

Constitutionalism and the possibilities of peace

How is law and order to be maintained in times of conflict even while ensuring that the exercise of state power is kept within constitutional boundaries, asks **Siddharth Narrain**. More importantly, should not the state ensure a lasting peace by promoting social, economic and political justice? It is the manner in which the state behaves in times of conflict that determines the nature of the state in times of peace, the recent Supreme Court judgment on the Salwa Judum reminds us

Given humanity's experience of unchecked power, where unchecked power then becomes its own principle, and its practice its own raison d'être, resulting in the eventual dehumanisation of all people, the scouring of the earth by the unquenchable thirst for natural resources by Imperialist powers, and the horrors of two World Wars, modern constitutionalism posits that no wielder of power should be allowed to claim the right to perpetrate state's violence against anyone, much less its own citizens, unchecked by law, and notions of innate human dignity of every individual. -- Supreme Court in Nandini Sundar and Ors v State of Chhattisgarh (1)



The Supreme Court's recent judgment in the Nandini Sundar case on Special Police Officers (SPOs) and vigilante forces like the Salwa Judum, raised by the state of Chhattisgarh to fight the Maoists by recruiting young men from local areas, has come as a huge boost to those fighting for civil liberties and the restoration of the rule of law in states affected by armed violence and insurgency. The Supreme Court has asked the state government to ensure that these vigilante forces give up arms in their possession, and it has also asked the state to protect the SPOs from retribution by the Maoists.

At the core of the court's decision was protection of the rule of law based on the ideas of constitutionalism, ideas that take on enormous significance in times of violence. State policy has always been to create exceptions to the rule of law to maintain 'law and order' and ensure peace. Draconian legislations like the Armed Forces Special Powers Act, extra-judicial killings, the power of preventive detention, and more recently

the arming of vigilante forces to combat Maoists have for a long time been justified both by the state and by the courts as necessary exceptions in times of violence. The Supreme Court's decision in ***Nandini Sundar*** questions the basis of this logic. Delving into the reasons behind these violent times, the court concluded that we cannot ignore the reasons behind what has led to people taking up arms against the state -- increasing inequalities spurred by amoral economies and unfettered extractive industries. Chhattisgarh is an example of how states with abundant mineral wealth have gone out of their way to attract investments in the mineral sector, and in doing so have weakened whatever little social and environmental protections that the law provided to tribal and marginalised communities that live and depend on the land where these minerals are situated.

The violence of rapacious capitalism

The logic of rapacious capitalism has little space for the niceties of informed consent, where the opinions of villages that are opposed to mining or other industrial development are often brushed aside. Comparing the logic of mineral extraction in Chhattisgarh to that of early colonial expansion in Africa (through Joseph Conrad's description of colonialism in the Congo), the court points out that what we are seeing in Chhattisgarh and other parts of the country is the violent outcome of an equally violent economic logic. The Chhattisgarh example is especially stark, as the state has dealt harshly with any voices of dissent. The Chhattisgarh Public Security Act, passed without debate in the legislature, has extremely draconian provisions. The way the state has dealt with Dr Binayak Sen, one of the first human rights activists to question the logic of the vigilante Salwa Judum, is only one example of how it has become almost impossible to challenge predatory forms of capitalism backed by draconian legislation.

Referring to the root causes of violence in the state of Chhattisgarh, the court said:

Guided by an instinct for survival, and according to Thomas Hobbes a fear of lawlessness encoded in our collective conscience, we seek an order. However, when that order comes with the price of dehumanisation, of manifest injustices of all forms perpetrated against the weak, the poor and deprived people revolt.

(2)

The dangers of vigilantism

One of the founding principles of the colonial state in India is that the state retains an absolute monopoly over violence. In that sense, those who believe in violence as a form of resistance fall outside the fold of constitutional protections. The irony of the

situation in conflict zones in India is that the state is attempting to lease out this right of using violence to armed vigilante forces. The warped reason for this is that these vigilante forces will comprise of persons from the local area, many of whom have been impacted by Maoist violence. However, the Supreme Court has completely dismissed this logic, saying that those personally impacted by Maoist violence should not be used in counter-insurgency operations as their actions will be prompted by feelings of rage and hatred, thus making them highly suspicious of everyone around them, and increasing the chances of them perpetrating grave human rights violations and branding those unconnected with Maoist violence as Maoists or their sympathisers. Commenting on the inherent dangers of the government policy of arming vigilante groups, the court said:

What the mandarins of high policies forget is that a society is not a forest where one could combat an accidental forest fire by starting a counter forest fire that is allegedly controlled. Human beings are not individual blades of dry grass. As conscious beings, they exercise a free will. Armed, the very same groups can turn, and often have turned, against other citizens, and the state itself. (3)



Founding moments of constitutionalism

The Indian Constitution is the main text where we find an attempt to address the issue of economic, political and social justice. The Directive Principles of State Policy, though non-justiciable, form the backbone of legislative and judicial measures to address the massive gap in the socio-economic conditions of the country's citizens. These, when read with the Fundamental Rights guaranteed in the Constitution, laid the foundation for a plethora of laws and regulations that formally intended to address the central problem of distributive justice while at the same time guaranteeing individual freedom. Our constitutional framework or gridlines thus envisaged the idea of society in which peace could only be addressed through a more just society.

However, there remain tensions between the founding moments of constitutionalism and its invocation now to ensure peace in the long term. Ranabir Samaddar, who has worked extensively on the early history of the Indian nationalist movement, points us to the violent history of Indian constitutionalism, in which the colonial government crushed any violent resistance to its rule. These measures ranged from the use of torture to the inhuman conditions at transportation centres where many early nationalists died or lost their sanity (4).

It is the legal and constitutional regime that arose out of these developments that became the foundations for the colonial legal apparatus, much of which was retained

by independent India. While the British used extensive violence to crush any violent resistance, with scant respect for the rule of law, it is through the law that they codified many of these principles. For instance, the violent history of constitutionalism has meant that most constitutional schemes have always included exceptions to the rule of law. These exceptions have been invoked in times of emergency, but in parts of India it is the exception that continues to be the norm. For instance, the Armed Forces Special Powers Act is an exceptional legislation that has been impossible to dislodge despite Justice Jeevan Reddy's recommendations that it be re-examined.

The legal scholar Upendra Baxi has, in his work, pointed to the foundations of modern legal and constitutional regimes in countries like the United States, which are based on a violent history that involved the genocide of the native Indian population (5). In India, the parallel is the plight of the adivasi population. One of the spokespersons of the adivasi community, Jaipal Singh, in a speech before the Constituent Assembly, on December 19, 1946, while welcoming the Objectives Resolution Parliament, post-Independence, warned against continuing the policies of the British that had marginalised the adivasi population. Unfortunately, statistics show us that this is exactly what we have continued to do. Between 1951 and 1990, around 8.5 million members of the scheduled tribes were displaced by development projects. This number represents a disproportionate percentage (over 40%) of the total number of those displaced (6).

It is this inherent contradiction that surfaced when the state of Chhattisgarh claimed before the Supreme Court that it needed constitutional sanction to perpetrate what the Supreme Court termed, "its policies of ruthless violence against the people of Chhattisgarh" to establish a constitutional order.

Given the violent foundations of the rule of law in India, the question is how one reconciles the need to preserve constitutional gridlines with the long-term prospects of peace in the country. The Supreme Court points us to one particular solution.

The court said:

Our Constitution provides the gridlines within which the state is to act, both to assert such authority and also to initiate, nurture and sustain such authority. To transgress those gridlines is to act unlawfully, imperilling the moral and legal authority of the state and the Constitution. We, in this court, are not unaware of the gravity that extremist activities pose to the citizens, and to the state. However, our Constitution, encoding eons of human wisdom, also warns us that ends do not justify the means, and that an essential and integral part of the ends to which the collective power of the people may be used to achieve has to necessarily keep the exercise of state power within check and constitutional bounds.

(7)

This statement, when examined carefully, is laying down two important principles. The first, in the court's own words, is that the "law cannot remain silent when the canons roar". This implies that the rule of law becomes even more important in times of conflict. It is the manner in which the state behaves in times of conflict that determines the nature of the state in times of peace. However, this principle is circumscribed by the origins of constitutionalism, which is itself embedded in violence. It is the second principle that we have to look at then -- how do we draw upon the collective power of the people and 'eons of human wisdom' to keep a check on state power? Can we think of an ethical framework, or a way of life outside of the formal legal and constitutional setup that will enable peace in the long term? Such a framework will have to, as the court puts it, "undertake all those necessary socially, economically, and politically remedial policies that lessen social disaffection giving rise to such extremist violence".

The promise of fraternity

In constitutional terms, looking for an ethical framework could mean looking outside of just limiting state power to breathing life into ideas of fraternity that are enshrined in the Preamble of the Constitution. As the judges in this case explain, the Constitution in no uncertain terms demands that the state shall strive, incessantly and consistently, to promote fraternity among all its citizens, thus ensuring that the dignity of each citizen is protected (8). At the heart of this endeavour is the duty of the state to strive for social, economic and political justice.

Dr Ambedkar, in his closing speech in the Constituent Assembly, stressed the importance of fraternity, liberty and equality to achieve an ethical framework that he termed a 'social democracy':

We must... not be content with mere political democracy. Political democracy cannot last unless there lies at the heart of it social democracy. What does social democracy mean? It means a way of life that recognises liberty, equality and fraternity as the principle of life. These principles of liberty, equality, and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy... Without fraternity, equality and liberty could not become a natural course of things. It would require a constable to enforce them.

(9)

Sixty-four years after Independence, we seem to have lost sight of the far-sighted vision of the framers of our Constitution. The Supreme Court, through this remarkable

judgment, has reminded us that it is imperative for us to begin thinking seriously of challenging the amoral political economy that we live in. How do we work towards building an ethical framework, informed by the constitutional values of fraternity, liberty and equality? How do we avoid the path where the only option for the state is to rule with an iron fist, establish a social order where every person is to be treated as suspect, and anyone speaking for the human rights of citizens is deemed a suspect and a Maoist sympathiser (10)? These are questions that we need to ponder before we can begin to think of the possibilities of a constitutional path to peace.

(Siddharth Narrain is a legal researcher and lawyer with the Alternative Law Forum, Bangalore)

Endnotes

1 Writ Petition (Civil) No 250 OF 2007, decided on July 5, 2011, para 3

2 Supranote 1 at para 4

3 Supra note 1 at para 17

4 Ranabir Samaddar, 'Law and Terror', in Gilles Tarabout and Ranabir Samaddar, 'Conflict, Power and the Landscape of Constitutionalism', Routledge, London, 2008, p76

5 Upendra Baxi, 'Violence, Dissent and Development', ***Law and Social Change***, pp 72-76, www.upendrabaxi.net, accessed August 13, 2011

6 Supra note 1 at para 13

7 Supra note 1 at para 71

8 Supra note 1 at para 12

9 ***Constitutional Assembly Debates***, November 25, 1949, p 979, Book No 5 as cited in People's Union for Civil Liberties (PUCL) Karnataka, ***Cultural Policing in Dakshina Kannada: Vigilante Attacks on Women and Minorities***, Bangalore, 2009, pp 39-40

10 Supra note 1, para 4

Infochange News & Features, October 2011