Envisioning Subaltern Criminology for India

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CHALLENGING THE RULE(S) OF LAW: COLONIALISM, CRIMINOLOGY AND HUMAN RIGHTS
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/The book is, both a challenging and an exciting preposition, challenging, because it brings together the intellectual initiatives of the nineteen contributors drawn from different social sciences disciplines, working on diverse crime themes, in pre-colonial, colonial and postcolonial time-frame in one large volume; and exciting, because it endeavours to run the two thought streams, namely, human rights and criminology in almost all the essays.

The book is a fall-out of a larger Ford Foundation Project: Strengthening Criminal Justice and Human Rights in India.1 The location of this project in NALSAR, a distinguished National Law School of India seems to have contributed to the outcome of the project that has remained, by and large, theoretical and, at best, a critical overview of Indian crime realities. Hence, most of the essays lack any kind of recipe for strengthening the criminal justice or human rights. As a matter of fact what appears to have emerged and rightly so is a picture of the inherent antagonism between criminal justice and human rights. The task of strengthening lies beyond this antagonism which most of the essays find not worthwhile to traverse.

Another feature of the venture is its sociology of law orientation and obvious Baxi-centrism. Criminal law in the courts as well as in the academe in India is still largely understood in terms of analytical tradition that makes it primarily concerned with normative fidelity. This fact has been largely responsible for a weak understanding and tradition of sociology of law in India.

Upendra Baxi enjoys the unique distinction of being a scholar of sociology of law, who is equally well founded in the analytical tradition. However, the book has focused on the former contributions. A tribute to Professor Baxi, this collection of essays 're-examines the field of criminology through an interdisciplinary lens, speaking to Uprendra Baxi's concerns and work in India' (p. xiii). Though the festschrift is a welcome initiative, I wish that the organizers of this excellent venture had been a little more catholic in their choice of contributors. A wider involvement of scholars, particularly those who have been acquainted with Baxi's thought, research and writing process for a longer period could have gone a long way in enriching the worth of the volume.

To this reviewer it seems that 'Succumbing to the Rule of Law' would have been more appropriate a title than 'Challenging the Rules of Law', because the large population of the powerless and marginalized can do nothing more than merely succumb to the dictates of the rule of law. That is the reason why Richard Quinney (Class, State and Crime: On Theory and Practice of Criminal Justice (1977) had conceived of crimes in two distinct categories, namely crimes of domination and crimes of accommodation or resistance. The crimes of resistance comprise all the underclass population crimes that are committed in trying to overcome the existing material conditions in a capitalist society. Therefore, using the term 'challenging' conveys an impression of a deliberate and intended act of defiance to the laws of the state which may be true only in the case of political or social dissenters.

The introduction sets the broad parameters of the venture that are supposed to focus around the various sociology of law debates identified by Baxi in the course of scores of researches and writings in the past three decades. Therefore, the contributions included in the volume are set to revolve around the three axes, namely (a) The Baxian sociology of Law axis, (b) The Human Rights axis, and (c) The subaltern or the indigenous criminology axis, which also constitute the core of the present review.

For the present purpose we draw on three elements of Baxian sociology of law, namely (1) contextuality of criminality and norm violation, (2) dominant versus subaltern legalism, and (3) creativity and activism of judge, lawyers and academics. These three core elements are located in the wide range of writings by Baxi, right from early eighties (The Crisis of the Indian Legal System (1982)) down to his recent writings ('Promise and Perils of Transcendental Jurisprudence 'in Raj Kumar et al ed. Human Rights, Justice and Constitutional Empowerment, 2007).) The five section scheme has grouped the eighteen essays into five categories namely: 'The Construction of Crime and Criminality', 'Vulnerability, Governance and the Law', 'Legislating the "other" and the "extraordinaire"', 'Social Ordering of the Legal', and 'Human Rights and Criminal Jurisprudence'. The five categories represent the conceptualization of crime, the responses to crime and the intellectual output of crimes debates. Section one comprises four essays that relate to the socially stigmatized categories of persons, namely nomads, prostitutes, homosexuals and the victims of sexual aggression. The essays have elaborately traced the colonial historical context of these controversial forms of crimes. But they appear to be deficient in the discussion of the contemporary societal context. Furthermore, the essays seem to have relied overly on the British society explanations and sources, particularly the first essay: 'Laws of Metamorphosis: From Nomad to Offender', that

has perceived the problem of Nomads/gypsy's/vagabonds from the viewpoint of British society.2 The tendency of ignoring the Indian context has led essays one and three to miss out some of the vital sociology of law debates raised in Ram Lakhan v. Delhi State3 and the Naz Foundation cases. It may be worthwhile to refer to the Ram Lakhan case and its ruling in some detail here. The case came before the Delhi High Court by way of a revision petition of the accused convicted under the provisions of the Bombay Prevention of Begging Act, 959. The single Judge Badar Durrez Ahmed J. not only displayed impeccable logic in critiquing the law that criminalized soliciting alms in public place, but also deployed unusual judicial creativity in meaningfully interpreting the law in question. Justice Ahmed's critique of law runs thus: 'Does the starving man not have a fundamental right to inform a more fortunate soul that he is starving and request for food? And, if he were to do so, would he not be liable under the said act to be declared as a 'beggar' and consequently being deprived of his liberty by being sent for detention at a certified institution? Does this not mean that the said act leads to deprivation of liberty on the basis of a law which runs counter to the fundamental right of freedom of speech and expression?'4 To Justice Ahmed creative judicial functioning imposes a duty on the court, thus: 'Judicial notice must be taken of the fact that as the accused are poor they will not have access to quality legal assistance, if at all. The duty is therefore cast upon the courts to satisfy themselves that the accused did not have a defense of necessity. Prevention of begging is the object of the said act. But one must realize that embedded in this objective are the twin goals—Nobody Should beg and No Body shall have to beg.'5 Justice Ahmed has underscored not merely the high flown objectives of the law, but also tried to supply the tools to the magistracy for achieving the objective by identifying four different types of beggars, namely: (a) the lazy beggar, (b) the addicted or alcoholic beggar, (c) the victim beggar at the mercy of beggary gang leader and, (d) the starving homeless and helpless beggar.'6 The court concluded thus: 'He ought not to be detained if, in considering his condition and circumstances of living as required under the section 5(6) of the said act, the court discerns a defense of necessity; a situation where the person had no legitimate alternative to begging to feed and clothe himself or his family. Similarly, where it is apparent that the person was found begging under the exploitative command of others, he ought not to be deprived of his liberty by being sent to a certified institution for detention.'7

The element of legislation raises the demand of fidelity to the written law. Through most of the essays have kept hard legal discourse to a minimum, the essays 'Preserving Wellness and Personhood', 'Penal Strategies and Political Resistance' and 'Crimes, Passion and Detachment' do carry certain legal loose ends that need to be tied up: for example Shekhar P. Seshadri and Kaveri I. Haritas's on 'A Psychological Approach to the Child' in the context of child sexual abuse carries this statement in the reference to Section 377 of the penal code: 'This Provision is used to penalize sexual abuse against male children and non-penetrative sexual abuse against female children, as also homosexuality . . . which means that sentences for rape against boys can be less than 7 years.' The aforesaid statement is not only factually incorrect but legally flawed. Section 377 is primarily a provision for penalizing homosexuality and lesbianism and under the Indian Criminal Law 'Rape' is an offence that a man commits against a woman. Similarly, the authors seem to have defined juvenile delinquency very loosely and arbitrarily thus: 'Juvenile delinquency can range from minor acts of non-conformation to public rules such as theft, drinking, eve-teasing, watching adult movies and so on' (pp. 184–85). With a positive Juvenile Delinquency law in vogue in terms of section 2(e)of the Juvenile Justice (Care and Protection of Children) Act, 2000 'Juvenile in Conflict with Law' means a juvenile who is alleged to have committed an offence and has not completed eighteen years of age as on the date of commission of such offence.' There are other slips such as the JJ Act 2002 and above 17 years and below 17 years age anomaly (p. 199).

Ujjwal Kumar Singh in his essay on political resistance in Independent India has in table 9.1 given statistics about banned organizations and for Madhya Pradesh and Maharashtra states as 1593 and 1717 respectively. On the face of it this appears to be inaccurate, but there is no way of verifying this fact, because the table does not refer to the source (p. 231). Similarly, the Unlawful Activities (Prevention) Act 1967 has been referred to at three places as UPPA 2004 (pp. 242 and 246) Ranabir Samaddar has in an otherwise interesting essay, carried some loose ends thus: 'A confession, if deliberately and voluntarily made, was to be accepted as conclusive proof of matters confessed. But it was not a conclusive proof of matters admitted to and from taking a contradictory stand thereafter' (p. 359). The statement is contradictory and in the light of Section 31 of the Evidence Act incorrect too.

Since one of the objectives of the book is to suggest ways and means for strengthening human rights, the essays need to be evaluated in the light of human right touchstone. Not only are the four essays in Section I and three essays in Section III devoted to conceptualization of human rights of ignored sections of our society, but essays six, seven, thirteen and fourteen also relate to certain raw aspects of human rights. Some of these new categories of right claimants are women, children, tribals, nomads and vagabonds, homosexuals and sex-workers. Kalpana Kannabiran's essay 'Sexual Assault and the Law' has explored the wide range of woman's right that stand violated by diverse forms of sexual aggression on women. The essay rightly concludes thus: 'The quantification, measurement or assessment of harm that must determine the course of justice is a central aspect of criminal justice that is deeply problematised in cases of sexual assault especially in the context of collective violence. Access to most basic mechanisms of justice and redress are non-existent where state is complicit in the perpetration of assault' (p. 110). Equally significant for human rights are the essays that are devoted to formal as well informal responses to crimes. In this respect the essays included in Section II and IV has a special significance. Particularly notable in this respect are essays thirteen, fifteen and sixteen (also essays eleven and twelve). Vijay K. Nagraj in his essay titled: 'Revisiting Impunity and Criminality: Of Corruption, Collusion, Consequences and Victims' brilliantly exposed the collusive character of the Indian state that becomes complicit in large scale human rights violation through corruption and immunity from state action. Ranabir Samaddar in the essay titled 'Crime, Passion and Detachment: Colonial Foundations of Rule of Law' has in a unique manner analysed the evidence law that has been admirably used to strengthen the rule of the dominant classes right from the nineteenth century itself in these words: 'Clearly the latter half of the 19th century was laying down the most objective process of domination possible through establishing objective standards of defining the relationship between law, facts and decision. This is how judicial power took shape: it was rational; hence, it reinforced power and domination' (p. 369). The story of domination through rule of law is brilliantly carried to the contemporary context by K.G. Kannabiran in his essay titled 'Conspiracies of Association: Associational Offences, Associational Freedoms and the Rule of Law'. The author's analysis through select case studies is almost flawless, but the activist spirit of the author does not seem to rest at that: 'We cannot take legal authority as well grounded and deserving obedience while allowing the perpetration of historical inequalities to oppress us. It may not be acceptable to many to resist in order to redeem historical inequalities and injustice yet if all the institutions created by the constitution fail the people, the right to revolt should be available' (p. 406).

In a sense all the essays can be seen as an excellent basic material for developing indigenous or subaltern criminology for India that needs to be different and more society focused than the prevalent mainstream criminology. In this respect we draw from Professor Wolfgang's perception of criminology thus: 'We have focused long enough on the offender and his weaknesses. It is time we look to this chaotic, decaying, degrading

system and indict it for its failures.'8

In particular Kalpana Kannabiran in the last essay titled: 'The Contexts of Criminology: A Brief Restatement' has devoted attention to: 'Investigate the fields of criminal law and interrogate the fundamental assumptions of the rule of law in constructing criminality and fashioning its treatment by law' (p. 451). The author expresses her despair from the point of view of criminology: 'The widespread and diverse human rights struggles have not had much impact on the basic tenets of criminology. Particularly where we are dealing with a situation in which multiple forms of discrimination intersect producing a powerlessness that increases vulnerability to violence and violation, and special legislations in some instances recognize these sources of violence, a consideration of discrimination is indispensible to theorizing criminal justice' (p. 469). Perhaps the author's diagnosis of failures of criminology is not appropriate. Steven Box had strictly located it in the source of our understanding of crime itself thus: 'For too long too many people have been socialized to see crime and criminals through the eyes of the State.'9

Again, Kalpana Kannabiran tries to propose a blueprint for indigenous criminology on the lines laid down by Biko Agozino10 that argues for developing technologies of peace and love instead of being fixated on the gunboat criminology of imperialism. The author seems to have shown her total agreement with Agozino's plea of need for criminology of peace and love and goes about citing with approval the Telangana experiment of peaceful resolution of conflict through the initiative of committee of concerned citizens (p. 470). But the odds in the path of peace initiatives are multifaceted as identified by Steven Box again: 'The public seems to have little awareness of the democratic principles and the rights and duties these impose on the citizens. The state seems determined not to relieve this ignorance but actually compounds it further by introducing or firming up authoritarian control devices.'11 Therefore, the agenda for subaltern criminology should essentially focus on public education and awareness not about rhetoric of criminal law but also its realities and practice. The volume under review has contributed admirably to the cause of imparting such education and creation of awareness for the Indian seekers of knowledge.

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