

# U.C.L.A. Law Review

## W(h)ither Environmental Justice?

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### ABSTRACT

This Article considers Gitanjali Nain Gill's recent book *Environmental Justice in India*, the first comprehensive look at India's National Green Tribunal. India's environmental crisis—major international surveys highlight its severe environmental degradation—is of interest to the global public, for no progress on climate change can be made without improving its environmental governance. In addition to assessing issues concerning the best ways to integrate science into judicial decisionmaking and highlighting India's failure to maintain good environmental data, I argue that the Tribunal's record reveals several crucial challenges for India's environmental future. In particular, India's punishingly overcrowded courts raise the specter that the Tribunal's advances in environmental governance will become overwhelmed by lack of resources. In this light, this Article argues that the nation's judiciary possesses the constitutional authority to fund itself, and also to fund a major expansion of legal assistance for underserved communities that is necessary for achieving true environmental justice.

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## INTRODUCTION

“Fresh air doesn’t exist in New Delhi . . . .” That is the straightforward conclusion of CNN, and its assessment has scientific backing.<sup>1</sup> “Measurements taken at the US Embassy in Delhi put the city’s Air Quality Index at 999 . . . off the standard chart, which finishes at the ‘hazardous’ level of 500.”<sup>2</sup> Even famously polluted China is pristine in comparison: At the same time, “the highest AQI level recorded Monday in *Baoding—China’s most polluted city*—was 298.”<sup>3</sup> It’s not just the cities: 75 percent of India’s air pollution deaths came from rural areas.<sup>4</sup>

It’s not just the air. More than 38,000 million liters of untreated sewage flows into the Union’s rivers every day, most prominently the Ganga.<sup>5</sup> The Ganga might be a source of spiritual purification, but don’t bathe in it. Toxics? They’ve got toxics: maybe as many as 600 unremediated sites around the country, but no one knows for sure because the government has not issued guidelines for identifying or remediating them.<sup>6</sup> Little wonder, then, that Yale University’s 2018 Environmental Performance Index put India 177th out of 180 nations worldwide, including 178th in air quality and 180th—dead last—for environmental health.<sup>7</sup>

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1. James Griffiths, *New Delhi Is the Most Polluted City on Earth Right Now*, CNN (Nov. 8, 2016, 12:41 AM), <https://www.cnn.com/2016/11/07/asia/india-new-delhi-smog-pollution/index.html> [https://perma.cc/6JTY-D92F].
  2. *Id.*
  3. *Id.*
  4. Huizhong Wu, *75% of India’s Pollution-Related Deaths Are Rural, Study Finds*, CNN (Jan. 15, 2018, 3:32 AM), <http://www.cnn.com/2018/01/15/health/india-air-pollution-study-intl/index.html> [https://perma.cc/8LEQ-B448].
  5. See Sushmita Sengupta, *Cleaning India’s Polluted Rivers*, DOWNTOEARTH (Mar. 14, 2018), <https://www.downtoearth.org.in/news/water/cleaning-india-s-polluted-rivers-59877> [https://perma.cc/SCY4-AV9P]. And this figure might even understate the matter, because as Sengupta explains, “[T]he treatment capacity of major sewage treatment plants (STPs) in the country is around 66 per cent of the installed capacity as per CPCB findings of 2013.” *Id.*
  6. See Malavika Vyawahare, *At Over 300 Sites Across India Hazardous Waste Is Part of the Landscape and Life*, HINDUSTAN TIMES, (May 25, 2017, 3:24 PM), <https://www.hindustantimes.com/health/at-over-300-sites-across-india-hazardous-waste-is-part-of-the-landscape-and-life/story-gzplhStuF3pNhMJRaKSizK.html> [https://perma.cc/HPC3-Q2CN]. This Article quotes Bishwanath Sinha, Joint Secretary of the Hazardous Waste Management Division at the Ministry of Environment, Forestry and Climate Change, as promising a remediation framework by the fall of 2017. As of this writing, August 2018, I have been unable to locate this framework.
  7. *India*, ENVTL. PERFORMANCE INDEX, <https://epi.envirocenter.yale.edu/epi-country-report/IND> [https://perma.cc/B4RA-EKB2].

India's environmental crisis carries implications far beyond its own citizens and its own frontiers. Simply put, no solution to climate change can occur without India controlling its emissions because, of the big emitters, only India's emissions are still rising.<sup>8</sup> It cannot control emissions, however, unless it establishes effective environmental governance.

If the Indian public expected the judiciary to fix the problem, they were sorely disappointed. Despite several important pro-environmental decisions over the last thirty years, such precedent was essentially confined to the Indian Supreme Court, for the backlog in the lower courts essentially foreclosed any sort of actual relief. And so, it seemed, India's environmental crisis and judicial inefficacy would continue.

Then in 2010, the Union<sup>9</sup> Government, then under the control of the United Progressive Alliance, established a specialized environmental court—the National Green Tribunal (hereinafter Tribunal)—with jurisdiction over cases deriving from the Union's seven principal environmental statutes. The National Green Tribunal Act<sup>10</sup> not only created the Tribunal, but also gave it strong substantive mandates and a unique structure: three-member panels composed of two lawyers and one scientist, installing procedurally the notion that environmental law must rest on a firm scientific basis.

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8. See Damian Carrington & Michael Safi, *How India's Battle With Climate Change Could Determine All of Our Fates*, GUARDIAN (Nov. 6, 2017, 3:36 PM), <https://www.theguardian.com/environment/2017/nov/06/how-indias-battle-with-climate-change-could-determine-all-of-our-fates> [<https://perma.cc/CT35-SCQS>]. Carrington and Safi report:

*Of all the most polluting nations—US, China, Russia, Japan and the EU bloc—only India's carbon emissions are rising: they rose almost 5% in 2016. No one questions India's right to develop, or the fact that its current emissions per person are tiny. But when building the new India for its 1.3 billion people, whether it relies on coal and oil or clean, green energy will be a major factor in whether global warming can be tamed.*

*"India is the frontline state," says Samir Saran, at the Observer Research Foundation in Delhi. "Two-thirds of India is yet to be built. So please understand, 16% of mankind is going to seek the American dream. If we can give it to them on a frugal climate budget, we will save the planet. If we don't, we will either destroy India or destroy the planet."*

*Id.* (emphasis added).

9. Because India's Constitution specifies that it is a union of states, INDIA CONST. art. 1, the national government is usually referred to as the "Union Government." See, e.g., *Constitution of India*, INDIA.GOV.IN, <https://www.india.gov.in/my-government/constitution-india> [<https://perma.cc/ST2P-W34H>]; see also Darshana Naik, *Government of India: A Look at the Functioning and Decentralization of Power*, TOPPR (Mar. 28, 2017), <https://www.toppr.com/bytes/government-of-india> [<https://perma.cc/2P9S-YKPL>].

10. National Green Tribunal Act, 2010 (No. 19 of 2010).

Has it worked? Gitanjali Nain Gill's monograph, *Environmental Justice in India: The National Green Tribunal*, is the first comprehensive effort to answer the question, and she responds with a resounding yes. Gill's exploration of the Tribunal's work goes further than mere doctrinal analysis: She not only interviews members of the Tribunal and lawyers who practiced before it, but also sets forth what she considers to be the principle theoretical bases of environmental adjudication in India, as well as doing the grunt work of compiling and analyzing the Tribunal's actual case load. The result is a necessary reference for any academic working on environmental law in India: Gill's work represents a model of scholarly ground-clearing.

As with any work of ground-clearing, *Environmental Justice in India* leaves critical questions unanswered or underanalyzed. In one critical sense, this is a very good thing: Now that we have much of the crucial baseline data and basic account of the Tribunal's formation and early years, scholars can begin to probe more fully into how Indian environmental law works (or doesn't), and, just as importantly, ask new questions about how to construct a robust system for protecting India's (and thus the world's) fragile ecological resources.

In this Article, I attempt to develop some of these crucial questions. After setting forth Gill's account, I explore four separate themes: (1) different models for integrating law and science in judicial decisionmaking, (2) assessing the efficacy of courts, (3) defining environmental justice, and (4) maintaining necessary funding to ensure adequate court functioning. I conclude that the Tribunal, and the Indian Supreme Court, must take a more aggressive role in ensuring their efficacy and the Union's constitutional provisions protecting the environment. In particular, I argue that not only must the Tribunal consider new ways of bringing scientific information into its decisions, and more forcefully demand better data to improve Indian environmental performance, but the judiciary in general must use its inherent power to expand court funding and promote the sorts of programs that can bring about true environmental justice. These last two contentions might be somewhat controversial, because they might be seen as casting doubt on the separation of powers. A clearer understanding of the Directive Principles of India's Constitution and the nature of the Indian state, however, show them to be well within the parameters of the Union's jurisprudence.

## I. GILL'S ACCOUNT

Gill's story is one of government addressing environmental problems in straightforward fashion, investigating a problem, and developing a solution for it. The problem here is one of "environmental justice," which Gill acknowledges constantly shifts in definition. But it appears to focus on affording economically and politically disenfranchised communities "equal opportunities in the fair distribution of environmental resources and involvement in environmental decision-making."

The way to establish such equality, Gill contends (following other scholars and international institutions) is through the judiciary. The reader is given a tour d'horizon of the discourse surrounding specialized environmental and science courts, with brief examples from nations around the world. Gill makes clear that she believes in "the essential role of an enlightened judiciary in enforcing the environmental rule of law."<sup>11</sup>

Gill then leads us through the law itself. The Tribunal has jurisdiction over seven specific statutes;<sup>12</sup> all cases with "substantial environmental questions" arising under them go first to the Tribunal. Substantial environmental questions, Gill explains, fall into three categories: (1) where the community at large other than an individual or group of individuals is affected or likely to be affected by the environmental consequences, (2) the gravity of damage to the environment or property is substantial, or (3) the damage of public health is broadly measurable.

In addition, the Tribunal has original jurisdiction over environmental consequences relating to a specific activity or a point source of pollution. For the most part, Gill's treatment lies in discussing some of the most prominent cases fleshing out these provisions, as well as making a broader claim (supported in the case law) that the Tribunal is not passively adjudicating disputes but taking a more aggressive approach, citing its own scientific

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11. GITANJALI NAIN GILL, ENVIRONMENTAL JUSTICE IN INDIA: THE NATIONAL GREEN TRIBUNAL 31 (2017).

12. The specific statutes are set forth in Schedule I of the Act and comprise:

[See sections 14(1), 15(1), 17(1)(a), 17(2), 19(4)(j) and 34(1)]

1. The Water (Prevention and Control of Pollution) Act, 1974;

2. The Water (Prevention and Control of Pollution) Cess Act, 1977;

3. The Forest (Conservation) Act, 1980;

4. The Air (Prevention and Control of Pollution) Act, 1981;

5. The Environment (Protection) Act, 1986;

6. The Public Liability Insurance Act, 1991;

7. The Biological Diversity Act, 2002.

The National Green Tribunal Act, 2010, Gazette of India, pt. II sec. 1 (June 2, 2010).

expertise in crafting remedies. Of particular interest on the ground, Gill notes that the Tribunal has been particularly assiduous in adhering to its mandate of deciding cases within six months of application.

As Ronald Dworkin argued nearly a half-century ago, law is not simply the rules and standards explicitly contained within it, but also its underlying principles.<sup>13</sup> For Gill, these principles are: (1) the precautionary principle, (2) polluter pays, and (3) sustainable development. She derives these principles not from philosophizing about the environment but from examining the actual court decisions interpreting the Tribunal statute itself. (Indeed, *Environmental Justice in India* is valuable simply for culling and discussing the Tribunal's most important decisions.) Unlike the second, the first and third of these principles remain ambiguous despite constant judicial and institutional references to them. Gill sees the precautionary principle as something of a combination between a default norm for environmental protection under uncertainty and a strong bias toward prevention of harm. The third appears to represent a complex balancing of economic, environmental, and political factors; the overall point is to detach "development" from simple calculations of economic growth and gross domestic product and to move toward a somewhat more holistic notion.

All the talk of science is fine, but how do they interact in practice? Gill's answer: quite well. She argues—refreshingly, in the contemporary context—that science is *not* simply about politics or narrative, and expertise is not merely elite obfuscation: Scientific expertise, rather, forms the basis of any sensible system of environmental regulations. Although this expertise does have important symbolic purposes, aiding the Tribunal's legitimacy, the lion's share of Gill's account argues that the Tribunal actually does rely heavily upon scientific findings in making its decisions. This argument relies particularly heavily on qualitative interviews with judges and advocates before the tribunal. Often, she contends (although with very thin evidence) that the Tribunal uses science in "strategic" fashion—that is emphasizing its expertise to increase its jurisdiction and power. In all, she finds, the Tribunal's use of scientific expertise "offers an internalised, accountability-focused approach whereby a diverse set of actors, such as governmental and local authorities, companies and multinational corporations, are restrained from compromising human welfare and the ecology."<sup>14</sup>

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13. See RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

14. GILL, *supra* note 11, at 172–80.

This all gets us to the heart of the book—namely, Gill’s empirical findings. Finding first that the Tribunal’s docket is rapidly increasing, Gill then breaks it down in ways useful for future research. Most importantly, three types of cases—those over environmental clearances, disputes over pollution levels,<sup>15</sup> and failure to enforce regulations—comprise 90 percent of the caseload. Interestingly, areas that have received a great deal of press attention—forest clearances and activities in ecologically sensitive areas—are comparatively rare. Delhi is dominated by environmental clearance litigation, Chennai by failure-to-enforce. Not surprisingly, the largest category of plaintiffs is nongovernmental organizations (NGOs) and social activists, but industry is the second largest. Both sides in traditional environmental battles seem to see the Tribunal as a place where it is worthwhile to bring their disputes. And everyone challenges the government: Governments at every level comprise three-quarters of defendants.

But who wins? As Gill shows, affected individuals, communities, or residents win a majority of their cases (56.3 percent), and NGOs also have a respectable record (38.4 percent of cases allowed). Industry fares worse, at 24.6 percent. We should expect these numbers to drop in future years, as defendants both adjust substantively to Tribunal mandates, and more cynically, learn how to mask their decisions so as to avoid legal consequences. Gill argues that “[t]he relatively low cost of bringing the case coupled with positive encouragement by the [Tribunal] to litigants in person reflect a conscious effort on the part of the Tribunal to promote access to environmental justice.”<sup>16</sup>

In conclusion, Gill considers the Tribunal’s emerging challenges and successes. The former consists primarily of hostility from those governments whose actions (or inactions) the Tribunal reviews. State governments were slow in setting up the Tribunal’s infrastructure around the country; more

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15. Gitanjali Nain Gill’s definition of this is somewhat unclear, for she does not define precisely what is a “pollution” case. It seems as if this category reflects a substantive challenge, claiming that the effects of the defendant’s action violate the law, as opposed to improper procedures in granting (or denying) clearances, or the failure to enforce regulations.

16. GILL, *supra* note 11, at 203–05. The National Green Tribunal (Tribunal) has a relatively low cost because litigants need not be represented by lawyers, and the Tribunal does follow neither the Indian Code of Civil Procedure, 1908, nor the Indian Evidence Act, 1872. It has also developed a standard template for making an initial claim: [http://www.conservationindia.org/wp-content/files\\_mf/NGTApplication-Appeal-templates.pdf](http://www.conservationindia.org/wp-content/files_mf/NGTApplication-Appeal-templates.pdf). Nonetheless, because the Tribunal operates in English and the submission of such a form requires literacy, hundreds of millions of Indians are at the outset prevented from initiating a case. This is another place where community-based paralegal (CBP) programs can be of particular assistance.

importantly, “[e]arly exposure by the [Tribunal] embarrassed both civil servants and politicians to such an extent that they were reluctant to provide appropriate support in the expectation that it would restrict the activities of the [Tribunal].”<sup>17</sup> A high level committee of the Ministry of Environment, Forest, and Climate Change even suggested stripping the Tribunal of virtually of its original jurisdiction—a proposal that the Lok Sabha<sup>18</sup> rejected but will arise again if and when the Tribunal continues to find government mis-, mal-, and nonfeasance.

On the positive side, Gill argues that the Tribunal has done an excellent job in bringing new scientific rigor to judicial decisionmaking, developing legitimacy in other parts of the Indian judiciary and the bar, and, most importantly, generating social capital for individual and groups traditionally locked outside of governance. In particular, Gill sees the Tribunal as beginning the long process of transforming what Indians see as environmental issues, helping the country recognize that environmental questions must play a central role in matters traditionally not thought of as “green.”

We must now ask: What is the upshot of this account? Gill emphasizes three major themes in her book: (1) the use of science in adjudication, (2) the Tribunal’s efficacy, and (3) the growth of environmental justice. The next three Parts turn to these themes.

## II. LAW IN SCIENCE—SCIENCE IN LAW

Perhaps the Tribunal’s biggest procedural innovation lies in its use of scientific experts as judges on panels. Gill lauds this step in particular, drawing on qualitative research showing that lawyers and scientists cherish the collegiality that this generates and its ability to integrate legal and scientific thinking.

But while Gill shows that the Tribunal’s model is potentially a good one, it is not clear whether there might be better ones. Consider, for example, the use of a special master, a practice explicitly contemplated by American procedural rules.<sup>19</sup> Masters hold hearings and make evidentiary findings, as

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17. GILL, *supra* note 11, at 213.

18. The Lok Sabha is the name of India’s lower house of Parliament, which holds effective legislative power in the same way that the House of Commons does in the United Kingdom or Canada, although the upper house, or Rajya Sabha, holds more power than either the Canadian Senate or the British House of Lords. See *Lok Sabha*, PARLIAMENT OF INDIA: LOK SABHA, <https://loksabha.nic.in> [<https://perma.cc/YFT3-PHBV>].

19. See FED. R. CIV. P. 53.

well as propose legal conclusions for the judiciary itself to consider. Importantly, courts usually appoint masters in the most scientifically and technically complex cases they receive—precisely the sorts of cases that the Tribunal is routinely called upon to consider. In the American experience, masters are often called upon in water rights litigation, because such disputes often occur between states, and the U.S. Supreme Court has original jurisdiction in such cases,<sup>20</sup> as does the Indian Supreme Court in India.<sup>21</sup> Actually taking original jurisdiction in such cases would constitute a waste of time for U.S. Supreme Court justices, and so they are content to leave it in the first instance to a special master.

Although masters are usually lawyers, they do not have to be. And in complex cases, creative special masters can find ways to avoid the law and focus on the substantive technical issue. In the wake of the celebrated case of *South Burlington County NAACP v. Township of Mount Laurel*,<sup>22</sup> the judge and his special master confronted the formidable task of determining the “fair share” of affordable housing for each town in one-third of the state of New Jersey. This could have involved months if not years of testimony in a normal courtroom setting. Charles Haar explained how the Gordian Knot was cut:

After a brief attempt at hearing testimony in a conventional adversarial process persuaded him that the planning community could debate for years over equally reasonable alternatives, [the

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20. See U.S. CONST. art. III, § 2. For examples of this sort of litigation, see, *Arizona v. California*, 373 U.S. 546 (1963); *Kansas v. Colorado*, 206 U.S. 46 (1907). *But cf.* *Alabama v. Arizona*, 291 U.S. 286 (1934) (declining to take jurisdiction of cases between states except when an “absolute necessity”).

21. See INDIA CONST. art. 131, *amended by the States Reorganization Act, 1956* (giving the Supreme Court original jurisdiction). Article 131 of the Indian Constitution reads in full:

Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute—

- a. between the Government of India and one or more States; or
- b. between the Government of India and any State or States on one side and one or more other States on the other; or
- c. between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends: Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, *sanad* or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement or which provides that the said jurisdiction shall not extend to such a dispute.

22. Several decisions take the name of *South Burlington County NAACP v. Township of Mount Laurel* because of the protracted litigation in the matter. The case discussed here is generally known as *Mount Laurel II*, and is cited at 456 A.2d 390 (N.J. 1983).

judge] placed the parties' planning experts together in a conference room with the request that they work out a formula to which all could subscribe. *All lawyers were excluded.* If not quite as extreme as the closeting of the medieval jury, whose members were denied food until they reached a verdict, the technique still worked in the modern drama. Somehow, after breaking up into subcommittees, with back-and-forth private consultations, the twenty-one experts, representing a cross-section of the profession (and including professional planners not involved in the litigation), after several days succeeded in hammering out a consensus formula for prescribing regional fair share.<sup>23</sup>

Haar himself had ample expertise with special mastering in complex environmental cases, because he was one, serving in the massive multiparty litigation surrounding the technically and politically fraught issue of cleaning up Boston Harbor.<sup>24</sup> In that case, Massachusetts Judge Paul Garrity appointed Haar as a special master, and directed him to find facts concerning the causes and severity of the harbor's pollution, as well as to make remedial suggestions. The special master technique, Haar says, enabled a more active fact-finding process: The court did not have to rely on presentations from the parties. Haar himself consulted a wide variety of experts, and when those experts gave advice, it was shared with the parties in the case.<sup>25</sup> Haar also used a series of *ex parte* contacts, which is questionable, but a special master on the record is in general more transparent than one judge on a panel being the scientific arbiter in a decision.

A special master might also bring more expertise on an issue precisely because she can choose which expert makes the most sense given the circumstances of the case—an option that the Tribunal currently lacks because it is restricted to those experts that currently serve on the Tribunal. Gill concedes this as a flaw, and suggests that the Tribunal might need to develop a longer list. This suggestion makes sense, but then that begins to look a little more like court-appointed experts used on a case-by-case basis—in which one must ask again whether a special master format might not be better. Certainly creating a special master framework lies within the competence of the Indian Supreme Court, which has the power to create rules of procedures for courts (although it is less clear whether this would

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23. CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, PLACE, AND AUDACIOUS JUDGES* 57 (1996).

24. Haar turned his experience into a book. *See generally* CHARLES M. HAAR, *MASTERING BOSTON HARBOR: COURTS, DOLPHINS, AND IMPERILED WATERS* (2005).

25. *Id.* at 96–97.

apply to tribunals).<sup>26</sup> Former Solicitor General Fali Nariman has already proposed a special master system for adjudicating water rights claims between Indian states,<sup>27</sup> which fall under the Indian Supreme Court's original jurisdiction. Clearly the use of special masters is familiar to India's bench and bar.

The foregoing hardly constitutes a compelling case for reworking Tribunal procedure: far from it. Rather, it challenges scholars of Indian law to not become wedded to what are, after all, experimental and tentative models. Perhaps the Tribunal itself could experiment with different models in different regions. Cliché does not begin to describe Justice Brandeis's overused description of the American states as policy laboratories<sup>28</sup>—platitudes or banality might come closer. But in the case of India and particularly in facing new environmental challenges, it makes sense, and the Tribunal can apply it within its current structure.

### III. SEARCHING FOR OUTCOMES

Unlike many legal scholars, Gill actually attempts to determine the efficacy of the institution she studies. As noted above, her impact assessment is positive. But this assessment is essentially procedural: It describes how well the institution performs based on professional norms of how courts should operate. But that elides the bigger and, frankly, more important question of whether any of the Tribunal's actions have actually improved India's environment. Indeed, throughout the book, Gill makes no effort to assess whether any of the Tribunal's orders have generated positive environmental outcomes.

For the most part, this is not Gill's fault, for India's statistics, particularly in the environmental field, are notoriously unreliable and often nonexistent.

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26. See INDIA CONST. art. 145, *amended by* The Constitution (Forty-Third Amendment) Act, 1977. One could argue that the Indian Evidence Act, 1872 § 45, which allows court appointed experts, specifically in, inter alia, complex scientific cases, would also allow for this procedure. Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872. The Evidence Act, however, while allowing for court-appointed experts, does not say anything about the management of those experts or the procedures to be used. In any event, a constitutional basis serves as firmer ground.
27. Fali S. Nariman, *Inter-State Water Disputes: A Nightmare!*, in WATER AND THE LAWS IN INDIA 32, 54 (Ramaswamy R. Iyer ed., 2009).
28. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

As a leading survey noted, India missed many of the Millennium Development Goals (MDGs) because

[I]t did not have the relevant indicators to measure the outcomes. For example, the Central Pollution Control Board, the nodal agency which monitors pollution levels, does not maintain pan-India levels of PM2.5, which is one of the deadliest forms of pollutant. [Moreover], most agencies implementing social schemes did not have latest [or] relevant data. Just imagine, for some of the goals, no data is available after Census 2011.<sup>29</sup>

The problem suffuses state and local governments throughout the Union. State Pollution Control Boards use outdated or ineffective technology, often rigging their monitoring to different times of day to generate better results than an accurate count would develop. India as a whole still lacks air-quality monitoring protocols and often just uses U.S. Environmental Protection Agency's standards, which are a very poor fit in India because of sharply different monitoring conditions.<sup>30</sup> Thus, as awful as Indian air quality appears to be, it might actually be worse than the official counts.<sup>31</sup>

Nor is the problem limited to air quality. For example, in considering rural water quality data, researchers discovered that village panchayat information is highly unreliable and is belied by even cursory visual inspection. The census uses statistics such as "access to taps," which avoids the obvious issue of whether anything potable is coming out of those taps. Nor have good quality control measures been established for enumerator integrity or even whether competent enumerators can get good information: How can rural families, for example, answer the question of whether their water has been treated? They can't: So what is the point of statistics

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29. KIRAN PANDEY & RAJIT SENGUPTA, CTR. FOR SCI. & ENV'T, STATE OF INDIA'S ENVIRONMENT 2017: IN FIGURES 8 (2017).

30. This problem figures to become even more severe given the Trump Administration's attempts to dismantle the U.S. Environmental Protection Agency's institutional capacity and prevent it from using the best scientific standards. See, e.g., Robinson Meyer, *Scott Pruitt's New Rule Could Completely Transform the EPA*, ATLANTIC (Apr. 25, 2018), <https://www.theatlantic.com/science/archive/2018/04/how-the-epas-new-secret-science-rule/558878> [<https://perma.cc/SW3C-PLF5>] (noting that proposed rule governing use of science would strip EPA of its ability to use science in rulemaking).

31. See M Rajshekhhar, *Why India's Numbers on Air Quality Can't Be Trusted*, ECON. TIMES (Oct. 14, 2014, 7:23 AM), <https://economictimes.indiatimes.com/news/environment/pollution/why-indias-numbers-on-air-quality-cant-be-trusted/articleshow/44808434.cms> [<https://perma.cc/ND42-W7JG>].

purportedly demonstrating that the water *has* been treated?<sup>32</sup> And all this derives from publicly available water data. Since, however, India's water quality data has long suffered from a lack of transparency, there might be a massive iceberg lurking under the inadequate tip.<sup>33</sup>

The failure to establish reliable baseline data presents the most obvious next phase for the Tribunal's remedies. These two examples derive from the statutes over which the Tribunal has jurisdiction. As Gill makes clear, the Tribunal is not reluctant to maintain jurisdiction over cases for extended periods of time. Any case involving these core statutes, then, must scrutinize the relevant data carefully, and if they are shown to not meet quality standards, the Tribunal must not only issue an order in the case itself, but also establish a procedure for ensuring data quality going forward. Then, and only then, will policymakers (not to mention scholars) be able to determine the efficacy of the Tribunal's work.

#### IV. WHAT IS ENVIRONMENTAL JUSTICE?

On its face, no one could actually oppose something called environmental justice. So a definition is crucial, which is why it is so surprising that Gill never precisely defines the term. She does identify the distribution of environmental burdens and benefits, and procedural participatory norms as important, but she does not try to encapsulate it.

The best definition of environmental justice comes from the California statute book, which directs the state's environmental protection agency to:

- (a) Conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state.

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32. See Meghana Eswar & Bejoy K Thomas, *Data Discrepancies: Interpreting Rural Water Data in the Decadal Census*, 52 *ECON. & POL. WKLY.* 29 (2017), <https://www.epw.in/journal/2017/25-26/web-exclusives/data-discrepancies.html> [<https://perma.cc/9BHQ-E3Y3>].

33. See Mihir Shah, *The Way Forward*, 51 *ECON. & POL. WKLY.* 56 (2016). The problems of data reporting even extend to areas where one might think that visual inspection would be enough, such as rates of open defecation. In many cases, localities appear to simply be reporting things that the Union Government and funders want to hear, not what is actually occurring . . . uh . . . on the ground. See Joanne Lu, *India's 'Successful' Toilet Campaign May Be Missing Its Mark*, *HUMANOSPHERE* (May 25, 2017), <http://www.humanosphere.org/basics/2017/05/indias-successful-toilet-campaign-may-missing-mark> [<https://perma.cc/DM7Q-XWBP>].

- (b) Promote enforcement of all health and environmental statutes within its jurisdiction in a manner that ensures the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations in the state.
- (c) Ensure greater public participation in the agency's development, adoption, and implementation of environmental regulations and policies.
- (d) Improve research and data collection for programs within the agency relating to the health of, and environment of, people of all races, cultures, and income levels, including minority populations and low-income populations of the state.
- (e) Coordinate its efforts and share information with the United States Environmental Protection Agency.
- (f) Identify differential patterns of consumption of natural resources among people of different socioeconomic classifications for programs within the agency.<sup>34</sup>

Because it centers on the activities of an administrative agency rather than a comprehensive policy regime, this definition is somewhat too narrow. A fuller definition would and should apply not just to agency actions but also to all legislation. Still, it hits on the critical environmental justice issues: fair treatment of all races and socioeconomic groups, an emphasis on public participation, and rigorous data collection to guard against the imposition of disparate impacts between groups. It essentially follows the formula of President Clinton's famous 1994 executive order, which originally placed environmental justice considerations at high levels in the American government.<sup>35</sup>

#### A. In Search of a Definition

One can easily see, however, how "environmental justice" might be difficult to implement, because its key terms are so ambiguous and politically contested. What, for example, does "fair treatment" mean? John Rawls famously devoted an entire book to it,<sup>36</sup> which has spawned a cottage industry since then. How much greater is "greater" public participation?

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34. CAL. PUB. RES. CODE § 71110 (West 2018).

35. See Exec. Order No. 12, 898, § 1-101, 3 C.F.R. 859, 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (2012).

36. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971) (setting a theory of "justice as fairness").

And ironically, if anything, this definition is routinely derided by scholars who deem it too narrow. David Schlosberg believes that environmental justice reflects the notion that the environment itself *constitutes* social justice: It cannot be limited to a particular consideration in specific disputes. Environmental justice, he argues, is global in the sense that it critiques the fundamental nature of the international economic system. Indeed, environmental justice also forces us to reexamine the relationship of human and nonhuman species.<sup>37</sup> He is not alone. Sze and London have insisted that “instead of imposing a restrictive boundary around the concepts of environmental justice, scholarship in this emerging field should embrace its wide-ranging and integrative character.”<sup>38</sup>

These radical critiques pose an even more difficult problem: As the saying goes, if everything is a priority, then nothing is a priority. Similarly, if everything is environmental justice, then nothing is. In the context of the Tribunal, judges must make a decision, and their jurisdiction does not include reordering the global economic system.

Suppose a major global corporation wants to put an industrial facility in a very low-income rural area. Farmers vehemently object. But the corporation argues, with some justification, that it will hire hundreds of low-income people. Suppose also that such a facility will destroy much of the natural beauty of the area, but makes generic pharmaceuticals that will reduce the spread of HIV and give access to millions. Or suppose that energy for the plant will require fracked natural gas, which will replace black carbon. Under what rubric do we assess the environmental justice of such an outcome?

Perhaps the solution is to have no solution. In any particular dispute, the sheer complexity of balancing the equities defies a substantive legal framework to guide the judiciary. Or at the very least, we cannot pursue it by developing a deductive principle from the head of Zeus (or worse yet, a legal scholar) and applying it uncontroversially downward.

Rather, a better approach to actual environmental justice adjudication would focus on building the capacity of disadvantaged and repressed groups to build their own power. Public participation—the traditional nomenclature of environmental justice—does not truly reflect such an approach, nor even does Schlosberg’s reasonable insistence on the “recognition” of subordinated

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37. See David Schlosberg, *Theorising Environmental Justice: The Expanding Sphere of a Discourse*, 22 ENVTL. POL. 37 (2013).

38. Julie Sze & Jonathan K. London, *Environmental Justice at the Crossroads*, 2 SOC. COMPASS 1331, 1332 (2008).

groups.<sup>39</sup> Instead, if it really wanted to pursue “environmental justice”, the Tribunal would establish programs under its own auspices in such a way as to empower the disadvantaged no matter what the substantive issue at hand.

## B. Environmental Justice on the Ground

What, however, would it mean to empower the disadvantaged? In the Indian context, answering this question carries a distinguished pedigree, for the greatest of all American scholars of India law, Marc Galanter, famously cautioned about the potential for courts and litigation for promoting greater equality.<sup>40</sup> The problem, as Galanter analyzed it, is that law does not operate through crude power but rather through institutions, so only those with the necessary institutional skills can exert power through it. The “haves” come out ahead because they are repeat players (as opposed to one-shotters), and thus are able to consistently turn the law and make use of legal institutions. In more recent work, Galanter has attempted to show that the problem he identified in 1974 was still a significant problem two decades later in the context of promoting the rights of Dalits.<sup>41</sup>

We need not and should not look to any foreign models for ameliorating this problem (least of all the United States). Rather, India itself has generated an innovative solution that should be coupled more tightly with the work of the Tribunal: community-based paralegals.

The central idea behind a community-based paralegal (CBP) program is to hire and train members of subordinated communities, who can then bring legal knowledge to those communities. As one of the leading accounts of CBP programs puts it, “Ideally, a community-based paralegal should be a person who has the following skills and attributes:

- Has basic knowledge of the law, the legal system and its procedures, as well as basic legal skills;
- Is a member of the community (or part of an organization that works in the community) and has basic knowledge of the ways community members access justice services, including traditional or informal justice mechanisms;

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39. See Schlosberg, *supra* note 37, at 40.

40. See Marc Galanter, *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974).

41. MARC GALANTER, *Missed Opportunities: The Use and Non-Use of Law Favourable to Untouchables and Other Specially Vulnerable Groups*, in LAW AND SOCIETY IN MODERN INDIA 208–33 (Rajeev Dhavan ed., 1989).

- Has skills and knowledge on alternative dispute resolution mechanisms, including mediation, conflict resolution and negotiation;
- Is able to communicate ideas and information to community members using interactive teaching methods;
- Is able to form effective working relationships with local authorities and service delivery agencies;
- Has community organizing skills that can be used to empower communities to address systematic problems on their own in the future.<sup>42</sup>

CBP programs are cost-effective because they do not require high-priced legal talent, and they have an ability to penetrate into the most disadvantaged communities because they come from those communities and already have ample social capital within them. In this, they represent a legal application of community health worker programs, where non-physician yet highly trained health professionals have achieved startling success in reducing the incidence of communicable disease and improving health outcomes in some of the most disadvantaged and isolated communities on the planet.

Originally, CBP programs, developed by think-tanks focusing on land rights, concentrated on building the capacity of low-income communities, particularly low-income women, in establishing and preserving their property ownership as an economic and social development tool. More recently, however, CBP programs have broadened their reach into traditional environmental justice areas.<sup>43</sup> For example, in Bogribail, Karnataka, paralegals organized the local community to challenge a road construction company's factory that was spreading deadly fumes and dust into the village—and in doing so, discovered that the firm's license had expired.<sup>44</sup>

CBP programs' promise applies not simply into traditional environmental justice, but into more comprehensive governance issues. Because community-based paralegals come from the communities they serve,

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42. M. Sunil Kumar, *A Systems Approach for Providing Legal Aid for Land* 7–8 (presented at the Annual World Bank Conference on Land and Poverty, Apr. 2013), <http://www.landesa.org/wp-content/uploads/A-Systems-Approach-for-Providing-Legal-Aid-for-Land-263-Kumar.pdf> [<https://perma.cc/2NZB-CAA5>].

43. See *Seeking Environmental Justice*, NAMATI, <https://namati.org/ourwork/environment> [<https://perma.cc/H8NG-KNWA>]; see also *Environment*, NAMATI, <https://namati.org/news/category/environmental-justice> [<https://perma.cc/BSF3-DVTL>].

44. See Tina Rosenberg, Opinion, *India's Barefoot Lawyers*, N.Y. TIMES (Aug. 8, 2017), <https://www.nytimes.com/2017/08/08/opinion/indias-barefoot-lawyers.html> [<https://perma.cc/X4YR-9377>].

their very existence builds capacity for those communities in becoming more proactive in planning and decision processes. And since the model is not simply to represent, but also to educate community members, this capacity will be more broadly disseminated throughout the community. In this sense, it epitomizes a sort of “rebellious paralegaling,” echoing Gerald Lopez’s conception of nearly a quarter of a century ago.<sup>45</sup>

Building capacity, although perhaps a popular phrase among grantmakers, obscures the real meaning of CBP programs: enabling members of subordinated community to see their injuries not as acts of God or simply the way things are, but as legal and political problems subject to legal and political action.<sup>46</sup> Community-based paralegals educate community members about their legal rights and ways of redress. It hardly stretches the imagination to posit that consistent education could accustom subordinated groups into thinking of problems more commonly as legal or political ones.

In fact, it doesn’t stretch the imagination at all, because describing and advocating such a process has become commonplace for feminists and more radical social critics for nearly five decades. Whether it be noting that “the personal is the political”<sup>47</sup> or discussing the “third dimension of power,”<sup>48</sup>

45. See generally GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

46. After the 2004 U.S. presidential election, political commentator Chris Hayes related a particularly sharp way in which framing disputes could have political impacts. The example is American but the principle is global:

I had a conversation with an undecided truck driver who was despondent because he had just hit a woman’s car after having worked a week straight. He didn’t think the accident was his fault and he was angry about being sued. “There’s too many lawsuits these days,” he told me. I was set to have to rebut a “tort reform” argument, but it never came. Even though there was a ready-made connection between what was happening in his life and a campaign issue, he never made the leap. I asked him about the company he worked for and whether it would cover his legal expenses; he said he didn’t think so. I asked him if he was unionized and he said no. “The last job was unionized,” he said. “They would have covered my expenses.” I tried to steer him towards a political discussion about how Kerry would stand up for workers’ rights and protect unions, but it never got anywhere. He didn’t seem to think there was any connection between politics and whether his company would cover his legal costs. Had he made a connection between his predicament and the issue of tort reform, it might have benefited Bush; had he made a connection between his predicament and the issue of labor rights, it might have benefited Kerry. He made neither, and remained undecided.

*Decision Makers*, CHRIS HAYES (Nov. 17, 2004), <https://chrishayes.org/articles/decision-makers> [<https://perma.cc/F478-MYRS>].

47. Carol Hanisch’s classic essay, “The Personal Is Political,” was published in 1970. See Carol Hanisch, *The Personal Is Political*, in *NOTES FROM THE SECOND YEAR: WOMEN’S LIBERATION: MAJOR WRITINGS OF THE RADICAL FEMINISTS* 76 (Shulamith Firestone & Anne Koedt eds., 1970).

scholars and activists of all sorts have recognized that the number of legal and political disputes turns on ideology and the consciousness of social groups.<sup>49</sup>

CBP programs matter because they could serve as a lever to mitigate the problems that Galanter has long identified at a cost that is more feasible than hiring lawyers, and be more effective because they focus on hiring advocates from the communities involved. For example, the Society for the Elimination of Rural Poverty (SERP) piloted a CBP program in Andhra Pradesh concerning land access issues and found that the annual cost per paralegal is approximately INR 100,000 (USD 2,200), “which includes salary, travel, training and management costs.”<sup>50</sup>

None of this means that CBP programs avoid litigation—far from it. In the Bogribail case, the company’s lack of a license has not stopped it from continuing its pollution.<sup>51</sup> But from the standpoint of the legal system, the presence and activity of community-based paralegals open up not only many opportunities for successful litigation, but also a well-worked-out factual record, reducing litigation costs and making the case much more credible from the outset. And in the case of the Tribunal, paralegals might suffice precisely because the Tribunal does not require lawyers to handle cases; indeed, as Gill notes, it has encouraged litigants to bring cases even if they are not represented by counsel and has developed standard forms for making complaints. While it remains problematic that hundreds of millions of Indians might not be able to use these forms because the Tribunal operates in English and requires literacy, community-based paralegals could be the ideal

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48. Social scientists have attempted to define “power” in three ways. Robert Dahl originally defined power by saying “A has power over B to the extent that he can get B to do something that B would not otherwise do.” This is now thought of as the first dimension of power. See Robert A. Dahl, *The Concept of Power*, 2 BEHAV. SCI. 201, 202–03 (1957). Shortly thereafter, Bacharach and Baratz defined a “second dimension,” which they referred to as “the mobilization of bias,” in which decisions are taken outside public view, and complex institutions confine agenda items and political choices to serve certain interests. See Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 952 (1962). By the early 1970s, more radical theorists outlined what they saw as the third dimension of power, a sort of ideological hegemony, in which people themselves define their own interests in a way that runs counter to their “real” interests, making them accede to their own oppression. See John Gaventa, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY* (1980); Steven Lukes, *POWER: A RADICAL VIEW* (1974).
49. The classic description of this development in the legal literature remains. See, e.g., William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631 (1980).
50. See Kumar, *supra* note 42, at 10.
51. See Rosenberg, *supra* note 44.

paraprofessionals to work with communities in accessing a hearing before the Tribunal and receiving redress.

All very well and good. But what does it have to do with the Tribunal's operations now? It might not; it is simply to say that if we are serious about promoting environmental justice in India, we might well have to look beyond formal legal institutions (such as the Tribunal itself) and certainly past formal legal doctrine, and toward the institutions that generate claims and, potentially, empower subordinate communities. And that might be an adequate lesson in and of itself. But we need not give up on courts and judges quite yet, because judicial powers exist under Indian law that might provide the necessary support for such empowerment. To see why, we need to look more closely at the impending crisis of the Tribunal itself: funding.

## V. IS THERE A CONSTITUTIONAL RIGHT TO ADEQUATE JUDICIAL FUNDING?

### A. A Looming Crisis?

Lurking behind Gill's relatively sunny account lies a danger she acknowledges. The Tribunal's success has derived in no small part from its workload. At least during the years she studies, the Tribunal has had adequate resources to handle disputes. But this could be changing. As Gill shows, the Tribunal's workload has skyrocketed. In 2011, it handled all of eighteen disputes; by 2015, that figure exceeded four hundred.

And it figures to accelerate. As litigants become more familiar with the Tribunal's procedures and jurisdiction, they will make more use of it. Even without CBP programs, the Tribunal's availability also means that problems previously thought of as "just the way things are" can now be conceived of as legal issues susceptible to challenge. Thus, the Tribunal's very success might also generate more cases, as new highway construction generates traffic.

Behind all the talk about environmental justice, the precautionary principle, and specialized court expertise, it could be that the Tribunal's greatest contribution simply lies in its status as a new set of courts that can take the load off of India's infamously clogged civil courts. And if that is the case, we could well find that Gill's account will be outdated in a few years because the Tribunal itself will become as overburdened as the rest of India's judicial system.

As of this writing, similar threats have emerged politically. The Union Government under Prime Minister Narendra Modi has refused to

appoint replacements to several Tribunal benches. As Geetanjoy Sahu revealed:

Forget about minimum ten judicial and ten expert members, the tribunal doesn't even have a total of ten members today. There has been no full-time chairperson since Justice Swatanter Kumar's tenure ended on December 19, 2017, and there are only two expert members and four judicial members for all the five benches including the principal bench in New Delhi. The tenure of the current acting chairperson, Justice U.D. Salvi, will end on February 13, 2018.

The vacancy of judicial and expert members led the Chennai bench to completely shut from January 3, 2018. Things are worse in both Kolkata and the Western Bench in the absence of expert members. No judgment has been passed by the Kolkata bench since November 16, 2017, after expert member P.C. Mishra's tenure ended. . . .

[T]he Pune bench now has no expert members and has not been passing judgments [since the end of 2017].

Justice Jawad Rahim and Justice S.P. Wangdi from the Kolkata and Western Bench, respectively, have expressed their limitation to pass judgments due to the lack of quorum—minimum one judicial and one expert member to an adjudicate environmental matter before the [Tribunal].<sup>52</sup>

If the critics are to be believed, then the Union Government has adopted a belt-and-suspenders approach, not only trying to get the Tribunal to wither on the vine but also to more tightly control its members, in particular removing the most highly-qualified members from its bench.

But what can be done? Prime Minister Modi has a strong majority in Parliament, with little to no resistance from supporters of the Tribunals. After all, courts cannot provide their own funding: They will be at the mercy of a Lok Sabha with other things on its collective mind.

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52. Geetanjoy Sahu, *Ecocide by Design? Under Modi, Vacancies at National Green Tribunal Reach 70%*, WIRE (Feb. 15, 2018), <https://thewire.in/politics/ngt-political-apathy-vacancies> [<https://perma.cc/4YBY-LSSJ>].

## B. Judicial Inherent Rights

Or can they? To answer this question, we should look at the United States.

Early in the morning on September 25, 1991, a lawsuit was filed in Brooklyn's state trial court challenging the actions of the Governor of New York, Mario Cuomo.<sup>53</sup> That much was unexceptional; plaintiffs challenge state executive branch actions all the time. What made this case different was the name of the plaintiff, Sol Wachtler. And that mattered because Wachtler happened to be the chief judge of the entire New York state court system at the time.<sup>54</sup>

Why would a state's chief judge sue its governor? The issue was this: Faced with a new, large state deficit in the wake of recession in the early nineties, the governor had decided to propose a budget cutting many state agencies, among them the court system. And that decision, Wachtler, alleged, was unconstitutional.<sup>55</sup>

Schoolchildren in the United States and around the world learn that funding is the quintessentially legislative function: If the legislature has any power, we are told, it lies in the power of the purse.<sup>56</sup> So for a litigant, even a chief judge, to argue that the political branches lack such power, seems obviously wrong. But like virtually everything schoolchildren learn about government, it is massively oversimplified.

Several state courts from all parts of the United States have held that courts have the "inherent judicial power" to protect their own functions.<sup>57</sup>

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53. *Wachtler v. Cuomo*, No. 91-CV-1235, 1991 WL 249892, at \*1 (N.D.N.Y. Nov. 21, 1991).

54. See Edward Frost, *Battle of New York "Titans": Court Budget Cuts Sparks Lawsuits by Chief Judge, Governor*, A.B.A. J., Dec. 1991, at 18, 18.

55. For background, see Sam Howe Verhovek, *Wachtler v. Cuomo: Duel of Ex-Friends*, N.Y. TIMES (Oct. 29, 1991), <https://www.nytimes.com/1991/10/29/nyregion/wachtler-v-cuomo-duel-of-ex-friends.html> [<https://perma.cc/YV76-7VYH>]; see also Walter E. Swearingen, *Wachtler v. Cuomo: Does New York's Judiciary Have an Inherent Right of Self-Preservation?*, 14 PACE L. REV. 153 (1994).

56. See *I'm Just a Bill* (Schoolhouse Rock, Sept. 18, 1975). The significance of this cartoon, often viewed by the author during the 1970s, is such that it now appears on the U.S. Senate website. *I'm Just a Bill*, U.S. SENATE, [https://www.senate.gov/reference/bibliography/kids/Congress/Im\\_Just\\_a\\_Bill.htm](https://www.senate.gov/reference/bibliography/kids/Congress/Im_Just_a_Bill.htm) [<https://perma.cc/VD2M-KYBK>]. In New York, as in many states, the governor is mandated to submit a budget to the legislature, which then considers it and amends it as necessary. See N.Y. CONST. art. VII, §§ 2–4.

57. The best discussion of this issue is found in G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 JUDICATURE 12, (2004). A thorough earlier discussion can be found in Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993).

The touchstone case came from Pennsylvania, where the state's highest court ruled that in order to "protect itself" from the other branches, the "[j]udiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer [j]ustice."<sup>58</sup> The Court influentially held that courts were entitled to whatever funds were "reasonably necessary" for the "efficient administration of justice."<sup>59</sup>

But Pennsylvania is not alone. More recently, the Kansas Supreme Court has engaged in an extended showdown with the state legislature over the same issue. After years of the legislature repeatedly reducing the judiciary's budget and forcing furloughs, layoffs, and service cutbacks, the state's chief justice took the extraordinary step of increasing court filing fees across the state—not simply ordering appropriations but assuming the power to raise money directly. The state's legislature accepted the move, perhaps amazing separation-of-powers theorists but hardly surprising political cynics, who noted that the Kansas chief justice's unilateral action took the heat off the legislature itself in making some hard choices.<sup>60</sup>

In New York, Cuomo and Wachtler agreed to a settlement: The chief judge dropped the lawsuit in exchange for a commitment from the governor and the state legislature for adequate funding. But the governor also got his pound of flesh when the chief judge agreed to an outside audit of state courts.<sup>61</sup> In an important sense, the system worked: The political branches did their job. But that meant that the lawsuit had to be credible; the judiciary had to be able to force action through citing its independent and inherent power.

### C. Inherent Rights in India

These American cases provide persuasive authority for the notion that India's judiciary might well have the legal right to take matters into its own

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58. See *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193, 197 (Pa. 1971).

59. See *id.* at 199.

60. See Webb & Whittington, *supra* note 57, at 19 (noting that legislators "generally responded with enthusiasm to the Kansas court's initiative, since it freed them of any responsibility for the political fallout from making an unhappy fiscal choice regarding the judiciary"); see also generally David A. Sklansky, *Proposition 187 and the Ghost of James Bradley Thayer*, 17 CHICANO-LATINO L. REV. 24, 32–33 (1995) (noting legislators' political incentives to punt hard questions to the judiciary).

61. See Kevin Sack, *Cuomo and Chief Judge Settle Court Budget Fight*, N.Y. TIMES (Jan. 17, 1992), <https://www.nytimes.com/1992/01/17/nyregion/cuomo-and-chief-judge-settle-court-budget-fight.html> [<https://perma.cc/6D2N-WHGG>].

hands if Parliament will not allocate sufficient funds for it to do its job. And that might have to be good enough, because the text of the Constitution of India gives us little guidance: Although that document tells us a great deal about the Indian Supreme Court's jurisdiction, it is remarkably silent with regard to its substantive powers, even eschewing something similar to Article III of the U.S. Constitution's cryptic reference to "[t]he judicial power of the United States."<sup>62</sup> And of course that assumes particular importance in considering whether there is inherent judicial power to mandate expenditure of funds.

Yet the Indian Constitution is what the judges say it is, and the judges have strongly suggested that they believe in the inherent judicial power to fund its functions. In *All India Judges' Association v. Union of India (All India Judges' Association I)*<sup>63</sup>, the Indian Supreme Court gave a number of directions for appointment of State Pay Commissions for fixing scales of pay for the judicial officers, residential accommodation, working library at the residences, transport vehicles, and the establishment of in-service institutes. It also directed that income from court fees should be spent on the administration of justice.<sup>64</sup>

But *All India Judges' Association I* contains a crucial gap, namely: on what basis does a court derive the power to appropriate funds? The Indian Supreme Court addressed this question the next year, when several states argued that Court orders did in fact violate the separation of powers. The Court turned it aside quite easily, noting that:

14. By giving the directions in question, this Court has only called upon the executive and the legislature to implement their imperative duties. The Courts do issue directions to the authorities to perform their obligatory duties whenever there is a failure on their part to discharge them. The power to issue such mandates in proper cases belongs to the Courts. . . . The further directions given, therefore, should not be looked upon as an encroachment on the powers of the executive and the legislature . . . . They are directions to perform the long overdue obligatory duties.

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62. U.S. Const. art. III, § 1.

63. *All India Judges' Ass'n v. Union of India*, (1991) Supp. 2 SCR 206.

64. In *All India Judges' Ass'n v. Union of India*, the Indian Supreme Court held that it could give directions to the executive and the legislature to perform their obligatory duties. *Id.* The earlier directions were reiterated. Thereafter, the Indian Supreme Court continued to monitor the implementation of the above directions in *All India Judges' Ass'n v. Union of India*, (1993) Supp. 1 SCR 749.

15. The contention that the directions of this Court supplant and bypass the constitutionally permissible modes for change in the law, we think, wears thin if the true nature and character of the directions are realised.<sup>65</sup>

And, in case anyone had missed the point, in *All India Judges' Association III*<sup>66</sup> the Court gave further directions for implementation. It also directed that in as much as the judge-population ratio was between 10.5 to 13 per million population, the executive should increase the number to 50 judges per million population in five years. Further, pursuant to the directions given by the Supreme Court in an earlier *All India Judges' Association. vs. Union of India* case,<sup>67</sup> and in a latter judgment in the same case,<sup>68</sup> the Government of India in 1996 appointed the First National Judicial Commission for fixing the pay scales and rationalizing them. The Commission submitted its report in November 1999, and, thereafter, it was implemented by the Union Government consequent to further directions by the Indian Supreme Court. Those directions were comprehensive and often detailed. The Indian Supreme Court gave directions for establishment of fast track courts in *Brij Mohan Lal v. Union of India*,<sup>69</sup> and then gave further instruction two years later for construction of court rooms or taking premises on lease.<sup>70</sup>

The implication is clear: If the Supreme Court can (1) establish courts, (2) establish population-to-court ratios, (3) create libraries for these courts, (4) set pay scales for judicial and other court personnel, (5) order the construction of courtrooms or direct the leasing of buildings, (6) authorize residential accommodations for judges and court personnel, and (7) inaugurate in-service

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65. *All India Judges' Ass'n. v. Union of India*, (2002) 5 SCR 712.

66. *Id.*

67. *All India Judges' Ass'n v. Union of India*, (1991) Supp. 2 SCR 206.

68. *All India Judges' Ass'n v. Union of India*, (1993) Supp. 1 SCR 749.

69. *Brij Mohan Lal v. Union of India*, AIR 2002 SC 2096.

70. *Brij Mohan Lal v. Union of India*, (2004) 11 SCC 244. Further directions were given in *Brij Mohan Lal v. Union of India* on March 31, 2005. See also *Salem Advocates Bar Ass'n v. Union of India*, (2005) 6 SCC 344, in which the Indian Supreme Court gave several orders either directing funding or ordering the legislature and executive to "consider" funding of various alternative dispute resolutions services as well as procedures for judicial summons. The posture of this complex case deserves fuller analysis to consider issues surrounding the separation of powers. For the classic template, see Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PENN. L. REV. 715 (1978). At this point, in *Salem Advocates Bar Association*, one could see how such a power could emerge, which is why it fits in under judicial inherent powers. If the government fails to consider the request adequately, and repeatedly, the judges could conclude that the government's position is irrational, and simply order it to fund the request.

training institutes, it can obviously mandate adequate resources so that the Tribunal can do its job.

#### D. Applying Environmental Justice

What, however, has become of environmental justice? In the previous Subpart, I argued that were the judiciary truly committed to environmental justice, it would focus not so much on nailing down specific doctrine, but rather on creating a legal system that empowers low-income and subordinate communities. Obviously, as detailed above, the judiciary has the inherent power to spend money in order to preserve itself. Here, I will argue that the judiciary thus has the inherent power to spend money in order build a legal aid institutional system that can develop and stimulate environmental justice. Specifically, it can establish CBP programs in the absence of legislative action. Examination of the crisis of Indian judicial funding points to an even greater role for India's judges if it wishes to fulfill its constitutional role.

The Indian Constitution, in Article 39A, specifically directs that:

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes *or in any other way*, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.<sup>71</sup>

“In any other way” by its own terms implies that “free legal aid” can be provided outside legislation. To be sure, this provision of the Indian Constitution is a “Directive Principle of State Policy,” and thus not “enforceable” in court.<sup>72</sup> But of course agencies of the state can apply it. So is the judiciary part of “the State”? It would seem so: Under the Indian Constitution, the State “includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.”<sup>73</sup> By its own terms, then, the Constitution of India

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71. INDIA CONST. art. 39A, *amended by* The Constitution (Forty-Second Amendment) Act, 1976 (emphasis added).

72. INDIA CONST. art. 37: “The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

73. INDIA CONST. art. 12.

does not exclude the judiciary from the State, and the judiciary clearly is an authority within the territory of India.

In any event, legal enforcement connotes a judicial remedy for a complaint brought by a complainant.<sup>74</sup> Even law enforcement essentially means, in a just society, the apprehension of purported lawbreakers and bringing them to a court for judgment. In this sense, the enforcer is the judiciary, not the executive. Application, by contrast, contains no such connotation. Indeed, quite often a judicial opinion from the U.S. Supreme Court will “apply these principles” to a particular case even though it is the U.S. Supreme Court that developed the principles to begin with. The Indian Supreme Court does the same.<sup>75</sup> The foregoing suggests that while a litigant could not necessarily file a case with the Supreme Court of India, or the Tribunal itself, to enforce the Directive Principles, these judicial bodies could decide *sua sponte* to do so themselves.

The Supreme Court of India already has begun to enforce Directive Principles in a traditional adversarial posture, albeit an example of public interest litigation. In *M.C. Mehta v. Union of India and Ors*,<sup>76</sup> the Indian Supreme Court created a commission to consider and assess technologies for the reduction of air pollution in Delhi, examine the feasibility of using these technologies, and then develop legal and administrative regulations for implementing the commission’s conclusions. It directed the Union Government and the Delhi Administration to cooperate with the Commission in the formulation of its proposals. The Indian Supreme Court described the process by which it established this body:

In course of the hearing of this matter we had called upon counsel to look at the problem *not as an adversarial litigation* but to come forward with useful deliberations so that something concrete could finally emerge for easing the situation. We were shown some literature and even gadgets which might help reduction of

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74. See, e.g., 28 U.S.C. § 3202(a) (2012) (“A *judgment* may be enforced by any of the remedies set forth in this subchapter.” (emphasis added)).

75. See, for example, very famously *M.C. Mehta And Anr vs Union Of India & Ors*, (1987) 1 SCR 819 (asking, “Does the rule in *Rylands v. Fletcher*, (1866 Law Report 1 Exchequer 265) [sic] *apply* or is there any other principle on which the liability can be determined?”). “This rule *applies* only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority.” *Id.* (emphasis added). This famous case applied the polluter-pays principle, gleaned from *Rylands*, to a gas leak from a fertilizer factory near Delhi.

76. *M.C. Mehta v. Union of India*, (1991) 1 SCR 866.

pollution. The question of eliminating use of motor spirit and replacement of battery operated two-wheelers was also mooted. The Association of Indian Automobile Manufacturers had made an application for intervention and was present in Court. Some of the aspects which came up for discussion were indeed sufficiently technical. Some other aspects require laboratory testing and probe into efficacy. Therefore, the question of setting up of a high-powered committee was also mooted.

However one might describe such a process, a piece of adversarial litigation it was not. A sardonic reader might smile at the image of enchanted judges playing with air pollution gadgets.

And what substantive legal basis did the Indian Supreme Court rely upon for assuming such broad powers? Well, none really, except for Articles 48A<sup>77</sup> and 51A<sup>78</sup> of the Indian Constitution—both of which are Directive Principles allegedly not judicially enforceable. All of which goes to show that the Indian Supreme Court has already been “enforcing” the Directive

77. INDIA CONST. art. 48A, *amended by* The Constitution (Forty-Second Amendment) Act, 1976 reads in full: “The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.”

78. INDIA CONST. art. 51A, *amended by* The Constitution (Eighty-Sixth Amendment) Act, 2002 reads in full:

“It shall be the duty of every citizen of India—

- a. to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
- b. to cherish and follow the noble ideals which inspired our national struggle for freedom;
- c. to uphold and protect the sovereignty, unity and integrity of India;
- d. to defend the country and render national service when called upon to do so;
- e. to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
- f. to value and preserve the rich heritage of our composite culture;
- g. to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
- h. to develop the scientific temper, humanism and the spirit of inquiry and reform;
- i. to safeguard public property and to abjure violence;
- j. to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;
- k. who is a parent or guardian, to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.”

The Court did not specify which subparagraph of Article 51A was relevant in its holding, although presumably subpart (g) played a vital role as well as perhaps subparts (h) and (i).

Principles implicitly but without saying so for quite a long time. At least as of this writing, the sky has not fallen.

Still, skeptics might claim that such an argument might prove too much. After all, if the judiciary is part of “the State,” and thus responsible for applying the Directive Principles, wouldn’t that (1) defeat the entire nonenforceability provisions of the Directive Principles, and (2) open the door to a judicial takeover of wide swathes of state functions, including social welfare policy, economic development, and the like?<sup>79</sup>

We need not worry about such a parade of horrors for a straightforward reason: When it comes to the justice system, the judiciary represents that part of the State with unique competence and responsibility. Questions of the justice system thus stand in a special place concerning judicial enforcement (or not) of Directive Principles. The judiciary’s job is to oversee and enforce the aspirations of the legal system. In the same way that the Directive Principles guide the legislature and executive in regard to their functions and policy areas, they guide the judiciary in its function and policy area, namely, the legal system. Put another way, as to the legal system, when the Directive Principles tell the state to do something, the judiciary *is* that part of the state that they are commanding.<sup>80</sup>

Inherent judicial power has long been construed to include both the judiciary itself as well as the legal profession. Indeed, it is not too much to say that the legal profession cannot exist without the judiciary: Even the contracts that transactional attorneys craft have no legal basis until and unless they can be enforced in court, and the judiciary has authority concerning admission of attorneys as well.<sup>81</sup> It thus has long been conceded

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79. See Mahendra P. Singh, V.N. SHUKLA’S CONSTITUTION OF INDIA 346 (Eastern Book Co., 11th ed. 2008) (“If the Court can compel Parliament to make laws then parliamentary democracy would soon be reduced to an oligarchy of judges. It is for this reason that the Constitution says that the directive principles shall not be enforceable by courts. However, it does not mean that the directive principles are less important than fundamental rights for the simple reason that they are not judicially enforceable.”).

80. One can imagine the delicious legal fictions that such a command would entail. A litigant could not petition the Indian Supreme Court to comply with the Directive Principles, because these principles are not judicially enforceable. If, however, a litigant were simply to alert the Indian Supreme Court of its obligations under Article 39A, the Indian Supreme Court could choose to comply with the principles’ command—which of course would not be the same as being judicially enforceable.

81. See, e.g., *In re Att’y Discipline Sys.*, 967 P.2d 49 (Cal. 1998). There, the California Supreme Court noted:

Our inherent authority over the discipline of licensed attorneys in this state is well established. Article VI, section 1 of the California Constitution vests the judicial power in the Supreme Court, Courts of Appeal, superior courts, municipal courts,

that the judiciary can prescribe rules and regulations for the bar, as well as creating mandatory bar programs that all licensed attorneys must.

If such inherent power exists for attorneys, it also stands to reason that it exists for paralegals. In the United States, paralegals are closely regulated by the states, which prescribe for them educational qualifications and professional responsibility requirements, as well as intimately regulating the scope of services they can provide.<sup>82</sup> The American Bar Association has developed model guidelines for them.<sup>83</sup> In India, there is virtually no regulation of paralegals,<sup>84</sup> which is probably a good thing at this stage, and particularly in the context of CBP programs: Those programs rest on the fact of paralegals being less expensive than attorneys, and costs would quickly skyrocket were paralegals regulated like the bar.

Still, paralegals are part of the justice system, and in CBP programs they engage in functions requiring specifically legal expertise. They are not simply community organizers, although they are that as well. The leading professional manual for CBP programs, focusing specifically on environmental justice, stresses the inherently legal aspect of their work: identifying statutes and administrative regulations that might be brought to bear on environmental problems, the way of relating specific facts to these

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and justice courts. “Since the ‘courts are set up by the Constitution without any special limitations’ on their power, they ‘have . . . all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government. In California, the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of the article VI courts. Indeed, every state in the United States recognizes that the power to admit and to discipline attorneys rests in the judiciary. “This is necessarily so. An attorney is an officer of the court and whether a person shall be admitted [or disciplined] is a judicial, and not a legislative, question.”

*Id.* at 54 (emphasis added) (quoting *Hustedt v. Workers' Comp. Appeals Bd.*, 636 P.2d 1139 (Cal. 1981)(en banc)).

82. See generally NAT'L FED'N OF PARALEGALS ASS'N, PARALEGAL REGULATION BY STATE (2017), <https://www.paralegals.org/files/2017-08-24%20Regulation%20by%20State%20FINAL.pdf> [<https://perma.cc/WK86-FEJ4>] (specifying regulatory framework in all 50 American states).
83. See generally ABA STANDING COMM. ON PARALEGALS, ABA MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVICES (2012).
84. See NAT'L LEGAL SERVS. AUTH., SCHEME FOR PARA-LEGAL VOLUNTEERS (REVISED) & MODULE FOR THE ORIENTATION – INDUCTION – REFRESHER COURSES FOR PLV TRAINING (2017), [https://nalsa.gov.in/sites/default/files/document/Scheme%20\(Para%20Legal%20Volunteers.pdf](https://nalsa.gov.in/sites/default/files/document/Scheme%20(Para%20Legal%20Volunteers.pdf)) (noting that “the western concept of ‘Paralegals’ cannot be totally adopted to Indian conditions having regard to illiteracy of large sections of the community: The hours of training as applicable to a regular academic course, cannot be adopted. It should be more like a bridge course conceptualised in a simple and need-based module”).

legal frameworks, and methods of recordkeeping that can prepare for litigation or advocacy before other decisionmakers.<sup>85</sup>

Thus, the upshot of this extended discussion is this: If the Indian judiciary has a special constitutional responsibility to apply Article 39A (which directs the state to provide free legal aid to ensure equal opportunity for “securing justice”), as well as the inherent power to fund the justice system, and if it wants to promote environmental justice, it should create and expand CBP programs of the sorts already being piloted throughout the Union and around the world. If we are serious about calling upon the Indian judiciary to foster environmental justice, that is not merely a matter of doctrine and rulings on specific cases, but also the proactive development of environmental justice institutions—institutions that themselves are mandated by Article 39A.

The inherent judicial power to fund the legal system might very well not lie in the Tribunal itself. The Tribunal is a creation of statute, so it might be up to the Indian Supreme Court to establish CBP programs to promote environmental justice.<sup>86</sup> But if we are truly interested in environmental justice, we might apply to it to get on with this work.

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85. See generally MANJU MENON ET AL., CTR. FOR POLICY RESEARCH-NAMATI ENVTL. JUSTICE PROGRAM, PARALEGALS FOR ENVIRONMENTAL JUSTICE: VERSION 2.0 (2017).

86. The Supreme Court of India, in *Durga Shankar Mehta v. Thakur Raghuraj Singh*, (1955) 1 SCR 287, held, “The expression ‘Tribunal,’ . . . does not mean the same thing as ‘Court’ but includes, within its ambit, all adjudicating bodies, provided they are constituted by the State and are invested with judicial, as distinguished from purely administrative or executive functions.”

The 42nd Amendment of the Constitution of India inserted Articles 323-A and 323-B. Article 323-A provides for the creation of Administrative Tribunals, and Article 323-B provides for other tribunals like Election Tribunal, Revenue Tribunal, Armed Forces Tribunal, etc. This provision was upheld by a Constitutional Bench of Supreme Court in 1994 in the landmark case of *Sampath Kumar*.

The Tribunal, the Central Administrative Tribunal (CAT), the State Administrative Tribunals, the Armed Forces Tribunals are virtually the substitutes of all Courts in all aspects except the Writ Jurisdiction under Articles 32 & 226 of the Constitution of India and the Appellate Jurisdiction of Supreme Court of India. Therefore, after the insertion of Articles 323-A and B in the Constitution of India, the tribunals constituted under these articles are no less than courts.

The only substantial difference between the courts and the tribunals is that the courts are general courts, dealing with all sort of matters, whereas the tribunals are the specialized courts dealing with the matters for which they are created. Nevertheless, because tribunals have those powers given to those by the legislature, whereas the Indian Supreme Court is a creation of the Indian Constitution, it could be the case that the Tribunal will not have the sorts of inherent judicial powers that courts do. It is still an unresolved legal question that I hope to take up in future work, but is beyond the scope of this Article. See Jatin Gandhi, *Tribunals Only Supplemental Not Substitute for High Courts: Law Commission*, HINDUSTAN TIMES (Oct. 25, 2017, 3:34 PM), <https://www.hindustantimes.com/india->

Critics could rightfully worry about an institution essentially funding itself, potentially generating an unaccountable drain on the public fisc. There are several reasons, however, to question the realism of such fears.

First, the Supreme Court decided *All India Judges' Association I* more than a quarter century ago, and fiscal consequences have yet to materialize. The judiciary accounts for only 0.4 percent of the Union budget,<sup>87</sup> an almost insignificant amount. Cassandras warning about a bloated judiciary will have to look elsewhere.

Second, in the specific circumstances of the Tribunal, the Tribunal is not funding itself. Decisions about the funding level of the judiciary or of tribunals would be made by the Indian Supreme Court, either on first impression or on appeal. So a check exists within the judicial branch against abuse.

Third, recall that the Tribunal is a creation of statute, not of the Indian Constitution. At some point or another, a Tribunal or judicial insistence on adequate funding could become such a headache that the Lok Sabha might decide it isn't worth it and abolish the Tribunal altogether. This very risk creates a certain amount of countervailing pressure for the Tribunal: Its personnel will understand that pushing too hard on its own funding stream might result in drowning.

Finally, institutional competence—a traditional headache in systemic reform litigation—is not a problem here. Critics have long questioned whether judges should involve themselves in program construction, so much so that the judges themselves often feel the need to make obeisance to the principle.<sup>88</sup> Such considerations, however, do not arise here, for while courts and legislatures can certainly differ over appropriate funding levels, there is little to no reason to think that legislatures can design better policies for civil and criminal justice than the judicial system.

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news/tribunals-only-supplemental-not-substitute-for-high-courts-law-commission/story-yNV7p3aFFVMUP5DTINQw9Lhtml [https://perma.cc/W8LL-AQZC].

87. Siddhartha Dave, *The Price of Justice: Government Needs to Invest More in the Judiciary to Reduce Pendency*, INDIAN EXPRESS (Dec. 25, 2017, 7:19 AM), <https://indianexpress.com/article/opinion/columns/the-price-of-justice-pending-court-cases-across-india-judiciary-budget-4997466> [https://perma.cc/U6HA-ESGW] (“For 2017–18, the Union budget allocated a meagre Rs 1,744 crore to the judiciary—about 0.4 per cent of the total budget. To put this in perspective, each of the 12 companies with the highest non-performing assets (NPA) have debts at least eight to 10 times more than the judiciary’s budget.”).

88. See, e.g., *South Burlington Cty. NAACP v. Township of Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (N.J. 1975) (“Courts do not build housing nor do municipalities.”).

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### CONCLUSION

On the eve of India's independence, Jawaharlal Nehru famously proclaimed that India had a "tryst with destiny." But if the Union continues to poison and foul its heritage, and do so by subordinating its most oppressed classes, its tryst will resemble something closer to a really bad date.<sup>89</sup> Avoiding such a vision will require more vision on the part of all parts of Indian governance. As Gill shows, the judiciary has begun to play this role. But much more is needed, and it must avoid the temptation to yield to premature calls for restraint.

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89. Cf. Georgia Wells & Eric Bellman, *Tinder Is Big in India—At Least With Men*, WALL STREET J. (June 24, 2018, 3:47 PM), <https://www.wsj.com/articles/india-has-lots-of-single-women-but-good-luck-finding-them-on-tinder-1529869656>.