

Summer 2012

Public Interest Litigation in India as a Paradigm for Developing Nations

Zachary Holladay

Indiana University Maurer School of Law

Follow this and additional works at: <http://www.repository.law.indiana.edu/ijgls>

 Part of the [Comparative and Foreign Law Commons](#), [International Law Commons](#), and the [Litigation Commons](#)

Recommended Citation

Holladay, Zachary (2012) "Public Interest Litigation in India as a Paradigm for Developing Nations," *Indiana Journal of Global Legal Studies*: Vol. 19: Iss. 2, Article 9.

Available at: <http://www.repository.law.indiana.edu/ijgls/vol19/iss2/9>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Journal of Global Legal Studies by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Public Interest Litigation in India as a Paradigm for Developing Nations

ZACHARY HOLLADAY*

ABSTRACT

Public interest litigation (PIL) in India can serve as a vehicle for creating and enforcing rights and is critical to the sustenance of democracy. PIL in India can address the needs of its citizens when legislative inertia afflicts the Indian National Congress. This Note discusses how PIL in India can serve as a model for other developing nations struggling with legislative inertia and can provide recourse to marginalized and disadvantaged communities. Furthermore, while PIL obscures the traditional boundaries of power in a liberal democratic polity, democracy is in fact strengthened by the expansion of standing to include any citizen who has suffered a rights abuse.

INTRODUCTION

India is a nation of seemingly infinite paradoxes. This was apparent in my visit to India during the summer of 2010 when I had the opportunity to intern at a women's rights organization called Jagori (which in Hindi means "awakening"). Jagori is dedicated to promoting women's rights in a variety of ways, including providing legal advice to victims of domestic violence, researching and developing policy initiatives that address rights disparities, and counseling victims of domestic and communal violence. Through my experiences with this organization, I became aware of one of the most perplexing, and indeed frustrating, paradoxes of India: the coexistence of refreshingly progressive laws and a record of haphazard implementation.

* J.D. 2012, Indiana University Maurer School of Law; B.A. University of South Florida. I am greatly indebted to Professor Jay Krishnan for the opportunity to participate in the inaugural India summer internship program. I would also like to thank my mom and my grandmother, because without their unconditional love and support, I would not be the person I am today.

The Constitution of India resembles the U.S. Constitution in many respects, including its commitment to fundamental rights to freedom of speech and expression and to equality. Legislation, such as the Protection of Women from Domestic Violence Act (DVA), supplements these constitutional provisions and advances their goals. The DVA, legislation that Jagori sought to educate women about, is but one of many examples of progressive laws that aim to tackle rights abuses. One of the many purposes of the DVA, passed in 2005, was to articulate the duties and responsibilities of protection officers, shelter homes, and medical facilities when addressing complaints from female victims of violence.¹ Not only does the DVA extend protection to the wife or female live-in partner from domestic abuse (including physical, sexual, verbal, and economic abuse) at the hands of her husband or male live-in partner, but also from unlawful dowry demands from her in-laws.²

Five years since its inception, the protections afforded by the DVA have yet to fully materialize. The data accumulated from extensive field research strongly indicates a failure among law enforcement institutions to execute their duties to arrest and prosecute those accused of perpetrating violence against women.³ Among the reasons for this deficiency of responsibility to comply with the statute include police corruption and individual apprehension to pierce the sacrosanct realm of the private.⁴

Jagori aims to combat the lack of enforcement of the DVA through a uniquely Indian judicial mechanism known as public interest litigation (PIL), which serves as a tool for protecting the rights of India's impoverished and disadvantaged. In conjunction with Action India, another nongovernmental organization (NGO) in Delhi, Jagori is in the process of accumulating data from all police precincts in Delhi to determine any discrepancy between the reports and investigations of violence against women. The remedy the organizations seek is a form of

1. See The Protection of Women from Domestic Violence Act, No. 43 of 2005, INDIA CODE (2005), vol. 15.

2. *Id.*

3. This data was gathered in a collective effort among several NGOs in India, including Jagori and Action India. See generally Amy Hornbeck et al., *The Protection of Women from Domestic Violence Act: Solution or Mere Paper Tiger?*, 4 LOY. U. CHI. INT'L L. REV. 273 (2007) (noting the lack of enforcement in this area).

4. From my encounters with women at Jagori, the police are hesitant to investigate such matters because of an implicit social constraint on delving into private matters. One could argue that the State itself condones such inaction because of its policy of neutrality toward religious, or personal, laws, which govern private matters such as divorce, inheritance, and child custodial rights. The unfortunate consequence of balancing collective and individual rights has effectively allowed for the subordination of women, especially Muslim women, in India.

equitable relief compelling police precincts to investigate such crimes in a manner consistent with the procedures established by Parliament. I became intimately aware of the mechanics of PIL in India, as it was my responsibility as an intern with the organization to peruse Supreme Court and Delhi High Court opinions regarding gender justice to extract language pertinent to Jagori's case and provide an informed opinion regarding the case's likelihood of success.

Through my research at the organization, I discovered the especially omnipotent power of the Indian courts. PIL allows for any individual who claims a violation of one of her or his fundamental rights, as enshrined in the Constitution, to bypass the local courts and appeal directly to one of the state's High Courts or to the Supreme Court.⁵ The preferred remedy is often in the form of equitable relief, such as an injunction, to compel the government to take appropriate measures to redress violations of fundamental rights. In many instances, however, the courts will assume a more legislative role in enforcing rights through the issuance of writs of mandamus that force the government to pass legislation dealing with rights disparities. For example, in a sexual harassment case, the Supreme Court enacted anti-harassment guidelines that function effectively as law.⁶ These approaches underscore the apparent lack of trust in the legislature to carry out its duties.

This Note examines PIL in India as a model for addressing rights abuses in other developing nations. Specifically, this Note argues that the Indian model of PIL can serve as a vehicle for creating and enforcing rights necessary to the successful functioning of a liberal democracy. Section I of this analysis provides relevant background information about PIL in India, including its historical underpinnings and the logistics of its operation. Section II briefly describes the theory of liberal democracy. Section III interlaces PIL and liberal democratic theory to show how the judiciary acts to redistribute justice in an effort to level the playing field in a nation with severe resource disparities. Finally, Section IV considers the Indian model of PIL as an instrument for addressing rights disparities in other developing nations.

5. See generally Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1 (2009) (describing the Indian judiciary as a two-tiered system composed of an upper judiciary, which includes the High Courts and the Supreme Court, and a lower judiciary, which is comprised of district courts and specialty courts, such as family and property courts).

6. See *Visaka v. Rajasthan*, A.I.R. 1997 S.C. 3011 (India).

I. PUBLIC INTEREST LITIGATION IN INDIA

A. *History of Public Interest Litigation in India*

In India, PIL assumes many of the same characteristics of its relative enterprise in the United States, including a liberal understanding of party joinder and a preference for equitable relief, such as an injunction, as a remedy.⁷ Yet the comparisons end there. PIL in the United States requires a great deal of expenditure, thus limiting its exercise to those individuals and firms with adequate financial resources. Many Indian citizens and firms, however, lack those resources, so PIL requires a different approach. Additionally, the issues advocated through PIL are substantively different. Justice Bhagwati has described the goal of PIL in India as endeavoring to counter “state repression, governmental lawlessness, administrative deviance, and exploitation of disadvantaged groups and denial to them of their rights and entitlements.”⁸ Hence, the PIL instrument serves to counter parliamentary inertia and governmental neglect. Perhaps the most distinguishing feature of PIL in India is that the Supreme Court rules of *locus standi*, or the eligibility of a person to invoke the jurisdiction of the courts, are so relaxed that anyone asserting a violation of fundamental rights can file a claim in one of the appellate courts.

To understand how PIL began in India, it is necessary to recognize the propitious conditions under which it arose. During the 1970s, a majority of Indians suffered from a severe lack of access to justice. Legal fees were prohibitively expensive to the extent that only the few could afford representation.⁹ Moreover, the lack of education for many rural Indians meant that most people were unaware of their legal rights, and lawyers working on their behalf were few and far between.¹⁰ Compounding the dire situation of many of India’s citizens, then-Prime Minister Indira Gandhi—the daughter of India’s first prime minister, Jawaharlal Nehru—suspended elections and civil liberties in response to great political upheaval that threatened her premiership, a time in Indian history known as the Emergency Period (June 25, 1975 to March

7. See Ranjan K. Agarwal, *The Barefoot Lawyers: Prosecuting Child Labour in the Supreme Court of India*, 21 ARIZ. J. INT’L & COMP. L. 663, 688-90 (2004).

8. P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT’L L. 561, 569 (1985).

9. Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT’L L.J. 57, 63 (1994).

10. See *id.* at 64-65 (noting the story is further complicated “by a political undercurrent of double standards,” which permeates Indian society with entrenched divisions along caste, religious, gender, economic, and cultural lines rendering justice variable and concentrated among the advantaged).

21, 1977).¹¹ Many citizens were expecting the Supreme Court to intervene. The Court failed to do so and instead capitulated to Indira Gandhi's autocratic tendencies.¹² In fact the Court held in *A.D.M. Jabalpur v. Shivakant Shukla*, a severely criticized case,¹³ that certain fundamental rights, including the right to liberty, did not survive the executive's proclamation of emergency.¹⁴ That decision only served to erode further the Court's esteem.

The Supreme Court's expansion of *locus standi*, therefore, traces its roots to post-Emergency Period efforts to recapture its legitimacy. After the Emergency Period ended in 1977, when Indira Gandhi and her allies in the Congress party lost in the elections, the Court was rendered impotent in the eyes of the Indian public. The Supreme Court responded to this sentiment of unpopularity by expanding its jurisdiction to better secure those civil liberties threatened during the Emergency Period.¹⁵

In 1978, the Supreme Court received a letter from an inmate detailing the gruesome torture of a fellow inmate at the hands of the prison guards. The note, a mere scribble on a piece of paper, prompted the Court to assume jurisdiction over the case, ruling that a prisoner was entitled to the same rights and liberties conferred on the rest of society.¹⁶ The case opened the floodgates to a litany of public interest claims, assuming virtually every form, including media reports, formal briefs, and letters.¹⁷

One of the provisions of the Constitution that the courts rely on to create new rights and enforce existing rights is Article 21, which states, "No person shall be deprived of his life or personal liberty except according to procedure established by law."¹⁸ Under this Article, the Supreme Court has questioned the validity of death sentences and articulated the right to privacy. The Court has read this Article broadly to encompass various socioeconomic rights as well, such as rights to education,¹⁹ clean air,²⁰ and food and clothing.²¹ With respect to

11. See Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT'L L. 311, 344-47 (2001).

12. See Robinson, *supra* note 5, at 31-33.

13. S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J. L. & POL'Y 29, 47 (2001).

14. A.I.R. 1976 S.C. 1207.

15. See *id.* at 42.

16. Sathe, *supra* note 13, at 73.

17. In expanding its jurisdiction, the Court relied on Article 32 of the Constitution, which guarantees "[t]he right to move the Supreme Court by appropriate proceedings" for the enforcement of fundamental rights. INDIA CONST. art. 32, §1.

18. INDIA CONST. art. 21. Additional provisions the courts rely on in deciding PIL cases include Articles 14 (right to equality), 16 (right to equal opportunity), and 19 (right to freedom of speech).

19. See *Jain v. Karnataka*, (1992) 3 S.C.R. 658, 660 (India).

women's rights, advocates have invoked Article 21 to combat child marriages²² and coerced sterilization practices.²³

Many Indians, especially those in the NGO community, have celebrated the broad rendering of Article 21. NGOs rely on the Article to combat the rights abuses they encounter everyday in the field. Supporters of PIL argue that it is critical to "compensate for the inaction of the legislative and executive branches of government."²⁴ This inertia has been attributed to several causes, including a severely fractured Parliament, as well as "bureaucratic hurdles . . . and corruption 'of a tremendous order.'"²⁵ For many, the courts serve as guardians of political, social, and economic rights, providing relief in the event of parliamentary failure. This societal cognizance of the Court as the purveyor of rights has inflated public support for the institution and prompted a significant degree of confidence in its capacity to "surely do something" about the problems of the underprivileged.²⁶

Despite a considerable amount of public support since PIL has been entrenched as a trademark of the Supreme Court, the judiciary has received criticism for its tendency to overreach. Often, the judiciary will encroach upon the administrative and policy functions of the legislature to protect the rights of the disadvantaged. At the heart of this criticism is a fear of "judicial despotism"; that courts will take over the total administration of the more politically accountable bodies of government.²⁷

B. Mechanics of Public Interest Litigation

Since PIL began in the late 1970s, thousands of suits have been instituted before the courts through the agency of "public interest." However, despite the lowering of the threshold, many Indians are still unable to use, or are denied access to, the courts; "widespread poverty, bonded labor, social restrictions and illiteracy all [pose] real bars to

20. *M.C. Mehta v. Union of India*, (1996) Supp. 10 S.C.R. 973 (India).

21. *Shantistar Builders v. Narayan Khimalal Totame*, A.I.R. 1990 S.C. 630 (India).

22. *Petition for Writ, Forum for Fact Finding Documentation & Advocacy v. Union of India* (2003) (No. 212) (India).

23. *Petition for Writ, Ramakant Rai v. Union of India* (2005) (No. 209) (India).

24. Avani Mehta Sood, *Gender Justice through Public Interest Litigation: Case Studies from India*, 41 VAND. J. TRANSNAT'L L. 833, 845 (2008).

25. *Id.* at 846 (quoting an Interview with Fali Nariman, Senior Supreme Court Advocate and Former Solicitor General of India, in New Delhi, India (Mar. 10, 2006)).

26. *Id.* at 847 (quoting Confidential Interviews with Low-Income Women Residing in Urban Slums, in New Delhi, India (Mar. 23, 2006 & Apr. 10, 2006)).

27. Agarwal, *supra* note 7, at 696-97.

legal rights.”²⁸ Therefore, the courts have allowed for third-party standing. Justice Bhagwati, in holding that social and economic conditions necessitate this model of standing, stated:

When a person or class of persons to whom legal injury is caused by violation of a fundamental right is unable to approach the Court for judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting bona fide can move the Court for relief under Article 32 . . . so that the fundamental rights may become meaningful not only for the rich and the well-to-do who have the means to approach the Court but also for the large masses of people who are living a life of want and destitution and who are by reasons of lack of awareness, assertiveness and resources unable to seek judicial redress.²⁹

Hence, this expansion of standing has enabled Indian NGOs, such as Jagori, Human Rights Law Network (HRLN), and Lawyers Collective, to collaborate with each other in fact-finding and data-accumulation efforts to ensure that public interest actions are pursued in a bona fide manner.³⁰ At Jagori, I had the opportunity to witness and participate in this process directly. The research stage of a PIL action requires an excavation of legal precedent and objective findings to support the suit.

When the research is finished, the suit is ready to be litigated. Often, victims who are the subject of the suit are heard in the courtroom. Occasionally, however, the lawyers advocating on behalf of the victims have had no real contact with the injured parties, relying on the evidence gathered through the efforts of NGOs or available in media reports.

Furthermore, the proceeding itself is technically nonadversarial. Despite the connotations of the phrase “nonadversarial” in Western settings, the Indian Supreme Court has interpreted PIL as “not in the nature of adversary litigation but [as] a challenge and an opportunity to the government and its officers to make basic human rights meaningful”³¹

28. Susman, *supra* note 9, at 73.

29. *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802, 813 (India).

30. It is not uncommon for individual states to have their own Legal Aid committees to assist in the fact-finding and investigation process of PIL actions, exemplifying just how “nonadversarial” the process really is. See Susman, *supra* note 9, at 78.

31. *Bandhua*, A.I.R. 1984 S.C. at 811.

The remedies stage of a PIL suit is the most contentious stage of the dispute, as the courts have afforded themselves extensive leeway in deciding which remedies are appropriate. Some of the remedies the courts construct include the creation and implementation of regulations, the establishment of free legal services, and the formation of administrative bodies to oversee the remedies ordered. It is this stage of the PIL suit that attracts criticism that the courts are usurping the authority of the legislature by creating laws.

II. LIBERAL DEMOCRATIC THEORY

Liberalism today is “almost invariably coupled with democracy,”³² while simultaneously constraining it.³³ In a liberal democracy, certain inviolable freedoms (those that cannot be compromised through the democratic process) are necessary for the success of a democracy. Liberal democracies around the world exhibit characteristics that are unique to the countries they inhabit; thus it is difficult to articulate a theory of liberal democracy that applies to all nations. For example, while the United States considers gun ownership rights to be important fundamental rights, other nations do not.³⁴

David Held recognizes two models of the liberal democratic tradition: “protective” democracy and “developmental” democracy.³⁵ The protective model of democracy “holds that, given the pursuit of self-interest and individually motivated choices in human affairs, the only way to prevent domination by others is through the creation of accountable institutions,” while a developmental model of democracy emphasizes the political process as a means to achieving the promotion of an “active, informed and involved” *demos*.³⁶ Both are relevant to Indian democracy, as elements of both can certainly be found in India; however the protective model is more applicable, considering the role of the judiciary as a mechanism for “protecting” citizens from government tyranny.

The critical elements of a protective model of democracy include an emphasis on sovereignty resting with the *demos* (through a

32. Marc F. Plattner, *From Liberalism to Liberal Democracy*, in *DEMOCRACY: A READER* 58, 58 (Larry Diamond & Marc Plattner eds., 2009).

33. See generally CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* 10 (2000) (discussing the conflict inherent in democratic politics).

34. See, e.g., Christopher D. Ram, *Living Next to the United States: Recent Developments in Canadian Gun Control Policy, Politics, and the Law*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 279 (1995).

35. DAVID HELD, *MODELS OF DEMOCRACY* 5 (1996).

36. *Id.* at 75 (Held refers to the *demos* as the voting contingent of a republic).

representative assembly);³⁷ the securing of certain freedoms as individual rights (especially rights to freedom of speech, association, and belief) subject to legal or constitutional protection;³⁸ and an institutional separation of powers between the legislative, executive, and judicial branches.³⁹

A. *Sovereignty*

One of the significant elements of a successful protective democracy stresses the capacity of the individual to be the “master of his [or her] destiny”; to exercise the freedom to choose one’s own path.⁴⁰ Liberalism may be defined as “the attempt to uphold the values of freedom of choice, reason, and toleration in the face of tyranny, the absolutist system, and religious intolerance.”⁴¹

A truly liberal system, one in which individuals are truly unrestrained and free to do what they wish, is both unrealistic and dangerous.⁴² Therefore, according to a liberal theory of democracy, this freedom is limited to some extent by relinquishing some liberties in exchange for a system of government that acts in the interests of its citizens. Furthermore, individuals, in exercising their autonomy, *choose* the government representation that best reflects their interests. The institutions created in a liberal democracy derive their legitimacy by affording individuals the right to dispense with their representatives in the event of dissatisfaction.

Finally, the extension of suffrage to all citizens is crucial to the legitimacy of the democracy and to ensuring that all voices are communicated in the political discourse. While history in the Western tradition of democracy has demonstrated a preference for white male property owners as the sole decisionmakers,⁴³ the emergence of cultural and racial pluralism as a customary norm in the twentieth century has

37. See *id.* at 76 (discussing Hobbes view of individual bargaining for rules to enforce natural laws in the absence of a common power).

38. See *id.* at 78.

39. See *generally id.* at 82-88 (discussing the concept of separation of powers by analyzing Montesquieu’s views on a reformed representative government).

40. *Id.* at 73.

41. *Id.* at 74.

42. According to Hobbes, in the state of nature, in which individuals enjoy their unfettered freedoms, life “is solitary, poore, nasty, brutish, and short.” *Id.* at 76 (quoting THOMAS HOBBS, *LEVIATHAN* (C.B. Macpherson ed., 1968)).

43. Deseriee A. Kennedy, *Judicial Review and Diversity*, 71 TENN. L. REV. 287, 294 (2004).

seriously undermined that tradition. Today, a theory of democracy relies heavily on citizenship as a distinguishing marker for suffrage rights.⁴⁴

B. Individual Rights

Another necessary element of protective democracy is the guarantee of certain democratic rights that are critical to the means of securing control of the collective decisionmaking process. These rights are generally expressed negatively, providing *freedom from* government interference. David Held identifies several political and civil rights guaranteed in a protective democracy: the right to free speech, expression, association, voting, and belief.⁴⁵ These rights draw boundaries around the state from invading the private realm. That which is public, or confined to the territory defined by those boundaries, is the political domain: governmental activity and institutions.⁴⁶

Moreover, those rights subject to legal or constitutional protections are vital to maintaining efficiency in the marketplace of ideas. The liberal democratic tradition is predicated on the unfettered competition of ideas in the public discourse, so that the policy best fit for a state's citizens is one that survives the struggle and emerges from the market.

C. Separation of Powers

In *The Spirit of Laws*, Montesquieu articulated a strict demarcation of state power "between the executive, the legislature, and the judiciary," arguing that liberty would be negligible "were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing public resolutions, and of trying causes of individuals."⁴⁷ Under this scheme, power is divided equally among the branches so that no one branch can impose itself on the others.

Traditionally, under a theory of liberal democracy, the judiciary serves to provide protection to the rights enshrined in a constitution or in historical precedent and interprets the laws enacted by the popularly elected legislature.⁴⁸ Under the aegis of the judiciary, citizens of a liberal democratic state are guaranteed protection of their rights to due process and equal justice before the law.

44. See HELD, *supra* note 35, at 77.

45. *Id.* at 98.

46. *Id.*

47. *Id.* at 85 (quoting MONTESQUIEU, *THE SPIRIT OF LAWS* 69 (1952)).

48. See *id.* at 86.

III. LIBERAL DEMOCRACY AND PUBLIC INTEREST LITIGATION IN INDIA

The Republic of India reflects the essential qualities of a liberal democracy, albeit with an exceptionally robust judiciary. The Indian Constitution, adopted in 1950, divides state power into three branches of government: the executive (composed of a titular President, the Council of Ministers, which is headed by the Prime Minister, and the bureaucracy), a bicameral legislature (divided between the Lok Sabha and the Rajya Sabha), and the judiciary (with a Supreme Court at the peak of the system).⁴⁹ In addition, the Constitution recognizes a set of inalienable rights protected from the vagaries of the three branches of government.

Yet, PIL in India challenges the conceptual underpinnings of a conventional understanding of liberal democracy in at least three powerful ways: (1) the empowerment of the individual through collective action; (2) a strong emphasis on the creation of positive rights through a broad rendering of Article 21 of the Indian Constitution;⁵⁰ and (3) a blurring of the traditional circumscriptions of the powers of government. In each of these ways, the Indian judiciary has refashioned the traditional model of liberal democracy to adjust to the demands of India's widespread and entrenched financial and social inequalities.

A. *Collective Action*

Liberal democratic theory places substantial emphasis on the rights of the *individual*. It is the individual in the protective model of democracy whose constitutional rights are protected from state interference, and it is the individual who approaches the judiciary for relief. This emphasis is exemplified in the U.S. tradition when the Supreme Court expressed the requirement that "a party seeking review must allege facts showing that he is himself adversely affected"⁵¹

The Indian focus, while recognizing individual rights, stresses collective action in empowering the individual. In commenting on the difference between public interest action in India and the Anglo-Saxon traditions, Justice Bhagwati said of the latter that it is "transactional, highly individualistic, concerned with atomistic justice incapable of responding to the claims and demands of collectivity, and resistant to

49. See ROBERT L. HARDGRAVE, JR. & STANLEY A. KOCHANER, *INDIA: GOVERNMENT AND POLITICS IN A DEVELOPING NATION* 64, 69-122 (2008).

50. While other Articles have been employed to address rights violations, for the purposes of simplicity, I am relying only on Article 21.

51. *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972).

change.”⁵² PIL in India, on the other hand, is concerned with “enforcing collective rights, an objective that is inconsistent with a private rights model of public law litigation.”⁵³

The emphasis on collective rights is demonstrated in many Supreme Court decisions handed down since PIL began three decades ago. One particular case emphasizing collective rights was *Visaka v. Rajasthan*, a case in which the Supreme Court promulgated procedures concerning the sexual harassment of women in the workplace. A woman named Bhanwari Devi was working as a social worker for the State of Rajasthan when five male members of the community raped her.⁵⁴ The rape was prompted by her attempts to expose the marriage of a one-year-old girl in the rural Rajasthani village. All of the assailants were tried for the offense of rape, but acquitted because the judge did not find credible evidence “that upper caste men would rape a lower caste woman.”⁵⁵ Visaka, a social action group, moved the Supreme Court to establish guidelines for protecting women from sexual harassment in the workplace in the absence of such legislation. In executing the order, Chief Justice J.S. Verma stated:

The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement is of the legislature and the executive. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19, and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights to fill the legislative vacuum.⁵⁶

Visaka represents a collective solution to rights abuses. While prior to this case, specific legislation regulating the sexual harassment of women in the workplace did not exist, female government workers were presumed to be protected by the Indian Constitution’s right to equality in Article 14. However, the government’s failure to enforce its own constitutional safeguards prompted the judiciary to intervene.

Naina Kapur, the lawyer acting on behalf of Bhanwari Devi, became “[f]rustrated by the criminal justice system’s inability to provide

52. Bhagwati, *supra* note 8, at 570.

53. Agarwal, *supra* note 7, at 691.

54. Sood, *supra* note 24, at 866.

55. *Id.* at 867.

56. *Visaka v. Rajasthan*, A.I.R. 1997 S.C. 3011 (India).

tangible remedies, restore the dignity of the victim, address systemic issues, and create widespread social change”⁵⁷ The frustration Kapur experienced translated into a determination to “focus on the big picture” by filing a PIL action in the Supreme Court to investigate and address sexual harassment in the workplace.⁵⁸ During the PIL, Kapur and other lawyers collaborated to demonstrate a pattern of sexual harassment of women in the workplace by “providing examples of five other women who had experienced sexual assault in the course of employment.”⁵⁹

The collective solution to the rights abuses detailed in *Visaka* is but one example among many in India. The transition from the emphasis on the individual in the traditional liberal democratic tradition to the collective represents an effective method of confronting widespread rights abuses, like those discussed in *Visaka*. Because of the government’s failure to prosecute Bhanwari’s assailants, the petitioners made the decision to attempt to obviate future abuses of women in the workplace. It is in this sense that the individual is empowered through the elaboration of collective rights.

B. Creation of Positive Rights

The theory of liberal democracy regards rights as negative entitlements against the state.⁶⁰ These “rights from” relegate the private sphere beyond the ambit of the courts. Furthermore, the notion that “rights are individual ‘trumps’ against collective goals and decisions limits the potential for requiring positive action even of public authorities.”⁶¹ Thus, even where legislative inertia inhibits operation of the state, the “notions of the separation of powers and the distinction between legislation and adjudication” discourage any extensive degree of judicial involvement.⁶²

In applying a broad rendering of Article 21, the Court has added several unenumerated rights, such as the right to privacy⁶³ and the right to food (discussed below). The Court will justify its actions on the grounds that the right to life entails a right to *livelihood*, and the “right

57. Sood, *supra* note 24, at 867.

58. *Id.* (quoting Telephone Interview with Naina Kapur, Director, Sakshi, in New Delhi, India (Apr. 10, 2006)) (internal quotation marks omitted).

59. *Id.*

60. See HELD, *supra* note 35, at 98.

61. Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 501 (1989).

62. *Id.*

63. *Mr. X v. Hospital Z*, A.I.R. 1999 S.C. 495 (India).

to live with human dignity and all that goes along with it," including "the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self."⁶⁴

The Right to Food Case, a continuing case as of March 12, 2012, provides an illustration of how courts read rights into Article 21.⁶⁵ In November of 2001, the Supreme Court ordered all state governments to implement food disbursement programs to supply the underprivileged with access to grain. Additionally, the Court ordered the state governments to provide subsidies to certain impoverished sectors of the population when the primary breadwinner of the household dies. The Court also appointed several commissioners to ensure that the directives were implemented. In that case, the Court justified its intervention, stating:

The anxiety of the Court is to see that the poor and destitute and the weaker sections of the society do not suffer from hunger and starvation. The prevention of the same is one of the prime responsibilities of the Government—whether Central or the State. Mere schemes without any implementation are of no use.⁶⁶

The finding of unenumerated rights demonstrates a dramatic level of intervention in social and economic rights cases.⁶⁷ Undoubtedly, lowering the threshold for standing has allowed for this proliferation of rights cases, thereby providing those who previously lacked the financial means of approaching the Court with a significant incentive to do so. The creative, or "activist," interpretation of fundamental rights is unique to India because of the nation's great disparities in access to justice. Indeed, by liberally applying Article 21 to create new regimes of rights and by lowering the threshold for standing, the Court is leveling the playing field and rebalancing "the scales of justice."⁶⁸

One spectacular development in the articulation of new rights in India occurred just over one year ago when the Delhi High Court struck down section 377 of the Indian Penal Code, or the anti-sodomy laws. The significance of the decision does not reside in rejection of the law

64. *Mullin v. Administrator*, (1981) 2 S.C.R. 516, 529 (India).

65. *See* Petition for Writ, *People's Union for Civil Liberties v. Union of India & Ors.*, (2001) (No. 196) (India).

66. *Id.*

67. *See* Robinson, *supra* note 5, at 44.

68. Cassels, *supra* note 61, at 498.

itself, but the language employed in expressing why the law should be struck down:

If there is one constitutional tenet that can be said to be [sic] underlying theme of the Indian Constitution it is that of "inclusiveness." This Court believes Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a role in society for everyone. Those perceived by the majority as "deviants" or "different" are not on that score excluded or ostracized.⁶⁹

While the ruling itself was decided on privacy grounds, the language of the ruling suggests the future recognition of other rights for India's LGBT population. On the one-year anniversary of the ruling in July 2010, I was able to attend a rally for LGBT rights. I spoke with many attendees, who universally expressed optimism in future recognition of their rights to marriage and freedom from discrimination. Furthermore, the high-profile nature of the case thrust the issue into the public discourse in a manner welcomed by members of the LGBT community.

By striking down the anti-sodomy laws, the Delhi High Court in a sense triggered public awareness of those rights, which is a critical element of pursuing PIL actions. Especially when confronting large-scale rights issues, such as gender equality and rights for LGBT people, lawyers recognize that they must "build public opinion to have a support base when going to Court," as "judges are not cut off from what is happening around them."⁷⁰ Again, this need to build public support reflects the "Indian emphasis on the collective," in pursuing the recognition of rights.⁷¹

C. Institutional Challenge to the Separation of Powers

The Supreme Court's (and the states' High Courts') willingness to supersede the legislature in the case of legislative inertia and neglect runs contrary to the essential liberal democratic element of a separation of powers. In this sense, the courts have faced passionate criticisms

69. *Petition for Writ, Naz Found. v. Gov't of NCT of Delhi*, (2009) (No. 7445/2001), ¶ 130 (India).

70. Sood, *supra* note 24, at 896.

71. *Id.*

from various participants in the political sphere for a method of decisionmaking that is traditionally left to the politically accountable legislative branch. These criticisms are based on fears of judicial despotism: that the unelected bodies will overwhelm the elected institutions, thereby creating a judicial dictatorship.

One case that received such criticism was *M.C. Mehta v. State of Tamil Nadu*, in which the Supreme Court addressed the issue of child labor in matchstick manufacturing enterprises.⁷² In tackling the matter, the Court articulated an elaborate set of guidelines and regulations, including enjoining the state to provide free and compulsory education for children below the age of fourteen and a scheme of fines for offending employers.

Justice Balakrishnan has justified the actions of the judiciary by admonishing the legislature for its failure to address rights abuses:

It is often argued that the Supreme Court should maintain restraint and should not violate the legitimate limits in the exercise of powers. However, this argument fails to recognize the constant failures of governance taking place at the hands of other organs of State, and that it is the function of the Court to check balance and correct any failure arising out of any other State organ.⁷³

The Court's inclination to dispense justice in a manner that borders "legislative" blurs the periphery separating it from the legislature because the legislature has failed to execute its own duties. In filling the void created by the legislature, the judiciary sees itself participating in and shepherding social transformation.

While the role of the judiciary in this capacity obfuscates the separation of powers in a liberal democratic model, the purpose of "legislating" from the bench is to promote the disadvantaged segments of society so that they can lend their voices to the political dialogue and participate in the democratic process in a more meaningful way. Indeed, there is a danger in sitting idly while rights abuses go unchecked: "If the courts cannot, or will not, give relief to people who are in fact concerned about a matter then they will resort to self-help, with grave results for other persons and the rule of law."⁷⁴

72. *M.C. Mehta v. State of Tamil Nadu*, A.I.R. 1997 S.C. 699 (India).

73. Robinson, *supra* note 5, at 16-17 (quoting Shri K.G. Balakrishnan, Chief Justice of India, Address at Kerala Legislative Assembly, Golden Jubilee Celebrations 2007-08, Seminar on "Legislature, Executive, and Judiciary" (Apr. 26, 2008)).

74. *Fertilizer Corp. Kamager Union v. Union of India*, (1981) 2 S.C.R. 52, 75 (India).

In addition, the popular support of the judiciary provides legitimacy to its institutional capacity to address rights abuses and steer public policy. Indeed, by challenging the normative framework of institutional barriers, the courts in India retrieve a "degree of popular moral support at the same time that other social and political institutions are facing a legitimization crisis."⁷⁵ The doctrine of the separation of powers presupposes that each branch possesses a degree of legitimacy and popularity; however, when one or more of the branches lacks that support, "the assumption of a political role beyond that traditionally ascribed to the judiciary may not undermine, but indeed enhance its credibility and support."⁷⁶

IV. EXPANSION OF *LOCUS STANDI* AS A PARADIGM FOR OTHER DEVELOPING NATIONS

The signature element of PIL in India is its expansion of *locus standi* to move the Supreme Court or one of the State's High Courts. The extremely liberal rendering of *locus standi* in India allows for any individual to move the courts on behalf of the individual or on behalf of another. The only rule is that the individual must assert a violation of a fundamental right. This uniquely Indian legal mechanism serves to provide a voice to the disadvantaged and socially immobile elements of India by democratizing access to the courts. Lowering the threshold has allowed for a multitude of suits to address social, economic, civil, and political rights abuses in India. The judiciary in India has recognized itself as a critical actor in legitimating the rule of law and instilling confidence in the *demos* that their rights will be protected.

This paradigm of PIL works⁷⁷ in India because of frequent gridlock in the legislature, which fails to pass critical laws necessary to the welfare of the citizenry, of which a sizable portion are very poor. Moreover, the purpose of the standing expansion serves as "a matter of public accountability against corruption and, in human political terms, as giving more of India's populace access to the legal system."⁷⁸

While other nations, such as South Africa and Brazil, have interventionist judiciaries that guarantee social and economic rights,⁷⁹

75. Cassels, *supra* note 61, at 515.

76. *Id.*

77. Debate continues on the extent to which the Indian courts are able to truly redistribute justice. However, many scholars would agree that, despite its problems, PIL is often an effective instrument for redressing abuses. See, e.g., Agarwal, *supra* note 7, 688-700.

78. Susman, *supra* note 9, at 100.

79. Cf. Robinson, *supra* note 5, at 63.

the *locus standi* expansion in India sets it apart from other developing countries. However, the Indian model of standing could serve as a source of protecting the rights of the disadvantaged and marginalized in other nations.

The Indian model performs well because of its emphasis on collective action. In developing nations, large populations often are subject to government neglect, which results from circumstances similar to those in India. An emphasis on the "group" as a source of PIL focus can uplift and emancipate entire communities. Additionally, this emphasis incentivizes collaboration among social action groups to work on behalf of the underprivileged sections of society, which assists in more equitably distributing the inherent costs of litigation.

By providing new checks on the representative institutions, the courts can address the needs of the poor populations. This concept is foreign to the U.S. experience precisely because the United States does not exhibit the characteristics of a developing nation that necessitate such action. Moreover the U.S. emphasis on the individual fails to consider widespread rights abuses that affect entire communities. However, the procedural transformation could succeed in developing countries where legal aid is minimal and great disparities in access to resources prevent citizens from exercising their constitutional rights.

CONCLUSION

PIL serves a vital function in Indian democracy by redistributing justice and providing access to the courts. When confronting a fractured Parliament, a bewilderingly complex bureaucracy, legislative inertia, and severe corruption, the judiciary can effectuate systemic change. The judicial "usurpation" of the policy and administrative functions of the legislative branch may be the answer to addressing rights abuses and disparities and dispensing social justice.

According to the liberal democracy model, the securitization of rights is an essential element to the success of democracy. PIL in India provides a voice to the disadvantaged and underprivileged. The guarantee of access to the courts through the lowered threshold ensures that those segments of the population are able to assert their interests and contribute to the public discourse.⁸⁰ In this sense, PIL redistributes justice in an effort to level the playing field.

The PIL mechanism in India represents an era in the history of democracy in which the judiciary establishes "principles and norms to

80. It should also be noted that, despite vast disparities in resources, India does not suffer from a lack of voter enthusiasm. See Robinson, *supra* note 5, at 9.

control both parliament and the executive," thereby distorting the traditional liberal understanding of democracy.⁸¹ This mechanism may serve as a model for other developing nations to pursue in their efforts to address the needs of the disadvantaged sections of society, thereby contributing to the prosperity of democratic institutions.

81. *Id.* at 58.

