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## Snakes and Ladders: Suo Moto Intervention and the Indian Judiciary

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## Snakes and Ladders: *Suo Moto* Intervention and the Indian Judiciary<sup>\*</sup>

Marc Galanter<sup>\*\*</sup>

Legal systems are hierarchical constructions, some taller and deeper, some shallower, and commonly portrayed as an orderly pyramid. Sometimes an incident in this hierarchic landscape reminds us that, as in a game of snakes and ladders, there may be startling and unexpected connections (and disconnects) between different locations in the system. I want to talk about such an instance, initiated by the Supreme Court of India on January 24, 2014.<sup>1</sup> It led to a judgment delivered two months later, on March 28, by a three judge bench<sup>2</sup> presided over by Chief Justice P. Sathasivam, who had ascended to the Chief Justiceship (by the rule of seniority) on July 19, 2013, and was anticipating compulsory retirement in just four weeks, on April 26, 2014.<sup>3</sup> (This was the culmination of a judicial career of more than six years on the Supreme Court, preceded by eleven years of service on two High Courts. On September 4, 2014, he was appointed Governor of the State of Kerala—the first retired Chief Justice of India to occupy such a position. The appointment drew criticism from the

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<sup>\*</sup> This paper grew out of a talk to the Conference on “India in the Global Legal Context: Courts, Culture, and Commerce,” at the University of Chicago, April 4, 2014. Earlier versions were presented at the symposium on “Layers of Law and Social Order” at the Florida International University College of Law, Oct. 24, 2014, at the National University of Juridical Sciences in Kolkata, Dec. 1, 2014, and at Oscar Chase’s seminar at New York University Law School, Mar. 23, 2015. I am indebted to Emma Babler for imaginative research assistance, to Nick Robinson and Osama Siddique for insightful comments, and to Vasujith Ram for marvelous collaboration in this project.

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<sup>1</sup> In Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated Jan. 23, 2014, *Suo Moto* Writ Petition (Criminal) No. 24 of 2014, order dated Mar. 28, 2014, available at <http://supremecourtindia.nic.in/outtoday/WR24.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> The Supreme Court of India presently has 29 judges (full authorized strength is 31, as per the Supreme Court (Number of Judges) Act, 1956 as amended in 2008). Nick Robinson, *A Quantitative Analysis of the Indian Supreme Court’s Workload*, 10 J. EMPIRICAL LEGAL STUDIES 57 (2013). The Court sits in benches of two (most frequently), three (a “Full Bench”), five (a “Constitution Bench”) and extraordinarily seven, nine, or more. *Id.* The average size of benches has been falling steadily as the Court takes on more and more cases. *Id.* Judges typically join the Court in their late fifties and face compulsory retirement on their sixty-fifth birthday. *Id.* Ascension to the Chief Justiceship is by a custom of seniority based on length of service on the Court, which leads to a typical brief tenure in that post. In the Court’s sixty-five years, there have been forty-two Chief Justices. See ABHINA V. CHANDRACHUD, *THE INFORMAL CONSTITUTION: UNWRITTEN CRITERIA IN SELECTING JUDGES FOR THE SUPREME COURT OF INDIA* (2014); see also GEORGE H. GADBOIS, *JUDGES OF THE SUPREME COURT OF INDIA: 1950-1989* (2011).

Kerala bar and others in legal circles.)<sup>4</sup>

In late January 2014, the Court (or, one supposes, one of the judges, very likely the Chief Justice himself), encountered a news item dated January 23, describing the rape, two days earlier, of a twenty-year-old Santhal<sup>5</sup> woman in a West Bengal village.<sup>6</sup> The newspaper presented an account, relying on a “senior police officer” of a gang rape imposed by a “community panchayat”<sup>7</sup> (that is the Court’s term) as punishment for having a romantic relationship with “a man from a different community.”<sup>8</sup>

Exactly what happened is far from clear. The story centers on a young Santhal woman of unusual initiative and independence, who had gone off to Delhi, a thousand miles away, and worked there, returning after a year with savings that enabled her to enjoy consumer goods that were unknown or certainly uncommon among her tribal neighbors. It seems that on Monday, January 20, 2014, she and her paramour, a somewhat older Muslim man with whom she did construction work, were accosted at her home by a group of male villagers, offended by this disapproved liaison. They were bound, taken to the local headman, and tied to a tree near his residence. There are conflicting accounts of what ensued. In some accounts a salishi sabha (assembly of adult males) was convened that evening; there was deliberation and demand for payment of large sums by the girl and her family, far beyond their means, as a fine. Then the salishi was scheduled for (or postponed until) the next morning. According to the young woman, the

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<sup>4</sup> Sneha Mary Koshy, *118 Kerala Lawyers Appeal to President, Say ex-CJI Can't be Made Governor*, NDTV (Sept. 3, 2014, 5:12 PM), <http://www.ndtv.com/india-news/118-kerala-lawyers-appeal-to-president-say-ex-cji-cant-be-made-governor-658567>; Upendra Baxi, *A Matter of Propriety*, INDIAN EXPRESS (Sept. 8, 2014, 12:14 AM), <http://indianexpress.com/article/opinion/columns/a-matter-of-propriety/>.

<sup>5</sup> The Santals are a tribe of some six million people living in eastern India, mostly in the states of Jharkhand and West Bengal. For a brief account of their relations to India’s legal system, see VASUDHA DHAGAMWAR, *ROLE AND IMAGE OF LAW IN INDIA: THE TRIBAL EXPERIENCE* (2006). For an extended account of Santhal society, see W.G. ARCHER, *TRIBAL LAW AND JUSTICE: A REPORT ON THE SANTAL* (photo reprint 1984) (1946). For a recent survey of their conditions, see MINISTRY OF TRIBAL AFFAIRS [XAXA COMMITTEE], *REPORT OF THE HIGH LEVEL COMMITTEE ON SOCIO-ECONOMIC, HEALTH AND EDUCATIONAL STATUS OF TRIBAL COMMUNITIES OF INDIA* (2014).

<sup>6</sup> Sujoy Dhar, *Indian Woman says Gang-Raped on Orders of Village Court*, REUTERS (Jan. 23, 2014, 10:53 AM), <http://www.reuters.com/article/2014/01/23/us-india-rape-idUSBREA0M0VH20140123>. [Appendix A].

<sup>7</sup> The term “panchayat” (literally a coming together of five) can refer to various indigenous institutions, established or ad hoc, administrative or judicial. Here the Court’s reference is to a proceeding that was judicial in the minimal sense of applying and enforcing local norms to a specific “case.” That proceeding was locally understood as a salish, an assembly or meeting of a council or assembly. Such bodies are sometimes referred to by newspapers as “kangaroo courts.” On the local scene “panchayat” referred to the statutory council that served as an organ of local government.

<sup>8</sup> *Supra* note 1, at 1. “Community” in contemporary Indian usage refers to a section of the population differentiated by religion, caste or tribe. In this case, the man was a married Muslim who worked with the young woman.

headman then invited or instructed those in attendance: “as they are unable to pay the cash, you enjoy the girl in any manner as you wish.” She described being raped by thirteen men in a kitchen shed adjacent to the house of the headman.<sup>9</sup> According to supporters of the accused men, the girl and her paramour remained tied up in public view throughout the night.

The next morning a *salishi* convened at 7:00 a.m., attended by a several hundreds of tribals and a few others, including some local workers of the Trinamool Congress, the ruling party in the State of West Bengal. After extended negotiation, perhaps with the intercession of the politicians present,<sup>10</sup> the Muslim paramour’s fine was set at Rs. 25,000 instead of the Rs. 350,000 initially demanded. The demand that the girl pay a fine of Rs. 27,000 was reduced to Rs. 3000 after her brothers argued that the initial sum was beyond their reach. It was agreed that the brothers would pay it within a week. The *salishi* broke up at about 1:00 in the afternoon. The girl returned to her home and, after initial reluctance, told family members what had befallen her. The next day, accompanied by her brothers, she went to the police station at Labhpur (at a distance of ten kilometers from Subhalpur, the hamlet where the events occurred) and reported that she was raped. As she was illiterate, she was assisted by Anirban Mondel, a non-tribal college graduate from a village some nine kilometers distant, whose presence and connection remain unexplained. He wrote the First Information Report and she affixed her thumb impression.<sup>11</sup> At the trial some months later, the Judge did “not find any reason to delve into the matter as to who took the victim to . . . [the scribe].”<sup>12</sup>

The police then rounded up the accused men, though there are conflicting stories, one involving their coming to the police station at the encouragement of Ajay Mondal, a political leader, member of the government panchayat, a non-tribal who had served as bagman in the delivery of the Muslim paramour’s “fines” the previous day.

On the morning of the following day, January 23, several newspapers published accounts, reporting the victim and police version of the event. This report resonated because of growing concern about a long series of reports of unpunished rapes in Bengal<sup>13</sup> and massive public protest about a horrific gang rape in New Delhi (in December 2012) that led to death of the

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<sup>9</sup> As per the written complaint of Jan. 22 at the Police Station.

<sup>10</sup> The *Salishinama* or the settlement deed bears the signature of Ajay Mondol, a local Trinamool Congress leader.

<sup>11</sup> *State of West Bengal v. Jolha Maddi and Ors.*, Sessions Case No. 51 of 2014 at Bolpur, judgment dated Sept. 9, 2014, at 81 (on file with the author).

<sup>12</sup> *Ibid.*, at 81.

<sup>13</sup> As per the latest data compiled by the National Crime Records Bureau, West Bengal has the third lowest conviction rate (after Jammu, Kashmir and Arunachal Pradesh) for crimes under Section 376 of the Indian Penal Code (Rape).

victim.<sup>14</sup>

The very next day, January 24, in New Delhi, the Chief Justice's bench of the Supreme Court—on its own initiative, without the filing of a case by any party in any court—took the unusual but not unprecedented step of intervening *suo moto*.<sup>15</sup> The Court directed the District Judge of Birbhum District to investigate the matter and report to the Supreme Court within one week. When the report arrived a week later, the Court found the information insufficient with respect to the steps taken by the police and directed the Chief Secretary of West Bengal (that is, the State's chief administrative official—a career civil servant rather than a political appointee) to submit a detailed report within two weeks. The Court also appointed an Additional Solicitor General<sup>16</sup> to assist the Court in this matter. Ten days later the Court received a detailed report from the Chief Secretary and four days after that the Court directed West Bengal to put on record the legal and medical documentation.

On March 13, the Court conducted a hearing at which it heard the amicus (the Additional Solicitor General) and counsel for the State, but neither the victim nor those accused in the criminal case were summoned or represented by counsel. The amicus pointed to a number of problems in the story: if it was a village salish, how account for the presence of outsiders (i.e., the politicians belonging to the ruling party in the state)? Was there a salish in session in the evening of January 21, before the alleged rape, as well as in the morning of January 22? How account for the presence of Anirban Mondel at the police station to serve as the victim's scribe? And, most strikingly, the Additional Solicitor General "pointed out that the aspect as to whether there was a larger conspiracy must also be seen."<sup>17</sup> It appears that the Additional Solicitor General was referring to the discrepancy in the accounts, compounded by the unexplained presence of the ruling party politicians. Counsel for West Bengal assured the Court that any deficiencies in the investigation "would be looked into and rectified."<sup>18</sup>

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<sup>14</sup> A 23-year-old woman was gang-raped and beaten to death in a moving private bus with tinted windows. The incident was followed by large-scale protests in the capital, Delhi (and other cities), and the institution of a Committee on Amendments to Criminal Law (Justice Verma Committee), which recommended significant changes, especially with respect to sexual crimes. The report of the Committee was released on January 23, 2013, and soon after, the Criminal Law (Amendment) Act, 2013 was passed.

<sup>15</sup> South Asian courts and journalists use "*suo moto*" and "*suo motu*" (preferred by language purists) interchangeably. American courts use the equivalent "*suo sponte*."

<sup>16</sup> In India the Solicitor-General, the second highest-ranking government lawyer (after the Attorney General) and Additional Solicitor Generals, about 12 in number, are distinguished lawyers who appear on behalf of the Government in the Supreme Court and the High Courts. They are appointed for three-year terms and may also appear on behalf of other clients but not adverse to governmental bodies.

<sup>17</sup> *Supra* note 1, at 5.

<sup>18</sup> *Id.* at 6.

Two weeks later, on March 28, a three-judge bench, with Chief Justice Sathasivam presiding, published its judgment.<sup>19</sup> Proceeding to the merits without any further visible compiling or testing of evidence, it concluded that “[t]he case at hand is the epitome of aggression against a woman.”<sup>20</sup> The Court announced that ultimately the question it ought to assess is “whether the State Police Machinery could possibly have prevented the said occurrence. The response is certainly a ‘yes.’”<sup>21</sup> Such offenses, declared the Court, result from “the State[’]s incapacity or inability to protect the Fundamental Rights of its citizens.”<sup>22</sup> Therefore, the state is duty bound to compensate the victim. The Court concludes that “[s]uch crimes can certainly be prevented if the state police machinery work in a more organized and dedicated manner.”<sup>23</sup>

On behalf of the State government, the Chief Secretary had proposed a long list of measures for aiding the victim—including legal aid, allotment of a plot of land, construction of a house, installation of a tube well, and Rs. 50,000 to be paid to the victim within a week. The Court endorsed these arrangements, but regarded the Rs. 50,000 compensation as inadequate and directed the State to make a payment of an additional Rs. 500,000 within one month. In addition the Court asked for details about “the measures taken for security and safety of the family” and for their “long term rehabilitation” as they are “likely to be socially ostracized.”<sup>24</sup> The State proposed to build a house for the victim. Alert to possible tensions, the Court insisted that the house, compensation, and other benefits be in her name rather than that of her mother.

Back in Bengal, the criminal investigation proceeded, culminating in a trial in the Sessions Court in Birbhum that began on July 18 and lasted until September 19, at which all the thirteen accused were found guilty and sentenced to twenty years of rigorous imprisonment.<sup>25</sup> An appeal is pending before the Calcutta High Court.

The Supreme Court’s extraordinary initiative in this matter was not unprecedented. Proactive judicial intervention has become a familiar if not frequent feature of judging in the higher courts of India since the emergence of “public interest litigation” in the aftermath of the Emergency, over 30 years ago—starting with the Court’s 1979 intervention in the horrific

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 13.

<sup>21</sup> *Id.* at 12.

<sup>22</sup> *Id.* at 13.

<sup>23</sup> *Id.* at 21.

<sup>24</sup> *Id.* at 20.

<sup>25</sup> In addition, they were fined Rs. 5,000 with the provision that if the fine were not paid, their sentences would be extended by a year.

blinding by the Bhagalpur police of 31 undertrials who they regarded as troublemakers.<sup>26</sup> In some of these public interest litigations, the Supreme Court and the High Courts have not only ordered injunctive relief and mandated government action, but have awarded substantial amounts of damages to victims—typically without detailed calibration of the victim’s injuries.<sup>27</sup>

Typically such “public interest” forays by the Supreme Court and High Courts have been in response to submissions by lawyers or non-governmental organizations (NGOs), facilitated by the relaxation of requirements of standing. But sometimes these initiatives derive from judicial reaction to a newspaper article or a letter (the so-called “epistolary jurisdiction”), which have become a familiar feature of the Indian judicial scene, rare but highly visible.<sup>28</sup>

The term *suo moto*, used to describe cases initiated by the court (i.e., the bench), itself had earlier been employed in reference to contempt citations, but around 2002 it begins to be used to refer to other instances in which the court takes the initiative to take cognizance of a matter. Such initiatives become markedly more prevalent beginning in about 2010. Tables 1-3 display the number of reports in four prominent news sources of such initiatives taken by the Supreme Court and the High Courts. Duplicative reports of the same instance have been eliminated. We see the onset and a marked increase of such interventions. The trend lines are similar in the Supreme Court and in the High Courts. On examination, some cases to which the “*suo moto*” label is applied appear to be instances of judicial actions taken in response to the initiative of some organizational petitioner, so that to some extent we may just be marking a change in terminology. But many of these cases appear to be instances in which the initiative came from the judges themselves.<sup>29</sup> One reason to think that the presence of the new terminology marks a change in judicial behavior rather

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<sup>26</sup> Anil Yadav v. State of Bihar, 1982 (2) SCC 195 (first case in which compensatory damages for human rights violations were awarded). The literature on “public interest litigation” as this came to be called, is vast; see generally S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (2002); Ashok H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOR OF THE SUPREME COURT OF INDIA 151-192 (B.N. Kirpal, et al. eds., 2002); Oliver Mendelsohn, *Life and Struggles in the Stone Quarries of India: A Case Study*, in LAW AND SOCIAL TRANSFORMATION IN INDIA (2014).

<sup>27</sup> See, e.g., Rudul Shah v. State, AIR 1983 SC 1086—the first case where compensatory damages were actually awarded—(Rudul Shah was kept in prison until 1982 even though he was acquitted in 1968. Rs. 30,000 compensation was directed); Sebastian Hongray v. Union of India (1984) 3 SCC 82; Chairman, Railway Board v. Chandrima Das, AIR 2000 SC 988; ZIA MODY, 10 JUDGMENTS THAT CHANGED INDIA app. II, ch. 7 (“Death in Custody: The Breach of Trust and its Price”) (2013).

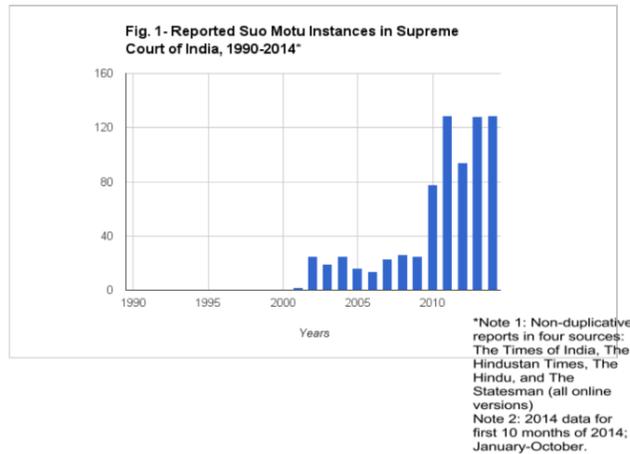
<sup>28</sup> Nick Robinson, *A Quantitative Analysis of the Indian Supreme Court’s Workload*, 10 J. EMPIRICAL LEGAL STUDIES 570, 599 (2013).

<sup>29</sup> This is based on examination of the Supreme Court ones; I have not examined the High Court ones.

than mere relabeling is the emergence in the same time period of comparable *suo moto* initiatives in the judiciaries of Pakistan and Bangladesh.<sup>30</sup> So we have several instances of a court at the peak (or at least a high elevation) of a complex judicial hierarchy adopting this device of reaching one might say to the bottom of the system to sort out matters of a kind otherwise unlikely to make their way to those exalted institutions.

**Table 1. Reported Suo Motu Instances.**

Year	# of Instances
1990	0
1991	0
1992	0
1993	0
1994	0
1995	0
1996	0
1997	0
1998	0
1999	0
2000	0
2001	2
2002	25
2003	19
2004	25
2005	16
2006	14
2007	23
2008	26
2009	25
2010	78
2011	129
2012	94
2013	128
2014	129

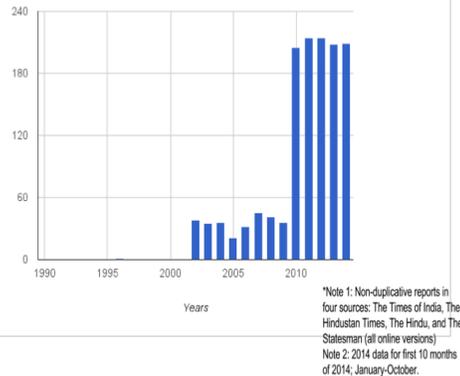


<sup>30</sup> This judicial recourse to *suo moto* initiatives occurs with greater intensity and scope in Pakistan, somewhat less in Bangladesh, and only very occasionally elsewhere in the common law world. By curious coincidence, at the very time the Indian Supreme Court was taking up the Birbhum case, a three judge bench headed by the Chief Justice of Pakistan was engaged in *suo moto* inquiry into two gang rapes in Muzaffargarh district. In one “a panchayat ordered the gang rape of a woman.” Hunain Naseer, *Initial Hearing for Muzaffargarh Rape Case Takes Place in Supreme Court*, NEWS PAKISTAN (Feb. 4, 2014). In the other, a girl died by self-immolation in front of the police station after the accused rapists were released by the police. Reportedly the rape followed the girl’s refusal of engagement to one of the culprits. *Geo News Headlines* (Mar. 14, 2014), ASHAM TV NEWS (March 14, 2014), <https://www.youtube.com/watch?v=d4gV001SxZg>. A subsequent police report, claiming that the victim was not sexually assaulted and that “the whole incident was a ploy to trap the suspects” was mockingly dismissed by the Supreme Court bench. *Muzaffargarh Rape case: Police Report Claims Victim was not Sexually Assaulted*, THE EXPRESS TRIBUNE (Apr. 21, 2014), <http://tribune.com.pk/story/698377/muzaffargarh-rape-case-victim-was-not-sexually-assaulted-claims-police-report/>. Many of the *suo moto* initiatives in Pakistan engaged with major issues of governance. See Osama Siddique, *The Judicialization of Politics in Pakistan: The Supreme Court after the Lawyers’ Movement*, in UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA (Mark Tushnet, ed., 2014); M.H. CHEEMA & I.S. GILANI, THE POLITICS AND JURISPRUDENCE OF THE ‘CHAUDHRY COURT’ 2005-2013 (2014).

**Table 2. Reported Suo Motu Instances.**

Year	# of Instances
1990	0
1991	0
1992	0
1993	0
1994	0
1995	0
1996	1
1997	0
1998	0
1999	0
2000	0
2001	0
2002	38
2003	35
2004	36
2005	21
2006	32
2007	45
2008	41
2009	36
2010	205
2011	214
2012	214
2013	208
2014	209

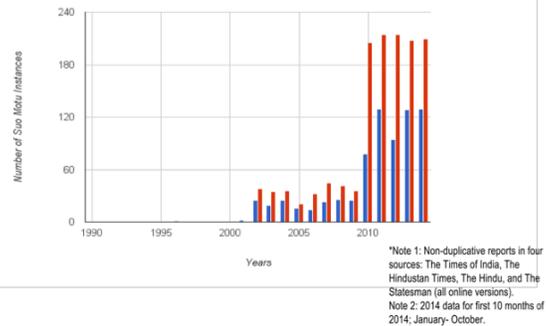
**Fig. 2- Reported Suo Motu Instances in High Courts of India, 1990-2014\***



**Table 3. Reported Suo Motu Instances.**

Year	Supreme Court	High Courts
1990	0	0
1991	0	0
1992	0	0
1993	0	0
1994	0	0
1995	0	0
1996	0	1
1997	0	0
1998	0	0
1999	0	0
2000	0	0
2001	2	0
2002	25	38
2003	19	35
2004	25	36
2005	16	21
2006	14	32
2007	23	45
2008	26	41
2009	25	36
2010	78	205
2011	129	214
2012	94	214
2013	128	208
2014	129	209

**Fig. 3- Reported Suo Motu Instances in Supreme and High Courts of India, 1990-2014\***



Is the 2002 starting date a reflection of changing practices or changing recording or naming of these events? There definitely seems to be a time factor, for the pattern in the High Courts is very similar. Public Interest Litigation in India, with the concomitant expansion of standing, dates from the early 1980s. Those PILs, as they were called, included some started by a judge in response to a news account or by a letter. As far as I can tell, the term “*suo moto*” was not in vogue. In the early years of public interest litigation, the Supreme Court famously responded to the occasional letter from an aggrieved party, a practice that was dubbed its “epistolary jurisdiction.” In recent years such incoming mail is screened by court staff and only a tiny portion (e.g., 1.4% in 2007, 0.9% in 2008) are taken up by

the Court.<sup>31</sup> It appears to be the case most of these *suo moto* proceedings are launched by benches on which the Chief Justice is sitting and in cases where the judgement is given by the Chief Justice.<sup>32</sup>

There are many intriguing things here—many departures from the Court’s regular mode of operation<sup>33</sup> and from our expectations as observers of courts:<sup>34</sup> the constraints of passivity displaced by active outreach and management; the abandonment of the adversarial frame. Institutional space and time are compressed: instead of being separated by layers of institutional intermediaries and years of process, there is an imperative to connect with the immediacy of events. The Court is eager to project itself into the moment of action, to act at the coal face, where the rubber meets the road, liberated from the stylized intermediation of registry, clerks and lawyers, pleadings, motions, appeals, that present matters to the court in standardized digestible packages. We have the court contending, as directly as it can envision, with the raw “facts” of the victim’s plight. The Supreme Court’s aspiration to be effective at this point reveals something important about the court and about its spectator public. The Court aspires to correct injustice without the constraining forms in which it is enmeshed. This is done publically, attracts media attention, and is applauded by wide sections of the public that are looking for a champion, an actor that pursues and achieves substantive justice, that can do the right thing, that can get things done—something they don’t necessarily see when they look at familiar legal institutions.

It is notable that the Supreme Court in this case doesn’t direct the rape dispute into the lower courts or engage the lower court as its agent. This may reflect caution about losing momentum or pessimism about the reliability of the lower courts. The result is that the Court retains the starring role, making decisions and issuing orders about various aspects of the investigation and the remedy. We might call this Cinderella law—the Court as good fairy appears, unbidden, to turn the tables on behalf of an obscure and resourceless victim. I don’t mean to denigrate or minimize the Court’s genuine concern nor its steadfastness and courage. My question is

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<sup>31</sup> Robinson, *supra* note 28, at 36.

<sup>32</sup> Some court-like bodies that are not part of the judiciary (like the National Human Rights Commission) have taken similar *suo moto* initiatives. This is less surprising since such bodies are understood to have investigatory as well as adjudicatory functions.

<sup>33</sup> And departure at least in degree from the format of public interest litigation—where the initiative is typically provided by a party or champion. In these *suo moto* actions the Court is not only the ally of would-be “reformers” but the entrepreneurial reformer itself.

<sup>34</sup> Compare the regulatory and enforcement initiatives by judges in American trial courts, departing from the passive and reactive model thought to describe the common law judge, described by Marc Galanter, Frank S. Palen & John Thomas, *The Crusading Judge: Judicial Activism in Urban Trial Courts*, 52 S. CAL. L. REV. 699 (1979).

why its response takes the form of these singular heroic interventions rather than promoting some institutional shake-up, some initiative to empower and equip courts lower in the judicial hierarchy and closer to the matter at hand to engage in this way. The Supreme Court (or these benches at least) seems to envision itself not as a specialized limb of the judicial body, with supervisory and standard-setting responsibilities but as an institution that fully incarnates in its purest and highest form the mission and plenary powers of the judiciary.

The Court's actions mark a departure from the normal operation of the judicial hierarchy. There is an echo here of the disdain with which higher courts in India frequently treat the efforts of the lower judiciary, a hint of the disconnect between the higher judiciary and the ordinary courts.<sup>35</sup> But for a moment the Court dramatically invokes and instantiates the presence of a single integrated system in which the norms of modern "constitutional" India are realized and embodied. The Court's action registers deviance from these norms, but it announces and dramatizes that there is a remedy that is hierarchically present. Momentarily at least the "great pyramid of legal order"<sup>36</sup> is integrated and whole, from the Chief Justice of the Supreme Court at its peak, projecting undiluted remedial justice, to the police constables protecting the victimized villager. The norms of the Indian state are vindicated as the victim is remedied and rehabilitated by the civil law and violators are punished by the criminal law. For a moment the law is whole, effective, benign, and accessible. In the Court's initiative one can hear faint echoes of accounts of the Moghul Emperor Jahangir who reported in his memoirs:

After my accession, the first order that I gave was for the fastening up of the Chain of Justice, so that if those engaged in the administration of justice should delay or practise hypocrisy in the matter of those seeking justice, the oppressed might come to this chain and shake it so that its noise might attract attention.<sup>37</sup>

In the case at hand the modern day judges don't only provide a chain,

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<sup>35</sup> Jay Krishnan, et al., *Grappling at the Grassroots: Litigant Efforts to Access Economic and Social Rights in India*, 27 HARV. HUM. RTS. J. 151 (2014).

<sup>36</sup> Cf. HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 312 (1958).

<sup>37</sup> JAHANGIR, *THE TUZUK-I-JEHANGIR OR MEMOIRS OF JAHANGIR* (trans., Alexander Roberts, ed., Henry Beveridge), available at [http://archive.org/stream/tuzukijahangirio00jahauoft/tuzukijahangirio00jahauoft\\_djvu.txt](http://archive.org/stream/tuzukijahangirio00jahauoft/tuzukijahangirio00jahauoft_djvu.txt). Jahangir (1569-1627) reigned from 1605 until his death in 1627. His son Shah Jahan (1594-1666), who reigned from 1628 to 1658, substituted "a string that he would let down from the window where he appeared in the mornings. People tied their petitions to this string and thus complaints reached the Emperor unhindered." LINDA T. DARLING, *DO JUSTICE, DO JUSTICE, FOR THAT IS PARADISE: MIDDLE EASTERN ADVICE FOR INDIAN MUSLIM RULERS*, *COMPARATIVE STUDIES OF SOUTH ASIA, AFRICA AND THE MIDDLE EAST*, vol. 22 (2002).

but they take the initiative and themselves shake it vigorously on behalf of the perceived victim. While the Court is free to shake the chain when it is so disposed, the location of the chain—that is, the lever to inspire the court to launch on this infrequent and unpredictable intervention—is, unlike Jahangir’s chain, not known to or reachable by the remote suppliant. Its sound is not to summon the caring sovereign, but to proclaim the Court’s benign intervention. That intervention is a performance—for the judges themselves, as well as for the wider audience that may be thrilled or at least reassured by the Court’s demonstration of the immanence of justice. Apparently the show is very appealing—at least to some sections of the public and to the judicial actors themselves. As for the officials, the judges of the lower courts, and the police, we may wonder if they are inspired or alienated.

The judicial fondness for this strategy suggests several things. First, that the higher courts, that is the Supreme Court and the High Courts, with their extensive original jurisdiction, are not only the hierarchic controllers of the lower courts, but also their rivals for attention, prestige and power—a rivalry that manifests itself in reluctance to accord the lower courts a sphere of autonomy and initiative.<sup>38</sup> Second, it reminds us that India’s legal structure is not an orderly unified pyramid radiating legal illumination into unoccupied neutral space.<sup>39</sup> Instead it is situated in a space populated by a thick tangle of other forms of normative regulation like, for example, the rules or standards invoked by the actors in the Bengal village.<sup>40</sup> I make no claim that these other forms of regulation are “prior” to the state, that they form a basic substratum of social regulation in contrast to “artificial” or superficial state institutions. These local legalities may come into being together with state institutions or in reaction to the presence or absence of state institutions. Local legality may imitate state institutions—and these, conversely, may pretend to embody indigenous forms.<sup>41</sup> But whatever their

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<sup>38</sup> Cf. Krishnan, *supra* note 35, at 183.

<sup>39</sup> I don’t mean to imply that such an orderly pyramid accurately describes legal institutions in settings outside India that are familiar to me. But the imagery has a powerful hold on the legal imaginary in many places.

<sup>40</sup> A few examples of the many studies of these non-governmental regulatory orders are MAARTEN BAVINCK, *MARINE RESOURCE MANAGEMENT: CONFLICT AND REGULATION IN THE FISHERIES OF THE COROMANDEL COAST* (2001) (regulation among fishermen, boat owners); Julia Eckert, *Urban Governance and Emergent Forms of Legal Pluralism in Mumbai*, 50 *J. OF LEGAL PLURALISM* 29 (2004) (Shiv Sena courts); K.S. Sangwan, *Khap Panchayats in Haryana: Sites of Legal Pluralism*, in *CHALLENGING THE RULE(S) OF LAW: COLONIALISM, CRIMINOLOGY AND HUMAN RIGHTS IN INDIA* (Kalpana Kannabiran Ranbir Singh eds., 2008) (khap panchayats).

<sup>41</sup> For example, the State has established nyaya panchayats, lok adalats, and lok nyayalalas, which try to borrow the charisma of “traditional” institutions. On panchayats, see Upendra Baxi & Marc Galanter, *Panchayat Justice: An Indian Experiment in Legal Access*, in *ACCESS TO JUSTICE: VOL. III: EMERGING ISSUES AND PERSPECTIVES* 341 (Cappelletti & B. Garth, eds., 1979); Catherine S. Meschivitz & Marc Galanter, *In Search of Nyaya Panchayats: The Politics of a Moribund Institution*,

origin, these non-state regulators are there and their presence alters the impact and meaning of state law. Like a sandbar formed around the hulk of a sunken vessel, local norms that contradict those embodied in the state's official pronouncements presents a challenge to governmental navigation that cannot be ignored or simply overridden by a claim of superior legitimacy. Of course in practice the organs of the state themselves (a conspicuous but not solitary example is the police) frequently exhibit norms and practices that depart from the "higher law" to which they pledge fealty.

Curiously sudden interventions of the higher courts like the one here may take the form of dramatic eruptions of *kadi* justice,<sup>42</sup> in the Weberian sense of responding to individual cases in terms of concrete ethical judgments rather than by routine application of generalized rules. Such intervention has emerged as a prominent instrument of governance and a source of legitimacy for a system of formal legality—in this case dramatizing the triumph of official law over the familiar but ever surprising and alarming presence of "retrograde" immanent law. So we see the Indian state's institutions of rational bureaucratic legality promoted and defended by adventurous excursions into individualized *kadi* justice.

But there are limits on the efficacy of such judicial adventures/initiatives. Weber's ideal-typical *kadi* presumably enjoyed intimate and direct knowledge of the case before him. But inevitably, there are limitations on how much a real world court knows about what actually happened and on how accurately it can ascertain what the consequences of its intervention will be. The Indian Court here seems to abandon some of the cautions and checks institutionalized in the judicial process, unintentionally compromising accuracy in the case at hand in the service of broadcasting images of its benign intervention.

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in THE POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES 47 (Richard L. Abel, ed., 1982). On Lok Adalats, see Marc Galanter & Jayanth Krishnan, *Debased Informalism: Lok Adalats and Legal Rights in Modern India*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 76 (Erik G. Jensen & Thomas C. Heller, eds., 2003); Marc Galanter & Jayanth Krishnan, *Bread for the Poor: Access to Justice for the Needy in India*, 55 HASTINGS L.J. 789 (2004). On lok nyayalayas, see Menaka Guruswamy & Aditya Singh, *Accessing Justice: The Gram Nyayalayas Act*, 45 ECON. & POL. WKLY. 43 (2010).

<sup>42</sup> See MAX WEBER, ECONOMY AND SOCIETY 976 (Vol. 3, 1922). Weber associates *kadi* justice with charismatic adjudication ("...the Solomonic award of a charismatic sage, an award based on concrete and individual considerations which demand absolute validity."). *Id.* at 1115.

## APPENDIX A

The question has been raised whether the cases labelled *suo moto* in these news accounts were in fact instances in which court involvement originated with judicial initiative rather than response to the initiative of some other agency. A preliminary inspection of selected reports of “*suo moto*” activity by the Supreme Court for four years suggests that a substantial portion of things labelled by the newspapers as “*suo moto*” seem to be instances of judicial initiative.

Table A-1 Actual versus labeled *suo moto* instances

Year	Press Items Labeled as “Suo Moto”	Appear to be Court-initiated	%
2002	22	9	41%
2007	21	14	67%
2012	24	19	79%
2014 (10 mos.)	22	14	64%

## APPENDIX B

*The Newspaper Account that provoked the Supreme Court's Intervention*Indian Woman says Gang-Raped on Orders of Village Court<sup>43</sup>*By Sujoy Dhar*

KOLKATA, Jan 23 (Thomson Reuters Foundation) - A 20-year-old woman in eastern India was gang-raped by 13 men on the orders of a village court as punishment for having a relationship with a man from a different community, a senior police officer said on Thursday.

The woman, who is now recovering in hospital, told police she was assaulted by the men on the night of January 20 in Birbhum district in West Bengal.

Police said that her male companion was tied up in the village square, while the assault on the woman happened in a mud house.

"We arrested all the 13 men, including the village chief who ordered the gang rape. The accused have been produced in court which remanded them to jail custody," Birbhum's Superintendent of Police, C. Sudhakar, told the Thomson Reuters Foundation.

India toughened laws on sex crimes in March last year following the fatal gang rape of a physiotherapist on a moving bus in Delhi in December 2012. The case led to nationwide protests for better security and has helped sparked national debate about gender inequalities in India.

The issue was highlighted in local media again last week after a 51-year-old Danish tourist was gang-raped in central Delhi by at least five men whom she had asked for directions.

The West Bengal victim's family told media that she was assaulted because the court believed she had violated the rules of her tribe by falling in love with a man from another community.

The couple were ordered to pay a fine of 25,000 rupees (\$400), said the victim's mother, adding that the village head then ordered the rape of her daughter.

Human rights groups say diktats issued by kangaroo courts are not uncommon in rural regions.

In northern parts of India, illegal village councils known as "Khap Panchayats" act as de-facto courts settling rural disputes on everything from land and cattle to matrimony and murder.

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<sup>43</sup> Sujoy Dhar, *Indian Woman says Gang-Raped on Orders of Village Court*, REUTERS (Jan. 23, 2014, 10:53 AM), <http://www.reuters.com/article/2014/01/23/us-india-rape-idUSBREA0M0VH20140123>.

But such councils are coming under growing scrutiny as their punitive edicts grow more regressive—ranging from banning women from wearing western clothing and using mobile phones to supporting child marriage and sanctioning the lynching of young couples in so-called “honour killings.”

The assault comes after a spate of high profile rapes in West Bengal which have brought Chief Minister Mamata Banerjee under fire for not doing enough to stop violence against women.

West Bengal recorded the highest number of gender crimes in the country at 30,942 in 2012-12.7 percent of India’s total recorded crimes against women. These crimes include rape, kidnapping and sexual harassment and molestation.

Earlier this month, West Bengal’s capital, Kolkata, witnessed public protests against police who have been accused of failing to act on the gang rape of a 16-year-old girl who was later murdered.

(The story was refiled to fix date in dateline, no changes to text.)

(Writing and additional reporting by Nita Bhalla; Editing by Sanjeev Miglani and Nick Macfie.)