The Politics of Public Interest Litigation in Post-Emergency India

NIPFP, JNU
7 February 2017
‘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.” (Vandenhole 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’
• 42\textsuperscript{nd} 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 became 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 indigenousness

• 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 mandamuses’
• 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