

The Judge as an Urban Planner

Law, Interests, and Politics in India

by Sanjeev Routray

Two recent books explore how the judiciary has become the new engine of urban restructuring in New Delhi. Having managed to get hold of a real ‘slum demolition machine’, the judges are arbitrarily trying to impose their upper-middle class conception of the city.

Reviewed: Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India*, Cambridge, Cambridge University Press, 2017, 166 p. & Gautam Bhan, *In the Name of Public’s Interest: Evictions, Citizenship, and Inequality in Contemporary Delhi*, Athens, University of Georgia Press, 2017, 256 p.

Urban restructuring in Indian cities such as Delhi has led to massive evictions of poor people from low-income neighborhoods. The judiciary has played a central role in these restructuring processes by circumscribing the entitlements of the urban poor through a narrow definition of the ‘public’. Most importantly, the judicial innovation in the form of Public Interest Litigation (PIL) has allowed interventions that have provided the legal backing to government authorities to evict and disenfranchise the poor with impunity. This review essay explores the politics of PILs and their connection to urban disenfranchisement and citizenship in Delhi, a topic adeptly taken up by Anuj Bhuwania and Gautam Bhan in two different books. As the authors critically summarize, a PIL is characterized by peculiar judicial procedures including the ease of rules to approach the court, the constitution of court committees to gather evidence, enforcement mechanisms to follow up interim orders through a continuing judicial command, and the recruitment of amicus curiae (literally meaning ‘friend of the court’) to carry out multiple functions and the simultaneous redundancy of the petitioners, and the conspicuous absence of affected parties in the court. In fact, the petitions, debates, and judgments integral to the PILs that aim at evictions, the closure of shops and

industries, and pollution control have addressed particular ‘interests’ thereby limiting the scope of the judiciary in progressive politics. In his book, *Courting the People: Public Interest Litigation in Post-Emergency India*, Anuj Bhuwania in describing PIL as a “slum demolition machine” (p. 80), closely analyzes the procedural departures and peculiarity of PIL in the recent past. In contrast, Gautam Bhan, *In the Name of Public’s Interest: Evictions, Citizenship, and Inequality in Contemporary Delhi* analyzes how the legal mechanisms shaping the PILs are underwritten by the planning mechanisms of the Delhi Development Authority.

The Force of PILs

Bhuwania’s book systematically lays out the history and politics of the emergence of Public Interest Litigations (PILs) in India. His primary aim is to critically examine how a “culturalist maneuver” and “procedural flexibility” (pp. 1-2) allowed PILs to attain such force in the Indian appellate courts and public life. He cogently demonstrates how the celebrated appellate courts attained an elevated status in taking up PIL cases by analyzing the theatricality and performance of the judges, PIL lawyers, amicus curiae, and the journalists involved in these litigations. Drawing on the work of various scholars, he historically documents the conflicts that resulted from the constitutional mandates to simultaneously secure ‘fundamental rights’ and address the ‘social question’ of poverty and inequality. Thus, the unresolvable conflicts to mediate between enforceable fundamental rights and the non-justiciable ‘social question’ that guaranteed minimal entitlements within the Directive Principles of State Policy created “competing populisms” (p. 25), the need for a “committed judiciary” (p. 22) and an emphasis on PIL judicial provision. Once the judges took on the role of carrying out ‘social revolution’, they started making departures from legal procedures through the innovation of PIL thus consolidating an arbitrary vision for itself.

Bhuwania demonstrates that the PIL lawyers and judges shifted their focus “from ‘poverty’ to ‘environment’ to ‘governance’” over the years (p. 112). While the political economy could have played a major role in the changing nature of PILs, Bhuwania astutely demonstrates how the force of PIL was largely due to judicial populism and the peculiarity of adjudication processes. He argues that while the departure from a standard, fair, rigorous, and logical judicial process could allow ‘benevolent’ judges to deliver substantive progressive judgments in addressing the ‘social question’, this also provided an opportunity for the ‘malevolent’ judges to deliver utterly regressive judgments in an anti-poor and neoliberal ideological era. Further he emphasizes the emergence of what he calls “Omnibus PIL”: “a PIL originally filed to address a specific problem in a specific part of the city could now be turned into a matter that dealt with that particular problem all over the city” (p. 9). In fact, as he shows, the informal legal procedures coded in Omnibus PILs helped the amicus curiae to displace PIL lawyers from their cases altogether. Thus, the chilling implication, as he shows

in various examples, is that the judges and *amicus curiae* could simultaneously serve their own interests along with the interests of capital or their political masters.

Similar to Bhuvania's assessment, Bhan unpacks the historical context of PILs, but in his case, he also lays out the task of examining the relationship between informality and illegality, 'good governance', urban citizenship, subaltern resistance, law and urbanism, and democracy and inequality. His primary aim is to examine eviction from low-income settlements, which he argues is the key to theorize the dynamics of urbanism in the global south. In contrast to Bhuvania's focus on procedural flexibility, Bhan adopts a Foucauldian approach in analyzing PILs as part of "emergent rationalities" – the rationalities based on the ideas of planning that underscore planned development, 'good governance', and legalities in the city. He further argues that these emergent rationalities act as "ethico-moral imperatives of judicial intervention" and "modes and technologies" for implementation of planned development (p. 98). In other words, these "emergent rationalities" are precipitated by what he argues the crisis or failure of planned development demonstrated by encroachments thereby necessitating judicial interventions in the name of the public interest.

The Template of Urban Disenfranchisements

Bhan's main argument is that the production of space is largely predicated on illegality in Delhi, as a majority of all the settlements in the city can be deemed 'unplanned', 'illegal' and 'informal'. As he argues, "Put simply: it is plans, and not the failure of their implementation, that produces and regulates illegality" (p. 88). He nuances various types of settlements with respect to their planning and legal status, and argues that the logic of legitimacy (or the lack of it) that is bestowed to various settlements is refracted through the planning processes, which in turn determines their fate. Thus their fight is to "seek and enhance legitimacy" through both institutional as well as everyday political practices (p. 92). By meticulously tracking the housing shortfall, he emphasizes "the impossibility of legal and planned inhabitation for the poor and the rich alike (p. 60)".

Through an analysis of settlement patterns and the juxtaposition and superimposition of Master Plans, he analyzes what he calls their "bounding condition" (p. 65) and shows how the Delhi Development Authority (DDA) plays a central role in producing legality and illegality. Further, he uses the analytics of rescaling to argue how the specific problems tackled in the PIL petitions are translated into concerns of general public interest in the entire city on the part of the court. He also uses the analytic of reframing to show how multiple PILs are clustered into a single case thereby erasing the complexities, particularities, motives, and historical origin of each case by facilely proffering the notion of public interest. In this regard, he shows how the court-mediated model of 'good governance' emphasizes the crises in the city.

In analyzing urban citizenship, Bhan demonstrates how the judiciary has narrowly defined constitutional rights to assure particular ‘life styles’ in the city. As a result, the ‘encroacher’ is defined as an identity thereby making her illegitimate, undesirable, and unworthy of rights. In his examination of resistance, he focuses on institutionalized activism rather than the resistance politics of the poor. Bhan creditably argues how the relative security or vulnerability of the low-income residents guide their motivations and create disunity regarding the modes of resistance. Further, the divisions among the activists exhibit fault lines concerning whether one could fight the judiciary or take recourse to it. Overall, he proposes the idea of a ‘judicial urbanism’ to suggest “a mode of urbanization where the production of space, social struggles over the meaning of space, and the possibilities of urban citizenship are significantly determined in a judicial register” (p. 248).

Unlike Bhan’s forays into a multitude of issues as discussed above, Bhuwania draws our attention to PIL cases where the judges attempt to “micromanage” governance issues by turning the city of Delhi into the “laboratory of PIL jurisdiction” (p. 8). By focusing on the malleability of PILs, he examines how the courts set out to carry executive and municipal functions that remain inimical to the interests of the poor. To offer an example, he argues that a controversial Supreme Court decision to adopt an alternative fuel in Delhi—CNG—without clear scientific proof of its efficacy negatively affected public transport and auto-rickshaw employees and commuters. He documents the hardships of auto-rickshaw owners who became reliant on usurious loan sharks hoping to invest in the change of technology, and who also lost time in queuing up for refilling. Further, he argues how the Supreme Court’s license freeze created a black market, and how the financiers ultimately became owners of fleets of auto-rickshaws, reducing the original owners to daily wage laborers.

From Bhuwania’s research into pollution cases in the Supreme Court, we learn about the disastrous effects of PIL on many marginalized communities. For example, he describes how the designation of nomadic indigenous communities as ‘encroachers’ led to their eviction from Asola Wildlife Sanctuary without affecting the illegal farmhouse owners who built their palatial bungalows in non-residential land. He shows how the closure of industries jeopardized the livelihood options of a range of workers without affecting the factory owners who conveniently converted some of the land into commercial real estate. He also shows how deindustrialization led to the loss of livelihoods through the closing down of a range of non-conforming industrial units. Further, he demonstrates how the closure of commercial units in residential areas caused distress to a range of traders, shopkeepers, and workers. In a nutshell, he shows how the peculiarity of PIL could allow a “bizarre logical jump” (p. 83) in initiating demolitions, closures, and deindustrialization. For instance, in the Almitra Patel case, he analyzes how the initial focus on the management of solid waste in the city gave way to an insistence on the micromanagement of slum demolitions subsequently.

On Method, Law, and Urban Citizenship: Concluding Remarks

Both authors offer persuasive arguments regarding the way PILs manufacture a template for urban disenfranchisement. Bhuwania's modest approach solely focuses on the origin, logic, and peculiarity of PILs. Through his expertise, he highlights the procedures, technicalities, and historical contingencies that created PILs and the powerful ability of the judiciary in restructuring Delhi; Bhuwania is a qualified lawyer and has had relatively easy access to the appellate courts. Thus, we could have gained important insights if he had supplemented his research by investigating the symbolic and power struggles between progressive and conservative lawyers in the contemporary context. For instance, Pierre Bourdieu has drawn our attention to the specific forms of juridical discourse and the struggles within the juridical field in ("The Force of Law: Toward a Sociology of the Juridical Field", *Hastings Law Journal*, vol. 38, 1986-87, pp. 814-853). In similar vein, one could ask the following two questions: How does the appellate juridical field operate in Delhi? How is juridical capital distributed among various actors, and how do the judges go about legitimizing their own actions within the court and beyond it? Further, one is also tempted to learn if there is a predominant form or emergent culture of judicial sociality today. Answers to these questions could yield important insights into the working of the judiciary in contemporary Delhi.

In contrast, Bhan proposes that we reflect on a multitude of issues related to the judiciary, including poverty, inequality, spatial illegality, urban welfare and entitlement regimes, and property rights for the poor in order to understand urbanism in the global south. In this regard, Bhan has produced some compelling insights about the production of illegality, the rationality underpinning 'good governance', and urban citizenship. However, he largely relies on the documentary artifacts of the court and interviews with the middle-class activists, which does not give us a clear picture about the judicial palimpsest of popular assertions. We do not hear the narratives of specific judicial struggles and conflicts among various stakeholders. The voices from the margins are sorely missing, especially when Bhan's purported task is to theorize the periphery. One does not get a clear understanding of the "dynamic aspects and intersection of planning, legal, and political regime" that shape the particular legal cases and outcomes and the ways in which "law is lived, encountered, and challenged" by affected communities (Sanjeev Routray, *Between Eviction and Existence: Urban Restructuring and the Politics of Poverty in Delhi*, Unpublished Doctoral Dissertation, University of British Columbia, Vancouver, Canada, 2014, p. 244).

For future directions in legal research on Delhi, there is a need to engage with an extant and a post facto ethnographic appraisal of the judiciary. In other words, we could understand the role of judiciary in urban restructuring more fully by building archival as well as ethnographic repertoires to construct detailed narratives of the courts, agencies, and people on a case-by-case basis. There is a need to ethnographically document fractious and courteous

relationships and alliances among various urban stakeholders. To understand 'judicial urbanism', as proposed by Bhan, one must also be attentive to the processes that produce law on a case-by-case basis. This also impels us to understand various modes of political practices on the part of urban poor in order to theorize the periphery. Notwithstanding Partha Chatterjee's prognosis-laden query "Are Indian cities becoming bourgeois at last?" in *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (2004, p. 131), there is a need to engage as well as go beyond 'political society' (see also Sanjeev Routray, "The Postcolonial City and its Displaced Poor: Rethinking 'Political Society' in Delhi", *International Journal of Urban and Regional Research*, vol. 38, n° 6, 2014, pp. 2292-2308) in order to understand contentious political logics, shifting parameters of judiciary, and the associated challenges of the subaltern in the transforming cities of the global south.

Published on booksandideas.net, 12 February 2018.