THE CONSTITUTION AND SOCIAL MOVEMENTS

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I am not using the expression 'social movements' here in any esoteric sense that excludes political and economic movements, but in an inclusive sense that comprehends all movements of the oppressed, the exploited and the underprivileged for a better life. How does the Constitution of India look if one sees it from the stand point of such social movements?

First, how does one look at the Constitution? The Constitution is a historical document, and one can quarrel with it as one can quarrel with history in general. One may say: we could have had a better Constitution, just as one may say: we could have had a better history. There is nothing *per se* good or bad about this attitude, and whether it can lead to a meaningful critique depends on the direction in which we take it. If it remains a mere grouse, then that is a good instance of a particularly bad way of quarreling with history. But if the grouse leads to an analysis of the circumstances then prevailing, and if the analysis is of the type that helps us to acquire a better understanding of the present, and of future possibilities, then that would be a different matter.

When we say that we could have had a better Constitution, we are saying one of two possible things. We may be saying that the political forces and circumstances that led to the making of the Constitution could have been altogether different, or we may be saying that in the given circumstances a better Constitution could have been written. If the first view rests on a realistic analysis of our history, it may tell us much about our society, but it will tell us little about the Constitution as it is, and how to interact with its institutions. The second could.

I am saying this because even within a given ideological framework, there is no single way of 'looking at' the Constitution. It all depends on why you are looking at it. I will be looking at it for the reasons integral to the purposes of the human rights movement as we have known it in our country.

The Indian Constitution was written in the background of widespread hopes and expectations. It was believed that the opportunity to 'rule ourselves' would open up extensive if not unlimited possibilities of bettering our lives across the board. 'From the beginning of the freedom struggle the basic purpose had been a government of the people, by the people and for the people' says B. Siva Rao in his widely read book on the framing of the Constitution[1]. Ideas of what was a better life had been thrown up by social struggles and

[1] Framing of the Indian Constitution : A Study, by B..Shiva Rao, I.I.P.A., New Delhi, p. 835

reform movements of many kinds that dominated Indian public life for more than a century preceding Independence. Some of the struggles were organised by political parties and movements, whereas some were initiated and shaped either by the masses themselves or by individuals living among the masses. Some were more militant and radical than the others. Similarly some of the reforms were the handiwork of well-meaning individuals of the more privileged classes/groups, and some were the effort of the disadvantaged people themselves. The exposure to ideas emanating from the liberal west as well as the socialist east had their impact, too.

The persons sitting in the Constituent Assembly were acutely aware of these expectations, even if they were not all conscious of their roots, nor were they uniformly sympathetic to the hopes. Whether the same persons would have been sitting there, and whether whoever was sitting there would have taken the same view that they finally did, if the expectations had taken more militant or radical forms of expression, are questions more important to a political analysis of the Constitution than the kind of analysis the human rights movement would benefit from.

The Constitution as it was finally made presupposes that there would be no immediate and drastic reordering of society on the day the Constitution comes into force, but the way would be kept open for such change in due course. It would be kept open by two things: institutionalising representative democracy in the mixed Westminster-Gandhian mode (Parliament plus gram panchayats), and giving certain political freedoms to the citizens outside the institutions of representative democracy; and laying down a welfare oriented policy framework for the Indian State. What does this mean for social movements?

For social movements did not come to a halt the day the Constitution came into being. They had no reason to. Some of the leaders of the social movements of the past may have decided, honestly or otherwise, that with the Congress in power, no further movements were required, for the benign rule of the Congress would ensure all the benefits the people needed, but not all were so easily taken in. For them, any presumption that with independence and representative democracy social movements would no longer be required would have been not only unacceptable but a positive hindrance. *Yet there is little in the form of an explicit right to fight for a better life in the Constitution*.

It is not very strange that the makers of a Constitution should believe that the aims of the Constitution would be realised in the normal course of the working out of its institutions for to believe otherwise would put a question mark on their honesty in writing all the ideals they would have written into the Constitution. But a truly democratic Constitution would leave open the possibility that people may have to struggle against entrenched interests to realise the egalitarian goals of the Constitution, or perhaps improve the goals themselves, in the light of emergent aspirations. Our Constitution is not totally hostile to this notion, but there is no explicit recognition of it, nor any provision for it. And there is much that works

against it. The paradox – from a human rights point of view – with our Constitution is that it places the highest goals – taken equally from the liberal west, the socialist east and India's own rebel traditions – before the nation, but does not provide the people with instruments of requisite strength to realise the goals. And it puts the kind of power in the hands of the administration that would certainly militate against it. The strongest instrument would be the freedoms needed to agitate and struggle against the inequalities that are in the way of the goals of the Constitution. I am not saying this out of any romantic attachment to the idea of a life of endless agitations and struggles, an idea common enough among radical intellectuals though rarely among the masses, but out of a realistic appreciation that entrenched inequalities do not usually give way unless they are confronted with the organised struggles of the oppressed. Law and the institutions of representative democracy can play a role in the matter, indeed their role is often essential in the matter, but they are rarely strong enough to move the mountains of oppression.

What does the Constitution of India offer us in this regard? Ambedkar is often quoted as having said that the political equality guaranteed in the Constitution was intended as an instrument of social and economic equality, and that if the latter was not achieved the people would reject the Constitution itself. His sincerity in saying so need not be doubted, but is the political freedom guaranteed in the Constitution equal to the task of achieving social and economic democracy? The right to vote is not by itself sufficient. It must be adequately supplemented by the right to agitate. We do have a fundamental right to associate, to assemble, to hold beliefs and to speak out. That is good as far as it goes, for there are many countries which do not guarantee these rights, but the catch is in the restrictions put upon those rights, and the permissiveness – called 'impunity' in international human rights law - that allows the imposition of unsanctioned restrictions as well. Ask any political activist about the freedom to agitate, and the cynical reply will be that its measure is the local Station House Officer's caprice. The Constitution does not say so, but then the Constitution does not provide any mechanism to control the 'impunity' that rears its head time and again in the country's administration.

But we will come to the impunity later. It was not clear in the beginning that the Constitution guarantees even the right to hold a demonstration, take out a procession or undertake a dharna, which are basic events in any democratic agitation. It was left to the Courts to say that the right to take out a procession is implied in the Constitutional fundamental rights. And that Public meetings cannot be arbitrarily prohibited or prevented. The Supreme Court very ingeniously reasoned[2]* that inasmuch as we have a fundamental right to assemble peacefully and another fundamental right to move about anywhere in the country, the two put together give us the right to take out a procession, since a procession is nothing but a moving assembly. Of course, this was in 1973: it is doubtful that if a Constitution Bench had not taken this view thirty years ago, the Courts would take such a

[2] Himmat Lal vs Police Commissioner, Ahmedabad, AIR 1973 SC 87

large view of the matter today. But the judgements of the Courts invariably leave a lot of freedom to the police to interfere with the meetings and processions, and if that has not happened very often against meetings permitted by the Courts, that is only because the executive in our country is unsure about the extent to which it can play around with Court orders. And since not every one can go to Court to get permission to hold a public meeting, that right remains a prisoner of policemen's caprice.

It may be said that no Constitution can give an absolute right to agitate, i.e., to disturb public order. And since Constitutions written after they came to power by movements much more radical than India's freedom struggle did not give even the limited right that India's Constitution does, it may seem that I am arguing for a right that has no basis in any realistic assessment of political possibilities. This needs clarification.

We need to make a distinction between social order, i.e., the complex of social relations, and public order, i.e., the assurance of peaceful and orderly public life. Every known Constitution in history has been predicated on the protection of public order. And that is one of the primary purposes of the law as an instrument of the State. This is not necessarily such a uniformly bad thing as radical critiques make out. Other things being equal, it is the weak and not the strong who need the assurance of order protected by the rule of law. The strong can protect themselves, at the expense of the weak if necessary. But the Constitution and the law protect not only public order in the sense of an orderly public life, but also social order i.e., social and economic relations, including property and the privileges attached to status and stations of life, whether traditional or contractual. This is inimical to the interests of the socially weak. To the extent that the Constitution permits orderly change in these social relations towards a more egalitarian direction, there is no conflict between the two meanings of order vis-a-vis the poor and the weak. That is perhaps what genuine democrats like Ambedkar hoped the Constitution would permit. But where, as a matter of political reality, that does not happen, not only because the powerful do not let the Constitution work against their interests, but also because *the Constitution itself does not contain in full measure the instruments needed to empower the weak to effectively challenge inequality*, the weak may be forced to upset public order to change the social order. When they do so, it is not in their interest to totally debunk the notion of public order as radical critics who speak in their name tend to do, but to critique its structural insensitivity to the nature and roots of the disturbance of order. The right to agitate must be located here and its nature must be understood accordingly.

I do not have any comprehensive prescription for what the right to agitate would look like and what (in the language of the law) all its ingredients would be, but there is little doubt that it is required. The right to propagate ideas by means of cheap publications, and by means of theatre performances/public meetings/demonstrations at public places (and not merely in closed halls), the right to express collective resentment in a form that will convey the

message to the person/group/establishment responsible for the denial of the right (and not at a pre-fixed common place ordained by the police, as in most of our cities), the right to all the relevant information in the matter, whether it is in the hands of private persons or public authorities, the right to a public hearing on the issue raised and the Government's response, protection from criminal charges for entering a government office or private establishment, or for stopping a functionary or people's representative on tour or at a gathering, to raise a demand (usually penalised as obstructing public servant in the discharge of duty, criminal intimidation, etc), would certainly be part of the right to agitate. Not all these rights are non-existent today, but they depend mostly on the interpretation put on Constitutional fundamental rights by the Courts. I have already referred to the means by which the Supreme Court has read into the Constitution a fundamental right to take out a procession. The right to publish is also a consequence of a judgement of the Supreme Court, which held[3] that it is implied in the right of free expression, which is a Constitutional fundamental right. But otherwise, all these rights are subject to the general powers of policing, which are a colonial legacy that has remained entirely unaltered after the Constitution came into being. I do not wish to say that the powers of policing and the discretion they give the police are totally unnecessary. We realise that they are not when we complain about lack of prompt police action to prevent assault on the weaker sections by the powerful, or communal disturbances. But clear restrictions that are sensitive to the need of protest must be placed upon the powers. It is to the credit of the late Ram Manohar Lohia and his associates that they were in the forefront of questioning the continued validity of pre-independence police laws after the Constitution came into force[4]*, and it must be said to the credit of the Supreme Court as it then was that even if it did not agree with them, and even if it missed a chance to direct the Indian rulers to drastically rewrite police laws, it at least took the question seriously and constituted big benches to go into the issue thoroughly: a compliment to the idea of civil rights that the same Court no longer finds time to pay.

It must be made clear that the right to agitate is required not only to achieve the equality that the Constitution promises in the future, but even to protect the rights that the Constitution and the laws made under it have already given. The reason is that unlike laws made for the benefit of the rich, which find their way to implementation without any difficulty, laws made for the benefit of the poor and the otherwise underprivileged encounter obstacles at every step. Dalit activists have found this to be true with the S.C & S.T (Prevention of Atrocities) Act, and women activists with laws pertaining to dowry, domestic harassment and equal pay. Not a single step is taken by the police or the other authorities entrusted by law with the implementation of these statutes unless the victims agitate at every level. The fact that the Constitution itself, in Articles 14, 15, 16 & 17 prohibits caste and sex

[3] Romesh Thapar vs State of Madras, (1950) S.C.R. 594

[4] Madhu Limaye vs S.D.M., Monghyr, AIR 1971 SC 1762, and Babulal Parathe vs State of Maharashtra, AIR 1961 SC 884 on Sec 144 Cr.P.C., are good instances.

discrimination and untouchability in all its forms – a creditable achievement, if one recalls the protracted struggle it took to outlaw racial and gender discrimination in the U.S – has not meant that the former untouchables and women could sit back and reap the benefits of the Constitutional prohibition. They have had to struggle step by step to *in fact* overcome caste and gender discrimination, in village after village, mohalla after mohalla, college, factory and office. The struggle is even today far from complete. What then should one think of a Constitution that does not recognise this socio-legal reality, and does not make provision for it, and instead leaves the beneficiaries of its welfare provisions to contend with and negotiate the strong suspicion with which the administration – and society in general - look upon all tendencies to upset public peace, in their endeavour to actually enjoy the rights written down in black and white in the Constitution?.

As the Courts become more and more illiberal, and Government policy becomes less and less welfarist, the weakness thrust upon the people by the Constitution becomes more apparent. A wide spectrum of political opinion, political sympathy and political activity is dragged into the perimeter of crime by extraordinary laws enacted in the name of tackling seditious activity, terrorist activity, and activity prejudicial to nation's territorial integrity and unity. The Supreme Court has however persuaded itself that all such laws are constitutionally valid. No activity, even peaceful activity, can be taken up in favour of a cause which these extraordinary laws have identified with sedition, terrorism, etc, since those laws – POTA is the latest instance – specifically target expression of political sympathy with the proscribed organsation or activity, and make it punishable in harsh measure. Insofar as these laws meant to contain terrorism, or acts prejudicial to the unity and integrity of the nation, have found the approval of the Supreme Court, this means that a large area of political expression is rendered illegal under the Constitution. If the opinion is itself illegal, then obviously no agitation for its dissemination or realisation can be tolerated by the law. Whether one should blame the Constitution or the Courts for this is a dispute of some research interest, but since the Constitution (and law, in general) is what the Courts say it is, it is all the same for us whichever view of the matter is taken.

Since the Constitution is what the Courts say it is, the issue of Constitution vis-à-vis Social movements necessary includes the subordinate issue of Courts vis-à-vis Social Movements. The Courts have never been greatly sympathetic to social movements, but the present trend is for the worse. The 'judgement' of a Full Bench of the Kerala High Court[5] which declared that to give a call for a bandh is unconstitutional *even when there is no threat of coercion in its enforcement* is a classic instance of a prejudiced political view being passed off as a judicial pronouncement. And the Supreme Court[6], sitting in appeal over this view of the Kerala High Court, did not deem it to be a matter worth going into in any detail, but

[5] Bharat Kumar K Palicha vs State of Kerala, AIR 1997 Kerala 291

[6] Communist Party of India (Marxist) vs Bharat Kumar, 1998 (1) SCC 201

merely extracted a couple of paragraphs from the Kerala High Court's judgement and said that there is nothing wrong with it. The cavalier treatment the matter received in this case need only be compared with the very careful – even if finally inadequate – treatment similar issues received at the hand of the same Court in the Babulal Parathe, Madhu Limaye and Himmat Lal cases to realise that the times have changed drastically for civil rights in the highest Court of the land. And in the bargain, a very major form of protest invented by the national movement and used frequently against the colonial regime that would deny Indians any fundamental rights, has been casually declared an act violative of the fundamental rights chapter of the Constitution written for themselves latter by the colonised. That neither the High Court nor the Supreme Court were conscious of this irony is merely illustrative of the happy ignorance of the historical roots and genesis of our Constitution that characterises a substantial section of our judiciary. It is a different matter that the country has ignored these 'judgements' with the contempt they deserve, and bandhs continue to be called for and observed as usual.

However, the real deficiency of our Constitution in the matter of the right to agitate will hit us hard in the future, for the State is deviating systematically from the directive of the Constitution that India shall be a Welfare State, and the Supreme Court which once upon a time interpreted the Constitution to have said so[7], now says that however that may be, if the State decides to deviate from the directive as a matter of policy, there is nothing that the Courts can do. It appears to be the view of the Courts that if the political executive that inherited the freedom struggle decides to systematically undo the entire heritage in the teeth of the Constitution that encoded the aspirations of that struggle, there is nothing the Courts can do, and there is no interpretative device that will help the Courts to interfere in the matter[8]. It is difficult to accept that it is only judicial modesty – our Supreme Court normally suffers from very little of it – that prevents the Court from interfering with the systematic denial of the State's welfare responsibilities. The fact is that in common with the elite of this country as a whole, the judiciary too believes – and there is nothing judicial about this belief, it is purely political – that welfare and social justice have been a drag on the country's development potential and it is time we are done with it.

It is now that the lack of a Constitutional guarantee for the right to struggle and to agitate will be felt most strongly. And yet the political possibility of amending or rewriting the Constitution to include such a right is at its weakest today. On the contrary, we are forced to defend even the limited rights the Constitution gives from the Sangh Parivar's street armies which have no patience with any kind of democracy. But while we are willy-nilly engaged in that task, we had better have an eye on the substantial positive changes required to make the Constitution a more empowering instrument.

[7] eg., Justice A.P.Sen in Bhim Singhji vs Union of India, AIR 1981 SC 234

[8] eg., BALCO Employees Union (Regd.) vs Union of India, AIR 2002 SC 350