

SAVING THE TREES ONE CONSTITUTIONAL PROVISION AT A TIME: JUDICIAL ACTIVISM AND DEFORESTATION IN INDIA

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I. INTRODUCTION

As the twenty-first century enters its second decade, India's population growth stands to place it as the world's most populous nation by 2030.¹ Most of India's population lives in rural villages,² in close proximity to the nation's forests rather than major metropolitan centers, like Delhi. With a land area about one-third the size of the United States³ and a population almost four times as large,⁴ Indian forests are under increasing pressure from population growth as well as economic modernization.⁵ The forests are home to some of the world's signature fauna, including the Bengal tiger and Asian elephant, as well as a diverse tropical flora unique to the subcontinent.⁶ The forests also contain vast reserves of natural resources, like timber products and minerals.⁷ With its population growing, demanding more resources, and consuming more, Indian forests face possible degradation.⁸ Any significant degradation would bring greater resource scarcity that would increase pressure on the government to provide those resources. Difficulty by the government in provisioning the population would bring economic and political turmoil within India. Given the country's prominence in the world economy and the effect its instability could cause in world markets, and given the population pressures it faces, the importance of maintaining forest cover and the attendant resource

¹ Dep't of Econ. & Soc. Affairs, Population Div., Population Challenges and Development Goals, at 5, U.N. Doc. ST/ESA/SER.A/248 (2005).

² *Rural-Urban Distribution*, CENSUS OF INDIA, http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/rural.aspx (last visited Jan. 4, 2012).

³ *The World Factbook*, U.S. CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/> (select "India" from the drop down menu of countries and locations, and then expand the "Geography" tab) (last visited Mar. 31, 2012).

⁴ *Id.* (select "References," then "Guide to Country Comparison", and then "Population"). It is estimated that by July 2012, the population of India will be 1,205,073,612, while the U.S. population will be 313,847,465. *Id.*

⁵ See Surya P. Sethi, Principal Adviser, Power & Energy, Gov't of India, Dialogue on Cooperative Action, India Presentation to United Nations Framework Convention on Climate Change COP-12 (Nov. 16, 2006), available at http://unfccc.int/files/meetings/dialogue/application/vnd.ms-powerpoint/061115_cop12_dial_india.pps.

⁶ See generally Shalini Bhutani & Ashish Kothari, *The Biodiversity Rights of Developing Nations: A Perspective from India*, 32 GOLDEN GATE U. L. REV. 587, 588 (2002) (discussing the megabiodiversity of India).

⁷ *The World Factbook*, *supra* note 3 (select "India" from the drop down menu of countries and locations, then expand the "Geography" tab, and then expand the "Natural Resources" tab) (last visited Mar. 31, 2012); National Forest Policy, 1998, pmb., No. 3-1/86-FP (India), available at <http://moef.nic.in/divisions/fp/nfp.htm>.

⁸ Amiya Kumar Bagchi, *From a Fractured Compromise to a Democratic Consensus: Planning and Political Economy in Post-Colonial India*, 26 ECON. & POL. WKLY. 611, 625 (1991) (discussing how densely populated nations face special pressures in environmental planning).

availability is critical to ensure India's economic and political stability. The future of the forests and Indian stability depends on identifying ways the Indian government can effectuate maintenance of the nation's forests.

Unique among common law jurisdictions, India provides constitutional protections for the environment as well as a wide array of statutory schemes that address particular environmental concerns.⁹ Additionally, over the last thirty years, the Indian Supreme Court has adopted a more activist approach to its jurisprudence as it relates to social issues.¹⁰ The Court's approach greatly expanded standing and induced much public interest litigation aimed at preventing environmental degradation, including deforestation.¹¹ Given the potential ramifications of forest resource scarcity, it is necessary to examine the effectiveness of this judicial approach and enforcement of it through agency action. This examination will aid in determining whether the current jurisprudence is effective or whether other legal solutions would provide greater protection to the forests.

Part II of this Note provides a background on the three main Indian legal mechanisms for environmental protection: the common law, the Indian Constitution, and statutory schemes. Part II also reviews the Court's interpretations of both the Constitution and environmental statutes that facilitate its authoritative reach.¹² In Part III, this Note surveys the development of the Indian Supreme Court's activist jurisprudence, beginning with a discussion of the Court's expansion of standing and public interest litigation, both of which not only enable a wider class of plaintiffs to bring suit to enforce constitutional rights and duties, but also provide a vehicle for remedying harms to the public interest.¹³ Part III also outlines how administrative agencies operate in India, focusing primarily on the Ministry of Environment and Forests.

⁹ INDIA CONST. arts. 48A, 51A(g). Article 48A directs the state to protect the environment and safeguard national forests. Article 51A(g) mandates that Indian citizens protect and improve the environment, including forests. *See, e.g.*, The Forest (Conservation) Act, No. 69 of 1980, INDIA CODE (1993) [hereinafter The Forest Act] (prohibiting state governments from using forests for non-forestry purposes without government approval); The Environment (Protection) Act, No. 29 of 1986, INDIA CODE (1993) (implementing environmental protection measures discussed at the UN Conference on the Human Environment in Stockholm in 1972).

¹⁰ *People's Faith in Judiciary Led to Judicial Activism, Says Judge*, TIMES OF INDIA (Nov. 4, 2011), http://articles.timesofindia.indiatimes.com/2011-11-04/Kanpur/30358832_1_judicial-activism-session-christ-church-college.

¹¹ J. Mijin Cha, *A Critical Examination of the Environmental Jurisprudence of the Courts of India*, 10 ALB. L. ENVTL. OUTLOOK J. 197, 199-204 (2005).

¹² *See Delhi Rd. Transp. Corp. v. DTC Mazdoor Cong.*, A.I.R. 1991 S.C. 101, 193 (India) ("Public policy can be drawn from the Constitution.").

¹³ *Id.* at 208-09 (discussing the liberalization of standing to increase court access for the poor and disadvantaged).

Part IV of this Note examines data on deforestation over the last twenty years in India and determines whether the rise of the Court's activism contributed to increased protection for forests, or whether the Court took risks without resulting in corresponding benefits to the forests. Finally, Part V outlines what the Court should do to minimize or reduce deforestation and also identifies how agencies can take steps toward full implementation of the protections the Court affords to better protect forests.

II. ENVIRONMENTAL PROTECTION MECHANISMS

There are three basic legal mechanisms for protecting the environment in India: the Common Law, the Constitution, and more recently, environmental statutes, particularly the Forest (Conservation) Act of 1980.

A. *Indian Common Law*

Prior to 1970 and the beginnings of a statutory approach to environmental protection, Indian common law derived from the British legal system in place since the colonial era provided several avenues for protecting the environment.¹⁴ Similar to the British and American legal systems, Indian tort law recognizes nuisance, trespass, negligence, and strict liability as the central causes of action available for protecting the environment.¹⁵ A brief description of each right of action is necessary to understand the overall framework of environmental protection in India.

1. *Nuisance*

The Indian common law divides nuisance into public and private nuisance.¹⁶ The law defines public nuisance, which is both a tort and a crime, as "an unreasonable interference with a right common to the general public."¹⁷ A member of the public, however, must show special damages in order to create a private right of action.¹⁸ As a result, environmental protection litigation based on a public nuisance cause of action rarely occurs.¹⁹

¹⁴ KAILASH THAKUR, ENVIRONMENTAL PROTECTION LAW AND POLICY IN INDIA 184 (1997) (discussing how Indian common law continues to provide these causes of action, with nuisance in particular remaining a popular choice for plaintiffs).

¹⁵ *Id.* at 185–93.

¹⁶ *Id.* at 185.

¹⁷ *Id.*

¹⁸ *Id.* at 186, 190.

¹⁹ *See id.* at 190 (noting that plaintiffs often cannot prove special damages).

Private nuisance is a tort defined as “the using or authorizing the use of one’s property or of anything done under one’s control, so as to injuriously affect an owner . . . of property by physically injuring his property or by interfering . . . with his health, comfort or convenience.”²⁰ Most often, private nuisance claims arise as a result of continuing unreasonable use of land.²¹ Remedies for private nuisance include both damages and injunctions, depending on the factual circumstances.²²

The tort of nuisance has drawbacks in terms of environmental protection.²³ A nuisance action generally requires the plaintiff to establish the reasonableness of the defendant’s conduct, something notoriously difficult to prove in Indian courts.²⁴ Moreover, nuisance law application varies from jurisdiction to jurisdiction in India and therefore consistent results for plaintiffs are rare.²⁵

2. Trespass

Trespass is a less-used, but still viable, cause of action in Indian environmental cases.²⁶ Trespass requires “an intentional invasion of the plaintiff’s interest in the exclusive possession of property.”²⁷ Trespass closely resembles private nuisance.²⁸ It differs, however, with respect to the nature of the injury involved.²⁹ With trespass the injury is direct, whereas with private nuisance it is consequential.³⁰ Though courts readily give relief for trespass, even displaying an activist sentiment by bending the trespass definition to accommodate a wide range of pollution sources,³¹ invocation of this tort is rare.³²

²⁰ *Id.* at 186.

²¹ *Id.*

²² J.C. Galstaun v. Dunia Lal Seal, (1905) 9 C.W.N. 612 (India) (issuing an injunction preventing discharge of shellac refuse liquid into a municipal drain and awarding damages for harm to plaintiff’s health, comfort, and property value of garden).

²³ THAKUR, *supra* note 14, at 189.

²⁴ *Id.* (noting that this especially true in the case of large corporate defendants whose actions have high economic and social value).

²⁵ *Id.*

²⁶ *Id.* at 190.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* An injury is direct if it results directly from the violation of a legal right. BLACK’S LAW DICTIONARY 801 (8th ed. 2004). Consequential loss arises from the results of a direct injury, rather than from the injury itself. *Id.* at 964.

³¹ THAKUR, *supra* note 14, at 190.

³² *Id.*

3. Negligence

The negligence cause of action in India is identical to that available in the United States. Negligence requires (1) a legal duty of care; (2) a breach of that duty by the defendant; (3) a causal connection between the breach and injury; and (4) the resulting injury.³³ Negligence is used infrequently in environmental actions, often appearing only because of technical difficulties in nuisance actions.³⁴ Additionally, negligence actions prove difficult in environmental contexts because of the need to establish a causal connection between the breach and injury given the inherent challenges in tracing the sources of pollutants.³⁵

4. Strict Liability: *The Rylands v. Fletcher Rule*

Though technically still good law, the strict liability rule derived from the English case *Rylands v. Fletcher*³⁶ is infrequently applied in environmental protection actions in India.³⁷ The rule states that “the person who . . . collects and keeps [on his land] anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.”³⁸ Because the liability is strict, defendants can raise few defenses.³⁹

The Indian Supreme Court, recognizing the difficulty in applying the *Rylands* rule, articulated a harsher strict liability rule in *M.C. Mehta v. Union of India*.⁴⁰ There, the Court introduced an enterprise liability theory for businesses engaged in inherently dangerous activities.⁴¹ The theory creates absolute liability for any harm resulting from a hazardous activity engaged in by the enterprise.⁴² Despite this expansion of strict liability, however, the cause of action remains relatively unused.⁴³ Unlike public interest litigation,

³³ Compare *id.* at 191, with 57A AM. JUR. 2D *Negligence* § 71 (2010).

³⁴ THAKUR, *supra* note 14, at 192.

³⁵ *Id.* at 193.

³⁶ *Rylands v. Fletcher*, [1868] UKHL 1, 3 (H.L.) 330.

³⁷ THAKUR, *supra* note 14, at 193.

³⁸ *Rylands*, 3 (H.L.) at 339–40.

³⁹ Strict liability, unlike simple negligence, eliminates defenses based on causation (which also eliminates many defenses based on the duty element of negligence because of the close connection between the two), which are frequent grounds for defending against negligence claims. Vernon Palmer, *A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law*, 62 TUL. L. REV. 1303, 1310 (1988). Certain defenses, such as denying possession of the thing “likely to do mischief,” and disputing the hazardous nature of the thing that causes injury, remain.

⁴⁰ *M.C. Mehta v. Union of India*, (1987) 1 S.C.R. 819 (India).

⁴¹ THAKUR, *supra* note 14, at 195.

⁴² *Id.*

⁴³ *Id.*

which can enable relief applicable beyond the parties immediately before the court, strict liability typically produces limited relief focused only on the people or property directly injured by the presence of a mischievous or hazardous item.

B. The Indian Constitution

This section discusses first the basic structure of the Indian Constitution; second, Article 21 of the Fundamental Rights, a common source of environmental protection; and third, how the intersection of the Fundamental Rights and Directive Principles are used by courts to enforce environmental protections.

1. Basic Structure

Operating much like the American Constitution, the Indian Constitution contains the fundamental legal precepts of Indian society.⁴⁴ The document is split into twenty-two parts. The relevant sections for the purposes of this Note are Part III, Fundamental Rights; Part IV, Directive Principles of State Policy (Directive Principles); and Part IVA, Fundamental Duties.

Part III, Fundamental Rights, is similar to the Bill of Rights in the U.S. Constitution, making inviolable by subsequent legislation basic protections such as freedom of speech, equal protection, and due process.⁴⁵ Part IV, Directive Principles, does not have a ready analogue in American law.⁴⁶ This part of the Indian Constitution recognizes certain economic, social, and cultural rights retained by the Indian people.⁴⁷ These rights, however, are nonjusticiable by virtue of Article 37 of the Constitution, which prevents judicial enforcement of the Directive Principles.⁴⁸ It is the only section of

⁴⁴ INDIA CONST. preface (“Constitution is a living document, an instrument which makes the government system work.”). Note also the organizational structure of the Constitution; rights and duties are labeled as “fundamental,” implying their centrality to Indian society and its legal system. *Id.* pt. III.

⁴⁵ See 1 A.S. CHAUDHRI, CONSTITUTIONAL RIGHTS AND LIMITATIONS 168 (1958) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . .”).

⁴⁶ The U.S. Constitution contains no article that sets forth foundational principles, not enforceable by judicial review, to guide Congress in its enactment of law. Article I of the U.S. Constitution enumerates congressional powers but does not animate those powers with policy directives as the Directive Principles do for Indian constitutional provisions. U.S. CONST. art. I.

⁴⁷ INDIA CONST. arts. 41–43; see also Vrinda Narain, *Water as a Fundamental Right: A Perspective from India*, 34 VT. L. REV. 917, 920 (2010) (“[T]he Constitution recognizes economic, social, and cultural rights under the Directive Principles of State Policy.”).

⁴⁸ INDIA CONST. art. 37 (“The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”);

the Constitution “the violation of which by a law does not render [the law] *pro tanto* void.”⁴⁹ Part IVA, Fundamental Duties, prescribes social behaviors incumbent on the Indian people to follow, in the interest of society as a whole.⁵⁰ Of particular relevance, Article 51A(g) states that it is the duty of every Indian citizen “to protect and improve the natural environment including forests.”⁵¹ Like the Directive Principles, the Fundamental Duties are nonjusticiable, though they do guide the Supreme Court in determining governmental duties.⁵²

2. *Environmental Protection Based on Article 21 of the Fundamental Rights*

Article 32 of the Indian Constitution provides Indian citizens “[t]he right to move the Supreme Court by appropriate proceedings for the enforcement [of fundamental rights].”⁵³ The Court uses Article 21 (India’s version of the American Due Process Clause) to expand substantive rights available for enforcement through Article 32.⁵⁴ By interpreting the right to life as it has, the Court created the market for public interest litigation—its preferred vehicle for enforcement of constitutional rights.⁵⁵

Through this broadening of the right to life, the Court articulated, among others, a right to education⁵⁶ and an environmental right in the form of the enjoyment of a pollution-free environment.⁵⁷ Public interest environmental litigation roared forward upon recognition of a right to environmental

Narain, *supra* note 47, at 920.

⁴⁹ 2 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY 1923 (4th ed. 1993).

⁵⁰ C.M. ABRAHAM, ENVIRONMENTAL JURISPRUDENCE IN INDIA 14 (1999) (comparing the Fundamental Duties to the Universal Declaration of Human Rights).

⁵¹ INDIA CONST. art. 51A(g).

⁵² Avani Mehta Sood, *Gender Justice Through Public Interest Litigation: Case Studies from India*, 41 VAND. J. TRANSNAT’L L. 833, 851 n.95 (2008).

⁵³ INDIA CONST. art. 32.

⁵⁴ *Id.* art. 21 (“No person shall be deprived of his life or personal liberty except according to procedure established by law.”); Narain, *supra* note 47, at 920. It is interesting to note the Court’s utilization of the right to life, as opposed to Article 21’s liberty provision, in its expansion of protected rights. Substantive due process in the American Supreme Court takes the opposite tack, protecting individual liberties through the liberty provision of the Fifth and Fourteenth Amendments. RUSSELL L. WEAVER ET AL., CONSTITUTIONAL LAW: CASES, MATERIALS & PROBLEMS 451 (2006).

⁵⁵ Lavanya Rajamani, *The Right to Environmental Protection in India: Many a Slip Between the Cup and the Lip?*, 16 REV. EUROPEAN CMTY. & INT’L ENVTL. L. 274, 277 (2007).

⁵⁶ *Mohini Jain v. State of Karnataka*, (1992) 3 S.C.R. 658, para. 12 (India) (decided prior to the introduction of Article 21A in 2002 which guaranteed education for children ages six to fourteen).

⁵⁷ *Subhash Kumar v. State of Bihar*, A.I.R. 1991 S.C. 420, para. 7 (India).

protection.⁵⁸ The resulting cases produced a myriad of orders over the past thirty years, including the landmark decision in *M.C. Mehta v. Union of India*, which required both central and state governments to establish mass education programs regarding the environment.⁵⁹

The Supreme Court frames the constitutional environmental right available in India as a negative right because Article 21 itself is framed as such.⁶⁰ It is thus not a stand-alone right;⁶¹ rather, it is dependent on other rights for its enforcement.⁶² It is with this in mind that this Note turns to the interaction between the Fundamental Rights and the Directive Principles in the context of the implied environmental right in Article 21.

3. Fundamental Rights and Directive Principles: Co-Application to Form an Enforceable Environmental Right

In addition to the right of environmental protection that comes from the Court's reading of Article 21, Article 48A, a Directive Principle, mandates that the "State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."⁶³ Reading the trio of Article 21, Article 48A, and the Preamble to the Indian Constitution together,⁶⁴ the Court has held that "[i]n deciding a case which may not be covered by authority[,] courts have before them . . . the trinity of the Constitution Lacking precedent, the court can always be guided by [its] light Public policy can be drawn from the Constitution."⁶⁵

Although Article 37 limits direct enforcement of the Directive Principles,⁶⁶ the Supreme Court treats the Fundamental Rights and the Directive Principles "like two wheels of a chariot, one no less important than the other."⁶⁷ This, however, was not always the case. Over the last three decades, the Court evolved its jurisprudence, going from a time where the Fundamental Rights always prevailed over the Directive Principles, to the

⁵⁸ Rajamani, *supra* note 55, at 275.

⁵⁹ *M.C. Mehta v. Union of India*, A.I.R. 1992 S.C. 382 (India).

⁶⁰ INDIA CONST. art. 21 ("No person shall be deprived of his life or personal liberty except according to procedure established by law."); Rajamani, *supra* note 55, at 278 (defining a negative right as one that requires government inaction for effectuation, as opposed to a positive right, which requires action).

⁶¹ Rajamani, *supra* note 55, at 278.

⁶² *Id.*

⁶³ INDIA CONST. art. 48A.

⁶⁴ *Id.* pmb. (calling for the Indian government to "secure to all its citizens," justice, liberty, fraternity, and equality).

⁶⁵ *Delhi Rd. Transp. Corp. v. DTC Mazdoor Cong.*, A.I.R. 1991 S.C. 101, 193 (India).

⁶⁶ INDIA CONST. art. 37 ("The provisions contained in [these Directive Principles] shall not be enforceable by any court.").

⁶⁷ *Minerva Mills Ltd. v. Union of India*, A.I.R. 1980 S.C. 1789, para. 61 (India).

last ten years, which have seen the Directive Principles shape activist interpretations of the Fundamental Rights.⁶⁸

Armed with Articles 21 and 48A and a “legal ideology . . . centered on public duty rather than on individual rights,”⁶⁹ the Court has decided many cases in favor of greater environmental protection, including protection of forests.⁷⁰ It appears that the Court fully intends to continue broadly interpreting the Constitution to afford greater judicial protection of the environment. From a private property perspective, which would prefer private entities determine uses of land, this strategy may appear fraught with peril.⁷¹ Indian communitarian ideologies, however, see the Court’s jurisprudence as implementing unique Indian cultural ideals.⁷²

C. *Environmental Statutes*

1. *Early Statutes*

Local custom dictated use of forest resources in India prior to the British rule over India.⁷³ The British subsequently regulated the forests as “resource[s] to be exploited.”⁷⁴ Eventually the British adjusted their approach.⁷⁵ The Indian Forest Act of 1927 (the 1927 Act) provided for the preservation of forests and set up a framework for forest management, including previously private forest lands.⁷⁶ Within a few decades, however, it became apparent that the 1927 Act did not successfully protect the interests of forest inhabitants.⁷⁷ Not only did the 1927 Act fail to protect the forest,

⁶⁸ ABRAHAM, *supra* note 50, at 18; *see also Minerva Mills Ltd.*, A.I.R. 1980 S.C. 1789 (holding two constitutional amendments passed by Parliament to be in violation of the basic structure of the Constitution, which structure is informed in part by the Directive Principles).

⁶⁹ ABRAHAM, *supra* note 50, at 18.

⁷⁰ *See, e.g., T.N. Godavarman Thirumulpad v. Union of India*, A.I.R. 2005 S.C. 4256 (ordering the closure of saw mills within ten kilometers of protected forest).

⁷¹ Lynda L. Butler, *Private Land Use, Changing Public Values, and Notions of Relativity*, 1992 BYU L. REV. 629, 631 (discussing the reactions of private land owners to environmental regulations affecting their future interest in their land).

⁷² ABRAHAM, *supra* note 50, at 19.

⁷³ S.S. Garbyal, *Comments on Forest Legislation*, in HANDBOOK OF ENVIRONMENT, FOREST & WILDLIFE PROTECTION LAWS IN INDIA 19 (1998); Timothy J. O’Neill, *Through a Glass Darkly: Western Tort Law from a South and East Asian Perspective*, 11 RUTGERS RACE & L. REV. 1, 7 (2009).

⁷⁴ Garbyal, *supra* note 73, at 19.

⁷⁵ *Id.*

⁷⁶ *Id.*; The Indian Forest Act, No. 16 of 1927, INDIA CODE (1993), available at <http://envfor.nic.in/legis/forest/forest4.html>.

⁷⁷ Garbyal, *supra* note 73, at 19 (noting that the 1927 Act codified extraction of forest resources rather than addressing sustainability and local populations).

the 1952 National Forest Policy extended forests beyond their traditional area and gave impetus to forest farming and agricultural forestry.⁷⁸

In 1976, the national government, concerned with the rising rate of deforestation, enacted the forty-second amendment to the Indian Constitution, which transferred forests from state listing⁷⁹ only, to concurrent listing with the government.⁸⁰ Subsequently, the government formed the Ministry of Environment and Forests (MOEF) and established “administrative jurisdiction over national forest development.”⁸¹ MOEF and its role in forest protection are explored in greater depth in Part III below.

2. *Forest (Conservation) Act of 1980*

Four years after the forty-second amendment, the government enacted the Forest (Conservation) Act of 1980 (the Forest Act).⁸² This legislation effectively prohibits state governments from “allowing the use of any forest lands for non-forestry purposes without the prior approval of the [government].”⁸³ The Forest Act’s definition of non-forestry purpose includes “any purpose other than reforestation; but does not include any work relating [to] . . . conservation, development and management of forests.”⁸⁴

The Forest Act also gives the government the power to create a committee to advise the government on grants of approval under Section 2 of the Forest Act, as well as on other matters relating to forest conservation the government sees fit to refer to the committee.⁸⁵ Further, violations of the Forest Act carry criminal penalties, both for individuals who violate the Act and for negligent government officials.⁸⁶

In addition to creating an advisory committee, the Forest Act also empowers the government to promulgate rules for carrying out its provisions.⁸⁷ In 1981, the government acted pursuant to Section 4(1) and

⁷⁸ National Forest Policy, 1952, No. 13-1/52-F (India), *available at* <http://forest.ap.nic.in/forest%20policy-1952.htm>.

⁷⁹ India has a federal system of government, with states and a national government, much like the United States. A simple read through of the Indian Constitution’s Table of Contents demonstrates the federal structure of India’s government. INDIA CONST.

⁸⁰ THAKUR, *supra* note 14, at 277; The Constitution (Forty-second Amendment) Act, No. 91 of 1976, INDIA CODE (1993).

⁸¹ THAKUR, *supra* note 14, at 277 (noting that prior to the formation of MOEF there existed no agency for the administration of environmental policy).

⁸² *Id.*; The Forest Act, *supra* note 9.

⁸³ Garbyal, *supra* note 73, at 20.

⁸⁴ The Forest Act, *supra* note 9.

⁸⁵ *Id.* § 3.

⁸⁶ THAKUR, *supra* note 14, at 277; The Forest Act, *supra* note 9.

⁸⁷ The Forest Act, *supra* note 9, § 4.

created the Forest (Conservation) Rules (the Rules).⁸⁸ The Rules define the composition and function of the advisory committee, as well as outline the considerations the committee must use in “tendering its advice.”⁸⁹ The Rules also confirm that the advice of the committee is just that—advice.⁹⁰ The government is in no way obligated to do anything more than consider the advice, having the power to “grant approval to [a] proposal with or without conditions or reject the same.”⁹¹

Contemporary Indian legal scholars harshly criticize the Forest Act and associated rules.⁹² Many view the Forest Act as “merely centrali[zing] the power concerning forest land use,” without “[doing] much for the protection and conservation of forests.”⁹³ Scholars also complain that though the Forest Act provides protection for property rights to forest land and products, it denies access to the forests by indigenous people who live in them.⁹⁴

In response to the Forest Act’s inability to either protect forests or carry out reforestation, the government resorted to administrative decrees to achieve those objectives.⁹⁵ As well, the Indian Supreme Court effectively circumvented the Forest Act’s provision allowing application to the government for de-reservation⁹⁶ of forests by determining that the word “forest” as used in the Forest Act encompassed and protected forests regardless of de-reservation or statutory recognition.⁹⁷ The virtual abandonment of statutory procedures by the Court, as well as the government’s reticence to use the same, indicate that the Forest Act, while substantively inspirational to Supreme Court orders, is no longer procedurally central to Indian efforts at containing deforestation.

⁸⁸ Indian Ministry of Environment and Forests, Forest (Conservation) Rules, 2003, Gazette of India (Jan. 10, 2003), available at [http://envfor.nic.in/legis/forest/gsr23\(e\).htm](http://envfor.nic.in/legis/forest/gsr23(e).htm).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² THAKUR, *supra* note 14, at 278.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Reservation is used to refer to the Forest Act’s prohibition on the use of forests, in effect *reserving* them, for anything other than forestry purposes.

⁹⁷ See T.N. Godavarman Thirumulpad v. Union of India, A.I.R. 1997 S.C. 1228, 1230 (India) (holding the provisions of the Forest Act “apply to all forests irrespective of the nature of ownership or classification thereof”).

III. ENVIRONMENTAL ENFORCEMENT

A. *Judicial Activism in the Indian Supreme Court*

The Indian Constitution expressly provides for judicial review, unlike in the United States where the doctrine developed in the courts.⁹⁸ The Indian Supreme Court, however, originally upheld executive and legislative actions, choosing to interpret the Constitution strictly, in keeping with the British positivist view of law.⁹⁹ It was not until 1950, in *A.K. Gopalan v. Madras*,¹⁰⁰ that the Court first asserted its powers of judicial review.¹⁰¹

Thereafter, the Court slowly grew into its role as a court of “good governance,” actively policing the actions of other branches.¹⁰² It was not until the post-emergency period¹⁰³ “that the Court’s jurisprudence blossomed with doctrinal creativity as well as processual innovations.”¹⁰⁴

1. *Standing*

The major doctrinal innovation undertaken by the Court during this time was to expand standing requirements.¹⁰⁵ The traditional approach to standing, in both American and Indian jurisprudence, has been that “only an aggrieved person that is [someone] who ha[s] suffered a specific legal injury [can] bring an action for judicial redress.”¹⁰⁶ The Indian Supreme Court

⁹⁸ INDIA CONST. arts. 13 §§ 1–2, 32 § 2; see *Marbury v. Madison*, 5 U.S. 137 (1803) (establishing the doctrine of judicial review in the United States); S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL’Y 29, 37–41 (2001).

⁹⁹ S.P. SATHE, *JUDICIAL ACTIVISM IN INDIA* 40–41 (2002).

¹⁰⁰ *A.K. Gopalan v. Madras*, A.I.R. 1950 S.C. 27 (India).

¹⁰¹ SATHE, *supra* note 99, at 40. In *Gopalan*, the Court upheld the government’s position, deciding not to exercise its power to void a legislative enactment. *Gopalan*, A.I.R. 1950 S.C. 27.

¹⁰² SATHE, *supra* note 99, at 43 (using good governance in reference to the Court’s role as overseer of other governmental branches). The Indian Supreme Court maintained a positivist approach to judicial review even after *Gopalan*. *Id.* For example, in 1975 the Court held by a 4–1 vote that they were powerless to protect individuals from assertions of executive power, even if the assertion deprived the person of life and/or liberty. *A.D.M. Jabalpur v. Shiv Kant Shukla*, A.I.R. 1976 S.C. 1207 (India). Only in the arena of property rights did the Court attempt an activist approach, and even there they encountered stiff resistance from Parliament. SATHE, *supra* note 99, at 46.

¹⁰³ The emergency period refers to two years of martial law declared by Indira Gandhi after the Allahabad State Court convicted her of election fraud. Manoj Mate, *The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases*, 28 BERKELEY J. INT’L L. 216, 243 (2010). During this time the government restricted many civil liberties and fundamental rights. *Id.*

¹⁰⁴ SATHE, *supra* note 99, at 100 (stating that the post-emergency period is generally thought to run from 1977–1978).

¹⁰⁵ Rajamani, *supra* note 55, at 275.

¹⁰⁶ *Id.*

rationalized the move away from this definition of standing as done “in the service of the poor, oppressed and voiceless.”¹⁰⁷

The Court’s first step in expanding standing was to recognize representative standing.¹⁰⁸ In *Sunil Batra (II) v. Delhi Administration*, the Court allowed the petitioner to move for redress of wrongs committed against those who could not approach the Court themselves, either because of social (caste) or economic disadvantage.¹⁰⁹ In the same case, the Court also recognized epistolary jurisdiction, where letters to the Court are treated as writ petitions.¹¹⁰

One year later, in *S.P. Gupta v. Union of India*, the Court went even further, allowing members of the public to claim redress for public injuries arising out of a breach of public duty.¹¹¹ The Court recognized the dangers inherent in opening its doors to what is often referred to as “citizen standing,”¹¹² yet saw activism as “essential for participative public justice.”¹¹³

2. Public Interest Litigation

This liberalization of standing requirements resulted in a new class of legal action: public interest litigation (PIL).¹¹⁴ PIL suits seek to redress wrongs to public interests, such as the right to a clean environment.¹¹⁵ PIL involves the Court in not only application of law to fact, but also fact-finding, administrative agency monitoring, and policy determinations.¹¹⁶ Under Article 142 of the Constitution, the Court has far-reaching power to act in ways that would be unthinkable in an American court.¹¹⁷ The Court

¹⁰⁷ *Id.*

¹⁰⁸ Clark D. Cunningham, *Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience*, 29 J. INDIAN L. INST. 494, 499 (1987); SHYAM DIVAN & ARMIN ROSENCRANZ, ENVIRONMENTAL LAW AND POLICY IN INDIA: CASES, MATERIALS AND STATUTES 135 (2d ed. 2002).

¹⁰⁹ *Sunil Batra (II) v. Delhi Admin.*, (1980) 2 S.C.R. 557 (India).

¹¹⁰ Rajamani, *supra* note 55, at 275.

¹¹¹ *Id.*; *S.P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149 (India).

¹¹² Rajamani, *supra* note 55, at 276 (“[I]f we keep the door wide open for any member of the public to enter the portals of the court to enforce public duty . . . the court will be flooded with litigation.”).

¹¹³ *Id.*

¹¹⁴ *Id.* Public Interest litigation can be pursued directly to the Supreme Court if the complaint, or citizen letter, alleges violation of a Fundamental Right. *Id.* at n.30.

¹¹⁵ SATHE, *supra* note 99, at 211 (discussing *Fertilizer Corp. Kamgar Union v. Union of India*, A.I.R. 1981 S.C. 344 (India), a case where workers in a public sector company sued their employer to prevent losses to the public treasury).

¹¹⁶ Rajamani, *supra* note 55, at 276.

¹¹⁷ INDIA CONST. art. 142 (empowering the Court to “make such order as is necessary for doing complete justice in any cause or matter pending before it”).

interprets this provision to encompass not only damages and injunctive relief, but also a wide range of administrative solutions, like continuing mandamus.¹¹⁸ This essentially allows the Court to monitor the executive and legislative branches.¹¹⁹ The Court also put in place bureaucratic committees to monitor the enforcement of final decrees, which are typically wide-reaching.¹²⁰

However, the Court's orders are enforceable only by the President, both at his discretion and in ways he finds appropriate, until such time as Parliament passes enforcement legislation.¹²¹ This apparent paradox in the form of a relatively toothless constitutional enforcement mechanism might be the root cause of much of the ineffectiveness in the Court's orders.¹²²

After the Court recognized the right to a pollution-free environment in 1991,¹²³ it incorporated not only many established principles of international environmental law, but also some nascent ones into its environmental rulings.¹²⁴ As international environmental law expert Lavanya Rajamani notes, "[t]hese [principles] include the polluter pays principle, the precautionary principle, the principle of inter-generational equity, the principle of sustainable development and the notion of the state as a trustee of all natural resources [including forests]."¹²⁵ Combined with the advent of PIL, this wide-ranging environmental right led to the Court's oversight of virtually every area of environmental governance.¹²⁶

For instance, in the Delhi Pollution Case,¹²⁷ the Court on its own motion mandated that the administration of the state of Delhi use compressed natural

¹¹⁸ According to Rule 9 of the Supreme Court Rules of India, the Court "may, if it thinks fit, grant such ad interim relief to the petitioner, as the justice of the case may require, upon such terms, if any as it may consider just and proper." The Supreme Court Rules, 1966, pt. IV, order xxxv, para. 9 (India).

¹¹⁹ Rajamani, *supra* note 55, at 276. Indian law professor Upendra Baxi referred to this as "creeping jurisdiction." Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in JUDGES AND THE JUDICIAL POWER 289, 298–300 (R. Dhavan et al. eds., 1985).

¹²⁰ Rajamani, *supra* note 55, at 276.

¹²¹ INDIA CONST. art. 142 ("[A]ny . . . order so made shall be enforceable throughout . . . India in such manner as may be prescribed by . . . any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe." (emphasis added)).

¹²² See generally SEERVAI, *supra* note 50; CHAUDHRI, *supra* note 46 (discussing the Indian constitution).

¹²³ Subhash Kumar v. State of Bihar, A.I.R. 1991 S.C. 420 (India).

¹²⁴ Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, 19 J. ENVTL. L. 293, 294 (2007).

¹²⁵ *Id.* at 294–95.

¹²⁶ *Id.*

¹²⁷ M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 1086 (India).

gas in the city's bus fleet in order to reduce air pollution.¹²⁸ The Court essentially made a legislative policy choice that affected not only local governmental bodies, but also private citizens and companies.¹²⁹ It is clear from the Court's willingness to extend its authority over something as policy-specific as fuel choice for a city's bus fleet that the lines between judicial and legislative purview blur when it comes to environmental concerns.¹³⁰ This blurring continues today, with the Court issuing far-reaching orders in PIL as recently as March, 2010.¹³¹

B. Indian Administrative Agencies

As in many modern administrative states, agencies and local governments occupy key roles in the administration of environmental law in India.¹³² In India, the government established MOEF subsequent to the passage of the forty-second amendment.¹³³ This ministry "is the nodal agency in the administrative structure of the [government] for the planning, promotion, coordination and overseeing [of] the implementation of India's environmental and forestry policies and programmes."¹³⁴

MOEF is responsible for monitoring Indian forest cover and reporting its statistical data to the Food and Agriculture Organization of the United Nations, in addition to other responsibilities.¹³⁵ MOEF also coordinates and monitors the National Forest Commission, set up under Article 2 of the Forest Act.¹³⁶ This commission advises MOEF as to whether applications to use forest land for non-forest uses should be approved.¹³⁷ As noted above in

¹²⁸ Armin Rosencranz & Michael Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 COLUM. J. ENVTL. L. 223, 233 (2003) (citing S.C. Writ Petition (Civil), M.C. Mehta v. Union of India (1998) (No. 13029/1985), available at <http://www.elaw.org/node/2783> (click the link below the word "Attachment")).

¹²⁹ *Id.* at 233–34.

¹³⁰ SATHE, *supra* note 99, at 229–30 (discussing how the expanded meaning of justiciability in PIL creates a more positive role—in the sense of action as opposed to inaction—for the Court).

¹³¹ See *Goan Real Estate & Constr. Ltd. v. Union of India*, (2010) 5 S.C.C. 388 (India) (holding construction completed within fifty meters of the coastline pre-1996 to be legal, despite public interest litigation setting aside the agreement which reduced the permitted construction zone to fifty meters).

¹³² I M.P. JAIN & S.N. JAIN, *PRINCIPLES OF ADMINISTRATIVE LAW* 663 (6th ed. 2007).

¹³³ THAKUR, *supra* note 14, at 277.

¹³⁴ *About the Ministry*, MINISTRY OF ENV'T & FORESTS, GOV'T OF INDIA, <http://moef.nic.in/modules/about-the-ministry/introduction/> (last visited Oct. 17, 2011).

¹³⁵ *Id.*; see *infra* note 153.

¹³⁶ *Forest Policy Division*, MINISTRY OF ENV'T & FORESTS, GOV'T OF INDIA, <http://envfor.nic.in/divisions/forpol.html> (last visited Nov. 11, 2011).

¹³⁷ *Id.* (identifying that one of the functions of the commission is "mak[ing] recommendations indicating policy options for achieving sustainable forest and wildlife management and development, bio-diversity conservation and ecological security").

the discussion of the Forest Act, however, both the application process and the commission have limited power, with the Court approving and denying applications.¹³⁸

Furthermore, the Supreme Court is the only court to retain its jurisdiction over administrative tribunals set up by Parliament or state legislatures governing matters including environmental concerns.¹³⁹ In *S.P. Sampath Kumar v. U.O.I.*,¹⁴⁰ the Court exercised this jurisdiction by defining the process for selection of tribunal members, going so far as to require legal or judicial experience for tribunal chairmen.¹⁴¹

The Indian administrative system operates similarly to that of the United States and other common law countries in some respects, while differing in others.¹⁴² The fundamental difference between Indian and U.S. administrative law is the application of the separation of powers doctrine.¹⁴³ The U.S. constitutional framework provides for three mutually exclusive branches of government.¹⁴⁴ Though the judicial branch is nominally separated from the legislative and executive branches in India,¹⁴⁵ in reality the Supreme Court has gathered so much control that it is, in effect, a court of good governance over the other branches, not just a judicial organ.¹⁴⁶

The centralization of power in the Court is not without reason, however.¹⁴⁷ Administrative agencies in India, including MOEF, often do not enforce their mandates.¹⁴⁸ There is little accountability,¹⁴⁹ and thus agencies have little incentive to respond to public grievances.¹⁵⁰

¹³⁸ T.N. Godavarman Thirumulkpad v. Union of India, A.I.R. 1997 S.C. 1228 (India).

¹³⁹ 1 JAIN & JAIN, *supra* note 132, at 663 (noting that Article 323B of the Indian Constitution “empowers the appropriate legislature to provide . . . tribunals . . . with respect to the following matters: (i) taxation . . . [and] (v) land reforms,” which can exclude the jurisdiction of any court except the Supreme Court).

¹⁴⁰ *S.P. Sampath Kumar v. Union of India*, (1987) 1 S.C.R. 435 (India).

¹⁴¹ 1 JAIN & JAIN, *supra* note 132, at 664.

¹⁴² 1 *id.* at 17–19 (noting that all common law systems are subject to the same rule of law principle, yet are driven by different constitutional law backgrounds).

¹⁴³ 1 *id.* at 17, 31.

¹⁴⁴ See U.S. CONST. arts. I–III (Article I provides for legislative authority to reside with Congress. Article II consigns all executive authority to the president. Article III establishes the federal judiciary and the scope of its jurisdiction); 1 JAIN & JAIN, *supra* note 132, at 32.

¹⁴⁵ See INDIA CONST. pts. VI, IXA (laying out structure of the National Government’s executive, legislative, and judicial branches, as well as defining the role of municipalities in the Indian system).

¹⁴⁶ SATHE, *supra* note 99, at 43 (noting that the Court was not a mere legal court and had a political role to play).

¹⁴⁷ 1 JAIN & JAIN, *supra* note 132, at 2296 (concluding that judicial activism has been helpful in the area of environmental protection because of the “apathy and inertia of the Administration to enforce anti-pollution laws”).

¹⁴⁸ *Id.* at 2309 (discussing how “public interest litigation has grown in India because of bureaucratic unresponsiveness”).

¹⁴⁹ India does not have an ombudsman system—where non-agency officials oversee

In addition to systemic inertia, agencies also face potential shortfalls in the resources needed to effectively monitor compliance, monitor afforestation, and seek redress for grievances against the public interest.¹⁵¹ For instance, though spending levels on afforestation and reforestation are higher now than they were ten years ago, funding dropped in certain years, with a recent downward trend from the highs of 2007.¹⁵² Faced with such resource constraints and inertia issues, agencies cannot be relied on to deliver reliable environmental protection.

IV. ACTIVISM AND DEFORESTATION

Before addressing the impact of activism on deforestation, it is important to have a sense of what India's forests look like today as compared to years past. Unlike many countries in southeast Asia, according to official reports India's forests have not seen high rates of deforestation over the previous twenty years.¹⁵³ In fact, according to the Indian government and United Nations (whose statistics derive from reports submitted by the Indian government), Indian forests today cover a slightly higher percentage of the land area than twenty years ago.¹⁵⁴ These appraisals of forest cover, however, may not paint the most realistic portrait of Indian forests.¹⁵⁵ Evidence suggests that removing the growth in commercial exotic tree plantations from forest growth calculations would show actual deforestation of native Indian forests.¹⁵⁶ Data indicates that, since the 1990s, these plantations grew at a rate of approximately 18,000 square kilometers per year.¹⁵⁷ If in fact government statistics do not compensate for the growth in plantations, deforestation rates for native forests and the success of afforestation may need reexamination.

agencies' adherence to their mandates—to ensure agency accountability. *Id.* at 2269.

¹⁵⁰ *Id.* at 2309.

¹⁵¹ See *National Afforestation Program: Year-wise Summary, 2000-2010*, NAT'L AFFORESTATION & ECO-DEV. BOARD, <http://www.naeb.nic.in/statics.html> (under Statistics at a Glance, and National Afforestation Programme (NAP), click "Funds Released") (last visited Oct. 30, 2011) (stating that from 2000–2010 approximately \$500 million went toward afforestation programs in all twenty-nine states).

¹⁵² *Id.*

¹⁵³ FOOD & AGRIC. ORG. OF THE U.N., *GLOBAL FOREST RESOURCES ASSESSMENT 2010*, at 230 (2010), available at <http://www.fao.org/docrep/013/i1757e/i1757e.pdf> (noting Indian forest cover was 63,939 hectares in 1990 and 67,709 hectares in 2004).

¹⁵⁴ *Id.*

¹⁵⁵ Jean-Philippe Puyravaud et al., *Cryptic Loss of India's Native Forests*, 329 *SCIENCE* 32, 32 (2010) (discussing how satellite imagery used to determine forest cover does not distinguish between commercial tree plantations and native forest cover).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

With that picture of the state of forests roughly outlined, it is now proper to overlay judicial activism and forestation rates to determine if the former has affected the latter. As discussed above, the Indian Supreme Court's environmental reach has expanded greatly since 1980.¹⁵⁸ The Court oversees administrative tribunals and it allows anyone to write a letter and initiate public interest litigation.¹⁵⁹ Access to the Court for judicial redress could not be broader in terms of standing.¹⁶⁰ Court control over the other branches of government exceeds that of other constitutional common law courts in the world.¹⁶¹

At the same time, as the Court opened its doors to all comers and exercised greater control over administrative actions, the forests of India remained vulnerable, even shrinking according to some statistics.¹⁶² On its face, data suggesting that forest cover shrank over the last twenty years partially contradict any assertion that the Court's judicial activism played a successful role in providing adequate protection to forests. If forest cover in fact shrank, the relaxation of standing requirements and the increase in public interest litigation correlate to a slight decrease in forest cover. If government statistics represent reality, however, these doctrinal changes correlate to a slight increase in forest cover.¹⁶³

Such a comparison is incomplete, however. A second question must be asked before the true effect of the Court's activist approach on deforestation can be understood. What would have happened had the Court *not* expanded standing and encouraged public interest litigation? Although speculative in

¹⁵⁸ See, e.g., *S.P. Gupta v. Union of India*, A.I.R. 1982 S.C. 149 (India) (expanding standing to include citizen standing in public interest litigation); *M.C. Mehta v. Union of India*, A.I.R. 1992 S.C. 382 (India) (involving four hundred industries and one hundred municipalities in oversight by the Court).

¹⁵⁹ 1 JAIN & JAIN, *supra* note 132, at 663 (outlining the retained jurisdiction of the Court over administrative tribunals); see also Rajamani, *supra* note 55, at 275 (noting that the Court recognized epistolary jurisdiction in *Sunil Batra (II) v. Delhi Admin.*, (1980) 3 S.C.C. 488).

¹⁶⁰ Allowing any person, injured or not, to initiate suit, whether they intended to or not, is at least close to the outer limit of standing. Cf. *Friends of the Earth Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 180–81 (2000) (outlining the elements of standing in American courts). The Indian Supreme Court requires that an injury to the public be present, but does not limit who can seek redress for it. See *S.P. Gupta*, A.I.R. 1982 S.C. 149.

¹⁶¹ The British Supreme Court does not have the power to invalidate laws of Parliament. Monica A. Fennell, *Emergent Identity: A Comparative Analysis of the New Supreme Court of the United Kingdom and the Supreme Court of the United States*, 22 TEMP. INT'L & COMP. L.J. 279, 295 (2008). The American Supreme Court retains the power to invalidate laws of Congress; however, it also retains strict rules of standing requiring a "concrete and particularized injury" to sustain a cause of action. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

¹⁶² Puyravaud et al., *supra* note 155, at 32.

¹⁶³ See *supra* note 153 (citing government statistics that show greater forest cover in 2004 than 1990).

nature, this inquiry is necessary to understand the full effects of the Court's approach.

Precise forest cover levels, absent expanded standing, are impossible to discern. The standing expansion is historical fact and cannot be erased from the record. The effects of traditional standing on judicial enforcement of rights and the likelihood of Indian agency inaction absent judicial prodding, however, are known. Agencies simply do not enforce statutes as vigorously without oversight, whereas when courts hold them accountable there is more incentive to take action.¹⁶⁴ The Court's expanded standing requirements, moreover, increase citizen enforcement actions and PIL in the environmental context and in doing so increase opportunities for oversight of agencies.¹⁶⁵ Together, these two known cause-and-effect relationships suggest that, at a minimum, governmental enforcement (judicial or administrative) of forest laws would wane absent the Court's activist stance.

If a lack of expanded standing and public interest litigation decreased enforcement as expected, it is also likely that forest cover would decline in tandem. Without judicial oversight and agency enforcement, industries would not be as accountable for encroaching on indigenous lands in their search for minerals and forest products. There would be few consequences to forest destruction other than higher profits, something private entities pursue with vigor.

Unprotected, the commons (public utility lands for the common benefit of villagers)¹⁶⁶ would face rapid extinction at the hands of those who would exploit public resources for private benefit. Given the risks to the judicial system posed by liberal standing requirements and an activist approach to judicial decision making,¹⁶⁷ however, it bears examining whether the Court's activism benefits more than it burdens. The fears of expanded standing include a multiplicity of frivolous lawsuits and the resulting judicial morass, as well as "the predilections of the judges [ruling] the day."¹⁶⁸ Despite these reasonable fears, the expansion of standing in India has not resulted in the Court hearing a plethora of nonjusticiable issues.¹⁶⁹ This is at least in part

¹⁶⁴ 1 JAIN & JAIN, *supra* note 132.

¹⁶⁵ SATHE, *supra* note 99, at 224–25 (discussing the wide range of circumstances in which the Court dealt with environmental protection in the face of government intransigence).

¹⁶⁶ See Jagpal Singh v. State of Punjab, Civil Appeal No. 1132/2011 at SLP(c) No. 3109/2011, para. 3 (India).

¹⁶⁷ Rajamani, *supra* note 55, at 276 (noting fear of litigation flood if standing were relaxed).

¹⁶⁸ *Id.* at 285.

¹⁶⁹ 1 JAIN & JAIN, *supra* note 132, at 2314 (noting that to avoid ruling in favor of claims that under previous standing doctrine would have been nonjusticiable, the Court can (1) refuse to decide a case on the merits; (2) dismiss for failure to state a claim; or (3) reject the claim on the merits rather than deny relief because of a lack of standing).

because there is no recovery for the named plaintiff in PIL outside of the protection sought for the public interest in which the plaintiff shares.¹⁷⁰

Fears of a judge's own views dictating outcomes are also often espoused in opposition to activist jurisprudential approaches.¹⁷¹ In the United States today, the phrase "judicial activism" is practically an epithet, for the very reason that it implies a judge making his own law instead of applying the law as found in precedent.¹⁷² There exists a notion that society is ill-served by an unelected body having the power to hand down law without going through a legislative process.¹⁷³

In India, however, judicial activism occurs in a different cultural milieu, surrounded by different governmental institutions and capabilities. Indian society does not have the same emphasis on private property or individualism that is present in U.S. society.¹⁷⁴ Communitarianism rather than individualism is the dominant ideology, and it has only grown in importance since the end of British rule.¹⁷⁵ The Preamble to the Indian Constitution even states that the document forms a socialist government; a form more oriented toward community rights than the constitutional system of the United States.¹⁷⁶

Moreover, the Indian Government has a history of corruption in all areas of governance, not just environmental protection.¹⁷⁷ From the time of Indian

¹⁷⁰ Ashok H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, in SUPREME BUT NOT INFALLIBLE—ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 159, 165 (B.N. Kirpal et al. eds., 2000) ("A PIL petitioner is provided by the Court as one who draws its attention to a grievance requiring remedial measures and having no personal stake in the matter.").

¹⁷¹ Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, 95 GEO. L.J. 929, 939 (2007) (listing elements common to many understandings of judicial activism).

¹⁷² See, e.g., Alexander Mooney, *Specter Issues Parting Blow to Roberts, Alito*, CNN, <http://politicalticker.blogs.cnn.com/2010/12/21/specter-issues-parting-blow-to-roberts-alito> (last visited Jan. 6, 2012).

¹⁷³ Dinh, *supra* note 171, at 940 ("An activist court 'legislates from the bench,' and thus, 'encroaches on the legislature's constitutional turf.'").

¹⁷⁴ ABRAHAM, *supra* note 50, at 83 ("[I]ndividualistic notions are made subservient to the needs of the system as a whole, in effect a situation where public interest overrides private interest." (internal quotation marks omitted)).

¹⁷⁵ Sarah Joseph, *Politics of Contemporary Indian Communitarianism*, ECON. & POL. WKLY., Oct. 4, 1997, at 2517.

¹⁷⁶ INDIA CONST. pmb.; Thomas T. Ankersen & Thomas K. Ruppert, *Defending the Polygon: The Emerging Human Right to Communal Property*, 59 OKLA. L. REV. 681, 694 (2006) (noting that the protection of civil and political rights, rights at the center of the U.S. Constitution's protections, came before socialism, which grew in response to the economic disparities present at the beginning of the twentieth century).

¹⁷⁷ Ashish S. Prasad & Violeta I. Balan, *Strategies for U.S. Companies to Mitigate Legal Risks from Doing Business in India*, in DOING BUSINESS IN INDIA: CRITICAL LEGAL ISSUES FOR U.S. COMPANIES 31 (PLI Corporate Law & Practice, Course Handbook Ser. No. 11926, 2007) (discussing the pervasiveness of bribery in both government and private sector engagements).

nobility pre-British rule, through 1948 when India regained its independence, to modern times with an elected executive, the persons and bodies in charge of the country have often exploited the commons to benefit a select few.¹⁷⁸ From maharaja, the Indian version of an English king, to the prime minister, executives in India are not known for judicious handling of the country's resources.

As a result of executive misfeasance and nonfeasance, the Indian Supreme Court began oversight of executives, both state and federal, in a multiplicity of circumstances, including over MOEF and environmental decisions (and non-decisions).¹⁷⁹ Given the historical exploitation of the commons and the propensity for executive inaction, the Court's oversight role appears more appropriate. Although Americans may blanch at the idea of the judiciary essentially legislating from its unelected perch, Indian forests likely benefits from this approach. The commons, including the forests, receive much greater protection and attention from the Court than they have under the oversight of any other body.¹⁸⁰

Because expanded standing has not resulted in a flood of frivolous lawsuits, and judicial oversight is likely an appropriate response to executive inability or unwillingness to protect the commons, judicial activism remains a viable component of protecting Indian forests.¹⁸¹ Though forest cover may be less than it was when the Court began its activist approach, there is no reason to suspect the Court's jurisprudence had no positive effect on the deforestation rate. To the contrary, it is far more likely that absent the Court's direction, forests in India would cover even less of the nation than they currently do. Therefore, absent clear negative impacts of its activist jurisprudence on governmental institutions or society, the Court should continue its activist approach as a court of good governance.

¹⁷⁸ See ANN GRODZINS GOLD & BHOJU RAM GUJAR, *IN THE TIME OF TREES AND SORROWS* 126 (2002) (describing how the commons once were the private lands of the maharaja); Prasad & Balan, *supra* note 177, at 31 (citing a 2000 survey by India's Central Vigilance Commission finding that "almost fifty percent of Indians [using] government services pay bribes"). Modern exploitation often is less a matter of agencies actively working against communitarian interests and more a matter of agencies and the executive not acting, that is, failing to enforce their legislative mandates.

¹⁷⁹ Rajamani, *supra* note 55, at 276.

¹⁸⁰ *Id.* at 278. Though beyond the scope of this Note, one might validly ask whether that protection comes at a cost in terms of economic development.

¹⁸¹ If the Supreme Court ever allows its personal predilections to trump the public interest when it is deciding cases, its activist tendencies could be used to make policy choices damaging rather than reparative to the public interest. As outlined above, however, this eventuality is unlikely to occur at an institutional level given Indian societal makeup.

V. MOVING FORWARD

This Part attempts to provide a blueprint for agency and Supreme Court action to ensure that the government protects India's forest-based resources. First, this Part will outline the steps the Court should take to prevent deforestation. Second, it will propose a plan of action for MOEF and other relevant agencies that will minimize agency inaction on forest matters and make better use of the limited resources agencies have at their disposal.

A. *The Indian Supreme Court in the Twenty-First Century*

As detailed in the previous Part, expansions in activist jurisprudence have for the most part been implemented. For example, it would be very hard for the Court to liberalize standing further.¹⁸² Furthermore, the Court does not view its activist approach as particularly controversial, as the justices almost universally accept the role the Court has today.¹⁸³ Thus, it is unlikely that any further acceptance of activism by the Court would increase the scope of its application.

Given that its activist approach to environmental issues has seen some success in protecting forests,¹⁸⁴ the Court should continue to invite PIL and maintain standing requirements as they currently exist. To hold accountable those responsible for deforestation, the Court should continue to recognize epistolary jurisdiction as a way to increase and equalize access to the judicial system. Moreover, the Court should continue to respond to such letters by initiating Court-monitored investigations and commissions. Though outside the traditional ambit of a constitutional court, the need for this oversight persists because many Indian political and industrial interests continue to subvert the public interest in a protected environment.¹⁸⁵

Moreover, should the Court retract its standing expansion and embrace of PIL, citizens seeking to enforce forest policy and their fundamental rights under the Constitution would have a meager basket of remedies. As shown above in the review of common law remedies, nuisance and its companions do not effectively address all the harms that occur to the environment and the public. The injury requirement inherent in those actions precludes the vast majority of the populace from participating in litigation and thus requires that

¹⁸² Rajamani, *supra* note 55, at 278. (noting the liberalization of standing in India and the fear of a flood of litigation if it is expanded further).

¹⁸³ ABRAHAM, *supra* note 50, at 35.

¹⁸⁴ See e.g., T.N. Godavarman Thirumulpad v. India, (1997) 2 S.C.C. 267 (India) (refusing to grant clearance to an aluminum mining project on forested land).

¹⁸⁵ Ajit Menon, *Situating Law: Adivasi Rights and the Political Economy of Environment and Development in India*, in LAW, LAND USE AND THE ENVIRONMENT, AFRO-INDIAN DIALOGUES 363 (2007).

actions be brought by a narrow subset of the population. Often those excluded because of the injury requirement are those in a position to bring suit, while those who sustain injury often are not.

In addition to maintaining its current standing requirements, the Court should also continue with its promotion and treatment of PIL. Through that vehicle, the Court manages to wield an immense amount of control over both executive and parliamentary action. Though potentially harmful to notions of separation of powers and rule by democratically elected branches of government, the Court's oversight is not currently tainted by judges' individual motivations. The Court's idealism regarding the proper role of government and the enforcement of law guides its oversight and leads to a pursuit of justice.

Moreover, the benefits of PIL, at least in the current state of governance in India, outweigh the detriments. PIL allows redress of grievances that would otherwise go without remedy. With agencies often unwilling or unable to enforce environmental law and policy, there must be some alternative that allows protection of public interests. PIL fulfills this role, coupled with citizen standing, by allowing anyone to bring actions for redress of public harms. Without PIL, deforestation in India would likely increase because there would be substantially less enforcement of the forest's legal protections.

The occasional nuisance claim by one injured party does not carry the severity or constancy required for nuisance to act as an adequate deterrent to deforestation. Businesses would have fewer incentives not to exploit the forests if PIL standing did not exist. The threat of judicial oversight and agency regulation of business projects provides greater incentive to abide by forest protection requirements than does a suit brought by one person with an individual injury.

B. Administrative Agencies Moving Forward

Indian agencies often have idealistic mission statements and glass-half-full views of their own accomplishments.¹⁸⁶ They have a history of inaction in the face of citizen concerns and even in the face of legislative and judicial mandates to act.¹⁸⁷ Agency inaction was compounded by the recent economic downturn, which impacted government revenues and caused

¹⁸⁶ See, e.g., *About the Ministry*, *supra* note 134.

¹⁸⁷ See generally JOINT COMM. OF MINISTRY OF ENV'T & FORESTS & MINISTRY OF TRIBAL AFFAIRS, GOV'T OF INDIA, REPORT NATIONAL COMMITTEE ON FOREST RIGHTS ACT (2010), available at http://moef.nic.in/downloads/public-information/FRA%20COMMITTEE%20REPORT_FINAL%20Dec%202010.pdf.

expenditures on deforestation programs to decline.¹⁸⁸ Any recommendations for future action must be made in light of agency inertia and inadequate enforcement resources.

One possible approach moving forward is to reorganize the Indian environmental bureaucracy by placing MOEF under the direct supervision of the Supreme Court. Arguably, placing the agency under closer supervision would incentivize it to act in the face of citizen petitions and blatant violations of law. However, the Court already exercises oversight over virtually all administrative tribunals either directly, by establishing criteria for selecting tribunal members,¹⁸⁹ or indirectly, by preventing tribunal-created legislation from exempting tribunals from the Court's jurisdiction.¹⁹⁰

A solution addressing fundamental questions about organization is necessary to change the deep-seated tendency not to act by MOEF and other agencies. First, parliament should pass regulatory legislation that creates a system-wide sense of accountability for agency inaction. Establishing an ombudsman to oversee administrative agencies would be a good first step. Considering the Court's successful (as compared with the executive branch) oversight of MOEF and other agencies, the Court should be the venue for any ombudsman's reports. The Court has the power to act on such reports and, through its activist approach, has demonstrated its ability to hold agencies accountable. As perhaps the only institution in India with a demonstrated history of prioritizing community values, the Court is uniquely positioned to resist the tug of corrupting influences.

Those tribunals or agencies that fail to act in the face of evidence that environmental laws are being violated should face repercussions. These repercussions, however, should not negatively impact efforts at afforestation and environmental protection. Budgets should not be cut in response to agency inaction. Rather, agencies should operate more like private enterprises, with pay and job security tied to performance. Agency jobs should not be viewed as assignments with guaranteed pay and little work, but they must pay enough to discourage wage-related turnover. These jobs should be structured to incentivize people to work hard. Benefits and pay should flow to those who are not corrupt and who enforce the Court's orders and statutory mandates. Those who do not perform or are involved in any corruption should be terminated.

The consequences of inaction should be certain, swift, and proportional for infractions by omission. No sanction is worth enacting if it is not applied in every instance possible and with haste. Deterrence will not flow if agency

¹⁸⁸ *National Afforestation Program: Year-wise Summary, 2000-2010*, *supra* note 151.

¹⁸⁹ *S.P. Sampath Kumar v. Union of India*, (1987) 1 S.C.R. 124 (India).

¹⁹⁰ 1 JAIN & JAIN, *supra* note 132, at 663.

employees do not view possible consequences as a probable reality for inaction. Moreover, consequences must be proportional to the offense. In other words, if a consequence is not strict enough, there will be no incentive to discontinue the inaction, but if a consequence is too strict, the job will hold very little appeal and drive valuable people away from protecting the forests.

There should also be accountability for those tasked with exercising agency authority. That is, the individuals within agencies should face some measure of punishment for inaction in their sphere of responsibility. One possible model of accountability for agency employees would be the command responsibility standard featured in the Statute of the International Criminal Court, Article 28.¹⁹¹ Under this model, those in positions of authority would be held accountable for the inaction of their inferiors if they knew or should have known that improper inaction took place.

This system of individual accountability at the agency level has the benefit of imposing sanctions on the parties most likely to benefit from inaction. Authority figures, not low-level employees, control the agenda in any hierarchical organization and targeting them is more cost-effective and efficient at reducing infractions than attempting to punish all employees who, through inaction, act inappropriately.

Second, environmental protection and MOEF must garner a larger portion of resources than they currently do. At some level, an agency's ability to take effective action is simply a matter of prioritizing national problems. As long as the national government decides that forest protection should take a backseat to other issues, there will always be a disconnect between what the agencies can do and what the law and Court require of them. That is not to say that more money is a panacea for deforestation. What more resources will bring, however, is greater incentive for agency employees to act on an individual level. If employees feel they have the resources to do their jobs effectively and if they receive competitive wages, they are that much more likely to act accordingly.

Moreover, greater resources enable agencies to engage in more enforcement and remediation actions. However, more ability does not necessarily translate into more action. Therefore, careful monitoring of agencies and their resource expenditures would be necessary to ensure that any additional resources were fruitfully employed.

¹⁹¹ Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 3.

VI. CONCLUSION

India's forests contain not only a vast array of species, but also a vast array of resources. The forests contain minerals, timber, and perhaps most importantly, land. As the population of India continues to grow, the pressures to extract those resources by removing the forests will increase correspondingly. Without protection and sustainable management, the forests will fall victim to the rising tide of human demands on its contents.

India possesses many legal mechanisms with which it can protect forests. Owing to its common law heritage, causes of action such as nuisance, trespass, and strict liability exist to protect primarily private interests in the environment. India also has several environmental statutes that protect broad swaths of the environment. The Indian Forest Act of 1927 and the Forest (Conservation) Act of 1980 work together to establish a framework for forest management.

India's most unique protection for the environment and forests is the Indian Constitution. It contains environmental policy guidance for parliament,¹⁹² as well as a guarantee of life that the Indian Supreme Court interprets as providing a right to a protected environment.¹⁹³ Unlike other common law jurisdictions, India's most basic legal instrument is used to directly address the question of forest protection.

The activist jurisprudence of the Indian Supreme Court overlays all three sources of forest protection. Over the last several decades, the Court eliminated the vast majority of standing requirements, most of which demanded personal injury and formal pleading requirements. Now people from any walk of life, with any amount of money, can petition the Court to remedy harm to the public interest, including the public's interest in forests. The rise of PIL involves the Court in a much broader spectrum of cases and broader oversight of the national and local governments.

Nevertheless, the positive effect judicial oversight has on the forests is insufficient in the face of the certainty of population growth. Some data even suggests that Indian forest cover actually shrank over the last twenty years as the Court adopted a more activist approach.¹⁹⁴ Since populations are guaranteed to rise and current protections may be inadequate at current population levels, a modified approach is necessary.

The Supreme Court's activism likely stemmed from a tide of deforestation caused by demands from the present population, but it has not achieved greater forest protection in the recent past. However, the Court is

¹⁹² INDIA CONST. art. 48A ("The State shall endeavour to protect . . . the forests . . . of the country.").

¹⁹³ *Id.* art. 21.

¹⁹⁴ Puyravaud et al., *supra* note 155.

not omnipotent and relies on the executive agencies, like MOEF, for enforcement. What India needs now is for the Court to maintain its activist approach to protection of the public interest. At the same time, it must also reform its administrative agencies by encouraging greater accountability for agency inaction at both the agency and individual levels. If the Court can continue its role as the good governance organ of the national government, and if administrative agency inaction decreases, the forests of India and those whose lives depend on them stand more than a fighting chance of seeing the end of this century in as good a shape as they saw the beginning.