BUCHBESPRECHUNGEN / BOOK REVIEWS

Anuj Bhuwania, **Courting the People: Public Interest Litigation in Post-Emergency India,** Cambridge University Press, Delhi 2017, 157 pages, £ 89.99, ISBN: 9781107147454

The book is dedicated to Public Interest Litigation (PIL) in India. PIL is a topic that has attracted great interest in the German-speaking area, especially in the environmental law literature, where it is usually equated with the concept of class action or used synonymously.[1] In American literature, there exist mores articles on PIL than on any other area of Indian law (p. 1). The Indian PIL system is an export hit as well and has been adopted by other South Asian states. Consequently, there is a certain pride of the Indian legal community in its special PIL procedure. However, PIL procedures are not only of special importance within the Indian legal community, since the general public in India has also taken an interest in them. There exist Bollywood movies dealing with PIL procedures and they are omnipresent in the Indian daily newspapers, especially in Delhi (p. 1, 5).

What is PIL? In the Indian legal system, PIL is more than just a class action lawsuit. Certainly, PIL proceedings extend the rules of access to justice (*locus standi*). A petition by a citizen is sufficient to initiate such a procedure, but the court is also able to proceed without a petition (*suo moto*). However, the special features of this procedure go beyond the access to justice. A commission appointed by the court may collect important facts and evidence. The course of the proceedings itself is not adversarial. Furthermore, the court may issue far-reaching orders, the implementation of which it then monitors itself. PIL proceedings thus differ from other court proceedings not only at the beginning, but also during the procedure and at the end.

The book takes a critical look at these changes in the judicial process. In particular, four points of criticism concerning the PIL procedure are expressed. First, the book argues that the role of the applicants in the proceedings became less and less important, until, in the end, the judges themselves (*suo moto*) were able to initiate proceedings. Second, the parties affected by the decision or order do not need to be heard, even if they are directly and drastically affected by the decision. Third, in relation to the far-reaching consequences that these decisions have, the collection of evidence in the proceedings is insufficient. The last point of criticism concerns the fact that the proceedings almost always result in the issuing of orders. These do not need to be justified, which leads to a lack of legal grounding of the decisions. Accordingly, there was no need to deal with legal arguments. Overall, the aim of the book is to demonstrate "the political" in and around the PIL procedures. It also aims at clarifying the extent to which these procedures empower the judges in terms of decision-making and power. "*PIL has often been talked about as romance – if anything, as romance*

1 See e.g. Astrid Epiney, Gemeinschaftsrecht und Verbandsklage, NWvZ 1999, p. 485 ff.

gone wrong. In this book I will argue that PIL was a tragedy to begin with and has over time become a dangerous farce" (p. 12).

The book is divided into four chapters. The first chapter (p. 16-49) deals with the origins of the PIL procedure and the first point of criticism: the applicant's vanishing role in the procedure. The question is raised as to why the Indian Supreme Court, after its "capitulation" during the period of the state of emergency (1975-77), positioned itself as court *for the people* and how this happened (p. 17). During the state of emergency and even before, then-Prime Minister Indira Gandhi repeatedly questioned the power of the Constitutional Court. It was criticized as blocking the enforcement of the state objectives, laid down in the Constitution itself (Articles 36-51). It has been argued that these state objectives prevail over the individual freedoms laid down in the Constitution. Eventually, the Constitutional Court adopted this line of argumentation and elevated itself to the position of guardian of these state protection goals (p. 24) and spokesman for the entire people. Procedural rules became irrelevant when it came to the realization of true justice. Thus Bhagwati, one of the leading judges in the creation of PIL, stated in a much quoted sentence: „*But it must not be forgotten that procedure is just a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities*."[2]

This renunciation from procedural rules was not only decisive for the PIL procedures but also led to the emergence of Indian "exceptionalism" and "debased informalism".[3] In summary, all procedural changes could accordingly be explained with the circular argument that India was different and that procedural rules thus had to be designed differently. Initially, this referred only to the access to court, but it later also covered other areas of the judicial process. In terms of access to court, the changes went so far that in the end, no applicant was needed, but the court could select its own procedures (p. 43): „*The PIL Judges could now give free rein to their ideological predilections; their awesome power had no limits except their own sense of judgement*" (p. 44).

In the second chapter, the book illustrates how the PIL process has evolved on the basis of two famous cases, the Writ Petition (Civil) 4677/1985 and the Delhi Pollution Case. The main point of criticism that these procedures are intended to illustrate is that the parties concerned were not or only insufficiently heard in the various procedures themselves, although the court orders had far-reaching consequences for them. Both proceedings were started in 1985 by a writ petition from MC Mehta, a prominent lawyer in Delhi who had initiated many significant environmental PIL proceedings. In the Delhi Pollution Case, which is still pending, the court ruled inter alia in 1998 that local public transport had to be converted from diesel to gas. As a result, many rickshaw drivers who owned rickshaws had to sell them, because they could not afford the conversion to gas. Now, many rickshaw drivers rent

2 SP Gupta v. President of India, AIR 1982 SC 149, Decision from 30 December 1981, Rn 17.

3 *Marc Galanter and Jayanth K. Krishnan*, Debased Informalism: Lok Adalats and Legal Rights in Modern Indian, in: Erik G. Jensen and Thomas C. Heller (eds.), Beyond Common Knowledge: Empirical Approaches to the Rule of Law, Stanford 2003, p. 76-121.

their vehicles and are no longer owners themselves. The rickshaw drivers themselves were not heard in the proceedings. The number of licenses was also kept very low, but at the same time the number of private car registrations in Delhi increased enormously. The book thus concludes: „*In this case, which transformed Delhi's roads, the Supreme Court displayed a stark preference for imposing disproportionate costs on public transport while allowing private transport to thrive, even so the latter was the cause of most of the vehicular pollution in Delhi*" (p. 56).

The second procedure (Writ Petition (Civil) 4677/1985) is one of those mammoth procedures that the book refers to as Omnibus-PIL. It initially dealt with quarries, then with the pollution of the Yamuna River, until it ended up dealing with commercial enterprises in residential areas. The process has contributed significantly to a "large scale deindustrialization" and an "urban transformation" in Delhi (p. 51). It is also referred to as the "sealing case" because it resulted in businesses having to be relocated, shops and businesses were sealed. Again, the affected parties were not or insufficiently heard. In the end, because of the end of a judge's term of office and the government's legislative changes, some of the court's drastic orders were never enforced.

In the third chapter, the author describes a case before the Delhi High Court that led to a reduction of almost a third in the number of slums in Delhi between 1998 and 2011, leaving about one million people homeless. The book argues that "*it was the unbearable lightness of PIL procedure, which provided the juridical conditions of possibility for it to function as a slum demolition machine*" (p. 83). In addition to the point of criticism already mentioned in chapter two, which referred to the inhabitants of the slums that were not included in the proceedings, there happened to be another problem in these proceedings: the collection of evidence. In the PIL proceedings, usually, affidavits are submitted, and no evidence is collected. However, the answer to the question whether a slum is a nuisance for the other residents actually requires the gathering of evidence. Evidence in this procedure was only provided by photographs of the conditions in the slums (p. 86). A further point of criticism is the decision-making practice in these procedures. Frequently, as a result of the process, mere orders are issued that do not have to be justified but have far-reaching consequences. „*In the PIL cases I have discussed, the court can initiate a case on any public issue on its own, appoint its own lawyer, introduce its own machinery to investigate the issue and then order its own solutions to the issue at the level of the entire state*" (p. 106).

The fourth chapter presents two strands of criticism of PIL in Indian legal literature. The first strand of criticism regrets the development away from the original PIL procedures, in which the marginalised groups in Indian society were given a voice and helped to their rights. This strand of criticism is called "consequentialist". Accordingly, the focus lies on the consequences of a judgment. The book's critique of this position can probably be summed up well with the phrase "the end justifies the means" as well as with Goethe's po-

em of the sorcerer's apprentice „Die ich rief, die Geister werd ich nun nicht los“.[4] The aim of the criticism is to show that the ‘consequentialist’ perspective does not include the fact that the opportunities created by the instrument of a PIL procedure can be used for different purposes. According to the argumentation of the book, this potential for abuse, which is inherent in the PIL procedure, is misjudged. A further line of criticism, as it is followed throughout the book, starts with the procedure. This strand includes only isolated voices, some of which demand guidelines for the procedural rules in the PIL procedure.

The book is absolutely worth reading, as it provides a deeper insight into the Indian legal system and the PIL procedure. It is rich in detailed descriptions of various well-known Indian cases and can be understood even by readers who are not familiar with the Indian legal system. It raises the intriguing question about the role that constitutional courts should have in a democratic post-colonial state. From a comparative perspective, the book offers a wealth of information and connecting points for the reflection on one's own legal system, not only with regard to the issues of class action.

Some of the cases described could perhaps be narrated differently from other perspectives. Did the courts consciously seize power or just fill a vacuum?[5] To what extent did certain path dependencies play a role in the development of the procedures? Are courts perhaps a second-best option when the administrative apparatus fails? For the Delhi Pollution case, this is partially accepted.[6] In the other cases described, it is just as evident, to what extent the administration fails to fulfil its inherent task of implementing law. The question remains, however, whether such an extensive departure from the usual procedure is needed in order to act as a second-best option. And what is the normative value of the various procedural rules that have been overridden here? A more in-depth discussion of the theories of separation of powers or a comparison with the functioning of PIL procedures in other Asian countries would have been desirable.

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4 In English: “The spirits I summoned - I can't get rid of them”, translation by *Richard Stokes*, The sorcerer’s apprentice, Oxford Lieder, https://www.oxfordlieder.co.uk/song/4163 (last accessed on 25 September 2020).

5 cf. *Rike Krämer-Hoppe*, When courts step in? Air quality litigation and adjudication in Germany and India, Indian Law Review (accepted online 2020).

6 *Michael G Faure and A.V. Raja*, Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables, Fordham Environmental Law Review (2010), p. 239-294.