

POSTCOLONIAL CONSTITUTIONALISM IN INDIA: COMPLEXITIES & CONTRADICTIONS

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I. INTRODUCTION

Despite strong constitutional guarantees, women in postcolonial India have been excluded from equal citizenship. They face systemic discrimination within the contradictory context of legal equality in the public sphere and legitimized discrimination in personal status laws; laws to protect women's rights are not enforced, gender-based violence has sharply increased, and the state does little to ensure equality and non-discrimination guarantees. Arguably, democratic institutions and structures of accountability have failed women. A shocking incident of violence against women in India was the brutal gang rape and subsequent death of a young woman in a moving bus in India's capital, New Delhi, in December 2012. Following the tremendous national outrage at the incident, the government set up the Verma Committee to consider amendments to the criminal law dealing with sexual violence. Headed by a former Chief

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Justice of India, J. S. Verma, the Verma Committee published its report in January 2013.¹ This report was a scathing indictment of the postcolonial state: the legislature, the executive, and law enforcement structures. It exposed the staggering extent to which the state and democratic institutions of the country have failed to act to enforce constitutional guarantees of equality and non-discrimination. As well, the Report was a call to action for civil society to engage in dialogue and introspection to better understand cultural and attitudinal changes critical to addressing and remedying the status of women in India. In May 2013, the government of India constituted a High Level Committee (“The Committee”) to inquire into the status of women.² The Committee’s mandate was “to undertake a comprehensive study on the status of women since 1989, and to evolve appropriate policy interventions based on a contemporary assessment of women’s economic, legal, political, education, health, and socio-cultural needs.”³ Since 1975, there had been no systematic inquiry into the status of women in India.⁴ The 1975 Report was a wake-up call for the Indian women’s movement—harshly critical of the government and holding it accountable for the continued abysmal status of women in postcolonial India.⁵ The Committee released its report in 2015 and identified violence against women, the low sex ratio, and the continued economic disempowerment of women as the critical aspects of women’s disadvantage that required immediate state action.⁶

Significantly, the Report emphasized the need to enforce the constitutional promise of gender equality and the imperative to pursue not just legal reform, but enforcement of existing laws to address women’s vulnerability.⁷ The Report found that neo-liberal economic policies have disadvantaged women in India and that, across all indicators, women’s equality remains elusive.⁸ Despite state efforts in initiating legislation and in creating remedial programs to address women’s status, none of these have had any significant impact.⁹ The Committee reaffirmed the findings of the Verma Committee regarding the harsh climate of violence against

1 J.S. VERMA, LEILA SETH, & GOPAL SUBRAMANIAM, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW (2013) [hereinafter VERMA REPORT].

2 HIGH LEVEL COMMITTEE ON THE STATUS OF WOMEN IN INDIA, MINISTRY OF WOMEN AND CHILD DEV., EXECUTIVE SUMMARY: REPORT ON THE STATUS OF WOMEN IN INDIA (2015) at 2.

3 *Id.*

4 *See id.*

5 PHULRENU GUHA ET AL., MINISTRY OF EDUCATION & SOCIAL WELFARE, TOWARDS EQUALITY: REPORT OF THE COMMITTEE ON THE STATUS OF WOMEN IN INDIA (1975).

6 HIGH LEVEL COMMITTEE ON THE STATUS OF WOMEN IN INDIA, *supra* note 2, at 2.

7 *Id.*

8 *Id.* at 3-4.

9 *Id.* at 4.

women and called on the state to implement the recommendations linking the state's failure to enforce laws and the violation of women's human rights.¹⁰ It called on the state to honor its obligations under international human rights law and, in particular, the Convention on Elimination of all Forms of Discrimination against Women ("CEDAW").¹¹ Personal laws, which legitimized women's unequal status within the family, were identified as a primary cause of women's inequality.¹² In political participation and representation, education, health, access to justice, access to credit, and property ownership, women continue to be discriminated against.¹³ In total, the Committee found that across all aspects of life, the State had to be more effective in order to address women's inequality across the country. Significantly, the Committee laid great emphasis on law reform as a critical aspect of ensuring women's equality and called on the state to fulfill the promise of constitutional equality—a promise that had yet to be translated into material reality for women.

Postcolonial constitutions have often been understood as providing: "a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence" ¹⁴ Considering the emancipatory potential of postcolonial constitutions is an exciting area of study that resonates across global democracies as they grapple with the issue of fostering constitutional cultures that can strengthen citizenship, equality, and the protection of women's human rights.

The objective of this Article is to examine the transformative potential of postcolonial constitutionalism for women's rights in India. I will consider its complexities and contradictions, questioning the extent to which constitutional guarantees and their judicial affirmation can ensure justice for women. My objective is to further develop an understanding of whether postcolonial constitutionalism can be seen as transgressive and emancipatory or as reinforcing existing relations of power. The premise of this inquiry is that constitutionalism carries within it the potential of inducing far reaching social transformation through democratic, peaceful processes grounded in the rule of law. This issue shall be examined through the lens of the Indian Constitution, which was drafted as a manifesto for

10 See generally *Id.*; See generally VERMA REPORT, *supra* note 1.

11 HIGH LEVEL COMMITTEE ON THE STATUS OF WOMEN IN INDIA, *supra* note 2, at 9.

12 *Id.* at 36.

13 See generally *id.*

14 Pius Langa, *Transformative Constitutionalism*, 17 STELLENBOSCH L. REV. 351, 352 (2006), quoted in S. AFR. (INTERIM) CONST. 1993.

social change and was intended to return the imperial gaze to construct the modern Indian nation on the values of equality and the rule of law. The Indian constitution was constructed as a moral autobiography, which promised a new future while explicitly rejecting the colonial past.¹⁵ It was deeply influenced by the ideas of human rights and committed to the principle of equality.¹⁶ However, these lofty aspirations have not translated into better rights for women on the ground.

The theoretical framework will be informed by insights from comparative constitutionalism, postcolonial theory, feminist legal theory, and traditional legal doctrinal analysis. My aim is to examine the Indian Constitution in order to uncover its underlying assumptions as well as its normative aspirations, and to reflect on the Indian experience as it relates to broader themes of postcolonial constitutionalism. In Part I, this Article examines the constitutional context and framework; in Part II, the Article comments on the *Vishaka v. Rajasthan* decision, using it as the prism through which to examine the transformative promise of constitutionalism in India.¹⁷ The Article concludes in Part III, with an analysis of postcolonial constitutionalism and evaluates its emancipatory promise for Indian women.

The long tradition of equality jurisprudence in India and the tremendous potential of constitutional provisions provide the context and opportunity for a rich engagement with constitutionalism to further equality rights. As Granville Austin notes, “The Indian Constitution is a live document in a society rapidly changing and almost frenetically political. The touchstone for public and many private affairs, the Constitution is employed daily, if not hourly, by citizens in pursuit of their personal interests or in their desire to serve the public good.”¹⁸ This Article will not only help elucidate areas in which the promise of constitutional law can be realized to create salient changes in people’s everyday lives, but will also help better identify what can be done to strengthen the state’s commitment to equality and inclusive citizenship, focused on those who are most marginalized and disempowered. This Article aims to contribute to efforts to ensure more effective legal protection for women in India; and to promote a stronger transnational rights dialogue which will further our

15 Upendra Baxi, *Postcolonial Legality*, in A COMPANION TO POSTCOLONIAL STUDIES 540, 544 (Henry Schwarz and Sangeeta Ray, eds., 2000) [hereinafter Baxi, *Postcolonial Legality*].

16 GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 59 (1966), [hereinafter AUSTIN, INDIAN CONSTITUTION].

17 *Vishaka v. Rajasthan*, AIR 1997 SC 3011 (India).

18 GRANVILLE AUSTIN, WORKING IN A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 10 (1999) [hereinafter AUSTIN, WORKING].

understanding of equality and discrimination in India. I draw upon the theoretical perspectives of Upendra Baxi to build upon the idea of transformative constitutionalism in postcolonial nations with a view to construct an understanding of the possibility of rights enforcement and social justice. Baxi's work provides an essential starting point to examine the constitutional implications of the gap between law and justice and the reality of rights violations in contemporary India.

II. THE CONSTITUTIONAL FRAMEWORK: COMPLEXITIES & CONTRADICTIONS

The postcolonial Indian state was acutely conscious of the need to address the status of women and disadvantaged groups. Law reform was written into the national program of development and modernization, and yet discriminatory family laws coexist with constitutional guarantees. Women's constitutional equality remains elusive particularly with regard to violence against women.¹⁹ It is this complexity and contradiction that provides a rich venue in which to understand how law and constitutionalism can guide projects of modernization, transformation, and social change. Indeed, India's complex Constitution can be credited for mandating and sustaining reform and guiding India through its tremendous diversity and inequity to a certain uniformity and equality while respecting group difference.²⁰ The ways in which constitutional law is implicated in these efforts in India, to recognize diversity, engage citizens, and uphold rights guarantees, makes this inquiry compelling and underscores the significance of determining whether constitutions are transgressive and emancipatory or serve merely to reinforce existing relations of power.

This Article acknowledges the limitations of rights and of constitutionalism. As constitutional scholar Austin astutely observes, neither the constitution's rights nor the courts themselves can ensure citizens' equality; it is the executive branch that can fulfill these constitutional promises.²¹ Further, "so long as judicial processes continue being inordinately slow . . . the courts, themselves, provide all too little protection for citizens' fundamental rights."²² The Indian judicial system is notoriously backlogged. The Supreme Court of India noted this critical

19 VERMA REPORT, *supra* note 1, at 7-13, 32, 45-51, 56.

20 Werner Menski, *Fuzzy Law and the Boundaries of Secularism*, 13:3 PORCHEFSTROOMSE ELEKTRONIESE REGSBLAD 30, 38, 47-49 (2010).

21 Granville Austin, *A Historian's Reflections on the Indian Constitution*, in HUMAN RIGHTS, JUSTICE, & CONSTITUTIONAL EMPOWERMENT xxii, xxv (C. Raj Kumar & K. Cockalingam eds., 2007) [hereinafter Austin *Historian's Reflections*].

22 *Id.*

situation with regard to the backlog of cases in *Imtiyaz Ahmed v. State of Uttar Pradesh*.²³ Taking note of this decision, the 20th Law Commission of India prepared a Report highlighting the critical situation with regards to arrears and backlog.²⁴ With *Imtiyaz Ahmed* as the premise of its inquiry, the Commission's Report makes the link between the delay in justice and the denial of justice.²⁵ The Report identified the lack of judges as one of the primary reasons for the staggering backlog of cases to be heard.²⁶ According to this Report, the current ratio of 10.5 judges per million, far lower than in other countries, is woefully inadequate, and the Commission recommended that it be increased to at least fifty judges per million of the Indian population.²⁷ Further, acknowledging that simply increasing the number of judges is not a sufficient response, the Report noted as well the need for systemic judicial reform aimed at reducing delays at all levels of the judicial system.²⁸ Given this state of affairs, it is valid to question whether in practice, constitutional guarantees of equality exist at all.²⁹

At the same time, women in India are challenging laws, religious norms, and cultural traditions, drawing upon arguments of constitutional equality, fundamental rights and international human rights law, notably CEDAW.³⁰ This engagement with the discourse of rights occurs at several levels. As claimants, women assert their constitutional equality rights in the courts appealing as well to international human rights norms of equality and anti-discrimination. For its part, the Supreme Court, through its interpretational creativity of constitutional provisions and its receptiveness to Public Interest Litigation ("PIL"), has breathed life into formal constitutional guarantees.³¹ Interestingly, the Supreme Court has linked the non-enforceable Directive Principles with enforceable Fundamental Rights

23 *Imtiyaz Ahmed v. State of Uttar Pradesh*, AIR 2012 SC 642 (India).

24 GOVERNMENT OF INDIA, LAW COMMISSION, REPORT NO. 245, ARREARS AND BACKLOG: CREATING ADDITIONAL JUDICIAL (WO)MANPOWER (2014), <http://lawcommissionofindia.nic.in/reports/Report245.pdf>.

25 *Id.* at 1.

26 *Id.* at 47.

27 *Id.* at 53.

28 *Id.* at 51.

29 Austin, *supra* note 21.

30 *See, e.g.*, Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 34/180, (Dec. 18, 1979); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, (Dec. 10, 1948); and Vedna Jivan & Christine Forster, *What Would Gandhi Say? Reconciling Universalism, Cultural Relativism, and Feminism Through Women's Use of CEDAW*, 9 SING. Y.B. INT'L L. 103, 104 (2005).

31 Upendra Baxi, *Preliminary Notes on Transformative Constitutionalism*, in TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA 19, 38 (Oscar Vilhena, Upendra Baxi & Frans Viljoen, eds., 2013) (referring to "social action litigation" when describing the influence of Public Interest Litigation in the development of constitutional and human rights.").

to strengthen its recognition of women's equality rights.³² Using Directive Principles to inform its interpretation of the right to gender equality, the Supreme Court has crafted thoughtful, contextual responses to women's inequality. In addition, the Supreme Court of India explicitly incorporates the rules and principles of international human rights norms where gaps exist in national legislation.³³ Finally, in what might be characterized as a constitutional dialogue between the judiciary and the legislature, the legislature has initiated laws that are consistent with the protection of women's human rights.³⁴ Most recently, Parliament has enacted legislation to address domestic violence and sexual violence against women in the workplace.³⁵ Despite such promising developments, the material reality of women's lives in India does not reflect much improvement, nor has the gap between formal rights and the actual status of women been narrowed as a result of this legalization of human rights.

The Indian Constitution has been characterized as a manifesto for social revolution with an explicit transformative agenda.³⁶ It was drafted at a time when the ideals and aspirations of human rights were compelling to the leaders of the newly independent nation.³⁷ The Constitution mandates the state to redress not just the injustices of the colonial past but also ancient wrongs such as untouchability, the status of women, and Hindu patriarchy.³⁸ The status of women was central to this self-conscious modernizing project of nationalism. As in other postcolonial societies, law was understood to be the primary agent of social change. Recognizing the importance of law reform as a catalyst for social change and the significance of rights in remedying the harsh inequities of colonial India—with its divisions of class, caste, gender, and religion—the Constitution emphasized the importance of universal human rights, principles of equality, and non-discrimination.³⁹

In turn, the judiciary was mandated with the task of bringing about change, enforcing rights and regulating and reforming religion to address

32 Vishaka v. Rajasthan, AIR 1997 SC 3011 (India).

33 *Id.* at 2-4.

34 See The Protection of Women from Domestic Violence Act, 2005, Gazette of India, pt. II sec. 1 (Sept. 13, 2005) [hereinafter *Domestic Violence Act*]; The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013, Gazette of India, pt. II sec. 1 (Apr. 22, 2013) [hereinafter *Sexual Harassment Act*].

35 Sexual Harassment Act, *supra* note 34.

36 AUSTIN, INDIAN CONSTITUTION, *supra* note 16, at 51, 164.

37 *Id.*

38 Baxi, *Postcolonial Legality*, *supra* note 15, at 545.

39 AUSTIN, INDIAN CONSTITUTION, *supra* note 16, at 50-51.

inequities, particularly with regard to gender and caste.⁴⁰ Taking its postcolonial constitutional mandate for social reform through judicial activism seriously, the Indian Supreme Court has been remarkably enthusiastic about interpreting the Constitution to reach decisions in favor of equality rights. The Supreme Court, as in most postcolonial states, has played a critical role in fostering constitutional culture, strengthening democratic citizenship and protecting constitutional rights. The main organizing principles of the Indian Constitution were democracy and social revolution. It was understood early on, that for social revolution to be successful, it had to be grounded in democracy. And yet, without socio-economic reform, the postcolonial nation could not be democratic.⁴¹

With regard to the fundamental rights, the pre-eminent issue has been promoting the social revolution.⁴² Austin identifies universal adult suffrage and fundamental rights as the principal constituents of the constitution's radicalism and, related to this, the critical need to address the status of women through constitutional change and law reform was recognized as one of the fundamental aspects of modernization and postcolonial nationalism.⁴³ Yet, while the Constitution contained the promise of radical change, ironically, in the early years of the Constitution, the courts held as unconstitutional much of the social reform legislation.⁴⁴ This is one of the enduring complexities and contradictions of Indian constitutionalism.

A. FUNDAMENTAL RIGHTS AND DUTIES

The Constitution of India guarantees equality and freedom from discrimination.⁴⁵ It also guarantees religious freedom and protection of minority rights.⁴⁶ In sharp contrast to these equality guarantees, women are subject to explicit discrimination in the family, which is regulated by religious personal laws. These laws discriminate on the basis of both religion and gender.

40 *Id.* at 169–185.

41 AUSTIN, WORKING, *supra* note 18, at 6, 14.

42 *Id.* at 71.

43 Austin, *Historian's Reflections*, *supra* note 21, at xxiii.

44 Arun K. Thiruvengadam, *Revisiting the Role of the Judiciary in Plural Societies*, in *COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA* (Sunil Khilnani et al. eds., 2013) [hereinafter Thiruvengadam, *Revisiting*].

45 INDIA CONST. arts. 14–16, 39.

46 INDIA CONST. arts. 14–16(2), 25.

Article 21 of the Constitution of India reinforces the “right to life.”⁴⁷ Using the right to life, the Supreme Court has creatively read in fundamental rights guarantees where no positive right existed:

Equality, dignity of person, and right to development are inherent rights in every human being. Life in its expanded horizon includes all that give meaning to a person’s life including culture, heritage and tradition with dignity of person. The fulfillment of that heritage in full measure would encompass the right to life. For its meaningfulness and purpose every woman is entitled to elimination of obstacles and discrimination based on gender for human development, women are entitled to enjoy economic, social, cultural and political rights without discrimination and on a footing of equality . . . but also all forms of gender-based discrimination should be eliminated.⁴⁸

Article 32 supports the role of the judiciary in social action litigation.⁴⁹ Through its writ jurisdiction, the Supreme Court has the authority to uphold fundamental rights by relaxing rules of standing that democratize the constitution and access to justice.⁵⁰ Article 51(A) of the Fundamental Duties has been used by the Supreme Court to support the protection of fundamental rights to equality and non-discrimination and to underscore state accountability, particularly for disempowered groups.⁵¹

B. DIRECTIVE PRINCIPLES

Borrowed from the Irish Constitution, Directive Principles were included in the fundamental rights chapter of the constitution and were another critical aspect of this radicalism.⁵² The status of Directive Principles has been a matter of some controversy and debate.⁵³ Nevertheless, through its decisions interpreting the Constitution to protect fundamental rights, the Supreme Court has relied on Directive Principles to breathe life into Fundamental Rights.⁵⁴ The Directive Principles of State Policy and the Charter of Fundamental Duties of Citizens embody constitutional ideals. Although not judicially enforceable, these principles

47 *Id.* at art. 21; *see also* Maneka Gandhi v. Union of India, AIR 1978 SC 597 (India) (deciding that Article 21 “confers fundamental right to life and personal liberty”).

48 Madhu Kishwar v. State Of Bihar, (1996) 5 SCC 125 (India).

49 INDIA CONST. art. 32.

50 *Id.*

51 *Id.* art. 51A(e).

52 AUSTIN, INDIAN CONSTITUTION, *supra* note 16, at 75-83.

53 *Id.*; SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA 154-55 (2009); Rajeev Bhargava, *Introduction: Outline of a Political Theory of the Indian Constitution*, in POLITICS AND ETHICS OF THE INDIAN CONSTITUTION 9, 26-34 (Rajeev Bhargava ed., 2013).

54 Vrinda Narain, *Water as a Fundamental Right*, 34 VT. L. REV. 917, 920 (2010).

are fundamental in the governance of the country. The state is mandated to apply these principles in making laws, and the Directive Principles are imperative to the legislature and the executive.⁵⁵ The Directive Principles, setting out humanitarian socialist principles, may be characterized as an expression of the social revolutionary aspect of India's Constitution, insisting that the state has the positive obligation to ensure a social order based on both economic and social justice; that state institutions promote equality both individually and for groups.⁵⁶ Importantly, as Baxi highlights, Directive Principles:

[P]rovide critical social spaces for politics of identity and difference by introducing dissonance in the life of civil society and the state. The fundamental duty to respect and cherish the ideals of the freedom movement; to respect the "composite culture" of India; to develop a scientific temper, spirit of enquiry, and reform; and to renounce practices derogatory of women – all enable discourses of empowerment. These draw legitimation not from some abstract conception of toleration and dignity but from the source of all legality: the Constitution itself.⁵⁷

Article 44 of the Directive Principles calls upon the state to enact a uniform civil code ("UCC").⁵⁸ Recognizing the contradiction of formal equality guaranteed by the fundamental rights and the explicit inequality of religious personal laws, the insertion of Article 44 calling upon the state to initiate a UCC has been one of the ways in which the Directive Principles have been explicitly linked to fundamental rights. Article 44 has been largely ignored by successive governments, most notably for reasons of political expediency, and justified in the name of the state's commitment to minority rights.⁵⁹

Article 51(c) of the Indian Constitution is a Directive Principle that directs the state to fulfill its obligations under international law.⁶⁰ In addition, under Article 253 of the Constitution, the state is required to honor its commitments under international human rights law.⁶¹ The Supreme Court's increased use of international law and universal norms to interpret constitutional guarantees of women's substantive equality and freedom from discrimination is promising. Arguably, international law has

55 INDIA CONST. art. 37.

56 INDIA CONST. arts. 38-39; AUSTIN, *INDIAN CONSTITUTION*, *supra* note 16, at 75.

57 Baxi, *Postcolonial Legality*, *supra* note 15 at 546.

58 INDIA CONST. art. 44.

59 VRINDA NARAIN, *GENDER AND COMMUNITY: MUSLIM WOMEN'S RIGHTS IN INDIA* 24 (2001).

60 INDIA CONST. art. 51(c).

61 *Id.* art. 253.

a normative impact on states, as demonstrated by the adoption of international human rights norms by the Indian Supreme Court.⁶²

III. LOCATING INDIAN WOMEN

The harsh reality, as noted by the Verma Committee, is that in contemporary India, the promise of constitutional equality has not been realized for women.⁶³ Despite economic growth, gender inequality persists:⁶⁴

On the Gender Inequality Index—inequalities in reproductive health, empowerment and economic activity—India has been ranked 132nd among the 148 countries for which data is available. Only 10.9 per cent of the parliamentary seats are held by women, and 26.6 per cent of adult women have reached a secondary or higher level of education, compared with 50.4 per cent of their male counterparts. For every 100,000 live births, 200 women die of causes related to pregnancy, and female participation in the labour market is 29 per cent, compared with 80.7 per cent for men.⁶⁵

According to the Indian National Crime Bureau, 24,206 cases of rape were reported in 2011, or one every 21 minutes.⁶⁶ As Aseem Prakash and Joshua Eastin note,

Only 26% of these cases resulted in conviction, a 0.2% decline from 2010. Domestic abuse also remains a serious problem in India. The World Bank reports that in 2006, 47% of women were physically abused by their husbands, 21% of whom were beaten for simply “burning the food” and 31% for “arguing.” Indian women have higher illiteracy rates than men (26% versus 12%, respectively, among those ages 15 to 24 years) and dramatically lower levels of labor force participation (29% versus 81% for those 15 years and older in 2010). These statistics are startling, especially when one considers that India is the world’s largest democracy and has experienced considerable gains in economic prosperity.⁶⁷

62 See *Vishaka v. Rajasthan*, AIR 1997 SC 3011 (India); *Madhu Kishwar v. State Of Bihar*, (1996) 5 SCC 125 (India).

63 VERMA REPORT, *supra* note 1, at iv, 10, 56.

64 Amartya Sen, *The Many Faces of Gender Inequality*, 225 NEW REPUBLIC 35, 40 (2001).

65 UNDP Brackets India with Equatorial Guinea in Human Development Index, THE HINDU (Mar. 15, 2013), <http://www.thehindu.com/news/national/undp-brackets-india-with-equatorial-guinea-in-human-development-index/article4510390.ece>.

66 NATIONAL CRIME RECORDS BUREAU, CRIME IN INDIA 2011 STATISTICS 81 (2012), <http://ncrb.nic.in/CD-CII2011/cii-2011/Chapter%205.pdf>

67 Joshua Eastin & Aseem Prakash, *India Rapes Show Gender Inequality Persists Despite Economic Growth*, SEATTLE TIMES (May 4, 2013), <http://www.seattletimes.com/opinion/guest-india-rapes-show-gender-inequality-persists-despite-economic-growth/>.

An awareness of the fragility of rights and the limits of law lends urgency to the question of women's equality in postcolonial India. Of particular interest are the links between transformative constitutionalism, equal citizenship, and social change. I focus on the landmark *Vishaka* decision on violence against women,⁶⁸ which resulted in the Indian Parliament's enactment of legislation addressing sexual harassment in 2013.⁶⁹ This case demonstrates law's transformative potential, while simultaneously underscoring the reality of persistent rights violations in contemporary India. It is significant in that it resulted in legislative action that addresses gender inequality. It is also noteworthy for underscoring the richness of transnational rights dialogue as the Indian Supreme Court enthusiastically embraced international human rights norms. The Supreme Court of India linked gender inequality with workplace sexual harassment and contextualized the issue within the framework of fundamental human rights, emphasizing state responsibility.⁷⁰

In *Vishaka*, the Supreme Court presided over the case of a brutal gang rape of a female social worker in rural Rajasthan.⁷¹ The Supreme Court demonstrated its receptiveness to incorporating international law into domestic law, citing Article 51(c) of the Constitution and Article 253, as it turned to international norms to craft a legal response to sexual assault.⁷² *Vishaka's* particular significance lies in its emphasis on linking constitutional guarantees of gender equality with international human rights to respond to women's experiences of sexual assault and sexual harassment in the workplace. In response to the gap in domestic legislation on this issue, the Supreme Court recognized its normative role to "fulfill this felt and urgent social need."⁷³ Looking to CEDAW, the Supreme Court incorporated these legal provisions into Indian domestic law and entrenched international norms into Indian constitutional law to enlarge and interpret widely the guarantee of gender equality.⁷⁴

The Court then strengthened its argument by turning to national legislation, the Protection of Human Rights Act, to reinforce the entrenchment of anti-discrimination principles of international human rights law into Indian constitutional law.⁷⁵ The Court previously held that

68 *Vishaka v. Rajasthan*, AIR 1997 SC 3011 (India).

69 *Sexual Harassment Act*, *supra* note 34.

70 *Vishaka*, AIR 1997 SC 3011.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*; The Protection of Human Rights Act, 1993, No. 10 of 1994, (codified as amended by The Protection of Human Rights (Amendment) Act, 2006, No. 43 of 2006).

by virtue of the Human Rights Act, “the principles embodied in CEDAW and the concomitant right to development became integral parts of the Indian Constitution . . . and became enforceable.”⁷⁶ Most importantly, the Court categorically asserted that India’s reluctance to enforce CEDAW was not acceptable in light of Indian constitutional law and India’s commitments to international human rights.⁷⁷ The Court called on the state to make good its commitments to constitutional guarantees of antidiscrimination under Articles 14 and 15 of the Constitution, as well as its obligations to equality and antidiscrimination under human rights law.⁷⁸ Thus, the Court emphasized the link between national constitutional law and international human rights law to expand and enforce state accountability to all its citizens through the implementation of equality rights. Specifically, the Court noted the duty of the state to remedy existing domestic legislation, laws, regulations, customs, and practices that discriminate against women.⁷⁹ *Vishaka* illustrates that much can be achieved through judicial engagement where a proactive judiciary compels an unenthusiastic state executive to comply with the Constitution.⁸⁰

Another case following the decision in *Vishaka* is *Apparel Export Promotion Council v. A K Chopra*, which also concerned sexual harassment.⁸¹ The Supreme Court turned to CEDAW and other international agreements and directed the state to take appropriate steps to prevent all forms of discrimination against women.⁸² Relying on *Vishaka*, the Court held that international agreements must be applied when there is no inconsistency between international human rights law and domestic law.⁸³

In *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*, the question before the Court was whether the Maternity Benefits Act of 1961 applied to women who were employed on daily wages and not permanent employees.⁸⁴ Asserting the fundamental rights to equality and non-discrimination to support these workers, the Supreme Court

76 C. Masilamani Mudaliar v. Idol of Sri Swaminathaswamiswaminathaswami Thirukoil, AIR 1996 SC 1697 (India).

77 *Vishaka*, AIR 1997 SC 3011.

78 *Id.*

79 *Id.*

80 Baxi, *Postcolonial Legality*, *supra* note 15, at 550 (India).

81 *Apparel Exp. Promotion Council v. A.K. Chopra*, AIR 1999 SC 625 (India).

82 *Id.*

83 *Id.*; Other cases decided after *Vishaka* include: *Saudi Arabian Airlines v. Mudbhatkal*, (1999) 81 FLR HC 767 (25 Nov., 1998) (India); *Rupan Deol Bajaj v. KPS Gill*, AIR 1996 SC 309 (India); *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 SCC 14 (India); *Chairman, Ry. Bd. v. Chandrima Das*, (2000) 2 SCC 465 (India).

84 *Mun. Corp. of Delhi v. Female Workers (Muster Roll)*, AIR 2000 SC 1274 (India).

highlighted gender equality and social and economic justice as fundamental organizing principles of the Indian Constitution.⁸⁵ The Court once again supported its constitutional argument extending maternity benefits to female daily wage workers, relying on principles of social justice as embodied in Universal Declaration of Human Rights (“UDHR”) and Article 11 of CEDAW, which calls for the state to eliminate discrimination against women in employment and the right to work.⁸⁶ In its decision, the Court set out detailed provisions of CEDAW’s Article 11, ruling that these provisions must be read into the Maternity Benefits Act, and it also upheld the right of female workers to receive maternity leave benefits.⁸⁷

In *C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil*, the Supreme Court considered inequality in religious personal law, emphatically asserting the connection between constitutional rights to equality and India’s obligations under international law to eliminate gender discrimination.⁸⁸ In allowing the appeal, the Court held that provisions of religious personal law that discriminate against women violate the equality guarantee and must be consistent with constitutional law.⁸⁹ Turning to international law to support its decision, the Court underlined India’s obligations under CEDAW to prohibit all gender-based discrimination and made specific mention of property issues.⁹⁰ Significantly, women’s human rights were seen as indivisible as the Court insisted that the goal of development as outlined in the UN Declaration on the Right to Development signified the indivisibility of economic, social, and political rights.⁹¹ The Court stressed the purpose of law as an instrument of social change, noting the role of the Supreme Court in bringing about such change, and mandated the state to enforce constitutional rights.⁹² In using human rights law to interpret Indian constitutional law, the Court stated, “Law is an instrument of social change as well as the defender for [sic] social change.”⁹³

These cases demonstrate the transformative potential of constitutional rights and international human rights norms to compel state accountability to vulnerable groups where domestic legislation falls short. Nevertheless,

85 *Id.*

86 *Id.*

87 *Id.*

88 *C. Masilamani Mudaliar v. Idol of Sri Swaminathaswamiswaminathaswami Thirukoil*, AIR 1996 SC 1697 (India).

89 *Id.*

90 *Id.*

91 *Id.*; G.A. Res. 41/128 (Dec. 4, 1986).

92 *C. Masilamani Mudaliar*, AIR 1996 SC 1697.

93 *Id.*

the Supreme Court has generally approached the incorporation of international law into domestic law with caution, taking care even in *Vishaka* to note that in the case of any conflict between municipal law and international law, municipal law would prevail.⁹⁴ The *Vishaka* decision culminated in the drafting of the Protection of Women Against Sexual Harassment at Workplace Act of 2013.⁹⁵ The Act incorporates the guidelines laid out in *Vishaka*, explicitly linking constitutional rights to equality, life, and liberty with universal human rights norms.⁹⁶ Through this legislative initiative, Parliament has responded to the Supreme Court's insistence on incorporating international human rights law to enforce women's rights, where national legislation is inadequate. Yet, as the culmination of the struggle for recognition of sexual harassment began with the *Vishaka* case, the Act is a shaky victory and has been criticized by activists, scholars and feminists.⁹⁷ It has certain problematic provisions, specifically with regard to false and malicious complaints that might deter women from coming forward to report harassment.⁹⁸ In addition, there are certain groups of women who are excluded from the purview of the Act, such as University students and agricultural workers.⁹⁹ Finally, enforcement mechanisms provided for in the Act may not be particularly effective. Indeed, enforcement might remain the biggest challenge as acknowledged by the Supreme Court in *Medha Kotwal Lele v. Union of India*, decided in October 2012, wherein it decried the lack of enforcement of *Vishaka* guidelines.¹⁰⁰

94 *Vishaka v. Rajasthan*, AIR 1997 SC 3011 (India).

95 *Sexual Harassment Act*, *supra* note 34.

96 *Id.*; *Vishaka*, AIR 1997 SC 3011.

97 Naina Kapur, *The Sexual Harassment Bill undermines the innovative spirit of Vishaka*, BAR & BENCH (Mar. 1, 2013), <http://barandbench.com/sexual-harassment-bill-undermines-innovative-spirit-vishaka-naina-kapur-lawyer-and-0/>.

98 *Sexual Harassment Act*, *supra* note 34, § 14(1).

99 *Id.* § 2 (o); VERMA REPORT, *supra* note 2, at 119.

100 *Medha Kotwal Lele v. Union of India*, (2012) 9 SCR 895 (India); *see, e.g., Sexual Harassment Act*, *supra* note 34. India's new law meant to prevent and redress incidents of sexual harassment of women in the workplace isn't likely to do much of either, and has been criticized by the Verma Commission as well as women's rights activists. The law requires that all companies and employers who have more than ten employees, constitute an "Internal Complaints Committee" to which an aggrieved woman can take her complaint. This committee, which must be headed by a senior female employee, is supposed to try initially to get the complainant and accused to reach a settlement and only launch an investigation if mediation fails. Critics object to this provision requiring conciliation before an inquiry. If harassment is proved, the law leaves it up to the internal committee to decide a monetary fine to be paid by the perpetrator, depending on their "income and financial status." The law doesn't define the range of financial penalties. The prescribed mechanism of filing complaints is too bureaucratic and could deter women from coming forward. There is a provision in the law that calls for punishment for making a false complaint. Women with legitimate grievances may keep quiet, fearing that they will not be able to prove their allegations and may instead be hounded for making false claims. Finally, activists note that while the new law starts by advocating prevention of sexual harassment, it

IV. POSTCOLONIAL TRANSFORMATIVE CONSTITUTIONALISM

Baxi's definition of constitutionalism states:

Constitutionalism, most generally understood, provides for structures, forms, and apparatuses of governance and modes of legitimation of power. But constitutionalism is not all about governance; it also provides contested sites for ideas and practices concerning justice, rights, development, and individual associational autonomy. Constitutionalism provides narratives of both rule and resistance.¹⁰¹

The role of the judiciary in Indian constitutionalism has been to step in where other institutions are unable or unwilling to do so.¹⁰² The Indian Supreme Court, through its activism and acceptance of social action litigation, has demonstrated a willingness to embrace universal notions of human rights. The Indian judiciary has become "an institutionalized movement for the protection and promotion of human rights."¹⁰³ Indeed, India has accepted the authority of the UDHR and CEDAW.¹⁰⁴ Although this acceptance is at the elite interstate level, it does have significance for the grassroots equality struggle in India where movements for social justice have increasingly relied on the discourse of human rights to forward their claims. However, despite this progressive jurisprudence, the state has done little to enforce judicial decisions or to conform domestic legislation to India's international law obligations.

Significantly, the workload of India's highest court is rising, particularly as citizens are losing faith in other democratic institutions as well as in the lower judiciary. As Nick Robinson notes, the Indian judiciary

dilutes the responsibility of the employer in preventing it. Since the fine for an offence has to be paid by the employee, it doesn't give companies much incentive to take active steps to create a harassment-free environment at work. The penalty for not setting up the internal committee is a maximum of 50,000 rupees (\$919). The law also extends to women in the unorganized sector, such as domestic workers and day laborers. But here too the legislation is not strong enough to empower these women; and even if it were, the question of how to enforce it in informal, unregulated workplaces would remain.

¹⁰¹ Baxi, *Postcolonial Legality*, *supra* note 15 at 540.

¹⁰² C. Raj Kumar, *Introduction: Rights, Justice, and Empowerment*, in HUMAN RIGHTS, JUSTICE, & CONSTITUTIONAL EMPOWERMENT xxvii, xxxi (C. Raj Kumar and K. Chockalingam eds., 2007); *see also* *Judiciary Still the Most Trusted Wing*, THE HINDU (May 9, 2000), <http://www.thehindu.com/thehindu/2000/05/09/stories/0209000a.htm> ("The people see the judiciary as their only hope, because of the incompetence of the legislature and the executive branch. The almost instinctive demand for judicial inquiries into incidents in dispute comes up only because judges are believed to be able to bring out the facts impartially.").

¹⁰³ FRANCIS DENG, ADULLAHI AN-NA'IM, YASH GHAI, & UPENDRA BAXI, HUMAN RIGHTS, SOUTHERN VOICES 196 (William Twining ed., 2009).

¹⁰⁴ *See supra* text accompanying notes 74-87.

is currently seeing a rush of litigants to the Supreme Court.¹⁰⁵ At the same time, the staggering backlog of cases in Indian courts is indicative of institutional failures and systemic problems.¹⁰⁶ And, in addition to the backlog of cases, the entire judicial system is struggling to keep up with an ever-increasing number of pending cases—as of 2010, there were over 32 million pending cases across India’s judiciary.¹⁰⁷

Postcolonial constitutionalism allows for normalizing judicial activism. It allows for a jurisprudence of engagement to ensure the future of rights in India. Most importantly, it democratizes the Constitution, ensuring a ground-up understanding of the Constitution not just as “a history of power but a future of social justice, which includes in its transformative praxes the struggle of disempowered groups; and one that recognizes that constitutionalism is a constant work in progress.”¹⁰⁸ Thus understood,

105 NICK ROBINSON, LAW, GOVERNANCE AND DEVELOPMENT INITIATIVE—AZIM PREMJI UNIV., THE INDIAN SUPREME COURT BY THE NUMBERS (2012), http://azimpremjiuniversity.edu.in/SitePages/pdf/LGDI_WorkingPaper_14December2012_The%20Indian-Supreme-Court-by-the-Numbers_NickRobinson.pdf#search=Robinson.

106 India has an integrated judicial system:

One of the unique features of the Indian Constitution is that, notwithstanding the adoption of a federal system and existence of Central Acts and State Acts in their respective spheres, it has generally provided for a single integrated system of Courts to administer both Union and State laws. At the apex of the entire judicial system, exists the Supreme Court of India below which are the High Courts in each State or group of States. Below the High Courts lies a hierarchy of Subordinate Courts. Panchayat Courts also function in some States under various names like Nyaya Panchayat, Panchayat Adalat, Gram Kachheri, etc. to decide civil and criminal disputes of petty and local nature. Different State laws provide for different kinds of jurisdiction of courts. Each State is divided into judicial districts presided over by a District and Sessions Judge, which is the principal civil court of original jurisdiction and can try all offences including those punishable with death. The Sessions Judge is the highest judicial authority in a district. Below him, there are Courts of civil jurisdiction, known in different States as Munsifs, Sub-Judges, Civil Judges and the like. Similarly, the criminal judiciary comprises the Chief Judicial Magistrates and Judicial Magistrates of First and Second Class.

SUPREME COURT OF INDIA, <http://www.sci.nic.in/constitution.htm>.

107 Anjani Trivedi, *When All Else Fails, Try the Supreme Court*, N.Y. TIMES: INDIA INK (Dec. 14, 2012), <http://india.blogs.nytimes.com/2012/12/14/when-all-else-fails-try-the-supreme-court/>. See COURT NEWS, Jan.-Mar. 2011, http://www.sci.nic.in/courtnews/2011_issue_1.pdf. See also Colin Gonsalves, *When India had 1,500 Fast Track Courts*, THE HINDU (Jan. 11, 2013), <http://www.thehindu.com/opinion/op-ed/when-india-had-1500-fast-track-courts/article4295245.ece>. Gonsalves, a leading Indian human rights lawyer notes:

India has about 11 judicial officers per million population as compared to Australia’s 42 and Canada’s 75; the United Kingdom has 51 and the United States has 107 per million population. To deal with the current volume of litigation and eliminate arrears, India needs to appoint five times the present strength of judges. The Central and State governments, however, treat the judiciary as a pariah and pretend not to understand how important this institution is for the survival of democracy itself.

108 Baxi, *Postcolonial Legality*, *supra* note 15.

postcolonial constitutionalism is a demonstration of the judiciary taking rights seriously through taking human suffering seriously.¹⁰⁹

Transformative constitutionalism, Baxi asserts, is signified by allowing for, and drawing from, a radical rereading of the Constitution.¹¹⁰ Postcolonial constitutionalism is aimed at democratizing the constitution and moving towards a subaltern constitutionalism. It raises the question whether constitutions can reimagine democratic politics to have an inclusive praxis? It is premised on constitutionalism from below rather than constitutionalism from above. Postcolonial constitutionalism argues for an understanding of democratic constitutionalism that conceptualizes citizenship as interrogating received norms and structures of power and representation.¹¹¹ It engenders resistance to governmentality and state power. It forces us to interrogate notions of integrity and unmask the foundational violence of state power and constitutional promises. It articulates reinterpretations of rights that speak to human suffering and a lack of rights. Arguably, constitutionalism as implemented by the Supreme Court of India encompasses these characteristics and allows for using judicial power to transform basic human needs into fundamental rights and freedoms.¹¹²

An interesting issue is whether the colonial inheritance of constitutionalism inhibits or prevents transformative praxes. Rohit De writes that,

Political scientists writing on the postcolonial Indian state have been suspicious of the claim that the Indian Constitution ushered in a new order. Drawing on the Gramscian notion of 'passive revolution', they suggest that there is a degree of continuity between the colonial state and the Indian republic despite independence and elections. This draws upon the failure of the postcolonial state to bring about the massive social and economic transformations that it promised. They argue that the emerging bourgeoisie that dominated the new leadership lacked the social conditions to establish a complete hegemony over the new nation, and entered into an alliance between an older dominant class with only a partial appropriation of the popular masses (through elections)...This explains the failure of the state

109 Upendra Baxi, *The Promise and Peril of Transcendental Jurisprudence: Justice Krishna Iyer's Combat with the Production of Rightlessness in India*, in HUMAN RIGHTS, JUSTICE, & CONSTITUTIONAL EMPOWERMENT 3, 15 (C. Raj Kumar and K. Chockalingam eds. 2007) [hereinafter Baxi, *Rightlessness in India*].

110 *Id.* at 20-21.

111 *Id.*

112 *Id.* at 22.

to implement its policies successfully. The conventional understanding is that most citizens remained outside these elite conversations....¹¹³

Others refute this understanding, arguing that while many of the structural and procedural aspects of the new postcolonial constitution relied on colonial legal structures and laws, there were an overwhelming number of changes, modifications, and new aspects of constitutionalism incorporated in the Indian Constitution. Borrowing heavily from the United States, the Indian Constitution incorporated entrenched fundamental rights, the separation of powers, federalism, and basic structure.¹¹⁴

In fact, the common law principles that influenced the making of the Indian Constitution are to be found in other liberal democracies. The Indian Constitution is premised on fundamental principles of democracy, the rule of law, federalism and the division of powers, and an independent judiciary. Arguably, these common law aspects serve to respond to the extraordinary challenges of “joining colonial inheritance with the challenge of transformative praxes.”¹¹⁵ Baxi points out the following:

Among the most notable transformations is the extension of the “classical” western notions of rights. The Indian Constitution, inaugurally, extends the notion of rights beyond the state to civil society. It outlaws practices based on the ground of “untouchability”; forbids and penalizes practices of forced and bonded labor and markets for trafficking in human beings; and provides a first contemporary example of *empowering* state action in aid of human rights against formations of cruelty in civil society. The Indian Constitution, in its progressive development, becomes the vehicle of empowerment of the untouchables and indigenous peoples. . .¹¹⁶

The Indian judiciary’s interpretational creativity is a critical aspect of postcolonial constitutionalism and its transformative potential. The Supreme Court’s decisions can be understood as challenges to existing power structures. De asserts that the Indian Constitution, through social action litigation and by virtue of judicial interpretation of fundamental rights and directive principles, has succeeded in democratizing the constitution.¹¹⁷ Through judicial review of laws and of administrative actions, the Constitution has enabled the judiciary to act as a check on executive power, insisting on access to justice for the poor, thus enabling a bottom-up constitutionalism. “A bottom up view of the Constitution would

113 Rohit De, *Beyond the Social Contract*, SEMINAR MAGAZINE: SPECIAL ISSUE ON 60 YEARS OF THE INDIAN CONSTITUTION (Nov. 2010), http://www.india-seminar.com/2010/615/615_rohit_de.htm.

114 Austin, INDIAN CONSTITUTION, *supra* note 16, at 186.

115 Baxi, *Rightlessness in India*, *supra* note 109, at 15.

116 Baxi, *Postcolonial Legality*, *supra* note 15, at 545.

117 De, *supra* note 113, at 6.

therefore suggest that the Constitution is not just a document prepared by an Assembly in 1950, but a continuous conversation between the citizens and the state.”¹¹⁸

Through judicial engagement and PIL, the Supreme Court has democratized the Constitution, transforming access to justice through its writ jurisdiction under Article 32, whereby the Supreme Court has democratized rules of standing to accept jurisdiction, and creatively enlarged peoples’ rights by taking social suffering seriously.¹¹⁹ Under this process, citizens may write letters to the Court with regard to violations of human rights of any person within India’s jurisdiction.¹²⁰ One need not be directly affected by this violation.¹²¹ This is a demonstration that the Supreme Court takes suffering seriously.¹²² Judicial activism has “steadily emerged as a foremost powerful site, making adjudication . . . a people’s ally contributing to social movement for redemocratization.”¹²³ Judicial redress through social action litigation has allowed individuals and groups not represented adequately in the electoral system the possibility of speaking truth to power and of challenging state hegemonies.¹²⁴

The importance of the disruption of professional hegemonies especially in the Indian context is underscored by the prevalence and success of social action litigation.¹²⁵ The nature of social action litigation in India is such that the Supreme Court justices initiate a constitutional rights conversation; of course the crucial point remains whether they have the power to influence legislative and executive action in response.¹²⁶ Commenting on the transformative power of constitutionalism, Baxi notes that “[s]ocial action litigation has led to judicial enunciation of new constitutional and human

118 See Baxi, *Rightlessness in India*, *supra* note 109, at 13. For a complete discussion on the legitimacy of judicial review in India, see KRISHNASWAMY, *supra* note 53, at 198-205.

119 Baxi, *Postcolonial Legality*, *supra* note 15, at 549.

120 *Id.*; *Compilation of Guidelines to be Followed for Entertaining Letters/Petitions Received in this Court as Public Interest Litigation*, SUPREME COURT OF INDIA, <http://www.sci.nic.in/circular/guidelines/pilguidelines.pdf> [hereinafter *PIL Guidelines*].

121 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 159, 165 (B.N. Kirpal et al. eds., 2011).

122 De, *supra* note 113, at 6; S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (2002); Upendra Baxi, *The Avatars of Judicial Activism: Explorations in the Geography of (In) Justice*, in FIFTY YEARS OF THE SUPREME COURT OF INDIA: ITS GRASP AND REACH 156, 156-209 (S.K. Verma & Kusum eds., 2001) [hereinafter Baxi, *Judicial Activism*].

123 Baxi, *Postcolonial Legality*, *supra* note 15 at 548.

124 De, *supra* note 113 at 6.

125 Wouter Vandenhoe, *Human Rights Law, Development and Social Action Litigation in India*, 3.2 ASIA-PAC. J. ON HUM. RTS. & L. 136, 137, 143-45 (2002).

126 *Id.* at 162, 198.

rights, and the Supreme Court has devised various ways and arrangements to monitor implementation, specially via continuing mandamus power and process.”¹²⁷

In “The Political Origins of the New Constitutionalism,” Ran Hirschl urges caution in embracing an unequivocal celebration of judicial engagement.¹²⁸ Constitutional scholars embrace judicial engagement as a bulwark against a democracy that is subject to the tyranny of the majority, seeing judicial review as introducing egalitarian ideals and progressive social values through the power-diffusing impact of constitutional supremacy.¹²⁹ Hirschl, however, argues that rather than demonstrating any real commitment to democracy, social justice, or egalitarian ideals, politicians have in fact harnessed the power of constitutionalism in a cynical manipulation that furthers a particular power hegemony.¹³⁰ He suggests that the global trend towards juristocracy serves particular interests while professing support for democratizing constitutions, and is used to “insulate policymaking from the vicissitudes of democratic politics.”¹³¹ Here, political elites, influential economic stakeholders, and judicial leaders unite to determine the “timing, extent, and nature of constitutional reforms,” and to control the process of PIL and its outcomes.¹³²

Indeed, in the particular context of India, this caution with regard to judicial governance through Supreme Court pronouncements on all matters—from slum clearance projects, to violence against women—must be taken seriously as the Court moves beyond its expertise and its judicial mandate. This can have a profound impact on constitutional arrangements, judicial independence, and the separation of powers. Tracing the evolution of PIL in India, Arun Thiruvengadam supports, “the view advanced by a number of progressive scholars that the Indian Supreme Court has, in a process which began in the 1990s and has continued over the current decade, transformed the nature of PIL and in some cases turned away from concerns it embraced in its original phase.”¹³³

127 Baxi, *Preliminary Notes on Transformative Constitutionalism*, in TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA, AND SOUTH AFRICA, *supra* note 31, at 38-39.

128 Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71 (2004).

129 *Id.* Prominent among these scholars is Ronald Dworkin.

130 *Id.* at 71-72.

131 *Id.* at 73.

132 *Id.* at 72.

133 Arun K. Thiruvengadam, *Swallowing a Bitter PIL? Reflections on Progressive Strategies for Public Interest Litigation in India*, in TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX

While PIL decisions are often in the news, as Robinson in his comprehensive study of the Supreme Court observes, in actual fact they account for only between 1 and 2 percent of the Supreme Court's docket.¹³⁴ Although notions of standing and jurisdiction have been greatly expanded by what Baxi terms epistolary jurisprudence, in 2008 while 24,666 letters were sent to the Supreme Court only 226 were placed before judges, who then either accepted or rejected them for regular hearing.¹³⁵ Moving forward, what is the potential of PIL to advance socially progressive causes? Is it a reasonable response, as others have suggested, that PIL is discredited by its co-option by neo liberal, conservative forces? Thiruvengadam suggests that this disengagement with the law is not an appropriate response.¹³⁶ At the same time, it is important to note the excessive over-reliance on the judiciary by proponents of PIL and the focus on the judiciary to implement social change and legal reform, which does not adequately acknowledge the very significant impact other civil society organizations play in forwarding equality agendas.

Indeed, Baxi himself expresses certain misgivings about the changing nature of PIL and its move away from its initial concerns with disempowered marginalized groups to a more bourgeois sensibility.¹³⁷ The greatly expanded role judges have carved out for themselves through activist engagement might be characterized, following Hirschl's functionalist perspective explanation of judicial activism, as arising where the judiciary takes on an expanded role in the context of a democratic deficit—filling the gap where other institutions of India's democracy have lost public confidence.¹³⁸ Although Hirschl suggests that this explanation might be inadequate to explain the Indian situation, it would not be wrong to say that India's democratic institutions have lost their credibility and the judiciary remains, because of judges' perceived neutrality and freedom from electoral politics, the guardian of the Constitution.¹³⁹

The limits of constitutionalism and the appropriation of judicial engagement by conservative elements are demonstrated most recently by the Supreme Court's decision in *Suresh Kumar Koushal v. NAZ*

COURTS IN BRAZIL, INDIA AND SOUTH AFRICA 519, 524 (Oscar Vilhena, Upendra Baxi & Frans Viljoen eds., 2013) [hereinafter Thiruvengadam, *Swallowing*].

134 Robinson, *supra* note 105, at 43.

135 *Id.*; *PIL Guidelines*, *supra* note 120.

136 *Id.* at 530.

137 See Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 *THIRD WORLD LEGAL STUD.* 107, 109, 130 (1985); Baxi, *Rightlessness in India*, *supra* note 109, at 3-25; Thiruvengadam, *Swallowing*, *supra* note 133, at 524-26.

138 Hirschl, *supra* note 128, at 72, 77-78.

139 See, e.g., VERMA REPORT, *supra* note 1, at 61, 123-34.

Foundation.¹⁴⁰ This decision overturned the landmark Delhi High Court decision in *Naz Foundation v. Government of NCT Delhi* decriminalizing same-sex consensual sex, severely undermining the progress made thus far.¹⁴¹ The case was filed by the NAZ Foundation, a non-government organization (“NGO”), as a public interest litigation challenging the constitutionality of Section 377 of the Indian Penal Code, which criminalizes homosexuality.¹⁴² In its decision, the Delhi High Court drew on international human rights law and comparative constitutional jurisprudence from the United States, Canada, South Africa, Fiji, and Nepal as well as the European Court of Human Rights, to support its holding that Article 21 of the Constitution, the right to life, covers the right to consensual same-sex relations as well as to rule that the criminalization of homosexuality violated Constitutional guarantees of equality.¹⁴³ Most noteworthy however, as Sujit Choudhry points out, was the invocation of the ideals of social revolution, equality and human dignity that animated the drafting of the Constitution.¹⁴⁴

The Delhi High Court decision was challenged in an appeal to the Supreme Court in *Suresh Kumar Koushal*. The Supreme Court took a position in sharp contrast to the lower court, rejecting constitutional arguments, comparative case law, and deference to international human rights. Instead, relying on judicial deference, the Supreme Court refused to strike down Section 377 of the Penal Code as unconstitutional, asserting that it was up to the legislature to change the law.¹⁴⁵ The Court relied on a disingenuous argument of deference to Parliament, shirking its duty of judicial review and interpretation of the Constitution, and failing to measure laws against the touchstone of constitutional guarantees. The Court refused to engage meaningfully, if at all, with arguments of equality and non-discrimination. This refusal to engage seriously with issues of equality contradicts the trend of Indian Supreme Court decisions such as *Vishaka*, *Bandhua Mukti Morcha*, *Olga Tellis*, and *Danial Latifi*.¹⁴⁶

Certainly, this Supreme Court decision was of great disappointment to progressive forces in India. It took LGBTQ communities and civil society

140 *Suresh Kumar Koushal v. Naz Found.*, (2014) 1 SCC 1 (India).

141 *Id.*

142 *Naz Found. v. Gov't of NCT of Delhi* (2009) 160 DLT 277 (India).

143 *Id.*

144 Sujit Choudhry, *Living Originalism in India? "Our Law" and Comparative Constitutional Law* 25 *Yale J. L. & Human.* 1, 12-15 (2013).

145 *Naz Found.* (2009) 160 DLT 277.

146 *See* *Vishaka v. Rajasthan*, AIR 1997 SC 3011 (India); *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802 (India); *Olga Tellis v. Bombay Mun. Corp.*, AIR 1986 SC 180 (India); *Danial Latifi v. Union of India*, (2001) 7 SCC 740 (India).

activists by surprise. This decision's only silver lining is that it might serve as a corrective to the collective Indian understanding of the Supreme Court as the keeper of fundamental rights, the guardian of the Constitution. The Supreme Court's reputation as the last bastion of participatory and inclusive democracy has been severely undermined. As Arghya Sengupta writes, "[a] combination of inadequate justification, sophistry and a woeful non-application of mind makes the unfortunate conclusion inescapable that the judgment ultimately rests on a deep-seated prejudice shared by the two judges that has no place in a legal judgment."¹⁴⁷ India expected more from its Supreme Court. This expectation illustrates the high regard with which the Supreme Court is held and the use of PIL by minorities historically. At the very least, this decision, so completely lacking in merit, intellectually impoverished, and analytically bereft, should be a call to action for reform minded groups to build coalitions across civil society—calling all democratic institutions to account, including the Supreme Court.¹⁴⁸

While maintaining a critical lens and being aware of the potential for judicial engagement to reinforce conservative agendas, the reality in India is that, through PIL, women's rights activists and NGOs have been able to influence law reform and push legislative action and executive compliance with the Constitution. At the same time, the complexity and contradictions of postcolonial constitutionalism are exemplified by the Supreme Court decision in *Suresh Kumar Koushal v. Naz Foundation*. In the final analysis, I would like to remain optimistic about the nature of constitutional change in India. This optimism is supported by the Naz Foundation's continued engagement through PIL with constitutional litigation, insisting on judicial recognition of the violation of fundamental rights guarantees. Soon after losing at the Supreme Court, the Naz Foundation filed a petition seeking a review of the *Koushal* decision.¹⁴⁹ The Court, on January 28, 2014, dismissed the review petition as without merit, refusing even to hear oral arguments.¹⁵⁰ In their latest move, the Naz Foundation filed a curative petition seeking to cure the defects in the Supreme Court decision. The Court admitted the curative petition and it is still pending.¹⁵¹ It is significant that the Court admitted the curative petition as such petitions are rarely

¹⁴⁷ Arghya Sengupta, Opinion, *The Wrongness of Deference*, THE HINDU (Dec. 16, 2013), <http://www.thehindu.com/opinion/lead/the-wrongness-of-deference/article5463126.ece?css=print>.

¹⁴⁸ *Id.*

¹⁴⁹ *Naz Foundation files review petition against the Supreme Court judgment on Section 377*, LAWYERS COLLECTIVE (Dec. 24, 2013), <http://www.lawyerscollective.org/updates/naz-foundation-files-review-petition-supreme-court-judgment-section-377.html>.

¹⁵⁰ Record of Proceedings, Curative Petition, Naz Found. Trust v. Suresh Kumar Koushal, (2014) SCC (Nos.88-102) (India).

¹⁵¹ *Id.*

allowed, and only in cases where the Court deems there has been a breach of natural justice.¹⁵²

Also noteworthy is the decision by a Division Bench of the Supreme Court handed down on April 15, 2014, in *National Legal Services Authority v. Union of India*, concerning the legal recognition of transgendered people.¹⁵³ Interestingly, while the Court noted the decision of another two-judge Division Bench of the Supreme Court in *Koushal*,¹⁵⁴ it declined to comment on that decision.¹⁵⁵ In this Writ Petition, the judges took a sharply contrasting position to that of *Koushal* to pass measures aimed at ensuring the safety and security of trans people. Significantly, the Court noted that Section 377 of the Indian Penal Code was used by law enforcement authorities to harass transgendered persons.¹⁵⁶ The judges provided a detailed, well-reasoned analysis of discrimination and inequality faced by transgendered individuals on the basis of gender and sexual orientation, drawing extensively on international human rights law and on decisions from courts across the world including Australia, Germany, Nepal, and England.¹⁵⁷

Vishaka was a PIL filed by a number of NGOs and women's rights activists. It is an example of a challenge to state power and demonstrates the judiciary's activist role.¹⁵⁸ *Vishaka* is also an example of interpretational creativity where the judiciary reinterpreted the relationship between fundamental rights and directive principles to assert violence against women as an aspect of gender discrimination, asserting women's equality rights together with the state's duty to prevent sexual violence against women.¹⁵⁹ Through judicial creativity, the courts have asserted human rights norms and standards not explicitly stated in the text of the Constitution, resulting in the transformative Delhi High Court *Naz Foundation* decision, which declared as unconstitutional the criminalization of the right to sexual orientation and conduct among consenting adults.¹⁶⁰ As Baxi notes, "the Supreme Court of India brings back into the realm of the constitutional state features often declared to be unsuitable by the emerging political state (such as the right to speedy trial,

152 Rosalind Dixon & Rishad Chowdhury, *Naz Foundation III*, INTL. J. CONST. L. BLOG (May 16, 2014), <http://www.iconnectblog.com/2014/05/naz-foundation-iii/>.

153 Nat'l Legal Servs. Auth. v. Union of India, WP (Civil) No.604 of 2013.

154 Suresh Kumar Koushal v. Naz Found., (2014) 1 SCC 1 (India).

155 Nat'l Legal Servs. Auth., WP (Civil) No. 604.

156 *Id.* at 13-14.

157 *Id.*

158 *See supra* text accompanying notes 68-80.

159 *Id.*

160 Suresh Kumar Koushal v. Naz Found., (2014) 1 SCC 1 (India).

bail, compensation for injurious state action or conduct).”¹⁶¹ The Supreme Court of India has also displayed a judicial will to combat government corruption.¹⁶²

V. CONCLUSION

Mindful of the challenges to women’s liberation in a traditional, patriarchal society, and acknowledging the limits of constitutionalism, the Constitution drafters understood that it was not just traditional culture but also colonialism that posed barriers to women’s empowerment. Judges in *Vishaka* used their judicial creativity and interpretive insurgence, reading against the grain, to effect a radical transformation. They read in constitutional guarantees, linking fundamental rights with directive principles, relying on international human rights law as well as transnational jurisprudence to actively engage with the enforcement of gender equality guarantees. This manner of engaged judicial activism, underscored their commitment to taking suffering seriously. Joining the local and national discourse with the global discourse on women’s human rights, to promote women’s equality, holding the state accountable, *Vishaka* demonstrates how the Supreme Court is being enlisted by women activists to democratize the Constitution, and to craft a subaltern constitutionalism that challenges the structures of power.

Such feminist legal theorizing combined with feminist legal action is arguably the starting point for understanding how “constitutionalism may be empowering or disempowering” for Indian women.¹⁶³ It is particularly important given that feminist social action “is significantly premised on the notion that constitutionalism is an ally in the struggle for women’s emancipation and a fair amount of energy has been devoted to engaging it.”¹⁶⁴ The challenge for Indian constitutionalism is to reclaim PIL, to ensure that judges remain within judicial bounds, and to guard against judicial governance while continuing to have an engaged judiciary committed to the ideals of the early PIL movement. It is also necessary to address the democratic deficit by moving away from a focus on judges, and to continue efforts to democratize the Constitution, enlarging the role of civil society organizations, and holding the state accountable to all its

¹⁶¹ Upendra Baxi, *The Judiciary As a Resource for Indian Democracy*, Seminar, vol. 615, Oct; see also SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* (2008).

¹⁶² Baxi, *Judicial Activism*, *supra* note 122.

¹⁶³ AYODELE V. ATSENUWA, *CONSTITUTIONALISM AND LEGAL FEMINISM: STEPPING STONES OR IMPEDIMENTS ON THE LONG ROAD TO FREEDOM FOR NIGERIAN WOMEN?* 18 (2011).

¹⁶⁴ *Id.*

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citizens. As Thiruvengadam writes, “once such a ‘support structure’ is in place, judges will feel obliged to adopt more modest roles by deferring to the greater credibility and representational capacity enjoyed by a strengthened support structure.”¹⁶⁵ The Indian example shows that much can be achieved through judicial engagement and that judicial power and process hold tremendous scope for combating patriarchy and challenging inequalities.¹⁶⁶ Finally, most significantly, transformative constitutionalism problematizes patriarchal traditions, challenges power formations, and interrogates state institutions and thus contains the potential and promise to forward women’s equality rights.¹⁶⁷

165 Thiruvengadam, *Swallowing*, *supra* note 133, at 530.

166 Baxi, *Postcolonial Legality*, *supra* note 15, at 550.

167 *Id.* at 550-51.

