

The Politics of Public Interest Litigation in Post-Emergency India

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‘Yeh PIL kya hota hai?’ (‘What is PIL?’)

- a. The rules of locus standi were relaxed.
- b. The formal requirements regarding the lodging of a petition were simplified.
- c. Evidence could be gathered by a commission appointed by the court.
- d. The procedure adopted was claimed not to be of an adversarial nature.
- e. The court could order far-reaching remedial measures.
- f. The execution of the remedial orders was supervised and followed up.
- “The first two innovations concern the start of the procedure, the next two have to do with its course, and the last two with its outcome.” (Vandenhoele 2002)

A revisionist history of PIL

- A revolution in procedure
- Politics of PIL per se
- From outcomes to processes

Begging the question: understanding PIL as a response to Emergency

- The question that is evaded is why the response of the court had to be in the form of PIL.
- Continuity of Maintenance of Internal Security Act (MISA) and National Security Act (NSA) and TADA...

Decline of negative liberty

- Concern no longer negative liberty from the state; much more often, it is positive liberty through the state
- civil liberties concerns have been palpably weak in Indian courts.

Why did the court need to position itself as speaking for ‘the people’

- The language of a ‘committed judiciary’
- 42nd Amendment
- Article 31C and ‘the 1971–76 empowerment/immunization’ approach to Directive Principles (Dhavan)
- The Supreme Court had to respond and out-radicalize the political masters, but the ground for this battle had been already laid by the apotheosis of the Directive Principles.

The emergence of a populist court

- The Supreme Court, in search of a new legitimacy, responded by mimicking Mrs Gandhi's populism.
- The battle henceforth was between the competing populisms of the court and the political class.
- The Court did become a 'committed judiciary' but with itself as the self-proclaimed vanguard of the social revolution

The emergence of a populist court

- More references to the people in the constitutional decisions of the Court since the Sixth General Elections [of 1977] than ever before in the Court's history (Baxi 1979)
- Judges Transfer case

The rhetoric of indigenoussness

- PIL's status as a 'distinctly Indian' legal phenomenon
- 'Debased informalism' in Indian law (Galanter & Krishnan 2004)
- Lok Adalats, Tribunals and PIL

Further diminishing of PIL procedure in 1980s

- Standard of evidence relaxed (Bandhua Mukti Morcha 1984)
- Petitioner could be removed (Sheela Barse 1988)
- The Bhopal tragedy

PIL and its 'annihilation of procedure'

- The Jain Hawala case and 'continuing mandamus'
- The Forest case and the Niyamgiri Hills
- In Re: Networking of Rivers

The PIL case with nine lives

WP 4677/ 1985- cause of action changing multiple times:

- pollution caused by stone-crushing units
- pollution in the river Yamuna
- removing 'encroachers' from the ridge forest
- mining in areas of neighbouring Haryana's tourist resorts and Aravalli hills
- closing down of all 'hazardous' and large industries in Delhi
- Closing all 'non-conforming' industries,
- The 'sealing case'

PIL as a slum demolition machine

- The 'omnibus PIL': the departure of geography
- The Yamuna Pushta case
- Continuities with Bandhua Mukti Morcha
- The 1984 Ahmedabad case as the counter-example

From ideological critique of PIL to a critique of its materiality

- The neo-liberalism argument
- The narrowly consequentialist critique
- The institutional critique

The pathology of PIL infecting Indian legal culture more generally

- The Ayodhya case
- Family courts
- Bhopal case
- Lok Adalats

PIL as an example of Indian exceptionalism

- Moving from an 'is' proposition to an 'ought' proposition: *Indian* secularism, *Indian* democracy, *Indian* PIL

PIL as counter-democratic

Role of court as representation-reinforcing:

- 1. the government in power “clogs off the channels of political change to ensure that they will stay in”
- 2. A counter-majoritarian role (Ely 1980)

From judicial review to judicial populism

- The case of Section 377