I. Introduction

To many who study India, it has become a tad trite to describe this complex nation-state as one that is filled with contradictions. Attuned observers know that what India has accomplished during its fifty-plus years of independence is nothing short of astounding. Notwithstanding the country’s high levels of poverty, underdevelopment, illiteracy, and population growth, as well as the twenty-month period of dictatorial rule that it experienced, India today sits as a vibrant democracy promoting many classic ideals of liberalism. In comparison to other developing nations throughout the world, the democratic “idea of India,” as Sunil Khilnani observes, has survived even in the face of antagonistically great odds.3

The “success” of India’s democracy is a feat that must not be underemphasized; this article by no means will attempt to say otherwise. However, even within the most thriving of democratic societies problems exist. In addition to the challenges mentioned above, India confronts other issues. Corruption and bribery of politicians, police abuse, non-performance by and incompetence among bureaucrats, and an inadequate

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1 Assistant Professor of Law, William Mitchell College of Law, St. Paul, MN. B.A., Ohio State University; J.D. Ohio State University; Ph.D. University of Wisconsin-Madison. For their comments, the author is grateful to Marc Galanter, Bert Kritzer, Charles Epp, and the various social policy activists, judges, and lawyers in India who provided keen insight on how the country’s legal system functions.


4 See Kohli, The Success.
infrastructure are just a smattering of troubles that burden the Indian state.\(^5\) As serious, if not more so of a problem, but one that has received passing attention by most scholars, is the inefficiency of the country’s judicial system. The courts in India are thought to be the most crowded of any in the world. A recent report states there are “23 million pending court cases-20,000 in the Supreme Court, 3.2 million in the High Courts and 20 million in lower or subordinate courts.”\(^6\) Cases take decades, and sometimes generations, to resolve. A *New York Times* story from a few years ago tracked one property law case that remained open for forty years - long after both original litigants were dead.\(^7\)

These mind-boggling backlogs and delays in the legal process have far reaching implications for those interested in making social policy changes. As I shall suggest in this article, in spite of all its successes, India’s democracy is at risk of becoming de-legitimized because of the increasing lack of faith many Indians have in the judicial process. Social policy advocates, in particular, who work on behalf of such groups as the poor, lower castes, women, the ill, and/or religious minorities, often have not found the legislature to be responsive to their needs. But lately, they neither have found it worthwhile to redress their grievances in what has become a time-engulfing legal process. Instead, these activists have opted for other means to advocate their causes that

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This article then will argue that India’s democracy, which in the West is lauded as a beacon for other developing nation-states, is at its most crucial juncture. Large numbers of citizens for a long while have been disillusioned with the legislative process. Now that the courts are also seen by many as a futile forum in which to bring about social change, it is little wonder why those who are aware of the turmoil within the Indian legal system fear that this great democratic experiment is encountering one of its biggest crises to date. In this article I shall concentrate on the challenges facing the courts and the implications of this on social policy advocacy. It is important to note that the substantive decisions emerging from the courts - particularly from the Supreme Court - can and often have been to the benefit of social policy activists. The issue here, however, is the length of time it takes to receive one of these beneficial judgments. That such massive delay inheres within the legal process is what deters many from pursuing this route. But before proceeding to a full discussion of this point, it is necessary to provide a brief overview of
the literature that has recognized what India’s democracy has accomplished - by way of both political and social policy advances. Section two, therefore, will summarize a selected sample of readings that address this topic.

In sections three and four, I return to my main thesis by suggesting that much of the standard literature has failed to offer a critical analysis of one of India’s most important institutions: the courts. In providing such an analysis, I discuss how within this touted democracy those interested in making social policy changes have in fact shied away from using the legal process. While I focus on social policy advocates who promote civil rights, gender equality, the environment, and the rights of the ill, the secondary literature I draw on shows that the negative sentiments towards the courts penetrate through to a much larger segment of the population. I conclude in section five by evaluating some of the proposals aimed at “fixing” the legal system to make it more user-friendly for social policy advocates. As I suggest, such remedial measures are laced with numerous problems. Only through real, substantive legal reform can we hope to make the courts in India an arena available to those who otherwise perceive of themselves as excluded from the political process.

II. The Many Virtues of India’s Democracy – Rights, Political Parties, and the Presence of Social Movements

Atul Kohli and his colleagues recently published an important volume documenting the many successes accomplished by India over the past fifty years. As these scholars recognize despite India’s troubles the country still finds a way to maintain a democratic political system. For example, India possesses one of the most detailed

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10 See Kohli, *The Success*. 
constitutions in the world that provides for, among other things, a representative parliamentary system, federalism, employment and educational benefits to minority groups, and suffrage for all adult citizens, regardless of religion, gender, or caste. Each citizen also is guaranteed protection under the Constitution’s set of “fundamental rights,” which are found in Articles 12-35 and include such provisions as: the right to equality; the right to freedom of movement; the right to freedom of speech and expression; the right to freedom of religion; and the like.

That India is a thriving democracy has been long observed by Western scholars. The political scientist, Robert Dahl, over three decades ago commented that in a comparative perspective India’s tolerance for difference, its respect for a free press, and its steadfast commitment to maintaining democratic institutions places it among the strongest of what he called polyarchies in the post World War II era. Although Dahl wrote his book before Indira Gandhi declared an twenty month period of Emergency Rule, his overall message continues to ring true today. As he stated then:

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13 See Robert Dahl, *Polyarchy: Participation and Opposition*, (New Haven: Yale University Press, 1971). Dahl used the term polyarchy to define those “regimes that have been substantially popularized and liberalized, that is highly inclusive and extensively open to public contestation.” As he explains on page 8, Dahl reserves the term democracy for those systems that have completely achieved a full, open liberal style of governance. Yet, as he states, “in my view no large system in the real world is fully democratized; [thus] I prefer to call real world systems that are closet [to this ideal] polyarchies.”
“In India, language, caste, and region generate a fantastic panoply of subcultures, each of which is a relatively small minority . . . . India’s extreme pluralism is not merely a source of difficulty but is also in some ways one of the strengths of the Indian polyarchy, for it now compels the leaders of every group to learn and practice the arts of conciliation and coalition formation and prevents any single unified group from even approaching a monopoly of political resources.”14

Over the past few decades, India’s democracy also has witnessed increased political participation by social policy movements. For thirty years after independence (1947-1977) governmental power at the national level was in the hands of the Congress Party.15 Congress remained the primary possessor and distributor of resources and retained uninterrupted dominance over Indian political life.16 But by the 1960’s there were signs of dissatisfaction with Congress; Indians increasingly complained of the party’s inability to implement earlier promises. The mystique of the party faded and ordinary citizens became frustrated with their low standards of living. Following the death of the country’s first Prime Minister, Jawaharlal Nehru in 1964, regional parties and social policy movements emerged and started to challenge the power of Congress.17 Lower castes, the poor, agriculturalists, and others organized to pressure government leaders to address their social policy needs. These forces played an important role in reducing the Congress’s majority in the 1967 elections. But by the end of the 1960’s,

14 Ibid, p. 117-118.

15 The Congress Party’s roots trace back to an interest organization known as the Indian National Congress (INC) that formed in the late 1800’s. The INC was comprised of educated, urban nationalists who originally demanded that the British allow more Indians to participate in the governing of colonial India. After decades of ignoring their requests, the INC, led by Mohandas Gandhi who helped bring millions of supporters to the INC’s cause, eventually began pushing for independence. Upon the British’s departure from India in 1947, the INC transformed into the Congress Party with Jawaharlal Nehru serving as the country’s prime minister from 1947-1964. See Khilnani, *Idea of India*.


17 See Kohli, *Democracy and Discontent*. 
with Indira Gandhi in power, most of these social policy groups soon were co-opted by
the ruling Congress Party as Mrs. Gandhi used her position to appeal to, and temporarily
satisfy, these disaffected citizens.18

Social policy movements, however, reemerged in response to the suspension of
the democratic constitution by Mrs. Gandhi in 1975. During this time Mrs. Gandhi ruled
by decree, arguing that the state faced a national security threat from opposition forces in
the country.19 Although many social policy activists operated from underground during
the “Emergency Rule,” once the democratic constitution was restored, they mobilized
and helped force the Congress Party out of power in the 1977 election.

Since 1977 the prominence of social policy movements in India has ebbed and
flowed. Many struggle for resources, lack a strong internal bureaucracy, and suffer from
an unstable membership base.20 Furthermore, various governments have been in power
and this has affected how these interests function.21 But Indian society no longer is

18 See Brass, Politics of India. Following the 1967 election, the Congress Party split into two factions:
Congress (I), and Congress (O). The former represented Mrs. Gandhi’s party, while the latter represented
members whom Indira believed were political opponents out to sabotage her efforts as prime minister.
Eventually Congress (O) died out, and today Congress (I) is simply referred to as the Congress Party.

19 Ibid. Grassroots activists remained skeptical; they cited several self-interested factors that caused her to
suspend the constitution. The economy was weak. The public disapproved of her policies, leading to
opposition leaders calling on the military to oust her from power. And she was convicted of corruption
charges in a state court in Gujarat.

20 Ghanshyam Shah, “Grass-Roots Mobilization in Indian Politics,” in India’s Democracy: An Analysis of
Rights Revolution.

21 See Khilnani, Idea of India. For example, after the Emergency the Janata Party, a left-of-center umbrella
organization, was swept into power with the help of many interest groups and social movements that
represented: 1) lower castes; 2) women; 3) the poor; 4) Muslims and other religious minorities; 5)
agriculturalists; 6) labor; and 7) the disaffected. The Janata Party stayed in power for less than two years
before falling in 1979. In 1980, grassroots activists and smaller political parties, disillusioned with the
Janata’s ineptness, returned the Congress Party to power with Mrs. Gandhi resuming the position of prime
minister. Following the assassination of Mrs. Gandhi in 1984, elections were held and Congress retained its
majority in parliament winning the largest number of seats in Indian history. However, since 1989, when
national elections deprived Congress of a majority in parliament, no one party has captured an absolute
dominated by one political party or one political family. India today is a true multi-party state where thousands of non-governmental organizations of every stripe are present. And it is not unusual to find parties and social policy movements that are ideologically aligned working together. Overall, since the Emergency Rule’s end, India’s democracy has expanded to allow for more participation in the political process.

We see then that India possesses many of the same characteristics found in other Western democracies. Given that India remained subjugated under British rule for hundreds of years, such advances are indeed impressive. The above discussion only scratches the surface of India’s intricate democracy. There are other aspects that we could mention, but the point of this section is to acknowledge the strides India has made in just five decades. One conspicuous omission from this above description is a lauding of how the judicial process in India functions. As we shall see in the next section, it is not so much that the rulings from the Indian courts have run contrary to the interests of democracy. Rather, the time it takes to receive a verdict, favorable or not, is so long that most social policy movements opt not to engage in the legal process. In effect, such disregard for the judicial system, as we will discover, puts into question what role the rule of law plays within India’s democratic society.

III. The Functioning of the Courts and the Impact on Social Policy Advocacy

In the Supreme Court alone there are some 20,000 cases pending while millions of other matters await hearing in the lower courts. One explanation for these high majority of seats in the lower house. Even in the election of 1999 when the BJP garnered a significant number of seats, it still had to rely on the support of other smaller parties – who in turn were supported by various grassroots movements and interest organizations – to form a majority government.
numbers is that Indians view the courts with great respect -- after all how else could such massive numbers of cases be explained unless people believed the courts work? Others have attributed this volume to the openness of especially the upper courts to “writ petitions.” Ordinary citizens may file petitions or claims in a state high court where that state government is accused of violating a statutorily or constitutionally protected right.22 Similarly, where the central government is charged with infringing upon the fundamental rights of an individual, that person may file a claim in the Supreme Court.23 Such accessibility, the argument goes, has allowed many different types of litigants, including social policy activists, to pursue what are known in India as “PIL’s,” or public interest litigation claims.24 These claims include litigating causes involving civil rights, civil liberties, the environment, women’s rights, and the like.

Yet, for those of us who study the Indian dockets, we find that it is not so much that the courts are constantly receiving petitions from anxious litigants, but rather that so few cases are resolved by the legal system. Procedural laws allow lawyers of clients who oppose resolving cases to submit endless interlocutory appeals. This results in long

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23 See Rajeev Dhavan, “Law as Struggle: Public Interest Law in India,” Journal of the Indian Law Institute 36 (1994): 302. For relevant case law, see S.P. Gupta v. Union of India, AIR 1982 SC 149; D.C. Wadhwa v. State of Bihar, AIR 1987 SC 579; Ratlam Municipal Council v. Vardhichand, AIR 1980 SC 1622; Fertilizer Corp v. Union of India, AIR 1981 SC 344; People’s Union for Democratic Rights v. Union of India, AIR 1982 SC 1473. To facilitate the use of these rights the upper courts accepts epistle petitions (letters that state a legal claim). This form of litigation has two advantages – it is simple and inexpensive. Upper courts also have lenient standing rules. Issues in front of these courts do not need to be “ripe,” nor is there a sense that upper courts may involve themselves only in actual cases and controversies.

delays in judgments and vast backlogs.\textsuperscript{25} Moreover, because these opposition lawyers are paid per court appearance, they have little incentive to resolve cases. Such “delay lawyers,” as they are called, become masters in the art of perpetuation and manipulate the civil and criminal codes to force cases to remain in the system for decades.

Existing empirical research also seems to indicate that on a per capita basis India is one of the least litigious countries in the world. Christian Wollschlager’s thirty-five country study of litigation rates between 1987 and 1996 notes that Indians ranked among one of the world’s lowest (thirty-second).\textsuperscript{26} Robert Moog has data showing that in India’s most populous states, Uttar Pradesh, litigation rates have declined over a thirty-year period.\textsuperscript{27} And I recently conducted a study, the most extensive one to date on organizational litigation in India, which documents that in comparison to eight other formal and informal political tactics, litigation is the least used strategy by social policy associations.\textsuperscript{28} (This data will be discussed in section four.)

\textsuperscript{25} See Galanter and Krishnan, “Debased Informalism.”

\textsuperscript{26} Christian Wollschlager, “Exploring Global Landscapes of Litigation Rates,” in Soziologie Des Rechts: Festschrift Fur Ehrhard Blankenburg Zum 60 Geburtstag, eds., Jurgen Brand and Dieter Strempel, (Baden-Baden, Nomos: 1998). Wollschlager notes that India has an annual per capita rate of 3.5 filings per 1000 persons compared to Germany which had a per capita rate of 123 filings per 1000 persons and Sweden which had a per capita rate of 111 filings per 1000 persons. It is important to keep in mind that because no national data is available, Wollschlager relied on statistics from the state of Maharashtra. Admittedly, Maharashtra has a comparatively lower population of adults than other countries in Wollschlager’s study, and several matters that are brought to various tribunals in the state were not included in the data collection. But there is no reason to think that Maharashtra is glaringly unrepresentative of India as a whole. Although not without its weaknesses the Asian Development Bank conducted a six-country study of Asian countries and found India’s rate of litigation ranks near the bottom. See Katherine Pistor and Philip Wellons, The Role of Law and Legal Institutions in Asia Economic Development: 1960-1995, (Asia Development Bank, 1999).

\textsuperscript{27} Robert Moog, “Indian Litigiousness and the Litigation Explosion,” Asian Survey 33 (1993): 1138-1139. There is a limitation to Moog’s study in that his data goes from 1951 to 1976; after this year the state of U.P. stopped keeping such records.

\textsuperscript{28} See Krishnan, “New Politics.”
Furthermore, for those seeking to make social policy changes through the courts, the structure of the Indian legal profession is not conducive to achieving this goal. The most qualified observer of the Indian legal profession for over the past four decades is Marc Galanter. As he notes:

“Among the prominent features of Indian lawyers [in general] are their orientation to courts to the exclusion of other legal settings; the orientation to litigation rather than advising, negotiating or planning; their conceptualism and orientation to rules; their individualism; and their lack of specialization.”

Thus, most Indian lawyers are rarely involved in non-courtroom activities, let alone mobilizing people to pursue a social policy agenda. Negotiating, strategizing, and participating in the social policy process are tasks left to others. Indian lawyers tend to become involved in social policy causes late in the game and their ties to clients and social activists are fleeting. Indian lawyers are conditioned to think in narrow terms, focusing their efforts on litigation strategies. Most are atomistic actors who deal with clients, cases, and policy causes in a discrete, isolated fashion. There is no long-term set of objectives vis-à-vis clients, nor do lawyers have the incentive (or specialization) to perform anything but the most basic of services. And, because individuals and groups interested in social policy issues tend to be resource-poor and disorganized, they do not

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30 Ibid., 282-83.


33 See Epp, Rights Revolution; Krishnan, “New Politics.”
provide a market for lawyers who may wish to help but, given their own constraints, are unable to do so using the courts.34

Therefore, for most Indians interested in social policy change turning to the legal process is not a priority – logic dictates avoiding a system that is fraught with delay and operates at a glacial-like pace. Of course there are situations where social policy movements are persistent and eventually accomplish their goals through litigation. In a moment we will focus on such movements and discuss the benefits provided by the courts. But before doing so, we first evaluate the more common sentiments expressed by several different social policy movements towards the legal process. As we shall see, these activists are reluctant to engage in litigation, mainly because of the institutional flaws inherent within the judicial system.

IV. A Snapshot of Social Policy Associations and the Strategies They Employ

The few studies that have examined the tactics used by Indian social policy movements agree that litigation is not a frequently opted for strategy. Nearly twenty years ago in his classic book on affirmative action in India, Marc Galanter noted that most civil rights groups do not have the resources, time, or legal skills to participate in the judicial process.35 Charles Epp found similar results in his work on non-governmental organizations in India.36 L. P. Misquitta in his study of business-oriented, policy organizations discovered that working within legislative and bureaucratic

35 Galanter, Competing Equalities.
36 Epp, Rights Revolution.
institutions was the primary tactical method for this set of associations. And Murray Culshaw’s national directory of social policy groups in India - the most comprehensive compilation on this subject to date - reveals that only around five percent of his three hundred groups employ litigation. Between 1998 and 2001 I made repeated visits to New Delhi to gather a full list of social policy groups that focus on civil rights, gender equality, and the environment. While in India I relied on Culshaw’s directory as well as assistance from lawyers, activists, academics, and politicians in putting together this list. Eventually I acquired information on seventy-three advocacy groups. Table 1 provides data on the types of policy tactics these organizations employ.


39 I chose New Delhi because it is the hub for political activity within the country. Obviously India is a nation that has over a billion people, so arguing that this one city is representative of the entire country would be disingenuous. However, this is a first step that hopefully will lead to more research on this topic.
Table 1  
Reported Tactical Use by Indian Social Policy Groups

<table>
<thead>
<tr>
<th>Activity</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public awareness activities, including publishing materials, and/or holding educational seminars</td>
<td>74%</td>
</tr>
<tr>
<td>Use of media</td>
<td>33%</td>
</tr>
<tr>
<td>Demonstrations/Protests</td>
<td>62%</td>
</tr>
<tr>
<td>Informal Contacts with bureaucrats or legislators</td>
<td>59%</td>
</tr>
<tr>
<td>Monitoring Gov’t Activity</td>
<td>71%</td>
</tr>
<tr>
<td>Involved in policy formation; serves on gov’t committees</td>
<td>33%</td>
</tr>
<tr>
<td>Formal Contact with bureaucrats and legislators</td>
<td>40%</td>
</tr>
<tr>
<td>Litigation</td>
<td>25%</td>
</tr>
<tr>
<td>Work with Political Parties</td>
<td>37%</td>
</tr>
<tr>
<td>N</td>
<td>73%</td>
</tr>
</tbody>
</table>

The table highlights a number of different points. For example, seventy-four percent participate in the publication of materials and the holding of seminars. Seventy-one percent monitor government policy-making and slightly over sixty percent engage in demonstrations and protests. These statistics perhaps are unsurprising given that many Indian organizations are poor and institutionally weak. Employing public awareness strategies, monitoring government policy-making, and using demonstrations and protests are inexpensive forms of participation and expression when compared to other more formal tactics.

We next find that just under sixty percent of groups maintain informal contacts with government officials as a means to achieve policy goals. Contrast this with the fact that forty percent of groups engage in formal contacts or direct lobbying with bureaucrats and legislators, and thirty-seven percent interact with political parties. A third of groups use the media, and a third also serve on government committees and work on policy
formulation. Finally, with respect to litigation, this tactic is used by the least number of groups in the table.

Table 1 provides the aggregate figures of organizational tactics in India. Table 2 disaggregates the data. From this next table we are able to compare across groups as to what types of tactics are employed in order to achieve policy objectives.
Table 2  Reported Tactical Use by Individual Sets of Groups

<table>
<thead>
<tr>
<th>reported tactic</th>
<th>women</th>
<th>envir</th>
<th>civil lib./rts</th>
<th>chi square</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public awareness activities, including publishing materials, and/or holding educational seminars</td>
<td>74%</td>
<td>92%</td>
<td>59%</td>
<td>7.76**</td>
</tr>
<tr>
<td>Use of media</td>
<td>32%</td>
<td>44%</td>
<td>24%</td>
<td>3.00</td>
</tr>
<tr>
<td>Demonstrations/Protests</td>
<td>58%</td>
<td>32%</td>
<td>90%</td>
<td>17.8**</td>
</tr>
<tr>
<td>Informal Contacts with bureaucrats or legislators</td>
<td>74%</td>
<td>64%</td>
<td>45%</td>
<td>4.31</td>
</tr>
<tr>
<td>Monitoring Gov’t Activity</td>
<td>89%</td>
<td>84%</td>
<td>48%</td>
<td>14.03**</td>
</tr>
<tr>
<td>Involved in policy formation; serves on gov’t committees</td>
<td>47%</td>
<td>40%</td>
<td>17%</td>
<td>6.73**</td>
</tr>
<tr>
<td>Formal Contact with bureaucrats and legislators</td>
<td>58%</td>
<td>52%</td>
<td>17%</td>
<td>10.41**</td>
</tr>
<tr>
<td>Litigation</td>
<td>32%</td>
<td>20%</td>
<td>24%</td>
<td>.49</td>
</tr>
<tr>
<td>Work with Political Parties</td>
<td>37%</td>
<td>24%</td>
<td>48%</td>
<td>9.42**</td>
</tr>
<tr>
<td>N =</td>
<td>19</td>
<td>25</td>
<td>29</td>
<td>73</td>
</tr>
</tbody>
</table>

*   p < .10  
** p < .05

In terms of litigation, in particular, we see that nearly a third of women’s groups, a fifth of environmental groups, and about a quarter of civil liberties/civil rights groups use this tactic.40

These slight variations across the three sets of groups, with respect to litigation, are not statistically significant. Using a chi-square test I calculated that in fact no one particular set of

40 The study defines litigation in the manner typically found in the interest group literature. A group is a participant in litigation when: it files suit on behalf of its own members; represents an outside party; and/or hires an outside party to represent it in court. In India litigation is oftentimes performed by the filing of a writ petition. For a discussion of writ petitions see Carl Baar, “Social Action Litigation in India: The Operations and Limitations on the World’s Most Active Judiciary,” Policy Studies Journal 19 (1990): 140-150.
organizations employs litigation at a statistically different rate than any of the other two.\(^{41}\)

Overall, this data is important because unlike past findings that have been based on case studies, my information confirms on a larger scale the main argument purported by previous scholars - that litigation is a tactic used by a small number of social policy groups.

\(^{41}\) I answered the question of statistical significance as a two-step process. First, I computed a chi square test for statistical significance across the three groups. The chi-square is shown in the last column of table 2. If the test did not indicate significance at the .10 level, I concluded that there were no statistical differences among the three groups in their use of the particular tactic. If the initial test did indicate statistically significant differences among the groups, I proceeded to conduct a series of difference of proportions tests to determine what differences were statistically significant. For the difference of proportions tests, I use \(p < .05\). It is true that the difference of proportion tests constitutes a set of post hoc comparisons. Ideally, one would perform these comparisons using a statistical procedure intended for such a comparison (e.g. Scheffe’ or Bonferonni procedures used in analysis of variance.) Unfortunately, there is no such procedure, but this small number of comparisons is such that the dangers of paired comparisons is minor. See David Moore and George P. McCabe, *Introduction to the Practice of Statistics*, (New York: W.H. Freeman, 1999), 604-606, 770. For a discussion of difference of proportions, see id at 604-606. We see from the last column in table 2 that the chi-squares for six of the tactics are statistically significant at a .05 level. First, in terms of public awareness activities, seventy-four percent of women’s groups, ninety-two percent of environmental groups, and fifty-nine percent of civil liberties groups engage in this tactic. The difference between women’s groups and environmental groups in the use of public awareness activities is not statistically significant. (\(Z = 1.58\) P value .114.) Between women’s groups and civil liberties groups, here too the difference between the two percentages is not statistically significant. (\(Z = 1.11\); P value .267.) However, between environmental groups and civil liberties groups the difference is statistically significant. (\(Z = 3.12\); P value .002.) Second, in terms of demonstrations and protests, there is statistical significance in the difference between women’s groups and civil liberties groups (Z score is 2.54; P value .011) and between environmental groups and civil liberties groups (Z score is 5.34; P value .001). In the comparison between women’s groups and environmental groups the difference is not statistically significant. (Z score 1.77; P value .077). Third, with respect to monitoring government activity, the difference between women’s groups and civil liberties groups is statistically significant. (Z = 3.49; P value .002.) The difference between environmental groups and civil liberties groups is also statistically significant (\(Z= 3.05\); P value .002.) The difference between women’s groups and environmental groups, however, is not statistically significant. Fourth, in terms of policy formation, only the difference between women’s groups and civil liberties groups is statistically significant. (The Z score is 2.24 and the P value is .025.) Fifth, with regards to formal contacts with bureaucrats and legislators, the difference between women’s groups and civil liberties groups is statistically significant (Z = 3.08, P value .002), and the difference between environmental groups and civil liberties groups is statistically significant (the Z score is 2.87 and the P value is .004.) Finally, for the tactic involving coordination with political parties, none of the comparisons is statistically significant.


\textit{The Disaffection towards the Legal System}

Although the courts in India are deeply congested, the different sources of data reveal that social policy movements, and the population more generally, are not as litigious as the conventional wisdom suggests. Again, in India it is not so much that volumes of cases are coming into the legal system but rather that so few make it out. Defense lawyers use procedural strategies to frustrate the litigation efforts of social policy movements, and in doing so keep cases in the system for many years. Opponents of change - whether they are state officials, corporate directors, or others in positions of power - can file various forms of what are called \textit{interim orders}, or temporary delays. These “temporary” motions often are granted under the theory that the defending party should have the maximum amount of time to prepare a vigorous defense. Yet according to the lawyers, judges, and social policy activists with whom I spoke, defendants use these interim orders as a way to avoid having their cases heard. Such widespread abuse has prompted a respected social policy think-tank to declare that “the honest litigant is impeded in the asserting of his legal rights, while paradoxically enough, the dishonest litigant is encouraged to assert unfounded or exaggerated claims.”\textsuperscript{42} And disappointingly (but not all that surprising), a local banker confided to a journalist, “we tell our clients to settle if they have a strong case and to go court if it’s weak.”\textsuperscript{43} As a result of this legal manipulation by opponents, most social policy movements cannot financially endure what can be a decade’s worth of entanglement in the courts.


Also another reason these activists find litigation difficult stems from the lack of judges available to hear their cases. Marc Galanter and I recently compiled data illustrating how India has anywhere from one-sixth to one-tenth the number of judges found in the developed parts of the common law world. As opposed to other democracies where there is on average sixty cases per judge, in India each judge has roughly three thousand six hundred cases on her docket. Low numbers of judges translate into longer periods of time policy activists must wait to receive judgments from the courts.

Add to all this, the frustration that Indians historically have had towards the judicial process. During the colonial period, many British administrators noted that the courts they had instituted were unsatisfactory to the indigenous population. According to one British officer, everyday Indians were understandably unfamiliar with how to use the complex, transplanted English legal process. When they did become involved they would tend to “pervert” the system by filing unnecessary, time-consuming motions and prolonging the endeavor with what the British saw as irrelevant questions and useless appeals. Perhaps not surprisingly, following Independence, Mahatma Gandhi’s proposal to have India return to a system of nyaya panchayats

44 Galanter and Krishnan, “Debased Informalism.”


47 Penderel Moon, Strangers in India, (London: Farber and Farber, 1945).

– whereby village courts would adjudicate most civil and criminal matters relying on traditional, local norms – garnered a great deal of support.49

Given these circumstances, most people refrain from using the courts to redress their personal grievances or to enact large-scale social policy proposals. Aside from just deterring people from using the courts, the dysfunctional nature of the legal system also plays a role in how social policy movements wish to be viewed – or not to be viewed. Consider the TATA Energy Research Institute (TERI), one of India’s largest and wealthiest environmental policy organizations. The organization originated in 1974 and since 1982 it has studied how best to eradicate environmental and energy problems.50

The group conducts research on the emission of pollutants, solar energy, deforestation, biodiversity, and other ecological issues. While its headquarters are in New Delhi, it is a national organization that staffs several hundred people.

Dr. R.K. Pauchari is the director of TERI, and he explained to me that his organization uses a variety of tactics to achieve its policy goals. The group lobbies bureaucrats and legislators; it uses the media, holds seminars and conferences, publishes reports, journals, and books, and conducts a series of public awareness campaigns.51 The group also serves both as a think tank and special interest organization. Pauchari noted that the group does not use litigation as a tactic to pursue its policy objectives. He stated

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49 See Catherine S. Meschievitz, “Panchayat Justice: State-Sponsored Informal Courts in 19th and 20th Century India, Disputes Processing Research Program,” Working Paper, 8:1 Madison Wisconsin, Institute for Legal Studies, 1987; Galanter and Krishnan, “Debased Informalism.” Note Gandhi’s ideals were bitterly opposed by several activists at the Constituent Assembly that was formed to create the country’s constitution. Many of these critics, the most prominent of them being Dr. B.R Ambedkar, chastised Gandhi for wanting to return to a legal system that for so long had subjugated many of the same individuals that Gandhi wanted to help – namely the untouchables.

50 TERI’s website is extremely detailed and provides an important source of information. See: http://www.teriin.org/.

51 Author interview, December 2, 1998.
that TERI seeks to improve the environment in India by channeling its energies in other directions. Much of the group is comprised of scientists, researchers, academics, and social activists who are not interested in using the legal process as a policy strategy. As he stated, “it’s not as though we can’t afford to use litigation, we just choose not to. That’s not who we are, nor who we want to be.”

TERI is not the only the group with high amounts of resources that seeks to disassociate itself from the legal process. Development Alternatives is another wealthier environmental organization that expressed similar sentiments. Like TERI, Development Alternatives is a national organization that works on a range of issues including reducing global warming, preventing air, water, and land pollution, ending soil erosion, and stopping deforestation. About 150 people are on staff at Development Alternatives and since its birth in 1982 the group has been one of the most respected in the environmental sector. Development Alternatives is involved in a variety of political strategies, but litigation is not one of them. The group can afford to utilize the legal process, however it has little desire do so because it believes that its other tactics are responsible for the environmental progress made to date. Leaders in this group, like in TERI, see the courts as nothing more than a delay-ridden, time-consuming institution, where the pay-offs are minimal compared to the cumulative costs involved. The worry is that being associated with such a process could result in undermining the leadership;

52 Ibid.

53 Development Alternatives also has an impressive website with an abundant amount of information. See: http://www.devalt.org/.

54 Author interview with high-ranking official from D.A., December 4, 1998.
constituents, financial donors, and policy partners could very well question or challenge such a tactical decision.

TERI and Development Alternatives are outliers in the sense that they are wealthy policy organizations. Most of the social policy groups I examined do not use litigation, because they cannot afford to engage in this tactic. Leaders from environmental groups such as the Centre for Law and Environment, Conservazone, and Lokayan all noted that a lack of resources inhibits their ability to move from being research-based groups to research, lobbying, and litigating-based groups.55 Members from women’s groups such as the National Federation of Women, Karmika, Saheli, and the National Alliance of Women all told me that budgetary constraints also limit their ability to participate in institutional tactics such as lobbying and litigation. For this reason they are forced to rely on the efforts of individual women’s rights attorneys to promote their causes. And several of the civil liberties groups interviewed had no financial capabilities for mounting serious litigation campaigns.

But the leaders from these resource-poor policy groups commented that even if they had a strong financial base, litigation would be the last course of action they would consider. They remarked that because many of their goals involve changing government policy, if litigation were employed, one or more government agencies invariably would be on the opposite side. Movement leaders perceived that the government agency being sued would engage in endless delay and relentless appeals even where the government’s chance of winning was remote. Such an image seems to have documented support. A recent report by an analyst from the World Bank reveals that in the northern state of Uttar Pradesh, a government transportation company lost virtually every accident case in which it participated at the trial level during the late three

55 Author interview with Sarbani Sarkar, Centre for Law and Environment, November 27, 1998; Author interview with leaders of Conservazone and Lokayan on December 1, 1998.
years. Nevertheless, this government company appealed a large percentage of these cases to the state’s High Court. Although the company was involved in thousands of accident cases during this time, the Bank report discusses how the government refused to make reasonable settlement offers and instead forced the victims to take the case to trial – which the state eventually lost on most occasions. This pattern of scorched earth litigation resulted in filling the courts with meritless claims (and defenses) and discouraged meritorious claims by increasing the expense and delay of using these forums.56

We thus have the beginnings of important empirical evidence showing how the institutional failings of the legal system in India contribute to why many social policy groups seek to avoid litigation. Yet, there are organizations that do turn to the courts to pursue their policy agendas. With such deficiencies in the judicial process, why would certain social policy groups still decide to use litigation as a strategic option? We turn to this question in the next section.

Who Litigates and Why?

Among the social policy organizations that I examined, those with the strongest financial base were also the ones more likely to employ litigation as a policy tactic. Consider the data in table 2.

56 The World Bank report referred to here in this section is thus far an unpublished document and was provided to the author in a personal communication from the official who conducted the study. Although the author has been granted permission to discuss the Uttar Pradesh study in academic work, to protect the confidentiality of the World Bank paper, the author, for now, is not releasing the official’s identity or the title of the report. However, the contents of the document can be discussed by contacting the author directly.
Table 2

| Ranking Indian Policy Groups on Basis of Resource-Possession$^{57}$ |
|---------------------------------|-----------------|-----------------|-----------------|-----------------|
|                                 | High Top $\frac{1}{4}$ | Medium Second $\frac{1}{4}$ | Low Third $\frac{1}{4}$ | Bottom Last $\frac{1}{4}$ |
| % using litigation              | 56%              | 38%              | 13%              | 7%              |
| % not using litigation          | 44%              | 62%              | 87%              | 93%              |
| N                               | 16               | 16               | 16               | 14               |

Chi Square = 10.70, df = 3, p = .013

Relying on a blunt measure of group-resources (the financial budget of each interest organization), the table shows that of the groups that are in the top quartile (with respect to resources) 56% engage in litigation; of those in the bottom quartile, only 7% litigate. Of the groups in the second quartile, 38% participate in the legal process while of those in the third quartile only 13% litigate.

The fact that resources affect whether or not social policy movements in India litigate is not a novel finding. Such trends, both within and outside of India, have been documented elsewhere by other observers.$^{58}$ Even with the financial capabilities to engage in litigation, Indian social policy groups must have other reasons to participate in a process latent with so many of the problems mentioned above. One might assume that a desire to gain favorable legal judgments would be one reason for choosing this tactic. But as I was told, because receiving such benefits can take great amounts of time this is not a primary motivation for many groups. (The deficiencies associated with the legal

$^{57}$ I interviewed 62 groups and each of these groups also completed a questionnaire. I also obtained an additional 11 questionnaires from groups I did not interview. The questionnaire did not raise questions involving group budget. I obtained information on each group’s budget from my interviews with the group leaders and/or from budgetary reports the leaders provided.

system are not lost on these court-users.) So why, then, is litigation employed as a means to pursue social policy objectives?

For some movements, there is a feeling that a range of tactics must be pursued – including litigation – in order to prove to financial contributors that all is being done to advance the cause. The People’s Union for Democratic Rights (PUDR) is a good example of a social policy organization that highlights this point. The history of the PUDR is tied to the People’s Union of Civil Liberties and Democratic Rights (PUCLDR) which emerged in 1975. The PUCLDR was the country’s preeminent civil liberties and civil rights organization throughout the 1970’s. In 1981, however, the PUCLDR split into two groups: the People’s Union for Civil Liberties (PUCL) and the PUDR.\footnote{Epp, \textit{Rights Revolution}, 97-98.} The former, according to PUCL board member Hasan Mansoor, is a frequent and regular user of litigation that sees the courts as the “primary way of preserving human rights.”\footnote{Author interview, October 28, 1998.} In contrast, Dr. Sudesh Vaid, a high ranking official in the PUDR, views her organization as one that uses the courts but also is involved in other more grassroots activities.\footnote{Author interview, December 5, 1998. Sadly, Dr. Vaid died in 2001.}

The PUDR derives much of its support from younger constituents who are committed to pursuing their policy objectives through different avenues. As Dr. Vaid indicated, while both the PUDR and PUCL work together on certain issues, most PUDR members do not belong to the PUCL. The reason is because there is a perception among PUDR supporters that the PUCL’s activities are too tailored towards litigation. Vaid commented that members are attracted to her organization because of its “tactical
pluralism.” For example, in the winter of 1998 several Hindu-nationalist members of parliament proposed passing a law that would expand capital punishment. The PUDR voiced opposition to the proposal by holding vigils, public awareness meetings, and a series of protests and demonstrations. In discussing these activities used by the PUDR, Vaid stated that her group would not hesitate to file for an injunction in court if this proposal became law. Abandoning litigation as a policy tactic has never been an option. But Vaid remarked that her supporters back the PUDR because – not in spite of – the group’s moderate use of litigation in conjunction with other tactics. Having its financial supporters satisfied and confident that an array of tactics is being used to promote their agenda, including that of litigation, is a key factor for why the PUDR turns to the judiciary despite the many structural shortcomings present within this institution.

Another reason that prompts some policy groups to use the courts relates to the type of role that the group perceives itself as having. The Centre for Science and the Environment (CSE), one of India’s most respected environmental organizations, is an important case study to highlight this point. Before his untimely death Anil Agarwal, the powerful and charismatic leader of the CSE granted me an in-depth interview describing his organization’s interaction with the legal system. Agarwal noted that while the CSE does not typically serve as a party to a lawsuit, it has on occasion attempted to petition the Supreme Court to hear environmental cases. In addition, CSE leaders have served as members on a governmental body known as the Environmental Authority. (The Authority was set up in 1997 by the Supreme Court after Agarwal had pressured the

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62 Ibid.

63 Ibid.

64 Author interview, December 1, 1998.
Court to address the problem of air pollution in New Delhi. As a result of CSE involvement the Supreme Court has adopted multiple recommendations of the Authority.\textsuperscript{65}

Although quite cynical about the Indian legal process Agarwal stated that CSE involves itself in law-related activities because of its position vis-à-vis other environmental organizations. CSE is wealthy; it is internationally renowned; and it is politically powerful. Other environmental organizations are familiar with the laurels of CSE, and according to Agarwal, there is an expectation placed upon his group by these policy partners. As he put it:

\textbf{“we are sometimes expected to be all things to all people, and while I might hate a lot of things about the court-system, \ldots [why] unnecessarily anger those who I may need to help me, sometime down the road?”}\textsuperscript{66}

Maintaining a strong reputation within its organizational policy sector is of crucial importance to CSE. The tactics CSE employs, its perception of success using these tactics, and its ultimate decision on whether to use the law to pursue policy goals are predicated on how it thinks its relationship with other environmental organizations might be affected.

Still another reason a group may turn to the courts is to gain publicity for its cause. One such group that brings this point to light is the All-India Women’s Conference (AIWC). The AIWC traces its roots to the time of the British Raj. The group was founded in 1927 by Margaret Cousins, an Irish woman who immigrated to

\textsuperscript{65} Ibid.

\textsuperscript{66} Ibid.
India to help promote gender equality. Prior to Independence the AIWC focused its efforts on educating women and making them aware of the political, social, and economic inequity between the genders. Following 1947 the AIWC began expanding its activities. The group started helping victims of domestic violence through counseling services and therapy. Battered women’s shelters were established as were family planning clinics and health care facilities. The AIWC also began to assist women who sought employment, and the group has lobbied members of parliament to pass laws protecting the rights of women. The group arranges both national and international conferences to address the needs of women, and it participates in marches, protests, and demonstrations.67

The AIWC uses the law in different ways. Some AIWC members are attorneys who counsel women on a pro bono basis. In addition, the government subsidizes two “legal aid cells” to the AIWC.68 Each cell, or office, is staffed by outside attorneys who volunteer their time to provide free legal advice to women on such matters as divorce, alimony, inheritance, and domestic violence.69 Throughout the country the AIWC has free clinics of its own that offer women information regarding their legal rights. The group also sponsors educational seminars to make women politically and legally aware of their options. And, indeed, on some occasions the group opts to pursue direct legal action in the courts.70

67 This information comes from literature published by the AIWC (on file with author). Particularly see, Years Under Review: All-India Women’s Conference (New Delhi: AIWC, 1997).

68 Author interview with AIWC official, Nov. 30, 1998.

69 Ibid.

70 Ibid.
It terms of serving as a litigant, it is true that in most cases this is a route that AIWC would rather avoid. In my interviews with AIWC officials, I learned that the leadership believes that other tactics are more conducive to the group’s mission. One top policy advisor noted that decisions from courts alone do not alter a women’s status in society. “There has to be pressure from all sides, particularly from the bottom-up,” this advisor commented.71 However, this individual, as well as other AIWC officials with whom I met, suggested that serving as a lawsuit participant at times helps to bring women’s issues into the public discourse.72 When the group has difficulty generating desired attention for one of its causes, turning to the courts becomes an important option. As I was told, even though the courts are backlogged with cases, it is common for legislators, bureaucrats, the media, and the educated public to follow important activity occurring in the courts.73 With such attention being paid to the judiciary, the AIWC knows the likelihood is high that engaging in litigation will result in making more people aware of the group’s cause.

I then asked this particular official why the AIWC - given its history and name recognition - needs to worry about trying to generate public attention for its causes. Are not people already familiar with the work of this long-standing organization? The official stated that while the AIWC is an old organization, today the group is quite different in nature. Although the goal is still to empower and protect the rights of women, the group’s activities are more numerous and its mission is more comprehensive. According to this official many people are not aware of the “new” AIWC and thus there

71 Author interview, December 24, 1998.
72 Ibid.
73 Ibid.
is a need to publicize the causes that the group champions.\textsuperscript{74} There is a perceived sense that litigating in court can bring to light what the group does and \textit{who the group is} - in a manner distinct from other types of available tactics.

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These above examples exemplify the fact that even among those that use the courts to pursue policy goals, there is a belief that the system alone does not provide enough of an incentive for most social policy organizations to opt for this route. Other factors, ranging from donor pressure to policy partner commitments to achieving publicity for a cause, seem to weigh heavily in the minds of these organizational leaders.

This is not to say that all social policy organizations view the courts with such cynicism. Each of the above organizations conceded that on occasion the judicial process has provided them with important and necessary benefits, furthering their respective agendas. One organization engaged in the legal process for the specific purpose of acquiring policy benefits is the civil rights group known as the Lawyers Collective. This Bombay-based organization has served as a champion for the ill, particularly those individuals with HIV and/or AIDS. Elsewhere I have discussed in detail the various cases brought by the Lawyers Collective,\textsuperscript{75} but for our purposes here, what is noteworthy is that the courts have secured for the ill significant rights that they had here-to-fore been denied. For example, because of court intervention, people with HIV/AIDS now can marry, whereas prior to a 2003 Supreme Court ruling such a fundamental right had been denied.

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\textsuperscript{74} Ibid.

\textsuperscript{75} See Krishnan, \textit{Rights of the New Untouchables}.  


denied to these individuals.\textsuperscript{76} In addition, because of the government’s lack of interest and ability, the courts have been involved in overseeing how blood banks are administered throughout the country. And, it is the courts, upon suits initiated by the Lawyers Collective, that have ruled that people with HIV cannot be disqualified from employment opportunities because of their health condition.\textsuperscript{77}

Therefore, for some groups the legal process can be an avenue where policy objectives are achieved. But the case of the Lawyers Collective is more of an exception than the rule. Even officials from this organization admit that because of the delay-ridden quality of the judicial system, litigation has to be just one of several tactics it employs in order to ensure that its goals are recognized.\textsuperscript{78} It is true that when the group receives a favorable judgment, it is confident that such a ruling will be in place for a long period of time – mainly because of the enormous time it takes to obtain a court decision in the first place. But as these officials acknowledged, it is not as though all court decisions have been in their favor; for those that have not, attempting to overturn an unfavorable ruling through litigation has remained a time-consuming, Sisyphian-like task.

V. Conclusion

In his famous footnote four the American Supreme Court Justice, Harlan Fiske Stone, several decades ago noted that the judiciary must be the institution for redress when there is a curtailment in “the operation of those political processes ordinarily to be

\textsuperscript{76} Ibid.

\textsuperscript{77} Ibid.

\textsuperscript{78} See Lawyers Collective website: http://www.hri.ca/partners/lc/.
relied upon to protect minorities.” If under-represented interests are to seek protection in the courts, then it is imperative that a democratic state not forget that the adjudication of justice in a fair, timely, and cost-effective manner impacts whether and how frequently groups will wish to use the legal process. The data above reveal that several Indian social policy groups have tended to shy away from the courts not only because of resource-considerations but also because of the consequences associated with being involved in such a flawed system. Although some organizations pursue litigation in order to obtain social policy benefits, most opt for other routes because of the extraordinary delay present within the courts.

Are there reforms that could be enacted that might provide more organizations with the opportunities to use the legal process? One recommendation is that substantive changes be made in both the Indian Civil and Indian Criminal Procedure Codes. As already stated, the current Codes allows for endless appeals that result in cases being continued for decades or simply never heard. Bibek Debroy notes that:

“Half a million cases in the High Courts have been on hold for 10 years or more, and almost 1 million in the lower courts. While the overly long time taken for civil cases to be resolved can be frustrating to litigants, of much greater concern are cases that involve incarceration. Two-thirds of the case backlog involves criminal trials. Today, there are 275,000 people in India's jails; 200,000 of them are waiting for their day in court. Even more distressing, 72% of the jail population consists of people accused only of petty crimes. Many have been locked up awaiting trial for longer than the maximum sentence for their alleged crime.”

Yet the problem with trying to reform the Codes lies with the Indian Bar. Lawyers tend to receive their fees on the basis of court appearance. So on its face there


seems little incentive to change the way the game is currently played. A recent proposal to overhaul the civil procedure code met with fierce resistance from lawyers who demonstrated and went on strike; eventually a watered down version of the proposal was passed, but most observers are skeptical that real change is on its way. One possible compromise might be to implement a contingency or conditional fee system whereby lawyers would have a financial incentive to resolve cases both conscientiously and efficiently.     

Whether such a proposal would receive the blessing of the powerful Indian Bar Council remains to be seen.

In addition, India desperately needs more judges and more physical courts. In terms of judges, consider that just at the state High Court level, there are 610 seats reserved for judges throughout the country – an already woefully low number for a nation of one billion. Currently, 129 of these positions remain vacant, and in the lower courts the percentage of vacancies is even greater, thus resulting in each sitting judge being saddled with thousands of cases on her docket per year. As for the physical courts themselves, they are poorly equipped and often unable to perform even the most basic tasks found in the west (e.g., systematized record-keeping, transcription, and the like). More resources devoted to the building of courts and the training of competent judges could go a long way in providing additional points of access for social policy groups interested in seeking to address their claims in court.

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Finally, a more accountable system of alternative dispute resolution (ADR) could provide structural assistance for those groups that wish to resolve issues in a less adversarial, perhaps even more efficient, manner. Beginning in the 1980s India formally adopted a system of ADR, with an institution known as the *lok adalat* (people’s court) serving as the main dispute resolution forum. There are many different types of lok adalats today, each one focusing on individual civil and criminal matters. In some cities, lok adalats have been established to hear cases relating to women’s rights, environmental pollution, and other social policy issues. Professor Marc Galanter and I are involved in a yearlong project evaluating how these forums function, but our preliminary data gives us pause. Thus far, we have found that the lok adalat system suffers from several serious problems. There are often huge power differentials between the opposing parties that place into question the fairness of agreed-upon settlements. At some of our observation sites, we have discovered that arbitrators are more concerned with disposing of cases than reaching equitable resolutions. There are also questions of whether poorer claimants, particularly in social policy-oriented lok adalats, have their claims adequately presented. And we have raised queries regarding the consistency of outcomes and the overall efficiency of the process. If alternative dispute forums are to serve as an arena for social policy organizations to present their claims, these issues first need to be resolved.

This study then has sought to provide a framework for future inquiry on social policy advocacy and the role of the courts in India. There are numerous institutional impediments obstructing social policy groups from feeling confident enough to turn to the legal process to redress their concerns. The hope is that the issues raised in this study
will lead to further investigation on how best to make the Indian courts more accessible to the greatest number of people.
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