

*Role of Law
in
Development*

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Preface

Law is difficult to ignore when working towards social justice. Its competing qualities make it a contentious site for engagement. On the one hand, the political economy of law supports the socio economic privileges of class, caste and gender; on the other hand, law sets normative universal standards of non-discrimination, equality, and dignity as an alternative to the hierarchical, unequal social order. It is this positive quality that compels engagement with the law; as does the need to transform the substance, structures and practice of law to make it responsive and accessible to the disadvantaged and the poor.

It is to share, learn from and record the different field based initiatives in law that this workshop was jointly organised by Astha Sansthan, Udaipur and Partners for Law in Development [PLD], New Delhi. Astha, has worked for several years on issues of environment, tribal rights, and displacement - all of which have a legal dimension that they have had to engage with from time to time. PLD in contrast is relatively young organisation that aims to integrate law into development and social action. Both PLD and Astha have worked collaboratively on PLD's 'partnership project', which facilitates the attachment of a lawyer [or legal resource] to a NGO to help integrate law in the issue/s of concern to the NGO. PLD is committed to building, strengthening and promoting a culture of collaborative lawyering that treats law as a component of social action rather than an autonomous expertise. It perceives a role for law only in relation to supporting socio political movements and processes that resist discrimination, disadvantage and injustice. Towards this end, PLD seeks to explore innovative, non-formal and contextually relevant ways of using law:- to build a culture of human rights; to set popular normative standards based on equality, dignity and non discrimination; to influence alternative mediation systems within the community; and promote integration of law as a component in development action.

Given the common interest of both Astha and PLD, this workshop was jointly organised. PLD's project partners were invited to build a cross-sectoral community of lawyers and social workers committed to working together for social justice. PLD is extremely grateful to both Astha and Sida for their collaboration and support. Their solidarity to PLD's objectives was the basis for this workshop, and helped provide PLD and its project partners a valuable opportunity to come together, share, learn and grow from each other's experiences.

This report documents the proceedings and discussions of the workshop. It is hoped that the report serves as a resource not just for PLD, but all those engaged in re-visioning and re-constructing a new role for law: one that is relevant and responsive to addressing contexts of poverty, disadvantage and discrimination.

Madhu Mehra

[Executive Director, PLD]

Panel Discussion on “Alternative Lawyering” and “Alternative Approaches to Issues in Law”

Introduction

This session was open to participants and guests. It comprised of a panel presentation and plenary discussion to provide a wider forum for interaction on the session themes. The panelists were persons with considerable experience in practicing “Alternative Lawyering” as well as promoting “Alternative Approaches to Issues in Law”. The panel comprised of Nandita Haksar, a human rights lawyer, Kirti Singh, a women’s rights lawyer and Aradhana Nanda, of FARR. It was moderated by Usha Ramanathan, a legal researcher.

Usha introduced the themes of discussion, distinguishing between alternative lawyering and alternative approaches to issues in law. Critiquing the centrality placed by lawyers on the black letter of law as formulated by statutes and judicial interpretations, she said this narrow approach does not leave room for basic life issues within the law. Instead she emphasised the need to place centrality on the issue and treat the law as supplementary. We need to approach the law from the perspective of the issue, with the objective of resolving it, and where required adopt approaches that help resolve the issue. This is where the need for alternative approaches come in. Sometimes the law itself is the issue - as with TADA, where the law led to a lot of human rights violations. At other times the issue lies outside the realm of law.

The Court processes have a tendency to make the lawyer’s voice the only one which is heard, and limit the domain of argument to the black letter of the law. In contrast “alternative lawyering” demands that you take into court, the politics and convictions on the issue. It means not using the jargon of the court, nor condensing and compromising your politics just for getting an immediate relief. For instance feminist lawyers will refuse to argue in court that women are weak, kind, nurturing, and so on, just to win a case, because it compromises their larger political purpose. The challenge is to ensure that the voices of the people you represent are not lost within the court processes and jargon.

Usha then invited each of the panelists to share their experiences to illustrate the session themes. The summaries of the panel presentations and discussions that followed are reproduced below:

■ Nandita Haksar

She felt it was important to recognise the role of law in denying the poor access to development. For those of us engaging with the law, the understanding of the political

economy of law was critical for recognising the limitation of legal system in delivering social justice. In fact the law is geared towards obstructing development and maintaining the status quo. For instance under the 'public purpose' clause of the Land Acquisition Act, all over the country, land has been taken away by the state from the people. Despite this, we cannot reject the law but need to use it to further social justice. The challenge here is in defining your role, identity and approach as a lawyer. This would determine one's ability to be an alternative lawyer. She felt it was important to not define oneself as an activist. She personally prefers to describe herself as a Supreme Court lawyer and felt that the label of an activist or an NGO is used to sideline and diminish one's professional standing. She emphasised the need to undergo the rigors of the legal system to become a meaningful alternative lawyer and not step out of it.

The day to day nitty gritty of practice is important for giving sound advice to the people you support. Alternative Lawyering must provide the best professional and legal service, to the clients especially as they are disadvantaged socially and cannot pay for services. Also the approach here is not that of charity, but **solidarity** in order to lend dignity to our client community and to ourselves. It is in no way comparable to pro bono work being done by corporate law firms, which is charity.

She shared some concrete alternatives law principles that she practices -

1. **Ethics:** A basic principle of legal ethics is that a lawyer must represent whoever comes to them. Where do feminist lawyers who refuse to represent a rape accused stand in relation to this? Such a stand could be seen as undermining the assumption of innocence of the accused until proven guilty. However it can be justified if one recognises the imbalance of power within the criminal justice system in favour of the rape accused and against the victim. The refusal to represent a rapist is based on denying him the moral advantage that comes with having a human rights lawyer to defend the case especially when the whole system is tilted against the woman. Similar stands have been taken by lawyers while representing tribals against non-tribals, workers against management, and so on.
2. **Redefining lawyer-client relationship:** The manner we adopt while interacting with our clients must break the unequal power dynamics particular to this relationship. For example we could substitute sitting across a table with sitting in a circle. At the same time the challenge remains - during the court appearances the lawyer is alone and the sole spokesperson for the client. The responsibility here is to ensure that even in court, the voice of the client group is heard through the lawyer.
3. **In court practice and out of court practice:** There must be a close involvement with the people we represent to understand their issues. It cannot be a court-centered practice. Corporate lawyers too socialise with their clients at five star hotels, that is their version of out of court practice. Alternative lawyering requires a close understanding and involvement with the life and reality of the client group to enable collective and informal discussion on the course of action.

These principles were illustrated by Nandita through examples of how she handled some of the prominent cases.

- a) **Olga Tellis - The pavement dwellers case:** The "behind the scene" approach to this case differentiates the alternative lawyering approach adopted by Lawyers Collective from a conventional approach adopted by PUCL although the outcome of both was the same.

In resisting eviction of the pavement dwellers PUCL evoked sympathy of the court for their poverty, homelessness and the additional hardship caused by eviction during the monsoons. In contrast the Lawyers Collective asserted rights of pavement dwellers under Article 14 and 21 of the Constitution - forcing the court to examine the circumstances causing them to dwell on the pavement. The issues of development model - of industrialisation in cities and no opportunities in the rural areas that force the rural poor to migrate in search of livelihood; issues of rural indebtedness and hunger in villages; and finally, in view of the state's failure to check circumstances forcing migration, the right of the poor to live at least on poverty line and not below, were brought before the court. With some research they were able to establish that a minimum of 1500 calories a day was required for poverty line survival. This was possible only if they lived on the pavement since they saved on rent, transportation, etc. Facilities such as health care, education, and so on, are already beyond their reach. If they are evicted from the pavements, they would be forced below the poverty line. The Lawyers Collective argued that under Article 21 there is a right to live at least on the poverty line, and not be pushed below it.

Lawyers Collective also went into the streets and organised the pavement dwellers into unions. The purpose of alternative lawyering is to build an alternative jurisprudence and not merely get relief.

- b) **Hawkers Case:** There was an attempt to stop hawkers selling sugarcane juice on the ground that these 'dirty' people spread disease. Lawyers Collective collected random samples of sugar cane juice from hawkers and of strawberry milkshake from Taj Hotel. It was found that the e-coli content of the milkshake was much higher, and this evidence was used in court. The allegation against the hawkers was based on a prejudice that poor people are dirty and tell lies. The Lawyers Collective instead proceeded on the belief that their clients were telling the truth. Given our own class background and conditioning, this is not easy, but we need to believe our clients.
- c) **Challenging disinvestment and privatisation:** This case involved the privatisation of Bharat Electronics Limited (BEL) Bangalore, by the government. Nandita appeared for the trade unions. It first appeared that this action could not be challenged in court as they were unfamiliar with basic terms like privatisation, share price, or stock exchange. First this lack of information was corrected by learning about these issues.

The process of disinvestment was complex. The reserve price of the shares of BEL

was Rs. 60, but during the process of privatisation the government sold the shares for Rs. 30. These were bought by private parties and sold in the open market for Rs. 120. The tender documents contained no plough back clause, which requires the buyer to plough back to the government some part of the profit on sale of shares. In effect the buyer made a huge, unfair, profit.

They relied upon the Kamani Tubes case to assert that if workers have the right to buy a sick factory they should also have right to be consulted and own shares in case of a non-sick mill. It was argued that workers must be offered 26% (this is the controlling share) of the shares of a factory being disinvested by the state and rejected the 5% pittance permitted under ESOP as unacceptable.

Their petition claimed that workers be allowed to hold 26% of the shares in a trust by four trade unions, and the dividend be distributed equally among the workers. This was an important argument, because for the first time creation of a common property resource in the industrialised world was asserted. Training classes with workers were held in order to help them acquire skills for managing the company. They succeeded in getting a stay on the disinvestment process.

However as one of the four trade unions did not agree to the creation of the trust, they had to ask the judge to withhold judgment. Nonetheless such efforts are important and we must continue to try.

- d) **Land Acquisition case, Manipur:** In a tribal village in Manipur called Hundung, the state acquired land under the Land Acquisition Act. As is expected in an economy that is not based on the market, the land had no market value and therefore was acquired by the state at a compensation rate of 5 paise per hectare of wet paddy field, a pittance. With the help of locals, a study was conducted to calculate the ecological and nutritional value of a wet paddy field. The calculations included the nutritional value of frogs and insects, which are part of the local diet, the crop yield and so on.

As it turned out, the bench comprised of two Naga judges who found the argument perfectly reasonable. Someone not rooted in tribal culture would have found the 'frogs and insects' basis of calculation imlausable and rejected the case. The Court directed compensation of Rs. 2 crores be paid, and the verdict was upheld by the Supreme Court. Unfortunately, the Supreme Court merely concurred but did not lay down jurisprudential principles for calculating compensation in such situations.

Your political position should influence your lawyering. Alternative lawyering means moving away from the charity of legal aid, to legal reform, with the ultimate goal of legal transformation, to generate when the jurisprudence of insurgency. The most important lesson is that when resisting a development project or government scheme, it is essential that we put forward an alternative version of development rather than simply rejecting the existing one. The critique must not remain at the level of opposition, which is negative, but must create a positive vision for development in India.

■ Kirti Singh

The second panelist was Kirti Singh, a lawyer practicing in the Delhi High Court and active for many years with the women's movement. She started her work in 1979 with the legal cell of AIDWA (All India Democratic Women's Association). AIDWA has units in all resettlement colonies in Delhi, and was already working closely with women from the area. Most of the cases that came to the cell pertained to domestic violence, maintenance, rape, and sexual assault. When the legal cell was set up, the two main issues which had surfaced, were dowry and rape, and the first campaigns for law reform were on these issues.

They found the Dowry Prohibition Act totally inadequate in dealing with the cases of dowry and instead resorted to provisions in the Indian Penal Code on the issue, to seek police intervention to register a case, if only as a pressure tactic to protect a women from domestic violence. In the absence of a special law, they used the law of injunctions to get immediate relief and protection for women in violent situations. A very frustrating experience has been trying to use section 498-A IPC, where the police refuse to register a case unless the word "dowry" is mentioned. Kirti stressed the need to strengthen the first limb of the provision, which deals with cruelty, unrelated to dowry. Complaining of dowry harassment for convenience of getting a complaint of 498A registered would render injustice to the client, since she will eventually not be able to prove the case. It would also harm the women's movement, since it amounts to excluding cruelty unrelated to dowry from the purview of section 498A. It would be better to take the harder path and press your point to force the state to change its attitudes and perceptions on domestic violence.

The AIDWA approach differed from the traditional legal aid as campaigning for law reform was an integral part of it. Both law reform and legal aid went together. After a long campaign they were able to get the dowry law changed, to what exists today.

One negative fallout of this work was that the state opened their own dowry cells, where instead of replicating the AIDWA model they subverted it. The approach of the government dowry cells was to force women to reconcile and return to the matrimonial home.

As a feminist lawyer you cannot deal with a case at just the level of the courts and the law, which in any case is archaic and biased against women. You need to address the issue at multiple levels, that is, at the level of the police, the judiciary as well as at the community. Our approach as feminist lawyers must be to ensure that the woman is in a strong position when she leaves the matrimonial home and goes to court. Often the parental home is not the safest place for her, and alternatives must be found which strengthen rather than weaken her. Lawyers therefore need to work at several levels at the same time.

■ Aradhana Nanda

She spoke of her experience working with tribal communities through her NGO, FARR in Kalahandi, Orissa. After 10 years of working with tribals, FARR learnt that the

community faced a lot of difficulty enforcing their rights in courts on the following fronts :

1. The legal system was expensive to activate, and beyond the means of the poor.
2. The tribals are intimidated by the law and the law enforcement machinery, including the courts, the police and lawyers. They are afraid to approach the legal system on their own.
3. The legal system is fraught with delays, and justice comes too late, if at all.
4. There is a very low level of legal literacy and awareness of rights guaranteed by law. The books available in the local language on law are mere translations from English, and are incomprehensible to common people.
5. Legal aid machinery of the State is a complete failure
6. The attitude of judges and lawyers is anti-people and their experience is limited to books. They have no understanding of social reality. Recently a judge told her that 40% of the cases filed by women for matrimonial relief are false. Astounded at how the judge had arrived at such a figure, she made her own enquiries, only to find that 40% of women lose cases. To the judge the fact that the women lost the case simply translated into these cases being false. He was totally unaware of the barriers women face in filing cases, and those that do have a very hard time producing evidence as required by law.
7. Often paying a bribe to a local policeman in the village is easier than going to court which could be 100 kms away.

It was in this context that 10 years ago FARR began to take up issues in law, and started a Legal Counselling Cell at the block level. Here issues of forests, land, excise, and women's issues were raised. They have been able to establish direct contact with the people, stake legal claims and in some cases have even succeeded in getting relief.

Discussion

Bhanwar Singh of Astha Sansthan turned the discussion to how PIL can actually have a negative effect, and quoting the example of the WWF case where in the name of conservation, Supreme Court ordered eviction of thousands of people from areas demarcated as national parks and wildlife sanctuaries. Rupsa of NFI spoke of the issue of female foeticide and infanticide. Increasingly they are having to engage with the law, while at the same time the limitations of the law, and criminalisation, are becoming apparent.

Nandita responded that there are several issues, which are not matters for the courts but are political or social issues, and must be settled at that level. She stressed the need to do comprehensive studies to develop viable alternatives of development. Where people in such struggles refuse to engage with the courts, it is important for us to respect that

decision and work through alternative mechanisms that are available. PILs should not be filed by lawyers without any strategic decision being taken by the affected people. Lawyers can be totally irresponsible in resorting to PIL without following a process of decision making with the affected constituency. She cited the instance of PIL filed by a single environmentalist lawyer, which gave him fame, but rendered 2 lakh workers in Delhi jobless. The petition did not consider or include the rights of workers, nor were any trade unions made a party to the petition. Usha too affirmed the need to engage with the law at the level of policy and planning rather than on litigation alone. There are some areas where court interventions must not be made for eg. in cases of female infanticide judges do not want to punish the parents, as it will increase their victimisation.

Usha Ramanathan summed up the morning's panel discussion. It is important to use various strategies while working with people's movements. Using just a court strategy, where the problem gets condensed to its legalistic components, is reductionist. While working with communities it is important to establish a mechanism for contact and communication. But as Kirti Singh's presentation showed, often this strategy gets appropriated by the state, and even the language gets appropriated.

She referred to the analysis of reductionist strategy by R.B.Sachs, a South African Judge. He observed that there are many truths, of which one is the microscopic truth, which judges want to see. They want to see only the pure legal issue, and apply their minds to that alone. We need to fight and resist such perception's of people's lives.

On the subject of legal literacy she observed that Nandita's book on demystification of the law was a path breaking one. Most other legal literacy books have only served to reinforce the mystification of law. Legal literacy has to be reconstructed in order to enable us to fight the law as well as use it.

On legal aid it is often observed that legal aid for the poor is poor legal aid. The lawyers who provide legal aid are regular lawyers, and all too often, along with the bench, they see themselves as part of the system. But an alternative lawyer's relationship is not just with the court, but more importantly with the people whom they represent. Associations of lawyers were formed with the view to empower them as a group to stand up to the bench. Today these associations have become very much part of the established structure.

There was also some discussion on the difficulty for a practicing lawyer to tread the 'slippery slope' of being a lawyer and an activist. There has been a lot of pressure on lawyers who have attempted to redefine their roles, mainly to the extent they can challenge without falling prey to the contempt laws. Usha succinctly pointed out that it was not necessary to literally throw shoes at judges, but it is necessary to throw the metaphorical shoe once in a while. The experience of women lawyers during demonstrations against the Sudha Goel judgment were discussed, where women lawyers were charged with contempt of court. It is necessary today to develop alternative fora where lawyers can express solidarity with people's movements and with each other, since existing associations have become so isolating.

Further discussion centred around alternative dispute resolution mechanisms, and the need to contextualise them, whether they be tribal systems or the MCC in Bihar. It is important to determine as an alternative lawyer where is your intersection with these systems. Huma Khan of Vanagana was of the view that community dispute resolution systems cannot be romanticized, since the power is in the hands of the men of the community and they are not governed by any guidelines. The legal system, with all its drawbacks, is at least bound by certain guidelines of rights and fairness. There have been too many experiences where community mechanisms have sentenced women to death, excommunication, being paraded naked, and what not. Usha expressed her concern that the legal system is heavily loaded against the poor. There has been a major critiquing of the concept of community dispute settlement systems in the context of nyaya panchayats, and on whether the state can ensure that punishments are not meted out, but disputes are discussed, aired, and resolved.

Calling the session to an end, Usha there are a number of ways in which alternative lawyering is being done all over the country, where standard mechanisms are being used but by taking a totally different approach, they are being transformed. These are small but significant metaphors of change.