

# BEYOND APPEARANCES

A documentation and reflection by Partners for Law in Development, of the use of law and rights in community action, particularly by the partnerships supported by PLD across the states of Orissa, Tamil Nadu, Himachal Pradesh, Uttar Pradesh, Rajasthan, Bihar, Kerala, Delhi and Goa. This documentation is also available in Hindi titled ‘Vaykalkpik Kanooni Prakriyain: Ek Khoj (November 2002)’

*“Beyond appearances” refers to practices involving law and rights that are not restricted to the courtroom, but where the lawyer or the para legal joins with movements, organizations and sangathans to jointly undertake steps that advance rights of the affected groups.*



PLD

PARTNERS FOR LAW IN DEVELOPMENT

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Sourced from Nandita Haksar and Anju Singh, Demystification of Law for Women, Lancer Press (1986). PLD is grateful to Lancer Press for permitting use of the illustrations in this paper.

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## Introduction

Many years ago, when this author was still a law student, a cherished friend in the civil rights movement described lawyers as 'porcupinish'. This description of members of the bar, with its strong imagery of a prickly, individualistic and rather self-important being, is not far from the truth. When a lawyer attempts to shed the metaphorical quills, and use her/his professional skills and influence to further the interests of marginalised people, s/he invariably becomes isolated in the local bar, a bit of a maverick. Many lawyers who have tried to do just this are familiar with the anguish of unlearning and resolving attitudes of 'professional detachment' and individualism ingrained in us as students, with the need of the movements we support for a different kind of legal practice.

The present paper attempts to draw on a variety of such experiences in the Indian context, and weave them together within a tentative theoretical framework of 'alternative lawyering'. The paper also hopes, perhaps optimistically, to lay the groundwork for the coming together of a community of alternative lawyers in the country in solidarity.

Apart from looking at written materials on the subject, the paper draws extensively on the experiences of a programme initiated by the Partners for Law in Development (PLD) three years ago. The programme aims at integrating law into development/ social action to promote a rights oriented approach to development. It works through field projects which comprise of an NGO and legal partner working collaboratively towards this end. The project partners till date have been engaged in wide ranging issues such as promotion of women's rights in Orissa, Kerala, Delhi and Bihar, promotion of tribal and land rights issues in rural Rajasthan, setting up para-legal structures and documentation systems to build capacity of a women's group in crisis intervention in rural UP, developing a tree policy in Tamil Nadu, building documentation to support claims for coastal action in Tamil Nadu, and enabling people's participation in natural resource management in Himachal Pradesh.

This paper begins in Section I with a discussion of the current context of economic and social development and introduces the concept of an alternative, people-centred development. In Section II the role of law is examined. Law plays an immensely powerful role in society today, and it is this very power of law that necessitates an engagement with it. Yet any engagement with law must also

recognize that law is not central to social transformation but rather plays a supportive/collaborative role. Section III examines the role of lawyers in this framework, and whether alternatives to the traditional legal professional can be found. During the course of this discussion we find our focus shifting away from the legal professional towards legal resources, and Section IV goes on to examine the various kinds of legal resources which can serve as valuable inputs into people's struggles for social transformation. This section draws from the experiences of PLD and its partners since the inception of the programme. Moving beyond the current absorption of the legal profession with litigation and court centred law practice, we find that when using law as a legal resource for movements of the poor and the marginalized, vast alternative arenas of legal practice emerge. And that lawyers who want to collaborate with movements have begun to turn their attention to these arenas.

*Who Am I? Am I a practicing lawyer? If so, am I dealing in universal law or all pervasive lawlessness? What is my role? To demonstrate the majesty of law or to expose the impotence of law? To help the poor and disadvantaged through law and legal action or to increase their miseries, hardships, sufferings and injustices through law and legal action? Where is my place? In the court-room, with black robed persons all around talking of the constitution, law and justice, oblivious of the lawlessness, injustice and oppression outside; or is my rightful place in the fields, slums, factories, mines or the forest, where the suffering masses directly experience unconstitutionality, illegalities and injustice?*

*Girish Patel, 'Dilemma of a PIL Lawyer',  
Lawyers Collective, July 1988.*

## **Acknowledgements**

Many thanks are due to Madhu Mehra for initiating this paper and the ideas it presents, and her patient and insightful comments as the writing progressed. I would also like to thank D.J.Ravindran and S.Muralidhar, who spent considerable time going through the draft of this paper and giving critical as well as supportive advice on how it could be improved. Kalpalata Dutta's good humour and patience while I used PLD's resource library and office, are also greatly appreciated.

Thanks are also due to Partners for Law in Development, for their continuing support for my own experiments with alternative lawyering as a PLD partner.

The paper has relied heavily on discussions and ideas generated by friends and colleagues over many years, and the list is too long to go into here. I would however like to place on record the lasting influence of C.V.Subba Rao, whose spirit, inspiration and friendship has influenced all my work even so many years after he left us.

I would also like to thank my 'folks' for their support and for tolerating unnecessary temperamentalism on my part while I wrote this paper.

Palampur  
May, 2001



## Challenging the Existing Development<sup>1</sup> Paradigm

In the first heady days of development planning after India achieved a hard won independence from colonial rule, while drafting the initial five-year development plans, economists, planners and politicians alike were convinced that the fruits of industrial development would soon ‘trickle down’ to the poor. Influenced greatly by the socialist model of industrial development, Nehru and his team laid the foundation of what they believed would grow into a strong, self reliant and equitable economy. State investment was channelised into the public sector, heavy machinery and large scale industrialisation. Later, when the agricultural sector received a share of the attention, ‘green revolution’ technologies geared towards large scale production, mechanisation and commercial cropping patterns, were favoured.

The drafters of the Constitution placed great hopes in the document as the beginning of an era of social justice. Drawing on constitutions from around the world, and on their own experiences during the freedom struggle, they laid down a basic structure for the Constitution, the fundamental rights and directive principles of state policy, a system of checks and balances, again believing that the constitutional safeguards they so painstakingly laid down would transform the balance of power in the polity.

There can be no doubt that last fifty years of the republic have seen the social, economic and political fabric of the nation state transformed. A detailed examination of these changes goes beyond the scope of this paper, but suffice it to say that even as the temples of modern India were raised, the hopes of benefits of development reaching the most needy, slowly diminished. Even as the power of the old elites faded, and new dominant groups emerged who controlled economic and political power, what also emerged was new and unprecedented mechanisms for marginalisation of the poor and their alienation from economic gains as well as political participation.

The development of the legal system has reflected this process. A top heavy

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<sup>1</sup> In the present paper the term ‘development’ has been used to indicate social as well as economic development.



judicial system inherited from the British, based on the Constitution and a complex array of statutes, rules and guidelines, remained beyond the reach of the majority of the people. At the same time the inequities in the social fabric have heightened, as new forms of gender and caste discrimination continue to evolve.



Today with the country's wholehearted commitment to globalisation and liberalisation of the economy, even lip service to the 'trickle down effect'- be it with regard to economic development or justice-has been abandoned. It is clear that this is not just an aberration but an inherent characteristic of the social and economic development model. The persistence of rural impoverishment, and the marginalisation of the

poor not only from economic benefits and ownership of resources, but also from having a voice in the institutions which control these resources, places a deep question mark on the development paradigm itself.

Within this general pattern of development, the last fifty years have also witnessed the emergence of protest movements which have directly or indirectly challenged the dominant development paradigm. The growth of the women's movement and a nascent feminist jurisprudence has deconstructed gender discrimination within the social, political, economic as well as legal framework. In small pockets all over the country, unconnected with each other for the large part, a wide variety of movements of village communities, workers, tribals and forest dwellers, fisherfolk, dalits, and other marginalised groups, have emerged, bringing with them their own visions of an alternative, people-centred development.

These movements, whether issue based or ideological, have varied in intensity, method, sustainability as well as success. At present they seem also to lack in a larger unity and coherence, with many being contradictory and opposed to one

another. For instance the women's movement has sometimes found itself at loggerheads with the trade unions<sup>2</sup>, while the environmentalists are increasingly being opposed by human rights groups<sup>3</sup>. Some of the people's movements emerging around issues of ethnicity have taken up methods of violence, which have alienated them from other movements which are committed to the Constitution. Again, it remains beyond the scope of this paper to attempt to predict where these processes will eventually converge, or even whether they ever will. It is sufficient to say that the complexities, paradoxes, and struggles, which are a lived reality for these movements, are the seeds of an emerging alternative people - centred development paradigm, and the raw material for an alternative jurisprudence.

The term 'alternative development' or 'human needs centred development' is not easily defined, and means different things to different people in different contexts. To some it means ecologically sustainable development. To others it means development of participatory self governance mechanisms, with 'bottom-up' planning processes, and to yet others it means recognition of rights of those classes of people, such as women and dalits, which have been historically discriminated against. Again, it could mean distributive justice - that the fruits of economic and social development are enjoyed equally by all. At the core of the concept lies the belief that all people have the right to live without discrimination and with dignity. If these rights are to be given any meaning at all and treated as legitimate claims of the poor to land, employment, nutrition, health care, and political participation, then the development model adopted must reflect a commitment to these rights.

Clarence Dias and James Paul define three kinds of needs essential for human development<sup>4</sup>:

1. Basic needs - these are needs essential for physical well being, such as land, habitat, food, employment, and other goods and services.

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<sup>2</sup> For instance, see a case study of a free trade zone conducted by Dr. Padmini Swaminathan and reported in "Building Bridges: A Report on the workshop on Integrating Women's Rights in Human Rights". ForumAsia, November 1998.

<sup>3</sup> A poignant example of just such a face-off is the struggle around the Sanjay Gandhi National Park, Mumbai, where an environmental group has initiated the eviction of 3 lakh slum dwellers residing within the national park, to the fury of human rights groups working in the city.

<sup>4</sup> James C.N. Paul and Clarence J. Dias, 'Law and Legal Resources in the Mobilisation of the Rural Poor for Self Reliant Development' at 9.

2. Social, political and economic needs - these enable people to become self-reliant.
3. Needs for participatory social structures - these enable people to gain more decision-making power regarding the allocation and management of scarce resources.

The importance of mobilisation of the very people who have been marginalised by the existing development paradigm in order to challenge and transform it, can hardly be denied. Dias and Paul in various writings have stressed the need for autonomous, endogenous, participatory organisations and of self-reliant collective actions by the poor as essential vehicles of a human needs centred development.<sup>5</sup> A striking illustration of this recognition has been in the 1978-1983 Five Year Plan, which, while proposing massive shift of resources in favour of rural areas, states:

“Critical for the success of all redistributive laws, policies and programmes is that the poor be organised and made conscious of the benefits intended for them. Organised tenants have to see that the tenancy laws are implemented. Organisations of the landless have to see that surplus lands are identified and distributed to them in accordance with the law....”<sup>6</sup>

Having said this much, we now turn to the subject matter of the present paper, and attempt to examine the role of law, and more specifically the role of lawyers, within these emerging processes.

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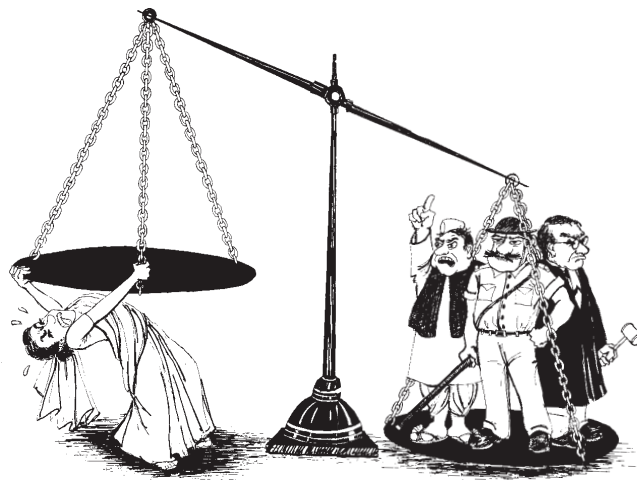
<sup>5</sup> *Supra* note 4 at 11.

<sup>6</sup> As quoted in Clarence J. Dias and James C.N. Paul, ‘Observations on Lawyers in Development and Underdevelopment’ in C.J. Dias, R. Luckham, D. Lynch and J.C.N. Paul eds. *Lawyers in the Third World: Comparative and Developmental Perspectives* (1981) at 354.

## II The Role of Law

At the time of independence, 200 years of colonial rule had all but decimated traditional dispute settlement mechanisms in the country. It can be argued that there was no option but to acquiesce to inheriting a colonial justice delivery system, along with all its baggage of adversarial dispute settlement, rules of procedure, civil and criminal laws, the judiciary and the legal profession. The justice system served the ends

of the development model adopted by the emerging nation state by providing mechanisms for protection and settlement of issues which were of concern to dominant interest groups.<sup>7</sup> At the same time the increasing professionalisation of the bar and the demographic concentration of lawyers in urban centres made the courts more



and more out of reach for the poor, and especially the rural poor.

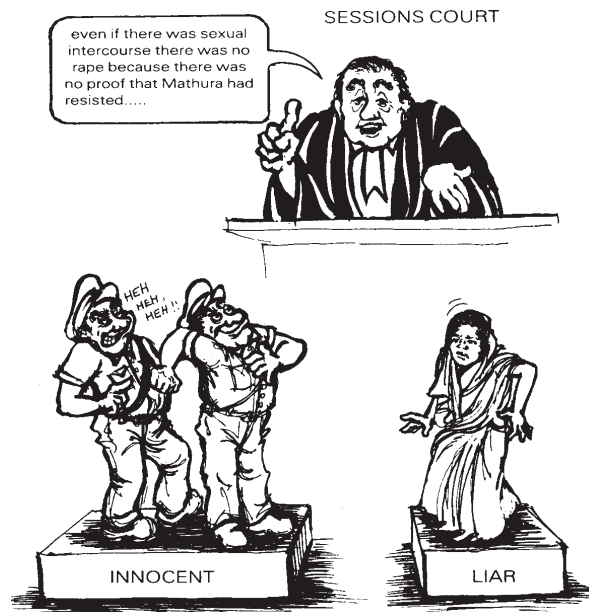
In the present paper the term *law* refers not only to *legal rules*, but to the *legal system* as a whole. This is because law is not just a collection of texts, but operates within a system. The legal system, in turn, interacts with and is influenced by other social institutions, as well as the cultural and social reality within which it is placed.

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<sup>7</sup> An illustration of this argument is found in the Indian Penal Code, 1860, where a large majority of the substantive provisions deal with offences related to property, offences against the state, the armed forces and public servants, interference with the processes of justice, and public peace, health and morality.

Law plays a very important role in our lives in the present political and social context. Though law constitutes a plurality of principles, knowledges, and events, yet it claims a unity through the common usage of the term 'law'.<sup>8</sup> This unity or coherence is derived from its black letter form, its power of intervention, regulation and adjudication, supported by the combined strength of the legislative, the executive and the judicial arms of the state.<sup>9</sup> Law has an ability to impose its definition on everyday life and has, as a discourse, appropriated to itself the power to differentiate between what is the truth and what is false, making law the final arbiter on an issue. It claims to have the method by which the truth of events is established, namely, the legal method<sup>10</sup>. As the legal process translates everyday events into legal relevances, it excludes a great deal of what may be relevant to

the parties, demonstrating its power to disqualify or accord a lower status to, alternative accounts of reality and truth. Even when it does accept other forms of knowledge, it does so by appropriating them into the legal domain. That the law adopts a reductionist approach to 'truth', reducing the issues that come before it to the bare legal question involved, means that reality is viewed through a tunnel. This power is reinforced by the fact that law's assertion



<sup>8</sup> Carol Smart, 'The Power of Law' in *Feminism and the Power of law*, (London: Routledge, 1989)

<sup>9</sup> Madhu Mehra, 'Exploring the Boundaries of Law, Gender and Social Reform', *Feminist Legal Studies* Vol.VI, no. 1 (Sage 1998) at 71-72.

<sup>10</sup> *Supra* note 8 at 21-22, Carol Smart describes the three elements of legal method thus:

1. boundary definition - this is the process by which certain matters are described as outside the realm of law, falling rather in the category of political or moral issues.
2. defining of relevance - certain facts are seen as relevant to the legal question involved and others are excluded as being irrelevant.
3. case analysis - this is the process by which certain judgments become 'good' law and therefore form precedents to be followed in future, while others become 'bad' law.

of what is the truth is backed by the state and the state machinery, which swings into operation to ensure that the law has the final authority.

Clearly, law exerts immense power on the popular psyche. It sets normative standards for social behavior and interaction. The people perceive law as the final arbiter of, often conflicting, rights, and also expect the law to deliver justice. The fact that law in practice often does not deliver justice is not as important as the fact that law is perceived as the ideal. At the same time the endemic corruption within the legal system, and the immense powers in the hands of the law enforcement machinery, have tended to reinforce a popular perception of law as coercive and intimidating. The common person has a definite notion, based perhaps on anecdotal information, that the law, inherited from India's colonial masters, is biased in favour of dominant interest groups, towards the protection of private property, and is deeply entrenched in feudal and patriarchal values.

### **Why Law?**

Before we turn to the need to engage with law, it would be useful to list some of the reasons why law is *not* used by marginalised groups and people's movements to enforce their rights<sup>11</sup> :

1. Ignorance and suspicion: Ignorance of their rights under the law, and a suspicion of the legal process, especially where the legal system is in an alien language, and is mystified and inaccessible, severely restricts rural organisations from even considering engagement with the law as an option.
2. Fear of reprisal: In many areas, there is a very real fear of reprisal from vested interest groups, which are often far better organised and have the backing and support of the state administration, and this prevents the group from asserting rights which it may be aware of.
3. Institutional biases: Even if a group is able to overcome the obstacles of ignorance, suspicion and fear, there is still the fact that institutions, including law enforcement agencies, courts, judiciary as well as state administration are heavily biased against the poor, and its functionaries are closely linked to existing political and social elites.
4. Individualisation of the legal profession: The orientation of law practitioners is individualistic, and a chamber-based, specialist practice is preferred. The

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<sup>11</sup> *Supra* note 4 at 17-18.

majority of lawyers are demographically situated in urban centres and are far removed from the struggles of the rural poor - they must take a huge professional risk to become accessible, and not many are willing to do this.

A further limitation of the legal system is that it is reactive, in the sense that it needs to be activated by a specific claim, rather than pro-active. This skews the law in favour of those who have access to information and the means to activate the legal system, and against those who are without these means.<sup>12</sup>

*What then is the role of law in development?* There is an overwhelming notion within activism that legal action is secondary to direct action in the struggle for social transformation, and it is important to examine this perspective. Upendra Baxi describes the legal system as a *contradictory social reality*.<sup>13</sup> On the one hand the legal system serves as an instrument of oppression, manifesting the tendency of the state towards lawlessness while trampling on those already marginalised - what he describes as the 'policemaniac' character of the state.

On the other hand the law also lays the foundation of the rule of law - the recognition of certain fundamental rights and freedoms which are given constitutional status and are applicable, at least notionally, across the board for all people. Basic values such as formal and substantive equality and freedom are recognised, and structures and institutions exist within the legal system to enforce these rights. A growing body of international human rights standards have created spaces within and beyond the existing statutory law for the recognition of rights of marginalized people. Both these roles of law coexist in a state of uncomfortable balance.

The very fact of law as a site of power necessitates that struggles for altering the existing social and political status quo must engage with law. That law plays these dual roles described by Baxi means that there exist within the legal arena sites of contention which provide opportunity for change. Yet the law cannot and should not become the sole arena of struggle.

The relationship between social action and legal action in feminist struggles can illustrate this argument. At the turn of the 19<sup>th</sup> century in Europe, and through

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<sup>12</sup> Marc Galanter, "Why the Haves Come out Ahead: Speculations on the Limits of Legal Change".

<sup>13</sup> Prof. Upendra Baxi 'Law, Struggle and Change: An Agendum for Activists' in *Social Activists and People's Movements*, Walter Fernandes ed. (1985) at 112-113.

most of the last century in India, it is not surprising that law was a focus of feminist struggles. As long as starkly discriminatory laws remained on the statute books, the law was an obstacle to the attainment of fundamental rights and substantive equality for women. As discriminatory laws have slowly been repealed and/or replaced with more gender sensitive laws, it is but natural that the focus of struggle has shifted away from the textual law to other sites of struggle.<sup>14</sup> For instance, the inadequacy of the 1961 Dowry Prohibition Act prompted the women's movement in India to campaign for law reform, and the struggle culminated in a set of changes in the criminal laws relating to dowry in 1983 and 1986.<sup>15</sup> This was a definite strategic achievement for the women's movement, since through the criminalisation of dowry and domestic violence, the law censured and brought within state control hitherto private conduct. But what was initiated by the women's movement as grounded in women's perception of reality, became appropriated by law as the legal discourse usurped the task of re-defining the problem, and imposing its own definition of the truth.<sup>16</sup> What began as a campaign for law reform continues today as a struggle within the family, in court rooms, police stations, and 'crime against women' cells, so that women's experiences of violence are recognised in a substantial and meaningful way.

While on the power of law in discursive strategy, it would be useful to draw a distinction between civil and criminal law, two entirely different arenas. It is a truism that the operation of the criminal justice system, beginning with the codification of offences, to the law enforcement machinery, bail procedures and incarceration, is markedly anti-poor. Emergent feminist deconstruction of the criminal justice system has also exposed the complex levels of gender discrimination that occur. The criminal justice system is today increasingly used as a political tool to neutralize opposition to dominant political groups, manifest in laws such as the Terrorist and Disruptive Activities (Prevention) Act, 1985, and its reincarnation, the proposed Prevention of Terrorism Bill, 2000. Where criminal laws which protect the rights of marginalised groups have been enacted, such as the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, these have been difficult to implement even while they hold an important symbolic significance.

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<sup>14</sup> Carol Smart and Julia Brophy, *Locating Law: A Discussion of the Place of Law in Feminist Politics*.

<sup>15</sup> The first set of changes in 1983 introduced section 498-A IPC and section 113A in the Evidence Act, 1892. The second set of changes in 1986 brought section 304-B IPC, and section 113B in the Evidence Act.

<sup>16</sup> *Supra* note 9.



The domain of civil laws, on the other hand, has provided a much larger space for intervention and social transformation. Laws relating to land reforms have transformed the balance of social relationships in many parts of the country, while the 73<sup>rd</sup> and 74<sup>th</sup> Constitutional Amendments have empowered panchayats (local self-governance mechanisms) all over the country, providing critical spaces for people's movements to carry these changes forward. Similarly, the debate around reservations for scheduled castes and scheduled tribes in education and government jobs, has seen the polarisation of Constitutional safeguards *against* the dominant classes, mainly upper castes.

The difference between the two arenas is illustrated, somewhat poignantly, by the struggle around the issue of deaths due to torture in police custody. While civil rights groups have met with some measure of success over the last twenty five years in compelling courts to grant monetary compensation to the families of victims of custodial violence, whether as violations of Article 21 or as tort violations, the struggle to get the errant policemen charged, tried, convicted and sentenced for the crime of causing wrongful death has been a draining and uphill task, bringing no lasting systemic changes.<sup>17</sup>

While shifting the focus away from law as it exists on statute books to other sites of struggle, it is important to recognise that the law and the legal system is not a homogenous unit with a unitary purpose. Rather it must be recognised that there are contradictions within the law as well as in legal practice, between constitutional rights and administrative norms for instance, which permit tremendous scope for creative use of law and legal resources in bringing about social transformation. It is important to recognise that law cannot lead social change, but it would also be a mistake to discard the tools law provides to strengthen the struggle for social change. Disengagement with the law is not a luxury that people's struggles can afford, nor can they afford to restrict the struggle to the arena of law alone.

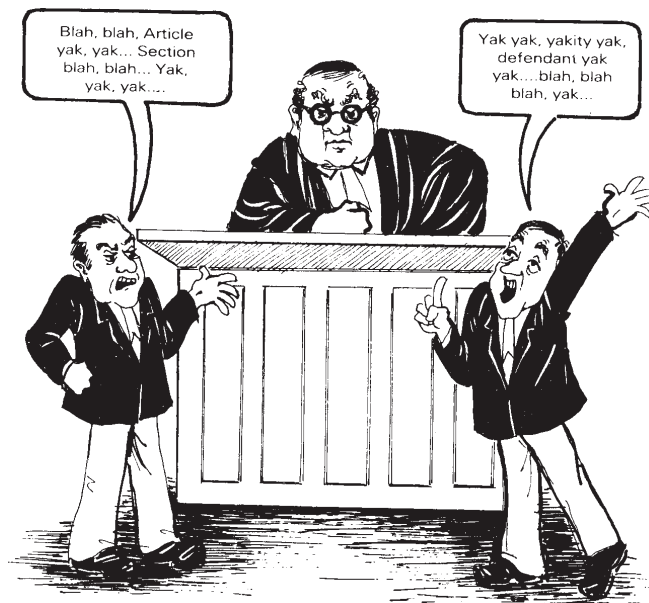
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<sup>17</sup> See various reports of People's Union for Democratic Rights, Delhi.



## Role of lawyers : The search for alternative lawyering

Legal education is largely geared towards training students as skilled professionals, while the lure of eventually amassing great wealth plays its own persuasive role. Even as law students train within a curriculum geared towards mainstream law practice, they learn to cultivate relationships, 'contacts', and behavioral skills which will further their careers as professionals. Early in her/his training as a student, s/he internalises an attitude towards law as an impartial, autonomous field of knowledge, with the individual lawyer as the legal 'expert'. Orientation in law schools in the social reality in which the vast rural and urban poor live, in issues of development, feminism, and participatory democracy, is rare. Even more rare is training in the legal processes which most directly impact on the lives of the poor. The vast arena of administrative rules, norms and guidelines, welfare schemes and political processes, so imperative in the lives of the poor, remain alien to legal training.



Once a law student enters the profession, usually in an urban centre already clogged with lawyers, the young lawyer is under pressure to make a mark in the profession, with other 'successful' lawyers as role models. S/he finds that an aura of power surrounds her/him once s/he dons black robes, and slips easily into treating the client as a dependent, inferior being who does not understand the intricacies of the law and thus does not really 'need to know'. Exerting this power over her/his client, s/he soon begins to control the client's narrative itself, and

projects in the litigation that part of the client's story that highlight victimisation, while narratives of self-help, empowerment and control are submerged.<sup>18</sup>

Applying a traditional lawyer-client relationship of dependency and mystification, however well meaning, in an alternative development context, can be frustrating and even dangerous. The limitations of a traditional reductionist approach to individual problems, are magnified several times when applied to a people's movement which challenges existing development mechanisms or injustices. The primary challenge lies in countering the tendency of law to reduce a social, political, or economic problem to its strictly legal component, and this cannot be done by a lawyer in the traditional mould. Lawyers tend to restrict themselves to a reactive, delivery of services role, whereas legal assistance geared towards alternative development must take a multi-disciplinary approach and ensure full participation and control by the client-group. It is this group that takes the risks - often serious risks of backlash from the state itself - and it must take its own fully informed strategic decisions.<sup>19</sup> The process of lawyering thus has to be a collaborative effort rather than an individualistic one.

When examining how lawyers and the law can be used to advance the movement for a people centred development, it is essential that we move away from traditional roles and search for creative ways to use, mould and extend existing structures.

Gerald P. Lopez examines the role of what he terms the 'rebellious' lawyer in progressive law practice,<sup>20</sup> a lawyer who adopts a 'problem solving approach'. In a traditional role, when a client comes to a lawyer with a problem, the lawyer, even when starting to listen to the story, looks for those elements that can be converted into a litigation strategy, and the relationship starts off on the wrong foot immediately. The client soon learns to 'edit' her/his story to suit the needs of the litigation strategy, On the other hand a lawyer willing to adopt a problem solving approach will then be open to listening to the complete client narrative, examine the entirety, recognise that the client is in fact the 'expert' on her/his real situation. A 'rebellious' lawyer together with the client, will look for solutions

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<sup>18</sup> For a discussion on listening to client narrative, see Anthony V. Alfieri 'Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative' *Yale Law Journal*, Vol. 100 (1991).

<sup>19</sup> *Supra* note 4.

<sup>20</sup> Gerald P. Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice*, (Westview Press, 1992)

outside the domain of traditional law practice. These could include options for self help, for collaboration with others who are similarly placed, for alternative arenas in which the problem could be lobbied, for instance within the administrative structures of the state, rather than just the courts. The relationship between the lawyer and the client then becomes one of collaboration, of working together towards finding a lasting, sustainable and empowering solution, rather than seeing litigation as the only solution and then trying to fit the problem into the necessary strait jacket to convert it into a court case. In short the rebellious lawyer is not afraid to let go of the power and control implicit in the traditional lawyer-client relationship in order to help the clients help themselves.

Because developmental legal practice is critical of the law and the legal system, it only follows that its boundaries go well beyond the parameters of traditional legal practice. Alternative legal practice strategies also include empowerment of client communities through legal education and community action.<sup>21</sup> Divesting themselves of the status of legal 'experts', alternative lawyers work towards eliminating undue dependence of communities on lawyers and the demystification of law and legal processes. When a collaborative approach to lawyering is adopted, the group and the lawyer work together towards building a pool of 'legal resources', as distinct from 'legal services' and enhancing the capacities of the community to generate its own legal resources by breaking the monopoly of lawyers over engagement with the law.

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<sup>21</sup> Evalyn G. Ursua and Carolina S. Ruiz, 'Feminist Legal Advocacy in the Phillipines: Defining a Framework, Women's Legal Bureau, Inc. (1998) at 11.

## IV Types of Legal Resource

When we think of the role of law in social transformation, the first image that comes to mind is the role of law in the courts and the traditional adversarial structure of litigation. No doubt the courts have played an important part in bringing to the fore a culture of rights and concomitant obligations on the state



to protect and realise these rights. No small part has been played by the Supreme Court of India and the various High Courts by using the tool of public interest litigation (PIL) in trying to make constitutionally recognised rights a reality for the poor. Activist judges have transformed the legal doctrine of *locus standi* to make the legal system more accessible for the poor, and sought out ways to make the law pro-active. The development of legal aid as a fundamental right is an important effort in bridging the gap between the justice system and the poor.

But the fact remains that public interest litigation as well as state sponsored legal aid have largely reflected the priorities of the elite, albeit the liberal elite, and the participation of the people has been limited.

There is, however, a growing corpus of experience and literature that breaks the boundaries of the traditional roles of lawyers, judges and of law itself in social transformation, that tries to free itself from the norms and rules of an inherited colonial justice system, in order to make the law more responsive to the needs of people centred alternative development.

## **A. Legal Literacy and Education:**

As stated earlier in this paper, marginalised people are suspicious of the legal system and often unaware of their legal rights. Lack of awareness of rights is not an aberration, but an inherent feature of a system of education which is geared towards functionalism, towards preparing skilled human resource for industry and governance, rather than encourage self reliance and dignity. No small part has been played in this by the lawyers themselves in continuing to maintain the mystification of the law and legal processes.

Thus any form of collaborative lawyering must start with educating the group or the individual about their rights and their status under the law. Kapur and Cossman define three types of approaches to legal literacy as a tool for social transformation in the context of feminist engagement with the law<sup>22</sup>, which we can extrapolate to address the issue of alternative development :

- a. Access to justice : This approach addresses the issue of educating individual people about their rights, so that they will be in a position to enforce these rights. Access to this information is seen as the first, and often most significant, step in ensuring access to the law. However, the problem of access is framed within the liberal discourse of law, which focuses on individual rights - lack of access is seen as a problem of individual awareness, rather than as a structural problem. Such an approach is extremely limited in that it does not recognise that there are structural obstacles within the law and the legal system which operate against disadvantaged groups, nor does it recognise the role law has played, and continues to play, in the continuing subordination of these groups. Economic barriers to accessing justice are also not recognized. Without examining these issues, such an approach can create and reinforce unrealistic expectations of the law, leading to eventual disenchantment.
- b. Legal literacy for mobilisation: Under this approach legal literacy is seen as a tool in collective mobilisation for social and political action, and is seen as a first step within the broader context of political strategies. While it moves beyond the limits of the liberal approach of seeing access to law as an individual problem, it is not without its attendant risks. The approach risks

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<sup>22</sup> Ratna Kapur and Brenda Cossman, 'Feminist Legal Revisions: Strategies for Engaging with the Law' in Ratna Kapur and Brenda Cossman *Subversive Sites: Feminist Engagements with Law in India*, (Sage, 1996)

cultivating dependency on activists and lawyers who set agendas and run campaigns. Again it does not sufficiently address the limitations of law, and notwithstanding the more collective focus of this approach, disadvantaged groups may still be encouraged to believe in the centrality of law as a solution to their problems.



- c. Legal literacy for empowerment :  
When empowerment is the goal, legal literacy must be used as a tool to develop people's critical consciousness, the ability to look



at power relationships affecting their lives and ultimately to challenge and transform these relations. Legal literacy within this approach is defined as the 'process of acquiring critical awareness about rights and the law, the ability to assert these rights, and the capacity to mobilize for change'.<sup>23</sup> Thus people must be allowed to reflect upon their social and economic environment, to connect the legal information with their lives, develop an understanding of the historical and structural causes of their subordinate status, and then evolve solutions. Within this approach, mobilization remains an important objective of legal literacy, but not its sole or even primary objective. When legal literacy is seen as a tool for empowerment of disadvantaged groups, and as a resource for developing self help and self critiquing skills within the group, the collaborative lawyer is drawn into areas beyond traditional boundaries. Development of legal knowledge and skills within the organisation therefore becomes a necessary part of the process.

It would be useful to turn to one such effort made by PLD's legal partners. *Vanangana* is a women's resource organisation working towards empowerment of women through helping them learn technical skills and secure gainful employment

<sup>23</sup> Margaret Schuler and Sakuntala Kadirgamar-Rajasingham, 'Legal Literacy: A Tool for Women's Empowerment' in Margaret Schuler and Sakuntala Kadirgamar-Rajasingham, *Legal Literacy: A Tool for Women's Empowerment* (UNIFEM, 1992).

to improve their position in society. The organisation also deals with the issue of violence against women. During the first phase of the partnership, the legal partner, Huma Khan, did not restrict herself to holding legal literacy and training workshops for activists and women within the organisation. She went beyond that to setting up structures within the organisation which are responsive and conscious of legal information and issues. The group together developed creative legal awareness materials in the local language, which state the law in simple terms and use illustrations to make the information more accessible. These materials were then used during mobilisation campaigns on violence against women among rural women, during street plays, demonstrations and village meetings. Going further, in order to reduce the organisation's dependence on her skills as a trained lawyer, Huma devoted special energy to building a team of paralegals from the community, and a support team of grassroots workers who are given basic legal skills and do the information gathering. Urmila, one such paralegal, today is a legal resource in her own right and is a PLD partner for the year 2000-01.

## **B. Litigation:**

The importance of litigation as a tool for disempowered groups and individuals lies in the fact that rights to essential needs can and are asserted in courts. The court justice system provides a range of litigation strategies for the protection and advancement of rights. When examining the role of litigation as a resource in people centred development, the focus must remain on the collaborative lawyer:

- a) **Legal Aid** : The traditional concept of legal aid to the poor is based on the reading of a 'due process' clause into Article 21 of the Constitution. The Supreme Court has interpreted Article 21 to include the right to fair trial which includes the right to legal representation<sup>24</sup>. While at the outset the right to be provided with a lawyer at state expense was seen to be restricted to defence in criminal trials, where issues of personal liberty were involved, today legal aid as a right has been extended to all forms of legal proceedings before a variety of fora.<sup>25</sup> Legal aid as conceptualised by the various committees that went into the issue,<sup>26</sup> was seen as an important tool for

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<sup>24</sup> *Madhav H. Hoskot vs. State of Maharashtra*, AIR 1978 SC 1948.

<sup>25</sup> The Legal Services Authorities Act, 1987, defines *legal service* under section 2 (c) as "conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter".

<sup>26</sup> Most noteworthy among these are the Report of the Legal Aid Committee, Government of Gujarat (1971) headed by the then Chief Justice of the Gujarat High Court, Justice P.N. Bhagwati, followed by the Report on National Juridicare: Equal Justice - Social Justice, Government of India (1978).



the transformation of civil society and its ultimate goal was distributive justice and the eradication of poverty.

Sadly, the operation of state sponsored legal aid programmes has fallen short of this ideal.<sup>27</sup> Legal aid schemes have been conceptualised within a liberal interpretation of rights where the focus remains on individual rights, and structural causes of subordination of disempowered groups have remained unaddressed. In addition, there is a legitimate logistical obstacle to providing one-to-one legal aid to a vast underclass when lawyers remain largely concentrated in cities and oriented towards mainstream law practice.

However this is not to say that legal aid to the poor has no role at all as a legal resource in alternative development. A large number of organised groups, NGOs, women's groups, village communities and activists have set up legal aid cum counseling centres as part of their overall mobilisation strategy within a particular community. A legal aid clinic set up within the reach of a local disadvantaged group may adopt a one-to-one approach to the individual cases which come to it, counseling clients individually, approaching courts by way of individual petitions, and so on. However, when the lawyer adopts a 'problem solving approach' even such a one-to-one setting becomes the starting point for a larger, more collective struggle. Getting individuals who are similarly placed in touch with each other, generating a realization that their problems are not individual but part of a shared reality, getting them to explore options for self help, become part of the role of the 'alternative' lawyer.

b) **Test Case Litigation:**

Conducting legal aid clinics serves another critical purpose- it provides a fertile ground for identifying cases that could turn into test case litigation. The tool of test case litigation has been used by activists and lawyers in order to use a particular fact situation of rights violation, to push the courts and the justice system towards evolving new legal



<sup>27</sup> N. R. Madhava Menon 'Legal Aid and Justice for the Poor' in Upendra Baxi ed. *Law and Poverty: Critical Essays* (1988).

norms, whether substantive or procedural. While it is often difficult to predict which case will turn into a test case, once such a case is identified, it becomes an important focal point for mobilisation, legal awareness, campaigns for law reform and political lobbying. Often the focus shifts away from the end result of 'winning' or 'losing' the case, to the process of using the case as a mobilisation tool.

It must be pointed out here that there are several ethical dilemmas of legal representation and lawyer accountability in test case litigation, which remain unresolved. When an individual case of rights violation is appropriated by a group of similarly situated persons as a test case to push for changes in the law which will benefit them all, often the interests of the individual, perhaps in reaching a settlement, may be subordinated in the larger interest of the group, which may be benefited from seeing the litigation through to its end. In such situations the lawyer must face the agony of balancing her/his professional commitment to the individual client with her/his political commitment to the client-group.<sup>28</sup> Another dilemma revolves around balancing confidentiality and public advocacy. For instance, when an incident of sexual assault becomes a point of mobilisation and campaign, feminist lawyers face the dilemma of balancing the need of the movement for publicity and debate around the case, with the survivor's right to privacy and protection from her life being turned into a media circus.<sup>29</sup> These issues need to be tackled by alternative lawyers and groups together.

**c) Public Interest Litigation:**

The tool of PIL evolved out of a realisation within the bench and the bar that the structural obstacles within the legal system were stacked against the poor and disadvantaged groups, and that access to justice remained a remote dream for large sections of the Indian people. The relaxation of the rule of locus standi and the removal of procedural complexities for PIL cases has no doubt opened up a world of possibilities. A range of economic, social, and developmental issues have been brought before the courts in the last 20 years, with some measure of success.

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<sup>28</sup> *Supra* note 22 at 298.

<sup>29</sup> Just such a dilemma has been discussed in Ursua and Ruiz, *supra* note 21 at 23.

At the same time it remains true of a large majority of PIL cases that they reflect the priorities of elite groups rather than those of the rural and disadvantaged communities. PIL suffers from many of the limitations of mainstream law practice. Social realities are complex and discrimination is more often than not inter-sectional, requiring a multi-disciplinary approach. A PIL filed before a court without following a process of consultation and participation where it emerges as a need from a people's struggle, is bound to have an inadequate understanding of the social and economic dynamics involved, and can have devastating consequences.

As an illustration, it would be useful to examine the process in *Centre for Environmental Law, WWF-I vs. Union of India and others*<sup>30</sup> before the Supreme Court of India. The petitioners, WWF, approached the Supreme Court in 1995 on a limited question. All over the country, state governments had issued notifications of intent under the Wildlife Protection Act, 1972, demarcating areas for wildlife sanctuaries and national parks. However, the process of assessment of claims for compensation of those who would be dispossessed by these sanctuaries and parks was not being undertaken and as a result the final proclamation notifications under section 21 of the Act were not being made. At the request of WWF, the Court issued a blanket direction on August 22<sup>nd</sup>, 1997, to all the state governments to complete the compensation procedure and issue final notifications within one year.<sup>31</sup>

The results have been catastrophic. The court did not consider that thousands of people are dependant for their livelihood on the forests and grasslands falling within the demarcated areas, and many others live there. Their claims cannot possibly be settled in a year. Nor did the court examine the current debates within activist and academic circles questioning the conservation model on which the existing law is based, which excludes rather than involves people in conservation. The state governments have used the Supreme Court's directions to advance their own agendas of evicting whole communities from these areas, often only to make way for large industrial projects. In many areas no claims for compensation were filed by the people likely to be affected as state governments short circuited claims procedures provided by the Act under the guise of meeting the deadlines issued by the Supreme Court.

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<sup>30</sup> Writ Petition (Civil) no. 337 of 1995.

<sup>31</sup> 1997 (6) SCALE (SP) 8

An application for intervention filed by jointly several NGOs working on conservation issues<sup>32</sup>, placing detailed information regarding the consequences of the above order, has been rejected by the Supreme Court.

The above case illustrates that the courts are constrained by their own limited knowledge of specific issues and their remoteness from lived realities of rural communities, or even the urban poor. They are further constrained by a court procedure that is adversarial rather than consultative. Their lack of independent research inputs and information mechanisms are compounded by lawyers, themselves often inadequately informed, who may even withhold critical information from the bench in order to advance their own agendas.

However PIL as a tool is not without its worth when seen in the context of a larger advocacy and mobilisation strategy within a human needs centred development paradigm. Manna Ram Dangi, a PLD partner and lawyer working with *Astha Sansthan*, has creatively used the tool of PIL. Due to the proposed Kodyagaun Dam, 56 families were displaced in Dungarpur district in Rajasthan without any compensation or rehabilitation. Manna Ram was already in the process of building a team of paralegal workers with the NGO, and used this issue as a focal point. The team went into the affected area in order to assess the problem and mobilise the affected families. Upon their feedback, the team along with the lawyer devised a litigation strategy and evolved a comprehensive survey format. The team then collected detailed information regarding the displaced persons and their property, towards the goal of filing a writ petition in the High Court. The process is exceptional in that the lawyer devised the litigation strategy in a consultative manner along with the affected people and the paralegal team. Detailed data was gathered not only keeping in mind the litigation but also as a means of mobilisation. He also used this opportunity to hone the skills of the paralegal team itself. A PIL which emerges from a well grounded consultative process can become a real tool for empowerment.

## **Evaluation**

The parameters for evaluation of the litigation strategy are usually set at the planning stage itself. Thus if the objective is the realisation of an individual claim, the evaluation will be on the basis of whether the case is “lost” or “won”. While

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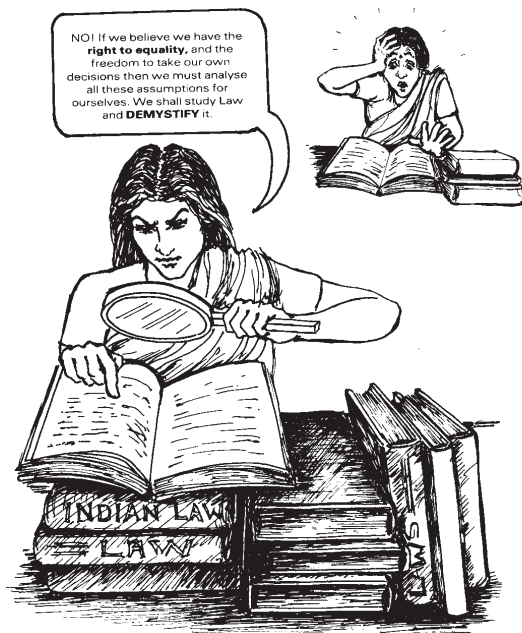
<sup>32</sup> Including PLD's partners Manna Ram Dangi and *Astha Sansthan* in Rajasthan.

gaining redress for the specific claim is naturally important, the objective of the litigation could also be to use the litigation as a focus for mobilisation, as an opportunity to advance rights discourse within legal institutions and the courts, or even to advance a particular question of law or procedure in the public domain for debate. In such a situation, while ‘winning’ the case becomes an important boost, ‘losing’ cannot be seen as the end of the road and the culmination of a wasted effort, but rather as part of an ongoing struggle.<sup>33</sup>

### C. Research and Documentation:

Action research in law can take several forms depending on the purpose. The following instances are only meant to be illustrative of the wide range of activities research and documentation can feed into :

- a) When using law as a tool for mobilisation, the organisations of the poor often find themselves constrained by inadequate information on the laws that affect them and the procedures which are applicable. Legal research includes investigation of the laws as well as administrative rules, notifications and guidelines which affect the group, as well as spaces for advocacy and interrogation available, judicial precedents, international documents and status in other countries.



Such information is fairly easy for a legal practitioner to obtain, but remains inaccessible to disadvantaged groups.

- b) Demystifying the law by translating and simplifying this information into the language and context of the community, and using creative methods to make it accessible, is the next step, and can prove to be an extremely empowering

<sup>33</sup> Kapur and Cossman, *supra* note 22 at 312.

exercise.<sup>34</sup> This lays the ground work for consultation processes within the community, where the community is fully informed about its rights under various statutes and can jointly take its own decisions, reducing its dependency on legal professionals.

- c) While planning an advocacy strategy, whether it involves political advocacy or litigation, socio-economic data which substantiates the claims of the disadvantaged groups can be crucial. The legal professional may often be called upon to step outside the realm of law and legal interpretation into socio-economic research and documentation in order to sustain the advocacy strategy of the group. Sometimes this happens for the simple reason that lawyers are trained in basic writing skills, which may not otherwise be available in the group. Documentation of the struggle in the form of fact finding reports, or otherwise, may also become part of the inputs of the legal professional. Thereafter, the lawyer uses her/his professional skills to translate information on socio-economic conditions into the language of rights in order to make it comprehensible to the courts.
- d) Similarly, when using law reform as a strategy, a lawyer may be called upon to research the existing legal positions, the current debates on the law, various proposals for reform and their implications. Translating the agenda of the group into a coherent proposal for law reform, must be a collaborative effort between the lawyer's creative and legal skills and the group's analysis of the socio-economic context. The success of this exercise will depend on how successful the lawyer's sensitisation to the complexities of the situation are, and how far the group has developed its own understanding of law and legal processes.

#### **D. Alternative Dispute Settlement Mechanisms:**

The evolution of 'modern' legal systems in third world countries, imposed during colonisation, had little or no connection with traditional dispute settlement mechanisms. In fact, these systems have actively displaced and destroyed traditional systems. Imposed from above, in an alien language and promoting alien procedural and substantive norms, the legal system became increasingly alienated from the lives of the common people. The professionalisation of law inevitably led to

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<sup>34</sup> For an all time classic, see Nandita Haksar and Anju Singh, *Demystification of Law for Women*, Lancer Press, (1986). The illustrations in the present paper have been taken from this book.

differential access to the courts and resulted in a differential capacity to use law, especially in conflicts over control or equal distribution of land, water, credit, prices, health care and other essential goods and services.<sup>35</sup> The realisation that the justice system was becoming increasingly irrelevant for the poor, and in fact operated as a tool in class domination, led to several experiments in looking for alternative dispute resolution mechanisms.

- a) Strengthening community based mechanisms: While the decisions of traditional community based mechanisms for dispute settlement have a tenuous recognition in law, they have immense importance in community life. Following customary laws, and simple rules of procedure, they provide what can be termed a 'rough justice' which is immediate, and has the active support and participation of the local people. The customary laws are deeply rooted in the collective social, economic and cultural reality of the community. These systems have often come into conflict with the mainstream legal system, as members of the local community challenge their jurisdiction in the local courts. In certain tribal areas of the North East, the clash between the traditional and the mainstream legal system has become a site of the political struggle of the local people against domination by the Indian state.<sup>36</sup>

Perhaps the most important distinction between community based mechanisms and the mainstream legal system is the discourse on rights. Rural communities are still rooted in traditions of interdependency and sharing, and are steeped in notions of collective rights, be they right to property and inheritance, right to water, or usufruct rights on the forest. The mainstream legal system tends to centre the notion of individual rights, devastating whole communities once the individual right to buy and sell property captures the popular imagination. There have been efforts to revive these traditional systems as part of the larger goal of promoting the sense of collectivism in the community.

At the same time, it must be pointed out that the customary systems are not without their problems, and can operate against groups within the community which have been historically discriminated against, such as women and dalits. The notion of collective rights can stonewall efforts by women to

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<sup>35</sup> Clarence. J. Dias and James. C. N. Paul Observations on Lawyers in Development and Underdevelopment, *supra* note 6.

<sup>36</sup> Nandita Haksar, 'Human Rights Lawyering: A Feminist Perspective', *Engendering Law - Essays in Honour of Lotika Sarkar*, EBC (1999) at 83-86.

assert their right to a share in matrimonial or maternal property or their right to self determination, or effort by dalits to gain access to community water sources, and so on. We cannot forget that many of these community based mechanisms are steeped in patriarchal and caste hierarchies which offer no recourse for redress or empowerment.<sup>37</sup> Again, the dangers of strengthening community based mechanisms of dispute resolution in the context of a polity where the right wing holds considerable sway, cannot be overemphasised.

The challenge is to evolve methods by which community mechanisms can be strengthened along with the rights of women, dalits and other marginalised groups. One such experiment has been the Mahila Panchayat in the Chattisgarh region of Madhya Pradesh. When 19 year old Thagni Bai was murdered by her father-in-law in Torla village, local activists were up against a wall when the police refused to do an investigation. The Chattisgarh Mahila Jagriti Samiti raised the issue before the Mahila Panchayat. At a hearing characterised by participation of the entire village as well as residents of surrounding villagers, the panchayat decided on a social boycott of the murderer and his family.<sup>38</sup> Here the traditional mechanism of the panchayat has been transformed by the fact that it is dominated by women and is actively linked and supported by a local people's organisation which is committed to a rights approach.

- b) Nyaya panchayats: The objective of nyaya panchayats was to give an institutional, statutory space to traditional community based dispute settlement mechanisms. The nyaya panchayats were developed as part of the panchayat system with the objective of decentralising justice administration, the idea being to make the nyaya panchayats a part of, and therefore accountable to, the existing justice system, without constraining them with existing rules of procedure.

Unfortunately the experiment has not proved to be successful.<sup>39</sup> Perhaps the most crucial reason has been that the nyaya panchayats have been made subordinate to the panchayats, having no independent existence. Another

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<sup>37</sup> Village panchayats have often passed orders of execution against women who have had sexual liaisons outside the permitted domain, or had lower caste men as lovers. Many of these executions have been carried out in the presence of and with the complete support of the local community.

<sup>38</sup> Fighting Crimes Against Women: An Alternative Approach, *Lawyers Collective*, May 1992.

<sup>39</sup> See S. N. Mathur, 'Decentralisation of Administrative Justice - Nyaya Panchayats' mimeo for Indian Social Institute.



important factor has been the restriction of substantive jurisdiction to issues which can be termed almost petty. The complete lack of enforcement powers, and the total dependence on the local judiciary to enforce even minor orders such as summons, has severely undermined their authority in the eyes of the community.

- c) Mediation: Activist groups working with rural communities and disadvantaged groups have found that an essential part of their work in the community is developing sustainable mechanisms for mediation within the community. Mediation sessions provide a forum which is accessible and non-threatening for the airing of differences and problems, and facilitates a community resolution without the challenges, biases, and structural barriers of the established legal system. Mediation is also an important mechanism for building a sense of sharing and self-worth within the community, while at the same time reducing their dependence on the existing legal system and on legal professionals.

Pratap Pradhan and *Friends Association for Rural Reconstruction*, legal partners with PLD during 2000, are working with tribal people in Kalahandi, Orissa. As part of their strategy for addressing the problems of tribal women, the legal partners have collaborated with the functioning of the Shakti Cell, a district level pressure group comprising of lawyers, social activists and panchayat members. The cell meets every Saturday at the Collector's office in Kalahandi, and acts as a community mediator in the problems brought before it.

- d) Administrative fora within the state structure: Apart from the court system, there exist a large number of fora within the structure of state administration and bureaucracy which need to be creatively used to advance the goal of alternative development. A vast arena of ministries, departments, banks and public corporations operate through a complex structure of rules, bye-laws, guidelines and internal memos, administering development, essential services, welfare schemes and so on. More often than not, the operation of these fora is quite different from, and sometimes even contradictory to, the norms of the established legal system, such as constitutional and fundamental rights. And when it comes to the rural poor and other disadvantaged groups, it is these structures that they have to most often deal with and are oppressed by. The legal profession on the other hand is far removed from this arena of state control, and activist lawyers often find themselves stumped by the sheer complexity of the state administration systems. The centrality of this arena

in the struggle for alternative development places an even greater burden on the alternative lawyer to use it creatively.

Geeta Devi, a PLD partner with *Institute of Women's Development* in Ganjam district of Orissa, has been working on cases of wife desertion, adultery, dowry torture, domestic violence and child marriage. She found that the women are unable to secure alimony, maintenance and other matrimonial relief due to their inability to prove the existence of a marriage in accordance with the requirement of the Hindu Marriage Act, 1955.<sup>40</sup> The group identified this as one of the key structural causes of exploitation of women in the area. Their initial research revealed that under section 65 of the Orissa Gram Panchayat Act 1965, the local panchayat has the power to register births, deaths and marriages, but this provision had never been used.

Geeta Devi along with the organisation undertook intense lobbying on this issue with the concerned bureaucracy, and eventually the District Collector responded by issuing a circular in the vernacular language to all the gram panchayats in Ganjam district to enforce the said provision and maintain a register for recording all future births, deaths and marriages. The DC also instructed them to undertake an exercise to register all existing marriages taking the help of ward members as recorders. The process has been used as a focal point for mobilisation of local women, panchayat functionaries and the bureaucracy on this issue.

- e) Tribunals, commissions and other quasi-judicial fora: Another offshoot of this process has been the emergence of a large number of specialised fora which have taken certain categories of cases outside the jurisdiction of the established legal system. The objective of the state has been to create quasi judicial bodies with expertise in a certain area of law and with simplified rules of procedure and evidence, which would take the pressure off the existing justice system and provide accessible and expeditious justice. The requirement of representation through a lawyer was removed in many of these tribunals, with the hope that the absence of lawyers would simplify matters. Fora such as

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<sup>40</sup> While registration of marriages is not necessary under the Hindu Marriage Act, 1955, and customary forms of marriage are considered valid, there has evolved through years of judicial interpretation, a complex set of prerequisites that a marriage ceremony must comply with to be termed valid in law, especially in a situation where one of the parties challenges the existence of the marriage. A procedure for registration of such marriages with the District Magistrate is provided under the Special Marriage Act, 1954, but is so complex and inaccessible, that it is used as an option only by the elite who have access to lawyers who can negotiate the legal intricacies.

the Consumer Dispute Redressal Commissions have been fairly successful in supporting a recognition of consumer rights in the country.

No doubt these fora provide important spaces for the advancement of the goal of alternative development, and their potential cannot be entirely dismissed. However, there are certain limitations which must be kept in mind. The close connection of these fora to the established legal system has resulted in most of them developing as parallel courts advancing the same legal principles and the same culture of professionalisation. On the other hand the relaxation of rules of procedure and evidence, lack of appellate and revision avenues, has often resulted in serious travesty of justice, advancing the interests of dominant groups at the cost of the poor.<sup>41</sup>

### E. Advocacy :

Advocacy work is where all the legal resources discussed above come together with the organizational resources at the ground to their logical conclusion, that is, to pressurize the state to implement structural changes in law and in administrative policy. Although the role of advocacy has been touched upon in connection with each of the legal resources discussed above,



the importance of advocacy in development work today merits a separate discussion. Much has changed since the days the women's movement in India came

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<sup>41</sup> Jerold S. Auerbach examines the history of alternative dispute resolution mechanisms in the USA, beginning with the Cahns proposal based on the underlying principle that 'disputes should belong to the community rather than the formalised judicial system.' But when the alternative mechanisms were set up, the driving force was the notion that the legal system was overburdened and congested, apart from being costly and inaccessible. In practice it was most enthusiastically prescribed for disadvantaged citizens who had only recently begun to litigate successfully to extend and protect their rights - consumers, prison inmates, tenants, juveniles, the elderly, as well as Eskimos and native Americans. As a result citizens disadvantaged in American society by race, class, age or national origin - those who most needed legal rights and remedies - faced the prospect of reduced possibilities for legal redress in the name of access to justice and judicial efficiency, and their 'minor disputes' were designated 'inappropriate for adjudication'. Auerbach goes on to say "justice centers and their progeny managed to combine some of the worst features of legality *and* informality, without incorporating many advantages of either...Government sponsorship encouraged the extension of state legal control into urban neighbourhoods, bringing private disputes under official scrutiny. At the same time, however, mediation processes dispensed with due process safe-guards (representation by counsel and the right to a jury trial), making rights even more precarious than they were in court without compensatory benefits to disputants." Jerold S. Auerbach, 'The Legalization of Community' in Jerold S. Auerbach *Justice Without Law?* (OUP 1983).

together to demand changes in the rape law after the Mathura rape case. Today advocacy for legislative and policy reform is an integral part of development work. Organisations working with the poor invariably come up against laws, guidelines and policies of the state which obstruct their work, and need to be targeted for change. Lawyers have continued to play a critical role in translating the demands arising from the experiences on the field into cohesive legal/policy reform which then become the basis for negotiation with the state.

Advocacy strategies involve the following<sup>42</sup>:

1. **Mobilisation:** Advocacy has one primary goal - empowerment of the powerless, the weak and the marginalized, by changing public policy. Advocacy cannot be sustained without a movement, and conversely, every movement needs advocacy to translate its demands into structural changes. Thus the first step of advocacy is mobilization of the very people it seeks to benefit, who form the information base for the strategy. Opening up the communication links between the affected communities, the NGOs working with such communities and lawyers is an essential prerequisite of effective advocacy.
2. **Legal and judicial advocacy:** As discussed earlier, test case litigation as well as public interest litigation are both tools for effecting changes in law as well as state policy, and collaborative lawyering with people's organizations plays a key role. One of the dilemmas of using this advocacy strategy is that once an organization approaches the court, its options for exerting other forms of advocacy are restricted considerably. The Courts expect that once a matter is before it, the state as well as the public maintain a certain decorum, and the threat of contempt action does tend to dampen public debate. Given that demands for social and economic justice are not easily translated into legal arguments on which pleadings are based, the strategy of litigation in advocacy has to be approached with great care. An important part of any court strategy therefore would be to challenge the reductionist approach of the judiciary to socio-economic issues, and compel judges to adopt a multi disciplinary approach.
3. **Networking:** Establishing alliances and networks, whether ad-hoc or long term, with similarly affected people, as well as with like-minded groups and individuals at the national, regional and international level, is again critical to advocacy.

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<sup>42</sup> This categorization has been taken from Amit Mitra, 'Needs Assessment for Capacity Building of Community Based Organisations in Advocacy Strategies and Skills in the Hindu-kush Himalayas', ICIMOD, (1998) at 55-60.

Such networking enables the groups working in the field to place their specific experiences within a holistic perspective, and their struggle is transformed from one which seeks 'special treatment', into one which demands systemic change for the larger good. Networks can also act as a stronger pressure group, and their members gain strength and confidence by supporting each other during times of conflict or crisis.

4. Lobbying: Exerting pressure through lobbying with the judiciary, bureaucracy, politicians, donor agencies, as well as the academic community and the media, forms a critical part of advocacy work. Many people's organizations have evolved specialized mechanisms for lobbying with each of these groups. For instance, civil rights groups work closely with the media through systems of press releases, press conferences, and personalised contact in order to ensure that issues of rights violation are highlighted in the mainstream press. Again, the women's movement in India used the opportunity of the Beijing Conference to develop mechanisms of collaboration, networking, and pressure tactics among women's groups in the country. Lawyers are able to maximize the benefit of their professional status combined with an understanding of development issues during lobbying.
5. Direct pressure: Non-violent public protest through the holding of demonstrations, public meetings and even civil disobedience are tools of impacting on democratic political processes and are important advocacy strategies.

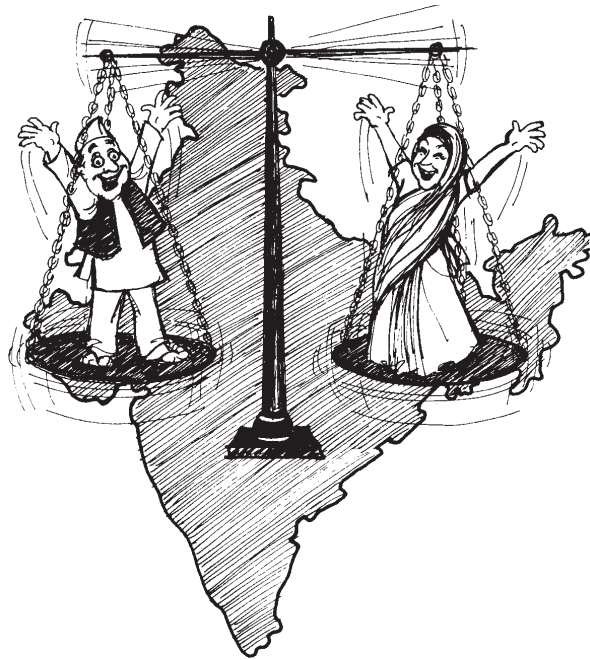
PLD partners A. Gandhimathi and *Legal Aid Trust to Women* have been working with coastal communities in Tamil Nadu and Pondicherry. They found that the coal based thermal power projects are causing severe pollution along the coastal region which is directly affecting the livelihood of the coastal communities. They joined forces with the Coastal Action Network (CAN) as well as the Campaign Against Shrimp Industries (CASI) and engaged a range of advocacy strategies with the courts, the media, the local politicians, and so on, to bring about changes in the local as well as the national policy and laws on coastal region. Intense research was undertaken into scientific documents, and fact finding studies as well as micro-level case studies with the affected communities were conducted in order to consolidate an information base. This then became the foundation for challenges to state policy in the courts as well as for lobbying with policymakers and for highlighting the issue in the media. Throughout this process the lawyer and the NGO worked in close tandem with each other.

## V

## Conclusion

More than a decade ago, this author, freshly enrolled as a law student then, waited with an activist friend outside a lawyer's office for a long overdue consultation. "One day when you are a big shot lawyer, you will keep me waiting like this outside your office", he observed. Stung, I vowed silently to myself that it would never happen. I also had no idea how I would achieve this goal.

Developmental or alternative law practice was not a 'career option' for young lawyers at the time, and you either joined the mainstream or dropped out. But there were some of us who refused to do either, and struggled to find a third option, a space for lawyers beyond the confining walls of court appearances. Even while the praxis of developmental lawyering grew on the other side of the globe in emergent democracies such as South Africa and Benin, and closer to home, in the Philippines<sup>43</sup>, we went through cycles of trial and error as we grappled with what seemed like contradictory identities.



For many of us it was a lonely struggle. Lawyers are not forgiving of those among them who strike at the root of their monopoly by attempting to demystify and decentre the law. Often a heavy professional price is paid by a lawyer who

<sup>43</sup> For a detailed study of developmental law practice in these countries, and more, see Mary McClymont and Stephen Golub, *Many Roads to Justice: The Law Related Work of Ford Foundation Grantees Around the World*, The Ford Foundation, (2000)

overturns the sacred balance of power in the lawyer-client relationship, and the processes of client networking followed by mainstream lawyers. On the other hand the lines between one's role as a lawyer and as an activist become blurred, raising critical questions of identity that need to be confronted squarely for such a lawyer to be of relevance within the movement for change itself.

There is no single 'formula' which holds the key to these dilemmas, and individual lawyers continue to struggle and negotiate for alternative ground within legal practice as well as within people's movements. Initiatives such as the Partners for Law in Development have provided a space to develop experimental collaborations between the struggle for people-centred alternative development and lawyers, to learn from each other's experiences, and to together search for conceptual answers. But most importantly such initiatives mark the end of isolation and the beginning of solidarity in a community of alternative law practitioners.