
Visiting Retribution Upon the State: Is There Another Way?

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The current discourse on human rights is generally circumscribed by the December 10, 1948, Universal Declaration of Human Rights proclaimed by the UN General Assembly. A close scrutiny of this declaration will reveal that while endowing an individual anywhere in the world with certain rights considered to be “self-evident and inalienable,” except for Articles 25 and 26, there is little suggestion of the responsibilities of states to provide the individual the minimum means of sustenance, basic education and health care, and the means to have a worthwhile standard of living. Even these two Articles speak of the individual’s rights without making incumbent on the signatory states to take responsibility for this. It seems that while individuals have rights, states have no or few responsibilities.

It would be worthwhile to note that at the time when this was being adopted, the leading lights of the new UN like the USA, UK and France either had active segregation policies or were in physical control of other nations and routinely denied these very same human rights, so eloquently proclaimed, to people of other races. On the other hand the former USSR too had enslaved millions of its own people in the Gulag and had established a de facto control over much of Eastern Europe.

Realising that the so-called right to self-determination was a double edged sword that could atomise many a new nation, particularly the multi-ethnic ones, countries like India did not subscribe to this notion elaborated in General Comment 12 on the Right to Self-Determination. In fact, self-determination was seen as a sword that was liable to be used whenever certain external powers decided it was in their interest to either stoke such notions or lend support to indigenous movements. India expressed itself very explicitly on this when

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ratifying the International Covenants on Economic, Social and Cultural Rights; and on Civil and Political Rights when it declared that “the words ‘the right of self-determination’ appearing in this apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation – which is the essence of national integrity.”

Many of the newly independent countries such as India faced such challenges no sooner than they had emerged from long and despotic colonialism. A country like the USA, which was one of the moving forces behind the Universal Declaration, not only permitted segregation in many states but also denied African Americans voting rights and basic human dignity. Apart from this, the USA squelched the aspirations of the people of Puerto Rico for nationhood. At the other end of the world, Britain which had extended its Indian Empire into the Naga Hills region, now fomented a secessionist movement there with the elements of the Anglican Church at its forefront.

It is not without some irony that Europe has now come together as the European Union (EU); for the great lesson of history is that only larger entities which successfully collectivise their many lesser identities can survive and thrive in the emerging world order. It would suffice to say that if China and India did not exist in their present form, many of their parts would have come under the domination of extra-territorial powers. Witness what happened to the former Yugoslavia where the North Atlantic Treaty Organisation (NATO) midwived a bunch of small states. Or contemplate the economic viability of independent states in the Naga Hills or even Tibet without the active involvement of foreign powers?

While it goes without saying that larger states have a right to exist, they also have a responsibility to cherish and even nurture their diversity. This is best ensured by giving people institutional mechanisms such as free and fair elections and a level of self-government. The great lesson from the collapse of the USSR is that ideological monoliths cannot imperviously exist in a world where the forces of new economics and technology have given rise to a new set of aspirations, expectations, values and beliefs.

It is also now very clear that as with the case of self-determination, the notion of individual human rights as provided by the Universal Declaration was at once also intended as a sword that could be conveniently wielded on some states. The notion that all people are equal and have certain inalienable rights is unchallengeable. This is the single great notion upon which modern political thought and societies are structured. Without it, we lapse into medieval times. Many countries, such as the monarchies, theocracies and military dictatorships,

however, still exist without even a modicum of the notions of equality and justice permeating them. The great irony of our times is that nations and organisations at the forefront espousing human rights seem quite comfortable with such political structures that exist in many of their national allies. We don't, for instance, hear of the USA or UK expressing concern about the human rights and individual freedoms situation in Saudi Arabia or in the Israeli occupied areas of Palestine, and for that matter nor do we hear much comment from the self-styled watchdogs of human rights like Human Rights Watch and others.

The discussion on human rights has centred for far too long on the rights of the individual. It now needs to shift focus on the responsibilities of the state. It must be mentioned here that one of the principal responsibilities of the state would also be to preserve its existence. If minorities have rights, so do majorities. But this does not automatically give the majority the right to steamroll over minority aspirations. Clearly, there is need to discuss this further.

If the rights of individuals are central to good governance, then the responsibilities of governments to their citizens are also central to good governance. Thus, if the right to education or good health is a basic right, it would be a meaningless right if the state did not provide the infrastructure and facilities for education and health care. We find that many states routinely deny these on the specious plea that it is not feasible to cover all areas and citizens. Even in a country like India, with a plethora of progressive and egalitarian laws, the state is still not held entirely responsible when citizens are denied these. It has been sixty years since the world has become party to the Universal Declaration and many of its covenants are largely unfulfilled. It's time then that the responsibilities of states also are defined and the powers that be become answerable to laws specifically enacted to impose these responsibilities upon the rulers.

In 1976, the Supreme Court of India declared "the right to life *includes* the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings." Civil society

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institutions in India, including its great newspapers, have fought many battles in defence of the people's right to read, express and move freely, and won them. From time to time, the state has had to retreat from its attempts to encroach upon them. Yet, when it comes to the "bare necessities of life such as adequate nutrition, clothing and shelter," we find that civil society in India has been less than active in ensuring equality of benefits to all Indians. Consider this: despite its great economical and technological strides, no less than a quarter of all Indians live below the official poverty line. This means not only inadequate food, but no shelter and wherewithal to live with even a modicum of minimal human dignity. In absolute terms, the numbers have increased significantly since independence in 1947. According to the Government of India, 24.6 per cent of the population lives below the official poverty line, which translates to about US\$ 1 per day.

Once again, India's Supreme Court has expressed itself even more explicitly on this. In the case of *Paschim Banga Khet Majdoor Samity v. State of West Bengal* (1996), the Supreme Court found that "government hospitals run by the state and medical officers employed therein are duty bound to extend medical assistance for preserving human life. The failure on the part of the government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21." Despite stressing the need "to provide timely medical treatment," the Supreme Court has been ambiguous about the state's responsibility to extend medical coverage so as to provide *timely* medical treatment. Even today, much of rural India has to do without even the most basic medical facilities. Thus, even the most treatable ailments often cause death or prolonged suffering.

However, in the case of the right to education, the Supreme Court has been quite explicit in what it expects from the state. Article 45 of the Constitution of India provides that "the state shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years." The fact of the matter is that even after over five and a half decades of its adoption, this great objective of the Indian Constitution remains unachieved. Even today, no less than 20 per cent of its 15-24 year olds are illiterate, which means that even if the primary education coverage is 100 per cent now, for the next 40-50 years, at least 20 per cent of India will be illiterate. The overall literacy rate is now 64.8 per cent.

The 2001 Census of India informs us that there are over 635,000 villages in India. The same census tells us that there are 712,000 primary and middle schools in India. If we consider the incidence of schools required to cover the

cities, towns and larger villages, it becomes evident that many villages in India have no access to education.

In the matter of *Mohini Jain v. State of Karnataka* (1992), and *Unnikrishnan J.P. v. State of Andhra Pradesh* (1993), the Supreme Court of India once again explained that the core obligations are as follows: “The right to education further means that a citizen has a right to call upon the state to provide educational facilities to him within the limits of its economic capacity and development.” At one time, this would have been clearly inadequate as it allows the state to determine

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what its economic capacity and development levels are. With post-2000 economic growth over 7 per cent per annum and poised to rise even further, the economic capacity has quite clearly increased. With a gross domestic product (GDP) currently in excess of US\$1 trillion, it is obvious that the willingness to spend only 2.4 per cent of its GDP on education is now a self-imposed one and not constrained at all by economic capacity and development. It is now just a matter of political and administrative desire and will. Now is the time to put a weight on what it means when it is stated that “the state shall endeavour.” That the state has the economic capacity is not in doubt. What is in doubt is the willingness of the state to endeavour to fulfill its obligations.

In such circumstances, how can the citizen expect the state to discharge its obligations and responsibilities, particularly since, as we have seen, its failure to fulfill goes unpunished save by electoral retribution. And since electoral retribution is always by the majority, the voice of the poor and unsung is hardly ever heard. Is it now time for a new path to be broken by the jurists? With the often claimed constraints of economic capacity no longer valid, the Supreme Court of India can now direct in more specific terms what it expects by way of coverage, standards, amenities and facilities. If the state finds it unfeasible to build and maintain a school for every village or population cluster, quite evidently it has adequate resources now to provide transportation facilities for children to be taken to, and back from, schools located elsewhere.

We also have a vast diversity of standards in India's school system. If the notion of equality of opportunity is to be meaningful, then we must begin with

equal education based on equal standards and facilities. The Indian state has not showed any inclination to move in this direction.

It is time the Supreme Court of India ordered the state to properly discharge its responsibilities and commitments with the proviso that failure to do so will invite retribution from it upon the persons constitutionally and administratively deemed responsible. This is not without precedent. In the well known case of former Chief Minister of Uttar Pradesh state Kalyan Singh, the Supreme Court held him guilty of not fulfilling his commitment to it to protect the disputed Babri Masjid and sentenced him to a token term in jail. India's courts at all levels must hear the complaints of its citizens on matters relating to the failure of the state to discharge its functions as mandated by law. This should include elected as well as appointed officials of the government. Otherwise, the people will have no choice but to impose their will upon the state, by whatever means possible. Many a time, this would mean a direct physical assault on the instruments of the negligent state. This is precisely what is happening in over 150 of our districts which are now besieged by insurgency.