Law and State Regulated Capitalism in India: Some Preliminary Reflections

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Akshay Desai has been among the very few eminent Asian thinkers, and is perhaps a solitary Indian thinker, to feel tormented by the expanding frontiers of state lawlessness and the illegality of (class) rights and is a pioneer (much before the advent of Subaltern Studies) pedagogue of popular illegalities. Unlike most other social theorists, the law and the constitution for him are not fugitive figures; rather, he conceives the law as dynamically providing the basis for hegemony as well signposts of, and for, struggle. Akshay Desai is a theoretician of the concrete practices of power and resistance to power; in an intellectually more engaging milieu he would have grown into India's own Foucault. His abiding archival labours in depicting state violence and brutality and popular struggles provide endless insights into the nature of contemporary India's political economy of violence, terror and illegality. More than any other Indian thinker, Desai has continually illustrated how the Indian state skillfully combines both the rule of law and reign of terror into the hegemonic tasks and apparatuses of governance.

In what follows, I seek an understanding of the illegalities of the contemporary Indian law standing, as it were, on the shoulders of A.R. Desai. I seek, in broad outline, to explore the several uses of law in facilitating the accomplishment of state-regulated capitalism in India.

I identify ways in which the Indian legal order has been deployed as a monumental resource for (a) primitive accumulation processes; (b) maturation of capitalistic relations in agriculture; (c) disciplining labour on behalf, and at the behest, of capital; (d) mediating conflicts between fractions of industrial and financial capital; (e) perfecting hegemonic domination by ascendent classes and their capabilities to privatize the resources of state and society; and (f) developing techniques of surplus repression, essential to the accomplishment of reign of terror. A fuller demonstration of each of these accomplishments would be a task of several specialist lifetimes. Here, a bare outline will have to suffice.

Law as a Resource for Primitive Accumulation

The commoditization of labour power, the "expropriation of agricultural pro-
ducer, of the peasant, from the soil’ and the celebration of ‘the free development of production and the free exploitation of man by man’ are images which leap to mind at the very invocation of the notion of ‘primitive accumulation’ (Marx 1954, 669). But the law was a critical component of Marx’s analysis of the entire process. In Part VIII of Capital, Volume One the law itself ‘becomes the instrument of theft of the people’s land’ (p.678), the law organizes conditions of social memory so that ‘the very memory of the connection between the agricultural labourer and the community property’ vanishes (p.681) and itself acts as a circumstance of ‘reckless terrorism’ (p.685); through, for example ‘bloody legislation’ authorizing flogging, branding and brutalizing the marginal classes, mainly beggars, vagrants and vagabonds (pp.686-688). The law was central to the processes of primitive accumulation by its presence as well as by its absence which, for example, enabled the capitalist to regulate his factory by ‘private legislation’ (p.691, emphasis added).

In modern India, the presence as well as absence, or rather the absence-in-the-act-of-presence, of the law has done the tasks of primitive accumulation rather well. The absence of law is most notable in the areas of agricestic serfdom, especially the bonded labour outlawed explicitly by the fundamental right against exploitation embodied in Article 23 of the Constitution of India, which required the enactment of a national law ‘as soon as possible’ (Article 35), upon its adoption. The Bonded Labour System (Abolition) Act arrived only 25 years after the adoption of the Constitution. Other forms of unfree labour received national attention in the seventies and the Migrant Labour Act came into being after the Green Revolution processes have been consolidated.

Forty three years after Independence, 44 to 155 million children (whom the Constitution promised in the Directive Principles free and compulsory education under the age of 14) continue to be exploitatively employed and bonded child labour exists in agriculture, handlooms, carpet weaving, match and fireworks, glass and bangles, diamond polishing, brick klin and stone quarries and construction (e.g. Gill 1990; Kohari 1989; Matta 1986). The Act seeking to regulate conditions of child-workers came into being only in 1986, and in the last four years, not a single conviction has been recorded for its violation. Article 24 of the Constitution outlawing child labour in hazardous manufacture is a dead letter. S

Similarly gender-based wage discrimination, illegitimate under the Constitution, found its legislative ‘saviour’ at last in the Equal Remuneration Act, 1976. But the character of this saviour is deeply patriarchal.

If the absence of the law (or its belated appearance on the scene) fosters private legislation by employer-classes, the law’s presence quite often achieves the same result. In most states of India, the benign provisions of the 43 year-old Minimum Wages Act, continue to be violated with gay abandon, despite the fact that the Indian Supreme Court was moved in the eighties to innovate an interpretation of Article 23 which embraced labour below statutory minimum wages in the constitutionally outlawed practice of ‘forced labour’. Private legislation, of infinite vitality and variety, flourishes here side by side with the Minimum Wages Act, 1947.

Much the same situation exists under the Indian Factories Act, whose enfeebled
enforcement has produced a stunning variety of private legislation by factory
owners. There is in this respect an amazingly unbroken continuity. As early as
1905, "the system of factory inspection in India had partly broken down" and
the "provisions of Factories Act were systematically violated" given low re-
source investment on implementation. In 1905, a factory manager whose mill
employed nearly 400 children "actually affirmed that he had never heard of a
Factories Act imposing restrictions on child labour!" (Fraser quoted in Palme
Dutt 1940, 397).

It is unnecessary to multiply examples. We ought, however, to note that state
law in India does not display the bloody-minded penal savagery that Marx char-
acterizes as a mark of primitive accumulation in England (and Europe) in the
erly industrialization phase. The normative law of contemporary India is thus
liberated from barbarism. However, the characteristic of "bloody legislation" is
reproduced in diverse ways in the private legislation ordained by the owners of
the means of production. Such private legislation ordains standardless use of
physical force, collective atrocities, sexual exploitation, beggary and other forms
of servitudes. Almost invariably immunized from prosecution and flourishing
under the 'communitarian adjudicatory' systems.

A critical distinguishing feature of primitive accumulation in India is that it
occurs not only in the domain of private capital but also in the arena of the state's
production activities. Increasingly, state agencies engaged in productive enter-
prises seem unable to follow the state laws -- whether they relate to conditions of
work, wages including gender-based discrimination, migrant and contract, tempo-
rary or baddi workers' rights, or to child labour. Insofar as the ownership of
means of production in the state may be said to be a chief characteristic of state
capitalism, it too appears guided and directed towards the same formations of
private legislation, with the very same attributes of bloodied-mindedness displayed by
private capital.

I appreciate that this bare-bones description of the dynamics of state and
private legislation assessing primitive accumulation tendencies does not offer any
explanation of it, let alone an agenda of change. Even as a bare description,
it is clearly insufficient in providing a correlation between rate of exploitation and
capital formation in India over the four decades. Clearly, these tasks invite rig-
orous theoretical labour. At the same time, the interpenetration between state law
and private legislation in the context of primitive accumulation is a stark reality
which one has to begin to more fully acknowledge in a quest for an adequate
understanding of law's role in capitalists development in modern India.

The Growth of Capitalist Relations in Agriculture

The literature, both official and non-official, on this theme is enormous and
still growing. Yet it remains striking that post-colonial studies on the growth of
capitalist relations in agriculture have paid scant attention to the role of the legal
order (Baxi 1986, 45-49). In contrast, studies of agrarian relations in the colonial
period significantly address the critical role of legal process. This fact becomes
all the more striking when we recall the extensive legalization and constitution-
alization of agrarian reforms in India since Independence. An unproductive rupture has occurred, impoverishing understanding, in scientific discourse on agrarian relations between the 'economic' and 'sociological' discourse on the one hand and legal and juristic discourse on the other. Apart from the lamentation on the lack of political will (the pedestrianization of Rousseauque conception of the general will) manifest in the 'failure' of agrarian reform measures, in the former genre of discourse almost all opportunities of grasping how the law structures capitalist relations in agriculture have been virtually surrendered to the empire of nescience.

In this milieu, even the proposition that the law has a substantial role in this historic process may appear extravagant. But if you were to indulge in (in the poet Coleridge's words) a willing suspension of disbelief for a while, the silhouette of law will begin to emerge. The most interesting aspect of the appearance of the state law in the field of agrarian relations is its hegemonic role: that is, the law appears as an agency of radical social justice under whose auspices capitalist relations in agriculture quietly pursue their itinerary of history. And it is an aspect of this hegemonic twist that the issue of agrarian reforms and social justice gets converted into a superstructural issue of the plenary powers of Parliament to amend the Indian Constitution and of the limits of judicial review.

Confronted with the need to accelerate ‘growth' (capital formation and accumulation) and the need to retain political legitimacy, the announcement of extensive agrarian reforms became inevitable in the first 15 years of independent India's planning. The Constitution, devoid of justice texts for the toiling agricultural labourers, was replete with the guarantees of fundamental right to property. Integrity forbids a description which would suggest that the Indian nationalist leaders were bursting with a passion to radically restructure agrarian relations in the fifties and sixties. They, clearly, willed only such reforms as will be consistent with the rise in agricultural productivity. At the same time, it was not politically expedient to eschew the radical rhetoric of reforms sustaining legitimacy. A complex way out was found in badly drafted state land reform legislation compounded by the refusal to delete the right to property from Part III (which was attenuated progressively) proclaiming security of tenants in ways which would allow resumption of land for 'personal cultivation', resulting in graver insecurity; inadequate record of land rights; 'secret' orders subverting implementation, prevention of leading party cadres' involvement in the implementation of land reform legislation, and ambivalent support to farmers and tenants organizations. To this was added the process of judicial appointments carefully indifferent to the holding of agrarian assets by India's leading Justices.

But when Justices accomplished only that which they were ideologically and professionally equipped (and even programmed) to do, the crucial grassroots issue of agrarian reforms got converted into the superstructural issue of the limits of judicial review power and the plenary power of the amendment of the Constitutional Parliamentary sovereignty haunted political discourse. And that 'sovereignty' was secured not to delete the right to property (as a vehicle of growth and accumulation) but to immunize legislations from judicial review through the device of the Ninth Schedule seeking to oust the jurisdiction of courts.
device, and the associated one of attenuating the text of Article 31, did not bring
even a moderate implementation of agrarian reform at the aggregate national
level, though some success was recorded here and there. But all this reinforced,
at a populist level, the appearance of political determination, creating legitimization
of the regime. The revolutionary opposition to it through the naxalite ‘Jurisprude-
cence’ was, of course, an invitation to repression which followed in bloody
abundance.

The superstructural discourse portrays the Justices as subverting a progressive
ruling elite. Judicial discourse began to raise awkward questions concerning the
intentions, competence and wisdom of the executive. This capacity to raise
awkward questions became an arena of symbolic constitutional politics; it had to
be removed: that, not the pursuit of agrarian reforms, represented the political
function of the Ninth Schedule and the assertion of parliamentary sovereignty.
That was the political function of discourse around parliamentary sovereignty. No
one wanted ‘activist’ judges there; no one also wanted the frustration of radical
rhetoric. Constitutional controls were soon established to discipline the discourse
of judicial power on the right to property. And the judiciary served increasingly,
as the ‘whipping-woman’ (the Indian patriarchy requires this translation of the
English phrase), reinforcing the legitimacy of the leadership and the regime
style. Both the landowners and the executive/parliament used the courts for their
own ends.

The dilemmas of accumulation and legitimacy reappear in the late sixties, but
now more acutely. The Supreme Court poses now no difficulties in the pursuit
of state capitalism, heralded by bank nationalization. But it maintains in Golak
Nath as late as 1969 its power to veto amendments which adversely affect to
the point of abrogation the fundamental rights in Part III. A determined Indira
Gandhi regime unleashes the 24th and 25th amendments seeking to restore par-
liamentary (executive) hegemony. When the Golak Nath bar to the amendment
of fundamental rights is removed (paving the way to the eventual abolition of
the right to property in the Janata regime) the doctrine of the basic structure of the
Constitution now emerges as imposing teasily amorphous limitations on Parlia-
ment’s (executive’s) vast powers. The massive inauguration of state capital-
ism serving needs of accumulation is achieved but the problem of legitimization
remains.

And this is sought to be solved by the elaboration of the doctrine of the
‘committed’ judiciary advanced as justification of the supersession of the three of
the Kesavananda Justices. The discourse of ‘commitment’ signified, too, that the
judicial power of the state legitimated through the doctrine of separation of
powers should serve as a mask of the centralized unity of state power. ‘Commit-
ment’ symbolized the claim that the supreme judiciary must be compliant, in vital
matters, with the supreme executive (the Prime Minister).

This made sense. By ‘commitment’ was meant the articulation of judicial
power in ways which will protect and promote the unwritten constitution underly-
ing the written one. But justices who also sustained the canons of the unwritten
Constitution in many matters (including constitutionality of the declaration of
emergencies, President’s rule, the official secrets and security legislation) simply
refused to surrender their relative autonomy. The growing dislocation between the judicial and executive power of the state culminated in the decision unseating a popular and powerful Prime Minister on admittedly "technical" grounds of election law, precipitating, among other factors, the imposition of the national Emergency.\textsuperscript{29}

The contrast between the written and unwritten Constitution forms many a theme of power, outlasting the experience of the Emergency. Unlike the conception of the unwritten constitution elsewhere (say in the United Kingdom), where it pre-eminently serves to supplement the fragments of the written texts, in India it serves to supplement the written Constitution! The unwritten constitution signifies a series of tacit understandings developed among the weilders of state power in ways which sustain the legitimacy of the totality of the organization of political power in society. In particular, the unwritten constitution must operate to protect the overall interests of the regime or the ruling bloc even when the interpretation of the written Constitution generates the appearance of accountability. It is the unwritten constitution which prescribes the conventions, occasions, uses and limits of high judicial power. It signals to justices the wisdom of not too sharply interrogating the supreme executive at key points of the management of economy and process of accumulation. The Emergency regime is notable only for the elevation of the norms of unwritten constitution in the realm of the written Constitution as for example, in the judicial discourse on the infamous habeas corpus case. In the non-Emergency periods, the unwritten constitution must operate as the inarticulate major premise of the interpretation of the written one.

The diaspora of agrarian reform laws into a vast and varied discourse concerning the co-existence of a plenary parliamentary power to make, remake or unmake the Constitution with the existence of relatively autonomous judiciary has, historically, served to accelerate the growth of capitalist relations in agriculture. One might even go so far as to suggest that it has extensively mystified the discourse of state power.

It will, of course, be insufficient to stress this dimension alone. The Indian legal system has furthered tendencies towards capitalists relations in agriculture through the law, and discretion, in several other ways. Some of the notable modalities of facilitative legal intervention or abstention are:

* continuous toleration of private legislation based on the \textit{grundnorm} of force and fraud in agrarian relations between producers and labourers;
* state patronage of hazardous chemicalization of agriculture (witness the noxious continuity between the Green Revolution and the Bhopal catastrophe);
* state facilities for farm mechanization accompanied by scrupulous disregard of safety of life and limb of agricultural workers;
* relative immunity from agricultural taxation, unaccompanied by any insistence of social justice obligations on peasant proprietors;
* similar periodic immunities from debts, levies and taxes;
* state-sponsored irrigation facilities for multi-crop productive farming without any significant legislative effort at curbing the vandalistic appropriation of
water and energy resources, especially ground water resources;
* welfare schemes like crop insurance benefits of which most do not percolate
to the landless labour.
* procurement laws (such as Agricultural Market Produce Acts) or policies
(such as those laid down by the Agriculture Prices and Costs Commission)
which, increasingly as they must, respond to the owner’s needs without any
attempt to ameliorate immiseration of landless labourers.

This checklist of points (and many more could be readily added) harbours on
my part no anti-middle-peasant bias. In their pursuit of organizing steady urban
food supply (the leitmotif of planning since the days of Jawaharlal Nehru - a pre-
requisite for the stability of hegemonic rule, given the extreme political volatility
of the urban classes) the Indian state had to decelerate social justice concerns to
accelerate ‘self-reliance’ in foodgrains. Nor do I wish to suggest here any bour-
geois - landlord class character of the Indian state (see Lyn 1980, 515; Baxi 1988,
80-83; Desai 1986, 148-161). Nor do I proclaim any lack of grasp of the authen-
tic middle peasant demands. What I do wish to emphasize is the harsh fact
concerning the Indian legal order: namely, its predisposition to foster the full-
lledged emergence of capitalist relations in agriculture, with a complete readiness
to accept the high democratic rights costs for the toiling masses. The inability to
grasp this fact also signifies a paralysis of praxis directed to frustrate the promises
of the Constitution to the Indian masses who paid a bloody cost to achieve, and
are paying an equally gory cost to maintain, Indian independence.

Disciplining Labour at the Behest of Capital

Deconstructive critiques viewing labour law and adjudication in advanced
capitalist societies as a protector, rather than innovator, of existing "property
relations or the social distribution of power" sustain the broad thesis of the
modern law’s role in ‘deradicalizing’ working class consciousness. Of the Ameri-
can Wagner Act, and the formative period of adjudication in 1937-1941, it
has been said from this perspective that "collective bargaining has become an
institutional structure not for expressing workers' needs and aspirations but for
controlling and disciplining the labour force and rationalizing the labour market"
(Klare 1981, 139).

And of adjudication it has been observed in a similar vein that "cases held as
pro-labour victories may... some day be regarded as long-run defeats for the
working people, particularly in an industrial world where it is debatable whether
the institutional interests of labour unions are entirely congruent with the needs
and interests of working people" (Ibid 167).

It will, of course, be a categoric mistake to transpose these conclusions
uncritically to the Indian context, which is decisively distinct from advanced
capitalism. And yet an early seminal analysis (Datta - Gupta, 1974) certainly
paves the way for a broad sociological impression that labour adjudication in
India has tendencies to favour "long run defeats for the working people". A
pioneering subaltern study also indicates the bhadralok or labour aristocratic
tendency in the evolution of the trade union movement in the late colonial period (Chakraborty 1984, 130).

Legal regulation of workers’ rights in India stands excessively legalized and juridicalized. The Industrial Disputes Act recognizes the concept of collective bargaining in a "nebulous and limited form". The process of collective bargaining appears to rest on "statutory crutches". There is "more continuous and systematic surveillance over industrial disputes" by the government; state intervention takes the "form of compulsory adjudication" (Malhotra 1985, 8-9).

Interestingly, the rationale for systemic state intervention in capital-labour relations is based on a mix of paternalistic and productivity considerations. The Industrial Disputes Act, in its dynamics, is in essence an aspect of state-regulated capitalism; and operates so as to discourage all other processes other than compulsory adjudication. As a well-known writer, not noted for his 'radical' sympathies, has observed: "The central theme of the Act is adjudication. From its scheme it is clear that the Act does little more than lip service to collective bargaining, relegates the conciliation to the position of a mere stepping stone to adjudication and gives step-motherly treatment to arbitration. By and large, the ultimate remedy of unsettled disputes...is by way of reference by the appropriate government to the adjudicatory machinery..." (Id. at 16).

The power of the government to refer an industrial dispute to adjudication is plenary. It cannot be compelled to refer a dispute to adjudication; the government is the 'sole arbiter' of the apprehension or existence of a dispute. The government can refer the dispute to courts at any time - in the leading case of Western India Match Co. Ltd., the Uttar Pradesh government was held justified in making a reference six years after the decision not to make a reference; in Mahabir Jute Mills, the reference, initially declined, was made after a lapse of 20 years - a period during which 800 dismissed workers were already substituted over the two decades by other workers! In a Delhi case, the High Court sustained a reference after 18 years. There is no legislative prescription of limitation of state's power to make a reference; nor is there any judicial insistence that parties be heard before reviving a dispute through a belated reference. And the Supreme Court has ruled that all industrial disputes can only be redressed under the Act and not by the invocation of judicial remedies available to the ordinary citizens under section 9 of the Civil Procedure Code.

Even this bare summary suggests the overwhelming role of the law in regulating conflicts between labour and capital. The power to make a reference is almost quasi-sovereign. It serves, often and undoubtedly, as a device of political management of capital-labour conflicts in the interests of overall development of economy. At the same time, the plenitude of reference power is such that a political regime may often initiate reorganization of effective trade union power and leaderships by withholding or declining a reference. Considerations of political patronage to compliant elements within the trade union movement must, largely, explain the pathology of the power to make reference, especially manifest in reference made after long periods of time.

The Industrial Disputes Act protects a wide variety of management prerogatives also. When, for example, seven workmen of Indian Iron and Steel Company
were in police custody for 14 days, the termination of their services was justified by the Supreme Court of India on the ground that they were held by the law enforcement authorities "by reason of their questionable activities in connection with a labour dispute". The management was also held justified in refusal to grant leave. It did not matter, said the Court, "Whether the charges on which workmen are arrested ... are ultimately proved or not in a court of law." The workers can, of course, show that their arrest was at the instance of the company "for the purpose of victimization and in order to get rid of them on the ostensible pretext of continued absence." It would be extraordinary if workers were ever able to invoke this benign defence!

The management prerogatives extend to disciplinary action both for acts of indiscipline and acts subversive of discipline, the latter estimated having the potential of "impairing the discipline of the industrial establishment as a whole." Some of those acts of indiscipline are: writing "offensive" letters to a director of a company, constructing a pucca structure in labour quarters or refusing to dismantle it on orders, and sleeping in office while on duty! (This last, fortunately for Indian democracy, does not amount to misconduct for the members of Parliament, appellate justices, politicians, intellectuals and eminent citizens put to sleep in public by the hazard of listening to voices other than their own!) Not merely this: in 1975 the Supreme Court ruled that an alleged assault of a company official which took place on a railway train, obviously outside the premises or of the industrial establishment, will amount to misconduct if it has (or can be attributed) the effect of subverting discipline within the industrial establishment.

The law of misconduct applies not only to "illegal" strikes but also to "unjustified" strikes. We need not marry over this metaphysical distinction. But as early as 1960, Chief Justice Sinha urged employer caution for dismissal for misconduct when employees took recourse to illegal strike. His Lordship urged leniency for those (majority) workers "who may have acted as dumb-driven cattle" and the minority active leadership which had "not only participated in it but had fomented it." The judicial image of worker solidarity in a strike action has, more or less, persisted, resulting in punishment to 'ringleaders' and amnesty to 'dumb-driven cattle'. Not merely are the juridical categories of strike -- 'lawful' but 'unjustified', 'unjustified' and 'illegal' pre-eminently in authoritative judicial discourse; even the forms of collective industrial action, such as 'go-slow' or 'gherao' have been held to be 'pernicious' and 'unlawful'.

The labour law abounds with mystifications -- within a broad framework of interpretation its core categories remain highly susceptible to frequent adjudicatory shifts. Judicial activism valorizing the rights of the organized working classes -- an infrequent decisional formation -- also finds its nemesis in the overall opacity and complexity of labour jurisprudence. In addition, there exists a growing legislative tendency to exclude hard-won workers' rights in essential services and to provide special regimes of labour law for distinct public services like educational institutions and hospitals. Even in non-emergency periods, the capitalist class sponsored abuses of security legislations (like the National Security Act or the dreaded - and dreadful - Terrorist and Disruptionist Activities Act)
have now been brought on judicial record. And although it has not been empirically measured, the 'use' of ordinary criminal law to intimidate and harass trade union activists by managements with the active connivance of politicians is common knowledge. I have myself heard a Home Minister of an Indian state assuring a bunch of industrialists from an adjoining state how trade union leadership was well under control in his state; naming a rising trade union leader, he said "That fellow is now busy defending himself on a murder charge; he won't make any trouble for a while." Mysteriously, that leader was shot dead at a later point of time in the precincts of a sessions court and that murder is, after several years, still unresolved. Such instances, I am sure, can be multiplied.

It is in this overall context of political management of trade union activities - both within and outside the law - that we can grasp more fully the reality of the progress achieved by benign judicial interpretations of the rights of the working classes. The movement to protect and promote their statutory rights is undoubtedly quite impressive. But this movement has to be placed within the larger process of disciplining the 'organized' labour force by the state at the behest of capital. The rights accruing by and large incrementally and atomistically to individual workers while the collective solidarities remain inhibited both by the overall framework of law and the abuses of the legal process as a whole to control the working class movement. The slow-motion adjudication vindicates a right here and there but in the process strengthens the tendencies towards 'labour aristocracy', weakens the autonomous working class movements and reinforces the tendencies towards deradicalization of working class movements already embedded at their very core by the historic conjuncture of Indian development.

In a symbolic way, the emasculation of the trade union movement is encoded in its lack of response to the Bhopal catastrophe; it is neither at the forefront of the protracted struggle to ensure justice to Bhopal victims nor successful in even launching a nationwide campaign, five years after the catastrophe, on issues of safety-at-work or against the private legislation (under the auspices of the state law) encouraging hazardous industrialization in India.

State and Law in the Image of an Ideal Collective Capitalist

Law and adjudication in India seek extensively to regulate business and industry; the law also simultaneously seeks to mediate growing conflicts between the fractions of capital and, overall, to act out the role of the state as an "ideal collective capitalist". Planned regulation of the economy over the last four decades has, overall, not signified any authentic socialist breakthrough. Although the relationship between the plan and the market has been often deeply conflicted, the deep structure of planning in India has been to serve the ordered growth of modern capitalism in India.

This proposition does not require, it is hoped, abundant justification. Planning has not significantly served as an instrument of generating a minimal standard of responsibility or accountability in business and industry: Indeed, social costs of increased productivity are increasingly left to be borne by the workers, consumers and the community at large. The Bhopal catastrophe, in this sense, epitomizes the
success in failure of the Indian planning. In relation to efficient and just management of business and industry, planning has not been able to significantly discourage fraud, mismanagement and oppression. Indeed, planning has become a process absorbing the social consequences of vandalistic capitalist behaviour; for example, sick industrial units are regularly taken over for restoration to health by government ostensibly in the interests of workers but really in aid of the capitalist classes whose members are not sanctioned for inefficiency or planned mismanagement of enterprises. Nor has governmental regulation of business and industry been able to control policies and practices which are pernicious: for example, management practices which generate continuous catastrophic air and water pollution have not been sufficiently inhibited by a plethora of modernistic environmental legislations and a trickle of progressive judicial decisions. Nor have the practices of accounting and tax planning and evasion which contribute extensively to the creation of a parallel economy been significantly combated by acts of planning. In this sense, the concepts and practice of planning anachronistically inaugurated in India have served only to help mature the early capitalist phase of Indian development.

The extensive bureaucratic control over business and industry through licensing foreign exchange, monopolistic and restrictive practices and company laws do not appear to have had a significant adverse effect on corporate growth in India. Although from time to time there are organized outrages against bureaucratic oversight, the capitalist classes are, in reality, not seriously worried about the regulatory frameworks which they find irritating but also wholly negotiable by networks of influence and power as well as by fostering public service corruption. And the ruling classes are not too unhappy either with this appearance of regulation masked by the reality of negotiated deregulation. In fact, the manufacturing of the appearance is a valued resource for legitimation of the practices of power and the engineered deregulation provides the hidden material bases for survival and growth of formations of political power. One has only to study somewhat carefully the operation for example of the Foreign Exchange (Regulation) Act, 1973 or the Capital Issues Control Act, 1967 to realize how incestuously are the market and plan related in India and how the politics of production is intertwined with the production of politics of contemporary India.

But the Indian state has also gone further by policies and acts of nationalization and governmental takeovers in the direction of state capitalism. Unmistakably, nationalization ostensibly for 'socialistic' objectives is, in effect, a variant of capitalist, rather than, socialist, nationalization; today close to 70 per cent of working capital of companies comes from the network of six major state financial institutions. The lending by these institutions has increased from 29.9 per cent in 1970-71 to 58.2 per cent in 1983-1984. The law still maintains a distinction between 'public' and 'private' sector, even when as a matter of hard economic realities the bulk of the operating capital comes from the state.

The fantastic (there is no other apt word) growth of the public financial institutions has exacerbated emergent contradictions in the state regulated capitalist order. The financial institutions have generated their own strata of state bourgeoisie who seek both perks and powers typically associated with the mana-
gential classes in the private sector. Their roles and desires impel them to play a greater part in the management of client corporations. And their role is occasion-
ally modulated by the regime in power. In the eighties, increasingly, the conflict between state bourgeoisie and political managers on the one hand and the capitalist classes began to surface acutely. And this brought to the public view what has been aptly termed as the "political processes" or "corporate democracy". No better example of this conflict may be found as regards indigenous capitalist class than the epic warfare between the Reliance and DCM, and as regards foreign and indigenous capital than the Swraj Paul episode. And both these situations quickly led to the wholesale appropriation of adjudicatory power of the state as well.

The conflict between public financial institutions and Indian capitalist classes - between state and 'private' capitalism - is a pervasive feature of the contempo-
rary political landscape. This conflict has engulfed whole regimes and also consumed, to some extent, the institution of the free press in India - a constitu-
tional estate of the people of India has been gradually converted into a medium of corporate warfare! The judiciary, including the Supreme Court of India, has been converted into a theatre of war, with all-round costs to images of the integrity and autonomy of the judicial process. Temporarily, the Supreme Court has itself repudiated the distinction between state financial institutions and capital-
ist entities by holding in the Escorts case that the institutions are not subject to the same democratic controls as the state; they constitute, as it were, private commercial enterprises of the state governed by their statutory charters and are not controlled by any constitutional imperatives. How far this judicial abstention will survive will be determined, at any rate partly, by how the state bourgeoisie, the political managers, and the capitalist classes are able to renegotiate equilibria of power-relations among themselves.

This paper, sketchy as it is, simply does not allow any further exploration of how state and the law stand related to global capitalist forces and tendencies. But it should suffice for the present purposes to suggest that the state and the law have to negotiate the contradictions between indigenous capitalist classes and foreign capital and contradictions between the political imperatives of national sovereignty and the foreign economic policies promoted both through the instru-
m ents of foreign aid and debt as well as the multinationals. The continuing saga of the Bhopal case condenses both those sets of contradictions. It is clear that in the near future the relative autonomy of the judiciary offers the best site for negotiation and re-negotiation of these contradictions. The indirect rule by the capitalist class now appreciates the simultaneous need of preserving the autonomy of the judiciary and of its exploitation for its own distinct ends. This appreciation is also writ large in the ruling 'class' approaches to the problem of structuring independence-in-dependence of the adjudicative power (See Baxi 1985,23-63). Undoubtedly, given the present state of capitalist development, adjudicatory power will remain a deeply contested site.

Privatization of State and Societal Resources

Privatization of the resources of state and society - the key characteristic of a
mercantilist state - manifests itself as corruption in high places. The linkages between such privatization and ascendency of the dominant classes is a self-evident feature of contemporary Indian development. All the same, we need to understand corruption in high places in its linkages with state-regulated capitalism and industrial capitalism. Corruption in high political places has almost assumed a visage of a nationalized service industry. We ought to attend to it, even briefly, in any endeavour to understand the relation of law to capitalism.

'Corruption' is just one word but a multitude of baffling realities lie concealed and concealed within it. Indeed, if 'corruption' helps us to decipher independent India’s political economy, it also foretells its rather dismal future as well.

The four decades since independence have witnessed a steady rise of the fact (magnitude and complexity) of corruption in public life and also the folklore about corruption (Myrdal, 1968, 1940; Goh 1964, 101). And since the legal proof of the facts of corruption is made so difficult by the strategic laws dealing with corruption offences, the folklore has grown to fantastic proportions. Even if Lord Acton may not exist for the masses of India, his dictum that power corrupts is indelibly etched in their life experience and social imagination. Each civil servant, minister and politician is perceived to be corrupt in such abundantly diverse ways that people are ready to believe the very worst of them. And every expose of corruption nourishes the roots of the folklore about corruption.

The folklore is allowed to grow apace by acts of law and policy, which all but prevent the vindication of truth concerning allegation of corruption offences through orderly judicial proceedings. Although the Indian Penal Code 1860, the Prevention of Corruption Act, 1947 and the Criminal Laws Amendment Act, 1952 (all now replaced by the Act of 1988) provide for a stringent regime of investigation, trial by special courts, reversal of onus of proof, and stiff sanctions, only rarely has a prominent political personage been brought at the bar of public prosecution in the Indian courts. Instead, the standard device has been the deployment of formal and informal commissions and committees of enquiry, presided over by distinguished and reticent Indian appellate justices. Their reports (nearly 200), ever since the first years of Independence, have arraigned some of the most powerful political leaders at state and national levels (Nourani 1974; Shourie 1980, 1984; Rajgopal 1988). And yet not a single commission report documenting judicial findings on lapses in integrity has resulted in a major criminal prosecution or conviction. The law relative to corruption offences operates episodically against the higher echelons of bureaucracy and more systematically on smaller and lower officials (Agarwala 1980). But in popular belief, an immunity attaches to corruption in high places; it is an area of non liquet, where no human law and justice may ever reach.

Even when the habitats of corruption may thus be identified as peaks and pinacles of power, and variation in its nature acknowledged (see for the typology of corruption: Reisman 1973,69-73; Rose-Ackerman 1978; Baxi 1989, 1-11), the institutionalization of corruption as a way of governance signifies planned subversion of the law by its makers. Clearly, the long-term democratic costs appear to be offset by the short-term gains to state managers of a growing servitude to national and multinational capital, which alone possesses the manifold resources
to operate and sustain a tribal culture for its own ends.

The criminogenicity of corruption entails more than bribery offences between the giver and the receiver and spills over further to the 'misappropriation' of bribes, distortions in markets of corruption, intimidation and outright violence to remedy unjust enrichment or for rendering of promised services and even possibilities of counter-intimidation and violence. And in these latter stages of further criminalization of tribal cultures, the shadowy figures from the underworld may be summoned as opportunistic allies or even if not summoned may intervene and appropriate conflicts within the tribal markets for their own distinct ends. All this moves uncomfortably close to the beginnings of the criminalization of politics: or the crime of politics and politics of crime (Rajgopal 1988; Wade 1985; Baxi 1988).

At the level of organized politics, moral crusades against corruption condense the massive evils of a going system into an attack against a person, through 'diabolizing' the 'corrupt' adversary. Moral crusades furnish well-known democratic rituals. Usually elite initiated or co-opted, moral crusades against corruption may "publicly humiliate or penalize some elite members but does not change the basic power structure, the composition of the elite, or their fundamental practices." Moral crusades do induce popular catharsis "but achieve, in the end, only reinforcement of the elite" (Reisman 1974, 15:33, 95-118) This reinforcement may be achieved in unexpected ways which range from mild authoritarianism (the 1975-1976 Emergency following the 'total revolution' crusade against corruption in high places) or military takeovers (in Pakistan and Burma, a few decades back).

And in anti-bribery campaigns, the free press always plays a leading, but historically ambivalent, role. Corruption is the hard core pornography of power; and has all its voyeuristic attractions. And people, the anonymous mass of victims of tribal practices who otherwise feel so powerless, now get their temporary revenge through the spectacle of consenting political adults found in publicly compromising positions. The politicus in its momentary interruption at the full public gaze appears to endow the public with the illusion of enhanced capabilities to combat corruption. The cynical, and often violent, consequences of subsequent disillusionment carry very high costs for the framework of democratic politics.

Anti-corruption laws both in intention and impact remain deeply embedded in the overall political economy of corruption. They provide the appearance of being a sword against corruption in high places but really offer a shield to the informal economy operating between captains of capital and managers of the state. The latter's increasing legitimation deficit, however, constrains them to place struggle against corruption high on the agenda of political management. No longer in India is the devaluing of the discourse on corruption (inaugurated and sustained by Jawaharlal Nehru see Baxi 1990,110-11) a wholly persuasive or even legitimate strategy. The latent contradiction between the ruling and capitalist classes will, undoubtedly, be accentuated by the need of the latter to sustain markets of corruption and of the former to overtly regulate these markets. In the future elaboration and accentuation of this contradiction, the Indian legal order will
increasingly experience its own internal incoherence, already manifest in the Antulay discourse (see Baxi, 1989).

'Surplus' Repression

By this somewhat inchoate notion, I wish to signify those brutal practices of power which do severe and unjustified aggression and harm to individuals or groups by the agents of the state. The legitimate monopoly over force stands justified (and legally limited) by the principle, largely, of preventing manifest harm to society or state. 'Surplus' repression signifies the use of excessive force not justifiable by principles of legality or legitimacy. Pervasive 'surplus' repression indeed, over a period of time, not just brutalizes the state and its people but also justifies the insurrectionary practices of people's power leading to a replication of the state-sponsored regime of terror. What this latter begets is, in other words, the prominence of terror in popular illegalities matching the level of surplus repression by the state. In India, in some ways, the counter productivity of surplus repression by the state is already becoming divisively visible over the past decade.

When we begin, even in a preliminary way, to identify the normative constraints on surplus repression, we find that the Indian law and Constitution are not powerful articulators of these.

Significantly, the Constitution nowhere asserts a duty of the state not to intentionally or knowingly harm its own citizens, individually or collectively, by its acts of omission. If the fundamental rights are violated one would say that some harm has been afflicted on citizens and courts stand empowered to invalidate a law or executive action. But there is no duty inscribed in the Constitution explicit ly forbidding the state to violate the enshrined rights. Citizens have no right to redress in the exercise of public power. Nor indeed do they have any right to immunity from any abuse of public power. Nor, further, have they any specific entitlement to compensation for such abuse of power which demonstrably harms or hurts them, save the very tentative beginnings made by the Supreme Court recently to award compensation for violation of Article 21 rights of life and personal liberty in social action litigation.55

Indeed four decades of the working of the Indian Constitution have produced affirmation of the amplitude of state power which tends to negate both rectitude and integrity in the wielding of it. For example, the Supreme Court has repeatedly held that the mere possibility of the abuse of public power is no ground for challenging its conferment. This is 'logical' enough since all state power carries the potential for its own abuse. But when the potential is so writ large as to manifest an active emergence of abuse of power, one would expect judicial interpretation to caveat this enunciation. Not so. In the infamous habeas corpus case, the Supreme Court of India said that during a validly imposed Emergency, the state may even extinguish the right to life (Baxi 1980, 79-120). The 59th Constitution Amendment, only recently repealed, authorized the state to accomplish the same end, but challenges to it were not even brought for hearing by the Supreme Court!
Similarly, courts have developed a doctrine named as "presumption of constitutional validity" of state action. A citizen contesting state action has to somehow displace this presumption. In other words the presumption entails the benign view that the wielder of public power embodies rectitude and integrity and exercise of power is always free from the suspicion of abuse. Citizens are at liberty to prove that the power is exercised *mala fide*. But such strict standards of proof have been erected by the courts that rarely can a citizen satisfactorily prove this. And courts will not examine large political acts on the grounds of *mala fides*: for example, the power of the President (that of the Council of Ministers, that of the Prime Minister) to impose President's rule in the states or the power to declare emergencies. Those are termed "political questions" in practice, beyond judicial review, though in the theory of judicial power and process (developed by the Supreme Court itself) eminently justifiable.

No collective *mala fides* may be ever attributed to legislatures under the Indian law. Even the 39th Amendment cancelling the powers of adjudication in the election petition against Indira Nehru Gandhi - cancelling it to the point of striking down from the cause list of Supreme Court - could not be questioned on the ground of *mala fide*. It was struck down on the ground of the violation of the basic structure during the second phase of the Emergency, but the same decision upheld the retroactive Amendment to the Representation of People's Act, cancelling Justice J. M. L. Sinha's decision unseating her for corrupt practices (Baxi 1980, 66-70).

At this level, it must be straightway said that the constitutional discourse does not encourage public responsibility of the state at the very level where it matters most for life of democracy: namely, the assertion of normative constraints against abuse of state power in distinct harm-causing ways. Rather, it ordinates a second-order discourse on public accountability, dispersing this moral question into hundreds of little questions of what relief a citizen is entitled to when abuse of power is a *fait accompli*. In atomizing the bearer of injury by the state and seeking to remedy it case-by-case, the structure of abuse of power remains largely unaffected. Not merely unaffected. In a curious sense, this dispersal legitimizes that structure by the very fact that individual instances of violation remain subjected to the discipline of the law.

So far we have looked at the notion of abuse of state power rather generally. Let us look at one instance of it - the standardless, and therefore, illegal use of force by state agents and agencies.

Nothing at first sight appears more clear than the proposition that the agents of law, wielding the force of the state, shall not intentionally use illegal force against citizens. The state has a duty to prevent and punish such behaviour. Or a duty to bring, if it can ever be rationally or morally done, such use of force as 'justified harm'. Let us look at three situations of such use of force: torture, use of fatal force in law and order situations and custodial rape.

As to torture, the Indian Constitution, law and state are inarticulate. The list of basic, fundamental rights do not mention immunity from torture. The prohibition of 'third degree' methods in criminal law is modest as well as minor: it does not define prohibited practices which are well-known, nor does it provide
evidentiary regimes where complaints of torture can be expeditiously and equitably examined. Administratively, prevention and prohibition of torture are not high on the agenda. Although as early as 1895, a Bombay case established (Lati Khan 20 Bom 394) that nothing save the fear of death constitutes a defence for a policeman who tortures anyone, and that the doctrine of respondent superior does not act as a defence, it is doubtful whether this decision has survived the attainment of Independence! The 1895 principle was also enshrined in the Nuremberg trials. But the Nuremberg principles do not inform the articulation of the ethic of the Indian state.

The practice of police torture in India is widespread (Baxi 1982, 124-129; Ghose 1989). Not merely is torture widespread, but the state has done very little to reform the legal system to detect, prosecute and punish it. For example, more than 10 years ago, the Indian Law Commission recommended a change in the law of evidence creating a rebuttable presumption that if death occurs in police custody it shall be presumed, unless otherwise proved, that it did not occur naturally. India has also, while ratifying the covenant on Civil and Political Rights, derogated from the clause requiring the state to compensate/rehabilitate victims of such excessive, standardless use of force.

I remain aware that 'torture' is a complex phenomenon (Baxi 1982, 121-143); and my understanding of its complexity has been enhanced by Elaine Scarry's The Body in Pain (1985). But this complexity has nothing redeeming about it, especially if one is to view the state as an ethical entity of some sort, having some kind of public responsibility.

Let us take the situation of use of fatal force by police in ostensible law and order operations. Here again, at least in terms of jural principles, the colonial law appears more strict than Indian law. In 1882 in Gurdit Singh (P.R.No.16 of 1883), a nabi and three sepoys were found guilty of culpable homicide not amounting to murder for firing on a mob killing two men since on facts the mob was not menacing and superior orders did not justify the firing and killing. A little less than fifty years later the Supreme Court of India ruled (State v. Shew Mangal Singh, AIR 1981 SC 1917) that if the orders of Deputy Commissioner of Police to shoot-at-sight were justified, the defence of superior orders applies, providing police with immunity for causing death and grievous hurt. The issue of legality of shoot-at-sight orders in law and order operations, and counter insurgency operations, has not yet featured pre-eminently in juristic or judicial discourse. Certainly, the due process protection of Article 21 right to life militates against such carte blanche powers. Very few prosecutions for excessive use of fatal force are likely to succeed if the victims of law and order operations are burdened with the task of proving, in the first instance, that the use of such force was not justified in the facts and circumstances of the case.

Police firings on assemblies of people stand amply documented in the growing human rights literature (Desai 1986, 293-306). Their growing incidence has also led to the phenomenon of 'encounter' killings: the incomplete but otherwise accurate lists of names of victims of such killings include 290 people killed in Andhra in the period 1970-1982; 21 in Tamil Nadu (1980-82); 364 in Uttar Pradesh (from August 1981 to February 1982); 417 in West Bengal (from 1970-
1971; 81 in Punjab (April 1977 killings of 'Naxalites') -- see Desai 1986, 456-568. The count is on the increase. And so is the lethal silence of the law, signifying ways in which the rule of law discourse also legitimizes the co-existence of reign of terror.

The absence of any sustained public discourse on the Indian states' proclaimed penchant for, or pronounced inability to inhibit, infliction of death and mayhem on its own citizens suggests an elite moral consensus which regards the use of standardless force as a necessary evil, if not a positive good. This moral consensus is shocking when we recall Indian society's collective response to the Jalianwala Bagh massacre. This metaphor is not invoked for police firings of a comparable magnitude and intensity which independent India has witnessed on a growing scale at least in the last two decades. On what perceptions may such a consensus be based? Even if it is based on utilitarian calculus of deploying public force for 'security' of state and public safety, there should at least be some endeavour to justify that such large-scale infliction of death and injury is in the first place geared to that end; the democratic costs of trigger-happy practices of power should be at least assessed by the same utilitarian calculus. Is the repudiation of legality, for example, conducive to utility maximization or to security? Even if the law is to be considered a mere means to the ends of power, the ends of power should be subjected to some moral scrutiny in the light of bloody experience. How may any one begin even to speak about 'public responsibility' of the Indian state in the face of such messy 'moral' consensus?

Even the utilitarian calculus proves unavailing for the third form of abuse of power: the growing phenomenon of rape by 'subordinate' policemen. And one is not referring here to threat or act of aggression against women in large-scale law and order or counter-insurgency operations (where such aggression appears morally unproblematic, where the militant phallic symbolizes the height of state power in extremis). Rather, one refers to such aggression in peacetime, in the 'normal' course of operations of the Indian police-rape of women who, for example, go to the police station for filing first information report, rape of women who have to file statements or of women whom police find on patrol duties or in the course of investigation. And such behaviour is not confined to police but extends also to the growing para-military forces of the state, increasingly involved in internal security operations. People's protest against a rape by four Central Industrial Security Force Jawans in Dalli-Rajahara in 1980, for example, invoked brutal violence causing one fatality. And the force spokesman was heard to say: '“Such things have been happening for a long time ... everything would have been running smoothly but for the hooligan workers who have broken the peace and harmony of Dalli-Rajahara”. And a commission of enquiry which was established to find out the guilt of public assault on Maya Tyagi at Bagpat, and shooting of her husband on the spot, finding only minor guilt of one policeman, reported that “there was no need to recommend policy measures to prevent the recurrence of such incidents” (Desai 1986, 298-300).

All this was happening even as the nation was engulfed in an intense controversy on the Supreme Court decision acquitting the rapist of Mathura (a young tribal girl raped inside a police station) on the ground that since she did not resist
she consented! The controversy triggered off by four law academics' open letter to the Chief Justice of India (see Baxi et al 1979) ultimately, after four years, led to severe law reform. But this, in the period 1984-1990, has led to no significant change in police behaviour.

The ingrained patriarchy of the Indian law makes reporting of such police behaviour very difficult (Shyam Singh 1989); but when reported, proof and conviction remain equally difficult as the recent public outrage on Suman Rani (where the Supreme Court condoned the statutory minimum punishment and even justified its decision on review).26 The pronounced inability of the Indian state to do anything significant about such behaviour, no doubt testifies to its inherently lecherous character. In this situation, how does one even begin a discourse on its public responsibility?

Towards a Conclusion

This effort of exploring the dynamic relation between capitalism, state and law might be exposed to a withering criticism that it is based on analytical/historical frameworks which have been rendered obsolete by the mighty transformations in the actually existing societies. To be sure, one unintended consequence of the Gorbachev revolution has been the curious revival of the cold war spirit hostile to any invocation of Marx's or Marxian categories. The 'end of the ideology' genre of discourse yet once again threatens to overwhelm us all. But the realities of global uneven development and the distinctiveness of the process of capitalist maturation of the Indian state and society suggest that Marx's and Marxian frameworks of analysis still remain luminously relevant. As to the more general point of the criticism, the Marxian framework has been in continuous struggle with the charges of obsolescence, ever since its inception. Its hallmarks is a struggle for the imagination of human emancipation - a struggle remarkably achieved for India by the immortal labours of Akshay Desai.

NOTES


The conception of "popular illegalities" is heavily used in Foucault (1975,273-276) as bearing potential "threefold diffusion". Popular illegalities may be inserted in "a general political outlook"; in "their explicit articulation on social struggles"; and in "communication between different forms and levels of offences". Desai's works, overall, focused on the first two dimensions of popular illegalities.

2. Desai (1984, 1986), especially the introductory observations under each part of the work indicate the depth of sensitivity.

3. For a moving account of bonded labour see Bandypadhyay 1988; see also Breman 1979,

4. E.g., The Contract Labour Act, 1970, criminalizing the judicial conception of protection of the rights of casual workers was foreshadowed as early as 1960; see Standard Vacuum Corporation Case AIR 1960 SC 948; see for an analysis of this Act, e.g., The Report of the Second Labour Laws Review Committee cited infra note 44 at 161-178; see also Sivastava, 1988.

5. On migrant labour conditions, and castration, see e.g. Breman 1985 and the material there cited and see note 9 infra.

6. My position on child labour is rather of a fundamentalist kind. I read Article 24 not as outlawing employment of persons below fourteen years in hazardous employment such as factory or mine. Rather, any employment of a child is hazardous per se since the deprivation of childhood is itself a hazard. And the Indian Constitution's conception of child is itself supportive of this reading.

7. The patriarchal character of the legislation is explicit in its formulation: normative proclamations are not supported by any proactive implementation structures. The relevant committees to determine equal remuneration for "same or similar work" have not yet been set up. And casualized female labour continues to be largely unprotected -- see Balram 1984.

8. See People's Union for Democratic Rights v. Union of India 1985 AIR SC 1973

9. E.g., The Report of the Labour Law Review Committee 77-79 (1974; Govt. of Gujarat); see also, South Gujarat University "Working Conditions of Textile Workers in Surat" (1984), a report submitted to the High Court of Gujarat in a public interest petition.

10. See e.g., The Twentieth Report of the Commissioner for Scheduled Castes and Scheduled Tribes (1966-1967); Baxi 1988, 288; and Breman supra note 3 Pandey 1986.

11. People's Law forms can be emancipatory as well as repressive. See on these aspects Baxi 1982, 328-347; Baxi 1986.

12. See supra notes 3,4,5; see also the judicial indifference to hadi workers in Prakash Cotton Mills Case (1986) 3 SCC 588 (per Dutt, J.)


18. The problem appears to be of enormous magnitude at a national level: the Second Five Year Plan proposed a centrally administered scheme with an outlay of Rs 650 crores to assist computerization of land records. And even the Supreme Court of India has to oversee the preparation of land records: see Banarasi Sawa Ashram v. Uttar Pradesh (1986) 4 SCC 153.


20. The Ninth Schedule sought to immunize legislations named therein from any challenge in courts on the ground that they violate any of the fundamental rights! How far it actually did assist achievement of agrarian reforms is an open question. See, e.g., Ghose 1988; Kohli 1989; Omvedt 1986; Rudolph & Rudolph 1987, 312-332 and the literature there cited.

21. See Baxi 1988, 65-97, and for the relevant literature notes 2, 17, 18.


23. See for voluminous litigation the works cited in note 17, 20 supra.


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27. See Baxi 1985, 65-112 and the material there cited.
29. See Baxi & Paul (1985); Baxi (1986); Baxi & Dhanda (1990).
30. See, e.g., Dhanagare (1977); Dinesh Mohan (1987). As to Industrial Safety, see Bhata (1986).
31. See the Report of the National Commission on Labour (1969) which explicitly states the
"parent paria" role of the state in relation to the trade unions which are "still unprepared and
incapable" and "organisationally weak" to operate a collective bargaining system and why the
state has to be involved with the role of assisting them as well as the capital and the community; no
such withdrawal from the field can be justified by considerations of productivity or justice (at p.46).
32. Western India Match Co. v. Western India Match Co. Workers’ Union (1973) II LLJ (SC)
326.
34. Ibrod Motor Transport (P) Ltd. v. Bis Singh (1974) II LLJ 293 (Del.)
(1979) I ILJ 413 (Mad).
39. The mystifications surround the very conception of ‘industry’, ‘industrial dispute’, ‘strikes’,
closure’, ‘reward’ - ‘settlement’ categories which have spawned enormous litigation; see the
weighty analysis in Malhotra (1985).
40. See Desai (1986) 102-113; see also V.K. Karmak (1967) Orangee (1955) Ramaswamy &
41. See the cogent, at a technical legal level, criticism of judicial activism in labour law, for
example, in Malhotra at pp. 594-596; XI-XI-XVI; and the charge of “misapplied” dialectical materialism
made by Justice Hidayatullah in the Foreword.
42. See Ramaswamy & Ramaswamy (1981); Radhakrishnan & Radhakrishnan (1986) 269-270.
43. See, e.g., Usmanbhai Dawood Memon v. State of Gujarat (1986) SYP 344 (Bailment SYP
2006/2049 where prosecutions against workers were at the instance of Ahmedabad Textile Mill).
44. See The Report of the Second Labour Laws Review Committee (1983-1984); Gandhinagar,
Gouv. of Gujarat at pp. 19-23.
45. Id. at 107-156; also see The One Hundred and Twenty-second Report of the Law Commission
of India (1987; Delhi, Ministry of Law, Gouv. of India)
46. Although the trade union movement is concerned with issues of safety at work to the point
of hosting an international congress on the theme recently in India, the leading trade unions have
not been prominent in popular campaigns in or after Bhopal. A veteran trade unionist explained to
me that mobilization on safety issues requires a level of strength and solidarity which is beyond their
reach at this moment, given the priority enjoyed by employment opportunity over safety. Job
blackmail continues to be the standard technique.
47. See the Industries (Development and Regulation) Act 1951, The Cotton Textile (Management
of Undertakings and Liquidation or Reorganization Act) 1967; The Sick Textile Undertakings
(Taking Over of Management) Act, 1972; The Sick Textile Undertakings (Nationalization) Act,
1979. Among the sick units the affected industries include engineering and electrical, iron and steel,
textiles, chemicals, jute, sugar, cement and rubber industries. The sick units as of 1989 totalled
nearly 100,000.
48. On the nature and number of environmental legislations see Centre for Science & Environment
(1985) 343-351; see also Baxi (1986).
49. See e.g., M. C. Mehta v. Union of India (1987) SC 611; 1988 (4) SCALE 54; 1988
(1) SCALE 441. See also M.C. Mehta v. Union of India (1987) 1 SCC 395.
50. See the extraordinary mutations of non-convertible debentures, convertible debentures in, e.g., Kulshreshtha (1986) 101-08. Much of the conclusions in those areas are said to be responsible for preeminence of certain mega-corporations at the cost of others. See also Desai 1986,4-73.
51. See on the working of state financial institutions Kulshreshtha (1986) 113-192. The leading finance agencies IFCI (Industrial Finance Corporation of India), ICICI (Industrial Credit & Investment Corporation of India), NSIC (National Small Industries Development Corporation), NIDC (National Industrial Development Corporation), IDBI (Industrial Development Bank of India) and the State Finance Corporation and Industrial Development Corporations. The leading investment institutions comprise LIC (Life Insurance Corporation of India), UTI (Unit Trust of India) and GIC (General Insurance Corporation)
52. See LIC of INDIA v. Escort Ltd., AIR 1986 SC 1370 at 1375 (per Chinnappa Reddy J.)
53. The growing conflict between leading industrial houses - especially Reliance and Bombay Dyeing - has led to all variety of proceedings before the High Courts and the Supreme Court. The image for integrity of the apex adjudication has also come into public and press criticism. The LIC’s endeavour to reorganize the management of Reliance Corporation by insisting on an extraordinary general meeting of shareholders in a 700 crore mega-issue of Larsen and Toubro shares (a company under the management of Reliance) is bound to add to the burgeoning volume of corporate litigation, with alarmist consequences for the image of judicial process and power in India.
54. But all this is perhaps not going wholly to undermine the correct understanding of the Indian state’s relationship with the capitalist class, enunciated, memorably, by G.D. Birla as early as 1958: “Those circles who believe that the public sector is straddling on the toes of the private sector are taking a short sighted view. The position is that the public sector is even now helping to give a tremendous push to the private sector ... The public sector is ... going to act as a generator of the private sector.” Quoted in Desai 1984.
55. See supra note 52, at 1424-1425.
57. Prem Chand and Another v. State of Haryana (1989) Supp 1 SCC 286; see also the review petition, dismissed in a controversial fashion by the Supreme Court in (1990) 1 Sup. Court Cases 249.

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