Law, Struggle and Change: An Agendum for Activists

Upendra Baxi

The propagation of limits of Law

The burgeoning literature on the relations between law and social change celebrates the limits of effective legal action. Much of this literature comes from the First World. The Indian outpourings on the subject thrive on pithed phrases, pale impersonations of, and borrowed wisdom from, the First World articulations. Lawpersons (and occasionally social scientists) keep on telling lay persons in India that the law cannot lead change but can only follow it, that it cannot be an instrument of basic transformation of values and attitudes and that there are other agents of social change far more crucial than law. An ideological climate is thus created to devalue the role of law; it then becomes a self-fulfilling prophecy for all—for the quack and the charlatan as well as for the tyrant. 'Didn't we tell you that law cannot bring about significant social change? 'Now, you know,' they say. 'What is to be done?' They answer: 'Well, don't despair: if human law fails, there is the higher law—the Law of Karma—which never fails to succeed in its inexorable operations.'

Everyone, including the activists and social action groups (SAG) are thus made to understand the limits of law even before they understand its potential to foster directed social change. An important task on the agenda of social activists and SAG in contemporary India is to understand how law, as it exists today, can be used in favour of the exploited classes and against the dominant ones.

For this to happen, activists and SAG will also have to combat their own internal ideologies which assign the most marginal place to state law. Among the more entrenched people's groups in India are the Gandhian or neo-Gandhian, the Marxist and the liberal ones. The Gandhian or neo-Gandhian groups inherit a world view in which the moral integrity of the individual and the collective ethic of a group remain the vital forces for social transformation. Struggle against domination has to be peaceful and punishment for knowing violation

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Everyday people are thus made to stand its price on the agenda to understand the exploited and oppressed. For them, their own interests and state of affairs are more relevant than the Gandhian or the Marxist doctrine. Lawpersons and the state representatives remain the vital forces for social transformation. Struggle against domination has to be peaceful and punishment for knowing violation.

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of the law has to be borne with dignity. The state law is external to conscience; over-reliance on it is, therefore, against the development of ethical sensibility as a prime mover for social transformation. The 'left-wing' groups, therefore, regard the state law primarily as an instrument of class oppression. By definition, then, an activist assertion cannot rely on state law and its processes. To do so will be to enhance the legitimacy of the state and its law which must be challenged and exposed by social action. The purest form of radical groups' approach to state and the law is, perhaps, to be found in Naxalite 'jurisprudence' which believes in the creation of alternate legality (people's courts, public executions of the 'enemies of the people,' terror as distinct from structured coercion as the basis of legitimation of a new polity) and in the annihilation of state law and its agencies and agents.

In contrast, the liberal groups whose presence is now growing, believe in sustained or episodic and opportunistic strategic uses of the law. The liberal NGOs believing in sustained uses of law are marked by their metropolitan leadership and decision-making locations and by high presence of NGIs (non-governmental individuals) such as academics, lawyers, retired justices and administrators. Other liberal groups not having metropolitan location and 'intellectual' leadership are in the habit of activating law (mostly courts) when they can or when they must. But for those operating at the grassroots, access to the law, the aftermath of its activation, and the future impact of the use of law on their leadership and organisation continue to present rather constant themes for agonising in their struggle.

As the reader would realise, this classification of activists and groups is by way of ideal types; in real life one finds mixed types. One also notices tendencies towards transition, in real life, from one category to another. For example, the essentially Gandhian oriented organisation of the rural poor (like the Rangpur Ashram led by Hariyallabh Parekh or the Chipko Movement) have become 'liberal' at least in so far as their approach to the law is concerned; and left-oriented groups do use the courts rather effectively (e.g. the Lawyers' Collective or the PUDR). But the essential ideology concerning the role of the law in social transformation is not drastically changed in the process; the law is only used tactically and strategically, while the overall negation of the law remains latent as the basic theoretical approach.

The rule of law and the reign of terror

Activists and groups encounter law typically at its repressive worst; they internalise thus the fact that law is the negation of freedom and justice and the very embodiment of arbitrariness and cruelty. More concretely, the law to the poor means suffering the lawlessness of the agents and institutions of the state and of law. I
Hitler, Idi Amin or Papa 'Doc' to be an activist in such regimes is also to be a terrorist and the best strategy is what medievalists call 'tyrannicide' and modern wisdom describes as 'coup.'

In societies like India, at the present stage, what we have is a co-presence of terror with the ideology of the rule of law. In such a situation, the state law can be as effectively used to expose the state's lawless terror. It can also be used to combat repression. It may be relatively harder for people's groups to wield the rule of law ideology as effectively for emancipation as it is used by the dominant groups for repression. But it is possible to use and enhance the liberation profile and content of the law, as legislation, adjudication and administration. The state law provides ideologies, institutions and structures which can be effectively used for domination as well as struggles against domination.

Some experiences of the liberation uses of state law

Many PORP (Participatory Organisations of the Rural Poor), ORP (Organisations of the Rural Poor) and SAG (Social Action Groups) encounter, in the early phase of their organisation and action,

1. The people's groups have been classified into these three categories for the sake of convenience, rather than out of any theoretical mischief! The key distinction here is between ORP and PORP—ORP do not adopt participation as a principle of organisation; PORP do precisely this. Among the ORP we include a whole variety of groups—party-based cadres, non-party developmental groups (e.g., Rangpur, Chipko, Tilonia); specific constituency groups (e.g., environmental groups, women's organisations, caste upliftment associations); mobilisation groups (e.g., Chhatra Yakti); task-oriented service groups (Jyoti Sanghi, Sanjeevini; Nari Rakshakamits or anti-dowry groups). PORP include participatory ORP like the Bhoomi Sema and Kastakari Sangathan.

SAG present a wide variety of activities. Essentially SAG are linkages and service groups; they are designed to assist ORP and PORP in normal times as well as in distress. Mostly, they are city-based, and managed by members of ideological preferences including the social science establishment. They seek to comprehend ORP and PORP through dialogue research. SAG seek to serve ORP and PORP by:

(a) helping communication and coordination among diverse groups, within the region and across the nation;
(b) creating and mobilizing upward linkages of power and influence in support of ORP and PORP;
(c) providing orientation and reflection, and self-correction mechanisms, to ORP and PORP; and
(d) providing specialized services and skills like legal services.

The SAG category would include entities such as PIDT (People's Institute of Development and Training); Lokayuk; Rajivjala Free Legal Services Programmes; CERC (Consumer Education and Research Centre); Gandhi Peace Foundation, ASSALT (Association for Social Action and Legal Thought); PUDR; and PUCL.

a disproportion between their knowledge of the repressive procedures and contents of state law and the liberative contents of the state law. They have sure knowledge of the varieties of repressive experience that the state law promises and provides, but little information about the liberational potential of the self same state law. This cognitive gap is not accidental. It is structured in the very mode of production of the state law. The mode of production of the state law determines the level of legal illiteracy and ignorance. The state law is so produced that its beneficiaries may have the weakest prospect of knowing about it. This applies not just to the legislative law but also to judge-made law. The fact remains that legal ignorance is created and sustained as a systemic level by the legal system itself. This problem is not merely of communication of the law as the literature on mobilisation of law might suggest; it is a problem of the structure of the state law itself.

Be that as it may, groups of and for the rural poor often cannot use the law as a resource to combat excesses of power because of the well-nurtured incidence of legal ignorance. But when this ignorance is removed, however slightly, the groups gain strength which they did not previously have.

The knowledge that the crop protection society milita maintained by the landlords is not equivalent to state police has proved useful, and even important, to the Kastakari Sangathan. ORP dealing with the landless poor often find it exceedingly useful in their struggle with landlords for just wages, to know the precise rates of minimum wages under the Minimum Wages Act. The Chipko Movement was helped with information about the limits of power by the forest and revenue bureaucracy to award licenses for the felling of trees. Information about debt-relief legislation enabled adivasis of Rangpur villages to accomplish massive scaling of debts and to even seek their cancellation. Information about impending introduction of a forest bill in India which created a very large variety of forest offences, including those of unauthorised removal of grass and leaves, has already enabled concerned groups to energise successfully the public opinion of a large number of adivasis throughout the country.

Undoubtedly, access to legal information diminishes, to some or other extent, the vulnerability of the poor to exploitation or manipulation. It does also introduce possibilities of change in power relations between the people and their adversaries. Further, it assists the processes of self-reliance and self-assertion considerably.

But access to legal information can have other benign impacts on the internal structure and function of the people's groups themselves. The internal constitution of a people's group may, at times, be assisted by the models of organisation provided by the state law. For example, it provides a variety of organisational forms such as
credit cooperatives, registered societies, trusts, trade unions, companies and partnerships. Most people's organisations tend to operate outside these organisational models; in a sense, they do not exist as entities in the eye of the state law. But often this happens because ORP have no real information on the relative merits of alternate organisational forms under the state law.

The point about these models is that they provide the accumulation of legal experience for structuring associational or group activities. What is more these models provide essentially facilitative, non-coercive, legal arrangements; and they provide a wide range of choice. It goes without saying that any ORP needs some norms for internal structures, and functional spontaneous is just not enough. There arises need for certain, tacit or explicit, norms governing decision making, allocations of tasks and benefits, management of affairs, recruitment and training of cadres and personnel, and accountability of active leaders to the rank and file. Not merely do the ORP need to have an internal constitution, they have also to be imbued with their own distinctive spirit of constitutionalism.

This way of expressing the need for internal constitution for ORP of course states the matter too formally; but it indicates at least the broad range of problems arising for ORP, PORP and SAG. Sooner or later, at some point of their development, a choice is made of a legal form. Some SAG start with an explicit choice (e.g., SEWA, the Self-Employed Women's Organization, or PIDT). The former is a trade union registered under the law while the latter is a registered society). Some ORP and PORP who defer these choices find themselves later in a situation requiring a choice (e.g., Bhoomi Sena in its dynamic relations with the Torun Mandal). Sometimes, the need for choice arises out of the nature of the enterprise preferred by an ORP. For example, when an ORP decides to sell its produce not to the local trader who offers a low price but to an outsider trader. This marketing arrangement may entail a common fund which has to be administered to everyone's satisfaction and benefit. Appropriate information concerning the range of legal forms which facilitate ORP is indeed vital.

Aside from this constitutive role of legal information, we may also find that information about the state law may often help ORP to fashion more effective strategies for attainment over a period of time, of social change objectives. If the state law imposes prohibition on reckless felling of trees, or pollution of environment or provides for free and compulsory education of children, or family planning, the ORP, following the same objectives can attain several concrete results by using these information packages. First, they can resist delegitima-

tion from adversaries by stressing the commonality of the developmental objectives. Second, they can negotiate bureaucratic contingen-
cies more effectively (e.g., from obtaining major resource allocation decisions in their favour to even getting support for seemingly small steps as use of a public place in a village for a night school for landless labourers, and getting priority quota for kerosene lamps for this purpose from public distribution systems). Third, ORP can by reference to the commonality with the national objectives embodied in the state law, add to their capabilities to withstand repression. Fourth, ORP can also thereby obtain political space and time—both valuable resources in themselves—needed for their growth and viability. Last, but not the least, insofar as ORP are funded, especially from overseas, they need to have a legal habitation (a bank account, at the very least) and a name; and this process is facilitated by invocation of commonality.

The question of effective access to law is vital to people's groups. But it is, and it should not be, regarded as merely a problem of information. The problem of information is also one of power and domination. People's groups have to consider alternatives to the present mode of production of the state law, including participative law making, interpretation and enforcement. Episodic liberational uses of the law will relate primarily to the problem of access. Sustained liberational strategies will question, and delegitimize, the systemic creation of legal ignorance.

Recourse to law or to direct action

The ORP's legal consciousness will also determine the range of uses of law which may be imaginatively built into social action as well as cadre building and training programmes. If the ORP are opportunistic and casual law users, the liberational potential of the law is likely to be overlooked. This may happen in a variety of important ways.

The ORP may overlook the choices made available by the legal system in planning its strategies. The system might provide a simple and effective remedy through court activation (say an injunction) as against a protracted and taxing campaign of direct action or civil disobedience. Of course, recourse to courts tends usually to depoliticise consciousness which it is the primary aim of direct action to foster. But direct action strategies, if consistently overused, make demands on the leaders and the led which might eventually make such direct action counter-productive. Most ORP have not been able to evolve the right mix of recourse to law and direct action. To that extent either they have been ineffective in some of their campaigns
or they have achieved success at high costs of enervation. Fasting up to death, gherao (which literally means encirclement of the adversary till a decision is revised), picketing, processions and marches, involve gains of mobilisation, participation, publicity and politicisation. On the other hand, they also might involve considerable leadership and economic costs. Direct action modalities may also occasionally involve survival costs (as when police use riot control methods and even shoot at sight), freedom costs (as when large numbers of people are arrested and detained), and dignity costs.

The gains of successful direct action campaigns are, of course, always impressive; but when it fails, its costs appear no less striking. And overuse of its strategies may so routinise direct action as to deprive it of its symbolic mass protest value; they indeed become political rituals which hard-nosed administrators regard as being no more than routine order of business (in terms of response or repression) at best or as occupational hazards at worst.

ORP do not frequently realise that direct action is made possible only because the legal system provides for free expression of dissent through organised public gestures. If the law and polity did not tolerate collective peaceful protest and was inhospitable to even the most innocuous expression of organised public opinion, people’s group would be deprived even of this much political space.

If this is fully grasped, the choice of strategies between direct action and law recourse is not between legal and non-legal action. Both are law-related actions. Both have their manifest and latent costs and gains. Both involve exercises in political rationality. The antithesis is not really between direct action and recourse to courts; it is rather between an effective and ineffective strategy in certain specific contexts.

Of course, it may be extremely difficult for most ORP to identify certain problems as those which may be met by simple recourse to law. The poor typically fail to identify their problems as distinctively legal and indeed not many could really be so identified. This understandably gets carried over to organisations of the rural poor. But alternate legal modes of action do enhance the capabilities of ORP, and ways have to be found to carry this message to them.

Legal activism and social action litigation

Access to information is only a part of the story; access to favoured interpretation of state law by the ORP and PORP is another. And access to interpretation, pre-eminently by recourse to courts and tribunals, is also a form of domination and power. In a sense, the power to interpret laws is the power to make them; and

the power to manipulate the interpretation process is also the power to make law. But the interpreters and manipulators of interpretation, lawyers and judges, are themselves not easily accessible to the poor or the ORP. Part of the reason for their non-availability is, of course, the class character of the legal profession and the judiciary. But a part of the explanation lies also in the fact that the poor and the ORP do not provide any systematic input of their problems in the court system in a proactive manner. And the reason for this lies in the divergent legal consciousness of the ORP and PORP! Once again through this vicious circle the people’s groups lose whatever opportunities they have of activating the liberational potential of the state legal system.

This vicious circle can only be broken by the initiative of legal SAG. Unless legal activists emerge, the gulf between courts and poor must remain almost the same. And the emergence of legal activists, whether academics, lawyers or judges, is itself problematic and contingent. India has witnessed its first real upsurge of legal activism (including even among justices of the Supreme Court) only in the past four years. This can be explained by the catharsis of middle and upper middle classes, and their slight radicalisation, in the wake of and upon the cessation of the internal Emergency in 1977 and the tumultuous populism of the Janata Years and the return of Indira Gandhi. While it describes certain historical processes, even the above statement does not furnish a full explanation of the emergence of legal activism.

But it is true that social action litigation in India has emerged through uncoordinated use of law by scattered legal activists in the universities, the bar, the bench and the media. The following episodic review indicates the range and scope of present developments:

(a) Four law professors issued an open letter to the Chief Justice of India sharply criticising its decision acquitting police constable accused of committing rape of tribal woman within the confines of a police station, on the specious ground that because she did not resist she must have consented to sexual intercourse. This created a nationwide controversy, led swiftly to a bill proposing an amendment of the criminal law relating to rape, and a protest march by women’s organisations to the Supreme Court seeking a review of the decision.

(b) The Supreme Court of India, acting on complaints by or on behalf of prisoners, has revolutionised, normatively at least, prison jurisprudence (Baxi 1980; Baxi 1982).

2. See for reasons to avoid the American label ‘public interest litigation’ (Baxi 1979).
(c) Journalists have sought intervention of the Court to prevent the buying and selling of women (the Kamala case), the torture of Naxalites in Madras jails, the importation for carnal use of children in a Kanpur jail, and seeking full investigation into extra-judicial investigation of prisoners, and seeking full investigation into extra-judicial investigation of prisoners, and seeking full investigation into extra-judicial investigation of prisoners, and seeking full investigation into extra-judicial investigation of prisoners, and seeking full investigation into extra-judicial investigation of prisoners.

(d) Public-spirited lawyers have questioned with remarkable success the long incarceration of people awaiting trial for crimes carrying maximum sentences often under half the period of pre-trial detention already served.

(e) A Bombay-based lawyer group has persuaded the Supreme Court to admit a petition claiming that pavement dwellers in Bombay have a fundamental right under the Constitution to dwell on pavements and has filed a writ claiming access to clean and hygienic drinking water for villagers in Maharashtra.

(f) An agitated Supreme Court is proceeding to fix culpability for the blacking of undertrials in Bihar and has ordered a number of compensatory measures.

(g) Two law professors have filed writ proceedings for violation of constitutional rights of women detained in a protective home for women in Agra and for cruel and sadistic torture of eleven young persons in Madhya Pradesh jails.

(h) A legal sociologist has successfully moved the Court to secure expeditious trial of four persons under detention for seven to eight years for a crime they did not commit.

The Supreme Court has also assumed an activist role. It has developed a simple and swift technique of what must be called 'epistolary' SAG and bona fide public citizens may simply write a letter to a judge of the Supreme Court or High Court concerning excesses of public power against the deprived and the dispossessed and the Court will treat it as a writ petition. The rules on locus standi have been radically liberalised to allow this and associated forms of action. The Supreme Court and the High Courts have appointed socio-legal commissions of enquiry to ascertain facts. Courts have assumed suo motu jurisdiction also to review lawless use of force by agents of the state. Compensation for violation of fundamental rights is now emerging as a new constitutional principle. The lawlessness of the state stands massively exposed and indicted.

For the first time India has a National Committee on the Implementation of Legal Aid Programmes (as distinct from committees on legal aid which produce excellent blueprints of what needs to be done). Aside from the routine dispensation of legal services through state boards, the committee has started a unique programme of legal aid camps. These camps are held in rural areas where specific collective complaints of the rural poor are attended to in the presence of Supreme Court and High Court judges, district judiciary, administration and police. Some of these camps have been held at the request of the ORP.

This is an unprecedented and remarkable development quite likely to survive the reactionary onslaughts against it by those who were accustomed to the use of judicial process only by the privileged few to protect their interests and values. The future of social action litigation is indeed quite bright. Already many ORP have begun to realise the potentialities of the liberational uses of law, and not a week passes without at least one group trying to reach out to legal activists for initiation of social action litigation on behalf of the poor.

Social action litigation: prospects and limits

Among the gains of social action litigation are: the heightened sensitivities to injustice on the part of a cross-section of the elite, increasingly insistent claims for accountability of the ruling classes and dominant political institutions, a gradual, pro-people renovation of judicial process and values, emergence of a special kind of confidence in the judiciary in its unequal battle with administrative deviance, and crystallisation of informed consensus on the need for fundamental reform of the legal system. Given the unplanned efforts of a few individual legal activists, with shoestring budgets and poor infrastructural facilities, these achievements are indeed astonishing.

But even as we celebrate these achievements, we must stress the inherent limitations of social action litigation. The identification of many of these limitations may be premature as considerable social research is necessary to identify the characteristics of legal activists: their growing linkages with ORP and PORP, the effectiveness of court recourse both in terms of redistribution of resources and of ameliorating the repressive core of the law. The limits delineated here may well be seen as hypotheses on the research agenda of this new mode of activating the liberational potential of law through courts.

First, we must note that courts may not reverberate with such populism, every time and everywhere. Even the Indian experience is somewhat unique in terms of the history of adjudication in the country. But it highlights the fact that just judges everywhere are sensitive human beings and they can be made to understand and appreciate the repressive potential and reality of the law, and they can be converted into crucial resources for legal mobilisation.

Second, we have to acknowledge that court recourse means depoliticisation of the problem. Sooner or later, the invocation of the jurisdiction of courts means that we professionalise conflicts. The bonded labourers may be freed by a judicial order but the social meaning of liberation, and its political message for the structure of power relations, may well be lost.
Professionalisation of conflicts (by hiring intermediaries—lawyers—for advocacy and by its translation of issues of concrete material interests in conflict into issues of interpretation of abstract legal norms) may deprive self-reliant PORP and ORP of their vitality on certain issues. They may not merely lose control over the range of probable choices for action but also acquire characteristics of dependency or vassalage to alien organisations designed to serve, or primarily serving, the dominant interests. The implications of such dependency need pondering. ORP and PORP thus have choices to make. They could, for example, fight certain forms of dependencies with other forms of dependencies! In other words, the choice may 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 legitimates exploitation of the poor is historically inevitable in a non-revolutionary strategy of social change through voluntaristic community action. The choice relates not to the *factum* of dependency but rather its *forms*.

There is much to commend strategies of professionalisation of conflict, and thereby dependency on courts and judges, in regard to the repressive realities of the law. Most people's groupings are not, given the configurations of the political economy, likely to be able to combat the repressive essence of state law and order, without involving significantly, judges and courts. It is no accident that much of social action litigation before the Supreme Court of India has, in its essence, the plea for the activation of judicial power to diminish the repression through the law, especially the reign of terror.

Third, even when we activate judicial power to combat legal repression, we may acknowledge constantly that the limits of social action litigation are the very limits of law and legal action. Such action removes constraints on liberty by eliminating repression; but it does not provide conditions which would make the restoration of liberty meaningful. Persons detained over ten years or more, awaiting trial, may be set free, but how can legal activists help them to stand on their feet after all the enormous disadvantages attendant upon incarceration? Bonded labourers may be freed from debt bondage but what can social and legal activists do to help them realise the full meaning of their liberation? To what extent can courts be asked to fashion lasting and meaningful measures of relief that would add meaning to the endowment of freedom? How far may courts compel the state to concretely act for lawlessness of the law? How do courts and legal activists monitor institutional reforms compelled by social action litigation? How can one structurally lessen, through massive invocation of the social action jurisdiction lead to a dynamic of disenchantment in the coming years. This will happen because the underlying structure of legal institutions and processes will remain unaffected by social action litigation and very few PORP, ORP and SAG will have the capabilities to back up and oversee the implementation of judicial directives. Social action litigation will then begin to be perceived (it has begun so to be perceived even by a leading social and legal activist as Vasudha Dhagamwar) to be only a *symbolic* leverage for a more just and responsive social order. Unless the liberational potential of the law is enhanced as a *part of the struggle* for emancipation of the poor, the repressive reality will continue to haunt them with all its diabolical force. Herein lies the challenge of law to social action.

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