

SOCIAL ORDER AND THE LIMITS OF LAW

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Introduction

We are witnessing mushroom growth of social-action groups to espouse the interests of the victimized and the oppressed individuals and groups. Societal reliance on court-recourse for enlarged justice is being given added impetus by pro-active judges. Legal aid and Public Interest Litigation (PIL) has become an "urban folklore" adored largely in seminars, scholarly comments and judicial rhetorics and continues to be a source of enchantment and sanguine optimism about the effectiveness of judicial initiative as a means of social change.

But the masses are still bewildered by dramatic increase in lawless violence and standardless use of force both by the agents of the government and dominant groups. Trust in law and legal methods is fast declining. The governors of the people are perceived to be unable to control the oppressors and violators and are believed to be susceptible to all kinds of illegitimate pressures. Tendency to use direct action strategies like *Chakkajams, marches, morchas, bandhs, gheraos, amaran anshan*, and other non-violent means of mass protest are increasing. Impressive gains and successes of many direct action strategies confirm the cynicism about court-recourse as a means of the redressal of grievances.

For the poor and the victimized, the state, law and its agents are still present as oppressors. Promise of liberation is seen as empty. Enduring loyalties to Anglo-Indian adversary jurisdiction, colonial structure of the bar, bench and police, shocking instances of administrative deviances, and non-compliance of legal directives have remained the pervasive feature of the Indian public life. One is, quite often reminded of the saying of Karl Marx that at times the state and law may itself "create circumstances of reckless terrorism" and may display a "purely *policemaniac* character in dealing with the subjugated 'classes'¹. The puzzle, therefore, is that we are seeking to use the law for the liberation of the masses, through judicial intervention, and in this we seek to turn to one organ of the state to reform another organ of the state, both operating on a superstructure sustaining and legitimising domination and power.

Deficiencies of Indian Legal Profession

The ineffectiveness of the legal activism derives largely from the organisation of the Indian legal profession itself. Studies of Indian legal

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1 Upendra Baxi, "Law Struggle and Change : An Agendum For Social Activists " social action, Vol. 35, April- June 118-130 (1985).

profession portray the picture of the supply of legal services largely by “solo” practitioners locked in the traditional modes of lawyering. The concept of corporate lawyering or collaborative lawyering is yet to reach the Indian legal milieu. A typical Indian lawyer is oriented to court-room advocacy where he spends the whole of his life. There is almost no attempt to operate in other legal settings. The legal profession is highly stratified by skill, wealth, and prestige at each level of hierarchy. There is almost no incentive or willingness to develop new expertise except the centuries old civil-criminal-revenue distinction. Happily few lawyers are trying to specialize in cyber laws and cyber crimes in order to face the challenges of globalization. Arid conceptualism, rule-mindedness, verbal-textual analysis of the law, taught in almost all the law schools in India, is carried over to the court settings and lawyering². An Indian lawyer is generally perceived as a mere wordmonger, parasitic, serving the dominant interests, and thriving largely on caste, community kinship, village notables and tout-networks³. He has little to contribute in the developmental processes. The prestige of the bar has quickly declined in the post-independence era although the profession had played a crucial role in the freedom struggle.

A lawyer has to wait passively for clients. He works in the conditions of chronic oversupply of lawyers. Keen competition, dependency on senior lawyers, sense of insecurity in the profession hinder the growth of any ideology of voluntarism or social commitment among the lawyers for the relief of the oppressed. Skilled and experienced lawyers devote their time in the remunerative work. Consequently, with notable exceptions legal aid cases are handled mostly by the unspecialized and substandard lawyers and that too just routinely and unaggressively.

So we get a picture of legal service supplied by “solo” “individualized” lawyers taking up discrete cases of isolated individuals. This kind of “atomized” legal service is inevitably matched by most of the legal aid programmes pursued by the state legal boards, law school clinics, or the voluntary groups manned by legal academics, social activists or advocates. Legal aid in this sense, refers to the bringing of a case by a poor litigant to the legal aid centres to be pursued in a court through oral and written arguments. These centers handle isolated cases of the individuals, who are able to reach the centers after overcoming several hazards (psychological distrust in free legal service, money spent in the journey, taking off a day from the work place, fear of retaliation by the opponent, fear of non-selection by the centre being not a legal case or being too diffuse or trivial issue to be pursued in a court, etc.).

2 J. Gandhi, *LAWYERS AND TOUTS: A STUDY OF SOCIOLOGY OF LEGAL PROFESSION* (1982).

3 Marc Galanter “*Making Law Work For The Oppressed*” the other side, Vol. 3, No. 2, March 1983.

The traditional mode of legal services is passive in the sense that the legal aiders do not reach out to the clients. The clients remain passive spectators depending on their luck and the skill of their advocates. Legal aid of this type does not undertake massive publicity about the services offered by the them. The “atomistic” legal aid schemes, therefore, offer a very narrow range of services in isolation of the total environment of the client but the dynamic legal aid strategy planned by the Legal Aid Service Authority and legal-aid rulings, demand wide range of services from the professional lawyers. They demand collaborative lawyering and corporate advocacy. They expect the professional lawyers to detach themselves from atomistic lawyering and operate in legislative, educational, administrative, and political settings as advisors, negotiators, social planners, researchers and social investigators, espousing the cause of the poor and the unserved. They demand a new creative social role of the lawyers to make legal aid socially meaningful.

Rather than operating exclusively through litigation, new strategy should pursue the interest of the poor and the victimized in legislative, administrative, educational, social and political settings. Such types of programmes should be oriented both to long range and immediate legal gains on matters that affect groups rather than isolated individuals. They would be in search of test-case-litigation and seek structural reforms in legal institutions including jail, police, and beauracritic organisations. The proactive-structure-oriented, community action legal strategies involve considerable gains of mobilization, participation, politicization, education, planning, social investigation, research, advising, negotiation and collaboration. These strategies would attack the real causes of social inequality and mass poverty pervading our social life.

The pro-active strategies try to reach out to the potential clients to make them realize that the miseries and environmental hardships of the poor and their routine victimization both by the agents of the State and the dominant elements in the community is basically due to unequal social structure sustained by the very superstructure of the State and the legal system which must be transformed drastically. Thus, the constitution can be used both, symbolically and substantively, as a medium of non-revolutionary struggle against domination and abuses of power.

Limits of Judicial Intervention

PIL significantly departs from the traditional mode of legal aid and lawyering in its pro-active stance. It refers to test-case litigation pursued in a High Court or the Supreme Court, with the collaboration of professional lawyers and social activists, to win a favourable judicial response on behalf of the poor and victimized groups such as bonded labourers, tortured prisoners, degraded

inmates of protective and mental asylums, dislocated slum and pavement dwellers, victims of the polluters and politicians, and many others.

PIL is pro-active as it focuses on matters having social dimensions. It seeks to liberate the classes of the disadvantaged groups through test-case litigations. Typically, PIL encourages mobilisation, specialization, social investigation, participation, innovative remedies, etc. It heightens the expectations of the poor and the oppressed from the judicial process and seeks to enhance State accountability towards constitutional values and social justice. It addresses larger questions of policy, particularly, the vindication by the government of its commitment of the relief of the poor and the victimized.

Temporary, incidental, episodic, casual success stories, therefore need not blind us to the harsh realities. The following flaws accompanying PIL activism may be mentioned here.

- (a) PIL also emphasizes litigation and enhances dependency of the victims on middle class social activists and hired professional lawyers. It cannot generate any effective participation of the beneficiaries who remain passive depending on their good luck only.
- (b) PIL is controlled by elites who utilize legal resources by their own priorities and choices. PIL is largely episodic reaction to a particular outrage or victimization exposed in the newspapers. Scattered, unplanned, uncoordinated, and numerous social action groups have different agenda and different ideologies. There is almost no effort to promote collaboration among various sectors of people's groups pursuing similar interests. There is almost no effort to aggregate claims of similar interest groups benefited by a favourable liberative decision. Perhaps, most of the rural groups are located in tribal areas and many of them are believed to survive on foreign charities.
- (c) It is feared that PIL too is giving rise to a new kind of constitutional politics presided mainly by metropolitan leaders, eminent legal academics, well-known politician-cum-lawyers, noted journalists and social scientists-cum-legal sociologists. Many thoughtful persons are fearing the return of a new kind of "feudalism" growing out of public interest advocacy. One witnesses the growth of "priesthood" or *Brahammanism* among the social activists just for self-aggrandizement including the lust for power, eminence, recognition and wide media coverage.
- (d) PIL cannot be pressed into service to force the executive or the legislature to initiate or pass a reformist legislation notwithstanding too

much of the exaltation of the directive principles on doctrinal or verbal level. PIL can be pressed into service only if there is already an existing ameliorative measure and the same has not been faithfully implemented by the legal actors. PIL, should therefore, not expect the justices to fill the void created by decline in public and political morality.

- (e) Through PIL activism the justices are free to engage themselves in mass production of rights and entitlements broadside to the poor but all the judicial commitments might not easily be fulfilled by the government given the scarcity of resources and government's own priorities and choices.
- (f) Finally the effectiveness of the judicial decisions are powerfully affected by several interlocking factors too remote from the knowledge and control of the courts, such as traditional resistance to change, alliances of the implementers with vested interests (local *dadas*, politicians and other dominant elements), improper dissemination or transmission of the judicial symbols or directions to the various environments (police, jail, administrative authorities, lower courts, members of the bar, social activists, clerks), and ambiguous judicial decisions. Weak communication channels accompanied by well-nurtured and well-structured barriers to access to legal information may also lead to the cancellation, diffusion or defiance of liberative judicial directions by lower echelon legal actors⁴.

There is a need for innovative social action strategies including wider social movements through non-litigious means. This kind of strategy also solves many pitfalls accompanying atomistic legal services. The underlying idea here is to operate at the grassroot levels and to enhance the governmental accountability towards human rights. For example, community action programmes may rescue the poor and the victimized from routine exercise of victimization by the police, revenue officials, co-operative societies, village headmen. Social action can force the master to pay the statutory minimum wages to the landless workers. It can ensure adequate supply of drinking water, electricity for irrigation, essential commodities from fair price shops and so on. It can mount pressure on police to make a proper investigation of a crime committed against tribal or *harijan* girls. Perhaps PIL cannot effectively be used in all these situations. It can perhaps, be used when the violation of the legal or constitutional rights have already occurred by acts or omissions of the State agencies.

4 Parmanand Singh, "Protection of Human Rights Through Public Interest Litigation In India", 47, Journal of the Indian Law Institute 263 (2000).

One can hardly disagree with Jagat Narain⁵ that legal actions should try to bring about a “conflict-situation” between urban and rural poor and hierarchy (Establishment) so as to compel the latter to be responsive to human rights. The Indian State has to be “negotiated” at several ideological and institutional levels not by middle-class entrepreneurs but by the poor and the disadvantaged themselves. But how these poor people can be organized and made capable to launch their own struggle is problematic given the existing power relations in the village India⁶.

Whether one favours litigative (in the sense of public law litigation) strategy or non-violent/non-revolutionary direct action strategy, both entail dependency of the poor and the oppressed. And both may fail. Judges may stop responding favourably by undue constriction of PIL jurisdiction; social activists may stop activism due to fear of reprisals. But there is no point to lose heart. So long as India remains a liberal democracy, both the bureaucrats and the political executive will have to respond to the values enshrined in the Constitution of India with an overarching appeal to social justice. In any case the choice will have to be made between political dependency (for insulation and protection from terror, force and lawlessness of the State law) and professional dependency. Some dependency on the very political and legal superstructure which legitimizes exploitation of the poor is historically inevitable in a non-revolutionary strategy of social change through voluntary community action. The choice relates not to the factum of dependency but rather its forms.

Conditions of Legal Effectiveness

When we employ law and legal activism as a mean of social change we somehow tend to think of law as an autonomous and self-sufficient force upon which the rest of the social order depends. Thus we oversimplify the nature of law and exaggerate its power. But law is neither autonomous nor self-sufficient but is heavily dependant upon other institutions to accomplish its tasks. We rely heavily on formal structure of law composed of the *documents* i.e. constitution, statutes and precedents, the *apparatuses* i.e. legislatures, courts, executive departments and the *personnel* i.e. judges, lawyers, administrators, policemen. We begin to believe that a legislative enactment or a judicial decision aimed at social change would automatically be translated into corresponding social actualities.

5 Jagat Narain, “*Legal Aid: Litigational or Educational*”, 28 JOURNAL OF THE INDIAN LAW INSTITUTE 72 (1986).

6 Parmanand Singh, “*Judicial Socialism and Promises of Liberation: Myth And Truth*”, 28 JOURNAL OF THE INDIAN LAW INSTITUTE 336 (1986).

This is however a mere delusion. We exaggerate the power of law because we have inadequate notion of both what law is and how it acts. Positive law supervenes upon an established social order which is supported by prior facts such as caste, religion, family, morality, habits, beliefs, attitudes, emotions and traditions. Law has to perform the task of repairing the deficiencies in the social order. For instance law and legal action tries to eliminate social and economic inequalities, social oppression, gender-injustice, sex-exploitation, delinking of crime from politics and removing several social practices such as untouchability, child-marriage, sati, bonded labour and caste-domination. These deficiencies in social order are rooted in various social and religious institutions which law seeks to repair. Traditionally the most conspicuous and important of these institutions have been family, education and religion which perform the crucial role of transforming human nature. These institutions exert a powerful influence upon the attitudes and behaviour of the people.

In our respectful submission the effective operation of law as an agent of change depends largely upon the support extended by other social institutions. If the institution of family, religion and education have not been doing their job properly, law shall be missing support from them and all our attempts at social reconstruction through law will be thwarted or delayed. The disappointing performance of the law and legal doctrine prohibiting untouchability, dowry, sexual exploitation, torture, rape and caste-discrimination support our contention that legal effectiveness depends upon the effectiveness of other agents of social order. Law and legal action can never provide the conditions of cultivation, socialisation, sense of obligation, responsibility, sympathy, fellow feeling, and other factors that mould human character in definite ways. These undertakings have to be carried on by other social agencies because they lie within the province of morality rather than law.

The question is to what extent law can solve social problems and achieve social goals? It is interesting here to point out the change in the attitude of Professor Roscoe Pound in the twenty years between his 1922 Storrs lectures and 1942 Mahlon Powel Lectures. In 1922 Dean Pound expressed his unconditional confidence in the power of law to bring out social change by the techniques of "social engineering"⁷. By 1942 he recognised the limits to the reach of law. He remarked⁸:

When we have got so far we must pause to inquire how far, after all, the law in any of its senses can achieve this purpose (of harmonizing human demands, maintaining a social order, and furthering the course of civilization). We must ask how far social control through politically organized society,

7 Roscoe Pound, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, 97 (1922).

8 Roscoe Pound, SOCIAL CONTROL THROUGH LAW, 54 (1942).

operating in an orderly and systematic way by a judicial and administrative process applying authoritative grounds of or guides to decision by an authoritative technique, can stand by itself as self sufficient and equal by itself to the maintaining and furthering of civilization. Thus we are brought to consider the limits of effective legal action, the practical limitations which preclude our doing by means of law everything which ethical considerations or social ideals move us to attempt.

Dean Pound then proceeds to cite various 'sets of limitations' that weaken the force of legal action for social reform⁹. The first limitation of the legal action is that redressal of grievance through legal proceeding is limited by "the necessity of appealing to individuals to set the law in motion". Thus the redressal of grievances depends on individual initiative and sustained legal action. Secondly, the law sets rigid standards of testimony making it difficult to ascertain the facts at issue. Despite relaxed standards of evidence and procedure, the legal process still insists on legal formalism and adherence to accepted rules of evidence and procedure. Thirdly, and finally, Pound refers to the inability of law and legal apparatus to enforce duties, protect rights and secure redress even by a well disposed judiciary. Here he refers to the intangibility of many duties which are normally of great moment but defy legal enforcement. He gives examples of gratitude, benevolence, and obligation to help those in distress which cannot be enforced by law. Then there are certain rights and interests which are often infringed in ways that are so subtle and difficult to establish that the law and courts cannot protect against them. Alienation of affection, domination and invasion of privacy fall under this category. Pound refers to the inability of law and legal apparatus to inculcate moral righteousness. Legal machinery, according to him, cannot remedy many phases of human conduct and human relations. He asserts that one cannot legislate morality¹⁰. Law would be helpless to impose many traits of character, and modes of conduct which are morally desirable and socially useful. For character building we have to rely upon other institutions and agencies the family, religion, education, professional and economic organisations to instill in men, the habits and attitudes, the modes of behaviour and the mutual respect and cooperation. It is beyond the law and legal apparatus to inculcate morality and instill the habit of conformity and obedience in men women and to make them accomplished social persons.

We all know that the other social institutions are declining. For instance, *Ayodhya* issue and *Godhra* incident has divided Hindus and Muslims on religious lines. The strain in Kashmir where religious fundamentalism is on

9 *Id* 60.

10 *Id* 55.

the rise, is challenging the secular ideology of a modern nation-State¹¹. Communal riot, atrocities on *Harijans*, sexual harassment at work place, reservation riots and communalization of politics have become the ugly features of Indian social order. The poor and the oppressed are frightened, insecure and humiliated. The economic relations are still moulded by capitalist dominations and under the conditions of capitalist economic developments, the State is providing enormous facilities, resources, and opportunities favouring the propertied classes.

A sense of responsibility is indispensable if we have to live and work together. Responsibility, again is a social virtue, a trait of character and there is very little that law can do in inculcating moral virtues. Law can, of course, make people accountable to their outward actions violating the legal rights of others. This is done by creating legal duties and imposing sanctions for violating of rules. In our view inculcating moral virtue of responsibility is the work of other social institutions which help to make people good and law simply inhibit men from being bad. What would happen if family, culture, education, morality and religion fail to perform their work and their hold on individuals is weakened. The inevitable result would be that defiance of law will increase and law would lose its effectiveness.

It must therefore be acknowledged that law operates at a distance far removed from the people whose lives it governs. The other social institutions like family, school, religion and morality are in more intimate touch with men's emotions and thus mould human character. Therefore, unless more intimate social institutions are strengthened to prepare men to be law abiding citizens with a sense of responsibility to societal values, law can never be an effective instrument of social change. Professor Roscoe Pound very well recognised the limits of law as a means of social control when he asserted that "law must function on a background of other less direct but no less important agencies, the home, home training, religion and education. If they have done their work properly and well much that otherwise fall to the law will have been done in advance. Anti-social conduct calling for regulation and ill-adjusted relations with neighbours will have been obviated by bringing up and training and teaching leading to life measured by reason"¹². The decline of many of these social agencies in India is more than apparent. This has resulted in serious lapse in the inculcation of support of moral rules. If law is missing moral support of other agencies of social order, law will be limited in its effectiveness.

11 Parmanand Singh, "*The Problem of Minorities and the Constitution : A Preferatory Note*", MINORITIES AND THE STATE AT THE INDIAN LAW 7 (1991).

12 *Supra note 8*, 25-26.

Conclusion:

The efficacy of the legal action in achieving the goals of social justice is equally affected by the political economy and cultural policies. The politics of “cultural nationalism” nurtured through the vague and controversial conceptions of *Hindutva* is promoting only higher Hinduism detrimental to the interests the *Dalits* and other oppressed classes. The economic policies of liberalization and privatizations being pursued by the Indian State has failed to augment wealth in a manner which would eliminate poverty, generate growth with justice and eliminate social and economic inequalities. How can in such a setting, courts can achieve social justice simply by acknowledging new positive human rights? Spreading of norms and values and creation of elaborate institutional mechanisms for generating humane, equalitarian, and rationalistic social climate and eliminate pre-capitalist feudal or semi-feudal modes of exploitation and oppression is the task of the political executive and social and economic institutions and professional organizations and not of the judges. Unfortunately the political economy emerging in globalised India has resulted in the formation of new social classes of landowning prosperous farmers, traders, moneylenders, and bureaucrats which are controlling social and economic institutions and cultural networks and are promoting the capitalist path of development. The economic policies of liberalization and privatization pursued by successive political regimes have provided enormous resources as well as legal and normative value system favourable to the new social classes¹³. This has resulted in massive unemployment, pauperization, atrocities on women, children and *dalits* and State oppression. The much applauded and publicized judicial activism has completely failed to check the growing frustration among the exploited and oppressed classes¹⁴. Mass production of rights through judicial activism has only resulted in heightened expectations from the judges that they are available to provide relief from all miseries and personal misfortunes¹⁵. But when a stage would come when the gap between what has been promised and what has been performed would become too wide, the outcome will be only confusion, frustration and disenchantment. The courts might then loose persuasive power, draining away the credibility of judicial institution. The disillusioned masses might then turn to other means of achieving their claims, whether it be civil disobedience, protests, demonstration or even violence.

13 See Parmanand Singh, “*Human Rights in India : Some Epistemological Question*” XVII DELHI LAW REVIEW 40-61 (1995).

14 Rajeev Dhavan “*Law As Struggle : Public Interest Law in India*” 36 JOURNAL OF THE INDIAN LAW INSTITUTE 302-38 (1994).

15 Parmanand Singh, “*State, Market and Economic Reforms in (P. Singh (ed.)) LEGAL DIMENSIONS OF MARKET ECONOMY* 23 (1996).

It is beyond the judges to instill in men and women the habits and attitudes, the modes of behaviour, the mutual respect and cooperation, that are indispensable to a decent social life. They can undoubtedly intervene to correct any form of exclusion, discrimination, exploitation and institutional abuses. The judges have performed this task in a commendable way in upholding the ideology of rule of law. They have unmasked the repressive realities of State and law by providing access to justice to the poor and the victimized people. But the law and legal action can achieve something of real value if other social and economic institutions besides law also perform their function in an efficient way in the formation of human character to make men and women acceptable social members.