SCHOLARLY DISCOURSE AND THE CEMENTING OF NORMS: THE CASE OF THE INDIAN SUPREME COURT—AND A PLEA FOR RESEARCH

Jayanth K. Krishnan*

I. INTRODUCTION

For Americans, India has been a country of intense interest in recent years. Less than ten years ago India alarmed many around the world, including then-President Clinton, after it (and neighboring Pakistan) conducted a series of nuclear tests.[1] But even before this military display, India was on the radar of observers in the United States. Since opening its markets in 1991, India has been fertile ground for American entrepreneurs engaged in outsourcing and for other foreign investors as well.[2] With the exception of a two-year period between 1975 and 1977, India has served as a light of democratic rule in the developing world since it gained independence from Britain in 1947. It is a constitutional republic with a representative

* Professor of Law, William Mitchell College of Law. J.D., Ohio State University; Ph.D. University of Wisconsin-Madison. For their trenchant insights, I am grateful to Jamie Cameron, Don Davis, Marc Galanter, Chandra Mallampalli, Bob Moog, and Russ Pannier. I also wish to extend special thanks to the law faculty at the Australian National University, and, in particular, to Peter Cane, for inviting me to present a version of this paper in March 2008.

1. A host of websites and news services have talked about the nuclear crisis between these two countries. For just one sample, see *South Asia's High Nuclear Stakes*, BBC News (May 7, 2003) (available at http://news.bbc.co.uk/1/hi/world/south_asia/1732430.stm) (accessed May 19, 2008; copy on file with Journal of Appellate Practice and Process). For a set of scholarly books on this topic, see generally Ashley J. Tellis, *India's Emerging Nuclear Posture* (Rand Corp. 2001); *South Asia's Nuclear Security Dilemma* (Lowell Dittmer, ed., M.E. Sharpe 2005); *The India-Pakistan Conflict: An Enduring Rivalry* (T.V. Paul, ed., Cambridge U. Press 2005).

2. *See generally* Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 Wm. & Mary L. Rev. 2189 (2007).

Parliament; it has a free and flourishing media; and in certain ways it has sought to emulate the American way of governance.[3] And for decades there have been interchanges between groups of Americans and Indians on issues ranging from agricultural development to legal education reform to various social, religious, and cultural matters.[4]

Despite all of India's past, current, and no doubt future successes, a pervasive, competing problem has long plagued this country. The state and its agents—including politicians, bureaucrats, and the police—are routinely held in low regard by the mass public. Empirical evidence suggests that the source of this disdain is the public's perception that corruption runs rampant among these state actors. Transparency International is a leading independent non-governmental association that has made fighting corruption around the world its central mission.[5] One of its most highly cited, methodologically reputed publications, the Corruption Perceptions Index (CPI), is a survey of 150-plus nations where it measures "the degree to which corruption is perceived to exist among public officials and politicians."[6] (The survey includes the views of respondents both within and outside of each country,[7] and the scoring is done on a scale of one to ten, where one is perceived as most corrupt and ten as least corrupt.[8])

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3. *See generally* Gary J. Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton U. Press 2005). Jayanth K. Krishnan, *Social Policy Advocacy and the Role of the Courts in India*, 21 Am. Asian Rev. 91 (2003) [hereinafter Krishnan, *Social Policy Advocacy*].

4. *See generally* Jayanth K. Krishnan, *Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India*, 46 Am. J. of Leg. History 447 (2004) [hereinafter Krishnan, *Professor Kingsfield*].

5. For background information on Transparency International, see its online site at http://www.transparency.org/about_us (accessed May 19, 2008; copy on file with Journal of Appellate Practice and Process), and for information specific to the CPI, see *id.* at *2007: FAQ: General: What is the Corruption Perceptions Index (CPI)?* http://www.transparency.org/policy_research/surveys_indices/cpi/2007/faq#general1 (accessed May 19, 2008; copy on file with Journal of Appellate Practice and Process).

6. *See Transparency International: FAQ: General: What is the CPI?* http://www.transparency.org/policy_research/surveys_indices/cpi/2006/faq#general1 (accessed July 30, 2008; copy on file with Journal of Appellate Practice and Process).

7. *Id.*

8. *Id.*

Between 1995 and 2007 India's CPI score ranged from 2.63 to 3.50 with a median score of 2.80 and a mean of 2.83.[9] Soberly, India's 2007 score (3.50) was its highest since the survey began, tying it for seventy-second with six other countries.[10] Compare these data with that of Finland, Denmark, New Zealand, and Sweden—four other parliamentary democracies—which had medians and means of higher than 9.0 during this same time period.[11] The CPI score for the United States between 1995 and 2007 remained rather consistent, ranging from 7.30 to 7.80 with a median score of 7.60 and a mean of 7.59.[12] But maybe most telling is that among longstanding consolidated democracies, India's CPI repeatedly ranked the lowest.[13]

Admittedly, the CPI is open to the criticism that the survey respondents are business leaders and what Transparency International refers to as "country analysts,"[14] or those experts who have a deep understanding of the political, economic, and socio-cultural practices of the society in question. But other empirical work by Transparency International, focusing on the views of ordinary citizens, confirms that Indian governmental institutions are indeed held in low regard because they are perceived as corrupt. Since 2003, Transparency International has administered what it refers to as the Global Corruption

9. From the Transparency International website, the following data on India is provided. (The first number after the year is the CPI score, followed by where India ranked in the survey for that year.) 2007: 3.5 (72nd); 2006: 3.3 (70th); 2005: 2.9 (88th); 2004: 2.8 (90th); 2003: 2.8 (83rd); 2002: 2.7 (71st); 2001: 2.7 (71st); 2000: 2.8 (69th); 1999: 2.9 (72nd); 1998: 2.9 (66th); 1997: 2.75 (45th); 1996: 2.63 (46th); 1995: 2.78 (not numerically ranked).

10. *See* http://www.transparency.org/policy_research/surveys_indices/cpi/2007 (chart showing both countries' ranks and scores, and information about the survey instruments) (accessed May 19, 2008; copy on file with Journal of Appellate Practice and Process).

11. On Transparency International's website, the data set, specifically the CPI scores for each year dating back to 1995, is provided. *See e.g.* http://www.transparency.org/policy_research/surveys_indices/cpi/2007 (featuring 2007 results, but also including links to prior years' results).

12. The US scores for the following years are 1995: 7.79; 1996: 7.66; 1997: 7.61; 1998: 7.5; 1999: 7.5; 2000: 7.8; 2001: 7.6; 2002: 7.7; 2003: 7.5; 2004: 7.5; 2005: 7.6; 2006: 7.3; 2007:7.2. *Id.* Australia's scores can be found at the same site.

13. *Id.*

14. *Id.*

Barometer.[15] Each year this Barometer has probed the sentiments of mass populaces in over sixty countries that range from one extreme to the other in economic development.

As the data indicate, the perceptions from the ground level regarding corruption in India differ little from the responses in the CPI.[16] For example, between 2003 and 2005 roughly three-fourths of Indians stated that corruption in public services and civil society was likely only to increase in the future.[17] Although the 2006 survey shows some softening of this position, Indians still perceive that most of their institutions "are significantly affected by corruption."[18] Add to this the point that Indians still report being asked to pay bribes in order to obtain the majority of governmental services.[19]

While perceptions of corruption are seemingly endemic to this democratic nation, interestingly, there is an expressed norm, found namely within scholarly discourse, that one institution is not part of this negative stereotype—the Indian Supreme Court. Scholars in India and in the West have tended to view the Court

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15. *See e.g.* Policy & Research Dept., Transparency International, *Report on the Transparency International Global Corruption Barometer 2007* at 2 (Dec. 6, 2007), http://www.transparency.org/policy_ research/surveys_indices/gcb/2007 (noting that Barometer evaluates "how and where ordinary people feel corruption") (accessed May 19, 2008; copy on file with Journal of Appellate Practice and Process).

16. For a detailed discussion of the methodology of the Global Corruption Barometer, see Transparency International, *Global Corruption Barometer 2007-Frequently Asked Questions 1, 2, & 3*, http://www.transparency.org/policy_research/surveys_indices/gcb/2007/gcb_2007_faq#1 (describing general nature of Barometer, survey organizations that gather data reported in it, and subjects reporting data) (accessed May 20, 2008; copy on file with Journal of Appellate Practice and Process).

17. The surveys from these three years can be found at the Global Corruption Barometer site by clicking on the 2003, 2004, and 2005 links, which lead to the survey results for each year. *See* Policy & Research Dept., Transparency International, *Report on the Transparency International Global Corruption Barometer 2005*, http://www.transparency.org/policy_research/surveys_indices/gcb/2005 (Dec. 9, 2005); Policy & Research Dept., Transparency International, *Report on the Transparency International Global Corruption Barometer 2004*, http://www.transparency.org/policy_research-surveys_indices/gcb/2004__1 (Dec. 9, 2004); Transparency International, *The Transparency International Global Corruption Barometer*, http://www.transparency.org/policy-research/surveys_indices/gcb/2003__1 (July 3, 2003) (all accessed May 20, 2008; copies on file with Journal of Appellate Practice and Process).

18. *See* Policy & Research Dept., Transparency International, *Report on the Transparency International Global Corruption Barometer 2006* at 14, http://www.transparency.org/index.php/policy_research/surveys_indices/gcb/2006 (accessed May 20, 2008; copy on file with Journal of Appellate Practice and Process).

19. *Id.*

with admiration and respect. Of course there has been disagreement with and anger towards the Court when it has issued judgments contrary to specific agendas. Rarely, though, within scholarly discourse is the Court's reputation placed in the same category with other state institutions. Moreover, the expressed reverence from scholars is frequently imputed to the mass public.[20] We often hear, for example, that the general public has a high opinion of the Court because it is uncorrupted and because of its willingness to stand up on behalf of the powerless and against the powerful.

But here is the puzzle. To date, there has been no serious, systematic public opinion data on the Court. On occasion, polling organizations have inquired about the public's views towards the judiciary. The problem is that in these few isolated instances the "judiciary" is treated as a single entity rather than as a series of separate and hierarchical courts. In India, it is especially necessary to investigate what the public thinks of the different levels because while the Supreme Court is lauded by scholars, the lower courts (particularly at the district level) are depicted in a highly negative manner. Therefore, without differentiating among the layers of courts, the little information we do have on the public's attitudes towards the judiciary is virtually meaningless.[21]

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20. There is a rich political communications literature which has examined both scholarly and elite discourse and the manner in which they help to shape and construct norms and attitudes within a society. For a select set of readings, see John R. Zaller, *The Nature and Origin of Mass Opinion* (Cambridge U. Press 1992); *Political Persuasion and Attitude Change* (Diana C. Mutz, Richard A. Brody, & Paul M. Sniderman, eds., U. Mich. Press 1996); Hannah Goble and Stacey Pelika, *Elite Discourse, Public Opinion, and Significant Social Policy Change during the Clinton Administration: The Cases of Welfare and Health Care* (unpublished paper; presented at 63rd Annual Natl. Conf., Midwest Political Sci. Assn., Apr. 10, 2005); Teun Van Dijk, *Elite Discourse and Racism* (Sage Publications 1993); Shanto Iyengar, *Is Anyone Responsible? How Television Frames Political Issues* (U. of Chi. Press 1991); Lutz Erbring, Edie N. Goldenberg, & Arthur H. Miller, *Front-Page News and Real-World Cues: A New Look at Agenda Setting by the Media*, 24 Am. J. Political Sci. 16 (1980); Jeffery Cohen, *Presidential Rhetoric and the Public Agenda*, 39 Am. J. Political Sci. 87 (1995); Robert M. Entman, *How the Media Affect What People Think*, 51 J. Pol. 347 (1989).

21. One study that asserts that it is studying public support for the Supreme Court was conducted in 1989. *See* George H. Gadbois & Mool Chand Sharma, *Law Students Evaluate the Supreme Court: A Case of Enchantment*, 31 J. Indian L. Inst. 1 (1989). This is an interesting piece of research; however, it is seriously limited by the fact that, as the title of

So why then is there a strong scholarly norm indicating that the Indian Supreme Court possesses such integrity? One explanation might be that the case made by scholarly observers has been so persuasive—and correct—that any alternative argument is simply not tenable. Another more unsettling hypothesis is that the scholarly based perception of the Court may not be the perception held by the mass public, which would suggest the existence here of what social psychologists call pluralistic ignorance. That is, there may be those, perhaps even a plurality of the public, who individually disagree with the norm expressed by scholarly elites. However, because the power of this norm is so overwhelming, this plurality is unwilling to express its sentiment for fear of social, political, or legal sanction. If this is indeed the case, there is a lack of knowledge—or ignorance—on the part of scholars vis à vis the mass public's real belief structure, and among people within the mass population vis à vis each other.

I hasten to emphasize that I hope there is no mismatch between how scholars and the general public see the Court; it would be a tremendous testament to India's highest legal institution if no disconnect exists. But given the stark absence of public opinion data or other large scale empirical evidence affirming this congruence, the fact is that we simply do not know. And the ramifications of this observation, I believe, are especially relevant for those in India and in the West who routinely assert that the Indian Supreme Court is a widely revered institution, one that is both effective and legitimate in advancing a social justice, rights-based agenda.

With that background, this article will proceed as follows. In Section II, I explain how and why within scholarly discourse the Supreme Court of India has been able to retain such high regard. Admittedly, there will be some disagreement and certain limitations as to how I define "scholarly discourse."[22]

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the article suggests, the respondents were limited to "261 law students of the Campus Law Centre at Delhi University." *Id.* at 3.

22. One immediate critique some may have is that all of the sources that I rely on are in English, which while one of the national languages of India and the language used by the Supreme Court in its decisions, is not the only way in which discourse on the Court is expressed. Given that India has many languages, it is conceivable and likely that there are discourses on the Court that occur within these other linguistic traditions. I recognize this point, and hope that future scholarship will examine how the Court is discussed in these

Conceding this point, for this project I see the term as constituting the normative views of the Court expressed primarily (a) in journals, books, and internet blogs that are academic in nature; (b) in popular newspapers and magazines (which in India are frequent venues for scholarly commentaries); (c) on television news broadcasts; and (d) through academic lectures or speeches. In Section III, I suggest that because it is an open question as to whether the views of these elites reflect the attitudes of the mass public, there is a possibility that a pluralistic ignorance phenomenon is occurring in India. I then conclude in Section IV by discussing the implications of this study and then proposing a set of research questions that future scholars of the Indian Supreme Court—as well as others interested in rights discourse, public opinion, and judicial politics more generally—may wish to engage.

II. PERCEPTIONS OF THE SUPREME COURT: A DIFFERENT, MORE COMPLICATED STORY

A. Carving out an Independent Reputation: The Early Years

The Constitution of India became effective on January 26, 1950, and two days later an inaugural ceremony was held for the country's Supreme Court.[23] Articles 124 and 147 provide the constitutional basis for the Court. Under these provisions, the Court is empowered with original, appellate, and advisory jurisdiction.[24] The Court initially seated eight justices (including the Chief Justice), but over time that number has grown, where today there are twenty-six justices on the Court who usually hear cases in panels determined by the Chief Justice.[25]

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other languages.

23. *See* Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Clarendon Press 1966).

24. India Const., Art. 124, 147; *see also* Sunita Parikh & Alfred Darnell, *Interbranch Bargaining and Judicial Review in India* (unpublished ms., presented July 25, 2007, at International Conference "Law & Society in the 21st Century," Humbolt-Universität zu Berlin) (copy on file with author).

25. Pursuant to Article 124 of the Constitution, Parliament increased the number of Judges from eight in 1950 to eleven in 1956, fourteen in 1960, eighteen in 1978, and twenty-six in 1986. For a retrospective, see generally *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (S.K. Verma & K. Kusum, eds., Oxford U. Press 2000).

Article 124 also states that in order to be eligible as a justice, an individual must have served at least five years on a state supreme court, or what is called a "High Court,"[26] or practiced as a lawyer in front of a state High Court or the Supreme Court for at least ten years.[27] In addition, the constitution sets forth a mandatory retirement age of sixty-five.[28] And justices are selected to the Court by the ceremonial President of the country working on behalf of the Prime Minister's government and in consultation with sitting members of the Court itself.[29]

In its formative years the Court seemed satisfied to give India's first Prime Minister, Jawaharlal Nehru, the leeway to follow through on his vision for creating a democratic-socialist republic.[30] In several cases during the 1950s and early 1960s, the Court affirmed the government's initiatives nationalizing industries, creating monopolies over certain sectors, and regulating private businesses.[31] But upon closer scrutiny of the case law during this time, there were certain occasions when the Court refused to acquiesce completely to the government.

For example, between 1950 and 1960, the Indian Parliament passed legislation that stripped zamindars, or landlords, of large estates that they owned throughout the country.[32] The goal was to redistribute these lands to individuals and communities that had long been denied fee simple

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26. *See* Austin, *supra* n. 23.

27. *See* India Const., Art. 124, § 3(a), (b). Note that the constitution does allow for a "distinguished jurist" to qualify as a justice. India Const. Art. 124 § 3(c). This conceivably would mean an influential legal thinker or academic who is at the peak of her or his legal field. It might even mean an eminent lawyer or judge who may not yet have satisfied the requirements in section 124(3)(a) or section 124(3)(b). Still, the most frequent way to be appointed to the Court is through meeting the criteria set forth in these first two provisions of Article 124.

28. *See* India Const., Art. 124, § 2.

29. *Id.* (providing also for consultation with judges of High Courts should President deem it necessary).

30. For a detailed and excellent discussion of Nehru, see Stanley Wolpert, *Nehru: A Tryst with Destiny* (Oxford U. Press 1996).

31. *See e.g. Ram Krishna Dalmia v. Justice Tendulkar*, A.I.R. 1958 SC 538; *Hamdard Dawakhana v. India*, A.I.R. 1960 SC 554; *Akadasi v. Orissa*, A.I.R. 1963 SC 1047.

32. For a discussion on the history of land reform in the post-independence era, see R.S. Gae, *Land Law in India: With Special Reference to the Constitution*, 22 Intl. & Comp. Law Q. 312 (1973).

ownership.[33] In order to immunize its program from judicial review, the Parliament in 1951 amended the constitution (which in India only takes a two-thirds majority in each house), removing the issue of property takings from the Court's jurisdiction.[34] In a move surprising to observers at the time, the Court in two companion cases refused to forfeit its jurisdictional authority and ruled that compensation must be provided to the zamindars, and that the pay-out must match market value.[35]

In response, the Parliament amended the constitution again in 1954.[36] This new provision allowed for compensation to property owners, but only when private land was directly seized for public use—effectively then foreclosing regulatory takings claims from being made.[37] The Court responded in *K. K. Kochuni v. Madras*[38] by firmly stating that it would not dilute the importance of Article 19—a fundamental guarantee enshrined in the constitution which provided for the right to property. In this landmark case the Court held that it, and not Parliament, would determine whether the state was providing adequate compensation and whether a regulation was a compensable taking.[39] Between adhering to an amendment passed by Parliament and enforcing Article 19, then, the Court clearly believed that its obligation was to the latter.

The staunch position of the Court regarding landowners' rights during the first two decades of independent India could be seen as anti-democratic, especially given the dominance of Nehru's Congress Party at the local, state, and federal levels. But within scholarly discourse an alternative narrative emerged: that while the Court "seemed to share the Nehruvian vision of socialist India, as evident in its decisions on the rights of

33. *See generally id.*

34. *See* S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* 46-47 (Oxford U. Press 2002).

35. *West Bengal v. Bella Bannerjee*, A.I.R. 1954 SC 170; *West Bengal v. Subodh Gopal*, A.I.R. 1954 SC 92. For commentary on these cases, see Sathe, *supra* n. 34, at 47.

36. *See* Sathe, *supra* n. 34, at 47; *see also* S.P. Sathe, *Constitutional Amendments, 1950-1988: Law and Politics* (N.M. Tripathi 1989).

37. Sathe, *supra* n. 34, at 47.

38. 1960 Indlaw 463.

39. *Id.* For a follow-up decision affirming the Court's institutional presence on this issue, see *Vajravelu Mudaliar v. Spec. Dep. Collector*, 1964 Indlaw SC 380.

industrial labour and regulation and control of the economy,"[40] it could not without losing its integrity completely buckle to the government. The few property law cases that came its way gave the Court the opportunity to display its independence from the aggressive pressure being wielded by the national government. These rulings were important because, even though they preserved the status quo, they were steeped in the constitution's own rhetoric, particularly in terms of protecting the fundamental rights of individuals. Yes, as then sitting Justice K. Subha Rao told the late Professor S.P. Sathe in an interview, landlords were able to retain their property.[41] But by adhering to the constitution's principles rather than to the policy preferences of politicians, the Court was establishing that it took the rule of law seriously and, perhaps as important, the Court was also establishing that it, as an institution, would not curtail individual rights even when pressured to do so by an increasingly powerful government.[42]

This exhibition of institutional muscle-flexing, I believe, helped scholarly observers, like Professor Sathe and others who have written about this period, begin the process of crafting the reputational norm of the Court.[43] By acceding to the economic policies of Nehru, the Court was viewed by these elites as gaining enormous capital among the large majority of the public that the government sought to aid. At the same time, the Court's firm stance on the issue of takings was interpreted as a sign that this institution was not going to be obsequious to, or in the pocket of, the government.

Jawaharlal Nehru died in 1964. Although the Congress Party continued to remain in power, for the next ten years the Court's reputation within scholarly discourse was further enhanced. I will next examine the reasons for this enhancement of the Court's reputation.

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40. *See* Sathe, *supra* n. 34, at 6.

41. *Id.* at 50 (citing S.P. Sathe, *Interview with Shri K. Subba Rao*, 4 J. Const. & Parliamentary Stud. 99 (1970)).

42. *Id.*

43. For another parallel view, see Granville Austin, *Working a Democratic Constitution: The Indian Experience* (Oxford U. Press 1999).

B. Refusing to be a Pawn of Indira

Nehru was succeeded first by an interim prime minister (Gulzari Lal Nanda) and then by L.B. Shastri, who died in office in 1966. Subsequently Nehru's daughter, Indira Gandhi (no relation to Mahatma Gandhi), who was a sitting member of Parliament at the time, was voted in as prime minister in a contested intra-party election.[44] Despite her win and the fact that her Congress Party retained a majority in Parliament, the political landscape was fractured.

In an effort to consolidate and bolster her authority, Mrs. Gandhi sought, among other acts, to override the Supreme Court's power of judicial review, which appeared as the main issue in the 1967 case of *Golaknath v. Punjab*.[45] Here the question was whether Mrs. Gandhi's majority-led Parliament could pass either a statute or constitutional amendment that contradicted or abridged the fundamental rights enumerated in the constitution.[46] In ruling against Mrs. Gandhi, the Court

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44. For further discussion of this point, see Stanley Wolpert, *A New History of India* (7th ed., Oxford U. Press 2003) and Paul R. Brass, *The Politics of India since Independence* (2d ed., Cambridge U. Press 1994).

45. 1967 Indlaw SC 462. *Golaknath* reversed a decision that was handed down by the Court in 1965, *Sajjan Singh v. Rajasthan*, A.I.R. 1965 SC 845. In *Sajjan Singh*, the Court was confronted with a property law case similar to one that it had decided a few years earlier. Parliament had passed a constitutional amendment which said that certain types of privately owned land that previously were immune from governmental taking now could be requisitioned for public use by either the central or state government. The petitioner in the case argued that this amendment unfairly targeted his property and sued, claiming a fundamental rights violation. Backtracking on its precedent, the Court, by a three-to-two majority, ruled that because constitutional amendments were different from ordinary statutes, it, as an institution, did not have the authority to restrict Parliament's power to abridge any of the fundamental rights. In a sharply worded separate opinion, however, Justice Mohammad Hidayatullah questioned whether the fundamental rights should be so easily alterable given the relatively simple process of passing a constitutional amendment. *See e.g. Saijan Singh* at 962-63 (indicating that "the power to make amendments ought not ordinarily to be a means of escape from absolute constitutional restrictions") (Hidayatullah, J., concurring in the result).

46. These fundamental rights included the right to equality, the right to freedom, the right to hold private property, the right against exploitation, the right to freedom of religion, the protection of cultural and educational rights of minorities, and the right to seek constitutional remedies. Note that the right to freedom includes six sub-rights, including the freedom of speech and expression, freedom to assemble, freedom to form unions and associations, freedom of movement, freedom to settle in any part of India, and the freedom to practice a profession. These freedoms, as noted earlier in the text, all have caveats in that

reiterated that it alone was obligated to preserve these rights.[47] The Parliament was too political a body, one which was too easily subject to the whims of politicians who were guided by majority will, a desire to remain in office, or sheer craven interests.[48] The fundamental rights, on the other hand, were steadfast protections for the minority who needed an independent arbitrator to safeguard their interests;[49] and in *Golaknath* the Court affirmatively opted to embrace this role.

So that there would be no mistake that this was an isolated decision, the Court in two other cases issued judgments which clearly signaled that it was willing to stand up against what it saw as Mrs. Gandhi's coercive tactics to curtail the rights of those who opposed her authority. First, the Court sided with the individual shareholders who complained that because they refused to sell their stakes in various private banks to the government, Mrs. Gandhi was unconstitutionally nationalizing these financial institutions as a means of end-running shareholders' fundamental rights to property.[50] And one year later, the Court held that Mrs. Gandhi's plan to force a small sovereign province within southern India to integrate into the union without compensation was an unjust taking.[51]

Within scholarly discourse, each of these three cases is taken as highlighting the Court's willingness to challenge the

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the government may restrict them on behalf of the public interest or to preserve public order. *See* India Const., Pt. III ("Fundamental Rights").

47. *Golaknath*, 1967 Indlaw SC 462 (stating that "there is nothing in the nature of the amending power which enables Parliament to override all the express or implied limitations imposed on that power" by the Constitution, and holding the proposed act "void" because it sought to take away or abridge the fundamental rights).

48. *Id.* (asserting that "a bill enacted by a unanimous vote of all the members of both Houses is ineffective to derogate from . . . [their] guaranteed exercise," and pointing out that "[t]he incapacity of Parliament . . . in exercise of its amending power to modify, restrict, or impose fundamental freedoms in Part III arises from the scheme of the Constitution and the nature of the freedoms").

49. *See id.* (citing Austin, *supra* n. 23, for both the proposition that incorporating an expression of the fundamental rights into the written Constitution would provide "tangible safeguards against oppression" of one minority by another, and the conviction that the fundamental rights are the "conscience of the Constitution").

50. *R.C. Cooper v. India*, A.I.R. 1970 SC 564 (holding invalid the act authorizing the takings).

51. *Madhavrao Scindia v. India*, 1971 A.I.R. 530 (holding the orders eliminating the local rulers illegal and inoperative).

state's abusive assertion of power.[52] This admiration for the Court was only heightened with the judgment in *Kesavananda Bharati v. Kerala*.[53] The facts surrounding *Kesavananda Bharati* came on heels of the Congress Party's 1971 electoral win in the lower house of Parliament, with Mrs. Gandhi at the helm. During the campaign Mrs. Gandhi had promised that if elected she would seek to curb the activism of the judiciary.[54]

Believing that she and her party had enormous political capital following the election, Mrs. Gandhi successfully pushed through a constitutional amendment that overturned the *Golaknath* decision.[55] This amendment was challenged in *Kesavananda Bharati*, in which the Court, sitting in a panel of thirteen, held by a seven-to-six margin that *Golaknath* had been incorrectly reasoned. According to the seven justices, Parliament could alter the fundamental rights in the constitution through the passage of a constitutional amendment, but not through the passage of an ordinary legislative act.[56] After all, even within the fundamental rights themselves, the majority contended, exceptions existed indicating that these guarantees could be restricted.[57] Nevertheless, while the Court was willing to reinstate Parliament's ability to amend the constitution, including the fundamental rights, it set forth what has come to be known as the basic structure doctrine.[58]

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52. *See e.g.* Sathe, *supra* n. 34 at 63-73; *see also e.g.* B.P. Jeevan Reddy, Speech, *The Centenary Celebration of Chief Justice K. Subba Rao*, 8 SCC Journal 41 (2003) (noting that within the political sphere, the "decision [in *Golaknath*] created a furore . . . [and that the] Government of the day felt deeply disturbed by this decision") (also available at http://www.ebc-india.com/lawyer/articles/2003v8a6.htm).

53. 1973 Indlaw SC 537.

54. *See* Wolpert, *supra* n. 44; *see also* Sathe, *supra* n. 34, at 68-69.

55. *See* Sathe, *supra* n. 34, at 68-69. Mrs. Gandhi pushed through two other amendments as well—one which sought to undo the *R.C. Cooper* case and another which sought to overturn *Madhavrao Scindia*. *Id.*

56. *See generally Kesavananda Bharati*, 1973 Indlaw SC 537.

57. India Const., Part III ("Fundamental Rights"). A refrain found throughout the Fundamental Rights is that "[n]othing in the . . . said clause shall . . . prevent the State from making any law imposing, in the interests of . . . public order, reasonable restrictions on the exercise of the right conferred." *See e.g.* India Const, Art. 19, § 3 (addressing freedom of speech, association, choice of domicile, and employment, and incorporating the quoted language).

58. *See e.g. Kesavananda Bharati*, 1973 Indlaw SC 537 at ¶¶1171, 1291 (setting out features of Constitution's "basic structure").

Under this principle, according to the Court, the Constitution had certain features to it that could never be compromised or abused by those entrusted with public authority—else India's democracy would cease to exist. For the Court, these features included constitutional, not parliamentary, supremacy; a republican form of government; secularism and federalism; separation of powers; a mutual respect for the fundamental rights and for a establishing a welfare state; and keeping the country unified.[59] For Mrs. Gandhi and her supporters, the decision in *Kesavananda Bharati* was a direct repudiation. Although *Golaknath* had been overruled, the reversal was cold comfort given the Court's firm pronouncement of the basic structure doctrine. Indeed Mrs. Gandhi was determined not to allow the Court to define the contours of the Constitution and the powers (and limitations) of the government. But as we will see in the next section, the Court refused to cave in to the Prime Minister—at least for a while—which further enhanced its image among those contributing to the scholarly discourse.

C. Consolidating an Uncorrupted and Just Image

Following the decision in *Kesavananda Bharati*, Mrs. Gandhi's government took dramatic steps to limit the ruling's effect. As noted above, Article 124 of the Indian Constitution spells out the required qualifications for Supreme Court justices.[60] An unwritten rule that is part of the process includes a tradition that the Chief Justice will be the person who has the most number of years on the Court. In *Kesavananda Bharati,* the presiding Chief Justice was in the majority bloc, but because he was approaching sixty-five, he was on the verge of mandatory retirement.[61] The next justice in line, J.M. Shelat,[62] had argued for even stronger limitations on the government and in fact

59. *See id.*

60. *See* India Const., Art. 124.

61. Sathe, *supra* n. 34, at 72-73.

62. *Id.* at 70, 72-73.

believed that *Golaknath*, the predecessor case, did not need to be overturned.[63]

Shelat too, though, was close to sixty-five. Claiming that his appointment would have forced the Court to endure another leadership change in just a few months, Mrs. Gandhi's government bypassed naming Shelat as Chief,[64] and then passed over the next person in line, as well as the justice after him. (Both of these justices also had been part of the majority opinion in *Kesavananda Bharati*.[65]) She then tapped Justice A.N. Ray to lead the Court; Ray had been a dissenter in the case and believed the Parliament had virtually limitless power in amending the constitution.[66]

Mrs. Gandhi's manipulation of the Chief Justice selection process was chastised and came to be known derisively in scholarly discourse as the Supersession.[67] Her actions were boldly confrontational, but rather than accommodating her agenda, the three members who had been bypassed for the Chief Justice post defiantly resigned from the Court.[68] With these departures and the death and retirement, respectively, of two other justices who had joined the majority in *Kesavananda Bharati*, the bloc which had put forth the basic structure doctrine had shrunk considerably.[69] In 1975, Mrs. Gandhi looked to the newly comprised Court, headed now by Chief Justice Ray, to validate a controversial decision she had taken.[70] Specifically, Mrs. Gandhi declared emergency rule that year, suspending the Constitution and imprisoning hundreds of her political opponents.[71]

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63. *Id.* at 69-70.

64. *Id.* at 72.

65. *Id.* 70, 72-73 (noting that Justices Hegde and Grover were in the *Kesavananda Bharati* majority, and that they were passed over when Ray was selected to be chief justice).

66. *Id.* at 70, 72.

67. *Id.* For a classic treatment of this subject in greater detail, see Rajeev Dhavan, *The Supreme Court of India: A Socio-Legal Critique of Its Juristic Techniques* (N.M. Tripathi 1977).

68. Sathe, *supra* n. 34, at 73.

69. *Id.*

70. *Id.*

71. *See generally* Mary Calliope Carras, *Indira Gandhi: In the Crucible of Leadership* (Beacon Press 1979).

The "Emergency" was in part prompted by a state High Court judgment, which had nullified Mrs. Gandhi's election victory of a contested seat in the lower house of Parliament. The state High Court had found her guilty of violating an anti-corruption election statute and ordered that she be removed from Parliament and banned from participating in electoral politics for a set period of time.[72] Mrs. Gandhi appealed to the Supreme Court; as the case was pending her party pushed into law the "Thirty-Ninth Amendment" to the Constitution, which established a special parliamentary-based adjudicative body to hear all election matters involving the Prime Minister.[73] The amendment was to apply prospectively as well as retroactively, and thus her hope was that the Supreme Court would render moot the decision by the lower court.

A panel of five justices heard the case, and in a complicated judgment the Court unanimously ruled that the Thirty-Ninth Amendment was unconstitutional.[74] The justices, however, differed on how they reached this conclusion. One opinion signed by three justices held that the amendment violated the basic-structure doctrine.[75] Another opinion stated that Parliament simply had no authority to adjudicate.[76] And a third opinion rejected Parliament's attempt to strip the Court of its ability to review a lower-court ruling.[77]

Although the Court refused to uphold Mrs. Gandhi's Thirty-Ninth Amendment, it did provide her with an olive branch. The Court unanimously allowed her election win to stand, ruling that the evidence on which the lower state court based its decision was not enough to overturn the original outcome.[78] Mrs. Gandhi thus was allowed to retain her Parliamentary seat and in turn the Premiership.

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72. *Id.*; *see also* Sathe, *supra* n. 34, at 73-74.

73. *See* Sathe, *supra* n. 34, at 73-75; *see also* Carras, *supra* n. 71. Note that the text of the thirty-ninth amendment is available on line at http://constitution.org/cons/india/tamnd 39.htm (accessed June 2, 2008; copy on file with Journal of Appellate Practice and Process).

74. *Indira Gandhi v. Raj Narain*, 1975 Indlaw SC 473.

75. *Id.* at ¶¶ 1-158.

76. *Id.* at ¶¶ 230-696.

77. *Id.* at ¶¶ 159-229.

78. *See generally Gandhi*, 1975 Indlaw SC 473.

To some observers, the Court diluted its otherwise monumental ruling by not voiding Mrs. Gandhi's election. But for most, the Court played it just right. It placed the necessary check on abusive governmental power while recognizing that going any further (e.g., nullifying the election) might jeopardize its position vis à vis the public—a public that had voted Mrs. Gandhi and her party into office.[79]

The Emergency was the most polarizing era in India since it had gained independence. The Court's decision in the Thirty-Ninth Amendment case helped consolidate its reputation within scholarly discourse as an institution of integrity willing to invalidate a clearly abusive initiative by the Prime Minister. But as the Emergency continued over the next two years, the Court's steadfast image eroded—to the point where a new norm seemed to emerge: that of a weak Court kowtowing to the whims of the Executive.

D. Serious Missteps

Mrs. Gandhi's Emergency lasted from June 26, 1975, until March 23, 1977.[80] During this time Mrs. Gandhi autocratically ruled India—imprisoning her opponents, barring protests and strikes, and suspending civil liberties. A great deal has been written on the abuses and corruption she perpetrated,[81] but for our purposes what is important is that following the Thirty-Ninth Amendment case, Mrs. Gandhi asked the Supreme Court, and Chief Justice Ray in particular, again to reconsider whether the basic-structure doctrine was constitutional.[82] In an unprecedented step, the Chief Justice organized a panel of thirteen justices to deliberate on the matter even though there was no case at bar.

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79. *See* Sathe, *supra* n. 34, at 77 (noting the author's opinion that "the . . . case provided social legitimacy to the basic structure doctrine"); *see also* H.M. Seervai, *The Emergency, Future Safeguards, and the Habeas Corpus Case* (N.M. Tripathi 1978); Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Co. 1980).

80. *See* Carras, *supra* n. 71.

81. *See e.g. id*; Wolpert, *supra* n. 44; Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (U. Chi. Press 1998).

82. *See* Sathe, *supra* n. 34, at 85-87.

This move was interpreted by a number of scholars as a serious concession to Mrs. Gandhi's dictatorial government.[83] Although the Court ultimately refused to make a ruling on the issue, it nevertheless looked enfeebled on two counts: First, by agreeing to entertain a petition from an undemocratic government which had no standing, the Court was seen as submissive. Second, the Court, to its credit, did allow a set of acclaimed civil liberties lawyers to argue against overturning the basic-structure doctrine.[84] But by not issuing a judgment affirming their sentiments (and instead simply dismissing the hearing in totem) the Court's reputation within scholarly circles as the de facto opposition to, or check on, the government was placed into question.[85]

Without a doubt, however, the Court's most obsequious moment came in the 1976 case of *A.D.M. Jabalpur v. Shiv Kant Shukla*.[86] Here, the Court was confronted with whether during the Emergency the government could suspend an individual's right to liberty guaranteed under Article 21 of the fundamental rights. The issue involved Mrs. Gandhi's sweeping detention of her political opponents. Reports were that within the prisons, police were engaging in abusive tactics including torturing those being detained.[87] A challenge to the Court was made by Mrs. Gandhi, who sought a reversal of several different state High Court rulings prohibiting the government's suspension of habeas corpus.

To the dismay of many, the Court held that the government's detention practices were outside its scope of review given that the country was under the unusual period of Emergency Rule.[88] Likely out of fear that its institutional existence was at stake, the Court capitulated to the government's

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83. *Id.*; *see also* Dhavan, *supra* n. 67; Baxi, *supra* n. 79; H.M. Seervai, *Constitutional Law of India: A Critical Commentary* vol. 2 (3d ed., N.M. Tripathi 1983).

84. *See* Sathe, *supra* n. 34, at 85-87; *see also* Dhavan, *supra* n. 67; Baxi, *supra* n. 79; Seervai, *supra* n. 79.

85. For a discussion of this point, see the works cited in notes 79-81.

86. A.I.R. 1976 SC 1207.

87. *Id.*

88. *Id.* For a passionate critique of this decision, see Jos. Peter D'Souza, *When the Supreme Court Struck Down the Habeas Corpus*, PUCL Bulletin (June 2001) (available at http://www.pucl.org/reports/National/2001/habeascorpus.htm) (accessed June 4, 2008; copy on file with Journal of Appellate Practice and Process).

wishes. If the *Golaknath*, *Kesavananda Bharati*, and even the Thirty-Ninth Amendment decisions were considered high points in the Court's efforts to counter abuses of power by the executive, this latest case proved to be its low-water mark. Although widespread outcry from writers was muted during the Emergency, following its lifting—upon which Mrs. Gandhi and her party were summarily drummed out of power in the 1977 national elections—criticism from various scholars was unrelenting.[89] The Court's image among these observers was in tatters. The following discussion will illustrate how the Court sought to improve its reputation after 1977, and how, by and large, it has been successful in regaining its reputation for integrity—at least among those who contribute to the scholarly discourse.

E. Reputational Redemption[90]

Mrs. Gandhi lifted her Emergency Rule in 1977, and thinking that she had public support behind her, held open elections. To her surprise, her Congress Party failed to gain a majority of seats in Parliament for the first time since independence.[91] This defeat and return to democracy in 1977 was met with great excitement, including from a new group of judges on the Supreme Court interested in pursuing social justice issues.[92] Upon the restoration of democracy, the Court quickly tried to rehabilitate its integrity by, for example, appointing commissions to investigate human rights abuses. It also began allowing claimants directly to petition it in matters where the central government was accused of infringing upon the fundamental rights of the constitution.[93] The Court

89. *See e.g.* D'Souza, *supra* n. 88; *see also* Dhavan, *supra* n. 67; Baxi, *supra* n. 79; Seervai, *supra* n. 83.

90. Note that Professor Sathe has used the term "atonement" to describe the Court's post-Emergency behavior. *See* Sathe, *supra* n. 34, at 106.

91. *See e.g.* Carras, *supra* n. 71.

92. *See generally* Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in *Judges and the Judicial Power* 289 (Rajeev Dhavan, R. Sudarshan, & Salman Khurshid, eds., N.M. Tripathi 1985).

93. *See* Jayanth K. Krishnan, *Lawyering for a Cause and Experiences from Abroad*, 94 Cal. L. Rev. 575 (2006) [hereinafter *Lawyering for a Cause*]; Marc Galanter & Jayanth K. Krishnan, *"Bread for the Poor": Access to Justice and Rights of the Needy in India*, 55

broadened who could qualify as a litigant with standing and did not even require litigants to specify the relief being sought in order to have their cases heard.[94] And there was an effort to implement a long-standing commitment to legal aid;[95] a national legal aid body was established, under the aegis of the Chief Justice of India, resulting in a number of innovative legal service schemes in which social justice groups used the law "systematically and continuously" to promote the interests of various constituencies.[96]

The Court's actions helped to start a public interest litigation movement during the late 1970s and early 1980s. This development resulted in important social changes—such as protecting the rights of excluded and powerless groups,[97] raising public awareness of many issues, energizing grassroots movements, increasing scrutiny on government agencies, and enhancing the institutional integrity of the Court.[98] Indeed the

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Hastings L. J. 789 (2004) [hereinafter *Bread for the Poor*]; *see also* Carl Baar, *Social Action Litigation in India: The Operations and Limitations on the World's Most Active Judiciary*, 19 Policy Stud. J. 140 (Fall 1990).

94. *See Lawyering for a Cause*, *supra* n. 93, at 594; Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 Wis. Intl. L. J. 57, 90 (1994) (noting that the courts have found themselves "in the business of constructing remedies unknown in pre-P[ublic] I[nterest] L[aw] days"). For relevant case law, see *S.P. Gupta v. India*, AIR 1982 SC 149; *D.C. Wadhwa v. Bihar*, AIR 1987 SC 579 (indicating that members of the public have standing, by virtue of their status as citizens, to challenge governmental actions alleged to be in violation of the Constitution); *Ratlam Municipal Council v. Vardhichand*, AIR 1980 SC 1622 (noting, in a case involving both a municipality's failure to provide adequate sewers and drains and its failure to abate a factory's release of pollutants into a residential area, that governmental bodies must provide their citizens with basic services); *Fertilizer Corp. v.India*, AIR 1981 SC 344; *People's Union for Democratic Rights v. India*, AIR 1982 SC 1473.

95. *See Bread for the Poor*, *supra* n. 93, at 796; *see also id.* at 796 n. 27 (quoting the Constitutional provision that requires the provision of "free legal aid").

96. *Id.* at 796.

97. *See generally Lawyering for a Cause*, *supra* n. 93; *see also* Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?* 37 Am. J. Comp. L. 495 (1989); Sathe, *supra* n. 31, at 195-248.

98. *See e.g. Bread for the Poor*, *supra* n. 93, at 796. A large body of scholarly discourse has focused on this point. *See e.g.* Upendra Baxi, *Courage, Craft, and Contention: The Indian Supreme Court in the Eighties* (N.M. Tripathi 1985); S.P. Sathe, *Judicial Activism (II): Post-Emergency Judicial Activism: Liberty and Good Governance*, 10 J. of Indian Sch. of Political Econ. 603 (Oct.-Dec. 1998); Oliver Mendelsohn, *Life and Struggle in the Stone Quarries of India: A Case-Study*, 29 J. of Cmmw. and Comp. Pol. 44 (Mar. 1991) [hereinafter *Life and Struggle*]; Susman, *supra* n. 94; G.L. Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 Intl. & Comp. L.Q.

series of pro-public-interest rulings during this time rebuilt the Court's reputation among scholars and seemingly beyond, prompting, for example, the country's oldest polling agency, the Indian Institute of Public Opinion (IIPO), to declare in 1984 that "[t]he Supreme Court[] [now]... enjoy[s] a high level of confidence by a majority of Indians."[99] And this sentiment has only continued and been promoted by many other observers to this day, including by one of the world's most prominent scholars on India who recently noted that since 1977 he has always assumed that Indian society as a whole sees the Supreme Court in a very positive light.[100]

But as noted, to date there is no reliable data, even from the IIPO, confirming that the mass public sees the Court in such a manner. In fact, the long-time director of the IIPO has conceded that the available public opinion data includes "no specific information on the Supreme Court of India."[101] While the Court has been lauded in scholarly discourse for its initiatives, there is some empirical evidence which shows that the public interest litigation movement, in particular, has proved to be a weak

66 (1991); Marc Galanter, *New Patterns of Legal Services in India*, in Marc Galanter, *Law and Society in Modern India* 279 (Rajeev Dhavan ed., Oxford U. Press 1989) [hereinafter *New Patterns*]; Clark D. Cunningham, *Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience*, 29 J. of Indian L. Inst. 494 (Oct.-Dec. 1987); Madhava Menon, *Justice Sans Lawyers: Some Indian Experiments*, 12 Indian B. Rev. 444 (1985).

99. Indian Inst. of Pub. Opinion, *Metropolitan Opinion on the Instruments of the Indian Republic, Blue Supplement to the Monthly Public Opinion Survey* vol. XXIX, No. 11, at V (1984).

100. Interview with Marc Galanter, John and Rylla Bosshard Professor of Law and South Asian Studies, emeritus, U. of Wis.-Madison (Mar. 27, 2007).

101. Ltr. from V.P. Madhok, former Dir., Indian Inst. of Pub. Op., to author (Mar. 9, 2007) (on file with author). Polls that ask about the courts, even in general, are not that frequent. And when a poll does ask about the courts, it is usually along the lines, such as one conducted by the Center for the Study of Developing Societies, which, once—in 1996—asked how much faith the public then had in the "judiciary." *See* Questionnaire and Survey Findings, at http://www.csdsdelhi.org/index_pg1.htm (Question 40) (accessed June 9, 2008; copy on file with Journal of Appellate Practice and Process). One could find other similarly uninformative questions being asked by the IIPO as well, and this problem was not just an Indian phenomenon. Polls conducted in India by Western polling agencies suffer from similar omissions. *See e.g.* http://www.transparency.org (click on India link); http://www.worldvaluessurvey.org (polling by Transparency International and World Values Survey, respectively) (accessed June 9, 2008; copy on file with Journal of Appellate Practice and Process). Indeed, no poll results focused specifically on either the Supreme Court of India or the different levels of the courts in India came to light during the research conducted for this article.

vehicle for enlarging access to justice for the disadvantaged.[102] Statements which suggest that the general public perceives the Court as possessing great integrity, therefore, are conjecture.

So where does that leave us? As I commented in the Introduction, my hope is that scholars who view the Court with such respect do reflect the sentiments of the mass public. But as we do not know for sure, it is only appropriate to consider alternative scenarios under which the public may see the Court. Below I provide one such alternative, that, although admittedly provocative, will, I hope, spur much-needed empirical investigation into this matter.

III. THE SILENT MAJORITY?

A. Postulating a Pluralistic Ignorance Hypothesis

How might it be that public opinion of the Supreme Court in India fails to match up with the prevailing vision that scholars have of the institution? One explanation is that the social psychological phenomenon of pluralistic ignorance is occurring within this environment. Although there is a rich, recent scholarship on this subject,[103] the concept was first introduced into the academic discourse in the 1920s by Floyd Allport, who then followed up on his work with Daniel Katz and Margaret

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102. *See Bread for the Poor*, *supra* n. 93, at 797; *see also id.* at 797 nn. 36, 37; Epp, *supra* n. 81.

103. *See e.g.* John M. Darley, *The Cognitive and Social Psychology of Contagion Organizational Corruption*, 70 Brook L. Rev. 477, 1189-91 (2005); Alex Geisinger, *Are Norms Efficient? Pluralistic Ignorance, Heuristics, and the Use of Norms as Private Regulation*, 57 Ala. L. Rev. 1 (2005); J. Nicole Shelton & Jennifer A. Richeson, *Intergroup Contact and Pluralistic Ignorance*, 88 J. Personality & Soc. Psychology 91 (2005); Jonathon R.B. Halbesleben & M. Ronald Buckley, *Pluralistic Ignorance: Historical Development and Organizational Applications*, 42 Mgt. Decision 126, 134 (2004); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 Geo. L. J. 1 (2004); Tracy A. Lambert, Arnold S. Kahn & Kevin J. Apple, *Pluralistic Ignorance and Hooking Up*, 40 J. Sex. Research 129 (2003); David Luban, *Integrity: Its Causes and Cures*, 72 Fordham L. Rev. 279, 284 (2003); David Hines, et al., *Pluralistic Ignorance and Health Risk Behaviors: Do College Students Misperceive Social Approval for Risky Behaviors on Campus and in Media?* 32 J. Applied Soc. Psychology 2621, 2622 (2002); Dan Hunter, *Phillipic.Com, Review Essay of Cass Sunstein's* Republic.Com, 90 Cal L. Rev. 611 (2002); Richard H. McAdam, *An Attitudinal Theory of Expressive Law*, 79 Or. L. Rev. 339, 340 (2000).

Jenness.[104] Pluralistic ignorance, according to these researchers, manifested when a noticeable sum of individuals rejected an existing societal norm, but because they believed that others accepted it, they remained silent about their own rejection of that norm.[105] As the social theorist Robert Merton would note almost four decades later, there is the "unfounded assumption that one's own attitudes are unshared"[106] by the rest of the members of the group or society.

More contemporary work too has addressed the pluralistic ignorance dilemma. Several scholars in the 1980s found that influential individuals with pronounced opinions within a society often would inhibit less-informed members from expressing a point of view, thereby contributing to a downward "spiral of silence" among the mass populace.[107] In the 1990s, a series of theoretical and empirical studies by Deborah Prentice and Dale Miller further advanced our understanding of pluralistic ignorance.[108] Based on their behavioral experiments,

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104. *See* Floyd Allport, *The Influence of the Group upon Association and Thought*, 3 J. Experimental Psychology 159 (1920); Daniel Katz, Floyd Allport & Margaret Babcock Jenness, *Student Attitudes: A Report of the Syracuse University Reaction Study* (Craftsman Press 1931).

105. *See* Katz, Allport & Jenness, *supra* n. 104.

106. *See* Robert K. Merson, *Social Theory and Social Structure* 431 (Free Press 1968).

107. Stephen D. Gottfredson, Barbara D. Warner & Ralph B. Taylor, *Conflict and Consensus about Criminal Justice in Maryland, in Public Attitudes to Sentencing* (Nigel Walker & Mike Hugh, eds. Gower Pub. Co. 1988); Allen Breed, *The State of Corrections Today: A Triumph of Pluralistic Ignorance* (Edna McConnell Clark Found. 1986); Dale T. Miller & Cathy McFarland, *Pluralistic Ignorance: When Similarity is Interpreted as Dissimilarity*, 53 J. Personality & Soc. Psychology 298, 301 (1987); Elihu Katz, *Publicity and Pluralistic Ignorance: Notes on "The Spiral of Silence"*, in *Offentliche Meinung und Sozialer Wandel* (H. Baier, H.M. Kepplinger & K. Reumann eds., Verlag für Sozialwissenschaften 1982); D. Garth Taylor, *Pluralistic Ignorance and the Spiral of Silence: A Formal Analysis*, 46 Pub. Opinion Q. 311 (1982); Daniel J. Isenberg, *Levels of Analysis of Pluralistic Ignorance Phenomena: The Case of Receptiveness to Interpersonal Feedback*, 10 J. Applied Soc. Psychology 457, 467 (1980). Note that much of this work drew (either implicitly or explicitly) on the enormous developments made in the research during the 1960s and 1970s. *See e.g.* David Matza, *Becoming Deviant* (Prentice Hall 1969); Ronald L. Akers, Norman S. Hayner, & Werner Gruninger, *Prisonization in Five Countries: Types of Prison and Inmate Characteristics*, 14 Criminology 527 (1977); Warren Breed & Thomas Ktsanes, *Pluralistic Ignorance in the Process of Opinion Formation*, 25 Pub. Opinion Q. 382 (1961); Hubert J. O'Gorman & Stephen L. Garry, *Pluralistic Ignorance—A Replication and Extension*, 40 Pub. Opinion Q. 449 (1976).

108. Deborah A. Prentice & Dale T. Miller, *Pluralistic Ignorance and the Perpetuation of Social Norms by Unwitting Actors*, 28 Advances Experimental Soc. Psychology 161 (1996) [hereinafter *Perpetuation of Social Norms*]; see also Dale T. Miller & Deborah A.

Prentice and Miller argued that silent constituencies are not necessarily "ignorant" of other members' "sentiments; rather they think they know, but are mistaken."[109] They also found that dominant norms were often not beneficial for those perpetuating these beliefs.[110] And building upon this work, scholars in recent years have noted that powerful pervading norms may ultimately serve as a counterproductive, hegemonic societal force, leading to an "entrenchment of suboptimal, as opposed to welfare-enhancing behaviors."[111]

Given India's socio-demographic character, inferring that there is a divide between scholars and the mass populace is not a logical leap. Consider the situation just in terms of economic and social distinctions. The country, as discussed earlier, still struggles with debilitating poverty and economic hardship. Over fifty percent of the population belongs to lower castes—which often seriously hinders the academic, political, and socio-economic opportunities of these individuals.[112]

In addition, over the last two decades a rich literature has developed—mainly from non-legal and non-judicial politics scholars—that sheds light on the subaltern, or marginalized, peoples of India.[113] Although these works vary in subject matter

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Prentice, *Collective Errors and Errors About the Collective*, 20 J. Personality & Soc. Psychol. Bull. 541 (1994); Deborah A. Prentice & Dale T. Miller, *Pluralistic Ignorance and Alcohol Use on Campus: Some Consequences of Misperceiving the Social Norm*, 64 J. Personality & Soc. Psychology 243, 244 (1993).

109. *Perpetuation of Social Norms*, *supra* n. 108, at 161.

110. *Id.*

111. *See* Geisinger, *supra* n. 103, at 16.

112. The exact number of lower castes in India has been a matter of debate for years. According to recent census data, there are over 166,000,000 scheduled castes and 84,000,000 scheduled tribes, which would be part of this lower-caste category. *See* 2001 Census of India, http://www.censusindia.gov.in/Census_Data_2001/Census_data_finder/A_Series/SC_ST.htm (chart entitled "Scheduled Castes & Scheduled Tribes Population) (accessed Aug. 11, 2008; copy on file with Journal of Appellate Practice and Process). In addition, the government believes that there are "other backward castes," or "other backward classes," which too would be considered lower castes, and has estimated this figure to over fifty percent, although there is debate over this latter figure. *See* Subodh Ghildiyal, *Gov't Wants OBC Census*, Times of India (Oct. 20, 2006) (available at http://timesofindia.indiatimes.com/articleshow/2210455.cms) (accessed Aug. 11, 2008; copy on file with Journal of Appellate Practice and Process).

113. The University of Virginia has put together a wonderful online subaltern studies bibliography at http://www.lib.virginia.edu/area-studies/SouthAsia/Ideas/subalternBib.html (accessed June 9, 2008) (copy on file with Journal of Appellate Practice and Process).

and methodological approach, most are unified around the idea that traditional scholarly research has overlooked how subaltern populations throughout Indian history have drawn upon their own norms, beliefs, and identities to become politicized agents in their own right.[114] Upendra Baxi, one of the few Indian Supreme Court scholars who is also steeped in subaltern rhetoric, has implored others who study Indian judicial politics to recognize that for centuries indigenous communities in this society debated and studied issues of "prescriptions, prohibitions, punishments—the grammar and even the practice of power."[115]

Of course this does not mean that all subaltern populations behave in the same manner. Some have the opportunities and resources to become more mobilized, while others face greater constraints. But the body of work from these scholars highlights a recognition that a disconnect certainly can exist between the mass public and those who contribute to scholarly discourse. In the next section, I pursue this possibility by focusing on two reasons why, in my view, the general public may not feel the type of affinity for the Supreme Court exhibited by supportive scholars.

B. The Supreme Court's Contempt Power

The Indian constitution contains two provisions that arm the Supreme Court with the ability to "punish . . . for contempt."[116] (A statute passed shortly after independence provided lower courts with similar power.[117]) What does this

114. *See generally id.* Arguably the most renowned scholar writing on subalternality has been Professor Partha Chatterjee. For a selected sample of relevant works, see Partha Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (Columbia U. Press 2004); Partha Chatterjee, *Two Poets and Death: On Civil and Political Society in the Non-Christian World*, in *Questions of Modernity* (Timothy Mitchell ed., U. Minn. Press 2000); Partha Chatterjee, *The Nation and Its Fragments* (Princeton U. Press 1993).

115. Upendra Baxi, *"The State's Emissary": The Place of Law in Subaltern Studies*, in *Subaltern Studies VII: Writings on South Asian History and Society* 247, 251 (Partha Chatterjee & Gyanendra Pandey eds., Oxford U. Press 1992).

116. India Const., Art. 129; India Const., Art. 142.

117. The Contempt of Courts Act, 1952 (repealed 1971). For a historical discussion of this statute that includes the text of the act with which it was replaced, see Network of Women in Media, India, *The Contempt of Courts Act, 1971*, http://www.nwmindia.org/

power mean, and how has it been used? In the Supreme Court, the decision to hand down a contempt citation typically has hinged on whether an order by the Court has been defied; whether there is a finding that pending matters in the Court have been undermined; or whether a justice or the Court itself has been defamed.[118] While it is understandable that the Court might issue a contempt citation against a party in the first two instances, the use of this power in the last case deserves discussion.

The Framers of the Indian Constitution believed, and many scholars and judges have also long believed, that allowing the judiciary's integrity to be questioned "would destabilize the Constitution and ultimately the whole edifice of constitutional government."[119] There is, in other words, an established norm in India which treats the judiciary—and especially the Supreme Court—as a sacred institution. Without precise data, it is difficult to know for certain why this norm exists. Perhaps one reason, as argued by one scholar, is that as opposed to other countries where there are legendary stories of lawyers and judges using the law to fight on behalf of those in need, in India the historic folklore has centered on judges alone.[120] In ancient and pre-colonial times, judges were seen as impartial, wise, and almost divine.[121] Because they were typically of a high-ranking caste affiliation, their social status was that much more enhanced as well.[122]

During the colonial period (1757-1947), judges also played an important role in governing India. The British established a general territorial law that operated in a common law style and

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Law/Bare_acts/contempt_act.htm (accessed June 10, 2008; copy on file with Journal of Appellate Practice and Process).

118. *See* Sathe, *supra* n. 34, at 286; *see generally* K. Balasankaran Nair, *Law of Contempt of Court in India* (A. Publishers & Distributors 2004).

119. Sathe, *supra* n. 34, at 289.

120. Velcheru Narayana Rao, *Courts and Lawyers in India: Images from Literature and Folklore*, in *Boeings and Bullock Carts: Studies in Change and Continuity in Indian Civilization* vol. 3, 196, 205, 209 (Y.K. Malik & D.K. Vajpeyi eds., Chanakya Publications 1990) (noting that "stories of lawyers who stand our as heroes fighting for justice" are "significantly absent in [Indian] movies, literature, and folklore," and that "the judge is viewed with respect even when he fails to deliver justice," for "[p]opular movies and folklore do not usually present the judge in a bad light").

121. *Id.*

122. *Id.*

was administered in a nationwide system of government courts, first by English judges but then increasingly by Indian judges.[123] These judges helped to transition the substantive law to resemble its British counterpart, by adhering to the practice of stare decisis and by applying codified statutes to cases at bar.[124] And judges in colonial India were also active in deciding the ever-important area of family law matters.

Yet relying on a historical or path dependency argument for why judges today remain sacrosanct is not entirely satisfying. Over the course of Indian history, judges in fact have been subject to scrutiny and suspicion. Acclaimed Sanksritist Richard Lariviere has documented how ancient Hindu scriptures set forth strict codes of judicial conduct out of concern (and experience) that judges may be tempted to transgress the norms of professional ethics.[125] Furthermore, during the British rule many saw judges as collaborators with the oppressors and as caring little about India's disadvantaged.[126] Indeed, the use of the contempt power in this era was angrily interpreted as a key way in which the British exercised their dominance over Indians. Therefore, it is unclear and somewhat surprising why, in a democracy that prides itself on free expression, judges in the post-Independence era are able to possess such sweeping contempt powers and receive special immunity as well.

And over the years the Supreme Court has not shied away from using this constitutional power to discipline those it perceives as tarnishing its reputation. The Court's most famous exercise of it came in a case involving the acclaimed author Arundhati Roy. Roy has been active in working with Medha Patkar, a leader in the grassroots movement known as the Narmada Bachao Andolan (NBA), which since the early 1980s

123. For a discussion of this issue, see extraction from Marc Galanter and Jayanth K. Krishnan, *Personal Law and Human Rights in India and Israel*, 34 Isr. L. Rev. 101 (2000).

124. *Id.*

125. *See* Richard Lariviere, *The Naradasmrti* (Dept. of S. Asian Regl. Stud., U. of Pa. 1989). (I must express special thanks to Don Davis for highlighting this point.)

126. For example, various nationalist leaders during the Indian Independence movement sought to boycott the courts. At the forefront of this cause, of course, was Mohandas Gandhi who as early as 1919 spoke out against colonial judges. For a selected set of readings on this particular issue see generally Sunit Bal Kher & Mohandas K. Gandhi, *The Law and Lawyers* (Navajivan Publg. House 1962); Judith M. Brown, *Gandhi: Prisoner of Hope* (Yale U. Press 1989).

has focused on blocking the construction of a government dam on the Narmada River in Western India.[127] To protest the government project, the NBA has embraced a range of practices, including litigation. Lawyers for the NBA have cast the government's dam project as an unconstitutional taking in violation of Article 31;[128] a violation of Article 14's equal protection clause;[129] and a violation of Article 19(e)'s right "to reside and settle in any part of the territory of India."[130]

In 1998, the Court ruled that although the government would be required to ensure that habitable "relief and rehabilitation" sites be provided to the displaced villagers, the NBA could not block or "come[] in the way" of the dam construction.[131] Both Roy and Patkar publicly and repeatedly derided the Court, and in a subsequent ruling made in 1999 the Court lashed back, warning that such "vicious stultification and vulgar debunking cannot be permitted to pollute the stream of justice."[132]

In 2000 the NBA re-petitioned the Court, seeking a complete injunction against the government construction. The Court, however, refused to grant such a motion, prompting further outrage from Roy and other NBA supporters. Ultimately, in 2002, Roy was convicted of contempt of court after she continued her oral and written attacks on the Court. She served one day in jail and paid a fine.[133]

The Roy affair has brought to light the chilling effect that the contempt power can have on individual expression regarding the Court. Perhaps one charitable interpretation of this matter is

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127. *See* Ashish Kothari & Shekar Singh, *The Narmada Valley Project: A Critique* (Kalpavriksh 1988). Portions of the ensuing discussion on the NBA are extracted from *Lawyering for a Cause*, *supra* n. 93.

128. India Const., Art. 31.

129. India Const., Art. 14.

130. India Const., Art. 19.

131. *See Narmada Bachao Andolan v. India* 1998 Indlaw SC 1602, at ¶¶ 1, 2.

132. *See id.* at ¶ 6.

133. *See e.g.* J. Venkatesan, *Arundathi Roy Jailed for Contempt of Court*, The Hindu (Chennai, India) 1 (Mar. 7, 2002) (available at http://www.hinduonnet.com/thehindu/2002/03/07/stories/2002030706060100.htm) (accessed June 10, 2008; copy on file with Journal of Appellate Practice and Process). The case cite for the 2000 decision is *Narmada Bachao Andolan v. India* 2000 Indlaw SC 3658. Readers might also be interested in the discussion of these matters in *Lawyering for a Cause*, *supra* n. 93, at 611-12.

that the Court did not seem to allow Roy's fame to interfere with its imposition of a sentence against her. On the other hand, it may have been the case that because of Roy's popularity she was treated in a less harsh fashion than someone not as well known. Without any data, it is hard to know how many people have been imprisoned (and for how long) for criticizing the Court. And given the uncertain nature of this area of the law where no bright-line rule exists, it is unclear when a critical statement towards the judiciary is likely to lead to a contempt citation and when it is simply the exercise of free speech.

If understanding the parameters of the contempt law is difficult for even legal observers, if there is a well-accepted norm against criticizing the judiciary, and if the public witnesses the consequences of defying this norm, then it is reasonable to assume that everyday individuals may not wish to express openly their real sentiments towards the Supreme Court. On the other hand, however, it is true that questions have recently been raised about the Court's integrity.

For example, Indira Jaisingh, a highly reputed lawyer and women's rights activist, has harshly reviewed a January 2007 decision that reaffirmed the principle that it, rather than the Parliament, is the final interpreter of the basic structure of the constitution.[134] Jaisingh has referred to the ruling as "devastating" and accused the Court of being "unaccountable."[135] Another well-known public intellectual, Nivedita Menon, has commented that allowing the Court to remain shielded from criticism is the epitome of contempt for the democratic process.[136] And even Arundhati Roy has not relented in her scathing assessment of the Court. Shortly after her release from prison, she issued a statement questioning the

134. This essay can be found at Indira Jaisingh, *Ninth Schedule: What the Supreme Court Judgment Means*, Rediff.Com (Jan. 11, 2007) (available at http://us.rediff.com/news/2007/jan/11indira.htm) (accessed June 10, 2008; copy on file with Journal of Appellate Practice and Process).

135. *Id.*

136. Nivedita Menon, *Contempt of Democracy: Time for Judicial Reform*, on Kafila: Media/Politics/Dissent, http://www.kafila.org (Mar. 1, 2007) (main page of site; click "Menon" under "Authors" for archived columns; scroll down to March 2007) (accessed June 11, 2008; copy on file with Journal of Appellate Practice and Process).

Court's inconsistent use of the contempt power[137] and deriding it for its own contemptible, condescending comments in demeaning her gender in its ruling against her.[138]

Open criticism by such high profile people may well motivate the general public to challenge both the norm and the law which prohibit criticizing the bona fides of the Court. But recall that while neither Jaisingh nor Menon has been held in contempt, Roy was—which may chill others from speaking out. If someone of Roy's status[139] could be convicted, what chance does the average citizen have of challenging the contempt power of the Court?

Moreover, consider the case of a German writer, Hans Dembowski, whose contract was canceled by his publisher—Oxford University Press—as his book was about to be widely distributed in 2001.[140] The reason: the West Bengal state High Court had issued a contempt citation against the author and the publisher after receiving word that the manuscript contained an academic assessment, to which the state High Court objected, of how public interest litigation functioned in its jurisdiction.[141] Even though the author consulted and was supported by some of India's finest lawyers,[142] his contempt citation was not lifted and

137. Arunduthi Roy, *Statement* (Mar. 7, 2002), http://www.narmada.org/sc.contempt/aroy.stmt.mar7.2002.html (accessed June 11, 2008; copy on file with Journal of Appellate Practice and Process).

138. *Id.* (pointing out that the Court in its ruling stated that it was acting in a proper manner "by keeping in mind that the respondent is a woman, and hoping that better sense and wisdom shall dawn upon the respondent" before she makes any further critical comments).

139. Roy's *The God of Small Things* (Random House Canada Ltd. 1997) won the Man Booker Prize in 1997.

140. For a discussion of the Dembowski case, see T.M. Ciolek, *Taking the State to Court: Public Interest Litigation and the Public Sphere in Metropolitan India*, on The Best of the Asian Studies WWW Monitor, http://asia-www-monitor.blogspot.com/2006_07_01_archive.html (July 20, 2006) (accessed June 11, 2008; copy on file with Journal of Appellate Practice and Process). For more discussion of the book, see *Web Publication of Controversial Book: OUP's Grovel Stretches from Calcutta to Essen*, http://www.btinternet.com/~akme/calcont2.html (Nov. 2, 2006) (anonymous post) (accessed June 11, 2008; copy on file with Journal of Appellate Practice and Process). And also see Hans Dembowski, *Limits to the Public Sphere: How the Calcutta High Court is Stifling Academic Debate* (unpublished ms., 2007) (copy on file with Author).

141. *See e.g.* Ciolek, *supra* n. 140.

142. Indeed, the late Professor S.P. Sathe was one of the lawyers he consulted, as was the Supreme Court advocate Dr. Rajeev Dhavan.

remains in effect to this day. Some wonder whether Dembowski, who has since returned to Germany, will be prosecuted if he ever travels back to India.

Therefore, without any systematic evidence of the supposedly high esteem in which the public holds the Court—along with the fact that this contempt power hangs over Indian society—it seems reasonable to assert that we really do not know whether the public privileges the Supreme Court over other governmental institutions. Indeed, as I shall suggest below, given how the lower courts function, as well as the reality that it is in the lower courts that most Indians engage the legal process, it might well be that any impression that the public has of the Supreme Court would be based on their experiences at this lower level.

C. A Different Legal Universe—A Different Reality

Given its national policy-making power, along with the fact that as of March 2007 there were a startling 40,000 cases pending before the Indian Supreme Court,[143] it is no surprise that it (the Court) has attracted the attention of legal scholars and the media. Even with its influence and packed docket, however, the workings of the Supreme Court represent only a small portion of what occurs within the Indian judiciary. The vast majority of Indians never interact with the Court; rather it is in the lower courts where people encounter the legal process most often. Consider that the total number of cases pending in all of the state High Courts is roughly three million.[144] And nationwide there are twenty-five million cases pending in the district courts.[145]

Although Indians appear highly litigious, ironically the little empirical evidence available suggests that in terms of civil filings of lawsuits per capita, comparatively, they are not high

143. *See* Press Information Bureau, Government of India, Ministry of Law and Justice, *Over 40 Thousand Cases Pending in Supreme Court and About 40 Lakh Cases in High Courts*, http://pib.nic.in/release/release.asp?relid=25376 (Mar. 2, 2007).

144. *Id.*

145. As of June 30, 2006, the website India Stat, a fee-based membership site, which is the most comprehensive database that tracks pending suits in court, stated that the figure was 25,393,251. *See* www.indiastat.com. (Relevant data on file with Author).

users of the legal process. This point and the causes for it have been discussed elsewhere in greater detail,[146] but in short because of the expenses associated with engaging in litigation, a shortage of judges to hear cases, and the inordinate number of interlocutory appeals allowed for by the Indian legal system (which results in the huge backlog of cases) there is the natural tendency to want to stay away from the courts if at all possible. There is no current data on the length of delays present in the district courts (although the anecdotes are both legendary and depressing[147]), but we do have information on the High Courts:

Table 1[148]

Pending Cases in State High Courts

High Courts	Total Pending Cases	Pending More than Five but Less than Ten Years	Pending for More than Ten Years	Population Rank per High Court
Allahabad	981245	164484	322244	1
Andhra Pradesh	183139	35215	3796	5
Bombay	332975	66807	61035	2
Calcutta	209233	48296	91080	4
Delhi	113785	18909	20799	17
Gujarat	143655	46808	19321	10
Gauhati	57381	10616	32	14
Himachal Pradesh	23539	36196	0	20
Jammu & Kashmir	45225	5088	240	18
Karnataka	129653	617	5656	9
Kerala	130267	18965	1026	12
Madras	298759	26958	4347	6
Madhya Pradesh	200918	32567	9975	7
Orissa	106549	2905	32015	11
Patna	84948	67075	13461	3
Punjab & Haryana	265302	66589	56338	15
Rajasthan	204348	42234	14545	8
Sikkim	55	0	0	21
Uttaranchal	35898	6516	5960	19
Jharkhand	63732	Not Available	Not Available	13
Chhatisgarh	35812	Not Available	Not Available	16
Total	**3,648,475**	**627,680**	**65,4206**	

146. *See e.g. Lawyering for a Cause*, *supra* n. 93; *Bread for the Poor*, *supra* n. 93.

147. *See e.g.* Barry Bearak, *In India, The Wheels of Justice Hardly Move*, 149 N.Y. Times A1 (June 1, 2000). Note that the website India Stat includes data from 1999-2000 indicating that 4,616,057 cases had at that time been pending between three and ten years, while 829,345 had been pending more than ten years.

148. The data for this table come from the comprehensive India Stat database. *See* n. 145, *supra*. The data are from 2004, and are the most recent statistics compiled at the time of this writing.

As we can see from Table 1, of the more than 3.6 million cases in all of the High Courts, over 627,000 have been pending for more than five years and over 654,000 have been pending for more than ten years. More generally, the table seems to confirm a correlation between how populated a jurisdiction is and the number of cases pending before its respective High Court. (To be sure, there is some variation. Take, for instance, the state of Bihar, which has the third largest population in India. Its High Court (in Patna) is almost in the bottom one-third in terms of the number of cases pending.)

On an absolute scale the numbers of cases backlogged in the High Courts—and the amount of time litigants have to wait to obtain a final outcome—are mind-boggling. That a relatively small percentage of the population has any contact with the Supreme Court makes it conceivable that the impressions and attitudes of the general public towards the judiciary, including the Supreme Court, are based upon the only reality with which they are familiar: that in the lower courts. Therefore, given the combination of the contempt power discussed in the previous section, the situation of delay in the High Courts and district courts addressed here, and the overall possibility of pluralistic ignorance occurring among the mass populace, it is reasonable to wonder whether the scholar-driven norm regarding the Supreme Court is in fact widely accepted by the general public.

IV. CONCLUSION

This project has sought to understand why despite being surrounded by institutions that are publicly disdained, the Indian Supreme Court has been able, by and large, to retain a reputation of high regard. As it turns out, the Court's reputation appears to be based on the expressed sentiment mainly found within scholarly discourse. The Court's historically aggressive protection of individual rights during tumultuous times certainly has enabled supporters to promote its reputation. But because actual evidence is lacking, we simply do not know if this scholarly belief is shared by the mass public.

Some may interpret this inquiry as exhibiting contempt for the Court—a potentially criminal offense as we have seen. Yet in a free and democratic society like India, a call for further

empirical confirmation of a norm should be welcomed rather than viewed with hostility. Moreover, consider that it was former Chief Justice S.P. Bharucha who just a few years ago asserted that he believes twenty percent of Indian judges are corrupt.[149] Add to this a recent anthropological study conducted over a two-year period finding that officials, including members of the Court, who publicly promoted alternative dispute resolution tribunals as a means of reducing the backlog in the judiciary, were overtly chided by the everyday claimants who participated in these forums.[150] And most recently, Prime Minister Manmohan Singh has strongly cautioned the Court against what he perceives as its increased "judicial . . . over-reach[ing],"[151] implying that the practice undermines India's democratic process. My article is thus not alone in trying to situate the Court's role and reputation within Indian society.

Beyond sheer academic interest, though, my desire that future scholarship might examine how the Court is publicly regarded has important policy implications as well. By first understanding what the public thinks of the Court, we might then move to learn why the public thinks what it does. This follow-up question is important because it is likely to tap into Indians' perceptions of how effective the Court is in addressing their concerns.

Assume that subsequent research finds that the general public holds the Court in high esteem. Does that necessarily mean that the public perceives the Court to be effective as well? Perhaps not, for as mentioned above, there is preliminary empirical evidence to suggest that some of the Court's public interest decisions have not produced tangible societal benefits. Thus, we might find that the public believes that the Court does not abuse its entrusted authority and is composed of justices who

149. *See Only a Handful of Judges Face Corruption Charges: Chief Justice*, http://www.indiaenews.com/india/20070204/38111.htm (Feb. 4, 2007) (indicating that "[f]ormer chief justice S.P. Bharucha had said that perhaps 20 percent of judges were corrupt") (accessed June 13, 2008; copy on file with Journal of Appellate Practice and Process).

150. *See generally Bread for the Poor*, *supra* n. 93.

151. *See* Sandeep Phukan, *PM Sends Out Strong Message to Judiciary*, http://www.ndtv.com/convergence/ndtv/story.aspx?id=NEWEN20070008083 (noting, for example, that the issue of affirmative action, which is as divisive a topic in India as it is in the United States, should be left to the legislative process) (NDTV News, Apr. 8, 2007) (accessed June 13, 2008; copy on file with Journal of Appellate Practice and Process).

are well-intentioned, but the public might nonetheless think that the Court is simply incapable of meeting their everyday needs.

In addition, careful probing of mass opinion could also shed light on how legitimate the Court is among the Indian public. As scholars in the United States have found when studying American public opinion of its Supreme Court, determining what legitimacy means is complicated.[152] Consider that recent polling data from Gallup has shown a steady decline in the American public's esteem for its Supreme Court.[153] In spite of this trend, rigorous surveying by Professor James Gibson reveals that the United States Supreme Court has not lost its legitimacy among the American public.[154] Upon thoughtful questioning we similarly might find that the Indian public perceives its Supreme Court as quite legitimate, irrespective of the esteem it holds for—or how effective it deems—this institution. After all, even with their cynicism towards the Parliament, the police, and the bureaucracy, Indians continue to value and actively participate in the democratic process, intimating that the public believes, at least to some degree, in the legitimacy and overall "idea of India."[155]

In sum, having more of this type of information, in my view, would be important not just for members of the Court but for policy-makers in charge of executing judicial decisions, for lawyers, for interest group leaders, and for others whose tactical strategies (including using litigation) may be altered upon knowing the public's perspective. I hope that the preceding study prompts observers of the Indian Supreme Court—and constitutional courts more generally—to undertake the investigation of issues like these in the years ahead. Only then

152. *See e.g.* James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. of Empirical Leg. Stud. 507 (Nov. 2007); James L. Gibson, Gregory A. Caldeira, & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. Pol. Sci. 354 (2003); Herbert M. Kritzer, *The American Public's Assessment of the Rehnquist Court*, 89 Judicature 168 (Nov.-Dec. 2005).

153. *See* Gallup Poll, www.gallup.com (noting the percentage of Americans who have "a great deal" or "quite a lot" of confidence in the United States Supreme Court: 2007: 34%; 2006: 40%; 2005: 41%; 2004: 46%; 2003: 47%; 2002: 50%; 1999: 49%; 1997: 50%; 1995: 44%; 1991: 39%; 1990: 47%) (accessed June 13, 2008; copy on file with Journal of Appellate Practice and Process).

154. *See* Gibson, *supra* n. 152.

155. *See* Sunil Khilnani, *The Idea of India* (Farrar, Straus & Giroux 1998).

can we know for sure that when elites claim to be speaking on behalf of the general public, that they truly are.