

Rights versus the Law: Emerging Challenges

The Context

In early 2004, an estimated 35,000 households – colloquially called ‘Pushta’ — on the banks of Delhi’s river Yamuna were destroyed in what was the first in a series of evictions. Between 1990-2003, official statistics say that 51, 461 households were evicted and resettled in Delhi. Yet between 2003-2007 –a third of the time – 45,000 households were evicted, with less than 25% receiving any resettlement or compensation. These evictions are different not just in degree or intensity but also in kind. They were not initiated by the city’s planning agency, its municipal bodies or by either the city or central government. Each was the result of a verdict in an innovative judicial mechanism created, ironically, to protect the poor: the Public Interest Litigation (PIL). The last phase of such intense evictions occurred under the Emergency [1975-77] when suspended constitutional safeguards were worsened by the repression of traditionally strong social movements that had historically and effectively mobilized the urban poor both as national citizens and subjects of the developmental, welfare state. In Pushta, these movements, visibly present as a city-wide coalition called the *Visthapan Virodhi Andolan* [Anti-Displacement Movements] failed both in the unfamiliar territory of the courtroom and also outside it as their traditional ally against the state – the media – seemed to align with the city’s emerging middle class in describing the evictions as a much needed “return to order” and “good

governance” just before the city hosts the Commonwealth Games in 2010. It was into this context that I was researching.

My Proposed Project

For my fellowship, I had wanted to understand how the rights of so many citizens could be violated in the name of “public interest,” “the rule of law,” and “good governance. I had argued in the proposal that “the increasing criminalization of the urban poor is one of the most critical ways in which the rights of the poor have been able to be violated so blatantly and in seeming complicity with public opinion. In a democratic state, the poor cannot be openly marginalized. Criminalisation and re-casting of the poor as “encroachers,” however, re-frames rights violations as simply following “the rule of law.” It erodes, put simply, their right to have rights.

I had argued in my proposal that my on-going PhD research suggested that this criminalization, though ongoing within and outside the court, was emerging primarily from within the courts through public interest litigations. I wanted to spend the summer doing archival work looking at the actual texts of legal judgments [what judges said as opposed to how they ruled], interviewing activists, lawyers and, if possible, judges of the High and Supreme Courts of India to begin to understand the reasons behind this emerging criminalization of the poor that I thought I would find in the legal texts. I further wanted then to think about what this means for the use of a human rights framework to talk about the right to the city for the urban poor.

My Sponsoring Organisation

I was located at the Centre for the Study of Developing Societies [CSDS], a think-tank affiliated with the University of Delhi, who has a practicing urban media arm called Sarai. Sarai means neighborhood or place in Hindi/Urdu and has been active in both political movements around resisting evictions in the city as well as extensively documenting and producing analytical work on the city. I have a long association with the Centre, and my work with them over the summer strengthened this. I have developed my research this past summer [with previous and ongoing work since then] into a paper that has recently been accepted for publication. As per my agreement with them at the start of the summer, a working paper version of my research was used for several in-house and public seminars at the Centre and helped further mobilizations and analytical discussions on different ways of mobilizing against exclusion in the city.

My work

It was a very difficult summer for me. My grandfather, one of my most important mentors in my life and who through his own work in housing and sheltering children, taught me how to both care for human rights and respect human needs, was diagnosed with cancer. That summer was also the last summer I spent with him – he died this past December. Nevertheless, he was the one who kept sending me out of the hospital to go do “something useful,” so I was able to interview four current senior advocates in the Supreme Court of Delhi, three advocates of the Delhi High Court, several academic commentators on judicial and legal trends in India, two recently retired judges as well as one eminent jurist who is an ex-Attorney General. I was unable to get interviews in the

time I was there with sitting judges of the High and Supreme Courts, which was disappointing, since they were the judges whose judgments I was looking at most closely. My preliminary findings, therefore, do reflect only initial analyses and do not include an important set of actors. I am, however, headed back into the field for a year of dissertation research in June, 2009 till December, 2010, so there will be plenty of time to develop this work much further.

In addition, I was able to compile a large number of documents and published interviews with existing senior judiciary members and judges through archival research. I also compiled an index of 19 cases that I have identified as being cases of rights violations of the urban poor since the mid 1990s, narrowing them down from hundreds of cases I had to plow through!

My Findings I: Excerpts from Archival Research

Before the fellowship, I had done some very initial archival work from available online sources on legal petitions that led to evictions in Delhi over the past five years. Through my fellowship, I was able to find, as I stated above, nineteen cases that I think tell the complete story of two instances of large-scale evictions in the city, including the one at Pushta that I started this report with. Below, I present excerpts from these cases to illustrate the point I was making about judgments criminalizing the poor.

I did find what I expected but was unprepared for the severity of some of the texts I found. I also, however, found precedence for alternate judgments, and the work of many judges trying to find ways to resolve the dilemma of urbanising cities and shrinking

spaces that were not so violent on the poor. All in all, the exercise made me realize that the judiciary does not speak in one voice, which is a cause for hope. It also, however, made me realize how open “the law” – something I had thought of as being a given textual entity with some, but in the end limited, flexibility – was. I will speak to the importance of this for rights work in the conclusion.

First, I found that the law was ordering not just evictions but almost everything urban. PIL decisions emerging out of the courts have been responsible for most of the major changes to the city’s urban systems in the past decade. To mention only a few: the closure and relocation of medium and large urban industries¹, the conversion of all public transport and private commercial transport to compressed natural gas (CNG)², decisions on municipal solid waste disposal³, the “sealing” of unauthorized commercial units in residential neighborhoods in violation of the city Master Plan⁴, as well as the evictions of “unauthorized settlements” and JJ clusters from multiple sites in the city. This made clear to me that dealing with the rights of the poor in the urban meant dealing with the courts.

I found in my work that there was a clear trend of criminalizing the poor in these judgments. In *Almitra Patel vs. the Union of India (2000)*, the court opined that Delhi should be the “showpiece of the country” yet “no effective initiative of any kind” has been taken for “cleaning up the city.” Rather than see them as the last resort for shelter, “slums,” the court said, were “large areas of public land, usurped for private use

¹ M.C Mehta vs. Union of India (Petition no 13381 of 1984)

² M. C. Mehta vs. Union of India (Petition no 13029 of 1985)

³ Almitra Patel vs. Union of India WP 888 of 1996 (1996)

⁴ Delhi Pradesh Citizen’s Council

free of cost.” The slum dweller was named an “encroacher,” and the resettlement that had hitherto been mandatory became, suddenly, a matter of injustice: “rewarding an encroacher on public land with an alternative free site is like giving a reward to a pickpocket for stealing.”

In *Dhar vs. Govt of Delhi (2002)*, the court differentiated between the justice deserved by slum dwellers who are “unscrupulous citizens” versus the “honest citizens who have to pay for land or a flat.” In *Hem Raj vs. Commissioner of Police (1999)*, the rights of “unscrupulous citizens” were summarily dismissed – “when you are occupying illegal land, you have no legal right, what to talk of fundamental right, to stay there a minute longer” – in the name of order: “if encroachments on public land are to be allowed, there will be anarchy.”

In its latest order for demolitions in 2006, the Delhi High Court refused to stop demolitions even though most households in the settlement did not have any alternative resettlement sites. No more delays were permissible, the judges argued, because the land has “uses that cannot be denied,” and that the more settlements are removed, the “more they come.” Using language that echoed ideas of epidemics and illness, the judges argued that “their” numbers were “growing and growing,” and that steps must be taken to “deal with the problem.” When asked about where the poor were meant to reside in the city if not in informal settlements, the judge said: “if they cannot afford to live in Delhi, let them not come to Delhi.”

The second trend I found in the above excerpts that surprised me by its significant presence in the law was the idea of the “world-class city.” So many of the judgments made note of changing economic fortunes of Indian cities and the need for them, suddenly, to be seen as “world-class.” This has led to certain kinds of infrastructure and urban governance policies, for sure, but I found it fascinating to see that judges were equally influenced by the idea of the global city when ruling on matters of law, as opposed to urban policy.

My Findings II: Excerpts from Interviews

There were two main findings from my interviews that I want to share here. The first is that in my interviews with lawyers and retired judges I found a clear concern about the judiciary “overstepping its bounds.” As one ex-Attorney General put it: “I have never seen a judiciary like this before – why is it acting like the government?” His concern was that if the judges started acting like the government and issuing orders to “make the city as they see fit” then their role as arbiters of violations would be greatly hindered. Judges, he argued, “are meant to follow the letter of the law.” He said he was “disappointed but not surprised” at the moral and perjorative tone of the judgements I showed him.

Lawyers echoed this concern. It was common knowledge, said one, that “certain judges have certain views – you are aren’t going to win against them if you argue any other way.” The lawyers, as I expected, seemed to think that they “had their hands tied” and didn’t see themselves as in any way responsible. I intend to delve much deeper on their role in this new emergent “judicial activism” when I return for research.

Yet both the lawyers and the jurists were near unanimous that the PIL had become instrument for the powerful to exert their interests. “What we had thought would be a tool for the poor,” said a jurist, “has turned on us.” There seemed to be a general agreement on the need to re-think the PIL as a tool, so that “we can get to what we were trying to get at, for the lives of the poor to have some value and standing in the court.”

The other section of interviews I did led me to the most uncomfortable and challenging part of my research for me. Speaking to activists from the social movements resisting evictions, they described to me in detail how “until we were fighting the government, it was fine – the minute we tried to organized against the courts, we lost all support.” Activists said that they struggled to understand the roots of this “unshakeable faith in the courts.” In an emotional interview, a long time union organizer told me: “I felt betrayed. This was the same court that had thrown half of our union out of their homes. Half! This same court... and somehow it was outside the bounds of protest.” This faith in the judiciary and judicial process, even at a time of increasing judicial intolerance, is puzzling. It might perhaps remind us of how string the idea of the law as a site for justice is in our minds. It is also a reminder that the emerging presence of the judiciary in urban life means a new set of challenges for those speaking for human rights.

Conclusion: Reflections on the use of Human Rights

Using the rights framework, we often make a critical assumption: that people believe, inevitably and somehow naturally, that they have the right to have rights. We

may debate what these rights are, what benefits they entail, but we rarely question the right of human beings to have rights in the first place. I think that it is instructive for our work as human rights activists to look at the ways through which people are made to believe that they don't have the right to have rights, or that the rights of an entire body of people are made to be irrelevant. My work this summer under the fellowship made me acutely aware of the importance of such subjectivity in rights work.

The law is one of the most powerful instruments through which the setting aside of rights can occur and is occurring. The law lays claim to many of the same moral and ethical foundations that rights language does: notions of common good, public interest, equality and justice. I think this is why the law is a particularly important site for us to examine critically. It allows us to ask a different question. We no longer just ask how, where, when and by whom rights were violated but how they are removed from debate itself. The social and legal construction of the figure of the urban poor migrant as a criminal combined with the position of the law as a site of justice and authority made the question of the rights of the poor seem irrelevant and almost paradoxical. Other ways of thinking about the city and about the informal settlements were foreclosed from imagination.

This is a case where a massive violation of rights was not even recognized as a violation! More than anything, I think what my research implies is that the rights framework must broaden its analysis of the ways in which rights violations occur. They are often not nearly as visible or direct as we would think and can, for example, come

under legal judgments based on good governance. The internalization of these judgments poses an additional challenge for activists – how do you make people believe that they have the right to have rights?

My Plans

I return to Delhi to continue this research as part of my on-going PhD. I am eager to get back and get into the world, especially after this taste of what is out there. I will be based at the same Centre again, this time for a full year as a Fellow. I hope in my future work to return to these questions, and thank the Human Rights Centre for the chance to begin my exploration of them.