative body to
incorporate considerations of what will pass constitutional muster in its legislative decisionmaking? Is it unhealthy for a constitutional court to provide detailed guidance to legislators of how to avoid constitutional difficulties?

1. INDIA AND PUBLIC INTEREST LITIGATION

India became an object of European conquest and colonisation in the 16th century; by mid-nineteenth century, most of India was under British rule. British governors were appointed for the Indian provinces and court systems were established which used an amalgam of local and British law. In the late 19th century, the Indian National Congress was established, with representatives from all over India, which began to demand self-governance. The Muslim League was organised soon after, partially out of fear that the Hindu-dominated National Congress would not protect the position of Muslims. For most of the period after World War I until 1947, India's people struggled for independence from Britain. Mohandas Gandhi, trained as a lawyer, persuaded the Indian National Congress to adopt a program of nonviolent disobedience and resistance against British rule. In 1947, British and Indian leaders agreed on a partition of the country (establishing the separate nation of Pakistan to protect Muslim interests) and a plan for independence. Following independence, widespread efforts were made to strike down socialist programs, and the Indian government continued to acquire control over independent princely states, and over areas under the control of Portugal, into the 1960s. For useful historical accounts of the pre-independence period, see Judith M. Brown, Modern India: THE ORIGINS OF AN ASIAN DEMOCRACY (2d ed. 1994); D.A. LOW, BRITAIN AND INDIAN NATIONALISM: THE IMPACT OF AMBIVALENCE 1929-42 (1997).

Under its post-independence Constitution of 1950, India is a federal republic of more than 1 billion religiously and ethnically diverse people, a large number of them very poor. The Constitution establishes a strong central government on a parliamentary model. There is a two house parliament, a lower house (House of the People) and an upper house (House of Elders or Council of States). The lower house is popularly elected at least every 5 years, and the upper house is elected indirectly, staggered, 6-year terms, largely by the various state legislatures; each state is allotted a number of seats based primarily on its population. If the two houses do not agree on a measure, the measure is put before a joint meeting of both houses and can be passed by a simple majority, thus giving more power to the larger house than to the other.

The Constitution establishes both fundamental rights (e.g., freedom of the press, equality before law) and "Directive Principles" that are not justiciable but which encourage the government to pursue social and economic welfare measures, including, e.g., to secure "the right to an adequate means of livelihood." India Const. art. 39. The Supreme Court of India, like the U.S. Supreme Court, functions as a final court of appeals for civil and criminal matters, and also has the power of constitutional review over the actions of the Parliament, of executive officers, and of the state governments. The court system is essentially unitary, the judges of the state High Courts being appointed by the President; most judges of the Supreme Court have previously served on a lower court (e.g., a state High Court). Justices are appointed by the President, upon consultation with the Chief Justice; they serve until the mandatory retirement age of 65 (after which they are prohibited from practising law). See M.V. Pyle, INDIA'S CONSTITUTION 202 (1994); M.P. Singh, Securing the Independence of the Judiciary: The Indian Experience, 10 Ind. Intel. & Comp. L. Rev. 245, 253 (2000).

Between 1960 and 1975, the Indian Supreme Court established itself as a fairly activist court; at least on occasion it was "accused of obstructing social reform" particularly for its invocation of private property rights to strike down socialist programs. In an effort that "led Prime Minister Indira Gandhi to make changes in the courts that became part of the background of the 1973-77 Emergency," Jeremy Cooper, Poverty and Constitutional Justice: The Indian Experience, 49 Mercer L. Rev. 611, 613 (1993). Indira Gandhi was convicted by a lower court of illegal campaign practices but refused to resign, and instead declared a state of emergency in which many of her political opponents were arrested, the press was censored, Parliament passed legislation retroactively purporting to legalize her actions, and amendments were

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4 See India Constitution, art. 124 (2) ("Every Judge of the Supreme Court shall be appointed by the President ... after consultation with each of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose ... provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted"). There has been controversy and conflicting opinions from the Court over whether the consultation requirement gives the Chief Justice something close to a veto. See Mohinder Khalsa, This INDIA'S CONSTITUTION 25-29 (1991); M. J. Jio, Judicial Activism: The Indian Experience, 6 Wash. U. J. L. & Pol'y 29, 33 (2001). Under Indian law, judges are appointed by the President on the recommendation of the Chief Justice of India, on the recommendation of the "Mr. Justice Council" (in the case of the Chief Justice, of the state judges, the state governor or the state legislature). The Chief Justice or the state judge making the recommendation recommends to the President to appoint an individual for a fixed term of 10 years. The Supreme Court has ruled that the decisions of the "Mr. Justice Council" are not justiciable, but has also ruled that the Chief Justice cannot be prevented from making a recommendation, and that the Chief Justice and his associates can accept the recommendation of the President and make a recommendation. In re Presidential Reference, A.R. 1999 S.C. 1 (restating that the opinion of the Chief Justice of India on proposed appointments to the Supreme Court has "primary", but must be given after the Chief Justice consults with at least four senior judges on the Court in forming an opinion). For helpful discussion, see Singh, supra, 10 Ind. Intel. & Comp. L. Rev. at 266-77 (discussing three different "judges""); Khalsa, at 28-29 (emphasizing degree to which the power is shared among the President and the Chief Justice on consultation).
passed increasing Parliamentary power and decreasing the powers of the courts. The Court itself was under pressure to do so by the government’s suspensions of certain rights.

Mrs. Gandhi’s attack on the courts, to which in common opinion the Supreme Court failed adequately to respond in the Habeas Corpus case, brought on behalf of thousands of political detainees, was one of the more dramatic aspects of the Emergency. Judges were transferred for rendering decisions unfavorable to the government, politically “committed” persons were favored in judicial appointments, senior justices were passed over, contrary to custom, in the appointment of Chief Justice of the Supreme Court, in order to reach a candidate agreeable to the government. Repeated efforts were made by the government to curtail the jurisdiction of the courts, so that they would not threaten Mrs. Gandhi’s hold on power or thwart the social revolution that the government claimed it was trying to promote.


Various law reform committees in India in the 1970s, including one in 1976 on which two Supreme Court justices served, recommended modifications of litigation rules and procedures in order to permit litigation to enforce the legal rights and improve the lives of the poor. By the early 1980s, the activism of the Indian Supreme Court looked in a different direction. As described by Carl Baer, Social Action Litigation in India: The Operation and Limits of the World’s Most Active Judiciary, in COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY (Donald W. Jackson & C. Neal Tate eds., 1992):

Since 1977 judges have become outspoken supporters of the political, social, and economic rights of oppressed peoples. The vehicle for this new form of judicial activism is usually termed public interest litigation (PIL) or social action litigation (SAL), the term preferred by some of its leading advocates. Public interest litigation had its origins not in a popular or even a professional movement. It began in the Supreme Court of India itself, initially in two-judge panels of reform-minded judges who sought new ways to bring issues affecting unrepresented Indian people before the courts. By the mid-1980s, public interest litigation would comprehend any legal wrong or injury or illegal burden, caused or threatened (Agrawala, 1985: 9). It would extend beyond individual rights to collective or social rights that “require active intervention by the State and other public authorities for their realization, including freedom from discrimination, ignorance and discrimination as well as the right to a healthy environment, to social security and to protection for massive financial, commercial and corporate oppression” (Bhugwati, 1987: 21).

As Baer summarizes SAL at this time, it included:

The duty of the Supreme Court to protect the rights of all persons in the country and to facilitate the rule of law.

(4) Innovative remedies including monitoring, in cases involving prison conditions, bonded laborers, "pavement dwellers" (as in Olga Tellis v. State of Maharashtra, 1979), shackles and chains, and "diaslas," members of the so-called "untouchable" castes or of "other backward classes," or "adivasis" (aboriginals, literally, "original inhabitants," usually members of scheduled tribes designated for protection under Part XVI of the Constitution, sections 330B).

Although many writers treat these developments as entirely generated by the Court as a response to its loss of legitimacy in the Emergency period, Khosla points out Article 32 and 226 of the Indian constitution themselves contemplate and authorize "a range of procedural innovations . . . and public law remedies . . .". Khosla, THE INDIAN CONSTITUTION, supra note 4, at 32. Article 32 allows petitioners to approach the Supreme Court directly for the enforcement of a fundamental right, and itself forms part of the fundamental rights chapter . . . By granting the judiciary the power to issue prerogative writs, and much more, the Constitution places a serious check on popular governmentality, that is, to protect the people from fundamental rights but also for any other purpose (and) to any person or authority . . . ." Id. at 30. Khosla describes Article 226 as "broader in its scope," empowering the high courts in India to "issue directions, orders, or writs not simply for the protection of fundamental rights but also for any other purpose (and) to any person or authority . . . ." Id. at 31.

Bear describes the massive case loads, and arrears, that exist in the Indian Court system, noting, for example, "an advocate who had recently completed a Supreme Court appeal in a nonconstitutional matter that had commenced 52 years earlier but resolved amid my concerned questions, referring to the case as "luxury litigation." Barr argues interestingly, that the arrears are so great the Supreme Court paradoxically has greater discretion on when to act, and has used intermand orders successfully in SAL to shift[] the burden of court delays from the petitioners to hear the state . . .

Thus a court committed to an agenda of social justice could advance matters on its docket whose resolution would promote that goal, and avoid cases that are either marginal or detrimental to the goal.
Baar explains the "conditions" for SAL, beginning with the aggressive judicial activism of the Indian Supreme Court in the Golak Nath (1967) and Kesavananda (1973) cases, in each of which the Court asserted a power to declare constitutional amendments unconstitutional (see Chapter IV above).

If Kesavananda could be India's Marbury v. Madison (because, as argued by the Rudolph [1981:10], it "established an acceptable ground for judicial review"), it could also be India's Schechter Poultry case (the most newsworthy of the U.S. Supreme Court's decisions invalidating New Deal legislation in the 1930s). For just as President Franklin Roosevelt responded to Schechter by appointing a number of Supreme Court judges more sympathetic to his social and economic reforms, and saw those judges go on to become judicial activists when individual rights were violated by government action, so it was that the Indian Gandhi government, in the years following Golak Nath, appointed a number of more left-wing judges, including Bhagwati, V. R. Krishna Iyer, and O. Chinnappa Reddy, who accepted an active state role in socioeconomic policy, but supported judicial activism in cases of government infringement of civil liberties.

Baar also notes the importance of the "Directives Principles of State Policy" in the Indian constitution; the existence of an "administratively independent judiciary" that, for example, enabled the Court to establish the PIL cell, or to appoint sociopolitical commissions of inquiry; and the very broad jurisdiction of the Indian Supreme Court—as factors enabling the successful use of PIL litigation.

At the same time, Baar offers several reasons for what he sees as the limited practical impact of social action litigation in India. First, there are inadequate additional government actions for the states are weak; and the constitution can be easily amended by the national parliament acting alone. He comments, "It is no wonder that the Supreme Court developed the 'basic structure' doctrine: no other institution outside the government in power at the center could check so fundamental an exercise of authority." Moreover, he notes the absence of an "independent upper house" to review proposed judicial appointments: "In practice, it is the Supreme Court again that has provided a check. No justice has been appointed to the Supreme Court of India since independence without the consent of the chief justice, and the veto has gained strength as its conventional use has continued...."

At the same time, though, Baar notes that Supreme Court justices must retire at age 65, which produces rapid turnover in the Court's membership. Moreover, he emphasizes, the Bar has nothing like the organizational or financial resources of the Bar in the United States, by which to initiate suits around the country; the Supreme Court's initiative, he suggests, was in a sense necessary, but its impact also limited by the necessities to which it was responding.

The following excerpt provides some further sense of the nature of PIL in the 1970s and 1980s.

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Jamie Cassels, Judicial Activism and Public Interest Litigation in India: Attempting the Impossible, 37 Am. J. Comp. L. 495 (1989)

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... Originally aimed at combating inhumane prison conditions and the horrors of bonded labor, public interest actions have now established the right to a speedy trial, the right to legal aid, the right to a livelihood, a right against pollution, a right to be protected from industrial hazards, and the right to human dignity.

A number of distinctive characteristics of PIL can be identified. Unlike the cases of public interest litigation in Canada or the United States, the legal aid/public interest movement in India has been almost entirely initiated and led by the judiciary. [PIL's] distinctive characteristics include: a) liberalization of the rules of standing; b) procedural flexibility; c) a creative and activist interpretation of legal and fundamental rights; d) remedial flexibility and ongoing judicial participation and supervision.

A. Access and Standing ...

[The Indian approach to PIL has extended the rules of standing to the point that they may be said to have ceased to present any real obstacle to the public interest litigant. Public interest litigation has been initiated by individuals on behalf of other individuals and groups, by academics, journalists and by many social action organizations. As Krishna Iyer J. explained in Mumbai Kangar Sabha v. Abdulahali]

Test litigations, representative actions, pro bono publico and like broadened forms of legal proceedings are in keeping with the current emphasis on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral, procedural shortcomings. ... Public interest is promoted by a spurious construction of locus standi in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualization of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker ...

B. Procedural Flexibility

The Indian judiciary has shown a willingness to alter the rules of the game where necessary. Actions may be commenced not only by way of formal petition, but also by way of letters addressed to the court or a judge who may choose to treat it as a petition. ... Judges have been known to invite and encourage public interest actions.

Most constitutionally-based public interest litigation in India is aimed at challenging the validity of legislative measures, but rather at enforcing existing laws and forcing public agencies to take steps to enhance the welfare of the citizen. As the Supreme Court declared in one case (concerning the displacement of slum dwellers in Bombay), positive action is required "if the theory of equal protection of laws has to take its place in the struggle for equality. ..."

In these matters, the demand is not so much for less Governmental interference as for positive Governmental action
to provide equal treatment to the neglected segments of society. The profound rhetoric of socialism must be translated into practice. . . .

Through an expansive reading of fundamental rights, informed by a commitment to the (non-enforceable) social welfare objectives of the Directive Principles, the courts have sought to read substance into otherwise formal guarantees. . . .

A few examples . . . will illustrate this tendency. In Olga Tellis, the court affirmed that "the sweep of the right to life contained in Article 21 is wide and far-reaching" and includes the right to a livelihood. . . .

In Francis Coralie Mullin, the court stated that the right to life includes the right to life with human dignity and all that goes along with it . . . must in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.

In cases dealing with the treatment of prisoners awaiting trial, the court has found support in the Constitution for orders requiring the state to take active steps to ensure effective legal aid. In one such case, it ordered that assistance provided by the state, that information on prisoners be provided immediately to Legal Aid Committees, that prisoners be educated about their legal rights, and that compliance be monitored by surprise visits to the jail by a local judge. The court reasoned that, absent positive measures, prisoners would be priced out of their rights.

In M.C. Mehta v. Union of India, the Supreme Court accepted that environmental pollution and other hazards were not only potential civil torts, but also violations of fundamental rights, redressable directly by the Supreme Court through a public interest petition. It took the opportunity in this case to forge a doctrine of absolute liability with respect to hazardous operations, unrestricted by the traditional qualifications and exceptions that have grown about the common law rule in Rylands v. Fletcher. The Court reasoned that injuries to workers and others caused even by necessary industries are part of the social cost of development and should not be borne by the victims.

As one observer has concluded, through their interpretation of Article 21 the courts have sought to convert formal guarantees into positive human rights . . .

If left unqualified, this is an overstatement. . . .[W]hile the court may attempt to improve the administration of various welfare laws (in some cases almost rewriting them) it has said consistently that it cannot force the state to enact legislation to enhance fundamental rights or to pursue the Directive Principles. The true measure of judicial activism in India, therefore, is found less in the rhetoric of rights definition than in the remedial strategies deployed and actual outcomes in P.L. cases.

D. Remedial Flexibility

In this area too, the Indian courts have demonstrated an ability to press against the boundaries of the traditional understanding . . .

By way of example, in environmental litigation, the courts have been shown itself willing to overturn wide powers that might otherwise be left to other rule-making authorities and regulatory agencies. In the Shriram Fertilizer case the court permitted a chemical plant to reopen after a gas leak only upon satisfying a set of stringent conditions. On the basis of the considerations of four separate court-appointed technical teams the court ordered specific technical, safety, and training improvements. It required the plant to establish a set of independence committees to visit the plant every two weeks, and also ordered the government inspector to make surprise visits once a week. In addition, noting the increasing frequency of environmental litigation, and the technical difficulties which the court experienced in acquiring competent independent technical information and advice, it "suggested" that the government establish an ecological sciences resources group to assist the court. The court also required the company and its managers to deposit security to guarantee compensation to any who might be injured as a result of the enterprise's activity.

* Editors' Note. The preamble to the Indian Constitution describes India as a "souverign Socialist Secular Democratic Republic."

** Art. 37 states that the provisions contained in Part IV are "not enforceable by any court, but the principles therein laid down are fundamental in the governance of the country."

Though the Directive Principles are not enforceable, the courts consistently use them to interpret enforceable fundamental rights (as to the union or creating them into fundamental rights), to ground their assumption of jurisdiction over "regulatory" matters, and to support the remedial strategies they adopt. The reliance on Directive Principles is partially apparent in legal aid, prison and environmental litigation. The relevant Directive Principles are 20-A to 20-D (to provide free legal aid) and 45-A (to provide an adequate system of fundamental rights), to the extent that the court relied on Art. 39-A to support its finding that legal aid was a fundamental right (as held in Article 21) and suggested, even in the absence of legislation, that if legal aid was not provided by the state criminal trials might be void: "This constitutional obligation cannot wait any longer for its fulfillment. . . . [N]o state Government can possibly have any ability for not carrying out this command of the Constitution." (1985).

** S.C.C., 572, A.I.R.: 1993. This case concerned the eviction of pavement and shanty dwellers from the streets in Bombay. The "right" established may have been somewhat below the point at which the court held in the end that the law authorizing the eviction was reasonable if read down to provide for a housing scheme protection was afforded. The court concluded that the established communities could not be removed where they did not interfere with the public way unless the land was needed for a proper public purpose, that others could not be removed until after the monsoon, and that alternate accommodation should be found (though this was not a provision).

** The Supreme Court has, however, ruled that where a fundamental right applies against private action as well as government, the government is constitutionally obligated to take steps to enforce that right. See People's Union for Democratic Rights v. Union of India (the Aroos Workers' Case), A.I.R. 1982 S.C. 1475. . . .

** S.C.C., 572, A.I.R.: 1993. This case concerned the eviction of pavement and shanty dwellers from the streets in Bombay. The "right" established may have been somewhat below the point at which the court held in the end that the law authorizing the eviction was reasonable if read down to provide for a housing scheme protection was afforded. The court concluded that the established communities could not be removed where they did not interfere with the public way unless the land was needed for a proper public purpose, that others could not be removed until after the monsoon, and that alternate accommodation should be found (though this was not a provision).
Similarly, in the Bonded Labour Case the court instructed local officials to identify oppressed workers, and to effect their release and physical, economic and psychological rehabilitation. To this end the court directed the authorities to accept the assistance of social action groups, to carry out surprise checks on local quarries, to set up labour camps to educate workers about their legal rights, and to ensure a pollution-free environment with adequate sanitary, medical and legal facilities. In a case dealing with the conditions in children’s homes, the court ordered the public broadcasting authorities to provide publicity for the effort to rehabilitate destitute children.

III. PROBLEMS, CRITICS AND THEMES . . .

A. Procedure and Practical Difficulties . . .

The nonadversarial nature of the proceedings is a matter of concern to many. Unfounded allegations may be made that cannot be subjected to rigorous tests of proof; defendants may not know the full case against them; and over-extensive reliance on sociological commissions of enquiry may give the court a partial and possibly biased view of the facts. These concerns are, perhaps, exaggerated. The facts upon which the courts rely are made available to the concerned parties and an opportunity is given to them to respond. Affidavits may be challenged, additional reports commissioned and new evidence entered.

Both the manner in which litigation may be initiated and the activism of the judiciary in prosecuting such cases raise the specter that litigants are shopping for particular judges and that judges are shopping for particular issues and causes. Increased formalization, however, would block access to less sophisticated petitioners. . . .

The resolve of judges and the expedited fashion in which cases can be brought in public interest matters put enormous strains on already extremely scarce judicial resources. Some High Courts are reported to receive 50 to 60 public interest letters per day. In the fifteen months from January 1987 to March 1988, the Supreme Court received 23,772 letters. Permanent PIL cells have now been established at some courts to act as an initial filter for applications. These enable judges to pass communications through a screening process and from there on to the Chief Justice for assignment in the ordinary way. Resources permitting, these, along with the various legal aid organizations, might also serve a more active investigatory role. The PIL cells call through the letters, winnowing out frivolous and inappropriate matters and prepare files for the Chief Justice. Nevertheless, the problem of backlogs and delays remains a serious concern and appears to underlie a recent.

By Canadian and American standards, Indian courts are dramatically understaffed and poorly equipped. . . .

Of these, 110 were automatically posted as writ petitions in the Supreme Court. 938 were referred to the Supreme Court Legal Aid Committee, and 3,867 to various state legal aid and advocacy boards for action. 4,745 were referred directly to various government departments, for direct action, or were left to the disposers of, the various tasks provided by the PIL roll. See, also, 9,240 (1987), April 10.

Informally the workers at these cells estimate that they receive 60-80 letters per day, while the Chief Justice has provided broad guidelines, there is obviously a great deal of discretion involved in assigning these letters.

JUSTICIABILITY, JUDICIAL ACTIVISM, AND THE EFFECTS OF SECTION D

DIFFERENT FORMS OF JUDICIAL REVIEW ON LEGISLATIVE ROLES

The 42nd amendment, which sought among other things to provide a new concept of justiciability, has been tempered by the 43rd and 44th amendments, enacted by the post-emergency domicile governments.
judicial non-accountability, institutional competence, etc.), does not of itself indicate precisely where they should be placed. As one Supreme Court judge said, when a citizen seeks vindication of a fundamental right or Directive Principle the court cannot simply "shrug its shoulders and say priorities are a matter of policy and so it is a matter for the policymaking authority." Whenever a court is called upon to scrutinize an official decision or operation it is immediately and inevitably engaged in both policy analysis and the political exercise of determining its own jurisdiction. . . . Where the lines may be drawn is as much a matter of institutional capacity, practical politics and popular support as of constitutional theory. . . .

The question of practical politics brings us once again to the more general issue of political viability and popular support. The effectiveness of general and intrusive judicial remedies depends almost entirely upon good faith compliance efforts. In the absence of such efforts many fear that there is little the court can do except watch its own authority erode. As one Supreme Court Justice said of the "politicization" of the judiciary:

Since the court possesses the sanction neither of the sword nor of the purse and . . . its strength lies basically in public confidence and support, consequently the legitimacy of its acts and decisions must remain beyond all doubt. . . . Indeed, both certainty of substance and certainty of direction are indispensable requirements in the development of law, and invest it with the credibility which commands public confidence in its legitimacy.

There is a recognized need to . . . determine the degree to which PIL orders have actually contributed to improving the lives of the disadvantaged.

Whether the popular legitimacy of the courts has been enhanced or diminished as a result of its PIL activism is another empirical question that awaits systematic study. . . . There seems to be no doubt that the court's public profile has been raised considerably. The popular press, social action newsletters and magazines and scholarly literature are replete with reports, by and large favorable, of PIL matters. The sheer volume of PIL petitions attests to the demand for the new forum. One of the foremost observers of PIL has claimed that by transgressing received liberal notions of the judicial function courts are retrieving a degree of popular moral support at the same time that other social and political institutions are facing a legitimation crisis. He suggests that the "transition from a traditional captured agency with a low social visibility into a liberated agency with a high socio-political visibility is a remarkable development." . . . [The assumption of a political role beyond that traditionally ascribed to the judiciary may not undermine, but indeed enhance its credibility and support.]

The final question is whether such claims are an over-enthusiastic response to the early experience of PIL, whether they underestimate the nature of India's social problems and ignore the inherent limitations of the judicial process . . .

C. Efficacy

To the foreign observer, one of the most striking aspects of the Indian legal system is the extent to which formal legal arrangements exist in almost metaphysical isolation from social reality. It is hardly surprising, therefore, that while public interest litigation may have secured a better life for some individuals, it has not ended bonded labor nor found homes for the Bombay pavement dwellers . . .

Critics and social activists alike question the utility of expending scarce human and financial resources on litigating strategies. . . . As [Dr. Vasudha Dhavan, a] PIL activist, suggested: " . . . We must link up with social activists who alone can provide them with ground support."

The experience of both the social activists and the beneficiaries of PIL is no doubt a contradictory one. For example, after a drawn out effort to improve the practices prevailing in children's homes, one prominent social activist stated, "I shall not [again] enter the courts as a petitioner or as a respondent . . . I have no respect for the courts." Of public interest litigation she said, "Does it work for the commoners sans silk gown? The thousands of children in jails throughout India testify to the fact that it does not." Four months later, the Supreme Court again had occasion to decide a petition filed by this same individual. This time she was more successful. The issue concerned the denial of public access for journalists to prisons in order to assess conditions and ensure the welfare of the detainees. The Court took note of the fact that through public interest litigation and the intervention of the courts, prison conditions had substantially improved over the years. But the court also reasoned that, until the attitudes of administrators changed, the ongoing efforts of social activists on the ground remained the crucial link in ensuring the fundamental rights of citizens.

IV. CONCLUSION

In the final analysis, the fate of PIL in India may therefore hinge on the concrete experience and continued faith and effort of social activists and their constituent groups; and, notwithstanding some successes, this exercise is a contradictory one. The Indian legal system suffers exponentially from all the same defects as that in the developed countries of the West. Ordinary litigation is expensive and well beyond the means of disadvantaged groups in society. Delays of Black House proportions are notorious. Stories of corruption, bias, and political interference can frequently be found in the national press. The Indian legal system was designed to further the goals and policies of colonial control and exploitation. . . . More recently, the bar and bench have proved their willingness to serve the needs of modern corporate capitalism; they have extended to the powerful segments of society constitutional guarantees which to many observers simply obstruct socially progressive measures.

Judges, lawyers and politicians of the left . . . are vividly aware of their inheritance. Many perceive law in straightforward Marxist terms: a system organized around formal individual rights and private property, designed by and for the ruling class, to preserve the maldistribution of wealth and power in society. As one judge of the Supreme Court said: . . . "It is obvious that the provision for socialism
and the high-ringing Directive Principles are a facade and that to the ruling classes equality has never meant more than 'formal equality' and socialism has never been more than a verbal mask."

Even the immediate future of PIL remains uncertain. It remains dependent on the personal commitment of individual judges. Simple noncompliance can effectively derail judicial reform. The ultimate power of easy constitutional amendment allows inconvenient decisions to be legislatively overruled.

Nevertheless, critical legal activists also believe that to the extent that law does have a degree of autonomy from the immediate requirements of the political and economic elite it might be harnessed for the cause of the less advantaged. By exploiting the limited autonomy of law, the courts become an arena of social struggle wherein the stakes may be largely ideological and only incrementally material. The crucial question remains whether this ideological function will serve to expose and alter pathologial social arrangements, or simply paper over the abyss which separates formal legal promises from Indian social reality.

S.P. Seth, Judicial Activism: The Indian Experience, 6 Wash. U. J. L. & Pol'y 29 (2001)

The Supreme Court of India is the protector and guarantor of the fundamental rights of the people of India, the majority of whom are ignorant and poor. The liberalization of the rule of locus standi arose from the following considerations: (1) to enable the Court to reach the poor and disadvantaged sections of society who are denied their rights and entitlements; (2) to enable individuals or groups of people to raise matters that concern them arising from dishonest or inefficient governance; and (3) to increase public participation in the process of constitutional adjudication. PIL brought about a radical metonymy in the judicial process, imbuing it polycentric, as well as legislative, characteristics.

[Professor Seth describes the origins of the Court’s “epistolarv" jurisdiction, notes critiques of reliance on anonymous letters and a potential lack of adversarial testing, and reports a diminishment in reliance on such letters in later PIL cases (where counsel or amici would be appointed). Noting the availability of cross-examination of the reports of sociological commissions, he comments:]

What the courts expected from the respondent, which was the state in most of the cases, was that instead of taking an adversarial position and merely denying the allegation, the respondent should help the court to find the truth. The litigation was not against the respondent but against the illegities committed on its behalf. The state would benefit from such judicial inquiries because the state would know what it was lacking in administration and would be able to improve performance. In this sense Justice Bhagwati said, in P.U.D.R. v. India, that it was not an adversarial proceeding:

Public interest litigation, as we conceive it is essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them. The State or public authority against whom public interest litigation is brought should be as much interested in enforcing basic human rights, constitutional rights, and the like as those who are in a socially and economically disadvantaged position, as the petitioner who brings the public interest litigation before the court.

Concept of Justiciable Extended

The PILs, raising the question of governance, asked the courts to compel the government to do its duty or to prevent the government from doing what it was legally forbidden to do. This is the function of the writ of mandamus. The difference between the traditional mandamus and the mandamus under PIL is that under PIL, the scope of mandamus increased. Mandamus was issued under traditional administrative law only to compel the state or a public authority to do what it was legally bound to do. Under PIL, however, mandamus is issued to mandate acts within the discretionary power of the government that do not fall within the purview of the traditional writ of mandamus. For example, mandamus was issued when the petition alleged a violation of human rights [that a government agency] should investigate, or when a petition sought directions from the Court to [the agency] to inquire into the sexual exploitation of children and the flesh trade. Mandamus was also issued when government hospitals failed to provide timely emergency medical treatment to persons in need, violating their right to life, or when petitions against the management of hospitals for mental diseases had failed. Mandamus was issued with petitions seeking to enforce public health and safety measures against municipal corporations, petitions against nonfunctioning medical equipment in government hospitals, and petitions against the mosquito menace that jeopardized the right to life. A petition asked for education of the children of prostitutes and a petition impugned a provision in the Jall Manual, that provided the body of an executed convict be suspended for half an hour after death, on the ground that it violated the right to dignity included in the right to personal liberty. Petitions for improving the conditions of service of the members of the subordinate judicial service, for filling vacancies of the judges of the Supreme Court and the High Courts, for seeking a ban against judges taking up post retirement jobs in government or politics, and for seeking directions from the Court to expedite the disposal of pending cases so as to reduce the period of pretrial detention are examples of PILS in judicial matters. Other examples include a petition by a Bar Association seeking contempt proceedings against the police for patronizing an organized political party and a petition seeking permission of the Court to allow nonlawyers to appear in court during a lawyers’ strike. Common Cause, a registered society founded by Mr. H.D. Shourie, could raise questions about blood transfusions, arrests in courts, appointment of consumer courts, and abuse of distribution power, as in the case of petrol pumps. Shiv Sagar Tiwari could raise a question about arbitrary
allegations of house rent. Finally, Vinod Nairin could obtain orders from the Court to deal with such matters.

Article 32 and Article 226 confer on the Supreme Court and the High Courts the power to issue "directions, orders or writs" for achieving the objectives of these articles. The courts have issued directions for varied purposes. In public interest litigation, the Supreme Court has issued directions for transferring cases to lower courts, or for directing the government to take necessary steps. Directions in Common Cause v. India provided for the regulation of rental transactions.

Directions were given to the government to disseminate knowledge about the environment through schools and colleges. The Supreme Court gave directions to private educational institutions to provide free education to girls and to ensure that a large number of schools are established in underserved areas.

In the case of contractual labor, the Supreme Court directed the state governments to ensure that contractual labor is abolished, and that it is replaced by permanent employees.

In Kishen v. State of Orissa, the Supreme Court gave directions to the government regarding measures to be taken for preventing the use of children in hazardous occupations. These measures included the establishment of special schools and the provision of alternative employment opportunities.

The Court has clearly transcended the limits of the judicial function and has undertaken functions which really belong to either the legislature or the executive. A court is not equipped with the skills and the authority to discharge these functions. However, the Court has taken upon itself certain responsibilities that it does not possess. The Court has, therefore, been criticized for its overreach.

The Court has the power to make certain proposals and recommendations. These proposals are not binding on the government, but they do have the potential to influence government policy. The Court has made proposals in areas such as land reform, education, and health care. The Court has also made recommendations to the government on issues such as the prevention of child labor and the protection of women's rights.

The Court has also made proposals for the development of the judiciary. The Court has recommended the establishment of specialized courts for the resolution of specific types of disputes. The Court has also recommended the establishment of a national law school for the training of judges.

The Court has also made proposals for the improvement of the administration of justice. The Court has recommended the establishment of a national legal aid scheme to provide legal aid to the poor. The Court has also recommended the establishment of a national legal aid commission to monitor the implementation of the legal aid scheme.

Some of these directions had legislative effect and were considered binding not only on the Supreme Court and lower courts, but also by the government and social action groups. In Common Cause v. India, the Supreme Court provided guidelines as to what procedures should be followed and what precautions should be taken when allowing the adoption of Indian children by foreign parents. There was no law to regulate inter-country adoptions and such lack of legal regulation could cause irreparable harm to Indian children. Considering the possibility of child trade for prostitution as well as slave labor, legal regulation of such adoptions was essential. Therefore, Justice Bhagwati created a scheme for regulating both inter-country and intra-country adoptions. For the last twenty years, social activists have used these directions to protect children and promote desirable adoptions.

Legitimacy

The Supreme Court of India has become the most powerful apex court in the world. Unlike the Supreme Court of the United States, the House of Lords in England, or the highest courts in Canada or Australia, the Supreme Court of India may review a constitutional amendment and strike it down if it undermines the basic structure of the Constitution.

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The Court has also made proposals for the protection of the rights of the poor and the marginalized. The Court has recommended the establishment of a special court for the resolution of disputes involving the poor and the marginalized. The Court has also recommended the establishment of a national human rights commission to monitor the implementation of the human rights scheme.

The Court has also made proposals for the protection of the environment. The Court has recommended the establishment of a national environmental commission to monitor the implementation of the environmental protection scheme. The Court has also recommended the establishment of a national environmental court for the resolution of disputes involving the environment.

The Court has also made proposals for the protection of the rights of the disabled. The Court has recommended the establishment of a national disability commission to monitor the implementation of the disability scheme. The Court has also recommended the establishment of a national disability court for the resolution of disputes involving the disabled.
political players believe that in matters involving conflict between various competing interests, the courts are better arbiters than politicians.

[Sathu argues that the period of the Emergency was a "watershed" for the Court. The end of the emergency, marked by the defection of Gandhi government and the rise of the Janata government, commenced the restoration of the Constitution to its pre-emergency position. The movement against emergency emphasized the sanctity of the Constitution and the rule of law. The anti-emergency discourse also included pro-Constitutional and pro-judicial review discourse. While criticizing the Supreme Court for its decision in A.D.M. Jabalpur v. Shaikeb Shabir, the anti-emergency discourse emphasized that the power of declaring emergencies and the power of suspending judicial review, must be circumscribed by adequate safeguards and the independence of the judges must be established. Anti-emergency discourse legitimized the Constitution and condemned the constitutional amendments enacted during the emergency. It was during the emergency that a consensus in favor of judicial review and the basic structure limitation upon Parliament’s power of constitutional amendment emerged. The Gandhi government had passed several amendments to the Constitution during the emergency. Some of these amendments changed the face of the Constitution. The Janata government promised to restore the Constitution to its original position. Almost all the opposition parties, even those who had been critical of the Constitution, rallied around the Constitution and vowed to protect it. The emergency's net gain was the legitimization of the Constitution. Although the Court had let down the cause of individual liberty in the Jabalpur case, the people generally believed that judicial review by an independent court was desirable for democracy. The Jabalpur decision was attributed to the basic psychosis created by the emergency and now there was greater support for judicial review by an independent judiciary. The basic structure doctrine that lacked support in 1973 acquired greater legitimacy because the emergency had revealed how the Constitution could be prey to the whim of a partisan majority. After the Supreme Court asserted the power to review a constitutional amendment in Minerva Mills v. India, even the Gandhi government, which came to rule after the collapse of the Janata government, did not make any renewed effort to restore unlimited constitutional power to Parliament.

QUESTIONS AND COMMENTS

1. Consider whether, as Baar suggests, "arrows and delay" can promote judicial activism by facilitating selective judicial intervention. Compare

[Editors’ Note: As Sathu explains earlier in the article, “Judging the 1975 emergency, the President issued an order under Article 356 of the Constitution suspending the right to move any court to enforce the fundamental rights guaranteed by Articles 14, 21 and 22 of the Constitution. The questions posed were whether reasons were detained according to law, whether the law authorizing the detention was valid, and whether the executive had acted and made factual; the majority held, 4-1, that no court could examine the executive... The dissent, Justice Khanna, said the prior for his judgment when he was superseded by a junior Justice and not appointed Chief Justice.”]
Consider Armin Borsequav & Michael Jackson, The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power, 28 Colum. J. Envtl L. 223 (2003), which describes a PIL commenced in the Indian Court in 1985 asserting that existing environmental law required governmental action to reduce Delhi’s air pollution. After establishing and hearing from commissions to investigate the facts, the Court issued an order in 1996 requiring the City of Delhi to convert its buses from diesel fuel to compressed natural gas. In 2002 the Court issued further orders chastising the government for delay and ordering “immediate installation of 1500 CNG buses and the replacement of 800 diesel buses per month beginning May 1, 2002,” under threat of fines each day of noncompliance. The authors praise the Court for “maintaining its independence from private interest in seeking to champion the public good ... and relying on the most up-to-date research provided to it by unbiased sources,” to produce a plan that is “environmentally friendly and has a realistic chance of successfully controlling air pollution in Delhi.” Yet they also suggest, the Court ... usurp[ed] the authority of the existing pollution control authorities.... The infrastructure of “environmental legislation and bureaucracy in India)” is already in place for effective environmental management. While the Court evidently intended to protect the health of citizens of Delhi, and protect their constitutional right to life, it may in fact be impeding the development of more effective environmental controls in the country.... The Supreme Court cannot become a crutch upon which environmentalists are forced to lean. ... By ruling in this case on its own motion instead of mandating that the Central government use its statutory powers to control air pollution throughout the country, the Supreme Court is establishing itself as the main protector of the environment, and enabling the Executive to shed this controversial responsibility. Similarly, not wishing to alienate their corporate supporters in the diesel industry, many legislators fail to demand rules that implement controversial environmental legislation, leaving those matters to Supreme Court justices. 

The authors also report that after the Court’s orders were partially implemented, there were lines on the CNG buses, which, together with the opening (on time and within budget) of a subway system in Delhi, contributed to declining public support for the CNG bus conversions. Id. at 252–53.

Later reports indicate that the use of CNG buses has been effective in reducing some forms of pollution, but may have contributed to other environmental problems. See Lavanya Rajamani, Public Interest Environmental Litigation in India: Exploiting Issues of Access, Participation, Equity, Effectiveness and Sustainability, 19 J. Envtl. L. 293, 312 (2007) (noting a 25% decrease in suspended particulate matter in Delhi, though also noting increases in diseases relating to other pollutants). Rajamani notes that the Court continues to issue orders in the environmental area, including “to protect the Taj Mahal from corrosive air pollution, rid the River Ganges of trade effluents, address the air quality in Delhi and other metropolitan cities, protect the forests and wildlife of India and clear the cities of their garbage,” and that such an “expansive role in judicial governance has been welcomed in some quarters as ‘thermotherapy for the carcinogen body politic.’” Id. at 290 (quoting Glocerstory). The accused, who discusses in detail the Multispot Solid Waste Management and the Delhi Transportation litigations, raises concerns about the sustainability of what she calls “judicial governance.” See id. at 315 (noting that in the Delhi transport case, the Court had to perform the duties of screening thousands of affidavits ordinarily performed by regional transport officers). The author suggests that such “eloquent judicial oversight... leads to a reactive rather than a proactive administration.” “Repeated judicial incursions into the arena of policymaking” has led to “disaffection” with public interest litigation, reflected in various bills in the parliament to regulate PIL. Id. at 317.

5. But suggests that certain conditions—including the presence of both fundamental rights and Directive Principles, a Supreme Court of broad jurisdiction, an independent judiciary, and traditions of judicial activism—can facilitate a socially progressive, activist court. Which of these are present in the United States? What explanatory power do these have? Do they cause you to rethink Professor Tushnet’s skepticism about judicial review?

6. According to another scholar, “The Indian Supreme Court clearly tried to spark a rights revolution—but little happened.” Charles R. Epp, The Indian Supreme Court as an Independent Stimulator of Rights Revolution: Lawyers, Activists, and Supreme Court in Rights Revolution: Lawyers, Activists and Supreme Court in Comparative Perspective 71 (1998) (emphasis in original). Growing cautiousness and massive appeals on this account, are manifestations of the weakness of the infrastructure for “legal mobilization.” Agreeing in part with Baar, Epp notes that “the key conditions identified by the conventional explanations [for a rights revolution]—rights consciousness, judicial independence and the presence in the constitution of rights guarantees and rights-supportive judicial judges—were all met by 1976....” [After 1977, leading judges on the Supreme Court became deeply committed to the protection of individual rights.” Moreover, by virtue of Article 32 of the Indian Constitution, Epp concludes, the Indian Supreme Court was the “most accessible” of the four courts studied (the others were the United States, Canada, and the United Kingdom).

Nonetheless, India’s “rights revolution” was the weakest of the countries Epp studied. The Court’s workload “is staggering,” the Court handled 16,934 cases in 1985, but had 185,195 still on its docket. Id. at 82–83. Rather than giving the Court a discretionary jurisdiction the political

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7. Article 32 provides:

22. Remedies for enforcement of rights conferred by this Part.—(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(a) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whatever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(b) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (5).

(c) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.
response to the workload has been to increase the number of judges, many of whom serve only short periods because of the retirement age, factors that contribute to a lack of cohesiveness in the Court's decisions, according to Epp. His study of the Court's agenda (that is, the subject matter of the cases being decided) reveals, for the most part, no greater proportion of individual rights claims than in 1965, although women's rights claims had increased somewhat beginning in the 1970s. Epp attributes the weakness of India's rights revolution to "the patterns of development in the Indian judicial support structure for legal mobilization. The Indian interest group system is fragmented, the legal profession consists primarily of lawyers working individually, not collectively and the availability of resources for non-economic appellate litigation is limited." Id. at 85. For a more recent statistical analysis of the Indian Supreme Court's PIL docket, see Varun Gauri, Public Interest Litigation In India: Overreach or Underachievement?, World Bank, Policy Research Working Paper 5109 (Nov. 2009) (finding a "slight upward trend" in PIL cases, but which constitute on average only 0.4% of the cases filed and finding that a majority of the roughly 250 PIL cases in the Supreme Court each year—out of a docket of about 40,000 cases per year overall—are brought through formal channels, because only a handful of letters are converted into cases).

The dockets of the lower courts in India are, if anything even more crowded. These observations raise the question: "how the Supreme Court is able to retain such high levels of legitimacy in light of the massive failings of the lower courts." Jayanthi K. Krishnan, reviewing S.P. Sathe, Judicial Activism in India: Transgressing Borders and Enforcing Limits (2002), in 13 LAW & POLITICS BOOK REV. no. 2, at http://www.gypt.umd.edu/lpb/subscribe/reviewviews/sathe-sp.htm (visited Jan. 14, 2014). See Marc Galanter & Jayanthi K. Krishnan, "Bread for the Poor": Access to Justice and the Rights of the Needy in India, 55 Harv. L. J. 789 (2004) (noting that despite its "inventive and activist judiciary," the limitations of India's "top-down" public interest litigation approach has led to efforts to settle disputes through more traditional and informal mechanisms, the lok adalate, at the grassroots level). Galanter & Krishnan, at 787, conclude that judicially orchestrated public interest litigation has proved only to be a frail vessel for enlarging access to justice by empowering disadvantaged groups. Among its limitations are an inability to resolve disputed questions of fact; weakness in delivering concrete remedies and monitoring performance; reliance on generalized volunteers with no organizational staying power; and disconnection from the organizations and priorities of the disadvantaged. While affirming and dramatically broadcasting norms of human rights, the courts were frequently unable to secure systematic implementation of these norms. If judged by the standard of securing "systematic implementation" of norms, how effective were the U.S. Court's decisions on school desegregation (Brown), school prayer (Schempp), or effective assistance of counsel for the indigent (Gideon)?

7. In recent years accoumations have been made that the Indian Supreme Court's PIL litigation has focused on areas of concern to more rather than less advantaged persons. See, e.g., Balakrishnan Rajagopal, Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court

8. Criticism of PIL within and without India, from a different direction can be found in Venkat Iyer, The Supreme Court of India, in JUDICIAL ACTIVISM IN COMMON LAW SUPREME COURTS (Bruce Dickson ed. 2009), which raises issues of principle—including that the instrumentality of some judges in PIL litigation is inconsistent with the idea of judicial impartiality and equal treatment of litigants, and of the separation of powers—and practical concerns, about judge-shopping and abuse of the PIL form. A number of commentators note as an example of possible judicial overreaching into the legislative sphere, the Court's order, essentially creating a law to govern sexual harassment, in the Vishaka case (see Chapter X).

2. CONSTITUTIONAL LITIGATION AND COURTS' RELATIONSHIP TO CIVIL SOCIETY AND POLITICAL INSTITUTIONS

To what extent does constitutional adjudication depend on legal and social infrastructures? In discussing barriers to public interest/social justice litigation in civil law countries in Europe (including the "orientation of civil law judges" as less well-suited to litigation that "reaches beyond the parties present in" an adjudication, and their wariness of "too evident manifestations of lawmaking through the courts"), Mauro Cappelletti, writing in 1889, identified the absence of strong traditions of "intermediate societies" as a further obstacle. David Landau, analyzing the role of the Colombian constitutional court offers a framework for understanding the normatively appropriate role for courts in the context of the functioning of political parties, other government institutions, and civil society; he argues that the presence or absence of well-functioning political institutions may constrain or empower courts in the enforcement of constitutional social welfare rights.