



SHRUTI PANDEY,

Human Rights Program officer,
India, Nepal & Sri Lanka
Ford Foundation

*Strategic Litigation
for Economic-Social
Rights in India*

Executive Summary of Presentation

- The Indian **P**ublic **I**ndian **L**itigation (PIL) – features, Successes; some illustrative cases
- Limitations; Problems; Learnings
- Ways forward in Indian Strategic Litigation
- Ford Foundation's interventions in India around new approaches to strategic litigation and its ecosystem

“Public Interest Litigation” in India

The Indian “Public Interest Litigation” (PIL)

- In India, the term ‘PIL’ refers to a judge made innovation from 1980s, that opened the gates of the court to representative class action for the historically disadvantaged and socially marginalized – judicial response to the extremes of emergency era in late 1970s
- Operates only in Supreme Court of India and High Courts at State level (the Constitutional courts)
- The only remedy used is *Writ Petitions* (for directions on constitutional legality and illegality of laws and executive actions, around fundamental rights) – so the respondent can be only a state or state agencies, and not private actors
- Huge expansion of common man’s access to justice – free from procedural rules regarding form and manner
- Began from the arena of civil-political rights but moved on to cover socio-economic rights, making the ESRs also justiciable and enforceable

Access, Standing

- Non-technical remedy, highly accessible
- Liberalized *locus standi* requirements – any person/ organization with bonafide concern with an issue and having worked on it, can take a case to Supreme Court or High Court especially where the directly affected individual/ class cannot do that due to a social/ economic disadvantage or disability
- Even a letter /postcard to the court's registry can be taken up as a writ petition (*'epistolary jurisdiction'*)
- *Suo motu* notices by courts – with appointment of *amicus curae* to assist

Non-technical proceedings

- No evidence is led – proceeds on the basis of admitted and credible facts brought on record by the petitioner in affidavits
- Non-adversarial – it is possible to work out a solution in cooperation with the government/ respondents
- Even the court proactively takes a position by appointing expert bodies as commissioners for inquiry into facts where facts are inadequate but they promise to be compelling if substantiated

A range of new reliefs devised by Court

Apart from the traditional remedies (declaring legality/ validity or illegality), the courts have evolved principles that allow a petitioner to:

- ask for implementation of existing laws/ policies for an entire section of population or on an entire issue (coercive and unsafe sterilizations; child marriages)
- read down the law (Naz case S.377 IPC criminalizing homosexuality)
- amend laws (pre-birth sex selection), enact new laws (food, child sexual abuse), amend constitution for new fundamental rights (education)
- even lay down new laws/ guidelines in the absence of law which amounts to violation – new areas of rights (Vishaka case - sexual harassment; trafficking)
- declare new facets of fundamental rights (compensation for gross infringement)

The Large Constitutional Rights Umbrella

- Extremely expansive construction of the constitutional fundamental right to life, equality and liberty (bringing in directive principles under the constitution which are technically not enforceable under the Constitution) –

food, water, shelter, health, education, roads, access, communication, culture, sexuality/sexual orientation, natural resources (airwaves)...(now, even right to sleep!), apart from the traditional CPRs

- Frequently import standards from international human rights treaties

Efforts to build some follow-up and implementation measures within PIL

- Courts often expand the reliefs as the case proceeds – “part-orders” are passed from time to time as against one final order/ judgment – this allows for evolution of reliefs and also ongoing monitoring
- Robust follow-up mechanism and implementation through Court Commissioners or High Powered Committees, compliance reports, shadow reports
- Monitoring role through the innovative “Continuing Mandamus”: Several ‘Part Orders’ to keep the case alive, instead of one final judgment and order that would dispose of the case

Issues, Limitations, Learnings on PIL

“Social Reversal” of PIL in Post-liberalization times

- From mid-1990s - Roll-back and weakening of PIL courts' espousal of ESRs, in the name of Law and Policy divide, especially around 'development' – deference to government as it withdrew from services and allowed privatization
- 'War on terror' – as the security panic has risen with the growing extreme left wing insurgency in some of the poorest states of India (Naxalism/ Maoism); Army Rule
- Prioritization of rights – especially in cases of conflict of rights; increasingly supporting influential sections as against vulnerable ones
- PIL has become an “uncontrollable Frankenstein” – overreaching its mandate

Inherent Limitations of Constitutional Court-centered PIL

- By definition and design - Supreme Court and High Courts are 'Courts of Law' – can lay down the normative framework of rights; the declaratory language of the judgments has therefore focused on the strength of the right rather than the remedies.
- Legitimacy and competence issues have been raised by the courts as well as lawyers;
- While Constitutional framework has been expanded innovatively, the concrete remedies under the specific statutes have been neglected; in some instances the Supreme Court actually prevented local remedies (Bhopal gas leak disaster case; eviction of slum dwellers cases)
- The courts and other enforcement bodies at the district level (around 20,000 in number as against the 1 Supreme Court and 21 High Courts; and which are located close to people's homes) have been kept outside the judicial response to rights – irony that while PIL was inspired by access to justice, by centralizing rights and justice delivery, it has actually led to decline in access to justice ; related issues of access, time, funding, efficacy

The Persisting Enforcement Challenges

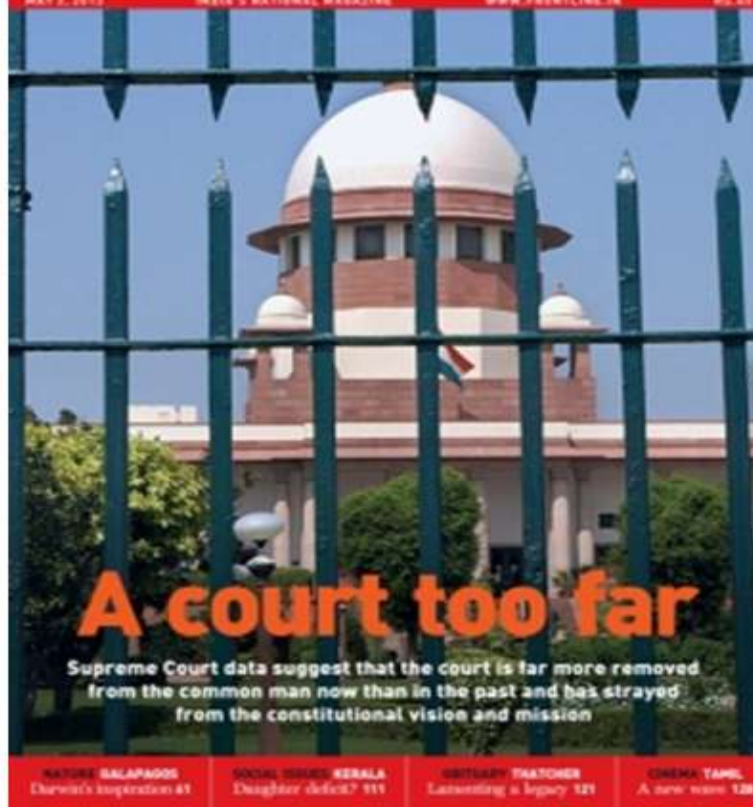
- While the Supreme Court of India has shown itself to be more willing to undertake *Olympian* tasks of investigation and supervision of government conduct, the record of government compliance with the Court's sweeping orders concerning social problems is not encouraging.
- Despite its great success, even the right-to-food campaign is looking beyond the current legal tools to carry out and sustain its work.
- Villages and communities have the potential to build state specific campaigns and cases that concern the specific needs of their locales, and to present these claims in the state courts.

Strategic Litigation – Combining the fire from below, with fire from above:

- Successful PILs (Right to food) showed value of - constant back and forth between the movement and lawyers; availability of lawyers who understand the politics and goals of the movement and closely aligned with the movement
- Instead of broad declarative remedies, specific tangible realizable legal remedies
- A combination of other strategies used alongside for continuum
- Bottom-up, evidence based litigation - backed by research by grass-root level activists
- Strategic litigation depends heavily on effective, accessible and carefully conducted community level lawyering at local courts

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LOUNGE

Decentralise public interest litigation

JAN 15, 2011 | PAVAN KUMAR

The issue of decentralisation assumes a lot of significance in the context of the present state of affairs at the higher courts. Having opened the floodgates of PIL, the high courts and the

Innovative Remedies in *Public Interest Litigation:* Bottom-upwards & beyond Supreme Court



The Supreme Court by and large remains popular. Yet, if one digs a bit, beneath the surface is an institution that has strayed from its mission and may even be undermining the rest of the judicial system. By NICK ROBINSON





Ecosystem of Human Rights Practitioners – *‘Cause-lawyers’*

OPINION • LEAD

September 15, 2012

Raising the bar for the legal profession

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N. R. MADHAVA MENON



lawyers in India are, simply put, elitists. While lawyer-grassroots interaction may have been prevalent immediately after the Emergency Period, that happy marriage was short-lived. Today, Indian Supreme Court lawyers are isolated actors who generally are not concerned about receiving input from those on the ground. Because the Indian system allows lawyers to file peti-

The Indian legal profession has grown over a short period of less than 50 years to become the world's largest and most influential in the governance of the country. At the same time, it reflects the diversity of Indian society, its caste structure, inequalities and urbanised delivery of services depending upon the market forces. Being a private monopoly, the profession is organised like a pyramid in which the top 20 per

COURTING SOCIAL JUSTICE

JUDICIAL ENFORCEMENT OF
SOCIAL AND ECONOMIC RIGHTS

IN A CHANGING WORLD





Reorienting Human Rights legal Practice in India



Human Rights Laws & Discourse

The diagram features a light blue header at the top. Below it, a red arrow points left from the center, and a green arrow points right. Between these arrows are two yellow, egg-shaped faces. The face on the left has a hostile expression with slanted eyes and a frown. The face on the right has a sad expression with drooping eyes and a downturned mouth. A grey, jagged starburst shape is positioned below the faces, containing text about the result of the current state of affairs.

Securing Human Rights of the Poor and Marginalized

- Poor connect, little social relevance, indifference
- Increasingly, people are giving up on law, turning hostile

Result:
Growing disenchantment &
confrontation between the people &
rights movement, towards law, legal &
judicial systems

Combination & Continuum of Interventions

