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# Grappling at the Grassroots: Access to Justice in India's Lower Tier

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*From 2010 to 2012, a team of academic and civil society researchers conducted extensive ethnographies of litigants, judges, lawyers, and courtroom personnel within multiple districts in three states: Maharashtra, Gujarat, and Himachal Pradesh. This Article provides an in-depth account of the everyday struggles these actors face in the pursuit of their respective objectives. The findings illustrate a complex matrix of variables—including infrastructure, staffing, judicial training and legal awareness, costs and continuances, gender and caste discrimination, power imbalances, intimidation and corruption, miscellaneous delays, and challenges with specialized forums—impact access to justice in the lower tier. The results of this study offer competing yet complementary narratives. On one hand, there is immense despair, frustration, and anger among the various sets of respondents about the current state of the lower tier. At the same time, however, there is great hope and optimism among individuals who work in the judicial sphere, as well as litigants desperately seeking to gain relief from long-endured grievances, toward what the lower tier*

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*can offer. Indeed, if the lower tier is empowered with greater resources and certain perverse aspects of the legal system can be reformed, it has vast potential to promote social change that advances the socioeconomic status of India's most disadvantaged groups.*

## INTRODUCTION

In the 1970s, Marc Galanter's view of the courts as inherently passive institutions that primarily benefit those without enough resources to be "repeat players" captured the imagination of legal scholars.<sup>1</sup> In the United States, disadvantaged groups that achieved legal victories in the latter half of the twentieth century were only able to do so once they had developed adequate funding, coordinated strategies, and effective legal advocacy, as well as legislative progress, which meant that they increasingly found a litigation ally in the federal government.<sup>2</sup> Indeed, Gerald Rosenberg has observed that the presence of sympathetic judges could not bring about substantive change for these groups in the absence of executive or legislative intervention.<sup>3</sup> Without institutional and resource support, it was difficult for weaker interests to stave off wealthier opposing parties in court.<sup>4</sup> Moreover, several commentators have observed that legal victories do not necessarily translate into actual improvements in the lives of disadvantaged groups.<sup>5</sup>

This Article seeks to understand the systemic factors and constraints that affect the extent to which litigants in India are able to rely on courts to enforce their rights. Decades of scholarly investigation on the legal system in India and the manner in which people access justice has tended to emphasize the upper tier of the judiciary, namely the State High Courts and

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1. See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y REV. 95 (1974) (rejecting the belief that American courts had provided material benefits for claimants seeking economic and social justice). Galanter has noted that his classic study was inspired by his work in India. See Jayanth K. Krishnan, *Peel-Off Lawyers: Legal Professionals in India's Corporate Law Firm Sector*, 9 SOCIO-LEGAL REV. 1, 3–12 (2013); Telephone interview by research team with Marc Galanter (Oct. 16, 2012).

2. See IAN ROSS BRODIE, FRIENDS OF THE COURT: THE PRIVILEGING OF INTEREST GROUP LITIGANTS IN CANADA 7, 141–44 (2002); Galanter, *supra* note 1. *But see* MARK TUSHNET, NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925–1950 (1987); STEPHEN L. WASBY, RACE RELATIONS LITIGATION IN AN AGE OF COMPLEXITY (1995); Stephen L. Wasby, *How Planned is "Planned Litigation"*, 9 LAW & SOC. INQUIRY 83 (1984).

3. See generally GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

4. See, e.g., BRODIE, *supra* note 2, at 1–16; CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 71–110 (1998).

5. See EPP, *supra* note 4; Jayanth K. Krishnan, *Academic SAILERS: The Ford Foundation and the Efforts to Shape Legal Education in Africa, 1957–1977*, 52 AM. J. LEGAL HIST. 261 (2012); see generally HERBERT M. KRITZER & SUSAN S. SILBEY, IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? (2003).

the Indian Supreme Court.<sup>6</sup> The focus has been on the lawyers who practice in these forums, the constitutional jurisprudence produced by the forums, and the judges who render the decisions.<sup>7</sup> A knowledge vacuum surrounds the vast majority of parties (litigants, lawyers, and judges) who operate in the lower tier—the district courts; sub-district courts; specialized alternative bodies; and administrative, quasi-judicial tribunals—where tens of millions of cases are projected to be pending, many for more than a decade.<sup>8</sup> This Article seeks to better understand public perceptions toward these forums and the extent to which they actually serve as instruments of justice.

Part I provides an overview of the broader theoretical and policy frameworks on access to justice and judicial power and frames the importance of access to courts in light of unresponsive government officials. It argues that while lower-tier judges must be more assertive in protecting the rights of socioeconomically disadvantaged claimants, they cannot do this on their own. Part II follows with a description of the research method, which includes interviews and multi-year ethnographies conducted in three regions of India. Part III presents the findings, focusing on types of infrastructure, the rules and operations of courts and judges, and, perhaps most importantly, the types of relief provided to litigants and their perceptions of the lawyers, judges, and court personnel who serve them. The Article concludes that judges must play more of an active role in protecting the rights of socioeconomically disadvantaged claimants. This, in turn, requires

6. See generally EPP, *supra* note 4; S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (2002); RAJEEV DHAVAN, THE SUPREME COURT OF INDIA: A SOCIO-LEGAL CRITIQUE OF ITS JURISTIC TECHNIQUES (1977).

7. See generally UPENDRA BAXI, COURAGE, CRAFT, AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES (1985); Marc Galanter, *Fifty Years On, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA* 57, 57–65 (B.N. Kirpal et al. eds., 2000); Marc Galanter, *New Patterns of Legal Services in India, in LAW AND SOCIETY IN MODERN INDIA* 279, 279–95 (Rajeev Dhavan ed., 1989); P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L. 561 (1985); Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495 (1989); Oliver Mendelsohn, *Life and Struggle in the Stone Quarries of India: A Case-Study*, 29 J. COMMONWEALTH & COMP. POL. 43, 44–51 (1991); G.L. Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 INT'L & COMP. L.Q. 66 (1991); S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL'Y 29 (2001); S.P. Sathe, *Judicial Activism (II): Post-Emergency Judicial Activism: Liberty and Good Governance*, 10 J. INDIAN SCH. POL. ECON. 603 (1998); Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT'L L.J. 57 (1994–1995).

8. NAT'L CT. MGMT. SYS., SUPREME CT. OF INDIA, NATIONAL COURT MANAGEMENT SYSTEMS POLICY & ACTION PLAN 15 (2012), available at <http://supremecourtsofindia.nic.in/ncms27092012.pdf>, archived at <http://perma.cc/5THN-TTWE>; type=pdf; see also Jayanth K. Krishnan, *Outsourcing and Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2221–26 (2007); Anjani Trivedi, *When All Else Fails, Try the Supreme Court*, N.Y. TIMES (Dec. 14, 2012), [http://india.blogs.nytimes.com/2012/12/14/when-all-else-fails-try-the-supreme-court/?\\_r=0](http://india.blogs.nytimes.com/2012/12/14/when-all-else-fails-try-the-supreme-court/?_r=0), archived at <http://perma.cc/535U-ASSF>; Judge Me Not, BUS. & ECON. (Feb. 23, 2006), <http://www.businessandconomy.org/23022006/storyd.asp?sid=1644&pageno=1>, archived at <http://perma.cc/8DPM-YUYX>. For a recent study on litigation patterns in India and their state-level variation along socioeconomic development lines, see Theodore Eisenberg et al., *Litigation as a Matter of Well-Being* (Cornell Legal Studies, Research Paper No. 12-28, 2012), available at [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1102&context=clsops\\_papers](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1102&context=clsops_papers), archived at <http://perma.cc/CED4-VEHD>.

broad support from the bar, the upper judiciary, legal educational institutions, civil society organizations, and state and central governmental leaders.

## I. THE ACCESS TO JUSTICE IMPERATIVE

### A. *Historical Background and Policy Considerations*

Previous attempts to strengthen the hand of the lower tier have met with varied success. A movement to restore an indigenous legal system flourished briefly in the years just after Indian Independence.<sup>9</sup> As part of the *panchayati raj* (local self-government) policy of the 1950s, elected *gram panchayats* (local self-government councils) and corresponding *nyaya panchayats* (judicial councils) were established with optional jurisdiction over specific categories of petty cases.<sup>10</sup> Although the *nyaya panchayats* derived sentimental and symbolic support from their appeal to the virtues of the indigenous system, they encountered severe problems with adequacy of judicial training, establishing their independence from personal ties to the parties, enforcing their decrees, and acting expeditiously.<sup>11</sup> They never attracted significant support from the villagers in whose name they were established, and their caseloads declined steadily while those of the district and sub-district courts rose.<sup>12</sup> By the mid-1970s, *nyaya panchayats* were moribund and were eventually replaced by *gram nyayalayas*, tribunals of compulsory jurisdiction for certain petty civil and criminal cases.<sup>13</sup>

9. The lead author published a detailed summary of this topic with Marc Galanter. Therefore, part of this section, with permission of the original publisher, excerpts that work here, with some edits. See Marc Galanter & Jayanth K. Krishnan, *Bread for the Poor: Access to Justice and the Rights of the Needy*, 55 HASTINGS L.J. 783, 791-97 (2004) (citing Marc Galanter, *The Aborted Restoration of 'Indigenous' Law in India*, in LAW AND SOCIETY IN MODERN INDIA, *supra* note 7, at 53, 56-57).

10. Galanter & Krishnan, *supra* note 9, at 791-92 (citing Marc Galanter & Upendra Baxi, *Panchayat Justice: An Indian Experiment in Legal Access*, in 3 ACCESS TO JUSTICE, EMERGING ISSUES AND PERSPECTIVES 343, 343-86 (Mauro Cappelletti & Bryant Garth eds., 1978); R. KUSHAWAHA, WORKING OF NYAYA PANCHAYATS IN INDIA 67-88 (L.M. Singhvi ed., 1977)).

11. Galanter & Krishnan, *supra* note 9, at 792 (citing Catherine S. Meschievitz & Marc Galanter, *In Search of Nyaya Panchayats: The Politics of a Moribund Institution*, in 2 THE POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES 47, 47-77 (Richard Abel ed., 1982)).

12. In Uttar Pradesh, civil filings in the *nyaya panchayats* decreased four-fold from 82,321 in 1960 to 22,912 in 1970 (just over four cases per *nyaya panchayat*), while civil filings in the district and sub-district courts rose from 74,958 to 86,749. Galanter & Krishnan, *supra* note 9, at 792-93 (citing Galanter & Baxi, *supra* note 10, at 369 tbl.1; KUSHAWAHA, *supra* note 10, at 99; Meschievitz & Galanter, *supra* note 11, at 55).

13. For further discussion on the promise and demise of the *nyaya panchayats*, see Galanter & Krishnan, *supra* note 9, at 793-94 (citing Meschievitz & Galanter, *supra* note 11, at 68-70; Catherine S. Meschievitz, *Panchayat Justice: State-Sponsored Informal Courts in 19th and 20th Century India* 19 (Disputes Processing Research Prog., Madison Inst. for Legal Studies, Working Paper No. 8, 1987) (providing a general account of reformers' fondness for *panchayats*); V.R. KRISHNA IYER, EXPERT COMM. ON LEGAL AID, REPORT OF THE EXPERT COMMITTEE ON LEGAL AID: PROCESSUAL JUSTICE TO THE PEOPLE (1973) (critiquing Indian legal arrangements while speaking glowingly of *nyaya panchayats* as part of a larger scheme of legal aid and access to the courts); P.N. BHAGWATI, INDIA COMM. ON JURIDICARE, REPORT ON NATIONAL JURIDICARE: EQUAL JUSTICE-SOCIAL JUSTICE 33-34 (1976) (endorsing a system of "law

India underwent Emergency Rule for nearly two years beginning in 1975, and it was only after the country's return to democracy in 1977 that there was hope that public institutions could be fashioned to protect the rights of the powerless.<sup>14</sup> A Directive Principle enacted in 1976 had decreed "equal justice and free legal aid," but it remained an unfulfilled promise during the Emergency Rule.<sup>15</sup> However, after the Emergency Rule ended, the Supreme Court proceeded to embark on a series of unprecedented and far-reaching initiatives, including the relaxation of standing requirements, the appointment of investigative commissions and lawyers as representatives of client groups, and the creation of an "epistolary jurisdiction" in which judges took the initiative to respond to grievances brought to their attention by third parties, letters, or news reports.<sup>16</sup> At the same time, public interest litigation and legal aid organizations used the courts to protect excluded and powerless groups, such as prisoners, migrant laborers, and the environmentally susceptible.<sup>17</sup> Public interest litigation has promoted important social changes, raised public awareness of many issues, energized

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and justice at the *panchayat* level with a conciliatory methodology"); Upendra Baxi, *From Takrar to Karar: The Lok Adalat at Rangpur*, 10 J. CONST. & PARLIAMENTARY STUD. 52 (1976) (describing the Gujarat *lok adalat* as independent of official law, both institutionally and normatively, although it bore no evident connection to traditional tribal institutions)). For background on the *gram nyayalayas*, see LAW COMM'N OF INDIA, ONE HUNDRED AND FOURTEENTH REPORT ON GRAM NYAYALAYA (1986), paras. 5.12–5.13, available at <http://indiankanoon.org/doc/1161600/> (describing the intended differences between *nyaya panchayats* and *gram nyayalayas*); The Gram Nyayalayas Act, 2008, No. 4, Acts of Parliament, 2009, available at <http://www.lawmin.nic.in/doj/justice/gramnyayalayas.pdf>; see also Menaka Guruswamy & Aditya Singh, *Accessing Injustice: The Gram Nyayalayas Act, 2008*, 43 ECON. & POL. WKLY. 16, 17 (2010); *Gram Nyayalaya Act 2008 to Come Into Effect from October 2, 2009*, INDLAW.COM, <http://www.indlaw.com/guest/DisplayNews.aspx?36C64BC7-9E86-4DBC-BA23-38AF9BA5A139> (last visited Jan. 19, 2014), archived at <http://perma.cc/DH4R-T2ZL>.

14. Galanter & Krishnan, *supra* note 9, at 794–95 (citing Upendra Baxi, *Taking Suffering Seriously*, in *JUDGES AND THE JUDICIAL POWER* 107, 107–32 (Rajeev Dhavan et al. eds., 1985); Smithu Kothari, *Social Movements and the Redefinition of Democracy*, in *INDIA BRIEFING* 131, 141–51 (Philip Oldenburg ed., 1993) (noting enthusiasm among civil rights and public interest organizations that democracy could be ensured by the rule of law following the Emergency)).

15. INDIA CONST. art. 39A, amended by The Constitution (Forty-Second Amendment) Act, 1976, § 8 ("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.").

16. Galanter & Krishnan, *supra* note 9, at 795 (citing Carl Baar, *Social Action Litigation in India: The Operations and Limitations on the World's Most Active Judiciary*, 19 POL. STUD. J. 140, 142, 147 (1990) (discussing the evolution of social action litigation since the end of the Emergency in 1977); Bhagwati, *supra* note 7 (describing how the Supreme Court has used public interest litigation to alleviate the plight of those who are disadvantaged); Rajeev Dhavan, *Law as Struggle: Public Interest Law in India*, 36 J. INDIAN L. INST. 302 (1994) (noting the difficulty the needy and disadvantaged in India have using the law, and in turn, how public interest litigation has sought to improve this situation)).

17. Galanter & Krishnan, *supra* note 9, at 795–96 (citing, e.g., SAKUNTALA NARASIMHAN, *EMPOWERING WOMEN: AN ALTERNATIVE STRATEGY FROM RURAL INDIA* (1999) (describing the activities of Action for Welfare and Awakening in Rural Environment ("AWARE")); SATHE, *supra* note 6; G. Oliver Koppell, *The Indian Lawyer as Social Innovator: Legal Aid in India*, 3 L. & SOC'Y REV. 299 (1969) (noting how the implementation of legal aid before the Emergency was desultory); Peiris, *supra* note 7; D.L. Sheth & Harsh Sethi, *The NGO Sector in India: Historical Context and Current Discourse*, 2 VOLUNTAS 49 (1991)).

citizen action, ratcheted up governmental accountability, and enhanced the legitimacy of the judiciary.<sup>18</sup> However, commentators have criticized top-down approaches to public interest litigation that were largely limited by public interest advocates' lack of sufficient resources to thoroughly investigate disputed questions of fact, achieve concrete remedies, monitor performance, or maintain organizational staying power based on a cadre of generalist volunteers.<sup>19</sup>

For these reasons, since the mid-1980s there have been efforts to find other ways to increase access to justice at the individual grassroots levels. A range of alternative dispute resolution (ADR) bodies have emerged over the past three decades to deliver resolutions (*samadhans*) in a more timely manner.<sup>20</sup> However, they may be less effective or of lower quality than district and sub-district courts.<sup>21</sup>

### B. *The Unresponsiveness of Politicians and Bureaucratic Officials*

Socioeconomically disadvantaged claimants who lack proportional demographic representation in public office have extremely limited institutional options for redressing their grievances concerning basic needs like water, food, health care, sanitation, education, and safety.<sup>22</sup> While the *panchayats* and *jati panchayats* (their unofficial, traditional, caste-based counterparts)—which have transformed in composition and character over centuries—are supposed to be the most accessible representative body, socioeconomically disadvantaged groups report that their concerns are routinely ignored.<sup>23</sup> Members of the state legislative assemblies (“MLAs”) and national parliament (“MPs”) are also seen as non-responsive,<sup>24</sup> as well as caste-driven and caste-discriminating.<sup>25</sup> “If there are disputes [with the government],” re-

18. Galanter & Krishnan, *supra* note 9, at 797 (citing SATHE, *supra* note 6, at 249–311 (documenting how the environment, rights of women and minorities, rights of the ill and poor, and other rights all received important protections as a result of public interest lawsuits filed by rights-conscious activists)).

19. The Supreme Court's public interest docket did not significantly increase between 1960 and 1990. Galanter & Krishnan, *supra* note 9, at 797 (citing EPP, *supra* note 4).

20. See discussion *infra* Part II.D.

21. See Galanter & Krishnan, *supra* note 9, at 792–98, 811–28; see also Jayanth K. Krishnan, *Scholarly Discourse, Public Perceptions, and the Cementing of Norms: The Case of the Indian Supreme Court and a Plea for Research*, 29 J. APP. PRAC. & PROCESS 255, 255–90 (2007).

22. See generally Rohini Pande, *Can Mandated Political Representation Increase Policy Influence for Disadvantaged Minorities? Theory and Evidence from India*, 93 AM. ECON. REV. 1132 (2003).

23. E.g., Interview by research team with litigant, in Maharashtra, India (Oct. 31, 2011); see JACOB PANADIAN, *CASTE, NATIONALISM AND ETHNICITY: AN INTERPRETATION OF TAMIL CULTURAL HISTORY AND SOCIAL ORDER* 105–07 (1987).

24. Interview by research team with litigant, in Maharashtra, India (June 12, 2012); Interview by research team with litigant, in Maharashtra, India (June 11, 2012); Interview by research team with litigant, in Maharashtra, India (June 6, 2012); Interview by research team with litigant, in Himachal Pradesh, India (Oct. 14, 2011).

25. E.g., Interview by research team with litigant, in Maharashtra, India (Mar. 22, 2012); see PANADIAN, *supra* note 23; ROBERT HAYDEN, *DISPUTES AND ARGUMENTS AMONGST NOMADS* 83–109 (1999); PAUL BRASS, *THE POLITICS OF INDIA SINCE INDEPENDENCE* 228–67 (1994); PRADEEP K.



marked a Himachali litigant, “there is no way to solve them . . . [because] they will never get resolved or compromised at the village level. That is why these matters come to the court.”<sup>26</sup> Litigants complained that elected officials only came to the aid of those who vote for them or belong to their political party.<sup>27</sup>

Elected officials or bureaucrats are seen as especially useless in private disputes such as labor disputes between employees and employers.<sup>28</sup> Although various government departments are dedicated to hearing labor disputes, and workers are repeatedly proclaimed by state and national officials to be a major constituency whose concerns are vital, elected representatives and their staff are often not accessible to provide assistance.<sup>29</sup> A labor activist noted that “MLAs and MPs are seen at the time of election only. In five years, they make their own pockets full and leave problems for the next government.”<sup>30</sup> A litigant whose home was damaged after a local river flooded recounted:

When our home got flooded, the media covered it and politicians took notice of that. The mayor came to my house and so did the local [city council official]. They came soon after the floods and they even assured to help us. . . . [But] [w]hen we contacted them later, no one responded. Now I feel that they came only for the sake of publicity.<sup>31</sup>

According to litigants, corruption permeates every aspect of grievances against the government and private disputes to the point where these institutions were seen as virtually impotent.<sup>32</sup> A trade union activist explained:

Political leaders somehow find a method of [only] intervening in labor disputes which are hyped by the media. If they realize they aren't becoming popular, then they use their petty power to extort money—usually from the employer and sometimes from the

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CHHIBBER, *DEMOCRACY WITHOUT ASSOCIATIONS: TRANSFORMATION OF PARTY SYSTEMS AND SOCIAL CLEAVAGES IN INDIA* 135–158 (1999); CHRISTOPHE JAFFRELOT, *RELIGION, CASTE, AND POLITICS IN INDIA* 54–73 (2011); PRATAP BHANU MEHTA, *THE BURDEN OF DEMOCRACY* 57–84 (2003); ANUPAMA RAO, *THE CASTE QUESTION: DALITS AND THE POLITICS OF MODERN INDIA* 39–162 (2009).

26. Interview by research team with litigant, in Himachal Pradesh, India (Oct. 14, 2011).

27. *E.g.*, *id.*; Interview by research team with litigant, in Himachal Pradesh, India (Oct. 31, 2011) (“When we go to the MLA and discuss our problems with him, his first reaction is . . . [to ask whether] our votes have gone to him.”); Interview by research team with litigant, in Himachal Pradesh, India (Oct. 18, 2011) (“I am from [the] Congress Party and [the] MLA is from [the] BJP party. Because of this, why would he listen to a poor person like me?”).

28. *E.g.*, Interview by research team with litigant, in Himachal Pradesh, India (June 25, 2012); Interview by research team with litigant, in Himachal Pradesh, India (Oct. 14, 2011); Interview by research team with litigant, in Maharashtra, India (Mar. 14, 2011).

29. Interview by research team with litigant, in Himachal Pradesh, India (June 25, 2012); Interview by research team with litigant, in Maharashtra, India (Mar. 14, 2011).

30. Interview by research team with litigant, in Himachal Pradesh, India (June 25, 2012).

31. Interview by research team with litigant, in Maharashtra, India (May 26, 2011).

32. *E.g.*, interviews cited *supra* note 29.

employees as well. In the latter instance, we are left to fight two battles—one with the employer and another with the politicians.<sup>33</sup>

A disillusioned energy activist described that under the Electricity Act of 2003, citizens are supposed to be able to present electricity-related grievances to a tribunal that monitors the distribution of electricity,<sup>34</sup> but this commission has ultimately done very little:

We have been trying to work with the commission, but it's far too difficult to even organize a meeting that will bring all the MPs and MLAs together at the same time. Then to speak about their functioning as a dispute resolution forum becomes irrelevant.<sup>35</sup>

In Himachal Pradesh, however, some litigants spoke positively about interactions they had with local *panchayat* leaders.<sup>36</sup> One litigant described how an elected official directly contributed to solving a problem related to his labor group's legal case:

There was one MLA who put our wage problem into the [state] parliament, and from that day they increased [the statutory wage] by 16 rupees from the 36 rupee rate at that time. . . . The local delegates are good, they perform their duties very well, and [they try to] preserve people's rights at the local level.<sup>37</sup>

Wealthier, more connected respondents generally echoed this satisfaction with elected officials.<sup>38</sup> A litigant in the district court said that she had been able to file her case in court “only because of the support and cooperation of the *sarpanch* [elected *panchayat* leader] in my village.”<sup>39</sup> Another litigant stated that the locally elected official helped her in gathering and procuring the documents related to her land for the dispute she was involved in.<sup>40</sup> These anecdotes, however, were more like the exception than the rule.

33. Interview by research team with litigant, in Maharashtra, India (Mar. 14, 2011).

34. The Electricity Act, 2003, No. 57, Acts of Parliament, §§ 6, 9–11, 2003, available at [http://www.powermin.nic.in/acts\\_notification/electricity\\_act2003/pdf/The%20Electricity%20Act\\_2003.pdf](http://www.powermin.nic.in/acts_notification/electricity_act2003/pdf/The%20Electricity%20Act_2003.pdf), archived at <http://www.perma.cc/0fqsRny4P9d>; see also APP. TRIBUNAL ELECTRICITY, <http://aptel.gov.in/> (last visited Mar. 14, 2014), archived at <http://perma.cc/8L6X-XT9N>.

35. Interview by research team with litigant, in Maharashtra, India (Mar. 14, 2011).

36. Interview by research team with litigants, in Himachal Pradesh, India (June 22, 2012); Interview by research team with litigants, in Himachal Pradesh, India (June 15, 2012); Interview by research team with litigants, in Himachal Pradesh, India (Mar. 14, 2012); Interview by research team with litigants, in Himachal Pradesh, India (Mar. 13, 2012) (“The elected representatives of my village are very cooperative. They do help us to resolve our problems and guide us in court matters too.”).

37. Interview by research team with litigant, in Himachal Pradesh, India (June 22, 2012).

38. E.g., Interview by research team with litigant, in Maharashtra, India (Mar. 13, 2012).

39. Interview by research team with litigant, in Maharashtra, India (Mar. 14, 2012).

40. Interview by research team with litigant, in Maharashtra, India (June 15, 2012).

Civil servants and the police are also viewed as slow to react and hampered by red tape.<sup>41</sup> Underlying this pessimism is a strong belief that many public officials are corrupt,<sup>42</sup> a well-known problem plaguing much of Indian society.<sup>43</sup> Moreover, public institutions remain male-dominated,<sup>44</sup> and many women continue to perceive intense, deeply seated, and insurmountable patriarchal biases.<sup>45</sup> As a result of all these political disadvantages, villagers may come to believe that, even in its suboptimal state, the judiciary is one of their only viable institutional options for redress.<sup>46</sup>

## II. METHODOLOGY

### A. *Researchers and Data Collection*

Field research was conducted by the authors of this Article and nearly two dozen additional research partners who speak various Indian languages and dialects. Field researchers were employees of three human rights non-governmental organizations (“NGO”), Centre for Social Justice, Jagori Grameen, and the National Centre for Advocacy Studies. Data collection took place from 2010 to 2012 using two approaches: semi-structured interviews and ethnographic observations (including shadowing and interviewing) of respondent groups. These observations were made over the course of three years inside and outside the courts, in chambers, in offices, at homes, and in village community centers.

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41. *E.g.*, interviews cited *supra* note 24.

42. *E.g.*, Interview by research team with litigant, in Maharashtra, India (June 13, 2012); Interview by research team with litigant, in Maharashtra, India (June 12, 2012).

43. See Jayanth K. Krishnan & C. Raj Kumar, *Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective*, 42 GEO. J. INT’L L. 747, 751, 767, 775–77 (2011); see generally BRASS, *supra* note 25; ATUL KOHLI, DEMOCRACY AND DISCONTENT: INDIA’S GROWING CRISIS OF GOVERNABILITY (1990); ATUL KOHLI, THE STATE AND POVERTY IN INDIA: THE POLITICS OF REFORM (1987); MEHTA, *supra* note 25; Krishnan, *supra* note 21; C. Raj Kumar, *Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Services in India*, 17 COLUM. J. ASIAN L. 31 (2003); *Corruption by Country: India*, TRANSPARENCY INT’L, <http://www.transparency.org/country#IND> (last visited Jan. 13, 2014); Pratap Bhanu Mehta, *A Decade of Hope, OUTLOOK INDIA* (Jan. 11, 2010), <http://www.outlookindia.com/article.aspx?263732>, archived at <http://perma.cc/0BqMUNsnipL/>; TRANSPARENCY INT’L INDIA, <http://www.transparencyindia.org> (last visited Jan. 13, 2014), archived at <http://perma.cc/0KhAruyere3/>.

44. See generally SEEMA SINGH, PANCHAYATI RAJ AND WOMEN EMPOWERMENT 8–12, 104–35 (2003); Lori Beaman et al., *Female Leadership Raises Aspirations and Educational Attainment for Girls: A Policy Experiment in India*, 335 SCI. 582 (2012); Rikhil Bhavnani, *Do Electoral Quotas Work After They Are Withdrawn? Evidence from a Natural Experiment in India*, 103 AM. POL. SCI. REV. 23 (2009); Raghavendra Chattopadhyay & Esther Duflo, *Women as Policy Makers: Evidence from a Randomized Policy Experiment in India*, 72 ECONOMETRICA 1409 (2004); Pradeep Chhibber, *Why Are Some Women Politically Active? The Household, Public Space, and Political Participation in India*, 43 INT’L J. COMP. SOC. 21 (2002); Maitreesh Ghatak & Maitreya Ghatak, *Recent Reforms in the Panchayat System in West Bengal: Toward Greater Participatory Governance?*, 37 ECON. & POL. WKLY. 45 (2002); Pande, *supra* note 22.

45. See generally Beaman et al., *supra* note 44; Pande, *supra* note 22.

46. Interview by research team with litigant, in Himachal Pradesh, India (Oct. 18, 2011).

### B. Research Locations

Field research was undertaken in Maharashtra, Gujarat, and Himachal Pradesh. Subsequent research is essential for determining the applicability of these findings to other regions. Notwithstanding this caveat, the three states serve as nice sites for comparisons because of key similarities and differences among them. Each state has a large rural population in need of greater access to socioeconomic opportunities. Each also has lower tiers inhabited by district and sub-district courts, specialized courts, and quasi-judicial administrative bodies. In addition, each state has upper judiciaries that promote strategies to reduce the tremendous backlog of cases in the lower tier.

Nevertheless, there are important variations in the demographics and development of these regions. The metropolitan areas of Maharashtra and Gujarat are technologically, financially, and physically more developed than Himachal Pradesh. Although the population of Himachal Pradesh (where Hindi is the official language) is just under 7 million people,<sup>47</sup> Gujarat (where Gujarati is the official language) has just over 60 million people,<sup>48</sup> and Maharashtra (where Marathi is the official language) is home to over 112 million people.<sup>49</sup> Population differences contribute to differences in the number of courts, law colleges, litigants, lawyers, judges, and backlogged cases in each state.<sup>50</sup> There is also political variation. Gujarat is led by officials from the nationalist Bhartiya Janata Party,<sup>51</sup> whereas the Indian Congress Party leads Himachal Pradesh.<sup>52</sup> A coalition consisting of the Indian Congress Party and the Nationalist Congress Party leads Maharashtra.<sup>53</sup>

47. See generally *Himachal Pradesh Population Census Data 2011*, CENSUS 2011, <http://www.census2011.co.in/census/state/himachal+pradesh.html> (last visited Feb. 25, 2014), archived at <http://perma.cc/Q7PW-6A6V>.

48. See generally *Gujarat Population Census Data 2011*, CENSUS 2011, <http://www.census2011.co.in/census/state/gujarat.html> (last visited Feb. 25, 2014), archived at <http://perma.cc/8LYD-WJUK>.

49. See generally *Maharashtra Population Census Data 2011*, CENSUS 2011, <http://www.census2011.co.in/census/state/maharashtra.html> (last visited Feb. 25, 2014), archived at <http://perma.cc/F5JV-VJDX>.

50. See *State-wise Number of Pendency Civil and Criminal Cases in District and Subordinate Courts of India*, INDIASTAT.COM, <http://www.indiastat.com/default.aspx> (last visited Nov. 23, 2013) (on file with lead author); *State-wise Sanctioned/Working Strength and Vacancies in District and Subordinate Courts in India*, INDIASTAT.COM, <http://www.indiastat.com/default.aspx> (last visited Nov. 23, 2013) (on file with lead author); *Locations Searched: Gujarat*, INDIA COLL. SEARCH, <http://www.indiacollegesearch.com/law/colleges-gujarat> (last visited Nov. 23, 2013), archived at <http://perma.cc/7AGN-6QSY>; *Locations Searched: Maharashtra*, INDIA COLL. SEARCH, <http://www.indiacollegesearch.com/law/colleges-maharashtra> (last visited Nov. 23, 2013), archived at <http://perma.cc/3NVC-GV98>; *Law Colleges in Himachal Pradesh*, HIMACHAL EDUC. (Apr. 23, 2010), <http://www.himachaleducation.net/law/>, archived at <http://perma.cc/VRW3-TGLT>.

51. See generally *BJP GUJARAT* (2012), <http://www.bjpgujarat.org/english/> (last visited Jan. 11, 2014), archived at <http://perma.cc/0mrZAh494ks>.

52. See *Chief Minister*, HIMACHAL PRADESH, <http://himachal.nic.in/CMTours.htm> (last updated Jan. 8, 2014), archived at <http://perma.cc/HQA4-ZEW6>.

53. See *Chief Minister*, GOV'T MAHARASHTRA (Oct. 19, 2013), <https://www.maharashtra.gov.in/Site/Profile/profileCM.aspx> (on file with lead author).

There is further variation in terms of caste, religion, and tribal populations among the three states.<sup>54</sup>

### C. Respondents

Respondent judges were identified through the public listings provided by each court of focus. Respondent lawyers were identified through bar directories or other public listings of practicing lawyers, reference to public case files, in-person solicitation of those whose offices were located at the courts, and recommendations from judges, litigants, and court personnel. Litigants were similarly identified through public case files, referrals from lawyers who had permission from their clients to share client contact information, and through in-person solicitation in courts. Lastly, court personnel were approached through in-person contact in courts.

### D. Forums Studied

Figure 1 depicts the complex web of institutions available to those seeking to pursue their claims.<sup>55</sup> There is substantial overlap in the judges, lawyers, staff, and litigants who occupy these forums, as well as their jurisdiction. While researchers only conducted field research at some of these forums, they learned about several others through interviews with individuals who had experience with them.

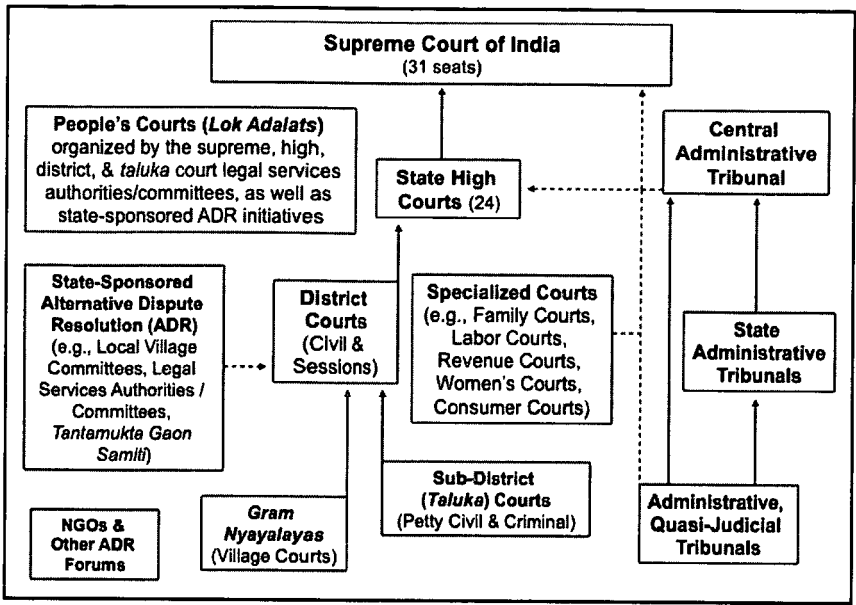
The Supreme Court, state high courts, and district courts have both original and appellate jurisdiction. The sub-district courts are courts of first instance and general jurisdiction for petty civil and petty criminal matters. The *gram nyayalayas* are pro se village courts that have mandatory jurisdiction for certain petty civil and criminal matters. Administrative quasi-judicial bodies are staffed by civil servant officers, with possible internal appellate boards. Specialized courts are statutorily created to offer more expeditious relief than the district and sub-district courts. Specialized courts and administrative courts of first instance and the Central Administrative Tribunal (“CAT”) can appeal to either the high court or the Supreme Court in rare cases involving fundamental rights.<sup>56</sup> *Lok adalats*, which are ADR forums that are either permanently established or convened to resolve hundreds or thousands of pending general or specialized civil cases within a

54. See 2011 Census Data, GOV'T INDIA: MINISTRY HOME AFF., <http://censusindia.gov.in/> (last visited Jan. 11, 2014), archived at <http://perma.cc/0CLUSS1YH8R>.

55. Dotted arrows indicate a limited appellate pathway for issues involving fundamental rights. See INDIA CONST. arts. 32, 226. For more information about many of the forums included in the figure, see *Indian Courts*, CT. WEBSITES, <http://indiancourts.nic.in/sitesmain.htm>, archived at <http://perma.cc/A4PF-K3MY>.

56. For more information about administrative tribunals, see generally SHARMA BRIJ KISHORE, INTRODUCTION TO THE CONSTITUTION OF INDIA 236 (6th ed. 2011); see also Abhishek Kumar Jha, “Administrative Tribunals of India”: A Study in the Light of Decided Cases (Nat'l Univ. of Study & Research in Law, Ranchi, India), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1989780](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989780) (last visited Mar. 13, 2014), archived at <http://perma.cc/KW9F-S7TH>.

FIGURE 1



short time frame, can play a critical role in providing speedy access to justice; their resolutions are final and cannot be appealed.<sup>57</sup>

Additional state-sponsored ADR forums have designated officials that can give authoritative advice at the village level, appealable to district courts in some instances. For example, the Mobile Legal Services (“MLS”) initiative of the Maharashtra State Legal Services Authority (“MSLSA”) is comprised of a coalition of judicial officers (retired or serving), lawyers, social activists, NGO workers, law students, and law professors who travel to remote areas to “create awareness on new laws through written and visual materials in the [community’s] local language.”<sup>58</sup> Additionally, where possible, the MLS team assists with adjudication and brings together com-

57. Remedies awarded by *lok adalats* come with a trade-off: while disputes may be resolved more quickly in these forums, monetary awards are usually much smaller than they would be in ordinary courts. See Galanter & Krishnan, *supra* note 9, at 808–09. For a thorough analysis of the early *lok adalats*, see generally *id.* at 797–833. For further details on the efficiency of modern *lok adalats*, see, e.g., Sridhar Mothe, *Alternative Dispute Resolution Reduces Burden on Courts*, METRO INDIA, <http://metroindia.com/Details.aspx?id=12866> (last visited Mar. 13, 2014), archived at <http://perma.cc/N6DU-MAP9>; Raju Verneker, *Permanent Lok Adalat for Mumbai*, AFTERNOON DESPATCH & COURIER (Nov. 25, 2013), [http://www.afternoondc.in/city-news/permanent-lok-adalat-for-mumbai/article\\_96830](http://www.afternoondc.in/city-news/permanent-lok-adalat-for-mumbai/article_96830), archived at <http://perma.cc/K2QF-UHLT>; *Mega Lok Adalat to Settle 60,000 Cases*, DECCAN HERALD (Nov. 21, 2013), <http://www.deccanherald.com/content/370292/mega-lok-adalat-settle-60000.html>, archived at <http://perma.cc/62EB-EKSW>; *Lok Adalat*, GUJARAT LEGAL SERV. AUTHORITY, <http://gujarathighcourt.nic.in/gslsa/lokadalat.asp> (last visited Mar. 13, 2014), archived at <http://perma.cc/H29-H93L>.

58. See generally *Scheme for Mobile Legal Services-Cum-Lok Adalat in Maharashtra: Justice at the Doorsteps*, MAHARASHTRA ST. LEGAL SERV. AUTHORITY, [http://legalservices.maharashtra.gov.in/Links/latest/mobile\\_scheme.pdf](http://legalservices.maharashtra.gov.in/Links/latest/mobile_scheme.pdf) (last visited Mar. 13, 2014) [hereinafter *MSLSA, Scheme for Mobile Legal Services*]; see

munity members to watch and engage in the process, with a view toward achieving a non-adversarial, harmonious process that people at the grassroots feel is fair; they also visit inmates “to ensure that there is no violation of Human Rights and to address the problems of inmates for access to justice.”<sup>59</sup> Similarly, the *tantamukta gaon samities* (“TGS”)—headed by the local chief of police and composed of village residents—provide ADR at the village level for petty civil and criminal matters.<sup>60</sup> Criminal or civil procedure codes do not govern these specialized forums; rather, the state encourages them to be creative and entrepreneurial in how they resolve disputes, a flexibility seen as essential for increasing access to justice.<sup>61</sup> TGSs are evaluated for efficiency by the state government, which offers financial rewards for the best-performing villages.<sup>62</sup>

In Maharashtra, researchers conducted a total of 274 interviews in two of the thirty-five districts,<sup>63</sup> including one district court and two *taluka* courts per district, as well as evening courts that seek to expeditiously process specialized civil matters (typically divorce, property, and water disputes).<sup>64</sup> In total, interviewees included 24 court personnel (including judicial clerks, bailiffs, and mediators), 46 judges, 97 lawyers, and 107 litigants. Researchers also conducted ethnographic observations of the district and *taluka* courts, family courts that hear divorce cases, quasi-judicial administrative tribunals,<sup>65</sup> labor courts, revenue courts, and *lok adalats* organized by the MSLSA.<sup>66</sup> Through their interviews, researchers also learned about other ADR forums established by legislation or statutorily created bodies,<sup>67</sup> as well as the *gram nyayalayas*.<sup>68</sup>

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also Legal Services Authorities Act, 1987, No. 39 of 1987, GEN. S. R. & O. 762(E), § 13 (1987), available at <http://lawmin.nic.in/la/subord/nalsa.htm>, archived at <http://www.perma.cc/0xp2qKCDSvh/>.

59. MSLSA, *Scheme for Mobile Legal Services*, *supra* note 58, at 2.

60. The types of cases being dealt with here tend to be minor property matters, small business disputes, revenue cases, and land-use disputes against the government. *Dispute-Free Village*, MAHARASHTRA ST. POLICE DEP'T, <http://www.mahapolice.gov.in/mahapolice/jsp/temp/disputefree.jsp> (last visited Jan. 19, 2014), archived at [www.perma.cc/0oKZzZMsA9N](http://www.perma.cc/0oKZzZMsA9N).

61. See Galanter & Krishnan, *supra* note 9, at 830–31.

62. See *id.* at 804–11; *Dispute-Free Village*, *supra* note 60.

63. See generally *List of Districts in Maharashtra*, CENSUS 2011, <http://www.census2011.co.in/census/state/districtlist/maharashtra.html> (last visited Jan. 12, 2014), archived at <http://www.perma.cc/0DfdD7x4jMK/>.

64. Interview by research team with lawyers, in Maharashtra, India (Oct. 10, 2011); Interview by research team with lawyers, in Maharashtra, India (Nov. 23, 2011).

65. These forums include the Income Tax Appellate Tribunal, Maharashtra Administrative Tribunal, Sales Tax Appellate Tribunal, Consumer Forum, Debt Recovery Tribunal, School Tribunal, University Tribunal, and Charity Commissioner of Maharashtra.

66. See Galanter & Krishnan, *supra* note 9, at 809–28.

67. Interview by research team with judge, in Maharashtra, India (June 28, 2011).

68. Few *gram nyayalayas* have been set up in Maharashtra. *Idea of Rural Courts Not a Hit With States*, ZEE NEWS (Jan. 4, 2011), [http://zeenews.india.com/news/nation/idea-of-rural-courts-not-a-hit-with-states\\_678468.html](http://zeenews.india.com/news/nation/idea-of-rural-courts-not-a-hit-with-states_678468.html), archived at <http://www.perma.cc/8CE8-RSFR>.

In Gujarat, researchers conducted 743 interviews and made ethnographic observations in eleven of thirty-three districts,<sup>69</sup> covering district and *taluka* courts,<sup>70</sup> specialized courts (including labor courts, consumer courts, and family courts),<sup>71</sup> and an administrative revenue tribunal.<sup>72</sup> These interviews included 23 judges, 26 court personnel, 180 lawyers, and 514 litigants. Each district court includes a court of first resort for civil cases involving higher monetary values and a sessions court for more serious criminal cases.<sup>73</sup> Each district is further divided into *talukas*, which vary in number based on the size of the district.<sup>74</sup> Although the state government aspires to have one *taluka* court per *taluka* to hear minor civil and petty criminal matters, to date that has not occurred.<sup>75</sup> Thus, some *talukas* share one *taluka* court, which can mean long journeys for litigants and lawyers.<sup>76</sup> Researchers also studied some less formal ADR forums that include NGOs and other Gujarat Legal Services Authority initiatives.<sup>77</sup>

In Himachal Pradesh, researchers studied one district (out of twelve<sup>78</sup>) and its district court.<sup>79</sup> Within this district, researchers studied five sub-districts—alternatively known as sub-divisions or outlying districts (but not *taluka*, or *tehsil* courts, as they are called in Hindi).<sup>80</sup> Each has a court that hears petty criminal or civil cases.<sup>81</sup> Additionally, researchers studied multiple *tehsil* courts that fall under the jurisdiction of administrative revenue officers and hear matters relating to land, employment, pensions, and social security. Researchers undertook ethnographic observations at three of these.<sup>82</sup> Researchers also conducted interviews at two specialized courts, a labor court and a consumer court. In total, interviewees included ten

69. For more information about these districts, see *Seven New Districts as Gujarat's 1-Day Gift*, DNA INDIA (Aug. 14, 2013, 11:45 IST), <http://www.dnaindia.com/ahmedabad/1874372/report-seven-new-districts-as-gujarat-s-i-day-gift>, archived at [www.perma.cc/0gAhE23eJJoq](http://www.perma.cc/0gAhE23eJJoq).

70. E.g., Interview by research team with district court judge, in Gujarat, India (Jan. 21, 2011).

71. E.g., Interviews by research team with labor court judges, in Gujarat, India (Oct. 19–20, 2011).

72. E.g., Interview by research team with revenue judge, in Gujarat, India (Apr. 25, 2013).

73. *Gujarat District Courts*, GUJARAT JUDICIARY, <http://gujcourts.guj.nic.in/> (last visited Jan. 12, 2014), archived at <http://www.perma.cc/0rtQ7yP6hbJ>.

74. See *id.*

75. *Each Taluka in Gujarat Will Have a Court: Modi*, MBC TV (Mar. 14, 2011), [http://www.mbcvtv.co.in/viewnews.php?news\\_id=89](http://www.mbcvtv.co.in/viewnews.php?news_id=89), archived at <http://www.perma.cc/0H5ELLMdHz/>.

76. *Id.*; e.g., Interview by research team with litigant, in Himachal Pradesh, India (Feb. 25, 2012).

77. See sources cited *infra* notes 225–26 and accompanying text.

78. *List of Districts of Himachal Pradesh*, CENSUS 2011, <http://www.census2011.co.in/census/state/districtlist/himachal+pradesh.html> (last visited on Jan. 12, 2014), archived at <http://www.perma.cc/0tmZPSwG9K/>.

79. *See District Courts of Himachal Pradesh*, HIGH CT. HIMACHAL PRADESH, <http://hphighcourt.nic.in/districtcourts/> (last visited Jan. 12, 2014), archived at <http://perma.cc/UW8-E8SQ>.

80. E.g., Interview by research team with district and sub-district judges, in Himachal Pradesh, India (Apr. 28, 2013).

81. E.g., *id.*

82. Adding to the complexity, the district also has separate sub-*tehsils* (although there are no sub-*tehsil* courts) and several hundred *panchayats* (local village governmental units) spread throughout the blocks.



judges, eighty-four lawyers, fifty litigants, and fifteen court personnel. Overall, respondents cited land disputes as the most common type of case (e.g., ownership disputes,<sup>83</sup> landlord-tenant disputes,<sup>84</sup> or the government seeking to regulate private property<sup>85</sup>).

### III. RESEARCH FINDINGS

Researchers found that the lower tier is characterized by poor court infrastructure, heavily backlogged dockets, excessive continuances, an insufficient quantity of judges, and inadequate legal training.<sup>86</sup>

#### A. Infrastructure

Infrastructure within the district and sub-district courts is poor. There is a lack of standardization in digital files, and physical files are frequently haphazardly catalogued in cramped storage spaces.<sup>87</sup> Furthermore, electrical power is irregular, causing lights and fans to shut down for extended periods of time.<sup>88</sup> Although judges, some lawyers, and courtroom staff may have access to safe water, the same is not true for most litigants who travel great distances to the courts.<sup>89</sup> Most courts and the surrounding areas have inadequate access to food, and transportation to and from the court site is onerous and not always available.<sup>90</sup> Latrines go unclean, and there are insufficient usable toilets for women.<sup>91</sup> Judges and lawyers both complain of lack of office space, computers, and access to libraries.<sup>92</sup> Internet connections are weak or nonexistent, and legal research tools (ranging from web databases to the most basic case reporters and legal periodicals) are largely unavailable.<sup>93</sup> While some judges in these regions were satisfied with courtroom

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83. *E.g.*, Interview by research team with litigant, in Himachal Pradesh, India (Feb. 25, 2012).

84. *E.g.*, Interview by research team with a tenant, in Himachal Pradesh, India (Oct. 18, 2011).

85. *E.g.*, Interview by research team with litigant, in Maharashtra, India (Feb. 15, 2012).

86. *See generally* ROBERT S. MOOG, *WHOSE INTERESTS ARE SUPREME? ORGANIZATIONAL POLITICS IN THE CIVIL COURTS IN INDIA* 1–16 (1997); Galanter & Krishnan, *supra* note 9; Krishnan & Kumar, *supra* note 43; Jayanth K. Krishnan, *Lawyering for a Cause and Experiences from Abroad*, 94 CALIF. L. REV. 575 (2006); Interview by research team with district and sub-district judges, in Himachal Pradesh, India (Apr. 28, 2013).

87. *E.g.*, Interview by research team with judge, in Himachal Pradesh, India (Apr. 28, 2013); Interview by research team with judge, in Himachal Pradesh, India (July 30, 2012).

88. *E.g.*, interviews cited *supra* note 87.

89. *E.g.*, Interview by research team with judge, in Himachal Pradesh, India (July 30, 2012); Interview by research team with litigant, in Himachal Pradesh, India (Feb. 25, 2012); Interview by research team with litigant, in Himachal Pradesh, India (Oct. 31, 2011).

90. *E.g.*, Interview by research team with litigant, in Maharashtra, India (Mar. 16, 2012); Interview by research team with litigant, in Himachal Pradesh, India (Oct. 14, 2011).

91. *E.g.*, Interview by research team with judge, in Himachal Pradesh, India (July 30, 2012).

92. *E.g.*, Interview by research team with prosecutor, in Himachal Pradesh, India (Apr. 10, 2012); Interview by research team with lawyer, in Maharashtra, India (Oct. 13, 2011); Interview by research team with judge, in Maharashtra, India (Apr. 29, 2011).

93. *E.g.*, Interview by research team with prosecutor, in Himachal Pradesh, India (June 28, 2012); Interview by research team with prosecutor, in Himachal Pradesh, India (Apr. 10, 2012).

infrastructure improvements resulting from the Shetty Commission in the 1990s, noting that they had been provided laptop computers and better internet connections over the years,<sup>94</sup> some still lacked sufficient staff, internet, computers, and libraries.<sup>95</sup>

For quasi-judicial administrative forums and alternative specialized bodies, the quality of infrastructure varies depending on location and the level of government support. For example, some specialized body proceedings are held in the district or sub-district courts themselves—sometimes on the weekends when there is less crowding—whereas others take place in a separate facility.<sup>96</sup>

### B. Staffing

Court staffing is inadequate at all levels. The lack of responsive, honest, and competent courtroom staff to handle simple matters like scheduling frequently leads to even greater confusion, inefficiencies, and delays.<sup>97</sup> Courts may not provide adequate notice of a court date,<sup>98</sup> and may allot insufficient time for litigants to present their matter.<sup>99</sup> A Himachali litigant challenging a local company's eviction efforts described traveling an extended distance from his village to the court several times because of incorrect information given to him by court staff.<sup>100</sup> On at least three occasions, he found that multiple parties had been scheduled to appear at the same time.<sup>101</sup> Court personnel were indifferent to his plight and the ten-

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94. Interview by research team with judge, in Himachal Pradesh, India (Feb. 9, 2012) (“When we joined the service, we used to live in rented accommodation. . . . If you look at the residences provided [to us now], it has four bedrooms [and it is a] double-storied structure. There is no problem.”); Interview by research team with judge, in Himachal Pradesh, India (Jan. 28, 2012) (“The entire infrastructure, buildings, internet, computers, etc. are according to our needs and sufficient.”); Interview by research team with judge, in Himachal Pradesh, India (Jan. 23, 2012) (“I am fully satisfied with the facilities which have been given to us.”). In the late 1990s, the Shetty Commission increased the salaries and room, living, and board stipends across the country for lower-tier judges. See *generally* All India Judges Ass’n v. Union of India (2002) 4 S.C.C. 247, Decision on Interlocutory Application 279 of 2010 in Writ Petition 1022 of 1989, available at [http://barandbench.com/userfiles/files/File/infrastructure\\_in\\_subordinate\\_judiciary.pdf](http://barandbench.com/userfiles/files/File/infrastructure_in_subordinate_judiciary.pdf), archived at <http://www.perma.cc/04JGij5RYxB>; see also FIRST NAT’L JUDICIAL PAY COMM’N, SHETTY COMMISSION REPORT § 15.87, available at [http://biharjudicialserviceassociation.in/Docs/SHETTY\\_COMMISSION\\_REPORT\\_\(FULL\\_TEXT\\_\).pdf](http://biharjudicialserviceassociation.in/Docs/SHETTY_COMMISSION_REPORT_(FULL_TEXT_).pdf), archived at <http://perma.cc/4JFQ-P3WC> (citing All India Judges Ass’n v. Union of India, (1992) 1 S.C.C. 119).

95. Interview by research team with judges, in Himachal Pradesh, India (Feb. 4, 2012); Interview by research team with judges, in Himachal Pradesh, India (Dec. 15, 2011).

96. See Galanter & Krishnan, *supra* note 9, at 799, 810, 816–17, 821; MOOG, *supra* note 86, at 135–38.

97. E.g., Interview by research team with litigant, in Himachal Pradesh, India (Feb. 25, 2012).

98. Interview by research team with lawyer, in Maharashtra, India (Apr. 11, 2012) (“[Case] files are never in the court [on time] according to the cause list . . . . But the reply [from the court clerk] is: ‘We will put it after lunchtime as we already have so much work to do.’ . . . Maybe he is really busy but it happens many times. It is his duty . . . not mine as an advocate. The parties then suffer and they have to sit in a court for whole day.”).

99. E.g., *id.*

100. Interview by research team with litigant, in Himachal Pradesh, India (Feb. 25, 2012).

101. *Id.*

year delay in resolving his case.<sup>102</sup> The litigant had no alternative to the courts because neither *panchayat* officials nor the police had been willing to hear his complaint.<sup>103</sup>

Judges in district, sub-district, and specialized courts complain of extremely congested dockets exacerbated by the high number of judicial vacancies that go unaddressed.<sup>104</sup> Judges consistently stated that delays in the specialized bodies and administrative forums hampered the delivery of justice.<sup>105</sup> As one specialized court judge remarked, “If a judicial officer is absent on a particular day, then the file of that day gets delayed for at least two to three months.”<sup>106</sup>

Judges expressed frustration about frequent jurisdiction transfers, noting that the system of bi- or triennial transfers should be reformed, if not eliminated altogether, because it contributes to a lack of stability in both the courts and personal lives of judges.<sup>107</sup> Few judges have the opportunity to hear a case from start to finish and thus lack complete context to fully appreciate how a case has developed.<sup>108</sup> A Judicial Magistrate First Class (“JMFC”) judge who hears both petty civil and criminal matters at the *taluka* level in Maharashtra stated that she could only recall presiding over two to three cases from beginning to end, and those were all criminal cases.<sup>109</sup> Frequent transfers prevent judges from establishing roots in communities, which means they lack incentives to remain cognizant of the broader, longer-term community impacts of any given judicial opinion.<sup>110</sup> Judges also complain that transfers place an enormous strain on a judge’s family, and courts are not equipped to continuously adjust to the demands and needs of different judges who have different work habits, expectations, and skill levels.<sup>111</sup>

102. *Id.*

103. *Id.*

104. *E.g.*, Interview by research team with senior judge, in Maharashtra, India (May 16, 2011) (“Delays are caused because of the disparity in proportion of judges to the large flow of cases in the criminal courts. According to the [Judicial Officer] Manual, there should be a maximum of five hundred cases on the file of each judge. But we are dealing with almost five thousand cases on each of our files.”); Interview by research team with district court judge, in Gujarat, India (Jan. 21, 2011).

105. *E.g.*, Interview by research team with judges, in Himachal Pradesh, India (Jan. 31, 2012); Interview by research team with judges, in Gujarat, India (July 10, 2011).

106. Interview by research team with judge, in Himachal Pradesh, India (Jan. 31, 2012).

107. *E.g.*, Interview by research team with high court judge, in Gujarat, India (Jan. 21, 2011); Interview by research team with district and sub-district judges, in Himachal Pradesh, India (Apr. 28, 2013); *see also* MOOG, *supra* note 86, at 66–69 (discussing the problems of judicial recruitment).

108. Interview by research team with high court judge, in Gujarat, India (Jan. 21, 2011).

109. Interviews by research team with judges, in Maharashtra, India (Apr. 21, 2011) (“The only time I have seen a civil case filed before me also end before me is when it has been withdrawn.”).

110. Interview by research team with district and sub-district judges, in Himachal Pradesh, India (Apr. 28, 2013).

111. Interview by research team with high court judge, in Gujarat, India (Jan. 21, 2011).

### C. Judicial Training & Legal Awareness

Clients are often completely unfamiliar with the legal process and need lawyers to spend enormous amounts of time educating them about what can and cannot be done through litigation.<sup>112</sup> Because very little legal aid is provided by either the bar or the state, many judges see themselves as simultaneously filling the role of educator, representative, and adjudicator for the poor.<sup>113</sup> Yet adjudicators in specialized forums lack adequate training in the relevant specialized areas such as labor, consumer protection, land, and social security.<sup>114</sup> Far too often, the training they receive is general and conducted by members of the upper judiciary who also lack specialization in these areas of the law, with some training judges merely reading the relevant statutes.<sup>115</sup> In addition, private lawyers noted that many laws are outdated and inapplicable to everyday life in India.<sup>116</sup>

Many judges in the district and sub-district courts find themselves presiding over a wide range of cases, many of which they have little to no familiarity with, and therefore may not feel comfortable making final decisions.<sup>117</sup> In part, this is caused by how district court judges are appointed, which can follow two different paths. In one path, a lawyer can be appointed to the bench after practicing for a certain period of time.<sup>118</sup> In the three focus states, however, it is more common for judges to come to the lower-court benches through the second path: taking a series of civil service exams following their law school graduation.<sup>119</sup> According to judges, a major drawback of the latter approach is that they often preside over cases involving seasoned lawyers who tend to know more about the law than the judges do, making them feel insecure, cautious, and unwilling to take a

112. Interview by research team with lawyers, in Himachal Pradesh, India (Oct. 1, 2011).

113. Interview by research team with judges, in Himachal Pradesh, India (Feb. 4, 2012); Interview by research team with judges, in Himachal Pradesh, India (Dec. 15, 2011); Interview by research team with judges, in Gujarat, India (Jan. 21, 2011).

114. *E.g.*, Interview by research team with judges, in Himachal Pradesh, India (Apr. 28, 2013); Interview by research team with judges, in Himachal Pradesh, India (Sept. 1, 2011); Interview by research team with judges, in Gujarat, India (Jan. 21, 2011).

115. Interview by research team with judges, in Himachal Pradesh, India (Sept. 1, 2011).

116. Interview by research team with lawyers, in Himachal Pradesh, India (Dec. 27, 2011) (“The laws are made by the bureaucrats who do not know the reality of the people who actually need these laws.”).

117. Interviews by research team with judges, in Maharashtra, India (Apr. 21, 2011) (“Every judge in the lower court has all kinds of cases before him—civil, criminal, company matters, family disputes, etc. Unlike in the High Court, there isn’t an assignment of judges to a particular type of dispute. Therefore it becomes difficult to focus on and understand the various aspects of a particular law. If there was more planning involved in the assignment of cases . . . maybe we could see more number of cases from start to end.”).

118. *See generally* LAW COMM’N OF INDIA, ONE HUNDRED EIGHTEENTH REPORT ON METHOD OF APPOINTMENTS TO SUBORDINATE COURTS/SUBORDINATE JUDICIARY (1986); Arvind Kumar, *Short Essay on the Subordinate Courts in India*, PRESERVE ARTICLES, <http://www.preservearticles.com/2011111216843/short-essay-on-the-subordinate-courts-of-india.html> (last visited Jan. 18, 2014), archived at <http://perma.cc/MH2E-HMFD>.

119. *See* sources cited *supra* note 118; *see also* MOOG, *supra* note 86, at 65–70.

more assertive lead during the case.<sup>120</sup> Although younger lawyers frequently look to judges for advice and guidance on questions of law, without a practice background, judges may not be able to provide assistance.<sup>121</sup> As a result of this dynamic, judges generally either defer to the veteran lawyer's arguments, defer to the government if it is one of the parties, or strategically issue adjournments to buy themselves more time, especially if both sides have a veteran lawyer making persuasive arguments or both sides have young lawyers whose questions they are unable to answer.<sup>122</sup>

Lawyers and judges expressed concern that members of TGSs in Maharashtra seemed to have little understanding of their mission or awareness of how the proceedings ought to be conducted.<sup>123</sup> A junior lawyer in Maharashtra even complained of illiteracy among TGS committee members.<sup>124</sup> A veteran lawyer stated that these forums frequently entertain cases and facilitate compromises that they are not "even empowered to hear, [and] as a result the compromise has not a legal basis."<sup>125</sup>

The quality of legal education and lawyering at the grassroots level must be improved. Books are outdated, English (the formal language of legal precedents from the higher courts) is not emphasized, university infrastructure is abysmal, and teacher absenteeism is high.<sup>126</sup> The curriculum is based on learning statutes and regulations in a rote manner.<sup>127</sup> Especially in the more rural law colleges, there is no opportunity to educate students through clinics or to engage them in critical analysis of the daily problems they are likely to encounter in practice.<sup>128</sup> In most law schools, the values of helping the poor, promoting professional ethics and community responsibility, and following the Gandhian maxim of "never let[ting] my profession stand in the way of my public service" are sadly absent.<sup>129</sup>

Lack of adequate training discourages judges from being proactive or aggressive in their decision making, instead preferring to rule on matters in as narrow and technical a fashion as possible.<sup>130</sup> Judges themselves acknowledge the problem that they are often not equipped with the full array of necessary skills to adjudicate the cases that come before them; a chasm ex-

120. Interview by research team with judge, in Himachal Pradesh, India (Apr. 28, 2013).

121. *E.g., id.*

122. Interview by research team with judge, in Himachal Pradesh, India (Sept. 1, 2011); *see also* MOOG, *supra* note 86, at 25–26, 78–87.

123. *E.g.,* Interview by research team with judge, in Maharashtra, India (June 28, 2011); Interview by research team with judge, in Maharashtra, India (Apr. 27, 2011).

124. Interview by research team with lawyers, in Maharashtra, India (June 7, 2012).

125. *Id.*

126. *See generally* Jayanth K. Krishnan, *Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India*, 46 *AM. J. LEGAL HIST.*, 447, 494–98 (2004); C. Raj Kumar, *Legal Education, Globalization and Institutional Excellence: Challenges for the Rule of Law and Access to Justice in India*, 20 *IND. J. GLOBAL LEGAL STUD.*, 221 (2013).

127. *See* sources cited *supra* note 126.

128. *See id.*

129. M.K. Gandhi, *How to Spiritualize the Profession*, *YOUNG INDIA*, Dec. 22, 1927, at 428.

130. *E.g.,* Interview by research team with judge, in Himachal Pradesh, India (Sept. 1, 2011).

ists between what is being taught and the everyday realities on the ground.<sup>131</sup> Notably, judges receive little training on socioeconomic rights and concede that they often do not know how to decide cases involving them.<sup>132</sup>

Notably, litigants also cited their own illiteracy, which they were self-conscious about, as a source of delay.<sup>133</sup> There is tremendous confusion over how to fill out legal paperwork,<sup>134</sup> as well as which of many forums to file a complaint in,<sup>135</sup> resulting in litigants often being redirected multiple times.<sup>136</sup> A young woman in Maharashtra whose mother accompanied her for moral support explained, “I don’t know anything about law and the process of court hence I do not have the courage to face the process . . . all by myself.”<sup>137</sup> Another Maharashtrian who only spoke Marathi remarked, “Unfortunately, all the laws are printed in English, so I cannot even access the bare laws in Marathi so that I can understand a little of what the lawyers and judges are doing in my case.”<sup>138</sup> An indigenous litigant whose matter had been pending for over twenty-five years in a *taluka* court recounted:

Most part of the court’s time has been spent on [gathering] evidence. The judges ask for several documents. [But] we are illiterate and ignorant—on most occasions we do not know what documents the judge is asking for. All we learn is that it takes very long to acquire them.<sup>139</sup>

The lack of literacy and formal schooling causes litigants to feel insecure and lack confidence in the courts, as it is difficult for them to even understand village-based legal awareness campaigns.<sup>140</sup> Illiteracy disempowers both litigants and their lawyers, leading to resentment and suspicion stemming from litigants’ lack of control and lawyers’ frustration at litigants’ inability to engage.<sup>141</sup>

131. *E.g.*, Interview by research team with district and sub-district judges, in Himachal Pradesh, India (Apr. 28, 2013); Interview by research team with judges, in Himachal Pradesh, India (Sept. 1, 2011); see generally MOOG, *supra* note 86.

132. See sources cited *supra* note 131.

133. *E.g.*, Interview by research team with litigant, in Maharashtra, India (Mar. 22, 2012); Interview by research team with litigants, in Maharashtra, India (Feb. 19, 2012); Interview by research team with litigant, in Maharashtra, India (June 25, 2011); Interview by research team with litigant, in Maharashtra, India (June 15, 2011).

134. *E.g.*, Interview by research team with litigants, in Himachal Pradesh, India (Oct. 11, 2011).

135. *E.g.*, *id.*

136. *E.g.*, *id.*

137. Interview by research team with litigant, in Maharashtra, India (June 15, 2011).

138. Interview by research team with litigant, in Maharashtra, India (June 11, 2012).

139. Interview by research team with litigant, in Maharashtra, India (June 25, 2011).

140. *E.g.*, Interview by research team with litigants, in Maharashtra, India (Feb. 19, 2012); Interview by research team with litigant, in Maharashtra, India (June 15, 2011).

141. *E.g.*, interviews cited *supra* note 140.

#### D. *Costs and Continuances*

*Taluka* judges in Maharashtra explicitly rejected the notion that the courts did not offer a place for litigants to seek legal assistance, explaining that because courts are packed with lawyers looking for work, costs are low for would-be litigants.<sup>142</sup> However, indigent litigants cited costs as a major barrier to accessing the courts.<sup>143</sup> Frequently, additional fees emerge as litigation progresses, such as court fees, photocopying fees, file-retrieval fees, scheduling or calendar fees for court appearances, and “refresher” fees contingent on the length of the case, as well as unpredictable extralegal fees.<sup>144</sup> A repeated, bitter complaint from litigants was that lawyers routinely charge fees that seem quite arbitrary.<sup>145</sup> When litigants were unable to remit a demanded fee, work on their behalf stopped, and even where payments were properly made, cases continued for excessively long periods of time.<sup>146</sup> The lack of a systematic, transparent fee collection structure further enhances negative perceptions of lawyers.<sup>147</sup>

Many litigants cannot afford to forego even a day’s wages to appear in court.<sup>148</sup> A Himachali litigant explained, “We earn 3,000 rupees [USD 60] in a month, and our [initial] court date costs between 500 [USD 10] to 1,000 rupees [USD 20],” adding that they do not have the connections to get reduced fees.<sup>149</sup> Another litigant summarized the experiences of many:

During court days, one has to be sitting at court for the whole day. We wait for our number to be called and no one knows when that will be. We cannot go to eat or go to the washroom as our case may be called at any moment. We can’t even [go to] drink water just in case we will be called. There are no facilities for the poor people in the court and it is only . . . the rich people [who can afford to deal with this system].<sup>150</sup>

Continuances play a large role in increasing costs and further delaying access to justice. The presence of this interlocutory appeal system dates back to British times, whereby the Crown had the opportunity to petition any

142. *E.g.*, Interview by research team with judge, in Maharashtra, India (Apr. 25, 2011) (“The judiciary is an open place. I think it is most accessible. The Indian judiciary hears petitions of a person even if he has filed it on behalf of his neighbor.”); Interview by research team with judge, in Maharashtra, India (Apr. 29, 2011); *see also* MOOG, *supra* note 86, at 78–84.

143. *E.g.*, Interview by research team with litigant, in Maharashtra, India (Mar. 22, 2012); Interview by research team with litigant, in Maharashtra, India (June 15, 2011).

144. Interviews cited *supra* note 143.

145. *E.g.*, Interview by research team with revenue judge, in Gujarat, India (Apr. 25, 2013); Interview by research team with litigants, in Maharashtra, India (June 15, 2011).

146. *E.g.*, Interview by research team with litigants, in Maharashtra, India (Feb. 19, 2012); Interview by research team with litigants, in Maharashtra, India (June 15, 2011).

147. *E.g.*, interviews cited *supra* note 146.

148. Interview by research team with litigants, in Himachal Pradesh, India (July 3, 2012).

149. *Id.*

150. Interview by research team with litigants, in Himachal Pradesh, India (Apr. 4, 2012).

ruling that it felt was wrongly decided all the way to the Privy Council in London.<sup>151</sup> This process served as a safeguard against adverse decisions made by nationals who staffed the lower courts in colonial India.<sup>152</sup> This system carried over to independent India, where it has become a perverse incentive for “delay lawyering.”<sup>153</sup>

Some judges have responded to exorbitant delays by restricting the number of continuances they permit per case.<sup>154</sup> Other judges, however, noted that they repeatedly grant continuances because of intense pressure from parties and lawyers not to dismiss the matters outright.<sup>155</sup> This pressure mattered to the judges because, as they remarked, they too are part of the social fabric of the community, even though their jobs are already relatively isolated, lonely, and lacking in camaraderie.<sup>156</sup> Government lawyers, however, complained that this leads to delays beyond their control, particularly in cases where the government is the defendant.<sup>157</sup> While politicians, judges, clients, and even the bar are well aware of delay tactics in the lower tier,<sup>158</sup> legislators—who face a powerful bar—have been unable to amend the procedural codes enough to curtail and sanction those lawyers who abuse the system.

### E. Gender and Caste Discrimination

Female litigants and lawyers face similar biases as they navigate the different lower-tier forums.<sup>159</sup> Both groups endure the indignities of having to

151. See Jayanth K. Krishnan and Viprav Sharma, *Exceptional or Not? An Examination of India's Special Courts in the National Security Context*, in *GUANTANAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE AND POLICY PERSPECTIVE* 283, 284–85, 287 (O. Gross & F. Ni Aolain eds., 2013); see also Marc Galanter, *When Legal Worlds Collide: Reflections on Bhopal, the Good Lawyer, and the American Law School*, 36 J. LEGAL EDUC. 292, 296–97 (1986); Baar, *supra* note 16, at 144.

152. See Baar, *supra* note 16, at 144; Galanter, *supra* note 151.

153. See, e.g., MOOG, *supra* note 86, at 73–76; Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS 57, 73 (2010).

154. E.g., Interview by research team with judge, in Maharashtra, India (Sept. 15, 2011) (blaming the lawyers for perpetuating this problem by constantly asking for continuances and saying he “merely dismiss[es] the case if the advocate seeks more than three adjournments”); Interview by research team with senior judge, in Maharashtra, India (May 16, 2011) (“I try [to give] as few adjournments [continuances] as possible. When a matter is at the stage of final hearing, I give a maximum of three adjournments, each for not more than a week.”); Interview by research team with district court judge, in Gujarat, India (Jan. 21, 2011).

155. E.g., interviews cited *supra* note 154.

156. E.g., *id.*

157. E.g., *id.*; Interview by research team with lawyers, in Himachal Pradesh, India (June 28, 2012); Interview by research team with prosecutors, in Himachal Pradesh, India (Apr. 29, 2012); Interview by research team with prosecutors, in Himachal Pradesh, India (Apr. 10, 2012).

158. See, e.g., MOOG, *supra* note 86, at 73–76; Galanter & Krishnan, *supra* note 9, at 811–12; Krishnan, *supra* note 153.

159. Interview by research team with judges, in Himachal Pradesh, India (Dec. 15, 2012); Interview by research team with litigant, in Maharashtra, India (June 14, 2012); Interview by research team with litigant, in Maharashtra, India (June 13, 2012); Interview by research team with lawyers and judges, in Maharashtra, India (Nov. 23, 2011); Interview by research team with lawyers and judges, in Himachal Pradesh, India (Nov. 9, 2011); Interview by research team with lawyers and judges, in



work in environments where basic human infrastructural needs are unmet: lack of available and clean washrooms, absence of security to prevent and protect them from routine harassment and intimidation, unavailability of safe transportation to bring them to and from the courts, lack of adequate seating in (male-dominated) waiting areas, and gender-based verbal prejudice are just a handful of reprehensible conditions that require remedies.<sup>160</sup>

Female litigants regularly encounter poor treatment from their own counsel, opposing counsel, and courtroom staff,<sup>161</sup> which can cause them to feel marginalized, unassisted, and isolated.<sup>162</sup> The few female advocates that work within the bar are clearly aware of their minority status.<sup>163</sup> They regularly receive short shrift from courtroom staff, making it even more difficult to schedule court dates for their clients.<sup>164</sup> Women are rarely in positions of power within bar associations,<sup>165</sup> can be taunted and bullied by their male colleagues, and are often literally shoved aside in chaotic courts.<sup>166</sup> The female lawyers observed in this study had to proactively assert themselves to survive in an extremely male-dominated environment. In addition, the small number of female judges only further makes female lawyers feel alone within what is clearly a difficult workplace culture.<sup>167</sup>

Several lawyers reported indirect caste discrimination against themselves or their clients in the specialized courts.<sup>168</sup> This might include opposing lawyers who fail to act in good faith during negotiations or opposing clients who make subtly derogatory comments during out-of-court dealings.<sup>169</sup> Courtroom staff workers may also be rude, condescending, and purposely inefficient in the scheduling and overall handling of claims made by low-caste litigants or their lawyers.<sup>170</sup>

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Himachal Pradesh, India (Nov. 2, 2011); Interview by research team with litigant, in Himachal Pradesh, India (Oct. 31, 2011); Interview by research team with litigant, in Himachal Pradesh, India (Oct. 18, 2011); Interview by research team with lawyers and judges, in Maharashtra, India (Oct. 10, 2011).

160. Interviews cited *supra* note 159.

161. *Id.*

162. *E.g.*, Interview by research team with litigant, in Maharashtra, India (June 14, 2012).

163. *E.g.*, Interview by research team with lawyers and judges, in Himachal Pradesh, India (Nov. 9, 2011); Interview by research team with lawyers and judges, in Himachal Pradesh, India (Nov. 2, 2011).

164. *E.g.*, interviews cited *supra* note 163.

165. *E.g.*, *id.*

166. *E.g.*, *id.*

167. *E.g.*, *id.*

168. Interview by research team with lawyer, in Himachal Pradesh, India (Dec. 12, 2011); Interview by research team with labor court lawyers, in Gujarat, India (Dec. 1, 2011); Interview by research team with lawyer, in Maharashtra, India (Oct. 14, 2011).

169. Interview by research team with lawyers, in Himachal Pradesh, India (Nov. 11, 2011).

170. *Id.*; Interview by research team with lawyers, in Himachal Pradesh, India (Nov. 4, 2011).

### F. Power Imbalances

Specialized court judges in Maharashtra expressed hesitancy regarding potentially unfettered judicial power due to great power imbalances between parties in these forums.<sup>171</sup> In the absence of formal due process rules, disadvantaged litigants are especially vulnerable to biases and power politics.<sup>172</sup> The government is a party in many cases concerning water and electricity, and judges may be inclined to rule in its favor in the absence of formal rules or subject-matter training.<sup>173</sup> The absence of procedural protocols contributed to a lack of seriousness by the parties.<sup>174</sup> Because ad hoc sessions take place without predictability or regularity, and adjudicators appear weak in the absence of formal rules, opposing parties may resist requests to appear, thwarting litigants' efforts to make use of institutions such as TGSs.<sup>175</sup> Moreover, selection of judges in these forums can be demographically skewed and based more on the political preferences of the convenor than on merit or experience.<sup>176</sup> Some worry about perverse incentives resulting from the system of government rewards for forums like TGSs: one *taluka* judge who tried to work with a set of ADR forums reported that they enhanced their statistics by reporting settlements for cases lacking official records to receive financial rewards from the state government or attract media attention.<sup>177</sup>

Judges and lawyers viewed the administrative, quasi-judicial forums studied in Maharashtra as being characterized by political influence, lax practices, and chaotic proceedings with slanted outcomes.<sup>178</sup> Interviewees viewed overburdened revenue officers as particularly ineffective and subject

171. *E.g.*, Interviews by research team with judges, in Maharashtra, India (Oct. 10–11, 2011); Interview by research team with judge, in Maharashtra, India (June 28, 2011) (“This informality in the system may itself be the reason for their failure. Where there are no rules of procedures, there are chances of power politics and undue biases.”).

172. *E.g.*, Interviews by research team with judges, in Maharashtra, India (June 28, 2011).

173. Interviews by research team with judges, in Maharashtra, India (June 28, 2011) (noting that judges “are more likely to pass orders in favor of the government bodies,” mainly because these forums “don’t have procedures, they don’t have [adequate opposing] lawyers, and the presiding officers [judges] have no knowledge of the law”).

174. *E.g.*, Interview by research team with judge, in Maharashtra, India (Mar. 14, 2012).

175. Interview by research team with litigant, in Maharashtra, India (Mar. 14, 2012) (“The Committee made all efforts to convince the opposite party to settle the matter at the village level itself; but the opposite party was unwilling and avoided attending the meetings of the Committee.”).

176. *See* HAYDEN, *supra* note 25. Sometimes the relevant statute will define how judges are selected; alternatively, judges may be sitting or retired district or *taluka* court judges, civil servants, or new judicial training graduates. Galanter & Krishnan, *supra* note 9, at 811–12; Interview by research team with judge, in Maharashtra, India (Mar. 14, 2012).

177. Interview by research team with judge, in Maharashtra, India (Apr. 21, 2011) (noting that this judge had even sought to engage “these committees as part of . . . a legal aid program, but . . . received no cooperation from them”).

178. *E.g.*, Interview by research team with lawyers, judges, and litigants, in Maharashtra, India (Nov. 23, 2011); Interview by research team with lawyers, judges, and litigants, in Maharashtra, India (Nov. 22, 2011); Interview by research team with lawyers, judges, and litigants, in Maharashtra, India (Oct. 14, 2011); Interview by research team with lawyers, judges, and litigants, in Maharashtra, India (Sept. 14, 2011); Interview by research team with *taluka* judge, in Maharashtra, India (May 25, 2011);

to pro-government bias.<sup>179</sup> Similarly, neither lawyers nor judges were sanguine about the *gram nyayalayas* or TGSs in Maharashtra.<sup>180</sup> These forums, which are filled with *pro se* litigants, are seen as having significant power imbalances between the parties.<sup>181</sup> Additionally, the court environment is heavily male-dominated, with security officers doing little to stop verbal and sometimes physical harassment of females.<sup>182</sup>

### G. *Intimidation and Corruption*

Although judges staunchly defended the integrity of the judicial system, some stated—as did government lawyers—that corrupt practices abound.<sup>183</sup> Intimidation is widespread; witnesses are frequently threatened or bribed by defendants, and judges report that some unscrupulous members of the bar perpetuate these practices by taking additional fees to coerce a settlement.<sup>184</sup> Prosecutors—who are often confronted with state witnesses who can turn hostile out of fear of retribution—worried about inadequate security, particularly during criminal trials in the district courts.<sup>185</sup> As part of the intimidation process, associates of criminal defendants often lurk around the courthouses or sit in the gallery during the trial itself.<sup>186</sup> This type of threatening behavior faces little deterrence from court security, and prosecutors' demands for enhanced home security are routinely ignored.<sup>187</sup> Similarly, defense lawyers representing accused criminals felt as though they are not safe from harassment by the police patrolling the court grounds.<sup>188</sup> These lawyers saw court and jail police engaging in intimidating behavior toward defendants, ranging from verbal threats to physical

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Interview by research team with lawyer, in Maharashtra, India (Mar. 15, 2011); Interview by research team with lawyer, in Maharashtra, India (Feb. 23, 2011).

179. *E.g.*, Interview by research team with lawyers and judges, in Maharashtra, India (May 2, 2011) (“[R]evenue officers . . . at the *taluka* level . . . have a variety of duties, from supervising schemes [programs] to maintaining records. There is a lot of burden of them. How can such a man have the time and energy to deliver justice? Moreover, they are controlled by political leaders, so the probability of exercising bias is larger.”); Interview by research team with *taluka* judge, in Maharashtra, India (May 25, 2011).

180. *E.g.*, Interview by research team with lawyers and judges, in Maharashtra, India (May 2, 2011); Interview by research team with lawyers, in Maharashtra, India (June 7, 2012).

181. Interviews cited *supra* note 180.

182. *E.g.*, Interview by research team with judge, in Himachal Pradesh, India (July 30, 2012).

183. *E.g.*, Interview by research team with lawyer, in Himachal Pradesh, India (Dec. 7, 2011); Interviews by research team with labor court judges, in Gujarat, India (Oct. 19–20, 2011); Interview by research team with lawyer, in Gujarat, India (Oct. 17, 2011).

184. Interview by research team with judges, in Himachal Pradesh, India (Feb. 4, 2012); Interview by research team with judges, in Himachal Pradesh, India (Dec. 15, 2011); Interview by research team with judges, in Gujarat, India (Jan. 21, 2011).

185. *E.g.*, Interview by research team with prosecutor, in Himachal Pradesh, India (June 28, 2012).

186. *Id.*

187. *Id.* (“The [defendant] party may harm us anywhere . . . . Our private residence is far away from the office and to reach our home we have to walk. Who knows who will attack us?”).

188. *E.g.*, Interview by research team with defense lawyer, in Himachal Pradesh, India (Dec. 6, 2011).

assaults.<sup>189</sup> Some defense lawyers interpreted this as putting them on notice that they too are being watched and are at risk if they challenge the interests of government authorities.<sup>190</sup> Similarly, some judges viewed both *gram nyayalayas* and *lok adalats* in Maharashtra as extremely unsafe environments for presiding adjudicators, who are under significant pressure to rule according to popular appeal.<sup>191</sup>

While corruption was not necessarily seen as a problem by litigants vis-à-vis lower-tier adjudicators, many litigants—including approximately 80% of litigants interviewed in Gujarat—said that they had been asked to pay a bribe by lower-level staff at some point during an administrative proceeding.<sup>192</sup> Litigants in Maharashtra reported difficulties acquiring required documentation, scheduling hearings, or getting status updates without paying an extralegal fee.<sup>193</sup> A litigant in Himachal Pradesh seeking to schedule an administrative hearing regarding dam construction affecting his residential property explained his experience:

We asked the reader [if] there were two possible dates within a month . . . . The reader said that it was possible if they were provided with some service. . . . [W]hen we offered some refreshments to him, such as eggs or liquor, then we got the two dates within the month.<sup>194</sup>

Moreover, both judges and prosecutors expressed concern about lawyers who engage in subterfuge, deliberately delaying proceedings or intentionally providing inadequate information to litigants.<sup>195</sup> Judges who traveled to villages to assist in legal awareness campaigns routinely found lawyers attempting to subvert their mission.<sup>196</sup> Judges noted that appearance-based fee structures serve as a perverse incentive to keep cases in the system—a practice that judges repeatedly stated they had a legal and ethical obligation to challenge.<sup>197</sup>

189. *E.g., id.*

190. *Id.*; Interview by research team with lawyers, in Maharashtra, India (Nov. 10, 2011).

191. Interview by research team with judge, in Maharashtra, India (May 2, 2011) (“At the *gram nyayalaya*, the judge sits without any protection before society at large. He is bound to feel pressurized in this scenario and take a decision of popular appeal.”).

192. All interviews conducted with litigants in Gujarat, India; *e.g.*, Interview by research team with litigants, in Maharashtra, India (June 13, 2012); Interview by research team with litigant, in Himachal Pradesh, India (Oct. 31, 2011); *see also* MOOG, *supra* note 86, at 76–92 (noting how clerks, process servers, and unskilled workers influence how rapidly or slowly cases progress based on unofficial fees or tips).

193. *See* sources cited *supra* note 192.

194. Interview by research team with litigant, in Himachal Pradesh, India (May 7, 2012); *see also* MOOG, *supra* note 86, at 76–92 (discussing the power of court staff in the litigation process).

195. Interview by research team with prosecutors, in Himachal Pradesh, India (June 28, 2012); Interview by research team with lawyer, in Himachal Pradesh, India (Dec. 7, 2011); Interview by research team with lawyer, in Gujarat, India (Oct. 17, 2011).

196. Interview by research team with judge, in Himachal Pradesh, India (Dec. 15, 2011).

197. *E.g., id.*

Former Chief Justice S.H. Kapadia is an inspiration whose actions can and should be replicated within the lower tier. Chief Justice Kapadia, who served from 2010 to 2012, made it his mission to stamp out corruption among staff members in the High Courts and Supreme Court.<sup>198</sup> He came into office knowing full well that the perception of the judiciary was in tatters.<sup>199</sup> The number of corruption cases stalled in the courts contributed to this negative image, but another major problem in his view was that court staff members were engaging in a range of corrupt practices.<sup>200</sup> Not infrequently, later cases would leapfrog earlier ones, certain litigating parties would not receive important notices from staff members in a timely fashion, or staff would provide misinformation to lawyers and parties.<sup>201</sup> To stem this corruption, Chief Justice Kapadia fervently brought to light these transgressions.<sup>202</sup> In a break from tradition, he made public speeches denouncing staff within his own court as well as within the other High Courts who participated in this behavior.<sup>203</sup> He wrote letters to his High Court colleagues on the bench urging them to aggressively stamp out corruption within their institutions and publicly rebuking those who failed to do so.<sup>204</sup> He was heavily involved in monitoring staff practices and developed a reputation for stamping out corruption.<sup>205</sup> A well-known observer of Indian legal practice noted:

Kapadia [sought to] fix . . . this [system of corruption] through sheer force of personality and hard work, poring over the list of the next day's hearings with a fine tooth comb. 'People in the registry were in terror of him,' recounted one advocate about how the chief managed to stem the registry's indiscretions.<sup>206</sup>

### *H. Overlapping Jurisdictions*

There is often overlapping jurisdiction among two or more forums, leaving litigants (and sometimes even their lawyers) confused about where to proceed with their claims. According to private lawyers in Himachal

198. *CJI's Trailblazing Legal Legacy: Kapadia Set to Demit Office After Reinforcing Faith in Judiciary*, MAIL ONLINE INDIA (Sept. 9, 2012), <http://www.dailymail.co.uk/indiahome/indianews/article-2200839/CJIs-trailblazing-legal-legacy-Kapadia-ser-demit-office-reinforcing-faith-judiciary.html>, archived at <http://perma.cc/0nc3pFn3iWn> [hereinafter MAIL ONLINE INDIA].

199. See *id.*

200. Kian Ganz, *SH Kapadia, End of an Era: India's Greatest Ever CJI or Missed Opportunity? How Will You Remember the Legacy?*, LEGALLY INDIA (Sept. 28, 2012), <http://www.legallyindia.com/201209283149/Interviews/sh-kapadia-end-of-an-era-indias-greatest-ever-cji-or-missed-opportunity-how-will-you-remember-the-legacy>, archived at <http://perma.cc/0yJTrK5FnGal>.

201. See MAIL ONLINE INDIA, *supra* note 198; Ganz, *supra* note 200.

202. See MAIL ONLINE INDIA, *supra* note 198; Ganz, *supra* note 200.

203. See MAIL ONLINE INDIA, *supra* note 198; Ganz, *supra* note 200.

204. See MAIL ONLINE INDIA, *supra* note 198.

205. See Ganz, *supra* note 200.

206. *Id.*

Pradesh, the main source of delay is the existence of too many forums for any given claim, which results in cases being transferred from forum to forum and judge to judge.<sup>207</sup> One exasperated lawyer explained:

My client was involved in a case . . . which has been pending since the year 1974. I am the thirteenth advocate to be pursuing this case before the district court. . . . The case went to four courts and from the upper court it was taken back to the lower court before finally being referred to the [specialized] financial court. [Then there was] delay . . . [because of] the lack of availability of the finance commissioner who is engaged in [two different cities]. It thus depends on when the finance commissioner wants to come in. Nowadays he visits monthly, and he visits only if he is free from his work at [his other city]. But sometimes his [hearings here are] . . . canceled due to various reasons such as illness . . . [and] sometimes parties have to go [to the other city] with their cases, which also causes delays in the case.<sup>208</sup>

Underlying the forum confusion, judges and court personnel are often unaware of the procedural rules for how to move cases through the system.<sup>209</sup> There is no uniformity in legal procedures across forums regarding rules of evidence, lawyer involvement, and the availability of appeals.<sup>210</sup>

### I. Other Delays

Judges noted that localizing all of the relevant parties for even a single hearing is an extremely difficult task because many families do not live together on a daily basis, with males often working in neighboring districts or states.<sup>211</sup> Prosecutors complained that the government departments they represent stall, fail to turn over evidence, and impede claimants from receiving efficient verdicts in court.<sup>212</sup>

Litigants attributed delays to: lack of appearance in court by the opposing party or opposing counsel, multiple adjournments and appeals, failure of opposing parties (particularly governmental entities) to pay judgment awards fully, scheduling mistakes, misplaced hearing documents, lack of transportation, and judge absenteeism.<sup>213</sup>

207. Interview by research team with lawyers, in Himachal Pradesh, India (Oct. 11, 2011).

208. *Id.*

209. *E.g.*, Interview by research team with lawyer, in Gujarat, India (Oct. 17, 2011).

210. *See* MOOG, *supra* note 86, at 42–45, 73–84.

211. *E.g.*, Interview by research team with judge, in Himachal Pradesh, India (Jan. 23, 2012).

212. *E.g.*, Interview by research team with prosecutor, in Himachal Pradesh, India (May 10, 2012).

213. Interview by research team with litigant, in Maharashtra, India (June 13, 2012); Interview by research team with litigant, in Maharashtra, India (Feb. 15, 2012); Interview by research team with litigant, in Himachal Pradesh, India (Oct. 31, 2011); Interview by research team with litigant, in Maharashtra, India (June 14, 2011); *see also* MOOG, *supra* note 86, at 42–64, 89–92, 147–54 (noting similar factors in a study of district courts in Uttar Pradesh).

Private lawyers expressed frustration that they were seen as causing delays,<sup>214</sup> and many believed that litigants are partially responsible for prolonging litigation, with one lawyer explaining that “[n]o judicial process alone is responsible [for the delays]. It is the party which lingers on the case. . . . They make the case lengthy by . . . [demanding] unnecessary applications.”<sup>215</sup> Efficient representation is also often thwarted by late payment of legal and court fees, which can cause lawyers to lose interest in the representation.<sup>216</sup> If a court filing fee is missed or an administrative bill goes unpaid, the client’s case is tabled and placed toward the back of the queue even if the arrears are ultimately satisfied.<sup>217</sup> Inadequate trust in the lawyer-client relationship creates further “delays or a different outcome than the lawyer could have expected.”<sup>218</sup>

Many of the lawyers who work at the grassroots suffer from apathy, self-interest, and a lack of critical skill sets. It is noteworthy that these views reflect honest sentiments from the lawyers themselves.<sup>219</sup> Many lawyers concede that their daily professional lives are a struggle to eke out an existence to support themselves and their families. Although lawyers admit to contributing to delays, even if a few tried to move matters quickly through the process, the inertia within the bar is too deeply embedded to meaningfully alter the collective action problem and status quo.<sup>220</sup>

### *J. State-Sponsored ADR Forums*

ADR forums like TGSs can provide relatively fast and inexpensive resolution of some disputes, frequently disposing of cases involving land disputes, petty criminal charges, and divorce in less than a year.<sup>221</sup> In part, this is because parties can appear *pro se*, relying instead on judges who, free from common delay tactics, are incentivized to expeditiously move cases forward.<sup>222</sup> The absence of lawyers also gives judges more opportunity to interact directly with litigants.<sup>223</sup> A judge who served both in district and specialized courts said the following regarding this benefit of closer claimant-judge interaction:

I feel that parties before such forums are more willing to listen to the advice of the forum and cooperate, probably because they no-

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214. *E.g.*, Interview by research team with lawyer, in Gujarat, India (Oct. 17, 2011); Interview by research team with lawyers, in Himachal Pradesh, India (Oct. 11, 2011).

215. Interview by research team with lawyer, in Himachal Pradesh, India (Dec. 7, 2011).

216. Interview by research team with lawyers, in Himachal Pradesh, India (Oct. 1, 2011).

217. *Id.*

218. *Id.*

219. *E.g.*, Interview by research team with lawyers and judges, in Himachal Pradesh, India (Nov. 9, 2011); Interview by research team with lawyers and judges, in Himachal Pradesh, India (Nov. 2, 2011).

220. *E.g.*, interviews cited *supra* note 219.

221. *Id.*

222. Observations by research team, Maharashtra, India (Apr. 19, 2012).

223. *Id.*

... [In the district] courts, we have to handle so many cases that we cannot afford to deliberate for long over one case. Many times, the litigant only wants to be heard, but we are unable to do so because of the constraints of procedure, [presence of lawyers,] and case overload.<sup>224</sup>

The flexibility of ADR affords judges greater opportunity to work with the parties in a conciliatory manner to reach settlements that are agreeable to all involved.<sup>225</sup>

### K. Specialized Courts

Sometimes specialized court judges can arrive at quicker conclusions where they have become specialists in the particular area of law that their forum is designed to oversee.<sup>226</sup> One hundred eighty generalist lawyers in Gujarat who had experiences or familiarity with specialized courts and ADR forums in their areas were asked what forums were best at protecting the rights of their clients. Twenty-three percent stated that the consumer forum was the best at protecting claimants' rights, followed by the labor courts at 15% and NGOs at 13%.<sup>227</sup> There was a fairly even distribution among how the lawyers viewed the remaining forums.<sup>228</sup>

In Maharashtra, the availability of evening courts that handle specialized civil matters (typically divorce, property, and water disputes) does not appear to have reduced case pendency in the district and sub-district courts.<sup>229</sup> Judges, lawyers, and staff who work in the evening courts often are the same people who work during the day, and they are overworked, underpaid, and exhausted by evening.<sup>230</sup> Public transportation is unreliable or unavailable at night, which especially serves as a barrier for women who face heightened security risks when traveling late.<sup>231</sup>

224. Interview by research team with judge, in Maharashtra, India (Apr. 19, 2011).

225. See Galanter & Krishnan, *supra* note 9, at 810–28.

226. Observations by research team, Maharashtra, India (Apr. 19, 2012). Although, specialized forum judges go through routine transfers as well, which hinders the specialization process for some of them. *Id.*

227. These statistics are based on all interviews conducted with lawyers in Gujarat, India.

228. *Id.* These forums included specialized courts (*nari adalats* (women's courts), motor vehicle accident courts, juvenile courts, family courts, Judicial Magistrate First Class courts, workers' union courts, ad hoc specialized courts held at the district level as ordered by the upper judiciary), administrative, quasi-judicial bodies (social welfare department courts, district collector courts, *taluka* collector courts or *mamlatdar* courts), and ADR forums (*lok adalats* and other initiatives of the Gujarat Legal Services Authority, police tribunals, petty arbitration tribunals).

229. Interviews cited *supra* note 64.

230. *Id.*

231. *Id.*



## IV. OPPORTUNITIES FOR SOCIAL CHANGE

The Indian Constitution has a progressive set of Directive Principles influenced in part by the Universal Declaration of Human Rights.<sup>232</sup> The framers of the Indian Constitution set forth the Directive Principles as aspirational goals encompassing a progressive range of economic, social, legal, and political ambitions the state ought to pursue.<sup>233</sup> While the Directive Principles are technically considered non-justiciable, courts have substantively incorporated them into rulings at different points throughout the post-independence period.<sup>234</sup> In addition to embodying socioeconomic rights in the Directive Principles, India has acceded to the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”),<sup>235</sup> which mandates the progressive realization of socioeconomic rights.<sup>236</sup>

Although decades of scholarship documents the upper judiciary as central for engaging in the serious adjudication of these types of matters,<sup>237</sup> the lower judiciary, specialized alternative forums, and administrative courts at the grassroots level encounter such issues as well. Relying on the findings above, this Article revisits a central question of the law-and-society discourse in India, namely the extent to which Indian judges can and should play a greater role in securing the rights of those in need. Although cases in the lower tier involve discrete parties who are keen to pursue their respective individual claims, the questions of law and policy that are raised have broader economic and social ramifications. Because those who are socioeconomically disadvantaged receive such little support from local elected representatives and civil servants, judges in the lower tier may be the primary protectors of claimants who bring forth social and economic grievances.

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232. See RAJESH KUMAR, *UNIVERSAL'S GUIDE TO THE CONSTITUTION OF INDIA* 59 (2011); M.R. BIJU, *HUMAN RIGHTS IN A DEVELOPING SOCIETY* 69–70 (2005); *Circle of Rights: Economic, Social & Cultural Rights Activism: A Training Resource*, UNIV. OF MINN. HUMAN RIGHTS RES. CTR., <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm> (last visited Jan. 11, 2014), archived at <http://perma.cc/ZT3Z-6KS3> [hereinafter *Circle of Rights*].

233. See generally SATHE, *supra* note 6; Jayna Kothari, *Social Rights and the Indian Constitution*, L. SOC. JUST. & GLOBAL DEV. J. (Feb. 28, 2005), [http://www.go.warwick.ac.uk/elj/ugd/2004\\_2/kothari](http://www.go.warwick.ac.uk/elj/ugd/2004_2/kothari), archived at <http://perma.cc/8M28-AKB7>.

234. See *Circle of Rights*, *supra* note 232; see generally GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* (2003).

235. India acceded to the ICESCR in 1979. Status Report, Int'l Covenant on Civil & Pol. Rights, U.N. TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20I/V/IV-3.en.pdf> (last visited Jan. 11, 2014), archived at <http://perma.cc/E6PF-3H3Z>.

236. These include the work-related rights to equitable and humane employment conditions and the right to form labor unions. Additionally, the treaty recognizes the rights to social insurance, a life with a family, safe living conditions, health care, education, and participation in civil society and cultural life. International Covenant on Economic, Social & Cultural Rights arts. 2.1, 7, 8, 10–15, Dec. 16, 1966, 993 U.N.T.S. 3.

237. See generally Galanter & Krishnan, *supra* note 9; sources cited *supra* note 6.

Judges—who are seen as more legitimate than other public officials for historical, cultural, and religious reasons<sup>238</sup>—occupy a space that allows them to serve as important discursive agents with the power to frame issues, shape perceptions, and resolve disputes through logic, reason, and notions of equity. Thus, lower-tier judges in India can and should envision their role not as narrow technocrats—delivering short, terse opinions that privilege formal procedural rules above all else, as they have traditionally been trained to do<sup>239</sup>—but instead as deliberate, careful thinkers whose decisions can have enormous ramifications beyond the parties involved at bar. Because judges draw on a host of formal and informal community norms when addressing the litigants, lawyers, and witnesses during the course of a proceeding, they already engage in a combination of rule- and norm-setting as well as rule- and norm-following.<sup>240</sup> Far too commonly, though, judges, despite their best intentions, give mixed messages and act unpredictably toward parties and lawyers.<sup>241</sup> Even more commonly, though, they do not have the resources to engage as discursive agents protecting the interests of individuals whose interests go unnoticed elsewhere.

At least some judges desire to play a greater role and make more of a difference in the lives of those most in need.<sup>242</sup> As upper-level Indian judges have done for decades vis-à-vis state and national political leaders,<sup>243</sup> more powerful and respected lower-tier judges could serve as an effective check, a useful set of advisors, and a potential source of inspiration for local leaders who too often operate by fiat with only self interest as their guiding force. However, many existing constraints would need to be lifted and legal training improved for lower-tier judges to be so empowered.<sup>244</sup>

238. See FALI NARIMAN, *INDIA'S LEGAL SYSTEM: CAN IT BE SAVED?* 123–30 (2006); SATHE, *supra* note 6, at 161–94; Velcheru Narayana Rao, *Courts and Lawyers in India: Images from Literature and Folklore*, in BOEINGS AND BULLOCK-CARTS: *STUDIES IN CHANGE AND CONTINUITY IN INDIAN CIVILIZATION* 196, 196–214 (Y.K. Malik & D.K. Vajpeyi eds., 1990); Galanter & Krishnan, *supra* note 9, at 795–98.

239. Interview by research team with district and sub-district judges, in Himachal Pradesh, India (Apr. 28, 2013).

240. See Daniela Berti, *Trials, Witnesses, and Local Stakes in a District Court of Himachal Pradesh*, in *CITIZENSHIP, DEMOCRACY, AND BELONGING IN THE HIMALAYAS* 290, 292–93, 307–14 (Joanna Pfaff-Czarnecka & Gérard Toffin eds., 2011) (relying on an ethnographic observation of a case in Himachal Pradesh that showcases how local and state politics can affect courtroom proceedings); see also Daniela Berti, *Courts of Law and Legal Practice*, in *A COMPANION TO THE ANTHROPOLOGY OF INDIA* 355, 355–70 (Isabelle Clark-Déces ed., 2011) (arguing that the observation of case proceedings in court can highlight how norms and culture affect the different stakeholders who are participating in the process); Daniela Berti, *Hostile Witnesses, Judicial Interactions, and Out-of-Court Narratives in a North Indian District Court*, 44 *CONTRIBUTIONS INDIAN SOC.* 235 (2010) (noting how adjudicating and prosecuting cases can take different turns and affect lawyers, judges, and litigants when witnesses change their stories or turn hostile).

241. See sources cited *supra* note 240.

242. Interview by research team with judge, in Himachal Pradesh, India (Apr. 28, 2013); Interview by research team with judge, in Himachal Pradesh, India (July 30, 2012).

243. SATHE, *supra* note 6, at 1, 18–24.

244. Interviews cited *supra* note 242.

Moreover, district court judges feel further restricted by their colleagues in the high courts who may reverse decisions or stay judgments on appeal; sub-district judges feel similarly vis-à-vis their district court superiors.<sup>245</sup> Judges feel constrained by the prevailing norm of the steep judicial hierarchy that longer judgments that discuss substantive justice, legal philosophy, public policy, or socioeconomic implications should be left to the upper judiciary.<sup>246</sup> A senior district court judge noted that interpreting and taking decisions on the law was for the judges in the upper judiciary.<sup>247</sup> Another lower-court judge who had been on the bench for sixteen years remarked:

Merely working according to the procedures laid down is not enough to do justice. Judges need to be given freedom—the freedom to be more creative as regards interpretation. Technicalities shouldn't be allowed to come in the way of justice. The hands of the judges are almost tied under the garb of legal procedure.<sup>248</sup>

Yet another senior district court judge discussed a case where a witness sought a court order for police protection because a defendant was threatening him. As the judge detailed:

[The witness] was ultimately fighting for his right to life. The Court of the Judicial Magistrate First Class dismissed the petition stating that his court had no jurisdiction to decide the issue. [This judge ruled that] issues concerning the right to life can only be raised before the High Court. The matter came in appeal before me. I allowed the petition and passed an order granting the complainant police protection. This order, however, was reversed . . . on the ground that the lower judiciary did not have the jurisdiction to hear such a petition. The applicant was a poor man who would never be able to afford the expenses of filing an application before the High Court. What use is right to life being a justiciable right if it cannot be accessed in any court by any common person?<sup>249</sup>

Critics of a more empowered lower tier of judges may argue that enhanced judicial activism threatens the very essence of a democratic republic—that the lower tier itself has systemic deficiencies that inhibit predictable and equitable justice delivery, or that it is inappropriate for judges to address political disadvantages. Indeed, many lawyers interviewed

245. Interview by research team with judge, in Himachal Pradesh, India (Apr. 28, 2013).

246. Interview by research team with district and sub-district judges, in Himachal Pradesh, India (Apr. 28, 2013).

247. Interview by research team with judge, in Himachal Pradesh, India (Sept. 14, 2011) (“We are only a fact-finding court. We cannot interpret law. We do not take decisions on the law.”).

248. Interview by research team with judge, in Maharashtra, India (May 7, 2011).

249. Interview by research team with judge, in Maharashtra, India (Apr. 5, 2011).

strongly believed that constraining judges in the lower tier—with the higher-court judges serving as a check on them—is in the best interests of litigants.<sup>250</sup> With that said, based on qualitative assessments of the legal educational institutions at the grassroots, the vast majority of lawyers practicing in the lower tier are not qualified to sit as judges, and indeed empowering this group *en masse* might threaten (rather than aid) the socioeconomically disadvantaged.

The following account by a lower-court judge, who prided himself on being activist and socially conscious, illustrates this concern:

I have a case before me where a sixteen-year-old girl was raped by a neighbor's son. The boy was arrested. In the meanwhile, the parents of both the boy and the girl arranged the marriage of these two. When the advocate applied for bail for the boy, the girl's father requested the bail on the ground that the boy had now agreed to marry his daughter. Now, in such a situation, I know that the girl will not proceed with the case. She is bound to turn hostile if I pursue it. I allowed the bail. The couple is due to get married in December. I have warned the boy that . . . if he doesn't keep his promise and marry the girl, the court will take action. In such cases, the court has to keep the social situation in mind. People have faith in the court and we must keep up to that faith. This cannot be done by deciding cases only according to the law.<sup>251</sup>

Such a perspective undermines the type of activism conducive to enhancing justice at the grassroots. Instead of promoting a marital union between the rapist and the victim, the judge should have educated the girl and her family about the criminality of this behavior. He ought to have been at the forefront of protecting the girl's interests and her rights, and should have had the perpetrator arrested and indicted on criminal charges of sexual assault. The judge's actions of encouraging and endorsing a marriage between the two, taken in the name of harmonizing a "social situation," only reifies norms of inequality and perpetuates existing discrimination, sexism, and sexual violence.

A broad and deep-seated mentality of patriarchy and gender bias that pervades the courts at the lower levels and much of society has prompted a globally recognized social movement surrounding a notorious incident of gang rape in New Delhi. In December 2012, six men raped a twenty-three-year-old woman on a bus, severely beating her male companion as well.<sup>252</sup>

250. Interview by research team with lawyers, in Himachal Pradesh, India (Dec. 15, 2011).

251. Interview by research team with judge, in Maharashtra, India (Sept. 15, 2011).

252. The Indian and worldwide media extensively covered this attack. See, e.g., *Gangrape Victim News*, NDTV, <http://www.ndtv.com/topic/gangrape-victim> (last visited Oct. 27, 2013), archived at [www.perma.cc/0mGZT53UmCE](http://www.perma.cc/0mGZT53UmCE); *Archives Search: Delhi Rape*, N.Y. TIMES, <http://query.nytimes.com/search/sitesearch/#1/%22Delhi%22+%2B+rape>; see also Pratiksha Baxi, *We Must Resist the Cunning of Ju-*

The female victim's injuries were so severe that a Delhi hospital had to transport her to a better facility in Singapore, where she tragically died shortly after arrival.<sup>253</sup>

As these events unfolded, a movement arose on the streets of the capital. Thousands of people protested gender bias, sexism, and violence against women throughout the country.<sup>254</sup> The government has promised to enact measures in an effort to answer these protests. In 2013, the Justice Verma Committee Report recommended defining rape as a crime of power (rather than passion), expanding rape to include marital rape, specifically criminalizing non-penetrable sexual assault and verbal assault, and other important proposals.<sup>255</sup> Around the same time, however, members of the ruling political classes indefensibly made various incendiary comments, parallel in nature to those of the aforementioned lower-court judge.<sup>256</sup> A culture of gender bias, gender discrimination, and gender-based violence thus remains rife throughout Indian society and seeps into the courts.<sup>257</sup> There is an ur-

*dicial Reform*, KAFILA (Dec. 29, 2012), <http://kafila.org/2012/12/29/we-must-resist-the-cunning-of-judicial-reform-pratiksha-baxi/>, archived at [www.perma.cc/OxSyvaWzNXP](http://www.perma.cc/OxSyvaWzNXP); Pratiksha Baxi, *Rape Cultures in India*, KAFILA (Dec. 23, 2012), <http://kafila.org/2012/12/23/rape-cultures-in-india-pratiksha-baxi/>, archived at [www.perma.cc/06Zp9HEddnf](http://www.perma.cc/06Zp9HEddnf); Pratiksha Baxi, *The Verma Manifesto*, INDIAN EXPRESS (Jan. 25, 2013), <http://www.indianexpress.com/news/the-verma-manifesto/1064418/>, archived at <http://perma.cc/VGH2-Y8W6> [hereinafter Baxi, *The Verma Manifesto*] (commenting on the Verma Commission's recommendations on how to deal directly with the crisis of violence against women in India).

253. See sources cited *supra* note 252.

254. See *id.*

255. The report is an indictment of India's legal system, its tolerance of such crimes, and the ineptness of the state in its attempts to allow victims to redress their grievances after suffering such violence. J.S. VERMA ET AL., REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW (2013), available at [http://www.thehindu.com/multimedia/archive/01340/Justice\\_Verma\\_Comm\\_1340438a.pdf](http://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf), available at <http://perma.cc/RX35-L8SD?type=pdf> [hereinafter JUSTICE VERMA COMM. REP.]; see also Baxi, *The Verma Manifesto*, *supra* note 252 (noting additional recommendations).

256. See *supra* text accompanying note 251.

257. One of the most infamous and unfortunate set of remarks came from the son of the President of India. See Sreeja VN, *Delhi Gang Rape: Indian President's Son in Trouble After 'Sexist' Comment*, INT'L BUS. TIMES (Dec. 27 2012), <http://www.ibtimes.com/delhi-gang-rape-indian-presidents-son-trouble-after-sexist-comment-972990#>, archived at [www.perma.cc/OS368k99YPQ](http://www.perma.cc/OS368k99YPQ). Yet as the Justice Verma Committee Report notes, the problem goes deeper than just the comments of ill-informed individuals. See JUSTICE VERMA COMM. REP., *supra* note 255, at 1–19. The report points to the embedded culture of violence and the acceptance of such violence, which the Justice Verma Committee calls upon to be eradicated from Indian society. *Id.* In December 2013, the Indian Supreme Court issued a judgment that highlights how even courts at the highest level of the judiciary can disregard the human, economic, and social rights of certain groups. See *Koushal v. Naz Found.*, (2013) Civil Appeal No. 10972 of 2013 (arising out of SLP (c) 15436/2009), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>. In *Koushal*, a two-justice panel consisting of Justices G.S. Singhvi and S.J. Mukhopadhyaya ruled that Section 377 of the Indian Penal Code, which provides that “whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine,” *id.* at para. 32, is constitutional, *id.* at para. 54. In an analytically vacant opinion, the Court overturned a lower court judgment that had invalidated Section 377. *Id.* at para. 54; see also *Naz Found. v. Gov't of NCT of Delhi*, (2009) 160 D.L.T. 277. The *Koushal* judgment's impact is geared at specifically and unconstitutionally discriminating against a set of minority groups—namely lesbian, gay, bisexual, and transgendered communities by targeting them with imprisonment as well as economic and social punishment. The court's ruling that opponents of Section 377 should seek redress in Parliament, see *Koushal*, (2013) Civil Appeal No. 10972, at para. 56,

gent need for greater sensitivity, understanding, and empathy for the socio-economic rights of girls and women. To begin, active efforts must be made to increase the number of women in the judiciary.<sup>258</sup> To be sure, a complete cultural overhaul must involve education, training, civil society groups, and resource allocation from government leaders committed to gender justice and social and legal equality at the grassroots.

Empowering the lower tier to overcome deep-seated biases requires not only cultural reform but also structural innovation. To this end, the Verma Committee Report recommended the establishment of more alternative and specialized forums to address the needs of victims of gender-based crimes.<sup>259</sup> These kinds of relatively expedient forums, such as the *mahila panch* (women's council), the *nari adalat* (women's court), and grassroots educational, advisory, counseling, and advocacy initiatives, already exist in some regions.<sup>260</sup> An important step toward expansion of such forums should be the establishment of more "fast-track courts" for cases involving violence against women.<sup>261</sup>

Indeed, in other types of cases, such as land cases, judges have been at the forefront of social change. In several of the jurisdictions studied, many judges are from farming communities and agricultural castes. Both lawyers and claimants noted that these judges tend to have a stronger grasp of the legal and factual issues in these matters.<sup>262</sup> For instance, one lawyer remarked that because "many of the judges also belong to farmer families . . . [they] can therefore understand the circumstances or contexts of the disputes or cases."<sup>263</sup> Another lawyer stated that he observed judges approaching land cases with great sympathy for struggling farmers. He said that judges "do not insist on [the strict formalities of] procedure," and instead are willing to consider the immediate challenges facing individuals claimants.<sup>264</sup>

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defies the institutional obligation that the judiciary has in protecting the interests of minority groups. There is hope that *Koushal* will soon be reversed by a larger bench of the Supreme Court, or that Parliament will redact this archaic statute that violates individual liberty and basic human rights.

258. While data on the number of female judges in the lower tier is not readily available, at the high court level, less than 6% of judges are women, and the Supreme Court has only ever had five female judges. Sai Manish, *Can Our Courts Be Just to Women When They Promote So Few Women?*, YAHOO! NEWS INDIA (Sept. 16, 2013), <http://in.news.yahoo.com/can-our-courts-be-just-to-women-when-they-promote-so-few-women--072257488.html>, available at <http://perma.cc/XD5B-X4MS?type=image>.

259. See JUSTICE VERMA COMM. REP., *supra* note 255, at 260–311, 383–424.

260. See INT'L CTR. FOR RESEARCH ON WOMEN, DOMESTIC VIOLENCE IN INDIA: EXPLORING STRATEGIES, PROMOTING DIALOGUE 5—WOMEN-INITIATED COMMUNITY LEVEL RESPONSES TO DOMESTIC VIOLENCE (2002), available at <http://www.icrw.org/files/publications/Domestic-Violence-in-India-5-Women-initiated-Community-Level-Responses-to-Domestic-Violence.pdf>, archived at <http://perma.cc/LZG6-4BJR?type=pdf>.

261. See *Set Up More Fast-Track Courts to Try Rape Cases*, HINDU (Dec. 5, 2013), <http://www.thehindu.com/todays-paper/tp-national/tp-karnataka/set-up-more-fasttrack-courts-to-try-rape-cases/article5423921.ece>, archived at <http://perma.cc/9UZM-R7D8>.

262. E.g., Interview by research team with lawyer, in Maharashtra, India (Oct. 13, 2011).

263. *Id.*

264. Interview by research team with lawyer, in Maharashtra, India (Oct. 14, 2011).

There is perhaps no better example of judges being at the forefront of social change in land cases than with squatters' rights. As one judge explained:

It is important that we respect the law of our land. The law is, after all, enacted for the benefit of its citizens. Trespass is wrong, but . . . [i]n most cases, . . . people encroach because of circumstances of dire poverty. The situation that poverty places these people in would compel even the most law-abiding person to encroach. For instance, in this case, the people had no roof over their head. There were women in this group—single mothers, young girls, and widows. Let us say I had allowed the decision of eviction to be implemented overnight. Such young girls would be brought on the street. They would have no shelter, no privacy, and no protection. What if they were assaulted or abused? Who would take responsibility for that? At some level, the state would be responsible for her situation, wouldn't it? Therefore, at such times, I take into consideration the emergency that must have compelled the persons to take recourse to an illegal act and I give precedence to the principles of natural justice over all other procedures.<sup>265</sup>

The decision by this judge to allow the squatters to stay on the property until alternative arrangements could be made<sup>266</sup> highlights an example of how there may be a glimmer of hope for claimants when there is expanded judicial power at the local level. Still, episodes like these are more ad hoc than routine and sustained.

## CONCLUSION

In general, judges believe they are doing the best they can, given limited resources.<sup>267</sup> Judges defend the effectiveness of their institutions as preferable to corrupt *panchayat* leaders, politicians, and administrative bureaucrats.<sup>268</sup> Similarly, litigants believe that the legal system is relatively legitimate and that judges—with the exception of adjudicators working in quasi-judicial bodies—are relatively trustworthy and more rights-oriented<sup>269</sup> as compared to unresponsive legislative and bureaucratic officials

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265. Interview by research team with judge, in Maharashtra, India (June 28, 2011).

266. *Id.*

267. *E.g.*, Interview by research team with judge, in Maharashtra, India (June 30, 2011) (“Litigants have a lot of facilities; all the laws and the judicial infrastructure is for them only. There is even the legal aid center and other service providers all working to provide litigants with assistance.”).

268. *E.g.*, Interview by research team with judge, in Maharashtra, India (Apr. 29, 2011).

269. *E.g.*, Interview by research team with litigant, in Maharashtra, India (June 15, 2012); Interview by research team with litigant, in Himachal Pradesh, India (Oct. 19, 2011); Interview by research

like politicians, police, and civil servants.<sup>270</sup> Litigants hold hope that judges can safeguard their rights and interests better than anyone else.<sup>271</sup> To begin with, given the respect that lower-tier judges have within their communities, judges should be incentivized to take the lead in fighting corruption.

Training and education must be enhanced for current judges as well as for students studying to become judges. Moreover, judges' salaries could be increased to attract more motivated, thoughtful, and talented people from the bar to view the judiciary as a place where they would like to work. Judge salaries, accommodations, and benefits pale in comparison to what the top lawyers earn.<sup>272</sup> While achieving parity may not be practical or politically possible, there is certainly room for further modest adjustments.<sup>273</sup> Reducing the frequency of transfers and increasing personal security measures could also make the bench more appealing for potential candidates who have families or working spouses. With improved training, judges could use dicta to expound on matters that they are passionate about but rarely have an opportunity to officially express. Dicta can set forth a judge's aspirations for how the law should function in future situations or, as is common in the Indian context with the higher courts, how the government should conduct itself on significant issues relating to public policy.

More resources and greater financial commitment to the lower tier by the central government are critical if there is to be a transformation in how effective and efficient this institution functions. Court infrastructure and staffing need significant improvements. More judges must be added to the lower-tier bench to reduce the excessively high workloads of sitting judges. Court staff must be better equipped to deal with claimants' queries regarding the litigation process and disincentivized from seeking extralegal fees. The legal system should be streamlined, and clear guidelines on how to navigate it should be developed for both claimants and lawyers.

team with litigant, in Gujarat, India (Oct. 7, 2011). *But see* MOOG, *supra* note 86 (concluding that litigants perceive the lower courts as failed institutions).

270. Interviews by research team with litigants, in Maharashtra, India (June 7, 2011) ("Elected representatives do not help people after the elections."; "Elected representatives of this village are not capable of protecting the right of the common people. They only want to help the economically powerful. They do not have an interest in the issues of poor people."; "Although elected representatives are capable, they do not help people like us after elections are over. They are only interested in making money and gaining power. After the election, they are seen helping and supporting only the economically well-off people."; "Elected officials are competent enough to protect socioeconomic rights but they cannot ensure implementation of their orders."; "[Elected officials] take money from the developers to pass orders that regularize [the developers'] illegal encroachments. We are not against sitting and discussing issues with the politicians but we are against them . . . [promising the] addressing [of] grievances that they have caused themselves.").

271. *E.g.*, Interview by research team with litigant, in Gujarat, India (June 15, 2012); Interview by research team with litigant, in Himachal Pradesh, India (Oct. 19, 2011).

272. *See* Priya Sahgal and Kaverie Bamzai, *The New Nawabs*, YAHOO! NEWS INDIA (Dec. 15, 2010), <http://in.news.yahoo.com/the-new-nawabs.html>.

273. Ashurosh Bhardwaj, *Delhi Govt Clears Three-Fold Hike in Salaries for Judges*, INDIAN EXPRESS (Feb. 13, 2011), <http://www.indianexpress.com/news/delhi-govt-clears-threefold-hike-in-salaries-for-judges/7493421>, archived at <http://perma.cc/NGZ6-VLSU>.



The bar should embrace greater transparency in its fee structure to allow litigants to properly weigh the costs and benefits of pursuing court action, relying on the trusted guidance from the representing lawyer—just as the system was intended to work. The number of appeals that lawyers are allowed to make under the procedural codes should be curtailed to halt the clear patterns of abuse occurring at the expense of needy claimants.

Perhaps most immediately, the gender inequality and gender discrimination that exists in the lower tier must be eliminated. For a country that was led out of colonial rule by eminent lawyers who preached this same message, the modern-day bar should be vigorous in promoting the rights of the socioeconomically disadvantaged, including by promoting women's involvement in all facets of the lower tier. Only then can the lower tier provide access to justice for all Indians.

