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Legal Efforts for Social Reform through the Indian Supreme Court*

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Through a Bernstein Fellowship¹ with the Center for Reproductive Rights in 2006, I spent a year working toward promoting gender justice through the Supreme Court of India's Public Interest Litigation ("PIL") mechanism. PIL is a judicially created procedural vehicle through which any 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. I participated in legal training workshops to familiarize judges and lawyers in India with international law relevant to securing women's rights through the judicial system, and sought to understand the potential for achieving this goal through PIL. To this end, I conducted analyses of the applicable legal framework, case studies of landmark Indian Supreme Court decisions on women's rights, and in-depth interviews with stakeholders in the PIL process—including former and current Supreme Court Justices and high court judges, leading public interest lawyers, human rights activists,

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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.

My research indicated that the Indian Supreme Court is well poised, in terms of its constitutional and procedural PIL powers, to redress violations against women who would otherwise have little or no access to the justice system. However, I also confronted significant limitations of the PIL mechanism and some of 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 rights litigation, one found in many regions of the world.

I. SOCIAL REFORM THROUGH PIL

The key features of PIL are its drastic liberalization of procedural rules, such as standing and jurisdiction restrictions, for qualifying cases; the non-adversarial nature of the proceedings—the petitioners, respondents, and judges are expected to engage in a collaborative effort to address the problem at hand; the potential for objective input from court-appointed amici or expert committees; and the active role undertaken by the bench itself in shaping the cases, issuing broad injunctive remedies, and monitoring their implementation. Through PIL, the Indian Supreme Court has addressed issues of social reform and prodded the other branches of government into doing the same—a role that has helped the Court build a strong base of public support. The executive and legislature have largely tolerated—and, in some cases, even implicitly welcomed—the judiciary’s 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 the Court’s orders.

However, a danger inherent in the broad power and popularity of the Court is the resulting tendency toward judicial over-reaching, which can threaten the other branches of government. The legislative or executive nature of some judicial orders has sparked objections that the Court has violated the separation-of-powers doctrine through PIL. As noted by Indian Prime Minister Manmohan Singh, a “balanced approach” by the judiciary is critical “to keep[ing] PIL as a potent tool for rectifying public ills,” and “[j]udicial activism must also take adequately into account the administrative viability of the reform process.”²

II. LEGAL FRAMEWORK

The Constitution of India guarantees a number of judicially enforceable rights—such as the right to equality and the prohibition against discrimination

² Manmohan Singh, Address at the Conference of Chief Ministers & Chief Justices of High Courts (Mar. 11, 2006), *available at* <http://pmindia.nic.in/speech/content.asp?id=293>.

(Articles 14-15)—that provide a strong legal basis for PIL petitions seeking to promote gender justice. This potential has been limited, however, by the Court’s occasionally paternalistic interpretations of these provisions, and its continued deference to discriminatory religion-based personal laws. The Court has been more generous in its interpretation of the Constitution’s right to life provision (Article 21), but in doing so it has been criticized for creating expectations it may not be able to fulfill. Women’s rights advocates can optimize PIL petitions by considering these precedents and judicial trends when formulating the legal bases for their claims.

Although PIL petitions must be premised on constitutional claims, international treaties that India has ratified, explanatory comments issued by United Nations treaty-monitoring bodies, and comparative case law from foreign courts are also important sources of legal norms for PIL actions. 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.”³ PIL petitioners can additionally bolster their arguments by citing examples of successful policy initiatives in other countries. For example, recent petitions challenging child marriage and calling for increased public access to antiretroviral drugs highlighted relevant successful policy developments in Sri Lanka⁴ and Brazil,⁵ respectively. The Court has shown receptivity to international and comparative sources of law, as illustrated in the abridged case study that follows.

III. CASE STUDY HIGHLIGHTS: VISHAKA V. RAJASTHAN

The strong potential for promoting gender justice through PIL can be illustrated by a close study of an important Supreme Court action—*Vishaka v. State of Rajasthan*—that addressed the issue of sexual harassment in the workplace.⁶ 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 government to do village-level social work for honorarium compensation. 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. Members of the local community retaliated with a socioeconomic boycott, harassment, and threats against Bhanwari Devi and her family, which culminated in five men raping her in the presence of her husband. Bhanwari Devi faced numerous

³ 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).

⁴ Petition at ¶ 22, Forum for Fact Finding Documentation and Advocacy (FFDA) v. Union of India, W.P. (Civ.) No. 212/2003 (India Apr. 25, 2003) (noting the Sri Lankan government’s success in curbing child marriage).

⁵ 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).

⁶ *Vishaka v. State of Rajasthan*, Supp. (1997) 3 S.C.R. 404 (India).

obstacles from the police, governmental health facilities, and the local court system when she attempted to seek justice.

Frustrated by this case's illustration of the state's inability or unwillingness to address systemic threats faced by female workers and to restore the dignity of victims by providing tangible remedies, a lawyer named Naina Kapur decided to initiate a PIL action in the Supreme Court to challenge sexual harassment in the workplace. The action 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 efforts to protect her or to administer medical and legal redress for the rights violations she experienced. The petitioners then demonstrated an ongoing pattern of such rights abuses by providing examples of five other women who had experienced sexual assault in the course of governmental employment.

True to the collaborative ambition of the PIL vehicle, the outcome in the case was the product of cooperation from the government respondents and collective progress made by the parties at each hearing. The *Vishaka* judgment incorporated a broad reading of the Indian Constitution, recognizing sexual harassment as "a clear violation" of several fundamental rights guaranteed therein. In addition, the Court drew heavily upon international law, quoting relevant provisions of the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") and the CEDAW Committee's General Recommendation 19 on violence against women. The *Vishaka* judgment culminated in mandatory judicial guidelines to combat sexual harassment in the workplace, with the Court specifying that its directives would be "binding and enforceable...until suitable legislation is enacted to occupy the field."⁷

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 the legislature by enacting anti-sexual harassment guidelines that function as law. This proactive judicial response may nevertheless have had a galvanizing effect on the Indian Parliament, which thereafter introduced a Bill against sexual harassment in the workplace, explicitly acknowledging the Court's efforts to address this issue. Although the legislation is still pending passage, the remedies secured by the Court's guidelines provide relief in the interim. The *Vishaka* directives have increased awareness of and accountability for sexual harassment in Indian workplaces, and enabled greater enforcement of women's rights at the state high court level. Although implementation of the judgment has not been without significant challenges, the Court has maintained an active role in enforcing its ruling.⁸

⁷ *Vishaka*, (1997) Supp. 3 S.C.R. 404, *supra*, note 6 at ¶ 16.

⁸ See *Medha Kotwal Lele v. India*, W.P. (Crl.) Nos. 173-177/1999, Item No. 36 (Apr. 26, 2004); W.P. (Crl.) Nos. 173-177/1999, Item No. 104 (Jan. 17, 2006) (India).

The *Vishaka* PIL case had an impact not only on the rights of working women across the country, but also on the individual whose unfortunate story inspired the litigation. Kapur described Bhanwari Devi's reaction to the Court's judgment as follows: "She was over the moon. We were lying on two sides of a haystack [as I explained it to her], and she was in a state of joy that her whole experience had helped create something for other women."⁹ 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 redress rights violations suffered by disempowered segments of the population.

IV. CHALLENGES AND LIMITATIONS

There are undoubtedly numerous contextual challenges inherent in attempting to use PIL to promote gender justice in India. For one, securing successful working relationships between lawyers and ground-level activists can be problematic, since these groups do not always share the same concerns and approaches. The difficulty in advancing a coordinated litigation agenda reflects the general deficiency in the political mobilization of women in India—a serious obstacle to the advancement of equality through PIL or any other vehicle. Furthermore, women's rights advocates may be more disadvantaged than other less mobilized contingents because of the Court's tendency to reflect mainstream patriarchal gender biases in its rulings, as seen in some of its equality and privacy jurisprudence. Justice Ruma Pal, the last female Justice of the Indian Supreme Court (there are currently no women on the highest bench), observed that failures to obtain judicial redress for violations of women's rights have often resulted from a lack of "conceptual recognition of the offence," due in part to judicial predispositions about gender.¹⁰

Petitioners seeking to advance their causes through PIL must also confront limitations specific to the mechanism itself. Delays inherent in pursuing justice through the courts are a major disincentive for rights advocates in India, and PIL actions are no exception. Another key weakness is that the Court's authority to issue PIL orders far exceeds its ability to enforce them. Moreover, the PIL vehicle is increasingly encountering resistance from the public, the judiciary, and the other branches of government due to petitioner abuse and overuse, as well as judicial overreaching. The instability of the mechanism is exacerbated by the inconsistency of the Court's approaches and judgments in PIL cases—the twenty-seven justices usually sit on panels of two or three, and have relatively short tenures on the bench due to the mandatory retirement age of sixty-five.

⁹ Telephone Interview with Naina Kapur, Director, Sakshi, in New Delhi, India (Apr. 10, 2006).

¹⁰ 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).

PIL petitioners can fortify their cases against some of the challenges by investing in strong collaborations between lawyers and ground-level activists; developing coordinated strategies; building public support for the subject matter of the litigation *before* filing their petition; securing relationships with the media to ensure broad coverage of the Court's orders; and, when possible, engaging national statutory bodies, such as the National Commission for Women and the National Human Rights Commission, as allies. Notwithstanding its shortcomings, PIL has undeniably been instrumental in expanding access to the judiciary and procuring key advancements for women's rights, and human rights generally, in India. Even when the Court's orders are not fully enforced, PIL actions can add value by generating public awareness, mobilizing discourse, vitalizing activists, and paving the way for rights litigation in lower courts.

Advocates must, however, consider the risks inherent in bringing a PIL action directly in the highest court of the country and receiving an unfavorable, binding judgment—particularly when there is conflicting public opinion or a lack of 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. The high courts may have a better sense of on-the-ground realities, and offer the logistical conveniences of litigating locally and implementing targeted remedies on a state-by-state basis. Much of the scholarship on the Indian legal system, the present work included, has focused on the Supreme Court, but this represents only a small fraction of legal activity in the country. Future research and advocacy efforts focusing on social reform through lower courts will be critical for more comprehensively pursuing gender justice through the Indian judiciary.

CONCLUSION

The success of advancing women's rights through the courts, in a society that is rapidly evolving yet still largely governed by traditional gender norms, will depend upon strategic mobilization by women's rights advocates and committed efforts by judges to enforce the constitutional and international rights of women—independent of mainstream biases and within the boundaries of the separation-of-powers doctrine. As Indian society develops its own theory of gender justice, informed by local realities and international norms, women's rights advocates and the Supreme Court have the opportunity to play a critical part in shaping the legal discourse. If the Indian judicial system can assume a leading role in promoting the rights of disempowered women through the PIL vehicle, it could serve as an inspiring model for other constitutional courts and international human rights bodies.

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