Civil Society and its Engagement with the Constitution

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Before we understand the role of civil society in present day India, we must understand India at its founding movement. The post Independent State in India has been the creation of the prolonged struggle against colonial rule. Its foundation was in the principles of liberal democracy with an agenda of social change. The Indian Constitution is as much a culmination of the ideas of the freedom movement against colonial powers as it is of the achievement of a social revolution through law. Our Constitution, which was inspired by the Universal Declaration of Human Rights, thus, not only provided for political freedom from foreign rule and established a democratic republic, but it also provided a road map to undo the deeply entrenched hierarchies, inequalities, and social exclusions in our society and therefore for a social transformation. Much of the civil society interventions of the last seven decades have been to work for redeeming the promise of the constitution inside and outside courts.

The Struggle "on the other side of independence"

India's Constitution is unique as no other Constitution in the world attempted this magnitude of social change through constitutional means. It was a direct answer to the demands of women, minorities, Dalits and Adivasis, and other marginalized groups to their demands for equality before the law and equal protection of the laws. Reservations in public employment for Scheduled Castes (SCs) and Scheduled Tribes (STs) became a Fundamental Right on the basic premise that marginalized communities were required to be represented in institutions of state power. It was also a constitutional mechanism to end the oligarchy of Brahminism and its hierarchical philosophy in all organs of state. Drafted as it was at the time of a bloody partition of the country into two nations, Pakistan and India, India chose to remain a secular country and refused pleasure to be theocratic. It is the Constitution which has been our greatest strength of remaining together as a united nation with so many different linguistic and religious communities living in harmony.

All of India's legal activism by civil society, including its judicial activism, has been a struggle to implement our social and economic rights. It is on this "*other side of independence*" that much of civil societies' struggles have been located over the last 70 years. The rights were given by the Constitution; the struggle has been to get them implemented.

Though the Constitution of India is no doubt the outcome of a political struggle, it is primarily a legal document which means it enforces accountability through law of all organs of State. This meant that the power of judicial review could be effectively used in the service of the people.

Our political history does indicate that the legitimacy of protest by civil society, which itself was the legacy of non-violent struggle and civil disobedience inherited from the independence movement, was brought to a brutal and abrupt end when the Emergency was declared in June 1975. It made us realize the signification of our civil and political rights. However, our rights were restored when, through an electoral process, Mrs. Indira Gandhi, the incumbent PM who declared the Emergency, was voted out of power. Neither the protesters, nor the ruling party questioned the sanctity of liberal democracy as the governing norm of the country. The struggle against the Emergency was to *restore* our civil and political rights. After the Emergency was withdrawn, the Constitution was amended to ensure that the right to life, which was guaranteed by the Constitution, could not be taken away even during an Emergency. Both Mrs. Indira Gandhi, who was instrumental in imposing the Emergency, and Jayprakash Narayan, who led the struggle to

revoke the Emergency, accused each other of being "dictators" and "fascists"—meaning thereby they saw the other deviating from the path of liberal democratic principles on which the Constitution and Indian polity was founded. Both of them claimed allegiance to it. Speaking of the events which led to the imposition of the Emergency, namely the protests led by Jayprakash Narayan and the students' movements, Bipan Chandra points out in his book "In the Name of Democracy":

> *"The defense of Indian democracy seems to have been the main justification for both the JP Movement and the Emergency Regime."*

From Liberalism to Cultural Nationalism

It is this that has changed in 2014. The political philosophy of liberalism has been replaced by that of "cultural nationalism", culture being viewed as emanating from the religion of the Hindus, who form the majority of the population of the country. In his book *Modi's India*, political scientist Christophe Jaffrelot writes,

> *"The promotion of Hindu nationalism at the expense of secularism took the form of attacks against liberals (including NGOs, intellectuals, and universities like JNU) and the Saffronization of education. At the same time, minorities were subjected to both physical and symbolic violence by Hindu vigilante groups, which exerted a new form of cultural policing. These groups, usually under the umbrella of the Sangh Parivar, started to form a parallel state—with the tacit approval of the official state—as they launched one campaign after another, such as their fight against love jihad and land jihad, their attempts at reconverting those whose forefathers had embraced Islam or Christianity, and their attacks against people accused of slaughtering cows—a very emotional issue that was the root cause of a series of lynchings. Vigilantes were active not only in the street but also online, as evident from the psychological violence exerted by trolls—again with the blessings of the country's rulers."*

India is presented as a nation engaged in an anticolonial movement, which began in 2014. This ahistorical view is being propounded by a Hindu Nationalist party which came to power in 2014 with the aim of establishing a Hindu Nation. Liberalism as a political philosophy is being rejected. Secularism, as we know it, is sought to be replaced by a theocracy. All this has grave implications for those of us who believe that democracy, secularism and federalism are basic features of the Constitution as held by the Supreme Court in various judgments, including S.R. Bomai v. Union of India, Keshavananda Bharti v. State of Kerala and others.

The evidence of the rejection of the liberal secular principles of the Constitution is to be found in the public practice of the heads of State. In 2023, when a new building was inaugurated for our Parliament, a Sengol (symbol of kingship) was installed by Hindu priests in the presence of the Prime Minister. More recently, on 22nd January 2024, a Hindu temple dedicated to Lord Ram was consecrated by the Prime Minister in full view of the citizens of the country, establishing firmly, the transformation of a constitutional democracy into a theocracy, under the garb of revitalizing a supposed civilizational glory. Laws have been introduced in 2019 which enable the grant of fast-track citizenship to Hindu illegal immigrants while denying it to Muslims. Eating beef has been criminalized by banning the slaughter of cows. Interfaith marriages are policed in order to prevent Hindu women from marrying Muslim men. Hindu Vigilantism stalks the streets to implement a mobocracy.

What has this meant for civil society activism? A majoritarian society cannot tolerate any form of dissent, it needs obedience to maintain its authority. Hence, the first attacks have been on civil society and on organized groups such as the farmers who peacefully protest with their demands. As a child of the freedom movement, all through the 1970s till the regime change of 2014, I took my civil and political rights for granted. I thought they could never be taken away from us. We had a Constitution which guaranteed these rights to us and as a lawyer, I believed my main task was to struggle for social and economic rights of the marginalized as we were still a country defined by

poverty and undeserved want. The Constitution promised to the marginalized a life of equality. The work was exciting, and the Constitution proved very useful for our fights against bonded labor, wage workers, pavement dwellers and hawkers. It was much later in life, in the post-2014 state, when a Hindu right-wing political party came to power that I realized that our political and civil rights are a precondition to the realization of our social and economic rights. The rights are now endangered.

Criminalizing advocacy

Following a series of cases argued in a court of law, which we had argued against leaders of the political party in power, in 2019, I found myself a victim of the criminal justice system with a case registered against the organization we had founded, the Lawyers Collective. We were persecuted for ostensible violations of the Foreign Contributions Regulation Act 1986, a statute that was enacted by a Congress regime to prevent the interference of the "foreign hand" in India's political system. The organization itself had worked on issues of domestic violence and prevention of discrimination against people living with HIV, for which we had funding from international funding agencies. We were accused of not keeping accounts. We were told that issues of domestic violence and HIV had nothing to do with the objects of our organization, regardless of the fact that its objects included the defense of the Constitution of India. Advocacy in any form for rights was criminalized. This has happened to many organizations in India, including Amnesty India, the Center for Policy Research, a think tank, and the Center for Equity Studies founded by Activist Harsh Mander and others. It was then that I once again realized the power of the law of which all ruling parties are afraid.

But there is a contradiction here. Every law can be used as intended to protect human rights and every law can be weaponized with mala fide intent in its implementation since implementation is in the hands of the politician in power with no checks and balances or independently fact-checked to decide whether or not a prosecutable case is made out. Hence, what we are seeing in India today is the prosecution and incarceration of anyone who speaks up against the established. The right to freedom of speech and expression, the right to life and personal liberty have been reduced to a rope of sand for any person who spoke up against the ruling establishment. There have been cases on academics and Dalit activists in the Bhima Koreagon cases, journalists like Siddique Kappan, and student activists like Umar Khalid and Shrajeel Immam.

Civil society was seen as the actual political opposition outside parliament. But a time came when not just civil society but political leaders were accused of *"money laundering"* and put behind bars, all this to ensure that one day we have a single-party state by the elimination of the largest political party in opposition, the Indian National Congress.

Civil Societies' main contribution has been to insist on the enforcement of rights conferred by the Constitution. It is social activists who have kept the values of the Constitution—Liberty Equality, Fraternity, and Dignity—alive and refused to succumb to the demands of a Hindu fundamentalist state. It has been a hallmark of their activism that they protest with a copy of the Constitution of India in their hands, as if to protect it from majoritarian attack.

In retaliation the Indian state has labeled all protest movements as "anti-national" and conspiracies to destabilize the Indian State. As a result, the draconian Unlawful Activities (Prevention) Act, 1967, which is an anti-terror statute, has been used to put citizens behind bars to silence their voices.

"Culture" vs Constitutionalism

There is, in fact, fundamentally, a breach of the Rule of Law and it has fallen on the shoulders of civil society to struggle for the return of the Rule of Law. *Hindutva* is the political manifestation of Hinduism where Hinduism is justified as a "way of life", not a religion. These are demands for cultural nationalism to the exclusion of Constitutionalism as we know it.

A combination of these developments has resulted in a situation in which allegiance to "culture" overrides allegiance to the Constitution, i.e., the touchstone by which the validity of State action is judged. Our courts

have paid homage to this form of cultural nationalism denying us the one avenue of recourse against majoritarian rule that the Constitution provides, including judgements which have upheld a ban on hijab, taking away the Special Status of Kashmir etc. Article 13 of the Constitution explicitly says that all laws inconsistent with fundamental rights will be void. Articles 226 and 32 provide direct access to the High Court and the Supreme Court and yet we find that our courts have chosen to virtually give up on their power of judicial review and endorse every decision of the government. Since 2014, there have been only two major cases where the Court has decided against the Government: the judgement on the National Judicial Appointments Commission, which in effect preserved the power of the Supreme Court to appoint judges, and the Electoral Bonds case, which came too late after money had been collected and spent for electoral purposes. It seems almost as if the Courts have repudiated the Constitution of India and in synergy with the current State policy set up a cultural norm above the Constitution as the governing norm of society, in the Marriage Equality case. We are in danger to losing a Rule of Law society, with which we started our journey over 75 years ago.

Defending the constitution

It is in these circumstances that it has fallen on the shoulders of civil society to defend the Constitution through protest movements. In several protest movements, civil society has gone back to its Gandhian tradition of nonviolent protest and civil disobedience. What we see in India is the dramatic role reversal. While it is the constitutional duty of elected representatives to bear true faith and allegiance to the Constitution of India, they ignore the Constitution. Instead, civil society steps in to defend the Constitution.

It is worth recalling what Mahatma Gandhi had said if the rulers are doing wrong. He said:

> *"If our rulers are doing, what, in your opinion, is wrong, and if we feel it our duty to let them hear our voice though it may be considered seditious, I urge upon you to speak sedition—but at your peril. You must be prepared to suffer the consequences."*

We ask the question as to what the role of protests in a democratic society is. Our pre-independence history shows that it was nonviolent protest and civil disobedience that ultimately led to the end of colonialism and to independence.

While no law can prevent protests against policies of the government, we are now told that to protest against unjust laws is to attack the sovereignty and integrity of the nation. The tragedy of India is, that the state has equated legitimate protest with being a "terrorist". If Mahatma Gandhi was alive today, he would have joined the protest, for it was he who said in Young India, on 29 January 1925

> *"Real Swaraj [self-governance] will come not by acquisition of authority by few, but by the acquisition of the capacity by all to resist authority when it is abused. In other words, Swaraj is to be obtained by educating the masses to a sense of their capacity to regulate and control authority."*

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