Gender Justice through Public Interest Litigation: Case Studies from India*

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ABSTRACT

This Article examines the application of the Supreme Court of India's enterprising Public Interest Litigation (PIL) mechanism to a subject of compelling global concern: violations of women's rights. India is currently receiving much international attention for its dynamism and innovation on various fronts, yet the country also remains steeped in centuries-old norms and conventions. This tension is reflected in the decisions of the Supreme Court, which has assumed an active role in enforcing women's rights through PIL but is sometimes limited in this regard by the complex cultural context in which it operates. Based on an analysis of Indian constitutional law, case studies of landmark Supreme Court decisions, and extensive interviews with stakeholders in India, the Author argues that the PIL vehicle has great potential for advancing gender justice. However, the success of this endeavor in a society that is rapidly evolving—yet still deeply patriarchal—

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will depend upon strategic mobilization by women's rights advocates and committed efforts by the Court to enforce the rights of women, independent of mainstream opinion and within the boundaries of the separation-of-powers doctrine. If India can assume a leading role in advancing gender justice through its judiciary, its PIL mechanism could serve as an inspiring model for other constitutional courts and international human rights bodies.

TABLE OF CONTENTS

I. INTRODUCTION 835
II. PUBLIC INTEREST LITIGATION IN INDIA 837
A. *Expansion of* Locus Standi *to Address Rights Violations* 839
B. *Collaborative Nature of PIL Proceedings* 840
C. *Involvement of Third Parties* 842
D. *Expanded Role of the Court* 843
E. *Effects of the Court's PIL Activism* 845
1. Public Popularity and Support 845
2. Danger of Judicial Overreaching 847
3. Legislative and Executive Responses 848
III. LEGAL FRAMEWORK 850
A. *Key Constitutional Provisions* 850
1. Fundamental Rights 851
a. Rights to Equality and Non-Discrimination: Articles 14 and 15 852
i. Paternalism in the Court's Equality Jurisprudence 853
ii. Compromised Approach to Discriminatory Personal Laws 854
b. Right to Life: Article 21 856
i. Right to Health 858
ii. Right to Privacy 859
2. Directive Principles 860
B. *Applicability of International and Comparative Law* 861
1. Status of International Law in the Indian Legal System 862
2. Impact of Comparative Law 863
IV. CASE STUDIES 865
A. Vishaka v. State of Rajasthan 866
1. Background 866
2. Judgment 869
3. Response 871

4. Impact 873
5. Importance of Context 875
B. Javed v. State of Haryana 875
1. Background 876
2. Judgment 877
a. Equality and Nondiscrimination Claims 878
b. Religious Freedom Claim 879
3. Response and Context 880
4. Impact 883
V. CHALLENGES AND LIMITATIONS 885
A. *Contextual Challenges* 885
1. Challenges of Mobilizing and Collaborating 885
2. Shortcomings in Judicial Recognition of Women's Rights 887
3. Gender Composition of the Judiciary 889
B. *Limitations of the PIL Mechanism* 891
1. Implementation of the Court's Directives 892
2. Backlash against the PIL Vehicle 894
VI. STRATEGIC CONSIDERATIONS 896
A. *Building Public Awareness and Support* 896
B. *Involvement of the Media* 897
C. *Role of National Statutory Bodies* 898
1. National Commission for Women 899
2. National Human Rights Commission 900
3. Involving the Statutory Bodies 902
D. *Alternative Forums* 903
VII. CONCLUSION 904

I. INTRODUCTION

India's emergence as a leading player in international business and politics is increasingly drawing global attention to the nation's approach toward redressing and preventing violations of fundamental human rights, including the rights of Indian women. This Article examines the potential for promoting gender justice through the Supreme Court of India's pioneering Public Interest Litigation (PIL) mechanism.[1] Using this judicially created procedural vehicle, any

1. The Supreme Court of India will hereafter be referred to as "the Court." Public interest litigation is also known as "social action litigation"; however, the more common term "PIL" will be used in this Article.

individual or organization concerned with ongoing human rights violations can bring an action directly in the country's highest court against the national and state governments of India.[2] Through PIL, the Court has actively addressed issues of public concern and prodded the other branches of government into fulfilling their legal obligations.[3]

This Article aims to make a unique contribution to the understanding of the PIL mechanism and its capacity for securing gender justice by drawing not only upon analyses of Indian constitutional law and case studies of landmark Supreme Court decisions, but also upon a range of perspectives gathered through in-depth interviews with approximately sixty-five stakeholders in the PIL process in India, including: leading public interest lawyers; human rights activists; former and current Supreme Court Justices and high court judges; as well as social scientists, journalists, underprivileged women, and senior officials at the National Human Rights Commission, the National Commission for Women, and the Law Commission of India.[4] Based upon this extensive primary research, the Author argues that the PIL mechanism has great potential for advancing women's rights in India and therefore provides a compelling prototype for achieving this goal in other constitutional courts and international human rights bodies. Indeed, the growth of PIL in the Indian legal system illustrates that this innovative method of advocacy can thrive even in an adversarial and precedent-bound common law jurisdiction. However, the analysis also confronts some of the significant limitations of the PIL mechanism and the broader challenges of enforcing gender equality in a patriarchal society in which women are not sufficiently politically mobilized. These conditions create a complex cultural context for gender rights litigation, one found in many regions of the world.[5]

Part II of this Article introduces the key features of PIL and considers the responses to the Indian judiciary's activism through this powerful mechanism. Part III analyzes the Indian constitutional and international legal framework for promoting the rights of women through PIL. Part IV presents case studies of two critical Supreme Court decisions: *Vishaka v. State of Rajasthan*, a 1997 PIL action in which the Court used international law to enact guidelines for

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2. *See infra* Part II.A.

3. CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 86 (1998).

4. The Author conducted the interviews for this research between December 2005 and August 2006 in New Delhi and Mumbai, and at the National Judicial Academy in Bhopal. The interviewees were primarily individuals connected to the upper judiciary, because the scope of this Article is limited to PIL at the Supreme Court level.

5. *See* EPP, *supra* note 3, at 73 (discussing "sharp tensions along gender lines").

combating sexual harassment in the workplace; and *Javed v. State of Haryana*, a 2003 case in which the Court succumbed to public fears about population explosion by upholding a coercive state policy with adverse consequences for human rights, particularly for women.[6] The case studies illustrate variations in the Court's approach toward gender justice as well as the crucial importance of popular opinion and mobilization in PIL actions. Part V confronts some of the contextual challenges of enforcing women's rights through the judicial system in India and some limitations specific to the PIL mechanism itself. Finally, Part VI suggests counteracting these obstacles by strategically engaging the public, the media, national statutory bodies, and lower courts in PIL cases. Although the scope of this Article is confined to litigation at the Supreme Court level, PIL suits can also be initiated in the high courts of each Indian state—the advantages of which are reviewed briefly in Part VI.

The procedurally flexible PIL vehicle can be used very effectively for the advancement of gender justice. However, the success of this endeavor in a society that is rapidly evolving—yet still largely governed by traditional gender norms—will depend upon effective mobilization by women's rights advocates and committed efforts by the Court to enforce the constitutional and international rights of women, independent of mainstream opinion and within the boundaries of the separation-of-powers doctrine. If India can assume a leading role in advancing gender justice through its judiciary, its PIL mechanism could serve as an inspiring model for other legal systems around the world.

II. PUBLIC INTEREST LITIGATION IN INDIA

The development of PIL was spearheaded in the late 1970s and 1980s through a series of decisions issued by Indian Supreme Court Justices, whose goal was to "promote and vindicate public interest[,] which demands that violations of constitutional or legal rights of large numbers of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed."[7] Noting that a "right without a remedy is a legal

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6. Javed v. State of Haryana, A.I.R. 2003 S.C. 3057 (India); Vishaka v. State of Rajasthan, Supp. (1997) 3 S.C.R. 404 (India).

7. People's Union for Democratic Rights (PUDR) v. Union of India, (1983) 1 S.C.R. 456, ¶ 2 (India); *see* S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. & POL'Y 29 (2001) (discussing judicial activism in India and public interest litigation); Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT'L L. J. 57, 67–76 (1994) (same). For more on the historical context of PIL and the Court's activism, see M. J. ANTHONY, SOCIAL ACTION THROUGH COURTS: LANDMARK JUDGMENTS IN PUBLIC INTEREST LITIGATION 1-7 (2005); EPP, *supra* note 3, at 83–86; Jayanth Krishnan,

conundrum of a most grotesque kind," the Court regarded itself as constitutionally obligated to develop a mechanism to broaden access to justice.[8] "We have therefore to abandon the laissez faire approach in the judicial process . . . and forge new tools, devise new methods and adopt new strategies for the purpose of making fundamental rights meaningful for the large masses of people," the Court stated in a seminal 1984 PIL decision on the rights of bonded laborers.[9]

The Court derives its jurisdiction over PIL actions from Article 32 of the Constitution of India, which guarantees "the right to move the Supreme Court by appropriate proceedings" for the enforcement of fundamental constitutional rights.[10] The language of Article 32 is very broad; it does not specify how or by whom the judiciary can be moved to take action.[11] Consequently, the Court has observed: "The Constitution makers deliberately did not lay down any particular form of proceeding for enforcement of a fundamental right[,] nor did they stipulate that such proceeding should conform to any rigid pattern or straight-jacket formulas."[12] Furthermore, unlike in the United States, where the doctrine of judicial review was developed through case law, the Indian Constitution explicitly grants the Court this power.[13] The Constitution also provides the Court with extremely broad jurisdiction, enabling it to "decide nearly any issue that arises in Indian politics."[14] The Court relied on these potent provisions and its other "incidental and ancillary" constitutional powers to introduce the procedurally flexible and substantively powerful PIL mechanism.[15]

Scholarly Discourse, Public Perceptions, and the Cementing of Norms: The Case of the Indian Supreme Court and a Plea for Research, J. OF APPELLATE PROCESS & PRACTICE (forthcoming 2008).

8. Fertilizer Corp. Kamgar Union v. Union of India, (1981) 2 S.C.R. 52, ¶ 11 (India).

9. Bandhua Mukti Morcha v. Union of India, (1984) 2 S.C.R. 67, ¶ 13 (India); *accord* M. C. Mehta v. Union of India, (1987) 1 S.C.R. 819, ¶ 3 (India); S. P. Gupta v. Union of India, (1982) 2 S.C.R. 365, ¶ 17 (India).

10. INDIA CONST. art. 32, § 1; *see* EPP, *supra* note 3, at 81 (quoting the chair of the Constitution drafting committee describing Article 32 as "the very soul of the Constitution," without which it "would be a nullity").

11. INDIA CONST. art. 32.

12. *Bandhua Mukti Morcha*, 2 S.C.R. 67 at ¶ 12.

13. INDIA CONST. arts. 13, 32, 142; EPP, *supra* note 3, at 81; B. N. Srikrishna, *Skinning a Cat*, 8 SUPREME CT. CASES 3, n. 9 (2005).

14. EPP, *supra* note 3, at 82; *see* INDIA CONST. arts. 131, 133, 136 (establishing Court's original, appellate, advisory, and special leave jurisdiction).

15. *See, e.g.*, INDIA CONST. art. 142, § 2 (empowering Court to subpoena any necessary persons or documents and requiring all civil and judicial authorities to assist in the process as needed); *id.* art. 142, § 1 (authorizing Court to pass any decree or order "as is necessary for doing complete justice in any cause or matter"); *id.* arts. 141, 142, § 1, 144 (providing that Court's directives are enforceable throughout the country and its holdings are binding upon all other Indian courts). M.C. Mehta v. Union of India, (1987) 1 S.C.R. 819, ¶ 3 (India).

Through PIL, the Court has addressed a very wide range of human rights issues, including rights abuses suffered by women.[16] "PIL is really a response to the needs of society, particularly the society of women who . . . have been badly treated for centuries," observed Senior Supreme Court Advocate and former Additional Solicitor General of India, Fali Nariman.[17] Unlike some of the other groups that have historically been targets of discrimination, such as religious minorities and lower castes, women in India have not been politically mobilized enough to bargain in an electoral setting or to raise the resources necessary to support struggles through the adversarial judicial process.[18] The development of PIL is therefore of critical importance to the advancement of gender justice in India.

A. *Expansion of* Locus Standi *to Address Rights Violations*

The key feature of PIL is its liberalization of the traditional rule of *locus standi*, or standing, which requires litigants to have suffered a legal injury in order to maintain an action for judicial redress in Indian and U.S. courts alike. In a 1980 decision that has been hailed as "a charter of PIL" and "a golden master key which has provided access to the Courts for the poor and down-trodden,"[19] the Supreme Court of India articulated a new rule for cases involving violations of constitutional rights:

> [If] such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ . . . seeking judicial redressal for the legal wrong or injury. . . .[20]

The Court further expanded access to justice by establishing "epistolary jurisdiction," stating that judges would "readily respond" to letters or postcards alerting them to constitutional rights violations and treat such submissions as formal writ petitions for PIL

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16. *See, e.g.*, ANTHONY, *supra* note 3 (summarizing landmark PIL judgments); P. D. MATHEW, PUBLIC INTEREST LITIGATION 17-34 (2005) (describing PIL cases that have been initiated to protect the rights of female prisoners and various other groups, including bonded laborers, farmers, juveniles, villagers, pavement vegetable sellers, adopted children, and child workers).

17. Interview with Fali Nariman, Senior Supreme Court Advocate and Former Additional Solicitor General of India, in New Delhi, India (Mar. 10, 2006) [hereinafter Interview with F. Nariman].

18. *See* Interview with Dr. Sarojni Vasaria, in New Delhi, India (Apr. 12, 2006) [hereinafter Interview with S. Vasaria]; E-mail from Pavan Ahluwalia to author (Aug. 29, 2007) (on file with author).

19. Janata Dal v. H. S. Chowdhary, (1992) Supp. 1 S.C.R. 226, ¶¶ 95-96 (India) (referring to S. P. Gupta v. Union of India, (1982) 2 S.C.R. 365, ¶ 17 (India)).

20. *S. P. Gupta*, 2 S.C.R. 365, at ¶ 17.

purposes.[21] Exhibiting the surprising extent of its willingness to set aside traditional procedural principles in PIL cases, the Court said, "[I]t must not be forgotten that procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities."[22]

The Court has made it clear, however, that "[t]he lowering of the *locus standi* threshold does not involve the recognition or creation of any vested rights on the part of those who initiate the proceedings."[23] Accordingly, a petitioner cannot withdraw a PIL action once it has been filed and other stakeholders have become involved.[24] In 1988, the Court denied the attempt of a petitioner to withdraw her PIL action (which challenged the condition of children in Indian jails) when she became frustrated with the slow progress of the case. In its order, the Court stated that "[t]he 'rights' of those who bring the action on behalf of others must necessarily be subordinate to the 'interest' of those for whose benefit the action is brought."[25]

B. *Collaborative Nature of PIL Proceedings*

The loosening of traditional standing requirements is not the only feature that makes PIL a unique form of litigation. Unlike class action cases in India and the United States, PIL petitions must be based on constitutional claims and can be brought only against the state, not private parties.[26] Furthermore, the PIL process is technically non-adversarial: there is no trial, witnesses are not examined or cross-examined, and the governmental respondents are expected to work together with the petitioners to address the issue at hand.[27] The evidentiary record can be built through a variety of submissions, including affidavits, newspaper clippings, investigative reports by governmental agencies or non-governmental organizations (NGOs), data from surveys and other empirical studies, and government documents.[28]

Justifying its departure in PIL from the dynamics of conventional common law litigation, the Court has said:

> Strict adherence to the adversarial procedure can sometimes lead to injustice, particularly where the parties are not evenly balanced in

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21. *Id.*; M.C. Mehta v. Union of India, (1987) 1 S.C.R. 819, ¶ 5 (India). *But see* Bandhua Mukti Morcha v. Union of India, (1984) 2 S.C.R. 67, ¶¶ 53–54 (India) (warning against dangers of epistolary jurisdiction); Sathe, *supra* note 7, at 76–79 (discussing epistolary jurisdiction).

22 *S. P. Gupta*, 2 S.C.R. 365, at ¶ 17.

23. Sheela Barse v. Union of India, (1988) Supp. 2 S.C.R. 643, ¶ 11 (India).

24. *Sheela Barse*, 2 S.C.R. 643, at ¶ 11

25. *Id.* ¶ 13.

26. MATHEW, *supra* note 16.

27. *Id.*

28. *Id.* at 16–17.

> social or economic strength. . . . If we blindly follow the adversarial procedure in their case, they would never be able to enforce their fundamental rights and the result would be nothing but a mockery of the Constitution.[29]

Emphasizing that the government should not look upon PIL petitioners as opponents, the Court has explained, "Public interest litigation, as we conceive it, is essentially a *cooperative or collaborative effort* on the part of the petitioner, the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges."[30] In fact, the judiciary has urged governmental respondents to "welcome" PIL cases, because they provide "an opportunity to right a wrong or redress an injustice done to the poor and weaker sections of the community whose welfare is and must be the prime concern of the State or public authority."[31] In reality, however, governmental respondents, especially at the state level, have been resisting PIL petitions with increasing "vigor and legal maneuvering" due to "experience and concern about the expense of complying with the Court's anticipated remedial orders."[32]

The expansive reach of the PIL mechanism has been reinforced by the judiciary's flexible conception of governmental respondents. The duty to uphold constitutional rights lies with the state, which the Indian Constitution defines as including "all local or other authorities . . . under the control of the Government of India"[33]—and the Court has broadly interpreted the term "other authorities" to include actors that carry out "public functions closely related to government functions."[34] For example, in PIL cases addressing violations of the right to healthcare, the Court has applied its directives not only to public hospitals but also to private medical service providers.[35] Conversely, the Court has held governmental authorities responsible for abuses of workers' rights committed by

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29. Bandhua Mukti Morcha v. Union of India, (1984) 2 S.C.R. 67, ¶ 13 (India) ("[T]here is nothing sacrosanct about the adversarial procedure.").

30. *Sheela Barse*, 3 S.C.R. 443, at ¶ 8; People's Union for Democratic Rights (PUDR) v. Union of India, (1983) 1 S.C.R. 456, ¶ 2 (India) (emphasis added); *see* Sathe, *supra* note 7, at 63–65 (discussing how PIL differs from the adversarial process).

31. *PUDR*, 1 S.C.R. 456, at ¶ 2; *see Bandhua Mukti Morcha,* 2 S.C.R. 67, at ¶ 9.

32. Susman, *supra* note 7, at 77–78; *see also* Interview with F. Nariman, *supra* note 17 (noting that the central government has generally cooperated in PIL cases, but responses from state governments have varied). Governmental respondents' resistance to PIL is further discussed in Part V.

33. INDIA CONST. art. 12.

34. M.C. Mehta v. Union of India, (1987) 1 S.C.R. 819, ¶¶ 10, 12, 13, 16–17 (India) (listing non-exhaustive criteria for determining whether an entity is an agency of the state).

35. *See, e.g.*, Consumer Educ. and Research Ctr. v. Union of India, (1995) 1 S.C.R. 626, ¶ 163 (India); Parmanand Katara v. Union of India, (1989) 3 S.C.R. 997, ¶ 8 (India).

private contractors, emphasizing that the state "cannot ignore such violation and sit quiet by adopting a non-interfering attitude."[36]

C. *Involvement of Third Parties*

To compensate for the absence of the usual fact-finding of adversarial proceedings, court-appointed third parties often play an important role in PIL cases. The Court may convene a committee of experts to contribute specialized knowledge on the subject matter of the litigation, especially in PIL actions involving complex socioeconomic or scientific issues.[37] Judges may also supplement the factual record by appointing investigative commissions to conduct inquiries and issue reports.[38] Furthermore, after the Court issues PIL directives, it may appoint a commission to monitor compliance at the ground level.[39] The state is generally asked to bear expenses incurred by such bodies.[40]

Amici curiae can also have a significant impact on PIL proceedings. Unlike amici in U.S. litigation, who generally make sua sponte submissions supporting one side in the adversarial process, an amicus in an Indian PIL case is generally an individual appointed by the Court to "dig up" relevant factual data, provide comparative examples from other courts, suggest innovative remedies, ensure that the Court does not overlook important considerations, and keep PIL actions on track even if the original petitioners lose interest.[41] Critics contend, however, that the Court's choice of amici "tends to be

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36. *PUDR*, 1 S.C.R. 456, at ¶¶ 4, 10; *see also* Bandhua Mukti Morcha v. Union of India, (1984) 2 S.C.R. 67, ¶ 10 (India); Vijayashri Sripati, *Human Rights in India – Fifty Years After Independence*, 26 DENV. J. INT'L L. & POL'Y 93, 115–16 (1997) (discussing human rights in India).

37. *Bandhua Mukti Morcha*, 2 S.C.R. 67, at ¶ 91 (stating that "the power to appoint a commission or an investigating body" in PIL cases is "implied and inherent" under Article 32); *see, e.g.*, Interview with Justice B. N. Srikrishna, retired Justice, Supreme Court of India, in New Delhi, India (Mar. 8, 2006) [hereinafter Interview with Justice Srikrishna] (recalling reliance upon commission of computer and children's rights experts in PIL case pertaining to Internet child pornography); Interview with Justice J. S. Verma, retired Chief Justice, Supreme Court of India, in Noida, India (Mar. 29, 2006) [hereinafter Interview with Justice Verma] (explaining a committee of twelve medical experts assembled to assist in PIL case challenging allegedly harmful drugs, "because I am not an expert in pharmacopeias").

38. *See* Susman, *supra* note 7, at 88 (discussing PIL commissions sent to talk to slum residents and prisoners).

39. EPP, *supra* note 3, at 86.

40. MATHEW, *supra* note 16, at 17.

41. Interview with Justice D. Y. Chandrachud, sitting Judge, High Court of Bombay, in Mumbai, India (Mar. 16, 2006) [hereinafter Interview with Justice Chandrachud]; Interview with Justice Srikrishna, *supra* note 37; Interview with Justice Verma, *supra* note 37.

extremely ad hoc,"[42] that the quality of amici interventions is "inevitably patchy,"[43] and that the judiciary's dependency on amici in PIL cases has "shrunk the democratic space in court" by granting too much power and responsibility to one individual, thereby undermining the concept of PIL as a vehicle through which all voices can be heard.[44]

D. *Expanded Role of the Court*

The PIL process differs from traditional litigation not only in the reconfigured expectations of petitioners, respondents, and third parties, but also in the expanded role of the Court, which has described its own position in such cases as follows:

> [T]he court is not merely a passive, disinterested umpire or onlooker, but has a more dynamic and positive role with the responsibility for the organisation of the proceedings, moulding of the relief and . . . supervising the implementation. . . . This wide range of responsibilities necessarily implies correspondingly higher measures of control over the parties, the subject matter and the procedure.[45]

Thus a PIL bench plays a more active role than judges in a traditional common law system. The Court even has the power to broaden the scope of a case or make all state governments party to an action that was filed against only a few states.[46]

Judges have particularly wide leeway in fashioning remedies in PIL cases: "The power . . . is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental right already committed."[47] The Constitution suggests some types of writs that the Court can issue to enforce constitutional

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42. E-mail from Vishnu Vardhan Shankar, Former Judicial Law Clerk, Supreme Court of India, to author (Aug. 18, 2007) (on file with author) [hereinafter E-mail from V. Shankar];

43. *Id.*

44. Telephone Interview with Dr. Usha Ramanathan, Independent Researcher on Jurisprudence of Law, Poverty, and Rights, in New Delhi, India (Aug. 29, 2006) [hereinafter Interview with U. Ramanathan]; *see also* Sripati, *supra* note 36, at 123 (noting possible biases of Court-appointed commissioners).

45. Sheela Barse v. Union of India, (1988) Supp. 2 S.C.R. 643, ¶ 12 (India); *see* Sathe, *supra* note 7, at 78 (describing Court's PIL role).

46. *See, e.g.*, Paschim Banga Khet Mazdoor Samity v. State of West Bengal, A.I.R. 1996 S.C. 2426, ¶ 16 (India) (directing all Indian states to "also take necessary steps in the light of the recommendations made," even though West Bengal was the only named respondent); Interim Order, Ramakant Rai v. Union of India, W.P. (Civ.) No. 209 of 2003 (India, Mar. 1, 2005) (issuing directives against every state to better enforce national sterilization guidelines, even though PIL petition provided data on violations in just a few states).

47. M.C. Mehta v. Union of India, (1987) 1 S.C.R. 819, ¶ 7 (India).

rights but leaves the list open-ended.[48] Regarding this as evidence of "the anxiety of the Constitution makers not to allow any procedural technicalities to stand in the way of enforcement of fundamental rights," the judiciary has interpreted this provision as "conferring on the Supreme Court power to enforce the fundamental rights in the widest possible terms."[49] Accordingly, judges presiding over PIL cases have not limited themselves to petitioners' submitted requests for relief, instead issuing a broad range of creative remedies as they see fit.[50]

Through PIL orders, the Court has asked the legislature to enact or reform laws and has directed the executive to introduce new measures or more strictly enforce existing policies.[51] Justices themselves have even enacted guidelines "to fill the vacuum in existing legislation," as seen in the *Vishaka* case study (examined in Part IV of this Article) and in PIL actions challenging adoption and child labor practices in India.[52] In fact, the judiciary has explicitly stated that "an exercise of this kind by the court is now a well settled practice which has taken firm roots in our constitutional jurisprudence [and] is essential to fill the void in the absence of suitable legislation to cover the field."[53] Furthermore, the Court has actively involved itself in administrative and regulatory matters by issuing detailed directives in PIL actions, as seen in recent cases on environmental protection and distribution of food to the needy.[54]

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48. INDIA CONST. art. 32, § 2 ("The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."); *see* Sathe, *supra* note 7, at 67–68 (observing that the Constitution's "farsighted" use of the phrase "in the nature of" when suggesting types of writs liberates the Court from "technical constraints").

49. Bandhua Mukti Morcha v. Union of India, (1984) 2 S.C.R. 67, ¶ 13 (India).

50. *See, e.g.*, Sathe, *supra* note 7, at 67, 80–82; Susman, *supra* note 7, at 90.

51. EPP, *supra* note 3, at 86 (providing examples of the Court's "extended and detailed policy prescriptions for government officials to fulfill").

52. Vishaka v. State of Rajasthan, (1997) Supp. 3 S.C.R. 404, ¶ 2 (India); Lakshmi Kant Pandey v. Union of India, (1984) 2 S.C.C. 244 (India); *see also* Shubhankar Dam, *Lawmaking Beyond Lawmakers: Understanding the Little Right and the Great Wrong*, 13 TUL. J. INT'L & COMP. L. 109, 117 (2005) (citing guidelines issued in adoption, child labor, and environmental law cases); Sathe, *supra* note 7, at 85 (discussing PIL directions with legislative effect).

53. Vineet Narain v. Union of India, A.I.R. 1996 S.C. 3386, ¶ 57 (India) ("In exercise of the powers of this Court under Article 32 read with Article 142, guidelines and directions have been issued in a large number of cases."). *But see* Dam, *supra* note 52, at 127 (questioning constitutional grounds for judicial lawmaking).

54. *See, e.g.*, Right to Food Campaign, Legal Action for the Right to Food: Supreme Court Orders and Related Documents, http://www.righttofoodindia.org/orders/interimorders.html (last visited Mar. 18, 2008 [hereinafter Right to Food Documents]; Dam, *supra* note 52, at 118 (discussing Court's "super-executive" role); EPP, *supra* note 3, at 86 (providing examples of the Court's "extended and detailed policy prescriptions for government officials to fulfill"); Armin Rozencranz & Michael

The judiciary also plays an active role in monitoring the implementation of its PIL directives through the doctrine of continuing mandamus, which one retired Supreme Court Chief Justice described as enabling the Court to "keep a case open and direct the authority to perform and report, so you are constantly breathing down the neck of that authority."[55] Judges presiding over PIL cases often hold numerous hearings, issue series of interim orders with elaborate directions, collect regular affidavits from respondents to gauge compliance, and then issue new directives as needed.[56]

E. *Effects of the Court's PIL Activism*

1. Public Popularity and Support

The judiciary's activism through PIL has been regarded largely as an effort to compensate for the inaction of the legislative and executive branches of government.[57] This inaction has been attributed, *inter alia*, to "coalition governments where different parties are not able to pull together [for] effective legislation or

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Jackson, *The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power*, 28 COLUM. J. ENVTL. L. 223, 225 (2003) (discussing Court's "usurping" of "the authority of enforcement agencies designed to handle to air pollution problem"); Susman, *supra* note 7, at 79–80 (providing examples of Court's "detailed prescriptive remedies" in PIL cases).

55. Interview with Justice Verma, *supra* note 37; *see Vineet Narain*, A.I.R. 1996 S.C. 3386 (relying on the doctrine of continuing mandamus).

56. For example, in *People's Union for Civil Liberties v. India*, an ongoing PIL case on the right to food, the Court took on an elaborate role by issuing and monitoring specific directives about the type of food that should be collected, and how and where it should be distributed. Interview with Shruti Pandey, Director, Women's Justice Initiative, Human Rights Law Network, in N.Y., N.Y. (June 8, 2006) [hereinafter June 8 Interview with S. Pandey]; Interview with Vishnu Vardhan Shankar, Judicial Law Clerk, Supreme Court of India, in New Delhi, India (Mar. 8, 2006) [hereinafter Interview with V. Shankar]; Telephone Interview with Rohan Thawani, Supreme Court Advocate, in New Delhi, India (Mar. 24, 2006) [hereinafter Interview with R. Thawani]; *see* People's Union for Civil Liberties (PUCL) v. Union of India, W.P. (Civ.) No. 196/2001 (India, 2001); RIGHT TO FOOD DOCUMENTS, *supra* note 54; Y. P. Chhibbar, *PUCL Petitions Supreme Court on Starvation Deaths*, PUCL Bulletin (July 2001), http://www.pucl.org/reports/Rajasthan/2001/starvation_death.htm.

57. *See* Bandhua Mukti Morcha v. Union of India, (1984) 2 S.C.R. 67, ¶ 72 (India); Dam, *supra* note 52, at 124; Parvez Hassan & Azim Azfar, *Securing Environmental Rights Through Public Interest Litigation in South Asia*, 22 VA. ENVTL. L. J. 215, 223; Confidential Interviews with multiple High Court Judges at National Judicial Academy Symposium, in Bhopal, India (Apr. 15, 2006) [hereinafter NJA Interviews]; Interview with Justice Chandrachud, *supra* note 41; Interview with F. Nariman, *supra* note 17; Interview with Justice Leila Seth, retired Chief Justice, High Court of Himachal Pradesh, in Noida, India (Apr. 10, 2006) [hereinafter Interview with Justice L. Seth]; Interview with R. Thawani, *supra* note 56; Telephone Interview with Legal Editor of Major National Newspaper, in New Delhi, India (Apr. 9, 2006) [hereinafter Interview with Legal Editor]..

implementation,"[58] bureaucratic hurdles, political pressures,[59] "a lackadaisical attitude in fulfilling the constitutional vision,"[60] and corruption "of a tremendous order"[61] due to "criminal politicians who are not as concerned about development as filling their own pockets."[62] During recent parliamentarian debates, legislators acknowledged that "politicians and the bureaucrats are losing ground among the public . . . . The judiciary is perceived to be doing better even though there is a huge backlog [of cases],"[63] and "the common man on the street . . . feels very much let down by the Executive and the Legislature and he thinks that it is the Judiciary which is actually dispensing him justice."[64]

Elaborating on the need for judicial intervention in this context, a Supreme Court advocate observed, "It is not possible to ignore the fact that someone needs to do something about a lot of problems being faced by citizens of India in their everyday lives, and it is the Court which has taken the lead when approached by the citizens."[65] Considering the alternative, a retired Supreme Court Chief Justice remarked, "So if judicial intervention activates the inert institutions and covers up for the institutional failures by compelling performance of their duty . . . then that saves the rule of law and prevents people from resorting to extra-legal remedies."[66] The PIL mechanism has thus been described as "an alarm clock" that prods the other branches of government into "waking up" and fulfilling their obligations.[67]

The judiciary's attempts to broaden access to justice and enforce constitutional commitments through the PIL vehicle seem to have helped the Supreme Court build a strong base of public support.[68]

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58. Interview with Justice M. J. Rao, retired Justice, Supreme Court of India & retired Chairperson, Law Commission of India, in New Delhi, India (Apr. 11, 2006) [hereinafter Interview with Justice Rao].

59. Interview with Judicial Law Clerk, Supreme Court of India, in New Delhi, India (Mar. 26, 2006) [hereinafter Mar. 26 Interview with Law Clerk].

60. Dam, *supra* note 52, at 130.

61. Interview with F. Nariman, *supra* note 17.

62. Interview with R. Thawani, *supra* note 56.

63. Lok Sabha Debates, Fourteenth Series, Vol. XXXI, Twelfth Session, 2007/1929 (Saka), No. 13, Dec. 3, 2007/Agrahayana 12, 1929 (Saka) (statement of Shri Prasanna Acharya) [hereinafter Lok Sabha Debates of Dec. 3].

64. Lok Sabha Debates, Fourteenth Series, Vol. XXXI, Twelfth Session, 2007/1929 (Saka), No. 14, Dec. 4, 2007/Agrahayana 13, 1929 (Saka) (statement of Shri Kharabela Swain (Balasore)) [hereinafter Lok Sabha Debates of Dec. 4].

65. E-mail from Rohan Thawani, Supreme Court Advocate, to author (Aug. 22, 2006) (on file with author) [hereinafter E-mail from R. Thawani].

66. Interview with Justice Verma, *supra* note 37.

67. Interview with Justice Y. Singh, Judge, High Court of Allahabad, in Bhopal, India (Apr. 15, 2006); *see also* Interview with Legal Editor, *supra* note 57 ("The government would not wake up without the Court's intervention.").

68. *See* EPP, *supra* note 3, at 80–81 ("The Court, without any doubt, is a major political institution with broad powers and great popular support."); Sathe, *supra* note 7, at 89; Sandeep Phukan, *PM Sends Out Strong Message toJudiciary*, NDTV.com, Apr. 8, 2007, http://www.ndtv.com/convergence/ndtv/story.aspx?id=NEWEN20070008083

Although there is a lack of empirical data on whether the public actually holds the Court in "exceedingly high regard,"[69] this popular reputation was confirmed by a wide range of individuals interviewed for this study, from lawyers and high court judges to rights activists and journalists.[70] Even underprivileged women living in urban slums professed a surprising degree of confidence that the Court would "surely do something" about their problems if approached.[71] At the other end of the power spectrum, Prime Minister Manmohan Singh, head of the executive branch, has recognized the "impressive and enviable reputation" of the Court, describing it as "a shining symbol of the great faith our people have in our judiciary."[72]

2. Danger of Judicial Overreaching

A critical danger inherent in the broad power and popularity of PIL is the resulting tendency toward judicial overreaching. Despite the Court's strong reputation, the legislative or executive nature of some judicial orders has sparked objections that the Court has violated the separation-of-powers doctrine by "trespassing" into the territory of other branches "under the guise of PIL."[73] Critics—including some Supreme Court Justices themselves—point out that unlike legislators, judges are not elected officials, are not directly accountable representatives of the people, and cannot hold wide consultations with various stakeholders before enacting a law.[74]

(quoting Prime Minister Singh: "Courts have played a salutary and corrective role in innumerable instances. They are highly respected by our people for that.").

69. Krishnan, *supra* note 7, at 5–15.

70. *See, e.g.*, Confidential Interview with Justice, Supreme Court of India, in New Delhi, India (Apr. 13, 2006) [hereinafter Apr. 13 Interview with Supreme Court Justice]; Interview with Justice L. Seth, *supra* note 57; Interview with Legal Editor, *supra* note 57; Interview with Local Development Expert, Population Foundation of India, in New Delhi, India (Mar. 7, 2006) [hereinafter Interview with Development Expert]; NJA Interviews, *supra* note 57.

71. Confidential Interviews with Low-Income Women Residing in Urban Slums, in New Delhi, India (Mar. 23, 2006 & Apr. 10, 2006).

72. Manmohan Singh, Prime Minister of India, Address at the Conference of Chief Ministers & Chief Justices of High Courts (Mar. 11, 2006), *available at* http://www.outlookindia.com/full.asp?fodname=20060311&fname=manmohan&sid.= [hereinafter Singh 2006 speech]; *see also* Phukan, *supra* note 68 (discussing the Prime Minister's statements).

73. Interview with Justice Rao, *supra* note 58.; *see* Dam, *supra* note 52, at 127 (critiquing the Supreme Court's argument that the constitution permits it to legislate); Sathe, *supra* note 5, at 88–89 (discussing possible violations by the Supreme Court of the separation of powers doctrine).

74. *See* Srikrishna, *supra* note 13; Interview with Justice Rao, *supra* note 58; Interview with Rohit De, Indian Law and History Researcher, in New Haven, Conn. (May 12, 2006) [hereinafter Interview with R. De]; Bandhua Mukti Morcha v. Union of India, (1984) 2 S.C.R. 67, ¶ 74 (India); Dam, *supra* note 52, at 119–22 (discussing resistance to judicial law making). Supreme Court Justices are selected from a pool of senior high court judges and appointed with the approval of the President of India.

Similarly, the judiciary often lacks the comprehensive understanding of governmental resources necessary for making administrative decisions. "Reliance on affidavits tendered or even placing reliance on a report of a court-appointed Commissioner can hardly supplant a judgment made by a competent executive officer with regard to the actual ground realities," one Supreme Court Justice noted.[75]

Unrestrained judicial encroachment upon the legislative and executive realms could "boomerang" and ultimately make the Court a less powerful institution by causing a loss of credibility,[76] particularly when "[j]udicial forays into policy issues through trial and error, without necessary technical inputs or competence, [result] in unsatisfactory orders that have . . . passed beyond 'judicially manageable standards.'"[77] One retired Supreme Court Chief Justice commented in an interview: "You cannot use the Court for every purpose. The Court can compel performance and monitor it, but the Court cannot perform [the function itself], and it should not."[78] Foreshadowing this danger, a concurring opinion in a foundational PIL decision issued over two decades ago warned that the Court should be vigilant about determining and remaining within "the true limits of its jurisdiction" in PIL actions.[79]

3. Legislative and Executive Responses

The other branches of government have generally tolerated—and, in some cases, even implicitly welcomed—the judiciary's PIL activism, especially when it has enabled politicians to abdicate responsibility and insulate themselves from sensitive issues by claiming that they had no choice but to comply with orders issued by the Court.[80] For example, a retired high court chief justice pointed out that it was the judiciary, not the executive branch, that issued

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INDIA CONST. art. 124 § 2; Supreme Court Advocates-on-Record Assoc. v. Union of India, (1993) Supp. 2 S.C.R. 659, ¶ 71(5) (India). The Chief Justice position is generally filled on the basis of seniority within the bench. *Supreme Court Advocates*, Supp. 2 S.C.R. 659, at ¶ 73(15). Once appointed, Supreme Court Justices are protected by fixed salaries, tenure until the age of sixty-five, and a heavily safeguarded removal process. INDIA CONST. arts. 124 §§ 2–5, 125.

75. Srikrishna, *supra* note 13.

76. E-mail from R. Thawani, supra note 65; Interview with Justice Rao, *supra* note 58; Interview with R. Thawani, *supra* note 56.

77. Srikrishna, *supra* note 13, at J-21; *see also* Sathe, *supra* note 7, at 88–89 (noting that the Court's "institutional equipment is inadequate for undertaking legislative or administrative functions").

78. Interview with Justice Verma, *supra* note 37; *see* Dam, *supra* note 52, at 118 (discussing the Court's attempts to "run the nation from its headquarters in New Delhi, unconcerned about the constitutional ramifications").

79. *Bandhua Mukti Morcha*, 2 S.C.R. 67, at ¶¶ 57, 59.

80. Interview with Justice Seth, *supra* note 57; Mar. 26 Interview with Law Clerk, *supra* note 59; *see* Sathe, *supra* note 7, at 89 ("[T]he political establishment is showing unusual deference to the decisions of the Court.").

directives to curtail urban pollution because the executive was "influenced by the next election" and concerned that enacting antipollution laws would lead to transportation company strikes and a subsequent loss of votes.[81] Court-imposed directives and deadlines also empower proactive members of the executive and legislative branches to make change a priority for their colleagues. Furthermore, by assuming the role of an agent driving the process of reform by way of PIL, the judiciary can facilitate cooperation between governmental entities and NGOs.

However, an extensive level of judicial intervention through PIL can become a threat to the other branches of government. During the December 2007 Lok Sabha debates, the "harmonious functioning of the three organs of state" was a topic of heated discussion. Numerous legislators expressed concern about growing "judicial over-activism" and called for greater judicial accountability and respect for the separation-of-powers doctrine.[82] One legislator asserted, "Through Public Interest Litigation, the courts can decide anything under the Sun. . . . So, judicial activism has gone to such an extent that they are always interfering in the functioning of this House."[83] "'Judicial activism' is all right. But where do you draw a line between 'judicial activism' and 'judicial despotism'?" another questioned.[84] Several others echoed the sentiment that the judiciary "should not cross the *Lakshman Rekha*,"[85] a strict line that cannot be overstepped without serious repercussions, according to Hindu mythology.[86]

The debating legislators acknowledged the argument that people are compelled to seek justice through PIL in the judicial system due to shortcomings of the other branches of government,[87] but one participant vehemently countered:

> If one organ fails, it does not give license to another organ to take over. If the Judiciary fails, will it give a license to Parliament tomorrow to

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81. Interview with Justice Seth, *supra* note 57; *see* M.C. Mehta v. Union of India, (1998) 6 S.C.C. 63 (India).

82. *See, e.g.*, Lok Sabha Debates of Dec. 3, *supra* note 63 (statement of Shri Abdul Rashid Shaheen (Baramulla)) ("If Judiciary steps in and you encourage it that way, then, unfortunately, equilibrium can tilt."); *Id.* (statement of Shri Brahmananda Panda (Jagatsinghpur)) ("Unless the harmonious relationship between the Judiciary, Legislature and the Executive is maintained, the entire system may collapse. It may lead to chaos and instability."). The Lok Sabha is the lower house of the Indian Parliament.

83. *Id.* (statement of Shri Varkala Radhakrishnan (Chirayinkil)).

84. *Id.* (statement of Shri V. Kishore Chandra S. Deo).

85. *Id.* (statement of Shri Kharabela Swain).

86. *See generally id.*

87. *See, e.g.*, *id.* (statement of Shri Suresh Prabhakar Prabhu) ("[F]ailure of any institution gives rise to [a] vacuum which is filled by whichever institution can do that job."); *Id.* (statement of Shri Gurudas Dasgupta) ("People are compelled to go to the court to seek justice."); Lok Sabha Debates of Dec. 4, *supra* note 64 (statement of Shri Bikram Keshari Deo (Kalahandi)) ("[M]ore and more PILs are piling up and landing in the courts.").

> issue judgments or will the Executive tomorrow go and sit on the Bench or come here to Parliament to pass Bills? . . . You cannot upset the entire scheme of things which has been set by the founding fathers of our Constitution.[88]

Another participant pointed out, however, that the executive and legislative branches are contributing to the problem by supporting the judiciary's interference when it suits their needs: "In one case we define judicial activism in one way and in another case, we define judicial activism in another way. I think this opportunistic stand of the Members of the political parties is encouraging the judiciary to encroach upon our areas."[89]

The executive branch has acknowledged these concerns as well. Toward the end of the legislative debate described above, H. R. Bhardwaj, Minster of Law and Justice, made a statement emphasizing that "[t]he Constitution must function in its proper perspective and no organ of the State should try to usurp the turf of another organ."[90] Moreover, in speeches addressing the judiciary, Prime Minister Singh has cautioned that "the dividing line between judicial activism and judicial over-reaching is a thin one,"[91] and that "[a] balanced approach in taking up PIL cases will continue to keep PIL as a potent tool for rectifying public ills."[92]

III. LEGAL FRAMEWORK

The potential for promoting gender justice in India through the PIL vehicle is buttressed by the rich legal sources that petitioners can draw upon for this purpose, including a powerful constitution and major international treaties that obligate the Indian government to respect and protect women's rights. The Court has broadly interpreted and applied these constitutional and international law provisions to advance gender equality through PIL actions, with certain limitations.

A. *Key Constitutional Provisions*

Given that the Supreme Court's jurisdiction to hear PIL cases stems from its duty to enforce constitutional rights, PIL petitions

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88. Lok Sabha Debates of Dec. 3, *supra* note 63 (statement of Shri V. Kishore Chandra S. Deo).

89. *Id.* (statement of Shri Prasanna Acharya).

90. Lok Sabha Debates of Dec. 4, *supra* note 64 (statement of Shri H.R. Bhardwaj).

91. Phukan, *supra* note 68.

92. Singh 2006 speech, *supra* note 72.

must be founded upon constitutional claims.[93] The Constitution of India, which came into effect in 1950 and has since been "the conscience of the Nation and the cornerstone of the legal and judicial system," contains twenty-two parts.[94] The most relevant sections for PIL purposes are Part III's Fundamental Rights, defining the basic human rights of all citizens that are enforceable in court, and Part IV's Directive Principles of State Policy, listing nonjusticiable guidelines for the government to apply when framing laws and policies.[95]

The Court's constitutional jurisprudence has significantly expanded women's access to justice, but it has also been constrained by traditional conceptions of female autonomy. PIL judgments tend to reflect the consensus of India's educated middle and upper classes—a consensus that is often shaped by patriarchal biases.[96] Moreover, judicial shortcomings are apparent when the constitutional rights of women are pitted against the constitutional rights of more politically mobilized segments of society, such as religious minorities.[97]

1. Fundamental Rights

The Indian Constitution's Fundamental Rights fall into six categories: equality, freedom, protection against exploitation, freedom of religion, cultural and educational rights, and constitutional remedies.[98] The provisions most relevant to securing gender justice through PIL are Article 14's equality provisions, Article 15's prohibition of sex discrimination, and Article 21's protection of life and personal liberty, which the Court has broadly interpreted to include, *inter alia*, the rights to human dignity, health, and privacy.[99]

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93. *See* INDIA CONST. art. 32; People's Union for Democratic Rights (PUDR) v. Union of India, (1983) 1 S.C.R. 456, ¶ 11 (India) ("[I]t is only for the enforcement of a fundamental right that a writ petition can be maintained in this Court under Article 32").

94. *See* P. D. MATHEW, CONSTITUTION OF INDIA SIMPLIFIED, at xxx, 1 (2004).

95. INDIA CONST. arts. 12–51. Also relevant to PIL actions for the enforcement of women's rights are the Constitution's Fundamental Duties, which call upon citizens to, *inter alia*, "abide by the Constitution and respect its ideals" and "renounce practices derogatory to the dignity of women." INDIA CONST. art. 51A(a)(e). Although the Fundamental Duties are not directly justiciable, the Court "has in several cases relied on [them] to determine the duty of the State, and when necessary, given directions or frame[d] guidelines to achieve this purpose." MINISTRY OF HUMAN RESOURCE DEVELOPMENT, FUNDAMENTAL DUTIES OF CITIZENS 12 (1999) [hereinafter FUNDAMENTAL DUTIES REPORT].

96. *See infra* Part III.A.1.

97. *See infra* Part III.A.2.

98. *See* INDIA CONST. arts. 12–35.

99. INDIA CONST. arts. 14, 15, 21; *see also id.* art. 23 (prohibiting "traffic in human beings"). Not all the cases discussed in this Part were PIL actions, but they all

As experienced litigator Fali Nariman, who has played the roles of petitioners' lawyer, government lawyer, and amicus in PIL cases, noted, "The Indian Constitution is a very fine constitution because it enables courts to lay down parameters for a great enhancement of women's rights in various fields of activity."[100]

a. Rights to Equality and Non-Discrimination: Articles 14 and 15

The Court has described Article 14, which provides for equality before the law and equal protection of the laws,[101] as "a founding faith of the Constitution" and "the pillar on which rests securely the foundation of our democratic republic."[102] Therefore, the Court has emphasized:

> [Article 14] must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.[103]

Commenting on Article 14's potential for promoting gender justice, Indira Jaising, a Senior Supreme Court Advocate and leading litigator of women's rights in India, has observed: "Its brevity enhances its omnipotence, enabling creative judges to read within it equality of results. . . . [T]he Constitution left it to the courts to give life to the equality code."[104]

The complementary Article 15 prohibits the state from discriminating against any citizen "on grounds only of religion, race, caste, sex, place of birth or any of them."[105] Article 15(3) includes the following "special clause": "Nothing in this article shall prevent the State from making any special provision for women and children."[106] Describing this clause as "the fulcrum of the whole approach in the Constitution, which guides the approach of the Court," Nariman asserted: "It is this goal that has inspired the courts to always come out very strongly in these PILs[,] . . . to virtually prod the states to do

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illustrate facets of the Court's jurisprudence that are highly relevant to its PIL decision-making on gender issues.

100. Interview with F. Nariman, *supra* note 17.

101. INDIA CONST. art. 14.

102. Maneka Gandhi v. Union of India, (1978) 2 S.C.R. 621, ¶ 7 (India).

103. *Id.*

104. Indira Jaising, *Gender Justice and the Supreme Court, in* SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 288 (B. N. Kirpal et al. eds., 2000) [hereinafter SUPREME BUT NOT INFALLIBLE].

105. INDIA CONST. art. 15 § 1.

106. INDIA CONST. art. 15 § 3; *see* Catherine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects, and 'Personal Laws,'* 4 INT'L J. CON. LAW 181, 191–92 (2006).

much more than they are doing by way of legislative and executive action for women."[107]

Together, the Constitution's Articles 14 and 15 provide a strong legal basis for PIL cases seeking to enforce women's rights. Their application has been limited, however, by the Court's reluctance to challenge paternalistic gender norms and discriminatory religion-based personal laws.

i. Paternalism in the Court's Equality Jurisprudence

Women's rights advocates have objected to the language of Article 15 for the following reason: "Discrimination is always on the basis of sex in its gendered state. The use of the word 'only' in this Article has enabled the courts to segregate sex from gender and uphold blatantly discriminatory legislation."[108] For example, in the 1982 *Air India v. Meerza* decision, the Court upheld a regulation requiring airhostesses of a government-owned airline to retire if they got married within four years of being employed—a condition that was not imposed on their male counterparts, assistant flight pursers (AFPs).[109] The judgment concluded that this was not sex-based discrimination because different "rules, regulations and conditions of service" applied to the male and female positions,[110] and "the Constitution's equality provisions prohibit discrimination 'only on the ground of sex,' but do not prohibit discrimination 'on the ground of sex coupled with other considerations.'"[111] The Court's application of formal equality theory in this case has been criticized for its "circular reasoning," given that male AFPs were treated as an "entirely separate class" because they had been given arguably preferential career opportunities in the first place.[112]

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107. Interview with F. Nariman, *supra* note 17. The special clause was invoked in the *Vishaka* PIL against sexual harassment (*see infra* Part IV) to argue that an international treaty's provisions are binding in Indian courts because the government's ratification of the treaty is "tantamount to the creation of a 'special provision'" pursuant to Article 15(3). Vishaka v. State of Rajasthan, (1997) Supp. 3 S.C.R. 404, ¶ 5 (India) (setting forth the "Petitioner's Proposed Directions to be Incorporated as Guidelines to be Declared by the Hon'ble Supreme Court of India").

108. Jaising, *supra* note 104, at 294.

109. Air India v. Meerza, (1982) 1 S.C.R. 438, ¶¶ 62, 64 (India). The AHs had to be unmarried when first employed. Although the Court struck down another part of the regulation requiring AHs to retire at age 35, it did so not on the basis of gender inequality, but because the extension of employment for AHs over 35 was "entirely at the mercy and sweet will of the Managing Director" and such "wide and uncontrolled power" violated Article 14. *Id.* ¶ 119.

110. *Id.* ¶¶ 44–49, 57, 60 (noting that the positions differed in qualifications, starting salaries, number of posts, promotion avenues, and retirement benefits).

111. *Id.* ¶ 68.

112. *Id.* ¶ 60; Eileen Kaufman, *Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts' Equality Jurisprudence*, 34 GA. J. INT'L & COMP. L. 557, 598 (2006); *see also* Jaising, *supra* note 104, at 294, 297 (condemning the decision for "validating discrimination" between AHs and AFPs because "[s]ubstantive

The *Air India* decision also illustrates the judiciary's tendency to reinforce paternalistic gender norms despite its lauding of the Constitution's equality guarantee. The Court concluded that the *Air India* regulation's marital restriction was neither unreasonable nor arbitrary because requiring airhostesses to delay marriage until they were "fully mature" would improve their health and their chances of a successful marriage, promote India's family planning program, and prevent the airlines from having to incur the cost of recruiting new airhostesses if the airhostesses who married became pregnant and quit their jobs.[113] Although the decision did strike down a rule terminating the employment of airhostesses upon first pregnancy, it encouraged the passage of another proposed rule that would terminate an airhostess upon her *third* pregnancy on the grounds that this would be "for the good of upbringing the children" and help curtail "the danger of over-population."[114] The striking lack of respect for women's autonomy exhibited by the Court reveals the challenging context in which gender rights advocates in India operate. This point is reinforced in Part IV's case study of the *Javed v. State of Haryana* decision, which in fact cited the *Air India* precedent to support its upholding of a coercive population control policy.[115] The judiciary has also been criticized for using Article 15's special clause to "reinforce sexual stereotypes"[116] and "justify the regulation of female sexuality based on the weaker sex approach to gender issues," as seen, for example, in the Court's jurisprudence on adultery laws.[117]

ii. Compromised Approach to Discriminatory Personal Laws

The Court has particularly faltered in defending women's constitutional rights to equality and nondiscrimination in the context of India's religion-based personal laws. These personal laws, which are derived from religious scriptures, customs, and traditions, govern family law matters such as marriage, divorce, inheritance, and adoption because India has no uniform civil code.[118] As a result, the legal standards and protections that apply to a woman differ based on whether she is Hindu, Muslim, Christian, Parsi, or a member of a

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equality . . . would strike at discrimination based on sex plus gendered dimensions of sex").

113. *Air India,* 1 S.C.R. 438, at ¶¶ 80–81; *see* Kaufman, *supra* note 112, at 599 (noting that the *Air India* opinion "represents equality theory used to perpetuate sexual stereotypes rather than to ameliorate gender inequities").

114. *Air India,* 1 S.C.R. 438, at ¶ 101. *See generally* Kaufman, *supra* note 112, at 599–601 (discussing the follow-up case, Air India Cabin Crew Ass'n v. Merchant, A.I.R. 2004 S.C. 187 (India)).

115. *Javed*, A.I.R. 2003 S.C. 3057.

116. Kaufman, *supra* note 112, at 615.

117. Jaising, *supra* note 104, at 297–99 (citing case law on adultery).

118. P. D. MATHEW & P. M. BAKSHI, HINDU MARRIAGE AND DIVORCE 1 (2005).

tribe governed by customary precepts.[119] Moreover, the personal laws reinforce patriarchal norms and distinctions that disadvantage women.[120] The religion-based family law system thus violates the principles of equality and nondiscrimination guaranteed by the Indian Constitution and the international conventions that India has ratified.[121]

Judges have avoided striking down gender-biased personal laws as unconstitutional by straining to interpret them in ways that neutralize their discriminatory effect. Unfortunately, the rights of women have also been compromised in the process.[122] For instance, in the 1999 *Githa Hariharan v. Reserve Bank of India* decision, the Court upheld the Hindu Minority and Guardianship Act's provision that a mother can be the legal guardian of her child only "after" the father, but attempted to enforce the constitutional guarantee of gender equality by interpreting the term "after" to mean not "after the death" of the father but rather "in the absence" of the father.[123] Although the *Hariharan* court stated that "[n]ormal rules of interpretation shall have to bow down to the requirement of the Constitution," its interpretation of the law failed to put mothers on equal legal footing with fathers.[124]

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119. *Id.* The Hindu Marriage Act applies to Jains, Buddhists, and Sikhs as well. *Id.* at 4. The government recently enacted a Special Marriage Act that provides for a civil or registered marriage that is secular, statutory, recognized throughout India, and uniformly applicable to individuals regardless of their race, religion, and caste. P. D. MATHEW & P. M BAKSHI, SPECIAL MARRIAGE ACT 1–4 (2005).

120. *See* EPP, *supra* note 3, at 79 (noting that personal laws "greatly discriminate against women in some religious groups" and generally "disadvantage women"); MacKinnon, *supra* note 106, at 191–92 (providing examples of how "the personal laws of all of India's religions have contained facial and applied sex-based distinctions to women's disadvantage"); Interview with Fellow, National Judicial Academy, in Bhopal, India (Apr. 15, 2006) [hereinafter Apr. 15 Interview with NJA Fellow].

121. *See, e.g.*, Children's Rights Committee, *Concluding Observations, India*, ¶ 29, U.N. Doc. CRC/C/15/Add.115 (Feb. 23, 2000) [hereinafter CRC Concluding Observations 2000]; CEDAW Committee, *Concluding Observations, India*, ¶ 60, U.N. Doc. A/55/38 (Jan. 2, 2000) [hereinafter CEDAW Concluding Observations 2000]; Human Rights Committee, *Concluding Observations, India*, ¶ 17, U.N. Doc. CCPR/C/79/Add.81 (Aug. 4, 1997) [hereinafter HRC Concluding Observations 1997]; CEDAW Committee, *Gen. Rec. 21, Equality in Marriage and Family Relations*, ¶¶ 17, 44 (Feb. 4, 1994) [hereinafter CEDAW Gen. Rec. 21].

122. *See e.g.*, MADHU KISHWAR, OFF THE BEATEN TRACK: RETHINKING GENDER JUSTICE FOR INDIAN WOMEN 37–54 (2002) (recounting experience as PIL petitioner challenging discriminatory tribal law); Madhu Kishwar v. State of Bihar, (1996) Supp. 1 S.C.R. 442 (India).

123. Githa Hariharan v. Reserve Bank of India, (1999) 1 S.C.R. 669, ¶¶ 24–25 (India).

124. *See* Children's Rights Comm., *Concluding Observations, India*, ¶ 46, U.N. Doc. CRC/C/15/Add.228 (Feb. 26, 2004) [hereinafter CRC Concluding Observations 2004] (expressing concern that "under the law, the father still has the main responsibility with regard to the child"); Jaising, *supra* note 104, at 301.

A comprehensive review of the political, legal, and scholarly discourse surrounding the personal law system is beyond the scope of this Article, but it bears noting that the Court's failure to "test personal laws on the touchstone of fundamental rights" limits its potential for securing gender equality through PIL.[125] Senior Supreme Court advocates have observed that "[d]espite its many brave words and its otherwise strong pitch for gender justice . . . the Supreme Court has wavered to avoid being mired in controversies over the much needed reform of personal laws."[126] According to another experienced PIL litigator, "This is one exception to the Court's general enthusiasm to deliver justice."[127] U.S. feminist scholar Catherine MacKinnon has similarly observed, "India's jurisprudence having come this far for women, bearing such enormous promise, one major exception stands out. Out of step is the judicial reluctance to apply sex equality principles to the personal laws."[128]

b. Right to Life: Article 21

Attempts to enforce gender justice through PIL can also be substantiated by Article 21's protection of "life or personal

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125. Rajeev Dhavan & Fali Nariman, *The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities*, *in* SUPREME BUT NOT INFALLIBLE, *supra* note 104; *see also* Marc Galanter & Jayanth Krishnan, *Personal Law and Human Rights in India and Israel*, 34 ISR. L. REV. 101, 106–11 (2000) (discussing evolution of personal law system); MacKinnon, *supra* note 106 (discussing discriminatory impact of personal laws).

The Court's most renowned confrontation with the personal laws took place in its 1985 *Shah Bano* ruling, which led to a strong political backlash. Mohd. Ahmed Khan v. Shah Bano, (1985) 3 S.C.R. 844 (India); *see* Galanter & Krishnan, *Personal Law and Human Rights*, *supra*, at 113–14 (discussing the *Shah Bano* ruling); Jaising, *supra* note 104, at 299–300 (noting that the Court "went to great lengths to avoid the constitutional question, namely, would a personal law, which discriminated against women, be recognized after the Constitution had come into force," and the case thereby culminated in "a protest over the authority of the Court to pronounce on the interpretation of the Koran, rather than a straightforward protest over the right of women to equality"); Martha C. Nussbaum, *International Human Rights Law in Practice: India Implementing Sex Equality Through Law*, 2 CHI. J. INT'L L. 35, 46 (2001) (discussing the *Shah Bano* ruling); *The Shah Bano Legacy*, THE HINDU, Aug. 10, 2003 (same).

For a glimpse into the Court's unsuccessful attempts to promote the enactment of a uniform civil code, see Ahmedabad Women's Action Group v. Union of India, (1997) 2 S.C.R. 389, ¶¶ 3, 17(India); Sarla Mudgal v. Union of India, (1995) Supp. 1 S.C.R. 250, ¶¶ 34-36 (India); Jaising, *supra* note 104, at 302; Srikrishna, *supra* note 13, at J-15.

126. Dhavan & Nariman, *supra* note 125, at 274.

127. Interview with Shruti Pandey, Director, Women's Justice Initiative, Human Rights Law Network, in New Delhi, India (Sept. 18, 2006) [hereinafter Sept. 18 Interview with S. Pandey].

128. MacKinnon, *supra* note 106, at 131.

liberty"[129]—which the Court has described as "one of the luminary provisions in the Constitution," a "sacred and cherished right" that "occupies a place of pride in the Constitution" and "has an important role to play in the life of every citizen."[130] PIL rulings have repeatedly stated that the right to life "does not connote mere animal existence or continued drudgery through life" but rather implies a right to live with human dignity and "all that goes along with it."[131] In this context, the act of rape has been judicially recognized as "not a mere matter of violation of an ordinary right of a person," but a violation of the fundamental constitutional right to life with dignity.[132] Through PIL actions, the Court has also broadly interpreted Article 21 to encompass various socioeconomic rights, such as rights to education, work, shelter, medical care, food, clean water, and an unpolluted environment.[133]

Many have applauded the judiciary for creating a dramatic expansion of rights through its generous reading of Article 21,[134] but this reading has also been the subject of criticism; the Court has been accused of having used Article 21 "as some kind of cornucopia for everything."[135] Even those who strongly support the broad application of the Constitution to promote human rights warn that it is "not a very wise juristic concept to pin everything onto Article 21," because "the Court has given that Article too much ballast—something that it cannot possibly bear,"[136] and because it is

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129. INDIA CONST. art. 21 ("No person shall be deprived of life or personal liberty except according to procedure established by law.").

130. Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble, A.I.R. 2003 S.C. 4567, ¶ 4 (India).

131. *See, e.g.*, Consumer Educ. and Research Ctr. v. Union of India, (1995) 1 S.C.R. 626, ¶ 24 (India); Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 2 S.C.R. 516, ¶ 8 (India).

132. Chairman, Railway Board v. Chandrima Das, (2000) 1 S.C.R. 480, ¶¶ 12, 14, 43 (admitting case of a woman's alleged gang rape by Indian Railway employees as a PIL action because it sought "relief for eradicating anti-social and criminal activities" and holding the Indian government vicariously liable for damages); *see also* Gautum v. Chakraborty, (1995) Supp. 6 S.C.R. 731, ¶ 8 ("Women also have the right to life and liberty . . . Their honour and dignity cannot be touched or violated."); Justice Ruma Pal, *Redress for Violence against Women in India: The Successes and Failures of Judicial Action*, 8 DEVELOPING HUMAN RIGHTS JURISPRUDENCE 1 (1998) Commonwealth Secretariat (2001), http://www.humanrightsinitiative.org/jc/papers/jc_2004/supplementary_papers/ruma_pal.pdf.

133. *See, e.g.*, Dam, *supra* note 52, at 116 (citing case law on various rights stemming from Article 21).

134. *See, e.g.*, Confidential Interview with two Judges, High Court of Bombay, in Mumbai, India (Mar. 16, 2006) [hereinafter Interview with Bombay Judges] (stating that the Court's broad interpretation of Article 21 "has gone in the right direction, and there is much scope for further expansion"); Interview with Justice Seth, *supra* note 70 (describing the expansion of Article 21 as a "very positive" trend).

135. Interview with Justice Srikrishna, *supra* note 37; *see* Interview with Justice Rao, *supra* note 58 (describing Article 21 as a "supermarket" because "you can bring any right under Article 21 and pass orders").

136. Interview with F. Nariman, *supra* note 17.

dangerous for the judiciary to create expectations that it may not be able to fulfill.[137] However, the Court's conservative tendency to abide by patriarchal priorities is also seen in its use of Article 21—where, for example, its liberal interpretation of the right to health contrasts sharply with its reluctant application of the right to privacy.

i. Right to Health

The Court has construed Article 21 as providing a fundamental right to health, including the right to medical treatment.[138] This construction is of critical importance to women in India because they face some of the world's highest rates of child marriage and early pregnancy,[139] maternal mortality,[140] unsafe abortion,[141] and HIV/AIDS.[142] Specifying that its directives to make the right to health "meaningful" are applicable to both public and private providers, the Court has asserted that "[e]very doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life."[143] In a 1996 PIL case on the right to emergency health care, the Court further noted, "In the matter of allocation of funds for medical services the said constitutional obligation of the State has to be kept

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137. Interview with Justice Chandrachud, *supra* note 41.

138. *See, e.g.*, Consumer Educ. and Research Ctr. v. Union of India, (1995) 1 S.C.R. 626, ¶¶ 22–23, 26 (India); (citing the Directive Principles and several international instruments to support its holding that "the right to health and medical care is a fundamental right under Article 21"); Parmanand Katara v. Union of India, (1989) 3 S.C.R. 997, ¶ 8 (India) ("This Court in scores of decisions has . . . reiterated with gradually increasing emphasis" that Article 21 "casts the obligation on the State to preserve life.").

139. In numerous states, more than 50% of girls enter into arranged marriages before the age of sixteen. Petition at ¶ 5, Forum for Fact Finding Documentation and Advocacy (FFDA) v. Union of India, W.P. (Civ.) No. 212/2003 (India Apr. 25, 2003) [hereinafter *FFDA* Petition].

140. In India, a woman dies approximately every four minutes due to a lack of healthcare during pregnancy or childbirth. WORLD HEALTH ORG. ET AL., MATERNAL MORTALITY IN 2000 24 (2004), *available at* http://www.who.int/reproductive-health/publications/maternal_mortality _2000/mme.pdf.

141. Although India legalized abortion in 1971, access is so limited that every year an estimated 6.7 million women seeking to terminate pregnancy undergo unsafe procedures performed by unlicensed practitioners. *See* Ravi Duggal & Vimala Ramachandran, *Abortion Assessment Project – India: A Brief Profile*, *in* ABORTION ASSESSMENT PROJECT (2004), *available at* http://www.cehat.org/aap1/obj.pdf#search=%22abortion%20assessment%20project%22.

142. *See* CENTER FOR REPRODUCTIVE RIGHTS, WOMEN OF THE WORLD – SOUTH ASIA 10–28, 69–114 (2004), *available at* http://www.reproductiverights.org/pdf/pdf_wowsa_india.pdf; HUMAN RIGHTS WATCH, BROKEN PEOPLE: CASTE VIOLENCE AGAINST INDIA'S "UNTOUCHABLES" (1999), *available at* http://www.hrw.org/campaigns/caste/presskit.htm#5.

143. *Parmanand Katara*, 3 S.C.R. 997, at ¶¶ 8–9*; see Consumer Educ.*, 1 S.C.R. 626, at ¶¶ 22, 30.

in view."[144] Women's rights advocates have been able to draw upon Article 21 in recent PIL actions calling for greater government involvement in combating child marriages[145] and coerced or unsafe sterilization practices.[146]

ii. Right to Privacy

The judiciary has also "culled out" a right to privacy from Article 21 of the Constitution.[147] This line of jurisprudence began a few decades ago in police surveillance cases, for which the Court drew upon international conventions and U.S. reproductive rights decisions to conclude that "[a]ny right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing."[148] The development of this right has been problematic because of the context in which it arose:

> From the beginning of this privacy jurisprudence the notion of privacy is coupled with the notion that a (male) householder has the right to control his functioning in a protected space. And in fact traditional notions of the privacy of the home, in Indian legal tradition, strongly define the home as a patriarchal sphere of privilege, in which man may operate as king.[149]

Local lawyers and judges have further observed that the Indian mindset prioritizes the "collective, family, group, [and] society"[150] over the privacy rights of an individual, and that the judiciary "does not want to lose control over the woman's body since the notion of family is central, and family here means patriarchal family—a woman should be treated well [but] it is not about her having agency and autonomy."[151] By following such conventions, the Court has missed an opportunity to progressively apply the right to privacy to promote women's rights.[152]

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144. Paschim Banga Khet Mazdoor Samity v. State of West Bengal, A.I.R. 1996 S.C. 2426, ¶ 10 (India) (recognizing failure to provide timely medical treatment as a violation of the right to life and specifying list of "remedial measures to rule out recurrence of such incidents").

145. *FFDA* Petition, *supra* note 139.

146. Ramakant Rai v. Union of India, W.P. (Civ.) No. 209/2003 (India Jan. 3, 2005) (discussing a PIL action on behalf of women and minors being coerced into undergoing sterilization procedures in government facilities under alarmingly unhygienic conditions).

147. Mr. X v. Hospital Z, A.I.R. 1999 S.C. 495, ¶ 20 (India).

148. Gobind v. State of Madhya Pradesh, (1975) 3 S.C.R. 946, ¶¶ 23–25 (India); *see* Rajgopal v. State of Tamil Nadu, (1994) Supp. 4 S.C.R. 353, ¶ 28(1) (India) (recognizing the right to privacy as "implicit in the right to life and liberty").

149. Nussbaum, *supra* note 125, at 52; *see* MacKinnon, *supra* note 106, at 196 (observing that "the family is an institution of . . . male dominance" in India).

150. Interview with Justice L. Seth, *supra* note 57.

151. Interview with U. Ramanathan, *supra* note 44.

152. *Id.*

The Court cautioned from the outset that the right to privacy is not absolute and "must be subject to restriction on the basis of compelling public interest."[153] This limitation was illustrated in the judiciary's refusal to protect the confidentiality of people living with HIV/AIDS in a 1998 decision upholding a hospital's unauthorized disclosure of a patient's HIV-positive status to his fiancée's relatives.[154] Acknowledging the impact of mainstream social mores on its decision, the Court stated: "[M]oral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay, in the Hall known as the Court Room, but have to be sensitive, in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day."[155] Thus, although the Court has expansively interpreted the Constitution's Fundamental Rights to promote access to justice, limitations tend to emerge in cases that challenge traditional gender and sexuality norms.

2. Directive Principles

The Directive Principles contained in Part IV of the Constitution guide the state's formulation and administration of laws and policies and are "fundamental in the governance of the country."[156] They instruct the state to secure and protect a social order in which social, economic, and political justice "inform all the institutions of the national life."[157] Particularly relevant to women's rights are the Directive Principles directing the government to "eliminate inequalities in status, facilities and opportunities;" to ensure that the legal system "promotes justice, on a basis of equal opportunity;" to secure "just and humane conditions of work and maternity relief" and "equal pay for equal work for both men and women;" to ensure that "the health and strength of workers, men and women, . . . are not abused;" and to regard the improvement of nutrition, standard of living, and public health "as among its primary duties."[158]

Unlike the civil and political Fundamental Rights, the Directive Principles—which protect economic, social, and cultural rights—are not directly justiciable; one cannot bring a PIL action on the ground that the state has violated a Directive Principle.[159] Nevertheless, the Court has made it clear that the state's constitutional obligation to incorporate the Directive Principles into its policies "is not idle print

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153. *Gobind*, 3 S.C.R. 946, at ¶¶ 28, 31.

154. Mr. X v. Hospital Z, A.I.R. 1999 S.C. 495, ¶ 43 (India); *see also* Mr. X v. Hospital Z, A.I.R. 2003 S.C. 664, ¶ 2 (India).

155. *Mr. X,* A.I.R. 1999 S.C. 49, at ¶ 43 (internal quotation marks omitted).

156. INDIA CONST. art. 37; *see* P. D. Mathew, Part IV of Constitution of India: Directive Principles of State Policy 1 (2002) [hereinafter Mathew].

157. INDIA CONST. art. 38 § 1.

158. *Id.* arts. 38 § 2, 39(d)(e), 39A, 42, 47.

159. *Id.* art. 37; *see* Mathew, *supra* note 156, at 1.

but command to action."[160] To this end, the judiciary has used its broad PIL and constitutional powers to read the Directive Principles into the Fundamental Rights provisions, especially Article 21, "as a matter of interpretation"—thereby making the nonjusticiable guidelines indirectly enforceable.[161]

Critics have expressed concern about the Court using the PIL vehicle to enforce rights inherent in the Directive Principles "irrespective of the availability of resources."[162] Although the judiciary has arguably encroached upon the separation-of-powers doctrine in the process, it has put forth the following justification:

> Of course, the task of restructuring the social and economic order so that the social and economic rights become a meaningful reality for the poor and lowely [sic] sections of the community is one which legitimately belongs to the legislature and the executive, but mere initiation of social and economic rescue programmes by the executive and legislature would not be enough and it is only through multi-dimensional strategies including public interest litigation that these social and economic rescue programmes can be made effective.[163]

Through PIL, the distinction between legally enforceable, civil-political constitutional rights and nonjusticiable socioeconomic rights is gradually disappearing.[164] This trend creates more leeway for advancing gender justice since the two categories of rights are often interdependent in cases involving women's rights.[165] However, as discussed in Part II, the judiciary must consistently be wary of weakening its credibility by overstepping its jurisdictional bounds.

B. *Applicability of International and Comparative Law*

In addition to enforcing the state's constitutional obligations, the Court has been fairly assertive about holding the Indian government

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160. Fatehchand Himmatlal v. Maharashtra, (1977) 2 S.C.R. 828, ¶ 22 (India).

161. *See* Randhir Singh v. Union of India, (1982) 3 S.C.R. 298 (India) (turning Directive Principle of "equal pay for equal work" into an enforceable right through application of Article 14); EPP, *supra* note 3, at 87; Dam, *supra* note 52, at 114, 116 ("Article 21 became the repository of all socioeconomic rights mentioned in Part IV of the Indian Constitution, including rights not otherwise enumerated"); Interview with Justice Chandrachud, *supra* note 41; Interview with Justice Rao, *supra* note 58; Interview with Justice Verma, *supra* note 37.

162. Interview with Justice Rao, *supra* note 58.

163. People's Union for Democratic Rights (PUDR) v. Union of India, (1983) 1 S.C.R. 456, ¶ 2 (India).

164. Interview with Justice Chandrachud, *supra* note 41.

165. *See* International Covenant on Economic, Social and Cultural Rights, art. 2, U.N. Doc. A/6316 (1966) [hereinafter ICESCR]; MacKinnon, *supra* note 106, at 202 (noting India's recognition that "economic and social rights make access to rights of citizenship meaningful"); Interview with Bombay Judges, *supra* note 134 (asserting that a woman's ability to benefit from judgments upholding civil or political freedoms will be limited if she does not have access to healthcare, education, food, shelter, and safety).

to the international commitments it has made when ratifying numerous United Nations (U.N.) treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC).[166] Although PIL petitions must be premised on constitutional claims, these international treaties, the explanatory comments issued by U.N. monitoring bodies, and comparative sources of law from foreign courts can provide a critical source of legal norms for PIL actions seeking to advance gender justice in the Indian context.

1. Status of International Law in the Indian Legal System

International conventions ratified by the Indian government must be converted into domestic law before they are justiciable.[167] However, advocates can use treaty provisions to support PIL petitions before this process has occurred; in addition to authorizing Parliament to make laws "implementing any treaty, agreement or convention,"[168] the Constitution broadly directs the state to "foster respect for international law and treaty obligations."[169] The Court has relied upon this latter provision to establish that it "must interpret language of the Constitution . . . in the light of the United Nations Charter and solemn declaration[s] subscribed to by India," and "construe our legislation so as to be in conf[o]rmity with International Law and not in conflict with it."[170] Moreover, the Court has recognized that whenever there is any ambiguity surrounding a domestic law, "the national rule is to be interpreted in accordance with the State's international obligations."[171]

In considering the extent to which international conventions can be "read into" national laws, the Indian judiciary has consulted case law from other countries and concluded that treaty provisions that "elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of

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166. Office of the U.N. High Comm'r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (June 9, 2004), http://www.unhchr.ch/pdf/report.pdf.

167. INDIA CONST. art. 253.

168. *Id.*

169. *Id.* art. 51(c).

170. Kesavananda Bharati Sripadagalvaru v. Kerala, (1973) Supp. S.C.R. 1, ¶ 165 (India).

171. Varghese v. Bank of Cochin, (1980) 2 S.C.R. 913, ¶ 6 (India); *see* Chairman, Railway Board v. Chandrima Das, (2000) 1 S.C.R. 480, ¶ 25 (India).

those fundamental rights and hence, [are] enforceable as such."[172] In the landmark 2003 *Vishaka* ruling, which will be analyzed in greater detail in Part IV, the Court went one step further in incorporating international law into its constitutional jurisprudence by drawing upon CEDAW to frame binding guidelines against sexual harassment in the workplace.[173] "Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit *must be* read into these provisions to enlarge the meaning and content thereof," the decision stated, adding that this is "now an accepted rule of judicial construction" when there is a void in domestic legislation.[174]

Several major U.N. treaty-monitoring bodies have applauded the positive role that the Indian judiciary has played in implementing international human rights provisions at the domestic level, especially through its PIL mechanism.[175] As seen in the *Vishaka* case, and confirmed by former Supreme Court law clerks, Justices are particularly likely to use international law to support an argument they already want to make or to draw inspiration for how to operationalize the protection of fundamental rights.[176] The Court's ability to use international conventions as a doctrinal basis for intervention is facilitated by the conformity between the provisions of these treaties and the Indian Constitution, upon which PIL claims must be premised.[177] However, when there is a clear inconsistency between India's treaty obligations and its domestic law, the latter prevails.[178]

2. Impact of Comparative Law

The influence of comparative law on the Court's domestic jurisprudence has been evident from the earliest foundational PIL

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172. People's Union for Civil Liberties v. Union of India, A.I.R. 1997 S.C. 1203, ¶¶ 13, 15 (India).

173. Vishaka v. Rajasthan, (1997) Supp. 3 S.C.R. 404, ¶ 16 (India).

174. *Id.* ¶¶ 7, 14.

175. CEDAW Concluding Observations 2000, *supra* note 121, ¶ 46; CRC Concluding Observations 2004, *supra* note 124, at ¶ 9; CRC Concluding Observations 2000, *supra* note 121, ¶ 3; HRC Concluding Observations 1997, *supra* note 121, at ¶ 6.

176. *See, e.g.*, Interview with Law Clerk, *supra* note 59; *supra* Part IV.A.2.

177. Interview with Justice Chandrachud, *supra* note 41; *see* Chairman, Railway Board v. Chandrima Das, (2000) 1 S.C.R. 480, ¶ 33 (India) (noting that the Fundamental Rights "are almost in consonance with" the ICCPR and the ICESCR).

178. In a 1980 case involving a conflict between a provision of the ICCPR and a local statute, the Court acknowledged its obligation to respect international law but said that "until the municipal law is changed to accommodate the Covenant what binds the court is the former, not the latter. . . . From the national point of view the national rules alone count." Varghese v. Bank of Cochin, (1980) 2 S.C.R. 913, ¶ 6 (India).

judgments.[179] The first 1981 decision to use the PIL terminology cited a wide array of sources from other jurisdictions, including English and U.S. courts, the Australian Law Reform Commission, testimony before a U.S. Senate committee, and a host of international academic articles pertaining to judicial policing of administrative action and widening access to justice.[180] The decision applied to the Indian context commentaries on legal developments in England, Australia, New Zealand, the Soviet Union, sub-Saharan Africa, and the United States.[181] Over a decade later, in a judgment looking back on the "origin and meaning" of PIL, the Court explicitly recognized the influence of developments in the U.S., Australian, and Canadian legal systems, concluding: "The newly invented proposition of law laid down by many learned Judges of this Court in the arena of PIL irrefutably and manifestly establish[es] that our dynamic activism in the field of PIL is by no means less than those of other activist judicial systems in other part[s] of the world."[182] The extent to which comparative thinking influenced the development of PIL reflects the Indian judiciary's interest in keeping up with global legal norms.

Indian judges seem to engage in a two-stage approach toward applying comparative law: If there is sufficient, unambiguous domestic case law on an issue, they rely on that precedent alone, but when there is a vacuum in domestic jurisprudence or when Indian law is unclear, judges are more likely to look at "what like-minded people are doing all over the world."[183] Among sources of comparative law, the Indian judiciary most often consults decisions from other commonwealth jurisdictions, such as England and Australia, which are regarded as "the next best source of persuading the Supreme Court after its own judgments."[184] U.S. case law had a strong impact on the Indian Court's early jurisprudence, particularly

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179. *See, e.g.*, Janata Dal, v. H. S. Chowdhary, (1992) Supp. 1 S.C.R. 22 (India); S. P. Gupta v. Union of India, (1982) 2 S.C.R. 365 (India); Fertilizer Corp., Kamgar Union v. Union of India, (1981) 2 S.C.R. 52 (India).

180. *Fertilizer Corp.*, 2 S.C.R. 52, at ¶¶ 31–34, 37, 41–43, 46.

181. *Id.*; *see also* People's Union for Democratic Rights (PUDR) v. Union of India, (1983) 1 S.C.R. 456, ¶¶ 9, 21–23 (India) (discussing legal developments and commentaries on public interest actions in the United States, United Kingdom, and Australia); *S. P. Gupta*, 2 S.C.R. 365, at ¶ 1 (quoting U.S. Supreme Court Justice Oliver Wendell Holmes).

182. *Janata Dal*, Supp. 1 S.C.R. 226, at ¶ 88; *see id.* ¶¶ 49–50, 55.

183. Interview with Justice Srikrishna, *supra* note 37; *see also* Interview with Fellow, National Judicial Academy, in Bhopal, India (Mar. 30, 2006) [hereinafter Mar. 30 Interview with NJA Fellow]; Interview with F. Nariman, *supra* note 17; Interview with Judicial Law Clerk, Supreme Court of India, in New Delhi, India (Mar. 27, 2006) [hereinafter Mar. 27 Interview with Law Clerk]; Interview with V. Shankar, *supra* note 56.

184. Mar. 30 Interview with NJA Fellow, *supra* note 183; *see also* Michael Kirby, *The Supreme Court of India and Australian Law*, *in* SUPREME BUT NOT INFALLIBLE, *supra* note 104 (describing similarities and exchanges between Australian and Indian courts); Interview with V. Shankar, *supra* note 56.

because the United States also has a constitution-based and federally structured legal system, but this reliance decreased as the Indian judiciary built up its own body of constitutional case law.[185] The Court does, however, continue to rely on U.S. jurisprudence in "obtuse areas" for which it is difficult to find domestic precedents.[186] In addition to comparative case law, PIL petitioners can bolster their arguments by citing examples of successful policy initiatives in other countries. For example, recent PIL petitions challenging child marriage and calling for increased public access to antiretroviral drugs highlighted relevant policy developments in Sri Lanka[187] and Brazil,[188] respectively.

Critics of the Court's use of international and comparative law question the value of applying loosely worded international instruments in PIL cases involving concrete issues that are specific to the Indian context, and point out that foreign precedents can also impede the progress of gender justice by providing support for discriminatory rulings.[189] For instance, in the *Javed* decision the Court cited China's restrictive one-child policy to justify upholding a coercive approach toward population control in India.[190] Furthermore, it has been asserted that "acceptance of international norms and laws is an exclusively executive function since it is closely associated with questions of national sovereignty."[191] Nevertheless, the relevance of international and comparative law and policy to PIL actions, which impact all branches of government, is clear. As former Additional Solicitor General Nariman remarked, "We live in a global world, and courts do not shut their eyes to that."[192]

IV. CASE STUDIES

This Part focuses on two important Supreme Court judgments—*Vishaka v. State of Rajasthan*, a 1997 decision combating sexual harassment in the workplace, and *Javed v. State of Haryana*, a 2003 decision upholding a coercive population policy. These case studies

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185. Interview with F. Nariman, *supra* note 17.

186. *Id.*

187. *FFDA* Petition, *supra* note 139, at ¶ 22 (noting Sri Lankan government's success in curbing child marriage).

188. Petition at ¶¶ 48, 61–62, Voluntary Health Assoc. of Punjab v. India, W.P. (Civ.) No. 31/2003, (India 2003) (highlighting the Brazilian government's successful policy initiative to combat HIV/AIDS).

189. E-mail from V. Shankar, *supra* note 42; *see* Air India v. Meerza, (1982) 1 S.C.R. 438, ¶ 86 (India) (recognizing that U.S. decisions "may provide a useful guide" but resisting "a close adherence to those principles . . . because the social conditions in this country are different").

190. Javed v. Haryana, A.I.R. 2003 S.C. 3057, ¶ 34 (India).

191. Srikrishna, *supra* note 13, at J-13.

192. Interview with F. Nariman, *supra* note 17.

illustrate variations in the judiciary's and petitioners' approaches toward litigation regarding women's rights, as well as the critical impact of the context in which such actions are brought.

A. Vishaka v. State of Rajasthan[193]

Vishaka has been described by former Supreme Court justice Pal as "one of the more notable successes of judicial action in redressing violence against women" and recognized by the CEDAW Committee as a "landmark judgment [in India's] tradition of public interest litigation."[194] The *Vishaka* Court promoted gender justice by directly applying the provisions of constitutional and international law to enact enforceable guidelines against sexual harassment in the workplace, at a time when the public was mobilized to embrace a judicial solution to a significant void in domestic legislation.

1. Background

The *Vishaka* PIL case arose out of the gang rape of Bhanwari Devi, a member of a group of women called *sathins*, who are trained by the local government to do village-level social work for honorarium compensation.[195] As part of a governmental campaign against child marriage, Bhanwari Devi attempted to stop the marriage of a one-year-old girl in rural Rajasthan.[196] Members of the local community retaliated first by harassing Bhanwari Devi with threats and imposing a socioeconomic boycott on her family. Then, on September 22, 1992, five men raped Bhanwari Devi in the presence of her husband.[197]

Bhanwari Devi faced numerous obstacles when she attempted to seek justice: the police publicly disclaimed her complaint and were reluctant to record her statement or conduct an investigation, and doctors at two government health facilities refused to conduct a proper medical examination.[198] Upon hearing about the case, the National Commission for Women—a statutory body established by

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193. Vishaka v. Rajasthan, (1997) Supp. 3 S.C.R. 404 (India).

194. CEDAW Concluding Observations 2000, *supra* note 121, at ¶ 34; Pal, *supra* note 132, at 7.

195. *See* Petition at ¶¶ 14–15, Vishaka v. Rajasthan, W.P. (Cr.) Nos. 666-70/1992 (India 1992) [hereinafter *Vishaka* Petition]; *see* Mihir Desai, *Starting the Battle*, 4 COMBAT LAW (2005) (discussing the Supreme Court's opinion in the *Vishaka* case).

196. Desai, *supra* note 195.

197. *Vishaka* Petition, *supra* note 195, at ¶¶ 3, 31–37; Desai, *supra* note 195; Saira Kurup, *Four Women India Forgot*, TIMES OF INDIA, May 7, 2006, *available at* http://timesofindia.com/articleshow/1519056.cms.

198. *Vishaka* Petition, *supra* note 195, at ¶¶ 43–58; Desai, *supra* note 195; Kurup, *supra* note 197;.

the national government to promote women's rights—initiated a detailed inquiry and issued an independent report finding that "all evidence proved beyond any doubt that the victim . . . was gang raped."[199] Nevertheless, the Rajasthan state criminal court acquitted the five defendants of the rape charge because, among other things, the judge did not find it credible that upper caste men would rape a lower caste woman.[200]

Frustrated by the criminal justice system's inability to provide tangible remedies, restore the dignity of the victim, address systemic issues, and create widespread social change, Naina Kapur, a lawyer who had attended Bhanwari Devi's criminal trial, decided to "focus on the big picture" by initiating a PIL action in the Supreme Court to challenge sexual harassment in the workplace.[201] The case was premised on the argument that although Bhanwari Devi repeatedly reported the months of exhibitionism and sexual harassment to which she was exposed through her work, the state made no attempts to protect her.[202] According to the PIL petition, Bhanwari Devi's situation brought to light the state's "utter disregard [for] and failure to recognize" the sexual harassment experienced by women "while performing functions for the benefit and on behalf of" the government, as well as its failure to "administer prompt and efficient medical and legal redress."[203] Then, to show that the issue was broadly relevant to working women, the petitioners demonstrated a pattern of such abuse by providing examples of five other women who had experienced sexual assault in the course of employment.[204]

Kapur collaborated with other lawyers and women's rights activists to develop the PIL petition based on feedback from the *sathins* about when they experienced sexual harassment, where they felt it needed to be addressed, and how it could be prevented.[205] So, for example, even though the PIL petition addressed sexual harassment in the workplace, it did not include a definition of "workplace" because women who work in rural areas, like the *sathins*,

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199. *Vishaka* Petition, *supra* note 195, at ¶ 65.

200. Pal, *supra* note 132, at 3 (citing unreported decision of the Rajasthan trial court dated Nov. 15, 1995).

201. Telephone Interview with Naina Kapur, Director, Sakshi, in New Delhi, India (Apr. 10, 2006) [hereinafter Apr. 10 Interview with N. Kapur].

202. *Vishaka* Petition, *supra* note 195, at ¶¶ 31–39; Apr. 10 Interview with N. Kapur, *supra* note 201.

203. *Vishaka* Petition, *supra* note 195, at ¶¶ 1–2, 12; *see* INDIA CONST. arts. 14, 19, 21.

204. *Vishaka* Petition, *supra* note 195, at ¶¶ 67–72; Apr. 10 Interview with N. Kapur, *supra* note 201.

205. Apr. 10 Interview with N. Kapur, *supra* note 201 (noting that the *sathins'* description of the rights violations they experienced and the remedies they desired mirrored the provisions of the CEDAW Committee's General Recommendation 19 on violence against women); *see* CEDAW Comm., *Gen. Rec. 19, Violence against Women*, ¶¶ 18, 24(t)(i), U.N. Doc. A/37/48 (Jan. 29, 1992) [hereinafter CEDAW Gen. Rec. 19].

cannot tangibly define their workplaces.[206] The *Vishaka* writ petition was filed in 1992 in the names of five NGOs against the State of Rajasthan, its Women and Child Welfare Department, its Department of Social Welfare, and the Union of India.[207] After the Court accepted the petition for hearing, the petitioners submitted various international and comparative law documents to support their case, as well as a list of proposed judicial directions.[208]

True to the collaborative ambition of the PIL vehicle, the outcome in the *Vishaka* case was the product of cooperation from the government and collective progress made by the parties at each hearing.[209] Both sides submitted draft guidelines, and the petitioning lawyers then submitted suggested amendments to the government's draft.[210] Kapur recalled that the Court "wanted to balance both sides and then make [the guidelines] its own," and the Justices actively sought input from the government to avoid giving the appearance of legislating from the bench.[211] The respondents did put up some resistance along the way—not on the question of sexual harassment, but against the Court's bold application of international law.[212] On the whole, however, the petitioning lawyers felt they were "not battling the government" in this case.[213]

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206. Apr. 10 Interview with N. Kapur, *supra* note 201.

207. *Vishaka* Petition, *supra* note 195. The five petitioning organizations were Vishaka, Mahila Purnvas Samou, Rajasthan Voluntary Health Association, Kali for Women, and Jagori.

208. Proposed Directions of Petitioners at 3–19, Vishaka v. Rajasthan, W.P. (Cr.) Nos. 666-70/1992 (India 1992) [hereinafter *Vishaka* Petitioners' Proposed Directions]. The petitioners' supporting documents included a U.N. document confirming India's ratification of CEDAW (which occurred the year after the initial *Vishaka* petition was filed), relevant sections of a 1994 report by the U.N. Special Rapporteur on Violence Against Women, an International Labor Organization manual on combating sexual harassment in the workplace, a paper on Australian approaches to sexual harassment, and the Philippines Anti-Sexual Harassment Act of 1955. The petitioners also submitted a list of Indian and comparative case law—including decisions issued by courts in the United States, Canada, and Australia—on sexual harassment as a form of discrimination, incorporation of international treaties into domestic law, formulation of judicial guidelines, and compensation for victims.

209. Vishaka v. Rajasthan, (1997) Supp. 3 S.C.R. 404, ¶ 9 (India); *see* Interview with Justice Verma, *supra* note 37 (noting that the Solicitor General representing the government in the *Vishaka* case was "a good lawyer and a fine academician, and when he saw the mood of the Court he tried to assist as best he could").

210. *Vishaka* Petitioners' Proposed Directions, *supra* note 208; Guidelines Suggested by the Government at 3–19, Petitioner's Reply to Proposed Government Guidelines, and Petitioner's Suggestions to Proposed Government Guidelines, Vishaka v. Rajasthan, W.P. (Cr.) Nos. 666-70/1992 (India 1996); Telephone Interview with Naina Kapur, Director, Sakshi, in New Delhi, India (Aug. 29, 2006) [hereinafter Aug. 29 Interview with N. Kapur].

211. Aug. 29 Interview with N. Kapur, *supra* note 210.

212. Apr. 10 Interview with N. Kapur, *supra* note 201; Interview with F. Nariman, *supra* note 17.

213. Apr. 10 Interview with N. Kapur, *supra* note 201.

2. Judgment

A three-judge bench of the Supreme Court delivered the *Vishaka* judgment on August 13, 1997.[214] The decision, written by then-Chief Justice J. S. Verma, described Bhanwari Devi's gang rape as an illustration of "the hazards to which [a] working woman may be exposed," "the depravity to which sexual harassment can degenerate," and the urgent need "for safeguards by an alternative mechanism in the absence of legislative measures."[215] The Court embraced the task of tackling these issues "through judicial process, to fill the vacuum in existing legislation."[216]

Incorporating a broad reading of the Constitution, the *Vishaka* judgment recognized sexual harassment as "a clear violation" of the fundamental constitutional rights to equality, nondiscrimination, life, and liberty, as well as the right to carry out any occupation.[217] In addition, the Court invoked the Constitution's Directive Principle requiring the state to secure just and humane conditions of work and maternity relief and the Fundamental Duty it imposes on all Indian citizens to renounce practices derogatory to the dignity of women.[218]

The *Vishaka* Court also drew heavily upon international law, noting that

> [i]n the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purposes of interpretation of the guarantee of [rights] of the Constitution and the safeguards against sexual harassment implicit therein.[219]

The judgment quoted relevant provisions of CEDAW and the CEDAW Committee's General Recommendation 19 for their definition of sexual harassment and instructions on measures that states should take to combat the practice.[220] Summarizing its review of international law, the Court said, "Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right. The common minimum acceptance of this right has received global acceptance."[221]

The *Vishaka* Court justified its extensive application of international law by emphasizing the Indian government's legal

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214. *Vishaka*, Supp. 3 S.C.R. 404, at ¶ 2

215. *Id.*

216. *Id.* ¶ 1.

217. *Id.* ¶ 3 (citing INDIA CONST. arts. 14, 15, 19, 21).

218. *Id.* ¶ 5 (citing INDIA CONST. arts. 42, 51A); *see* FUNDAMENTAL DUTIES REPORT, *supra* note 95, at 12.

219. *Id.* ¶ 7.

220. *Id.* ¶¶ 12, 13 (citing CEDAW Articles 11 and 24); CEDAW Gen. Rec. 19, *supra* note205, at ¶¶ 17, 18, 24(j).

221. *Vishaka*, Supp. 3 S.C.R. 404, at ¶ 10.

obligations under CEDAW, the official commitments it made at the U.N. Fourth World Conference on Women in Beijing, comparable case law from Australia, and constitutional provisions permitting the state to enter into treaties, to make laws implementing treaty provisions, and generally to "foster respect" for international law.[222] "There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity," the opinion stated.[223] In a recent interview, Justice Verma said, "*Vishaka* is a landmark case [because] it lays down a new path. It was not intended merely to deal with sexual harassment; it opened new vistas in the field of international law becoming part of national law."[224]

To address the domestic and international rights violations highlighted by the *Vishaka* petition, the Court invoked its constitutional power to issue directives that are binding as law in all Indian courts, specifying mandatory guidelines for combating sexual harassment in the workplace.[225] These guidelines, directed toward employers, included a definition of sexual harassment, a list of steps for harassment prevention, and a description of complaint procedures to be "strictly observed in all work places for the preservation and enforcement of the right to gender equality."[226] The Court ensured that the petitioners or other NGOs could remain involved in the implementation of the guidelines by specifying that every workplace complaints committee must include a third party member who is "familiar with the issue of sexual harassment."[227] The coordinator of the Sexual Harassment Project at Sakshi, an NGO founded by Kapur that has played an important role helping employers in the public and private sectors to establish sexual harassment committees pursuant to the Court's directives, explained: "The role of a third party NGO member is to provide guidance to the committee

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222. *Id.* ¶¶ 6, 7, 13–15 (citing an Australian High Court case—Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh, (1995) 183 C.L.R. 273, 287–88—holding that the government's ratification of the CRC established a "legitimate expectation" that the treaty would be observed in the absence of a contrary legislative provision, because an international convention that "declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law").

223. *Id.* ¶ 15 (citing Nilabati Behera v. State of Orissa, (1993) 2 S.C.R. 581 (India)).

224. Interview with Justice Verma, *supra* note 37; *see* Claire L'Heureux-Dube, *From Many Different Stones: A House of Justice*, 41 ALBERTA L. REV. 659, 666 (2003) (quoting the Canadian Supreme Court's citation to the *Vishaka* decision to illustrate the role of international law in interpreting domestic law).

225. *Vishaka*, Supp. 3 S.C.R. 404, at ¶ 16 (citing INDIA CONST. arts. 32, 141).

226. *Id.* ¶¶ 16(1)–(12), 17.

227. *Id.* ¶ 16(7); *see* Nussbaum, *supra* note 125, at 56.

members, to train them on how to deal with sexual harassment cases, and to deal with any undue pressure [on the committee or the complainant]."[228] The *Vishaka* judgment specified that its guidelines would be "binding and enforceable . . . until suitable legislation is enacted to occupy the field."[229]

3. Response

The *Vishaka* case exemplifies the dynamics of judicial activism through PIL. Critics have expressed concern that the Court "stepped outside its bounds" and into the "domain of Parliament" by enacting anti-sexual harassment guidelines that function as law.[230] However, one defender of the judgment argued that "Parliament abdicated its responsibility by not taking action on a relevant and very much identifiable problem, and the Court then actually had to step in to plug the gap, otherwise there may not have been a solution to the problem at all."[231] Justice Verma noted that the other branches of government seem to have "indirectly accepted" the Court's guidelines, because the executive branch has been implementing them and Parliament has not yet replaced them with legislation.[232]

The *Vishaka* guidelines have been directly enforced in the public sector. Various governmental institutions, including the Sports Authority of India, the Central Board of Secondary Education, and the Ministries of Defense, Agriculture, and Human Resources have established internal sexual harassment complaint committees.[233] As for educational institutions, the state can condition financial support upon implementation of the Court's guidelines.[234] A recent graduate of the National Law School in Bangalore, where the guidelines have been enforced, said, "It just makes all the difference to women to know that this is the law. It makes a big difference to people harassing women as well to know that they can be called up on it."[235] The coordinator of the Sexual Harassment Project at Sakshi noted that although implementation of the *Vishaka* guidelines initially met with some resistance, "now people are asking for it."[236]

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228. Telephone Interview with Asha Rani, Sexual Harassment Project Coordinator, Sakshi, in New Delhi, India (Mar. 30, 2006) [hereinafter Interview with A. Rani].

229. *Vishaka*, Supp. 3 S.C.R. 404, at ¶ 16; *see* INDIA CONST. art. 141 ("[T]he law declared by the Supreme Court shall be binding on all courts within the territory of India.").

230. Interview with Justice Srikrishna, *supra* note 37; Interview with R. De, *supra* note 74; Interview with R. Thawani, *supra* note 56.

231. E-mail from R. Thawani, *supra* note 65.

232. Interview with Justice Verma, *supra* note 37.

233. Interview with A. Rani, *supra* note 228.

234. *See* Interview with Justice Verma, *supra* note 37.

235. Interview with V. Shankar, *supra* note 56.

236. Interview with A. Rani, *supra* note 228.

To ensure that its PIL ruling would be applied to private actors, the *Vishaka* Court ordered the central and state governments to "consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector" and directed that sexual harassment be prohibited in standing orders issued under the Industrial Employment (Standing Orders) Act of 1946.[237] Furthermore, Kapur asserted that the *Vishaka* judgment is applicable to the private sector because it was based on CEDAW and its General Recommendation 19, which requires the state to act with due diligence in preventing and punishing right violations committed by private actors.[238] In a recent interview, Justice Verma said he has been "pleasantly surprised" by the extent to which the private sector has "come forward on its own" to operationalize the Court's guidelines.[239]

On March 3, 2006, the Rajya Sabha responded to the *Vishaka* judgment by introducing the Working Women (Prevention of Sexual Harassment at Workplaces) Bill, which credits the Court for having "taken up this issue very seriously."[240] This Bill reveals how judicial response to rights violations through PIL can spur the legislative branch into action. Although the Bill is still pending, Kapur and Justice Verma both said they are not bothered by the legislative delay because of the strong remedies secured by the Court's guidelines.[241] "If the Parliament can do a better job, it better do so; but otherwise, let them not dilute it," Justice Verma remarked.[242] The legislature's delay in enacting the Bill also indicates a compelling motivation for seeking redress through PIL either before or while lobbying for legislation. Kapur expressed frustration with the delays of litigation—the *Vishaka* decision was issued five years after the PIL petition was filed—but she credited the judiciary with creating a big change and working "faster than Parliament at least."[243]

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237. Vishaka v. Rajasthan, (1997) 3 S.C.R. 404, ¶¶ 16(11), 16(3)(c); Interview with Justice Verma, *supra* note 37 ("Industrial establishments are governed by industrial rules called standing orders, which are to be approved by government officer; so at the time of approval, [the officers] should insist on making sexual harassment misconduct punishable under standing orders."); *see* Industrial Employment (Standing Orders) Act, No. 20 of 1946, *available at* http://labour.nic.in/act/acts/IndustrialEmploymentAct.doc.

238. CEDAW Gen. Rec. 19, *supra* note 205, at ¶ 9; Apr. 10 Interview with N. Kapur, *supra* note 201.

239. Interview with Justice Verma, *supra* note 37.

240. Working Women (Prevention of Sexual Harassment at Workplaces) Bill, No. 8 of 2006 (introduced Mar. 3, 2006), *available at* http://rajyasabha.nic.in/bills-ls-rs/2006/VIII_2006.PDF. The Rajya Sabha is the upper house of the Indian Parliament.

241. Interview with Justice Verma, *supra* note 37; Apr. 10 Interview with N. Kapur, *supra* note 201.

242. Interview with Justice Verma, *supra* note 37.

243. Apr. 10 Interview with N. Kapur, *supra* note 201.

4. Impact

The *Vishaka* ruling has made a far-reaching impression on the public by increasing awareness of and accountability for sexual harassment in Indian workplaces.[244] Discussing the significance of the PIL judgment, Justice D. Y. Chandrachud of the Mumbai High Court said:

> Initially, we felt *Vishaka* was just an elaboration of doctrine. But if you look at it now, in the past four to five years there has been tremendous impact. . . . Public organizations have laid down rules against sexual harassment and once there are rules, there is a greater awareness on the part of women. Things become more structured, more transparent. More women are willing to come out in the open now because there is an available forum for discussing these issues.[245]

Additionally, the *Vishaka* decision has promoted greater enforcement of women's rights and broader application of international law at the high court level.[246] The case has thus been described as "path breaking," "one of the most powerful legacies" of PIL, and a "trendsetter" that "created a revolution."[247]

Implementation of the Court's judgment has not been without significant challenges. A 2008 study conducted in West Bengal workplaces highlighted numerous weaknesses in the functioning of sexual harassment committees, and concluded:

> [E]ffective implementation of the Supreme Court guidelines on sexual harassment at the workplace depends both on constitution of proactive complaints committees and developing adequate monitoring mechanisms. This implies developing . . . case redressal procedures that ensure confidentiality, protection of the complainant from victimisation, timely addressal of complaint, capacity development, and a work environment that empowers women workers to raise their concerns.[248]

Moreover, a PIL action calling for better enforcement of the *Vishaka* guidelines was initiated several years ago, to which the Court has responded with various interim orders attempting to address the shortcomings.[249]

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244. *See* Interview with Justice Chandrachud, *supra* note 41; Interview with U. Ramanathan, *supra* note 44; Interview with V. Shankar, *supra* note 56.

245. Interview with Justice Chandrachud, *supra* note 41.

246. *Id.*; Interview with A. Bajpai (2006).

247. Interview with A. Bajpai, *supra* note 246; Interview with Akhila Sivadas, Director, Center for Advocacy and Research, in New Delhi, India (Mar. 14, 2006) [hereinafter Interview with A. Sivadas].

248. Paramita Chaudhuri, *Sexual Harassment at the Workplace: Experiences with Complaints Committees*, ECONOMIC & POLITICAL WEEKLY (Apr. 26, 2008), *available at* http://www.epw.org.in/epw//uploads/articles/12191.pdf.

249. *See, e.g.*, Medha Kotwal Lele v. Union of India, W.P. (Crl.) Nos. 173-177/1999, Item No. 36 (Apr. 26, 2004) (holding that a complaint committee's report "shall be deemed to be an inquiry report" based on which disciplinary action can be

The Court also had occasion to reinforce the *Vishaka* guidelines in a 1999 appeal filed by a female secretary who alleged that her employer had made repeated attempts to accost her sexually.[250] Although the high court had dismissed the action on the grounds that the defendant only "tried to molest" but did not "actually molest" the plaintiff, the Supreme Court reversed on the finding that the alleged behavior fell within *Vishaka*'s definition of sexual harassment.[251] The Supreme Court chastised the high court for having "totally ignored the intent and content of the International Conventions and Norms while dealing with the case,"[252] and also reiterated that "each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty—the two most precious Fundamental Rights guaranteed by the Constitution of India."[253] This case demonstrates how a PIL action that judicially recognizes women's rights can pave the way for the enforcement of those rights through litigation at an individual level. Kapur remarked, "What I love about *Vishaka* is that it is procedurally strong—if someone wants to do something with it they can."[254]

The PIL ruling that empowered working women to assert their rights and paved the way for the use of international law in domestic courts also had a poignant impact on the individual who inspired it. Kapur described Bhanwari Devi's reaction to the *Vishaka* ruling as follows:

> After the judgment came, I took it back to Bhanwari and explained it. She was over the moon. We were lying on two sides of a haystack and she was in a state of joy that her whole experience had helped created something for other women. . . . That it created change for somebody else was important to her.[255]

The *Vishaka* case thus fulfilled the vision of the Supreme Court Justices who developed the PIL mechanism so that the judiciary, the government, and public-spirited petitioners could work together to

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taken, in order to avoid unnecessary delays); Medha Kotwal Lele v. Union of India, W.P. (Crl.) Nos. 173-177/1999, Item No. 104 (Jan. 17, 2006) (directing every state's Chief Secretary to appoint a state-level officer "who is in charge [of] and concerned with the welfare of women in each State" and instructing Labor Commissioners to ensure that complaints committees are established in factories, shops, and commercial establishments, where implementation was most lacking").

250. Apparel Export Promotion Council v. Chopra, (1999) 1 S.C.R. 117 (India).

251. *Id.* ¶ 12 (citing Vishaka v. State of Rajasthan, (1997) 3 S.C.R. 404 (India)).

252. *Id.* ¶ 14 (emphasizing that "the message of international instruments . . . which direct all State Parties to take appropriate measures to prevent discrimination in all forms against women . . . is loud and clear").

253. *Id.*

254. Apr. 10 Interview with N. Kapur, *supra* note 201.

255. *Id.*

redress rights violations suffered by disempowered segments of the population.

5. Importance of Context

The *Vishaka* case highlights the importance of coordinated mobilization and public receptivity to the success of a PIL case. Akhila Sivadas, director of the media-monitoring Center for Advocacy and Research in New Delhi, observed that the *Vishaka* action was well-timed because it took place during a peak period in gender discourse: an era of "removing barriers" after the 1980s period of "breaking the silence."[256] Sivadas applauded the activist judiciary for "taking ownership" of the case: "They never said, 'These are feminists, these are a bunch of bra-burning women.' They did not deploy those tactics and they were not defensive. They themselves saw merit in being progressive, in being gender-sensitive."[257] The Indian media also played a key role in *Vishaka*'s success by providing extensive coverage of the case, reinforcing the critical role that popular opinion plays in the outcome of PIL actions.[258]

The *Vishaka* litigation occurred at a time when working women's rights were an issue of increasing public concern: the legislature had failed to take action, sexual harassment was not perceived as a controversial subject for the Court to address, and "the rationale for a law dealing with the same [was] not debatable."[259] Moreover, the PIL petitioners approached the Court with a coordinated strategy, using the emblematic story of a woman who had suffered undeniably egregious rights abuses. The public and other branches of government were therefore primed to accept the Court's assertive efforts to address the problem through the PIL process.

B. Javed v. State of Haryana

While *Vishaka* demonstrates how PIL and international law can be used to advance women's rights through the judicial system, the 2003 *Javed v. State of Haryana* decision illustrates the dangers of filing uncoordinated litigation in the highest court of the country.[260] In upholding a coercive legislative provision with particularly adverse consequences for women, the *Javed* Court applied a narrow reading of the Constitution, ignored India's international obligations, and exhibited a lack of awareness of Indian women's decision-making

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256. Interview with A. Sivadas, *supra* note 247.
257. *Id.*
258. *Id.*; Interview with Legal Editor, *supra* note 70.
259. Dam, *supra* note 39, at 52.
260. Javed v. State of Haryana, A.I.R. 2003 S.C. 3057 (India).

constraints.[261] The judgment created a precedent with damaging implications for human rights and gender justice in India.

1. Background

In *Javed*, the Supreme Court consolidated more than 200 writ petitions and high court appeals into one case against the State of Haryana and the Union of India, which was treated like a PIL action even though it was not filed as such.[262] The *Javed* litigants challenged the constitutionality of a coercive population control provision in the Haryana Panchayati Raj Act of 1994 (the Haryana Provision), which governed the election of *panchayat*, or village council, representatives in Haryana.[263] The Haryana Provision disqualified "a person having more than two living children" from holding specified offices in *panchayats*.[264] The objective of this two-child norm was to popularize family planning, under the assumption that other citizens would follow the example of restrained reproductive behavior set by their elected leaders.[265]

Forcing a choice between reproductive freedom and political rights by making participation in local governance contingent upon a candidate's number of children violates a number of human rights principles, including the rights to equality, privacy, and personal liberty.[266] A qualitative study conducted in 2001-2002 on the consequences of the two-child *panchayat* norm in five Indian states, including Haryana, found that it had particularly serious consequences for women.[267] The study uncovered "disquieting trends . . . in practices used to meet the conditionality of the law," including falsification of hospital and birth records; marital desertion, divorce, or denial of paternity by male political candidates; sex-selective abortions and abandonment of female infants ("whereas having a son was seen as far outweighing the benefits of being a *panchayat* representative"); and exclusion from political participation

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261. *Id.*

262. *Id.* (noting that the first of the individual cases was filed in 2001, the last was filed in 2003).

263. *Id.* ¶¶ 1–3.

264. *Id.* ¶ 3. The Haryana Provision's two-child norm went into effect one year after the commencement of the act and applied to candidates that had a third child or more after that point. *Id.* ¶¶ 2–3.

265. *See id.* ¶¶ 2, 15 (citing National Commission on Population, Government of India, *National Population Policy 2000*, ¶ 2, http://populationcommission.nic.in/npp_leg.htm); Nirmala Buch, *Law of Two-Child Norm in Panchayats: Implications, Consequences and Experiences*, 2005 Econ. & Pol. Wkly. 2422 (2005) [hereinafter Buch, *Implications*].

266. Buch, *Implications, supra* note 265.

267. *Id.* at 2428.

of women who lacked control over their reproductive decision-making.[268]

The petitioners and appellants in the *Javed* case (hereinafter "petitioners") were individuals who had been disqualified from either standing for election or continuing in the office of a *panchayat* because they had more than two children.[269] After all the petitions and appeals were consolidated, the petitioners agreed to categorize their grounds for challenging the constitutional validity of the Haryana Provision into the following:

> (i) [T]hat the provision is arbitrary and hence violative of Article 14 of the Constitution; (ii) that the disqualification does not serve the purpose sought to be achieved by the legislation; (iii) that the provision is discriminatory; (iv) that the provision adversely affects the liberty of leading [a] personal life in all its freedom and having as many children as one chooses to have and hence is violative of Article 21 of the Constitution; and (v) that the provision interferes with freedom of religion and hence violates Article 25 of the Constitution.[270]

Despite these efforts at consolidation, the *Javed* petitioners' case suffered from the poorly organized manner in which the action arose before the Court.

2. Judgment

A three-judge bench delivered the *Javed* judgment, written by Justice R. C. Lahoti, on July 30, 2003.[271] Upholding the Haryana Provision as "salutary and in the public interest," the Court's main emphasis was on "the problem of population explosion as a national and global issue" at the expense of protecting human rights.[272] The *Javed* decision neglected to evaluate critically whether the contested provision was actually having its intended effect on family planning.[273] Furthermore, the Court did not acknowledge that the application of a coercive two-child norm violates India's international

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268. Nirmala Buch, *Two-Child Norm in Panchayats: People's Experiences*, *in* COERCION VERSUS EMPOWERMENT 28, 28–30, 32–33 (Shruti Pandey et al. eds., 2006) [hereinafter Buch, *Experiences*]; Rita Sarin, *Two-Child Norm and Political Participation of Women in Marginal Communities*; Jagmati Sangwan, *State Overview: Haryana*, *in* COERCION VERSUS EMPOWERMENT, *supra*, at 73-75

269. Javed v. State of Haryana, A.I.R. 2003 S.C. 3057, ¶ 4 (India).

270. *Id.* ¶ 5.

271. *Id.*

272. *Id.* ¶¶ 26–32. The decision initially stated that the Fundamental Rights had no bearing on the case because the right to contest an election is "a special right created by statute and can only be exercised on the conditions laid down by the statute." *Id.* ¶ 21 (citing Jumuna Prasad Mukhariya v. Lachhi Ram, (1955) 1 S.C.R. 608 (India)). Nonetheless, the Court did address the petitioners' constitutional challenges to the Haryana Provision. *Id.* ¶¶ 34–38.

273. *Id.* ¶¶ 56–58.

commitments under various treaties.[274] In fact, the *Javed* opinion's primary reference to international or comparative law was a downward comparison to China's "carrot and stick" approach of attractive incentives and drastic disincentives to enforce strict population control.[275] Discussed below are the Court's responses to the *Javed* petitioners' gender equality and freedom of religion arguments, whose contradictory and poorly supported reasoning contributed to the disappointing outcome of the litigation.

a. Equality and Nondiscrimination Claims

The *Javed* Court held that the Haryana Provision did not violate Article 14 of the Constitution because it was not arbitrary, unreasonable, or discriminatory; instead, the Court described the provision as "well-defined," "founded on intelligible differentia," and based on a clear objective to popularize family planning.[276] The Court failed to respond to the petitioners' argument that "the impugned disqualification has no nexus with the purpose sought to be achieved by the Act" because the number of one's children "does not affect the capacity, competence and quality" to serve in a *panchayat*.[277] Furthermore, the judgment erroneously insisted that the Haryana Provision "[was] consistent with the national population policy."[278] In actuality, India's National Population Policy "affirms the commitment of government towards voluntary and informed choice and consent of citizens while availing of reproductive health care services, and continuation of the target free approach in administering family planning services."[279]

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274. ICESCR, *supra* note 165, at art. 10.1; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 17.1, U.N. GAOR, 21st Sess., 1496th plen. mtg., U.N. Doc. A/6316 (Dec. 16, 1966); *see, e.g.*, Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, art. 16.1(e), U.N. GAOR, 34th Sess., 107th plen. mtg., U.N. Doc. A/34/46 (Dec. 18, 1979); Human Rights Comm., Int'l Covenant on Civil and Political Rights, *General Comment No. 25 (57) 25*, ¶ 15, U.N. Doc CCPR/C/21/Rev.1/Add.7 (Aug. 27, 1996), http://documents-dds-ny.un.org/doc/UNDOC/GEN/G96/180/94/pdf/G9618094.pdf?OpenElement (stating that "[p]ersons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation").

275. *Javed*, A.I.R. 2003 S.C. 3057, at ¶ 31.

276. *Id.* ¶ 7.

277. *Id.* ¶ 8.

278. *Id.*

279. *Id.*; Colin Gonsalves, *Two Boy Norm: State Governments Poised to Blunder*, *in* COERCION VERSUS EMPOWERMENT, *supra* note 268, at 14–17, 18–19; National Commission on Population, Government of India, *National Population Policy 2000*, ¶ 6, http://populationcommission.nic.in/npp_intro.htm; *see* National Colloquium on Population Policy, Development and Human Rights, New Delhi, Jan. 2003, *Final Declaration*, 1-2, http://www.nhrc.nic.in/Publications/PopulationP.pdf [hereinafter NHRC Declaration] (noting that "a coercive approach through use of incentives and

The *Javed* petitioners attempted to highlight the two-child norm's discriminatory impact by pointing to women's lack of reproductive self-determination[280]—an unfortunate reality in India, exacerbated by factors such as coerced early marriage, lack of access to contraception, low literacy levels, economic dependence, and widespread sexual violence.[281] The Court, however, refused to recognize the unequal playing field in which the Haryana Provision operated, stating, "We do not think that with the awareness which is arising in Indian women folk, they are so helpless as to be compelled to bear a third child even though they do not wish to do so."[282] Nor did it direct the governmental respondents to take measures to help couples control the size of their families, such as ensuring access to contraception or combating child marriage. In upholding the Haryana Provision, the Court ignored "the social context of early marriages, early pregnancies and son preference," as well as "the state's responsibility in providing accessible, affordable, equitable, quality health and family welfare services."[283]

b. Religious Freedom Claim

Article 25 of the Constitution states, "Subject to public order, morality and health . . . , all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."[284] The *Javed* petitioners argued that Muslim personal law permits men to have up to four wives "obviously for the purpose of procreating children and any restriction thereon would be violative of [this] right to freedom of religion . . ."[285] Given that polygamy is a form of marriage recognized by international law as inherently

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disincentives which in some cases are violative of human rights . . . is not consistent with the spirit of the National Population Policy").

280. *Javed*, A.I.R. 2003 S.C. 3057, at ¶ 63; Interview with R. Thawani, *supra* note 56 (recalling that "one of the main arguments made in court was that a woman in India does not have control over the number of children she bears, so it is unfair to exclude her from political participation on this basis").

281. Abhijit Das, *A Review of the Supreme Court Judgment*, *in* COERCION VERSUS EMPOWERMENT, *supra* note 268, at 235 [hereinafter Das, *Review*]; Interview with Justice Verma, *supra* note 37.

282. *Javed*, A.I.R. 2003 S.C. 3057, at ¶ 63 (adding that although the legislature may "choose[] to carve out an exception" to the Haryana Provision for females, it will not render the exception unconstitutional "merely because women are not excepted from the operation of disqualification").

283. *See* Buch, *Implications, supra* note 265, at 2429 (noting that when enforcing the two child norm, "all the responsibility is placed only on individuals, particularly women, with serious consequences for them").

284. INDIA CONST. art. 25(1).

285. *Javed*, A.I.R. 2003 S.C. 3057, at ¶ 42.

discriminatory and violative of women's dignity,[286] this claim is inconsistent with the petitioners' equality argument, which emphasized the two-child norm's discriminatory impact on women. The clash highlights the dangers of litigation arising out of numerous individual petitions rather than a unified legal strategy.

The Court rejected the petitioners' freedom of religion argument on two grounds. First, it pointed out that Article 25 does not apply to the Haryana Provision's alleged interference with polygamy because, although Muslim personal law *permits* polygamy, it does not *require* followers to engage in the practice.[287] Further, the Court noted that the Constitution's subjection of the right of religious freedom to the interests of public order, morality, and health render Article 25 inapplicable to "legislation in the interest of social welfare and reform."[288] Notwithstanding the negative result of its reasoning, the *Javed* opinion's refusal to accommodate polygamy is its most positive feature. However, this stance is not surprising given that, in contrast to the mainstream consensus in favor of population control, only a small minority within the Indian Muslim community engages in polygamy and general public opinion stands against the practice.[289] Unfortunately, women's rights issues do not always garner enough popular support for the Court to take a strong position against discriminatory religious norms, as indicated in Part III's discussion of the personal law system.

3. Response and Context

Public health and legal experts have criticized the *Javed* judgment for being "misinformed," "very paternalistic," and demonstrating "no concern about what [the two-child norm] does to the health of the women."[290] The Court's neo-Malthusian approach of "feeling an urgent need to control population" has been condemned as overly emotive and misguided[291] because the Court was "not informed about the position India is occupying in the demographic transition cycle"—i.e., fertility rates have declined but population growth rates continue to appear relatively high due to a momentum effect.[292]

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286. *See, e.g.*, CEDAW Gen. Rec. 21, *supra* note 121, at ¶ 1; Human Rights Committee, International Covenant on Civil and Political Rights, *General Comment No. 28*, ¶ 15, U.N. Doc CCPR/C/21/Rev.1/Add.10 (Aug. 27, 1996).

287. *Javed*, A.I.R. 2003 S.C. 3057, at ¶ 40.

288. *Id.* ¶ 43.

289. *Id.* ¶ 47.

290. Das, *Review*, *supra* note 281, at 234–35; Interview with U. Ramanathan, *supra* note 44.

291. Interview with A. R. Nanda, Executive Director, Population Foundation of India, in New Delhi, India (Mar. 7, 2006) [hereinafter Interview with A. R. Nanda].

292. Das, *Review*, *supra* note 281, at 235; *see also* Gonsalves, *supra* note 279, at 19 (noting that "India has experienced the sharpest fall in its decadal growth

Although the Court treated the *Javed* litigation as a PIL case, it neglected to appoint an amicus or expert committee to enrich its limited understanding of the relevant issues, and it did not check the governmental respondents' adversarial approach.[293] Furthermore, the Court failed to seek input from the National Human Rights Commission (NHRC), despite the fact that the commission had organized a national colloquium on population policies earlier the same year as the *Javed* ruling.[294] In fact, the Court's decision did not even acknowledge the NHRC's strong public stance against coercive population control measures.[295]

The petitioners and their lawyers have also been faulted for not presenting the Court with sufficient field studies on the effects of coercive population control measures and neglecting to draw upon the extensive academic literature and international references on the subject.[296] The judicial law clerk who assisted the Court with the case said he did not recall the petitioners providing sufficient factual data or citing any international law to support their claims.[297] There were even contradictions within the petitioners' constitutional law arguments, as described above in Part IV(B)(2). "Things were not presented properly by the people taking up the case . . . [and] it was a very superficial way of presenting the population scenario," said Dr. A. R. Nanda, director of the Population Foundation of India, who reviewed the *Javed* petitions only after the Court had issued its

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rate . . . and its lowest population growth rate since Independence"). The theory of population momentum, which the Court failed to take into account, explains that population will continue to increase even after the fertility rate is on the decline, due to momentum of past periods of high growth: "[I]ts sheer inertia would keep it moving for some time." Shruti Pandey, *Introduction*, *in* COERCION VERSUS EMPOWERMENT, *supra* note 268, at xxiii; Interview with A. R. Nanda, *supra* note 291.

293. *Javed*, A.I.R. 2003 S.C. 3057.

294. In January 2003, the NHRC collaborated with the United Nations Population Fund and the Indian Ministry of Health and Family Welfare to organize a National Colloquium on Population Policy, Development, and Human Rights. NHRC Declaration, *supra* note 279, at 1. The declaration adopted at the meeting noted "with concern" the following: "[P]opulation policies framed by some State Governments reflect in certain respects a coercive approach through use of incentives and disincentives which in some cases are violative of human rights. . . . The violation of human rights affects in particular the marginalized and vulnerable sections of society, including women." *Id.* at 2. The NHRC distributed the declaration, calling for the exclusion of "discriminatory/coercive measures from the population polices," to all state governments. *Id.* at 2; National Human Rights Commission, *Human Rights Issues*, http://nhrc.nic.in/ ("Human Rights Issues" hyperlink; then follow "Population Policy – Development and Human Rights" hyperlink).

295. *Javed*, A.I.R. 2003 S.C. 3057.

296. Interview with A. R. Nanda, *supra* note 291; *see* Telephone Interview with Rohan Thawani, Supreme Court Advocate, in New Delhi, India (Aug. 8, 2006) [hereinafter Aug. 8 Interview with R. Thawani].

297. Aug. 8 Interview with R. Thawani, *supra* note 296; *see* Interview with A. R. Nanda, *supra* note 291.

ruling.[298] Perhaps most significantly, the litigants failed to publicize the *Javed* case and seek support from the NGO community—a critical shortcoming in PIL actions.[299] In fact, many rights activists working against coercive population policies did not even find out about the *Javed* litigation until after the Court made its final judgment, so they had no opportunity to offer their assistance in gauging public opinion and mobilizing support for the issue.[300]

The lack of engagement with civil society groups and the public was a key weakness of the *Javed* litigation because the two-child norm has received "wide, almost total, social acceptance in the Indian psyche" due to the "popular conception that India's large population is holding the country back."[301] According to social scientists and rights activists, the middle and upper classes in India tend to hold "ostriched opinions" on this matter, regarding the poor as "irrational in their choice of the size of the family"[302] without thoughtfully considering the complex factors at play in population dynamics.[303] The state has capitalized on skewed public assumptions by promoting population control incentives under the guise of "enlightening" the poor.[304] Thus, commentators suggest that the judiciary did not regard *Javed* as a particularly difficult or significant decision.[305] With much of the government and public supporting the two-child norm, the *Javed* Court had little incentive to strike it down.

The *Javed* ruling revealed a judicial Achilles' heel—the Court's inability to stand up for human rights in the face of public panic about population growth curbing development in India. According to one researcher, "The moment you say population is a problem we

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298. Interview with A. R. Nanda, *supra* note 291.

299. Interview with Development Expert, *supra* note 70.

300. E-mail from V. Shankar, *supra* note 42; Interview with Development Expert, *supra* note 70; Telephone Interview with Abhijit Das, Director, Sahayog and Director, Centre for Health and Social Justice, in New Delhi, India (Aug. 11, 2006) [hereinafter Interview with A. Das].

301. Pandey, *supra* note 292, at xix. *India Today*, a widely read national magazine, listed the population "emergency" as the third biggest problem confronting the country in its special 2004 Independence Day issue. S. Prasannarajan, *57 Ways to Make India a Better Place*, India Today, Aug. 23, 2004, at 25 (suggesting, *inter alia*, fines for individuals who have more than two children).

302. Telephone Interview with Akhila Sivadas, Director, Center for Advocacy and Research, in New Delhi, India (Aug. 9, 2006) [hereinafter Aug. 9 Interview with A. Sivadas]; *see also* Interview with A. Bajpai, *supra* note 246.

303. Buch, *Experiences*, *supra* note 268, at 25–27; *see, e.g.*, Apr. 15 Interview with NJA Fellow, *supra* note 120 ("In a country like India you cannot talk about reproductive rights because we have such a humungous population that we are thinking only of ways to control it.").

304. Interview with A. Sivadas, *supra* note 247; Interview with Human Rights Attorney, Lawyer's Collective, in New Delhi, India (Mar. 25, 2006) [hereinafter Interview with Human Rights Attorney].

305. Interview with A. R. Nanda, *supra* note 297; Interview with R. De, *supra* note 74.

have to control in order to develop, the Court will buy that," because tapping into this widely held fear is "the one thing that defeats all other arguments."[306] The case also illustrates another challenge of promoting gender justice in the Indian context: the educated public view many ongoing human rights violations as social, not legal, problems—a view that the Court's judgments in cases such as *Javed* reflect. For example, the recent chairperson of the Law Commission of India described the *Javed* case as involving "a socio-political issue, not a legal issue."[307] Similarly, Justice Lahoti defended the judgment by asserting, "I am a judge and not a social scientist."[308]

4. Impact

The *Javed* judgment has been a significant setback for rights activists because high court judges around the country are now bound to uphold two-child norms. The case highlights the danger of initiating litigation in the highest court in the country and receiving a negative decision—a glaring downside to the potential of the Indian Supreme Court's immense power. Lawyers and activists have held many consultations to determine how to respond to the ruling and have decided not to request a review by a larger Court bench.[309] "If it is referred to a higher bench and the higher bench also upholds the *Javed* judgment, it becomes even more enforceable," said one women's rights lawyer.[310] "It would be a huge risk to take. If the judiciary is using language of a ticking bomb in relation to population, what would be the kind of principles they would uphold?"[311] Indeed, the Court reiterated its decision to uphold the two-child norm by citing the *Javed* case in an unrelated October 2004 opinion.[312]

Litigators are therefore "lying low for the moment" and battling coercive population policies through advocacy efforts outside the

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306. Interview with R. De, *supra* note 74.

307. Interview with Justice Rao, *supra* note 73. Justice Rao is now retired but was sitting chairperson at the time of the interview.

308. Sreelatha Menon, *A Judgment Can't be a Solution to All Problems*, TIMES OF INDIA – AHMEDABAD, Mar. 21, 2006, at 14.

309. When faced with a negative PIL decision, advocates can lobby the legislature to overturn the legal effect of the judgment or request a judicial review of the case by a larger bench of the Court, although it is rare for the Court to overturn a decision on review. Interview with Justice Srikrishna, *supra* note 37.

310. Interview with Human Rights Attorney, *supra* note 304.

311. *Id.*

312. Zile Singh v. State of Haryana, A.I.R. 2004 S.C. 5100, ¶ 10 (India) ("The constitutional validity of 'two child norm' as legislatively prescribed, and a departure therefrom resulting in attracting applicability of disqualification for holding an elective office, has been upheld by this Court as intra vires the Constitution repelling all possible objections founded on very many grounds.").

courtroom.[313] For example, in the year following the *Javed* ruling, advocates organized a national People's Tribunal on Coercive Population Policies and the Two-Child Norm in New Delhi, targeting parliamentarians, policymakers, and the media. The tribunal was a forum in which experts working at the ground level and more than fifty individuals who had suffered gross rights violations due to coercive population policies gathered from fifteen states to present testimony.[314] The hearings highlighted the practical consequences of enforcing family planning in a manner that is insensitive to the rights of women.[315] According to the organizers, "[O]ne of the greatest successes of the tribunal has been its role in changing public discourse on population issues."[316] Such advocacy efforts have provoked positive governmental responses as well: India's Minister for Health and Family Welfare issued a statement against the two-child norm immediately following the 2004 tribunal, and Prime Minister Singh noted during his July 2005 address to the National Population Commission that coercive policies have no place in population programs.[317] Furthermore, several states, including Haryana, have repealed or resisted implementing two-child norms because "lobbies that were speaking against coercive population control have been able to make themselves heard in political circles."[318]

Repairing the damage caused by the *Javed* precedent remains an uphill battle. Despite the successes achieved through the post-judgment mobilization efforts, several other states are now on the verge of adopting two-child norm legislation, and population control remains a sensitive and controversial issue in India.[319] Sivadas, who managed the media coverage for the 2004 tribunal, remarked: "The

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313. Interview with Human Rights Attorney, *supra* note 304. Lawyers were, however, planning to intervene in *Haritash v. India*, a PIL filed in 2005 by supporters of the two-child norm to extend the *panchayat* disqualifications to other states and to members of the national Parliament. Interview with A. R. Nanda, *supra* note 297; Interview with Human Rights Attorney, *supra* note 304.

314. *Preface, in* COERCION VERSUS EMPOWERMENT, *supra* note 268, at vii-viii; Aug. 9 Interview with A. Sivadas, *supra* note 247; Interview with Human Rights Attorney, *supra* note 304.

315. Interview with A. Sivadas, *supra* note 247.

316. Abhijit Das, *Postscript*, *in* COERCION VERSUS EMPOWERMENT, *supra* note 268, at 172 [hereinafter Das, *Postscript*]; *see* Interview with A. Sivadas, *supra* note 247 (noting that the Tribunal has led to "a truce in the discourse" on coercive population policies).

317. Das, *Postscript*, *supra* note 316, at 171; Interview with A. Das, *supra* note 300; Interview with A. Sivadas, *supra* note 247.

318. Interview with Human Rights Attorney, *supra* note 304; *see* Das, *Postscript*, *supra* note 316, at 172; *Haryana Abolishes Two-Child Norm for Elections*, Hindustan Times, July 21, 2006; Interview with A. Das, *supra* note 300.

319. Das, *Postscript*, *supra* note 316, at 172-73.

whole discourse is very volatile; at any time the wind can blow it in any direction."[320]

V. CHALLENGES AND LIMITATIONS

A. *Contextual Challenges*

As illustrated by the *Javed* case and Part III's discussion of weaknesses in the Court's constitutional jurisprudence on gender equality, there are a number of contextual challenges to advancing women's rights through the judicial system in India, despite the availability of the PIL vehicle. This Subpart discusses the difficulties of securing sustainable partnerships between lawyers and ground-level activists, strategically organizing the gender justice movement, and confronting shortcomings in judicial recognition of women's rights. It also considers the skewed gender composition of the Indian judiciary and its implications for promoting women's equality in the country. The next Subpart examines limitations specific to the PIL mechanism itself.

1. Challenges of Collaborating and Mobilizing

Anyone can initiate a PIL case merely by submitting a postcard to the Court, as noted in Part II. However, due to the ballooning use of this mechanism, the success of PIL actions is increasingly dependent upon the filing of formal writ petitions that are strategically timed and supported by robust data, comprehensive legal arguments, and a well-coordinated advocacy movement.[321] The potential benefits of following this route, as well as the negative consequences of not doing so, are highlighted in Part IV's analyses of the *Vishaka* and *Javed* cases. The case studies and interviews with public interest lawyers in India further reveal that PIL actions are more likely to have positive outcomes when lawyers work in close cooperation with petitioners and other ground-level activists during all phases of the litigation, from developing the petition to monitoring implementation of the Court's orders.[322]

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320. Aug. 9 Interview with A. Sivadas, *supra* note 302.

321. Interview with Justice Seth, *supra* note 70; Interview with Shruti Pandey, Director, Women's Justice Initiative, Human Rights Law Network, in New Delhi, India (Dec. 5, 2005) [hereinafter Dec. 5 Interview with S. Pandey]; *see* Mathew, *supra* note 16, at 42–43 (noting that the PIL movement has suffered because "[s]ocial activists and lawyers were not willing to spend energy, time and money to collect relevant facts through survey and research from the field and to present them to the courts in a systematic and proper manner").

322. *See, e.g.*, Apr. 10 Interview with N. Kapur, *supra* note 201; Sept. 18 Interview with S. Pandey, *supra* note 127;; *see also* Jayanth Krishnan, *Lawyering for a*

Securing successful working relationships between women's rights lawyers and ground-level activists can be a challenge. A major point of contention among human rights or public health activists is whether to address a particular rights violation by pursuing litigation or by focusing on community mobilization and policy advocacy instead.[323] Some groups are wary or distrustful of PIL because they feel the legal process tends to be long and inconclusive, and they worry about being "at the mercy of" lawyers and judges.[324] Furthermore, NGOs in rural areas feel that they "take a legal path at their own risk," fearing backlash from local police or an end to governmental assistance.[325] As a result, women's rights groups have often "opted to devote their attention elsewhere, leaving the field [of PIL] to the ad hoc activities of individual lawyers."[326]

Meanwhile, grassroots activists who are keen to approach the courts through PIL petitions contend that it is difficult for them to obtain the long-term legal help they need.[327] A leading public health activist who initiated a recent PIL challenging the practice of prenatal sex selection explained: "There are very few lawyers who are really interested, and very few lawyers will stay with you from the time you file the case till the end. . . . We are not able to sustain their interest. . . . That has been a major limitation."[328] The growth of public interest lawyering organizations in India, such as Lawyer's Collective and Human Rights Law Network, has made a significant difference.[329] However, these two leading groups do not collaborate with each other; generally, "the legal profession consists primarily of

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Cause and Experiences from Abroad, 94 CALIF. L. REV. 574, 596–603 (2006) (describing critical role of grassroots activists in constitutional litigation for women's rights). This is especially crucial for litigation at the Supreme Court level, because attorneys who engage in such practices tend to be concentrated in major cities, removed from the large-scale rights violations occurring in less developed regions of the country.

323. Interview with Development Expert, *supra* note 70.

324. *Id.*; June 8 Interview with S. Pandey, *supra* note 56; *see* Jayanth Krishnan, *Social Policy Advocacy and the Role of the Courts in India*, 21 AM. ASIAN REV. 91 (2003) (discussing reluctance of Indian activists to pursue litigation).

325. EPP, *supra* note 3, at 102 ("Rights-advocacy organizations . . . face hostility and even brutal repression by police officials"); Interview with A. R. Nanda, *supra* note 297; Interview with Development Expert, *supra* note 70.

326. EPP, *supra* note 3, at 106.

327. Interview with A. Das, *supra* note 300; Interview with A. R. Nanda, *supra* note 297; Telephone Interview with Sabu George, public health activist, in New Delhi, India (Mar. 30, 2006) [hereinafter Interview with S. George].

328. Interview with S. George, *supra* note 327.

329. About Us | Lawyer's Collective, http://www.lawyerscollective.org/content/about-us-0 (last visited Mar. 4, 2008) ("Lawyers in the Lawyers Collective [are] engaged in both professional and public interest work, using the former to subsidise the latter."); About HRLN, http://www.hrln.org/aboutus.php (last visited Mar. 4, 2008) ("The Human Rights Law Network (HRLN) is a collective of lawyers and social activists dedicated to the use of the legal system to advance human rights, struggle against violations, and ensure access to justice for all.").

lawyers working individually, not collectively."[330] Consequently, it is difficult to advance a coordinated litigation agenda.

These difficulties in building effective collaborations reflect the general deficiency in the political mobilization of women in India—a serious obstacle to the advancement of gender justice through PIL or any other vehicle. "The women's movement has been too compartmentalized," noted a member of the first generation of feminists in the country.[331] "Some are talking in terms of legal problems, some are talking of social problems, some are talking of economic problems. But a holistic movement . . . [has had difficulty] taking root."[332] Similarly, comparative political scientist Charles Epp has pointed out that "there is little evidence of any larger strategy surrounding any of the Court's women's rights cases, particularly with regard to the systematic pursuit and development of issues over time."[333]

Epp further identifies the "dearth of financial resources for rights litigation" as "[p]erhaps the most significant weakness of the Indian support structure" for legal mobilization:[334]

> If a nation . . . wishes to protect individual rights, it would do well not to confine its efforts to encouraging or admonishing its judges, fine-tuning its constitution, or relying on the values of popular culture to affect rights by osmosis. Societies should also fund and support lawyers and rights-advocacy organizations—for they establish the conditions for sustained judicial attention to civil liberties and civil rights and for channeling judicial power towards egalitarian ends.[335]

Indian courts may direct the government to pay the petitioners' costs in PIL cases, but this ex post facto funding is not guaranteed and, in any event, is insufficient to fund the long-term mobilization efforts needed to successfully promote gender justice through the PIL process.[336]

2. Shortcomings in Judicial Recognition of Women's Rights

The judiciary has often been hesitant or ineffective in protecting the rights of women against the interests of more politically mobilized groups and issues, as seen in the Court's contorted interpretations of biased religion-based personal laws and its refusal to strike down

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330. EPP, *supra* note 3, at 95.
331. Interview with S. Vasaria, *supra* note 18.
332. *Id.*
333. EPP, *supra* note 3, at 106.
334. *Id.* at 101.
335. *Id.* at 6.
336. Mathew, *supra* note 16, at 38; *see* Sheela Barse v. Union of India, (1986) 3 S.C.R. 443, ¶ 8 (India); P. Nalla Thampy Thera v. Union of India, (1984) 1 S.C.R. 709, ¶ 34 (India).

discriminatory population control measures.[337] This is a significant limitation on the Indian judiciary's ability to enforce gender justice, both within and beyond the context of PIL actions.

Furthermore, in the realm of PIL, women's rights advocates may even be disadvantaged as compared to other less mobilized groups, such as environmental rights activists, because of the Court's tendency to reflect the mainstream patriarchal biases of the educated Indian middle and upper classes—as seen in Part IV's *Javed* case study and Part III's discussion of the Court's equality and privacy jurisprudence. Justice Pal, the last female Supreme Court Justice, observed that failures to obtain judicial redress for violations of women's rights often result from a lack of "conceptual recognition of the offence," and "[t]he most frequent judicial failures to conceptualize the offence arise when the court approaches the issue with certain judicial predispositions, based on either class or gender."[338] Acknowledging that most judges are influenced by unarticulated premises stemming from their personal backgrounds and experiences, a recently retired Supreme Court Justice, who was still in office when interviewed, noted that he "could not say confidently" that there is awareness of gender issues on the highest bench.[339] This lack of awareness was exhibited in the *Javed* Court's ill-informed assumptions about women's reproductive decision-making power and its refusal to recognize the implicated rights violations as a legal issue.[340]

The Court's inclination to abide by partriarchal gender norms might be a reflection of the Justices' desire to "keep their fingers firmly upon the pulse of the accepted morality of the day" in order to maintain popular support or to justify judicial encroachment into the roles of elected officials.[341] However, the judiciary has a mandate to enforce constitutional rights independent of mainstream sentiment.[342] As leading Indian jurist S. P. Sathe has argued: "Courts do not have to bow to public pressure, but rather they should stand firm against public pressure. What sustains legitimacy of judicial activism is not submission to populism, but its capacity to withstand such pressure without sacrificing impartiality and objectivity."[343] Similarly, a concurring opinion in a foundational PIL case emphasized that the Court must not "bend and mould its

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337. *See supra* Part III.A.1.a.ii, Part IV.B.

338. Pal, *supra* note 132, at 3.

339. Interview with Justice B. N. Srikrishna, *supra* note 37.

340. *See supra* Part IV.B.

341. Sans Pal Singh v. State of Delhi, A.I.R. 1999 S.C. 49, ¶ 43 (India) (internal quotation marks omitted).

342. Sathe, *supra* note 7, at 106.

343. *Id.*

decision to popular notions of which way a case should be decided," because:

> There is great merit in the Court proceeding to decide an issue on the basis of strict legal principle . . . [f]or that alone gives the decision of the Court a direction which is certain, and unfaltering, and that particular permanence in legal jurisprudence which makes it a base for the next step forward in the further progress of law.[344]

This cautionary statement is particularly relevant to PIL actions in which the Court is confronted with legitimate legal claims that conflict with conventional thinking, as in cases pertaining to gender equality. The judiciary risks betraying its own legitimacy if it conforms to a public consensus that conflicts with principles of the Constitution and international law.

3. Gender Composition of the Judiciary

An examination of the Court's potential for promoting women's rights would be incomplete without addressing the implications of the imbalanced gender composition of the Indian judiciary. There are currently twenty-five seats on the Supreme Court, and not one of them is occupied by a woman.[345] In the five-plus decades of the Court's existence, it has benched only three female justices—the first of whom was appointed four decades after the Court was established, and the last of whom retired in June 2006.[346] Women are also extremely underrepresented in the Indian high courts, with between zero and four female judges appointed on benches that have up to forty seats.[347] In 2003, there were 514 judges on the Supreme Court and high courts, of whom only 17 were women;[348] three years later, the director of the National Judicial Academy noted that the national

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344. Bandhua Mukti Morcha v. Union of India, (1984) 2 S.C.R. 67, ¶ 77 (India).

345. Supreme Court of India – CJI & Sitting Judges, http://supremecourtofindia.nic.in/new_s/judge.htm (last visited May 21, 2008).

346. The three female Supreme Court justices were Justice Fathima Beevi, Justice Sujata Manohar, and Justice Ruma Pal. *See* Jaising, *supra* note 104, at 292; National Resource Centre for Women, *Women in Judiciary*, http://nrcw.nic.in/index2.asp?sublinkid=478 (last visited Mar. 10, 2008) [hereinafter NRCW website]. It is unlikely that there will be another female justice on the Supreme Court bench for some time because the Court looks to the twenty senior-most high court judges to fill its vacancies and most of the female judges in high court positions have been appointed only within the last few years. INDIA CONST. art. 124 § 3; Supreme Court Advocates-on-Record Assoc. v. Union of India, (1993)4 S.C.C. 441, ¶ 70 (India); Apr. 13 Interview with Supreme Court Justice, *supra* note 70; *see* Jaising, *supra* note 104, at 291 ("This formula sounded the death knell of equitable appointment of women judges . . . . By this apparently egalitarian formula, women will have to wait for generations before they make it to the Supreme Court.").

347. *See* NJA Interviews, *supra* note 70.

348. NRCW website, *supra* note 346.

representation of women in the judiciary was as low as 2%.[349] Most disturbingly, the female judges interviewed by the Author consistently described encountering gender-related obstacles to becoming a judge, as well as continued discrimination from their male colleagues after being appointed to the bench.[350]

The U.N. Human Rights Committee has identified the fact that "[w]omen remain under-represented in public life and at the higher levels of the public service" as evidence of the Indian government's failure to meet its obligations of ensuring gender equality.[351] Furthermore, the discrimination encountered by female judges suggests a danger of similar gender biases being reflected in judgments pertaining to women's rights, as seen in Part III's discussion of the *Air India* case. The presence of more women in the judiciary could itself contribute to the promotion of gender justice by challenging patriarchal conceptions about gender roles in Indian society. One high court judge pointed out that women on the bench are "important catalysts" because "apart from the work they do as judges, they are important role models for society."[352]

Justice Verma—who presided over the *Vishaka* PIL alongside a female colleague, Justice Sujata Manohar[353]—asserted that having women in the judiciary also "makes a difference in the sense that you get valuable input for decision-making; if there is a gender issue, you expect that degree of sensitivity from a woman judge that maybe you have missed."[354] The female presence does not, of course, extinguish gender biases; as one lawyer noted, "Yes, it makes a difference, we need a body of women on the bench, but the assumption that having

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349. MADHAVA MENON, GENDER JUSTICE AND JUDICIARY: AN ASSESSMENT 35 (2006), http://ncw.nic.in/pdfreports/All%20India%20Meeting%20of%20chief%20Justice.pdf (last visited Mar. 10, 2008).

350. *See, e.g.*, LEILA SETH, ON BALANCE, 112–115, 319–320 (2003); Interview with Bombay Judges, *supra* note 134; Interview with Justice Seth, *supra* note 70 (noting that female candidates receive more scrutiny and criticism about their private lives than their male counterparts during the judicial appointment process, which is dominated by male judges); Mar. 26 Interview with Law Clerk, *supra* note 59; NJA Interviews, *supra* note 70 (providing examples of discriminatory treatment encountered on the bench as female judges). In fact, the unique challenges and insecurities inherent in being a female judge in India are starkly illustrated by the fact that all but one of the nine female judges interviewed asked to speak off the record or on the condition of anonymity, while only one out of the same number of male judges made such a request.

351. HRC Concluding Observations 1997, *supra* note 121, at ¶ 17; *see* INDIA CONST. art. 16 (guaranteeing equal opportunity and non-discrimination in public employment and appointment to public office); Jaising, *supra* note 104, at 291–93 ("It is pointless to evaluate a court without mentioning the manner in which the institution itself is constituted. . . . If equality is to mean anything at all, it must mean equal representation for women on the Bench.").

352. Interview with Justice Chandrachud, *supra* note 41.

353. Vishaka v. State of Rajasthan, A.I.R. 1997 S.C. 3011(India).

354. Interview with Justice Verma, *supra* note 37.

more women, any women, will make it more gender-friendly cannot be applied."[355] A more balanced and representational gender perspective in legal decision-making could, however, strengthen the legitimacy of the Court's jurisprudence on equality.

B. *Limitations of the PIL Mechanism*

In addition to the contextual challenges that women's rights advocates in India face, all petitioners seeking to advance their causes through the PIL process must confront limitations specific to the mechanism itself. As expressed by the petitioning lawyer in the *Vishaka* action, delays inherent in pursuing justice through the courts are a major disincentive for rights advocates, and petitioners have even sought to withdraw PIL actions for this reason.[356] One scholar of the Indian legal system explained:

> The courts in India are thought to be the most crowded in the world. A recent report states that there are "23 million pending court cases—20,000 in the Supreme Court . . . ." These mind-boggling backlogs and delays in the legal process have far-reaching implications for those interested in making social policy changes.[357]

Legal commentators have additionally pointed out the following drawbacks specific to the PIL vehicle: "an inability to resolve disputed questions of fact; weakness in delivering concrete remedies and monitoring performance; reliance on generalist volunteers with no organizational staying power; and dissociation from the organizations and priorities of the disadvantaged."[358] This Subpart focuses on two particular obstacles related to the PIL process: the Court's difficulties in implementing its PIL orders and the increasing backlash caused by abuse, overuse, and inconsistency of the PIL mechanism.

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355. Interview with Dr. Usha Ramanathan, Independent Researcher on Jurisprudence of Law, Poverty, and Rights, in New Delhi, India (Apr. 8, 2006) [hereinafter Apr. 8 Interview with U. Ramanathan]; *see also* Interview with Justice Chandrachud, *supra* note 41 (emphasizing need to generate judicial awareness of "hidden prejudices" regardless of gender).

356. Interview with N. Kapur, *supra* note 201; *see* Sheela Barse v. Union of India, (1988) Supp. 2 S.C.R. 643 (India).

357. Krishnan, *Social Policy Advocacy*, supra note 324; *see also* Mathew, *supra* note 16, at 44 ("Very few PIL cases ha[ve] been decided expeditiously."); Susman, *supra* note 7, at 98 (noting that any litigation in the Court can take a decade or more).

358. Marc Galanter & Jayanth K. Krishnan, *'Bread for the Poor': Access to Justice and the Rights of the Needy in India*, 55 HASTINGS L. J., 789, 797; *see also* Hassan & Azfar, *supra* note 57, at 228–29.

1. Implementation of the Court's Directives

A key weakness of PIL is that the Court's authority to issue orders through this vehicle far exceeds its ability to enforce them.[359] Despite the Court's powerful public reputation, it often encounters uncooperative or inefficient state officials to whom it must issue order after order to get anything done—especially when judicial directives are overly ambitious and difficult to implement.[360] Moreover, judges often lack the time and resources to follow up adequately on their PIL actions, which constitute only a small percentage of their heavy caseload.[361] Although it is the state's responsibility to carry out judicial directives, and NGOs play an important role in monitoring enforcement at the grassroots level, failures in implementation ultimately reflect poorly upon the judiciary itself.[362]

To address noncompliance among PIL respondents, the Court may first attempt to use judicial strong-arm tactics, such as ordering a high-ranking official of the unresponsive state government to appear before the bench and explain the noncompliance.[363] When this fails, the judiciary's primary weapon is to hold violators in contempt of court.[364] Although this is a significant power, it can be difficult to execute and "gets stunted with overuse."[365] In *Madhu Kishwar v. State of Bihar*, a PIL action challenging a tribal law that denied women equal inheritance rights, the petitioner recalled the Court's discouraging her request for a contempt order on the ground that "the Bihar government or its police are not going to heed it any more than they did our original order."[366] Summing up the

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359. EPP, *supra* note 3, at 88; Galanter & Krishnan, *Bread for the Poor*, *supra* note 358, at 797; Interview with Bombay Judges, *supra* note 134; Interview with F. Nariman, *supra* note 17; Interview with Justice Seth, *supra* note 70; Interview with R. Thawani, *supra* note 56.

360. KISHWAR, *supra* note 122, at 47–49; Susman, *supra* note 7, at 78; Interview with F. Nariman, *supra* note 17; Apr. 15 Interview with NJA Fellow, *supra* note 120.

361. Interview with Justice Srikrishna, *supra* note 37 (pointing to the difficulties in implementing recent PIL directives on the distribution of food and the demolition of illegal construction: "How can a judge sitting in court oversee this? . . . Are we going to keep count of that or do we have other work?"); Mar. 26 Interview with Law Clerk, *supra* note 59. In January 2007, 658 PIL petitions were pending admission and 313 PIL actions were pending hearing, but this comprised only 3% and 2% of the Court's pending cases, respectively.

362. Apr. 13 Interview with Supreme Court Justice, *supra* note 70; Interview with Bombay Judges, *supra* note 134; Interview with Human Rights Attorney, *supra* note 304.

363. Interview with F. Nariman, *supra* note 17.

364. INDIA CONST. art. 142, § 2; Srikrishna, *supra* note 13, at J-17; Interview with Justice Seth, *supra* note 70.

365. Srikrishna, *supra* note 13, at J-18; Interview with Bombay Judges, *supra* note 134; Interview with Justice Seth, *supra* note 70; Interview with R. Thawani, *supra* note 56.

366. KISHWAR, *supra* note 122, at 48.

judiciary's limitations in this regard, a Supreme Court Justice observed, "The courts possess neither the power of the sword, nor the purse; they only have to rely upon the goodwill and respect of the two coordinate constitutional branches as that of the general public, for the enforcement of their orders."[367] He hastened to add, however, that "this argument should . . . not be misunderstood as recommending the pursuit of public popularity or suggesting that Judges should be moved by the hysterias of the day."[368]

The implementation challenges faced by the Court are significant, but in a country as vast and complex as India, even legislative and executive laws and policies encounter similar hurdles. In fact, as noted in Part II's discussion of the Court's "enviable" reputation, the upper judiciary is generally regarded as more likely to get things done than the other branches of government. Moreover, even when the Court's orders are not fully enforced, PIL actions add value by generating public awareness, galvanizing activists, and thereby deterring further rights violations.[369] Just as the rights revolution in the United States "did not merely result in judicial recognition of individual rights; it also gave rights advocates bargaining power and leverage that enabled them to expand protection for individual rights in practice,"[370] the same can be said of the PIL vehicle in India. A local development expert noted that once there is a "Supreme Court stamp" in favor of a particular issue, advocates "get a certain upper hand and can go ahead with the changes very vigorously, . . . so it becomes a right."[371] The *Vishaka* judgment illustrates this point: "It is obviously not implemented absolutely, but just the fact that everybody knows about it, that it is there . . . makes the difference," observed one lawyer.[372] Similarly, although the above-noted *Madhu Kishwar* petitioner was disappointed by the Court's inability to secure implementation of its orders, she acknowledged that by bringing the PIL, "[w]ithin a short time, we had succeeded in getting the issue of women's land rights debated and discussed among a whole range of social and political organizations."[373]

Thus, as one high court judge pointed out, "By doing justice in each case, [judges] are important in mobilizing public opinions. Courts have an important, vital role to play as actors in the social process of changing opinions and views, and in shaping values of

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367. Srikrishna, *supra* note 13, at J-17.

368. *Id.*

369. *See, e.g.*, Apr. 15 Interview with NJA Fellow, *supra* note 120; Interview with Justice Seth, *supra* note 70; Interview with R. Thawani, *supra* note 56.

370. EPP, *supra* note 3, at 9.

371. Interview with Development Expert, *supra* note 70.

372. Interview with V. Shankar, *supra* note 56.

373. KISHWAR, *supra* note 122, at 41.

society."[374] In addition, each Supreme Court PIL judgment recognizing a rights violation paves the way for future litigation in lower courts, creating new avenues for seeking accountability and redress, as seen in the aftereffects of the *Vishaka* ruling.[375] For these reasons, PIL remains a crucial vehicle for promoting gender justice, regardless of the implementation difficulties inherent in the process.

2. Backlash against the PIL Vehicle

Contributing to the challenges of implementation is the resistance that the PIL mechanism is encountering from the public, the judiciary, and the other branches of government due to abuse and overuse. "The courts opened their doors so wide that they find it difficult to control the influx today," observed one Supreme Court Justice, adding that overuse of PIL could reduce its efficacy and erode the credibility of the Court.[376] Moreover, judges and members of the public are now referring to certain PIL actions as "private" or "publicity" interest litigation, because of petitioners who bring personal disputes under the guise of PIL or file "nonsensical things so that their names are reported."[377] PIL is also being called "politically" and "persecution" interested litigation, because petitioners often have their own agendas and "there are lawyers who specialize in PIL who are nothing but blackmailers."[378] Therefore, although the Court once encouraged PIL cases, it has now adopted a more wary stance.[379]

There are also increasing objections to the way PIL jurisprudence has evolved. Critics contend that PIL has changed drastically since the early 1990s: "the common man's constituency seems to have shrunk" and the mechanism is increasingly being used to protect the rights of the "propertied middle class."[380] They further

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374. Interview with Justice Chandrachud, *supra* note 41.

375. *See supra* Part IV.A.4.

376. Srikrishna, *supra* note 13, at J-19; Interview with Justice Srikrishna, *supra* note 37; *see* EPP, *supra* note 3, at n. 66 (discussing the down-sides of the Court's "easy access"—including litigants' limited motivation to "carefully develop case strategies," shortage of judicial attention given to each case, and impact of human rights PIL actions being diluted by "vastly larger number of cases continually brought by other interests").

377. Mathew, *supra* note 16, at 41, 44; Interview with Justice Srikrishna, *supra* note 37.

378. Interview with Justice Rao, *supra* note 58; Interview with Justice Srikrishna, *supra* note 37.

379. Mathew, *supra* note 16, at 43, 45; Susman, *supra* note 7, at 82; Confidential Interview with sitting Justice, Supreme Court of India, in New Delhi, India (Mar. 27, 2006); Mar. 27 Interview with Law Clerk, *supra* note 183.

380. Interview with Senior Official, National Human Rights Commission, in New Delhi, India (Mar. 28, 2006) [hereinafter Interview with NHRC Official]; Mar. 26 Interview with Law Clerk, *supra* note 59; Discussion at Law & Life in South Asia

argue that there has been a trend toward using PIL as a way to globalize India, and that the Court has shifted away from "anti-development" cases that protect against displacement of the poor.[381] Thus, some regard PIL as no longer having the "radical edge" it once had.[382]

Another factor contributing to the instability of the PIL mechanism is the inconsistency of the Court's judgments, as seen in the vastly contrasting judicial approaches taken in the *Vishaka* and *Javed* cases.[383] Epp has observed that the "most important reason for incoherence in the agenda is that the Indian government has responded to the Court's growing workload not by granting justices discretion over which cases to decide (as is the case in Canada and the United States) but by increasing the number of justices on the Court"—from the Constitution's original eight to today's bench of twenty-five.[384] The Supreme Court justices usually sit in panels of two or three rather than en banc, so it is possible for differing opinions to be issued on similar topics at the same time.[385] "The entertaining of PIL cases and their outcome depend very much on a particular Bench of Judges and their socio-political ideology," observed one commentator.[386] The judiciary's lack of predictability is exacerbated by the fact that, although Supreme Court Justices do not have fixed terms, their tenure on the bench, particularly in the position of Chief Justice, tends to be relatively short due to the mandatory retirement age of sixty-five.[387] Rajeev Dhavan, director of the Public Interest Legal Support and Research Centre in New Delhi, observed that the resulting unevenness in the Court's responses has led to "disenchantment" with the PIL mechanism.[388]

Notwithstanding these shortcomings vis-à-vis the goals envisioned by its creators, PIL has undeniably been instrumental in expanding access to the judiciary and procuring key advancements

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Conference at Yale University (May 12, 2006) [hereinafter Discussion at Law & Life Conference]

381. Discussion at Law & Life Conference, *supra* note 380.

382. *Id.*

383. *See* Apr. 13 Interview with Supreme Court Justice, *supra* note 70; Interview with Dr. Rajeev Dhavan, Director, Public Interest Legal Support and Research Centre, in New Delhi, India (Mar. 25, 2006) [hereinafter Interview with R. Dhavan].

384. EPP, *supra* note 3, at 83. Unlike the U.S. Supreme Court, which decides whether to hear a case based on written submissions alone, the Indian Court permits the practice of oral argument in this process.

385. EPP, *supra* note 3, at 83; Apr. 13 Interview with Supreme Court Justice, *supra* note 70; Interview with R. Dhavan, *supra* note 383.

386. Mathew, *supra* note 16, at 42; *see also* E-mail from V. Shankar, *supra* note 42 (emphasizing the significance of the Chief Justice's case assignment power).

387. *See* EPP, *supra* note 3, at 83 (explaining the appointment and retirement of Supreme Court justices).

388. Interview with R. Dhavan, *supra* note 383.

for women's rights and human rights generally. Dhavan thus maintained that "the place of PIL in India's democratic governance cannot be denied."[389] Another Supreme Court advocate observed that the Court's orders "are likened by some to a throw of dice, yet people abide by their judgments, obey their decisions, regard the Court as if it were a secular deity and the judges Gods in secular form."[390]

VI. STRATEGIC CONSIDERATIONS

Part VI discusses some strategic considerations relevant to countering the challenges and limitations encountered by advocates seeking to address violations of women's rights through PIL. Drawing upon findings from the case studies and interviews with a range of actors involved in the PIL process in India, this Part explores the important roles to be played by the public, the media, national statutory bodies, and lower courts.

A. *Building Public Awareness and Support*

As the case studies discussed in Part IV and the implementation difficulties discussed in Part V indicate, public support for matters brought before the Court can be critical in determining the outcome and impact of PIL actions. In fact, the very concept of PIL reflects the Indian emphasis on the collective. Thus, particularly when dealing with "large-scale social issues" like gender equality, lawyers emphasize that they must "build public opinion to have a support base when going to Court," because "judges are not cut off from what is happening around them" and "if you can create a political will, you can get the benefit of that in the judgment."[391]

One commentator suggested that activists and advocates should aim to "use PIL in the context of popular movements and social action" because "to rely entirely on PIL or courts for social transformation is wishful thinking."[392] Similarly, a seminal 1984 PIL opinion foreshadowed:

> The successful implementation of the orders of the Court will depend upon the particular social forces in the backdrop of local history, the prevailing economic pressures, the duration of the stages involved in the implementation, the momentum of success from stage to stage, and

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389. *Id.*

390. Gobind Das, *The Supreme Court: An Overview*, *in* SUPREME BUT NOT INFALLIBLE, *supra* note 104, at 45.

391. Interview with Human Rights Attorney, *supra* note 304; Mar. 26 Interview with Law Clerk, *supra* note 59.

392. Mathew, *supra* note 16, at 49.

> the acceptance of the Court's actions at all times by those involved in or affected by it.[393]

In addition, securing the support and potential involvement of civil society groups is a key element of initiating a PIL action because the very nature of the PIL mechanism causes the Court's decisions to affect many others beyond the petitioners and lawyers involved in the case at hand. The aftermath of the *Javed* ruling illustrates how filing unpublicized litigation on a particular issue can lead to binding negative legal precedent with devastating consequences for all activists working on the subject matter.[394] The "reflection and decision" of all those who will be impacted by the litigation should therefore be taken into consideration.[395]

Inversely, the strategic initiation of a well-planned PIL action can open new avenues for creating awareness about and challenging rights violations. For example, the lawyers who filed a recent PIL case challenging the practice of child marriage were subsequently invited by the government to provide input on draft legislation and to help states investigate ongoing violations.[396] An attorney involved in the action noted that in this manner PIL "ceases to be just a case in court where you are getting an order; it becomes a platform for social advocacy, for educating society, for getting to work with the government in a non-adversarial way."[397]

B. *Involvement of the Media*

The Indian media can play a pivotal role before, during, and after PIL actions in publicizing the cases and guiding public opinion and behavior.[398] "During the past, it was the law that provided the source of authority for democracy, which today appears to have been replaced by public opinion with the media serving as it[s] arbiter," a senior Supreme Court advocate observed.[399] In the *Vishaka* PIL, for example, the media helped promote and raise awareness about the

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393. Bandhua Mukti Morcha v. Union of India, (1984) 2 S.C.R. 67, ¶ 13 (India).

394. *See supra* Part IV.B.

395. *Bandhua Mukti Morcha*, 2 S.C.R. 67, at ¶ 75.

396. June 8 Interview with S. Pandey, *supra* note 56. While awaiting the enactment of new legislation against child marriage, lawyers involved in the PIL case have been monitoring incidents of child marriage at the local level and submitting reports to the Court. *See* Interim Order, FFDA v. Union of India, W.P. (Civ.) No. 212/2003 (India May 13, 2006) (directing states to file counter-affidavits and asking NHRC and state human rights commissions to conduct inquiries into alleged incidences of child marriage.).

397. June 8 Interview with S. Pandey, *supra* note 56.

398. Interview with Justice Chandrachud, *supra* note 41; Interview with Justice Verma, *supra* note 37.

399. Das, *The Supreme Court*, *supra* note 390, at 38; *see also* Interview with R. Dhavan, *supra* note 383 (describing the press as "not just the fourth estate, it is really a constitutional agency in its own right").

Court's judgment.[400] After the negative *Javed* decision, activists used the media to shift the public discourse on population policies in a more rights-based direction by informing journalists through training workshops and public hearings.[401]

Due to fierce competition for press coverage, ensuring media attention for a PIL case entails being persistent and building strategic relationships with newspaper editors and television producers.[402] For example, the public health activist behind the recent PIL challenging prenatal sex selection pursued a vigorous strategy of media mobilization—making between 100 and 150 calls per day to journalists during critical phases of the PIL—to obtain support for the case.[403]

The media can also act as a launching pad for PIL actions. A newspaper article depicting a harrowing incident with constitutional rights implications can provide a powerful impetus for litigation, because the violations will already have the Court's and the public's attention.[404] At the other end, after the Court issues orders in a PIL case, the media can facilitate their implementation by spreading knowledge about the judicially recognized rights and remedies. The Court has capitalized on this potential by directing newspapers and public radio and television stations to publicize its PIL rulings.[405] Following this lead, the *Vishaka* petitioners specifically requested that the Court circulate its judgment in that case through various points of distribution, including radio, television, and the Press Council of India.[406]

C. *Role of National Statutory Bodies*

The Indian government has established several national commissions to help it fulfill its constitutional and international

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400. *See Vishaka* Petitioners' Proposed Directions, *supra* note 208.

401. Sivadas, who handled the media contacts during the post-*Javed* 2004 tribunal, said she "made sure that the journalists came, that they were put in touch with the right people, and that strong things were written every day" to shift the media dialogue away from panic about population explosion. Aug. 9 Interview with A. Sivadas, *supra* note 302.

402. Interview with Legal Editor, *supra* note 57 (suggesting advocates must "keep hammering" with the media).

403. Interview with Legal Editor, *supra* note 57; Interview with S. George, *supra* note 327

404. Mathew, *supra* note 16, at 47 ("Many cases in the past originated from published news reports, analysis or letters to the editor."); Interview with Human Rights Attorney, *supra* note 304; Interview with Shruti Pandey, Director, Women's Justice Initiative, Human Rights Law Network, in New Delhi, India (May 25, 2006) [hereinafter May 25 Interview with S. Pandey].

405. *See, e.g.*, Parmanand Katara v. Union of India, (1989) 3 S.C.R. 997, ¶ 9 (India) (directing that "adequate publicity highlighting these aspects should be given by the national media as also through the Doordarshan and the All India Radio").

406. *Vishaka* Petitioners' Proposed Directions, *supra* note 208, at 19–20.

obligations. The National Commission for Women (NCW) and the National Human Rights Commission (NHRC) could be important allies in PIL cases addressing violations of women's rights.

1. National Commission for Women

The NCW is an autonomous, statutory body established by the Indian government in January 1992, pursuant to the National Commission for Women Act, to "review the constitutional and legal safeguards for women, recommend remedial legislative measures, facilitate redressal of grievances and advise the Government on all policy matters affecting women."[407] According to Chairperson Dr. Girija Vyas, the NCW functions "like a copula, a link between the government, the NGOs, and the victims."[408] The NCW interacts with the judiciary in several ways: it regularly assists NGOs that file PIL cases for women's rights by submitting supporting affidavits to the Court,[409] and it occasionally initiates litigation upon learning about gender-related "atrocities" that are not receiving adequate governmental attention.[410] Practitioners have praised the NCW for intervening "in a very, very proactive manner" and "taking up sensational or difficult cases."[411]

The NCW also gets involved in PIL cases pursuant to the Supreme Court's request or referral.[412] For instance, in a 1995 PIL decision addressing an incident in which five girls were raped by a group of soldiers while traveling on a train, the Court asked the NCW to frame a compensation and rehabilitation scheme for rape

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407. Government of India, National Commission for Women, http://pib.nic.in/feature/feyr2002/fmar2002/f050320021.html (last visited Mar. 28, 2008); *see* National Commission for Women Act, No. 20 of 1990, *available at* http://pib.nic.in/feature/feyr2002/fmar2002/f050320021.html; P. D. MATHEW, NATIONAL COMMISSION FOR WOMEN 6–7 (2004); Interview with Dr. Girija Vyas, Chairperson, National Commission for Women, in New Delhi, India (Apr. 12, 2006) [hereinafter Interview with G. Vyas]; Interview with Yogesh Mehta, Legal Officer, National Commission for Women, in New Delhi, India (Apr. 12, 2006) [hereinafter Interview with Y. Mehta].

408. Interview with G. Vyas, *supra* note 407.

409. When interviewed in April 2006, the NCW's legal officer said the commission was involved in six pending Supreme Court cases on gender-related issues. Interview with Y. Mehta, *supra* note 407.

410. Interview with G. Vyas, *supra* note 407. Although the NCW can be a petitioner in such cases, it cannot prepare and file petitions itself because its one legal officer is not a practicing lawyer. Therefore, the NCW seeks legal representation in PIL cases from a panel of independent lawyers with whom it works on a regular basis. Interview with Y. Mehta, *supra* note 407.

411. June 8 Interview with S. Pandey, *supra* note 56; *see, e.g.*, Danial Latifi v. Union of India, A.I.R. 2001 S.C. 3958, ¶ 17 (India).

412. Interview with G. Vyas, *supra* note 407.

victims.[413] More recently, when deciding the question of whether marriage registration in India should be mandatory, the Court sent notice to the NCW to place its views on the record.[414] The NCW responded by submitting an affidavit asserting that mandatory registration is of "critical importance to various women related issues,"[415] and the Court accepted this position, acknowledging that the NCW's argument was "rightly contended."[416]

Yet local advocates have noted that the NCW's role in promoting women's rights is limited for several reasons: the organization is too political and bureaucratic; it lacks sufficient legal expertise; and much of its work "remains on paper and does not really get going" because its recommendations are not binding upon the government.[417] The NCW has also been criticized for its delayed responses, attributable largely to resource limitations.[418] The NCW has proposed amendments to the National Commission for Women Act that, if enacted, would make it a more powerful and effective body.[419]

2. National Human Rights Commission

Two years after the establishment of the NCW, the Indian government enacted the Protection of Human Rights Act, which led to

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413. Delhi Domestic Working Women's Forum v. Union of India, (1994) Supp. 4 S.C.R. 528 (India); *see* Leila Seth, *Social Action Litigation in India*, *in* Constitution of South Africa from a Gender Perspective 106 (Sandra Liebenberg ed., 1995).

414. Notice of the Assistant Registrar to the National Commission for Women, Smt. Seema v. Ashwani Kumar, T.P. (Civ.) No. 291/2005 (India, Nov. 18, 2005).

415. Order, Smt. Seema v. Ashwani Kumar, T.P. Civ. No. 291/2005, ¶ 13 (India Feb. 14, 2006) [hereinafter *Smt. Seema* Order].

416. *Id.* ¶ 15.

417. Apr. 8 Interview with U. Ramanathan, *supra* note 355; Confidential Interview with Indian Human Rights Lawyer, in N.Y, N.Y (June 8, 2006) [hereinafter Interview with Indian Human Rights Lawyer]; Interview with F. Nariman, *supra* note 17; *see also* CEDAW Concluding Observations 2000, *supra* note 121,at ¶¶ 69, 84–85 (listing NCW's weaknesses).

418. Apr. 8 Interview with U. Ramanathan, *supra* note 355; Interview with Indian Human Rights Lawyer, *supra* note 417. For example, it took over a decade for the Commission to submit the rape victims' compensation and rehabilitation scheme requested by the Court in the *Delhi Domestic Working Women's Forum*. Supp. 4 S.C.R. 528.

419. Interview with Y. Mehta, *supra* note 407 (noting that suggested amendments include establishing an investigative wing to follow up on complaints; expanding the administrative resources of the legal department in proportion to its workload; instituting a coordinated effort with state-level commissions for women because "everyone is working at a tangent out there;" and giving the NCW additional powers, such as the power to implement its recommendations, call for records, and "ensure that people who are summoned come here immediately").

the creation of the NHRC.[420] The functions of the NHRC include conducting inquiries, *suo moto* or upon request, into alleged human rights violations; intervening (with judicial approval) in any court proceeding involving a human rights violation; making recommendations for the effective implementation of treaties and other international human rights instruments; spreading human rights literacy and promoting safeguards available for the protection of these rights; and encouraging the efforts of NGOs working in the field of human rights.[421] The Court occasionally calls upon the NHRC to "inquire into certain PIL matters" or to monitor rights violations.[422] Although the Commission's powers are only recommendatory, judges and lawyers have noted that "there is a great deal of coordination between the NHRC and the Supreme Court,"[423] and the judiciary does take the Commission's recommendations into account.[424]

The chair and two other positions in the NHRC are reserved for retired Supreme Court Justices,[425] leading the Court to describe it as a "unique expert body" because several of its members "have throughout their tenure [as judges], considered, expounded and enforced Fundamental Rights and are, in their own way, experts in the field."[426] Others, however, see this composition of the NHRC as a weakness. "The big problem is that you only have judges sitting there, and they carry their thoughts, habits, and practices from the Court into the NHRC," observed a human rights lawyer.[427] "There is no creativity in how things are approached; it is like a replica of a courtroom."[428] Critics further contend that the government has

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420. Protection of Human Rights Act, No. 10 of 1993, *available at* http://nhrc.nic.in/HRAct.htm#chap2; P. D. MATHEW, THE LAW TO PROTECT HUMAN RIGHTS IN INDIA 47–48 (2005).

421. Protection of Human Rights Act, *supra* note 420, at § 12; *see* Interview with NHRC Official, *supra* note 380; June 8 Interview with S. Pandey, *supra* note 56.

422. Interview with F. Nariman, *supra* note 17; Interview with NHRC official, *supra* note 380. For example, the Court has directed the NHRC to monitor implementation of the Bonded Labour System (Abolition) Act, supervise the functioning of mental hospitals and a government-run protective home for women, and assist the Court in the ongoing PIL on the right to food by forming an advisory group, conducting an inquiry into starvation deaths, and suggesting interim measures for relief. National Human Rights Commission, The Programmes in Pursuance of Supreme Court Remit, http://nhrc.nic.in/hrissues.htm (last visited Mar. 31, 2008).

423. Interview with F. Nariman, *supra* note 17.

424. Apr. 8 Interview with U. Ramanathan, *supra* note 355; Apr. 13 Interview with Supreme Court Justice, *supra* note 70; Interview with NHRC Official, *supra* note 380.

425. Protection of Human Rights Act, *supra* note 420, at § 3(2).

426. Paramjit Kaur v. State of Punjab, W.P. (Crl.) Nos. 497/95 & 447/1995, ¶¶ 10–11 (India Sept. 10, 1998); *see also* Interview with Justice Verma, *supra* note 37 ("This is how you are able to have complementarities between the Supreme Court and the NHRC.").

427. Apr. 8 Interview with U. Ramanathan, *supra* note 355.

428. *Id.*

"deliberately perpetuated the NHRC's lack of resources and enforcement power, opaque appointment and general operating procedures to ensure government-friendliness of members and staff."[429]

Although there is widespread skepticism about the NHRC's ability to act as an independent custodian of human rights, there are instances in which the NHRC has taken an objective stand against government actions. For example, in early 2003 it issued a public declaration condemning coercive population policies adopted by some Indian states.[430] However, the Court's failure to consider this position when it upheld the Haryana Provision later that same year in the *Javed* decision suggests a weakness in communication between the NHRC and the judiciary. Furthermore, recent reports and studies reveal that the NHRC is "plagued" by "understaffing, an overwhelmingly large caseload, and inefficient management," leading to "a performance marked by inaction and apathy."[431] The Protection of Human Rights Act was amended in 2006, but there is a continued need for "drastic reforms" within the Commission.[432]

3. Involving the Statutory Bodies

Despite the shortcomings of the NCW and the NHRC, the case studies in Part IV suggest that advocates and the Court could benefit from collaborating with the Commissions before, during, and after the PIL process. The *Javed* litigators might have had more success if they had capitalized on the NHRC's progressive stance against coercive population policies by engaging the Commission in a supporting role before approaching the Court. Although the NCW was not directly involved in the *Vishaka* case, its *suo moto* investigation and findings confirming Bhanwari Devi's gang rape were helpful to the petitioners, who annexed the Commission's report to their PIL petition.[433]

Furthermore, both statutory bodies contributed significantly to the implementation of the *Vishaka* Court's sexual harassment guidelines. The NHRC published a booklet to raise public awareness about the *Vishaka* ruling and convened meetings with various governmental departments, educational institutions, and senior members of the legal community to "consider and clarify" issues

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429. Josh Gammon, *A Meek, Weak NHRC*, 4(1) Combat Law (2007), *available at* http://www.combatlaw.org/information.php?article_id=983&issue_id=3.

430. *See* NHRC Declaration, *supra* note 279.

431. Gammon, *supra* note 429; *see* Sabine Nierhoff, From Hope to Despair: The Complaints Handling Mechanism of the National Human Rights Commission of India (2007).

432. Gammon, *supra* note 429 (providing examples of needed reforms).

433. *Vishaka* Petition, *supra* note 195, at ¶ 65.

relating to implementation of the judgment.[434] The NCW worked with national and state ministries to set up sexual harassment complaint committees, held numerous meetings to assess and improve implementation of the *Vishaka* guidelines, and formulated a Code of Conduct based on the Court's guidelines, which it circulated to ministries, state commissions, NGOs, corporations, and the media.[435] The NCW also submitted a draft bill in response to the Court's call for legislation addressing sexual harassment in the workplace.[436]

D. *Alternative Forums*

As illustrated by the broad and binding ramifications of the *Javed* ruling, bringing a PIL action directly in the highest court of the country can be risky, particularly when there is not enough public support or positive high court precedent on the issue. In some cases, initiating PIL actions in one or more of the twenty-one state-level high courts of India instead might be more advantageous.[437] The Supreme Court has the benefit of viewing rights abuses in a wide, national context, but it is more removed from the communities in which the violations are occurring. Lower courts are likely to have a better sense of on-the-ground realities and also offer the logistical convenience of litigating locally.[438] In addition, the circumstances and practices of each Indian state differ so much that it might be easier, quicker, and more effective in some cases to issue and implement targeted remedies on a state-by-state basis.[439] A positive high court decision is not a binding national precedent like a Supreme Court judgment, but it could act as a persuasive model for

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434. NATIONAL HUMAN RIGHTS COMMISSION, KNOW YOUR RIGHTS: SEXUAL HARASSMENT OF WOMEN AT THE WORKPLACE, 1, 14–27 (2004).

435. NATIONAL COMMISSION FOR WOMEN, COMBATING SEXUAL HARASSMENT IN THE WORKPLACE ii-iii (2001); National Commission for Women, *Highlights of Achievements: 2002-03*, http://ncw.nic.in/highlights.htm (last visited Mar. 28, 2008).

436. Interview with Y. Mehta, *supra* note 407; National Commission for Women, *Sexual Harassment of Women at their Work Place (Prevention) Bill (2003)*, http://ncw.nic.in/shpbill1.htm (last visited Mar. 28, 2008).

437. INDIA CONST. art. 226.

> Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs . . . for the enforcement of any of the rights conferred by Part III and for any other purposes.

Id.

438. Interview with Justice Chandrachud, *supra* note 41.

439. June 8 Interview with S. Pandey, *supra* note 56; Interview with Bombay Judges, *supra* note 134; *see* Susman, *supra* note 7, at 92 ("The remedies ordered by the state High Courts have often been more closely linked to the petitioner's requests, as long as they follow traditional norms.").

other states to follow and possibly improve upon.[440] Moreover, as seen in the *Vishaka* and *Javed* case studies, even Supreme Court judgments and petitions often cite high court case law to support their holdings or arguments.[441]

The present Article and much of the other scholarship on the Indian legal system has focused on the Supreme Court, but this represents only a small fraction of legal activity in the country. Future research on lower courts will be critical to a more comprehensive understanding of the Indian judiciary's role in promoting gender justice.[442]

VII. CONCLUSION

Although India is gaining international recognition as an innovative global leader in many fields, it concurrently remains a nation steeped in centuries-old beliefs and conventions—a tension that is reflected in the decisions of its Supreme Court. In a recent order making registration of all marriages mandatory, the Court devoted the opening paragraph of its opinion to a discussion of ancient Hindu law and then, in the very next paragraph, segued into a discussion of CEDAW.[443] This juxtaposition of antiquated religious scriptures with arguably the most progressive of international treaties, and the Court's reliance on such contrasting sources of law, demonstrate the complex context within which women's rights advocates in India operate.

As Indian society develops its own theory of gender justice, informed by local realities and universally accepted norms, women's rights advocates and the Supreme Court can play a critical role in shaping the discourse. Through the enterprising PIL vehicle, the Court has broadly addressed human rights abuses and spurred the other branches of government into action. As one high court judge remarked, "PILs are like alarm clocks. They tell the government: don't sleep, please get up."[444] However, judicial directives that trespass too deeply into the realms of the legislature and the executive can ultimately undermine the Court's powers, especially

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440. Interview with Bombay Judges, *supra* note 134.

441. *See, e.g.*, Javed v. State of Haryana, A.I.R. 2003 S.C. 3057, at ¶¶ 549–57 (India) (citing decisions of the Bombay, Allahabad, Gujarat, and Uttar Pradesh High Courts); *FFDA* Petition, *supra* note 139, at ¶ 20 (citing Rajasthan and Bombay decisions).

442. *See, e.g.*, Galanter & Krishnan, *Bread for the Poor*, *supra* note 358.

443. *Smt. Seema* Order, *supra* note 415, ¶¶ 1–2; *see also* Dam, *supra* note 52, at 134 (noting that the Court's approach toward PIL cases reflects the ancient Hindu legal system's approach to justice).

444. Interview with Justice Y. Singh, Judge, High Court of Allahabad, in Bhopal, India (Apr. 15, 2006).

when its orders cannot be effectively implemented. The judiciary must also be vigilant about not conforming to patriarchal gender norms that can have a limiting effect on PIL's fulfillment of women's rights.

The Court could avoid these problematic tendencies by maintaining a focused loyalty to the Constitution. Having generously empowered the judiciary to develop the procedurally flexible PIL mechanism, the Indian Constitution provides a strong legal basis to enforce gender justice through this process, and permits guidance from international law to that end. As observed by retired Justice Ruma Pal, the last female Justice to serve on the Supreme Court, "These articles [of the Constitution] are broadly worded and allow the judiciary free play within their parameters to redress an injury in a manner not otherwise provided for under any statute."[445] In order to meet its full potential in this regard, the Court must take an objective stance on enforcing the constitutional rights of women, even when they conflict with mainstream patriarchal consensus or the interests of more politically mobilized segments of society. To the extent that there are gaps in domestic law, it would benefit the Court to draw consistently upon international human rights provisions to aid its interpretation of constitutional rights, as permitted by the Constitution.

Moreover, the Constitution has clearly delineated the roles of each branch of government, and the judiciary must respect these boundaries in order to maintain its own legitimacy and credibility. As asserted by the legislator who raised the discussion about separation of powers in the December 2007 Lok Sabha debates, "Parliament is accountable to the people, Government is accountable to Parliament, what is the accountability of the Bench? To whom is the Judicial System accountable? I answer with humility that the Judiciary is accountable to the Constitution."[446] This was echoed by the Minister of Law and Justice, who added, "[W]e should maintain harmony, equilibrium[,] as well as open eyes in dealing with our own powers and yet see how we can serve our country the best."[447]

The successful promotion of gender justice through PIL will also depend on greater coordination and mobilization of women's rights advocates. As seen in the *Vishaka* and *Javed* case studies, strengthening collaborations between ground-level activists and lawyers, building public support, working with the media and

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445. Pal, *supra* note 132, at 1; *see also* EPP, *supra* note 3, at 77 (noting that the Indian Constitution "provides a nearly ideal constitutional foundation for a rights revolution").

446. Lok Sabha Debates of Dec. 3, *supra* note 63 (statement of Shri Gurudas Dasgupta).

447. Lok Sabha Debates of Dec. 4, *supra* note 64 (statement of Shri H.R. Bhardwaj).

national statutory bodies, and maintaining advocacy efforts with the other branches of government are all critical to the success of a PIL case.

Justice Verma, who authored the landmark *Vishaka* decision, observed that through PIL, "innovative measures have been taken, . . . [t]he paths have been laid, and there is a need to continue walking on them, and to walk properly."[448] Strategic use of PIL to confront rights violations in a constitutionally sustainable manner can secure these paths toward achieving widespread and enduring gender justice in India. In a speech commemorating India's sixtieth anniversary of independence last year, Prime Minister Singh recalled a quote from the country's first Prime Minister, Jawaharlal Nehru: "[L]aws and constitutions do not by themselves make a country great. It is the enthusiasm, energy and constant effort of a people that make it a great nation."[449] The PIL mechanism is a reflection of this aspiration. If leveraged correctly, it can help the Indian legal system exercise local and global leadership in advancing the rights of women, and inspire other nations to do the same.

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448. Interview with Justice Verma, *supra* note 37.

449. Manmohan Singh, Prime Minister of India, Prime Minister's Speech on Independence Day 2007 (Aug. 15, 2007), *available at* http://www.hindu.com/nic/pmspeech070815.htm.