

ACCUMULATION AND LEGITIMACY : THE INDIAN CONSTITUTION AND STATE FORMATION*

UPENDRA BAXI**

MANY OF us present here are lawyers and have had some training in law which is a good training and many of us respect lawyers. But nevertheless a lawyer represents precedent and tradition and not change, not a dynamic process. Above all, the lawyer represents litigation. Somehow we have found that this magnificent constitution that we have framed was later kidnapped and purloined by the lawyers.

—Jawaharlal Nehru¹

So far as I have been able to count, we are here only five. But we are millions and millions and we are the real owners of India. It has recently become the fashion to talk of "Quit India." I do hope that this is only a stage for the real rehabilitation and resettlement of the original people of India. Let the British quit. Then after that, all the later-comers quit.

—Jaipal Singh²

We have here two agonized and agonizing texts. Jaipal Singh complains that the very act of constitution-making entails an illegitimate appropriation of India. Jawaharlal Nehru, moving the first amendment to the Constitution, even before the ink with which it was signed by the members was dry, complains about the 'kidnapping' and 'purloining' of the Constitution by lawyers and courts. He articulates the agonies of the Modern Prince (in the Gramscian sense) as a proud shaper and inheritor of the power which the national liberation movement bequeathed to the newly emergent Indian ruling class. Nehru complains, in essence, about the legal larceny of legitimacy by judges and lawyers daring to question the executive wisdom and legislative will. He inaugurates a conception of judicial power as a servitor of the centralized unity of state power

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** Professor of Law and Vice-Chancellor, University of Delhi.

1. The speech made during discussion on the Constitution (First Amendment) Bill, 1951 : *Parliamentary Debates*, vol. 12, col. 8832, dated 16 May 1951.

2. The speech made in the Constituent Assembly on 11 December 1946: *Constituent Assembly Debates*, vol I, no. 3, pp. 46-47, dated 11 December 1946.

embodied in the person of the Prime Minister. The magnificence of the Constitution in his view, all said and done, can only be preserved by charismatic leaders.

Jaipal Singh, in contrast, interrogates the legitimacy of the constitution-making process which renders liminal the presence of India's oldest inhabitants in the Constituent Assembly. He presages a continuation of a more radical 'Quit India' movement; even as a metaphor, it summons the restoration of just rights of India's depressed classes. All they receive, at the end of constitution-making labours, are legislative reservations which, in the short and long run, demobilize the political consciousness of the scheduled castes and tribes, a tokenist formulation of rights against exploitation (article 23) and the effete abolition of untouchability (Article 17). What they lose out in terms of rights is, of course, lavishly returned to them in terms of the Directive Principles which, later in the constitutional day, would primarily become the foundations of a plebescitary democracy (through several point, though pointless, programmes) and not of rights of access to the nation's resources. The poignancy of the "Quit India" metaphor was to be more fully attested in the working of the Constitution over the four decades: again and again it was the indigenous population of India which had to be displaced from their age old habitats for the nation's development projects: it was to become the destiny of tribal population to quit their India as they knew her over the millennia. Jaipal Singh perceives, presciently, in the making of the Constitution itself an inauguration of further processes of detribalization and deprivation.

The two texts provide us with different conceptions of theft. Nehru complains of the theft of the Constitution. Jaipal Singh laments the Constitution as theft. The saga of the Constitution moves around the axis of these two narratives of theft.

II

The Indian Constitution has indeed been read in many diverse ways to sustain the Nehruvian critique of judges and lawyers. But rarely has a reading of it been animated by Jaipal Singh's *angst*. This is, of course, a natural outcome of the ideology and practices of power instituted by the very corpus of the Constitution which is disproportionately devoted to the structuration of the apparatuses of governance.

This disproportion between what this author would like to name as the 'social justice' texts, as distinct from the 'governance' texts, is rather conspicuous in the corpus which we call the Constitution. Only the Preamble, Part III (the Fundamental Rights), Part IV (the Directive Principles of State Policy), bits of Part IV-A (the Fundamental Duties of Citizens) and the Fifth and the Sixth Schedules (autonomous administration of tribal districts), in the main, form the 'justice' texts. The rest of the corpus ordains the ways of governance, marking the various sites of hegemonic domination. And clearly the corpus of 'social justice' texts dwindles

further when we recall that, save Part III, the other texts are purely hortatory and have been blithely regarded as such in the practices of power.

The contrast between the 'governance' and 'justice' texts does not suggest any easy minded antithesis between the two. The 'governance' texts of the Constitution are not necessarily inimical or at all unnecessary for the tasks of justice. Generation of justice in society often requires strong governance, a powerful and progressive administration. Salient social justice texts of the Constitution require vigorous exertions of progressive state power against intransigent—and incorrigible-looking—structures of the civil society—for example, the abolition of untouchability (article 17), rights against exploitation (articles 23, 24) and rights to gender justice (articles 14, 15, 23). So do the Directive Principles (Part IV of the Constitution) which command the redirection of the market by state and plan in ways which achieve the 'common good' and avoid the 'common detriment.' Indeed, the creation of the powerful and extensive state apparatus was justified precisely by an appeal to the need to erect a strong state which alone can attend to tasks of justice.

But difficulties do arise when we try to grasp the historic intentions of the Constitution-makers and their progressive interpretations by the successive regimes in power both at the national and state levels. Intentions are, at least, the mixed products of interests and ideologies. But neither is ever manifest with blinding clarity; neither interests nor ideologies (as Nicos Poulantzas said of the latter) are like number plates on the back of a car! And for a collectivity so large and ideologically diverse as the Constituent Assembly there is simply no way to discover the authorial intentions or even purposes.

Context does enable some grasp of the intentionality of the grand design and detail of the governance texts and the disproportionality between these and the social justice texts in the production of the Constitution of India. Context points to the need for a strong state; after all, the trauma of the enactment of the partition of India—available to the contemporary generation of Indian citizens only through aesthetic representations: for example, through Bhisham Sahani's *Tamas*, Manohar Mulgaonkar's *A Bend in the Ganges*, Kushwant Singh's *A Train to Pakistan* or the short stories of Manto.

That historic context also furnishes yet another overlay of history. India becomes a fully fledged nation-state. Nationalism itself becomes a "state ideology" which appropriates "the life of the nation into the life of the State." The very discourse of the Indian liberation movement leads, inexorably as it were, to a "presumed identity between the people-nation and the state-as-representing the nation..."³ But the nation-state is still emergent at the time of the constitution-making; it is besieged from within and without. Government becomes geared to the protection of the

3. P. Chatterjee, *Nationalist Thought and the Colonial World: A Derivative Discourse* 166 (1986).

territorial integrity of the new sovereign republic; the reason of the state gets inscribed thus on the constitutional text, legitimating the anti-democratic provisions of the Constitution at the very outset. The Constitution also elaborates the grid of national power in the mutation of the federal principle and detail; federalism is to be the overall framework of the national unity but under the benign auspices of a strong centre, charged with the mission of making a nation out of India. The enactment of brutal partition violence not just animates the reiteration of minority rights and state-sponsored secularization of governance but also leads to the enshrinement of some anti-democratic provisions in the Constitution such as the provision, in the heart of fundamental rights, for preventive detention, and of imposition of the President's rule and emergencies which could extend even to the suspension of the right to life of citizens.

And context shapes the design and detail of governance in myriad ways. The state apparatuses are catalysts for accelerating 'development'; the state is the planner and the provider and the hegemonic agency for the transformation of civil society. Thus, for example, the centralized unity of state power is to be preserved and promoted by executive power; the principle of the separation of powers is ordained to serve this dominant end. The legitimacy of executive power constituted through the operation of the right to adult franchise is located in legislative power.

The citizen is sovereign for at least one day in every five years: the day of voting. And the making of the Constitution, premised on the view that the Indian National Congress is India's political microcosm, also anticipated for the decades to come the preeminence of the party and within it of its leader. History had reserved that preeminence for Nehru. And no matter how the governance texts got formulated, the immediate outcome was a Prime Ministerial form of government, contained primarily, if at all, by intra-party, and intra-regime opposition. Practices of parliamentary authoritarianism—the overwhelming majority of one party and the decisive role of the Prime Minister—stood anticipated and anchored in the collective unconscious of the Constituent Assembly of India. For a body which produced a stunningly complex liberal democratic Constitution, it must also have been a comforting thought that the *karta* of the nation-family, a *pater familias* was already around. India, in her first democratic decade, stood embodied in Jawaharlal Nehru. And this concentration of power and authority invested the office of the Prime Minister with a cultural, symbolic capital which even determined spendthrift endeavours have been unable to wholly erode.

It is this wrinkle of India's destiny which furnishes the motif of Nehru's agonized text quoted at the beginning of this paper. Governance geared to tasks of social justice was the province and function of the executive: Judges and courts charged with the duty to interrogate and discipline legislative and executive power at the bar of fundamental rights were not expected

to do so in ways which too sharply limited the will, wisdom and ways of power. The fundamental rights were to be read and interpreted by the judiciary, of course; but the executive and legislature also claimed the supreme not just a superior, right and the power to read, as well as write and rewrite the Constitution.

The architecture of governance was designed to mute the archetypal interrogation by authentic voices of people like Jaipal Singh. When the British quit India, all Indians become citizens equal before the law and equal recipients of promises of rights to life, liberty, fraternity, dignity and equality. The 'oldest inhabitants' and the 'later-comers' were now all citizens commanded by the Constitution to build and preserve a new nation. All owed a duty to history: A duty to make Bharat that is India. Nehru's constant refrain in the first years of India was ".....dare not be little"; every interest, every ideology was to be imbued with a transcendent nation building motive and mission.⁴

If the creation of extensive state apparatus was justified by the 'logic' of the nation state, the justification of strong state lay in the promises of transformation of the Indian society, preeminently through the Constitution, law, planning and administration all dominant spheres of organized politics. The state had to be strong if the nation was to be preserved; the state had to be strong if tasks of justice had to be performed. But as Nehru formulated (in one line, for Andre Marlaux) the problem of independent India was to build a "strong state with just means." The Constitution was a code of just means.

The 'justice' texts, accordingly, were to provide the 'just means' for a 'strong' state. Put another way, the 'justice' texts, in all their slenderness, were to provide the very basis of erecting a 'strong' state. These texts were to provide, and have provided, a reservoir of legitimization motifs and symbols enabling the representation of the interests of certain class formations as the universal interests of the Indian society. The operation of the governance texts draws upon, inexhaustibly, and incessantly, on these motifs and symbols; in this sense, the verbiage of the constitutional corpus appears as no more than the massive footnote to the Preamble to the Indian Constitution. It makes no difference whether we invoke the outfashioned Laskian notion of the "grammar of politics" or the vougish Bourdieuan notion of "habitus"; the Constitution of India provides abundant justification for the capitalist maturation of the Indian state and society.

In this sense, the Indian Constitution, like all Constitutions, is a testament of the power of the ascendent classes. But the ascendent classes cannot allow provenance to Jaipal Singh's interrogation of constitution-making as theft. Rather, the principle of practices of power embodied in the Indian

4. Upendra Baxi, "Dare Not Be Little : Jawaharlal Nehru's Constitutional vision and Its Relevance in the Eighties and Beyond" in R. Dhavan and Thomas Paul (eds.), *Nehru and the Constitution* (forthcoming).

Constitution are to be deployed in ways by which the interests of the ascendent classes are represented as the interests of the whole nation. Constitutions everywhere, but especially in class-divided societies, perform this ideological function; at least they are so designed. Their languages convert, instrumentalities of power into those of 'justice.'

But if constitutional phrases mask the reality of the practices of power, they also remain important for struggles for justice. The extraordinary thing about Constitutions is that their rhetoric often provides potential to avenge the practices of powers; constitutional discourse, in its historic moments of articulation, structures both modes of legitimation of power and its delegitimation as well. Constitutional discourse is not simply a register of dominance; it also marks sites of resistance to domination. When Marx (and Engels) observed that Constitutions and laws furnish the means of class struggle they firmly had in view the dialectical role of constitutional discourse.

Undoubtedly, the trajectory of the struggle remains constrained and conditioned by the foundational corpus of the Constitution. In a sense, the very act of constitution-making marks a formative and integrative moment for the ascendent classes. For all his febrile rhetoric, Jawaharlal Nehru did not succeed (or did not allow himself to succeed) in describing India as a *socialist* republic even in the Preamble (that word came in 1976 into the Preamble during the massive internal emergency imposed by Indira Nehru Gandhi). Similarly, the fundamental right to property, assuring the immunity from confiscation and endless litigation against the acquisition of property, marked the organized triumph (against Nehru's *wishes*, if not against his will) of the claims of the owners of means of production over these of the owners of labour power. The precise coalescence of interests between the capitalist classes and the ruling classes—or within the ruling formation or power block—is still awaiting the labours of historiography. But even these gross examples remain suggestive of a foundational consensus or complicity.

The mandate for social and economic transformation, crystallized in the Directive Principles, was also cribbed and confined by this organized triumph. The ownership and control of the material resources of the community, enjoins the formulation in article 39(b), are "to be so distributed as best to subserve the common good." The latter is at least constituted by article 39(a) as "the right to an adequate means of livelihood" to all "citizens, men and women equally." But "concentration of wealth and means of production" is not *per se* bad: Article 39(c) sonorously declares that it is so only when the "operation of the economic system" embracing this concentration, results in "common detriment." Clearly, then, denial of adequate means of livelihood to all citizens is a "common detriment." But the Constitution makes the executive the best judge of common good and detriment.

If concentration of wealth and means of production is in the short run an instrument of denial of the "right to adequate livelihood" to the people of India, but is seen as providing that livelihood in the long run, how can one say that the state in thus ordering the economic system is violating the command of the Constitution? And who is to decide excepting the historian of *longue duree* what is 'short' and 'long' run?

Even, thus, the enunciation of foundational social justice texts mark the organized triumph of the ascendent classes. The Constitution of India of 1950 did not even envision (in an overwhelmingly agrarian society) the provision of land to the tiller or the worker's participation in management (the latter comes as a gift of 1975-1976 emergency, the *anushashan parva*—the age of discipline—as Saint Vinoba hailed it; an age which further 'disciplined' owners of labour-power to the needs and fetishes of the owners of the means of production).

The story of the constitution-making is thus the story of the ascendancy of the ascendent classes. And, naturally, members of these classes will appropriate the Part III freedoms to facilitate the pursuit of their own heterogeneous material interests. The state has to allow process of accumulation to run their historic capitalist course; the text of the Constitution encoded this development.

But primitive accumulation processes which contradicted article 39(a) enunciation of equal rights of all citizens to a means of livelihood undermined, at its roots, political legitimacy, a major resource for governance. The imperatives of accumulation and of legitimation were here at odds; and the anguished articulation of Nehru and Jaipal Singh curiously coincide. The processes of primitive accumulation point to Constitution as the theft of nation's resources by and for the few; the theft of the Constitution points to the larceny of legitimacy by the dominant, from the ruling class formations.

The dilemmas had to be dispersed by political action; and the constitutional discourse provided the site of this dispersal. To this emplotment of the Constitution we now briefly turn.

III

Confronted with the need to accelerate 'growth' (capital formation and accumulation) and the need to retain political legitimacy, the announcement of extensive agrarian reforms became inevitable in the first fifteen years of independent India's planning. The Constitution, as noted, devoid of justice texts for the toiling agricultural labourers, was replete with the guarantees of fundamental right to property. Integrity forbids a description which would suggest that the independent Indian nationalist leaders were bursting with a passion to radically restructure the agrarian relations in the fifties and sixties. They clearly willed only such reforms as will be consistent

with the rise in agricultural productivity. At the same time it was not politically expedient to eschew the radical rhetoric of reforms sustaining legitimacy. A complex way out was found in badly drafted land reform legislations compounded by progressive attenuation of the right to property from Part III, proclaiming security of tenants in ways which would allow resumption of land for 'personal cultivation' resulting in graver insecurity; inadequate record of land rights, 'secret' orders subverting implementation; prevention of leading party cadres involvement in implementation of land reform legislation, and ambivalent support to farmers and tenants organizations. To this was added the process of judicial appointments carefully indifferent to the holding of agrarian assets by India's leading justices.

But when justices accomplished only that which they were ideologically and professionally equipped (and even programmed) to do, the crucial grass-roots issue of agrarian reforms got converted into the superstructural issue of the limits of judicial review power and the plenary power of the amendment of the Constitution. Parliamentary sovereignty haunted political discourse. And that was secured not to delete the right to property (as a vehicle of growth and accumulation) but to immunize legislations from judicial review through the device of the Ninth Schedule seeking to oust jurisdiction of courts. This device, and the associated one of attenuating the text of article 31, did not bring even a moderate implementation of agrarian reform at the aggregate national level, though moderate successes were recorded here and there.⁵ But all this reinforced, at populist level, the appearance of political determination, creating legitimation of the regime. The revolutionary opposition to it through the naxalite 'jurisprudence' was, of course, an invitation to repression which followed in bloody abundance.

IV

The superstructural discourse elaborates the justices as subverting a progressive ruling elite. Judicial discourse began to raise awkward questions concerning the intentions, competence and wisdom of the executive. This capacity to raise awkward questions became an arena of symbolic constitutional politics; it had to be removed: that, not the pursuit of agrarian reforms, represented the political function of the Ninth Schedule and the assertion of parliamentary sovereignty. That was the political function of discourse around parliamentary sovereignty. No one wanted 'activist' judges then; no one also wanted the frustration of radical rhetoric. Constitutional controls were soon established to discipline the discourse of

5. Upendra Baxi, *Courage, Craft and Contentions: The Indian Supreme Court in the Eighties* 110-124 (1985); see also M. Ghouse, "Poverty, Structure Change and the Constitution" in N.R.M. Menon (ed.), *Social Justice and Social Process in India* 32-55 (1988).

judicial power on the right to property. And the judiciary served increasingly, as the whipping woman (the Indian patriarchy requires this translation of the English phrase) reinforcing the legitimacy of the leadership and the regime style. Both the landowners and the executive/Parliament used the courts for their own ends.

The dilemmas of accumulation and legitimacy reappear in the late sixties but now more acutely. The Supreme Court poses now no difficulties in the pursuit of state capitalism, heralded by the bank nationalization. But it maintains in the *Golak Nath*,⁶ as late as 1967, its power to veto amendments which adversely affect to the point of abrogation of the fundamental rights in Part III. A determined Indira Gandhi regime unleashes the twenty fourth and fifth amendments seeking to restore parliamentary (executive) hegemony. When the *Golak Nath* bar to the amendment of fundamental rights is removed (paving way to the eventual abolition of the right to property in the Janata regime) the doctrine of the basic structure of the Constitution now emerges imposing teasingly amorphous limitations on Parliament's (executive's) vast powers.⁷ The massive inauguration of state capitalism serving needs of accumulation is achieved but the problem of legitimization remains.

And this is sought to be solved by the elaboration of the doctrine of the 'committed' judiciary advanced as justification of the supersession of the three of the *Kesavananda*⁸ justices. The discourse of 'commitment' signified, too, that the judicial power of the state legitimated through the doctrine of separation of powers should serve as a mask of the centralized unity of state power. 'Commitment' symbolized the claim that the supreme judiciary must be compliant, in vital matters, with the supreme executive (the Prime Minister).

This made sense. By 'commitment' was meant the articulation of judicial power in ways which will protect and promote the unwritten Constitution underlying the written one. But justices who also sustained the canons of the unwritten Constitution in many matters (including constitutionality of the declaration of emergencies, the president's rule, the official secrets and security legislation) simply refused to surrender their relative autonomy. The growing dislocation between the judicial and executive power of the state culminated into the decision unseating a popular and powerful Prime Minister on admittedly 'technical' grounds of election law, precipitating, among other factors, the imposition of the national emergency.⁹

The contrast between the written and unwritten Constitutions forms

many a theme of power outlasting the experience of the emergency. Unlike the conception of the unwritten Constitution elsewhere (say in the United Kingdom) where it preeminently serves to *supplement* the fragments of the written texts, in India it serves to *supplant* the written Constitution. The unwritten Constitution signifies a series of tacit understandings developed among the wielders state power in ways which sustain the legitimacy of the totality of the organisation of political power in society. In particular, the unwritten Constitution must operate to protect the overall interests of the regime or the ruling bloc even when the interpretation of the written Constitution generates the appearance of accountability. It is the unwritten Constitution which prescribes the conventions, occasions, uses and limits of high judicial power. It signals to justices the wisdom of not too shaply interrogating the supreme executive at key points of the management of economy and process of accumulation. The emergency regime is notable only for the elevation of the norms of unwritten Constitution in the realm of the written Constitution as, for example, in the judicial discourse in the infamous *habeas corpus* case.¹⁰ In the non-emergency periods, the unwritten Constitution must operate as the inarticulate major premiss of the interpretation of the written one.

V

But, like all texts, the Constitution of India overruns the hegemonic intentionality of its collective authorship. The act of reading the constitutional text also becomes the act of rewriting it, at least in the supple, activist hands of creative justices. The constitutional text is a contested site of great hermeneutical complexity. If the act of reading-as-rewriting is, at one level, a product of historical conjuncture, the conjuncture, at another level, lies (as it were) emwombed in the originary overdetermined enunciations themselves. History as interpretation comingles, alarmingly for 'rigorous' minds, with interpretation as history.

The constitutional enunciations provide languages of diverse political ideological practices. If they provide, at one level, powerful mobilization of solidarities for dominance, they also provide equally powerful media of articulation of dissent, opposition even to the point of legitimization of insurrection.

Let us take at random a few more examples of the openness of the constitutional text. If the languages of adult suffrage and free and fair elections guaranteeing the logic of representation have been used to sustain for long periods of time the practices of "authoritarian parliamentism" (to invoke Professor Simoniya's apt notion,¹¹ they have also generated powerful texts of accountability to the point of articulation of a

6. *L.C. Golaknath v. State of Punjab*, AIR 1967 SC 1643.

7. Upendra Baxi, *Courage, Craft and Contentment: The Indian Supreme Court in the Eighties* 64-112 (1985) and the materials cited there.

8. *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

9. See Upendra Baxi, *The Indian Supreme and Politics* 41-120 (1980) and the materials cited there.

10. *Addl. Distt. Magistrate, Jabalpur v. Shivkant Shukla*, AIR 1976 SC 1207.

11. N.A. Simoniya, *Destiny of Capitalism in the Orient* 110-11 (1985).

natural right of people to recall their representatives during the Total Revolution movement. If the languages of security, which achieve their nadir in the articulation of the chasm between "freedom" and "chaos" in Indira Nehru Gandhi's stewardship of India of 1975-76 period (and of *ekta* and *akhandata* motif in the late Rajiv Gandhi era) the language of basic rights in the Constitution stood deployed to delegitimize the emergency regime and in the recent repeal of the fifty-ninth amendment. If the language of federalism structure the discourse of a "strong centre" they also sustain the discourse of "strong states." The languages of Constitution have sustained on the one hand the practices of parliamentary authoritarianism for India; but they have also sustained the discourse of 'insurgency' from the North-East to Punjab. And in between these ends of the spectrum, the constitutional discourse has preserved spaces for the emergence of "parliamentary" communism.¹² Overall, the languages of the Constitution serve, powerfully, to defeudalize the political discourse.

Hermeneutic and symbolic practices of politics have also been deployed to capture the ideological state apparatuses and the extent of this capture has resulted in the highlighting of the repressive visage of the coercive state apparatuses of the Indian state. The slender social justice texts have been, spectacularly in the late seventies and eighties, deployed by a variety of constitutional strategies to virtually overwhelm and overrun the bulk of the governance texts. To take but just one major example, the struggle to capture the judicial power on behalf of the dominant classes in the first two decades of the Constitution has been converted into a struggle for constraining judicial power on behalf, if not at the behest, of the dominated classes. The summoning rhetorical polemical crusade of Jawaharlal Nehru against the judiciary and its continuation by Indira Gandhi in the languages of 'committed judiciary' have, dialectically as it were, in the late seventies and throughout the eighties gifted us with 'judicial activism' which stands, in its social significance, as the triumph (howsoever wayward) of counter-hegemonic uses of the judicial power of the state against itself.

In the post-emergency India, the Supreme Court, through the processes of cathartic judicial populism, accentuates the justice texts of the Constitution by developing a new and ingratiating human rights jurisprudence. Judicial discourse, inaugurated by active citizen's epistles to the Supreme Court now archives the growing lawlessness of the Indian state. It relentlessly exposes violence against people in custody, continued exploitation of bonded labour, traffic in women and children patriarchal police violence against women, corruption in high places, extra-judicial killings (encounter 'deaths'), the barbarity of child labour, denial of rights to the undertrials and the infinite ways of bureaucratic deviance, especially in relation to the unorganized labour. The extraordinary saga of the social action litigation

cannot be pursued here.¹³ But by exposing the coexistence of the rule of law with the reign of terror in India,¹⁴ the judicial power assumes the role of a pedagogue in freedom and democracy and provides from the vantage point of the written Constitution a telling critique of the continued subversion by the executive power.

But somehow the social action litigation of the *exposé* of the state lawlessness is not seen as frontally to impugn the legitimacy of power as the denial of the plenary power of amendment. This needs to be deciphered.

But this much is clear: The reign of terror is dedicated, primarily, to the achievement of 'rapid' economic growth. Primitive accumulation processes entail a systematic denial of rights to the unorganized labour classes. The written Constitution requires an understanding of this stark 'necessity' of the Indian development; when justices who had cooperated with the regimes for well over a quarter century in disciplining labour on behalf of the capital begin to breach it, their intervention is itself considered illegitimate by the state and capital and is enfeebled in practice by both. The justice texts of the Constitution stand wholly displaced in planning for growth; these are not simply to intrude in the rapid 'development' of India. Thus, we witness the wholesale denial of rights to landless and migrant labour at all the moments of the so-called Green Revolution and all the major irrigation projects which swell the ranks of indigent, marginalized men and men upon whose docile bodies the process of development stand bloodily cribed. The noxious continuity between the Green Revolution and the Bhopal catastrophe testifies abundantly to this process of primitive accumulation, startling all those who thought the description of these process of *Capital* had no relevance to any understanding of 'development' in late twentieth century conditions. Bhopal also marks the coalescence of the material interests of the Indian industrial capital, the state bourgeoisie and the international monopoly capital, a confluence agonizingly manifested by the suborning of the Bar and Bench in the legitimization of a settlement registering the passing of the Indian sovereignty to the fractions of international capital.

In a curious sense, then, the *exposé* of the reign of terror has, for the time being, resulted in a powerful justification of it as an agent of 'development'. In so, care has been taken to ensure that the powerful dissident articulation of the violation of human rights in planning and development becomes

See S.P. Sathe, "Activist Lawyering for Social Justice" in N.R.M. Menon (ed.), *Social Justice and Social Process in India* 303 (1988); Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" in R. Dhavan et al. (eds.), *Judges and the Judicial Power* 289 (1985); Upendra Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties* 6-20 (1985).

M. Ghose, "State Lawlessness and the Constitution: A study of Lock-up Deaths" in Mahendra P. Singh (ed.), *Comparative Constitutional Law* 248 (1989); Upendra Baxi, *The Crisis of the Indian Legal System* 121-93 (1982).

12. See, e.g. K.S. Subramanian, *Parliamentary Communism: Crisis in the Indian Communist Movement* (1989).

an occasional rather than a growing permanent feature of judicial discourse; persons suspected of even remote tendencies towards activism are to be kept away from the high Bench. Whether such punny processes of wielding state power will reverse the counter hegemonic uses of the law and the Constitution by the activists and insurgent actors yet remains to be seen. But the struggle to capture the Constitution on the side of the rule of law, and to overcome the reign of terror, is now begun. Whether it would end in reinforcement of the authoritarian tendencies or of the rule of law inclinations within the domain of organized politics will depend in a very great measure on the possibilities of transformation of the very model of planned development which is currently constitution-blind in myriad ways. And on this the 'pessimism of the intellect' should, perhaps, be ruled by the 'optimism of will.'