I Marginalising social and economic rights: India’s constitutional compromise

HUMAN RIGHTS agendas throughout the world are built on an important distinction between civil and political liberties (CPR) and economic and social rights (ESR). The separation of human rights into two distinct compartments finds expression in two separate international conventions with distinctly different regulatory regimes.¹ Most Bills of Rights contain CPR but virtually no ESR provision. In the former Soviet Union and present-day China, both were given co-equal status; but, this had no legal or social consequences because neither were enforceable as a matter of constitutional right except to the extent to which government programmes (whether backed by legislative rules or not) suggested otherwise. Many Constitutions — such as those of USA, Canada and in Europe — give preferred constitutional status to CPR in the form of Bills of Rights (BoR) whilst ensuring that ESR are given, at least, a statutory status under the broad rubric of welfare programmes. Some of these programmes are resourced and instrumented by powerful bureaucracies even though controversy and criticisms continue to be directed against the range of these programmes and the manner in which they are implemented.

Borrowing an idea from the Irish Constitution, the original text of the Indian Constitution made an important distinction between justiciable Fundamental Rights (FR) and Directive Principles of State Policy (DP) which though non-justiciable were seen as “nevertheless as fundamental in the governance of the country”.² Although, in retrospect, some kind of parallel can be drawn by treating FR as CPR (which, to a great extent, is what they are) and DP with ESR (which they are not necessarily—in all and every particular in the sense in which they are commonly understood internationally), such a design was not necessarily the inspiration that motivated the framers of India’s Constitution. Since the constitutional text was devised and settled at a time (i.e., 1946-1950) when the country

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². Art. 37, Constitution of India.
was being partitioned amidst a chorus of demands from many diverse quarters, a premium was placed on enforceable FR. The other demands which were not included in the FR were shunted off into the chapter on DP — no less to appease sentiment and manage consensus. Sometimes, the logic of what was made a FR and what was included in the DP defies rational explanation. Sikhs were given a distinct FR to carry kirpans (daggers) as a part of their faith but restraints on cow slaughter were a DP. Achieving humane conditions of work and wages was a DP but the chapter on FR made the symbolic declaration that begar, forced labour and untouchability were abolished. It was not clear what the implications of such a declaration were in the light of such abolition being a judicially enforceable right. This is not to suggest that the occidental internationally enshrined catalogues of what are to be included in CPR and ESR are ex cathedra and not subject to variation. Indeed a part of the burden of this essay is to critique the false dichotomy between CPR and ESR — both in terms of the fundamental premise on which they are founded as well as the false separations that result from the differentiation. For the moment all that needs to be noted is that India’s chapter on DP was not really an ESR programme, but a pool of half hearted compromises which did not necessarily share a characteristic. The creation of constitutional space for DP was to enable compromises and obtain general consensus at a time when there was both euphoria and bitterness in the air. Even at the time, the DPs were not seen as a concrete promise but a dumping ground for unresolved compromises, with one member of the Constituent Assembly characterising the chapter on DP as “a veritable dustbin of sentiment”. It is not surprising that the early Supreme Court attached little juristic value to the DP even as an aid to interpretation. Yet, even if the text (as originally conceived) belies an exact comparison between CPR and ESR, the distinction remains important to Indian law which renders FR enforceable through the higher judiciary; and DP to be settled by government, to the extent possible.

Many elements conspired to posit the distinction between CPR and ESR other than the economic rationale that is often entered as a justification for it. The economic rationale pleads lack of resources — a plea that results in one of the most elegant descriptions of justice in our time according lexical priority to CPR and subjecting the fulfillment of ESR to the availability of resources. In the politically specific ideology of the West, a premium was attached to CPR, which, even though universally expressed as available to all, were differentially appropriated by the more powerful vested interests both for their own self advancement as well as an instrument to directly, indirectly and systematically oppress the disadvantaged. As the jurisprudence of human rights in nations like America painted its grey in grey, it also became abundantly clear that the very agency

through which CPR were to be preferentially enforced (namely, the judiciary) had more than a tendency to be class biased; and was, at times, so unfair in its approach that the entire enterprise of human rights was rendered suspect as being no more than a vehicle for the advancement of the well off to the prejudice of the disadvantaged and deprived. It was the interlude of fascism, the denial of CPR in communist regimes and the persecution of communists, aliens, coloured and the poor in the so called liberal democracies that kept the idea of human rights respectfully alive.

One part of the case against human rights was that judges, being class biased used CPR to thwart economic programmes by striking down welfare-alleviating programmes as well as limiting the extent to which the State could be empowered to instrument them. This was writ large over early judicial interpretations of America’s BoR whereby programmes for the poor, women and children were struck down; and general regulatory control by a welfare oriented economically interventionist State was shackled as an arbitrary, over-broad intrusion inconsistent with the liberalism of a BoR-based democracy. This had a somewhat frightening effect on the Constitution -making endeavours of many nations in and around the mid-twentieth century. Indian nervousness about a widely framed strong BoR found expression in the almost Cassandra like warnings in the writings of the leading contemporary constitutional advisors to its Constituent Assembly (1946-9) who, in turn, claimed to have been cautioned in this regard by a, then, much respected sitting, albeit conservative, judge of the American Supreme Court. Yet, even the ‘imitation' prone nations of the developing world, who, normally blindly followed what was going on in Europe and America, did not accept ‘western’ solutions for indigenous dilemmas without putting the solution through some kind of litmus paper test for suitability. The partition of the subcontinent resulted in blood and chaos on an unprecedented scale — stories of which continue to surface fifty years later. This led to relatively easily acceded demands for designing a BoR which made a ‘law and order’ State possible. This explains why

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7. See, B. Shiva Rao, supra note 3 at 187, 235, 482. (There appear to be no notes on his discussions with Justice Frankfurter); Granville Austin, in private conversation with the author, wondered whether such a substantive meeting with Justice Frankfurter on the basis of which a due process clause for India was discarded took place.

8. There appears to be a return to re-examining the social and emotional (as opposed to the political) aspects of the partition of India into India and Pakistan. One way of doing this is to look at the literature produced on both sides of the border. An attempt to bring some of the stories together may be seen in M. Hasan (ed.), India Partitioned: The Other Face of Freedom (1995).

9. For a detailed analysis of the various discussions in the Constituent Assembly see, R. Dhavan, "Tidy Intuitions, Untidy Discourse: Conversations and Exchanges on Human Rights Discourse in the Constituent Assembly 1947-1950" PILSARC Working Paper No. 20 (1994). Wary about the law and order situation getting worse in the aftermath of partition and generally wedded to a policy of State intervention to instrument social and economic change, the Constitution enacted an “Any (as opposed to due) process” clause (art. 21), permitted preventive detention without trial (art. 22) and built in considerable wide ranging restrictions into the clause dealing with the fundamental freedoms (art. 19) and religious freedom (art. 25-8).
the Indian chapter on FR not only contains an ‘any legal (as opposed to a due) process’ clause but also permits administrative detention without trial under circumstances which had been regarded by many western nations as intolerable even when they were at war. No less important to the framers of the Indian Constitution was the imperative of social reform in caste-ridden, gender-unjust society which disabled the economic and social transformation of a society that was dangerously differentiated into the excessively well off and the extremely poor. Since ESR (though not identified under that label at the time of Constitution making) were not strictu sensu a part of the human rights agenda, economic and social transformation was seen as a part of the general responsibilities of both the ‘new’ liberal as well as the socialist states created in the mid-twentieth century.

One group of persons (namely the status quoists) portrayed the general regulatory and welfare measures as a threat to the overall civil liberties of the people because they foresaw themselves being adversely affected by the incoming changes. The status quoists sought refuge in the enforceable CPR provisions to defend themselves from the onslaught of change. By way of contrast, the votaries and supporters of the social and economic transformation (whom we may call “transformationists”, for want of a better expression) protested that CPR based BoR were a conservative haven for protecting vested interests and generally inimical to the attainment of an egalitarian social justice. While such a description of the dispositional discourse (status quo v. transformation, liberty v. equality) is necessarily an over-simplification, it characterises a tension; and casts shadows over the BoR enterprise as a whole — setting up an antagonistic dichotomy between CPR and economic and social objectives even though the latter were loudly articulated as the raison d’etre of the Constitution itself.10

One other aspect of those controversies deserves to be noticed and forms the institutional framework within which the dichotomy between CPR and ESR has come to be settled. Since the main legal characteristic of the constitutionally preferred CPR lay in their enforceability through courts of law, and ESR were envisaged as being authorised by statutes and rules ordained by the legislature, an argument of principle arose out of the respective institutional locations in which the two enterprises were to find meaning. CPR, which was projected as the core of human rights concerns was seen as falling within the preserve of unelected class biased judges who were accountable to no one other than themselves and the supposed discipline of the rule of law which, in turn, was seen as no less suspect because it was judge biased, judge based and judge blessed. The economic and social programme was presented as representing the will of the people, articulated through their (perhaps, no less class biased) democratically elected representatives who were accountable to the political process which included accountability

10. At the same time, the justification for empowering the State and creating a strong Centre was to bring about social and economic change: see generally, G. Austin, supra note 3. The words “socialism” and “secularism” were added to the Constitution by the Constitution (Forty Second Amendment) Act 1976 (during India’s Emergency (1975-77)) but not taken out when the “emergency” amendments were sought to be edited out by the Constitution (Forty Fourth Amendment) Act 1978. For the political background to constitutional change during the Emergency and after see, R. Dhavan, The Amendment: Conspiracy of Revolution (1978) and Amending the Amendment (1979).
to the legislature and periodic elections. The grandness of the adversarial argument (Parliament v. judiciary, elected politicians v. nominated judges, democratic accountability v. the lack of it; status quo v. change; rights for some v. welfare for all) swept away the need for a rigorous examination of the empirical facts which suggested that politicians and political representatives were also drawn from the elite, that the political process was not as sensitive to accountability as it was made out to be and that the discipline of the law was not as principled or rigid as was supposed. As it happens, after the Constitution was enacted in 1950, Indian judges did block aspects of land reform legislation, inviting criticism precisely in terms of these classical oppositions whereby an elite unaccountable judiciary was pilloried for silencing the legislatively expressed will of a nascent nation allegedly on the move and gathering speed towards progress. This found expression in Nehru’s oft quoted and ruefully expressed phrase that lawyers and judges had “purloined the Constitution”.11

We are not really concerned with these early constitutional controversies which are recounted in detail by Indian scholarship exhaustively.12 Yet, all said and done, these arguments could not disguise the realities of every day life in India. There was endemic poverty in a strikingly inegalitarian over-populated and culturally diverse society. At the end of India’s Constitution making process, B.R. Ambedkar issued a sombre warning that if economic and social rights were not taken seriously, constitutional governance would be under grave threat of such enormous dimensions that the entire edifice of a liberal democracy which the Constitution makers had struggled to create may fall down.13 This warning went unheeded and relatively unnoticed at a time when India had committed itself to a massive social and economic transformation of Indian society itself; and, few believed that it was not serious in its aims.

One part of India’s initial planned economy endeavours sought to create an industrial base, human capital by investment in education, restructuring of land ownership and social legislation to eradicate invidious social differentials. The State was a key actor as an instigator of change, creator of possibilities, provider (through a huge industrial and commercial public sector) and a general regulator of social and economic life. The end-product of all these endeavours proved to be contradictory and cumbersome. Land reform did not travel to the peasantry but benefited the better off and richer peasant. A bio-mass based agriculture cannot tempt abrupt demographic movements any more than it can suffer too many economic and social differentials in a rapidly industrialising economy. If industrialisation provided opportunities for the existing and new middle class, the latter saw excessive regulation as throttling their efforts and inviting favouritism, red tape and-corruption. Into these and many other contradictions was thrown the advent of periodic elections. Elections have all kinds of effect on government and people. A government which wishes to bring justice to the poor yields to the business interests which fund its democratic campaigns and fill the coffers of

12. For legal analysis of the earlier controversies see, R. Dhavan, Supreme Court and Parliamentary Sovereignty (1976).
government, politicians, their political parties and their friends. Political parties, which enact legislation to expel caste considerations from governance, find themselves awkwardly placed by asking the populace to vote for them on caste lines. Since the poor and disadvantaged have a vote far greater than those of the advantaged, the former’s consent to govern in favour of the latter is sought to be achieved by a mixture of well worked out ideology and hyped-up propaganda to convince the poor that their predicament is being dealt with uncompromisingly on a war footing. It does not take long for hope to be transformed into cynicism and despair; and for an electorate to be fragmented along caste, communal and religious lines. At first, this happens covertly; and, then, openly to entrench differences. The rational objectives of a society have to yield to winning elections. Yet it is electoral democracy which keeps some kind of check on our rulers from straying too far afield into arbitrariness, corruption and the tyrannical pursuit of power for its own sake. An equation between a rational pursuit of just aims and populism is maintained by two simultaneously, important methods of governance: (i) institutions which preserve the polity; and (ii) traditions of governance which discipline the former’s working. The often skewed expression of the democratic will is tempered by democratic institutions being imprisoned by rules and principles of governance. Since these tend to favour the status quo, both fall under suspicion and attack. Yet, without such precautionary underpinning, the enterprise of governance can easily go astray.

All this is relevant to India’s constitutional experiments, because all these maladversions found place in various interludes of India’s near contemporary history. Its plans were thwarted by internal lack of discipline and dogged by corruption to suffer an entropic lack of direction. Electoral democracy undermined the pursuit of rationally just plans. The electoral process was abused; and suffered the onslaught of ‘money’ and ‘muscle’ power. India’s rulers did move to a tyrannical authoritarianism during the Emergency (1975-77); only to be told by the electorate that this was not acceptable to the Indian people. Its institutions of governance became dysfunctional without developing the institutional morality which should have moulded their use. A demographic explosion of immense proportions added to increasing differentials. Political society became unscrupulously unreliable; and led by a cycle of expectations as a ‘million mutinies’ traversed civil society. It was the non-governmental organisations, the media and the judiciary that fought back to find just and democratic balances in Indian society.

So far, Indian governance had only articulated what seemed to the poor and disadvantaged to be suspect plans and false promises. In alliance with the liberal and ‘left’ intelligentsia, the disadvantaged decided to make fresh and purposive (but, not necessarily coordinated) initiatives to vary and enlarge the scope and objectives of their struggle. Politically, the advent of Marxist government in West Bengal for an unbroken span of almost two decades (from 1977) gave courage and suffered emulative example. But, the path chosen by some of the better organised disadvantaged caste groups was manifestly different. Parliamentary seats were reserved for ‘untouchable’ and tribal groups (called Scheduled Castes and Scheduled Tribes (SC and ST) in the constitutional lingua franca of India). There was
also ‘Reservations’ of government jobs and other benefits for both SC and ST and “other backward classes” (OBC) by way of affirmative action. This had added significantly to their empowerment as a community. After the Emergency (1975-77), several groups claimed to be amongst the ‘backward classes’ and demanded their inclusion in affirmative action programmes — especially those which enabled them to get government jobs in the Union Government (which, by itself, was seen as an important social form of empowerment). This initiative acquired an important political edge in that certain political parties and leaders used the bait of affirmative action programmes to create new ‘caste’ constituencies in the sprawling populace of the North Indian States of Uttar Pradesh, Bihar, and Madhya Pradesh which — by virtue of their demographic size — have, inevitably, been pivotal in determining who should rule India from Delhi. The Janata Dal government (1989-91) encouraged such politics, revived long forgotten and shelved job-reservation plans in the Union Government and ended up by paying the heavy price of being thrown out of office because of the popular and political agitation that followed. The actual initiative of inviting job reservations for an ever expanding group of persons called the “other backward classes” (OBC) led to a larger than life constitutional extravaganza in the Supreme Court (known as the Mandal case) which ‘problem - solved’ the issue by combining political pragmatism with some measure of principled decision making. But, the political lid on pandora’s box had been opened, unleashing a caste based electoral process which promised to dominate Indian politics for a long time to come and which sits uneasily with India’s avowed claim to eliminate caste considerations from public governance. Whatever one makes of the intricate politics of the various groups that sought and obtained power in India through a caste based manipulation of the electorate, it was clear that the politics of the ‘excluded’ (even if they were not the truly disadvantaged) was menacingly on the move.

Concomitantly — but without any apparent nexus with the changing caste based politics generated by the ‘excluded’ and disadvantaged — activist persons and groups began to push the Supreme Court to abandon the narrow and somewhat ‘class’ biased interpretations of India’s chapter on FR; and read, into the contents of the latter, the ESR and other provisions of the DP using as they went along the Preamble of the Constitution which promised — apart from liberty, equality and fraternity — “JUSTICE, social, economic and political”. Significantly, during the Emergency (1975-77), the words “socialist” and “secular” were added to the preamble to declare India a “sovereign, socialist, secular, democratic republic”.


15. Supra note 10. Whatever the historical background, “secularism” has been accepted as part of the basic structure of the Constitution and, therefore, not susceptible to constitutional amendment, in addition to being an aid to assessing or reviewing (as the case may be) the exercise of constitutional, legislative and executive power. (See, S.R. Bommai v. Union of India, (1994) 3 SCC 1, and M. Ismail Faruqui v. Union of India, (1994) 5 SCC 360). Arguendo, if “secularism” is part of the basic structure of the Constitution, there is no reason to denying the same status to “socialism” — a challenge rather more difficult to give effect to honestly, given India’s self declared and avowed aims to liberalise into
After the Emergency this description of the republic remained unaltered. If — to borrow a famous metaphor — the justification of the addition of these words during the Emergency was that ‘socialist’ and ‘secular’ love had to be added at a time of supposed democratic cholera, their continuance seemed (to some) to invite authoritarian cholera after the restoration of ‘liberal’ love! But, all this gave activist lawyers and judges a handle to turn around and expand the limited interpretation of the chapter on FR. This led to a bitter struggle within the Supreme Court which, pushed by a small but committed minority of judges, reversed the previous human rights jurisprudence of the court to lay the foundations of a new amalgamated approach whereby CPR and ESR were read together as part of a common dispensation of human entitlements and duties. What is no less significant is that courts relaxed their rules of standing, invited bona fide democratic interventions in the judicial process and welcomed the idea of the ‘law’ as a legitimate arena of struggle. Since the court itself was divided (later, self evident from its juristic retreat on so many BoR issues), there was no promise of success in respect of this ‘democratic’ invitation. Much rather, playing on the indeterminacies of legal interpretation and the lapse of institutional governance in the other organs of State, the Supreme Court invited people to locate their struggles within the court processes ordained by the rule of law; and promised a sympathetic and positive hearing. This did not necessarily mean that the Supreme Court had now entered the domain of politics and begun to take suffering seriously. But, it did transform the nature and function of India’s higher judiciary in ways that were excitingly controversial.

The transformation of India’s judiciary as the most crucial institution of democratic governance in contemporary India is still taking place and has given rise to much academic, social, journalistic and political disputation as to whether these changes are compensatory in nature (following the failure of other institutions of governance) or whether the judiciary (in India and elsewhere), is the natural situs of peoples’ struggle in our time. The transformation of India’s judiciary as the most crucial institution of democratic governance in contemporary India is still taking place and has given rise to much academic, social, journalistic and political disputation as to whether these changes are compensatory in nature (following the failure of other institutions of governance) or whether the judiciary (in India and elsewhere), is the natural situs of peoples’ struggle in our time.

II Political and justice texts of Constitution

Every Constitution contains a mix of ‘political’ and ‘justice’ texts. The ‘political’ texts constitute the manner in which governance is conducted and concerns how policies are made, laws and rules enacted and decisions arrived at and given effect to. The ‘justice’ texts consist of the bundle of promises and expectations which people have of the constitutional set up. No distinctions are clear cut and decisive. This is equally true of the heuristic distinction between the ‘political’ and ‘justice’ texts. Typically, the institutions and processes associated with the ‘political’ texts are the processes by which rulers are chosen or replaced, a market economy. Yet, “social justice” (an aspect — if not the aim of — socialism) cannot be displaced from being a primary constitutional concern. It is for jurists and judges to give effect to the concept of “socialism” as part of the ‘basic structure’ of the Constitution.


the manner in which all institutions of governance are constituted, the legislative institutions and processes for formulating policies and framing laws and the executive system of making decisions and giving effect to them. We need not trouble ourselves with the deeper question of how the entire constitutional system is itself constituted. Those latter questions have been debated in the academy. Such questions have also been decided by judges appointed under a previous constitutional regime being called upon to decide on the constitutional validity of a legal "usurper". No less typically, the 'justice' texts have been associated with judicial institutions which — apart from dealing with the complex issues of dispute settlement — are expected to ensure that powers, responsibilities and immunities emanating out of the political texts are discharged in a consistent, neutral, fair, equitable and just manner.

This is not to suggest that people do not have any substantive expectations from the political texts. Expectations from the 'political' texts vary from Constitution to Constitution. In fact, such expectations are also impliedly part of the 'justice' texts and part of the right to "good governance". But the custodians of the political texts are not happy about being supervised over how the political texts work as long as law and order is preserved and the political system is working reasonably satisfactorily. This is the basis of the 'political question' doctrine which restrains judges from inquiring into such matters. Happily, the 'political question' doctrine has not been totally accepted in India although glimpses of it exist when judges formulate the principles of judicial restraint which they devise for themselves. Beyond this lies the larger question as to whether Constitutions subserve the purpose of sustaining a system of politics or also have the teleological objective of achieving socio-economic objectives (as for example, a substantively egalitarian society). Writing within the constraints of the constitutional system they describe — jurists take the view that socio-economic objectives do not attach to Constitutions which neither can, nor should, prescribe such aims. Accordingly, the socio-economic priorities of a people cannot be determined in advance, but must be settled, and resettled, by, and through the political process from time to time. This somewhat limited view of what can be expected from Constitutions generally has been criticised as inegalitarian, harsh and unhelpful.

The 'justice' texts give rise to a variety of expectations. The minimal expectation from the 'justice' texts is that the 'rule of law' in its narrowest sense (that is, adherence to the norms laid down by the rules) will be preserved. But, even the fulfilment of this expectation depends on the extent to which the 'judiciary' or judicial institutions are empowered to enforce adherence to the rule of law. Thus, at the time of British rule in India, the judiciary was not empowered to review and strike down governmental action contrary to the rule of law except to the very limited extent of the geographic limits of the Presidency towns of Calcutta, Bombay and Madras. The full fledged possibilities of judicial review

18. For an interesting analysis of how courts have dealt with 'usurper' regimes see, Paula R. Newberg, Judging the State: Courts and Constitutional Politics in Pakistan (1995). This problem has also arisen in the context of Rhodesia (as it then, was), Nigeria and Ghana.


arose only after the present Constitution of India was enacted in 1950, as a consequence of which, the various High Courts of the States were empowered to judicially review administrative action and strike down legislation that was incompetent (as being beyond the empowerment of the legislature in question) or violative of FR. But the ‘rule of law’ is not limited to the black letter texts of statutes and rules, but encompasses a wider "empire"\textsuperscript{21} extending to a controversial determination of issues according to principles allegedly underlying a universal concept of ‘law’ and which are inextricably linked to legal notions of justice. Such an approach emphasises the important nexus between law and justice which a century and a half of English analytical jurisprudence swept away.\textsuperscript{22} Expectations from the judicial texts — and, perforce, the judiciary — vary from system to system. But, there is an increasingly more acceptable view that ‘justice’ concerns are universal even though the form and content of ‘justice’ demands may not be. In any view of the matter, judicial institutions, reposed with the task of being custodians of the ‘rule of law’ in the ‘narrow’ and ‘wider’ sense of that phrase, have become important institutions of governance, concerned with not just mediating a narrow rule of law accountability, but more generally with the broader horizons of law and justice with which they are increasingly — albeit controversially — associated.

The mix of expectations from the ‘political’ and ‘justice’ texts (and the institutions which correspond to them) are diagrammatically illustrated below:

<table>
<thead>
<tr>
<th>Extent of adherence by judicial institutions to various versions of the ‘justice’ texts</th>
<th>Non-adherence (No adherence to rule of law)</th>
<th>Low compliance (Narrow black letter)</th>
<th>Medium compliance (Rights)</th>
<th>High compliance (Substantive justice)</th>
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<tbody>
<tr>
<td>High compliance (attempt to achieve, substantive ‘justice’ goals)</td>
<td>A4</td>
<td>7</td>
<td>8</td>
<td>9</td>
</tr>
<tr>
<td>Medium compliance (attempt to protect ‘rights’)</td>
<td>A3</td>
<td>4</td>
<td>5</td>
<td>6</td>
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<tr>
<td>Limited compliance (attempt to protect law and order)</td>
<td>A2</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Non-compliance</td>
<td>A1/B1</td>
<td>B2</td>
<td>B3</td>
<td>B4</td>
</tr>
</tbody>
</table>

\textsuperscript{21} A phrase taken from R. Dworkin, \textit{Laws Empire} (1988).
\textsuperscript{22} For an elegant twentieth century version of analytical theory see, H.L.A. Hart, \textit{The Concept of Law} (1961). Both Fuller, \textit{The Morality of Law} (1964) and Dworkin \textit{ibid.} and other writings critique the ‘justice’ implications of analytical theory. For the view that analytical theory is itself the expression of the politics of the day see, R. Dhavan, \textit{Government by Default: Essays in Law and Democracy} (1978) and more succinctly in R. Dhavan, “Juristic Ethnology of Kesavananda’s case”, 19 \textit{JLI} 489-97 (1978).
While the diagram is both self-explanatory and oversimplified, it portrays a range of combinations of intimations of what exists as well as of what is possible. Most political institutions profess to be at levels 7, 8 and 9 even though they may perform at levels 1, 2 and 3. In many countries, corruption has taken over the body politic so that political institutions (in the broad sense in which we have linked them to the political texts of the Constitution) do not even adhere to the rule of law. Where the judiciary is unable to provide a corrective, the system is constitutionally doomed (see Alternative A1). Where the ‘judicial’ institutions and texts fight back (as they are tending to do in India), the trajectory of constitutional viability moves to a better accountability amidst corruption and ineptitude (see B2, B3 and B4) or graduates to a better dialectic between the institutions responsible for the ‘justice’ and ‘political’ texts. If ‘political’ institutions discharge their constitutional functions well, it might appear a strong judicial oversight may not be necessary (Alternative 7). But, in fact, this is an illusion. In fact, the very sprawl of the modern (or, is it post-modern?) State suggests that the State (comprising both the ‘political’ and ‘judicial’ entities) do not all operate at the same level of constitutional understanding or responsibility. Some institutions may be below constitutional par (Alternatives A1-4 and B1-4). Some institutions may be effective but require internal or external oversight. The people in various countries, too, have divergent aims and ambitions. Some may use some institutions and play them off against other institutions. The relationship between civil society and political society cannot be reduced to simple (or for that matter even complex and, thereby, eclectic) explanations about how power in civil society replicates itself in the various institutions of State. All this has to be borne in mind while considering the judicial advancement of the career and prospects of human rights in India.

Despite the high sounding words that are littered in the discourses of the Constituent Assembly (1946-50) and, inevitably, in the text of the Constitution, the original design of the constitutional emphasis (taken in its purest form without being subjected to cynicism) was to sustain a strong political commitment to social justice with a very limited judicial review. This was not a-typical of the milieu. The intuitions that marshalled this emphasis were premised on two postulates. The first postulate was that the State had a duty to transform Indian society so that it was liberated from its caste, class and other unjust differentials in which its civil society had got enmeshed over the centuries so that India was modernised as a powerful industrial state with a strong agricultural base in which all persons achieved a measure of social and economic equality (with an ever increasing actual equality of opportunity for succeeding generations) under conditions of fairness and justice available to a liberal and democratic society.

The corollary to this jural postulate was that the primary duty of effecting and enabling this transformation lay with Parliament and the executive; and, that the judiciary (like its counterpart in the England of the day) would be generally restrained to do no more than ensure that the basic conditions of fairplay were

generally observed, bearing in mind that if the State (identified with Parliament and the executive) were not suitably empowered to effect and enable the intended transformation, the social and economic objectives for which the Constitution was created would not be achieved.

Even if in retrospect — and, that is after putting the best construction on it — the constitutional design underlying these postulates seems naive, even though it was in tune with the contemporary wisdom of the day. Despite the advent of the fascist totalitarianism leading to the Second World War (1939-45) and liberal propaganda against communism and the Soviet Union, few could deny the rapid transformation of Russia and its republics through, and under the aegis of, a strong State. America, too, had moved to a strong regulatory State. The Labour Government in England (1945-50) which laid the foundations of the welfare State had a profound effect on the Fabian Nehru. Arguendo, distributive justice was impliedly written into the political texts. Strong regulatory and welfare States were in vogue.

The compelling tour de force of this approach had an important import on the understanding of the impact on the justice texts of the Constitution. Juristically, the judges were expected to maintain a regulatory oversight, but not stand in the way of the empowerment of the ‘political’ institutions. In its conservative form, this meant devising public law doctrines that were low key and accommodated ‘wide discretionary authority’ in the various agencies set up through, and under, the political texts. In its more exaggerated ‘socialist’ version, judges were expected to devise juristic techniques which would help in the task of social engineering through law. This meant justifying the empowerment of the State in the name of social engineering; and also creating doctrine which would fulfill this task of social engineering in ways that did not undermine State empowerment. Somewhere in this twin expectation lay a contradiction. Judges were expected to be simultaneously both conservative and radical, restrained in their exercise of power as well as carry a social imagination in the exercise of the judicial power, be judges as well as social engineers.

The ‘left’ throughout the world had been distrustful of judges who were portrayed as class biased. Knowing this, it seemed incongruous to expect the judges to add to the socialist enterprise of the redistributive (regulatory and welfare) State. Yet, in the evangelical spirit that characterises all socialist movements, there was a feeling that judges (like everyone else) would simply have to change their attitude; and both accept and further the new dispensation.

At first, Indian judges were quite confused by this invitation to produce a ‘Statist’ but socially responsible jurisprudence. In the fifties and sixties (and, indeed, to this day) an element of class bias did enter into the juristic thinking of the Indian judiciary — even though the Supreme Court has found making such an allegation against judges to be punishable as a contempt of court for ‘scandalising the judiciary’. The context of the change was innumerable problems over the judicial interpretation of the guaranteed fundamental right to property which was

taken out of the FR by a constitutional amendment in 1978. Ironically, it was the allegedly class biased judges who laid the pre-Emergency (1975-77) foundations for developing a wider concept of due process in India developed after the Emergency. Not surprisingly, when the 'disadvantaged' hit back to persuade the judges to create a jurisprudence helpful to them, it was precisely these aspects of the development of the law which they seized upon to develop a jurisprudence responsive to their struggle. These ironies are writ large over governance generally, but are a special feature of the law. Since law is expected to be, at least, evenhanded (if not fair and just), it teaches — to borrow Shakespeare's phrase — "bloody instructions which return to plague the inventor".

But, if judges were expected to be both forbearing in their judicial oversight of public power as well as 'social engineers', what did the latter responsibility entail? At one level, the judges were expected to be 'problem solvers' — that is to say, their task was to iron out the creases of the "law" so as to fulfill the social purposes underlying any 'public' initiative that was placed in issue before them. But, could judges go further and try and evolve solutions of their own? And, if so, could the solutions they devised as social engineers be at variance with those envisaged by the contemporary custodians of the political texts of the Constitution? At some stage, some English judges — responding to the creative and constructive views of Lord Denning — frowned on the idea that judges could be legislators. For them, it meant that judges were crossing the sacral barrier that separated the 'justice' from the 'political' texts of the legal system. Yet, the severity of the frown is now seen as something of an over-reaction which did not do justice to the innovative possibilities of juristic development through, and by, the judges.

But, 'problem solving' can have more than one implication. At the decisional level it may mean making decisions favourable to the government, even if for the ostensible reason of not rocking the boat too much at a time of crisis. It is not impossible to construe the Congress Party's demand of 1973 for a 'committed' judiciary as envisaging a 'problem solving' judiciary of this nature. Both Nehru and Indira Gandhi were not appreciative of the logic underlying judicial decision-making when they displayed their hostility to the judges and virtually portrayed them as anti-national. Much rather, their concern was with the decisions themselves — especially in Indira Gandhi's case who felt that the Bank Nationalisation, Privy Purse and Newsprint Control decisions undermined the very basis on which she had split the Congress Party in 1969. Later, it was a decision of the Allahabad High Court that sought to unseat her as a Member of Parliament and Prime Minister which led to the Emergency. The only difference between Nehru and


26. For a rigorous and elegant account of the case see, Prashant Bhushan, The Case that Shook India (1977).
Indira Gandhi was that the former had his say but did not try and pack the judiciary; but the latter tried to manipulate both the judges and massively reduce their general power of judicial review after declaring a spurious Emergency (1975-77) in which the rule of law was asked to acquiesce into somnolence. To expect judges not to be aware of the pragmatic effects of their decision making is unrealistic, but to expect them to make decisions (albeit by a clear twisting of the law or facts) favourable to the regime in power or to any one party must necessarily result in their questioning the raison d'etre of the judicial enterprise and their role in it.

At the interpretative level, even if judges are not expected to be over imaginative in re-writing the text with fresh and more insightful texts, they are certainly expected to provide interpretations which will iron out creases. In the inimitable words of Justice Krishna Iyer (when he was a judge of the Kerala High Court):

[C]ourts which within strict limits have to essay social engineering, are not the sanctuary of age old but unwholesome customs, even if they are not the refuge of social reformers working to emancipate (people) ... in the spirit of the Constitution. In the inevitable chemistry of social change courts certainly are not anti-catalysts.27

The line between making favourable decisions and devising favourable interpretations is thin and, overlaps. But, in either case, making favourable decisions for their own sake is inimical to the judicial enterprise even if we accept (as we must) that in their quest for giving meaning to a legal text, judges must temper their perspective with an understanding of the pragmatic consequences of their decision making and interpretation.

It is at the reformative level, that the judicial enterprise becomes both interesting and controversial even though no such exercise can be divorced from the factual, legal and situational circumstances in which it is made. At this level, the judge as a social engineer may stay within the constraint of problem solving or may branch off as an innovator, giving rise to charges of excessive judicial activism.

Perhaps, some Indian examples might elucidate the contrast between a ‘reformist’ judge as a ‘problem solver’ and the ‘reformist’ judge as an innovator, bearing in mind that both exercises entail purposive interpretation and decision-making on the part of the judge. Let us take the ‘problem solving’ reformist first. Imbued with the idea of ‘social engineering’, one of the better known Chief Justices of India, felt that he must interpret various aspects of the statutory and case law in order to advance the cause of ‘State’ sponsored socialism and secularism. In Justice Gajendragadkar’s interpretations of labour law, ‘management’ and ‘labour’ had to be reconciled to a better understanding and a more rigorous use of the dispute settlement system. Again, in his interpretations of the right to religion and state management of religious endowments, Gajendragadkar

J. not only managed to 'problem solve' at the decisional level but also gave the court a more decisive say in matters concerning religion in ways that advanced State control and contributed to the creation of an assimilative secularism which slurried over religious distinctions important to those who practised it. Years later, many judges also played a similar role over a large number of issues including the controversies over affirmative action which erupted into violent public controversy.28 The reason why such, otherwise juristically creative, endeavours are placed within the 'problem solving category' is that there was a considerable identity of perspectives between the, then, government's policy and the juristic approval of the judge. Both believed in a common vision of planned change through State intervention within the context of a liberal democracy disciplined by the rule of law. Over time the vision got distorted. Concomitantly so also did the concept of a problem solving judge; and, perforce, the relationship between the government and the judiciary.

This is not to suggest — and the point needs emphasis — that the old style 'problem solving' judge was captive to the view of the government. In the existing milieu, such a judge accepted the government's bona fide interpretation of the substantive justice concerns of the Constitution and gave effect to them as part of the innovative re-working of the 'justice' texts. Nehru's personality and the sheer tour de force of India's plans for the future added to the constitutional vision of the judge and prevented him from wandering too far afield from what was seen as the 'national' approach. Perhaps, that is why this approach has been called the Planning Commission jurisprudence approach.29

In a less dignified version of the 'problem solving' judge, there is no identity of vision between the judge and the executive but an identity of interests whereby the judge simply does what is asked of him — camouflaging the 'deal' between 'them' and 'him' as best as he can with 'wordy subterfuge'.

In the alternative portrayal of the judge as innovator, he is no less a problem solver. But the 'problem' to be solved is one that relates to society. The judge is concerned about what is going on around him, including what is going on in the agencies of the State and the government of the day. In these circumstances, he does not necessarily place himself in notional opposition to the government's plan. Much rather, bearing in mind the needs of the contemporary situation, he explicates what he believes to be a democratic and just interpretation of the Constitution and advances that interpretation in a mostly neutral way, going beyond the immediate issue that has come to the judge for resolution. Such an approach is less statist, more sensitive to societal concerns and more discerning about the distribution of responsibility between the 'political' and 'justice texts.

In this approach, the somewhat over-simplified Nehruvian and socialist view that

28. For a summary description of the jurisprudence of Justice Gajendragadkar along with further references to his writing, writing on him and judgments see, R. Dhavan, “Introduction” to Marc Galanter, Law and Society in India xxv-xxvi and esp. n. 66-67 (at p. xxxiv) (1989) and the materials cited there.

29. See, R. Dhavan, id. at xxi-xxviii; as also for a general review, R. Dhavan, “Means, motives and opportunities: Reflecting on legal research in India”, 50 Mod L Rev 725-49 (1987).
sought solutions by empowering government and limiting judicial review is abandoned. Judges see their role much more expansively so that the 'justice' texts are not just viewed as being concerned with the "rule of law" in the narrow sense but with the wider dilemmas of justice. It has been suggested that the post-emergency Indian Supreme Court judges have been reformatory innovators in this strong sense.

At a critical juncture, soon after the Emergency, the judiciary — led by the Supreme Court — gradually meandered into becoming a pivotal institution poised to tidy up the ensuing confusion which was in some immediate danger of drifting into chaos. Two aspects of the Supreme Court's agenda setting are significant. The first was to endeavour to bring public governance within a disciplined and just framework, leading to an expansion of public accountability through law. The second was a restructuring of the human rights agenda to accord some primacy to the much neglected ESR on which the every day lives of ordinary Indians depended.

Ironically, perhaps understandably, this change came at the hands of 'Left' wing judges. Although there was a global melting of the negative attitude of the 'left' to 'rights' and the 'rule of law' (amidst warnings that human rights continue to be susceptible to class as opposed to community appropriation), the sea change in the attitude of the Indian 'left' towards 'rights' and rule of law derived almost next to nothing from the discourses in the West, but arose as a response to India's own experiences with its own social and political realities and experiments with democratic truth.30 The judges realised that there was no inherent contradiction between human rights and social justice — both of which must strive to procedural and substantial fairness. To adapt Brecht's powerful phrase: 'those who fight for kindness and fairness must necessarily had to be kind and fair'. No less, many economic and social rights were neither largesse nor mere statutory entitlements but an essential part of the wider human rights programme which had to be implemented if 'human rights' were to have meaning for the large bulk of India's population.

Both the democratisation of court procedures to invite public interest causes to be located in the court's docket as well as the expansive interpretation given to the substantive content of the chapter on FR, met reasonably heavy criticism both within and without the Supreme Court. The judicial protests within the court were strong, they remained footnote protests. The concerns of the judges were encapsulated in ten questions which were formulated by the court and referred to a five-judge Constitution Bench for clarification in 1982. So far, even though the questions re-surfaced in 1995 — these questions have remained unanswered. Perhaps, this was because judges, lawyers and activists felt that it was better for issues like locus — the right of ordinary citizens to file public interest causes, its extent and the procedure to be adopted ought to be settled on a case-by-case basis rather than in the abstract.31 Criticism directed itself against the time taken by


31. The 10 questions may be found in *Sudipti Majumdar v. State of MP*, (1983)2 SCC 258; and see generally, R. Dhavan, *supra* note 17 which reviews the cases and the literature.
such cases, the usurpation of the role of the executive and government, the existence of alternative remedies, the alleged takeover by the court of the government’s constitutional functions, the manner in which cases were filed and the *bona fides* of the ‘public’ interest litigants, the procedures devised by the court for investigating facts, schematic nature of the remedies, the failure of the remedies to manifest themselves in concrete results and the *ad hoc* manner in which the court has proceeded. These criticisms have been vigorously countered by defenders of the new dispensation who applaud the court variously for ‘taking suffering seriously’ and allowing courts to become the situs of struggle. There is also the deflating view that what Indian courts are doing now has been part of American public interest litigation for years.\(^{32}\) So what else is new? Behind the chorus of orchestrated critique lies the ire of the business community who are often substantively affected by public interest litigation as also the discomfiture of government who find their programmes exposed and subjected to complicated compliance orders, with report back and monitoring requirements built into such orders. Despite the continuing storm of protest and whatever its status elsewhere, the new litigation — characterised as a democratic social action (SAL) as opposed to an elitist public interest (PIL) litigation — is an Indian innovation which has far reaching consequences for both Indian governance and human rights generally.

After the immediate post-Emergency ‘innovators’ left the court around the mid-eighties, there was a feeling that the continuance of this new judicial initiative could not be vouchsafed. Although the new procedures and jurisprudence were ‘judge-led’, its sustenance was enabled by the simple fact that once the new route to obtain accountability was opened, the traffic of cases increased considerably. It was very difficult — and in some obvious and deserving cases, much too embarrassing — for the judges to step back and forbear from examining the continually expanding docket of public interest and social action cases. Nor was it the case, that the later ‘downstream’ judges were wholly resistant to develop the new jurisprudence which helped the judiciary to be more greatly identified with the concerns of the people. The judiciary was no longer viewed as being an aloof institution and one-stage removed from the people. It was sported as an institution to which the people could come directly to espouse their entitlements, public interest causes and protests against the lapses and failures of accountability in the apparatus of governance in civil and political society. Partly because they were caught in the flow of the new momentum and partly because the new juristic journeys were intrinsically exciting, the judicial imagination continued to be teased into action. There were setbacks. There was a feeling that many areas of juristic assertion had to be tidied up. In some cases, it was felt that the immediate post-Emergency ‘innovator’ judges had gone too far. A great deal of the law relating to government service and labour went into partial reverse gear as a result of the tidy up. The court became increasingly reluctant to question governmental wisdom even when there may have been cause to do so. The procedures of approaching the court were made more systematic but necessarily more forbid-

ding. The extent of court intervention decreased except in some areas relating to atrocities committed by the State and certain aspects of the environment. Yet, both the new procedures and the foundation jurisprudence engendered by them was not only sufficiently secure but expanded into new thresholds into the area of securing economic and social rights (ESR) as a part of the human rights agenda to be enforced through courts. The social and political circumstances and the cerebral possibilities of evolving a new jurisprudence suited to India opened up possibilities for a judiciary on a scale and to an extent that was hitherto unimaginable.

If we return briefly to our under written canvass of incomplete possibilities arising out of interpretations arising out of the 'justice' and 'political' texts of the Constitution, an alarming as well as optimistic picture emerges. After the publication of a recent report that many parts of the Indian state are run by local and national mafia, there was every reason to believe that, like so many developing nations, India too was succumbing to a ‘free for all’ justiceless lawlessness. But in India’s case, democratic forces in the form of social activism, the media and the judiciary were responsible for reversing the seemingly irreversible downhill trend of continuing failures in the working of executive and political governance which were dogged by a lack of honesty, endemic corruption and a near total failure to provide a meaningful justice to the people, especially the poor and disadvantaged. With the support of struggling forces in society, the justice texts were re-interpreted to provide compensating strength for the failure of the political texts. The intuition that the ‘political’ texts must yield more if India is to survive is unexceptional. But that intuition should not be taken to imply that if and when the political texts begin to deliver the promise of liberation, judges should retreat back into the normal conservatism associated with their style and functioning. In the first place, it would be wrong to assume that the political texts will continue to make a perfect delivery over time. Secondly, the expanded interpretation of the justice texts reposing the custodianship of a wider concept of justice in the hands of the judiciary seems generally necessary and proper. Henceforth, a more aggressive reading of the justice texts suggests that irrespective of how the political texts work, the justice texts should be read so as to involve the judiciary in a more confident assertion of itself as a mediator of accountability and an instrument to obtain a substantive justice including the fulfillment of ESR.

In all this, there remains the danger that too much is being left in the hands of too few in circumstances where these few are not subject to accountability. On the one hand, the judicial process itself contains some measure of accountability because it entails a fair hearing and reasoned decisions. On the other hand, procedural fairness and clever rationales for decisions are not enough. The dangers may be real and may require further consideration; but, that does not make this experiment into governance democratically unworthy.

III Ambedkar’s prophecy and India’s life of contradiction

There is a let-them-eat-cake quality about discussions about human rights in

India without examining the dimensions of the human and ecological predicament of its peoples. Styled as a subcontinent with large parts of its mountain, desert and other regions uninhabitable, its 3,287,263 sq. km of territory contains only 171.8 mn. ha that are cultivable of which 24.9 mn. ha are fallow and 140.7 mn. ha are the net sown area, including 44.5 mn. ha that is irrigated. Its river basins are by no means large. The longest river is the Brahmaputra (2900 km) with the Ganges and the Yamuna running for 2500 km and 1376 km only. The river basins of the south vary from the 1450 km Godavari to the 760 km Kaveri. Together, these basins already reduced to a trickle by irrigation projects — support a population of 844,324,222 in 1991 — an increase of decadal growth of 160,995,125 (23.36%) between 1981-1991. Around the turn of the century, India will crowd together over one billion people. Its land, forests and rivers support 43,000 (including 15000 endemic) floral species and 75,000 species of fauna. It is estimated that approximately 271 m (37.4%) of its peoples lived below the poverty line in 1983-4 (calculated at the rate of a per capita monthly income rate of approximately Rs. 100 per month or 4 or 5 dollars) decreasing to 237.67 m (29.9%) in 1987-8 (calculated at the rate of Rs. 131.8 per capita per month). The per capita availability of cereals and pulses is 474.2 grams per day with its cloth consumption per person being no more than 25 meters per year in 1990-1 (of all fabrics) compared with about 15 meters of 10 years earlier. The sheer diversity of its people can be gauged from its almost 100 million (m.) Muslims (a minority of 12 per cent, but making India one of the largest Muslim countries in the world), and (at 1981 estimates) 16.2 m. Christians, 13.2 m. Sikhs, 4.7 m. Buddhists and so on. With its over 20 major languages (each with their own script) and over 200 plus dialects, India is easily the most diverse country in the world.

Yet, apart from what has already been said about more than a quarter of its population being below the poverty line, and its limited consumption of cereals and pulses, even the official (somewhat optimistic) literacy rate is pitched at 52.21% (64.13% male and 39.29% female). Drinking water — often disease prone — facilities are admittedly available for only about half the population. Sanitation facilities in rural and urban areas are estimated to cover only 3.26% and 47.9% of the population respectively. The recent judgment of the Supreme Court on the treatment of Delhi’s garbage provides the lie to the claim that the facilities are anywhere near satisfactory. Hospitals are inefficient and maldistributed and the expansion of health services has tended to be low even though the number of doctors, nurses and dentists has increased to service those who can pay for their services. If suicides are an example of crisis and despair, there were 84,244 reported cases in 1993. Essentially a biomass based economy, the rural-urban ratio has been changing from 25:213 m in 1900 to 63:298 m in 1951 to 160:525 in 1981, urban areas increasing their share to around 25%, even though the towns are ill equipped to handle the increase. Above all, the economy has been overtaken by greed (manifest in the form of corruption and violence) as it has been liberalised from a regulatory to a “de-controlled-consumer” goods economy. The shop-

33b. Cf. 449.6 in 1960.
window glitter of the change has trapped an ever increasing number of people into a cycle of expectations which is unlikely to receive egalitarian fulfilment for at least the next half century, if not more. India’s disastrous acceptance of the Uruguay Round of the General Agreement on Trade and Tariffs (GATT) which has brought intellectual property, investment, agriculture and services within the new global trade and investment system lays India open to global competition under circumstances where, according to a Standing Committee Report of Parliament, it has little to gain.\textsuperscript{35} As the pressures on India increase, it is heir — in V.S. Naipaul’s evocative phrase — to a “million mutinies” which take place at virtually every instant every day.\textsuperscript{36}

If human rights are to have any meaning, they have to be located within the conditions as they actually exist in India. To distinguish between CPR and ESR — and making the former immediately enforceable by judicial fiat whilst making the latter an objective to be achieved subject to the availability of resources — seems unreal and dangerous. With the market unable and unwilling to reach the least advantaged, state poverty alleviation and welfare plans suffering from acute entropy and “hijack-by-corruption” and the diminishing possibilities of rigorous accountability under the aegis of the political texts of the Constitution, judges have a choice — they can either stand back and wait for the system to redeem itself (which it is unlikely to do) or expand judicial horizons so as to correct the system, including collapsing the distinction between priority CPR and de-prioritized ESR. It is in that sense, that Gandhi is alleged to have said that the only form in which God dare appear to a hungry man is food! The cycle of discontent having become more and more intense and extensive, it sometimes seems that Ambedkar’s prophecy, delivered at the end of the Constitution making process is coming true. He surmised:

(India is ...) going to enter into a life of contradiction. In politics, we will be recognising one man, one vote, one value. In our social and economic life, we shall by reason of our social and economic structure, continue to defy the principle of one man, one vote, one value. How long shall we continue to live this life of contradiction? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we shall do so by putting our political democracy at peril. We must remove this contradiction at the earliest possible moment or else those who suffer inequality will blow up the structure of political democracy which this Assembly has so laboriously built up.\textsuperscript{37}

Ambedkar’s only misjudgment was that violence was destined to be introduced into social and political life by the dissatisfied lower-middle, middle and well off classes rather than the truly badly off.

\textsuperscript{35} The (Gujral) Third Report : Draft Dunkel Proposals Departmental - Related Parliamentary Standing Committee on Commerce (1993-4).


Unfortunately, western political theory has always been more concerned about CPR, largely because it has been traditionally unconcerned about the poor (until the latter acquired a vote) and more concerned with questions relating to empowerment and dis-empowerment of the well off classes contending that notions of human rights and justice were part of the more focussed concern about who would obtain power and how this power could be curtailed. This is manifest in the distinction between CPR and ESR and the lexical priority accorded to the former. The problem of equalising the welfare opportunities for the poor and disadvantaged was seen as one of gradual re-distribution over time, subject to the just savings of society as a whole.\(^{38}\) Another way of looking at the caveat of ‘just savings’ not being disturbed by the programme of redistributing wealth, and resolved opportunities, is to characterise it as the preservation of the status quo. It is possible that in countries with small populations and more tolerable disparities between the rich and the poor, such approaches to governance are politically acceptable, socially inexplosive and not wholly morally perverse. But such approaches sit uneasily with the conditions that prevail in a large part of the world where the very right to a decent life is in question. Under these circumstances, the settled interpretation of the relative importance of CPR and ESR is both devious and invidious.

The Emergency (1975-77) represents the symbolic summation of everything that was wrong about the overtly instrumental interpretation of the ‘political’ and ‘justice’ texts of the Indian Constitution. An over-empowered State had not only failed to carry out its promise of social and economic liberation, but had lapsed into corruption and ineptitude, with its political system drifting into authoritarianism. During the Emergency (1975-77), the judges had, by and large, held back — taking the view that their jurisdiction to inquire into much of what was happening was ‘ousted’. Perhaps, some felt, that the Emergency was the high point of a bona fide instrumentalism geared towards a programmatic fulfilment of justice within a regulatory planned economy — even though the manner of its introduction was, ex facie, arbitrary following Indira Gandhi’s refusal to accept an Allahabad High Court judgment which unseated her as a Member of Parliament and, therefore, as Prime Minister of India. (In India, as elsewhere, a ‘political’ chair cannot be left vacant for long). But, at the same time, for the ‘instrumentalists’ imbued with what we have called ‘planning commission’ approach to law and development, it may have seemed that the Emergency was, at last, gathering together the vestiges of the Indian State (variously described by two famous economists as a ‘soft’ State capable only of ‘post office’ socialism)\(^{39}\) to develop the capacity to instrument change. This was the official justification for the Emergency. But the concentration of power enabled by the Emergency proved to be a sham, transposed only for supporting the personal reign of Indira Gandhi, her family and associates and entailing a wholly subversive abuse of both the political and justice texts of the Constitution. In the run up to the Emergency and in order

\(^{38}\) See, J. Rawls, supra note 5 at 302-3 for the statement of the principles of justice.

\(^{39}\) The phrase “soft State” comes from Gunnar Myrdal and “post-office” socialism from J K. Galbraith.
to keep the judiciary under check, unwelcome and independent judges had virtually been forced to resign. Judicial appointments were being tailored to create a ‘captive’ judiciary. During the emergency, judges of the High Courts of the States were transferred without, and against, their consent from one State to another. Yet, despite all this, most of the higher judiciary were reticent about inventing a way to ‘by pass’ the constitutional provisions which had been enacted to oust, control and check their judicial power. That methods to do this existed was displayed by the various High Courts who broke the back of the ouster clauses in the preventive detention law which enabled an arbitrary administrative detention without trial. After the display of judicial courage by various High Court judges, the matter went to the Supreme Court which, (over one dissent) accepted the ouster of its jurisdiction on even mala fide and arbitrary detentions without trial and earned the criticism of the legal and political community for years to come.40

It is in the situation — and bearing in mind the overall necessities of the day — that we have to visualise the predicament of the ‘left’ wing judges and socially sensitive judges of the Supreme Court in the aftermath of the Emergency. If the logic of their earlier jurisprudence was transformative change through the political texts of the Constitution with effective oversight through the judicial texts, this formula had failed. Yet, the problems of India remained. Its population was increasing as fast as the differentials between the rich and poor. Its governance had meandered from carelessness to arbitrariness to corruption to chaos. Its plans to effect change existed not only as executive promises without always being mired in mandatory statutory provisions. In any event, these promises were never fulfilled; and, the spoils of development went to more advantaged and those adept at hi-jacking and appropriating the benefits earmarked for the less well-off. A hugely talented people were suspicious, restive and alienated from governance. This restiveness increased when the experiment of an alternative democratic government (1977-80) installed after the Emergency failed. An unrepentant Indira Gandhi was returned to power for no other reason than the feeling that, despite her faults, she was, at least, able to govern. But, for the socialist and socially sensitive judges, a jurisprudence of judicial forbearance was no longer an option.

The judges responded by weaving into the interpretation of the ‘justice’ texts five juristic initiatives which can conceptually be characterised as follows:

(i) **Preservation and expansion of judicial review.**

(ii) **Anti-arbitrariness and due process** to check, monitor and control the increasing unprincipled usurpation of power by the executive.

(iii) **Re-definition of Human Rights** so as to partly collapse the distinction between Civil and Political Rights (CPR) and Economic and Social Rights (ESR).

(iv) **Democratisation of the judicial processes** so that people could locate their struggles with the judiciary directly.

(v) **Expansion of judicial capability** to produce schematic solutions over which the judiciary retained a continuing oversight and control in order to ensure results and evolve new remedies.

The five strands of the new approach — expanded judicial review, a strong due process, re-definition of human rights, judicial democratisation, and expanded judicial capability — have to be viewed together even though they have been compartmentalised for heuristic purposes.

(1) Judicial review

The balance of importance between the political and justice texts of the Constitution in India had always been precariously unequal. We have already seen that in Nehru’s vision, the judiciary was very much a minor partner. When the judges went ‘wrong’, Parliament had little hesitation in amending the Constitution and not only reversing what the judges had decided, but ousting their interference from vast areas of legislative and governmental action. This engendered a constitutional tension which resulted in the famous *Fundamental Rights* case (1973) by which a constitutional embargo was placed so that constitutional amendments could not alter the **basic structure** of the Constitution.41 While the contents of basic structure have never been exhaustively described, there is no dispute that **judicial review** is a part of the basic structure.42 But, having conquered the embargo, the judges remain uncertain about the extent of the review.

The uncertainty is explored in the differences between the judges in the *President’s Rule* case (1994—concerning the imposition of emergency rule by the Union on some of the States)43 in which some judges recognised the importance of judicial restraint but opted for a reasonably exacting review on the basis of all the materials which had to be placed before them. Some judges—greatly influenced by the approach of English judges—strongly emphasised the distinction between **judicial review** and **justifiability** to argue that certain kinds of decisions (especially those relating to the exercise of the political power of the prerogative) are not justiciable for want of ‘judicially manageable standards’. Since the phrase ‘judicially manageable standards’ (JMS) has become something of an icon in the hands of conservative judges, it may require deeper perusal which is outside the scope of this paper. Since the *President’s Rule* and the *Judges Appointment II* cases entailed exercises of what has been included within the broad prerogative power, judicial review in relation to such exercises of power may have to be considered in the context of these empowerments and the constitutional purposes


43. *S.R. Bommai*, ibid.
countenanced by them. But, the dilemma of the judges in emphasising the need for JMS needs to be understood, even if to be rejected by way of critique.

The JMS formula is another way of judicially stating that judges are unwilling to substitute their own wisdom for that of the executive unless the actions of the executive can be shown to be actually *mala fide* (that is exercised for corrupt purposes) or *legally mala fide* (that is exercised without taking into account all the *legally* required considerations that had to be taken into account or discounted, as the case may be). The JMS approach is linked to the idea that there are certain relevant considerations that are identifiable; and, the failure to take these considerations into account or the taking into account of irrelevant considerations are the sole basis of justiciability. The ‘relevancy’ doctrine can be traced back to an English judgment and is well known as the *Wednesbury* formula. But, the nub of the controversy is over defining what is relevant; and whether the JMS formula precedes an invocation of *Wednesbury*. If the judges have virtually pre-declared certain areas as non-justiciable because JMS must be deemed not to exist in that area of empowerment, we are back where we started. We need not go into the merits of the controversy or the somewhat angular view of one judge that judicial interference is not called for even if irrelevant considerations are taken into account as long as some relevant considerations exist to sustain the action.  

What seems to trouble the judges are the intimations arising out of doctrine of separation of powers and decades of ingrained forbearance whereby they feel that substantive review of executive action amounts to an unconstitutional usurpation on the part of the judges. All this is good in theory but belies the fact that the real problems of Indian governance have arisen precisely because corruption and arbitrariness have been cloaked within legally relevant parameters! Without examining the facts in detail, judicial forbearance could, and does, amount to judicial abdication. The case for rigorous review cannot be hedged in by strong pre-determined doctrines of judicial restraint. Yet, India’s jurisprudence — as will become self evident — postures a far greater judicial review of executive action than may exist.

(2) Anti-arbitrariness, anti-atrocity and due process

The absence of a due process clause in the FR texts placed the judges in an awkward position of being able to only examine whether the *legally prescribed procedure* was followed and taken into account. Throughout the late 1950’s and 1960’s, a brilliantly innovative judge and a perceptive Attorney General argued that an ‘any process’ clause should not prove to be as troubling for judicial review as it was otherwise perceived to be. For them, aspects of due process lay dormant and were inherently imbricated in other clauses of the FR chapter which dealt with

44. S.R. Bommai, *id.* at 268, para 374 (per Jeewan Reddy J.).

equality before law and equal protection of all laws and those which permitted only reasonable restrictions on the seven enumerated freedoms which were specifically protected. Yet, for a long time the inter-connections between various parts of the chapter on FR remained vague and unresolved. It was not until after the Emergency that these interconnections were firmly established. Once this was done, the path was cleared for interpreting the ‘any legally prescribed process’ clause enshrined in the Constitution as a proper due process clause. Having made this breakthrough, the judges have used the possibilities that flow from this transformation sparingly in matters of general administration but strongly in matters pertaining to the treatment of those in custody, mal-treatment of accused and prisoners, speedy trial and criminal jurisprudence. Although they have not self consciously linked many of their processual endeavours to an invocation of due process requirements, in many cases concerning jobs for the poor, anti-corruption and environment, the judges have prescribed due process norms and procedures for both the State and themselves. There remain two criticisms. The first is that, other than emphasising the importance of natural justice and theories of legitimate expectation, the judges have not been systematic in their approach to due process. The second criticism is that the judges themselves have not followed due process in many areas — especially in the recent anti-corruption and environment cases. The latter criticism has left them open to the charge of judicial activism. While the charge of judicial activism may be too broad, one aspect of the charge (namely, that the judges have not been assiduous in applying the constitutional discipline they have prescribed for others to themselves) is not entirely without merit even though it is possible to enter the defence that the judges acted bona fide to resolve complex problems requiring strong judicial intervention. But, even if the charge is reduced to over-zealousness, exacting standards of ‘fairness’ must discipline the judicial activism of the judges.\(^46\)

It is the broad anti-arbitrariness doctrine that has given rise to some discussion. In an important string of cases, the Supreme Court felt that modern State must be subjected to rigorous oversight for anti-arbitrariness. In one version of the declaration of this principle, it is stated:

It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.\(^47\)

\(^{46}\) There is a feeling that in the recent environment cases concerning the shifting of industries in Delhi and for the conservation of Delhi’s Ridge (M.C. Mehta v. Union of India unreported) and Agra’s Taj Mahal and the surrounding area (M.C. Mehta v. Union of India, 1996 (2) SCALE (SP) 65; 1996 (2) SCALE (SP) 88), the orders passed are over-broad and without following a rigorous due process.

The problem is to give meaning to this declaration. The situation is not helped by finding refuge in the general principle of equality which permits a reasonable classification of persons and situations. Yet the doctrine of classification itself serves very limited purposes, as was indicated by a dissenting judge of the Indian Supreme Court in observations that were later approved by a Constitution Bench of the Supreme Court:

(T)he doctrine of classification is only a subsidiary rule evolved by courts to give a practical content to the (equality...) doctrine. Over-emphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the (equality) article of its glorious content. That process would inevitably end in substituting the doctrine of classification for the doctrine of equality: the fundamental right to equality before law and equal protection of all laws may be replaced by the doctrine of classification.48

The quest for some method of reviewing arbitrariness must continue beyond a general reference either to the constitutional doctrine of classification or the declaration that the Constitution requires fairness in action.

Nor is it enough simply to make an appeal to the general doctrine of reasonableness which — in different senses — is a part of the Indian constitutional law and public law doctrines associated with the common law. The Indian Constitution permits reasonable restrictions on fundamental freedoms. Since the concept of 'reasonableness' has received interpretations in both public and private law, some elucidation of what it means in a constitutional context is called for. At least one former Chief Justice of India tellingly warned that, "some phrases which pass from one branch of law to another ... (as for example from) private law areas to public law situations carry over with them meanings that may be inapposite in the changed context".49

This is unexceptional and exhorts a more rigorous analysis of the concept of reasonableness in the Indian Constitution.

One view — drawn from English law — is that 'reasonableness' is no more than the Wednesbury doctrine, limiting the judges to considering whether the relevant legal considerations (and such considerations alone) have been taken into account by executive authorities. It is argued that following Wednesbury yields JMS; and is therefore, both necessary and proper.50 But, while Indian judges have


50. The Wednesbury Principle is to be found in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation, (1948) 1 KB 223.
been known to draw inspiration from English conservatism, limiting the constitutional doctrine of reasonableness to *Wednesbury* notions of legal relevancy seems inapposite for various reasons. The *Wednesbury* principle is limited to judicial review of administrative action; and English jurisprudence used an alternative concept of "reasonableness" when adjudging the validity of delegated legislation. Judicial review in the latter case seeks to ask and answer whether the impugned rules are "manifestly unjust and arbitrary". By contrast the doctrine of 'reasonableness' in the Indian constitutional law has a much wider pedigree and is used to judge all the varieties of intrusive action, including legislation.

It is, perhaps, in this context that a wider notion of reasonableness was articulated by a distinguished Chief Justice way back in 1952 soon after the Constitution became effective:

> [F]rom the point of view of reasonableness ... the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

No doubt this wider approach can be fitted into the *Wednesbury* formula. But the exercise would be akin to the ugly sisters trying to get into Cinderella's glass slippers. It must be stressed that the Cinderella metaphor cannot be carried too far in this context by analogy. It is no one's case that the broader concept of 'reasonableness' can be identified with the ugly sisters and the *Wednesbury* formula with Cinderella — even if Indian judges have indicated that this might be the case because they have found *Wednesbury* to be more judicially manageable!

Between these two views lies the fate of many aspects of judicial review in India. Given the fact that the Indian Constitution (unlike its unwritten British counterpart) reposes a strong BoR responsibility on the judges, falling back on a skewed English doctrine of administrative law does not seem promising. Much, rather, the post-Emergency judges were broadly speaking right to emphasise a broad commitment to examining whether there has been "fairness-in-action". What has constrained the judges is the fact that Indian FR litigation is usually determined on the basis of affidavit evidence in respect of the facts. Operating

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51. E.g., *Kruse v. Johnson*, (1898) 2 QB 91 at 100.
under this constraint, the judges have limited themselves to the record produced before them by the formal adversarial procedure prescribed for the ancient prerogative writs within which so much of Indian constitutional litigation is trapped. It is under these circumstances that the judges have opted for JMS and the skewed and somewhat limited Wednesbury doctrine. In fact, in actual cases, virtually every fact averred by one is disputed by the other, with the result that the judges have to either to call for more information (sometimes appointing fact finding commissions to do so or rely on their experience and intuition to decide who is telling the truth! Were FR cases filed as ordinary civil suits (and, in my view, they can be), this might have affected the choice of doctrine.53 It cannot but by anything other than the business of judges to examine whether an action or legislation has been ‘manifestly unjust or arbitrary’ in its intrusion on guaranteed FR. Any other view would belittle the ‘justice’ texts which have now become more important than they ever were. Judges may still forbear from interference. But, a formula forbidding inquiry because of the absence of so-called JMS (whatever that might mean) or limiting inquiry to narrowly construed Wednesbury constraints does not do justice to either the justice texts generally or the custodianship of the chapter on FR with which the higher judiciary has been entrusted and to fulfil which the higher judiciary has been given an extraordinary jurisdiction and empowerment.

In actual fact, whatever the theoretical approach — and despite articulated protests about the need for judicial forbearance — judges do, in fact, examine issues of fairness in minutae, taking judgmental decisions about what is generally fair as well as what is fair in the facts and circumstances of the case. Examples of this abound. In the Minority Education cases,54 the judges felt that a state-funded minority institution could give preferential admission to students from its own community only to the extent of 50 per cent which seemed reasonable to the judges but parsimonious to educational authorities. In the Reservations cases,55 the same formula of 50 per cent limits on preferential admission to state services was fixed as reasonable, with the judges deciding that such ‘reservations’ of posts should apply only to the initial appointment to the service and not to each post to which promotions were made. In cases of administrative lapse or alleged atrocity, judges have been rigorous to examine the fact situation and prescribe proper procedures. Where the environment has been under threat, the judges have devised procedures for investigation of facts and evolving remedies. But, the judges have not just been concerned with procedure but also matters of substantive decision making. No doubt, in many environmental cases, they have accepted the wisdom.

53. There is no reason to suppose that a civil suit will not lie to enforce a fundamental right, subject to the provision in the Civil Procedure Code 1980 (113) that any controversial question involving the interpretation of the Constitution should be referred to the High Court of the State in whose district court the suit is filed.
of the executive — sometimes without too much reserve or caution. But, they have also taken the view that such cases imply striking a balance which the court must undertake after the executive has made a considered decision. Judicial interference may be limited, but it is increasing and entails precisely that balancing of interests which is involved in making a substantive re-assessment. In the right to regular work and seniority cases, judges have undertaken complex journeys with reasonably satisfactory effect. No doubt, the judges have tried to move away from the ad hocism of the early 1980s and make more principled (even if much more conservative) decisions. But, this does not take away from the width of the exercise which — to some extent — requires judges to substitute their view of what is ‘reasonable’ and ‘fair’ for that of the executive. Over time, many principles will settle; and be unsettled. This has to be borne in mind if a rigorous judicial oversight over human rights is to be maintained. No doubt, the extent of judicial interference will depend on which authority is exercising the impugned power, the alternative form for accountability (if any) and the facts and circumstances of each case. But journeys into these questions have scarcely begun.

(3) Defining Fundamental Rights

Around the time the Indian Constitution was promulgated, human rights jurisprudence was trapped in creating compartments into which rights were classified. The primary classification was between CPR and ESR, rendering the former judicially enforceable and the latter unenforceable. We have already made the point that this arose because the mainstream liberal political theory of the West was obsessed with issues of empowerment (including questions as to who rules, who reigns and on what authority) and less with the quality of life of ordinary citizens. Not surprisingly, this ‘bias’ led to ‘priority’, being given to what have been described as the ‘bourgeoisie’ freedoms which have been described as such not because they concern only the middle class but because they were the primary concerns of the rising middle classes for whose benefit BoR were originally created. These ‘freedoms’ consist of the right to free expression, associational freedoms, freedom of movement (and, conversely from incarceration...
tion without due process), the right to property and the right to pursue one's business and profession. In fact the right to 'life and liberty' was defined in relation to these other freedoms and not with the quality of life of all persons in a society. If the right to religious freedom was thrown in as an independent right, it was because it was, no more, than an extension of freedom of expression and associational freedoms which were strong contenders for inclusion in the "bourgeois" bundle of rights. Equally if equality was emphasised as a separate 'compartment' in the apparatus of specially protected rights, this was done for the limited extent of ensuring that there was no discrimination amongst the aspiring middle classes inter se and not to ensure an equality of means and real opportunities. This compartmentalisation found its way into the Indian Constitution's chapter on FR.

At first, the Indian Supreme Court followed this 'compartmentalised' approach which disaggregated human freedoms into discrete rights rather than view the universal human rights enterprise as a whole. The first compartment consisted of separating the ESR contained in the DP, which were immediately accepted as unenforceable and mere aids to interpretation to which little credence was to be attached. But the 'compartmental' approach plagued the interpretation of the FR provisions as well. We have already seen how a contradiction developed when one compartment dealing with 'life and liberty' was interpreted so that any validly enacted law was permitted to intrude into the 'life' and liberty of a person under the 'any process' doctrine, whereas the equality and reasonableness doctrines yielded a wider procedural due process, which — in turn — sat uneasily with the 'any legal process' doctrine abstracted from the same FR chapter. No less a contradiction revealed itself when the court accepted that a person could be denied freedom of movement only on the basis of reasonable restrictions whilst a person deprived of all his liberties and imprisoned had no room for complaint if the procedure that led to his imprisonment was backed by a validly enacted law irrespective of whether such imprisonment or procedure was reasonable or not. The Supreme Court's explanation, that a total deprivation of 'liberty' could be made under the 'any legal process' doctrine and that the freedom of movement was only assured to a person who was 'free' (i.e., not incarcerated), was not convincing and led to further complications since it followed that prisoners were (on the logic of this argument) not entitled to any civil and political rights at all. Similar contradictions dogged interpretations over the right to 'regulate' and 'acquire' a person's right to property. These contradictions were pointed out by some of the judges themselves.

In the Bank Nationalization case (1970) the Supreme Court formally abandoned the 'compartmentalization' approach with which the court had been burdened by declaring as follows:

59. For the dilemmas of the early court see, R. Dhavan, supra note 12.
61. For an insight into the earlier developments, see supra note 45 and the Bank Nationalization case, infra note 62.
In our judgment, the (earlier) assumption ... that certain articles in the Constitution exclusively deal with specific matters and in determining whether there is an infringement of the individual’s guaranteed rights the object and form of the State action alone need to be considered, and the effect of the laws on fundamental rights of the individuals in general will be ignored cannot be accepted as correct.

Little was done with this declaration for the time being even though it found general support in the Fundamental Rights case (1973) which was also significant because it gave considerable pride of place to the DP as important principles which concerned the entire constitutional enterprise as a whole.63

After the Emergency, the ‘compartmentalization’ approach was abandoned in a variety of ways. In the Right to Travel Abroad (Maneka Gandhi’s) case this approach to constitutional interpretation was given a formal burial.64 Equally many untidy creases that flowed from the compartmentalisation approach were ironed out. The view that prisoners lost all their fundamental rights after they had been incarcerated according to procedure established by law has a medieval structure to it (glossed over by 19th century patnt). Such an approach was abandoned by Indian judges leading to an expanding jurisprudence of the rights of prisoners.65 With compartmentalisation out of the way, the court was called upon to define the content of ‘life’ and ‘liberty’ which were guaranteed fundamental rights. It was clear that these rights were more than the sum total of the seven freedoms which had otherwise been guaranteed as FR and which were subject only to reasonable restrictions backed by the authority of law.

Finding themselves free from the tunnel vision of its previous jurisprudence, the judges took an expansive view of ‘life’ and ‘liberty’ to include in the meaning of ‘life’ every aspect that made ‘life’ meaningful or worthwhile. In the Bombay Pavement Dwellers case (1980),66 while the court refused to permit local municipal plans to be flouted by pavement dwellers, yet there was specific acceptance of the right to livelihood as part of a person’s life and liberty, imposing some kind of obligation on the State to provide for right to livelihood to those who were denied it. And, if the right to life was to include the right to “live with human dignity ... (consistent with) some of the finer graces of civilisation”, the list of inclusions within the ambit of this right was wide ranging. There seemed little difficulty in including the right to environment within the ambit of the right.67

63. The Fundamental Rights case. supra note 41.
This led to considerable litigation whereby the Supreme Court and High Courts were called upon to, and took up the challenge of, ensuring that various environmental regimes set up by statute and devised by the judges (as the case may be) were adhered to. In a generously over-stated observation, the Supreme Court took the view that the right to education was a guaranteed fundamental right. Later, the Supreme Court — finding limiting words in the DP — declared an enforceable fundamental right till the age of 14. In the same case, the court virtually nationalised post-school technical education in order to provide access to such education for all, including some of those who could not afford it. This last decision has been firmly criticised as impractical; and an example of what happens when judges virtually take over administrative decision making when they are ill-equipped to do so. Included in the ambit of ‘life’ and ‘liberty’ is the right to health, the right to be rehabilitated from ‘bonded’ labour, the right to legal aid and to fund legal aid centres and so on. All this is in addition to the commitment to move against custodial crimes and atrocities committed by the State and its functionaries. More recently, the Supreme Court has taken the view that public interest litigants could move the court directly in order to ensure that the Election Commission works according to prescribed norms and corrupt officials and administrations are dealt with according to law and such other directions which the higher judiciary may give.

Although these juristic innovations have tended to break down the distinctions between the CPR and ESR, the distinction survives for several reasons. In the first place, not all ESR have been earmarked for enforcement. Although there are indeterminacies, the judges have been both careless and careful in their selection. To the extent to which the categories of inclusion under the rubric of ‘life’ and ‘liberty’ are not closed, the list may well be open-ended; but it is not unlimited. Secondly, Indian courts do not see themselves as actually fulfilling the mandate underlying rights by their own fiat but ensuring that the administration does so. Many a claim could flounder on this distinction. Where the administration is not bound by some existing law of rule to provide a remedy, the courts may not go further. In the Right to Regular Work the court has tried to return to statutory frameworks whilst creating certain parameters within which claims can

68. Unnikrishnan, supra note 54.


70. It would appear from the courts’ interference in the corruption cases such as matters relating to illicit foreign transactions and bribery. (Vineet Narain v. Union of India, 1996 (2) SCALE 42, 1996 (2) SCALE 84, (1996) 2 SCC 199), misuse of programmatic funds (State of Bihar v. Brishan Patel, J T 1996 (3) SC 751), and perverse allotment of government accommodation (Shivsagar Tiwari v. Union of India unreported) that the right to good governance is included in art. 21 as part of the right to life and liberty in addition to giving rise to the ordinary public interest litigation for the enforcement of a public duty.
be considered. In the *Environment* cases, the court has endeavoured to mandate directions within the statutory mandate. In future, much may turn on whether the ESR claimed as a fundamental right has already been recognised by statute or some welfare scheme, with the courts seeing their role as ensuring whether the scheme (for which budgetary and other allocations have been made) is expansively interpreted and enforced in a manner consistent with the status of the ESR right claimed. If all this leaves some distinctions blurred, there may be good practical reasons for doing so. Even if the claim that these interpretations have collapsed the distinction between CPR and ESR is found to be too far-fetched, there is no denying that significant steps to resist accepting the full import of these distinctions have been made.

(4) Democratising the judiciary

One important distinction between FR cases before and after the Emergency (1975-77) stares us in the face. Virtually all the pre-Emergency cases that have advanced the FR jurisprudence of the court have done so at the instance of the advantaged. After the Emergency, virtually all the cases that have taken the struggle for human rights further have been at the instance of or for the benefit of ordinary people and especially the disadvantaged. Too much should not be drawn from this distinction other than to stress that the degree of democratic access to the Supreme Court has increased and people are prepared to locate their struggles with the Supreme Court and High Courts.

This empirical evidence is supported by the explanation that at some stage the court opened an espistolary jurisdiction whereby a mere letter to any of the judges would be converted into a FR petition and examined by the courts. If facts were found wanting, the court appointed a lawyer by way of *amicus curiae*, a commission of inquiry to investigate the facts and posted the matter for hearing on an incremental step-by-step basis so that orders could be passed from time to time in conjunction with a schematic remedy to resolve the social and economic problem and not just provide a one time remedy in the case. One example is the *Banwasi Displacement* case\(^\text{72}\) where a letter led to the appointment of several *amicus* one after the other and the establishment of investigative and over-sight commissions and monitoring by the court over more than a decade. Over time, letter petitions have lessened. The Supreme Court has devised a procedure to convert letters into petitions. On their part social action groups have also felt the need to work up properly drafted legal dockets to provide the much needed detail rather than leave themselves to the mercy of the discretion of the court as to

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71. Even in the controversial environment cases, *supra* note 46, the broad endeavour of the court is to ensure that statutory bodies and government fulfil their legal mandate. But there is no doubt that by reading of the Directive Principles into Fundamental Rights, and statutes, the mandate has been enlarged (*e.g.*, *Unnikrishnan*, *supra* note 54; *CERS* v. *LIC*, (1995) 5 SCC 482; *CERS* v. *Union*: (1995) 3 SCC 42. In *Unnikrishnan* the court virtually took over the management of professional and technical education with disastrous consequences.

whether they wish to further investigate and hear the case. But, the very fact that the option of the letter petition exists and was used extensively suggests that it has made a significant contribution to the democratisation of the use of the Supreme Court.

Juristically, the issue of democratising judicial procedure is inter-linked with rules of standing by which a person claims the right (or locus standi) to pursue a particular cause before the courts. The normal rule for civil justice is that the right in question must inhere in the litigant himself. Where a number of litigants are affected, there are procedures for enabling the determination of their individual and group rights. Where it is felt that a public interest right is affected, the cause can be fought through the Advocate General of a State or (after 1976) by two or more persons with the permission of the court. These normal rules have not been applied to FR and other public interest petitions by the higher judiciary which were, before the advent of the letter petition, mostly filed by a petitioner who was personally affected, whether as an individual or a group. The letter petition forced the issue of standing which came to be determined in the Judges Appointment I case. The present rule is that a bona fide public spirited citizen may always bring to the court’s attention any lapse or infraction which is contrary to the law and Constitution and under circumstances where it is in the public interest that the court should examine the infraction. Where matters are brought to the Supreme Court, the matters can only be brought to the attention of the court if they affect any FR, the protection of which is an additional responsibility of the Supreme Court in addition to its appellate and other jurisdictions. At one stage the court took the view that the rule of standing should be relaxed only in cases where a person is held in allegedly illegal detention or where the person filing the petition represents the cause of the disadvantaged who would not otherwise be able to pursue their own cause due to their social and economic circumstances. But, these restrictions have long been removed in principle and ignored in practice. It is due to this relaxation (read with the letter petition) of procedure that an effective democratisation of the judicial access to the higher judiciary has been achieved.

But the problems of access are not resolved by opening the juristic doors of the court. India’s legal aid programme provides neither succour nor support. The strength of Indian public interest law has drawn from the fact that prominent and well known lawyers have chosen to espouse public interest causes and fight the cases emanating from such causes with tenacity. Since the movement has been judge led, weak lawyering has not interfered with, but advanced, the range and

73. The Civil Procedure Code 1908 permits group actions (see or. 1, r. 8) as well as public interest actions through the Advocate General (see ss. 91-4). Since 1976, such public interest causes can also be pursued by two or more individuals with leave of the court.


75. This is precisely the question that was raised in Sudipt Majumdar, supra note 31.
content of this use of the courts. But it has been argued that the matter cannot just be resolved by the provision of legal aid which does no more than put money into lawyers’ pockets. It has been generally argued that what a good public interest law movement requires is the creation of general and specialist law centres and public interest law firms who possess the institutional ‘repeat player’ abilities and capacities to espouse complex causes and take on powerful corporate adversaries including the State. To some extent, such prescriptive advice deserves to be implemented.76 But, those interested in democracy and the importance of social action groups may well find that these newly created institutionally capable ‘repeat players’ may become much too powerful entities in their own right and dominate the enterprise of public interest law without being subject to accountability themselves. The answer may lie in creating organisational structures which can house legal expertise but subject such expertise to democratic accountability.77 At present, India’s problem lies in finding the resources to fund a proper public interest law programme. The various governmental legal aid funds are much too inadequate for this purpose. India’s revenue law is devised in such a way that there are insufficient incentives to fund new law centres and public interest law firms. Much of the funding for such work comes from foreign funding organisations. We are still some distance from organising and securing democratic access in all its comprehensive aspects.

(5) Expansion of judicial capability

This aspect of Indian development need not detain us too long since aspects of the increased judicial capability to deal with public interest and complex ESR cases has already been referred to. If the court feels that it is unable to discern the factual matrix within which an issue has been placed before it, it may either ask the government to appoint a commission and report the result to the court or appoint such a commission itself, asking the commission to report back its findings to the court. Such commissions have been appointed in complex cases concerning the environment and land rights. Wherever such a commission has been appointed, they are expected to pursue their investigative tasks in a manner consistent with due process; and their findings may be challenged and controverted by affidavit evidence — leaving it to the courts to make up their mind on the truth of the findings of the commission. Once the court has determined the facts, it may conclude that there is no straightforward remedy. Especially in land settlement and environment cases, it may feel that some kind of schematic remedy needs to be devised. This may entail a report back requirement to the court which, may in turn appoint a commission to oversee the fulfilment of the remedy.78


78. Commissions of Inquiry have been appointed in various cases, e.g., Banwasi Sewa Ashram supra note 72 with the court having developed a procedure to deal with the report, with procedural fairness.
Where the orders of the court have not been adhered to, it has the power to punish for contempt. There appears to be some conflict between the constitutional provision identifying the higher judiciary as courts of record with the power to punish for contempt and statutory provisions placing tariffs limiting the thresholds of the punishment. The better view is that the statutory limits cannot limit the inherent power of the court to award such punishment and devise such remedies whereby they can secure compliance.\(^\text{79}\) But, the more controversial remedy devised by Indian courts has been to award damages where the State has deprived a person of his fundamental rights. At first this was limited to cases of custodial crimes and atrocities by the army, police and others. What seems to be emerging is a general theory that damages may be awarded in appropriate case where, (a) fundamental rights are affected; or — to take the matter further (b) there has been a breach of statutory duty; (c) the government action has been found to be *ultra vires* (but not necessarily *mala fide*); and (d) where the citizen has been adversely affected.\(^\text{80}\) All this is sought to be done not by way of an ordinary civil suit in an action by way of alleging a constitutional tort, but in FR and public interest petitions determined by a summary procedure before the Supreme Court and State High Courts.

What do we make of this ‘new’ approach? Overall, the new interpretation of India’s Bill of Rights suggests an imaginative shift from over-restrictive compartments. These interpretations seek to deal with the right to be human and the totality of what humans owe to the environment that they dwell in. The courts do not claim to have all the answers. But, in a time of crisis, they have invited ordinary people to locate not just their grievances but also their struggles before the courts.

IV An attempt at summary

It might be useful to recapitulate some salient features of this essay instead of providing a long summary of it.

(i) The over compartmentalisation of human rights into CPR and ESR (and their further division into further compartments) cannot and should not detract from the totality of the human rights enterprise. The overt emphasis on CPR (virtually eclipsing the importance of ESR) is peculiarly “western” because ‘western’ political theory and jurisprudence has been more concerned about the

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\(^{79}\) The better view is that the power of the court to punish for contempt as a court of record can only be furthered, but not restricted or inhibited, by statutory provisions on the subject (see, *Delhi Judicial Service Assn. v. State of Gujarat*, (1991) 4 SCC 406; *Pritam Pal v. H.C. of MP, Jabalpur*, 1993 Supp. (1) SCC 529; *In Re V.C Mishra*, 1995 2 SCC 584).

working of the political system and less about the quality of life of those living within it.

(ii) Earlier interpretations of the meaning and function of the ‘political’ and ‘justice’ texts of the Indian (and other) Constitutions gave the judiciary a limited oversight role in respect of CPR and virtually no role in relation to ESR.

(iii) Time and circumstances in India (and elsewhere) occasioned a re-appreciation of the meaning and purpose of the ‘political’ and ‘justice’ texts of virtually all constitutional enterprises; and have considerably enlarged the role of the judges in respect of human rights and constitutional governance.

(iv) India (and a large part of the world) can ill afford to ignore ESR for pragmatic and principled reasons. The pragmatic reasons are contained in Ambedkar’s celebrated warning that India would be entering into a life of contradiction if it neglected ESR and became complacent simply because it has provided for the judicial enforcement of CPR. In principle, prioritising CPR and marginalising ESR loses sight of the human rights enterprise as a whole and the duties human beings owe to each other and the environment in which they live.

(v) India’s public interest law movement and social action litigation have helped to humanise India’s approach to human rights, by collapsing water tight distinctions between CPR and ESR (and between various rights inter se) and enabling a democratisation of the use of courts as institutions of governance by ordinary persons, including — and especially — the disadvantaged.

(vi) In the new situation, a new human rights jurisprudence which is also concerned with the fulfilment of ESR and new approaches to public law are discernible in Indian jurisprudence.

(vii) By moving out of the shadow of English common law interpretations, Indian courts have sought to emphasise that juristic concepts cannot be transported from one jurisdiction to another in a facile way.

(viii) Above all, despite ‘left’ wing portrayals of ‘law’ and ‘legal’ enterprise being class biased, there is enough evidence to suggest that even if legal and judicial institutions cannot fulfil the tasks intimated by a radical egalitarian distributive justice, the ‘commutative’ role and ‘corrective’ role played by ‘law’ and ‘courts’ as mediators of accountability and creators of human right regimes can help change the quality of governance and the social, economic and environmental conditions in which we live.

Lest the author is misunderstood, those in power in any society are unlikely to give up the advantages which their civil, economic and political position affords to them. Neither the ‘legal enterprise’ nor judges can alter the balance of power between persons, groups and classes. Such changes must find sustenance from forces in civil society. But both democracy and the law can mitigate inhumanity, provide a discipline for those who exercise any and all kinds of power and create the circumstances in which those who wield power can be interrogated and subjected to increased plural accountability. To that extent ‘law’ may not eliminate oppression, but it is a more than a possible situs of struggle.