

Citizenship, Popular Constitutionalism and Social Transformation: A Preliminary Exploration

Kalpana Kannabiran

[Disclaimer: This is not in the form of a research proposal, rather it is a reflection on how we may set about thinking about popular constitutionalism in specific contexts in contemporary India]

"Citizenship is a status conferred on the people of a nation-state...and allows them to participate in government", and yet, "what is citizenship without the consciousness of a free nation?" Between the definitional statement and the interrogation of it lies embedded the question of marginality, of exclusion, of identity, of culture, indeed of nationality itself. The production and construction of citizenship is inextricably linked to power and social location, making the "nurturing of citizenship" a difficult and fundamentally unequal process tending to attach in the normal course to privilege of location. Popular constitutionalism, or to use Ambedkar's words [cited most recently in the celebrated Naz Foundation judgement] "constitutional morality" obstructs the congealing of this inequality in fundamental ways, broadening the arena of nurturance and the methods by which equal citizenship can be achieved.

After over three decades of feminist activism in which negotiations around law and justice delivery for women occupied a central place, we are at a point where questions of diversity, difference, and the multiple sites of pedagogic praxis have opened out several layers in earlier concerns on questions of women's entitlements and citizenship. Since our own political education as feminists began with learning to apply its tools to dismantle the master's house, so to speak, I would like to use the opportunity this project offers to focus on the crafting of popular constitutionalism and its praxis. The exploration, while it uses feminist politics as a point of departure, will look at a range of movements and the constitutional questions they have foregrounded and grappled with, as also the risks movements have had to confront in seeking the entrenchment of constitutional morality.

To anticipate the concerns of this project very briefly, what is the relationship between popular constitutionalism and law that arises from the politics of organizing.

Why think about this relationship at all?

Custodial violence was the bridge between the women's movement and the civil liberties movement in India in the late 1970s – custodial rape the critical issue -- first with Mathura in Maharashtra and soon thereafter with Rameeza Bee in Andhra. Over a decade later, the experience of Ameena in Hyderabad and mentally challenged women in Pune who were made to undergo forced hysterectomies turned the issue of custody around for us, showing us other faces of incarceration, violence, and the problem of citizenship where women are concerned.

A matter of concern, especially has been the specific ways in which the subaltern female subject (in Ameena's case) seems to precipitate the conflict/tension between community and state, an echo of what happened with Rameeza under very different circumstances (and with Shahbano and Bhanwari Devi) – a tension that ripples through the range of feminist and secularist discourses (from the uniform civil code to child marriage) on the meanings of equal

citizenship for dalit/minority women in a caste based Hindu majoritarian society, now problematised even more in the aftermath of Gujarat 2002.

The second issue has to do with women with disabilities. Differently abled women continue to suffer violence in families and communities with little recourse to redress. The fact of disability compounds their experience of disadvantage and disenfranchisement. The way people are treated then become conscious human choices that preserve rather than disrupt the status quo, bringing into sharp focus the question of power. If denial of individual volition is violence, it gets expressed in myriad ways, each more horrific than the other, with states and often families as well participating in and justifying the denial of active choice in decision making. Specifically with reference to disability one sees a convergence of will between the state and civil society. State run institutions arrogate to themselves the absolute control over women's sexuality, and private institutions run with the support of the community bind mentally challenged persons in chains with no regard to their safety or security, as was witnessed in the home in Tamil Nadu where several people died as a result of a fire from which they could not escape. But this is only one part of the problem. Located as it is within the "abnormal persons approach", the institutional apparatus of the state denies rights and obscures that denial in the name of care or protection for dependent people. This approach also constructs difference in static, unchanging ways thereby legitimizing irreversible non-consensual invasive medical procedures on persons, in this case mentally challenged women. The second aspect that the issue of disability as centrally one of difference foregrounds is the continuous and fluid definition and redefinition of the normal, tied to processes of exclusion in other social fields – caste, gender, community, work/employment and so on.

Perspectives on disability then are a part of larger perspectives on the intersectionality of difference and the "legitimate" uses of power. These two very different debates are threaded together through the single issue that is critical to feminist consciousness and politics – the control over sexuality – which enables us to understand other realities as well.

If Ameena and the mentally challenged women from Pune call into question one aspect of this control, namely consent, Shahbano raises the question of entitlements/obligations arising from heterosexual conjugality, and the campaigns around the rights of sex workers raise debates around non-conjugal female sexuality -- sometimes criminalized, sometimes licensed -- always under state surveillance and control thus rendering women in prostitution always vulnerable. This dilemma of criminalizing a systemic practice while recognizing the vulnerability of the "agents" is one that resonates throughout the discourse on women's human rights at all levels.

At the core however, is the question of culture and the collective conscience that does not militate against violent misogyny in our societies. If life with dignity and bodily integrity is undermined in fundamental ways for women within communities and the "legitimate" boundaries of society, how does one begin to articulate the question of personal autonomy and self-determination? What have been the ways in which deliberations around popular constitutionalism have been negotiated and what have been the tensions between "public morality" and "constitutional morality" in these contexts?

Popular Constitutionalism and the Law

The uses of the law and indeed its practice especially with respect to concerns of "nurturing citizenship" are located within a space where disenfranchisement marks difference, diversity and the denial of equal citizenship.

What are the philosophical foundations of popular constitutionalism in India? And how does one set about developing an inclusive praxis in law? Any attempt to answer this question would lead us to an exploration of the possibilities of an indigenous jurisprudence as well –

especially if one is speaking of a counter colonial/anti imperialist jurisprudence. If one is able to draw on the work of radical historians of Ancient India like Romila Thapar to look at the sources of justice and legitimacy, and the developments of the normative order through the ancient and medieval periods, and if one is able to look at the writings of BR Ambedkar, Jotirao Phule, Periyar, Tarabai Shinde, Satyamurti and others like them from different parts of the subcontinent who developed an anti colonial theory of justice, the radical political foundations of modern law in India will stand established. There will be a crisscrossing of the ideological apparatuses of gender, caste, class, race, and state formation in different historical periods.

There are multiple dimensions to the problem of developing an inclusive praxis in law. While one part of the problem and one that is immediately identifiable has to do with the structuring of the curriculum of formal legal education in India – and with mainstream pedagogic method in the law, a larger part of the problem has to do with the absolute exclusion of questions of ideology, practices of hegemony and power from mainstream legal pedagogy. To illustrate this problem, amendments in the law and passing of new legislations with respect to sexual assault, domestic violence, sex pre-selection and selective abortions are intertwined with feminist politics and cannot be adequately understood outside the analytical critique of patriarchy as a source of power, hegemony and dominance in our societies. The oft-lamented “failure” of laws is the result of the masking of theory from the remedies, which reduces the remedy to absurd levels of mechanical application both in courts and in the classroom.

Unlike the social sciences, law is a practitioner’s discipline, which means that the pedagogy is immediately tied to the delivery of services. The fact of its being a practitioner’s discipline also means that the law is something which is immediately relevant to people, especially to those at a social or political disadvantage – women, adivasis, dalits, unrepresented minorities – and provides the tools for the assertion of citizenship claims, while also embodying the slogan “knowledge is power” infinitely – as we have seen with the campaign on the right to information.

What are the many faces of popular constitutionalism then?

It is about teaching those who don’t know what their entitlements are how to demand them; creating the space for victim-survivors to tell their stories and then finding ways of breaking the silences around those stories and bringing justice to those who have suffered; teaching those who are meant to know what every citizen’s inalienable rights are, to apply that knowledge diligently and fulfil their moral responsibility; teaching those who represent fraught realities – either in the media or in courts – to discover the truth of those realities and represent them with courage and conviction, unmindful of dangers that might lurk around the corner; teaching those in locations of dominance that the source of their power is illegitimate and divesting of that power inevitable – either by individual volition or by force of the people’s will; finally it is about teaching law differently to practitioners and scholars to enable them to use the law and propagate it differently. It is about understanding social suffering. It is a course charted in the first instance by mass movements, and has now moved to other sites as well, but clearly, it is a project that is rendered meaningful by a commitment to socio-political struggles.

It is this texture of popular constitutionalism that this project will attempt to unravel.