

DYNAMICS OF SOCIAL JUSTICE

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Abstract

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.

Social stratification in India is based either on caste, or on class hierarchy in caste system is the basic principle in terms of purity and pollution which involves the superiority of pure to the impure. Hierarchy being quite independent of natural inequalities or the distribution of power, it is the relationship between the encompasses and the encompassed.

In traditional Indian society the basis of hierarchy and existence of social injustice was the idea of purity and pollution which turned to achievement resulting into open and fair competition.

Social and cultural norms have changed a great deal in the course of development. Remedies for these evils may be brought only through a common social frame work of ideas and legal values that can reduce social inequalities and provide justice to women at large.

A unique contribution has been made to the understanding of the PIL mechanism and its capacity for securing gender justice by drawing not only upon analysis of Indian constitutional law and case studies of landmark Supreme Court decisions, but also upon a range of perspectives gathered through in depth interaction and available literature regarding PIL process in India.

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.

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There are gaps in domestic law to certain extent, yet 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.

To whom is the Judicial System accountable? I answer with humility that the Judiciary is accountable to the Constitution.” “Laws 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.”

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.

Social stratification in India is based either on caste, or on class hierarchy in caste system is the basic principle in terms of purity and pollution which involves the superiority of pure to the impure. Hierarchy being quite independent of natural inequalities or the distribution of power, it is the relationship between the encompasses and the encompassed. Therefore hierarchy and not inequality is the opposite of equality contention thereby is that inequality caused by centuries of economic stagnation resulting into differences in opportunities of life between classes and inequalities caused by traditional values, social practices, and social restrictions imposed by cast system resulting in social injustice in reference to gender differences although men are free to discard conventions and institute new ones, yet it is not apparent how inequalities make the female gender suffer, have been sustained since long in the ancient societies, industrial societies, agrarian societies and the society at present.

Ground Reality

In traditional Indian society the basis of hierarchy and existence of social injustice was the idea of purity and pollution which turned to achievement resulting into open and fair competition depressed caste and classes got reservation in jobs, legislative bodies and educational institutions in the name of social justice.

Women partially succeeded in getting this justice when in some states 20% seats, come to be reserved for women in panchayats and in the middle of Dec. 1998 a bill was introduced in the Parliament for reserving 33% seats for women which resulted frustration among some casts and communities and give rise to various agitation and violent actions, most worrying are the extreme reactions from educated persons and views of politicians with vested interests. Social and cultural norms have changed a great deal in the course of development. Remedies for these evils may be brought only through a common social frame work of ideas and legal values that can reduce social inequalities and provide justice to women at large.

PIL Potentiality

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' 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 interaction with stakeholders in India, it can be well argued 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 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. In this context the most effective weapon would be the potential for promoting gender justice through the Supreme Court of India's pioneering Public Interest Litigation (PIL) mechanism. Using this judicially created procedural vehicle, 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 government of India. Through PIL, the Court has actively addressed issues of public concern and prodded the other branches of government into fulfilling their legal obligations. A unique contribution has been made to the understanding of the PIL mechanism and its capacity for securing gender justice by

drawing not only upon analysis of Indian constitutional law and case studies of landmark Supreme Court decisions, but also upon a range of perspectives gathered through in depth interaction and available literature regarding PIL process in India.

It could be well noticed 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.

Limitations

There are also 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 or gender rights litigation in many regions of the world. The key features of PIL and growing popularity considers the responses to the Indian judiciary's activism through this powerful mechanism. The Indian constitutional and International Legal frame work for promoting the right of women through PIL, highlights two critical Supreme Court decisions;¹ An action in which the Court used international law to enact guidelines for combating sexual harassment at 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.

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. Some of the contextual challenges of enforcing woman's rights through the judicial system in India and some limitations specific to the PIL mechanism itself suggests counteracting obstacles by strategically engaging the public, the media, national statutory bodies, and lower courts in PIL, cases. PIL suits can also be initiated in the High Court of each Indian state, which has advantage to be further reviewed. The procedurally flexible PIL which 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

¹ *Vishakha v. State of Rajasthan*, 1997 3 SCR, 404.

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 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 system around the world.

Vishakha has been described by former Supreme Court Justice Pal as "one of the most notable successes of Judicial action in redressing violence against women" and recognized by CEDAW committee as a landmark judgment in India's tradition of public interest litigation.² The Vishakha court promoted gender justice by directly applying the provisions of constitutional and international Law to enact enforceable guidelines against Sexual harassment at the workplace, at a time when the public was mobilized to embrace a judicial solution to a significant void in domestic legislation.

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).³ The Judgment concluded that this was not sex based discrimination because different "rules, regulations and condition of service applied to the male and female positions, and "the Constitution's equality provisions prohibit discrimination only on the ground of sex but do not discrimination on the ground of sex coupled with other considerations. The Court's application of formal equality theory in this case has been criticized for its circular reasoning given the male AFPs were treated as entirely separate class because they had been given arguably preferential career opportunities in the first place.

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 guarantees rather in the absence of the father. Although the Hariharan court stated that normal rule of interpretation shall have to bow down to the requirement of the constitution it's interpretation of the Law failed to put mother's on equal legal footing with father.⁴

² *Vishakha v. State of Rajasthan* (1997) Supp. 3 SCR, 404.

³ *Air India v. Meerza*, 1982 SC.

⁴ *Geeta Hariharan v. Reserve Bank of India* (1999) 2 SCC 228, 669.

The court applied the PIL action challenging a tribal law that denied women equal inheritance rights, the petitioner recalled the courts discouraging her request for a contempt order on the ground The Bihar Government or its police are not going to heed it any more than they did our original order.⁵

Path Progression

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, argued into a discussion of CEDAW. 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 of 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 which, 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 governments do not sleep, please get up. However, judicial directives that trespass too deeply into the realms of the legislature and the executive can ultimately undermine the Court's powers especially 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

⁵ *Madha Kishwan and others v. State of Bihar and others*, (1996) 5 SCC 1864.

by retired Justice Ruma Pal, the last female Justice to serve on the Supreme Court, these constitutional articles 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. 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.

Conclusion

There are gaps in domestic law to certain extent, yet 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.' This was echoed by the Minister of Law and Justice, who added, 'We 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.' 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 Vishakha and Javed case studies, strengthening collaborations between ground-level activists and lawyers, building public support, working with the media and national stakeholders 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 Vishakha decision, observed that through PIL. "innovative measures have been taken the path have been laid and there is a need to continue walking on them, and to walk properly "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 sixteenth anniversary of independence, a quote from the country's first Prime Minister, Jawaharlal Nehru: "Laws 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.” 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.

