# Introduction

In recent years, 'PIL' has made an appearance in many a Hindi film. Two examples come to mind. In the somewhat ungrammatically titled *Sahib, Biwi aur Gangster Returns*, the mention of PIL comes when a state legislator – the eponymous *Biwi*, whose official position has come to her by dint of being married to a small-time prince in the North Indian state of Uttar Pradesh – decides to take some interest in what's going on in her constituency. The first important piece of information her office assistant provides her with is that a PIL has been filed against land acquisition for a development project in her area. Her baffled response is, 'Yeh PIL kya hota hai?' ('What is PIL?') She is clearly ill-informed. But that the film chooses to invoke PIL to show her complete political cluelessness, and that the astounding nature of this fact will be immediately apparent to the audience watching popular cinema, the lowest common denominator in India if there is one, gives us some clue perhaps to the omnipresence of PIL in contemporary Indian life. The second film, a satirical comedy called *Jolly LLB*, is much more directly concerned with the operation of the judiciary. It centres around a small-town lawyer who is trying to make it big in Delhi's law courts and decides that filing a PIL might be the quickest way to get media attention. In a scene that made it into the film's promotional trailer, a judge is shown angrily throwing away Jolly's legal brief, saying, 'What kind of PIL have you filed? You have spelt Prosecution as Prostitution and appeal as apple!' Clearly, PIL is one kind of legal process everybody understands. As much as 'appeal' and 'prosecution', it has entered the Indian demotic lexicon.

So widespread is its reach that PIL has become a sort of metonym for the greatness of the Indian judiciary. No area of Indian law has been written about as extensively (and almost entirely hagiographically) as PIL. There are more American law review articles on PIL than on any other area of Indian law. Indeed, Indian judges routinely cite these approving articles to hail their own achievements. PIL has by now been successfully transplanted in other neighbouring South Asian countries as well[1]. PIL is celebrated by all and sundry as India's unique contribution to contemporary jurisprudence. Lest it appear that I subscribe to this culturalist understanding linking PIL to its Indian-ness, I hope it will soon be apparent that my aim is precisely to question such a move. The remarkable thing, as we will see, is that such a self-consciously culturalist manoeuvre was exactly what enabled and accompanied the rise of PIL.

This book will study the history and politics of Public Interest Litigation, or PIL as it is popularly known, a jurisdiction unique to the Indian higher judiciary that arose in the late 1970s in the aftermath of the political emergency of 1975–77. It has been hailed as the most dramatic democratizing move that the Indian judiciary had made in the post-independence period. For example, according to legal scholar Usha Ramanathan, PIL led to an explosive 'jurisprudence of constitutional relevance and the rejection of redundancy of peoples'.[2] She argues that it enabled the court to extend a unique invitation to journalists, activists, academics and anyone else who may be a witness to constitutional neglect and lawlessness to participate in the judicial process.

A PIL is pursued by filing a writ petition either in one of the various State High Courts or the Supreme Court. This avenue was already available under the Indian Constitution but PIL makes recourse to it significantly easier. PIL is primarily a revolution in procedure, and its innovative features that emerged in its early years have been usefully summarised by a commentator Wouter Vandenhole:

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.

As Vandenhole summed them 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.'[3]

Legal scholar Lavanya Rajamani explains the effect of these innovations:

> The power of public interest litigation (PIL) in India lies in its freedom from the constraints of traditional judicial proceedings. PILs in India have come to be characterized by a collaborative approach, procedural flexibility, judicially supervised interim orders and forward-looking relief. Judges in their activist avatar reach out to numerous parties and stake-holders, form fact-finding, monitoring or policy-evolution committees, and arrive at constructive solutions to the problems flagged for their attention by public-spirited citizens. Judges have tremendous power, in particular in PILs, to design innovative solutions, direct policy changes, catalyse law-making, reprimand officials and enforce orders. And, they are not hesitant to exercise this power in what they perceive as the public interest. Where there is a perceived 'vacuum in governance, the Court rushes to fill it'.[4]

In order to begin to make sense of such celebratory clamour, a brief introduction to the structure of the Indian judicial system is necessary. Robert Moog, an eminent sociologist of Indian law, provides this useful summary:

> India's judiciary is a three-tiered, integrated system. The Supreme Court, which sits in New Delhi, is the only all-India forum. High Courts stand at the head of the judiciary in each state. These are the intermediate appellate courts in the system, but they also have writ jurisdiction. The third tier is the district-level courts. Despite India's federal system of government, the court system is integrated in the sense that there is no bifurcation between state and federal judiciaries. These three tiers form a single hierarchy and administer both state and federal laws.[5]

It is important to keep in mind that the heroic persona of the Indian judiciary – made possible by PIL – is reserved only for the State High Courts and the Supreme Court. Indeed, thanks to PIL, the higher judiciary is often viewed as the panacea for the various endemic social and political problems that plague India. The lower judiciary, the system of civil and criminal courts at the district level, on the other hand, is perceived as purely pathological – inefficient, corrupt and overly embedded in the Indian social milieu – while the appellate courts of course apparently transcend it. A remarkable paradox about studying India's judiciary is the simultaneously held diametrically opposite view of the two wings of the same integrated system. This schizophrenia has been sustained for a long time and is only getting worse. One clue to the management of such an unsullied image by the higher judiciary, in the face of the impression of such extreme pathology below it, is the distancing tactic that the members of the higher judiciary have perfected: to intermittently express despair at the condition of the lower courts. Robert Moog gives a good example of this when he quotes a Supreme Court judge declaring from the bench in 1995, 'It is common knowledge that currently in our country criminal courts excel in slow motion.'[6] The higher judiciary has successfully evaded any responsibility for the problems of the lower judiciary, although strictly speaking, they have direct vertical oversight over the latter.

Moog has analyzed such appellate treatment of lower courts in India in some detail. One effect of such despair is a constant 'search for alternatives, which range from versions of the more traditional *panchayats* (village or caste), such state-run forums as *lok adalats* (people's courts) or the widening array of tribunals…'[7] Another result of this skewed judicial system is, as Moog demonstrates, 'an increased flow of cases to High Courts and the Supreme Court in the form of appeals, revisions, reviews, or the use of the upper courts' writ jurisdiction to avoid the district courts entirely.'[8] Thanks particularly to the proliferation of writ petitions as convenient

shortcuts to the High Court, the judicial system has gradually become so top heavy that by the early 1990s, Moog estimated that 'the High Court has become the single most active trial court in the state of Kerala'. Article 226 of the Indian Constitution empowers the High Courts to issue writs for the enforcement of Fundamental Rights and for any other purpose, allowing its use against a breach of any legal right by the state. The Supreme Court has an analogous provision under Article 32, enabling writ petitions to be filed directly before it. Such relative ease of access to the higher judiciary, Moog has argued, has further undermined:

> the public's perception of the quality of justice they receive from the subordinate courts. These very liberal appeals and writ policies encourage the impression that justice ultimately flows from the High Courts and/or the Supreme Court. They also feed the image that what the lower courts produce is a lower quality of justice, compounding the credibility problems these courts already have. These courts therefore become hurdles to get over, or avoid altogether (for example, through the writ jurisdiction), rather than forums from which final resolution of disputes is expected.[9]

Another symptom of this Indian version of 'appellate-court-itis',[10] is the common habit of lawyers describing themselves as 'Supreme Court advocate' or 'High Court advocate'. The premium put on these appellate courts means that associating with them quickly became a status symbol as if some of the charisma of these institutions would rub off on the lawyers practicing there. This practice, implying a higher status for a lawyer of a higher court, continues despite India having a rationalized legal profession since 1961 where there is no strict forum-based limitation on a lawyer and any lawyer is free to practice in a forum of her choice. This convention takes a particularly bizarre form when it comes to criminal lawyers because this is one field where the trial court is by definition the most important arena where evidence is recorded and where most of the real action actually occurs. But even then, in contemporary India's endless mediatized debates on criminal law reform, one will rarely find lawyers who regularly appear in trial courts. Invariably, it will be the appellate lawyers basking in the reflected glory of their higher location in the food chain of India's judiciary.

In this Indian malaise, the exalted status of appellate courts is also physically marked by their entry barriers, enhanced security set-up and monumental architecture. On the other hand, trial courts are easily accessible and are often compared derisively to railway stations, those most democratic and unruly of modern Indian public spaces. Indian appellate-court-itis has been compounded manifold by the political vanguardism of these courts in the post-emergency era through PIL. It is important to note that PIL has not only conferred a new

conspicuousness and higher political status to India's appellate judiciary, but to its dramatis personae as well, the charisma of heroic PIL judges often matched by those of PIL lawyers, Amicus Curiae and PIL petitioners, even if the latter are increasingly vestigial, as we shall see. Playing to the gallery is par for the course and can bring rich dividends. The theatricality of PIL also lends it a devoted audience of legal journalists, hanging on to every word, who impart to these performances the publicity implicitly demanded from them. All of these are important constituencies of India's appellate courts whose self-perception gets progressively accentuated, thanks to PIL.

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Returning to live in Delhi in 2006, after being away for nearly four years, I found that PIL had become ubiquitous in everyday discourses around the city. The urban fabric seemed torn asunder by PIL cases intervening in almost every part of the administration. The courts gave the impression of governing the city through the instrument of PIL. Newspaper headlines routinely quoted statements by the Delhi High Court threatening to shut down the Municipal Corporation of Delhi (MCD): 'Stop farmhouse weddings or we will shut MCD: HC'[11] or 'Catch monkeys or shut down, HC tells MCD'.[12] Slums labelled 'encroachments' were being demolished all over the city under court orders, the incidents reported with relish by new periodicals like *Neighbourhood Flash* and local sub-city supplements such as *South Delhi Live* that had begun to come bundled with major newspapers like the *Hindustan Times*. The city news became the site of both the demand and supply of the courts' attention. Any political intervention against any of this – or even the intention of an intervention – would be declared 'populist'. In those days, if one followed the city news at all, PIL was inescapable. The legal correspondent for a daily newspaper who reported from the Delhi High Court later described the period to me thus: 'I would have seven bylines in the first six pages. The government used to function with contempt of court hanging over it.'[13] There were PILs pending related to so many aspects of the city's governance that newspapers would periodically carry random lists of such cases – the case topics in one such list included simian trouble, stray menace, urinals, no-parking zone, tinted glasses, save Yamuna, nursery admissions, Blueline buses, traffic fines, MCD demolitions, plastic ban, India Gate subways, free beds in hospitals, free seats in schools and illicit liquor – all of these were just in the Delhi High Court and this was by no means an exhaustive list.[14]

The city was being remade through the means of PIL. Indeed, Delhi had already been transformed significantly because of PIL cases over the past decade, as we shall see in Chapter 2. Every aspect of Delhi's transport – for example, auto rickshaws, cars, buses, cycle rickshaws – had been reconfigured because of PIL. Urban heritage was another arena of PIL's regular intervention: in November 2006, I was a witness

to a well-connected lawyer specializing in heritage conservation cases threatening a local government official with the words 'Main toh bas PIL thok doongi (I will just slap a PIL [on you]).' Later, in December 2007, I heard an environmental scientist heading a new biodiversity park express the worry that the foreign species he had planted would be challenged by a PIL (This actually did happen, a year later.)

PIL procedure had enabled the court to monitor and micromanage every aspect of the city's governance, making the whole city the direct object of its reformative attention. The all-encompassing nature of the court's control over the city through PIL was slowly brought home to me as I began to follow the leads thrown up by newspaper headlines. In 2006, for instance, I was struck by the headline 'Supreme Court chides Delhi Government for Power Muddle'.[15] The story turned out to involve a PIL about the lack of access to adequate electricity in the capital city that had been admitted in 1999 by the Supreme Court at the instance of a senior advocate. The case came to be legally titled 'Power Crisis in National Capital Territory of Delhi vs Union of India'. The senior advocate in question was made the amicus curiae, meaning 'friend of the court'. The court went on to supervise the privatization of electricity in Delhi from 1999 onwards. By 2003, when privatization was complete, the PIL came to focus on transmission and distribution losses attributed to power theft. By 2006, this particular PIL's remit had turned to inadequate power supply in Delhi, and the court heard big power-generating companies talk of setting up 1,000 megawatt gas-based power plants. In May 2006, the judges in this case reportedly expressed the worry that if the power situation in the capital did not improve, 'how will we organize the Commonwealth Games in the year 2010 here?'[16] More than four years before the scheduled games, the PIL court's worry about the availability of electricity in Delhi was expressed through anxiety about the high-profile event. The court's ire in this case throughout this period was particularly excited by power theft in 'illegal' settlements – unauthorized colonies and especially slum clusters. While ostensibly the court's concern was the city as a whole, it were these communities that had emerged as the most visible symbols of illegality in its eyes. It was this conspicuousness that it wished to erase.

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I will illustrate the qualitatively transformed nature of the relationship between the court and the city's heterogenous publics in this period by discussing three revealing vignettes from three PIL proceedings I encountered during my fieldwork. The first was in March 2007 during the hearing of a case in which a two-judge bench of the Supreme Court was supervising the formulation of the Municipal Corporation of Delhi's draft scheme for grant of *teh bazaari* (vending rights) to street vendors in Delhi. The case was *Sudhir Madan vs MCD*.[17] The MCD scheme had envisaged a process that would require first identifying sites

in the city where hawking could be carried out, then inviting applications from interested eligible people and then granting such rights. During the day-long hearing, an alternative was suggested to the MCD scheme by one of the vendors' organizations. They suggested instead that first a census be conducted for the existing street vendors in the city and based on that ground-level mapping, vending rights be formalized at the already existing sites. The judges were livid at such a suggestion. If such a suggestion was accepted, Justice B. P. Singh interjected, Delhi would have to be renamed 'Hawker Nagar (lit. 'hawker city')'. There would soon be hawkers selling food in the Supreme Court building, he exclaimed[18].

The second vignette is from a hearing before a two-judge bench of the Delhi High Court in 2009, where a PIL against begging on the streets of Delhi was being heard.[19] The presiding judge, Sanjay Kishan Kaul, was particularly agitated about the proliferation of beggars in Delhi. He was specifically concerned about having come across beggars even while being chauffeured around the India Gate roundabout, the heart of the imperial capital. If the situation remained unchanged, he said, the day was not far when there would be beggars in the High Court building itself. The bench went on to order the active implementation of 18 'zero tolerance zones' for beggars in Delhi, including road intersections near New Delhi's court complexes as well as all railway stations and bus terminals in the city.

My final vignette is from a hearing in a PIL about traffic congestion in Delhi in 2006,[20] which was narrated to me in an interview by one of the lawyers in this case. As part of this PIL, the High Court had ordered the removal of a slum called Nangla Machi, which abutted an arterial road in Central Delhi and was allegedly causing traffic jams. When arguments were raised by a lawyer for the slum-dwellers in a court hearing, Justice Vijender Jain pointed out that currently the slum concerned was less than two kilometres from the High Court. If action was not taken immediately, he said, the slum dwellers would soon invade the court premises itself and squat there.

A spectre was haunting the court. The spectre of the unruly masses of the city – street hawkers, beggars and slum dwellers – invading its pristine environs. These were precisely the unwashed masses that PIL had originally invited into the courtroom. But now, PIL seemed to have adopted a path where it wanted to devour its own.

Political commentators Nivedita Menon and Aditya Nigam called the fantasy of 'Delhi-en-route-to-Paris' being played out in the city around 2006, the result of a 'judicial coup d'etat':

> Propelled by a judiciary with no accountability and a media that is deeply implicated in this new game, there has emerged a technocratic elite which desires hypermodern cities cleansed of all the 'mess' and 'irrationality' that comes with democracy and the people.[21]

Clearly, the higher judiciary with PIL as its principal weapon had taken over Delhi by 2006, affecting changes significantly different from the pious original aims of the PIL jurisdiction.

How did this jurisdiction of PIL, which arose with the court speaking in the name of the people, become parasitical on the very same people? Delhi in the 2000s was going through a process of dramatic transformations that seemed recognizably along the lines that were being affected in cities all over the world, usually termed as 'neoliberalism'. What marks Delhi's dislocations as distinct is their source and their basis – they were not based, as in the past, on administrative or municipal policy or executive directions, but on judicial directions in a series of PILs concerning the city. Delhi had emerged as the most relentless laboratory of the PIL jurisdiction. The question worth asking is how and why PIL emerged as the primary agent of 'neo-liberalism' in Delhi. Or rather, why did 'neoliberalism' in Delhi take the PIL route? This is what I will explore in this book.

A clue to understanding the new role played by the PIL court can be found in the other commonalities shared by all three of the cases mentioned above. These were all PILs which dealt squarely with three major problems that Delhi was perceived as having an excess of – street vending, begging and traffic congestion. In each case, the city as a whole was the site for reform. Even more crucially, in all of these PILs, the petitioner was either irrelevant, had been excised or had never even existed. All three were PIL cases owned and led by the court itself. A different form of adjudication – if one can call such PILs adjudication at all – was at work in all three of them.

I will briefly examine each of these three cases to highlight the strange new powers with which PIL had empowered the court. The street vendors' case, *Sudhir Madan vs MCD*[22] had been deployed to supervise policy formulation on this issue since 1987, when it was first filed. The petitioner had been made irrelevant and an array of parties concerned with street vending involved. The begging case was slightly different. *Court on Its Own Motion vs In Re: begging in Public* did not have a petitioner in the first place. The court initiated it as a *suo motu* case and appointed an *amicus curiae* to assist it. The third case, *Hemraj vs Commissioner of Police,* began with a plea to curtail goods traffic in a specific locality of Delhi called Chhattarpur. But, after this specific issue had been resolved, *Hemraj*'s remit was expanded to deal with the problem of traffic congestion in the entire city. The petitioner was made redundant and an 'amicus curiae committee' appointed.

A new kind of judicial process had emerged, entirely court led and managed, sometimes even initiated and implemented by its own machinery. The court appointed its own lawyers and instrumentalities. Such radical departures from basic norms of adjudication could be honed to perfection in PIL cases as they were never envisaged to have any procedural limitations in the first place. There

was almost no institutional control of these cases at all, except such self-control that the court wished to exercise.

A new kind of PIL had emerged – what I call an 'Omnibus PIL'. A PIL that had originally been 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*. In such an Omnibus PIL, the petitioner with his specific concerns about a particular place would be removed, and an amicus curiae appointed to guide the court. The whole city would be subject to intervention and correction through this process.

Through this new maneuver, PIL became a means to target those populations living on the margins of legality, who had hitherto been protected by their elected representatives. These illegalized citizens were ordinarily not even made parties to these omnibus PIL proceedings. These conspicuously illegal communities of the urban poor were seen as obstructing the neat solutions to the problems of the city. They would have to go as collateral damage. That they were there in the first place was because of the everyday political networks that Partha Chatterjee has called 'political society'.[23] These were the networks most drastically unravelled by this new kind of PIL.

The Omnibus PIL-led judicial interventions in almost every area of urban governance were cumulative and interlinked and are perhaps better understood as an aggregation rather than as isolated instances. The multiplicity of court-appointed bodies, the lack of clarity about their terms of reference and procedures, the extent of their investigative or executive powers and the non-availability of their records or minutes together made the entire adjudicatory process of PIL impenetrable and almost impossible to challenge. I came across an example of such opacity on a blazing hot morning in May 2007 when I received a frantic call from a friend in Nizamuddin Basti, informing me about shops being demolished near the famous Sufi shrine of Hazrat Nizamuddin Aulia. On reaching there, I came across a municipal 'demolition squad' going about their 'job' with large hammers and pickaxes (the lanes in this area are far too narrow for bulldozers.).

My persistent questions to the Assistant Engineer in charge of this demolition, about the orders under which it was being carried out, fetched only a vague response from him about it being a Supreme Court order in the 'M. C. Mehta case'.[24] I knew, however, that there were half a dozen 'M. C. Mehta' cases pending in the Supreme Court, so this wasn't particularly useful. I made at least 20 phone calls from my mobile phone, standing next to the demolition squad, just calling all the phone numbers of the various court-appointed committees I knew of, to try and figure out which of them had ordered this particular action. But, to no avail. After further requests, the best the leader of the demolition squad would do was to give me the phone number of the Deputy Commissioner of that particular municipal zone, for further following up. I mention this instance as an illustration of the incredible legal illegibility that characterizes the materiality

of PIL procedure. At that point of time, there were so many PIL cases pending under which both the Supreme Court and the Delhi High Court were ordering demolitions that it was virtually impossible to keep track of them, and people living and working in the fringes of legality had come to expect the worst.

The orders in these cases were often specific directions, which were unreported and difficult to access, as they were given in a bewildering array of 'interim' applications in open-ended Omnibus PILs. Indeed, PIL cases did not often end up in any 'judgments' at all but in an endless spiral of 'orders', which are not reported in law journals. However, much of the scholarship on PIL has continued to concentrate on the 'completed' judicial process, i.e. judgments and other reported decisions of the courts, and the discursive charge they have. Yet because of the way in which the PIL jurisdiction has developed, most of its concrete actions are based on interim orders. These are in the nature of what legal scholar Upendra Baxi has called 'creeping jurisdiction', where the court regularly hears reports about the status of compliance with its orders, and gives further interim orders, usually without passing a final judgment.[25] Researching PIL in all its materiality required me to focus attention on such minutiae rather than rely solely on judgments as traditional legal scholarship tends to do.

This book tries to engage in a method that Kim Lane Scheppele has described as 'constitutional ethnography', defined as 'the study of the central legal elements of polities using methods that are capable of recovering the lived detail of the politico-legal landscape.'[26] The focus throughout is on 'a set of repertoires that can be found in real cases and that provide insight into how constitutional regimes operate.'[27] PIL emerges as a robust instance of constitutionalism seen:

> As a set of practices in which the transnational ambitions of legal globalization flow over and modify the lived experience of specific local sites, and as a set of practices in which local sites inescapably alter what can be seen as general meanings.[28]

The higher judiciary has hardly ever been the locus of such an anthropological study, and this book hopes to address this lack. While legal academia in India is obsessed almost exclusively with the higher judiciary, legal anthropology has solely focused on trial courts and panchayats. This perhaps is related to the fetishization of the unmediated face-to-face interaction with the litigants in a dispute or trial that the ethnographer can represent, and a discomfort with the heavily mediated drama of an appellate court – where the litigant is marginal or even absent and the lawyers represent their cases through heavily textualized presentations. Of course, part of the reason PIL is anthropologically interesting is because it is very deliberately presented as providing substantive, popular justice, unmediated by