

A LEGAL EXCLUSION THROUGH 'CRIMINALIZATION', 'STIGMATIZATION' AND 'INVISIBILIZATION' IN THE PRE AND POST-INDEPENDENCE INDIA

*Professor B.B. Pande**

Law as an institution strives to perform both inclusionary and exclusionary functions in any societal structure. In the present paper, the author highlights the exclusionary role performed by law in Pre and Post-Independent India with the help of three primary modalities; 'Criminalization', 'Stigmatization' and finally 'Invisibilization', and then proceeds to offer a possible explanation to such societal exclusion along with advancing a critique to the same.

I. INTRODUCTION

Apart from other functions, law always plays a social exclusionary and social inclusionary function in almost all the societies. Traditionally the common law was seen as an elite instrument that was deployed primarily for protecting certain interests cherished by the dominant sections, thereby keeping out the vast numbers from claiming, much less enjoying the "prized" interests. The best example of such traditional exclusionary role played by law can be found in the rights, freedom and liberty discourse itself that explicitly excluded the poor and other resourceless from their concerns, in the writings of John Stuart Mill¹, John Rawls² and H.L.A Hart³ etc. The following observation of Hart aptly describes the exclusionary rationale :

"Freedom (the absence of coercion) can be valueless to those victims of unrestricted competition too poor to make use of it; so it will be pedantic to point out to them that

* Consultant (Research), NHRC. Formerly Professor of Law, University of Delhi.

¹ See generally JOHN STUART MILL, ON LIBERTY (1869)

² See generally JOHN RAWLS, A THEORY OF JUSTICE (1999)

³ See H.L.A. Hart, *Are there any Natural Rights*, 64 PHILOSOPHICAL REV. 175 (1955)

though starving they are free. This is the truth exaggerated by the Marxist whose identification of poverty with lack of freedom confuses two different evils.”⁴

In the twentieth century, particularly after the Second World War, the advent of Welfare State and the profusion of welfarist laws, an increased tendency of deploying law for building an inclusionary society was amply witnessed. But such sporadic inclusionary initiatives have been far from becoming a distinctive feature of any modern legal system so far, principally on account of lack of adequate formal recognition and persistent projection. For the present we shall leave law’s inclusionary function at that, and focus mainly on exclusionary function in the light of the phenomena of ‘criminalization’, ‘stigmatization’ and ‘invisibilization’ in the pre and post-independence era.

II. THE MECHANISM OF SOCIAL EXCLUSION

A. ‘CRIMINALIZATION’ AS A MEANS OF SOCIAL EXCLUSION

In the consensus tradition it may not be fashionable to talk of the criminalization process being partisan and prejudicial to the poor and marginalized, but the fact is that the whole process of criminalization, particularly in the capitalist societies has focused mainly on them. Peter Linebaugh has appreciated such an anti-poor rationale in the light of the critique of theft law by Karl Marx, thus:

“By applying the category of theft where it ought not to be applied you exonerate it? All the organs of the State become ears, eyes, arms, legs and means by which the forest owners hears, sees, appraises, protects grasps and runs.”
“The right of human brings gives way to rights of trees.”
As he stated this, Marx also had to ask, which human beings? For the first time he comes to the defence of the “poor, politically and socially propertyless”, when he demands for the poor a “customary right”.⁵

Equally significant are the techniques of expanding the net of criminalization to encompass a whole lot of new crimes like vagrancy, beggary, squatting on public land, illegal hawking, unlicensed rickshaw-pulling etc. The rationale of these new forms of criminality was summed up by Scott L.J. in an early House of Lords judgment in *Ledwith v Roberts*⁶ thus

⁴ *Id.* at n.2.

⁵ See generally CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY (David Greenberg ed., 1993).

⁶ (1937) 1 KB 232.

*“In my view these two expressions both refer to members of a class once prevalent in England to an extent which made it for four or five centuries a major political problem, a problem which taxed the forces of law and order to the uttermost and produced a long succession of repressive statutes. Those laws were framed exclusively in relation to that particular class of the community and had three purposes. The class consisted of the hoards of unemployed persons, many of them addicted to crime, then wandering over the face of the country; the purposes were: (a) settlement of the able bodied in their own parish and provision of work for them there; (b) relief for the aged and infirm, that is, those who could not work; and (c) punishment of those able bodied who would not work.”*⁷

Like the African colonial rulers, the British colonial rule in India, particularly after 1850s, freely used the technique of criminalization in respect of firstly, innocuous behaviours such as breach of contract by workers in plantation and other work places,⁸ and secondly, in respect of workers combinations and other collective ways of raising grievances⁹. The same trend of criminalization has continued even in the post-independence era in relation to collusive regulation of vendors, hawkers and rickshaw-puller in most of the metropolitan towns today. Here, criminalization assumes a more subtle and less visible form. For instance the plethora of provisions, in the Municipal Acts or Town Planning Acts are designed to regulate trade, business or livelihood patterns by imposing the requirement of license. But, by the technique of limiting the number of licenses to an absolute minimum, most of the vendors, hawkers and rickshaw-pullers are turned into unlicensed or illegal entrepreneurs, who can be subjected to penal action at will by the Police or municipal officials.

Thus, criminalization leads to social exclusion of not only those who actually indulge in diverse categories of crimes but also a much larger section of those, who are merely prospective criminals. An excellent example of perspective criminalization can be found in a recent Delhi Sessions Court case namely *Prem Pal v. State*¹⁰ in which a mason was framed up by the Delhi police in eight false cases that dogged him for over fifteen years. Since Prem Pal was poor and resourceless the police saw in him an easy victim who could be criminalized indiscriminately, thereby leading to effective exclusion for the over seven years period, during which Prem Pal was under detention.

⁷ *Id.*, at 270.

⁸ See e.g. The Workman's Breach of Contract Act, 1859, the Employer's and Workmen's (Disputes) Act, 1860; Indian Penal Code, §§ 491-93.

⁹ See Criminal Law Amendments, 1913 and 1932.

¹⁰ Sessions Case No. 29/02.

B. 'STIGMATIZATION' AS A MEANS OF EXCLUSION

In a recent article relating to image of the poor in the South Asian region Barbara Harris-White has elaborated the process of stigmatization thus :

“The neglect of actual or perceived or symbolic cleanliness (as happens in addiction); the inability to bear a (male) child; deformity or disability in childhood; signs or symptoms of certain kinds of disease, mental illness or psychological state; even outward signs of extreme malnutrition or starvation may precipitate disenfranchisement. Heroin or alcohol addicted people or those with leprosy may even be turned away from some religious orders and may be rejected even as objects of charity from them...It is also that the exclusion of people from exploitation is culturally legitimated; society actively allows oppressive practice and it is argued here that the state is often complicit in this process.”¹¹

Thus, a vast section of population is constantly kept in different levels of disenfranchisement through formal or informal measures. The stigma created by the various Lepers Acts or Mental Health Act against the lepers or non-criminal lunatics respectively, or in the contemporary context the labelling of a person as a HIV patient explains the far reaching implications of the exercise. Similar are the social exclusionary implications of the label “encroachers” used against the forest dwelling population under the diverse forest laws. In the urban areas ‘homeless’ or ‘slum dweller’ are the terms used against the sections who have no ownership rights or title to property, but much more importantly, such designated sections of the population lose many other kinds of civic benefits as well. Stigmatization may not only lead to social exclusion, but may pave the way for more stringent measures like criminalization itself. That is the reason why all measures of stigmatization ought to be taken up seriously and appropriately rationalized.

C. 'INVISIBILIZATION' AS A MEANS OF EXCLUSION

It is paradoxical that even after six decades of freedom and democratic governance, vast sections of our people still remain faceless and nameless. As a consequence, the destitutes and the homeless hardly figure in any official records. A recent official research study on trafficking on women and children provides statistics about missing children between 1996 to 2001 and casually mentions that almost 11000 children in the country remain untraced every year. To me, these

¹¹ B. Harris-White, *Destitution and the Poverty of the Politics with Special Reference to South Asia*, 33 WORLD DEV. 881-91(2005).

11000 children are officially 'invisibilized' persons. By invisibilizing persons the state and its officials find it easy to 'manage' the people without any sense of accountability. Yet another glaring and contentious instance of invisibilization is the recent amendment to the Juvenile Justice (Care and Protection of Children) Act, 2000. The amendment in 2006 equates abandonment of children with surrender of children.¹² This legitimizes surrender of children by parents, by making them legally available for adoption within the country and by foreign parents. This legal re-positioning may be again seen as a measure of 'invisibilization'. The Indian Penal Code, 1860 had criminalized abandonment of children below 12 years as an offence punishable with up to 7 years imprisonment,¹³ but now the Government has legitimized surrender or relinquishment of children by parents. Under Article 18 of the Convention on the Rights of the Child, the natural family of every child has the primary responsibility of rearing up and bringing up children. The State should strive to support the natural parents to perform their parenting responsibility more effectively rather than giving them an opportunity to surrender and relinquish children. Has the state found the measure of social exclusion by 'invisibilization' as a more easy way to deal with 'unwanted' children?

III. THE RATIONALE OF SOCIAL EXCLUSION

Every society is required to perform a delicate exclusionary task depending upon the context, aims and social purpose of the exercise. Social exclusion may be rationalized differently either (a) as a measure of social defence, (b) as a measure of social security, (c) as a measure of health and hygiene or (d) as a measure of beauty and culture. Though the dominant sections legitimize social exclusion mainly in their interest, it is often the interests of the most vocal and 'enlightened' middle classes which gets precedence in such social exclusionary decisions. The example of the recent trend of indiscriminate modernization of the metropolitan towns and urban trade centres, which has led to massive exclusion of large numbers from the residential areas, trade, business and professions, has the active or tacit approval of the middle classes, that has been somehow made to believe that it will stand to gain from such developments in the long run.

IV. CRITIQUING SOCIAL EXCLUSIONS

On what basis are the social exclusions to be critiqued? The Constitution mandates under the equality clause,¹⁴ as well as prohibition on discrimination on grounds of religion, race, caste, sex or place of birth etc,¹⁵ an inclusionary agenda for all its citizens. Thus any social exclusion that violates the equality guarantee or the non-discrimination guarantee would *ipso facto* fall foul of the mandate of the Constitution. However, speaking specifically in the context

¹² Juvenile Justice (Care and Protection of Children) Act, 2000, §2(d)(v).

¹³ Indian Penal Code, 1861, §317.

¹⁴ CONSTITUTION OF INDIA, Art.14.

¹⁵ CONSTITUTION OF INDIA, Art.15.

of exclusion through criminalization, stigmatization and invisibilization the following would have special relevance:

a) All means of social exclusion must be exposed and subjected to a public debate and open rationalization.

b) Immediate and far-reaching implications of social exclusion need to be understood and tested in the light of the Constitutional guarantees.

c) Decriminalization of petty and status offences need to be undertaken.

d) Legal regulation of all such behaviours that impair the poor man's ability to earn fair livelihood or fight the conditions of poverty need to be considered.

e) Measures designed to enhance the excluded section's abilities to seek access to justice need to be strengthened.

f) De-construction of the image of the vast sections of the excluded population, mainly the marginalized and poor, through education and media campaigning need to be undertaken on a regular and constant basis.