

# Book Review

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## Abstract

*Courting the People Public Interest Litigation in Post-Emergency India* is an anthropological account of PIL in India. To begin with, the book explores the reasons for rise of PIL in the aftermath of Emergency. It questions the axiomatic explanation that the Supreme Court adopted PIL in order to restore its credibility after the Habeas Corpus case. Instead, the author argues that the enthusiasm of Justice Bhagwati and Justice Krishna Iyer in adopting 'swadeshi jurisprudence' was an important factor in the rise of PIL. The quest for indigenization of justice led to loosening of procedural formalities and the rise of PIL. The book is a thorough assessment of the nature of PIL proceedings, the range of actors involved in a PIL and its impact on city governance, particularly Delhi. I highlight that the author's focus on Delhi, lack of comparison with other High Courts and under exploration of some arguments are some of the shortcomings of an otherwise well-written and impeccably researched book.

**Key words :** PIL, Swadeshi Jurisprudence, Habeas Corpus Emergency

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Public Interest Litigation (PIL) proceedings do not resemble a typical court proceeding. PIL is a unique remedy with major pitfalls and a thorough scrutiny that highlights its unusual characteristics was overdue.

*Courting the People Public Interest Litigation in Post-Emergency India* is an anthropological account of PIL in India. Anuj Bhuwania, a teacher with degrees in law and anthropology, begins his book with a terse observation - 'PIL was a tragedy to begin with and has over time become a dangerous farce'<sup>1</sup> – and then proceeds, by relying on his empirical research, to provide an almost Kafkaesque description of court proceedings and firsthand account of implementation of court orders. The author argues that the relaxation of procedure in PIL proceedings has allowed appellate courts to manoeuvre and place themselves in position of unaccountable authority whereby they can take over the governance of an entire city like Delhi – a city that is the focus of the book's attention.

Bhuwania dismisses the frequently offered explanation of the rise of PIL – that PIL was the result of an attempt by the Supreme Court to restore its image after capitulating in the Emergency-era; the capitulation most conspicuously recorded in the *Habeas Corpus* judgment.<sup>2</sup> Questioning the explanation, Bhuwania asks an important question – post-Emergency, in its attempt to restore its credibility - why did the court respond to this crisis in the 'form' of a PIL?<sup>3</sup> He answers this question convincingly. To begin with, one of the reasons was the fascination of Justice Bhagwati and Justice Krishna Iyer with indigenization of justice or 'swadeshi jurisprudence'. Heading Committees on Legal Aid and Social Justice respectively, the two judges in the name of removing foreign models of adjudication upended legal process.<sup>4</sup> For example, instead of making legal aid more meaningful, the judges identified legal process as hurdles in Court's quest for justice. Justice Bhagwati was particularly instrumental in advocating for PIL when he articulated that legal procedure was dispensable. Justice Bhagwati adopted a consequentialist perspective – if the Court intended to serve social justice, then the dispensation with procedural requirements should be overlooked.<sup>5</sup> Bhuwania reserves a special place of criticism for Justice Bhagwati's role in the rise of PIL. Bhuwania argues that by invoking 'poor', Justice Bhagwati enabled the Court to escape

constitutionalism and present technicalities of procedure as enemies of justice. In Bhagwati's view, a truly participatory legal process required dispensation of procedural formalities and PIL was the receptive home for procedural cleansing. A crucial factor in the rise of PIL, Bhuwania argues, was that the Supreme Court adopted the language of populist politics espoused by Mrs. Indira Gandhi:

The Supreme Court, too, 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.<sup>6</sup>

By attempting to seek legitimacy directly from the people, the Court was trying to get rid of its role in undermining democracy during the Emergency.<sup>7</sup> 'Judicial populism' has eventually led to a situation where the Court is seeking comfort in issuing vague legislative guidelines instead of performing its adjudicative function and the task of defending civil liberties with more care.<sup>8</sup> This is amply demonstrated in various areas of law. For instance, in election law the Court has introduced new obligations and issued directions that had little or no statutory basis – filing of affidavits by candidates<sup>9</sup>, introduction of NOTA<sup>10</sup> and voting rights for NRIs<sup>11</sup> among others. All three decisions were in exercise of PIL jurisdiction. However, one witnesses a weak defense of the right to vote and the right to stand for elections with the court upholding regressive and restrictive conditions on exercise of franchise.<sup>12</sup> The most discomfiting dimensions of PIL are elaborated in latter part of Chapter 1 where the author describes how the court, hiding behind public interest and procedural informality makes the petitioner inconsequential to the proceedings. The judge and the court appointed amicus curiae take complete control the proceedings.<sup>13</sup> Persons most affected by court orders are rarely heard and their concerns dismissed for the Court feels that it knows best. This of course turns the very rationale of PIL on its head for it was meant to provide judicial redress to members of public unable to approach the court directly.<sup>14</sup> In fact, the nature of PIL proceedings is now such that the fate of PILs is determined by an almost exclusive conversation between the judges, court appointed lawyers who in turn depend on the reports of various committees set up by the court.

Chapters 2 and 3 are where Bhuwania literally takes you on a journey of a PIL. A journey of unending interims court orders which lack even a pretense of reasoning, ruthless slum demolitions, massive population displacements, re-location of industries and 'sealing' of commercial establishments in the heart of the capital. Chapter 2 focuses on the PIL better known as the Delhi vehicular pollution case and the 'many-headed Hydra' PIL – the PIL originally filed to remove industries from the city of Delhi and eventually led to the famous 'sealing' of properties in Delhi in the name of implementing zoning laws. While the author devotes greater attention to the latter PIL, reading the path that both the PILs traversed is an astounding discovery of the worldview of judges.<sup>15</sup> Seemingly blind to their own failings, lack of understanding of the limitations and functions of law, the judges ably assisted by committees and 'friends of the court' went on a rampage lest the city may not fall behind in the global race to become a modern shining capital that housed no filthy industrial workers or rotten slum dwellers. And all this while, the media gleefully played the role of a cheerleader.

Chapter 3 details how a PIL became a 'slum demolition machine' and 'an excuse for the court to dwell on its own hobby horses.'<sup>16</sup> Using the Court sanctioned slum demolition in Delhi as an example, Bhuwania paints a powerful picture of what is essentially a mockery of legal process. This is not merely a critique of the class-based leanings of the judges.<sup>17</sup> The author goes beyond to demonstrate that the procedural innovations in PIL provide the judges the necessary infrastructure to take over governance, undermine representative institutions, mock political

negotiations and view anything related to political process as vote bank politics, appeasement and an excuse for corruption.

Chapter 4 is where Bhuwania drives home the underlying argument of his book: the relaxation of the procedural pre-requisites in PIL allows courts to arrogate unbridled powers to themselves.<sup>18</sup> He highlights the limitations in the consequentialist and institutional critiques of PIL and concludes by arguing that 'the procedural is political.' The informalism and 'panchayati justice' he claims has affected not only PIL jurisdiction but has become part of the legal system. He relies on the decisions of the court in the *Bhopal Gas Tragedy* and in the *Babri Demolition case* to arm his argument.<sup>19</sup> But where do we proceed from here? Have the PIL Rules of the courts made any difference in curing PILs of their procedural infirmities? Would the adoption of procedural formalism make any difference to PIL jurisdiction? Or do we need to abandon PIL altogether? Bhuwania offers no solutions or simple answers.

The book demonstrates that the author is attentive to the large range of actors that are involved in a PIL – the petitioner, the amicus curiae, the court appointed committees, the judge and the media. This is the strength of the book and sets it apart from most legal scholarship in India. At the same time, the attention to the various actors is also a weakness of the book, for the author picks up various threads without fleshing them out in detail. There were two that threads and arguments that I found were inadequately explored: the analogy with Emergency and the judge-journalist/media relation. While discussing the Supreme Court order that all public transport in Delhi will be converted to run on CNG, the author draws an analogy with Emergency.<sup>20</sup> While I do not necessarily disagree with the analogy, in my view the argument is underexplored. The judge-media relation is also insufficiently explored. There are a few telling anecdotes in the book. Judges looking at journalists while making a controversial or provocative statement, which were then picked up by the media and reported as headlines. And the dismay of journalists when Justice AP Shah took over as Chief Justice of Delhi High Court; for it dried up headlines due to Justice Shah's conservative approach to PILs. A bit more probing by the author on this front would have been welcome and would have inflicted sharper cuts from his fairly sharp blade of criticism.<sup>21</sup>

The book, at times, may seem like a well written history of urban governance in Delhi. While the author depicts a compelling picture, the exclusive focus on Delhi undermines the potential scope of the book. There is little by way of comparison with other cities or the attitude of other appellate courts in handling PILs. One understands that empirical research has limitations – geographical and otherwise. At the same time, a bit more context by way of comparison with other High Courts would have added greater weight to the book. The attitude of all the High Courts to PILs may not mirror that of the Supreme Court or Delhi High Court or does it? The book avoids this territory altogether. The book is written in accessible language, devoid of unnecessary jargon. This book isn't the result of a typical doctrinal research.<sup>22</sup> Practicing lawyers certainly need to read it, journalists covering courts will find descriptions of a familiar world, law students will find that the book offers immense scope to increase their knowledge base. I suspect the judges may not develop a fond liking for it, though it should not prevent them from reading a well-written and an impeccably researched book.

## References

1. Anuj Bhuwania, *Courting the People Public Interest Litigation in Post-Emergency India* (Cambridge University Press 2017), at 12 (hereinafter *Courting the People*).
2. *A.D.M. Jabalpur v Shivkant Shukla* 1976 2 SCC 521.

3. Bhuwania (n 1) 27.
4. Bhuwania (n 1) 31-35.
5. See *S.P. Gupta v Union of India* AIR 1982 SC 149, at 192 ('. indeed, a real revolution is in progress, in which even the most sacred ideas and themes of judicial law, such as due process and the right to heard are being challenged ....').
6. Bhuwania (n 1)25.
7. Bhuwania points out that in PIL the key rhetorical mode is to argue in the name 'of the people' while the Court sought to position itself as speaking 'for the people'. The latter is evident in other cases as well where the court has invoked 'collective conscience of the society' to justify its sentences of death penalty. See, for example, *State (N.C.T of Delhi) v Navjot Sandhu @ Afsan Guru* (2005) 11 SCC 600.
8. Bhuwania (n 1)27 ('Increasingly, the court prefers to formulate such legislative guidelines rather than evolve legal principles on the issue in a considered way. '); Also see *Courting the People*, *supra* note 1, at 26 (where the author argues that the court's cavalier approach to basic civil liberties has continued in the post-Emergency period, and it has consistently upheld anti-terror laws and draconian laws).
9. *Union of India v Association for Democratic Reforms and Another* (2002) 5 SCC 294; *People's Union for Civil Liberties & Anr. v Union of India & Anr* (2003) 4 SCC 399.
10. *People's Union for Civil Liberties v Union of India* (2013) 10 SCC 1.
11. *Dr. Shamsheer V.P. v Union of India & Anr*, Writ Petition (Civil) No. 265 of 2014.
12. See *Rajbala v State of Haryana* (2016) 1 SCC 463; *Javed v State of Haryana* 2003 (8) SCC 369.
13. The author describes how the Justice Venkatachaliah did not allow journalist Sheela Barse to withdraw her PIL. This marked the beginning of courts displacing petitioners and taking the PIL proceedings completely in its own hands. See Bhuwania (n 1) 39-40.
14. See *SP Gupta* case (n 5) 188 (the Supreme Court observed that the PIL is meant to provide judicial redress for legal wrong caused to a 'person or determinate class of persons (who) ... by reasons of poverty, helplessness or disability or socially or economically disadvantaged position' is unable to approach the court directly); Also see *Hussainara Khatoon v State of Bihar* AIR 1979 SC 1360; *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802.
15. Bhuwania mentions three vignettes at the start of the book that are a telling revelation of the worldview of the judges. See Bhuwania (n 1) 6-7.
16. Bhuwania (n 1) 90.
17. Bhuwania (n 1)134.
18. See generally Clark D. Cunningham, 'Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience' (1987) 29 JILI 494.
19. Bhuwania (n 1)134-136.
20. Bhuwania also makes a comparison with Emergency while discussing slum demolition. See Bhuwania (n 1) 80.
21. Bhuwania (n 1) 103-104.
22. A typical feature of books that result from doctrinal research is a long 'Table of Cases' at the beginning of the book; it is absent in Bhuwania's book. In fact, Bhuwania claims that PIL is anthropologically interesting because 'it is very deliberately presented as providing substantive, popular justice, unmediated by legalese and with an emphasis on questions of fact rather than law.' Bhuwania (n 1) 10-11