

LITIGATING REPRODUCTIVE RIGHTS:

Using Public Interest Litigation and International Law to Promote Gender Justice in India

Center for Reproductive Rights

120 Wall Street

New York, New York 10005

www.reproductiverights.org

info@reprights.org

Avani Mehta Sood

Bernstein International Human Rights Fellow

Yale Law School

avani@aya.yale.edu

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Avani Mehta Sood

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About this Report

This publication was authored by Avani Mehta Sood, J.D., as a Bernstein International Human Rights Fellow working in collaboration with the Center for Reproductive Rights. The Robert L. Bernstein Fellowship in International Human Rights is administered by the Orville H. Schell, Jr. Center for International Human Rights at Yale Law School.

In 2004, the Center for Reproductive Rights launched a global litigation campaign to promote the use of strategic litigation for the advancement of women's reproductive rights worldwide. Concerned by the magnitude of reproductive right violations that occur with impunity in India and inspired by the use of Public Interest Litigation (PIL) in that country to defend fundamental rights guaranteed by the Indian Constitution, the Center saw the need for in-depth research and analysis of this mechanism and its potential for advancing gender justice, with a specific focus on women's reproductive rights.

This report, which explores the use of PIL to promote gender justice and future opportunities for advancing women's reproductive rights in India, is based upon an analysis of relevant international and Indian constitutional law, case studies of select Indian Supreme Court litigation, and interviews with approximately 65 key stakeholders. The interviewees included former and current Supreme Court and High Court justices; lawyers; human rights and public health activists; social scientists; journalists; at-risk women living in conditions of poverty; and former and current officials of the National Commission for Women, the National Human Rights Commission, and the Law Commission of India. Ms. Sood conducted the interviews between December 2005 and August 2006 in New Delhi and Mumbai, and at the National Judicial Academy in Bhopal.

The primary goal of this publication is to advance strategic litigation and other forms of advocacy for the formal recognition and practical realization of reproductive rights. The report does not purport to comprehensively cover the development and dynamics of PIL or women's rights in India. Rather, the analysis, recommendations, and views presented by the interviewees relate to select dimensions of these complex and politically intricate topics.

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Table of Abbreviations and Glossary

ABBREVIATION	COMPLETE TERM AND DEFINITION
Advocate	A practicing litigator
Amicus curiae (pl. amici)	Individual lawyers appointed by the Supreme Court in PIL cases to present a neutral, objective point of view
Apex bench/court	Supreme Court of India (also referred to as “the Court”)
Beijing Conference	1995 United Nations Fourth World Conference on Women: Global conference on women’s human rights
Beijing Platform for Action	Beijing Declaration and Platform for Action, United Nations Fourth World Conference on Women: Consensus document adopted by nations participating in the Beijing Conference
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women: International treaty codifying states’ duties to eliminate discrimination against women
CEDAW Committee	Committee on the Elimination of Discrimination against Women: UN treaty monitoring body charged with monitoring states parties’ implementation of the Convention on the Elimination of All Forms of Discrimination Against Women
Central government	The governing authority of the federal Union of India, which includes all states and union territories in the country
Children’s Rights Committee	Committee on the Rights of the Child: UN treaty monitoring body charged with monitoring states parties’ compliance with the Convention on the Rights of the Child
Children’s Rights Convention	Convention on the Rights of the Child: International treaty upholding the human rights of children
Civil and Political Rights Covenant	International Covenant on Civil and Political Rights: International treaty protecting individuals’ civil and political human rights
Concluding Observations	Comments and recommendations issued to the reporting state party by the respective treaty monitoring body
Constitution	The Constitution of India
CSW	Commission on the Status of Women
Dalit	Member of a scheduled caste in India

Declaration	A declaration made by a state party to a treaty that aims to clarify what meaning or extent the state attributes to the given treaty or its provisions
Directive Principles of State Policy	Part IV of the Indian Constitution: non-justiciable principles that guide state administration and formulation of laws and policies
Economic, Social and Cultural Rights Committee	Committee on Economic, Social and Cultural Rights: UN treaty monitoring body charged with monitoring states parties' implementation of the International Covenant on Economic, Social and Cultural Rights
Economic, Social and Cultural Rights Covenant	International Covenant on Economic, Social and Cultural Rights: International treaty protecting individuals' economic, social and cultural human rights
Fundamental Duties	Article 51(A) of the Indian Constitution: moral obligations of Indian citizens
Fundamental Rights	Part III of the Indian Constitution: basic human rights guaranteed as enforceable
General Comment/ General Recommendation	Comprehensive interpretation of a particular article of a treaty issued by the respective UN treaty monitoring body
Human Rights Committee	UN treaty monitoring body charged with monitoring states parties' compliance with the International Covenant on Civil and Political Rights
ICPD	International Conference on Population and Development: United Nations Conference on population and development issues held in Cairo in 1994
ICPD Programme of Action	Programme of Action of the International Conference on Population and Development: Consensus document adopted by states participating in the International Conference on Population and Development
<i>Iddat</i>	A specified period of time following divorce during which a man must provide financial maintenance to his former wife (under Islamic law and the Protection of Muslim Women's Act)
Law Commission	Law Commission of India
<i>Locus standi</i> (standing)	The right to bring an action in court
NCW	National Commission for Women
NHRC	National Human Rights Commission
<i>Panchayat</i>	Local village council

PIL	Public Interest Litigation
Rajya Sabha	Upper house of the Parliament of India
Reservation	A unilateral statement made by a state party when ratifying a treaty, that purports to exclude or to modify the legal effects of certain provisions of the treaty in their application to that state
<i>Sathin</i>	Individual trained by the local government to do village-level social work for honorarium compensation
Senior advocate	Senior advocate of the Supreme Court of India: The Supreme Court has the discretion to designate a lawyer as a senior advocate after he or she has had 15 years of exemplary litigation experience before the apex bench
Special Rapporteur	An individual working on behalf of the UN, without financial compensation, to investigate, monitor, and recommend solutions to human rights problems
State party (pl. states parties)	Government that has signed or ratified an international treaty
<i>Suo moto (sua sponte)</i>	On its own motion, without prompting or suggestion
<i>Talaq</i>	Urdu word signifying divorce
Treaty monitoring bodies	United Nations human rights treaty monitoring bodies: Committees charged with monitoring states parties' fulfillment of their obligations under the six major international human rights treaties
Two-child norm	Policy provision that penalizes individuals who have more than two children
UN	United Nations
UNFPA	United Nations Population Fund: United Nations agency devoted to funding and supporting population and reproductive health programs in low- and middle-income countries
Universal Declaration	Universal Declaration of Human Rights: United Nations human rights instrument at the foundation of modern international human rights law
WHO	World Health Organization: UN agency devoted to researching and promoting public health worldwide

Recommendations

The government of India has obligations under international and constitutional law to respect, protect, and fulfill women's reproductive rights. The findings of this report, which explores the use of Public Interest Litigation (PIL) to address violations of reproductive rights, suggest that actors working in different capacities can play an important role in ensuring that the government upholds its obligations. The recommendations offered below are addressed to public interest lawyers, who can bring PIL actions for the promotion of reproductive rights; human rights, women's rights, and public health activists, who can act as petitioners and provide critical support for such cases; judges who preside over PIL actions; law schools, which produce future generations of public interest lawyers; and the media, which can significantly influence the impact of PIL. These suggestions for future action are drawn from analyses of relevant international and constitutional law, case studies of landmark PIL actions, and interviews with key stakeholders in India.

A. RECOMMENDATIONS FOR PUBLIC INTEREST LAWYERS

- Bring PIL cases to address ongoing reproductive rights violations in India. Consistent advocacy for women's rights to reproductive health and equality will encourage the government to comply with the national and international standards calling for the protection of these rights.
 - Identify potential PIL cases through conferences, media reports, contact with grass-root level activists, and by patterns of violations emerging through cases in legal aid cells. Gauge and build public support for PIL actions through consultations with civil society non-governmental organizations (NGOs) that are working on the subject matter of the potential cases.
 - Utilize international human rights instruments and comparative law to enforce the State's obligation to respect, protect, and fulfill women's reproductive rights and to seek accountability for violations.
 - ◆ Explore all relevant international conventions and treaty monitoring body interpretations and observations. Emphasize the right to non-discrimination, which the Indian government is obligated to protect irrespective of resource constraints.
 - ◆ Highlight persuasive comparative legal sources, such as progressive decisions from other countries and regional human rights mechanisms, to support legal arguments and inspire creative remedies.
 - Draw more heavily upon the Indian Constitution's Fundamental Rights and Directive Principles. Build upon prior cases that have led to broad judicial interpretations of the rights to life, health, equality, and non-discrimination. Explore and draw out new lines of jurisprudence on rights that have hitherto not received adequate judicial attention in the context of gender justice, such as the right to privacy. Invoke the Constitution's Fundamental Duties to encompass private citizens within reach of the Court's directives.
 - Highlight and call for the enforcement of national policies that establish guidelines or provide for allocation of resources to improve protections of women's reproductive rights.
 - Suggest concrete remedies that are exhaustive and practical to enforce, with indicators that enable implementation to be monitored and evaluated.
 - Request that the Court ensure its directives are widely circulated and given the broadest possible publicity to promote awareness and compliance.

- Develop a methodology for conducting human rights fact-finding missions, in order to build a strong factual base for PIL petitions. Present an emblematic case to help the judiciary, the media, and the public connect with the issue.
- Network and collaborate with social scientists, public health experts, doctors, and activists working at the ground level to gather clear and convincing facts, studies, and statistics. Involve such partners as independent third parties who can contribute their expertise to specific aspects of a PIL case through formal submissions to the Court.
- Build partnerships with international human rights organizations and lawyers working on similar issues in other jurisdictions to obtain supporting documentation, new ideas, and technical assistance with PIL cases. Request that partners supplement PIL petitions with supporting memoranda containing positive comparative examples from other courts.
- Attempt to involve the National Commission for Women and the National Human Rights Commission in PIL actions.
- Invest in a communications strategy to support PIL cases. Collaborate with activists to ensure that the media is accurately informed about reproductive rights violations and the cases being brought to remedy them. Organize tribunals, workshops, and trainings to build awareness about reproductive rights issues among journalists.
- Continuously emphasize the extent to which discriminatory personal laws violate the provisions of international treaties ratified by India and the Fundamental Rights guaranteed by the Indian Constitution.
- Work with ground-level activists to increase women’s legal literacy and spread awareness about the rights that the Court recognizes and establishes through PIL.
- Explore opportunities to intervene in PIL cases on issues related to reproductive rights—such as cases addressing HIV/AIDS, adolescent rights, and violence against women—to highlight how different rights intersect. Apply a gendered approach that underscores how certain violations have a disproportionate impact on women.
- Pursue concurrent advocacy strategies to complement PIL and safeguard against the challenges and limitations of litigation.
- Make use of international accountability mechanisms.
 - Submit shadow reports supplementing India’s state reports to treaty monitoring bodies of international human rights conventions. Highlight the Indian government’s successes and shortcomings in complying with its treaty obligations.
 - Submit communications that describe ongoing reproductive rights violations in India to the UN Commission on the Status of Women.
 - Urge the Indian government to ratify the optional protocols to international conventions that would enable advocates to pursue human rights claims directly before treaty monitoring bodies, after having exhausted all domestic remedies.

B. RECOMMENDATIONS FOR ACTIVISTS

- Work with lawyers to develop PIL petitions addressing reproductive rights violations. Bolster the petitions with field studies and propose pragmatic remedies.
- Spread awareness about the rights that the Court recognizes through PIL.
- Monitor and evaluate implementation of the Court's directives at the ground level. Inform local government officers about new laws and how best to implement them with a gender perspective in mind.
- Submit copies of reports, studies, and other material documenting domestic and international human rights developments directly to court libraries and judges' chambers.
- Collaborate with lawyers, the National Judicial Academy, media organizations, and law schools to conduct sensitization workshops for judges, journalists, and law students.

C. RECOMMENDATIONS FOR JUDGES

- Draw upon international law and comparative legal sources from other jurisdictions to inform judicial decisions on reproductive rights issues.
 - Continue to fulfill the Constitution's directive to "foster respect for international law and treaty obligations."
 - In addition to consulting jurisprudence from the United Kingdom, Australia, and the United States, draw on cutting edge case law and policies from other countries that are not usually considered in Indian courts.
 - Appoint judicial law clerks and assign them substantive research assignments on international and comparative law.
- Continue to broadly interpret the Constitution's Fundamental Rights and incorporate the values inherent in the Directive Principles and Fundamental Duties when fashioning remedies.
- Consider enforcing the right to privacy as a positive right that enables people to make decisions about their own bodies freely and without interference.
- Establish expert committees during the PIL process to gather complete information about the issue at hand and to help formulate the necessary orders.
- Ensure widespread publicity of PIL directives through various points of distribution, including government departments and ministries, national commissions, health facilities, national bar and press councils, law journals, and media outlets. Issue orders directing newspapers, public television stations, and radio channels to publicize PIL decisions, and make the requirement obligatory and enforceable by specifying the percentage of print space or Air time to be devoted to the public service messaging.

- Develop infrastructure to document and/or preserve all court submissions, court proceedings, and both oral and written judicial orders. Make these materials accessible to the public so that advocates and journalists can better inform themselves about past and current PIL cases.

D. RECOMMENDATIONS FOR LAW SCHOOLS

- Establish clinical programs through which law students can work with public interest lawyers on PIL cases as part of their legal education.
- Ensure that the legal curriculum provides an understanding and analysis of reproductive rights, international law, and comparative norms.
- Work with the government to establish guidelines and codes of conduct to facilitate the entry of recent law graduates into the arena of litigation, especially as public interest litigators.

E. RECOMMENDATIONS FOR THE MEDIA

- Promote public discourse on reproductive rights as human rights by articulating existing norms and shedding light on ongoing violations.
- Publicize Supreme Court and High Court petitions and judgments relating to reproductive rights. Raise awareness about the petitioners' requested remedies and the Court's directives.
- Promote healthy public debates about key human rights issues, such as the importance of the Indian government ratifying the optional protocols to major international human rights treaties.

INTRODUCTION

“It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler will be the sovereign’s boast when he shall have it to say that he found law dear and left it cheap; found it a sealed book and left it a living letter; found it the patrimony of the rich and left it the inheritance of the poor; found it the two-edged sword of craft and oppression and left it the staff of honesty and the shield of innocence.”

—Henry Peter Brougham, quoted by Justice Iyer in reference to the democratization of judicial remedies through PIL, *Fertilizer Corp. Kamgar Union v. Union of India*¹

In India, one woman dies approximately every four minutes due to lack of healthcare during pregnancy or childbirth.² Although the country legalized abortion in 1971, access is so limited that every year an estimated 6.7 million women seeking to terminate a pregnancy undergo unsafe procedures performed by unlicensed practitioners.³ In numerous states, more than 50% of girls enter into arranged marriages before the age of 16.⁴ Studies reveal that women are being coerced into undergoing sterilization procedures in government facilities under alarmingly unhygienic conditions.⁵ Various state governments have enacted coercive population policies that exclude families with more than two children from welfare programs, government jobs, political participation, and access to education and health facilities—without guaranteeing couples access to a full range of contraceptive services.⁶

Furthermore, Indian women face among the world’s highest risk of HIV/AIDS and discriminatory treatment if infected; forced abortions of female fetuses; trafficking for forced prostitution; custodial rape in governmental institutions; sexual harassment in the workplace; and harmful customs that seriously undermine reproductive health—such as the *devadasi* system, under which girls are “dedicated” to a deity or temple and required to engage in prostitution.⁷ All these occurrences constitute gross violations of women and girls’ reproductive rights.⁸

The evolving global reproductive rights framework is based on two key principles—the right to reproductive healthcare and the right to reproductive self-determination. As indicated in the box to the right, these principles encompass a range of internationally accepted civil, political, economic, and social rights. The Programme of Action of the 1994 United Nations (UN) International Conference on Population and Development in CAiro (ICPD Programme of Action) formally recognized reproductive rights as follows:

[R]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.⁹

Human Rights Inherent in the Protection of Reproductive Rights

1. The right to life, liberty, and security.
2. The right to health, reproductive health, and family planning.
3. The right to decide the number and spacing of children.
4. The right to consent to marriage and to equality in marriage.
5. The right to privacy.
6. The right to be free from discrimination on specific grounds.
7. The right to be free from practices that harm women and girls.
8. The right not to be subjected to torture or other cruel, inhuman, or degrading treatment.
9. The right to be free from sexual violence.
10. The right to enjoy the benefits of scientific progress and to consent to experimentation.
11. The right to information and education.

The Declaration and Platform for Action of the subsequent 1995 UN Fourth World Conference on Women in Beijing (Beijing Platform for Action) emphasized that reproductive health is “a state of complete physical, mental and social well-being,” and officially recognized reproductive rights as encompassing sexual rights—which include the right to be free from sexual violence and coercion, and the right to the highest standard of sexual health.¹⁰ Furthermore, the Beijing Platform for Action highlighted the need to promote and protect the reproductive and sexual rights of women “throughout their entire life cycle,” recognizing that “[d]iscrimination against women begins at the earliest stages of life and must be addressed from then onwards.”¹¹

In India, women’s enjoyment of the above-defined reproductive rights is heavily undermined by gender-biased norms and practices, and by discriminatory religion-based laws that govern family matters. Thus, Indian women face a wide range of human rights abuses—all of which violate key provisions of the Constitution of India and international conventions that the Indian government has ratified. Instead of being permitted to accept reproductive rights violations as inevitable, irreparable, customary, or necessary, the central and state governments of India must be held accountable for enabling such violations to continue. Moreover, women who experience rights violations must be guaranteed tangible legal remedies.

The Supreme Court of India (the Court or apex bench) is a prime vehicle for moving these goals forward, and it has provided advocates with a unique legal mechanism—Public Interest Litigation (PIL)—that can be utilized to this end. “PIL is really a response to the needs of society, particularly the society of women who, in this country at least, have been very badly treated for centuries,” observed a senior advocate and former Additional Solicitor General of India.¹² By enabling advocates to call upon the government to address and remedy ongoing violations of women’s rights, PIL can be an important catalyst for systemic social change.

This report explores the ways in which PIL has been, and can further be, used at the Supreme Court level to promote the reproductive rights of women in India. It is divided into three Parts. Part I describes the context and legal framework for using litigation to address violations of women’s reproductive rights. This includes brief background information on the PIL mechanism; a discussion of the international and comparative sources of law that can be relied upon in framing PIL actions; and an analysis of the Indian constitutional provisions upon which such litigation can be based. Part I will also consider the challenge posed by religion-based personal laws, and the role that statutory bodies—the National Commission for Women, the National Human Rights Commission, and the Law Commission of India—can play in promoting gender justice through PIL.

Part II of the report delves into case studies of select Supreme Court judgments and petitions addressing issues relating to reproductive rights, including sexual harassment, coercive population policy, child marriage, and unsafe sterilization practices. The case studies are based on analyses of the Court’s orders and on interviews with the lawyers, judges, and activists directly involved in the cases. Part II aims to shed light on the potential and pitfalls of addressing rights violations through litigation. The report’s final Part III discusses some obstacles and limitations of using PIL for the promotion of reproductive rights. It concludes by drawing upon lessons learned from the cases studies and interviews to propose strategies for advocates to consider in moving forward with PIL for the advancement of gender justice in India.

Key Statistics

- Total fertility rate: 2.85¹³
- Contraceptive prevalence (modern and traditional methods): 48%¹⁴
- Female literacy: 48% (compared with 73% male literacy)¹⁵
- Adolescent girls (aged 15-19) in rural areas who have been married: 40% (compared with 8% of men in same age group)¹⁶
- Married adolescent girls using contraception: 7.4%¹⁷
- Number of girls who begin childbearing during their teenage years: 1 in 6¹⁸
- Maternal mortality ratio: 540 deaths per 100,000 live births¹⁹
- Number of maternal deaths per year: 136,000 (This is the highest number worldwide. China, with a comparably large population, has 11,000 maternal deaths per year. Sweden, one of the countries with the lowest maternal mortality figures, has 2 maternal deaths per year)²⁰
- Percentage of Indian GDP devoted to public health expenditures: 1.2%²¹

Women's Lack of Reproductive Self-Determination

In its October 2005 report to the UN Committee on the Elimination of Discrimination Against Women, the Indian government acknowledged, "Women hardly have any choice in decision-making about having children or the number and spacing of children. The family and the male members often make these decisions and women are further burdened to produce male children."²² Interviews with low-income women in New Delhi confirmed this reality.

For example, Sandhya, a part-time domestic worker who was married at age 15, said she had three children within her first three years of marriage, followed by twins. She recounted:

I only wanted two children but my mother-in-law did not permit me to get the [sterilization] operation, because she wanted me to have seven children. My mother-in-law beat me when I said I did not want more children. When I said I wanted to abort my last pregnancy, she did not allow me to eat for two days. My husband listens to his mother. ...The decision of how many children to have is in the hands of the mother-in-law and the husband.²³

Sandhya felt she could not get an abortion without her mother-in-law's approval: "If I did it, wouldn't I have been beaten?"²⁴

Similarly, Indu, a mother of four who balances jobs as a school cook and a boiled-egg vendor, recounted that she wanted to get sterilized after having two daughters because her husband makes no financial contributions towards the children.²⁵ However, Indu's mother-in-law insisted that she keep having children in hopes of a grandson. After giving birth to a third and a fourth daughter, Indu decided to "take things into [her] own hands" by undergoing a sterilization procedure. For doing so, she suffered the wrath of not only her husband and in-laws, but also her own sister, who did not believe this choice was Indu's to make.

Another young mother, Bharti, tried to obtain a sterilization operation at a public hospital after having a son and a daughter, but the doctors and nurses pressured her not to go through with it by saying: "God forbid if something happens to your son, you will be left only with a daughter."²⁶ Bharti has still not undergone the sterilization procedure she wanted. She added, "If there is an unwanted pregnancy, it is our fault too. We should control it. We should eat medicine to prevent it. We should keep track of the time of month and keep the husband away from us at that time. But some husbands do not listen, especially after drinking."

Such situations in which women lack reproductive and sexual autonomy are likely to be even more prevalent in rural areas. "Today, [Indian] women continue to have little control over their reproductive lives, even in affluent, well-off, so-called 'advanced' families," a former Supreme Court chief justice observed.²⁷

PART I:

CONTEXT AND LEGAL FRAMEWORK

Part I provides the context and legal framework in which PIL operates in India. It discusses the legal and historical foundation of the PIL mechanism; the international and constitutional sources of law that reproductive rights advocates can use to support PIL cases; the religion-based personal laws that may pose an obstacle to achieving gender justice in India; and the statutory bodies that can complement the efforts of advocates seeking to promote reproductive rights through litigation.

CHAPTER 1. PUBLIC INTEREST LITIGATION IN INDIA

“PILs are like alarm clocks. They tell the government: don’t sleep, please get up.”

–Justice Yatindra Singh, High Court of Allahabad²⁸

The PIL mechanism was developed in the 1980s through a series of decisions issued by justices of the Indian Supreme Court, 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.”²⁹ Using PIL, petitioners can bring suits on behalf of others against the national or state governments of India, to ensure that “the State, either of its own volition, or due to its passivity and inaction, does not become an instrument of subverting the rights of the people.”³⁰ PIL actions can be initiated either in the High Courts located in each Indian state or directly in the Supreme Court of India. This report focuses primarily on PIL at the Supreme Court level, although initiating litigation in High Courts is discussed briefly in Part III.³¹

PIL cases must be based on constitutional claims and can be brought only against the government, not private parties. Unlike traditional litigation, PIL has looser procedural requirements, particularly in regard to legal standing. Furthermore, in a PIL case there is no trial; the governmental respondents are expected to cooperate with the petitioners, rather than act as opponents; objective third parties, such as amici curiae and expert committees, are often involved in the litigation; and the Court plays a particularly active role in directing the proceedings and monitoring the implementation of its orders. The justices who developed PIL regarded it as “absolutely essential for maintaining the rule of law, furthering the case of justice and accelerating the pace of realisation of constitutional objectives.”³²

A. CONSTITUTIONAL BASIS

The Supreme Court has jurisdiction over PIL actions through Article 32 of the Indian Constitution, which guarantees individuals the right to move the Court for the enforcement of fundamental constitutional rights.³³ Commenting on the significance of this provision, the Court has said: “The

jurisdiction conferred on the Supreme Court by Article 32 is an important and integral part of the basic structure of the Constitution because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated. A right without a remedy is a legal conundrum of a most grotesque kind.”³⁴

The language of Article 32 is very broad; it does not specify how or by whom the Court can be moved to take action.³⁵ “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,” the apex bench has observed.³⁶ The Court is constitutionally empowered to gather the information it needs in PIL cases by subpoenaing any necessary persons or documents, and all civil and judicial authorities are required to assist as needed.³⁷ Those who do not comply with judicial orders are subject to punishment under the Court’s contempt powers.³⁸

The Constitution authorizes the Supreme Court to pass any decree or order, “as is necessary for doing complete justice in any cause or matter.”³⁹ The Court’s directives are enforceable throughout India and, as the highest court in the country, its holdings are binding upon all other Indian courts.⁴⁰ Although the Constitution suggests the kinds of remedies that the judiciary can apply to enforce constitutional rights, it leaves the list open-ended. 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 apex bench has interpreted the Constitution’s remedy provision as “conferring on the Supreme Court power to enforce the fundamental rights in the widest possible terms.”⁴¹

The Supreme Court regarded itself as not just equipped with “all the incidental and ancillary powers” to develop a

mechanism as procedurally broad and substantively powerful as PIL, but also obligated to do so under its constitutional mandate.⁴² In *Bandhua Mukti Morcha v. Union of India*, a 1984 PIL decision on the rights of bonded laborers, the apex bench stated:

It must be remembered that the problems of the poor which are now coming before the Court are qualitatively different from those which have hitherto occupied the attention of the Court and they need...a different kind of judicial approach. 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.⁴³

The *Bandhua Mukti Morcha* Court concluded, “We have therefore to abandon the laissez faire approach in the judicial process, particularly when it involves a question of enforcement of fundamental rights, 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.”⁴⁴

Judicial Independence

The relative independence of the Indian judiciary enhances the potential effectiveness of the PIL mechanism. Unlike members of the executive and legislative branches, who are elected, Supreme Court Justices are selected from a pool of senior-most High Court Judges by a consortium of current justices on the apex bench, and appointed with the approval of the President of India.⁴⁵ There are currently 26 seats on the Supreme Court, and the Constitution provides for these seats be filled on the basis of seniority—by individuals who have served at least five years as a High Court judge or ten years as a court advocate.⁴⁶ The Supreme Court’s chief justice position is filled on the basis of seniority within the apex bench.⁴⁷ Once appointed, Supreme Court Justices are protected by fixed salaries, tenure until the age of 65, and a heavily safeguarded removal process.⁴⁸

A significant downside to the judicial appointment process, which will be discussed in greater depth in Part II, is the negative repercussions it has on the gender composition of the bench due to the lack of women in senior High Court positions.⁴⁹ Moreover, there is a perception that the executive branch’s practice of appointing retired justices to leadership roles on national commissions and councils is increasingly eroding the judiciary’s independence, because judges who consistently rule against the government may be less likely to be considered for these attractive posts.⁵⁰

B. FEATURES OF PIL

Former Supreme Court Justice Krishna Iyer is credited with having sown the seeds of the PIL concept in a 1976 industrial dispute decision, in which he encouraged a “spacious construction of locus standi” in order to promote access to justice.⁵¹ “After the germination of the seeds of the concept of PIL in the soil of our judicial system, this rule of PIL was nourished, nurtured and developed by the [a]pex court of this land by a series of outstanding decisions,” the Court has observed, describing the vigorous development of PIL in the early 1980s.⁵² Landmark cases from this era illuminate the key features of the mechanism, and provide historical context for understanding how today’s advocates can best use PIL to promote reproductive rights.

1. Expansion of locus standi to provide remedies

The predominant feature of PIL is its liberalization of the traditional rule of standing, which requires petitioners to themselves have suffered a legal injury in order to maintain an action for judicial redress.⁵³ In *Fertilizer Corp. Kamgar Union v. Union of India*, a 1980 case brought by factory workers challenging the constitutionality of a government factory’s sale of a steel plant, the Court noted, “[I]t may become necessary in the changing awareness of legal rights and social obligations to take a broader view of the question of locus to initiate a proceeding...”⁵⁴ In a concurring opinion, Justice Iyer explained that “some risks have to be taken and more opportunities opened for the public-minded citizen to rely on the legal process and not be repelled from it by narrow pedantry now surrounding *locus standi*.”⁵⁵ Moreover, he pointed out that the State cannot assert a right to be free from judicial review, because the Court needs to carry out “effective policing of the corridors of power.”⁵⁶ Inaugurating the Court’s first official use of the PIL term, the *Fertilizer Corp.* concurrence stated: “Public interest litigation is part of the process of participat[ory] justice and ‘standing’ in civil litigation of that pattern must have liberal reception at the judicial doorsteps.”⁵⁷ PIL thus emerged as a means for the judiciary to hold the government accountable and to catalyze action against rights violations.⁵⁸

As observed by the Supreme Court, the seed of PIL sowed by Justice Iyer “took its root firmly in the Indian Judiciary and fully blossomed with fragrant smell” in *S. P. Gupta v. Union*

of India, a 1980 decision authored by another forefather of PIL, Justice P. N. Bhagwati.⁵⁹ High Court and Supreme Court advocates initiated this litigation to challenge, *inter alia*, the constitutionality of a Ministry of Law circular on the appointment and transfer of High Court Judges.⁶⁰ In response to the Ministry's argument that the petitioners did not have standing to maintain the action, the Court articulated the new rule of *locus standi* for cases involving the violation of a constitutional right:

[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...in this Court under Article 32 seeking judicial redressal for the legal wrong or injury....⁶¹

To further broaden access to justice, the *S. P. Gupta* Court established epistolary jurisdiction, stating that it would "readily respond even to a letter addressed by such individual acting *pro bono publico*," and treat it as a formal writ petition for PIL purposes.⁶² "When the judicial conscience has been shocked, the procedural shackles have been shattered," noted a former High Court chief justice, commenting on the Court's willingness to bend long-established rules in order to address egregious rights violations.⁶³

Explaining the rationale behind the Court's radical departure from traditional procedural principles in *S. P. Gupta*, Justice Bhagwati wrote: "[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. ...The court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning."⁶⁴ The apex bench identified PIL as "the only way in which this can be done," and encouraged High Courts to also adopt "this pro-active, goal oriented approach."⁶⁵ For this reason, the *S. P. Gupta* decision has since been hailed by the Court as "a charter of PIL" and "a golden master key which has provided access to the Courts for the poor and down-trodden."⁶⁶

2. Non-adversarial nature

Another key feature of PIL is its non-adversarial nature, which the Court has differentiated from traditional litigation involving two opponents as follows: "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 conferred upon the vulnerable sections of the community and to reach social justice to them."⁶⁷ In *People's Union for Democratic Rights (PUDR) v. Union of India*, a 1983 judgment initiated by a letter describing the dismal conditions of bonded laborers working on construction projects for the Asiad games, the Court noted, "The State or public authority against whom public interest litigation is brought should be as much interested in ensuring basic human rights, constitutional as well as legal, to those who are in a socially and economically disadvantaged position, as the petitioner who brings the public interest litigation before the court."⁶⁸ The *PUDR* decision even went so far as to say that the State should "welcome" a PIL, "as it would give it 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."⁶⁹

According to a senior advocate who has played the roles of petitioner's lawyer, government's lawyer, and court-appointed amicus in PIL cases, the central government has taken a very cooperative and positive approach toward PIL because the Court generally "comes up with something positive" in its judgments.⁷⁰ A women's rights lawyer who has also been involved in numerous PIL actions agreed that in most of her cases, "the government has been an ally."⁷¹ However, these observations do not necessarily extend to state governments, which tend to vary in their response to PIL cases.⁷²

Given the collaborative nature of PIL, a petitioner cannot withdraw a case once it has been filed and other stakeholders have become involved. The Court established this principle in a 1988 order issued in *Sheela Barse v. Union of India*, when a petitioner sought to withdraw a PIL that she had filed on behalf of children in Indian jails, due to her frustration with the slow progress of the case.⁷³ Denying the petitioner's

motion, the Court explained, “The ‘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. ...The 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.”⁷⁴

3. Role of third parties

Third parties, such as amici curiae and members of expert panels or advisory committees, often help the Court to better understand the issues brought to its attention through PIL actions.⁷⁵ These amici and experts are selected by the presiding judges based on the capability of the individuals and the demands of the particular case.⁷⁶

The Court’s ability to convene expert panels and committees is critical given that judges may lack expertise on specific aspects of the complex socioeconomic or medical issues that arise in many PIL cases. For example, in a PIL action to ban certain drugs with allegedly deleterious side effects, the justice presiding over the case said he assembled a committee of 12 medical experts to assist him with the decision, “because I am not an expert in pharmacopeias.”⁷⁷ Another Supreme Court Justice recalled a case on Internet child pornography for which he gathered experts on computers and children’s rights to conduct a study and issue a report, upon which he then based his guidelines.⁷⁸ Expert committees may also provide judges with advice on how to structure their PIL orders in a manner that would facilitate implementation.⁷⁹

Similarly, amici curiae, who are individuals appointed by the Court to present a neutral, objective point of view, can have a significant impact on PIL proceedings.⁸⁰ A former Supreme Court chief justice who promoted the appointment of amici as a rule in every important PIL case explained the benefits of this system:

The biggest risk in PIL is if the persons dealing with it, particularly judges doing it, are not equal to the task, are not imaginative or innovative enough, ...are too sure of themselves, undertake tasks themselves which they are not capable of performing, or overlook something. That risk must be avoided, therefore the need for eminent counsel appearing as amicus curiae.⁸¹

He added that amici help to keep PIL cases on track even if the petitioners lose interest.⁸²

Another Supreme Court Justice noted that judges also rely on amici “to dig up relevant factual data or make inspections and report to us, and we use that primary material as a basis for finding facts.”⁸³ Furthermore, the Court may ask an amicus to explore potential remedies and provide advice on how best to enforce them.⁸⁴ Critics contend, however, that the Court’s use of amici 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 mechanism through which “you could have all voices being heard by the Court.”⁸⁵

4. Role of the Court

It is not only the roles of the petitioners, respondents, and third parties that are different in PIL cases, but also the role of the Court, which has greater involvement and obligations both in directing PIL proceedings and in monitoring the outcomes. As described in *Sheela Barse*:

[In PIL,] the 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 ...also supervising the implementation thereof. ...This wide range of the responsibilities necessarily implies correspondingly higher measures of control over the parties, the subject matter and the procedure.⁸⁶

A human rights lawyer further pointed out that the Court’s latitude to broaden the scope of a PIL petition by employing “the various devices that have been brought in—setting up committees to investigate, making all states party to the litigation, converting one cause into anything else” has altered the power structure by giving the Court far more discretion in PIL than it has in traditional litigation proceedings.⁸⁷

Justices also have 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,” the Court has explained.⁸⁸ It has also noted that in the context

of PIL, “the Supreme Court would not be constrained to fold its hands in despair and plead its inability to help the citizen who has come before it for judicial redress, but would have power to issue any direction, order or writ...”⁸⁹

Furthermore, judges play an ongoing role in monitoring the implementation of their PIL orders, because the relief they grant in such actions “looks to the future and is generally corrective rather than compensatory.”⁹⁰ For example, a human rights lawyer noted that in *People’s Union for Civil Liberties v. Union of India*—an ongoing PIL based on a report about large-scale starvation deaths in Rajasthan, which made a bold argument for the recognition of a right to food—the Court embraced the case and proactively took on “a very elaborate monitoring role...that it came up with itself.”⁹¹ The bench presiding over the case has been regularly holding hearings, collecting affidavits, and issuing specific directives about the type of food that should be collected, and how or where it should be distributed.⁹²

It is not uncommon for a PIL case to lead to a series of important interim orders rather than one final judgment. “Issuing a one time mandamus requiring compliance may be futile, [with] the remedy being only a contempt proceeding and nothing more,” a former Supreme Court Justice said, explaining that judges therefore employ the doctrine of continuing mandamus to “keep a case open and direct the authority to perform and report, so you are constantly breathing down the neck of that authority.”⁹³ In addition, the Court may appoint a special commission to monitor and report back on compliance at the ground level; and the petitioning lawyers may play an active role in comparing the original judgment with affidavits from the respondents and the monitoring commission to point out any discrepancies.⁹⁴ After examining all these materials, the Court may issue new directives if it finds government compliance unsatisfactory. As one justice remarked, the Court’s role in resolving a PIL case is “a continuing thing—you cannot do it overnight.”⁹⁵

5. Finality of decisions

In contrast to interim orders, a final Supreme Court judgment is difficult to change and is binding upon all lower courts in the country. When faced with a negative PIL decision, advocates can either lobby the legislature to overturn the

legal effect of the judgment, or they can request a judicial review of the case by presenting new facts that were not considered in the original decision.⁹⁶ If the petitioners’ request for a judicial review is granted, the case will generally be referred to a larger bench of Supreme Court judges for reconsideration. Although it is rare for the Court to overturn a decision on review, one Supreme Court Justice noted that judges might be willing to reconsider a decision if there is strong public opinion against it, or if a foreign court has delivered a landmark judgment on the same issue that was not available when the case was originally decided.⁹⁷ “Otherwise, once the Supreme Court decides, nothing can be done unless it is legislation,” he said.⁹⁸

C. JUDICIAL ACTIVISM

Through PIL, the Court has asked the legislature to reform or enact laws, and has directed the executive to better enforce existing laws and policies. Supreme Court judges have even gone one step further by themselves enacting guidelines to fill legislative vacuums, as will be explored in a case study on sexual harassment in Part II,⁹⁹ or by actively involving themselves in administrative matters to ensure implementation of their orders, as seen in the PIL on the right to food.¹⁰⁰ This judicial activism has been both applauded and disparaged. In an essay on the potential and problems of PIL, two senior advocates observed, “PIL in practice...tends to narrow the divide between the roles of the various organs of government, and has invited controversy principally for this reason.”¹⁰¹

1. Criticisms

The legislative or executive nature of some judicial orders has sparked criticism that the Court is violating the separation of powers doctrine by “trespassing” into the jurisdictions of other branches “under the guise of PIL.”¹⁰² Critics caution that unrestrained judicial activism could “boomerang” and ultimately make the Court a less powerful institution.¹⁰³

“There is a real danger that if you keep overstepping your bounds by passing orders that are difficult to implement, then nothing will be done about the orders you are passing,” remarked one Supreme Court advocate.¹⁰⁴ Furthermore, a former Supreme Court Justice observed, “Judicial forays

into policy issues through trial and error, without necessary technical inputs or competence, have resulted in unsatisfactory orders that have...passed beyond 'judicially manageable standards.'"¹⁰⁵ Even a former justice who is renowned for his judicial activism cautioned: "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, because there are not judicially manageable standards for that."¹⁰⁶ The executive branch has expressed similar concerns. In a speech at a conference of chief ministers and chief justices of High Courts in March 2006, Indian Prime Minister Manmohan Singh cautioned: "A balanced approach in taking up PIL cases will continue to keep PILs as a potent tool for rectifying public ills."¹⁰⁷

2. Context

Nevertheless, there is wide recognition, even among critics of judicial activism, that the Court has taken on such a proactive role to compensate for the inaction of the legislative and executive branches.¹⁰⁸ "In the last ten years, we have been having coalition governments where different parties are not able to pull together effectively," observed a former Supreme Court Justice and chairperson of the Law Commission of India. "There is no effective legislation or implementation, so people rush to the courts for redress."¹⁰⁹ The failings of the non-judicial branches have also been attributed to bureaucratic hurdles, political pressures,¹¹⁰ and corruption "of a tremendous order"¹¹¹ due to "criminal politicians who are not as concerned about development as filling their own pockets."¹¹² Furthermore, litigation is perceived as a speedier means of attaining desired outcomes than lobbying for legislation or executive policies.¹¹³

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 of the country. Therefore, although what the Court has done may be criticized on a pedantic footing, it [has been] necessary in order to alleviate the legitimate grievances of the citizens of the country.¹¹⁴

Considering the alternative, a former 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."¹¹⁵ The PIL mechanism has thus been described as an "an alarm clock" that prods the other branches of government into fulfilling their obligations.¹¹⁶ "The government would not wake up without the Court's intervention," one legal journalist asserted.¹¹⁷

According to some judges and lawyers, the Court's activism may have suited the other governmental branches in certain circumstances, enabling politicians to abdicate responsibility and insulate themselves from politically sensitive issues by claiming that they had no choice but to comply with orders issued by the apex bench.¹¹⁸ For example, a former High Court chief justice pointed out that it was the judiciary, and not the executive branch, that issued directives to curtail urban pollution, because the executive was "influenced by the next election"—concerned that enacting antipollution laws would lead to transportation company strikes and a subsequent loss of votes.¹¹⁹

3. Public response

Despite—or perhaps because of—its willingness to address controversial matters and expand its domain of responsibilities, the Supreme Court's activism has garnered a large amount of social sanction.¹²⁰ Lawyers, judges, and journalists have observed that public response to the Courts' interference is almost always positive,¹²¹ and that "a pronouncement of the Court has a terrific impact on society."¹²² As one senior advocate remarked, 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."¹²³

Even certain underprivileged sections of society that have limited access to the court system, such as women living in urban slums, profess a surprising degree of belief in the judiciary's ability to address their grievances.¹²⁴ At the other end of the power spectrum, Prime Minister Singh has noted: "[T]he Supreme Court of India is a shining symbol of the great faith our people have in our judiciary who see it

as a protector from the arbitrary exercise of power and as a custodian of their fundamental rights. This is an impressive and enviable reputation....¹²⁵ The Supreme Court is therefore an ideal forum in which to secure public attention and governmental accountability for ongoing reproductive rights violations in India.

CHAPTER 2. INTERNATIONAL AND COMPARATIVE SOURCES OF LAW

“[I]nternational instruments cast an obligation on the Indian state to gender sensitise its laws, and the Courts are under an obligation to see that the message of the international instruments is not allowed to be drowned.”

–Chief Justice Anand,
*Apparel Export Promotion Council v. Chopra*¹²⁶

International human rights law provides a body of legal analysis and norms that can help advance reproductive rights in the Indian context. These principles, many of which are consistent with the Constitution of India, are outlined here to describe the reproductive rights framework that has been developed at the international level. This section will discuss legally binding treaty provisions, authoritative interpretations and observations issued by treaty-monitoring bodies, and the Indian Supreme Court’s application of international and comparative law. The relevant constitutional provisions are discussed in the next chapter.

A. KEY INTERNATIONAL TREATIES AND INTERPRETATIONS

The Indian government is legally bound to respect, protect, and fulfill women’s reproductive rights pursuant to numerous international conventions that it has ratified. According to the Vienna Convention on the Law of Treaties, a state that ratifies or accedes to an international convention “establishes on the international plane its consent to be bound by a treaty.”¹²⁷ India is a state party to four particularly relevant UN treaties: the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (Civil and Political Rights Covenant), the International Covenant on Economic, Social and Cultural Rights (Economic, Social and Cultural Rights Covenant), and the Convention on the Rights of the Child (Children’s Rights Convention).

Each of these treaties has a monitoring body that oversees compliance, to which states parties are required to submit reports every few years describing the measures they have adopted to give effect to the convention. The treaty monitoring bodies meet periodically to review state reports in the presence of representatives from the state that is being reviewed. Following the review, the treaty monitoring

body issues Concluding Observations, commenting on the adequacy of the state party’s compliance with the relevant convention’s obligations.¹²⁸ The treaty monitoring bodies further contribute to the development and understanding of international law by periodically issuing General Comments or Recommendations, which are comprehensive commentaries on the nature of obligations associated with particular treaty provisions.¹²⁹

CEDAW and the Civil and Political Rights Covenant also have Optional Protocols that enable individuals and groups to submit complaints of rights violations directly to the treaty monitoring body after having exhausted domestic remedies.¹³⁰ Unfortunately, unlike several countries in the South Asian region, India has not signed either protocol, so its citizens cannot yet rely on this important feature of international accountability.¹³¹

The legally binding provisions of the major human rights conventions are complemented by politically binding international consensus documents that support a globally recognized reproductive rights framework. These include the above-discussed ICPD Programme of Action and Beijing Platform for Action, which were reinforced at the ICPD+5 and Beijing+5 special review sessions, respectively.¹³² Moreover, the UN’s Millennium Development Goals, which India has integrated into its national policy, prioritize promoting gender equality, reducing maternal mortality, and combating HIV/AIDS as key development issues for the new millennium.¹³³

1. Convention on the Elimination of all forms of Discrimination Against Women

CEDAW, which India ratified in 1993, protects both civil-political and economic-social-cultural rights of women, thereby providing the strongest international legal support

for the protection and advancement of reproductive rights.¹³⁴ The treaty broadly defines discrimination as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impAiring or nullifying the recognition, enjoyment or exercise by women...on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”¹³⁵

Right to reproductive healthcare

CEDAW recognizes access to reproductive healthcare as a basic right, directing states parties to ensure that women have “access to health care services, including those related to family planning,” “appropriate services in connection with pregnancy, confinement and the post-natal period,” and “adequate nutrition during pregnancy and lactation.”¹³⁶ According to the treaty’s monitoring body, the Committee on the Elimination of Discrimination against Women (the CEDAW Committee), “Measures to eliminate discrimination against women are considered to be inappropriate if a health care system lacks services to prevent, detect and treat illnesses specific to women [or] refuses[s] to legally provide for the performance of certain reproductive health services for women.”¹³⁷ Barriers to access, which states parties are obliged to eliminate, include “high fees for health care services, the requirement for preliminary authorization by spouse, parent or hospital authorities, distance from health facilities and absence of convenient and affordable public transport.”¹³⁸ Furthermore, governments must “ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control.”¹³⁹

In its 2000 Concluding Observations on India, the CEDAW Committee “note[d] with concern” that India’s maternal mortality rates “are among the highest in the world,” and that the government’s “family planning is only targeted at women.”¹⁴⁰ The Committee recommended that the Indian government adopt “a holistic approach to women’s health throughout the life cycle in the country’s health programme” and that it “allocate resources from a ‘women’s right to health’ perspective.”¹⁴¹

Violations in other contexts

CEDAW also provides a legal basis for protecting reproductive health in a variety of other contexts, such as education and employment. The State is required to secure gender-equal access to “specific educational information to help to ensure the health and well-being of families, including information and advice on family planning,” and to “ensure that family education includes a proper understanding of maternity as a social function.”¹⁴² In addition, CEDAW instructs governments to establish gender equality in the workplace by protecting the right to reproductive health and safety in working conditions and preventing discrimination on the grounds of marriage or maternity.¹⁴³ The CEDAW Committee has recognized that equality in employment can be “seriously impAired” by sexual harassment in the workplace.¹⁴⁴

CEDAW states parties are further urged to take effective measures to prevent abuses such as trafficking, sexual exploitation, sexual harassment, family violence, rape, sexual assault, and “coercion in regard to fertility and reproduction.”¹⁴⁵ In addition, the treaty instructs governments to “modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”¹⁴⁶ It particularly emphasizes the heightened reproductive vulnerability of women in rural areas, where approximately 71% of the population in India resides.¹⁴⁷

State’s duty to fulfill rights

The CEDAW Committee has specified that “the duty to fulfil rights places an obligation on states parties to take appropriate legislative, judicial, administrative, budgetary, economic and other measures to the maximum extent of their available resources to ensure that women realize their rights to healthcare.”¹⁴⁸ Highlighting India’s shortcomings in this realm, the CEDAW Committee stated in its 2000 Concluding Observations that “inadequate allocation of resources for women’s development in the social sector and inadequate implementation of laws are serious impediments to the realization of women’s human rights in India.”¹⁴⁹

CEDAW prohibits the Indian government from absolving itself “of responsibility in these areas by delegating or transferring [State health functions] to private sector agencies.”¹⁵⁰ Moreover, the treaty’s provisions are not

restricted to violations committed directly by or on behalf of governments, but rather, oblige states parties to take action against gender-based discrimination “by any person, organization, or enterprise.”¹⁵¹ As noted by the CEDAW Committee, “Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”¹⁵²

The Indian government’s declarations

The government of India ratified CEDAW with two declarations and one reservation.¹⁵³ In regard to the treaty’s Article 5 directive to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes,” the Indian government has declared “that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.”¹⁵⁴ The Indian government has taken the same stance with regard to CEDAW’s Article 16(1) obligation to “eliminate discrimination against women in all matters relating to marriage and family relations,” which requires the government to ensure that men and women have equal rights to enter into marriage with full consent, to decide freely on the number and spacing of children, and “to have access to the information, education and means to enable them to exercise these rights.”¹⁵⁵

The discriminatory conduct prohibited by Articles 5 and 16(1) of CEDAW includes “practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, [and] acid attacks,” as well as compulsory sterilization and abortion.¹⁵⁶ None of these practices should fall within the government’s policy of non-interference, because in addition to violating the fundamental principles of CEDAW and other international conventions, they contravene domestic legislation and key provisions of the Indian Constitution.¹⁵⁷

India has also limited its acceptance of CEDAW’s Article 16(2) requirement that states parties institute compulsory marriage registration, which can play a critical role in the enforcement of anti-trafficking and child marriage laws.¹⁵⁸

Upon ratifying CEDAW, the Indian government declared: “[T]hough in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy.”¹⁵⁹ Nevertheless, the Indian Supreme Court recently took the matter into its own hands and overrode India’s declaration to CEDAW in a 2006 order issued in a matrimonial case, *Smt. Seema v. Ashwani Kumar*.¹⁶⁰ After examining the varying state and religious laws that have thus far governed the issue of marriage registration in different parts of the country, the Court observed that the absence of a uniform registration requirement “affects the women to a great measure.”¹⁶¹ The Court concluded that “marriages of all persons who are citizens of India belonging to various religions should be made compulsorily registrable in their respective States, where the marriage is solemnized.”¹⁶²

This significant decision revealed the Court’s commitment to holding India accountable to its domestic and international legal obligations in spite of the executive branch’s expressed resistance. In fact, the Court explicitly highlighted the Indian government’s declaration to CEDAW in the opening paragraphs of the *Smt. Seema* order, before proceeding to issue a ruling to the contrary.¹⁶³ The Court’s action underscores the independence of the judiciary and the enormous potential for using litigation to bring the Indian government into compliance with international human rights standards.

2. International Covenant on Civil and Political Rights

The Civil and Political Rights Covenant, which India acceded to in 1979 with declarations on three articles,¹⁶⁴ also contains several key provisions relating to the protection of reproductive rights.¹⁶⁵

Protections of reproductive rights

The Covenant explicitly recognizes the equal rights of men and women to life, liberty, and security of person, as well as to noninterference with privacy, family, and home.¹⁶⁶ The treaty’s monitoring body, the Human Rights Committee, has clarified that the right to life “cannot properly be understood in a restrictive manner and the protection of this right requires that States adopt positive measures,” such as steps to “reduce infant mortality and to increase life expectancy.”¹⁶⁷

The Civil and Political Rights Covenant requires states parties to ensure full and free consent for entry into marriage, and “equality of rights and responsibilities of spouses as to marriage.”¹⁶⁸ It prohibits gender discrimination and it explicitly recognizes the need to give children measures of special protection without any discrimination as to sex.¹⁶⁹ Moreover, the Covenant prohibits slavery, servitude, torture, and cruel, inhuman, or degrading treatment.¹⁷⁰ The Human Rights Committee has emphasized that states parties must overcome gender inequality and report on measures they have taken to address violations of women’s reproductive rights, such as “life-threatening clandestine abortions,” rape, forced abortion or sterilization, and trafficking of women.¹⁷¹

State’s duty to fulfill rights

The Civil and Political Rights Covenant calls upon states parties “to develop the possibilities of judicial remedy” for people whose rights are violated, and to enforce such remedies when granted.¹⁷² Furthermore, the Human Rights Committee has instructed states parties to “ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights.”¹⁷³ In its 1997 Concluding Observations on India, the Committee said it was “concerned that women in India have not been accorded equality in the enjoyment of their rights and freedoms in accordance with...the Covenant. Nor have they been freed from discrimination.”¹⁷⁴

The *K.L.* case

In 2005, the Human Rights Committee issued a landmark ruling in *K.L. v. Peru*, a case brought against the Peruvian government under the Optional Protocol to the Civil and Political Rights Covenant.¹⁷⁵ The case involved a woman who was forced by state hospital authorities to carry a pregnancy to term, even though she carried an anencephalic fetus (characterized by severe anomaly in brain formation) that threatened her health and had no chance of survival. The Human Rights Committee ruled in favor of the woman, recognizing that denying her an abortion in a circumstance where it was legal violated her right to privacy, and that forcing her to carry the pregnancy to term constituted cruel, inhuman, and degrading treatment.¹⁷⁶ This decision reveals how the restrictive traditional perception of reproductive

rights as a socio-health issue is being broadened through creative lawyering claims that highlight the civil and political rights implicated in reproductive rights violations.

3. International Covenant on Economic, Social and Cultural Rights

The Economic, Social and Cultural Rights Covenant, which India acceded to in 1979 with declarations on four articles,¹⁷⁷ is particularly significant to the global reproductive rights framework because it was the first human rights treaty to recognize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹⁷⁸

Right to health

The Committee on Economic, Social and Cultural Rights (Economic, Social and Cultural Rights Committee), the monitoring body of the Economic, Social and Cultural Rights Covenant, has defined the right to health as encompassing entitlements, such as “the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health,” as well as freedoms, such as “the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, nonconsensual medical treatment and experimentation.”¹⁷⁹

Furthermore, the right to health requires states parties to ensure that health facilities, goods, and services are culturally acceptable; available in sufficient quantity; of good quality; and accessible—which includes non-discriminatory access, physical access, access to information, and affordability.¹⁸⁰ According to the Economic, Social and Cultural Rights Committee, violations of the right to health can occur both “through the direct action of States or other entities insufficiently regulated by States,” and “through the omission or failure of States to take necessary measures arising from legal obligations.”¹⁸¹

Women’s right to reproductive healthcare

Within the right to health, the Economic, Social and Cultural Rights Committee has emphasized the particular obligations of states parties vis-à-vis women’s reproductive rights:

The realization of a woman's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.¹⁸²

Highlighting the interconnectedness of women's and children's rights, the Committee has interpreted the treaty's directive to "promote healthy development of the child" as "requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information."¹⁸³

Additionally relevant to the promotion of reproductive rights is the Economic, Social and Cultural Rights Covenant's requirements that states parties ensure marriage is entered into only with the free consent of both spouses, adopt "special measures of protection and assistance" for young persons, recognize "the right of everyone...[t]o enjoy the benefits of scientific progress and its applications," and accord "special protection...to mothers during a reasonable period before and after childbirth."¹⁸⁴

State's duty to fulfill rights

Although the Economic, Social and Cultural Rights Covenant acknowledges constraints on states parties' resources and therefore provides for "progressive realization" of certain provisions, it also imposes certain obligations "which are of immediate effect"—including the obligation to guarantee the treaty's rights without discrimination as to sex.¹⁸⁵ Moreover, the Economic, Social and Cultural Rights Committee has noted that governments have "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights," including the right to essential primary health care.¹⁸⁶ "In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations," the Committee has stated.¹⁸⁷

The tangibility of the State's positive obligations is supported by the Economic, Social and Cultural Rights Committee's directives that victims of rights violations should be given access to effective judicial remedies, and that "[j]udges and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to health in the exercise of their functions."¹⁸⁸ As one international law commentator noted, "[I]n relation to economic, social and cultural rights, the elaboration and differentiation of positive obligations has made clear that those rights are not merely aspirational, programmatic statements of intent, to be achieved in a far-distant future, but that they impose concrete obligations on the state, albeit to be progressively realised, which are fully binding on state authorities and are justiciable before...domestic courts."¹⁸⁹

4. Convention on the Rights of the Child

The Children's Rights Convention, which India acceded to with one declaration in 1993,¹⁹⁰ is relevant to reproductive rights because female children and adolescents are particularly vulnerable to violations of these rights. In its 2004 Concluding Observations on India, the treaty's monitoring body, the Committee on the Rights of the Child (Children's Rights Committee), said it was "deeply concerned at the persistence of discriminatory social attitudes and harmful traditional practices towards girls, including... early and forced marriages, and religion-based personal status laws that perpetuate gender inequality..."¹⁹¹

Right to health

The Children's Rights Convention directs states parties to recognize the right to life and to ensure "survival and development of the child."¹⁹² It requires governments to protect children's right to the highest attainable standard of health, and to "ensure appropriate pre-natal and post-natal health care for mothers"—thereby reinforcing women's right to maternal health.¹⁹³ The Children's Rights Committee noted in 2004 that it "remains seriously concerned at the unavailability and/or inaccessibility of free, high quality primary health care," "the worsening maternal mortality rates," and "the practice of traditional and modern medicine by untrained and unqualified personnel" in India.¹⁹⁴

Protection of other reproductive rights

The Children’s Rights Convention also requires states parties to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.”¹⁹⁵ The Children’s Rights Committee has recommended concrete steps for the Indian government to take in combating sexual abuse, mother-to-child transmission of HIV/AIDS, sexual trafficking of children, and forced early marriage for girls, “which can have a negative impact on their health, education and social development.”¹⁹⁶ In addition, the Committee has suggested that the Indian government “[s]trengthen sexual and reproductive health education... and make [it] accessible to adolescents,” and “[u]ndertake gender impact studies when planning programmes relating to economic and social policies.”¹⁹⁷

B. COURT’S APPLICATION OF INTERNATIONAL LAW

1. Status of international law

Advocates in India need not wait until a treaty is converted into domestic law before using it to support a PIL petition. In addition to authorizing Parliament to make any law “for implementing any treaty, agreement or convention...or any decision made at any international conference, association or other body,”²⁰⁵ the Constitution of India broadly directs the State to “foster respect for international law and treaty obligations.”²⁰⁶ The Supreme 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[or]mity with International Law and not in conflict with it.”²⁰⁷ 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.”²⁰⁸

International Accountability Mechanisms

In addition to invoking India’s international law obligations through PIL petitions, advocates can use international accountability mechanisms to highlight ongoing reproductive rights violations.

Submissions to treaty monitoring bodies

The treaty monitoring bodies of the above-described conventions accept “shadow reports” from local lawyers and activists to supplement the state reports that the Indian government submits. Shadow reports are a convenient and efficient way to provide monitoring bodies with credible, independent information about the status of reproductive rights violations and the government’s efforts or failures to address them. Through this method, lawyers can incorporate reproductive rights into the national human rights discourse, and generate helpful Concluding Observations and Comments from the treaty monitoring bodies for use in future advocacy and litigation.

Advocates have also explored other ways to attract international attention to the Indian government’s failure to protect the reproductive rights of women. In May 2003, a group of human rights lawyers and social workers in India filed a petition before the CEDAW Committee, highlighting the Indian government’s failure to address gender-based crimes that occurred during episodes of mass violence against Muslim communities in the State of Gujarat in 2002.¹⁹⁸ The document drew upon various provisions of CEDAW, the CEDAW Committee’s Recommendations, other international treaties, and Indian Supreme Court jurisprudence on sexual violence.¹⁹⁹ It asked the CEDAW Committee to “inform, persuade and guide” the Indian government on “appropriate standards for justice delivery in gender crimes,” and to direct the government to submit a report detailing the gender-based violence in Gujarat, the State’s response, a rehabilitation plan, and a crisis management policy conforming to international law standards.²⁰⁰ In response, the CEDAW Committee issued a special decision asking the Indian government to include “information on the events in Gujarat and their impact on women” in its state report to the Committee, which will be reviewed by the Committee in January 2007.²⁰¹

CSW communications

An additional way for advocates in India to bring ongoing reproductive rights violations to international attention is the complaint procedure of the UN Commission on the Status of Women (CSW). The UN’s Economic and Social Council (ECOSOC) has established a working group that receives “communications” on rights violations, offers the relevant governments the chance to respond, and then compiles a report to submit to the CSW.²⁰² The CSW is empowered to make recommendations to ECOSOC based on the working group’s report.²⁰³ There are no admissibility criteria for a communication to the CSW; it need only involve an allegation of gender discrimination.²⁰⁴

The CSW communications procedure is an untapped resource—sometimes as few as ten communications are submitted in a year. Yet the process of submitting a communication need not be time-intensive, and the communications could provide an important platform for reproductive rights advocates to capture the attention of the Indian government and to familiarize UN representatives with gender issues in India.

In a 1997 decision, *People's Union for Civil Liberties v. Union of India*, the Court considered the extent to which an international convention can be “read into” national laws.²⁰⁹ After referring to Australian, British, and U.S. case law, the Court 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 those fundamental rights and hence, [are] enforceable as such.”²¹⁰ Later that year in *Vishaka v. State of Rajasthan*, the subject of an upcoming case study in Part II, the Court went one step further in embracing international law by applying CEDAW to enact guidelines against sexual harassment in the workplace that are “binding and enforceable in law until suitable legislation is enacted to occupy the field.”²¹¹ The *Vishaka* Court stated, “It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law where there is no inconsistency between them and there is a void in the domestic law.”²¹²

However, when there is an inconsistency between India’s treaty obligations and its domestic law, the latter prevails. In a 1980 case involving a conflict between a provision of the Civil and Political Rights Covenant and a local statute, the Court explained:

India is now a signatory to this Covenant and Article 51(c) of the Constitution obligates the State to “foster respect for international law and treaty obligations in the dealings of organised peoples with one another.” Even so, 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.²¹³

This stance is particularly problematic for reproductive rights advocates given that India’s religion-based personal laws, which govern family matters and disproportionately affect women, violate many of the human rights provisions contained in the major international treaties, as observed by the UN Human Rights Committee, Children’s Rights Committee, and CEDAW Committee.²¹⁴ These laws will be discussed in greater detail in Chapter 4.²¹⁵

2. Patterns of usage

The major treaty monitoring bodies have applauded the positive role that the Indian judiciary has played, and can continue to play, in implementing international human rights principles at the domestic level. In its 2000 Concluding Observations on India, the CEDAW Committee said it “appreciates the contribution made by the Supreme Court of India in developing the concept of social action litigation and a jurisprudence integrating the Convention into domestic law by interpreting Constitutional provisions on gender equality and non-discrimination.”²¹⁶ Similarly, the Human Rights Committee has acknowledged the “frequent references to provisions of international human rights instruments by the [Indian] courts, in particular the Supreme Court,” and the Children’s Rights Committee has “welcome[d] the fact that the Convention can be invoked before the courts and that the Supreme Court has adopted various decisions based on the Convention.”²¹⁷

Local legal experts have observed that the Indian judiciary is most comfortable relying on international law principles that stem from India’s ratified treaties, have clear links to constitutional provisions, have been interpreted in previous court decisions, or are universally accepted with established case law in other countries.²¹⁸ Fortunately, this suggests that the Court is likely to be receptive to PIL petitions that invoke the provisions of CEDAW and the other international conventions described above, because these human rights principles have been integrated into national policies in India,²¹⁹ have been cited in high profile Supreme Court and High Court cases,²²⁰ and have received official recognition and support from hundreds of countries around the world.²²¹ Furthermore, judges have noted that the Court’s ability to use international treaties as a doctrinal basis for intervention is facilitated by the conformity between the provisions of these treaties and the provisions of the Indian Constitution, which will be discussed in the next chapter.²²²

C. COMPARATIVE LAW

1. Impact on development of PIL

The influence of comparative law on domestic jurisprudence has been evident from the earliest PIL judgments. In

Fertilizer Corporation, the first case to use the PIL terminology, Justice Iyer cited a wide array of sources from other jurisdictions, including British lords, U.S. justices, 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.²²³ The Court applied to the Indian context commentaries on legal developments in England, Australia, New Zealand, the Soviet Union, sub-Saharan Africa, and the United States.²²⁴ Similarly, in *S. P. Gupta*, the case that was proclaimed a “major breakthrough” by the Court for its liberalization of standing requirements in PIL,²²⁵ Justice Bhagwati prefaced the decision by voicing his appreciation for the counsels’ use of foreign authorities and quoting U.S. Supreme Court Justice Oliver Wendell Holmes to reinforce the point that “constitutional interpretation must not suffer from the fault of emotionalism or sentimentalism.”²²⁶ A significant portion of the judgment then discussed legal developments and commentaries on public interest actions in the United States, United Kingdom, and Australia.²²⁷

A decade later, in a judgment looking back on the “origin and meaning” of PIL, the Supreme Court explicitly recognized the important role that comparative law played in the development of the PIL mechanism.²²⁸ Pointing to how the United States, Australia, and Canada had restructured their legal systems “to serve divergent aspects of the public interest,” the Court stated: “Thus the definition of PIL emerged from historical context in which the commonality of the various forms of legal representation involving the basic and fundamental rights of a significant segment of the public demanding vindication of its rights has been recognised in various parts of the world.”²²⁹

The large extent to which international thinking influenced the rise of PIL reveals the Indian judiciary’s interest in keeping up with global legal norms, and provides strong historical support for using PIL to enforce India’s current international human rights obligations. As the Indian Supreme Court has observed with pride, “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.”²³⁰

2. Current trends

Indicating the Court’s continued willingness to consult laws and policies from other jurisdictions, particularly in pressing human rights matters, a recently retired Supreme Court Justice observed: “The Court welcomes wisdom from any source—it could be a convention, a foreign precedent, even a foreign statute. If the wisdom behind it makes sense, we will say let us adopt this here because the Parliament is slow to react to situations, and situations do not brook delay when it is a question of life and death.”²³¹ However, Indian judges generally take a two-stage approach toward applying comparative case law and policies. If there is sufficient, unambiguous Indian case law on an issue, they tend to 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.”²³²

Among sources of comparative law, the Indian judiciary is particularly inclined to consult judgments from other common law courts, which are regarded as “the next best source of persuading the Supreme Court after its own judgments.”²³³ In particular, the Court has been described as being strongly inclined to follow British precedent.²³⁴ Indian judges also frequently cite cases from Australian courts, due in large part to the growing ties and exchanges between the Indian and Australian judiciaries.²³⁵ U.S. case law played an important role in the Court’s early years, particularly because the U.S. legal system is also based on a constitution; however, this reliance decreased as the Indian Supreme Court built up its own body of constitutional jurisprudence.²³⁶ The Court has recognized that “some of the principles adumbrated by American decisions may provide a useful guide,” but it has also voiced resistance to “a close adherence to those principles...because the social conditions in this country are different.”²³⁷ The Court does, however, continue to rely on U.S. jurisprudence in “obtuse areas” in which it is difficult to find domestic precedents.²³⁸ Lawyers and judges in India have noted that there is an unfortunate deficiency in applying case law from countries other than the United Kingdom, Australia, and the United States, even though progressive case law from other jurisdictions may have greater parallels to the Indian experience.²³⁹

In addition to considering comparative case law, the Court may be persuaded by successful governmental initiatives in other countries. For example, in a recent PIL case against child marriage, which will be discussed in greater detail in Part II, the petitioners highlighted how the executive, legislative, and judicial branches of the Sri Lankan government have worked together to raise the average age of marriage in Sri Lanka to 25.²⁴⁰ In another pending PIL case arguing for increased public access to antiretroviral

drugs, the petitioners emphasized the extent to which the Brazilian government has been able to combat the HIV/AIDS pandemic in Brazil by domestically manufacturing and distributing antiretroviral medication free of cost.²⁴¹ Such comparative examples of law and policy can have a significant impact upon the Court's decisions because, as one senior advocate remarked, "We live in a global world, and courts do not shut their eyes to that."²⁴²

CHAPTER 3. CONSTITUTIONAL LAW

“The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitudes to encompass all facets of gender equality....”

—Chief Justice Verma,
*Vishaka v. State of Rajasthan*²⁴³

The Supreme Court’s jurisdiction to hear PIL cases stems from its duty to enforce constitutional rights, and PIL petitions must be founded on constitutional claims. It is therefore important to consider how provisions of the Constitution of India can be used to advance reproductive rights. Fortunately, the reproductive rights framework that has been developed at the international level finds much support in the Constitution. As one senior advocate remarked, “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, and courts are not averse to doing it.”²⁴⁴

The Constitution of India—described as “the conscience of the Nation and the cornerstone of the legal and judicial system”—came into effect on January 26, 1950.²⁴⁵ Its preamble recognizes India as a “sovereign, socialist, secular, democratic republic,” and highlights the rights of all citizens to justice, liberty, and equality.²⁴⁶ The body of the document contains 22 Parts, the most relevant of which for PIL purposes are Part III’s Fundamental Rights, the basic human rights of all citizens that are enforceable in court, and Part IV’s Directive Principles of State Policy (Directive Principles), which are non-justiciable guidelines that the government must apply when framing laws and policies.²⁴⁷ Furthermore, the Constitution contains a section outlining the Fundamental Duties of Indian citizens.²⁴⁸

A. 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.²⁴⁹ The Fundamental Rights form the basis for incorporating a globally recognized reproductive rights framework into the Indian context. The key provisions for these purposes include Article 14’s right to equality before the law and equal protection of

the laws; Article 15’s prohibition of discrimination on the grounds of sex; Article 21’s protection of life and personal liberty—which the Court has interpreted to include the rights to human dignity, health, and privacy; and Article 23’s prohibition of trafficking in human beings.²⁵⁰

As observed by the last female justice on the Supreme Court, “These 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.”²⁵¹ The Fundamental Rights are paramount; the Constitution specifies that the State may “not make any law which takes away or abridges [these] rights...and any law made in contravention of [these rights] shall, to the extent of the contravention, be void.”²⁵²

1. Article 21: Right to life

Article 21 of the Indian Constitution states: “No person shall be deprived of life or personal liberty except according to procedure established by law.”²⁵³ The Court has regarded this article 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.”²⁵⁴ Therefore, judges have interpreted Article 21 very broadly.

Right to life with dignity

The Court has repeatedly stated that Article 21’s 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, namely, the bare necessities of life....”²⁵⁵ In a 1995 case on the housing needs of *dalits* (scheduled castes), the Court explained: “Right to live guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights.... All civil, political, social and cultural rights enshrined in the

Universal Declaration of Human Rights and Convention[s] or under the Constitution of India cannot be exercised without these basic human rights.”²⁵⁶

In this context, 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 right to life with dignity.²⁵⁷ In 2000, the Supreme Court issued a landmark judgment on this point in *Chairman, Railway Board v. Chandrima Das*, a case involving a Bangladeshi woman who was gang-raped by employees of the Indian Railway while waiting for her train.²⁵⁸ Admitting the action as a PIL because it sought “relief for eradicating anti-social and criminal activities,” the Court held the Indian government vicariously liable for damages.²⁵⁹ It rejected the respondents’ argument that Fundamental Rights cannot be invoked by a foreign national, stating, “The meaning of the word ‘life’ cannot be narrowed down. According to the tenor of the language used in Article 21, it will be available not only to every citizen of this country, but also to a ‘person’ who may or may not be a citizen of the country.”²⁶⁰ The judgment cited to various international conventions to support its holding, noting: “The Fundamental Rights under the Constitution are almost in consonance with the Rights contained in the Universal Declaration of Human Rights as also...the Covenants of Civil and Political Rights and the Covenants of Economic, Social and Cultural Rights, to which India is a party having ratified them.”²⁶¹

Right to health

The Supreme Court has construed Article 21 to also include a fundamental right to health. A 1995 PIL judgment on workers exposed to asbestos, *Consumer Education and Research Center v. Union of India*, established the following: “The jurisprudence of personhood or philosophy of the right to life envisaged under Article 21, enlarges its sweep to encompass human personality in its full blossom with invigorated health.”²⁶² The decision cited the Constitution’s Directive Principles and several international instruments, such as the Universal Declaration and the Covenant on Civil and Political Rights, to support its holding that “the right to health and medical care is a fundamental right under Article 21...”²⁶³ In addition, the Court set an important precedent in this case by clarifying that its directives to, *inter alia*, “make the right to life meaningful” were applicable not only to State authorities, but also to “private persons or industry.”²⁶⁴

Related to the right to health, the Supreme Court has also

recognized an individual’s right to medical treatment. In *Parmanand Katara v. Union of India*, a 1989 PIL decision invoked by a newspaper article about an accident victim who died after a hospital doctor refused to treat him, the Court observed that “the problem which led to the filing of this petition seems to exist in hospitals and private nursing homes and clinics throughout the country.”²⁶⁵ Recognizing this as an ongoing constitutional violation, the judgment noted that “this Court in scores of decisions has...reiterated with gradually increasing emphasis” that “Article 21 of the Constitution casts the obligation on the State to preserve life.”²⁶⁶

Extending its reach to both public and private providers, the *Parmanand Katara* Court held, “Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life.”²⁶⁷ To ensure that all medical providers in India learned of this decision, the Court directed law journals and broadcast by national newspapers, public television stations, and radio channels to publish or broadcast the judgement.²⁶⁸ In addition, the Court instructed that the judgment be forwarded to every medical college, to every High Court judge with instructions to distribute it to lower courts, and “to every State Government with a direction that wide publicity should be given about the relevant aspects”²⁶⁹

The Court elaborated on the right to emergency health care in government facilities in a 1996 decision, *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*.²⁷⁰ Presented with a situation in which a severely injured man was denied treatment in seven different hospitals before being admitted to a private facility where he incurred heavy expenses, the Court noted: “The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level....Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare State.”²⁷¹ Reinforcing the State’s duty “to safeguard the right to life of every person,” the *Paschim Banga* Court held: “Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.”²⁷² The judgment granted the individual victim monetary compensation, and specified a list of “remedial measures to rule out recurrence of such incidents in [the] future and to ensure immediate

medical attention and treatment to persons in real need.”²⁷³ Although West Bengal was the only respondent state in the case, the Court extended its holding to all Indian states, directing them to “also take necessary steps in the light of the recommendations made.”²⁷⁴

The *Paschim Banga* decision specified that the State cannot avoid its constitutional duties because of budgetary constraints:

It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. ... In the matter of allocation of funds for medical services the said constitutional obligation of the State has to be kept in view.²⁷⁵

The Court noted that its recommendations in the case were partly based on suggestions made by a senior advocate who “invited our attention to the recent developments that have taken place in this field in the United States.”²⁷⁶ Commenting in an interview about his role in the PIL, that senior advocate recalled citing to a U.S. statute and to various international decisions on the right to health, and noted that the Court was welcoming of his references to comparative law.²⁷⁷

Right to privacy

The right to privacy has been “culled out of the provisions of Article 21 and other provisions of the Constitution relating to Fundamental Rights read with Directive Principles of State Policy.”²⁷⁸ This line of jurisprudence began several decades ago in police surveillance cases, such as the 1975 *Gobind v. State of Madhya Pradesh* decision, in which the Court stated: “Individual autonomy, perhaps the central concern of any system of limited government, is protected in part under our Constitution by explicit constitutional guarantees. ... [M]any of the fundamental rights of citizens can be described as contributing to the right to privacy.”²⁷⁹ The *Gobind* Court supported its recognition of the right to privacy by citing the European Convention on Human Rights and a number of U.S. decisions, including *Griswold v. Connecticut* and *Roe v. Wade*—two landmark cases in the U.S. reproductive rights movement.²⁸⁰ The influence of these cases can be seen in the Indian Court’s position that “[a]ny right to privacy must

encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing.”²⁸¹ The Court cautioned, however, that the right to privacy is not absolute, and “must be subject to restriction on the basis of compelling public interest.”²⁸²

The limitations of the right to privacy were illustrated in the Supreme Court’s refusal to protect the confidentiality of people living with HIV/AIDS in the 1998 decision known as *Mr. X. v. Hospital Z.*²⁸³ Evaluating the argument that a hospital’s disclosure of a patient’s HIV-positive status to his fiancée’s relatives violated his right to privacy, the Court traced the use of privacy arguments in domestic and comparative jurisprudence.²⁸⁴ The *Mr. X.* decision acknowledged that privacy is “an essential component of right to life envisaged by Article 21,”²⁸⁵ but emphasized that the right to privacy “may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.”²⁸⁶ The decision concluded:

Since “Right to Life” includes right to lead a healthy life so as to enjoy all facilities of the human body in their prime condition, the respondents, by their disclosure that the appellant was HIV(+), cannot be said to have, in any way, either violated the rule of confidentiality or the right of privacy. Moreover, where there is a clash of two Fundamental Rights, as in the instant case, namely, the appellant’s right to privacy as part of right to life and [his fiancée’s] right to lead a healthy life which is her Fundamental Right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of Court....²⁸⁷

In reaching this conclusion, the Indian Supreme Court failed to consider that Mr. X should have been given the opportunity to inform his fiancée about his HIV-positive status himself, without the interference of the hospital or the Court.²⁸⁸

Thus, despite the Court’s references to landmark U.S. reproductive rights cases in its early privacy jurisprudence, a human rights lawyer noted that advocates are generally reluctant to invoke the right to privacy in gender justice cases

because the right has not been accepted by the judiciary in this context. “You cannot go and say something in court that will not get the order you want, so you tutor what you are saying to what you know the Court is willing to listen to,” the lawyer remarked.²⁸⁹ Highlighting the distinction between protection and empowerment of women, the lawyer added: “The Court does not want to lose control over the woman’s body since the notion of family is central, and family here means patriarchal family. [The prevailing view is that] a woman should be treated well—that is it. It is not about her having agency and autonomy.”²⁹⁰ Another legal expert suggested that the right to privacy has not received much backing because it emerged in the context of protecting the rights of criminal defendants against surveillance, which was not a very popular concept.²⁹¹ Nevertheless, a human rights lawyer expressed hope that privacy arguments can be applied to promote women’s reproductive autonomy in future litigation, suggesting, “Maybe we just have not yet had a good enough case.”²⁹²

Concerns about the Court’s expansion of Article 21

Although the judiciary has been praised for creating a dramatic expansion of rights through its generous reading of Article 21,²⁹³ it has also been criticized for having gone too far in using this provision “as some kind of cornucopia for everything.”²⁹⁴ Even those who strongly support the broad use of the Constitution to promote women’s 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,”²⁹⁵ and there is a danger in the judiciary creating expectations that it will not be able to fulfill.²⁹⁶ However, reproductive rights advocates need not base their petitions solely on Article 21; the Indian Constitution also guarantees the rights to equality and non-discrimination, which are implicated in most reproductive rights violations.

2. Articles 14-15: Rights to equality and non-discrimination

Equality and non-discrimination are Fundamental Rights stemming from Articles 14 and 15 of the Indian Constitution. Article 14 provides for equality before the law and for equal protection of the laws.²⁹⁷ The Court has described this article as “a founding faith of the Constitution” and

“the pillar on which rests securely the foundation of our democratic republic.”²⁹⁸ Therefore, it 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.²⁹⁹

Commenting on Article 14’s potential for promoting gender justice, a leading women’s rights advocate wrote: “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.”³⁰⁰ Meanwhile, Article 15 guarantees the right to non-discrimination through the following prohibition: “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”³⁰¹

Limitations: the *Air India* precedent

Although the Constitution’s equality and anti-discrimination provisions have much potential for promoting gender justice, their limitations are illustrated by a 1981 Supreme Court decision, *Air India v. Nergesh Meerza*.³⁰² In this case, the Court considered the constitutionality of a regulation requiring Air hostesses (AHs) of government-owned Airlines to retire if they (i) got married within four years of being employed, (ii) became pregnant, or (iii) reached the age of 35—conditions that were not imposed on their male counterparts, assistant flight pursers (AFPs).³⁰³ The Court held that Article 14 “cannot be attracted” by this regulation because the “class or categories of service” of AHs and AFPs “are essentially different in purport and spirit,” with the positions differing in required qualifications, starting salaries, number of posts, promotion avenues, and retirement benefits.³⁰⁴

The *Air India* decision rejected the petitioners’ argument that “the real discrimination is based on the basis of sex which is sought to be smoke-screened by giving a halo of circumstances other than sex.”³⁰⁵ It stated that 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.”³⁰⁶

Women's rights advocates have condemned this judgment for "validating discrimination" between AHs and AFPs, arguing that "[s]ubstantive equality... would strike at discrimination based on sex plus gendered dimensions of sex."³⁰⁷

The *Air India* Court based its conclusion that the regulation's marital restriction was neither unreasonable nor arbitrary on the reasoning that requiring AHs to delay marriage until they were "fully mature" would improve their health, their chances of a successful marriage, help promote India's family planning program, and prevent the Airlines from having to incur the expenditure of recruiting new AHs if the AHs who married became pregnant and quit their jobs.³⁰⁸ In making these untenable assumptions, the Court failed to recognize a woman's right to determine for herself when to marry and to have children. Similarly, although the decision did strike down the rule terminating the employment of AHs upon first pregnancy as "manifestly unreasonable and arbitrary," it encouraged a proposed rule that would terminate an AH upon her *third* pregnancy as "salutary and reasonable"³⁰⁹, explaining:

In the first place, the provision... would be in the larger interest of the health of the AH concerned as also for the good upbringing of the children. Secondly,... when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of over-population.³¹⁰

This disturbing language foreshadows the Court's recent judgment upholding a coercive population policy in *Javed v. State of Haryana*, a case studied in Part II, which in fact cited the *Air India* decision to support its holding.³¹¹

"Reading down" equality

The Supreme Court's attempts to use Articles 14 and 15 to uphold women's rights have often resulted in judicial "reading down" of discriminatory laws—*i.e.*, judges avoid striking down discriminatory laws as unconstitutional by purporting to interpret them in ways that render them non-discriminatory.³¹² For example, in the 1999 *Hariharan v. Reserve Bank of India* decision, the Court considered a constitutional challenge to the Hindu Minority and

Guardianship Act's provision that a mother can be the legal guardian of a son or unmarried daughter only "after" the father.³¹³ Instead of striking down this law as discriminatory, the apex bench 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—including situations in which the father demonstrates apathy toward his child.³¹⁴ "Normal rules of interpretation shall have to bow down to the requirement of the Constitution since the Constitution is supreme and the statute shall have to be in accordance therewith and not de hors the same," the decision stated.³¹⁵ The concurring opinion cited the equality requirements of CEDAW and the Beijing Platform for Action, asserting that the Court's interpretation of the law "gives effect to the principles contained in these instruments."³¹⁶

Despite its references to the internationally recognized right to equality, the *Hariharan* decision revealed a limited vision of this equality by failing to find the Hindu Act's discriminatory provision unconstitutional.³¹⁷ Moreover, the Court's interpretation did not put the mother on equal footing with the father. Commenting upon this case, the Children's Rights Committee stated: "While noting the judgment of the Supreme Court that the mother was as much the child's natural guardian as the father... the Committee expresses its concern that under the law, the father still has the main responsibility with regard to the child."³¹⁸ The judiciary's general hesitancy to interfere in the realm of religion-based personal laws to enforce women's right to equality will be discussed in the next chapter as a serious challenge to using litigation to advance reproductive rights in India.³¹⁹

Article 15's special clause

The Constitution's Article 15(3) contains a clause specifically designed for the promotion of gender justice, which states, "Nothing in this article shall prevent the State from making any special provision for women and children."³²⁰ Describing this clause as "the fulcrum of the whole approach in the Constitution, which guides the approach of the Court," a senior advocate said, "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 much more than they are doing by way of legislative and executive action for women."³²¹ The clause was invoked, for example, in the *Vishaka* PIL against sexual harassment that is

discussed in Part II, to argue that CEDAW's provisions have a binding effect in Indian courts. The petitioning lawyers in the *Vishaka* case contended that the Indian government's ratification of CEDAW was "tantamount to the creation of a 'special provision'" pursuant to Article 15(3).³²²

Article 15 has also, however, received criticism from women's rights advocates. "Case law indicates that the special provision clause has been used to justify the regulation of female sexuality based on the weaker sex approach to gender issues," a senior advocate contended, pointing to the Court's jurisprudence on adultery laws.³²³ Moreover, the language of Article 15's main clause has been criticized for prohibiting discrimination on the basis of sex, rather than gender: "There cannot be a greater negation of the prohibition on sexual discrimination, than to restrict it only to biological discrimination. 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."³²⁴

B. DIRECTIVE PRINCIPLES

The Directive Principles contained in Part IV of the Constitution, which guide the State's formulation and administration of laws and policies, are "fundamental in the governance of the country."³²⁵ They instruct the State to strive to secure and protect a social order in which social, economic, and political justice "shall inform all the institutions of the national life."³²⁶ Particularly relevant to the protection of reproductive rights are the provisions 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 to regard the improving of nutrition, standard of living, and public health "as among its primary duties."³²⁷ In addition, the Directive Principles call upon the State to direct its policy toward securing "that the health and strength of workers, men and women, and the tender age of children are not abused[.]. . . that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."³²⁸

While the civil and political Fundamental Rights are directly justiciable, the Directive Principles, which protect economic, social, and cultural rights, are not—so a citizen cannot bring a court action on the ground that the State has violated a Directive Principle.³²⁹ Nevertheless, the Supreme Court has made it clear that the State's obligation to incorporate the Directive Principles into its policies "is not idle print but command to action."³³⁰ According to a former chief justice, "The Supreme Court took the view that if they are principles that the state is bound to follow in governance, some way has to be found if that is not being done."³³¹

To this end, the Court has been using its broad powers of constitutional interpretation to read the Directive Principles into the Fundamental Rights, thereby making them indirectly justiciable.³³² This has been done primarily through Article 21; as discussed above, the Court has used this provision to enforce a range of economic and social rights inherent in the Directive Principles, including the rights to health and medical care, the right to education, the right to food, and the right to shelter.³³³ For example, in keeping with the Directive Principle directing the State to raise the standard of living, the Court enforced the right to shelter in a 1982 PIL case, asserting that Article 21's right to life with human dignity "derives its life and breath from the Directive Principles of State Policy" and therefore must incorporate them to the fullest extent possible.³³⁴

"As a result of judicial intervention, the distinction between economic-social-cultural rights and civil-political rights has gone," observed a High Court judge.³³⁵ Expressing concern about this phenomenon, a former Supreme Court Justice and Law Commission chairperson stated:

Economic and social rights require resources because they deal with a mass of human beings, whereas Fundamental Rights deal with individuals who want to get something from the State. There are no rights in which we have not gone into through PIL, irrespective of the availability of resources.³³⁶

The Supreme Court's approach is, however, consistent with global trends. The "clear-cut distinction" between economic-social rights as positive, resource-intensive

obligations and civil-political rights as negative obligations “has been abandoned for some time, and it is now generally recognised that the effective realisation and implementation of both categories of rights may require action by the state.”³³⁷ Moreover, the enforcement of civil and political rights is often dependent upon the realization of economic and social rights, especially in the context of gender justice. A woman’s ability to avail herself of judgments upholding her civil or political freedom will be severely limited if she does not have access to healthcare, education, food, shelter, and physical safety.³³⁸

Defending its indirect enforcement of the Directive Principles, the Court has stated, “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 lowly [*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.”³³⁹ Further explaining the context of this judicial trend, a former Supreme Court chief justice said:

What is the meaning of civil and political rights unless you also have economic, social, and cultural rights? For example, the right to adequate means of livelihood is a Directive Principle that the State has a duty to ensure, and the right to life is a Fundamental Right that is enforceable [by the Court]. If you do not have means of livelihood to survive, what is the meaning of the right to life? So the Supreme Court started reading into justiciable Fundamental Rights these Directive Principles [that] are fundamental in governance.³⁴⁰

This judicial approach bodes well for the potential of using litigation to advance reproductive rights, which encompass interconnected civil, political, economic, social, and cultural rights.

C. DUTIES OF PRIVATE ACTORS

1. Article 12 jurisprudence

The responsibility to fulfill Fundamental Rights and Directive Principles lies with “the State,” which the Constitution defines in Article 12 as including “all local or other authorities within the territory of India or under the control of the Government of India.”³⁴¹ The Supreme Court has interpreted the term “other authorities” very broadly, in order to “curb arbitrary and unregulated power wherever and howsoever reposed.”³⁴²

Relying on “the concept of State Action developed in the United States,” the Court has enumerated a list of non-exhaustive criteria for determining whether actors are instrumentalities of the State, which includes considering whether the actors carry out “public functions closely related to government functions.”³⁴³ This expansive definition has enabled the Court to extend its constitutional holdings in right to health cases to private medical service providers, as seen in the *Consumer Education* and *Parmanand Katara* cases discussed above.³⁴⁴ “[C]onstitutional guarantees... should not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation,” the Court has emphasized, adding that judges “should be anxious to enlarge the scope and width of the Fundamental Rights by bringing within their sweep every authority which is an instrumentality or agency of the government.”³⁴⁵

2. Fundamental Duties

Article 51(A) of the Indian Constitution contains a section entitled Fundamental Duties, which calls upon citizens to, *inter alia*, “abide by the Constitution and respect its ideals” and to “renounce practices derogatory to the dignity of women.”³⁴⁶ In 1998, the Supreme Court issued a notice to the Indian government highlighting its obligation to educate citizens about these constitutional duties. The government responded by establishing a committee (Fundamental Duties committee) “to work out a strategy as well as methodology of operationalizing a countrywide programme for teaching Fundamental Duties in every educational institution as a measure of in-service training.”³⁴⁷ The final report of the Fundamental Duties committee, which included

recommendations on how to actualize Fundamental Duties in a wide range of contexts, was submitted to the Prime Minister of India in 1999. Since then, the National Commission to Review the Working of the Constitution, the National Human Rights Commission, and other governmental bodies have made efforts to implement the recommendations by, for example, incorporating instruction on the Fundamental Duties into university curricula.³⁴⁸

Although the Constitution's Fundamental Duties are not directly justiciable, the Fundamental Duties committee noted in its report that the Court "has in several cases relied on the Fundamental Duties contained in Article 51A to determine the duty of the State, and when necessary, given directions or frame[d] guidelines to achieve this purpose."³⁴⁹ For example, in response to PIL cases against environmental damage, the Court "observed that preservation of environment and maintenance of the ecological balance are the responsibility not only of the Government but also the Fundamental Duty of every citizen."³⁵⁰ The former Supreme Court chief justice who

headed the Fundamental Duties committee explained that the Court enforced this joint duty to protect the environment, which is expressed in Directive Principle 48A and Fundamental Duty 51A(g), as follows:

Both of these are by themselves not justiciable. But Article 21's fundamental right to life is justiciable, and the right to life is dependent on [the environment]. So to expand the scope and content of Article 21, we read Articles 48A and 51A(g) into Article 21, and on that basis issued directions to the government and other authorities, and also directions regulating the conduct of citizens to be monitored by some public authorities.³⁵¹

The Fundamental Duties committee further pointed to *Vishaka v. State of Rajasthan*, the PIL studied in Part II, in which "by similar exercise, elaborate guidelines have been framed to ensure gender justice and realise the concept of gender equality and prevent sexual harassment of women in all work places through the judicial process...."³⁵²

CHAPTER 4. RELIGION-BASED PERSONAL LAWS

“Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity, decency of life and dictates of necessity in the pursuit of social justice should be invariably...decided on considerations other than religion or religious faith.”

—*Danial Latifi v. Union of India*³⁵³

Although the Indian Constitution contains numerous provisions that can help establish a reproductive rights framework in India, advocates may be hampered by domestic laws governing personal matters such as marriage, divorce, inheritance, and adoption. These laws are derived from religious scriptures, customs, and traditions, so the legal standards and protections they offer to a woman differ based on whether she is a Hindu, Muslim, Christian, Parsi, or member of a tribe governed by customary precepts.³⁵⁴ Moreover, many of the personal laws reinforce norms that are patriarchal and oppressive toward women.³⁵⁵ The personal laws therefore violate the principles of equality and non-discrimination promoted by the Indian Constitution and the international treaties that India has ratified. The coexistence and occasional precedence of personal laws over constitutional rights has major implications for women’s reproductive rights, which are frequently violated in the private sphere.

The CEDAW Committee has instructed States to “resolutely discourage any notions of inequality of women and men which are affirmed by laws, or by religious or private law or by custom.”³⁵⁶ Furthermore, in its Concluding Observations on India issued in 2000, the Committee directly criticized the Indian government for its failure to “reform the personal laws of different religious and ethnic groups, in consultation with them, so as to conform with the Convention,” and voiced concern that “the Government’s policy of non-intervention perpetuates sexual stereotypes, son preference and discrimination against women.”³⁵⁷ Similarly, the Human Rights Committee noted in its 1997 Concluding Observations on India that “the enforcement of personal laws based on religion violates the right of women to equality before the law and non-discrimination.”³⁵⁸ The Children’s Rights Committee has also said it is “deeply concerned at the persistence of...religion-based personal status laws that perpetuate gender inequality” in India.³⁵⁹ Nevertheless, due

to political sensitivities, all branches of Indian governance, including the judiciary, remain reluctant to dismantle the entrenched system of discriminatory personal laws.

A. STANCE OF THE CONSTITUTION AND THE COURT

Although the Constitution of India describes the country as a “secular, democratic republic,” it does not directly address the validity of religion-based personal laws.³⁶⁰ Article 13 provides that all laws that were in existence before the Constitution came into force are void “in so far as they are inconsistent with” the Fundamental Rights.³⁶¹ Although this principle—known as the “recognition clause”—may be used to strike down “any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law,” the judiciary has not used it to invalidate the personal laws.³⁶² Furthermore, although Article 44 of the Constitution’s Directive Principles exhorts the State to “endeavour to secure for the citizens a uniform civil code throughout the territory of India,” it fails to clarify whether or not the personal laws are valid until such a code is enacted.³⁶³

The judiciary has expressed conflicting views regarding the personal laws. *Bombay v. Narasu Appa Mali*, a 1951 Mumbai High Court judgment that has been cited by the Supreme Court, explicitly held that the Constitution leaves personal laws “unaffected except where specific provision is made with regard to it”—reasoning, *inter alia*, that a personal law is different from “custom or usage” to which the recognition clause applies and that “Article 44 itself recognises separate and distinctive personal laws because it lays down as a directive to be achieved that within a measurable time India should enjoy the privilege of a common uniform Civil Code applicable to all its citizens irrespective of race or religion.”³⁶⁴ In a 1980 decision, the Supreme Court stated that the Constitution’s Fundamental

Rights do not “touch upon” the personal laws, “except where such law is altered by any usage or custom or is modified or abrogated by statute.”³⁶⁵

Yet, Court has recognized in other decisions that “[t]he personal laws conferring inferior status on women [are] anathema to equality” and “must be consistent with the Constitution least [*sic*] they become void under Article 13 if they violated fundamental rights.”³⁶⁶ The Court has additionally stated, “We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning.”³⁶⁷ In a recent interview, a Supreme Court Justice clarified the position that the judiciary must take as follows: “Whenever there is a clash between a religious value and a constitutional value, there is no difficulty—my oath of office is that I will take the side of the Constitution. If I cannot interpret the constitutional value in terms of the religious value, I will take the constitutional value.”³⁶⁸

On the whole, however, the judiciary has placed the onus of overturning the discriminatory personal laws on the legislature and the executive.³⁶⁹ The Court has noted that personal laws “can always be superseded or supplemented by legislation,” and that “statutory law will prevail over the Personal Law of the parties, in cases where they are in conflict.”³⁷⁰ Furthermore, the Court has actively promoted the Constitution’s directive that the State establish a uniform civil code, observing that “Article 44 is based on the concept that there is no necessary connection between religion and personal law in civilised society,” and that the enactment of such a code “will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies.”³⁷¹

B. SHAH BANO AND THE MUSLIM WOMEN’S ACT

The Court did attempt to tackle the discriminatory impact of personal laws in the renowned *Mohd. Ahmed Khan v. Shah Bano Begum* decision issued in 1985.³⁷² In the *Shah Bano* case, a Muslim man who had divorced his elderly wife through Islamic law’s triple *talaq* provision—which permits a man to unilaterally dissolve a marriage by

thrice repeating the word *talaq*—appealed a High Court judgment directing him to pay her maintenance of Rs 179 (approximately USD 4) per month.³⁷³ The petitioner argued that his former wife had already received the amount due to her upon divorce under Islamic law. The question before the Court was whether Section 125 of the Indian Criminal Code (Section 125), which provides for financial maintenance of a wife, “prevails over” the Muslim personal law that limits maintenance to *iddat*, a specific period of time following divorce.³⁷⁴

The Court has described the circumstances of the *Shah Bano* litigation as follows:

The important feature of the case was that [the] wife had managed the matrimonial home for more than 40 years and had borne and reared five children and was incapable of taking up any career or independently supporting herself at that late sta[g]e of her life—remarriage was an impossibility in that case. The husband, [was] a successful Advocate with an approximate income of Rs. 5,000 per month...; the divorced wife, who had shared his life for half a century and mothered his five children...was in desperate need of money to survive.³⁷⁵

The All India Muslim Personal Law Board intervened in the case, arguing that an indigent divorced woman has no claim upon her husband and “must look to her relations, including nephew[s] and cousins, to support her.”³⁷⁶ Condemning this approach, the Court stated, “It is a matter of deep regret that some of the interveners...took up an extreme position by displaying an unwarranted zeal to defeat the right to maintenance of women who are unable to maintain themselves.”³⁷⁷

The *Shah Bano* judgment declared that “the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable.”³⁷⁸ Reasoning that the Muslim personal law “does not contemplate or countenance the situation envisaged by Section 125,” in which a wife is unable to maintain herself beyond the period of *iddat*, the Court held: “The true position is that, if the divorced wife is *able* to maintain herself, the husband’s liability to

provide maintenance for her ceases with the expiration of the period of *iddat*. If she is *unable* to maintain herself, she is entitled to take recourse to Section 125 of the Code.”³⁷⁹ The Court thereby insisted that “there is no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband’s obligation to provide maintenance for a divorced wife who is unable to maintain herself.”³⁸⁰ The decision even went so far as to offer an interpretation of the Koran to support its holding.³⁸¹

The *Shah Bano* judgment caused an uproar among the traditional Muslim community—particularly politically influential religious leaders and the All India Muslim Personal Law Board.³⁸² In response, the dominant political party that ruled the executive branch and commanded an absolute majority in Parliament at the time passed the Muslim Women’s (Protection of Rights in Divorce) Act, which crippled and “effectively reversed” the *Shah Bano* decision by codifying certain provisions of the Islamic divorce law and rendering Section 125’s maintenance provision inapplicable to Muslim women.³⁸³

“Parliament enacted the Act perhaps, with the intention of making the decision in *Shah Bano*’s case ineffective,” the Court observed in a later judgement.³⁸⁴ The All India Muslim Personal Law Board also took the position that “the main object of the Act is to undo the *Shah Bano* case” for allegedly “hazard[ing] interpretation of an unfamiliar language in relation to religious tenets.”³⁸⁵ Thus, the executive and legislative branches’ enactment of the Muslim Women’s Act has generally been regarded as a warning to the judiciary that religion-based personal laws are off limits.

The Muslim Women’s Act generated almost as much controversy as the judicial decision that provoked its enactment. Women’s rights groups and progressive Muslims denounced the legislation for violating women’s constitutional right to equality.³⁸⁶ Others “fiercely criticized [the Act] for its unequal and overtly favourable anti-secular and differentiated treatment” of Muslim men over non-Muslim men.³⁸⁷ The ruling political party was seen as having panicked during an election year and caved in to the conservative Muslim community’s demands in order to secure its votes.³⁸⁸

Advocates have also criticized the *Shah Bano* judgment itself for instigating this unproductive backlash by attempting to “make Islam gender-friendly.”³⁸⁹ In an essay on gender justice and the Court, a leading women’s rights lawyer wrote:

The Supreme Court was presented with an opportunity to...decide the issue as an equality issue. It failed to do so. Instead, it launched into a debate on the content of the Koran and was at pains to explain that the Code was not in conflict with the Koran. The Supreme 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?³⁹⁰

As a result, the lawyer observed, “The protest over the *Shah Bano* case ended up being 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.”³⁹¹

The Court did, however, have the last word in the controversy through a subsequent case, *Danial Latifi v. Union of India*.³⁹² The lawyer who had represented *Shah Bano* initiated this PIL along with other petitioners, challenging the Muslim Women’s Act on the grounds that it “undermines the secular character, which is the basic feature of the Constitution,” provides “no rhyme or reason to deprive the [M]uslim women from the applicability of the provisions of Section 125,” and must therefore “be held to be discriminatory and violative of Article 14 of the Constitution.”³⁹³

The *Latifi* Court upheld the Muslim Women’s Act through an interpretation that attempted to render it constitutional. Recognizing that Indian society is “male dominated both economically and socially,” the judgment focused on a clause of the Act that requires “a reasonable and fair provision and maintenance to be made and paid to [the former wife] within the period of *iddat* by her former husband.”³⁹⁴ The Court broadly interpreted the words of this clause as requiring the husband “not only to make provision for the *iddat* period but also to make a reasonable and fair provision for her future.”³⁹⁵

Following this lead, High Courts around the country have expansively interpreted the Muslim Women’s Act to ensure

that women receive large enough sums to support them beyond the *iddat* period. Although this is another example of the apex bench “reading down” a discriminatory statute, women’s rights lawyers have noted that the Court’s interpretation of the Muslim Women’s Act has left “enough scope for gender-sensitive judgments” by having “created a space for a [divorced Muslim] woman to be well provided for throughout her lifetime.”³⁹⁶

C. JUDICIAL AMBIVALENCE

There is a perception that since the *Shah Bano* controversy, judges have “realized their limitations” and have been “careful about what they say” in regard to religion-based personal laws.³⁹⁷ As seen in the *Latifi* and *Hariharan* cases discussed above, in subsequent attempts to address discriminatory laws the Supreme Court has resorted to interpretational techniques that attempted to render the laws constitutional, rather than outrightly rejecting them for violating women’s rights to equality and non-discrimination.³⁹⁸ Senior advocates have observed that the judiciary has “refus[ed] to test personal laws on the touchstone of fundamental rights,” and 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”—which “ill becomes a Court so widely renowned for its activist reformism.”³⁹⁹

A High Court justice noted that “every judge has a degree of objectivity...that makes you feel there are fundamental values that must apply irrespective of religious affiliation,” but acknowledged that the balance is “difficult to define” and is usually drawn by judges “from case to case.”⁴⁰⁰ Moreover, a Supreme Court Justice observed that judges on the apex bench have “very different views” on balancing the right to equality and the rights of minorities, which leads to a “patchwork approach” to religion-based personal laws.⁴⁰¹ This inconsistency may be exacerbated by several factors: Supreme Court Justices usually sit in benches of two or three, rather than *en banc*; their tenure on the apex court tends to be relatively short due to the mandatory retirement age of 65; and the judiciary has not established uniform guidelines on how to address discriminatory personal laws.⁴⁰² Thus, the situation remains much the same as it was decades ago, when the *Shah Bano* Court commented: “[P]iecemeal

attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.”⁴⁰³

D. UNIFORM CIVIL CODE

Unfortunately, the constitutional directive to enact a uniform civil code is becoming increasingly difficult to actualize. According to a former Supreme Court chief justice, male leaders of religious communities protect their own vested interests by opposing any challenges to personal laws as “interference with their religious tenets,” and politicians “combine to raise a hue and cry for vote purposes” whenever the issue of a uniform code arises.⁴⁰⁴ The justice added that there is growing doubt and cynicism, particularly among religious minorities, toward the intentions of those who are attempting to abolish the personal laws.⁴⁰⁵ In the process, the voices of the women who are discriminated against by the personal laws are pitted against and sacrificed for the rights of religious minorities. “If people say religion is in danger, women will not fight for their rights,” noted a former High Court chief justice.⁴⁰⁶

The Supreme Court tried to compel the government to enact a uniform civil code in a 1995 decision, *Sarla Mudgal v. Union of India*, but was once again beaten back by hostile political response.⁴⁰⁷ The *Sarla Mudgal* case involved a Hindu man who converted to Islam, which permits polygamy, in order to marry a second wife without legally dissolving his first Hindu marriage. The Court held that the husband’s second marriage was void because a Hindu man cannot convert to Islam to circumvent the provisions of Hindu law that govern his first marriage.⁴⁰⁸ Noting that a universal civil code would eliminate such a loophole, the Court criticized successive governments for being “wholly remiss in their duty of implementing the constitutional mandate under Article 44.”⁴⁰⁹ It further pointed out: “No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so.”⁴¹⁰

To spur the government into action, the *Sarla Mudgal* Court issued the following directions:

We...request the Government of India through the Prime Minister of the country to have a fresh look at Article 44 of the Constitution of India and “endeavour to secure for the citizens a uniform civil code throughout the territory of India.” We further direct the Government of India through Secretary, Ministry of Law and Justice to file an affidavit... indicating therein the steps taken and efforts made, by the Government of India, towards securing a “uniform civil code” for the citizens of India.⁴¹¹

A concurring opinion highlighted the “social necessity” and “urgency of such a legislation,” and emphasized that “a unified code is imperative both for protection of the oppressed and promotion of national unity and solidarity.”⁴¹²

Sarla Mudgal has been recognized as “a heroic attempt by the Court” and “[t]he only case in which the Supreme Court tangentially dealt with the misuse of the continued existence of separate personal laws.”⁴¹³ “The judgment is significant...because it held that the dispute would not be decided by Muslim Personal Law but that it had to be decided according to ‘justice, equity and good conscience,’” a leading women’s rights lawyer observed.⁴¹⁴

Nevertheless, the decision “erupted into a major political

issue,” forcing the Court to back down by explaining away its comments in a later case, *Ahmedabad Women Action Group (AWAG) v. Union of India*.⁴¹⁵ The 1997 *AWAG* decision stated that in matters relating to personal laws or a uniform civil code, “the remedy lies somewhere else and not by knocking at the door of the courts.”⁴¹⁶ The Court added that its *Sarla Mudgal* directives were not mandatory, and that “the observations on the desirability of enacting the Uniform Civil Code were incidentally made.”⁴¹⁷

Political sensitivities and pressures have thus made it difficult for the Court to consistently counteract the equality violations inherent in the application of religious-based personal laws.⁴¹⁸ “It will not be possible to do it judicially,” remarked a former chief justice of the apex bench. “The Supreme Court has drawn attention to this several times, but ultimately it will have to be done through the Parliament.”⁴¹⁹ As a local human rights lawyer observed, “This is one exception to the Court’s general enthusiasm to deliver justice, disregarding technicalities and the boundaries between the different branches.”⁴²⁰ The Court has, however, overtly recognized that: “[O]urs is a Secular Democratic Republic. Freedom of religion is the core of our culture... But religious practices, violative of human rights and dignity and sacerdotal suffocation of essential civil and material freedoms, are not autonomy but oppression.”⁴²¹

CHAPTER 5. NATIONAL STATUTORY BODIES

“Fight for justice by females or cry for gender equality should not be treated as if it is a fight against men. It is a fight against traditions that have chained them—a fight against attitude[s] that are ingrained in the society.... It is high time that Human Rights of Women are given proper priority.”

—Justice Anand, Chairperson, National Human Rights Commission⁴²²

The government of India has established a range of national commissions to help it fulfill its obligations under the Constitution and the international treaties that it has ratified. The National Commission for Women, the National Human Rights Commission, and the Law Commission of India play important roles in protecting and promoting human rights in the country. In fulfilling their mandates, the commissions interact with various governmental institutions, including the judiciary. Therefore, these commissions can be important allies for advocates who are attempting to address reproductive rights violations through the Court.

A. NATIONAL COMMISSION FOR WOMEN

1. Mandate

The National Commission for Women (NCW) is an autonomous, statutory body constituted by the Indian government in January 1992, pursuant to the National Commission for Women Act, to “seek justice for women, safeguard their rights, and promote women’s empowerment.”⁴²³ To carry out this mandate, the NCW may receive complaints relating to non-compliance with laws, policy decisions, or guidelines; conduct investigations with the powers of a civil court (although it has no independent investigation agency); fund litigation on issues affecting large groups of women; and make periodic reports and recommendations to the central government.⁴²⁴ In addition, the NCW may propose law reform, comment on draft legislation, and undertake campaigns to spread awareness about women’s rights at the rural level.⁴²⁵ “We work like a copula, a link, between the government, the NGOs, and the victims,” explained the current chairperson of the Commission.⁴²⁶ The NCW’s legal officer added that the Commission’s ability to protect and empower women in India is bolstered by its national ambit and independent budget.⁴²⁷

2. Involvement with the Court

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. When interviewed in April 2006, the Commission’s legal officer noted that the NCW was involved in six pending Supreme Court cases on gender-related issues such as trafficking and child marriage.⁴²⁸ Emphasizing the NCW’s willingness to assist in PILs for the promotion of women’s reproductive rights, the legal officer said the Commission is eager to collaborate with international and domestic individuals and NGOs—“anybody who has a cause worth contesting in court.”⁴²⁹

Occasionally, the NCW itself initiates litigation when it learns through its Complaint Cell about gender-related “atrocities” that are not receiving adequate governmental attention.⁴³⁰ “The decision [to litigate] is based on the severity of the problem,” explained NCW’s chairperson.⁴³¹ Although the NCW can be a petitioner in such cases, it cannot prepare and file petitions itself because the Commission’s one legal officer is not a practicing lawyer and has no support staff.⁴³² Therefore, the NCW seeks legal representation in PIL cases from a panel of lawyers with whom it works on a regular basis.⁴³³ The NCW has been praised for intervening “in a very, very proactive manner in...the Supreme Court” and for “taking up sensational or difficult cases.”⁴³⁴ For example, the NCW appeared as a party in the above-discussed *Latifi* case discussed in the previous chapter, arguing that the controversial Muslim Women’s Act was unconstitutional because it “operates appraisively, unequally and unreasonably against one class of women.”⁴³⁵

The NCW also gets involved in PIL cases pursuant to the Supreme Court’s request or referral.⁴³⁶ For instance, in

Delhi Domestic Working Women's Forum v. Union of India, a 1995 PIL decision responding to 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 victims.⁴³⁷ More recently, when deciding the question of whether marriage registration should be mandatory, the Court learned from an amicus that the NCW had proposed legislation on this issue, and sent notice to the Commission to place its views on the record.⁴³⁸ The NCW responded by submitting an affidavit in support of marriage registration, stating, "Such a law would be of critical importance to various women related issues...."⁴³⁹ In its decision, which accepted the NCW's position, the Court acknowledged that the Commission's argument was "rightly contended."⁴⁴⁰ A recently retired Supreme Court Justice observed that the NCW's opinions are "given lots of weight by the judiciary."⁴⁴¹

3. Limitations

Recognizing the importance of the NCW's input, the CEDAW Committee has called upon the Indian government to "strengthen law enforcement and introduce reforms proposed by the National Commission on Women...in regard to the law on rape, sexual harassment and domestic violence."⁴⁴² The Committee has expressed concern that the NCW is not empowered to enforce its law reform proposals or "intervene to prevent discrimination in the private or public sector;" that there are no formal links between the NCW and the state-level commissions for women; that the NCW does not have adequate resources, especially compared with India's National Human Rights Commission; and that there are no NGO representatives in the NCW.⁴⁴³

Local advocates have voiced similar concerns, describing the NCW as being too political and bureaucratic, and pointing out that a lot of its work "remains on paper and does not really get going" because the Commission's recommendations are not binding upon the government.⁴⁴⁴ The NCW has also been criticized for its delayed responses, attributable largely to its limited resources.⁴⁴⁵ One senior advocate noted that the Commission will only be able to play a more active role in promoting gender justice if it is equipped with "the necessary legal expertise."⁴⁴⁶ The NCW is currently in the process of reviewing the National

Commission for Women Act of 1990 to suggest amendments that would make the Commission more effective.⁴⁴⁷ "The government has been apprised of the limited manpower that seriously restrains the functioning of the Commission," its legal officer noted.⁴⁴⁸

B. NATIONAL HUMAN RIGHTS COMMISSION

1. Mandate

Two years after the establishment of the NCW, the Indian government enacted the Protection of Human Rights Act, which created the National Human Rights Commission (NHRC).⁴⁴⁹ According to a former chairperson of the NHRC, the Commission was designed to protect human rights as guaranteed under the Indian Constitution and the major international human rights treaties that the Indian government has ratified, including the Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights.⁴⁵⁰ 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 for the protection of rights; and encouraging the efforts of NGOs working in the field of human rights.⁴⁵¹

The NHRC has jurisdiction to investigate human rights violations in any Indian state with all the procedural powers of a civil court.⁴⁵² After reaching its conclusions, the NHRC may submit recommendations either to the Supreme Court or to the concerned state or central government. "Justice can come even without litigation if the grievances are brought before appropriate authorities and remedies are provided, and the NHRC is a forum for that," noted a consultant to the Commission.⁴⁵³ The NHRC also spreads public awareness about human rights abuses,⁴⁵⁴ and collaborates with legal organizations to sensitize judges on gender issues.⁴⁵⁵ A senior NHRC official emphasized that the Commission is an autonomous institution that is willing to take a stand that differs from "the version of the government."⁴⁵⁶ For example, in early 2003, the Commission issued a firm public declaration condemning coercive population policies that

have been adopted by some Indian states—a position that the Supreme Court unfortunately failed to consider when it upheld a coercive state policy later that same year in *Javed v. State of Haryana*, a case studied in Part II.⁴⁵⁷

2. Involvement with the Court

The NHRC is occasionally called upon by the Supreme Court to “inquire into certain PIL matters” or to monitor rights violations.⁴⁵⁸ Although the Commission has only recommendatory powers, a Supreme Court Justice remarked that like the NCW’s input, the NHRC’s recommendations “are given tremendous weight by the Court.”⁴⁵⁹ In 1995, the Supreme Court went so far as to entirely refer to the NHRC two writ petitions alleging mass abductions and illegal cremations by police forces in Punjab, stating, “[W]e leave the whole matter to be dealt with by the Commission.”⁴⁶⁰ Responding to the parties’ objections that the Court had “virtually delegated its own judicial powers” to the NHRC and thereby exceeded the Commission’s jurisdiction under the Protection of Human Rights Act, the NHRC asserted that it was reasonable for it to act “as a body *sui-generis* to carry out the functions and determine issues as entrusted to it by the Supreme Court,” for the following reason:

The shackles and limitations under the Act are not attracted to this body as, indeed, it does not function under the provisions of the Act but under the remit of the Supreme Court. The provisions of the Act do not bind or limit the powers of the Supreme Court in exercise of its powers under Article 32.⁴⁶¹

The NHRC clarified, however, that the Court would continue to retain jurisdiction over the petitions and that “the Commission discharges its functions...not as an independent adjudicatory body but as an instrumentality or agency of the Court.”⁴⁶² The apex bench largely upheld the NHRC’s order, stating that it “truly reflect[s] the intention of this Court.”⁴⁶³

However, such a wide delegation of power to the NHRC is more an exception than the norm. A senior advocate observed that in most PIL cases, the role of the NHRC is

“a limited one, but at the same time there is a great deal of coordination between the NHRC and the Supreme Court.”⁴⁶⁴ For example, pursuant to the Court’s directions in various PIL cases, the NHRC has monitored implementation of the Bonded Labour System (Abolition) Act; supervised the functioning of three mental hospitals and a government protective home for women; and assisted the Court in the ongoing right to food PIL by forming an advisory group, conducting an inquiry into starvation deaths, and suggesting interim measures for relief.⁴⁶⁵ “This is how you are able to have complementarities between the Supreme Court and the NHRC,” said a former Supreme Court chief justice, who called upon the NHRC to assist with PIL cases while he was on the bench and then remained involved in those cases as chairperson of the NHRC after retiring from the bench.⁴⁶⁶

3. Composition

The chair and two other positions in the NHRC are reserved for retired Supreme Court Justices.⁴⁶⁷ For this reason, a former NHRC chairperson opined that “you cannot have a better institution to inquire and report facts whenever needed to the Supreme Court.”⁴⁶⁸ The Court itself has described the NHRC 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.”⁴⁶⁹

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, adding that this hampers the creativity of the Commission’s approach.⁴⁷⁰ Although the benefits of the Commission’s composition are debatable, the NHRC leadership can overcome concerns about its effectiveness by collaborating with human rights activists. As a former NHRC chairperson pointed out, “involvement of civil society is...not only necessary but also a very useful tool for monitoring governance and all institutions of governance; in a democracy that is the most potent force.”⁴⁷¹

C. LAW COMMISSION OF INDIA

1. Mandate

The Law Commission of India (Law Commission) was established in 1955 to recommend law reforms to the government. The Commission has issued almost 200 reports on a variety of subjects pertaining to gender justice, including marriage, divorce, guardianship and child custody, women's property rights, sexual trafficking, rape, dowry deaths, adoption, women in custody, and access to healthcare.⁴⁷² The Law Commission's latest report, issued in 2006, is on "Medical Treatment after Accidents and During Emergency Medical Condition and Women in Labour."⁴⁷³ According to the most recently retired chairperson of the Law Commission, who was still in that position when interviewed, the government has implemented approximately 60% of the Commission's recommendations.⁴⁷⁴

2. Involvement with the Court

Although the Law Commission does not interact directly with the Supreme Court, the recent chairperson said the Court sometimes "points out lacunae in the legal system and refers it to us to see if any reform is necessary."⁴⁷⁵ For example, in 1997, Sakshi, a women's rights NGO, initiated a PIL action to broaden the Indian Penal Code's definition of rape to better address child sexual abuse.⁴⁷⁶ The *Sakshi v. Union of India* petitioners cited CEDAW, the Children's Rights Convention, and decisions from courts in England, South Africa, Canada, and the International Criminal Tribunal for the Former Yugoslavia to support

their position.⁴⁷⁷ An amicus in the case suggested that the Court direct the Law Commission to submit a report on the matter,⁴⁷⁸ and on August 9, 1999, the Court issued an order asking the Law Commission "to examine the issues submitted by the petitioners and examine the feasibility of making recommendations for amendment of the Indian Penal Code or deal with the same in any other manner so as to plug the loopholes."⁴⁷⁹

After hearing from the PIL petitioners and other women's rights groups, the Law Commission prepared a report with concrete suggestions on how the Indian Penal Code, the Code of Criminal Procedure, and the Indian Evidence Act should be amended to better address sexual abuse.⁴⁸⁰ The report was submitted to the Ministry of Law in March 2000, with a cover letter stating: "The UN Conventions and various constitutional provisions also underline the need for protecting the child from all forms of sexual exploitation and sexual abuse. This Report aims at the attainment of these objectives."⁴⁸¹

The *Sakshi* petitioners filed a response in the Supreme Court highlighting the ways in which the Law Commission's report failed to address the concerns raised in their PIL, thereby revealing the limitations of substituting a judicial ruling with a referral to the Commission.⁴⁸² Nevertheless, the petitioners acknowledged that the Law Commission "proved to be open and receptive" to several of their suggestions.⁴⁸³ Furthermore, a former Law Commission member who was involved in drafting the Commission's report said the government is considering the suggested amendments—"so the PIL had effects in many ways."⁴⁸⁴

PART II:

PUBLIC INTEREST LITIGATION CASE STUDIES

In exploring the best ways to use PIL to advance women's reproductive rights in India, it is helpful to examine past cases that have succeeded or failed in this regard. This chapter will focus on two important Supreme Court judgments relating to gender justice: *Vishaka v. State of Rajasthan*, a 1997 decision combatting sexual harassment in the workplace, and *Javed v. State of Haryana*, a 2003 decision upholding a coercive population policy. A close analysis will reveal that both cases hold important lessons for future litigation.

This chapter will also explore two pending cases that address ongoing rights violations: *Forum for Fact Finding Documentation and Advocacy v. Union of India*, a PIL against child marriage, and *Ramakant Rai v. Union of India*, a PIL against nonconsensual and unsafe sterilization practices. The petitions and interim orders in these pending actions provide useful insights into the ways in which reproductive rights abuses can be addressed through PIL.

CHAPTER 6. VISHAKA V. STATE OF RAJASTHAN⁴⁸⁵

“It has charted out a path, created multiple stakes, it has never left the public domain—somebody or the other is always using it. It has snowballed into different kinds of ownerships. The original creators may have moved on, but they have left a very powerful legacy.”

– A human rights activist, on the success of *Vishaka*⁴⁸⁶

Vishaka v. State of Rajasthan has been described by the last female justice on the Supreme Court 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.”⁴⁸⁷ The *Vishaka* Court filled a void in domestic litigation and upheld women’s constitutional rights by directly applying the provisions of CEDAW to enact guidelines against sexual harassment in the workplace. The case represents a leap forward for PIL, domestic application of international law, and gender equality in India.

A. BACKGROUND

The *Vishaka* PIL 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.⁴⁸⁸ As part of a governmental campaign against child marriage, Bhanwari Devi attempted to stop the marriage of a one-year-old girl. Members of the local community retaliated by harassing her with threats and imposing a socio-economic boycott on her family—refusing to sell them milk or to buy the earthen pots they sold for income.⁴⁸⁹ On September 22, 1992, five men raped Bhanwari Devi in the presence of her husband.⁴⁹⁰

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 carry out an investigation, and doctors at two government health facilities refused to conduct a proper medical examination.⁴⁹¹ Upon hearing about the case, the NCW initiated a detailed inquiry and issued an independent report finding that the “all evidence proved beyond any doubt that the victim... was gang raped.”⁴⁹² However, the state criminal court acquitted the five defendants of the rape charge because, *inter alia*, the judge did not find it credible that upper caste men would rape a lower caste woman.⁴⁹³ Naina Kapur, a New Delhi-based lawyer who was asked to attend the criminal trial to fulfill the requirement of a female lawyer presence,

described it as a deeply disturbing experience because of “the way it was handled, the humiliation and violation of the court process [for the victim]...it was a farce, it was ridiculous what they put her through.”⁴⁹⁴

Frustrated by the criminal justice system’s inability to provide tangible remedies, restore the dignity of the victim, address systemic issues, or create social change, Kapur decided to “focus on the big picture” by initiating a PIL in the Supreme Court.⁴⁹⁵ She and a local Rajasthani lawyer called a meeting of *sathins* to discuss when they experience sexual harassment, where they feel it needs to be addressed, and how it could be prevented.⁴⁹⁶ The women’s 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, which defines sexual harassment as including “such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions,” and calls upon states parties to take “[e]ffective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including...sexual harassment in the workplace.”⁴⁹⁷ Kapur worked with other lawyers to develop the PIL petition based on the feedback she received from the *sathins*.⁴⁹⁸ For example, even though the 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*, cannot define their workplace.⁴⁹⁹

B. BUILDING THE CASE

The *Vishaka* petition was filed in 1992 in the names of five Rajasthan and New Delhi-based NGOs that focus on women’s rights—Vishaka, Mahila Purnvas Samou, Rajasthan Voluntary Health Association, Kali for Women, and Jagori—against the State of Rajasthan, its Women and Child Welfare Department, its Department of Social Welfare, and the Union of India.⁵⁰⁰ The case was premised on the fact that although Bhanwari Devi was exposed to of exhibitionism and sexual

harassment for months before the gang rape took place, which she reported to the local authorities, the State made no attempts to protect her.⁵⁰¹ Kapur explained:

You could make a causal link between [the government] doing nothing and the gang rape that she eventually had to experience. It was important to make the employer accountable; she was acting on their behalf. . . . I filed the case using the logic that the local authority had betrayed her, let her down, left her vulnerable, and as a result, she was raped. [Then] I expanded it, saying it was a phenomenon that was affecting all women at work, and that we had to make the employer responsible for upholding their rights to dignity and equality.⁵⁰²

Although the *Vishaka* PIL arose from Bhanwari Devi's personal experience, the litigation was targeted toward empowering all similarly situated women. "She was one among many, so I felt the case had to be filed," said Kapur.⁵⁰³ The petition used Bhanwari Devi's story as a concrete illustration of systemic rights violations, and then demonstrated a pattern of abuse by providing examples of five other women who experienced sexual assault while doing public health or social work.⁵⁰⁴

The petitioners argued that Bhanwari Devi's case brought to light the State's "utter disregard and failure to recognize" the sexual harassment experienced by women "while performing functions for the benefit and on behalf of" the respondents, and also the State's failure to "administer prompt and efficient medical and legal redress," which violated the constitutional rights to life, personal liberty, equality, and right to practice any profession.⁵⁰⁵ After the Court accepted the writ petition for hearing, the *Vishaka* petitioners filed various supporting documents pertaining to international law, including a UN document confirming India's ratification of CEDAW (which occurred after the initial *Vishaka* petition was filed); relevant sections of a 1994 report by the UN 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 1955.⁵⁰⁶ 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.

Furthermore, the petitioners presented the Court with a document entitled "Proposed Directions to be Incorporated as Guidelines" (Proposed Directions), which discussed the failure of existing laws to recognize sexual harassment as a form of gender discrimination against women, the relevant provisions of CEDAW, and the Court's obligation to enforce them.⁵⁰⁷ Based on CEDAW and the CEDAW Committee's General Recommendation 19, the Proposed Directions suggested steps the Court should direct employers to take to combat sexual harassment in the workplace.⁵⁰⁸ When framing their proposed guidelines, the petitioning lawyers also consulted the Civil and Political Rights Covenant, the Economic, Social and Cultural Rights Covenant, international case law, and Malaysia's "Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace," which they "modified...to suit Indian conditions."⁵⁰⁹ The petitioners' Proposed Directions contained a request for the Court to ensure that its directives would be widely circulated through various points of distribution, including government departments, the Bar Council of India, public radio and television channels, and the Press Council of India.⁵¹⁰

Numerous lawyers and activists were involved in the *Vishaka* litigation, and the first draft of the petition was difficult to agree upon because it dealt with "an issue that many people were concerned about but had different views on—some were moderate, others radical."⁵¹¹ Ultimately, however, several factors came together at the right time to bring the *Vishaka* PIL to fruition, including a strong, emblematic victim who remained very clear throughout the litigation process.⁵¹² In addition, the advocates behind the case were highly motivated and willing to contribute a lot of time and effort without monetary compensation.⁵¹³ Kapur noted that while she was the instructing counsel who drafted the petition and "put the emotion and passion" into the case, the other petitioning lawyers made important contributions by focusing on procedure, strategy, and oral arguments.⁵¹⁴ Various people had a stake in the litigation because "it was a big case to create big change."⁵¹⁵

C. JUDGMENT

The Court delivered the *Vishaka* judgment on August 13, 1997.⁵¹⁶ The decision, authored by then-Chief Justice V. 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."⁵¹⁷ The Court identified the PIL's goals as being to bring attention to the "social aberration" of sexual harassment, to find "suitable methods for realization of the true concept of 'gender equality,'" and to "prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation."⁵¹⁸

Incorporating a broad reading of the Constitution, the *Vishaka* judgment recognized that sexual harassment violates the constitutional guarantee of gender equality in "all spheres of human activity," as well as women's fundamental rights to life with dignity, to personal liberty, and to carry on any occupation.⁵¹⁹ In addition, the Court cited the Constitution's Directive Principles 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.⁵²⁰

The *Vishaka* Court's primary focus, however, was on international law. "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, to promote the object of the constitutional guarantee," it stated.⁵²¹ The decision relied heavily upon CEDAW—quoting relevant provisions from the treaty and from the CEDAW Committee's General Recommendation 19—in enacting guidelines against sexual harassment.⁵²² The Court's guidelines included a definition of sexual harassment, a list of preventive steps, and a description of complaint proceedings to be "strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women."⁵²³ The judgment specified that the guidelines would act as binding law until Parliament enacts legislation to replace them.⁵²⁴

The *Vishaka* Court justified its reliance on international law by emphasizing India's legal obligations to uphold women's rights pursuant to its ratification of CEDAW, the official commitments it made at the UN Beijing Conference and the constitutional provisions directing the State to enforce the treaties it has signed.⁵²⁵ The decision noted:

Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose.⁵²⁶

Citing *Nilabati Behera v. State of Orissa*, its own 1993 judgment that had invoked a provision of the Civil and Political Rights Covenant to support its holding, the Court stated: "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."⁵²⁷ The Court also used comparative law to reinforce its decision, referring to an Australian High Court judgment that held that the government's ratification of the Children's Rights Convention established a "legitimate expectation" that the treaty would be observed in the absence of a contrary legislative provision because "[a]part from influencing the construction of a statute or subordinate legislation," an international convention, "especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law."⁵²⁸

In a recent interview, Justice Verma described why *Vishaka* represented "a big leap forward" not only for gender justice, but also for the development of Indian jurisprudence on international law:

I said in that judgment...that international law can be used for the purpose of expanding the scope of existing constitutional guarantees, and also for filling the gaps wherever gaps exist for the purpose of enlargements of human rights.... *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. ... That is why *Vishaka* is known all over the world.⁵²⁹

Through its integrated use of CEDAW, *Vishaka* established a strong precedent for the direct application of international conventions in future PIL cases.

True to the collaborative nature of PIL, the *Vishaka* judgment was the result of cooperation by the government and collective progress made by the parties at each hearing.⁵³⁰ Both sides submitted draft guidelines, and the petitioning lawyers then submitted suggested amendments to the government's draft guidelines.⁵³¹ "[The Court] wanted to balance both sides and then make [the guidelines] its own," recalled Kapur, adding that the presiding judges actively sought input from the government because they "did not want to make it seem like they were legislating."⁵³² According to Justice Verma, the Solicitor General representing the government, T. R. Andhyarujina, 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."⁵³³ The petitioning lawyers recalled that the government 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.⁵³⁴ On the whole, however, Kapur noted that she "was not battling the government" in this case, because the presiding judges "made the difference" by understanding the petitioners' position.⁵³⁵

D. PREDECESSOR CASES

Emphasizing that decisions like *Vishaka* cannot "come overnight," Justice Verma explained that he started laying the foundation for the judgment by promoting gender justice, creative remedies, and the application of international law earlier in his judicial career.⁵³⁶ "*Vishaka*'s origin is *Jani Bai v. State of Rajasthan*," he said, referring to a 1989 case he decided while he was Chief Justice of the Rajasthan High Court. "Once you read *Jani Bai*, you will be able to understand why I wrote *Vishaka*."⁵³⁷ Similarly, Justice Verma's inclination to incorporate provisions of international treaties into domestic jurisprudence was foreshadowed in the 1993 *Nilabati Behera* decision that he issued on the apex bench.⁵³⁸

The *Jani Bai* case challenged a Rajasthani state law that gave migrant temporary leaseholders preferential rights to permanent land leases, but applied only to adult sons and not to adult daughters.⁵³⁹ "It was easy to strike down the law because it offended Articles 14 and 15 [of the Constitution]," Justice Verma recalled. "But what occurred to me was that if you have a loaf of bread and I have none, and there is an arrangement by which both of us share it, then no one remains hungry. However, if you are deprived of the bread because I do not have it, we will both remain hungry. This is not the concept of equality as I would like to understand it."⁵⁴⁰ Justice Verma thus sought an interpretation of the law that would give the same benefit to the daughters as to the sons, instead of harming the well-being of all migrant leaseholders by striking down the law and leaving it to the legislature to come up with a new one.⁵⁴¹ "I am not one for leaving things to the legislature, as you can see in *Vishaka*," he remarked.⁵⁴² The *Jani Bai* decision held that the "presumption of constitutional validity" required the word 'son' to be read as 'issue,' which includes female children, because "[i]t is well settled that the distribution of State largess cannot be made in violation of the right to equality."⁵⁴³ According to Justice Verma, this judgment anticipated the extent to which he would "strain law to do gender justice."⁵⁴⁴

Justice Verma's willingness to use international treaties as a means to this end was seen in *Nilabati Behera*, which was cited in the *Vishaka* decision.⁵⁴⁵ The *Nilabati Behera* case concerned the death of an individual in police custody. The judgment referred to a provision of the Civil and Political Rights Covenant to support an award of monetary compensation for the death as a mode of enforcing the Constitution's Fundamental Rights, even though the Indian government had entered a reservation against that particular provision of the Covenant.⁵⁴⁶ Justice Verma regarded the *Nilabati Behera* decision as an important step toward his broad application of international law in the *Vishaka* judgment. "Something implied therein was expressly stated in *Vishaka*," he said. "I took the quantum leap in *Vishaka* to take it to the logical conclusion that whether you ratify [a convention] or not, if there is a constitutional guarantee akin to that, we can read [the international law] into that provision."⁵⁴⁷ This comment explains the *Vishaka* Court's comfort in relying upon CEDAW even though the Indian government ratified the treaty one year after the *Vishaka* petition was filed (but four years before the final judgment was issued).

E. IMPLEMENTATION

The *Vishaka* guidelines against sexual harassment are directly enforceable in the public sector, and women's rights NGOs like Sakshi have been involved in following up the PIL by helping set up sexual harassment committees in a diverse range of governmental institutions—including the Sports Authority of India, the Central Board of Secondary Education, and the Ministries of Defense, Agriculture, and Human Resources.⁵⁴⁸ “The role of a third party NGO member is to provide guidance to the committee 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],” explained the coordinator of Sakshi's sexual harassment project. She noted that although the enforcement of *Vishaka* guidelines initially met with some reluctance, “now people are asking for it, especially in the government sector.”⁵⁴⁹ As far as educational institutions are concerned, Justice Verma noted that the State can make financial support conditional upon implementation of the *Vishaka* Court's sexual harassment guidelines.⁵⁵⁰

As discussed in Part I, there are limitations to the applicability of constitutional law to private actors,⁵⁵¹ but the *Vishaka* judgment addressed this challenge by ordering 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 by directing that steps be taken to prohibit sexual harassment in standing orders under the Industrial Employment (Standing Orders) Act of 1946.⁵⁵² Explaining this direction, Justice Verma said, “Industrial establishments are governed by industrial rules called standing orders, which are to be approved by government officers. So at the time of approval, [the officers] should insist on making sexual harassment misconduct punishable under standing orders.”⁵⁵³ Meanwhile, Kapur interpreted the *Vishaka* judgment as applying 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.⁵⁵⁴

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 *Vishaka* guidelines.⁵⁵⁵

He attributed this to a paradigm shift from an emphasis on profit and occasional philanthropy, toward a focus on social responsibility. “Providing education and health care for your workers is corporate social responsibility,” he explained. “Similarly, ensuring a safe working place and safe environment for women working in your establishment is your responsibility.”⁵⁵⁶ There are still some corporations, however, that are worried that “if they accept a sexual harassment policy, it means they are accepting that sexual harassment exists in their workplaces.”⁵⁵⁷ To overcome such concerns, NGOs like Sakshi conduct awareness training programs to dispel stereotypes and generate a clearer understanding of sexual harassment and its harmful impact.⁵⁵⁸

The biggest challenge in implementing the *Vishaka* guidelines has come in the realm of unorganized workers, who represent a vast majority of the workforce in India.⁵⁵⁹ To address this “uncharted course of difficulty,” Justice Verma suggested that lawyers and social activists establish groups to receive sexual harassment claims from unorganized workers and bring them to judicial attention.⁵⁶⁰ Similarly, a sexual harassment bill proposed by the NCW in response to the *Vishaka* case provided for the establishment of district-level committees for unorganized workers.⁵⁶¹ Even though the implementation of the *Vishaka* guidelines is an ongoing process, the PIL has triggered creative reform attempts at various levels.

F. ROLE OF NATIONAL COMMISSIONS

Although the NCW issued a fact-finding report confirming Bhanwari Devi's rape allegations, it was not directly involved in the *Vishaka* litigation, and neither was the NHRC. Nevertheless, the two commissions have contributed significantly toward the implementation of the Court's sexual harassment guidelines. The NHRC has been actively involved in raising public awareness about *Vishaka*; for example, publishing and distributing a booklet that provides “a general understanding of the problem of sexual harassment of women at the workplace, the existing international safeguards, the legal approaches adopted by different countries,” and a detailed explanation of the *Vishaka* decision and its legal consequences.⁵⁶² In addition, the NHRC has convened meetings with various governmental departments, educational institutions, and

members of the legal community—including the Attorney General, chair person of the Bar Council of India, and senior advocates—to “consider and clarify” issues relating to the implementation of the *Vishaka* judgment.⁵⁶³

Meanwhile, the NCW has worked with national and state ministries to set up sexual harassment complaint committees, and has formulated a Code of Conduct based on the *Vishaka* guidelines that it has circulated to ministries, state commissions, NGOs, corporations, and the media.⁵⁶⁴ The NCW has also been addressing sexual harassment complaints and has held more than 20 meetings since November 2000 to assess and improve the extent to which the *Vishaka* guidelines have been implemented.⁵⁶⁵ Furthermore, in response to the Court’s call for legislation against sexual harassment, the NCW has used findings from studies, expert reports, and a national seminar convened for this purpose to draft a Sexual Harassment of Women at Their Workplace (Prevention) Bill.⁵⁶⁶

G. IMPACT

The *Vishaka* PIL has made a significant impression upon the public because it led to the establishment of systems for legal accountability, and it created a tremendous amount of awareness and open acknowledgment about sexual harassment.⁵⁶⁷ One human rights lawyer observed that the judgment has exerted a particularly large influence in universities and large workplaces, because “before *Vishaka* there was nothing” to empower women in this regard.⁵⁶⁸ “It just makes all the difference to women to know that this is the law,” said another lawyer. “It makes a big difference to people harassing women as well, to know that they can be called up on it.”⁵⁶⁹ Elaborating further on the consequences of the judgment, a High Court judge 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 have 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.⁵⁷⁰

The judge added that the awareness created by the *Vishaka* decision has led to a lot of litigation at the High Court level.⁵⁷¹

The *Vishaka* PIL has been described as “path breaking,” “one of the most powerful legacies,” and a “trendsetter” that “created a revolution” not only because it changed societal attitudes toward sexual harassment, but also because it altered the Indian legal system’s conception of international law.⁵⁷² The decision made lawyers and High Court Judges across the country realize the extent to which international law can be relied upon in domestic jurisprudence.⁵⁷³ Furthermore, the *Vishaka* judgment caused ripples in the international legal community. Justice Verma said he received very positive feedback on the decision from judges around the world, including Justice Sandra Day O’Connor of the U. S. Supreme Court and Justice Claire Dube of the Canadian Supreme Court.⁵⁷⁴ When he attended a conference in Philadelphia only two weeks after issuing the judgment, Justice Verma found that the other participants already knew about the decision and were very enthusiastic about it.⁵⁷⁵

Highlighting the importance of context in the success of PIL actions, one human rights activist observed that the *Vishaka* judgment came at the right time because it was issued during a peak in the gender discourse—an era of “removing barriers” after the 1980s period of “breaking the silence.”⁵⁷⁶ She 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.”⁵⁷⁷ According to the legal editor of a national Indian newspaper, the media also played a critical role in *Vishaka*’s success by providing extensive coverage of the case.⁵⁷⁸

H. LEGISLATION

Although critics have expressed concern that the *Vishaka* Court “stepped outside its bounds” and into the “domain of Parliament” by enacting guidelines to act as law, one Supreme Court advocate pointed out that this is “best classified as a necessary evil.”⁵⁷⁹ “It is unfortunate that this has happened but...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,” he asserted.⁵⁸⁰ Justice Verma himself described *Vishaka* as a “case of judicial legislation,” but maintained that the judgment had “a legal jurisdictional basis.”⁵⁸¹ He added that the other branches of government have “indirectly accepted” the Court’s guidelines, because the executive branch has been implementing them and Parliament has not been in a hurry to replace them with legislation.⁵⁸²

A Working Women (Prevention of Sexual Harassment at Workplaces) Bill was introduced in the Rajhya Sabha (upper house of Parliament) on March 3, 2006, and is still pending.⁵⁸³ This bill reveals how PIL and positive judicial response can spur the legislative branch into action. A women’s rights lawyer noted that it is important for Parliament to enact the bill as soon as possible in order to secure the progress achieved by the *Vishaka* Court’s guidelines. However, two of the key stakeholders in the *Vishaka* case are not bothered by the legislative delay. Kapur acknowledged that the pending bill has “definitely captured the spirit of what we were trying to do,” but added: “I have always said you do not need legislation.... What I love about *Vishaka* is that it is procedurally strong. If someone wants to [bring an action under] it they can.”⁵⁸⁴ Justice Verma said, “If the Parliament can do a better job, it better do so, but otherwise let them not dilute it.”⁵⁸⁵

I. SUBSEQUENT HISTORY

The Court had occasion to revisit the *Vishaka* guidelines in a 1999 case, *Apparel Export Promotion Council v. Chopra*, in which a female secretary accused her employer of repeatedly attempting to sexually accost her.⁵⁸⁶ Although the High Court dismissed the case on the grounds that the defendant only “tried to molest” but did not “actually molest” the petitioner, the Supreme Court reversed on the finding that the alleged behavior fell within *Vishaka*’s definition of sexual harassment.⁵⁸⁷ Exhibiting how *Vishaka* has sensitized the judiciary, the *Apparel Export* Court stated: “Such cases are required to be dealt with greater sensitivity. ...Reduction of punishment in a case like this is bound to have [a] demoralizing effect on the women employees and is a retrograde step.”⁵⁸⁸

The apex bench chastised the High Court for having “totally ignored the intent and content of the International Conventions and Norms while dealing with the case.”⁵⁸⁹ Citing CEDAW, the Beijing Platform for Action, and the Economic, Social and Cultural Rights Covenant, the Court stated that “the message of international instruments... which direct all State Parties to take appropriate measures to prevent discrimination in all forms against women besides taking steps to protect the honour and dignity of women is loud and clear.”⁵⁹⁰ The Court also emphasized that “each incident of sexual harassment, at the place of work, results in violation[s] 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.”⁵⁹¹

Another case calling for enforcement of the *Vishaka* guidelines, *Medha Kotwal Lele v. Union of India*, is currently pending in the Supreme Court.⁵⁹² According to an advocate involved in the PIL, the case was repeatedly adjourned over a period of two years because the government assured the Court that it was drafting a new law to comprehensively address the issue of sexual harassment in the workplace.⁵⁹³ However, in January 2006, the petitioning lawyers argued that irrespective of the pending bill, “certain issues remain alive in the case that need to be addressed by the Court and would remain alive even after the law is passed.”⁵⁹⁴ For example, the lawyers pointed out that affidavits filed by various states indicate that the *Vishaka* directive instructing all employers to establish sexual harassment complaint committees is not being actualized.⁵⁹⁵

In response, the Court issued an order directing the chief secretaries of each state to appoint a state-level officer “who is in charge [of] and concerned with the welfare of women in each State.”⁵⁹⁶ Noting that implementation of the *Vishaka* guidelines is particularly lacking in factories, shops, and commercial establishments, the Court instructed the Labor Commissioner of each state to take steps to ensure that the required complaint committees are “established in such institutions.”⁵⁹⁷ Furthermore, in response to the petitioners’ contention that the requirement of an inquiry probe after a finding of sexual harassment by a complaint committee was causing unnecessary delays in the resolution of cases, the Court held that a complaint committee’s report “shall be deemed to be an inquiry report,” based on

which disciplinary action can be taken.⁵⁹⁸ Discussing these developments, a senior advocate who argued on behalf of the petitioners in the *Vishaka* PIL observed that judges “have come forward and enforced *Vishaka* wherever people have complained.”⁵⁹⁹

J. PETITIONING LAWYER’S EXPERIENCE

Looking back on the experience of bringing the *Vishaka* PIL, Kapur said the biggest challenge of representing the petitioners was enduring the delays of litigation. “The PIL took five years,” she said. “That is not justice. Over the five years I kept refining it, but even the Court sat with it for adjournments. It took far too long.”⁶⁰⁰ Kapur was also dissatisfied with various aspects of the final judgment; she asserted that it could have used clearer language and reasoning, established more human rights norms, and created greater accountability.⁶⁰¹ “It took five years for an outcome that then should have been perfect,” she said.⁶⁰² Kapur acknowledged that some of her frustrations arose from having become close to the individual victim and very personally invested in the litigation. Nevertheless, she

emphasized that the success of PIL depends upon advocates being deeply involved in their cases: “I think you should be—otherwise, without passion, what will you move?”⁶⁰³

Despite the challenges and frustrations of bringing the *Vishaka* PIL, Kapur recognized that the case has “woken people up,” generated an understanding about sexual harassment, and made both men and women more able and willing to talk about it.⁶⁰⁴ She credited the Court with creating this difference and working faster than the legislature would have.⁶⁰⁵ Ultimately, the PIL that led to systemic change by paving the way for the use of international law in domestic courts and empowering working women to assert their rights has also had a poignant impact on the individual who inspired it. Kapur described Bhanwari Devi’s reaction to the *Vishaka* decision 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.”⁶⁰⁶

CHAPTER 7. JAVED V. STATE OF HARYANA

“It is an ongoing battle.”

– A human rights activist, on reversing the negative impact of *Javed*⁶⁰⁷

While *Vishaka* demonstrates how PIL and international law can be used to advance women’s rights in India, the Supreme Court’s 2003 *Javed v. State of Haryana* decision illustrates the dangers of filing uncoordinated litigation in the highest court of the country. In upholding a coercive legislative provision that violated women’s reproductive rights, the *Javed* Court applied a narrow reading of the Constitution, reinforced a negative domestic precedent on gender discrimination, revealed a lack of awareness about Indian women’s reproductive decision-making constraints, employed a downward comparison to China’s one-child policy, and ignored India’s international treaty obligations. The judgment created a precedent with damaging implications for human rights and gender justice in India.

A. BACKGROUND

In *Javed*, more than 200 writ petitions and High Court appeals were consolidated into one case against the State of Haryana and the Union of India, which the Court treated as a PIL even though it was not filed as such.⁶⁰⁸ The *Javed* litigants challenged the constitutionality of a coercive population control provision in the Haryana Panchayati Raj Act of 1994 (the Haryana Provision), which governs the election of *panchayat* (village council) representatives in Haryana.⁶⁰⁹ The Haryana Provision disqualifies “a person having more than two living children” from holding specified offices in *panchayats*.⁶¹⁰

The objective of this two-child norm was to popularize family planning—the implication being that the restrained reproductive behavior of elected leaders would be a model for others citizens to follow.⁶¹¹ The two-child norm is not exclusive to Haryana; other states have adopted similar legislation,⁶¹² and the government’s lawyers indicated at one of the *Javed* hearings that there was a possibility of instituting such a policy for the national legislature as

well.⁶¹³ The implications of the *Javed* Court’s judgment thus extended beyond the Haryana *panchayats*.

Forcing a choice between reproductive freedom and political rights by making participation in local governance contingent upon the number of children one has violates a number of established human rights principles, including the rights to equality, privacy, and personal liberty. A qualitative study (the Buch Study) conducted in the early 2000s on the consequences of the two-child *panchayat* norm in five Indian states, including Haryana, found the following: “[T]he application of the norm has the potential of adversely affecting both the democratic rights and reproductive choices of individuals. It has serious consequences for the status of women.”⁶¹⁴ In particular, the study uncovered “disquieting trends...in practices used to meet the conditionality of the law”—including sex-selective abortions and abandonment of female infants (“whereas having a son was seen as far outweighing the benefits of being a *panchayat* representative”); falsification of hospital and birth records; marital desertion, divorce, or denial of paternity by male political candidates; and exclusion from political participation of women who lack control over their reproductive decision-making.⁶¹⁵

B. LITIGANTS’ ARGUMENTS

The petitioners and appellants in the *Javed* litigation 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.⁶¹⁶ The first of the individual cases was filed in 2001 and the last in 2003. After all the petitions and appeals were consolidated into the *Javed* case, the parties agreed to categorize their numerous 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.⁶¹⁷

Although the application of the coercive two-child norm violates India's international commitments under CEDAW, the Civil and Political Rights Covenant, the Economic, Social and Cultural Rights Covenant, the ICPD Programme of Action, and the Beijing Platform for Action, the Court did not acknowledge any of these provisions in its decision.⁶¹⁸ A lawyer who helped the Court review the *Javed* petitions said he did not recall the petitioners raising any international law arguments.⁶¹⁹

C. JUDGMENT

The Court delivered the *Javed* judgment on July 30, 2003, upholding the Haryana Provision as “salutary and in the public interest.”⁶²⁰ The decision, authored by Justice R. C. Lahoti, stated that the Constitution's 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.”⁶²¹ The Court did nonetheless go through each of the constitutional challenges brought against the Haryana Provision, but it often avoided directly addressing the petitioners' arguments or providing an informed rationale for striking them down. Instead, the judgment repeatedly responded merely by emphasizing concerns about population growth in India.

1. Right to equality

The *Javed* Court found that the Haryana Provision did not violate Article 14 of the Constitution because it was not arbitrary, unreasonable, or discriminatory, but rather, “well-defined,” “founded on intelligible differentia,” and based on a clear objective to popularize family planning.⁶²² “There

is nothing wrong in the State of Haryana having chosen to subscribe to the national movement of population control by enacting a legislation which would go a long way in ameliorating health, social and economic conditions of the rural population, and thereby contribute to the development of the nation which in its turn would benefit the entire citizenry,” the decision stated, erroneously insisting that the Haryana Provision “is consistent with the national population policy.”⁶²³ In actuality, the National Population Policy does not support the use of coerced incentives and disincentives. Rather, it encourages the prioritization of women's health in family planning and “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.”⁶²⁴

The Court failed to respond to the petitioners' claim 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*. Instead, the decision merely reiterated that the Haryana Provision “seeks to achieve a laudable purpose—socio-economic welfare and health care of the masses,” through population control.⁶²⁵ The *Javed* decision further asserted that the Constitution specifically entrusts *panchayats* with “the powers to implement the schemes for economic development and social justice,” which encompass the imperative for family planning.⁶²⁶ However, the Court did not critically evaluate whether the two-child norm is actually curing “the evil sought to be cured,” or achieving “the purpose sought to be achieved by the enactment.”⁶²⁷

Despite its focus on population control, the Court did not issue any directives to ensure that the State helps citizens practice family planning. As the Buch study observed:

The norm imposed by a law ignores the state's responsibility in providing accessible, affordable, equitable, quality health and family welfare services. The inadequacy of these services is seen in high unmet contraceptive needs among desiring couples..., high unwanted fertility levels..., and poor quality health care services. The social context of early marriages, early pregnancies and son

preference is also ignored and all the responsibility is placed only on individuals, particularly women, with serious consequences for them.⁶²⁸

By disregarding these considerations and condoning the use of coercive measures, the *Javed* Court absolved the government of its obligations under domestic and international law. Furthermore, the Court failed to adequately address the petitioners' argument that the Haryana Provision is having disturbing social consequences, such as compelling couples with more than two children to give additional children up for adoption. The decision responded merely by emphasizing that the disqualification cannot be "wiped out" through such tactics.⁶²⁹

The *Javed* petitioners attempted to highlight the two-child norm's discriminatory impact on women by pointing to women's general lack of reproductive self-determination.⁶³⁰ A lawyer who worked under Justice Lahoti on the case recalled 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."⁶³¹ This impact is particularly problematic given that women already constitute an underrepresented minority in local governance, as evidenced by the enactment of the 73rd Amendment to the Indian Constitution mandating reservations of *panchayat* positions for women.⁶³² As the Buch study observed, "The norm contradicts the rights based approach to women's development, and...the objectives of the constitutional amendment enacted towards ensuring greater political participation and empowerment of politically and socially marginalized groups such as...women."⁶³³ Instead of recognizing the unequal playing field in which the Haryana Provision operates, the *Javed* decision remarked, "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."⁶³⁴

Contrary to the Court's assumption, Indian women's lack of reproductive decision-making power is an unfortunate reality, as illustrated by the examples in the box preceding Part I.⁶³⁵ The situation is exacerbated by factors such as early marriage, lack of access to contraception, low literacy, lack of economic independence, widespread sexual violence, and the dearth of female input in governance and

policy making.⁶³⁶ However, the *Javed* decision revealed a lack of awareness in the judiciary about the socio-cultural and economic obstacles that obstruct Indian women's right to decide the number and spacing of their children.

The *Javed* Court supported its holding by citing *Air India v. Nergesh Meerza*, a case in which "[t]he menace of growing population was judicially noticed and constitutional validity of legislative means to check the population was upheld."⁶³⁷ As discussed in Part I, the *Air India* Court "found no fault" with a regulation that would terminate the employment of Air hostesses upon a third pregnancy.⁶³⁸ The *Javed* decision's citation of this case underscores the latent dangers of every negative precedent.

2. Right to life and liberty

After rejecting the petitioners' equality arguments, the *Javed* decision shifted its focus to the Constitution's Article 21 protection of life and personal liberty. Listing a slew of facts and figures to "highlight the problem of population explosion as a national and global issue," the Court asserted that "Fundamental [R]ights are not to be read in isolation," and that "[t]he laudable goals spelt out in the Directive Principles of State Policy in the Constitution of India can best be achieved if the population explosion is checked effectively."⁶³⁹ This argument assumes, once again, that the two-child provision is having its intended effect on family planning. Moreover, it minimizes the Haryana Provision's negative impact on reproductive and political freedom, and its harmful consequences for women and children—all of which violate not only Fundamental Rights, but also Directive Principles and India's international treaty obligations.

3. Right to religious freedom

The final constitutional argument raised by the petitioners was based on Article 25's freedom of religion clause, which reads: "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."⁶⁴⁰ Article 25 further notes, "Nothing in this article shall affect the operation of any existing law or prevent the State from

making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.”⁶⁴¹ 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 [the] right to freedom of religion enshrined in...the Constitution.”⁶⁴² This argument contradicted the petitioners’ equality claim that highlighted the two-child norm’s discriminatory impact on women, because polygamy is a form of marriage condemned by the CEDAW and Human Rights Committees as inherently discriminatory and violative of women’s dignity.⁶⁴³

The Court rejected the petitioners’ freedom of religion argument on two grounds. First, it pointed out that Article 25 is inapplicable 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.⁶⁴⁴ The *Javed* decision invoked Supreme Court and High Court precedents to reinforce the point that a religious practice that is not “an essential and integral part of practice of that religion” is not protected by Article 25.⁶⁴⁵ Second, it noted that the Constitution permits limitations on religious freedom for the preservation of public order, morality, and health—thereby rendering Article 25 inapplicable to “a legislation in the interest of social welfare and reform which are obviously part and parcel of public order, national morality and the collective health of the nation’s people.”⁶⁴⁶

The Court’s discussion of why social welfare must trump religious norms is the most positive feature of the *Javed* decision, as it provides positive dicta against upholding discriminatory religion-based laws and practices. The Court supported its position by citing some of its own progressive judgments, such as the *Shah Bano* and *Sarla Mudgal* cases discussed in Part I, as well as High Court and U.S. case law, noting that while laws “cannot interfere with mere religious belief and opinions, they may with practices.”⁶⁴⁷ This is a heartening aspect of the otherwise bleak judgment.

4. International law

Other than its discussion of U.S. case law on polygamy, the *Javed* decision’s only reference to international or

comparative law was a downward comparison to China’s “carrot and stick” approach of using attractive incentives and drastic disincentives to enforce its one-child policy.⁶⁴⁸ The Court pointed out that measures like the Haryana Provision are not so extreme:

India being a democratic country has so far not chosen to go beyond casting minimal disincentives and has not embarked upon penalizing procreation of children beyond a particular limit. However, it has to be remembered that complacency in controlling population in the name of democracy is too heavy a price to pay, allowing the nation to drift towards disaster.⁶⁴⁹

The Court’s use of the phrase “so far” implies its frightening potential to condone more draconian population control measures in the future. The comparison to China illustrates how the judiciary’s willingness to look at policies from foreign jurisdictions can backfire on the goals of reproductive rights advocates.

In actuality, China’s one-child policy has had damaging consequences, such as skewed sex ratios caused by increases in sex-selective abortions and female infanticide, abandonment of babies, and other societal problems.⁶⁵⁰ Furthermore, population experts assert that the decline in China’s fertility rate really resulted from social development measures that the government took after the 1950 Cultural Revolution—when it did not have a one-child norm, but rather, took steps to ensure more equitable access to basic healthcare, education, and employment—which improved women’s status and “created a situation in which people went for small families.”⁶⁵¹ In fact, due to an emphasis on education instead of coercive norms, the Indian state of Kerala experienced a sharper fall in fertility between 1980 and 2002 than China did, despite China’s introduction of the one-child policy in 1979.⁶⁵² Unfortunately, neither the Court nor the petitioners seem to have considered these facts in the context of the *Javed* litigation.

D. RESPONSE

Public health and legal experts have criticized the *Javed* judgment for being “misinformed,”⁶⁵³ “very paternalistic,”

and demonstrating “no concern about what [the two-child norm] does to the health of the women.”⁶⁵⁴ The Court’s neo-Malthusian approach of “feeling an urgent need to control population” has been condemned as overly emotive and misguided,⁶⁵⁵ on the grounds that it was “not informed about the position India is occupying in the demographic transition cycle—the fact that growth rates have declined, fertility rates have declined and that growth rates will appear to be relatively high due to momentum effect.”⁶⁵⁶

The executive director of the Population Foundation of India (PFI) noted, “One should not be unduly nervous and take major short cuts that create situations that infringe women’s rights, reproductive rights, and rights of the poor...like the two-child norm.”⁶⁵⁷ Promoting a “demographic opportunity or dividend” approach to lowering population and increasing development, which mirrors the holistic approach envisioned in the ICPD Programme of Action, he added:

Even if population growth is a problem, the solution does not lie in going for rigid, restrictive policies, because these will be counterproductive. They have never worked in India or elsewhere in the world. ...There are other measures that can be taken, like better access to healthcare, equitable access to education, better employment opportunity. ...Once you take advantage of this and take the challenge, it will definitely lower the population.⁶⁵⁸

The Indian government could also stabilize population levels by increasing access to contraception and reducing child marriage, which leads to early childbearing. As a former Supreme Court chief justice who supports population control observed, policies enacted to achieve this goal can be consistent with human rights and should not be used to disempower women.⁶⁵⁹ “Measures which are punitive are not the answer,” he said, referring to the negative consequences of forced sterilizations during India’s Emergency period in the 1970s. “A great focus is required on methodology. The end is all right, but the means also matter.”⁶⁶⁰

Due to a lack of appreciation of these perspectives among the judiciary and across all sectors, commentators suggest that the Court did not regard *Javed* as a “hot case” or a particularly difficult or significant decision.⁶⁶¹ The decision revealed the judiciary’s Achilles heel—concern

about population explosion curbing development in India. According to one Indian law expert, “the moment you say population is a problem we have to control in order to develop, the Court will buy that,” because tapping into the fear of population explosion is “the one thing that defeats all other arguments.”⁶⁶² Thus, the Court failed to enrich its knowledge and understanding of the complex theories, variables, and consequences of population control policies by appointing an amicus or establishing an expert committee. Furthermore, it neglected to seek input from the NHRC, even though the Commission had organized a national colloquium on the issue of population policies earlier the same year that the *Javed* decision was issued. In fact, the Court neglected to even acknowledge the NHRC’s position against coercive norms.

The *Javed* judgment has been a big setback for rights activists, because High Court Judges around the country are now bound to uphold the two-child norm. As one local expert noted, “This case highlights the dangers of going to the highest court and coming back with something that is now on the books and that we cannot do anything about.”⁶⁶³ In a March 2006 interview published in *The Times of India*, Justice Lahoti remarked, “even I can’t touch my own judgment now”—but added that he did not regret the *Javed* decision because it was “in national interest.”⁶⁶⁴

When asked about studies showing the damaging impact of the two-child norm, Justice Lahoti responded: “I feel that anomalies in law can be corrected with amendments. Give tax benefits to fathers who have girl children. And if there is female foeticide, then amend the law so that only the male child is counted when enforcing the two-child norm. Don’t count the girls.”⁶⁶⁵ Justice Lahoti emphasized that the onus for deflecting the repercussions of the two-child norm should fall on the legislature, not the judiciary: “[A] judgment cannot be a solution to all the problems. It is for the legislature to make a law. We don’t prevent it from undoing the law or amending it or conducting a survey on the issue.”⁶⁶⁶ The Court is, however, empowered and legally obligated to strike down a law that violates constitutional rights. By doing so in *Javed*, it could have curtailed the human rights abuses resulting from the enforcement of the two-child norm, and created an opportunity for those who have suffered under the norm to obtain legal redress.

E. SHORTCOMINGS OF PETITIONS

The poor outcome of the *Javed* case has been attributed largely to the weaknesses of the petitions. “The decision... is a classic example of how the Court can make serious mistakes when dealing with intricate social issues, merely because the parties before the court do not explain the complexities involved,” observed a leading human rights lawyer.⁶⁶⁷

“Things were not represented properly by the people who were taking up the case against the two-child norm,” explained the executive director of PFI, noting that the *Javed* petitions he saw were “very superficial.”⁶⁶⁸ For example, the litigants did not present the Court with field studies demonstrating the detrimental effects of the Haryana Provision.⁶⁶⁹ A lawyer who worked under Justice Lahoti on the case confirmed that “there was absolutely zero data to back up the arguments, which was one of the main reasons they were not even considered.”⁶⁷⁰ In addition, the petitioners could have provided a richer “legal understanding of rights in the context of Fundamental Rights and Directive Principles,”⁶⁷¹ and drawn upon academic writings on population-related issues by eminent scholars like Amartya Sen⁶⁷² to counter the Court’s reliance on “obscure writers”⁶⁷³ who presented a neo-Malthusian perspective that was “journalistic and opinion-based rather than academic and evidence-based.”⁶⁷⁴ The petitioners also failed to provide evidence illustrating women’s lack of reproductive choices in India, and did not cite international law principles that would have provided gender-sensitive support for their arguments.⁶⁷⁵

These shortcomings are likely attributable to the fact that the *Javed* litigation arose out of numerous individual petitions rather than a unified, coordinated legal strategy. The majority of the NGO community did not find out about the case until after the decision had been issued, so there was no opportunity to build public consensus beforehand.⁶⁷⁶ This was a critical weakness of the 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.”⁶⁷⁷ The middle and upper classes tend to regard the poor as “irrational in their choice of the size of the family,”⁶⁷⁸ without thoughtfully considering the complex

factors at play in population dynamics.⁶⁷⁹ They express what activists describe as “ostriched” opinions,⁶⁸⁰ such as: “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.”⁶⁸¹ According to human rights advocates, the State is “exploiting” these skewed public assumptions by promoting population control incentives under the guise of “enlightening” the poor⁶⁸²—and “the judiciary is also part of the State...it will be convinced by state policies.”⁶⁸³ With much of the government and public supporting the two-child norm, the *Javed* Court had little incentive to strike it down.

F. ROLE OF NATIONAL COMMISSIONS

Neither the NCW nor the NHRC was directly involved in the *Javed* case. However, the NHRC has taken a firm public stance against two-child norms. In January 2003, it collaborated with the UN Population Fund (UNFPA) and the Indian Ministry of Health and Family Welfare to organize a National Colloquium on Population Policy, Development, and Human Rights. 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. This is not consistent with the spirit of the National Population Policy. The violation of human rights affects in particular the marginalized and vulnerable sections of society, including women.⁶⁸⁴

The declaration specifically recognized that “the propagation of a two-child norm and coercion or manipulation of individual fertility decisions through the use of incentives and disincentives violate the principle of voluntary informed consent and the human rights of the people...”⁶⁸⁵

The NHRC distributed the declaration—calling upon state governments to “exclude discriminatory/coercive measures from the population polices” and to “ensure that domestic laws on the subject promote exercise of reproductive rights”—to all state governments and union territories for compliance, and the Commission is now following up with local authorities.⁶⁸⁶ The NHRC’s proactive and progressive

stance suggests that it could be an important partner in building public consensus against coercive population policies. This underscores the need for reproductive rights advocates to explore the potential of working in collaboration with national commissions before filing litigation.

The NCW has not taken an official position on coercive population policies, but it has sanctioned a study on reproductive disincentives like two-child norms and has joined a population policy advisory group formed by the NHRC. “It is only after we get all the records that we will be able to take a view on it,” said the NCW’s chairperson.⁶⁸⁷ The Law Commission has similarly refrained from jumping into the fray of population policy.⁶⁸⁸

G. NEXT STEPS

Lawyers and activists have held many consultations to determine how to respond to the *Javed* judgment, but they are reluctant to request a review of the case by a larger Supreme Court bench. “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. “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?”⁶⁸⁹

Lawyers are, however, planning to intervene in *Haritash v. Union of India*, a PIL case filed in 2005 by supporters of the two-child norm to extend the *panchayat* disqualifications to governing bodies in other states and to members of the national-level Parliament.⁶⁹⁰ This case is being regarded as an opportunity for rights advocates to get the *Javed* decision reviewed without initiating litigation themselves.⁶⁹¹ “Strategy becomes incredibly important,” explained a lawyer involved in the *Haritash* intervention. “We thought instead of filing another petition, or a review or curative petition, we would come in as interveners on this PIL. At least it would be on the court record, even if the Court does not accept our intervention. ... So later, someone else could

file a petition that could draw upon the intervention we filed.”⁶⁹²

Other than this intervention, litigators are “lying low for the moment” and letting the focus shift to other advocacy efforts, such as national and state-level campaigns against coercive population policies.⁶⁹³ For example, in October 2004, various NGOs collaborated to hold the People’s Tribunal on Coercive Population Policies and the Two-Child Norm (the Tribunal) in New Delhi, targeting parliamentarians, policymakers, and the media.⁶⁹⁴ Experts working at the ground level and more than 50 individuals who had suffered gross rights violations due to coercive population policies gathered from across 15 states to present testimony at the Tribunal.⁶⁹⁵ The hearings highlighted the practical consequences of enforcing family planning in a manner that is insensitive to the needs and rights of women.⁶⁹⁶

According to the organizers, “one of the greatest successes of the Tribunal has been its role in changing public discourse on population issues.”⁶⁹⁷ Such advocacy efforts have also provoked significant governmental responses: the Union Minister for Health and Family Welfare issued a statement against the two-child norm immediately following the Tribunal, and the Prime Minister noted during his July 2005 address to the National Population Commission that coercive policies have no place in population programs.⁶⁹⁸ 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.”⁶⁹⁹

Nevertheless, 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.⁷⁰⁰ “The whole discourse is very volatile; at any time the wind can blow it in any direction,” one human rights activist remarked.⁷⁰¹

CHAPTER 8. PENDING CASES

“If we consider the battle won, it would be a premature celebration.”

– A public health expert, on gauging the success of the ongoing *Ramakant Rai* litigation⁷⁰²

There are currently two PIL cases pending before the Supreme Court that address wide-scale violations of reproductive rights in India: *Forum for Fact Finding Documentation and Advocacy v. Union of India*, which attempts to curtail the practice of child marriage, and *Ramakant Rai v. Union of India*, which aims to stop nonconsensual and substandard sterilization practices in government facilities. Human Rights Law Network (HRLN), a New Delhi-based nonprofit human rights lawyering organization with offices in various states, is providing legal representation to the petitioners in both cases. An examination of the petitions and judicial responses illustrates some key methods, benefits, and challenges of advancing reproductive rights through PIL.

A. FFDA V. UNION OF INDIA

In April 2003, the Forum for Fact Finding Documentation and Advocacy (FFDA), a human rights NGO based in the State of Chattisgarh, filed a PIL case against the Union of India and various Indian states, seeking “strict implementation” of the Child Marriage Restraint Act of 1929.⁷⁰³ The founder of FFDA asked HRLN lawyers to provide representation in the PIL and they agreed, because “he had good documentation and he was a strong petitioner.”⁷⁰⁴

1. Factual case

The *FFDA* petition began by presenting the Court with a stream of harsh statistics on child marriage in India: one-third of Indian girls are married by the age of 15, almost two-thirds are married by the age of 18, and, in the PIL’s respondent states, more than half of the girls are married by the age of 16.⁷⁰⁵ The petition described findings on child marriage from surveys conducted by a wide variety of organizations, and cited excerpts from leading newspapers that reflected “the gross neglect and callous attitude of government, local administration and officials responsible for abetting child marriages.”⁷⁰⁶

In its discussion on the prevalence of child marriage, the *FFDA* petition mentioned underlying “socio-cultural realities that need to be addressed,” including discriminatory practices that are maintained due to cultural traditions and “poor reproductive health education and facilities.”⁷⁰⁷ It also referred to the findings of a 2001 United Nations Children’s Fund (UNICEF) report to describe the negative consequences that child marriage has on girls’ reproductive and sexual rights—such as violations of the rights to refrain from sexual relations and to exercise control over reproductive decisions, as well as health risks like early pregnancy-related deaths.⁷⁰⁸ “The notion of an adequate reproductive health covers all aspects of the reproduction process, including a safe and satisfying experience of sexual relations,” the petition stated.⁷⁰⁹

2. Legal arguments

After having built its factual case, the *FFDA* petition turned to legal arguments. It invoked domestic legal provisions that the practice of child marriage contravenes, including the legal age of marriage in India (18 for girls, 21 for boys), the Child Marriage Restraint Act, and Article 39 of the Constitution, which directs the State to protect children against exploitation and to provide them with “opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity.”⁷¹⁰ The petition described child marriage as “merely a camouflage for servitude and child sexual abuse of the girl child, which is...violative of her right to life under Article 21 and constitutes bondage and beggar within the meaning of Article 23.”⁷¹¹ The petition also drew upon the Indian Penal Code’s provisions against unnatural offenses and child sexual abuse, which it argued are implicit in the practice of child marriage.⁷¹² In addition, the *FFDA* petition cited an injunction issued by the Delhi High Court to stop two child marriages in 2002, a 1995 Rajasthan High Court decision directing the state government to take specific measures to curtail child marriage, and a 1996

Mumbai High Court decision holding that child marriage is “a criminal and unlawful act.”⁷¹³

The *FFDA* petition referenced several international conventions, including CEDAW and the Universal Declaration of Human Rights.⁷¹⁴ It relied most heavily, however, upon the Children’s Rights Convention, quoting directly from a dozen of its articles.⁷¹⁵ The petition noted that by acceding to this treaty, India “has committed herself to protecting and ensuring child rights and has agreed to hold her Government accountable for this commitment before [the] International community.”⁷¹⁶

3. Comparative law

In addition to reminding the Court of India’s domestic and international legal obligations, the *FFDA* petition raised this comparative example of the neighboring country of Sri Lanka:

In Sri Lanka, where the average age of marriage has traditionally been low, it is now about 25 years. The country’s success in raising the marriageable age has been driven by the introduction of legislative reforms that require that all marriages be registered and the consent of both the partners be recorded. Sri Lankan courts have ruled that specific cases of non-consensual marriages by parents on behalf of their children are invalid. Underpinning these broad initiatives, which apply to Sri Lankan citizens of any religion, is that legislative changes have been supported by social policies on health and education...to create an environment in which the practice of early marriage is in steep decline.⁷¹⁷

Unlike the *Javed* Court’s downward comparison to China’s one-child policy, this comparative example was positive and inspiring. However, local women’s and children’s rights organizations have criticized the *FFDA* advocates for neglecting to provide supporting data, to acknowledge the dangers of invalidating child marriages, and to more comprehensively discuss key variables, such as Sri Lanka’s high literacy rate.⁷¹⁸

4. Requests for relief

In its prayer for relief, the *FFDA* petition requested that the Court issue a writ directing the respondent states to (a) require police officials to prevent child marriages from taking place; (b) hold government officials who fail to prevent child marriages liable; (c) ensure that the Child Marriage Restraint Act is strictly implemented; (d) launch state-level campaigns against child marriages, including regular programs on government-operated television and radio channels; (e) financially compensate girl children who are sexually abused under the guise of child marriage; (f) initiate criminal prosecution against parties responsible for child marriages; (g) involve reputed NGOs in implementing and reporting back on the implementation of orders; and (h) make registration of all births and marriages mandatory. The petitioners also filed an application for an interim order to enforce the Child Marriage Restraint Act, assign NGOs a role in implementation and monitoring, and require police officials to prevent child marriages.⁷¹⁹

5. Current status

On February 28, 2005, the Court issued an interim order noting that new legislation, the Prevention of Child Marriage Bill (the Bill), had been introduced in Parliament and was awaiting approval, pending a waiting period for objections from the general public.⁷²⁰ Consequently, the Court refrained from ruling on the *FFDA* petition, stating: “We, however, hope and trust that in the meantime the...States shall make endeavour to prevent child marriages as far as possible and preferably in cases where mass marriages take place.”⁷²¹

The introduction of the Bill in 2004 has been attributed to the *FFDA* case and to recommendations from the NCW and the NHRC.⁷²² HRLN had an opportunity to provide suggestions to the Parliamentary Standing Committee on Personnel, Public Grievances, Law, and Justice that was reviewing the Bill; according to an HRLN lawyer, the government was receptive to HRLN’s input because of the organization’s role in representing the petitioners in the pending PIL.⁷²³ The *FFDA* case thus demonstrates how litigation can be used to move an issue to the fore, inspire the legislature to take action, and involve advocates in the legislative process, even when the Court remains

THE COURT'S MARRIAGE REGISTRATION ORDER

In February 2006, the Court issued an order making registration of all marriages mandatory as part of a private matrimonial case, *Smt. Seema v. Ashwani Kumar*—which was unrelated to the *FFDA* PIL, although Justice Kapadia sat on the benches of both cases.⁷²⁹ “During the hearing of this petition, it appeared to us that in the absence of records relating to dates of marriages and parties to the marriage, problems come up which have far-reaching consequences,” the *Smt. Seema* Court stated.⁷³⁰ Having been informed by an amicus curiae that the NCW had proposed legislation regarding marriage registration, the Court issued notice directing the Commission to place its views on the record.⁷³¹

In response, the NCW submitted an affidavit stating the following:

[The] Commission is of the opinion that non-registration of marriage affects women the most and hence, has, since its inception, supported the proposal for legislation on compulsory registration of Marriages. Such a law would be of critical importance to various women related issues such as: (a) prevention of child marriages and to ensure minimum age of marriage; (b) prevention of marriages without consent of the parties; (c) check illegal bigamy/polygamy; (d) enabling married women to claim their right to live in the matrimonial house, maintenance, etc.; (e) enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband; (f) deterring men from deserting women after marriage; (g) deterring parents/guardians from selling daughters/young girls to any person...under the garb of marriage.⁷³²

The Court quoted this entire passage from the NCW's affidavit in its February 2006 order, which directed the central and state governments to establish procedures for marriage registration and to appoint officials to register all marriages in India.⁷³³ This decision was a very positive step for the protection of reproductive rights of young adolescents, especially in light of the Indian government's declaration to CEDAW's Article 16 marriage registration requirement, discussed in Part I.⁷³⁴

passive. “PIL becomes a tool for...governmental advocacy,” explained the HRLN lawyer. “It 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. Then the government starts taking you into confidence when they want to do something about [the violations].”⁷²⁴

While awaiting the enactment of the new legislation, which has been a lengthy process, HRLN is monitoring child marriage cases at the local level and keeping the judiciary updated.⁷²⁵ For example, it recently submitted reports to the Court about incidents in three states—Andhra Pradesh, Madhya Pradesh, and Chattisgarh—where child marriages continue to occur.⁷²⁶ On May 13, 2006, the Court issued an interim order directing these states to file counter-affidavits on this matter, and asked the NHRC and respective state human rights commissions to conduct inquiries into the alleged incidences of child marriage.⁷²⁷ The Court highlighted HRLN's willingness to assist in the inquiry process, in response to which the Andhra Pradesh government called upon the organization to join its inquiry team.⁷²⁸

B. RAMAKANT RAI V. UNION OF INDIA

The same year that the *FFDA* case was initiated, petitioners brought another PIL action to protect women's reproductive rights: *Ramakant Rai v. Union of India*. This case was brought to HRLN's attention by Health Watch UP Bihar (Healthwatch), a health advocacy and research network based in the State of Uttar Pradesh.⁷³⁵ The PIL petition, filed against the Union of India and all Indian states and territories, contended that the respondents “have totally failed and neglected to implement” the Ministry of Health and Welfare's Guidelines on Standards of Female Sterilization (the Sterilization Guidelines), which were enacted in October 1999.⁷³⁶

1. Factual case

The *Ramakant Rai* petition began by establishing the credibility of the petitioning organization, Healthwatch—describing its mandate, the work it has done, and its domestic and international partners—and laying out the factual and

legal basis for the petition.⁷³⁷ Citing data gathered by Healthwatch and another organization on the deplorable manner in which government facilities were conducting sterilization operations in the states of Uttar Pradesh, Bihar, and Maharashtra, the petition stated:

The studies disclose an appalling state of affairs: Lack of counselling, consents not obtained from the patients, unhygienic physical conditions, sterilisation of minor girls, misappropriation and misuse of monetary incentives, no assurance of privacy, ill-treatment of patients, unavailability of anesthesia, needles being re-used, lack of pre- and post-operative care of patients, [and] violations of the prescribed procedures for conducting operations. These aberrations have resulted in post-operative complications and intense trauma, and in some cases even in the death of patients.⁷³⁸

The *Ramakant Rai* petition asserted that by allowing these rights abuses to occur, the respondents were violating the Sterilization Guidelines, as well as the constitutional rights of the affected women.

The petition presented the Court with the entire text of the Sterilization Guidelines, which include eligibility criteria for sterilization; counseling and informed consent requirements; standards for medical care (including follow-up procedures); facility and staffing requirements; and provisions for prevention of infections.⁷³⁹ Using data from field studies, the petition then described how almost all these guidelines were being violated before, during, and after sterilization procedures—citing examples of women being operated on without anesthesia on bare, blood-covered floors of facilities lacking toilets, electricity, and running water, and being sent home with septic stitches.⁷⁴⁰ One study conducted in the state of Maharashtra found that instead of proper operating tables, sterilization facilities were using ordinary tables that were held up in slanting positions, “as a result of which, women used to slide off the tables during the operations.”⁷⁴¹

The findings also revealed an alarming degree of coercion and cruelty. Women were “sterilized without their consent and at times even by force” (including one woman who had gone in to seek treatment for a stomach ache and was

sterilized without her knowledge); subjected to coercive tactics, such as making medical assistance during childbirth conditional upon consenting to sterilization; and beaten by hospital personnel if they cried out in pain during sterilization procedures.⁷⁴² The majority of victims were young women; one study of sterilization camps in Maharashtra revealed that more than 80% of the 244 women interviewed were sterilized under the age of 30; almost one-third of the women had been married before they were 15; and the average age at the time of sterilization was 26.2 years.⁷⁴³ To reinforce the impact of the violations, the petition also provided individual case studies of women who were subjected to forced, cruel, negligent, or failed sterilization procedures.⁷⁴⁴

Although the *Ramakant Rai* petition submitted data from only a few states, the Court accepted the lawyers’ contention that the guidelines were being violated all across the country and addressed it directives to every state in India.⁷⁴⁵ An HRLN lawyer attributed this to the strong impact of the data: “We had very, very graphic studies...that showed minors were being sterilized to achieve targets, that women were bleeding to death, that there was no care before and after operations, and that there was no informed consent. The studies showed that every guideline was being violated.”⁷⁴⁶

2. Legal arguments

The *Ramakant Rai* petition invoked international sources of law, emphasizing that India has ratified many conventions that promote reproductive rights, “with special focus on women, health services, discrimination against women, support, etc.”⁷⁴⁷ Highlighting the salient features of the Alma Alta Declaration, CEDAW, the ICPD Programme of Action, and the Beijing Platform for Action, the petition framed its arguments based on the rights framework established through these international consensus documents.⁷⁴⁸ The *Ramakant Rai* petition relied upon domestic law, too, arguing that the respondents have “failed to realize” the constitutional right to health, “which is a part of the right to life enshrined in Articles 14, 15, 21, and 47.”⁷⁴⁹ In addition, the petition cited domestic case law in which the Supreme Court established the right to health, held the government vicariously liable for medical negligence, and recognized a right to compensation stemming from governmental negligence.⁷⁵⁰

To further bolster their PIL, the *Ramakant Rai* petitioners submitted a supporting memorandum from the Center for Reproductive Rights (CRR). This memorandum provided the Court with information about a successful case before the Inter-American Commission on Human Rights (IACHR) addressing the coercive sterilization of a woman in Peru.⁷⁵¹ CRR also submitted sterilization case studies from Sweden, Slovakia, and other countries, and discussed “the remedies provided by governments; international law and standards under which the Indian government is accountable for human rights violations resulting from negligent sterilization practices in government health-care facilities; and recommendations for relief in addition to those sought by the petitioners in their claim.”⁷⁵²

3. Requests for relief

The *Ramakant Rai* petition’s prayers for relief asked that the Court direct the respondent governments to, *inter alia*, strictly follow the Sterilization Guidelines; prominently display a copy of the Sterilization Guidelines in every hospital where sterilizations are carried out; compensate victims of medical negligence; hold errant government officials and health personnel liable for failures to follow the Sterilization Guidelines; and punish those who breach the Sterilization Guidelines.⁷⁵³ Later, feeling that the requested remedies could be more particularized, the lawyers consulted with the petitioners and returned to the Court with a concrete list of suggested directives.⁷⁵⁴ “That is how flexible the [PIL] system is,” remarked the petitioning lawyer, noting that the Court relied heavily on the suggested directives in formulating its interim order, which is described below. She added that the Court’s willingness to entertain additional submissions generally depends on the petitioning lawyers’ credibility and approach.⁷⁵⁵

4. Current status

On March 1, 2005, the *Ramakant Rai* Court issued an interim order that left the case open, enabling the Court to plan an ongoing monitoring role.⁷⁵⁶ The interim order noted that the affidavits filed by the respondent states “setting out the steps taken by them to regulate sterilization procedures” revealed that “there is no uniformity with regard to the procedures nor the norms followed for ensuring that the

guidelines laid down by the Union of India in this regard are being followed.”⁷⁵⁷ Drawing upon best practices from the state affidavits, the Court directed all states to take the following steps: (1) establish an approved panel of doctors to carry out sterilizations in accordance with uniform qualification criteria to be laid down by the central government; (2) prepare and circulate a checklist of patient data that every doctor must complete before conducting a sterilization procedure; (3) circulate uniform copies of a patient consent form, based on the model used by the State of Uttar Pradesh; (4) set up a quality assurance committee to issue biannual reports; (5) maintain overall statistics about sterilization procedures and resulting deaths; (6) hold an inquiry and take punitive action in every case where the Sterilization Guidelines are breached; and (7) bring into effect an insurance policy, based on the model followed by the State of Tamil Nadu.⁷⁵⁸

The Court directed the central government to establish uniform standards on various issues—including norms for compensation, formatting of statistics, uniform checklists, consent forms, and an insurance policy—within four weeks.⁷⁵⁹ In the interim, the Court instructed all states to follow the compensation norms of the State of Andhra Pradesh.⁷⁶⁰ Furthermore, all respondents were directed to “indicate the steps taken by them in compliance of this order” within eight weeks.⁷⁶¹

As required by the *Ramakant Rai* Court, the respondent states have been submitting affidavits to demonstrate how they have complied with the March 2005 order. After each round of affidavits, the Court sends states that are not in compliance back to the drawing board, requiring them to submit another affidavit in the next round. HRLN has played an active role in compiling comparative charts to help the Court determine the level of compliance by each state.⁷⁶² The Court is currently considering the third round of compliance reports, and with each round the task becomes “narrower and narrower” as the number of noncompliance issues and noncompliant governments continues to shrink.⁷⁶³

In response to the *Ramakant Rai* PIL, the central government has issued a national Family Planning Insurance Scheme to award monetary compensation to women and their families in cases of complications, pregnancy, or death after sterilization procedures in either government or

accredited private health facilities.⁷⁶⁴ A manual issued by the Secretary of Health in 2005, which cites the *Ramakant Rai* interim order, provides detailed information about the insurance scheme; procedures for settlement of claims; a model consent form to be signed by the beneficiary before sterilization; information on creating quality assurance committees; a checklist to be completed by doctors before conducting sterilization procedures; a list of necessary qualifications for doctors who conduct sterilization procedures; and criteria for empanelling doctors or accrediting private health facilities.⁷⁶⁵ This illustrates the significant governmental action that a PIL can inspire.

The *Ramakant Rai* Court's willingness to issue elaborate directives to the entire country based on findings from a few states sets an important precedent for reproductive rights advocates because countrywide studies are often impossible to conduct. This case suggests that PIL petitioners can

focus on gathering very strong evidence from a few states, which can then be extrapolated to the country at large. Unfortunately, the Court did not exhibit a similarly broad acceptance of the petition's legal arguments. In fact, the interim order did not contain any discussion of the international and domestic laws on which the PIL petition was based, thus making it a less useful precedent for litigants to draw upon in future petitions for the promotion of reproductive rights.

Nevertheless, a public health expert who was closely involved in the *Ramakant Rai* case described it as a successful PIL, because the Court's interim order constituted an important step towards curtailing unsafe and coercive sterilization practices.⁷⁶⁶ He cautioned, however, that community-based groups will need to track the outcomes to determine if the gains are being realized in practice.⁷⁶⁷

PART III:

CONSIDERATIONS AND STRATEGIES

Drawing from interviews with key stakeholders in India and the case studies in Part II, this final Part will set forth some considerations and strategies for reproductive rights advocates to take into account. It will touch upon broad contextual obstacles to promoting reproductive rights in India, as well as specific limitations of using the PIL mechanism to this end. Part III will also briefly discuss some of the challenges of becoming a female judge or a public interest litigator in India. Finally, it will offer some strategic considerations for using litigation to address violations of women's reproductive rights. These considerations relate to various stages of PIL—from initiating a case, to building allies for ensuring optimal success of the litigation process.

CHAPTER 9. OBSTACLES AND LIMITATIONS

“It is true that the adoption of this non-traditional approach is not likely to find easy acceptance.... But if we want the fundamental rights to become a living reality and the Supreme Court to become a real sentinel on the qui vive, we must free ourselves from the shackles of outdated and outmoded assumptions and bring to bear on the subject a fresh outlook and original unconventional thinking.”

–Justice Bhagwati on overcoming resistance to PIL,
*Bandhua Mukti Morcha v. Union of India*⁷⁶⁸

As evidenced by the case studies in Part II, there is great potential for using PIL to advance reproductive rights in India, but there are also significant obstacles and limitations in this regard. Some of these challenges relate to the context in which advocates in India operate—the conceptual recognition of reproductive rights is very limited, the dearth of female representation in the judiciary has disturbing implications, and the extent to which women in India lack awareness about their rights is a major barrier. There are also limitations specific to PIL, including the length of time it takes to obtain relief, challenges in collaborating effectively with ground-level activists, the shortage of public interest litigators, difficulties ensuring implementation of judicial orders, growing public and judicial skepticism about PIL due to misuse of the mechanism, and the judiciary’s shortcomings in addressing rights violations inherent in religion-based personal laws. The following chapter discusses some of these impediments and considers ways in which they can be overcome.

A. CONTEXTUAL CHALLENGES

1. Lack of recognition of reproductive rights

Judges and other government officials, the media, and the public regard many reproductive rights violations occurring across the country as purely social, rather than legal, problems. For example, the recently retired chairperson of the Law Commission described the *Javed* decision, which failed to acknowledge the right violations inherent in the coercive two-child norm, as involving “a socio-political issue, not a legal issue.”⁷⁶⁹ Similarly, the authoring justice defended the judgment by asserting, “I am a judge, not a social scientist.”⁷⁷⁰ There is also a widespread perception that public health problems, such

as maternal mortality and lack of access to safe abortion, are “not matters for the court to handle.”⁷⁷¹ Furthermore, many are skeptical about the legal system’s ability to address harmful traditional practices, like child marriage, that have been tolerated for centuries.⁷⁷²

Meanwhile, the Supreme Court has not yet used the term “reproductive rights” in any of its decisions; even the proactive interim order issued in the *Ramakant Rai* PIL against unsafe and coerced sterilizations did not incorporate any of the reproductive rights language or principles set forth in the petition and accompanying memo submitted by CRR.⁷⁷³ The last female justice on the Supreme Court 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.”⁷⁷⁴ Acknowledging that most judges are influenced by unarticulated premises stemming from their personal backgrounds and experiences, another recently retired Supreme Court Justice, who was still in office when interviewed, noted that he “could not say confidently” that there is awareness about gender issues on the apex bench.⁷⁷⁵ This was illustrated by the *Javed* Court’s false assumptions about women’s reproductive decision-making power.⁷⁷⁶

One way reproductive rights advocates can address this situation is to get involved in judicial sensitization trainings, which the former director of the National Judicial Academy (NJA) identified as “the known method by which you can influence attitudes and behavior of judges.”⁷⁷⁷ Supreme Court Justices themselves have recognized that judicial trainings are useful because they expose judges to “other types of thinking”⁷⁷⁸ and can be used to “evolve

capacities, strategies and attitudes in presiding officers of courts to eliminate gender bias from judicial processes.”⁷⁷⁹ Lawyers who have participated in NJA- or NGO-led gender sensitization trainings have observed that although they encounter some resistance, training efforts have made the judiciary “a thousand times” more gender-sensitive than before and judges “have learned political correctness if nothing else, which is a big help.”⁷⁸⁰ One frequent judicial trainer remarked, “In a group of 20 [judges], if I move two people that is enough; even one judge can create such remarkable change.”⁷⁸¹

Consistently bringing attention to reproductive rights violations through PIL will also help promote judicial and public recognition and understanding of these rights. A judge on the Mumbai High Court, one of the most progressive courts in the country, attributed the bench’s strong decisions against rights violations to the “good assistance” of lawyers and activists who bring the cases.⁷⁸² “Every case will open the judiciary’s minds,” said one women’s rights attorney. “Maybe first the term reproductive rights will be mentioned [in a decision], and after lots of persuasion the judiciary will recognize it as an independent set of rights.”⁷⁸³ Furthermore, using PIL to find a place for reproductive rights in Indian jurisprudence will raise public consciousness and attract national attention to ongoing violations.⁷⁸⁴ As one High Court judge recognized, “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 society.”⁷⁸⁵

2. Generating awareness of rights

Even after the Court recognizes and provides remedies for violations of reproductive rights, a significant hurdle to the practical realization of those rights lies in conveying the necessary knowledge to women whose daily lives are affected by discriminatory cultural and religious practices. “The barrier that exists in India is awareness,” said a recently retired Supreme Court Justice when asked about the limitations of using litigation to advance reproductive rights.⁷⁸⁶

To illustrate his point, the justice referred to the experiences of his daughter, who works as a gynecologist at a public hospital. When she asked one patient the date of her last menstrual

period, the patient replied, “I will ask my husband and tell you.”⁷⁸⁷ The justice noted, “The Court can deal with issues brought before it and do all that is possible, but the role of translation has to be played by NGOs, lawyers, human rights organizations—they have to generate the awareness.”⁷⁸⁸

A former Supreme Court chief justice similarly emphasized, “It is the duty of other aware citizens of this country, the social activists, to see that the promise of constitutional rights is not merely a mirage, that it is a reality.”⁷⁸⁹ Although the Court has a duty to protect human rights regardless of the level of public awareness, widespread legal literacy is critical to the effective enforcement of reproductive rights.

3. The judiciary’s gender skew

The skewed gender composition of the judiciary is another issue that has ramifications for the promotion of women’s rights in India. There are currently 26 seats on the Supreme Court, and not one of them is occupied by a woman. In fact, in the five-plus decades that the Indian Supreme Court has been in existence, it has benched only three female justices: Justice Fathima Beevi, Justice Sujata Manohar, and Justice Ruma Pal—the first of whom was appointed four decades after the Supreme Court was established, and the last of whom retired in June 2006.⁷⁹⁰ Women are extremely under-represented in the Indian High Courts too, with between zero and two female judges on some benches that have as many as 41 seats.⁷⁹¹ In 2003, there were 514 judges on the Supreme and High Courts, of whom only 17 were women.⁷⁹² The former director of the National Judicial Academy noted in a 2006 paper that the national representation of women in the legal profession and the judiciary is currently as low as 5% and 2% respectively.⁷⁹³

According to one recently retired Supreme Court Justice, it is unlikely that there will be another female on the Supreme Court bench for a while because the Court looks to the top 20 High Court Judges on the all-India seniority list to fill its vacancies, and there are no women in the top 20 right now.⁷⁹⁴ A High Court judge’s seniority is determined by the number of years that he or she has spent on the bench, and most of the female judges in High Court positions have been appointed only within the last few years.⁷⁹⁵ “This formula sounded the death knell of equitable appointment of women judges, as it is well known that they are low in the seniority list and far

fewer in number than men in the high courts,” observed a senior advocate. “By this apparently egalitarian formula, women will have to wait for generations before they make it to the Supreme Court.”⁷⁹⁶ Although the Supreme Court seeks even representation of justices from all parts of the country, giving priority to High Court Judges from under-represented states, there is no such consideration given to balancing the gender composition of the bench.⁷⁹⁷

The dearth of women in the Indian judiciary indicates a lack of equal opportunity for women to reach a position where they can contribute their gender perspective to important law and policy decisions. As one senior advocate remarked, “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.”⁷⁹⁸ Similarly, the UN 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 international law obligations of ensuring gender equality and non-discrimination.⁷⁹⁹

A former Supreme Court chief justice pointed out that having women on the bench “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.”⁸⁰⁰ A judge on the Mumbai High Court highlighted another key reason for appointing more women to the bench:

[A]part from the work they do as judges, they are important role models for society. If there is one lady judge in the Court, 5,000 lady lawyers aspire to be where she is. She acts as an important catalyst for members of the legal profession. When she speaks in literacy camps, young women see that is where a woman can be. This reflects an important aspiration of a vital segment of society.⁸⁰¹

However, even those who advocate for more female representation in the judiciary do not suggest that this will automatically promote women’s rights in India. “Yes, it makes a difference, we need a body of women on the bench, but the assumption that having more women, any women, will make it more gender-friendly cannot be applied,” observed a human rights advocate, emphasizing the need to sensitize judges of both genders to reproductive rights issues.⁸⁰²

Becoming and Being a Female Judge

Becoming and being a female judge in India is a challenge. The gender imbalance begins at an early stage, with girls and women receiving less encouragement and facing more obstacles in their pursuit of a legal career.⁸⁰³ Justice Leila Seth, who stood first in the London bar exam in 1957 and was the first female chief justice of an Indian High Court,⁸⁰⁴ recalled that when she began practicing law, other lawyers did not want to supervise her or work under her because they felt she would be less committed to her work than her male counterparts.⁸⁰⁵ Furthermore, as Chief Justice of the Himachal Pradesh High Court, Justice Seth found, “The difficulty was with how to handle the other judges because they were not used to having a woman sitting on their bench; I had to handle them very tactfully.”⁸⁰⁶

Although the male-centric nature of the legal profession is changing, biased considerations still influence the judicial appointment process—which, according to Justice Seth, is being judged primarily by men, who are much more critical of the private lives of female candidates.⁸⁰⁷ “Of course a judge’s personal life is important because it reflects a certain kind of integrity, but there should not be different standards for a man and a woman,” Justice Seth noted.⁸⁰⁸

Current female High Court Judges across the country have observed that the gender-based double standards did not disappear after they were appointed to the bench. “In my experience, women of the same caliber and background, and even better education, experience, and exposure as men, are not taken as seriously,” said one judge, recounting the resistance she faced from her male colleagues to being elevated within her bench, whereas when it came to catering or entertainment matters she was always put in charge.⁸⁰⁹ Another High Court judge described how her unmarried female colleague became the “butt of ridicule,” with people joking about how many homes she would break in the cases appearing before her because she did not have a husband herself.⁸¹⁰ Yet another said she heard jokes about how the High Court was turning into a family court as more women were being appointed to the bench.⁸¹¹ In addition, female judges recounted being teased by their male colleagues about “having competition” when another woman is transferred or appointed to their bench.⁸¹² “Why should there be competition between judges?” asked one female judge, adding that she would regard a new female colleague as company, not competition. “We are both supposed to do our best and dispense justice, and you do not get marks for being a judge. Any competition that does exist is between everybody [regardless of gender]. But that is how [the male judges’] mindset is.”⁸¹³

The unique challenges and insecurities inherent in being a female judge in India were starkly illustrated by the fact that the majority of female judges interviewed for this report asked to speak off the record or on condition of anonymity, while only one male judge made such a request.

B. LIMITATIONS OF THE PIL MECHANISM

1. Collaborations

In addition to the broader contextual problems of promoting gender justice in India, advocates face hurdles specific to PIL. For example, it may be challenging for lawyers to build successful PIL collaborations with activists working at the ground level. A major point of contention among human rights and public health activists is often whether to address a particular rights violation by taking a legal path or by focusing on community mobilization and policy advocacy instead.⁸¹⁴ 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.⁸¹⁵ Furthermore, NGOs in rural areas feel that they “take a legal path at their own risk,” fearing a social and legal backlash from local police or an end to governmental assistance.⁸¹⁶ It is possible, however, for such activists to be involved in PIL cases without directly acting as the petitioners. For instance, a renowned public health activist who worked extensively on the issue of coerced and unsafe sterilization practices chose not to put his name on the *Ramakant Rai* petition nor to appear at the court hearings, because he worked closely with the government and did not want to disturb his foothold there.⁸¹⁷ Nevertheless, the activist was very involved in the PIL, acting as a de facto petitioner and providing much support to the lawyers behind the scenes.⁸¹⁸

Meanwhile, activists who are keen to approach the Court contend that it is difficult for them to obtain the legal help they need.⁸¹⁹ As one public health activist explained:

Even today we are limited by the number of lawyers willing to give us advice. 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.⁸²⁰

The lawyers engaged in public interest litigation tend to be concentrated in large cities that are removed from the large-scale rights violations occurring in the less developed rural areas of the country.⁸²¹ Moreover, there is a perception

Obstacles to Becoming a Public Interest Litigator

Current students and recent graduates of the National Law School in Bangalore (NLS), which is widely acknowledged as the top law school in India, have voiced intense frustrations about the obstacles they face in becoming public interest litigators: the dearth of human rights and advocacy classes in law school, the lack of clinical programs, the difficulties in obtaining litigation training under a practicing senior advocate, and the lack of judicial encouragement in the courtroom.⁸²³ “We should have a space to learn, and that space is not being given; it is shrinking down,” said a recent NLS graduate.⁸²⁴

About 20 senior advocates currently dominate public interest litigation at the Supreme Court level, and young litigators need their backing, or that of judges, to succeed.⁸²⁵ This backing, however, is often dependent upon family connections. “The courtroom has become the domain of a few big shots and their sons, daughters, and relatives,” remarked one recent law graduate, while another added, “It is very difficult to break into the system without independent patronage—either from a lawyer, or [from] political heavyweights.”⁸²⁶ In fact, it is customary for law students to include their father’s name and profession at the top of their resumes.⁸²⁷

Given these barriers to becoming a general litigator, the percentage of law graduates pursuing public interest litigation is even smaller.⁸²⁸ One young lawyer explained that junior advocates “who are not familiar, trusted faces” are at a significant disadvantage if they try to argue PIL cases, and fear that judges are likely to dismiss their petitions.⁸²⁹ By deferring to senior advocates during court appearances, however, the junior lawyers get “frozen” in their careers.⁸³⁰ Most advocates thus take on human rights PIL cases only later in their careers, after they have established their reputations through more traditional litigation practice.⁸³¹ As a result, PIL is often “viewed as a side thing that senior lawyers do.”⁸³²

Another factor dissuading young lawyers from pursuing public interest work is the broad and rapid growth of the corporate law sector in India, which is attracting an increasing number of law graduates each year.⁸³³ There is a new “celebration” of corporate success and wealth among law students, which is making it “more and more difficult for graduates not to follow that path.”⁸³⁴ In fact, recent law graduates observed that students who choose to remain in the extreme minority by aspiring toward public interest work are now sometimes ridiculed by their peers.⁸³⁵ The polarization between the two groups is causing mutual animosity, observed a former NLS adjunct professor and alumnus.⁸³⁶

In this charged and discouraging environment, reproductive rights are not given much attention by budding lawyers.⁸³⁷ These challenges will have to be addressed jointly by educational institutions, practitioners, judges, bar councils, and the government, so that advocating for the enforcement of human rights does not become a purely theoretical concept for future generations of lawyers.

among activists that law schools and the nonprofit legal community are “not doing enough to create a pool of lawyers who believe in litigation for the public interest.”⁸²² Current law students and recent graduates confirmed this impression, as discussed in the accompanying box on obstacles to becoming a litigator.

2. Implementation

Even when advocates and activists collaborate smoothly on PIL cases and obtain the desired judicial response, a primary weakness of the PIL mechanism is that the Court’s authority to issue orders far exceeds its ability to enforce them.⁸³⁸ Although it is the State’s responsibility to carry out judicial directives, and NGOs play a large role in spreading awareness and monitoring enforcement at the grassroots level, failures in implementation ultimately reflect poorly upon the judiciary itself.⁸³⁹ Yet, judges often lack the time and resources to adequately follow up and enforce their directives.⁸⁴⁰ In addition, they are often faced with uncooperative or inefficient state government officials to whom they must issue order after order to get anything done.⁸⁴¹ Pointing to the difficulties in implementing recent PIL directives on the distribution of food in famine districts and the demolition of illegal construction around New Delhi, a Supreme Court Justice asked: “How can a judge sitting in court oversee this? ...Are we going to keep count of that or do we have other work?”⁸⁴² As these examples imply, the larger the scale of PIL directives, the more difficult it is for the Court to enforce them.⁸⁴³

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 lack of implementation.⁸⁴⁴ When this fails, the only weapon the judiciary has is to hold violators in contempt of court.⁸⁴⁵ According to judges and lawyers, the Court is reluctant to exercise the contempt power because it is difficult to implement and “gets stunted with overuse.”⁸⁴⁶ Furthermore, the Court is dependent on law enforcement officials of the executive branch to execute contempt orders, because “judges cannot step down from their benches and take [violators] away.”⁸⁴⁷ In *Madhu Kishwar v. State of Bihar*, a 1982 PIL challenging a tribal law that denied

women equal inheritance rights, the petitioner recalled that the Court discouraged her request for a contempt order on the grounds that “the Bihar government or its police are not going to heed it any more than they did our original order.”⁸⁴⁸ Summing up the judiciary’s limitations in this regard, a recently retired 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.”⁸⁴⁹

Despite these concerns, lawyers and judges have observed that the Court’s directives have value even when not fully enforced, because they get people to start thinking about the ongoing violations.⁸⁵⁰ 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,” noted a young lawyer.⁸⁵¹ Each Supreme Court order recognizing a rights violation can also pave the way for future litigation, creating new means for seeking accountability and remedies at both the Supreme Court and High Court level. Moreover, the effort of bringing a PIL case can mobilize activists in important ways. For example, although the *Madhu Kishwar* petitioner was disappointed by the Court’s response, 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.”⁸⁵²

3. Abuse and backlash

Compounding the challenges of collaboration and implementation, the PIL mechanism is encountering some resistance from the judiciary itself due to abuse and overuse. “The courts opened their doors so wide that they find it difficult to control the influx today,” observed a recently retired Supreme Court Justice, adding that overuse of PIL could reduce its efficacy and erode the credibility of the judiciary.⁸⁵³ Moreover, members of the judiciary and the public are now referring to PIL as “private” or “publicity” interest litigation, because of petitioners who bring personal disputes under the guise of PIL cases or file “nonsensical things so that their names are reported.”⁸⁵⁴ PIL is also being called “politically interested litigation” and “persecution interest litigation,” because petitioners

often have their own agendas and “there are lawyers who specialize in PIL who are nothing but blackmailers.”⁸⁵⁵ Therefore, although the Court once used to entertain almost all PILs, it has now adopted a more cautious approach toward admitting petitions.⁸⁵⁶

Public interest lawyers and activists are also increasingly critical of the way PIL jurisprudence has evolved. The director of the Public Interest Legal Support and Research Centre in New Delhi observed that the unevenness in the Court’s responses has led to disenchantment with PIL.⁸⁵⁷ Furthermore, human rights experts claim that PIL has changed drastically since the early 1990s, because “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.”⁸⁵⁸ According to political scientists and lawyers, there has been a trend toward using PIL as a way to globalize India to produce clean, orderly cities like Singapore; whereas the Court has shifted back on “anti-development” cases that protect against displacement of the poor.⁸⁵⁹ Thus, PIL is regarded by some as no longer

having the “radical edge” that it once had,⁸⁶⁰ and the long-term success of the mechanism might “increasingly depend on what issues come to the Court, who brings them, the institutional strengths of placing these issues before judges, and the judges themselves.”⁸⁶¹

Notwithstanding these shortcomings vis-à-vis the social justice goals envisioned by its creators, PIL has been instrumental in promoting democratic access to the judiciary and procuring key advancements in women’s rights. As illustrated by the case studies in Part II, the PIL mechanism has provided tremendous impetus to gender justice in India by bringing different groups together to conduct national-level advocacy using the language of legal rights and international norms.⁸⁶² Moreover, the Court’s PIL judgments have initiated change at multiple levels by conveying to lower courts, government officials, and citizens that rights violations will not be tolerated.⁸⁶³ Thus, as one senior advocate recognized, despite the mechanism’s limitations and the recent abuse and backlash it has encountered, “the place of PIL in India’s democratic governance cannot be denied.”⁸⁶⁴

CHAPTER 10. STRATEGIC CONSIDERATIONS

“Once there is a verdict in favor of particular group, you get a certain upper hand and you can go ahead with changes very vigorously. Once there is a Supreme Court stamp...it becomes a right. Given that we do not have recognition of reproductive rights [in India], this is an example of what the Court can create through PIL.”

–Local development expert,
Population Foundation of India⁸⁶⁵

Although establishing a reproductive rights framework in India will be challenging, there is great potential for using PIL to achieve this goal. The Supreme Court has been responsive when human rights violations are brought to its attention, as seen in the *Vishaka* sexual harassment and *Ramakant Rai* sterilization PIL cases.⁸⁶⁶ The lessons learned from these and the other case studies in Part II reveal key strategic considerations for using litigation to advance gender justice in India.

A. INITIATING A PIL

1. Timing and consensus

Although legal challenges to violations of women’s reproductive rights should be proactively initiated, it is critical to choose the right time and set the right stage for a PIL action. A negative judgment could lead to adverse consequences for all activists working on the issue; therefore, an important factor to consider before filing a petition is whether there is adequate public consensus on the PIL’s position.⁸⁶⁷ The Court itself acknowledged the significance of public opinion in the 1999 *Mr. X. v. Hospital Z* decision relating to the privacy rights of HIV-positive individuals, in which it 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.”⁸⁶⁸

2. Identifying victims

Another consideration for advocates initiating a PIL case is whether to focus on the example of an individual victim to address rights violations that affect many, as was done

in *Vishaka*. The great success of the *Vishaka* litigation demonstrates that using an emblematic story like Bhanwari Devi’s as the backbone of a PIL case can help concretize the alleged violations and be a persuasive strategy for capturing the attention of the Court and the public. Presenting a combination of wide-scale data on gross rights abuses complemented by several individual case studies, as seen in the *Ramakant Rai* petition, can also be very effective.

When a PIL case involves an individual victim, like Bhanwari Devi, her best interests must precede all other considerations. The petitioner in the *Madhu Kishwar* PIL against discriminatory tribal laws observed that PIL cases have too often failed to improve the situations of the victims on whose behalf they were initiated: “Indeed, many of them found themselves in ever-worsening circumstances as a result of agreeing to participate as complainants in these celebrated cases. The press publicity made them more vulnerable at the local level for they came to be big threats to the local vested interests.”⁸⁶⁹ Proactively guarding against these dangers will help bolster ground-level support for PIL and prevent those who have suffered rights violations from being re-victimized by their quest for justice.⁸⁷⁰

3. Assuming public responsibility

Bringing a PIL involves large responsibilities and opportunities for petitioners and lawyers not only in terms of developing and filing the petition, but also in becoming the public face for the issue at hand. For example, staff members at the Center for Inquiry into Health and Allied Themes (CEHAT), the petitioner in a recent PIL against the use of technology for sex-selection of fetuses, explained that after the case was filed they had to assume a leadership role in writing, speaking, and creating awareness about the subject matter of the litigation.⁸⁷¹

Moreover, the *FFDA* case against child marriage showed how being involved in the PIL enabled the petitioning lawyers to provide input on draft legislation on the issue and help state governments investigate ongoing violations.

4. Choosing the forum

Several factors may be considered when determining the best forum in which to initiate a PIL. Before filing at the Supreme Court level, lawyers should explore whether it would be more beneficial to first pursue litigation in one or more state-level High Courts, which have jurisdiction to hear PIL cases under Article 226 of the Constitution.⁸⁷² As illustrated by the broad and binding ramifications of the *Javed* case, bringing a PIL 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 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.⁸⁷³ The Supreme Court has the advantage of viewing rights violations in a wide, national context, but it is likely to be more removed than High Courts from the communities in which the violations are occurring.⁸⁷⁴

Pursuant to the Constitution's directive to "foster respect for international law and treaty obligations," and *Vishaka's* holding that "regard must be had to international conventions and norms for construing domestic law where there is no inconsistency between them and there is a void in domestic law," High Court Justices have sufficient authority to incorporate international law principles into their judgments.⁸⁷⁵ 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 other states to follow and possibly improve upon.⁸⁷⁶ Moreover, as seen in the *Javed* decision and the *FFDA* and *Ramakant Rai* petitions, Supreme Court judgments and briefs often cite High Court cases to support their holdings or arguments.⁸⁷⁷ If a PIL case at the High Court level does not elicit the desired judicial response, it could always be taken to the Supreme Court as a next step.⁸⁷⁸

In addition to filing PIL cases, lawyers may consider pursuing other litigation strategies in lower courts, such as

using tort or consumer protection laws to obtain compensation for victims of reproductive rights violations. The *Vishaka* case revealed, however, that PIL cases can not only inspire law reform and the establishment of infrastructures to combat systemic rights violations, but may also lead to reparations for individual victims. Bhanwari Devi received Rs 25,000 for the violations she suffered.⁸⁷⁹ Her lawyer noted that although this was not a large sum, the award was made on a "rights basis," and the judicial recognition inherent therein was very important for both the affected individual and the overall quest for gender justice.⁸⁸⁰

B. DEVELOPING THE PETITION

Although a PIL case can be initiated with the simple submission of a postcard, Supreme Court advocates are now increasingly filing formal writ petitions.⁸⁸¹ As seen in the *Ramakant Rai* PIL, a strong petition usually has these three main components: (1) a factual case that uses robust fact-finding and social science data to prove the alleged violations; (2) a legal case that invokes domestic and international laws and precedents to support the requested relief; and (3) requests for relief that seek to remedy the alleged violations in a concrete and comprehensive manner.⁸⁸² There are a number of factors to consider when developing each of these sections.

1. Using empirical data

The *Javed* Court's misguided assumption that women cannot be "compelled to bear a third child even though they do not wish to do so" suggests that PIL petitioners should consider supporting their petitions with surveys and affidavits documenting women's lack of autonomy in reproductive decision-making.⁸⁸³ Moreover, a Supreme Court lawyer who reviewed the *Javed* petitions, was present at all the court hearings, and worked closely with the justice in drafting the decision suggested that empirical studies demonstrating the negative consequences of the two-child norm might have been helpful if enough data had been shown to support the petitioners' conclusions. Reflecting an increasing skepticism about petitions that rely on questionable statistical data, however, he added that "somebody else can always compile a study that says the opposite thing."⁸⁸⁴ Thus, PIL advocates will have to consider

whether their methodologies and data are authenticated and incontrovertible enough to withstand rigorous questioning by the respondents and the Court.⁸⁸⁵

2. Applying domestic, international, and comparative law

PIL can be used not only to address a particular rights violation, but also as a tool to inform the judiciary about possible interpretations of domestic and international laws, and to develop positive reproductive rights jurisprudence.⁸⁸⁶

Indian advocates have the advantages of a bountiful Constitution and an apex judiciary that has been willing to interpret its provisions broadly. PIL petitions could comprehensively draw upon all applicable Fundamental Rights, Directive Principles, and domestic case law precedents to develop claims grounded in a broad range of rights, including the rights to life, liberty, security, health, equality, non-discrimination, privacy, education, information, and freedom from cruel or degrading treatment.

The onus to bring relevant international and comparative law into PIL cases falls upon lawyers.⁸⁸⁷ Given their heavy caseloads, most justices rarely consider such provisions unless advocates bring it to their attention.⁸⁸⁸ Moreover, because the Supreme Court's practice of hiring judicial clerks began only a few years ago, most judges are not used to giving their clerks substantive research assignments and some regard reliance on their law clerks as an abrogation of judicial responsibility.⁸⁸⁹ Advocates can employ a range of international sources, described in Part I, to inform the judiciary about the scope of specific international human rights and the positive obligations of the State.

References to international and comparative law could be particularly helpful in getting the Court to recognize and address the subversion of women's rights inherent in the application of India's religion-based personal laws. Given the dearth of useful domestic precedents in this realm, lawyers could explore innovative legal arguments grounded in international treaty provisions and comparative jurisprudence. For example, several treaty monitoring bodies have issued recommendations criticizing India's religion-based personal laws.⁸⁹⁰ Also, the Constitutional Court of South Africa recently struck down legislation based on customary laws of

succession, recognizing its disproportionate discriminatory impact on women and stressing that customary laws must be consistent with the constitution above all else.⁸⁹¹ Even the *Javed* judgment, despite being disappointing in many other respects, drew upon U.S. case law to support its non-enforcement of Islamic law's polygamy provision.⁸⁹² However, an important lesson learned from the *FFDA* petition is to thoroughly explore the entire context of a comparative example—what succeeded, what failed, correlating factors, and how the example translates to the Indian scenario—before bringing it to the Court's attention.⁸⁹³

PIL petitions that lead the Court to recognize and embrace international law principles and comparative analysis could facilitate the establishment of a reproductive rights framework in India. However, the applicability of one more developed internationally recognized right should not lead lawyers to neglect additional claims, because it is difficult to predict which arguments are most likely to influence the Court's decisions.⁸⁹⁴

3. Requesting remedies

Given that judges generally lack the time and resources to come up with remedies for PIL matters on their own, the outcome of a PIL case is largely dependent upon the quality and quantity of requests for relief put forth by the petitioners.⁸⁹⁵ Reproductive rights advocates can use PIL to demand systemic reform against rights violations through the establishment of complaint mechanisms, as seen in the *Vishaka* case, and to call for the creation of compensation guidelines, as seen in the *Ramakant Rai* case.⁸⁹⁶ In both those PILs, the petitioning lawyers gave the Court a proposed list of specific directives to issue, such as requiring employers to establish complaint committees to address instances of sexual abuse or requiring state governments to compensate all victims of unsafe or coerced sterilization procedures.⁸⁹⁷ The more remedies suggested in a petition the better, so that judges can consider a range of options before deciding which ones to actualize.

The outcome of PILs on large-scale reproductive issues, like maternal morality or lack of access to safe abortion, may be particularly dependent on how the requested relief is framed. As one Supreme Court Justice observed, judges are likely to shy away from suggestions that are too broad, but “if remedies

sought are specific and judges can see the light at the end of the tunnel, the PIL would be more effective.⁷⁸⁹⁸ The Court may be especially attentive to ideas from ground-level activists who work in closest contact with victims of rights violations, and to comparative examples from other jurisdictions and regional human rights courts that demonstrate international trends in support of innovative remedies.⁸⁹⁹

C. BUILDING ALLIES

1. Achieving consensus among partners

An important lesson learned from cases like *Vishaka* and *Ramakant Rai* is that the PILs most likely to succeed are those in which the petitioners and other activists working at the ground level are closely involved in all phases of the litigation—from helping the lawyers develop the petition to monitoring implementation of the Court’s orders.⁹⁰⁰ The synergy between different organizations with different expertise is very important in this process. However, along with their unique strengths, activists tend to have varying, and sometimes contrasting, approaches. There might be differences of opinion, for example, on when to file a PIL or how judicial directives should be implemented and monitored.⁹⁰¹ Although achieving consensus on every front is ideal, ensuring a timely intervention may necessitate accepting disagreements on certain issues while identifying sufficient common ground on which to proceed.

2. Involving other stakeholders

It is important for PIL lawyers and petitioners to maintain an open dialogue not only with each other, but also with stakeholders who are not directly involved in their case, including public health activists, women’s rights organizations, governmental bodies, and the media. Proactive communication strategies to clarify the goals of the litigation, such as holding open meetings after each court hearing, could help to channel and better inform the discourse on the progress and outcomes of a PIL case.⁹⁰²

This is particularly critical for a cause as sensitive as reproductive rights. For instance, after the Court issued its judgment in CEHAT’s PIL against the use of technology for sex-selection of fetuses, there was a surge in anti-abortion campaigns, even though CEHAT itself has always been a

clear proponent of abortion rights.⁹⁰³ Keeping constituents at the state and national level informed about key developments can help avert such situations, and can also help spread ownership of critical reproductive rights issues.

3. Collaborating with national commissions

The case studies reveal the value of strategically collaborating with national commissions, which can play significant roles before, during, and after the PIL process. For example, the NCW showed its ability to influence the Court through the impact of its affidavit in support of mandatory registration of marriages,⁹⁰⁴ and although the Commission was not directly involved in the *Vishaka* case, its *suo moto* investigation and findings confirming Bhanwari Devi’s rape helped the petitioners, who annexed the NCW’s report to their PIL petition.⁹⁰⁵ The NHRC’s progressive stance against coercive population policies demonstrated its potential to be an important partner even on highly controversial issues.⁹⁰⁶ Furthermore, both commissions were very active in implementing the *Vishaka* Court’s sexual harassment guidelines.⁹⁰⁷

4. Informing the media

The media often plays a key role in PIL cases by guiding social behavior and the formation of public opinion.⁹⁰⁸ In *Vishaka*, for example, the media helped promote and raise awareness about the Court’s guidelines against sexual harassment.⁹⁰⁹ After the negative *Javed* judgment, activists used the media to shift the public discourse on coercive population policies toward a more rights-based direction by sensitizing journalists through tribunals and training workshops.⁹¹⁰

“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 advocate observed.⁹¹¹ Acknowledging this power and its potential consequences, the Court has taken a strong stance against incorrect and misleading news reports. In one case, it issued an order to show cause for contempt proceedings against an errant newspaper publisher.⁹¹²

Given the fierce competition for press coverage, the legal editor of a national newspaper suggested that advocates

need to build strategic relationships with newspaper editors and television producers, and “keep hammering” to ensure that their PIL cases receive media attention.⁹¹³ For example, the primary public health activist behind the recent PIL on 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 media support for the case.⁹¹⁴

The media can also be a launching pad for a PIL petition. For instance, a newspaper article depicting a harrowing incident that has implications for women’s reproductive rights—such as the plight of a child bride or a young woman who unnecessarily died during childbirth or due to an unsafe abortion—could provide a powerful impetus for a PIL case, because the violation will already have the Court’s and the public’s attention.⁹¹⁵ Conversely, after the Court issues PIL orders, the media can facilitate implementation of the judicial directives by spreading knowledge about the rights that have been recognized. Capitalizing on this potential, the Court has sometimes ordered newspapers, radio stations, and television channels to publicize its PIL orders, as seen in the *Parmanand Katara* judgment on the right to medical treatment discussed in Part I.⁹¹⁶

5. Keeping the Court updated

Even when not pursuing litigation, advocates and activists may keep the Court informed about domestic and international human rights developments by submitting reports and other materials directly to the Supreme Court’s library.⁹¹⁷ The library currently contains several outdated reports from international NGOs such as Human Rights

Watch and Amnesty International.⁹¹⁸ According to Supreme Court law clerks, it is even more effective for NGOs to submit fact-finding and advocacy reports directly to judicial chambers: “The judges will not necessarily go searching for such things, but if these things are given to them, they will have a look at them.”⁹¹⁹

6. Pursuing concurrent strategies

While taking advantage of the potential for using PIL to promote reproductive rights in India, lawyers and activists can confront the limitations of litigation by concurrently pursuing complementary or alternative avenues for achieving their goals. For instance, they could consider investing in public advocacy strategies, like the Tribunal held after the *Javed* decision, to shape discourse, build public support, and bring human rights violations to the fore.⁹²⁰ In addition, strong national-level campaigns are important for effecting long-term structural change, as seen in the political movement accompanying the right to food PIL.⁹²¹

Advocacy strategies can also mitigate the potential failures of litigation. The post-*Javed* Tribunal, for example, helped lead some state governments and national officials to reject coercive population policies despite the Supreme Court’s judgment upholding the two-child norm.⁹²² Furthermore, advocates and activists can provide valuable input in the legislative process by submitting comments on pending bills, as was done by the lawyers involved in the FFDA PIL against child marriage⁹²³ Finally, international mechanisms, such as the ones discussed in Part I, can be used to generate greater governmental accountability for ongoing reproductive rights violations.⁹²⁴

CONCLUDING REMARKS

“Sixty years have passed since the founders of the United Nations inscribed, on the first page of our Charter, the equal rights of men and women. Since then, study after study has taught us that there is no tool for development more effective than the empowerment of women. No other policy is as likely to raise economic productivity, or to reduce infant and maternal mortality. No other policy is as sure to improve nutrition and promote health—including the prevention of HIV/AIDS. ...But whatever the very real benefits of investing in women, the most important fact remains: Women themselves have the right to live in dignity, in freedom from want and from fear.”

—Kofi Annan, Secretary-General, United Nations ⁹²⁵

India is a country in which the past and the future sometimes seem entwined with the present. The nation is poised toward innovative global leadership in the realms of science, technology, and international relations, and yet at the same time steeped in centuries-old beliefs, customs, and traditions. While the traditions contribute to India’s rich culture, some also lead to discriminatory practices that endanger the reproductive rights of women and girls.

India’s dichotomous nature is reflected in the decisions of its apex judiciary. In the recent order that made registration of all marriages mandatory, the Supreme Court devoted the opening paragraph of the opinion to a discussion of ancient Hindu law and then, in the very next paragraph, segued into a discussion of CEDAW.⁹²⁶ 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, exhibit the complex context within which reproductive rights advocates in India operate.

As Indian society develops its own theory of reproductive justice, informed by local realities and universally accepted norms, PIL can play a critical role in shaping the discourse. Through consistent, collaborative, and strategic litigation efforts, public interest lawyers and activists can call upon the judiciary to address ongoing rights violations by testing existing standards, enforcing constitutional provisions, incorporating international legal norms, providing judicial remedies, and exacting state accountability.

Former Supreme Court Chief Justice Verma, who authored the landmark *Vishaka* decision, has observed: “[Through PIL], innovative measures have been taken and the good side effect is that governmental authorities have become conscious. The paths have been laid, and there is a need to continue walking on them, and to walk properly.”⁹²⁷ Each PIL action that invokes domestic, international, and comparative law to address and remedy ongoing rights violations has the potential to result in a positive precedent for the next case to build upon. In this manner, various actors can use PIL to pave the way toward securing respect, protection, and fulfillment of the reproductive rights of all women and girls in India.

Appendix

WEBSITE RESOURCES

Constitution of India

India Code Information System
<http://indiacode.nic.in/coiweb/welcome.html>

Judgments of the Supreme Court of India

JUDIS: The Judgment Information System
<http://www.judis.nic.in>

Key International Treaties

Convention on the Elimination of All Forms of Discrimination against Women
<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>

Convention on the Rights of the Child
<http://www.unhchr.ch/html/menu3/b/k2crc.htm>

International Covenant on Civil and Political Rights
http://www.unhchr.ch/html/menu3/b/a_ccpr

International Covenant on Economic, Social and Cultural Rights
http://www.unhchr.ch/html/menu3/b/a_ceschr.htm

UN Treaty Monitoring Body Documents

UN Treaty Body Database
<http://www.unhchr.ch/tbs/doc.nsf>

Endnotes

1. Fertilizer Corp. Kamgar Union (Regd.) v. Union of India, (1981) 2 S.C.R. 52, para. 50.
2. WORLD HEALTH ORG. (WHO) ET AL., MATERNAL MORTALITY IN 2000: ESTIMATES DEVELOPED BY WHO, UNICEF, UNFPA 24 (2004), http://www.who.int/reproductive-health/publications/maternal_mortality_2000/mme.pdf [hereinafter WHO, MATERNAL MORTALITY REPORT].
3. See Ravi Duggal & Vimala Ramachandran, *Abortion Assessment Project (AAP) – India: A Brief Profile*, in ABORTION ASSESSMENT PROJECT – INDIA: RESEARCH SUMMARIES AND ABSTRACTS 1 (2004), available at <http://www.cehat.org/aap1/obj.pdf#search=%22abortion%20assessment%20project%22>.
4. Petition at para. 5, Forum for Fact Finding Documentation and Advocacy (FFDA) v. Union of India, W.P. (Civ.) No. 212 of 2003 (Supreme Court of India, Apr. 25, 2003) [hereinafter *FFDA* Petition].
5. Petition at paras. 8-9, *Ramakant Rai* v. Union of India, W.P. (Civ.) No. 209/2003 (Supreme Court of India, Jan. 3, 2005) [hereinafter *Ramakant Rai* Petition].
6. SHRUTI PANDEY, ET AL. (eds.), COERCION VERSUS EMPOWERMENT vii, xxii (Human Rights Law Network 2006); SAMA - RESOURCE GROUP FOR WOMEN AND HEALTH, BEYOND NUMBERS: IMPLICATIONS OF THE TWO-CHILD NORM 7 (2005).
7. See CENTER FOR REPRODUCTIVE RIGHTS (CRR.), WOMEN OF THE WORLD: LAWS & POLICIES AFFECTING THEIR REPRODUCTIVE LIVES - SOUTH ASIA 10-28, 69-114 (Center for Reproductive Rights 2004), available at http://www.reproductiverights.org/pdf/pdf_wowsa_india.pdf [hereinafter CRR, WOMEN OF THE WORLD]; HUMAN RIGHTS WATCH, BROKEN PEOPLE: CASTE VIOLENCE AGAINST INDIA’S “UNTOUCHABLES” Ch. VII (1999), available at <http://hrw.org/campaigns/caste/presskit.htm#5>.
8. For purposes of this report, the term “woman” is intended to encompass both women and girls, and the term “reproductive rights” is intended to encompass both reproductive and sexual rights. See International Women’s Health Coalition, *Sexual Rights*, <http://www.iwhc.org/issues/sexualrights/index.cfm> (last visited Nov. 16, 2006), for further information about sexual rights.
9. *Programme of Action of the International Conference on Population and Development*, CAiro, Egypt, Sept. 5-13, 1994, U.N. Doc. A/CONF.171/13/Rev.1, para. 7.3 (1995), available at <http://www.un.org/popin/icpd/conference/offeng/poa.html> [hereinafter *ICPD Programme of Action*].
10. *Beijing Declaration and the Platform for Action, Fourth World Conference on Women*, Beijing, China, Sept. 4-15, 1995, U.N. Doc. A/CONF.177/20, para. 96 (1995), available at <http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en> [hereinafter *Beijing Platform for Action*].
11. *Id.* at paras. 2, 40; see also *id.* at paras. 91, 106, 119, 216.
12. Interview with Fali Nariman, Senior Advocate and former Additional Solicitor General of India, in New Delhi, India (Mar. 10, 2006) [hereinafter Interview with F. Nariman, Mar. 10, 2006]. All interview notes and e-mails cited in the footnotes are on file with the author and CRR.
13. UNITED NATIONS POPULATION FUND (UNFPA), THE STATE OF WORLD POPULATION 2006 99 (2006), available at <http://www.unfpa.org/swp/2006/english/introduction.html> [hereinafter UNFPA, WORLD POPULATION REPORT].
14. *Id.* at 95.
15. UNFPA, WORLD POPULATION REPORT, *supra* note 13, at 95.
16. CRR, WOMEN OF THE WORLD, *supra* note 7, at 104.
17. *Id.* at 103.
18. *Id.*
19. *Id.* at 95; WHO, MATERNAL MORTALITY REPORT, *supra* note 2, at 19, 24 (listing range of 430 to 650 for India’s maternal mortality ratio).
20. WHO, MATERNAL MORTALITY REPORT, *supra* note 2, at 1, 24.
21. *Id.* at 99.
22. Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Combined second and third periodic report of State parties, India*, para. 333, U.N. Doc. CEDAW/C/IND/2-3 [hereinafter India CEDAW Report].
23. Confidential Interview with low-income female domestic worker, in New Delhi, India (Apr. 10, 2006). Name has been changed to protect confidentiality.
24. *Id.*
25. Confidential Interviews with low-income women residing in urban slum, in New Delhi, India (Mar. 23, 2006). Names have been changed to protect confidentiality.
26. *Id.*
27. Interview with Justice J. S. Verma, former Chief Justice, Supreme Court of India and former Chair, National Human Rights Commission, in New Delhi, India (Mar. 29, 2006) [hereinafter Interview with Justice J. S. Verma, Mar. 29, 2006].
28. Interview with Justice Yatindra Singh, Justice, High Court of Allahabad, in Bhopal, India (Apr. 15, 2006) [hereinafter Interview with Justice Y. Singh, Apr. 15, 2006].
29. People’s Union for Democratic Rights (PUDR) v. Union of India, (1983) 1 S.C.R. 456, para. 2.
30. B.L. WADEHRA, PUBLIC INTEREST LITIGATION: A HANDBOOK 22 (Universal Law Publ. Co. 2003).
31. See *infra* at Part III, Ch. 10 (discussion on initiating PIL cases in High Courts).

32. *S. P. Gupta v. Union of India*, (1982) 2 S.C.R. 365, para. 23.
33. INDIA CONST. art. 32.
34. *Fertilizer Corp.*, 2 S.C.R. 52 at para. 11.
35. *Bandhua Mukti Morcha v. Union of India*, (1984) 2 S.C.R. 67, para. 11.
36. *Id.* at para. 12.
37. INDIA CONST. art. 142(2).
38. *Id.*
39. *Id.* at art. 142(1).
40. *Id.* at arts. 141, 142(1), 144.
41. *Bandhua Mukti Morcha*, 2 S.C.R. 67 at para. 13.
42. *M.C. Mehta v. Union of India*, (1987) 1 S.C.R. 819, para. 3 (“[There is] a constitutional obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all the incidental and ancillary powers to forge new remedies and fashion new strategies designed to enforce fundamental rights.”).
43. *Bandhua Mukti Morcha*, 2 S.C.R. 67 at para. 13.
44. *Id.*
45. Although the Constitution states, “Every Judge of the Supreme Court shall be appointed by the President... [p]rovided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted,” the Court has interpreted this provision in a manner that enables the judiciary to control the appointment process. INDIA CONST. art. 124(2); *see* Supreme Court Advocates-on-Record Assoc. v. Union of India, (1993) Supp. 2 S.C.R. 659, para. 71(5) (“The opinion of the Chief Justice of India, for the purpose of Articles 124(2) and 217(1), so given has primacy in the matter of all appointments; and no appointment can be made by the President under these provisions to the Supreme Court and the High Courts, unless it is in conformity with the final opinion of the Chief Justice of India, formed in the manner indicated.”).
46. INDIA CONST. art. 124(3). *See* Supreme Court Advocates-on-Record Assoc., 2 S.C.R. 659 at para. 70 (“Unless there be any strong cogent reason to justify a departure, that order of seniority must be maintained between [High Court Judges] while making their appointment to the Supreme Court.”).
47. *Supreme Court Advocates-on-Record Assoc.*, 2 S.C.R. 659 at para. 73(15) (“Apart from the two well known departures, appointments to the office of Chief Justice of India have, by convention, been of the senior most Judge of the Supreme Court considered fit to hold the office; and the proposal is initiated in advance by the outgoing Chief Justice of India. The provision in Article 124(2) enabling consultation with any other Judge is to provide for such consultation, if there be any doubt about the fitness of the senior most Judge to hold the office, which alone may permit and justify a departure from the long standing convention... There is no reason to depart from the existing convention...”).
48. INDIA CONST. arts. 124(2)-(5), 125.
49. *See infra* at Part III, Ch. 9 (discussion of gender composition of the Indian judiciary).
50. Telephone Interview with Dr. Usha Ramanathan, independent researcher on jurisprudence of law, poverty, and rights, New Delhi, India (Aug. 29, 2006) [hereinafter Interview with U. Ramanathan, Aug. 29, 2006.]. *See also* author’s personal notes, Legal Education and Research Society (LEARS), International Conference on Access to Justice: Law, Policy and Institutions, Panel on Independence of Judiciary and Judicial Reforms, in New Delhi, India (Aug. 11-13, 2006) [hereinafter LEARS Access to Justice Conference].
51. *The Mumbai Kamgar Sabha, Bombay v. Abdulbhai Faizullabhai*, (1976) 3 S.C.R. 591, para. 7. *See also* *Janata Dal v. H. S. Chowdhary*, (1992) Supp. 1 S.C.R. 226, para. 58; *Maharaj Singh v. State of Uttar Pradesh*, (1977) 1 S.C.R. 1072, para. 27 (“Where a wrong against community interest is done, ‘no *locus standi*’ will not always be a plea to non-suit an interested public body chasing the wrong-doer in court.”) (italics added).
52. *Janata Dal*, Supp. 1 S.C.R. 226 at para. 59.
53. *S. P. Gupta*, 2 S.C.R. 365, para. 18.
54. *Fertilizer Corp.*, 2 S.C.R. 52 at para. 23.
55. *Id.* at para. 40 (italics added).
56. *Id.* at paras. 33, 35.
57. *Id.* at para. 43.
58. Interview with local rights activist, in New Delhi, India (Mar. 24, 2006).
59. *Janata Dal*, Supp. 1 S.C.R. 226 at para. 60.
60. *See S. P. Gupta*, 2 S.C.R. 365 at paras. 1-11.
61. *See id.* at para. 17.
62. *Id.* (emphasis added). *See also* *M. C. Mehta*, 1 S.C.R. 819 at para. 5 (“[E]ven if a letter is addressed to an individual judge of the court, it should be entertained, provided of course it is by or on behalf of a person in custody or on behalf of a woman or a child or a class of deprived or disadvantaged persons.”).
63. Leila Seth, *Social Action Litigation in India*, in CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE 110 (Sandra Liebenberg ed., 1995) [hereinafter Seth, *Social Action Litigation*].
64. *S. P. Gupta*, 2 S.C.R. 819 at para. 17.
65. *Id.*
66. *Janata Dal*, Supp. 1 S.C.R. 226 at paras. 95-96.
67. *PUDR*, 1 S.C.R. 456 at para. 2 (emphasis added).
68. *Id.* at paras. 1-2.
69. *Id.* at para. 2. *See also* *Bandhua Mukti Morcha*, 2 S.C.R. 819 at para. 9.

70. Interview with F. Nariman, Mar. 10 2006, *supra* note 12.
71. Interview with Shruti Pandey, Director, Women's Justice Initiative, Human Rights Law Network, in New Delhi, India (Dec. 5, 2005) [hereinafter Interview with S. Pandey, Dec. 5, 2005].
72. Interview with F. Nariman, Mar. 10 2006, *supra* note 12.
73. Sheela Barse v. Union of India, (1988) Supp. 2 S.C.R. 643. See also M.J. ANTHONY, SOCIAL ACTION THROUGH COURTS: LANDMARK JUDGMENTS IN PUBLIC INTEREST LITIGATION 114-115 (Indian Social Inst. 2005).
74. *Sheela Barse*, Supp. 2 S.C.R. at paras. 11, 13 (italics added).
75. *Id.* at para. 12.
76. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27. Third parties who want to intervene in a case must seek the permission of the Court.
77. *Id.*
78. Interview with Justice B. N. Srikrishna, former Justice, Supreme Court of India, in New Delhi, India (Mar. 8, 2006) (on the bench at time of interview) [hereinafter Interview with Justice B. N. Srikrishna, Mar. 8, 2006].
79. Interview with judicial law clerk, Supreme Court of India, in New Delhi, India (Mar. 8, 2006) [hereinafter Interview with Supreme Court judicial law clerk, Mar. 8, 2006].
80. The amici in Indian PILs differ from amici in United States courts, who are usually interested third parties that *sua moto* submit briefs supporting the case of one particular side.
81. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
82. *Id.*
83. Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78.
84. Interview with Justice D. Y. Chandrachud, Justice, High Court of Mumbai, in Mumbai, India (Mar. 16, 2006) [hereinafter Interview with Justice D. Y. Chandrachud, Mar. 16, 2006]; Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78.
85. Interview with U. Ramanathan, Aug. 29, 2006, *supra* note 50. Dr. Ramanathan further noted that the Court has too often asked corporate lawyers who are unsympathetic to the rights of the poor to act as amici in PIL cases. "[The use of amici] might have been convenient for the Court but it has not been conducive to justice," she contended. *Id.*
86. *Sheela Barse*, 2 S.C.R. 643 at para. 12.
87. Interview with Dr. Usha Ramanathan, independent researcher on jurisprudence of law, poverty, and rights, in New Delhi, India (Apr. 8, 2006) [hereinafter Interview with U. Ramanathan, Apr. 8, 2006].
88. *M.C. Mehta*, 1 S.C.R. 819 at para. 7.
89. *Bandhua Mukti Morcha*, 1 S.C.R. 67 at para. 13.
90. *Sheela Barse*, 2 S.C.R. 643 at para. 12.
91. Interview with Shruti Pandey, Director, Women's Justice Initiative, Human Rights Law Network, in New York, USA (June 8, 2006) [hereinafter Interview with S. Pandey, June 8, 2006]. See Y. P. Chhibbar, *PUCL petitions Supreme Court on starvation deaths*, PUCL BULLETIN (July 2001), http://www.pucl.org/reports/Rajasthan/2001/starvation_death.htm.
92. Telephone Interview with Rohan Thawani, Supreme Court Advocate, in New Delhi, India (Mar. 24, 2006) [hereinafter Interview with R. Thawani, Mar. 24, 2006]; Interview with Supreme Court judicial law clerk, Mar. 8, 2006, *supra* note 79. See People's Union for Civil Liberties (PUCL) v. Union of India, W.P. (Civ.) No. 196 of 2001 (Supreme Court of India 2001); RIGHT TO FOOD CAMPAIGN, LEGAL ACTION FOR THE RIGHT TO FOOD: SUPREME COURT ORDERS AND RELATED DOCUMENTS (Jan. 2004), <http://www.righttofoodindia.org/orders/interimorders.html> [hereinafter RIGHT TO FOOD CAMPAIGN, COURT DOCUMENTS].
93. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
94. Interview with S. Pandey, Dec. 5, 2005, *supra* note 71.
95. Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78.
96. *Id.*
97. *Id.*
98. *Id.*
99. See *infra* at Part II, Ch. 6 (*Vishaka* case study).
100. See RIGHT TO FOOD CAMPAIGN, COURT DOCUMENTS, *supra* note 92.
101. Ashok H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 177 (B. N. Kirpal, et al. eds., Oxford University Press 2000).
102. Interview with Justice M. J. Rao, former Justice, Supreme Court of India and former Chair, Law Commission of India (chairing Law Commission at time of interview), in New Delhi, India (Apr. 11, 2006) [hereinafter Interview with Justice M. J. Rao, Apr. 11, 2006].
103. Interview with R. Thawani, Mar. 24, 2006, *supra* note 92; Interview with Justice M. J. Rao, Apr. 11, 2006, *supra* note 102.
104. Interview with R. Thawani, Mar. 24, 2006, *supra* note 92. See also E-mail from Rohan Thawani, Supreme Court Advocate, to Avani Mehta Sood, author (Aug. 22, 2006).
105. Justice B. N. Srikrishna, *Skimming a Cat*, 8 Supreme Court Cases (Jour) 3, J-21 (2005) [hereinafter Srikrishna, *Skimming a Cat*]. See also Interview with Justice M. J. Rao, April 11, 2006, *supra* note 102 (noting that such judicial attempts can "create serious problems for the public"). Critics

- point out that unlike legislators, judges are not elected and directly accountable representatives of the people, and are not equipped to hold wide consultations with various stakeholders or to balance the rights of different sections of society before enacting a law. Interview with Justice M. J. Rao, Apr. 11, 2006, *supra*; Interview with Indian legal expert, Yale Law School, in New Haven, USA (May 12, 2006) [hereinafter Interview with Indian legal expert, May 12, 2006]. Likewise, critics argue that the Court lacks the executive's expertise and understanding of governmental resources, which are essential for making administrative decisions, because "[r]eliance 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." Srikrishna, *Skinning a Cat*, *supra*, at J-21. As an example, a former Supreme Court Justice pointed to a recent PIL in which the Court ordered wide-scale demolition of illegal constructions in New Delhi and surrounding areas. "They don't take into account how many lakhs of people—highly qualified and even ordinary skilled workers—have been unemployed [by the demolition of their workplaces]," he said. "Who is accountable for this? ... One must investigate this side too, not always from the side of the petitioners alone." Interview with Justice M. J. Rao, Apr. 11, 2006, *supra*.
106. Interview with Justice V. S. Verma, Mar. 29, 2006, *supra* note 27.
107. Manmohan Singh, Prime Minister of India, Address at the Conference of Chief Ministers & Chief Justices of High Courts (Mar. 11, 2006) (full text of speech available at Outlook India.com, *Has The Pendulum Swung to the Other Extreme?*, <http://www.outlookindia.com/full.asp?fodname=20060311&fname=manmohan&sid.=1>) [hereinafter Singh speech].
108. *See, e.g.*, Interview with F. Nariman, Mar. 10, 2006, *supra* note 12; Interview with R. Thawani, Mar. 24, 2006, *supra* note 92; Interviews with various High Court Justices, National Judicial Academy, Bhopal, India (Apr. 15, 2006) [hereinafter Interviews with High Court Justices at NJA, Apr. 15, 2006]; Telephone Interview with legal editor of major national newspaper, in New Delhi, India (Apr. 9, 2006) [hereinafter Interview with legal editor, Apr. 9, 2006]; Interview with Justice Leila Seth, former Chief Justice, High Court of Himachal Pradesh and former Member, Law Commission of India, in New Delhi, India (Apr. 10, 2006) [hereinafter Interview with Justice L. Seth, Apr. 10, 2006]; Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84.
109. Interview with Justice M. J. Rao, Apr. 11, 2006, *supra* note 102.
110. Interview with judicial law clerk, Supreme Court of India, in New Delhi, India (Mar. 26, 2006) [hereinafter, Interview with Supreme Court judicial law clerk, Mar. 26, 2006].
111. Interview with F. Nariman, Mar. 10 2006, *supra* note 12.
112. Interview with R. Thawani, Mar. 24, 2006, *supra* note 92.
113. Interview with Supreme Court judicial law clerk, Mar. 26, 2006, *supra* note 110.
114. E-mail from Rohan Thawani, Supreme Court Advocate, to Avani Mehta Sood, author (Aug. 22, 2006).
115. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
116. Interview with Justice Y. Singh, Apr. 15, 2006, *supra* note 28.
117. Interview with legal editor, Apr. 9, 2006, *supra* note 108.
118. *See, e.g.*, Interview with Supreme Court judicial law clerk, Mar. 26, 2006, *supra* note 110; Interview with Justice L. Seth, Apr. 10, 2006, *supra* note 108.
119. Interview Justice L. Seth, Apr. 10, 2006, *supra* note 108.
120. *See* Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
121. Interview with F. Nariman, Mar. 10, 2006, *supra* note 12.
122. Confidential Interview with Justice of the Supreme Court of India, in New Delhi, India (Apr. 13, 2006) [hereinafter Confidential Interview with Justice of the Supreme Court, Apr. 13, 2006]. *See also* Interview with legal editor, May 12, 2006, *supra* note 108; Interview with High Court Justices at NJA, Apr. 15, 2006, *supra* note 108; Interview with Justice L. Seth, Apr. 10, 2006, *supra* note 108.
123. Gobind Das, *The Supreme Court: An Overview*, in SUPREME BUT NOT INFALLIBLE, *supra* note 101, at 45.
124. Confidential Interviews with low-income women in New Delhi, India (Mar. 23, 2006, Apr. 10, 2006). For example, Seema, who works as a part-time sweeper in New Delhi, said: "If the Court picks up an issue, it should be able to do something, shouldn't it? If we have a fight or an issue, then the Court can do something." *Id.* Several other similarly situated women expressed this view during interviews. Names have been changed to preserve confidentiality.
125. Singh speech, *supra* note 107.
126. Apparel Export Promotion Council v. Chopra, (1999) 1 S.C.R. 117, para. 27.
127. Vienna Convention on the Law of Treaties art. 2.1(b), entered into force Jan. 27. 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [hereinafter Vienna Convention]. *See also*, *Vienna Declaration and Programme of Action, World Conference on Human Rights*,

- para. 1, Vienna, Austria, July 14-25, 1993, U.N. Doc. A/CONF 157/23 (1993) (reaffirming “the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law.”) [hereinafter *Vienna Declaration and Programme of Action*].
128. See *Introduction to the UN Human Rights Treaty System*, <http://www.bayefsky.com/introduction.php> (last visited Nov. 16, 2006).
 129. See *id.*
 130. See Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, Oct. 6, 1999, G.A. Res. 54/4, U.N. GAOR, 54th Sess., U.N. Doc. A/Res/54/4 (1999) *entered into force* Dec. 22, 2000, available at <http://www.un.org/womenwatch/daw/cedaw/protocol/>; Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 3, *entered into force* Mar. 23, 1976, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm; Second Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), *entered into force* July 11, 1991, available at http://www.unhchr.ch/html/menu3/b/a_opt2.htm.
 131. Bangladesh has signed and ratified CEDAW’s Optional Protocol; Nepal has signed the CEDAW Optional Protocol, and signed and ratified both optional protocols to the Civil and Political Rights Covenant. Status reports are available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.
 132. *ICPD Programme of Action*, *supra* note 9; *Beijing Platform for Action*, *supra* note 10.
 133. UNITED NATIONS, MILLENNIUM DEVELOPMENT GOALS REPORT 8-9, 12-13 (2006), available at <http://unstats.un.org/unsd/mdg/Resources/Static/Products/Progress2006/MDGReport2006.pdf> (goals include to prevent gender inequality and empower women, to improve maternal health and reduce maternal mortality, and to combat HIV/AIDS).
 134. Convention on the Elimination of All Forms of Discrimination against Women, *adopted* Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) *entered into force* Sept. 3, 1981, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> [hereinafter CEDAW]; Office of the U.N. High Commissioner for Human Rights, *Status of Ratifications of the Principal Int’l Human Rights Treaties*, <http://www.unhchr.ch/pdf/report.pdf> [hereinafter UNHCR *Status of Ratifications*].
 135. CEDAW, *supra* note 134, art. 1. The CEDAW Committee has clarified that the term “women” includes girls and adolescents, because governments are “encouraged to address the issue of women’s health throughout the woman’s lifespan.” CEDAW Committee, *General Recommendation 24: Women and Health (Article 12)*, para. 8, U.N. Doc. A/54/38/Rev. 1 (Feb. 2, 1999), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/77bae3190a903f8d80256785005599ff?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/77bae3190a903f8d80256785005599ff?Opendocument) [hereinafter CEDAW *Gen. Rec. 24*]. See also *supra* para. 1.
 136. CEDAW, *supra* note 134, arts. 12.1, 12.2.
 137. CEDAW *Gen. Rec. 24*, *supra* note 135, at para. 11.
 138. *Id.* at para. 21.
 139. CEDAW Committee, *General Recommendation 19, Violence against Women* para. 24(g)(j)(k)(m), U.N. Doc. A/37/48 (Jan. 29, 1992), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/300395546e0dec52c12563ee0063dc9d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/300395546e0dec52c12563ee0063dc9d?Opendocument) [hereinafter CEDAW *Gen. Rec. 19*].
 140. CEDAW Committee, *Concluding Observations, India*, para. 78, U.N. Doc. A/55/38 (Jan. 2, 2000), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/a730392d527393078025688c0055639a?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/a730392d527393078025688c0055639a?Opendocument) [hereinafter CEDAW *Concluding Observations 2000*].
 141. *Id.* at para. 79.
 142. CEDAW, *supra* note 134, arts. 10(h), 5(b).
 143. *Id.* at arts. 11(1)(f), 11(2), 11.
 144. CEDAW *Gen. Rec. 19*, *supra* note 139, at para. 17.
 145. *Id.* at para. 24(g)(j)(k)(m). “[F]orms of traffic in women and exploitation of prostitution of women” are strictly prohibited, and states parties are called upon to suppress all such practices. CEDAW, *supra* note 134, at art. 6.
 146. CEDAW, *supra* note 134, art. 2(f).
 147. *Id.* at art. 14; UNFPA, WORLD POPULATION REPORT, *supra* note 13, at 99.
 148. CEDAW *Gen. Rec. 24*, *supra* note 135, at para. 17.
 149. CEDAW *Concluding Observations 2000*, *supra* note 140, at para. 56.
 150. CEDAW *Gen. Rec. 24*, *supra* note 135, at para. 17.
 151. CEDAW *Gen. Rec. 19*, *supra* note 139, at para. 9; CEDAW, *supra* note 134, at art. 2(e).
 152. CEDAW *Gen. Rec. 19*, *supra* note 139, at para. 9.
 153. United Nations Division for the Advancement of Women (UNDAW), *Declarations, Reservations, and Objections to CEDAW*, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm> [hereinafter UNDAW *Reservations*]. India’s reservation to CEDAW applies to the treaty’s Article 29 provision on arbitration, to which India

- does not consider itself bound. *Id.* According to the Vienna Convention, the term “reservation” means “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty whereby it purports to exclude or to modify the legal effects of certain provisions of the treaty in their application to that State.” Vienna Convention, *supra* note 127, at art. 2(d). In contrast, an “interpretive declaration,” which may be made even after ratification of a treaty, “aims at clarifying what meaning or extent [a state] attributes to a given treaty or to some of its provisions.” The International Law of Treaties, Reservations, <http://www.walter.gehr.net/reservations.html> (last visited Oct. 26, 2006). A unilateral declaration, such as the ones that India has entered to certain provisions of CEDAW and other treaties, may qualify as either a reservation or as an interpretative declaration, depending on “the legal effects it intends to produce, a matter which is far from being always clear.” *Id.*
154. CEDAW, *supra* note B4, at art. 5(a); UNDAW Reservations, *supra* note 153.
155. UNDAW Reservations, *supra* note 153; CEDAW, *supra* note 134, at art. 16(1)(b) and (e).
156. CEDAW Gen. Rec. 19, *supra* note 139, paras. 11, 22-23.
157. See *infra* at Part I, Ch. 3 (discussion of constitutional law).
158. CEDAW Concluding Observations 2000, *supra* note 140, at para. 62. See CEDAW Committee General Recommendation. 21, Equality in marriage and family relations paras. 36-37, 39 (Feb. 4, 1994) (noting that mandatory registration of marriages can help ensure “equality between partners, a minimum age for marriage, . . . and the protection of the rights of children.”), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/7030ccb2de3baae5c12563ee00648f1f?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7030ccb2de3baae5c12563ee00648f1f?Opendocument) [hereinafter CEDAW Gen. Rec. 21].
159. UNDAW Reservations, *supra* note 153; see CEDAW, *supra* note 134, at art. 16(2).
160. Smt. Seema v. Ashwani Kumar, T.P. Civ. No. 291 of 2005 (Supreme Court of India, Feb. 14, 2006) [hereinafter *Smt. Seema*, Feb. 14, 2006 Order].
161. *Id.* at paras. 6-12, 15.
162. *Id.* at para. 17.
163. *Id.* at para. 2.
164. UNHCR Status of Ratifications, *supra* note 134; United Nations High Commissioner for Human Rights, Declarations and Reservations (as of Feb. 5, 2002), http://www.unhchr.ch/html/menu3/b/treaty4_esp.htm [hereinafter UNHCR Declarations and Reservations].
165. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, available at http://www.unhchr.ch/html/menu3/b/a_ccpr [hereinafter Civil and Political Rights Covenant].
166. *Id.* at arts. 2(1), 3, 6, 9, 17.
167. Human Rights Committee, General Comment 6, The right to life, para. 5. (Apr. 30, 1982), available at [[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument)] [hereinafter HRC Gen. Comm. 6].
168. Civil and Political Rights Covenant, *supra* note 165, at art. 23(3)-(4).
169. *Id.* at arts. 26, 24(1).
170. *Id.* at art. 7-8 (including a prohibition against medical or scientific experimentation without free consent).
171. Human Rights Committee, General Comment 28, Equality of rights between men and women paras. 10-11, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/13b02776122d4838802568b900360e80?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument) [hereinafter HRC Gen. Comm. 28].
172. Civil and Political Rights Covenant, *supra* note 165, at art. 2(3).
173. HRC Gen. Comm. 28, *supra* note 171, at para. 5.
174. Human Rights Committee, Concluding Observations, India para. 17, U.N. Doc. CCPR/C/79/Add.81 (Aug. 4, 1997), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/85e8bbf07b5dbdc88025652b005538bd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/85e8bbf07b5dbdc88025652b005538bd?Opendocument) [hereinafter HRC Concluding Observations 1997].
175. K. L. v. Peru, Comm. No 1153/2003, paras. 2.1-2.6, UN Doc. CCPR/C/85/D/1153/2003 (Nov. 22, 2005).
176. *Id.* at para. 6.6. The decision noted that the Peruvian government’s denial of access to an abortion in this case also violated the Civil and Political Rights Covenant’s Article 2 obligation to respect and ensure rights, and its Article 24 special measures for the protection of minors. *Id.* See Pardiss Kebriaei, UN Human Rights Committee Decision in [K.L.] v. Peru, 15 INTERRIGHTS BULLETIN, No. 3 (2006), at 151, for an analysis of the decision.
177. UNHCR Status of Ratifications, *supra* note 134; UNHCR Declarations and Reservations, *supra* note 164.
178. International Covenant on Economic, Social and Cultural Rights, art. 12(1), G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 3, entered into force Jan. 3, 1976, available at http://www.unhchr.ch/html/menu3/b/a_cescr.htm [hereinafter Economic, Social and Cultural Rights Covenant].
179. Economic, Social and Cultural Rights Committee, General Comment 14, The right to the highest attainable standard of

- health*, para. 8, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument) [hereinafter *ESCR Gen. Comm. 14*].
180. *Id.* at para. 12(b).
181. *Id.* at paras. 48-49.
182. *Id.* at para. 21.
183. Economic, Social and Cultural Rights Covenant, *supra* note 178, at art. 12(2)(a); *ESCR Gen. Comm. 14, supra* note 179, at para. 14. The treaty also instructs the State to take steps to prevent, treat, and control diseases and to create “conditions which would assure to all medical service and medical attention in the event of sickness,” which can be done by promoting “social determinants of good health, such as...gender equity” and establishing “prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases...and those adversely affecting sexual and reproductive health.” Economic, Social and Cultural Rights Covenant, *supra* note 178, at art. 12(2)(d); *ESCR Gen. Comm. 14, supra*, at para. 16.
184. Economic, Social and Cultural Rights Covenant, *supra* note 178, at arts. 10(2)-(3), 15(b).
185. Economic, Social and Cultural Rights Committee, *General Comment 3, The nature of states’ parties obligations*, para. 2(1)-(2) (Dec. 14, 1990), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument) [hereinafter *ESCR Gen. Comm. 3*].
186. *Id.* at para. 10 (A state party in which “any significant number of individuals is deprived of...essential primary healthcare...is, prima facie, failing to discharge its obligations under the Covenant”).
187. *Id.*
188. *ESCR Gen. Comm. 14, supra* note 179, at paras. 59, 61.
189. Silvia Borelli, *Positive Obligations of States and the Protection of Human Rights*, 15 *INTERRIGHTS BULLETIN*, No. 3 (2006), at 103 [hereinafter Borelli, *Positive Obligations of States*].
190. UNHCR *Status of Ratifications, supra* note 134. India acceded to the Children’s Rights Convention with the following declaration: “While fully subscribing to the objectives and purposes of the Convention, realising that certain of the rights of child, namely those pertaining to the economic, social and cultural rights, can only be progressively implemented in the developing countries, subject to the extent of available resources and within the framework of international co-operation; recognizing that the child has to be protected from exploitation of all forms including economic exploitation;...the Government of India undertakes to take measures to progressively implement the provisions of article 32, particularly paragraph 2(a), in accordance with its national legislation and relevant international instruments to which it is a State Party.” UNHCR *Declarations and Reservations, supra* note 164.
191. Children’s Rights Committee, *Concluding Observations, India*, para. 29, U.N. Doc. CRC/C/15/Add.228 (Feb. 26, 2004), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/35e5ebb72fcfadbac1256e83004a29a8?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/35e5ebb72fcfadbac1256e83004a29a8?Opendocument) [hereinafter *CRC Concluding Observations 2004*].
192. Convention on the Rights of the Child, art. 6, *adopted* Nov. 20, 1989, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, UN Doc. A/44/49 (1989), *reprinted in* 28 I.L.M. 1448, *entered into force* Sept. 2, 1990, available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>. [hereinafter *Children’s Rights Convention*].
193. *Id.* at art. 24(2)(d).
194. *CRC Concluding Observations 2004, supra* note 191, at para. 52.
195. *Children’s Rights Convention, supra* note 192, at art. 19.
196. Children’s Rights Committee, *Concluding Observations, India*, paras. 50-51, 55(b), 60-61, 74-75, U.N. Doc. CRC/C/15/Add.115, (Feb. 23, 2000), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6bfe919a361e8a498025687f005c9062?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6bfe919a361e8a498025687f005c9062?Opendocument) [hereinafter *CRC Concluding Observations 2000*].
197. *Id.* at paras. 34(c), 61(c).
198. THE CITIZEN’S COMMITTEE FOR EXTRAORDINARY REPORT ON GUJARAT, INDIA, SUBMISSIONS TO THE CEDAW COMMITTEE FOR SEEKING INTERVENTION ON GENDER-BASED CRIMES AND THE GENDERED IMPACT OF THE GUJARAT CARNAGE 2002 (2003) [hereinafter *CCERG Petition*].
199. *Id.* at paras. 18-21 (citing, *inter alia*, *Delhi Domestic Women’s Forum v. Union of India*, (1994) Supp. 4 S.C.R. 528).
200. *Id.* at para. 27. In discussing exhaustion of domestic remedies, the petition noted that the Gujarat government had rejected recommendations by the National Commission for Women and the National Human Rights Commission, and that efforts to use the PIL mechanism had been unsuccessful. *Id.* at paras. 10, 22-23. “The need for international intervention and scrutiny in Gujarat is compelled because the systems of governance in a well established democratic state, with strong state institutions, are overtly and explicitly not available or responsive to justice delivery for a section of its citizens,” the petition stated. *Id.* at 26.
201. CEDAW, *Special Decisions or Action Taken Regarding Reporting*, para. 459, U.N. Doc. CEDAW A/58/38 (2003).
202. *See* Economic and Social Council, *Communications*

- concerning the status of women*, para. 4, U.N. Resolution 76(V) (Aug. 5, 1947); *Communications concerning the status of women*, para. 5, Resolution 1983/27 (May 26, 1983).
203. Economic and Social Council, U.N. Resolution 1983/27, *supra* note 202, at para. 5.
204. Every communication is sent directly to the relevant government for its response. A communication cannot be submitted anonymously but, upon request, individuals' names may be deleted after submission. It is advisable that the communication describe the rights that are being violated, and specify actions that the respondent State should take to remedy the violations. The working group must receive all communications by September, in order to allow enough time to gather State responses and compile the report before the CSW's annual meeting in March.
205. INDIA CONST. art. 253. The Human Rights Committee has urged the Indian government to employ this constitutional provision to "incorporate fully the provisions of [international conventions] in domestic law, so that individuals may invoke them directly before the courts." HRC *Concluding Observations 1997*, *supra* note 174, at para. 13.
206. INDIA CONST. art. 51(c).
207. Kesavananda Bharati Sripadagalvaru v. State of Kerala, (1973) Supp. S.C.R. 1, para. 165 (citing to Lord Denning in *Corocraft v. Pan American Airways* (1969) All E.R. 82, 87).
208. Jolly George Varghese v. Bank of Cochin, (1980) 2 S.C.R. 913, para. 6. *See also* The Chairman, Railway Board v. Chandrima Das, (2001) 1 S.C.R. 480, para. 25 (relying on British courts' well established principles that "there is a prima facie, presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations").
209. People's Union for Civil Liberties v. Union of India, A.I.R. 1997 S.C. 1203.
210. *Id.* at paras. 13, 15 (citing Minister of Immigration and Ethnic Affairs v. Teoh, (1995) A.L.J.R. 423; Chan v. Korean Airlines Ltd., 104 L.Ed. 2d. 113; Eastern Airlines v. Floyd, 113 L.Ed. 2d. 569; R v. Secretary of State for Employment, Ex Parte Opportunities Commission, 1994 I.C.R. 317, 1994(1) All. E.R. 910; Factortame No. 2, 1991(1) A.C. 603).
211. Vishaka v. State of Rajasthan, (1997) Supp. 3 S.C.R. 404, para. 16. *See infra* at Part II, Ch. 6 (*Vishaka* case study).
212. *Id.* at para. 14.
213. *Varghese*, 2 S.C.R. 913 at para. 6.
214. HRC *Concluding Observations 1997*, *supra* note 174, at para. 17 ("The Committee points out that the enforcement of personal laws violates the right of women to equality before the law and non-discrimination"); CRC *Concluding Observations 2004*, *supra* note 191, at para. 9 ("The Committee remains concerned that domestic legislation, and in particular religious and personal laws which govern family matters, are not yet fully in conformity with the provisions and principles of the Convention"); CEDAW *Concluding Observations 2000*, *supra* note 196, at para. 60 (noting that the Indian government's policy of non-intervention with personal laws of different religious groups "perpetuates sexual stereotypes, son preferences and discrimination against women").
215. *See infra* at Part I, Ch. 4 (discussion of religion-based personal laws).
216. CEDAW *Concluding Observations 2000*, *supra* note 196, at para. 46.
217. HRC *Concluding Observations 1997*, *supra* note 174, at para. 6; CRC *Concluding Observations 2004*, *supra* note 191, at para. 9. *See also* CRC *Concluding Observations 2000*, *supra* note 196, at para. 3 (welcoming "the frequent references to provisions of international human rights instruments by the courts").
218. Interview with Indian legal expert, May 12, 2006, *supra* note 105; Telephone Interview with National Judicial Academy fellow, Bhopal, India (Mar. 30, 2006) [hereinafter Interview with National Judicial Academy fellow, Mar. 30, 2006]; Telephone Interview with Dr. Asha Bajpai, Reader, Tata Institute of Social Sciences, in Mumbai, India (Mar. 29, 2006) [hereinafter Interview with A. Bajpai, Mar. 29, 2006].
219. *See, e.g.*, Department of Family Welfare, Ministry of Health and Family Welfare, Government of India, *National Population Policy 2000* [hereinafter National Population Policy].
220. *See, e.g.*, *Vishaka*, Supp. 3 S.C.R. 404.
221. *See, e.g.*, UNHCR *Status of Ratifications*, *supra* note 134.
222. Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84; *see Chairman Railway Board*, 1 S.C.R. at para. 33 ("The Fundamental Rights under the Constitution are almost in consonance with the Rights contained in the Universal Declaration of Human Rights as also the Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights, to which India is a party having ratified them."); *infra* at Part I, Ch. 3 (discussion of constitutional law).
223. *Fertilizer Corp.*, 2 S.C.R. 52 at paras. 31-34, 37, 41-43, 46.
224. *Id.*
225. *PUDR*, 1 S.C.R. 456 at para. 9.
226. *S. P. Gupta*, 2 S.C.R. 365 at para. 1.
227. *See, e.g., id.* at paras. 21-23.
228. *Janata Dal*, Supp. 1 S.C.R. 226 at paras. 49-50.

229. *Id.* at para. 55.
230. *Id.* at para. 88.
231. Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78.
232. *Id.*; Interview with judicial law clerk, Supreme Court of India, in New Delhi, India (Mar. 27, 2006) [hereinafter Interview with Supreme Court judicial law clerk, Mar. 27, 2006]; Interview with National Judicial Academy fellow, Mar. 30, 2006, *supra* note 218; Interview with Supreme Court judicial law clerk, Mar. 8, 2006, *supra* note 79.
233. Interview with National Judicial Academy fellow, Mar. 30, 2006, *supra* note 218.
234. Interview with Supreme Court judicial law clerk, Mar. 8, 2006, *supra* note 79; Interview with National Judicial Academy fellow, Mar. 30, 2006, *supra* note 218.
235. For example, Justice Michael Kirby of the High Court of Australia visits the National Law School in Bangalore once a year, providing budding Indian lawyers with exposure to the Australian judicial system. Interview with National Judicial Academy fellow, Mar. 30, 2006, *supra* note 218. The influence is not one-sided; Justice Kirby has highlighted the Indian and Australian judiciaries' mutual reliance on each others' judgments. Michael Kirby, *The Supreme Court of India and Australian Law*, in SUPREME BUT NOT INFALLIBLE, *supra* note 101, at 66-86 [hereinafter Kirby, *Supreme Court of India and Australian Law*].
236. Interview with F. Nariman, Mar. 10, 2006, *supra* note 12.
237. *Air India v. Nergesh Meerza*, (1982) 1 S.C.R. 438, para. 86.
238. Interview with F. Nariman, Mar. 10, 2006, *supra* note 12.
239. *See, e.g.*, Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84; Interview with National Judicial Academy fellow, Mar. 30, 2006, *supra* note 218. The reliance on British, U.S., and Australian law used to be attributable to the fact that it was easier to get cases from those countries than from other jurisdictions. Interview with Justice D. Y. Chandrachud, *supra* note 84. However, modernization of different research tools has made many jurisdictions' case law more accessible. *See* Kirby, *The Supreme Court of India and Australian Law*, *supra* note 235, at 69 (predicting that due to the "Internet, direct contacts, and a growing realization of the things we have in common," judges' use of comparative law will increase as they "venture upon the greater treasure-house now made available to us from the leading courts of the common law world").
240. *FFDA* Petition, *supra* note 4, para. 22; *see infra* at Part II, Ch. 8 (*FFDA* case study).
241. Petition, paras. 48, 61-62, *Voluntary Health Assoc. of Punjab v. Union of India*, W.P. (Civ.) No. 31 of 2003, (Supreme Court of India, 2003).
242. Interview with F. Nariman, Mar. 10, 2006, *supra* note 12.
243. *Vishaka*, Supp. 3 S.C.R. 404 at para. 14.
244. Interview with F. Nariman, Mar. 10, 2006, *supra* note 12; Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78.
245. *See* P. D. MATHEW, CONSTITUTION OF INDIA SIMPLIFIED, at xxx, 1 (Indian Social Inst., 2004).
246. INDIA CONST. Preamble.
247. *See* INDIA CONST. Part III (arts. 12-35), Part IV (36-51). The Indian Constitution also contains 12 schedules, added by constitutional amendment. The 12 schedules in force cover the designations of the states and union territories; emoluments for high-level officials; forms of oaths; allocation of the number of seats in the Rajya Sabha per state or union territory; provisions for the administration and control of scheduled areas and tribes (with special protection due to disadvantageous conditions); provisions for the administration of tribal areas in various regions; lists of responsibilities of the central and state governments; the official languages; land and tenure reforms; the association of Sikkim with India; anti-defection provisions for members of Parliament and the state legislatures; rural development; and urban planning. *See* INDIA CONST. Schedules I-XII.
248. INDIA CONST. art. 51(A).
249. *See* INDIA CONST. Part III.
250. INDIA CONST. arts. 14, 15, 21, 23.
251. Justice Ruma Pal, *Redress for Violence against Women in India: The Successes and Failures of Judicial Action*, Eighth Judicial Colloquium on The Domestic Application of International Human Rights Norms, DEVELOPING HUMAN RIGHTS JURISPRUDENCE, 8 (1998) Commonwealth Secretariat (2001), at 1, available at http://www.humanrightsinitiative.org/jc/papers/jc_2004/supplementary_papers/ruma_pal.pdf [hereinafter Pal, *Redress for Violence against Women in India*].
252. INDIA CONST. art. 13(2).
253. *Id.* at art. 21.
254. *Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble*, A.I.R. 2003 S.C. 4567, para. 4.
255. *Consumer Education and Research Centre v. Union of India*, (1995) 1 S.C.R. 626, para. 24; *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 2 S.C.R. 516, para. 8.
256. *Chameli Singh v. State of Uttar Pradesh*, (1995) Supp. 6 S.C.R. 827, para. 7. In reaching this conclusion, the Court cited to India's obligations under the Economic, Social and Cultural Rights Covenant. *Id.* at para. 3 (citing to Universal Declaration of Human Rights art. 25(1), Economic, Social

- and Cultural Rights Covenant, *supra* note 178, at art. 11(1)).
257. *Chairman, Railway Board*, 1 S.C.R. 480 at para. 12. *See also* *Gautum v. Chakraborty*, (1995) Supp. 6 S.C.R. 731, para. 8 (“Women also have the right to life and liberty; they also have the right to be respected and treated as equal citizens. Their honour and dignity cannot be touched or violated. They also have the right to lead an honourable and peaceful life.”); Pal, *Redress for Violence against Women in India*, *supra* note 251, at 2.
258. *Chairman, Railway Board*, 1 S.C.R. 480.
259. *Id.* at paras. 14, 43.
260. *Id.* at para. 33.
261. *Id.*; *see also* paras. 19-24, 28-29.
262. *Consumer Education*, Supp. 6 S.C.R. 827 at para. 22.
263. *Id.* at paras. 22-23; 26. *See supra* at Part I, Ch. 3 (discussion of Directive Principles).
264. *Consumer Education*, Supp. 6 S.C.R. 827 at para. 30.
265. *Parmanand Katara v. Union of India*, (1989) 3 S.C.R. 997, para. 4.
266. *Id.* at para. 8.
267. *Id.*
268. *Id.* at para. 9.
269. *Id.*
270. *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, A.I.R. 1996 S.C. 2426, para. 1.
271. *Id.* at para. 9.
272. *Id.*
273. *Id.* at para. 10.
274. *Id.* at para. 16.
275. *Id.* *See also* *Municipal Council, Ratlam v. Vardichan* (1981) 1 S.C.R. 97, paras. 1, 15 (“At issue is the coming of age of that branch of public law bearing on community actions and the court’s power to force public bodies under public duties to implement specific plans in response to public grievances. ... A responsible municipal council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies”).
276. *Paschim Banga*, A.I.R. 1996 S.C. 2426 at para. 14.
277. 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, Mar. 25, 2006].
278. *Mr. X v. Hospital Z*, A.I.R. 1999 S.C. 495, para. 20.
279. *Gobind v. State of Madhya Pradesh*, (1975) 3 S.C.R. 946, paras. 23, 25.
280. *Id.* at paras. 16, 18, 29. In *Griswold*, the U.S. Supreme Court held that a law against contraception was an unconstitutional invasion of married people’s right to privacy. *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Roe*, the U.S. Court legalized abortion under the right to privacy. *Roe v. Wade*, 410 U.S. 113 (1973).
281. *Gobind*, 3 S.C.R. 946 at para. 24. *See also* *Rajgopal v. State of Tamil Nadu*, (1994) Supp. 4 S.C.R. 353, para. 28(1) (“[T]he right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. ... A citizen has a right to safeguard... privacy of his own, his family, marriage, procreation, motherhood, child bearing and education ...”).
282. *Gobind*, 3 S.C.R. 946 at paras. 28, 31.
283. *Mr. X*, A.I.R. 1999 S.C. 495. The appellant, a doctor himself, had donated blood that tested positive for HIV; instead of informing him directly, the hospital revealed this information to the relatives of his fiancée. *Mr. X v. Hospital Z*, A.I.R. 2003 S.C. 664, para. 2. As a consequence, the appellant suffered “discrimination, loss in earnings, and social ostracism” that forced him to move to another town. *Id.* (Although some versions of the published decision reveal the parties’ names, the pseudonyms will be used in this report).
284. *Mr. X*, A.I.R. 1999 S.C. 495 at para. 27.
285. *Id.*
286. *Id.*
287. *Id.* at para. 43.
288. Further controverting reproductive rights principles, the Court added that “so long as the person is not cured of the communicable venereal disease or impotency, the RIGHT to marry cannot be enforced through a court of law and shall be treated to be a ‘SUSPENDED RIGHT.’” *Id.* at para. 37. A petition was filed in objection to this finding, which the Court treated as a request “to clarify that there is no bar for the marriage, if the healthy spouse consents to marry in spite of being made aware of the fact that the other spouse is suffering from the said disease.” *Mr. X*, A.I.R. 2003 S.C. 664 at para. 6. *See also* *Mr. X v. Hospital Z*, (2000) 9 S.C.C. 439, para. 1 (designating the petition as an “application for clarification/directions in the case already decided by this Court”). In its clarification, the Court acknowledged that its observations on the right to marry were “uncalled for” and that “there was no need for this Court to go further and declare in general as to what rights and obligations arise in such contexts as to right to privacy or confidentiality or whether such persons are entitled to be married or not....” *Mr. X*, A.I.R. 2003 S.C. at paras. 4, 6-8. The Court also noted that it had not issued notice or heard from NGOs working on this matter before

- making the statements pertaining to the right to marry. *Id.* at para. 4. The judicial clarification in *Mr. X*, which has been interpreted as restoring the right of persons living with HIV/AIDS to marry (although they must first obtain informed consent from their potential spouses), demonstrates the Court's willingness to withdraw unreasonable findings that are outside the scope of litigation. See Richard Elliot, *India: Supreme Court Resiles from Earlier Statements Denying Right to Marry*, 8 (1) HIV/AIDS LAW AND POLICY REVIEW (April 2003).
289. Interview with U. Ramanathan, Apr. 8, 2006, *supra* note 87. In a 1995 case, the Court admitted the testimony of a rape victim on the ground that "even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes"—but its use of an archaic, offensive term to refer to the victim because she had engaged in an extramarital relationship revealed a disturbing lack of gender sensitivity. *State of Maharashtra v. Madhukar Narayan Mardikar*, A.I.R. 1991 S.C. 207, para. 8 (emphasis added).
290. Interview with U. Ramanathan, Apr. 8, 2006, *supra* note 87.
291. Interview with Indian legal expert, May 12, 2006, *supra* note 105.
292. Interview with U. Ramanathan, Apr. 8, 2006, *supra* note 87.
293. See, e.g., Confidential Interview with two Judges, High Court of Mumbai, in Mumbai, India (Mar. 16, 2006) (stating that the Court's broad interpretation of Article 21 "has gone in the right direction, and there is much scope for further expansion") [hereinafter Confidential Interview with Mumbai High Court Judges, Mar. 16, 2006]; Interview with Justice L. Seth, Apr. 10, 2006, *supra* note 108 (describing the expansion of Article 21 as a "very positive" trend and noting that "everything has been brought into it, which... is wonderful.").
294. Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78. See also Interview with Justice M. J. Rao, Apr. 11, 2006, *supra* note 102 (describing Article 21 as a "supermarket" because "you can bring any right under Article 21 and pass orders").
295. Interview with F. Nariman, Mar. 10, 2006, *supra* note 12. Mr. Nariman added: "Fortunately, of course, Article 21...now cannot be suspended. That is perhaps why we pile everything onto Article 21. But if it could be suspended, we would go right down to the bottom of the ocean.... Therefore, it is very difficult to put all your rights into one basket, which is an Article 21 basket." Mr. Nariman resigned from his post of Additional Solicitor General when the Indian Prime Minister suspended Fundamental Rights during the 1970s 'Emergency Period.' *Id.*
296. Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84.
297. INDIA CONST. art. 14.
298. *Maneka Gandhi v. Union of India*, (1978) 2 S.C.R. 621, para. 7.
299. *Id.* (holding that in order for procedures to be in conformity with Article 14, they must be "right and just and fair and not arbitrary, fanciful or oppressive").
300. *Indira Jaising, Gender Justice and the Supreme Court, in SUPREME BUT NOT INFALLIBLE, supra* note 101, at 294 [hereinafter, Jaising, *Gender Justice*].
301. INDIA CONST. arts. 15(1).
302. *Air India v. Meerza*, (1982) 1 S.C.R. 438
303. *Id.* at para. 62. The AHs had to be unmarried when first employed. The managing director had the discretion to extend employment for AHs over 35 years of age, on a yearly basis, for up to ten years.
304. *Id.* at paras. 39(1), 44-49, 57.
305. *Id.* at para. 64.
306. *Id.* at para. 68.
307. See, e.g., Jaising, *Gender Justice, supra* note 300, at 294, 297.
308. *Air India*, 1 S.C.R. 438 at paras. 80-81.
309. *Id.* at paras. 82, 101. The Court rightly rejected a proposal to selectively apply the pregnancy restriction to unmarried women, on the grounds that "the distinction of first pregnancy of a married woman and that of an unmarried woman does not have any reasonable or rational basis and cannot be supported." *Id.* at para. 83. Furthermore, the Court struck down the regulation on retirement age—not on the basis of gender inequality, but because the extension of employment for AHs who were over 35 years old was "entirely at the mercy and sweet will of the Managing Director," and "conferment of such a wide and uncontrolled power on the managing director is clearly violative of Article 14, as the provision suffers from the vice of excessive delegation of powers." *Id.* at para. 119.
310. *Id.* at para. 101.
311. *Javed v. Haryana*, A.I.R. 2003 S.C. 3057. See *infra* at Part II, Ch. 7 (*Javed* case study).
312. See, e.g., MADHU KISHWAR, OFF THE BEATEN TRACK: RETHINKING GENDER JUSTICE FOR INDIAN WOMEN 37-54 (Oxford University Press 1999) (2002) (recounting experience as petitioner in PIL against a discriminatory tribal law); *Madhu Kishwar v. State of Bihar*, (1996) Supp. 1 S.C.R. 442.
313. *Githa Hariharan v. Reserve Bank of India*, (1999) 1 S.C.R. 669.
314. *Id.* at paras. 24-25.

315. *Id.* at para. 24.
316. *Id.* at para. 14 (concurring opinion).
317. Jaising, *Gender Justice*, *supra* note 300, at 301.
318. CRC *Concluding Observations 2004*, *supra* note 191, at para. 46.
319. *See infra* at Part I, Ch. 4 (discussion of religion-based personal laws).
320. *Id.* at art. 15(3).
321. Interview with F. Nariman, Mar. 10, 2006, *supra* note 12.
322. Petitioner's Proposed Directions to be Incorporated as Guidelines to be Declared by the Hon'ble Supreme Court of India, at 5, *Vishaka*, Supp. 3 S.C.R. 404.
323. Jaising, *Gender Justice*, *supra* note 300, at 297 (citing *Abdul Aziz v. Bombay*, (1954) S.C.R. 930; *Sowmithri v. Union of India* (1985) Supp. S.C.C. 137).
324. *Id.* at 294.
325. INDIA CONST. art. 37. *See* P. D. MATHEW S.J., PART IV OF CONSTITUTION OF INDIA: DIRECTIVE PRINCIPLES OF STATE POLICY 1 (Indian Social Inst., 2002) [hereinafter MATHEW, DIRECTIVE PRINCIPLES].
326. INDIA CONST. art. 38.
327. *Id.* at arts. 38(2), 39A, 42, 47.
328. *Id.* at arts. 39(e)(f).
329. *Id.* at art. 37; *see* MATHEW, DIRECTIVE PRINCIPLES, *supra* note 325, at 1.
330. *Fatehchand Himmatlal v. State of Maharashtra*, (1977) 2 S.C.R. 828, para. 22.
331. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
332. *Id.*; Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84; Interview with Justice M. J. Rao, Apr. 11, 2006, *supra* note 102.
333. *See supra* at Part I, Ch. 3 (discussion of Article 21).
334. *Bandhua Mukti Morcha*, 2 S.C.R. 67 at para. 10.
335. Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84.
336. Interview with Justice M. J. Rao, Apr. 11, 2006, *supra* note 102.
337. Borelli, *Positive Obligations of States*, *supra* note 189, at 101 (The State's obligations to enforce civil and political rights may also require "actual expenditure and the deployment of resources to ensure that the rights can be freely exercised," and as such are more likely to have far-reaching social and economic consequences beyond individual findings of violation, insofar as substantive changes to domestic law or policy are required") (quoting A. CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* 345 (Clarendon Press 1993)).
338. *See* Confidential Interview with Mumbai High Court Judges, Mar. 16, 2006, *supra* note 293.
339. *PUDR*, Air 1982 SC 1473, para. 2.
340. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
341. INDIA CONST. art. 12.
342. *M.C. Mehta*, (1987) 1 S.C.R. 819, paras. 10, 12, 13.
343. *Id.* at paras. 13, 16 (listing the following non-exhaustive factors as "relevant for determining whether a corporation is an instrumentality or agency of the State or not"—(1) financial assistance given by the State and magnitude of such assistance, (2) any other form of assistance whether of the usual kind or extraordinary, (3) control of management and policies of the corporation by the State, (4) State conferred or State protected monopoly status, and (5) functions carried out by the corporation, [*i.e.*,] whether public functions closely related to governmental functions). *Id.* at para. 16. Whether or not the corporation was created by a statute is immaterial. *Id.* at para. 17.
344. *See supra* at Part I, Ch. 3 (discussion of right to health cases). *Consumer Education*, 1 S.C.R. 626 at para. 163; *Parmanand Katara*, 3 S.C.R. 997 at para. 8.
345. *M.C. Mehta*, 1 S.C.R. 819 at para. 17.
346. INDIA CONST. art. 51A(a)(e).
347. Ministry of Human Resource Development, Department of Education, *Fundamental Duties of Citizens: Report of the Committee set up by the Government of India to Operationalize the Suggestions to Teach Fundamental Duties to the Citizens of the Country*, 1 (1999) [hereinafter *Fundamental Duties Report*].
348. E-mail from Justice J. S. Verma, former Chief Justice, Supreme Court of India and former Chairperson, National Human Rights Commission, to Avani Mehta Sood, author (Sept. 30, 2006).
349. *Fundamental Duties Report*, *supra* note 347, at 12.
350. *Id.* at 2.
351. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
352. *Fundamental Duties Report*, *supra* note 347, at 12; *see Vishaka*, Supp. 3 S.C.R. 404 at para. 5.
353. *Danial Latifi v. Union of India*, A.I.R. 2001 S.C. 3958, para. 21.
354. P. D. MATHEW & P. M. BAKSHI, *HINDU MARRIAGE AND DIVORCE* 1 (Indian Social Inst. 2005). Jains, Buddhists, and Sikhs are governed by the Hindu Marriage Act. *Id.* at 4. To provide a form of marriage and divorce for partners belonging to different religions, the Indian Parliament enacted the Special Marriage Act, which can now also be used by individuals belonging to the same religion or to no religion at all. A special marriage, also known as a civil or

- registered marriage, 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 (Indian Social Inst. 2005).
355. Interview with National Judicial Academy fellow in Bhopal, India (Apr. 15, 2006) [hereinafter Interview with National Judicial Academy fellow, Apr. 15, 2006].
356. CEDAW *Gen. Rec. 21*, *supra* note 158, at para. 44. *See also id.* at para. 17 (noting that “variations in law and practice relating to marriage have wide-ranging consequences for women, invariably restricting their rights to equal status and responsibility within marriage”). *See also* ICPD Programme of Action, *supra* note 9, at para. 7.3.
357. CEDAW *Concluding Observations 2000*, *supra* note 140, at para. 60.
358. HRC *Concluding Observations 1997*, *supra* note 174, at para. 17 (recommending that “efforts be strengthened towards the enjoyment of their rights by women without discrimination and that personal laws be enacted which are fully compatible with the Covenant”).
359. CRC *Concluding Observations 2004*, *supra* note 191, at para. 29.
360. INDIA CONST. Preamble.
361. *Id.* at art. 13(1).
362. *Id.* at art.13(3)(a). *See also id.* at art. 13(3)(b) (“‘laws in force’ include laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas”). *See, e.g.*, *Bombay v. Narasu Appa Mali*, A.I.R. 1952 Bom. 84, para. 12 (“Custom or usage is deviation from personal law and not personal law itself.”).
363. INDIA CONST. art. 44.
364. *Narasu Appa Mali*, A.I.R. 1952 Bom. 84, at paras. 13, 12, 10; *see Ahmedabad Women’s Action Group (AWAG) v. Union of India*, (1997) 2 S.C.R. 389, paras. 7-11. *See also* Jaising, *Gender Justice*, *supra* note 300, at 298.
365. *Krishna Singh v. Mathura Ahir* (1980) 2 S.C.R. 660, para. 15.
366. *Masilamani Madular v. Idol of Sri Swaminathaswami Thirukoli*, (1996) 1 S.C.R. 1068, para. 15.
367. *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) 3 S.C.R. 844, para. 35.
368. Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78.
369. *See AWAG*, 2. S.C.R. 389 at para. 14 (“[W]e are satisfied that the arguments advanced before us [on the constitutionality of personal laws]...involve issues, in our opinion, to be dealt with by the legislature.”).
370. *Javed*, A.I.R. 2003 S.C. 3057 at paras. 46-47 (citing *Shah Bano*, 3 S.C.R. 844, and Sarla Mudgal, President, Kalyani v. Union of India, (1995) Supp. 1 S.C.R. 250).
371. *Sarla Mudgal*, Supp. 1 S.C. R. at paras. 30-31.
372. *Shah Bano*, 3 S.C.R. 844.
373. *See id.* at para. 2; *Latifi*, A.I.R. 2001 S.C. 3958 at para. 3.
374. *Shah Bano*, 3 S.C.R. 844 at paras. 12, 14.
375. *Latifi*, A.I.R. 2001 S.C. 3958 at para. 3.
376. *Shah Bano*, 3 S.C.R. 844 at para. 34.
377. *Id.*
378. *Id.* at para. 35.
379. *Id.* at para. 16 (emphasis added).
380. *Id.*
381. *Id.* at paras. 17-25.
382. Telephone Interview with Shruti Pandey, Director, Women’s Justice Initiative, Human Rights Law Network, in New Delhi, India (Sept. 18, 2006) [hereinafter Interview with S. Pandey, Sept. 18, 2006]; *Latifi*, A.I.R. 2001 S.C. 3958 at para. 6.
383. GARY JEFFREY JACOBSON, THE WHEEL OF LAW: INDIA’S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT 106 (Oxford Univ. Press 2003); *see Latifi*, A.I.R. 2001 S.C. 3958 at para. 22. The Act, for example, statutorily defined the *iddat* maintenance period as “three menstrual courses after the date of divorce,” three lunar months for women not subject to menstruation, and for a pregnant woman, “the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier.” *Id.* Unlike traditional Muslim law, the legislation did provide alternatives for a woman who is unable to maintain herself after the *iddat* period, but did not rely upon the husband in this regard. Rather, the Act stated that the magistrate is empowered to order an indigent divorced woman’s relatives or the state *wakf* board to pay for her maintenance. *Id.* at para. 25. According to the Muslim Women’s Act, a Muslim couple can be governed by the provisions of Section 125 only if both parties so request by jointly or separately filing an affidavit or declaration with the court. *Id.* at para. 26. Critiquing these provisions, the National Commission for Women, which appeared as a petitioner in *Latifi*, argued that the remedy provided to a woman under the Muslim Women’s Act is “illusory inasmuch as firstly, she cannot get sustenance from the parties who were...strangers to the marital relationship which led to divorce; secondly, *wakf* boards would usually not have the means to support such destitute women since they are themselves perennially starved of funds and thirdly, the potential legatees of a destitute woman would either be too young or too old so as to be able to extend requisite support.” *Id.* at para.

- 17 (italics added). The Commission further highlighted the troublesome provision of the Act that makes “the availability and applicability of the remedy as provided by Section 125 CrPC dependent upon the whim, caprice, choice and option of the husband of the Muslim divorcee....” *Id.*
384. *Latifi*, A.I.R. 2001 S.C. 3958 at para. 6.
385. *Id.* at para. 12.
386. JACOBSON, THE WHEEL OF LAW, *supra* note 383, at 106; Telephone Interview with S. Pandey, Sept. 18, 2006, *supra* note 382.
387. Rajeev Dhavan & Fali Nariman, *The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities*, in SUPREME BUT NOT INFALLIBLE, *supra* note 101, at 274 [hereinafter Dhavan & Nariman, *The Supreme Court and Group Life*].
388. *The Shah Bano Legacy*, THE HINDU, Aug. 10, 2003.
389. Interview with Supreme Court judicial law clerk, Mar. 8, 2006, *supra* note 79.
390. Jaising, *Gender Justice*, *supra* note 300, at 299-300.
391. *Id.* at 300 (italics added).
392. *Latifi*, A.I.R. 2001 S.C. 3958.
393. *Id.* at para. 5.
394. *Id.* at paras. 21, 33 (italics added).
395. *Id.* at para. 36.
396. *The Shah Bano Legacy*, THE HINDU, Aug. 10, 2003; Interview with S. Pandey, Sept. 18, 2006, *supra* note 382; Discussion with Mumbai-based women’s rights lawyer, Law & Life in South Asia Conference, Yale University, New Haven, USA (May 12, 2006).
397. Interview with National Judicial Academy fellow, Apr. 15, 2006, *supra* note 355; Interview with Indian legal expert, May 12, 2006, *supra* note 105.
398. *See, e.g., Latifi*, A.I.R. 2001 S.C. 3958, para. 34 (“It is well settled that when by appropriate reading of an enactment the validity of the Act can be upheld, such interpretation is accepted by courts and not the other way.”); *Hariharan*, 1 S.C.R. 669 at paras. 24-26; *supra* at Part I, Ch. 3 (discussion of *Hariharan* case); Jaising, *Gender Justice*, *supra* note 300, at 301; Interview with S. Pandey, Sept. 18, 2006, *supra* note 382.
399. Dhavan & Nariman, *The Supreme Court and Group Life*, *supra* note 387, at 274.
400. Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84.
401. Confidential Interview with Supreme Court Justice, Apr. 13, 2006, *supra* note 122.
402. *See, e.g.,* Interview with R. Dhavan, Mar. 25, 2006, *supra* note 277; Confidential Interview with Supreme Court Justice, Apr. 13, 2006, *supra* note 122.
403. *Shah Bano*, 3 S.C.R. 844 at para. 35.
404. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
405. *Id.* Some point to Goa, the only state that has a uniform civil code, as evidence that “in the same country, given a different kind of environment, it works...even though people practice different religions.” Confidential Interview with Mumbai High Court Judges, Mar. 16, 2006, *supra* note 293; Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27. However, Goa has some unique characteristics, including its history—it had a different colonizer and became a part of India after the country’s independence.
406. Interview with Justice L. Seth, Apr. 10, 2006, *supra* note 108.
407. *Sarla Mudgal*, Supp. 1 S.C.R. 250.
408. *Id.* at paras. 26-27.
409. *Id.* at para. 34.
410. *Id.* at para. 30.
411. *Id.* at paras. 35-36 (quoting INDIA CONST. art. 44).
412. *Id.* at paras. 39, 43.
413. Jaising, *Gender Justice*, *supra* note 300, at 302.
414. *Id.*
415. Srikrishna, *Skimming a Cat*, *supra* note 105, at J-15; *see AWAG*, 2 S.C.R. 389.
416. *AWAG*, para. 3; *see also* paras. 4-19.
417. *Id.* at para. 17; *see* Jaising, *Gender Justice*, *supra* note 300, at 178, fn. 142.
418. Interview with National Judicial Academy fellow, Apr. 15, 2006, *supra* note 355.
419. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
420. Interview with S. Pandey, Sept. 18, 2006, *supra* note 382.
421. *Sarla Mudgal*, Supp. 1 S.C.R. 250 at para. 43.
422. Justice A. S. Anand, Chair, National Human Rights Commission, 26th Bhimsen Sachar Memorial Lecture at Lajpat Bhawan, New Delhi (Dec. 1, 2005), *available at* <http://nhrc.nic.in/> (follow “Speeches” hyperlink).
423. NATIONAL COMMISSION FOR WOMEN, SEXUAL HARASSMENT AT WORKPLACE ii (2001). *See* National Commission for Women Act, No. 20, Acts of Parliament, 1990, *available at* <http://pib.nic.in/feature/feyr2002/fmar2002/f050320021.html>. For a more detailed description of the Commission’s work, *see* <http://pib.nic.in/feature/feyr2002/fmar2002/f050320021.html> (last visited Nov. 20, 2006) (stating that the NCW was established 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”).
424. P.D. MATHEW S.J., NATIONAL COMMISSION FOR WOMEN, 6-7 (Indian Social Inst. 2004).

425. Interview with Dr. Girija Vyas, Chairperson, National Commission for Women, in New Delhi, India (Apr. 12, 2006) [hereinafter Interview with G. Vyas, Apr. 12, 2006].
426. *Id.*
427. Interview with Yogesh Mehta, Legal Officer, National Commission for Women, in New Delhi, India (Apr. 12, 2006) [hereinafter Interview with Y. Mehta, Apr. 12, 2006].
428. According to a table provided by NCW's legal officer, the cases were: National Domestic Workers Welfare Trust v. Union of India, (NCW filed affidavit in support of comprehensive legislation to protect the rights of domestic workers); Shakti Vahini v. Union of India (NCW impleaded as respondent in case on failure to implement guidelines for rehabilitation of child sexual trafficking workers); Prajwala v. Union of India (NCW intervened in case on protection and rehabilitation of victims of trafficking); Safai Karmachari Andolan v. Union of India (NCW filed affidavit on manual scavenging); NCW v. Government of NCT Delhi and NCW v. Union of India (NCW filed petitions against judgments holding marriage of minor girls valid).
429. Interview with Y. Mehta, Apr. 12, 2006, *supra* note 427.
430. Interview with G. Vyas, Apr. 12, 2006, *supra* note 425. For example, Dr. Vyas disclosed that the Commission is currently planning to initiate a PIL "seeking directions and guidelines for victims of acid burning," because "there is no rehabilitation for the girls and the government is not giving money for their treatment." *Id.*
431. *Id.*
432. Interview with Y. Mehta, Apr. 12, 2006, *supra* note 427.
433. *Id.*
434. Interview with S. Pandey, June 8, 2006, *supra* note 91.
435. *Latifi*, A.I.R. 2001 S.C. 3958 at para. 17; *see supra* note 383 (discussion of NCW's arguments in *Latifi* case).
436. Interview with G. Vyas, Apr. 12, 2006, *supra* note 425.
437. *Delhi Domestic Working Women's Forum v. Union of India*, (1994) Supp. 4 S.C.R. 528; Seth, *Social Action Litigation*, *supra* note 63, at 106.
438. Notice of the Assistant Registrar to the National Commission for Women, *Smt. Seema v. Ashwani Kumar*, T.P. (Civ.) No. 291 of 2005 (Supreme Court of India, Nov. 18, 2005).
439. *Smt. Seema* Feb. 14 Order, *supra* note 160, at para. 13.
440. *Id.*, at para. 15.
441. Confidential Interview with Supreme Court Justice, Apr. 13, 2006, *supra* note 122.
442. CEDAW *Concluding Observations 2000*, *supra* note 140, para. 69.
443. *Id.* at paras. 84-85.
444. Interview with U. Ramanathan, Apr. 8, 2006, *supra* note 87; Interview with Indian human rights lawyer, in New York, USA (June 8, 2006) [hereinafter Interview with Indian human rights lawyer, June 8, 2006.].
445. Interview with U. Ramanathan, Apr. 8, 2006, *supra* note 87; Interview with Indian human rights lawyer, June 8, 2006. 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* case. The NCW's legal officer explained that the commission framed the scheme years ago, but the government sent it back for redrafting. The NCW did not submit the revised scheme until mid-2005. Interview with Y. Mehta, Apr. 12, 2006, *supra* note 427; *see supra* at Part I, Ch. 5 (discussion of *Delhi Domestic Working Women's Forum* case).
446. Interview with F. Nariman, Mar. 10, 2006, *supra* note 12.
447. Interview with Y. Mehta, Apr. 12, 2006, *supra* note 427. The 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, including the power to implement its recommendations, call for records, and "ensure that people who are summoned come here immediately." *Id.*
448. E-mail from Yogesh Mehta, Legal Officer, National Commission for Women, to Avani Mehta Sood, author (Aug. 26, 2006).
449. Protection of Human Rights Act 1993, No. 10, Acts of Parliament (1994), available at <http://nhrc.nic.in/HRAct.htm#chap2>.
450. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
451. Protection of Human Rights Act 1993, *supra* note 449, at § 12.
452. *Id.* at § 13(1); *see* P. D. MATHEW, THE LAW TO PROTECT HUMAN RIGHTS IN INDIA 47-48 (Indian Social Inst. 2005).
453. Interview with consultant to the National Human Rights Commission, in New Delhi, India (Mar. 28, 2006).
454. For example, the NHRC collaborates with the National Academy of Legal Studies and Research University to publish a "Know Your Rights" series that is "intended to assist a wide audience to achieve a better understanding of the basic human rights, and of the international and national machinery available to help realize those rights." NATIONAL HUMAN RIGHTS COMMISSION, KNOW YOUR RIGHTS: INTERNATIONAL HUMAN RIGHTS CONVENTIONS, inside cover (2004-05). The NHRC has translated this series into various

- regional languages and distributed the manuals free of cost through local NGOs. According to an NHRC official, the publications have been well received. Interview with National Human Rights Commission official, in New Delhi, India (Mar. 28, 2006) [hereinafter Interview with NHRC official, Mar. 28, 2006].
455. A women's rights lawyer explained that her organization collaborates with the NHRC to invite judges to colloquiums, and that the NHRC also provides financial resources to help lawyers share their expertise at judicial workshops. Interview with S. Pandey, June 8, 2006, *supra* note 91.
456. Interview with NHRC official, Mar. 28, 2006, *supra* note 454.
457. See National Human Rights Commission, Ministry and Health and Family Welfare & United Nations Population Fund, *Declaration adopted at the National Colloquium on Population Policy, Development and Human Rights*, New Delhi, (2003), available at <http://www.nhrc.nic.in/Publications/PopulationP.pdf> [hereinafter NHRC Declaration]; *infra* note Part II, Ch. 7 (*Javed* case study).
458. Interview with NHRC official, Mar. 28, 2006, *supra* note 454; Interview with F. Nariman, Mar. 10, 2006, *supra* note 12.
459. Interview with NHRC official, Mar. 28, 2006, *supra* note 454; Interview with U. Ramanathan, Apr. 8, 2006, *supra* note 87; Confidential Interview with Supreme Court Justice, Apr. 13, 2006, *supra* note 122.
460. *Paramjit Kaur v. State of Punjab*, W.P. (Crl.) Nos. 497/95 & 447/95 (Supreme Court of India, Dec. 12, 1996), available at <http://www.ensaaf.org/dec96.html>; see National Human Rights Commission Order, Case No. 1/97/NHRC (arising out of W.P. 447/1995 & 497/1995), para. 2 (Aug. 4, 1997) [hereinafter NHRC Cremations Order], available at <http://www.ensaaf.org/aug97.html>.
461. NHRC Cremations Order, *supra* note 460, at paras. 4, 10; *Paramjit Kaur v. State of Punjab*, W.P. (Crl.) Nos. 497/95 & 447/1995, para. 4 (Supreme Court of India, Sept. 10, 1998) [hereinafter *Paramjit Kaur* Sept. 10, 1998 Order].
462. NHRC Cremations Order, *supra* note 460, at paras. 16-17; *Paramjit Kaur* Sept. 10, 1998 Order, *supra* note 461, at para. 5.
463. *Paramjit Kaur* Sept. 10, 1998 Order, *supra* note 461, at para. 8. The NHRC subsequently itself limited the scope of its inquiry. See National Human Rights Commission Order, Case No. 1/97/NHRC (arising out of W.P. 447/1995 & 497/1995) (Jan. 13, 1999), available at <http://www.punjabjustice.org/legalbattles/nhrdocs/jan99.htm>. Human rights advocates have criticized the NHRC's handling of the Punjab cremations case. See, e.g., ENSAAF, *National Human Rights Commission: Punjab Mass Cremations Case*, <http://www.ensaaf.org/docs/nhrc.php> (last visited Nov. 20, 2006).
464. Interview with F. Nariman, Mar. 10, 2006, *supra* note 12.
465. National Human Rights Commission, *Human Rights Issues - The Programmes in pursuance of Supreme Court Remit*, <http://nhrc.nic.in/> (last visited Nov. 20, 2006) (mentioning *PUCL v. State of Tamil Nadu*, W.P. (Civ.) No. 3922 (1985); *Rakesh Chandra Narain v. State of Bihar*, (Civ.) No.339/96, No.901/93, No.80/94 and No.448/94 (Supreme Court of India, 1997); *Dr. Upendra Bakshi v. State of Uttar Pradesh*, W.P. No.1900/81 (Supreme Court of India, 1997); *PUCL v. Union of India*, W.P. (Civ.) No.42/97 (Supreme Court of India, 1997).
466. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
467. Protection of Human Rights Act 1993, *supra* note 449, at § 3(2). The chairperson of the NHRC must be a former chief justice of the Indian Supreme Court, and one seat on the NHRC must be reserved for the chairperson of the NCW. *Id.* The current composition of the NHRC can be seen on its website, <http://nhrc.nic.in/>.
468. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
469. *Paramjit Kaur* Sept. 10, 1998 Order, *supra* note 461, at paras. 10-11.
470. Interview with U. Ramanathan, Apr. 8, 2006, *supra* note 87.
471. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27. As Chairperson of the NHRC, Justice Verma harnessed the forces of activists who were “working all on their own, in different directions, sometimes duplicating work” by establishing “core groups” to coordinate their functions and optimize their performance. For example, prioritizing public health as “not merely a health issue, [but] a human rights issue,” he established a core group of public health professionals, including doctors and lawyers, to promote the message that “any convention whose preamble says health means not merely absence of disease, but general well-being—physical, mental, and psychological health.” *Id.* Although these core groups are now largely defunct, public health—particularly maternal mortality—is still a top priority of the NHRC. *Id.*; Interview with NHRC official, Mar. 28, 2006, *supra* note 454. Reproductive rights advocates could complement their litigation strategies by proactively urging the NHRC to establish new core groups to address ongoing violations of women's rights to reproductive health and self-determination.
472. Some of the Law Commission's more recent reports relating to women's rights include *Sale of Women and Children: Proposed Section 373-A, Indian Penal Code* (1993), *The*

- Indian Divorce Act, 1869 (Act IV of 1869)* (1998), *Review of Rape Laws* (2000), and *Property Rights of Women: Proposed Reforms Under the Hindu Law* (2000). Law Commission of India, *List of Reports Forwarded* (1955-2006), [http://www.lawcommissionofindia.nic.in/main.htm#LIST_OF_REPORTS_FORWARDED_\(1955-1999\)](http://www.lawcommissionofindia.nic.in/main.htm#LIST_OF_REPORTS_FORWARDED_(1955-1999)) (last visited Nov. 20, 2006).
473. Law Commission of India, *Medical Treatment after Accidents and During Emergency Medical Condition and Women in Labour*, Report No. 201 (2006).
474. Interview with Justice M. J. Rao, Apr. 11, 2006, *supra* note 102.
475. *Id.*
476. *Sakshi v. Union of India*, A.I.R. 2004 S.C. 3566.
477. *Id.* at paras. 8, 11-14, 21, 29. The *Sakshi* Court refused to alter the penal code's definition of rape "by a process of judicial interpretation." Instead, it stated, "We hope and trust that the Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves." *Id.* at paras. 26, 35. See SAKSHI ET AL., SEXUAL ASSAULT LAW REFORMS 1-22 (2000) for a detailed history of the *Sakshi* case [hereinafter SAKSHI, LAW REFORMS].
478. Interview with F. Nariman, Mar. 10, 2006, *supra* note 12; Telephone Interview with Naina Kapur, Director, Sakshi, New Delhi, India (Aug. 29, 2006) [hereinafter Interview with N. Kapur, Aug. 29, 2006].
479. Order, *Sakshi v. Union of India*, W.P. (Cr.) No. 33 of 1997 (Supreme Court of India, Aug. 9, 1999); Letter from B. P. Jeevan Redey, Chairman, Law Commission of India, to Shri Ram Jethmalani, Minister for Law, Justice & Co. Affairs, introducing 172nd Report on Review of Rape Laws (March 25, 2000), in SAKSHI, LAW REFORMS, *supra* note 477, at 23 [hereinafter Letter from B. P. Jeevan Redey]. Specifically, the Law Commission was asked to consider *inter alia* whether given "the widespread prevalence of child sexual abuse, would it not be appropriate to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration within the meaning of the expression 'penetration'" in section 375 of the Indian Penal Code. Law Commission of India, *Review of Rape Laws*, Report No. 172 (Mar. 25, 2003), available in SAKSHI, LAW REFORMS, *supra* at 29 [hereinafter Law Commission, *Review of Rape Laws*].
480. Interview with Justice L. Seth, Apr. 10, 2006, *supra* note 108; see Law Commission, *Review of Rape Laws*, *supra* note 479.
481. Letter from B. P. Jeevan Redey, *supra* note 479.
482. Petitioner's Submission, *Sakshi v. Union of India*, W.P. (Cr.) No. 33 of 1997 (Supreme Court of India, undated), in SAKSHI, LAW REFORMS, *supra* note 477, at 190-95.
483. *Id.* at 15-16.
484. Interview with Justice L. Seth, Apr. 10, 2006, *supra* note 108.
485. *Vishaka*, Supp. 3 S.C.R. 404.
486. Interview with Akhila Sivasdas, Director, Center for Advocacy and Research, in New Delhi, India (Mar. 14, 2006) [hereinafter Interview with A. Sivasdas, Mar. 14, 2006].
487. CEDAW *Concluding Observations 2000*, *supra* note 140, at para. 34; Pal, *Redress for Violence against Women in India*, *supra* note 251, at 7.
488. See Petition at paras. 14-15, *Vishaka v. State of Rajasthan*, W.P. (Cr.) Nos. 666-70 of 1992 (Supreme Court of India) [hereinafter *Vishaka* Petition]; see Mihir Desai, *Starting the Battle*, COMBAT LAW, Vol. 4 (Jan.-Feb. 2005) [hereinafter Desai article].
489. SAira Kurup, *Four Women India Forgot*, THE TIMES OF INDIA, <http://timesofindia.com/articleshow/1519056.cms> (last visited Nov. 20, 2006) [hereinafter Kurup article]; see *Vishaka* petition, *supra* note 488, at paras. 31-37.
490. *Vishaka* Petition, *supra* note 488, at para. 3; Kurup article, *supra* note 489; Desai article, *supra* note 488.
491. *Vishaka* Petition, *supra* note 488, at paras. 43-58; Kurup article, *supra* note 489; Desai article, *supra* note 488.
492. *Vishaka* Petition, *supra* note 488, at para. 65.
493. Pal, *Redress for Violence against Women in India*, *supra* note 251, at 3 (citing unreported decision of the Rajasthan trial court dated Nov. 15, 1995).
494. Telephone Interview with Naina Kapur, Director, Sakshi, in New Delhi, India (Apr. 10, 2006) [hereinafter Interview with N. Kapur, Apr. 10, 2006.].
495. *Id.*
496. *Id.*
497. CEDAW *Gen. Rec. 19*, *supra* note 139, paras. 18, 24(t)(i); Interview with N. Kapur, Apr. 10, 2006, *supra* note 494 ("They came up with a definition that was identical to Recommendation 19 [of the CEDAW Committee]... a definition that was on par with the common definition of sexual harassment. This does not surprise me because international human rights are very much [about] life that people experience. They can talk about it; they just do not use the legalese.").
498. Interview with N. Kapur, Apr. 10, 2006, *supra* note 494.
499. *Id.*
500. *Vishaka* Petition, *supra* note 488.
501. Interview with N. Kapur, Apr. 10, 2006, *supra* note 494.

- See *Vishaka* Petition, *supra* note 488, at paras. 31-39.
502. *Id.*
503. *Id.*
504. *Vishaka* Petition, *supra* note 488, at paras. 67-72.
505. *Id.* at paras. 1-2, 12, Grounds III; see INDIA CONST. arts. 14, 19, 21. In its requests for relief, the *Vishaka* petition asked the Court for an order directing the Central Bureau of Investigation to conduct an inquiry into Bhanwari Devi's rape and into the State's "lapses, omissions and commissions" thereafter; an order for action against errant officials who wrongly handled Bhanwari Devi's complaint; an order establishing a committee to frame guidelines for the prevention of sexual abuse in the workplace; and an order directing the State of Rajasthan to pay compensation to Bhanwari Devi. *Vishaka* Petition, *supra* note 488, Prayer, at 33-34. The requested inquiry was conducted and Bhanwari Devi did receive Rs. 25,000 in compensation. E-mail from Naina Kapur, Director, Sakshi, to Avani Mehta Sood, author (Sept. 9, 2006).
506. *Convention on the Elimination of All Forms of Discrimination against Women, Ratification by India Accession by Maldives and Morocco*, U.N. Doc. C.N. 251. 1993 TREATIES-5 (Depository Notification) (1993); Special Rapporteur on violence against women, its causes and consequences, *Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45*. U.N. Doc. E/CN.4/1995/42 (Nov. 22, 1994); INTERNATIONAL LABOUR ORGANIZATION, *COMBATING SEXUAL HARASSMENT AT THE WORKPLACE*, Module 7; Sue Walpole, *Australian Approaches to Sexual Harassment*, MAV/1993/WP.9 (Oct. 3, 1993); An Act Declaring Sexual Harassment Unlawful in the Employment, Education or Training Environment, and for Other Purposes, Rep. Act No. 78771 (July 25, 1994) (Phil.). The *Vishaka* petition was filed in 1992 and the Indian government ratified CEDAW in 1993.
507. Proposed Directions of Petitioners at 3-19, *Vishaka v. State of Rajasthan*, W.P. (Cr.) Nos. 666-70 of 1992 (Supreme Court of India) [hereinafter *Vishaka* Petitioners' Proposed Directions].
508. *Id.* See CEDAW *Gen. Rec. 19*, *supra* note 139, at paras. 1, 6-11, 22.
509. Letter from Fali Nariman, Senior Advocate, to Avani Mehta Sood, author (Aug. 28, 2006). See also Interview with N. Kapur, Aug. 29, 2006, *supra* note 478.
510. *Vishaka* Petitioners' Proposed Directions, *supra* note 507, at 19-20.
511. Interview with local expert, in New Delhi, India (Mar. 7, 2006).
512. Interview with N. Kapur, Apr. 10, 2006, *supra* note 494.
513. *Id.*
514. Interview with N. Kapur, Aug. 29, 2006, *supra* note 478.
515. Interview with N. Kapur, Apr. 10, 2006, *supra* note 494.
516. *Vishaka*, Supp. 3 S.C.R. 404.
517. *Id.* at para. 2.
518. *Id.* at para. 1.
519. *Id.* at para. 15; para. 3 (citing INDIA CONST. arts. 14, 15, 19, 21).
520. *Id.* at para. 5 (citing INDIA CONST. arts. 42, 51A). The Court implicitly relied upon the Fundamental Duties in framing guidelines "to ensure gender justice and realise the concept of gender equality and prevent sexual harassment of women in all work places through the judicial process." Fundamental Duties Report, *supra* note 347, at 12.
521. *Vishaka*, Supp. 3 S.C.R. 404 at para. 7.
522. *Id.* at para. 12 (citing CEDAW, *supra* note 134, at arts. 11, 24; CEDAW *Gen. Rec. 19*, *supra* note 139, at paras. 17-18, 24(j)).
523. *Id.* at para. 16.
524. *Id.*; see INDIA CONST. art. 141.
525. *Vishaka*, Supp. 3 S.C.R. 404 at paras. 6-7 (citing INDIA CONST. arts. 51, 73, 253; Seventh Schedule, Union List, para. 14); See also *id.* at para. 13.
526. *Id.* at para. 10.
527. *Id.* at para. 15 (citing *Nilabati Behera v. State of Orissa*, (1993) 2 S.C.R. 581).
528. *Id.* at para. 15; *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh*, (1995) 183 C.L.R. 273, 288. This decision is relevant to the Indian context because the status of international conventions is similar under Indian and Australian law. The *Teoh* decision stated: "It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. ... But the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law." *Id.* at 287.
529. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27; see *supra* at Part I, Ch. 2 (discussion on Indian Supreme Court's application of international law).
530. *Vishaka*, Supp. 3 S.C.R. 404 at para. 9.
531. Interview with N. Kapur, Aug. 29, 2006, *supra* note 478. See *Vishaka* Petitioners' Proposed Directions, *supra* note 507; Guidelines Suggested by the Government at 3-19, *Vishaka v. State of Rajasthan*, W.P. (Cr.) Nos. 666-70 of 1992 (Supreme Court of India, 1996); Petitioner's Reply to Proposed

- Government Guidelines, *Vishaka v. State of Rajasthan*, W.P. (Cr.) Nos. 666-70 of 1992 (Supreme Court of India, 1996); Petitioner's Suggestions to Proposed Government Guidelines, *Vishaka v. State of Rajasthan*, W.P. (Cr.) Nos. 666-70 of 1992 (Supreme Court of India, 1996).
532. Interview with N. Kapur, Aug. 29, 2006, *supra* note 478.
533. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
534. Interview with N. Kapur, Apr. 10, 2006, *supra* note 494. Interview with F. Nariman, Mar. 10, 2006, *supra* note 12.
535. Interview with N. Kapur, Apr. 10, 2006, *supra* note 494.
536. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
537. *Id.*; *Jani Bai v. State of Rajasthan*, A.I.R. 1989 Raj. 115.
538. *Nilabati Behera*, 2 S.C.R. 581.
539. *Jani Bai* was initiated by a writ petition filed in the Rajasthan High Court under Art. 226 of the Constitution. The challenged legislation's Statement of Objects and Reasons stated, "the preference to a son alone... is justified to avoid fragmentation of the holding since the daughter after marriage goes to another family while the son remains in the same family." *Jani Bai*, A.I.R. 1989 Raj. 115 at para. 15.
540. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
541. *Id.*
542. *Id.*
543. *Jani Bai*, A.I.R. 1989 Raj. 115 at para. 20; Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27. In reaching this conclusion, Justice Verma drew upon a 1955 Rajasthan act that provides for all state laws that use only masculine pronouns to be interpreted as including females, unless it appears that the legislature intended to the contrary. *Id.* at para. 18.
544. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
545. *Vishaka*, Supp. 3 S.C.R. 404 at para. 15 (citing *Nilabati Behera*, 2 S.C.R. 581).
546. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27. See *Nilabati Behera*, 2 S.C.R. 581 at para. 20 ("We may also refer to Art. 9(5) of the International Covenant on Civil and Political Rights, which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right."). Article 9(5) of the Civil and Political Rights Covenant provides: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." Justice Verma noted that he could use this provision of the Covenant only as support, and not as the basis for his decision, due to the Indian government's declaration. The declaration states: "With reference to article 9 of the International Covenant on Civil and Political Rights, the Government of the Republic of India takes the position that... under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State." UNHCR *Declarations and Reservations*, *supra* note 164.
547. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27. Telephone Interview with Justice J. S. Verma, in New Delhi, India (Aug. 15, 2006) [hereinafter Interview with Justice J. S. Verma, Aug. 15, 2006].
548. Telephone Interview with Asha Rani, Sexual Harassment Project Coordinator, Sakshi, in New Delhi, India (Mar. 30, 2006) [hereinafter Interview with A. Rani, Mar. 30, 2006].
549. *Id.*
550. See Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
551. See *supra* at Part I, Ch. 3 (discussion of constitutional law and private actors).
552. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27; *Vishaka*, Supp. 3 S.C.R. 404 at paras. 16(11), 16(3)(c). See Industrial Employment (Standing Orders) Act of 1946, Act of Parliament, 1946, available at <http://labour.nic.in/act/acts/IndustrialEmploymentAct.doc>.
553. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
554. Interview with N. Kapur, Apr. 10, 2006, *supra* note 494. See CEDAW *Gen. Rec. 19*, *supra* note 139, at para. 9.
555. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
556. *Id.*
557. Interview with A. Rani, Mar. 30, 2006, *supra* note 548.
558. *Id.* These "experiential" trainings educate participants about the history and important features of sexual harassment law (i.e., the *Vishaka* case) and engage them in role-playing exercises. Sakshi's project coordinator said: "People do not know what sexual harassment is, they just have their assumptions and stereotypes. When we do the trainings, there is a shift in attitude and they understand what it is and its impact in the workplace." *Id.*
559. Interview with local human rights lawyer, in New Delhi, India (Mar. 25, 2006).
560. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
561. Interview with Y. Mehta, Apr. 12, 2006, *supra* note 427; National Commission for Women, Sexual Harassment of Women at their Work Place (Prevention) Bill, paras. 16-18 (2003), available at <http://ncw.nic.in/shpbill1.htm>

- [hereinafter National Commission for Women Sexual Harassment Bill]. Unfortunately, the government's pending Working Women (Prevention of Sexual Harassment at Workplaces) Bill does not make any special provisions for unorganized workers. See Bill No. VIII of 2006 (introduced Mar. 3, 2006), available at http://rajyasabha.nic.in/bills-ls-rs/2006/VIII_2006.PDF [hereinafter, Working Women Bill].
562. NATIONAL HUMAN RIGHTS COMMISSION (NHRC), KNOW YOUR RIGHTS: SEXUAL HARASSMENT OF WOMEN AT THE WORKPLACE, 1, 14-20 (2004).
563. *Id.* at 20-27.
564. *Id.* at ii.
565. *Id.* at ii-iii; National Commission for Women, *Highlights of Achievements*, <http://ncw.nic.in/highlights.htm> (last visited Nov. 20, 2006).
566. Interview with Y. Mehta, Apr. 12, 2006, *supra* note 427. See National Commission for Women, Sexual Harassment Bill, *supra* note 561.
567. Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84; Interview with U. Ramanathan, Apr. 8, 2006, *supra* note 87.
568. Interview with U. Ramanathan, Apr. 8, 2006, *supra* note 87.
569. Interview with Supreme Court judicial law clerk, Mar. 8, 2006, *supra* note 79.
570. Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84.
571. *Id.*
572. Interview with A. Sivadas, Mar. 14, 2006, *supra* note 486; Interview with A. Bajpai, Mar. 29, 2006, *supra* note 218.
573. Interview with A. Bajpai, Mar. 29, 2006, *supra* note 218; Interview with National Judicial Academy fellow, Apr. 15, 2006, *supra* note 355.
574. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
575. *Id.*
576. Interview with A. Sivadas, Mar. 14, 2006, *supra* note 486.
577. *Id.*
578. Interview with legal editor, Apr. 9, 2006, *supra* note 108.
579. Interview with R. Thawani, Mar. 24, 2006, *supra* note 92; Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78; Interview with Indian legal expert, May 12, 2006, *supra* note 105; E-mail from Rohan Thawani, Supreme Court Advocate, to Avani Mehta Sood, author (Aug. 22, 2006).
580. E-mail from Rohan Thawani, Supreme Court Advocate, to Avani Mehta Sood, author (Aug. 22, 2006).
581. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
582. *Id.*
583. Working Women Bill, *supra* note 561. In its *Statement of Objects and Reasons*, the bill credits the Supreme Court and the NCW with having “taken up this issue very seriously.” It recognizes, however, that not all workplaces have established sexual harassment complaint committees, and states: “Though the Supreme Court judgment is there, no law, however, has been enacted to deal exclusively with this issue, which is of vital importance for the working women throughout the country. Hence this Bill.” *Id.*
584. Interview with N. Kapur, Apr. 10, 2006, *supra* note 494.
585. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
586. Apparel Export Promotion Council v. Chopra, (1999) 1 S.C.R. 117. The employer accused of sexual harassment was the head of an agency sponsored by the Ministry of Textiles.
587. *Id.* at paras. 24-25, 29.
588. *Id.* at para. 29.
589. *Id.* at para. 28.
590. *Id.* at para. 27.
591. *Id.* at para. 27.
592. Medha Kotwal Lele v. Union of India, W.P. (Cr.) Nos. 173-177 of 1999 (Supreme Court of India).
593. Interview with Indian human rights lawyer, June 8, 2006, *supra* note 444.
594. Internal report of local human rights organization, 2006 (on file with author and CRR).
595. *Id.*
596. Medha Kotwal Lele v. Union of India, W.P. (Cr.) No. 173-177 of 1999, Item No. 104, Court No. 3, Section PIL, para 6 (Jan. 17, 2006).
597. *Id.*
598. Medha Kotwal Lele v. Union of India, W.P. (Cr.) No. 173-177 of 1999, Item No. 36, Court No. 2 (Apr. 26, 2004).
599. Interview with F. Nariman, Mar. 10, 2006, *supra* note 12.
600. Interview with N. Kapur, Apr. 10, 2006, *supra* note 494.
601. *Id.* In addition, Kapur criticized the decision for creating confusion about third-party sexual harassment (harassment by people outside the workplace).
602. *Id.*
603. *Id.*
604. *Id.*
605. *Id.*
606. *Id.*
607. Interview with A. Sivadas, Mar. 14, 2006, *supra* note 486.
608. Javed v. State of Haryana, A.I.R. 2003 S.C. 3057.
609. *Id.* at paras. 2, 5, 66.
610. *Id.* at para. 4. The Haryana Provision's two-child norm went into effect one year after the commencement of the act, and applied only to candidates who had a third child or more

- after that point—i.e., those who were reproductively active. *Id.* at paras. 2-3.
611. *Id.* at para. 3; see Nirmala Buch, *Law of Two-Child Norm in Panchayats: Implications, Consequences and Experiences*, ECONOMIC AND POLITICAL WEEKLY 2422 (June 11, 2005) [hereinafter Buch, *Law of Two-Child Norm: Implications*].
612. Buch, *Law of Two-Child Norm: Implications*, *supra* note 611, at 2421. Nirmala Buch, *Two-Child Norm in Panchayats: People's Experiences*, in COERCION VERSUS EMPOWERMENT 21 (Shruti Pandey et al. eds., 2006); [hereinafter Buch, *Two-Child Norm: People's Experiences*].
613. E-mail from Rohan Thawani, Supreme Court Advocate, to Avani Mehta Sood, author (Aug. 28, 2006).
614. Buch, *Law of Two-Child Norm: Implications*, *supra* note 611, at 2428.
615. *Id.*; See also Buch, *Two-Child Norm: People's Experiences*, *supra* note 612, at 28-30, 32-33; Rita Sarin, *Two-Child Norm and Political Participation of Women in Marginal Communities*; Jagmati Sangwan, *State Overview: Haryana*, in COERCION VERSUS EMPOWERMENT, *supra* note 6, at 40, 73-75.
616. *Javed*, A.I.R. 2003 S.C. 3057 at para. 5.
617. *Id.* at para. 5.
618. The ICPD *Programme of Action* took a stand against coercive means of addressing population growth, and instead advocated for the empowerment of women. *ICPD Programme of Action*, *supra* note 9, at paras. 4.4, 4.16, 4.17, 7.3, 7.12, 7.22; see COERCION VERSUS EMPOWERMENT, *supra* note 6, at xxv. CEDAW's Article 16 instructs the State to ensure that men and women have the rights to "decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights." CEDAW, *supra* note 134, at art. 16.1(e); see also CEDAW, *supra* at arts. 7, 14.2; CEDAW *Gen. Rec. 21*, *supra* note 158, at paras. 21-22. The Civil and Political Rights Covenant provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home...." Civil and Political Rights Covenant, *supra* note 165, at art. 17.1; see also Civil and Political Rights Covenant, *supra* at arts. 23.1, 23.2, 25; Human Rights Committee, *General Comment 25, The right to participate in public affairs, voting rights, and the right of equal access to public service*, para. 15, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996) [hereinafter HRC *Gen. Com. 25*]. The Economic, Social and Cultural Rights Covenant directs the State to recognize that "[t]he widest possible protection and assistance should be accorded to the family...." Economic, Social and Cultural Rights Covenant, *supra* note 178, at art. 10.1. See also *Beijing Platform for Action*, *supra* note 10, at paras. 13, 14, 96, 223, 277.
619. Telephone Interview with Rohan Thawani, Supreme Court Advocate, in New Delhi, India (Aug. 8, 2006) [hereinafter Interview with R. Thawani, Aug. 8, 2006].
620. *Javed*, A.I.R. 2003 S.C. 3057 at para. 65.
621. *Id.* at para. 24.
622. *Id.* at paras. 8, 20. In regard to the norm being set at two children, the Court stated, "The number of children...is based on legislative wisdom [and]...is a matter of policy decision which is not open to judicial scrutiny." *Id.* at para. 8.
623. *Id.* at paras. 18, 20.
624. National Population Policy 2000, *supra* note 219, at para. 6. See also NHRC Declaration, *supra* note 457, at 1-2 ("Note[s] with concern that population 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. This is not consistent with the spirit of the National Population Policy."); A. R. Nanda, *Indian Population Policy: An Overview*; Colin Gonsalves, *Two Boy Norm: State Governments Poised to Blunder*, in COERCION V. EMPOWERMENT, *supra* note 6, at 14-17, 18-19 [hereinafter Gonsalves, *Two Boy Norm*].
625. *Javed*, A.I.R. 2003 S.C. 3057 at paras. 9, 10-11, 20.
626. *Id.* at para. 10.
627. *Id.* at para. 62.
628. Buch, *Law of Two-Child Norm: Implications*, *supra* note 611, at 2429.
629. *Javed*, A.I.R. 2003 S.C. 3057 at para. 62.
630. *Id.* at para. 63.
631. Interview with R. Thawani, Mar. 24, 2006, *supra* note 92.
632. Buch, *Law of Two-Child Norm: Implications*, *supra* note 611, at 2421.
633. *Id.* at 2429.
634. *Javed*, A.I.R. 2003 S.C. 3057 at para. 63. Although the *Javed* decision stated that the legislature may "choose[] to carve out an exception" to the Haryana Provision for females, it maintained that "merely because women are not excepted from the operation of disqualification it does not render it unconstitutional." *Id.* at para. 63. A restriction based on a false assumption of equal decision-making power does, however, violate the constitutional right to equality. Additionally, the Court did not carve out an exception for couples that have twins or triplets during a second pregnancy, stating: "Exceptions do not make the rule nor render the rule irrelevant. One swallow does not make a summer; a single instance or indicator of something is not necessarily significant." *Id.* at para. 64.

635. *Supra* at introduction (box on women's lack of reproductive self-determination).
636. *See, e.g.*, Abhijit Das, *A Review of the Supreme Court Judgment, in COERCION VERSUS EMPOWERMENT*, *supra* note 6, at 235 [hereinafter Das critique]; Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
637. *Javed*, A.I.R. 2003 S.C. 3057 at para. 40 (citing *Air India*, 1 S.C.R. 438).
638. *Id.* *See Air India*, 1 S.C.R. 438 at para. 101; *supra* at Part I, Ch. 3 (discussion of *Air India* case).
639. *Javed*, A.I.R. 2003 S.C. 3057 at paras. 31-37, 39.
640. INDIA CONST. art. 25(1).
641. *Id.* at art. 25(2)(a).
642. *Javed*, A.I.R. 2003 S.C. 3057 at para. 42.
643. The CEDAW Committee has noted, "Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited." CEDAW *Gen. Rec. 21*, *supra* note 158, para. 14. Similarly, the Human Rights Committee has observed: "[E]quality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently it should be definitely abolished wherever it continues to exist." HRC *Gen. Com. 28*, *supra* note 171, para. 24.
644. *Javed*, A.I.R. 2003 S.C. 3057 at para. 44 ("No religious scripture or authority has been brought to our notice which provides that marrying less than four women or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy would be irreligious or offensive to the dictates of the religion.").
645. *Id.* at para. 45; *see also* paras. 48, 55-57.
646. *Id.* at para. 43.
647. *Id.* at paras. 46-47; paras. 49-50 (citing *Bombay v. Narasu Appa Mali*, A.I.R. 1952 Bom. 84); *see supra* at Part 1, Ch. 4 (discussion of *Shah Bano* and *Sarla Mudgal* cases).
648. *Id.* at para. 34.
649. *Id.* (emphasis added).
650. *See, e.g.*, Buch, *Law of Two-Child Norm: Implications*, *supra* note 611, at 2422; Das critique, *supra* note 636, at 235; Pandey, *Introduction*, COERCION V. EMPOWERMENT, *supra* note 6, at xxii [hereinafter Pandey, *Introduction*]; A. R. Nanda, *Obsolescence and Anachronism of Population Control: From Demography to Demology*, 33 DEMOGRAPHY INDIA 1, 7 (2004).
651. Interview with Dr. A. R. Nanda, Executive Director, Population Foundation of India, in New Delhi, India (Mar. 7, 2006 [hereinafter Interview with A.R. Nanda, Mar. 7, 2006.]. Nanda, *Obsolescence and Anachronism*, *supra* note 646, at 6-7. *See also* Almas Ali, *Population: Myths and Facts*, COERCION V. EMPOWERMENT, *supra* note 6, at 7 [hereinafter Ali, *Myths and Facts*].
652. Interview with A. R. Nanda, Mar. 7, 2006; *see* Ali, *Myths and Facts*, *supra* note 651, at 7.
653. Das critique, *supra* note 636, at 234-35.
654. Interview with U. Ramanathan, Apr. 8, 2006, *supra* note 87.
655. Interview with A. R. Nanda, Mar. 7, 2006, *supra* note 651.
656. Das critique, *supra* note 636, at 235. *See also* Gonsalves, *Two Boy Norm*, *supra* note 624, at 19 ("In fact, India has experienced the sharpest fall in its decadal growth rate, from 23.81 percent in 1991 to 21.34 percent in 2001, and its lowest population growth rate since Independence."); Interview with A. R. Nanda, Mar. 7, 2006, *supra* note 651 (noting that fertility and population growth rates in India are on the decline and that the Court failed to understand the nature of demographic transition and population momentum that is taking place in India). Population growth takes place during the first stage of demographic transition, when mortality is controlled through better health care and fertility is high. In the second stage of demographic transition, mortality rates decline but fertility remains high. In the third stage, mortality rates remain low and fertility rates also come down. According to population experts, India is now entering the third stage, not the first. Interview with A. R. Nanda, *supra*; Das critique, *supra*, at 234-35. However, the theory of population momentum explains that population will continue to increase due to the momentum of past periods of high growth, even after that growth rate has been arrested and the fertility rate is on the decline. As one human rights lawyer explained, "The growth of a population as huge as India could not have come to a complete halt at once, its sheer inertia would keep it moving for some time, much like a huge truck that keeps rolling, even after the brakes have been pushed!" Pandey, *Introduction*, *supra* note 650, at xxiii.
657. Interview with A. R. Nanda, Mar. 7, 2006, *supra* note 651.
658. *Id.*
659. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
660. *Id.*
661. Interview with A. R. Nanda, Mar. 7, 2006, *supra* note 651; Interview with Indian legal expert, May 12, 2006, *supra* note 105.
662. Interview with Indian legal expert, May 12, 2006, *supra* note 105.
663. Interview with local rights activist, in New Delhi, India

- (Mar. 24, 2006).
664. Sreelatha Menon, *A judgment can't be a solution to all problems*, TIMES OF INDIA - AHMEDABAD, Mar. 21, 2006, at 14 [hereinafter Lahoti article].
665. *Id.*
666. *Id.*
667. Gonsalves, *Two Boy Norm*, *supra* note 624, at 19.
668. Interview with A. R. Nanda, Mar. 7, 2006, *supra* note 651.
669. *Id.*; Telephone Interview with Abhijit Das, Director, Sahayog and Director, Centre for Health and Social Justice, New Delhi, India (Aug. 11, 2006) [hereinafter Interview with A. Das, Aug. 11, 2006.].
670. Interview with R. Thawani, Mar. 24, 2006, *supra* note 92.
671. Interview with A. R. Nanda, Mar. 7, 2006, *supra* note 651.
672. Das critique, *supra* note 636, at 234-35.
673. Gonsalves, *Two Boy Norm*, *supra* note 624, at 19.
674. Das critique, *supra* note 636, at 235; Interview with A. Das, Aug. 11, 2006, *supra* note 669.
675. *Id.*
676. Interview with local expert, in New Delhi, India (Mar. 7, 2006); Interview with A. Das, Aug. 11, 2006, *supra* note 669.
677. Pandey, *Introduction*, *supra* note 650, at xix. *See also* Interview with A. Bajpai, Mar. 29, 2006, *supra* note 218 (noting the majority opinion in the country is not that a woman should have the choice to decide how many children to bear free of state intervention). *India Today*, a popular 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. The article suggested that the government and corporate sector enforce family planning by, *inter alia*, giving incentives to those with small families and fining those with more than two children. The article did, however, also mention more productive methods of population control such as promoting contraceptive use and discouraging early marriage. *Id.*
678. Telephone Interview with Akhila Sivadas, Director, Center for Advocacy and Research, in New Delhi, India (Aug. 9, 2006) [hereinafter Interview with A. Sivadas, Aug. 9, 2006.].
679. Buch, *Two-Child Norm: People's Experiences*, *supra* note 612, at 25-27.
680. Interview with A. Sivadas, Aug. 9, 2006, *supra* note 678.
681. Interview with National Judicial Academy fellow, Apr. 15, 2006, *supra* note 355.
682. Interview with A. Sivadas, Mar. 14, 2006, *supra* note 486.
683. Interview with local human rights lawyer, in New Delhi, India (Mar. 25, 2006).
684. NHRC Declaration, *supra* note 457, at 2.
685. *Id.*
686. *Id.* at 3-4; National Human Rights Commission, *Human Rights Issues*, <http://nhrc.nic.in/> (follow “Human Rights Issues” hyperlink; then follow “Population Policy – Development and Human Rights” hyperlink) (last visited Nov. 27, 2006).
687. Interview with G. Vyas, Apr. 12, 2006, *supra* note 425.
688. Interview with Justice M. J. Rao, Apr. 11, 2006, *supra* note 102.
689. Interview with local human rights lawyer, in New Delhi, India (Mar. 25, 2006). The Court reiterated its decision to uphold the two-child norm in October 2004. *Zile Singh v. State of Haryana*, A.I.R. 2004 S.C. 5100, para. 10 (“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 in [*Javed v. State of Haryana*].”) (italics added).
690. Interview with local human rights lawyer, in New Delhi, India (Mar. 25, 2006).
691. Interview with A. R. Nanda, Mar. 7, 2006, *supra* note 651.
692. Interview with local human rights lawyer, in New Delhi, India (Mar. 25, 2006).
693. *Id.*
694. Interview with A. Sivadas, Aug. 9, 2006, *supra* note 678; *see Preface*, COERCION VERSUS EMPOWERMENT, *supra* note 6, at vii. The director of the Center for Advocacy and Research, who handled the media for the Tribunal, “made sure that the journalists came, that they were put in touch with the right people, and that strong things were written every day.” Interview with A. Sivadas, *supra*. Her goal was to shift the media dialogue away from panic about population explosion.
695. *Preface*, COERCION VERSUS EMPOWERMENT, *supra* 6, at viii.
696. Interview with A. Sivadas, Mar. 14, 2006, *supra* note 486.
697. Abhijit Das, *Postscript*, in COERCION VERSUS EMPOWERMENT, *supra* note 6, at 172 [hereinafter Das, *Postscript*]; *see* Interview with A. Sivadas, Mar. 14, 2006, *supra* note 486 (noting that the Tribunal has led to “a truce in the discourse” on coercive population policies).
698. Das, *Postscript*, *supra* note 697, at 171; Interview with A. Sivadas, Mar. 14, 2006, *supra* note 486; Interview with A. Das, Aug. 11, 2006, *supra* note 669.
699. Interview with local human rights lawyer, in New Delhi, India (Mar. 25, 2006); *See* Das, *Postscript*, *supra* note 697, at 172; Interview with A. Das, Aug. 11, 2006, *supra* note 669; India eNews.com, *Haryana abolishes two-child norm*

- for elections (July 21, 2006), <http://indiaenews.com/2006-07/15724-haryana-abolishes-two-child-norm-elections.htm>.
700. Das, *Postscript*, *supra* note 697, at 172-73.
701. Interview with A. Sivadas, Aug. 9, 2006, *supra* note 678.
702. Interview with A. Das, Aug. 11, 2006, *supra* note 669.
703. *FFDA* Petition, *supra* note 4. The Respondent states listed in the caption of the petition were Chattisgarh, Madhya Pradesh, Rajasthan, Bihar, Jharkhand, Orissa, Andhra Pradesh, Maharashtra, Uttar Pradesh, and Karnataka.
704. Interview with S. Pandey, June 8, 2006, *supra* note 91.
705. *FFDA* Petition, *supra* note 4, at para. 5.
706. *Id.* at paras. 5-16 (presenting findings from surveys by National Family Health (1998-99), the Directorate of Economics and Statistics in Chattisgarh (2001), UNICEF (2001), the Social Welfare Department of Bihar (2002), the Joint Women's Programme (2002), and *FFDA* (2002-2003)); *id.* at para. 17.
707. *Id.* at paras. 14 (ii), (viii).
708. *Id.* at paras. 7(b)-(c). The petitioners later supplemented the record before the Court by filing a study by the Mamta Health Institute for Mother and Child demonstrating the link between child marriage and maternal mortality.
709. *Id.* at para. 7(b).
710. *FFDA* Petition, *supra* note 4, at paras. 18(ii).
711. *Id.* at *Grounds*, at para. (C)
712. *Id.* at para. 23.
713. *Id.* at para. 20 (citing *Sushila Gothala v. State of Rajasthan*, 1995 A.I.R. Raj. 90; *William Rebello v. Agnelo Vaz*, 1996 A.I.R. Bom. 204).
714. The petition cited to the Universal Declaration of Human Rights' provision on the right to marry with free and full consent; the 1956 Supplementary Convention on Abolition of Slavery, the Slave Trade, Institutions and Practices Similar to Slavery—which pertains to any practice “whereby a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind...”; the 1964 Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages; CEDAW's Article 16; and the International Labor Organization's Convention on the Elimination of Worst Forms of Child Labour. *FFDA* Petition, *supra* note 4, at para. 21 (II)-(VI).
715. *FFDA* Petition, *supra* note 4, at para. 21(I) (citing to Children's Rights Convention, *supra* note 194, at arts. 1-3, 6, 12, 19, 24, 28-29, 34-36).
716. *Id.* at para. 21.
717. *Id.* at para. 22.
718. Interview with S. Pandey, June 8, 2006, *supra* note 91; Interview with S. Pandey, Sept. 18, 2006, *supra* note 382.
719. Application for Interim Directions/Orders, Forum for Fact Finding Documentation and Advocacy v. Union of India, W.P. (Civ.) No. 212 of 2003 (Supreme Court of India, April 25, 2003).
720. Interim Order, Forum for Fact Finding Documentation and Advocacy v. Union of India, W.P. (Civ.) No. 212 of 2003, Item No. 303 (Supreme Court of India, Feb. 28, 2005).
721. *Id.*
722. Interview with S. Pandey, June 8, 2006, *supra* note 91; Siddharth Narrain, *Ambivalence in the Law*, FRONTLINE, Jul. 2-15, 2005, available at <http://www.hinduonnet.com/fline/fl2214/stories/20050715004802300.htm>
723. Interview with S. Pandey, June 8, 2006, *supra* note 91.
724. *Id.*
725. *Id.*
726. *Id.*
727. Interim Order, Forum for Fact Finding Documentation and Advocacy v. Union of India, W.P. (Civ.) No. 212 of 2003 (Supreme Court of India, May 13, 2006); Human Rights Law Network Internal Report (undated) (on file with author and CRR).
728. Human Rights Law Network Internal Report, *supra* note 727.
729. *Smt. Seema* Feb. 14 Order, *supra* note 106, at para. 18.
730. Notice of the Assistant Registrar to the National Commission for Women, *Smt. Seema v. Ashwani Kumar*, T.P. (Civ.) No. 291 of 2005, (Supreme Court of India, Nov. 18, 2005).
731. *Id.* at 3.
732. Affidavit on Behalf of the National Commission for Women, *Smt. Seema v. Ashwani Kumar*, T.P. Civ. No. 291 of 2005, para. 5 (Dec. 9, 2005).
733. *Smt. Seema* Feb. 14 Order, *supra* note 160, at para. 18.
734. *Id.* at para. 17. See *supra* at Part I, Ch. 2 (discussion of India's CEDAW declaration).
735. Interview with S. Pandey, June 8, 2006, *supra* note 91. The petition was originally filed with Healthwatch as the sole petitioner, but the Court registrar objected on the grounds that the organization was not registered. Thereafter, Healthwatch's Coordinator of Advocacy, Ramakant Rai, was added as a named petitioner. According to an HRLN lawyer, Rai had strong credibility as a petitioner because he was very familiar with the issue at the grassroots level. *Id.*
736. Petition, *Ramakant Rai & Health Watch U.P. and Bihar v. Union of India*, W.P. (Civ.) No. 209 of 2003, at A-1 (Supreme Court of India, 2003) [hereinafter *Ramakant Rai* Petition].
737. *Id.* at paras. 1, 3.
738. *Id.* at para. 1.
739. *Id.* at para. 5.

740. *Id.* at paras. 6, II(v), (vii), (viii), (xviii), 7(xi), 8(iv).
741. *Id.* at para. 8(xi).
742. *Id.* at paras. 6, I(iv), II(xvii), 9.
743. *Id.* at para. A-5.
744. *Id.* at para. 10.
745. Interview with S. Pandey, June 8, 2006, *supra* note 91.
746. *Id.*
747. *Ramakant Rai* Petition, *supra* note 736, at para. 11.
748. *Id.* at para. 11 (I-IV).
749. *Id.* at para. 14, *Grounds* (D)-(E).
750. *Id.* at paras. 12-13, *Grounds* D (citing *Mittal v. State of Uttar Pradesh*, (1989) 3 S.C.C. 223; *State of Madhya Pradesh v. Ashram*, (1997) *Accident Claim Journal* 1224; *Nilabati Behera*, 2 S.C.R. 581; *Upadhyaya v. State of Andhra Pradesh*, (2001) 1 S.C.C. 437; and *Consumer Education*, 1 S.C.R. 626).
751. The memorandum argued that because the facts and violations in the IACHR and *Ramakant Rai* cases were similar, the IACHR settlement in favor of the woman “supports a finding by the court in the instant case of the Government of India’s responsibility under national and international law for the violations documented in the petitioner’s writ petition....” Center for Reproductive Rights (CRR), Memorandum in support of *Ramakant Rai* Petition, para. 22 (April 1, 2004).
752. Center for Reproductive Rights, Addendum to memorandum in support of *Ramakant Rai* Petition, at 1 (April 1, 2004) [hereinafter CRR Addendum].
753. *Ramakant Rai* Petition, *supra* note 736, at *Prayer*, paras. (a)-(f). The additional recommendations in the CRR submission—which were made “in accordance with steps that other governments have taken to remedy past sterilization abuses and deter future ones”—suggested that the Indian government form a commission to examine sterilization practices in government health-care facilities; that the Ministry of Law and Justice investigate and prosecute government health-care personnel who have engaged in illegal and abusive sterilization practices; and that the Ministry of Health and Family Welfare ensure that all states have a “target-free” approach to reproductive health, ensure that the Sterilization Guidelines comport with international human rights standards, provide human rights training to all health-care providers, establish clear and independent patient complaint procedures in health facilities, and monitor all complaints that are filed. CRR Addendum, *supra* note 752, at paras. 26-31.
754. Interview with S. Pandey, June 8, 2006, *supra* note 92.
755. *Id.*
756. Interim Order, *Ramakant Rai v. Union of India*, W.P. (Civ.) No. 209 of 2003 (Supreme Court of India, Mar. 1, 2005) [hereinafter *Ramakant Rai* Interim Order].
757. *Id.* at para. 1.
758. *Id.* at paras. 1-7. In October 2005, the Court partly modified its order to double the compensation amount in states where insurance schemes were not viable due to the low rate of sterilization deaths. Interview with S. Pandey, June 8, 2006, *supra* note 92.
759. *Ramakant Rai* Interim Order, *supra* note 756, at para. 8.
760. *Id.* at para. 9.
761. *Id.* at para. 4.
762. Interview with S. Pandey, June 8, 2006, *supra* note 91.
763. *Id.*
764. Interview with A. Das, Aug. 11, 2006, *supra* note 669; Secretary for Health and Family Welfare, *Manual for Family Planning Insurance Scheme 2* (2005), available at <http://mohfw.nic.in/dofw%20website/Family%20Planning%20Insurance%20Manual.pdf>. [hereinafter *Manual for Family Planning Insurance Scheme*].
765. *Manual for Family Planning Insurance Scheme*, *supra* note 764, at 2, 4.
766. Interview with A. Das, Aug. 11, 2006, *supra* note 669.
767. *Id.*
768. *Bandhua Mukti Morcha*, 2 S.C.R. 67 at para. 13.
769. Interview with Justice M. J. Rao, Apr. 11, 2006, *supra* note 102.
770. Lahoti article, *supra* note 664.
771. Interview with Justice L. Seth, April 10, 2006, *supra* note 109.
772. Interview with Shruti Pandey, Director, Women’s Justice Initiative, Human Rights Law Network, New Delhi, India (May 25, 2006) [hereinafter Interview with S. Pandey, May 25, 2006].
773. *Id.*
774. Pal, *Redress for Violence against Women in India*, *supra* note 251, at 3.
775. Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78.
776. *See supra*, at Part II, Ch. 7 (*Javed* case study).
777. Madhava Menon, former Director of the National Judicial Academy (NJA), Comments at LEARS Access to Justice Conference, *supra* note 50. The NJA was established in 2002 to provide continuing education to judicial officers. The academy offers courses on various aspects of the law, including women’s rights. Interview with National Judicial Academy fellow, Mar. 30, 2006, *supra* note 218. For example, in mid-April 2006, the NJA held a judicial symposium on “Gender Discrimination, Population Policy, and Rights of Women,” which was attended by at least one judicial representative from each High Court in the country,

- including six female judges. Presentations by domestic and international advocates covered several reproductive rights issues such as population policies, abortion, gender-based violence, and HIV/AIDS, and included a discussion of international and comparative legal perspectives on reproductive rights. The judges were very receptive to this material and participated in vigorous discussions. The NJA planned to offer 24 courses in the 2005-2006 year. Each program culminates in the preparation of guidelines and recommendations, which are forwarded to the Chief Justice of the Supreme Court, who in turn forwards them to all High Court chief justices “so they can incorporate it wherever necessary.” Although the NJA trainings target only mid-level and High Court Judges, the NJA also coordinates with state judicial academies to train lower-level judicial officers. Interview with National Judicial Academy fellow, *supra*. See NJA website, <http://www.nja.nic.in>.
778. Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78.
779. Madhava Menon, *Gender Justice and Judiciary: An Assessment* 4-5 (2006), quoting JUSTICE A. S. ANAND, JUSTICE FOR WOMEN, CONCERNS AND EXPRESSIONS 71-72 (Universal Law Publ. Co. 2002) [hereinafter Menon, *Gender Justice and Judiciary*]. Justice Srikrishna noted that judges in the “younger generation” are particularly open to training efforts. Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78.
780. Interview with U. Ramanathan, Apr. 8, 2006, *supra* note 87. Dr. Ramanathan added that it makes a big difference to have women judges present at such trainings. *Id.* However, due to the small percentage of women on the High Courts, NJA trainings are often held without a single female judge in attendance. Interview with National Judicial Academy fellow, Apr. 15, 2006, *supra* note 355. See also Interview with N. Kapur, April 10, 2006, *supra* note 494 (“At the end of the meetings, I feel like [the judges] have got something, that their knowledge base has been enhanced; the next time a woman comes into their courtroom, they will definitely look at her differently.”).
781. Interview with N. Kapur, Apr. 10, 2006, *supra* note 494.
782. Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84.
783. Interview with S. Pandey, May 25, 2006, *supra* note 772.
784. See, e.g., Interview with National Judicial Academy fellow, Apr. 15, 2006, *supra* note 355.
785. Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84.
786. Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78. See also Interview with G. Vyas, Apr. 12, 2006, *supra* note 425; Confidential Interviews with Mumbai High Court Judges, Mar. 16, 2006, *supra* note 293.
787. Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78.
788. *Id.*
789. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
790. See Jaising, *Gender Justice*, *supra* note 300, at 292; National Resource Centre for Women, *Women in Judiciary*, <http://nrcw.nic.in/index2.asp?sublinkid=478> (last visited Nov. 21, 2006).
791. For example, only 4 out of 38 judges on the Chennai High Court are women; only 3 women sit on the 34-seat Gujarat High Court bench; only 2 of the 41 seats on the Punjab and Haryana High Court bench are occupied by women; and there are no women on the 14-seat bench of the Jammu and Kashmir High Court. Interview with High Court Justices of above-listed states, in Bhopal, India (Apr. 15, 2006).
792. National Resource Centre for Women, *Women in Judiciary*, <http://nrcw.nic.in/index2.asp?sublinkid=478> (last visited Nov. 21, 2006).
793. Menon, *Gender Justice and Judiciary*, *supra* note 779, at 5.
794. Confidential Interview with Supreme Court Justice, Apr. 13, 2006, *supra* note 122.
795. Confidential Interview with Supreme Court Justice, Apr. 13, 2006, *supra* note 122 (noting that generally, a High Court judge needs to serve at least ten years on the bench before being considered for elevation to the Supreme Court). See INDIA CONST. art. 124(3); *Supreme Court Advocates-on-Record Assoc.*, para. 70 (“Just as a High Court Judge at the time of his initial appointment has the legitimate expectation to become Chief Justice of a High Court in his turn in the ordinary course, he has the legitimate expectation to be considered for appointment to the Supreme Court in his turn, according to his seniority”); *supra* at Part I, Ch. 1 (box on judicial independence).
796. Jaising, *Gender Justice*, *supra* note 300, at 291. Although a caveat exists for appointing persons with “outstanding merit,” this means that “for women to be serious contenders, they must be of ‘outstanding merit’ to be equal to men.” *Id.* A former Attorney General of India noted that “a Senior Advocate has never been appointed directly to the Supreme Court,” and urged that “the time has come when the bench should be mixed with a greater number of women judges and... eminent jurists.” Mr. K. Parasaran, former Attorney General of India, Comments at LEARS Access to Justice Conference, *supra* note 50.
797. Confidential Interview with Supreme Court Justice, Apr. 13, 2006, *supra* note 122. See *Supreme Court Advocates-on-*

- Record Assoc.*, Supp. 2 S.C.R. 659 at para. 71 (“Along with other factors, such as, proper representation of all sections of the people from all parts of the country, legitimate expectation of the suitable and equally meritorious Judges to be considered in their turn is a relevant factor for due consideration while making the choice of the most suitable and meritorious amongst them, the outweighing consideration being merit, to select the best available for the apex court.”).
798. Jaising, *Gender Justice*, *supra* note 300, at 291, 293.
799. HRC *Concluding Observations 1997*, *supra* note 174, para. 17.
800. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.
801. Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84.
802. Interview with U. Ramanathan, Apr. 8, 2006, *supra* note 87. *See also* Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84 (emphasizing the need to generate judicial awareness of “hidden prejudices” regardless of gender).
803. Interview with Supreme Court judicial law clerk, Mar. 26, 2006, *supra* note 110; Confidential Interviews with High Court Justices, in Mumbai, India (March 16, 2005).
804. LEILA SETH, ON BALANCE, 112-115, 319-320 (Penguin Viking, New Delhi, 2003).
805. Interview with Justice L. Seth, Apr. 10, 2006, *supra* note 108.
806. *Id.*
807. *Id.* For example, Justice Seth noted that an unmarried woman going out with a man in the evenings is regarded as “a good reason for not making her a judge.” *Id.*
808. *Id.*
809. Confidential Interviews with High Court Justices, in Bhopal, India (Apr. 15, 2005).
810. *Id.*
811. *Id.*
812. *Id.*
813. *Id.*
814. Interview with local expert, in New Delhi, India (Mar. 7, 2006).
815. Interview with S. Pandey, June 8, 2006, *supra* note 91; Interview with local expert, in New Delhi, India (Mar. 7, 2006).
816. Interview with local expert, in New Delhi, India (Mar. 7, 2006); Interview with A. R. Nanda, March 7, 2006, *supra* note 651.
817. Interview with local Indian human rights lawyer, in New York, USA (June 8, 2006).
818. *Id.*
819. Interview with A. R. Nanda, March 7, 2006, *supra* note 651; Telephone Interview with Sabu George, public health activist, New Delhi, India (Mar. 30, 2006) [hereinafter Interview with S. George, Mar. 30, 2006.]; Interview with A. Das, Aug. 11, 2006, *supra* note 669.
820. Interview with S. George, Mar. 30, 2006, *supra* note 819.
821. Interview with A. R. Nanda, Mar. 7, 2006, *supra* note 651.
822. *See, e.g.*, Interview with S. George, Mar. 30, 2006, *supra* note 819.
823. Interview with student at National Law School - Bangalore (NLS), in New Delhi, India (Mar. 27, 2006); Interview with NLS alumnus, in New Delhi, India (Mar. 27, 2006); Interview with NLS alumnus, in New Haven, USA (May 12, 2006); Telephone Interview with NLS alumnus (Mar. 30, 2006).
824. Interview with NLS alumnus, in New Delhi, India (Mar. 27, 2006).
825. Interview with NLS student, in New Delhi, India (Mar. 27, 2006); E-mail from NLS alumnus to Avani Mehta Sood, author (Oct. 5, 2006).
826. Interview with NLS law student, in New Delhi, India (Mar. 27, 2006); E-mail from NLS alumnus to Avani Mehta Sood, author (Oct. 5, 2006).
827. E-mail from law student at Guru Gobind Singh Indraprastha University, School of Law and Legal Studies, in New Delhi, India, to Avani Mehta Sood, author (Oct. 2, 2006).
828. Interview with NLS alumnus, in New Delhi, India (Mar. 27, 2006); Interview with NLS student, in New Delhi, India (Mar. 27, 2006).
829. E-mail from NLS alumnus to Avani Mehta Sood, author (Oct. 5, 2006).
830. *Id.*
831. Interview with NLS law student, in New Delhi, India (Mar. 27, 2006); Telephone Interview with NLS alumnus (Mar. 30, 2006).
832. E-mail from NLS alumnus, to Avani Mehta Sood, author (Oct. 5, 2006).
833. *Id.*
834. Interview with NLS alumnus in New Delhi, India (Mar. 27, 2006).
835. *Id.* E-mail from NLS alumnus to Avani Mehta Sood, author (Oct. 5, 2006).
836. E-mail from NLS alumnus to Avani Mehta Sood, author (Oct. 5, 2006).
837. Interview with NLS alumnus in New Delhi, India (Mar. 27, 2006); E-mail from NLS alumnus to Avani Mehta Sood, author (Oct. 13, 2006).
838. Interview with R. Thawani, Mar. 24, 2006, *supra* note 92;

- Confidential Interview with High Court Judges, Mumbai High Court, Mar. 16, 2006, *supra* note 293; Interview with F. Nariman, Mar. 10, 2006, *supra* note 12; Interview with Justice L. Seth Apr. 10, 2006, *supra* note 108.
839. Interview with local human rights lawyer, in New Delhi, India (Mar. 25, 2006); Confidential Interview with Supreme Court Justice, Apr. 13, 2006, *supra* note 122. *See also* Confidential Interview with High Court Judges, Mumbai High Court, Mar. 16, 2006, *supra* note 293.
840. Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78; Interview with Supreme Court judicial law clerk, Mar. 26, 2006, *supra* note 110.
841. Interview with F. Nariman, Mar. 10, 2006, *supra* note 12; Interview with National Judicial Academy fellow, Apr. 15, 2006, *supra* note 355; *see* KISHWAR, OFF THE BEATEN TRACK, *supra* note 312, at 47-49 (“What was the point of fighting this case for so many years if the highest court of the land was admitting that its orders carried no weight whatsoever with the government of Bihar. . .”).
842. Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78.
843. Interview with Supreme Court judicial law clerk, Mar. 26, 2006, *supra* note 110.
844. Interview with F. Nariman, Mar. 10, 2006, *supra* note 12.
845. Srikrishna, *Skinning a Cat*, *supra* note 105, at J-17. *See also* Interview with Justice L. Seth, Apr. 10, 2006, *supra* note 108 (“Eventually the only thing the court can do is haul you in for contempt”); INDIA CONST. art. 142(2).
846. Interview with R. Thawani, Mar. 24, 2006, *supra* note 92; Srikrishna, *Skinning a Cat*, *supra* note 105, at J-18; Confidential Interview with High Court Judges, Mumbai High Court, Mar. 16, 2006, *supra* note 293.
847. Interview with Justice L. Seth, Apr. 10, 2006, *supra* note 108.
848. KISHWAR, OFF THE BEATEN TRACK, *supra* note 312, at 48.
849. Srikrishna, *Skinning a Cat*, *supra* note 105, at J-17.
850. *See, e.g.*, Interview with R. Thawani, Mar. 24, 2006, *supra* note 92; Interview with Justice L. Seth, Apr. 10, 2006, *supra* note 108.
851. Interview with Supreme Court judicial law clerk, Mar. 8, 2006, *supra* note 79. *See supra* at Part II, Ch. 6 (*Vishaka* case study).
852. KISHWAR, OFF THE BEATEN TRACK, *supra* note 312, at 41.
853. Srikrishna, *Skinning a Cat*, *supra* note 105, at J-19; Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 79.
854. Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78.
855. Interview with Justice M. J. Rao, Apr. 11, 2006, *supra* note 102; Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78.
856. Confidential Interview with Supreme Court Justice, in New Delhi, India (Mar. 27, 2006); Interview with Supreme Court judicial law clerk, Mar. 27, 2006, *supra* note 232.
857. Interview with R. Dhavan, Mar. 25, 2006, *supra* note 277.
858. Interview with National Human Rights Commission official, in New Delhi, India (Mar. 28, 2006); Discussion at Law & Life Conference, *supra* note 396.
859. Interview with Supreme Court judicial law clerk, Mar. 26, 2006, *supra* note 110; Discussion at Law & Life Conference, *supra* note 396.
860. Discussion at Law & Life Conference, *supra* note 396.
861. Interview with R. Dhavan, Mar. 25, 2006, *supra* note 277.
862. Interview with local expert, in New Delhi, India (Mar. 7, 2006).
863. Interview with National Judicial Academy fellow, Apr. 15, 2006, *supra* note 355.
864. Interview with R. Dhavan, Mar. 25, 2006, *supra* note 277.
865. Interview with local development expert, in New Delhi, India (Mar. 7, 2006)
866. *See supra* at Part II, Ch. 6 (*Vishaka* case study), Part II, Ch. 8 (*Ramakant Rai* case study).
867. Interview with local human rights lawyer, in New Delhi, India (Mar. 25, 2006).
868. *Mr. X*, A.I.R. 1999 S.C. 49 at para. 43 (internal quotation marks omitted).
869. KISHWAR, OFF THE BEATEN TRACK, *supra* note 312, at 51.
870. *Id.* at 47, 51 (describing the *Madhu Kishwar* PIL victim’s predicament as follows: “Instead of assisting her to get more than the discriminatory customary law allowed, her coming to the Supreme Court had actually endangered her life even further.”).
871. Interview with Padma Deosthali, Kamayani Mahabal, and Amita Pitre, Center for Enquiry into Health and Allied Themes (CEHAT), in Mumbai, India (Mar. 16, 2006) [hereinafter interview with CEHAT staff]. India’s Medical Termination of Pregnancy Act of 1971 (MTP Act) provides that a pregnancy may be terminated before 12 weeks by a registered medical practitioner, if the practitioner determines in good faith that either (i) continuation of the pregnancy would involve a risk to the life of the woman or of grave injury to her physical or mental health; or (ii) there is substantial risk of fetal impairment. Medical Termination of Pregnancy Act, No. 34 of 1971, paras. 3(1)-(4), available at <http://mohfw.nic.in/MTP.htm>. If the pregnancy is between 12 and 20 weeks, the consent of two medical practitioners is required (except where an abortion is immediately necessary to save the life of the woman). *Id.* The MTP Act permits any woman over the age of 18 to seek an abortion

- without the consent of her parent or spouse. *Id.* The 1994 Pre-Natal Diagnostic Techniques Act (PNDT Act) prohibits prenatal sex determination of fetuses, but does not affect the legality of abortion. The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, No. 57 of 1994, para. 6, available at [http://mohfw.nic.in/THE%20PNDT%20ACT%20\(PRINCIPAL%20ACT\)1994.htm](http://mohfw.nic.in/THE%20PNDT%20ACT%20(PRINCIPAL%20ACT)1994.htm) [hereinafter PNDT Act]. CEHAT's PIL sought amendments to and implementation of the PNDT Act. Centre for Inquiry into Health and Allied Themes v. Union of India, W.P. (Civ.) 301 of 2000 (Supreme Court of India). See CEHAT, *Call for a Ban on Sex Selection*, <http://www.cehat.org/pndt.html>, for more information on the PIL and the Court's orders.
872. INDIA CONST. art. 226 ("Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which is exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purposes.").
873. Interview with S. Pandey, June 8, 2006, *supra* note 91; Confidential Interview with Mumbai High Court Judges, Mar. 16, 2006, *supra* note 293.
874. Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84.
875. INDIA CONST. art. 51; *Vishaka*, 3 S.C.R. 404 at para. 14.
876. Confidential Interview with Mumbai High Court Judges, Mar. 16, 2006, *supra* note 293.
877. See, e.g., *Javed*, A.I.R. 2003 S.C. 3057 at para. 50 (citing *Bombay v. Narasu Appa Mali*, A.I.R. 1952 Bom. 84); *FFDA* Petition, *supra* note 4, at para. 20 (citing *Sushila Gothala v. State of Rajasthan*, A.I.R. 1995 Raj. 90; *William Rebello v. Agnelo Vaz*, A.I.R. 1996 Bom. 204).
878. Interview with S. Pandey, June 8, 2006, *supra* note 91.
879. E-mail from Naina Kapur, Director, Sakshi, to Avani Mehta Sood, author (Sept. 9, 2006).
880. *Id.*
881. Interview with Justice L. Seth, Apr. 10, 2006, *supra* note 108.
882. Interview with S. Pandey, Dec. 5, 2005, *supra* note 71.
883. See *Javed*, A.I.R. 2003 S.C. 3057 at para. 63; *supra* at Part II, Ch. 7 (*Javed* case study).
884. Interview with R. Thawani, Mar. 24, 2006, *supra* note 92. See also Interview with Shireen Jejeebhoy, Senior Program Associate, Population Council, in New Delhi, India (Mar. 13, 2006) (noting that although there is a growing body of evidence on reproductive health and behavior available, there is a dearth of quality data).
885. Interview with S. Pandey, June 8, 2006, *supra* note 91; Interview with local human rights lawyer, in New Delhi, India (Mar. 25, 2006).
886. Interview with S. Pandey, June 8, 2006, *supra* note 91.
887. See, e.g., Interview with F. Nariman, Mar. 10, 2006, *supra* note 12; Interview with S. Pandey, June 8, 2006, *supra* note 91. Those involved in the judicial system have noted that not many lawyers refer to international law in the domestic courts, even in important matters for which there is strong international legal support. Interview with National Judicial Academy fellow, Mar. 30, 2006, *supra* note 218; Interview with Supreme Court judicial law clerk, Mar. 26, 2006, *supra* note 110; Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84.
888. Interview with R. Thawani, Mar. 24, 2006, *supra* note 92; Interview with Supreme Court judicial law clerk, Mar. 26, 2006, *supra* note 110.
889. Interview with Indian legal expert, May 12, 2006, *supra* note 105.
890. CEDAW *Gen. Rec. 21*, *supra* note 158, paras. 17, 44; CEDAW *Concluding Observations 2000*, *supra* note 140, para. 60; CRC *Concluding Observations 2004*, *supra* note 191, at para. 29; HRC *Concluding Observations 1997*, *supra* note 174, at paras. 420, 432.
891. *Bhe v. The Magistrate, Khayelitsha*; *Shibi v. Sithole*; *South African Human Rights Comm'n v. President of the Republic of South Africa 2005 (1) BCLR 1 (CC) (S.Afr.)*, para. 136 ("The rule of male primogeniture as it applies in customary law to the inheritance of property is declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women...from inheriting property."). See also paras. 91-95 (court's discussion about the discriminatory impact of the customary law on women).
892. See *Javed*, A.I.R. 2003 3057 at para. 50; see *supra* at Part II, Ch. 7 (*Javed* case study).
893. See *supra* at Part II, Ch. 8 (discussion of Sri Lanka comparative example in *FFDA* petition); Interview with S. Pandey, June 8, 2006, *supra* note 91.
894. For example, although the petitioners before the Human Rights Committee in the above-discussed *KL v. Peru* case presented a strong discrimination argument, the Committee ruled against Peru for denying a woman an abortion on the grounds that this violated her rights to privacy and freedom from cruel, inhuman and degrading treatment. *K.L. v. Peru*, *supra* note 175; see *supra* at Part I, Ch. 2 (discussion of *K.L.* case).
895. Interview with S. Pandey, June 8, 2006, *supra* note 91; Interview with Supreme Court judicial law clerk, Mar. 8,

- 2006, *supra* note 79; Interview with F. Nariman, Mar. 10, 2006, *supra* note 12; Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78.
896. *See supra* at Part II, Ch. 6 (*Vishaka* case study) and Part II, Ch. 8 (*Ramakant Rai* case study).
897. *Vishaka* Petitioner's Proposed Directions, *supra* note 507, at 13; *Ramakant Rai* Petition, *supra* note 736, at Prayer (c).
898. Confidential Interview with Justice of the Supreme Court, Apr. 13, 2006, *supra* note 122.
899. Interview with S. Pandey, May 25, 2005, *supra* note 772; Interview with local human rights lawyer, in New Delhi, India (Mar. 25, 2006). For example, in *Paulina Ramirez v. Mexico*, a case brought against the Mexican government in the Inter-American Commission on Human Rights for denying a 13-year-old rape victim access to an abortion, the Mexican government agreed to provide individual reparations to the petitioner for the rights violation she had suffered, and to work toward systemic reform by issuing a decree regulating guidelines for access to abortion for rape victims. *See* Center for Reproductive Rights, Petition to the Inter-American Commission on Human Rights, *Paulina Ramirez v. Mexico*, http://www.reproductiverights.org/pdf/crt_PeticionPaulinaFINAL.pdf; Center for Reproductive Rights, Press Release, *Mexico Admits Responsibility for Denying Child Rape Victim's Rights* (March 8, 2006), http://www.reproductiverights.org/pr_06_0308MexicoPaulina.html. *See* Interview with Justice B. N. Srikrishna, Mar. 8, 2006, *supra* note 78 ("You have brought the PIL and have expertise on the practical branch of law, so we look at what you say and how the problem has been solved in foreign countries."); Confidential Interview with Justice of the Supreme Court, Apr. 13, 2006, *supra* note 122 ("Using international instruments, like conventions, would be useful.").
900. Interview with S. Pandey, Sept. 18, 2006, *supra* note 382.
901. Interview with local expert, in New Delhi, India (Mar. 7, 2006).
902. Interview with CEHAT staff, Mar. 16, 2006, *supra* note 871.
903. *Id.*
904. *See supra* at Part II, Ch. 8 (box on marriage registration order); *Smt. Seema*, Feb. 14, 2006 Order, *supra* note 160, at paras. 15, 18.
905. *See supra* at Part II, Ch. 6 (*Vishaka* case study); *Vishaka* Petition, *supra* note 488, at para. 65.
906. *See supra* at Part II, Ch. 7 (*Javed* case study).
907. *See supra* at Part II, Ch. 6 (*Vishaka* case study).
908. Interview with Justice J. S. Verma, Mar. 29, 2006, *supra* note 27; Interview with Justice D. Y. Chandrachud, Mar. 16, 2006, *supra* note 84.
909. *See supra* at Part II, Ch. 6 (*Vishaka* case study).
910. *See supra* at Part II, Ch. 7 (*Javed* case study).
911. Das, *The Supreme Court: An Overview*, *supra* note 123, at 38. *See also* Interview with R. Dhavan, Mar. 25, 2006, *supra* note 277 ("The press is not just the fourth estate, it is really a constitutional agency in its own right").
912. *See, e.g.*, *Dr. Paramjit Singh Ranu v. State of Punjab*, Order to Show Cause (date not available).
913. Interview with legal editor, Apr. 9, 2006, *supra* note 108.
914. Interview with S. George, Mar. 30, 2006, *supra* note 819; Interview with legal editor, Apr. 9, 2006, *supra* note 108.
915. Interview with local human rights lawyer, in New Delhi, India (Mar. 25, 2006); Interview with S. Pandey, May 25, 2006, *supra* note 772.
916. *Parmanand Katara*, 3 S.C.R. 997 at para. 9 ("[W]e direct that this decision of ours shall be published in all journals reporting decisions of this Court and adequate publicity highlighting these aspects should be given by the national media as also through the Doordarshan and the All India Radio....").
917. Meeting with O.P. Chadha, Director, Library of the Supreme Court of India, in New Delhi, India (Mar. 9, 2006).
918. Observation noted by author during tour of Supreme Court Library, New Delhi, India (Mar. 9, 2006) (the Supreme Court's library contains several international human rights reports published between the 1970s and 1990s).
919. Interview with judicial law clerk, Supreme Court of India, in New Delhi, India (Mar. 8, 2006).
920. *See supra* at Part II, Ch. 7 (*Javed* case study).
921. *See, e.g.*, *Right to Food campaign update*, PUCL BULLETIN (Dec. 2002), <http://www.pucl.org/Topics/Industries-envirn-resettlement/2002/food-right.htm> (publicizing forthcoming rallies, seminars, and public hearings in various states across India to promote the right to food); Right to Food Campaign website, <http://righttofoodindia.org/links/updates/update1.html> (last visited Nov. 21, 2006) (run by informal, decentralized network of individuals and organizations committed to the right to food). *See also* Interview with F. Nariman, Mar. 10, 2006, *supra* note 12 ("It is not only through PILs that these things are achieved.").
922. *See supra* at Part II, Ch. 7 (*Javed* case study).
923. Interview with S. Pandey, June 8, 2006, *supra* note 91; *see supra* at Part II, Ch. 8 (*FFDA* case study).
924. *See supra* at Part I, Ch. 2 (box on international accountability mechanisms).
925. United Nations Population Fund, *Quotes on Human Rights*, <http://www.unfpa.org/rights/quotes.htm> (last visited Nov. 21, 2006).
926. *Smt. Seema*, Feb. 14, 2006 Order, *supra* note 160 ("The

origin of marriage amongst Aryans in India, as noted in Mayne's Hindu Law and Usage, as amongst other ancient peoples is a matter for the Science of anthropology. From the very commencement of the Rigvedic age, marriage was a well-established institution, and the Aryan ideal of marriage was very high. The Convention on the Elimination of All Forms of Discrimination (in short 'CEDAW') was adopted in 1979 by the United Nations General Assembly. India was a signatory to the Convention....").

927. Interview with Justice Justice J. S. Verma, Mar. 29, 2006, *supra* note 27.

