Introduction

The Indian Supreme Court and Progressive Social Change

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There is a widely held belief among Indian academics, political and civil society activists, and public-spirited citizens that the Indian Supreme Court is both capable and uniquely structured to help the relatively disadvantaged. The broad scope of rights granted by the Indian Constitution and the relative institutional independence of the Indian Supreme Court bolster this optimistic view of the Court.[1] This view also draws support from the perceived inability of the Indian political system to respond to chronic denials of human rights. Political infighting, corruption, inert bureaucracies, and an ossified yet resilient cultural system render the political system structurally incapable of decisive and progressive social change. In contrast, the Indian Supreme Court is free from these constraints.

The optimistic view of the Indian Supreme Court extends to debates in comparative constitutional law where the Court is increasingly seen as an exceptional agent of progressive social change and an authentic expression of "Global South" constitutionalism.[2] Sandra Fredman argues that the Indian Supreme Court, through its Public Interest Litigation (PIL) docket, has played a vital, if not entirely unproblematic, role in the expansion of the positive freedoms of Indian citizens.[3] Daniel Bonilla Maldonado, in a more recent

[1] See, e.g., Vijayashri Sripati, *Human Rights in India – Fifty Years after Independence*, 26 DENV. J. INT'L L. & POL'Y 93 (1997); Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in JUDGES AND THE JUDICIAL POWER: ESSAYS IN HONOUR OF JUSTICE V.R. KRISHNA IYER (Rajeev Dhavan et al. eds. 289, NM Tripathi 1985); Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1 (2009).

[2] CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA AND COLOMBIA (Daniel Bonilla Maldonado ed. Cambridge University Press 2013).

[3] "By recognizing the inherent inequalities in the adversarial court system, the Court has adapted its processes so that the voices of the poor and disadvantaged can be heard . . . The result has been a transformation of the role of the Court in protecting and promoting the actual

contribution, argues that the Indian Supreme Court, along with the high courts in South Africa and Colombia, has "played an important role in the protection of the rule of law and the realization of individuals' constitutional rights." Further, he argues, its actions "present modern constitutionalism's basic components in a new light, or at least rearrange them in novel ways" and, therefore, "have something to contribute to the ongoing global conversation on constitutionalism."[4] Most recently, Mark Tushnet and Madhav Khosla have described the work of the Indian Supreme Court as an example of how countries can respond to the challenges of the "unstable constitutionalism" characteristic of South Asian jurisdictions. They posit that the Indian Supreme Court functions as an effective bridge between the normative commitments and empirical realities of South Asian society and politics.[5]

These views of the Indian Supreme Court as an effective agent of progressive social change, and as a bastion of constitutional values, are premised on the idea that decisions of the Indian Supreme Court actually improve the lives of the relatively disadvantaged. However, as Gerald Rosenberg demonstrated in the case of the United States,[6] there are reasons to be skeptical of this claim. To put it simply, if decisions of the Indian Supreme Court are unable to tangibly improve the lives of the relatively disadvantaged, then its most progressive pronouncements stand the risk of being hollow, as do its most delicate acts of constitutional mediation. There is, therefore, a need to empirically examine the effects of Supreme Court decisions on the lives of India's marginalized citizens. That is the aim of this volume.

Most work on the Indian Supreme Court is doctrinal with very few empirical studies.[7] Some of the earliest empirical investigations of the work of the Indian Supreme Court were undertaken by George Gadbois and Rajeev Dhavan. Both these early attempts, however, trained their empirical attention

enjoyment of human rights, particularly the right to life." Sandra Fredman, Human Rights Transformed: Positive Rights and Positive Duties 124 (Oxford University Press 2009).

4 Daniel Bonilla Maldonado, *Introduction: Toward a Constitutionalism of the Global South*, in Daniel Bonilla Maldonado ed. *supra* note 2 at 23.

5 Mark Tushnet & Madhav Khosla, *Unstable Constitutionalism*, in Unstable Constitutionalism: Law and Politics in South Asia 5–11 (Mark Tushnet & Madhav Khosla eds. Cambridge University Press 2015); See also Pratap Bhanu Mehta, *The Indian Supreme Court and the Art of Democratic Positioning*, in id.

6 Gerald N. Rosenberg, The Hollow Hope. Can Courts Bring About Social Change? (University of Chicago Press 1991; 2d ed., 2008; 3d edition forthcoming, 2020).

7 This is the general problem described by Jayanth Krishnan in his article on perceptions of the Indian Supreme Court. See Jayanth Krishnan, *Scholarly Discourse and the Cementing of Norms: The Case of the Indian Supreme Court – and a Plea for Research*, 9 J. App. Prac. Process (2007). The subject of perceptions of courts in India, and the Supreme Court specifically, is dealt with by Sudhir Krishnaswamy and Siddharth Swaminathan in this volume.

on the institutional character of the Supreme Court; neither broached the question of the impact of its decisions. Gadbois' work devoted substantial attention to the composition of judges in the Supreme Court, revealing them to be markedly socially homogeneous,[8] while Dhavan's early studies of the Supreme Court's docket revealed it to be creaking under the strain of pending cases ("arrears," as he describes them).[9]

The first call to look past doctrinal analyses of Indian Supreme Court decisions to their actual impact was made by Upendra Baxi in 1982.[10] In his provocatively titled article "Who Bothers about the Supreme Court," Baxi lamented the complete absence of attention to what happened to the decisions of the Court once they were made. His article presented two important analytic clarifications for the study of judicial impact in India. The first was the need to identify the different ways in which judicial decisions could affect behavior.[11] The second was the need to identify "Impact Constituencies" so that the effects of judicial decisions could be accurately measured.[12] Baxi's call for empirical investigation of the effects of Indian Supreme Court decisions could have inaugurated a wave of judicial impact studies. Unfortunately, such studies were not undertaken.

The timing of Baxi's early account is crucial because it arrived around the time that, post the Indian Emergency (1975–1977), the Indian Supreme Court sought to reclaim some legitimacy by instituting powerful procedural innovations through the device of "Public Interest Litigation" (PIL) (or as Baxi described it, Social Action Litigation).[13] In essence, PIL opens the courts to

[8] George Gadbois, *Indian Supreme Court Judges: A Portrait*, 3 L. & Soc'y Rev. Special Issue Devoted to Lawyers in Developing Societies with Particular Reference to India (1969).

[9] Rajeev Dhavan, The Supreme Court Under Strain: The Challenge of Arrears (NM Tripathi Pvt. Ltd 1978).

[10] Upendra Baxi, *Who Bothers about the Supreme Court? The Problem of Impact of Judicial Decisions*, 24 J. Indian L. Inst. (1982). Baxi's article was a follow-up to Stephen L. Wasby's work on the impact of US Supreme Court decisions. Stephen L. Wasby, *The Supreme Court's Impact: Some Problems of Conceptualization and Measurement*, 5 L. & Soc'y Rev. (1971).

[11] Baxi argued that as opposed to mere "compliance," which would simply mean whether or not a judicial decision was implemented by the persons or authorities whose job it was to do so, "impact" was a broader category. He further argued that a decision could have expected (or intended) impacts as well as unexpected (or unintended) impacts. Baxi argued that studies of judicial impact should enquire as to whether judicial decisions achieved their expected impact (or intended result) or not, and if not, to identify the reasons for this. See id. at 851.

[12] Baxi defined impact constituencies as follows: "human groups whose behavior is sought to be influenced in a definite manner by the court through its explicit decisions." *Supra* 10 at 852.

[13] This argument is most elaborately developed by Baxi in Upendra Baxi, The Indian Supreme Court and Politics (E. Book 1980). It also features in Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 Third World Legal

disadvantaged individuals and groups who have historically been unable to access them. The institution of Public Interest Litigation in India is responsible for some of the broadest expansions of the guarantees in the Indian Constitution and inaugurated an unprecedented wave of judicial activity on behalf of the relatively disadvantaged.[14] In turn, this wave of judicial activity was greeted by a veritable efflorescence of academic literature, both laudatory and critical.[15] Some scholars saw the rise of PIL as a clear sign of judicial overreach into the domains of the legislature and the executive.[16] Others were more optimistic, for instance assessing the Supreme Court's new role as filling a vital gap created by the governance failures of other state institutions.[17] What is undeniable, however, is that the judicial activity of the Indian Supreme Court, especially through the institution of PIL, has been, and continues to be, prominent. Yet very few of the contributions to this literature have taken

Stud. (1985), and Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?* 37 Am. J. Comp. L. (1989).

[14] The use of the term "judicial activism" to describe the activity of the Indian Supreme Court has, unsurprisingly, been controversial. See Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice*, in Fifty Years of the Supreme Court of India: Its Grasp and Reach (S. K. Verma & Kusum Kumar eds. Oxford University Press 2000); S. P. Sathe, Judicial Activism in India (1st ed. Oxford University Press 2002); Sudhir Krishnaswamy, Democracy and Constitutionalism in India (1st ed. Oxford University Press 2009); Madhav Khosla, *Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate*, 32 Hastings Int'l Comp. L. Rev. (2009) for diverse accounts of the judicial "activism" of the Indian Supreme Court.

[15] Cf. P. P. Craig & S. L. Deshpande, *Rights, Autonomy and Process: Public Interest Litigation in India*, 9 Oxford J. Legal Stud. (1989)(on the rise of PIL and its implication for the constitutional structure in Parts III and IV of the Indian Constitution); G. L. Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 Int'l Comp. L.Q. 66 (1991)(on the maturing of PIL in India to align with the separation of powers in India); Christine M. Forster & Vedna Jivan, *Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience*, 3 Asian J. Comp. L. 1 (2008)(on the importance of PIL for the implementation of human rights in India and Australia).

[16] Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. Democracy (2007)(on the appropriation by the Indian Supreme Court of many of the powers of both the legislature and the executive branches of government); Pratap Bhanu Mehta, *India's Judiciary: The Promise of Uncertainty*, in Public Institutions in India: Performance and Design (Pratap Bhanu Mehta & Devesh Kapur eds. Oxford University Press 2005). More recently, Anuj Bhuwania has delivered a sharp critique of PIL because of its tendency to remove all procedural safeguards and place overwhelming power in the hands and whims of individual judges. He describes this as a form of "panchayati justice." Bhuwania's critique is explicitly focused on PIL's impact on fidelity to legal process in Indian law and society, rather than its effect on substantive social outcomes. Anuj Bhuwania, Courting the People: Public Interest Litigation in Post-Emergency India (Cambridge University Press 2016).

[17] See Vijayashri Sripati *Supra* note 1; Jeremy Cooper, *Poverty and Constitutional Justice: The Indian Experience*, 44 Mercer L. Rev. 611 (1993).

seriously Baxi's earlier call to study the impact rather than only the content, coherence, or constitutional validity of judicial decisions.[18] There remains an urgent need to understand whether decisions of the Indian Supreme Court, and its (in)famous judicial activism, tangibly improve the lives of the relatively disadvantaged. Exploring this question requires rigorous empirical study.

In the United States, Gerald N. Rosenberg's *The Hollow Hope* undertook an in-depth empirical study of the effects of several of the US Supreme Court's most famous decisions aimed at improving the lives of the relatively disadvantaged.[19] Based on careful empirical investigation, Rosenberg argued that in the absence of a small set of unusual enabling conditions, judicial decisions aimed at helping the relatively disadvantaged, by themselves, were unable to bring about the widespread change for which they are celebrated. In large part, Rosenberg argued, this is the result of three constraints that limit courts; the lack of fundamental rights embodied in the US Constitution; the general unwillingness of courts to order changes not supported by other governmental institutions or the people; and the lack of tools at the Court's disposal to implement its decisions.

Since its initial publication, *The Hollow Hope* has provoked a range of reactions.[20] However, its central insight, that courts are constrained institutions, has enduring appeal. Contemporary attempts to study judicial impact must at least address these insights, even if they find them less applicable to the court under study. In India, there are three important reasons to suggest that the Indian Supreme Court might be less constrained and, therefore, more effective at bringing about progressive social change than its US counterpart:

The broad sweep of constitutional rights in India: Unlike the limited, largely negative rights contained in the US Constitution, the Indian Constitution

[18] There have been attempts to assess the effects of Supreme Court decisions in particular subject areas, especially the environment. See, e.g., Armin Rosencranz & Michael Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 Colum. J. Envtl. L. 223 (2003); Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, 19 J. of Envtl. L. 293 (2007). More recently, Gautam Bhan and Anuj Bhuwania have published two important studies on the impact of Supreme Court decisions on the city of Delhi, especially on slum demolition and the lives of slum dwellers. See Gautam Bhan, In the Public's Interest: Evictions, Citizenship and Inequality in Contemporary Delhi (Orient Blackswan 2016); Anuj Bhuwania *supra* note 16. These attempts are focused on particular areas of court intervention and stop short of systematically exploring the question of whether Indian Supreme Court decisions impact the lives of the relatively disadvantaged, and if so under what conditions.

[19] Rosenberg, *supra* note 6.

[20] For a selected list of reviews, and Rosenberg's response to them, see http://press.uchicago.edu/books/rosenberg/index.html.

contains both positive as well as negative rights.[21] Part III of the Indian Constitution, dealing with Fundamental Rights, sets out a range of civil and political rights that protect citizens from oppressive state action.[22] These rights are judicially enforceable, and citizens can petition the higher judiciary to set aside any law or administrative action that violates them.[23] At the same time, Part IV of the Indian Constitution, dealing with Directive Principles, lays out a number of positive socioeconomic goals of state action.[24] These provisions have been described as setting forth "the humanitarian socialist precepts that were, and are, the aims of the Indian social revolution."[25] Crucially, these provisions are technically not judicially enforceable.[26] However, the Indian Supreme Court has, in several decisions,[27] held that the positive obligations contained in the Directive Principles supply the substantive content of various Fundamental Rights, and are, therefore, integral to the securing of the latter.[28] As a result, the fundamental rights of citizens under the Indian Constitution have been imbued with a much more expansive positive content. Thus, the Indian Constitution is arguably a weaker constraint on the Indian Supreme Court's ability to help the relatively disadvantaged than is the US Constitution on the US Supreme Court.

The procedural improvisations of the Indian Supreme Court: Unlike its US counterpart, the Indian Supreme Court has introduced a range of procedural

[21] It must be emphasized that the distinction drawn here between positive and negative rights is merely heuristic. There is a powerful line of scholarship which argues that this distinction is unhelpful, and masks the requirements for "positive" state action even to secure ostensibly "negative" rights. Cf. David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864 (1986); Cass Sunstein, The Partial Constitution 69–71 (Harvard University Press 1993).

[22] See Indian Const. Arts. 12–35.

[23] See Indian Const. Art. 13. See also M. P. Jain, Indian Constitutional Law 834–836 (5th ed. reprint LexisNexis Butterworths Wadhwa 2009).

[24] See Indian Const. Arts. 36–51.

[25] Granville Austin, The Indian Constitution: Cornerstone of a Nation 75 (1st ed. 2d impression Oxford University Press 1974).

[26] Indian Const. Art. 37.

[27] Cf. *State of Kerala* v. *NM Thomas* (1976) 2 SCC 310; *Bandhua Mukti Morcha* v. *Union of India* (1984) 3 SCC 161; *Olga Tellis* v. *Bombay Municipal Corporation* (1985) 3 SCC 545.

[28] Craig and Deshpande make precisely this observation and argue that the Supreme Court has "construed the *substantive* rights which are protected by Part III as entailing certain minimum social and economic rights which flow from Part IV." See Craig and Deshpande *supra* note 15 at 365 (emphasis in original). Gautam Bhatia makes a similar point, *inter alia*, when he argues that the Directive Principles "play a structuring role in selecting the specific conceptions that are the concrete manifestations of the abstract conceptions embodied in the Fundamental Rights chapter." Gautam Bhatia, *Directive Principles of State Policy*, in The Oxford Handbook of the Indian Constitution 661 (Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta eds. Oxford University Press 2016).

changes that give it the potential to more effectively implement decisions furthering the rights of the relatively disadvantaged. First among these are the mechanisms of PIL itself. Emerging in the context of severe problems with access to justice,[29] PIL greatly reduces standing requirements to potentially allow diverse and traditionally excluded constituencies to approach the Supreme Court and the High Courts.[30] Sometimes, this access is facilitated simply through a letter mailed to the Court, through what is called its "epistolary jurisdiction."[31] Similarly, *suo motu* litigation enables the Indian Supreme Court to intervene on its own motion whenever it believes a violation of fundamental rights exists, even without being petitioned by an aggrieved claimant or party.[32] Another notable innovation is the *continuing mandamus* process that the Supreme Court has evolved. This device allows the Supreme Court to continually oversee the implementation of its orders rather than having to wait for parties to file new cases alleging non-compliance.[33] This means that *continuing mandamus* cases often remain open for years on end, while the Court oversees the progress made on implementing its decisions.[34] All these procedural innovations potentially give the Indian Supreme Court a greater ability to implement its decisions than the U.S. Supreme Court.

The formal independence of the Indian judiciary: Rosenberg's *constrained court* account of the US Supreme Court takes a qualified view of the Court's independence, because, as he writes: "Judges do not select themselves."[35] According to this view, the fact that appointments to the US Supreme Court are made by politicians means that judges are likely to be nominated for their

[29] See Marc Galanter & Jayanth Krishnan, *"Bread for the Poor": Access to Justice and the Rights of the Needy in India*, 55 Hastings L.J. 789, 795–797 (2004) for a discussion of Public Interest Litigation in the context of access to justice.

[30] For a rigorous examination of this question see Ashok H Desai & S Muralidhar, *Public Interest Litigation: Potential and Problems*, in Supreme but Not Infallible: Essays in Honour of the Supreme Court of India 162–165 (B. N. Kirpal et al. eds. Oxford University Press 2011).

[31] For some examples of cases initiated in this manner, see *Sunil Batra (II)* v. *Delhi Administration* (1980) 3 SCC 488, *Dr Upendra Baxi* v. *State of UP* (1983) 2 SCC 308, *Veena Sethi* v. *State of Bihar* (1982) 2 SCC 583.

[32] See Marc Galanter and Vasujith Ram, chapter 4, *infra*.

[33] The first notable instance of *continuing mandamus* was Vineet Narain's case (1998) 1 SCC 226, where the Court oversaw a criminal investigation into corruption and black money in the central government.

[34] *Continuing mandamus* was also used in one of the best-known environmental cases before the Supreme Court of India, *T.N. Godavarman* v. *Union of India* (1997) 3 SCC 312, which was filed in 1995 and is still pending before the Court. It has been heard by the Court 223 times to date. For a critical account of the Court's involvement in this case, see Armin Rosencranz & Sharachchandra Lele, *Supreme Court and India's Forests*, 43 Econ. Pol. Wkly. 11 (2008).

[35] Rosenberg, *supra* note 6 at 13.

adherence to particular (partisan) "judicial philosophies."[36] This, therefore, reduces their chances of issuing opinions requiring change that is politically unpalatable. This is a powerful consideration. It is, therefore, noteworthy that the opposite is true in India: judges do indeed select themselves. This position emerges from three decisions of the Supreme Court itself.[37] These decisions were delivered after the Indian Emergency, when the Executive was widely seen to have paid little respect to judicial independence.[38] Under the current system, a collegium of judges, led by the Chief Justice along with the four most senior judges, recommends appointments to the Supreme Court. Similarly, High Court judges are appointed on the recommendation of the Chief Justice of India, the two most senior Supreme Court judges, and the Chief Justice of the High Court concerned. These recommendations are always followed, and in no circumstances can the judiciary be bypassed or overruled.[39] Thus, owing to its remarkable insulation from executive influence, the Indian higher judiciary might be uniquely placed to order emancipatory social change against the political mainstream.

It must be emphasized that this formal independence is not without problems. The first of these is that judges in the Indian higher judiciary are a remarkably homogeneous group, and generally emerge from the upper echelons of India's highly stratified caste and class structure.[40] It is unclear

[36] Id.

[37] *SP Gupta* v. *Union of India* (1981) Supp SCC 87; *Supreme Court Advocates-on-Record**** *Association* v. *Union of India* (1993) 4 SCC 441; *Re Special Reference No 1 of 1998* (1998) 7 SCC 739.

[38] Nick Robinson, *Judicial Architecture and Capacity*, in The Oxford Handbook of the Indian Constitution 345 (Sujit Choudhry, Madhav Khosla, & Pratap Bhanu Mehta eds. Oxford University Press 2016).

[39] Id. at 346. In recent years, there have been attempts by the legislature and the executive to gain a measure of influence in the appointment of judges, through the creation of a National Judicial Appointments Commission (NJAC). The creation of this commission was, however, struck down by the Supreme Court as unconstitutional on October 16, 2015. The justices argued that the commission was detrimental to the independence of the judiciary, and hence violated the "basic structure" of the Indian Constitution. For two critical views, see Suhrith Parthasarthy, *Assessing the NJAC Judgment*, 3 J. Nat'l L. U. Delhi (2015–2016), and Rehan Abeyratne, *Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective*, 49 George Wash. Int'l L. Rev.(2017). At the very least, this exchange demonstrates the Supreme Court's continuing ability and willingness to defend its own independence.

[40] George Gadbois' portrait of "the archetypal judge" is instructive on this point. See George H Gadbois, Jr, Judges of the Supreme Court of India: 1950–1989 at 376–377 (Oxford University Press 2011). Gadbois' account traces this history until 1989, and the collegium system was truly established only in 1993. A more recent empirical account is provided by Abhinav Chandrachud, who finds a similar lack of diversity continues to prevail among judges of the Indian Supreme Court. Abhinav Chandrachud, The Informal Constitution: Unwritten

how their elite backgrounds condition their inclination towards widespread progressive social change. The second constraint is that unlike in the United States, judges in the Indian Supreme Court and High Courts do not have life tenure. This means that there is increasingly a politics of post-retirement appointment on government tribunals and commissions.[41] There is also a general sense that judges sometimes become more sympathetic to government or corporate interests as they approach retirement.[42] That being said, the complete autonomy of the Indian higher judiciary in questions of appointment is an exceptional arrangement, and does point to the possibility of progressive action against the vested interests of the political mainstream. Overall, these features of the Indian Supreme Court suggest that it might be more able to bring about progressive social change than its US counterpart.

In addition, there are potentially powerful constraints on the Indian Supreme Court that are missing in the United States. The bulk of these draw on the Indian Supreme Court's inability, in keeping with judicial institutions the world over, to implement its own orders. It thus depends on the other institutions of the state, both at central and subnational levels, to see that its orders are implemented. This dependence is typically less apparent when courts stick to making declarations on negative rights: the more traditional common law position. However, when courts seek to intervene directly in positive social policy, as the Indian Supreme Court has done repeatedly, the ability (and willingness) of other state institutions to implement becomes a particularly pressing consideration. Here, there are a few potential roadblocks. First, the Indian Supreme Court has not always maintained a cordial relationship with the national government.[43] Indeed, it is often seen as competing with the executive and legislature for legitimacy, particularly through exercising PIL jurisdiction.[44] In these conditions, the inclination of state authorities to implement Supreme Court decisions is better seen as highly contingent in each case, rather than a more or less stable background assumption. Second, even in cases where they are inclined to act, the capacity of state authorities to implement broad and potentially expensive judicial remedies is likely limited by the resources at their disposal. The Indian state has many fewer resources

Criteria in Selecting Judges for the Supreme Court of India (Oxford University Press 2014).

[41] Gadbois, at 370–375.

[42] Nick Robinson, *supra* note 38 at 346–347.

[43] See. Upendra Baxi *supra* note 13; Rajeev Dhavan, *Law as Struggle: Public Interest Law in India*, 36(3) J. Indian L. Inst.303 (1994) for two illustrative accounts.

[44] See Pratap Bhanu Mehta *supra* note 5; Anuj Bhuwania *supra* note 16.

than, for instance, its US counterpart.[45] In this situation, it is probable that the state will in certain cases simply be *unable* to fully comply with the directions of the Court, to the extent that they prescribe expensive state action.[46] Third, there are tremendous variations in the history, culture, and capacity of the individual states that make up the national unit. This has been clearly demonstrated by, among others, scholars of development who have studied the greatly varying outcomes achieved by the Indian states.[47] Since a large part of the implementation of Indian Supreme Court orders depends on the actions of individual state governments, these governments can either be a help or a hindrance to the prospects of progressive Supreme Court orders. Lastly, Supreme Court orders are articulated in the context of deep-seated cultural practices, beliefs, and cleavages in Indian society. At one level, these may form powerful barriers to the implementation of Supreme Court orders.[48] At another level, ostensibly neutral Supreme Court orders may have the unintended effects of emboldening reactionary social and political groups when placed in their social context.[49]

[45] The difference between the per capita gross domestic product (GDP) of India and the United States is dramatic: in 2015 India's per capita GDP (purchasing power parity) was $6,161, while the equivalent figure for the United States was $55,805. Int'l Monetary Fund, World Economic Outlook Database (Int'l Monetary Fund 2016), goo.gl/2mZcYf (last visited May 5, 2017). Per capita GDP is widely seen as a useful measure of bureaucratic and administrative capacity. In his study measuring state capacity in the context of civil conflict, Cullen Hendrix writes: "GDP per capita is highly correlated with a variety of measures of bureaucratic/administrative capacity and may be plausibly considered both a cause and effect of bureaucratic quality and strong state institutions." Cullen S Hendrix, *Measuring State Capacity: Theoretical and Empirical Implications for the Study of Civil Conflict*, 47 J. Peace Res. 273, 277 (2010).

[46] The links between state capacity and the implementation of judicial decisions, though merely suggested here, are more fully explored in Vinay Sitapati's unpublished dissertation. Vinay Sitapati, After Judgment Day: Under What Conditions Are Court Decisions Implemented? PhD Dissertation, Princeton University, 2016.

[47] Cf. Aseema Sinha, The Regional Roots of Developmental Politics in India: A Divided Leviathan (Indiana University Press 2005); Pradeep Chhibber & Irfan Nooruddin, *Do Party Systems Count? the Number of Parties and Government Performance in the Indian States*, [37 (2)] Comp. Pol. Stud. 152 (2004); Suraj Jacob, *Towards a Comparative Subnational Perspective on India*, 3 Stud. Indian Pol. 229 (2015).

[48] A 2018 example is the pushback against a Supreme Court order permitting women to enter a temple that was earlier only open to males. When women sought to enter the temple pursuant to the Supreme Court order, they were chased away by angry mobs, which themselves contained many women. Suhasini Raj & Kai Schultz, *Religion and Women's Rights Clash, Violently, at a Shrine in India*, N.Y. Times, Oct. 18, 2018 at, https://nyti.ms/2CwwJYR (last visited Oct. 20, 2018).

[49] Cf. Flavia Agnes on the discursive and political effects of Indian Supreme Court orders on Uniform Civil Code in Flavia Agnes, Law and Gender Inequality: The Politics of