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# The Emerging Civil Right to Counsel in India: On "Enforceable" Directive Principles

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# THE EMERGING CIVIL RIGHT TO COUNSEL IN INDIA: ON "ENFORCEABLE" DIRECTIVE PRINCIPLES

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*This Article challenges one of the most robust commonplaces in the study of Indian Constitutional Law, viz. that Directive Principles of State Policy under Article IV cannot be enforced by the judiciary. Through a careful reading of the Constitution's text and structure, as well as an investigation of relevant precedents within India, the United States, and other common-law jurisdictions, it argues: 1) Article 39A commands "the State" to promote justice on the basis of equal opportunity, in particular through legal services enacted through legislation or other methods; 2) The judiciary is part of the State that Article 39A commands; 3) Courts, then, must use their powers to fulfill Article 39A even if that Article is not judicially enforceable; 4) The judiciary has authority over the maintenance and integrity of the legal system; 5) It also has its own authority to spend money to maintain and improve that system; and 6) it has the authority to allocate funds to pay lawyers and other legal personnel in civil cases if it believes that doing so will strengthen the legal system and fulfill its Article 39A mandate. The Constitution's promise of the right to counsel in* civil *cases thus lies well within the judicial power to accomplish. The Article suggests areas where the judiciary should use this power, e.g. family law, housing, and the environment. It also raises important questions about the very nature of Directive Principles and the meaning of judicial "enforcement."*

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"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."

- Constitution of India Article 39A

## INTRODUCTION

In Assam province, a Muslim farmer whose family has worked the land for decades suddenly finds his citizenship stripped from him. It doesn't matter that he has been there for years: a "foreigner tribunal" has deemed him not to be an Indian citizen,[1] and the police are coming to put him in a detention camp for deportation to his "home country."[2]

On the other side of the Continent, in Karnataka, a road-construction company operates an open-air stone-crushing facility, filling the air with fine particulate matter and filling the lungs of nearby children and elderly.[3] Villagers have spoken to their local panchayat, but the sarpanch, paid off by the company, is uninterested and tells them to keep quiet "or else."

Up north in Rajasthan, a man kicks his wife out of the house and divorces her, taking the children with him. She is now penniless and cannot get her children back.

These three people are far apart, both physically and culturally. They might not even be able to speak to each other. But they share a common problem: they need a lawyer and cannot get one. A lawyer will not fix their problem, but can do a lot, and can fight for the larger changes that are needed: a

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[1] See Karan Deep Singh and Suhasini Raj, 'Muslims Are Foreigners': Inside India's Campaign to Decide Who Is a Citizen, N.Y. Times, Apr. 4, 2020, at https://www.nytimes.com/2020/04/04/world/asia/india-modi-citizenship-muslims-assam.html

[2] See Bibhudatta Pradhan, Millions in India Could End Up in Modi's New Detention Camps, Bloomberg, Feb. 25, 2020, at https://www.bloomberg.com/features/2020-modi-india-detention-camps/.

[3] I get this example from Tina Rosenberg, India's Barefoot Lawyers, N.Y. Times, Aug, 8, 2017, at https://www.nytimes.com/2017/08/08/opinion/indias-barefoot-lawyers.html

lawyer can help the Assamite get the documents he needs and challenge decisions made by the Foreigners' Tribunal. A lawyer can tell the Karantakans about their legal rights and help them gather the information they need to bring an action before the National Green Tribunal, which can stop the company's practice. And a lawyer can get at least partial custody and child support (and perhaps maintenance) for the woman in Rajasthan.

As the passage quoted from the Indian Constitution indicates, providing lawyers for those who cannot afford them is a mandate from the Union's basic law. The problem, however, is obvious for anyone with a cursory knowledge of the document. Article 39A falls under Part IV of the Costitution, making it one of the Directive Principles of State Policy, and everyone knows that the Directive Principles are non-justiciable. They have "mere moral appeal"[4] and "no practical implication,"[5] scholars recently yawned. One scholar has gone so far as to argue that due to their unenforceability, "directive principles are not law at all, much less a part of the supreme law."[6] And this seems straightforward, given the Constitution's clear statement that the Directive Principles "shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."[7]

But everyone is wrong. This Article argues that the judiciary, particularly the Supreme Court, possesses both the authority and the constitutional responsibility to implement the Directive Principles in one area where it has unique

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[4] DEJO OLOWU, AN INTEGRATIVE RIGHTS-BASED APPROACH TO HUMAN DEVELOPMENT IN AFRICA 96-98 (2009).

[5] CHRISTOPHE JAFFRELOT, DR. AMBEDKAR AND UNTOUCHABILITY: ANALYZING AND FIGHTING CASTE 112 (2005). Indeed, directive principles' alleged unenforceability has spawned a significant academic literature because scholars must answer the basic question: if one cannot enforce Directive Principles, then, like War, what are they good for? For two recent thoughtful works answering this question, *see, e.g.,* Lael K. Weis, *Constitutional Directive Principles,* 37 OXFORD J.L. STUD. 916-45 (2017); Tarunabh Khaitan, *Constitutional Directives: Morally-Committed Political Constitutionalism,* 82 MODERN L. REV. 603-32 (2019). For the song, see Norman Whitfield & Barrett Strong, *War, on* Psychedelic Shack (Gordy Records, 1970). But until this Article, to the best of my knowledge, no one has questioned the underlying assumption, namely, that the judiciary cannot on its own authority use Directive Principles.

[6] 2 H.M. SEERVAI, THE CONSTITUTION OF INDIA: A CRITICAL COMMENTARY 1923 (4th ed. 2015).

[7] CONST. OF INDIA, art. XXXVII.Wa

and unquestioned competence: the operation of the legal system itself. More specifically, the judiciary is that part of "the State" upon which Article 30A imposes affirmative obligations. And this responsibility, in turn, means that the right to *civil* legal services for the poor, contemplated in Article 39A of the Constitution, need not wait for Parliamentary approval: it can be achieved through petitions to the courts themselves. The promise of greater civil justice is now within the law's grasp.

It is not simply a matter of Article 39A. This Article considers a cluster of authorities, customs, and practices that generate a "judicial power of the purse"[8] in critical circumstances. Foremost among these is an "inherent judicial power" to spend money to maintain the legal system, a doctrine advanced and upheld even by conservative courts in the United States and endorsed sub silentio by the Indian Supreme Court. Such a power, together with other explicit Constitutional principles, enables the Indian Supreme Court, clothed with the broadest and deepest jurisdiction of perhaps any high court in the world, to take vigorous steps to ensure adequate representation for the poor and subordinated throughout the Union.

## I. ARTICLE 39A

We know a good bit about Article 39A generally and very little about it specifically. The overall background of the amendment has a straightforward history; how precisely it was supposed to work and what its framers envisioned for it as a constitutional provision is much murkier.

For nearly two decades before Article 39A's adoption, members of the bench and bar had studied and agitated for greater provision of state-supported civil legal services.[9] The leading figure in the movement was Justice VP Krishna Iyer, whose 1973 report declared that "the vital need for a comprehensive scheme on legal aid as it is an indispensable instrument on social

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[8] The phrase was coined by Gerald Frug. See Gerald Frug, *The Judicial Power of the Purse,* 126 U. PA. L. REV. 715 (1978). As will become evident, the conception here of this judicial power differs considerably from Frug's.

[9] *See* S.S. SHARMA, LEGAL AID TO THE POOR: THE LAW AND INDIAN LEGAL SYSTEM 64-78 (1993).

transformation of our country in the direction indicated by the Constitution."[10] But while some states established the rudiments of government-supported legal aid, the studies sat on shelves and gathered dust.

Then the Emergency came. Article 39A formed a small part of the Government's hugely controversial 42nd Amendment, which served as a centerpiece of Mrs. Gandhi's attempt to create a "socialist society" as well as stopping the judiciary from blocking her ambitious and radical social "reform" plans. The Amendment significantly restricted judicial review, especially of Directive Principles and election disputes, and purported to rid the Union of the "basic structure" doctrine, which had prevented Mrs. Gandhi from amending the Constitution itself. Opposition figures denounced the proposal, and large sections of it were repealed by the Janata Government that took power after the end of the Emergency in 1977.[11] The Supreme Court struck down many other parts of the Amendment in the late 1970's. But through it all, Article 39A proved uncontroversial and frankly invisible, very possibly because as a Directive Principle, it was seen as irrelevant and toothless. During the heated parliamentary debates on the whole Amendment, not a single member of the Lok Sabha mentioned it. And since the committee that prepared the Amendment worked in secret, we so far know little about precisely where it came from.[12]

It did not take long for Indian courts to derive a constitutional right to counsel in *criminal* cases, which they did by combining Article 21's[13] protection of "life and personal liberty" with Article 39A.[14] By 1986, Chief Justice Bhagwati could state blandly proclaim it "settled law" that "free legal assistance at State cost is a fundamental right of a person accused of an offence

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[10] Report of the Expert Committee on Legal Aid Processual Justice to the people 241 (1973).

[11] A good description of the adoption of and controversy surrounding the 42nd Amendment can be found in GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 370-90 (1999).

[12] *Cf.* Int'l Inv. Trust v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975)(Friendly, J.) (Noting of the Alien Tort Claims Act that "although it has been with us since the first Judiciary Act ... no one seems to know whence it came.").

[13] Article 21 of the Indian Constitution reads in full: "No person shall be deprived of his life or personal liberty except according to a procedure established by law."

[14] See M H Hoskot v State of Maharashtra, AJR 1978 SC 1548 (¶ 21) : 1978 CrLJ 1678 : (1978) 3 SCC 544.

which may involve jeopardy to his life of personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21."[15]

Civil cases, however, were different, even if jurists and commentators rarely made the distinction. For the next decade, several committees and commissions made proposals for the establishment of legal services, many of them focusing on informal dispute resolution mechanisms that eventually became known as *Lok Adalats*.[16] Politicians in particular loved showing up at Lok Adalats, as they represented an easy way to get face time with voters.[17]

Finally, however, Parliament decided to put both civil legal aid and Lok Adalats into legislation with the 1987 Legal Services Authorities Act. It says something about the Union's commitment to civil legal aid that historians have so not identified why Parliament waited a decade to act on its constitutional command, or why it suddenly decided to do so when it did.[18] At least on paper, though, the Act constructed an impressive organizational edifice.

Hidden within the legislation, however, lurks a potentially fatal flaw: legal services have no regular source of funding but instead must depend upon on annual Parliamentary appropriation.[19] The budgetary figures over the last several years reveal what a frail reed this has been. In 2018-2019, the Legal Services Authority received a pitiable ₹150 crores[20] – less than $20 million for all 1.35 billion Indians. Since then, it *declined* to ₹140 crores, and for the present year, the Law Ministry has request only ₹100 crores, making it wholly

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[15] Suk Das v Union Territory of Arunachal Pradesh, 1986 AIR 991, 1986 SCR (1) 590. To some extent, it was settled because of Justice Bhagwati's previous decisions, see, e.g., Husaainara Khatoon et al v. State Secretary of Bihar, 1979 AIR 1369, 1979 SCR (3) 532, but none of these decisions has ever been questioned.

[16] A good and somewhat cynical overview can be found in Sarah Leah Whitson, *Neither Fish, Nor Flesh, Nor Good Red Herring* Lok Adalats*: An Experiment in Informal Dispute Resolution in India*, 15 HASTINGS INT'L & COMP. L. REV. 391, 400-16 (1992).

[17] Id. at 410-11.

[18] One leading history strangely says simply that "due to various reasons no legislation was passed until 1986." S.S. SHARMA, LEGAL AID TO THE POOR: THE LAW AND INDIAN LEGAL SYSTEM 104 (1993).

[19] Legal Services Authorities Act 1987 §14.

[20] In Indian usage, a "crore" equals 10 million. Thus, 100 crore equals 1 billion in American usage.

within the realm of possibility that the Modi government will eliminate funding altogether.[21]

The political process hardly figures to solve the problem.[22] The Legal Services Authority has existed for more than three decades, and funding has declined sharply for its original wholly-inadequate level. For decades before that, high-powered committees chaired by high-powered jurists called for enhanced civil legal services – and were greeted with mostly polite smiles. Nor are the states able to adequately fill the gap – as they weren't before the enactment of the NLSA. A recent comprehensive study found virtually the entire legal system woefully underfunded, and noted that "[c]lients 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," but "very little legal aid is provided by either the bar or the state." [23]

In many instances, of course, this would at some level end the matter: elected politicians determine budgets, and they have determined that funding for civil legal services is simply not a high enough priority. But the Constitution directs the promotion of justice by providing for free legal aid in order to ensure equality of opportunity. And as we shall see, such a mandate imposes obligations upon the judiciary.

## II. WHAT IS "THE STATE"?

When all else fails, read the directions. Lost in the boilerplate statement that Directive Principles are unenforceable is the plain text of Part IV: Directive Principles instruct "the State" to apply them in "making law."[24] The

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[21] Budgetary figures from 2018 to the present may be found at https://www.indiabudget.gov.in/doc/eb/sbe64.pdf. See also Yash Agarwal, *Why Is The National Legal Services Authority Being Starved of Resources?*, THE LEAFLET, Sept. 14, 2020, at https://www.theleaflet.in/why-is-the-national-legal-services-authority-being-starved-of-resources/#.

[22] *See generally, e.g.,* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980)(arguing that the judiciary should step in under circumstances of "political process failure.").

[23] Jayanth Krishnan et al., *Grappling at the Grassroots: Access to Justice in India's Lower Tier*, 27 HARV. HUM. RIGHTS J. 151, 168 (2014).

[24] Const. of India, Article 37.Am

judiciary, however, constitutes an intrinsic and necessary organ of *state* power. We are long past the time when we would have to prove, as Justice Holmes famously asserted, that the "law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified."[25] This would seem to give the judiciary at least partial authority to take actions implementing the Directive Principles.

A. The Nature of Inclusion

Skeptics will immediately object that under the Indian Constitution, "the State" has a particular definition for Directive Principles: "'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."[26]

Does this definition, which focuses on the Government and the Legislature, exclude the judiciary? No, for the obvious reason that this definition does not pretend to be exclusive: the State "includes" legislative and executive bodies but does not limit it to those branches. Such language implicitly contemplates that others might be incorporated as well.

The Constitution itself requires the inclusion of the judiciary in "the State," for it provides that "The State shall not make any law which takes away or abridges [Fundamental Rights] and any law made in contravention of this clause shall, to the extent of the contravention, be void."[27] As the Supreme Court opinions have observed,[28] were this provision to exclude the judiciary, courts *could* abrogate Fundamental Rights – an absurdity that undermines the entire nature of the Constitution itself.

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[25] *Southern Pacific Company v. Jensen* 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[26] Const. of India Art. 12.

[27] Const. of India Art. 13(2).

[28] See, e.g., Naresh Shridhar Mirajkar And Ors vs State Of Maharashtra And Anr on 3 March, 1966, 1967 AIR, 1 1966 SCR (3) 74 (Hidayattulah, J., dissenting).
"To begin with we have the definition of 'State' in Art. 12.* That definition does not say fully what may be included in the word 'State' but, although it says that the word includes certain authorities, it does not consider it necessary to say that courts and Judges are excluded. The reason is made obvious at once. if we consider Art. 13(2).** There the word 'State must obviously include 'courts' because otherwise 'courts' will be enabled to make rules which take away or abridge fundamental rights."

An examination of British English dictionaries from the time of the framing of India's Constitution demonstrates the non-comprehensive nature of "include." Fowler's *Modern English Usage* specifically distinguished "comprise" from "include", because the former was comprehensive and the latter was not.[29] Similarly, the Oxford English Dictionary defined "include" to mean "part of the whole."[30] Some other dictionaries were equivocal, saying that "include" could mean "comprise" *or* "part of the whole."[31]

The issue, however, transcends lexicography. For decades prior to the Indian Constitution's framing, jurists and legal scholars discussed the meaning of the word "include." Lord Coleridge highlighted the issue in 1879, a year before he became Lord High Chief Justice of England:

> The words "shall include" are not identical with, or put for, "shall mean". The definition does not purport to be complete or exhaustive. By no means does it exclude any interpretation which the section of the act would otherwise have, it merely provides that certain specified cases shall be included.[32]

The same very same year, Lord Weston explained[33] that:

> The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural

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[29] H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 264-65 (corrected ed. 1937). The original Fowler was published in 1926 and was not updated until the mid-60's, so it can be safely said that if any drafter working in the Constituent Assembly worked with the volume, he used this edition.

[30] *See* THE POCKET OXFORD DICTIONARY OF CURRENT ENGLISH 399 (F.G. Fowler & H.W. Fowler eds. 4th ed. 1942 reprinted with corrections 1947). This edition also lists "comprise" as a definition of "include", but all of its examples use "include" as meaning "part of a whole." *See also* THE ADVANCED LEARNER'S DICTIONARY OF CURRENT ENGLISH 498 (A.S. Hornby, E.V. Gatenby, and H. Wakefield eds.)(2d. ed 1963)(1948)(defining "include" as "bring in, reckon, as part of the whole.").

[31] *See, e.g.,* ODHAM'S DICTIONARY OF THE ENGLISH LANGUAGE 563 (A.H. Smith & J.L. N. O'Laughlin eds. 1946).

[32] Queen v. Hermann, 4 Queen's Bench Div. 284, 288 (Mar. 22, 1879)

[33] Meux v. Jacobs, 7 House of Lords 481 (1875).

> import, but also those things which the interpretation clause declares that they shall include.[34]

Would Indian lawyers have been familiar with these cases? Absolutely – especially because courts discussed them in Indian cases as well. The precise issue was discussed in *Municipal Commissioner v. Mathurabai*,[35] a 1906 decision before the Bombay High Court. The case concerned a landowner in a subdivision whose plots were separated by a private road. The landowner wanted to build a house more than twice as high as the width of the road, thus creating shadows. Bombay municipal regulations allowed the commissioner to regulate "streets," and so the case turned on whether a private road within a subdivision constituted a "street."

The relevant Bombay ordinance defined streets as "including" a variety of synonyms for street "over which the public have a right of passage or access." Since this was obviously a private road, the landowner argued that the ordinance did not apply. The Court disagreed, noting that the word "include" in the regulation was non-exhaustive, and citing both Lord Coleridge's and Lord Watson's opinions, noted that

> [t]he draftsman of the Bombay Municipal Act was fully aware of the difference between "include" and "mean" and we are of the opinion that he used the word "include" in order to enlarge the meaning of the word "street," which, having before him the example of various Judges in England before him, he was careful not to define.

It was thus easy for the Bombay High Court to hold that "include" was non-exhaustive, and that the private road had to comply with municipal regulations. Nor was *Mathurabai* a one-off in pre-Emancipation Indian courts.

Treatises easily available to Indian lawyers told the same story. The equivocal nature of the word "include" was important to be…included in Beal's Cardinal Principles of Legal Interpretation, published in 1908. Craies'

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[34] But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include," and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act must invariably be attached to these words or expressions.

[35] Vol. VIII, pp. 457-470, A. CR. J., April 21, 1906, I.L.R. 30 Bom. 558.

Treatise on Statute Law, published in 1911, went further, stating strongly that "include" does not signify "mean."

B. The India Supreme Court's View

This non-comprehensive nature of the "include" appears to be the India Supreme Court's view. in the case of *Common Cause* v. *Union of India*,[36] the Court observed that: "Part IV of the Constitution [which sets forth the Directive Principles] is as much a guiding light for the Judicial organ of the State as the Executive and the Legislative arms, all three being integral parts of the "State" within the meaning of Article 12 of the Constitution." Similarly, in *Delhi Jal Board vs National Campaign Etc.& Ors on 12 July, 2011,* the three-judge bench stated the "it is the duty of the judicial constituent of the State like its political and executive constituents to protect the rights of every citizen and every individual and ensure that everyone is able to live with dignity."[37] That the judiciary was part of the State was so obvious that it did not even need to be argued.

And in the similarly famous case of *All India Judges' Association v Union of India,* the Supreme Court declared:

> Judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State.[38]

Nor are the cases outliers. The Supreme Court noted in the seminal case of *Ranjan Trivedi v. Union* that "*primarily* Article 39A is addressed to the Legislature and Executive, but so far as the court of justice can indulge in judicial lawmaking within the interstices of the Constitution or any statute

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[36] (2015) 7 SCC 1 : AIR 2015 SC 2286 (two-person bench).

[37] ¶20.

[38] (1993) 4 SCC 288 : AIR 1993 SC 2493.

before them for construction, the Courts too are bound by this mandate."[39] The equivocal nature of the language speaks volumes. It specifically disclaims the idea that Directive Principles only apply to the Legislative and Executive branches and just as specifically approves "judicial lawmaking within the interstices of the Constitution."

Thus, Article 12, far from excluding the judiciary from the State, leaves the matter open, and Supreme Court precedent takes the modern position that the judiciary is indeed part of the State. If that is the case, then, the judiciary is itself – like all institutions of the State -- obliged to follow the Directive Principles. But what might that mean? Were the judiciary to see itself as "the state" for *all* purposes, and thus take it upon itself to appropriate money in all or even many circumstances, we might indeed face the prospect, warned of by Mahendra Pal Singh, of an "oligarchy by judges." But we need not leap to such a conclusion. Let us first consider what kinds of powers judges have.

## III. JUDICIAL AUTHORITY IN INDIA

It is literally hornbook law that "the jurisdiction and powers of our Supreme Court are in their nature and extent wider than those exercised by the highest Court of any other country."[40] In this Section, I hope to show that Indian courts have pushed the boundaries of Article 39A beyond the hornbook cliché of judicial non-enforceability, chafing at this supposed limitation.

### A. Article 39A in the Supreme Court

Article 39A's status as a Directive Principle might imply to some that little case law would construe it: after all, if it is not judicially enforceable, why would judges have the occasion to discuss it?[41] Yet Courts have done so, repeatedly: and they have consistently interpreted broadly, suggesting that it does give them authority to act.

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[39] 1983 SCR (2) 982, 1983 SCC (3) 307 (emphasis added).

[40] DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 333 (23rd ed.; Justice G B Patnaik & Yasobant Das eds., 2018).

[41] One clear exception to this rule, of course, lies in the interpretation of statutes, because Directive Principles serve as canons of statutory construction. See, e.g., V. C. Rangadurai vs D. Gopalan And Ors on 4 October, 1978 (1979 AIR 281, 1979 SCR (1)1054)(Krishna Iyer, J.)(Noting that judges may "quarry" more meaning from statutes in light of Article 39A).

More than quarter of a century ago, the Supreme Court held that Article 21, which guarantees the "right to life,"[42] and Article 39A, have a "combined effect" and

> cast a duty on the State to secure that the operation of the legal system promotes justice, on the basis of equal opportunities and further mandates to provide free legal aid in any way - by legislation or otherwise, so that justice is not denied to any citizen by reason of economic or other disabilities. The crucial words are (the obligation of the State) to provide free legal aid `by suitable legislation or by schemes' or `in any other way', so that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The above words occurring in Article 39A are of very wide import.[43]

In other words, Article 39A is not merely symbolic or hortatory: it is "fundamental obligation of the state." In case there was any doubt on the matter, the Supreme Court explicitly *rejected* the notion that a court cannot issue a writ of mandamus based upon a Directive Principle. Courts, it held, "can in a fit case direct the executive to carry out the directive principles of the Constitution, and . . . when there is inaction or slow action by the executive the judiciary must intervene.[44]

The Court had precedent on its side. *Center For Legal Research And Anr. vs State Of Kerala*,[45] "raise[d] a question as to whether voluntary organisations or social action groups engaged in the legal aid programme should be supported by the State Government and if so to what extent and under what conditions." A three-judge bench of the Supreme Court per Justice Bhagwati held that the answer to the first question was unquestionably yes. Importantly, the Court cited no authority other than Article 39A itself: "we would direct

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[42] Article 21 reads in its entirety: "Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law."

[43] State Of Maharashtra vs Manubhai Pragaji Vashi & Ors on 16 August, 1995; 1996 AIR, 1 1995 SCC (5) 730, at ⁋ 16; *cited in* Manoharan vs Sivarajan & Ors on 25 November, 2013

[44] ⁋13. *Accord* Vanniyar Educational Trust vs The State Of Tamil Nadu on 13 August, 2010 (Madras High Court); Smt. Asha Patwa vs State Of M.P. And Ors. on 12 July, 2006 (Madhya Pradesh High Court).

[45] Equivalent citations: AIR 1986 SC 1322, 1986 (1) SCALE 907, (1986) 2 SCC 706, 1986 (2) UJ 445 SC

that the State Government shall, in compliance with its obligations under Article 39A of the Constitution extend its cooperation and support" to a series of voluntary organizations and social actions in running the legal paid program and organizing legal aid camps and lok adalats. While the specific mandate raised more questions than it answered,[46] the overall direction that the Court took was clear: courts have the authority under Article 39A to issue a writ against a state concerning the provision of legal services.

The doctrine of issuing writs of mandamus solely under the authority of Article 39A maintains present-day vitality. In 2015, when counsel for a plaintiff in a tort case failed to appear timely, the court appointed counsel for him and ordered the state Legal Services Authority of Madhya Pradesh to pay him a nominal fee. The only authority cited by the Court, aside from it being "just and proper," was Article 39A.[47]

B. Article 39A in the High Courts

The High Courts as well have been proactive on the issue, and have repeatedly chafed at the alleged non-enforceability of Article 39A, very much including the ability to order the appropriation of funds. For example, in *Advocates' Association vs Chief Minister, Government Of Karnataka*,[48] the petitioner complained that while the state government had long promised a new building for High Court advocates, it had never appropriated the funds to construct it and had begun no work on it. One of the Advocates' principal arguments fell under Article 39A, and if we took the prohibition of "judicial enforceability" seriously, such a argument would quickly fail.

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[46] Instructing a public agency to "extend its cooperation and support" is opaque. What exactly does it mean? Suppose a legal aid agency wants funds from the state government: is the state obliged to give it? Would the state be required to turn over lists of, say, recipients of grants under the National Rural Employment Guarantee Act to see if the program was working correctly?

[47] Jakir Hussein vs Sabir & Ors on 18 February, 2015 (two-judge bench), at https://indiankanoon.org/doc/140469912/ .

[48] ILR 1997 KAR 221 (1996). Importantly, the High Court rested its decision in part on State Of Maharashtra vs Manubhai Pragaji Vashi, 1996 AIR, 1 1995 SCC (5) 730. In that case, however, the Supreme Court's citation to "paucity of funds" referred to Maharashtra *discriminating* in favor of government law colleges and against private law colleges in giving grants. Here, the High Court gave a direct order to spend money.

But it did not. "[P]aucity of funds," the High Court stated, "cannot be a ground at all for the State to refuse to make available the minimum facilities required by an Association either in the form of a building to the Advocates' Association or a library or the minimum furniture to the Association."[49]

To be sure, the Karnataka High Court did reference the clearly enforceable Article 21 in its decision, and that Article has famously formed the basis for a great deal of the Indian judiciary's activism. Yet Article 21's terms hardly constitute a basis for mandating building construction. And they certainly provide no basis for referencing *civil* justice, which with certain exceptions (to be discussed infra) do not impinge on life or liberty. Put another way, however much the High Court might have referenced Article 21, that Article cannot explain a decision commanding a state government to spend money for a new Advocates' building. That explanation must be found in Article 39A.

A similar outcome and reasoning occurred in *Nagaland Bar Ass'n v. State of Nagaland.*[50] The state, in which the executive and judicial branches are unified, had evicted the bar association from its chambers in order for it to be used by the Deputy Commissioner. One would not ordinarily think that the existence *vel non* of a government provided room for attorneys to have their chambers would constitute a constitutional case,

The Gauhati High Court, however, disagreed. It repeated the strong language from State Of Maharashtra vs Manubhai Pragaji Vashi, quoted above, concerning the "fundamental" nature of Article 39A and its casting a positive "duty" upon the State. Thus, it concluded:

> In order to enable the State to afford free legal aid and guarantee speedy trial, a vast number of persons trained in law are essential. Legal aid is required in many forms and at various stages, for obtaining guidance, for resolving disputes in Courts, tribunals or other authorities. It has manifold facets, The explosion in population, the vast changes brought about by scientific, technological and other developments, and the all-round enlarged field of human activity reflected in modern society, and the consequent increase in litigation in Courts and other forums demand that the service of competent persons

[49] Id. at ¶31.

[50] AIR 2006 Gau 17.

> with expertise in law is required in many stages and at different forums or levels and should be made available.[51]

It takes little imagine to see how this language could be applied to questions of legal services: after all, if the point of mandating the construction of consultation chambers was necessary to provide legal aid, then all the more so the remuneration of the lawyers themselves.

And in one instance, it did, in a fashion. In *Abul Hassan Delhi Vidyut Board*,[52] the Delhi High Court considered whether it was appropriate to organize a Lok Adalat to consider disputes between residential electric customers and utilities. Although the State Legal Service Authority Act *permitted* such Lok Adalats, it did not mandate them. The High Court, however, noted that "it is clear that the State has been ordained to secure a legal system which promotes justice on the basis of equal opportunity. The language of Article 39A is couched in mandatory terms. This is made more than clear by the use of the twice occurring word "shall" in Article 39A." It thus took it upon itself to establish a Lok Adalat for resolving these disputes. It cited no other authority for its power to do so.[53]

In Damo v State of Rajasthan,[54] public prosecutors challenged the trial court's scheduling of cases, arguing inter alia that unless the scheduled the hearing of cases in the order they arose, it would violate Article 39A command for the legal system to "promote justice on the basis of equal opportunity." If judges had the discretion to schedule the cases according to the

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[51] ¶ 17. As in *Advocates' Association*, the High Court referenced Article 21. But in context, it is clear that the bite comes from Article 39A and Article 21 had nothing to do with it. It is something of a stretch, to say the least, to contend that the availability of a room has anything to do with the preservation of life and liberty. But it may have a significant amount to do with ensuring "that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities." The High Court did *not* distinguish between Article 21 and Article 39A in determining "enforceability." Indeed, the word "enforceable" appears nowhere in the opinion.

[52] 1999 IIAD Delhi 105, AIR 1999 Delhi 88, 77 (1999) DLT 640, 1999 (48) DRJ 483.

[53] The precise posture of this case is somewhat odd because the Delhi State Legal Services Authority submitted an argument favoring the establishment of a Lok Adalat, leading the observer to wonder what it simply didn't create the Lok Adalat itself. But the point about Directive Principles still holds: were they not enforceable, the High Court would simply have said that in its decision.

[54] AIR 1985 Raj 230, 1985 (2) WLN 182.

court's convenience or for other administrative purposes, the prosecutors argued, it would raise the spectre of corruption and contribute to the widespread belief that those with the funds to pay high-priced advocates could get faster and thus more effective justice.

The High Court quickly rejected such an argument, noting that:

> Unless a case is taken for hearing, it cannot be decided and for that purpose an order will have to be passed for listing the case out of priority at an early date. There is no law nor it can be so encroaching upon such right of the court. It is absolute right of the bench concerned to follow the manner and procedure in which cases shall be heard and disposed of by it. Art 39A is one of the directive principles of State Policy which promotes justice on a basis of equal opportunity. It nowhere envisages a situation that a court has no judicial discretion to hear a case out of priority.[55]

It thus had little trouble in disposing of the case. But the Court's manner of doing so revealed a crucial point. In noting that Article 39A in no way encroached upon court discretion, it *assumed* that Article 39A could conceivably have been applied. The easiest route for the High Court would have been to dismiss the argument on the grounds that Article 30A was not judicially enforceable.

### C A New Model? Delhi Domestic Working Women's Forum

*Delhi Domestic Working Women's Forum v. Union*,[56] presents the most prominent – and most intriguing – example of the Supreme Court establishing the unilateral power to spend. In that case, the Court established the right of sexual assault *complainants* to have legal counsel provided to them, in both pre-trial and trial settings.[57] The Court did not establish a general right of civil

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[55] ¶17a.

[56] 1995 SCC (1) 14, JT 1994 (7) 183. The importance and significance of *Delhi Domestic Working Women's Forum* is well-presented in LEILA SETH, TALKING OF JUSTICE: PEOPLE'S RIGHTS IN MODERN INDIA (2014).

[57] In referencing the formal establishment of this right, I do not, of course, intend in any way to suggest that it has been even partially implemente: recent reports have made clear that it has not. Human Rights Watch, "Every Blames Me": Barriers to Justice and Support

legal representation, but that should not obscure the issue: the decision mandated a significant increase in the right to counsel – and the state paying for it – for people who are not criminal defendants.

As significant as the *Delhi Domestic Working Women's Forum* is, the Court neglected to mention one significant point: which legal or constitutional principle did it rest on? The opinion never states it. It simply issues the order and moves on. But its order, while terse, carries potentially enormous fiscal implications. In 2015, the National Crime Records Bureau registered nearly 35,000 reported sexual assault cases.[58] Even if only a small percentage of these cases involve state-supported victims' attorneys, that would involve substantial expenditures. Yet the Court seemed fazed not at all.

Indeed, it even went further. After establishing a general right of civil counsel for sexual assault victims, it also created a Criminal Injuries Compensation Board in order to provide damages and restitution for sexual assault victims whether or not the defendant was convicted. Moreover, this Board was required to "take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape."[59] Here, the Court actually did provide authority, but it raised more questions than it answered, for it created the Board "having regard to the Directive Principles contained under Article 38(1) of the Constitution of India."[60] Thus, a supposedly non-enforceable Directive Principle became the basis for the creation of a wholly new administration agency.

And it was a Directive Principle comprising scope far vaster than the relative narrowness of Article 39A: Article 38(1) reads in full: "The State shall

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Services for Sexual Assault Survivors in India, Nov. 8, 2017, at https://www.hrw.org/report/2017/11/08/everyone-blames-me/barriers-justice-and-support-services-sexual-assault-survivors (last visited Jan. 17, 2021).

[58] "Crime in India, 2015," National Crime Records Bureau, Ministry of Home Affairs, Government of India, http://ncrb.gov.in/StatPublications/CII/CII2015/FILES/Compendium-15.11.16.pdf (accessed November 15, 2016); "Crime in India, 2012," http://ncrb.nic.in/StatPublications/CII/CII2012/Statistics2012.pdf (accessed November 15, 2016). According to the NCRB data, in 96 percent of rape cases, the offender was known to the victim, which included close family members, and 32 percent of rape victims were under 18 years of age.

[59] Delhi Domestic Working Women's Forum, supra note – at ¶ 15, § 8.

[60] Id.

strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life." If the Supreme Court can rely on that language, there is little that it cannot do. How was its opinion limited? In what ways would it be applied in the future? The Court did not say – or even seem to recognize that it was an issue. But there is sits, like a loaded weapon,[61] a precedent in Indian law.

This Section has sought to show that the Supreme Court and various High Courts have, when presented with properly framed cases, ignored or at least substantially curtailed the simple notion that Directive Principles are judicially unenforceable. In and of itself, however, these tendrils would not in and of themselves demonstrate a general right of counsel in civil cases: they fall under specific situations and use often opaque reasoning. Put another way, adumbrating the contours of the right to civil assistance requires developing a legal theory of what authority it rests upon. To that I now turn.

## IV. THE INHERENT JUDICIAL AUTHORITY TO SPEND MONEY

Finding that theory requires a trip to America. One might well ask what the United States has to do with any of this, especially since it is in no position to lecture other nations on the rule of law.[62] But in a genuinely significant way, that is the entire point. As noted above, the Indian Supreme Court has exercised on a wide variety of issues, making it perhaps the most activist high court among democracies. In contrast, American courts are far more cautious, not only because of their sharp rightward turn since 1980, but also because of

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[61] See Korematsu v. United States, 323 U.S. 214, 246 (1944)(Jackson, J., dissenting).

[62] *See, e.g.,* FREEDOM HOUSE, FREEDOM IN THE WORLD SURVEY 2021, at https://freedomhouse.org/country/united-states/freedom-world/2021 (noting "severe" erosion of US democratic institutions); *see also* TRANSPARENCY INTERNATIONAL CORRUPTION INDEX 2020, at https://www.transparency.org/en/cpi/2020/index/nzl (placing the United States behind inter alia the United Arab Emirates, 25th out of 180, falling six places since 2012).

jurisdictional restrictions imposed by the U.S. Constitution and their own decisions.[63]

Yet as we shall see, even in this highly constrained environment, American courts have concluded that they have "inherent judicial authority" in a number of areas directly relevant to a right to counsel in civil cases. No such right, of course, exists in the United States, but combined with the precedents set forth above, such inherent judicial authority provides the legal theory upon which can rest a qualified right to counsel to civil cases. Put another way, if American courts can exercise unilateral spending authority without legislative permission, and they can regulate the legal profession to require service of attorneys, then it surely follows that Indian courts can do the same.[64]

Moreover, the Indian Supreme Court has routinely cited American precedents as persuasive authority, in many of the most significant cases in the Court's history.[65] It has gone so far as to say that the United States Supreme Court "deals with a broadly comparable Constitution."[66] In addition, the United States and India are the world's two largest common-law jurisdictions, where judges have reserved authority to make law: little wonder that the Supreme Court explicitly refers to common-law jurisdictions when considering rules – very much rules concerning judicial independence and power.[67] The bottom line is clear: whatever observers might think of the relevance of US jurisprudence, the Indian Supreme Court has declared loud and clear that it is watching what occurs overseas.

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[63] See, e.g., Lujan v Defenders of Wildlife, 504 U.S. 555 (1992)(sharply curbing federal courts' jurisdiction through holding that standing is constitutional); Rucho v Common Cause, 588 U.S. --- (2019)(holding partisan gerrymandering a nonjusticiable political question).

[64] This sort of inference is as old as the oldest legal systems. See, e.g., *Sifra d'Rabbi Ishmael* 1:1-3 (setting forth *a fortiori* inference known as מקל וחומר– easy to strict).

[65] See, e.g., Kesavananda Bharati v State of Kerala, (1973) 4 SCC 225; AIR 1973 SC 1461 (citing to Story, Cooley, Corwin, and John Marshall, as well as several US cases; Navtej Singh Johar & Ors. v. Union of India, AIR 2018 SC 4321; W. P. (Crl.) No. 76 of 2016 (citing 22 times to United States cases).

[66] Minerva Mills Ltd. & Ors vs Union Of India & Ors, 1980 AIR 1789, 1981 SCR (1) 206.

[67] See, e.g., S.N. Mukherjee vs Union Of India on 28 August, 1990: 1990 AIR 1984, 1990 SCR Supl. (1) 44; Madras Bar Association vs Union Of India on 27 November, 2020 ("judicial independence and separation of judicial power from the executive, are part of common law traditions implicit in a Constitution like ours.").

And this attention, in turn, means that the American experience is relevant and persuasive to the question posed at the end of Section II, viz., if we believe that the judiciary, as part of the State, use its powers outside of judicial enforcement to advance Article 39A, what in fact are those powers and what would such advancement entail? American courts have considered the notion of this sort of inherent judicial authority for decades, and so their experience can be instructive to Indian courts attempting to answer the question.[68] It is to that experience that I now turn.

A. State Constitutional Authority for Judicial Spending

Hornbook law tells us that only the legislature can appropriate funds. Yet this boilerplate is manifestly untrue: courts routinely order the spending of money to force the executive to comply with constitutional provisions.[69] More to the point here, courts have also ordered monies released to fund the judicial system. Many times over the last two decades, several state supreme courts have held that the legislature's failure to fund the court system violates their own state charters. These courts have enforced the "inherent judicial authority" to maintain and protect the system of justice.

The Oklahoma Supreme Court stated the overall doctrine clearly when it held that state courts have:

> "inherent to them" those powers which, though neither granted to, nor withheld from them by the state constitution and not found in any other source of law, must nevertheless be concede

[68] I believe finally that including the American cases also answers a potential objection to my thesis that Indian courts have the inherent power to spend money on the legal system itself, namely: that it gives unaccountable power to the judiciary to spend public money. I hope that by detailing some of the American cases, I am able to show that even if the judiciary possesses this power, it does not constitute a recipe for breaking the public fisc. In any event, given the fiscal power that the judiciary has simply by tethering a judgment to Constitutional text, it is far less of a danger than might be initially supposed.

[69] The standard and now-classic description can be found in Gerald E. Frug *Judicial Power of the Purse* , 126 U. PA. L. REV. 715 (1978).

> to the judiciary as a separate department of government because their exercise is deemed absolutely essential for the performance of the court's constitutionally mandated mission.[70]

Although it might seem shocking at first, the idea that the judiciary can mandate its own funding flows naturally from basic separation of powers theory. Unless the courts could protect themselves through their inherent ability to fund the judicial system, the legislature could remove judicial checks simply by refusing to appropriate adequate funds. A more practical justification stems from the creation of courts in the first place: if any legal instrument – be it constitution or statute – creates courts, then it follows that those courts must have the resources to do their job.

The theoretical doctrine has had practical purchase in American litigation.[71] At first, courts used this inherent power sparingly – for example, charging the state government for housing juries that needed accommodations during long sequesters, or funding for temporary court facilities during construction of regular buildings.[72]

In the late 1960's, however, the Pennsylvania Supreme Court broke new ground. In *Commonwealth ex. Rel. Carroll, v. Tate*,[73] the Philadelphia Court of Common Pleas made a budget request of $20 million to the City of Philadelphia's, but the Mayor and the City Council approved only $16.5 million. Common Pleas then took the unusual step of suing the city for the requested budget, and in an even more unusual step, the Supreme Court agreed, ordering the city to fully fund the court. In order to "protect itself" from the other branches, the *Carroll* court argued, "the [j]udiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer [j]ustice."[74]

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[70] Winters v. City of Oklahoma City, 740 P.2d 724 (Okla. 1987).

[71] Much of the historical discussion here derives from the fine treatment in G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 JUDICATURE (July-Aug. 2004), p. 13.

[72] *See* Geoffrey C. Hazard, Jr., Martin B. McNamara, & Irwin F. Sentilles III, *Court Finance and Unitary Budgeting*, 81 YALE. L.J. 1286, 1288 (1972).

[73] 442 Pa. 45 (1971).

[74] Id. at 52.

In a remarkable restatement of the doctrine, the Supreme Court announced that "[n]ew programs, techniques, facilities and expanded personnel have been and will continue to be necessary to meet the mandate of providing and administering a more efficient Judicial system and making Justice for all speedier and more certain."[75]

If observers thought that *Carroll* would generate a series of legislative-judicial conflicts, they were mistaken. The case arose for what is now mostly an anomaly – local budgeting for state courts. In the 1970's, state legislatures began adopting unitary budgeting for the court system, allowing the government body with taxing power and greater fiscal capacity to assume responsibility.[76] Pennsylvania courts have subsequently invoked *Carroll,* and it remains good law, although they have been cautious, and at least until now it has not generated a state constitutional crisis.

The same, however, cannot be said for other states. In Kansas, more recently the state high court took matters into its own hands when the legislature refused to adequately fund it. It not only ordered greater spending on the court system, but mandated a series of new filing fees to fund the initiative. Put another way, it not only commanded appropriations, but also essentially instituted a type of taxation. As the state's Chief Justice argued in her State of the Judiciary report for the year,

> The simple truth is the [j]udicial [b]ranch cannot perform its constitutional and statutory duties with such a shortfall in funding," even though the "courts are the last bulwark of freedom as guaranteed by the Bill of Rights . . . [and a] fully functioning court system is essential to the American way of life. [Though] there are things the people of Kansas may have to give up in this fiscal crisis, justice cannot and must not be one of them.[77]

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[75] Id. at 56.

[76] It is important not to oversimplify the matter. A great deal of variation still exists between state in terms of the degree of local funding of state courts. *See generally* GEOFFREY MCGOVERN & MICHAEL D. GREENBERG, WHO PAYS FOR JUSTICE?: PERSPECTIVES ON STATE COURT SYSTEM FINANCING AND GOVERNANCE (2014)(noting wide disparities in state systems).

[77] Webb & Whittington, *supra* note --, at 45.

One might have expected an extended constitutional crisis in light of such an action. But the state legislature actually embraced the court's drive. After the court order imposing the emergency surcharge was issued, the Kansas Senate Judiciary Committee chair exclaimed, "I'm glad to see the courts take some action to meet their financial needs," and declared that the court had the power to do whatever "the court believes it has the power to do." The House Speaker blandly declared that the legislature had no authority to interfere with the court's action. For his part, the governor gave the chief justice "high marks" and praised her for taking "bold steps when necessary."[78]

It isn't hard to see why. A new state budget had proposed more extensive judicial funding, but it was rejected both by extreme right-wing Republicans as well as by the opposition Democrats, who accused the majority party of fiscal mismanagement. In this political quagmire, legislators were all-too-happy for the court to take a problem off of their hands. But precisely for this reason, the inherent judicial power remains robust.

Importantly, courts have not restricted their budgetary initiatives to the judiciary itself, but have extended it to the overall legal system. In other words, *Carroll*'s allusion to additional programs has not been stillborn, and it is not a relic of late 60's/early 70's judicial activism. In *Beard v. North Carolina State Bar*,[79] the North Carolina Supreme Court upheld its own creation of the Client Security Fund,[80] and charging every licensed attorney in the state $50 to capitalize the fund.[81] The plaintiff, a licensed attorney, refused to pay and challenged the law as an illegal tax unconstitutional impinging on the Legislature's taxing and spending authority. "This Court has the inherent power to deal with its attorneys," the opinion held.

> The order by this Court requiring annual payments by attorneys to the Client Security Fund is an essential corollary to this

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[78] Id .

[79] 357 S.E.2d 694 (N.C. 1987); 320 N.C. 126.

[80] "The Client Security Fund was established by the North Carolina Supreme Court in 1984 to reimburse clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina . The fund is administered by a board of trustees, called the Client Security Fund Board, appointed by the North Carolina State Bar Council." https://www.ncbar.gov/bar-programs/client-security-fund/.

[81] This constitutes approximately $125 in today's money. See https://www.bls.gov/data/inflation_calculator.htm.

> function of the Court. This Court found in the order under consideration that attorneys by misuse of clients' property were bringing public disrespect upon the legal profession, the courts, and the administration of justice. It was necessary to establish the Client Security Fund to better protect the public and to promote public confidence in the courts and the administration of justice.[82]

In similar fashion, the Court brushed aside the idea that financial assessments against attorneys constituted a tax reserved for the legislature: "Rather, it was an act, found necessary by the Court, in aid of its own responsibility to see to the proper administration of justice."[83]

It does not take long to see the implications of the Court's decision. If the judiciary can assess attorneys to promote programs combatting "public disrespect upon the legal profession, the courts, and the administration of justice," it opens up a potentially expansive range of policies and projects, especially given public views of the legal profession.[84] The check to it is not constitutional or legal, but rather political, i.e. the extent to which members of the bar will accept such initiatives – which is precisely the sort of calculation normally associated with legislative judgments.

Yet *Beard* is hardly an outlier. The North Carolina Supreme Court cited equivalent decisions from the Supreme Courts of Delaware and Maine, and a federal court decision from Massachusetts, all upholding the inherent judicial authority of a state Supreme Court to assess laywers monetarily in order to create Client Security Funds.[85] Rhode Island,[86] Oregon,[87] and New

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[82] 357 S.E.2d at 696.

[83] 357 S.E. 2d at 696.

[84] One study found that Americans believe lawyers contribute the least to society out of all major professions. *See Public Esteem for Military Still High*, PEW Research Ctr. (July 11, 2013), http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/ [https://perma.cc/7U4G-J38K] (displaying data showing dislike for attorneys).

[85] 357 S.E.2d at 696-97.

[86] Berberian v. Kane, 425 A.2d 527 (R.I. 1981).

[87] Bennett v. Oregon State Bar, 470 P.2d 945 (Or. 1970); 256 Or. 37.

Hampshire[88] have all established assessments and funds relying on inherent judicial authority.

Client Security Funds are not the only time courts have drawn upon an power of the purse to create programs. Since 1980's, states have enacted Interest On Lawyer Trust Account (IOLTA) programs, in which the interest in pooled client accounts goes to the provision of civil legal services for the indigent. All 50 states have such programs, but crucially, in 45 states, there is no legislative authorization at all: instead, "they are governed by rules adopted by the highest court of the state."[89] To be sure, IOLTA has faced substantial legal challenges since its inception. Those cases, however, challenge its constitutionality as a Taking, not the ability of the judiciary to create such a program.[90]

A broader conception of inherent judicial power has now become a commonplace in state courts, although they are reluctant to actually use it, not wanting to create the sorts of constitutional problems that occurred in New York and Kansas. Thus, courts assert their power of the purse while declining to exercise it. A good example can be found in Massachusetts, where Supreme Judicial Court has held that

> [t]he scope of inherent judicial authority reaches beyond traditional adjudicatory powers and encompasses (but is not limited to) the court's power to commit the fiscal resources of the Commonwealth and other governmental agencies necessary to ensure the proper operation of the courts; the power to make rules governing the internal organization of the courts; to control the practice of law; and the power to control and supervise personnel within the judicial system.[91]

In the actual case, however, the Court held that statutes stripping judges of their ability to appoint court clerks, and vesting it in an administrative body, did not infringe on inherent judicial authority. And at the same time, the Court ruled that statutes stripping the judicial branch of the power to hire

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[88] In re Proposed Public Protection Fund Rule, 707 A.2d 125 (N.H. 1998); 142 N.H. 588.

[89] Brown v. Legal Fdn. Of Washington, 538 U.S. 216, 221 n.2 (2003).

[90] These cases upheld the program against such challenges. *See* Brown, *supra* note --, and Phillips v. Washington Legal Foundation, 524 U.S. 156 (2000).

[91] First Justice of Bristol Div. of Juvenile Court Dept. v. Clerk-Magistrate of Bristol Div. of Juvenile Court Dept., 438 Mass. 387, 397; 780 N.E.2d 908, 916 (Mass. 2003).

and fire probation officers did not interfere with judges' ability to "supervise and control" probation officers. In the same fashion, subsequent Bay State court decisions have upheld the broad language of inherent judicial authority while consistently finding that authority not eroded.[92] The justices have warned the parties to stop fighting in the back seat, but have never turned the car around.

The same cannot be said for North Carolina, where in mostly rural Alamance County, the trial court, following an extensive report by the grand jury,

> concluded that the courtrooms and related judicial offices for Alamance County were "grossly inadequate, being in the large either obsolete, poorly designed, or nonexistent." The effects of such inadequacies included denying access to the handicapped and physically disabled, thwarting the effective assistance of counsel to litigants in violation of the law of the land, jeopardizing the right to trial by jury in civil and criminal cases, and causing delays in the prosecution and defense of civil cases. In addition, the lack of detention rooms constituted a clear and present danger to persons present at criminal judicial proceedings as well as to the public at large.[93]

The court then ordered a vast remedial array based upon its inherent power "necessary for the existence of the Court, necessary to the orderly and

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[92] See, e.g., Bower v. Bournay-Bower, 15 N.E.3d 745 (Mass. 2014); 469 Mass. 690 (family court judge did not have inherent judicial authority to appoint parent coordinator without consent of parties); Tilman v. Brink, 911 N.E.2d 764 (Mass. App. 2009); 74 Mass.App.Ct. 845 (trial court judge lacked inherent judicial authority to assess fees against insureds for bringing bad faith claims); Bromfield v. Treasurer & Receiver-General, 390 Mass. 665, 459 N.E.2d 445 (Mass. 1983)(Court lacked inherent power to compel legislature to make an appropriation sufficient to meet Commonwealth's obligation to pay eminent domain judgment to compensate owner for property taken); *but see, e.g.,* O'Coin's Inc. v Treasurer of Worcester County, 287 N.E.2d 608, 612 (Mass. 1972); 362 Mass. 507, 510 ("[A]mong the inherent powers possessed by every judge is the power to protect his court from impairment resulting from inadequate facilities or a lack of supplies or supporting personnel. To correct such an impairment, a judge may, even in the absence of a clearly applicable statute, obtain the required goods or services by appropriate means, including arranging himself for their purchase and ordering the responsible executive official to make payment.").

[93] Matter of Alamance County Court Facilities, 405 S.E.2d 125, 127 (N.C. 1991).

efficient exercise of its jurisdiction, and necessary for this Court to do justice."[94]

B. Reasoned Elaboration and Inherent Judicial Power

The crucial point of all these cases is that courts are exercising discretion to spend public funds: they are not, as is the case in much institutional reform litigation, simply enforcing Constitutional or statutory directives. Judges are making it quite clear that they are making such orders not as a matter of textual command, but rather as a matter of public policy. This obviously has significant implications for Article 39A. That article both commands "the State" – which clearly includes the judiciary -- to establish civil justice "through legislation or otherwise", but also states clearly that such a command is not "judicially enforceable."

We can square the circle by focusing on the notion of "enforceability." When the judiciary "enforces" a provision of the Constitution or statute, its posture is that of an officer implementing a command from elsewhere. Most (in)famously, Alexander Hamilton in The Federalist claimed that the judiciary "can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment."[95] We are long past such formalisms, and the notion of judicial discretion has become a commonplace.

Yet standard judicial discretion diverges from the sorts of choices normally considered in legislative action. Hart & Sacks' famous notion of "reasoned elaboration"[96] is useful here. As Richard H. Fallon, Jr., has commented, legal process theory clearly recognizes "while the judicial role is irreducibly creative in some respects, it is limited to the reasoned elaboration of principles and policies that are ultimately traceable to more democratically legitimate decisionmakers."[97] When India's Constitution speaks of

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[94] Id. at 127. Strictly speaking, the trial court relied partially on Article IV §12 of the North Carolina Constitution, which sets forth the general jurisdiction of state courts, but the state Supreme Court accurately framed the case one that considered "the scope of the court's inherent power to direct county commissioners to ameliorate such facilities and the proper means of effecting that end." 405 S.E.2d at 126.

[95] The Federalist No. 78 (Hamilton).

[96] HENRY M. HART JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 162-71 (tent. ed. 1958).

[97] Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 964-6 (1994). The authors of *The Legal Process* understood well that general

its provisions being "enforced," it reflects this notion of "reasoned elaboration": judges are taking a pre-existing text and applying its principles to a particular situation, consistent with previous similar examples.

Similarly, we might look at Ronald Dworkin's immensely influential theory of Law-as-Integrity, and its notion of a "chain novel." The idea is that several people write a novel seriatim, with one person writing a chapter after another one has finished. As Dworkin describes it:

> Each novelist aims to make a single novel of the material he has been given, what he adds to it, and (so far as he can control this) what his successors will want or be able to add. He must try to make this the best novel it can be can be construed as the work of a single author rather than, as is the fact, the product of many different hands.[98]

This process relies deeply upon coherence: each chapter must be consistent with the previous one in order to present a relatively consistent account.

Legislators, on the other hand, have no such formal constraints. They can change their minds completely, and in fact often do, whether it is because a different political coalition has assumed power, conditions have changed, or they have simply changed their minds.

The use of inherent judicial power, then, resembles legislation. It reflects the establishment of judicial *policy.* It does not seek to answer the question of what other decisionmakers would want judges to do, but rather what those judges *themselves* believe makes the best policy sense.

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principles do not decide concrete cases, and so judges literally cannot help importing their views into decision. But as William N. Eskridge, Jr. and Philip P. Frickey explain Hart and Sacks' philosophy,

> that does not mean that officials simply interpret ambiguous language to reflect their own political values. To the contrary, an official applying a "general directive arrangement" must "elaborate the arrangement in a way which is consistent with the other established applications of it" and "must do so in the way which best serves the principles and policies it expresses. '"

William N. Eskridge, Jr., & Philip P. Frickey, *Commentary: The Making of the Legal Process,* 107 Harv. L. Rev. 2-31, 2043.

[98] RONALD DWORKIN, LAW'S EMPIRE 229-30 (1986).

## V. THE INHERENT JUDICIAL AUTHORITY TO SPEND: INDIA COMPARED

How do the American precedents compare to Indian law? As mentioned briefly above, we can make an a fortiori inference: given the India Supreme Court's greater powers, if American courts have the power to spend, the India courts surely should. But we can more precisely develop the sources of the India judiciary's power, which is where I now turn.

### A. The Relevance of Article 39A Itself

For our purposes, the most important power is the mandate found in Article 39A itself, a direction not found anywhere in the US Constitution. We need wonder less if the inherent judicial power extends farther than the American because the Indian Constitution itself directs the judiciary – and in particular the Supreme Court – to take on substantive tasks, as it does to all branches of "the state."

Skeptics might immediately object that such an argument represents an illegitimate bootstrap. The preceding section sought to determine how far the powers of the judiciary could go in fulfilling its mandate under Article 39A. A Constitutional provision cannot be used to interpret itself, in the same way that no text interprets itself.

But such an argument moves too fast. As suggested above, inherent judicial power unquestionably exists, but its precise scope is uncertain. Article 39A, then, directs the judiciary to extend its inherent judicial power to establish civil legal services for the indigent as far as it can reasonably and honestly do so. Put another way, it serves as something of a canon of construction for an inherent power.

Reading the conjunction of inherent judicial power and a Directive Principle in this way should be familiar to any Indian lawyer or legal scholar. Directive Principles serve as canons of construction for statutes,[99] and can

[99] See, e.g., CB Boarding & Lodging v State of Mysore, AIR 1970 SC 2042 (¶ 13): (1970) 1 SCC 43.

also be used in conjunction with explicit and judicial enforceable constitutional principles;[100] it stands to reason that they perform the same function with inherent judicial powers. If there is a reasonable question about whether inherent judicial powers extend to the funding of attorneys, Article 39A weighs on the side of the affirmative.

B. The Legislative "Power of the Purse"

Although we normally, and casually, think of the legislature as necessarily having the "power of the purse," this assumption is somewhat contested in the Indian case. Unquestionable, Parliament holds appropriations primacy under the Indian Constitution, but primacy does not mean exclusivity.

The US Constitution is adamant facially on the legislative spending supremacy: "No Money shall be drawn from the Treasury," it demands, "but in Consequence of Appropriations made by Law."[101] This textual commitment, a leading scholar of the spending power says, "lies at the foundation of our Constitutional order."[102] Similarly, many states – including those with a relative expansive conception of inherent judicial power – have equivalent provisions.[103]

The Indian Constitution's parallel provisions, however, are far more equivocal, and indeed point in the other direction. For example, we read from the leading Indian constitutional law treatise that "Parliament has the sole power not only to authorize expenditure for the public services and to specify the purposes to which that money shall be appropriated, but also to provide

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[100] See, e.g., Kishore v State of Himachal Pradesh, (1991) 1 SCC 286 (¶ 12, 13) : AIR 1970 SC 2042 (¶ 13) : (1970) 1 SCC 43 (state must provide counsel for indigent defendants). That Directive Principles serve as a touchstone for constitutional interpretation is now a commonplace in Indian law and has generated an often endless scholarly literature. For our purposes, we can simply quote the hornbook: "in determining the scope and ambit of the Fundamental Rights themselves, the Court may not entirely ignore the Directive Principles and should adopt the principle of harmonious construction so as to give effect to both as much as possible." BASU, *supra* note – at 175.

[101] U.S. Const. Art I., § 9, cl. 7.

[102] Kate Stith, *Congress' Power of the Purse,* 97 YALE L.J. 1343, 1344 (1988).

[103] See, e.g., North Carolina Const. Article V, §7, cl. 1. (No money shall be drawn from the State treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually"); Mich. Const. of 1963 Art. IX § 17; Pa. Const. Art. II § 24; Cal. Const. of 1879, Art. IV § 22.

the ways and means to raise the revenue required."[104] Yet in order to justify this assertion it cites Section 109 of the Constitution – and Section 109 does not say that. It only provides for the procedure concerning Money Bills; it does not provide anything close to the sort of exclusivity found in the U.S. Constitution's Art. I §9 clause 7.[105] Importantly, no scholar holds that Congress' power of the purse comes from the legislative vesting clause[106]: this power is not inherent in the nature of a legislature, but rather fixed according to constitutional command.[107]

Instead, the Indian Constitution's provision for legislative supremacy in spending derives from Articles 112-117. Those articles provide for the President to provide an "Annual Financial Statement" to Parliament, and for Parliament to make appropriations based upon such a statement. And the Constitution makes a general provision that "no money shall be withdrawn from the Consolidated Fund of India except under appropriation made by law passed in accordance with the provisions of this article."[108] Of particular interest for our purposes, however, are the provisions of Article 112 specifying those expenditures that do *not* require an appropriation in order to be charged on the Consolidated Fund of India. They include "any sums required to satisfy any judgement, decree or award of any court or arbitral tribunal."[109] The Constitution is explicit in regard to these funds: they "shall not be submitted to the vote of Parliament, but nothing in this clause shall be construed as preventing the discussion in either House of Parliament of any of those estimates."[110] Such expenditures, then, form an explicit exception to the Constitution's general rule.

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[104] DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 232 (23rd ed. 2018). Chap. 12.VI.

[105] *See* CONST. OF INDIA §§109, 110.

[106] *See* U.S. CONST. Art I. §1. Importantly, the Federalist's most extensive discussion of the power of the purse refers to it in the context of the Origination Clause, Art. I §7, cl.1. *See* THE FEDERALIST No. 58 (Madison).

[107] Professor Stith sees Congress' spending power as originating in the Sweeping Clause of Article I § 8. Article I §9 cl. 7 is a limiting, not empowering, provision in her analysis. *See* Stith, *supra* note – at 1348-49.

[108] Const. of India Art. 114(3).

[109] Const. of India Art. 112(3)(f).

[110] Const. of India Art. 113(1).

Courts have had little reason to consider deeply the circumstances under which Article 112(3)(f) may be invoked.[111] Cases involving the provision usually concern a judgment against the Union of India, where the government refuses to pay pending appeal.[112] Unsurprisingly, they have insisted that the government put monies in some form of security for such litigants.[113]

How far, however, might Article 112(3)(f) go? In 1986, the Supreme Court expressed relief that it did *not* have to contemplate the problem, for it "would have required delicate handling, because how far and to what extent the court can be permitted, if at all, to have its order sanctified by making it a charge on the consolidated fund is a matter of some importance and requires serious consideration.[114] It thus eagerly yet gingerly stepped away. And it did so because it recognized that the plain text of the Union's founding charter presents something of an as-yet unsolved separation of powers conundrum.

But present purposes do not require us to solve that problem, for my aim is more modest, viz. to show that background principles of Indian law found in the Constitution tell the judiciary to maximize the reasonable scope of inherent judicial authority. And it is undeniable that, unlike the U.S. Constitution, the Indian Constitution explicitly authorizes ongoing judicial power to draw from the Consolidated Fund without legislative appropriations – indeed, it *forbids* Parliament from interfering with such judicial action.[115]

Reading Article 112(3)(f) together with Article 39A forms particularly powerful authority for judicial action. Article 39A specifies that legal aid can be provided by "suitable legislation *or any other way,"* and thus expressly

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[111] They might have been reluctant because Article 112(3)(f) is literally pulled directly from the Government of India Act of 1935, §33(h). That Act, of course, hardly pretended to give the Indian Legislature any sort of financial primacy. *See id.* at §67A. If such a provision, created in a context where legislative power was highly circumscribed, survives, it stands to reason that maintaining it without amendment suggests that it continues to exist outside of legislative check.

[112] See, e.g., Union of India v Amitava Paul (Calcutta High Court Appellate 2015), at https://indiankanoon.org/doc/146613469/ (last visited Feb. 10, 2021).

[113] See, e.g., Union of India v Sanjoy Gooptu (Calcutta High Court Appellate 2008), at https://indiankanoon.org/doc/98514550/ (last visited Feb. 10, 2021).

[114] State of Himachal Pradesh v Umed Ram Sharma, 1986 AIR 847, 1986 SCR (1) 251 (1986).

[115] Const. of India Art. 113 (1).

contemplates that this aid can be achieved outside the traditional appropriations process.

The specific provisions governing appropriations hardly exhaust Constitutional measures empowering the judiciary to spend. Article 146 of the Constitution specifically allows the Supreme Court to hire and retain its own "officers and servants," and also enables the Court's administrative expenses to be "charged upon the Consolidated Fund of India," in keeping with Article 112(3)(f). This power is not absolute: Article 146(2) requires Presidential approval for rules relating to "salaries, allowance, leave, or pensions." Yet neither should this Presidential power be regarded as a veto. As the Supreme Court explained:

> It is true that the President of India cannot be compelled to grant approval to the rules framed by the Chief Justice of India relating to salaries, allowances, leave or pensions, but it is equally true that when such rules have been framed by a very high dignitary of the State, it should be looked upon with respect and unless there is very good reason not to grant approval, the approval should always be granted.[116]

In other words, we might say that the Supreme Court will take the precise text of Article 146(2) seriously, but not literally. Unless the President, acting under the advice of his ministers, gives a "very good reason" for rejecting the Chief Justice's proposals, the Supreme Court might simply order them accepted, and draw from the Union's consolidated fund.

And less than two years later, the Court made clear that it meant what it said about judicial authority. In *All India Judges' Assn. vs. Union of India*,[117] it gave a number of directions for appointment of Pay Commission for fixing scales of pay for the judicial officers, residential accommodation, working library at the residences, transport vehicles, and the establishment of In-service institutes. It also directed that income from court fees should be spent on administration of justice. And it did so without bothering to determine which legal provision gave it this authority to spend money. It didn't have to: such authority was inherently part of the judicial power.

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[116] Supreme Court Employees' Welfare Ass'n v Union of India, AIR 1990 SC 334, JT 1989 (3) SC 188 (1990), at ¶56.

[117] AIR 1992 Supreme Court 165=1992(1) SCC 119

Subsequent rulings directed specific judge-population rations, fixed the pay scales of judges, [118] established fast-track courts, and mandated the appropriation of money for court room construction and leasing – a fairly far-reaching brief.

C. Officers of the Court?

What, however, does any of this have to do with civil legal services? A great deal, because attorneys might qualify as "officers" under the meaning of Article 146, presenting the judiciary with the power to fund them.

Seeing attorneys as officers of a court constitutes a standard account of their role in a common law system. As the United States Supreme Court explained forcefully:

> As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but also to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of Justice.[119]

In a similar fashion, Benjamin Cardozo famously observed that "[m]embership in the bar is a privilege burdened with conditions.' [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."[120]

It should hardly surprise that, given the greater powers of Indian courts as opposed to American, Indian courts have embraced the notion of advocates as officers of the court. As the Karnataka High Court made clear, noting "an

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[118] AIR 1992 Supreme Court 165.

[119] In re Snyder, 472 U.S. 634, 644-45 (1985).

[120] People ex rel. Karlin v. Culkin*,* 248 N.Y. 465, 470-471, 162 N.E. 487, 489 (1928) (citation omitted).

Advocate is an officer of the Court. the nature of the duties discharged by an Advocate is in the nature of a public duty."[121] Thus, "the Bar must be treated as integral part and parcel of Administration of Justice."[122] Similarly, the Punjab-Haryana High Court observed that in addition to the duty of zealous advocacy, "[t]he other obligation of the Advocates is towards the Court as an Officer of the Court. An Advocate is considered an Officer of the Court to assist the Court in the matter of dispensation of justice. Such status of an advocate is recognised by passage of time by the Courts."[123]

In a non-trivial sense, the Supreme Court already has adopted a broad reading of "officers" under Article 146 and has begun to fund them when it deems it useful for the legal system. In 1987, the Supreme Court amended its rules of court to provide for amicus curiae fees in public interest litigation, at the discretion of the Court.[124] While the initial fees were nominal, subsequent court orders have turned amici into something of an industry, with dozens of senior and junior advocates taking compensated positions.[125]

Read literally, Article 146 in conjunction Article 112(3)(f) could authorize the Supreme Court to "order" or "decree" the appointment of lawyers in civil cases, and draw down monies directly from the Consolidated Fund of India. As with Article 112(3)(f) we need not make broad assertions as to the specific meaning of Article 146. Rather, we need only say that, given Article 39A's mandate to the judiciary to use its powers promote justice on the basis

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[121] Advocates' Association vs Chief Minister, Government Of ... on 17 June, 1996 Equivalent citations: ILR 1997 KAR 221, ¶ 31.

[122] Id. See also The Nagaland Bar Association vs The State Of Nagaland, AIR 2006 Gau 17, ¶ 13.(noting that the lawyer is an "officer of the Court").

[123] See State of Haryana v Rahi Sahib, 1993 CriLJ 636, (1992) 101 PLR 693, at https://indiankanoon.org/doc/1967152/. The High Court continued that this obligation is "moral" and that no action can be brought for violating it, but it is clear from context that the Court meant this to apply to actions of litigants against their counsel, not about a Court taking disciplinary action against an Advocate for violating her obligation, which as will be detailed below, a court could clearly take.

[124] See Amendment made 26/7/87 inserting rule lO-A(I) to order XVIII of the Supreme Court Rules, 1966 (with effect from 18/7/87): *See also* Monika Sangeeta Ahuja, "Public Interest Litigation in India: A Socio-Legal Study," (unpublished Ph.D. dissertation, London School of Economics and Political Science, 1995), p. 96.

[125] *See* ANUJ BHUWANIA, COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA (2017).

of equal opportunity, Article 146 itself promotes an expansive notion of inherent judicial authority to spend.

## VI. INTERMISSION

We can now see the overall structure of the argument:

1. Article 39A commands "the State" to promote justice on the basis of equal opportunity, in particular through legal services enacted through legislation or other methods.
2. The judiciary is part of the State that Article 39A commands.
3. Courts, then, must use their powers to fulfill Article 39A even if that Article is not judicially enforceable.
4. The judiciary has authority over the maintenance and integrity of the legal system.
5. It also has its own authority to spend money to maintain and improve that system.
6. Thus, it has the authority to allocate funds to pay lawyers and other legal personnel in civil cases if it believes that doing so will strengthen the legal system and fulfill its Article 39A mandate.

## VII. INDIA'S NEW LEGAL SERVICES: CONTOURS AND LIMITATIONS

How precisely would such a system work? This would require a full treatment in and of itself, but it is useful to provide an outline to answer questions. Most importantly, who would be eligible? In the criminal context, the answer is straightforward enough: anyone who is accused of a serious crime. In civil actions, it is more complex: would the courts really attempt to fund anyone who wanted to bring a lawsuit?

### A. Focus on the Defense

Hardly.[126] In the United States, the National Coalition for the Civil Right to Counsel emphasizes those areas where those in need of legal services as

[126] *See* Andrew Higgins, *Legal Aid and Access to Justice in England and India,* NATIONAL LAW SCHOOL OF INDIA REVIEW, Vol. 26, No. 1 (2014), pp. 13-30, at 24 ("No serious legal

respondents to actions initiated by others, such as child custody/family law issues, and residential eviction actions.[127]

Both would be crucial in India. Mass evictions in urban bhatis are now the stuff of best-selling literature,[128] but throughout the Union mass and individual evictions have become an epidemic. In 2020, the Housing and Land Rights Network reported that over half a million Indians had been evicted, with the vast majority not receiving due process, and millions more at risk of evictions. More than half of these evictions come from "civic beautification" projects.[129] Even if the lawyers are too late to prevent an illegal eviction, they can undertake post-eviction civil claims for damages, restitution, or other remedies.

Many family law issues come in courts where lawyers are not strictly speaking necessary. But in one sense that is always true: litigants can always represent themselves pro se. Scholars have found that litigants representing themselves are often at a severe disadvantage, whether in court or in Lok Adalats; Marc Galanter and Jayanth Krishnan have evocatively termed this development "debased informalism."[130] It thus makes sense to follow the consensus of scholars and practitioners (as well as even some judges), and say that the right to counsel should be included for indigent litigants in child custody, divorce, child support, and other family law proceedings.[131]

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scholar has developed a credible theory of justice that requires the state to underwrite every civil claim.").

[127] See John Pollock, *The Case Against Case-by-Case: Courts Identifying Categorical Needs to Counsel in Basic Human Needs Civil Needs,* 61 DRAKE L. REV. 763 (2013).

[128] *See generally* DEEPA ANAPPARA, DJINN PATROL ON THE PURPLE LINE (2020).

[129] See generally HOUSING AND LAND RIGHTS NETWORK, FORCED EVICTIONS IN INDIA IN 2019: AN UNRELENTING NATIONAL CRISIS (2020).

[130] Marc Galanter & Jayanth Krishnan, *Debased Informalism: Lok Adalats and Legal Rights in Modern India, in* Erik G. Jensen & Thomas C. Heller, eds., BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Stanford, CA: Stanford University Press: 2003) 76-121.

[131] Even the United States Supreme Court's opinion in *Lassiter v Dept. of Social Services*, which effectively ended the federal constitutional push for a right to counsel in civil cases, conceded that "[a] parent's interest in the accuracy and injustice of the decision to terminate his or her parental status is, therefore a commanding one." Lassiter v Dept. of Social Services, 452 U.S. 18, 27 (1981).

Perhaps the most important part of what we might call the "respondent" side of the civil-right-to-counsel ledger lies in the immigration context. The Modi's government's 2019 citizenship law supposedly offers protections for immigrants of all non-Muslim religions, but contains within it provisions that could be used to expel Muslim Indian citizens.

In Assam, thousands of Muslims are being hauled before "tribunals" to determine their immigration status, and loss at such tribunals could result in detention or deportation.[132] Police and government officials are targeting Muslims as "foreigners" regardless of where they actually reside or hold citizenship:

> Many poor Indians lack the required paperwork to prove citizenship, like parents' voting records and land ownership documents that have been certified by authorities as authentic…..
>
> Some of the tribunal members interviewed said they felt pressure in general to find more "foreigners," with a monthly requirement to report how many cases they had heard and of those, how many people had been declared foreigners.
>
> Two other former members said officials in Assam's Home and Political Department, which from 2016 has been controlled by Mr. Modi's political party, had complained that they were not declaring enough people noncitizens. The former tribunal members said the complaints relayed to them were a form of indirect but heavy pressure. Tribunal members who declared more people foreigners had their performance rated as "good," which increased their chances of keeping their jobs, according to court documents viewed by The Times. The performance of those who didn't declare enough people foreigners was marked as "not satisfactory."

Obviously, legal representation in such biased tribunals will not change all outcomes. But they can do a great deal. Lawyers excel at delay, which could give litigants the chance to obtain documents. They might be able to navigate the byzantine bureaucracy to get those documents themselves. And if nothing else, they can create a record to allow for a clearer appeal. And they

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[132] See Karan Deep Singh and Suhasini Raj, *'Muslims Are Foreigners': Inside India's Campaign to Decide Who Is a Citizen,* N.Y. TIMES, Apr. 4, 2020, at https://www.nytimes.com/2020/04/04/world/asia/india-modi-citizenship-muslims-assam.html

can also bring more media attention to the issue, which often serves as a critical means of providing justice: sunlight might not be the best disinfectant, but it can often serve as a good one.

Nor is the problem restricted to Assam, although it has been pioneered there. The Modi government seeks to expand the Assam model to the entire Union.[133] Indeed, it appears as if the process has already begun. The journalist Aatish Taseer, currently based in Britain, had his citizenship stripped from him, essentially because he is Muslim on his father's side:

> On November 7, the Indian government had stripped me of my Overseas Citizenship of India and blacklisted me from the country where my mother and grandmother live. The pretext the government used was that I had concealed the Pakistani origins of my father, from whom I had been estranged for most of my life, and whom I had not met until the age of 21. It was an odd accusation. I had written a book, *Stranger to History*, and published many articles about my absent father. The story of our relationship was well known because my father, Salmaan Taseer, had been the governor of Punjab, in Pakistan, and had been assassinated by his bodyguard in 2011 for daring to defend a Christian woman accused of blasphemy.[134]

The Home Ministry's spokesperson announced the stripping of Taseer's citizenship on Twitter, before Taseer himself had been informed.[135] If the Union Government can liquidate the citizenship of someone as prominent as Taseer, it will have no compunction in attempting to do so with millions of anonymous Muslim Indian citizens.

B. Not Even Lawyers

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[133] *See* Jeffrey Gettleman and Suhasini Raj, *India Steps Toward Making Naturalization Harder for Muslims,* N.Y. TIMES, Dec. 9, 2019, at https://www.nytimes.com/2019/12/09/world/asia/india-muslims-citizenship-narendra-modi.html?fbclid=IwAR1uQZUI18cUL_y01Q8kKY1JXIH9m6FUurF9CXVa5_8r8ANZ3fw_YhWhW1I.

[134] Aatish Taseer, *India is No Longer India: Exile in the Time of Modi,* ATLANTIC, May 2020, at https://www.theatlantic.com/magazine/archive/2020/05/exile-in-the-age-of-modi/609073/ (last visited May 21, 2020).

[135] Id.

Not all provision of civil legal services needs to be defensive, of course. Legal services could also prove crucial to the building of civil society: "barefoot lawyers" – community paralegals – could become part of teams to work on crucial issues in environmental justice.[136] Such programs could be particularly important in light of fears for India's democratic institutions in the wake of the 2019 election: empowered communities are an important brake on governments that aspire to authoritarian control.[137]

Our knowledge of the community paralegal model is rudimentary, but rapidly growing, and the results are promising. Community paralegals obvious differ from standard paralegals because they work directly with clients and underserved communities, but differ from community organizers because they consciously focus upon enforcement of legal rights, as well as traditional organizing and education strategies.[138]

Community paralegals could form an important part of a civil legal services strategy because of cost and accessibility. Lawyers are expensive, and the judiciary, even with its inherent authority, must exercise it responsibly. Moreover, lawyers tend to gather in larger cities and often avoid the countryside. It makes sense, therefore, for the judiciary to begin with funding a select number community paralegal programs in addition to the basic "defensive" civil legal services work, and determine after a short time whether this model has generated results.

C. Who Pays? Fee-shifting As Legal Services Provision

Finally, the judiciary might generate funding for legal services without spending a dime. The question of payment of litigation costs, most notably attorneys' fees, has attracted substantial academic attention. Scholars usually distinguish between the "American Rule", where each party pays its own costs, and the "English Rule," where the loser pays the costs of the winner.

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[136] Tina Rosenberg, *India's Barefoot Lawyers*, N.Y. TIMES, Aug. 8, 2017, at https://www.nytimes.com/2017/08/08/opinion/indias-barefoot-lawyers.html. For a fuller treatment of how paralegals can empower communities, see www.namati.org.

[137] It is now becoming clearer and clear that this aspiration describes the current Modi regime. See Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India,* 14 LAW AND ETHICS OF HUMAN RIGHTS (Issue 1, 2020), at 49-95.

[138] At this early stage, the best source on the model, its strengths, and weaknesses can be found in COMMUNITY PARALEGALS AND THE PURSUIT OF JUSTICE (Vivek Maru & Varun Gauri eds. 2018).

The most comprehensive recent survey, however, has rightfully deemed such a distinction "hopelessly simplistic." As with so much else, India seems to fit in nowhere: the 1908 Code of Civil Procedure states that "the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs shall be paid."[139]

Yet whatever Indian law might say on the books, in practice, it appears to be a dead letter. The Supreme Court observed recently that "many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs, despite the language of §35(2) of the Code."[140]

This failure represents a fairly massive missed opportunity for increasing access to justice in India. While the vast majority of commentary on cost-shifting treats with the *general* concept, cost-shifting provisions can specifically enhance the ability to pay for public interest litigation.

Such an argument is not mere speculation. California Code of Civil Procedure §1021.5 reads, in relevant part:

> Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if:
>
> (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons,
>
> (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and
>
> (c) such fees should not in the interest of justice be paid out of the recovery, if any.

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[139] India Code of Civil Procedure §35.

[140] Salem Advocate Bar Ass'n v. Union of India AIR 2005 SCC 3353, quoted in Mulla, The Code of Civil Procdure 614 (17th ed. 2007).

This section, unique in American law. It does not provide for a general practice of cost-shifting, but also does not restrict it to specific statutory provisions. Instead, it gives guidelines as to when judges should shift costs, based upon the public interest nature of the litigation. And since it provides guidelines, it also makes the decision whether or not to award fees a matter that higher courts can review – allowing for a more coherent state-wide policy that the allegedly broader discretion currently provided in Indian law. The section has transformed the practice of public interest litigation in America's largest sub-national jurisdiction.

## CONCLUSION

"To see what is in front of one's nose," Orwell famously noted, "needs a constant struggle."[141] The judiciary's ability to establish – and fund – civil legal services for the poor and subordinated has been in front of our nose for several decades. Recent cases are making it clearer. We can now recognize the emerging outline of a new path for greater justice.[142]

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[141] George Orwell, *In Front of Your Nose, Tribune*. — GB, London. — March 22, 1946.

[142] A reviewer suggested that this Article should outline whether the framework presented here would apply to other Directive Principles. My tentative answer at this stage is no: the judiciary has inherent power over the legal system, but it lacks inherent power over, say, an economic system such that it could enhance equality of income, see Const. of India Article 38, or just and humane conditions of work and maternal relief, see Const. of India Article 42. Certainly it could use these articles in statutory and constitutional interpretation, but it has no inherent power over them. It could, however, use them in the formation of common law rules, over which it ***does*** have inherent power, and that will be a topic for a future article.