

3-2019

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Recommended Citation

Stevenson, Jordan E., "Public Interest Litigation & Women's Rights: Cases from Nepal & India" (2019). *2019 Symposium*. 2.
https://dc.ewu.edu/srcw_2019/2

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Public Interest Litigation & Women's Rights: Cases from Nepal & India

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Abstract

As a complex, diverse and dynamic region with diverging, constantly changing constitutional and jurisprudential contexts as well as lasting legacies of patriarchy, South Asia's traditions of public interest litigation are one of the most well-studied institutions by Western audiences due to their contradictory progressive and innovative nature. Particularly in India, where public interest litigation gives ordinary citizens extraordinary access to the highest courts of justice, questions have been raised as to the effectiveness of public interest litigation as a tool to address gender disparities across the region. Although Supreme Court justices have been a key ally in eliminating legal barriers to gender discrimination, the structure of the courts still reflect the patriarchal norms that plague society. Furthermore, a literature and case study review of gender-based litigation from India and Nepal reveals that legalistic gains are insufficient to meaningfully change the status of women relative to men in these countries. Without enforcement and policy change in legislative institutions, women still lack systemic power to change the socioeconomic barriers to equality.

Key words: Nepal, India, Public Interest Litigation, Law, International Law, Comparative Law, Women's Rights, Reproductive Rights, Gender Equality, Patriarchy.

Introduction

The judicial contexts in South Asia are complex and intertwined with legacies of colonial rule and struggles of governance in such diverse, pluralistic societies. India's Supreme Court is tasked with establishing jurisprudence in the largest democracy in the world, while other South Asian judiciaries have been defined by larger issues of gender norms, religious conflict, and governance struggles. However, public interest litigation has been used to great extent as a tool of gender-based advocacy in South Asia. Although public interest litigation has been used to further rights-based gender equality in South Asia, examples from India and Nepal demonstrate that it has been insufficient for lasting changes in patriarchy, due to structural misogyny in the judiciary of South Asian countries as well as other challenges in constitutional politics and governance.

South Asian legal systems are uniquely complex, as these democratizing states have used constitutional doctrine from around the world to shape judiciaries and enact jurisprudence. The use of public interest litigation as a tool for development in South Asia has been largely driven by India as an innovative tool for pluralistic, democratic, progressive action. Public interest litigation is seen as the "touchstone of the Indian democratic experience" since "only the fiercest of democracies would provide every individual direct access to the highest court in the land" and allow the courts to enact wide social change (Krishnan, 2003, p. 793). When legislatures and executive branches fail, become overrun by corruption, inaction, or military influence, South Asian citizens have (on occasion, and sometimes unsuccessfully) turned to the judiciary to provide protections for civil liberties, fundamental rights, and oppressed group remedies.

Anthropologist Anuj Bhuwania quotes legal scholar Lavanya Rajamani to explain the nature of public interest litigation, specifying that:

The power of public interest litigation (PIL) in India lies in its freedom from the constraints of traditional judicial proceedings. Judges have tremendous power, in particular in PILs, to design innovative solutions, direct policy changes, catalyse law-making, reprimand officials, and enforce orders. And, they are not hesitant to exercise this power in what they perceive as the public interest (Bhuwania, 2017, p. 2).

This perception of public interest has often adhered to progressive values of inclusion, equity, and social justice. However, there are still questions as to whether public interest litigation can be an effective tool to bring about broad social change in gender relations, given that the structure and nature of the judiciary is corrupt, biased, and inaccessible to the vast majority of Indian citizens. Similarly, “while Nepal’s Supreme Court has overall made a tremendous contribution to improving the status and position of Nepali women, its interventions have not been uniform, equally incisive, or proportionally successful” (Malagodi 1). In this paper, case studies will attempt to illustrate opportunities and challenges in public interest litigation in India and Nepal and then critically analyze and compare these case studies in the context of South Asia as a region.

PIL for Women’s Rights in India

As the originator of the concept of public interest litigation (PIL), India stands as one of the best examples of how it is used to extend gender-based protections in the legal sense. As a patriarchal society dominated by men, the judiciary is one of the few places where progressive attitudes toward gender equality is more commonplace. Important to understanding this is the

incremental nature of constitutional law and politics in India; over time, the judiciary (and especially the Supreme Court) has developed doctrines to extend its power relative to other branches of government. This back-and-forth between the legislative and judicial branches is emblematic of the difficulties of the political culture wherein parliamentary sovereignty preempts judicial activism. The judiciary has narrowly defined its own version of judicial review, and hesitancy with which it tries to enforce or reverse policy is due to the caution with which it asserts power over the legislature. As an alternative, the Court sometimes steps into a more legislative role and creates policy itself, rather than directly challenging existing policy--critiques of this strategy include that it is outside the jurisdiction of the court, and is not a strictly democratic remedy. Although structurally public interest litigation rulings have often sought a remedy in the form of an injunction, other policy tools used by the court have been characterized as more coercive toward the legislature to pass legislation (Holladay, 2012). Due to the lack of political mobilization, the judiciary remains the most potent tool that gender advocates have used to further the status of women in India (Sood, 2008). However, the effectiveness as a policy tool for lasting, structural change is disputed since enforcement of policy is equally important as its existence.

Individual cases demonstrate the complicated nature of PIL for gender equity in India. The most prominent of these cases is the landmark Supreme Court decision, *Vishaka v. State of Rajasthan*. The background of the case arose from the gang-rape of Bhanwari Devi, a social worker attempting to prevent the marriage of a one-year-old child in Rajasthan, whose situation was used as the catalyst for public interest litigation addressing the limitations in the law's remedy for sexual assault in the workplace (Sood, 2008). The Supreme Court affirmed that there

were insufficient means in existing legislation to seek redress, and thus enacted “anti-sexual harassment guidelines that function as law” (Sood, 2008, p. 871; Holladay, 2012). However, the legitimacy of the Court’s actions are disputed, since they overlap with legislative functions of governance. Furthermore: how meaningfully has this impacted gender-based violence? It is difficult to measure whether this has had a widespread preemptive effect on sexual assault in the country. The Shanti Devi case and other instances of public interest litigation mirror the willingness of the court to take progressive stances on gender politics, but demonstrate that “there is much still to be done to ensure that landmark judgement[s are] truly embedded within policy and practice in India” rather than simply judicial precedent (Kaur, 2012, p. 29). More recently, in a Mumbai High Court, public interest litigation won a judgment in 2016 that was in favor of improving “women prisoners’ access to abortion” and “strongly affirmed women’s rights to abortion as an aspect of the fundamental right to live with dignity under Article 21” (Center for Reproductive Rights, 2018, p. 3). Ultimately, the courts have been effective and largely progressive in their extension of gender rights through judgments, although judicial remedies are only one component of change in broader policy contexts.

These cases demonstrate some of the limitations to gender justice in India through public interest litigation. One of the issues is that since litigation is by definition in the public’s ‘interest’, thus it is sometimes necessary for cases to “to build public support” for issues that contravene mainstream society’s standards and norms for gender equality, a difficult undertaking (Holladay, 2012, p. 569). Other policy problems include the lack of enforcement mechanisms. Although it is argued that public interest litigation places “a strong emphasis on the creation of positive rights through a broad rendering of Article 21 of the Indian Constitution” and “a

blurring of the traditional circumscriptions of the powers of government” ultimately, these rights can be created and upheld without being enforced (Holladay, 2012, p. 565). Enforcement itself is another issue--the corrupt nature of existing executive and state-level enforcement of law can often prevent justice from being enacted. In one instance, the Domestic Violence Act--which was strongly supported by PIL and the judiciary--failed to materialize protections due to police incompetence and reluctance to “pierce the sacrosanct realm of the private,” a cultural norm that perpetuates gender inequalities (Holladay, 2012, p. 556). This example illustrates the difficulty of altering socioeconomic and cultural barriers to gender equality that are systemic within Indian society. These gains, unfortunately, cannot be attained through court judgments alone.

Gender Rights Litigation in Nepal

Nepal can also be seen as a case study in litigation for gender rights, and the questions of whether the court is the most strategic venue for women’s rights advocates to push for equality. Although the Supreme Court has “overall made a tremendous contribution to improving the status and position of Nepali women, its interventions have not been uniform, equally incisive, or proportionally successful” due to multiple cultural and structural factors (Malagodi, 2018, p. 1). Malagodi argues that since gender is a complex, intersectional system that interlocks with multiple identity-based forms of discrimination, these cases are more difficult to adjudicate, with equality more difficult to extract from the complexities of society, law, and culture (Malagodi, 2018). This is complicated further by the public interest litigations’ frequent challenging of legislation, which forces courts to address issues of judicial review rather than individual redress or remedy, a much higher entry point for change (Malagodi, 2018, p. 6). Although there is support for judicial review more generally, in cases when religious discrimination has been used

to justify gender discrimination, there is less ability to challenge for gender rights activists since “Nepal has constitutional provisions which recognize an unqualified right to religion” even in the face of discrimination that is deemed unconstitutional (Goonesekere, 2004, p. 36). These structural problems, unique to the Nepali context, have defined many instances of public interest litigation for women’s rights.

Some early case studies help explain these dynamics at the individual level. One is the Sapana Pradhan Malla case, which utilized public interest litigation to challenge the constitutionality of the Land Act of 1964’s provisions on daughter’s tenancy rights (Malagodi, 2018). Rather than exercising judicial review, the Court asked parliament to introduce a bill to address the issue whilst justifying “the rationale of gender discrimination in the existing legal regime” under the pretense of cultural norms (Malagodi, 2018, p. 7). This illustrates the reluctance by the Court to exercise political leverage and hold other branches of government accountable to progressive conceptions of gender norms. In another case, lawyers for Canda Bajracharya “filed a PIL seeking the constitutional review of a number of Muluki Ain’s provisions discriminating against women on the basis of the right to equality” but the Supreme Court again declined to review the legislature’s actions and deferred to other branches of government for remedy (Malagodi, 2018, p. 7). In this case, the the religious discrimination faced were interpreted to be quintessential to the nature and structure of the nation, which harkens back to the issue of the unqualified right to religion enshrined in the Constitution. More recent cases of PIL, such as the Chandra Gyawai and Mira Dhungana cases, have seen greater confidence in the Courts’ addressing of gender discrimination and inequality (Malagodi, 2018). This has been due partially due to the increasing eye towards globalized attitudes toward gender,

which skew progressive, and the desire for Nepal to embrace modernity. In one case, the Supreme Court actively condemned tradition “as superstition that ought to be erased from modern Nepal by means of criminalization and developmental interventions by the state,” a huge reversal from earlier attitudes (Malagodi, 2018, p. 13). However, this is unlikely to be a sustainable course for the Courts to enforce equality, as it is in direct opposition to popular governance and widespread cultural practices. Backlash is inevitable when Courts exercise ‘too much’ power, and it seems like that this may be deemed too extreme of a foray into gender equality. In contrast to some of the earlier cases in India, instead of rebuking specific instances of discrimination or inequality, the Courts have extended criticisms to the nature of Nepali society, which seems like a judgment ripe for backlash.

Regional Analysis

When examining the judiciary of countries in South Asia, including India and Nepal, public interest litigation has not had consistent or widespread impacts on the status of women outside of legalistic contexts. Furthermore, the structure of law and the courts as predominantly male institutions diminishes the ability to address human rights issues in an effective and meaningful manner. The lack of diversity in Nepal’s high courts has been noted

“both in terms of gender and other socially marginalized groups. [...] In this respect, a United Nations Development Programme (UNDP) Report from 2017 concluded that the lack of diversity across Nepal’s judiciary has negatively affected the legitimacy and public perceptions of the judicial system, and also the ability of the bench to empathize with vulnerable groups. Thus, the composition of the Supreme Court-dominated by the

hegemonic groups-ought to be factored in when explaining patterns of judicial decision-making in gender equality litigation” (Malagodi, 2018, p. 6).

This holds true for all South Asian judiciaries--less than 10% of judges in South Asia were women as of 2011, the lowest share of all regions in the world (United Nations Women, 2011). Representation can affect the likelihood for courts to take cases based on gender issues, much less rule in favor of extending women's rights in the face of political and public opposition.

However, the cases of India and Nepal are unique because, relative to most of South Asia, judicial review is present as a mechanism of challenging legal forms of discrimination, providing a check on legislative branches. However, religion is cited as one of the largest justifications for female subservience, and “the courts are ... reluctant to strike down personal religion-based laws or customary laws that conflict with the Constitution” even when there is Constitutional basis to do so (Goonesekere, 2004, p. 40). Additionally, logistical problems plague the courts and public interest litigation is even more at risk of impact due to “limitations specific to the mechanism itself. As expressed by the petitioning lawyer in the Vishaka action, delays inherent in pursuing justice through the courts are a major disincentive for rights advocates, and petitioners have even sought to withdraw PIL actions for this reason” (Sood, 2008, p. 891).

Furthermore, the colonial British legal heritage that subjugated women has had an enormous influence on the Indian subcontinent. Some of the cultural concepts in British law such as “the male ‘head of household’, and father as natural guardian and breadwinner” are “reflected in the laws of South Asia, “ even as “these values reinforce discriminatory and stereotyped views on women's role in the family, and their subordinate status” which has lasting impacts on the

culture of the law and litigation (Goonesekere, 2004, p. 50). When looking at South Asia as a region, lessons can be taken from India and Nepal's public interest litigation, but their unique judicial structure and cross-regional trends in law make it unlikely that other countries in South Asia will see similar attempts to use the courts for women's rights reform.

Conclusion

Ultimately, public interest litigation and remedy through courts are insufficient policy mechanisms for achieving gender equality in South Asia. Although they provide excellent sources of public scholarship and legal judgments in favor of women, legislative and sociocultural action must be taken in order to institutionalize reforms. One issue faced by feminist movements in South Asia is the de-prioritization of social issues in policy, as governments struggle to meet the demands of large, diverse, changing societies; researchers and practitioners in this area suggest that "women in South Asian countries therefore need to lobby governments on their accountability to provide basic needs even in an environment of economic transformation so that they refrain from cutting back on public sector spending in these areas" (Goonesekere, 2004, p. 28). Though public interest litigation provides a source of legitimacy to gender issues and justice, a mix of advocacy strategies targeting legislative action and executive enforcement are needed to truly change the status of women in society.

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