Continuing the Colonial Tradition of Social Exclusion Through the Penal Measures in India

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The phenomenon of social exclusion is a key indicator for the social scientist to understand any society. The phenomenon marks its presence both internationally and nationally in different periods of time and social formations. Equally vital are the forms and consequential import of social exclusion that accords significance to varied debates relating to absolute and relative social exclusion, direct and indirect social exclusion, and real and imaginary social exclusion. Furthermore, measures put to use for bringing about social exclusion such as informal measures like tradition, religion, caste, and education or the formal measures like law and administrative schemes assume special significance as well. All these render social exclusion a complex and multi-faceted phenomenon. Presently I shall focus on the colonial tradition of social exclusion through the penal laws.

I. RATIONALE OF THE COLONIAL SOCIAL EXCLUSION POLICY

The rationale of the colonial social exclusion policy can be gauged from the attitudes and understanding of the "other" on the part of the dominant sections of the society. Writing about the rationale of social exclusion in the period of the transformation of the communal society into industrial society, John. A. Mayer² makes the following observation:

The transitional stage of industrialism, with its breakdown of communal and differential authority patterns, its economic and residential separation of classes, its disjunction between people’s actual behaviours and the new

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¹ Professor T.K. Oommen has eloquently adverted to the technique of social exclusion deployed by the colonial regimes that had invented the identities such as "Savage other," "Black other," and "Oriental other." T.K. Oommen, Keynote Address at National Seminar on Social Exclusion and Empowerment in India: A Multidisciplinary Approach, Center for Interdisciplinary Studies, Burdwan University (2007).

behaviours needed for a modern industrial society led to a sense of crisis amongst elites, generalized as a fear of the lower and dangerous classes.³

The dominant sections resorting to a strict social control policy is further explained by Mayer as follows:

In the nineteenth century historical situation, the groups towards which controls were directed often were not deviants. They were sub-cultural ethnic groups. As such they had no great resources available with which to resist any attempts at control by dominant culture. Their major resource, of course was simply their membership in an ethnic culture, they possessed a systematic set of values, ways of perceiving and group re-enforcement of their beliefs, attitudes, norms and so on.⁴

Sir Leon Radzinowicz⁵ identified a somewhat similar rationale for targeting the poorer sections for social exclusion in seventeenth and eighteenth century English society:

The recurrences of criminal behavior in a comparatively narrow section of society, its concentration within certain definable areas of the Metropolis, its prevalence among the very young, were all perceived with a new intensity. They helped to focus the public attention on the manners and habits of the poor. A pre-occupation with the immoral, loose or improvident behavior of the lower order of the society, became marked amongst all would be reformers. The same ill-defined way, idleness, drunkenness or immorality came to be regarded as immediate causes of crime and therefore in themselves direct threat to social stability.⁶

The policy of social exclusion that was successfully deployed against the in-country poorer sections did provide a much stronger rationalization, particularly the poorer and underprivileged section. The reasons that sustained the colonial exclusion policy are: First, it was meant to provide strength to the moral fiber of the nation; second, it was meant to extend unquestioned support to the dominant class's ways of life and morality, and third, it served as a measure of

³ Id.
⁴ Id. at 23.
⁵ 2 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 2-3 (1956).
⁶ Id.
controlling the unstable and dangerous elements of the society. Though fear of the other, particularly the poor and the underprivileged sections, is projected as the most important motivation of social exclusion, the real, mostly hidden, motivation for impelling the dominant sections remains to be greed or consideration of economic gain. Thus, the dominant section found nothing wrong in pauperizing, stigmatizing, or criminalizing as long as it yielded economic gain to them. For example in the early stage of plantation and industrial capitalism in India in the late nineteenth and earlier twentieth century social exclusion was practiced as a technique of ensuring a regular supply of cheap and pliant labor. Even laws such as the Apprentice Act, 1850 were enacted to compel the children of the poor and destitute parents to work as apprentices up to three years without any payment. Who stood to gain by this device of ensuring regular supply of free apprentices labor? Obviously it was the European capitalist industries that were constantly threatened by irregular supply of labor force in these days.

II. LAW AS A MEANS OF SOCIAL EXCLUSION

In modern societies law invariably remains to be a vital instrument of social ordering. It is deployed both for social exclusion as well as for social inclusion. The social inclusionary role of law is of recent origin and is associated with the advent of the right conferring laws, particularly of the post Second World War era. The right-oriented laws are generally enabling in nature and egalitarian in character. Unlike these, the duty-oriented laws are disabling in nature and exclusionary in import. They cast universal duties or obligations and make non-compliance socially stigmatizing. Even the social exclusionary laws can assume either of the following two forms: (a) Those that directly or expressly lead to social exclusion of certain groups or individuals, and (b) Those that indirectly or incidentally lead to social exclusion.

Traditionally understood, laws were meant to serve certain interests that concern mainly the elitist sections of the society only. That perhaps was the reason for John Stuart Mill\(^7\) and John Rawls\(^8\) to expressly exclude the destitute and other underprivileged in their writings on liberty and justice. H.L.A. Hart\(^9\) was more forthright in expressly acknowledging this fact in the context of the discussion on freedom thus:

Freedom (the absence of coercion) can be valueless to those victims of unrestricted competition too poor to make use of it; so it will be pedantic to point out to them that through starving they are free. This is the truth exaggerated by the Marxist whose identification of poverty with lack of freedom confuses two different evils.\textsuperscript{10}

The legal system’s preoccupation with such an understanding of freedom and liberty tends not only to turn it into an elitist institution meant to serve the interests of only those who are capable, autonomous moral agents, but also leads to social exclusion of a bulk of the poor and underprivileged population. Law confers rights and guarantees freedoms, but the poor and underprivileged are not entitled to them because they lack the essential qualifications for claiming them — capabilities and autonomy. This traditional inbuilt social exclusionary stance of the legal system has come under strong criticism from those who espouse the proper viewpoint. Why should legal rights and freedoms not be understood in a sense that would enable a larger section of the population to take benefits through them? As a consequence several legislative and judicial initiatives are seemingly underway to offset the traditionally exclusionary stance of the legal system.\textsuperscript{11}

More significant social exclusionary fall-out relates to the duty-oriented or obligation-creating laws. Such laws require compliance with certain behavioral standards or require abstinence with certain forms of conduct. Though such laws are couched in neutral and universal terms, in effect it is the poor or underprivileged who are not in a position to comply with the legal duties or obligations, thereby leading to incidental social exclusion through criminalization. Karl Marx strongly critiqued the dominant class policy of criminalization of the whole lot of the underclass population in fifteenth and sixteenth century Europe thus:

\begin{quote}
[T]he right of human beings give[s] way to that of young trees. . . . By applying the category of the theft where it ought not to be applied, you have exonerated it where this category ought to be applied. . . . All the organs of the state become ears, eyes, arms, legs, by means of which the interest
\end{quote}

\textsuperscript{10} Id.

of the forest owner hears, observes, appraises, protects, reaches out, and runs.\textsuperscript{12}

As he stated this, Marx also had to ask, which human beings? For the first time he comes to the defence of the “poor, politically and socially property-less,” when he demands for the poor a “customary right.”\textsuperscript{13}

The social exclusionary fallout of the duty-oriented laws for the vast section of destitute and underprivileged population has been appreciated by Barbara Harris-White in her incisive article in the context of South Asian societies.\textsuperscript{14} She elaborately describes how the economic aspect of destitution, which is labeled by her as “having nothing,” the social aspect of destitution, which is labeled as “being nothing,” and the political aspect of destitution, which is labeled as “having no rights and being wrong” creates disenfranchisement and social exclusion for the vast range of poor and powerless population.\textsuperscript{15} Barbara Harris-White sees a direct State complicity in the culturally legitimated oppressive practices that leads to social exclusion of the wide range of population that may have had social powerlessness as a common feature.\textsuperscript{16}

Equally significant were the techniques of expanding the net of criminalization to a whole lot of new crimes like vagrancy, beggary, squatting on public land, illegal hawking, unlicensed rickshaw-pulling, etc. The rationale of these forms of criminality was summed up by Lord Justice Scott in an early House of Lords judgment in \textit{Ledwith v Roberts}\textsuperscript{17} thus:

In my view these two expressions both refer to members of a class once prevalent in England to an extent which made it for four or five centuries a major political problem, a problem which taxed the forces of law and order to the uttermost and produced a long succession of repetitive statutes. Those laws were framed exclusively in relation to that particular class of community and have three purposes. The class con-
sisted of the hoards of unemployed persons, many of them addicted to crime, then wandering over the face of the country; the purposes were: (a) settlement of the able bodied in their own parish and provision of work for them there; (b) relief for the aged and infirm, that is, those who could not work; and (c) punishment of those able bodied who would not work.\(^{18}\)

III. SOCIAL EXCLUSIONARY PENAL LAWS IN BRITISH INDIA

The deployment of social exclusionary penal laws in India was clearly associated with the earlier stages of plantation and industrial capitalism in the nineteenth and the early twentieth century in India.\(^{19}\) Like many other colonial states in Africa and Latin America diverse types of penal measures were devised mainly to control the working classes and petty traders. Some of the known types of criminalization measures were:

(a) Criminalizing breach of contracts by workers.

(b) Criminalizing indolent and parasitic ways of life by vagrancy and anti-beggary laws.

(c) Criminalizing workers combinations and other collective ways of raising workers grievances.

A. The Crime of Breach of Contract

This was a device in the hands of the employers in tea, coffee, and indigo plantations to compel workers to fulfill their work contracts on payment of monetary advances. The earliest penal measure was the Workman’s Breach of Contract Act, 1859, followed by the Employer’s and Workmen’s (Disputes) Act, 1860 and Chapter XIX (Sections 491-493) of the Indian Penal Code, 1860. In terms of the aforesaid penal provisions most of the criminals processed through the magistrate’s court, for the crime of breach of contracts were poor and resourceless villagers who had been duped into work contracts by the labor agents on payment of small sums of advance.\(^{20}\) Thus, the fear of penal sanctions was used to compel large numbers of plantation and factory workers to respect their work contracts, even where the conditions of the work were most inhospitable and exploitative.

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\(^{18}\) Id at 270.


\(^{20}\) See Govinda Chetty v. Munanooey Naik, 14 Cr. L.J. 400 (1913) (the advance amount was rupees one hundred); see also C.J. Lucas v. Ramai Singh, 15 Cr. L.J. 233 (All.) (1914) (the advance amount was barely rupees nineteen only).
B. The Crime of Vagrancy and Beggary

Though the Municipal Act, the Police Act and the preventive measures under the Code of Criminal Procedure, 1898 had measures which could be pressed into action to regulate parasitic and indolent ways of life, the real anti-vagrancy and beggary laws came to be enacted post World War II, which was the labor recession period in the early 1940s. As a consequence, most of the provincial governments enacted Beggary Prevention Acts that made soliciting alms in public places an offence. A crime of beggary could entail detention in a poor house for up to three years for the first offence and up to seven years for repeat offence. The anti-beggary laws carried a subtle message of requiring every able bodied and even disabled person to follow an industrious way of life and accept wages labor on any terms.

C. The Crimes of Collective Action of Workers

In the early twentieth century the tendency of workers to raise grievances collectively was for the first time perceived as a form of behavior that had the potential of seriously harming the employer’s interest. As a sequel the administration criminalized the combinations by enacting new crimes of criminal conspiracy and with the emergence of trade unions certain forms of collective action of labor were legitimised.

IV. Continuity of Social Exclusionary Law in the Post Colonial Era

In the post-colonial era social exclusionary laws were rationalized in view of the Trade Union Movement and labour regulation through non-penal measures. As a sequel, crimes of breach of contract and combination of workers were repealed. However, even in the post colonial period, penal measures relating to vagrancy and beggary were not only retained in the statute book, but enforced repressively. Since the various beggary preventions acts, including the Bombay Preventions of Begging Act, 1959 (extended to the Union Territory of Delhi in 1961) defines begging offences fairly widely under Section 2(1)(c) and 2(1)(d), it confers unduly wide discretionary powers on the police that constitute the core of the enforcement authorities. Such wide powers enable the enforcement agencies to interfere with the lifestyles of many innocent self-employed populations. Arbitrary arrest and detention in Poor House Reception Centre is fol-

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owed by trial, which mostly remains far from fair. As a consequence in most of the metro towns, the underprivileged population continues to be under a constant threat of action under the beggary law.

Since a substantial proportion of India’s urban work force is compelled to earn its livelihood through work in the informal sector, such as street vendors, hawkers, and rickshaw pullers, the independent Indian state continues to develop new and unique measures of social exclusion. Street vending, hawking, and rickshaw pulling require compliance with regulatory measures under the Municipal Corporations Acts and the Police Acts, and these along with the regulatory orders issued by the municipal authorities become crucial for the social exclusionary consequences. According to Madhu Kishwar, in Delhi alone of the estimated five lakh street vendors and hawkers, only 4916 tehbazari rights have been created, thus rendering the overwhelming majority of vendors and hawkers illegal. Such illegal vendors and hawkers perpetually remain at the mercy of the enforcement authorities, apart from their social exclusion from lawful trader status. Similarly, the municipal authorities control the cycle rickshaw trade, including the means of earning livelihood. Delhi had an estimated number of six lakh rickshaws, but the municipal authorities at no time issue more than 90,000 licenses. This leaves over five lakh rickshaw pullers in the status of illegal pliers, whose rickshaws can be confiscated at will by the enforcement authorities. Thus, the large population of illegal traders, hawkers, and rickshaw pullers are systematically subject to social exclusion apart from being subjugated to constant economic exploitation.

V. THE NEED TO CHANGE THE POLICY OF CRIMINALIZATION OF THE POOR AND MARGINALIZED

As discussed earlier, in Europe and England throughout the sixteenth to eighteenth century period, the poor, the marginalized, and the migrants were indiscriminately criminalized and invariably treated as suspects. The reasons underlying such an approach were diverse, such as: (a) the poor were perceived as inferior or subhuman, (b) the way of life of the poor was considered an anti-thesis to civilized way of life, (c) the poor needed to be disciplined and educated

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22 Reporting on these incidents is available in articles by Madhu Kishwar in volumes 124 through 126 and 135 of MANUSHI (2001, 2003).


in order to be converted into a resource for the larger society, and (d) the overwhelmingly large numbers of the poor, as against the well off and elite sections, constituted a threat to the material interest, particularly the private property of the dominant classes. These things were no different in India, either. With rampant deployment of coercive control techniques and creation of a plethora of status offences, coupled with differential application of criminal laws, the inherent bias of the criminal justice system against the poor became much too obvious. It is sad, but not surprising, that the policy of criminalization of the poor remains more or less uncontested even after five decades of independence. Much worse is that factors like population explosion, accelerated rate of rural-urban migration, globalization, and increased faith in coercive regulation of the poor are contributing to the proliferation in the explicit and implicit ways of social exclusion of the poor and marginalized.

However, there are some positive developments, too, that raise the hopes about the likely policy changes. The three notable developments in this regard are: First, conferment, after the creation of Indian Republic in 1950, of the constitutionally guaranteed rights to equality, liberty, and dignity to all the citizens, including the poor and marginalized, and the emergence of the conventional and statutory human rights regime that concerns them as well. Secondly, there is an increased emphasis on reform and rehabilitation ideals. Thirdly, the focus is shifting to the procedural determining line that identifies formal stigmatization itself as a major cause for the criminality of the poor. These developments may, it is hoped, trigger changes in the policy, both at the legislative as well as at the enforcement levels. The constitutional imperative of equality, liberty, and dignity is already reflected in the enactment of the laws meant to protect the weaker sections such as the Protection of Civil Rights Act, 1955, The Bonded Labour System (Abolition) Act, 1976, The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, and some of the judicial decisions that envisage to compensate the

25 That is the reason why the punitive approach taken to beggars and vagrants in the post-Second World War period that was associated with economic recession and massive retraction continued to hold sway even today, and many states have either enacted or extended these laws in the sixties and seventies to cope with the “menace” of begging.

26 It is significant that most of the modern textbooks on criminal law in England treat the Constitutional Principles and Human Right Conventions as the basis or source of their criminal policy, but it is curious that still criminologists in India pay little heed to the constitutional or human rights guarantees in the course of criminal justice policy discourses.
poor victims against the abuse process. But one can hardly say that the constitutional guarantees have already made a decisive impact on the criminalization policy, particularly relating to the poor.

In criminological theory, particularly in the line of consensus tradition, no distinction is made between crimes by the rich and the poor. The economic or social status of the lawbreakers is not to be taken into account at the time of either laying down the norms or its uniform enforcement, at least as an ideal. This is because all crimes deserve punishment commensurate with their seriousness. But criminal policy is not concerned with retribution and deterrence alone. The ideal of reform demands understanding the offender, and this is necessary because although people choose to act criminally, they hardly do so under the conditions of their own choosing. They might be compelled by the material conditions of poverty, alienation, etc. and do not remain fit subjects for a faithful compliance with criminal law norms. An anecdote from Lord Buddha's life may be very pertinent here. Lord Buddha after exposing his chosen three disciplines to advance discourses on nirvana and renunciation asked them: "What would be the nature of your response if you happen to confront a sick, tired, haggard, and emaciated person on the roadside, soon after you embark on your journey of spreading the message of Buddhism?" The response of all the learned disciples was more or less on the same lines: "We will tell him about the futility of human existence and about the path of nirvana that lies ahead after true renunciation" Buddha was thoroughly disappointed and exclaimed: "You have not understood my message at all. Because you must first nurse the person back to health by feeding him, resting him, treating him and then only subject him to the message of nirvana."

Is subjecting the poor and marginalized to criminalization indiscriminately not like subjecting the sick and hungry to the discourse on nirvana? The standards of right conduct, morality, decency, and hygiene conveyed through criminal law norms are likely to be better complied with by people who are in a position to enjoy minimum material conditions. Therefore, the criminal law norm as well as its enforcement needs to be rationalized in the light of the material conditions of a substantial majority who are everyday arrested, prosecuted, tried, sentenced, and imprisoned more for their poverty rather than their "deviations."

Finally, most of the criminality of the poor and marginalized is merely an ascribed status. Since the self of the poor is socially located, her or his contact with the systems of social control can in fact

have a negative effect on the rule breaker's self image. In a colonial society labeling those who breached service contracts, who led a life of idleness and social parasitism, and who indulged in trade that was designated as pretence for begging may have been tolerated because the ruling class was merely interested in keeping the native population under control. But in a free and democratic society, if some people are labeled as criminal merely because of their existential conditions then the enforcement officials are getting a decisive say in creating and perpetuating criminality of the poor and the marginalized. Not only the beggar and the vagrant but also the vendor, the hawker, and the rickshaw-puller may constantly live under the perpetual fear of being labeled as criminal and being subjected to formal action. In a democratic order such disproportionate power in the hands of the enforcement officials is hardly tenable, much less defensible.