
The Legal Imagination for the Struggle for Rights

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Tools of Justice is an exercise in legal imagination. C Wright Mills had spoken of sociological imagination more than half a century ago. Kalpana Kannabiran has used productively in the field of law particularly constitutional law, and the concept of sociological imagination to give birth to an outline of an agenda of the next phase of legal struggles for rights. This is a difficult, necessary, and ambitious aim. We must thank her for a pioneering exercise.

The Rights Schism

As we know, rights thinking in ex- or post-colonial countries have been marked by several divisions and closures. There is the great division of rights between the two categories of civil and political rights and social and economic rights. Human rights activists and thinkers in postcolonial countries, at least in India, fight on these two sets of rights as if they are two separate charters, with no template connecting the two. Thus the fight for civil and political rights is fought on the civil and political front, which leaves the social and economic rights out. Likewise, those who fight for social and economic rights, such as trade union rights or land rights, conduct their struggles separately on the perhaps justified ground that social and economic rights are equally important and stand on their own. In fact, the record of socialism is defended on the ground that it may have lapsed on civil or political grounds, but its record in protecting social and economic rights is beyond fault, and far better than that of capitalist countries. Even though T H Marshall more than half a century ago attempted to combine these two strands by invoking the idea of “social citizenship”, namely, that citizenship was enriched or substantiated by a century-long struggle

BOOK REVIEW

Tools of Justice: Non-discrimination and the Indian Constitution by Kalpana Kannabiran
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for labour rights. Yet the great schism remains. Activists talk of generations of rights. But that too does not solve the problematic of closure. In short, our concept of the indivisibility of rights is narrow and has remained poor.

We may recall another division that also leads to a closure of our thinking on rights. It is the one between equality and liberty. In some sense this is linked to the first schism. Thus those who emphasise social and economic rights fight under the standard of equality. Those who emphasise civil and political rights fight under the standard of liberty. Philosophers in this case have tried to solve the schism by producing the concept of “equaliberty”. They have dissected time and again the manifestos of great revolutions such as the French and the Russian revolutions to argue that liberty and equality are interconnected and organically linked. Yet this has been more of a logician’s exercise. The schism has proved intractable. The two schisms have resulted in a closure in our thinking.

Insurgent Constitutionalism

It is in this context that we have to read Kannabiran’s work and realise its significance. She does three things throughout and through this massive exercise. First, she teases out the issue of non-discrimination from the articles on equality in the Indian Constitution and places it on autonomous ground; and then she links it to the idea of liberty and thereby the liberty-bearing provisions in the Constitution. In her words in the introduction, “My central argument is

that we can only begin to understand Article 15 of the Constitution and its reach if we draw a jurisprudential nexus between Article 15 and Article 21, i e, non-discrimination and the right to liberty” (p 17). Second, she reinterprets the right to equality as a consequence of non-discriminated freedom. Third, she marshals jurisprudence in the spirit of what the late K G Kannabiran had termed as “insurgent jurisprudence”. Kannabiran develops the idea of an insurgent constitutionalism through a rereading of rebellious jurisprudence, and thereby takes the discourse of popular constitutionalism further. I find affinity with this way of thinking, for above all such a line of thinking bases itself on popular struggles for rights and justice.

The consequence of these three analytical moves that displace the earlier notions of equality, freedom, and constitutionalism with newer concepts produced out of the interface of popular struggles and constitutional ideas is that she is able to point out new directions in the struggle for justice that is based on a sense of rights, non-discrimination, and hence dignity and freedom. She thereby also points to the way in which the schism in the rights discourse and struggles can be negotiated.

Kannabiran demonstrates her analytical skill in this astonishing act of displacements. Through studies of jurisprudence relating to six discriminated groups – persons with disabilities, dalits, adivasis, religious minorities, women, and sexual minorities, in that order – she displaces earlier notions centred around constitutionalism with new juridical possibilities suffused with the popular spirit of protest for justice. While the lay reader may be partly familiar with the material on dalits, adivasis, and religious minorities, her analysis of the disability jurisprudence, jurisprudence on discrimination against women, and sexual minorities makes her approach significant. This is because the selection of the last three groups makes her strategy of making non-discrimination an autonomous principle of a transformed social life strong and full of possibilities. The

discussion on ability as a juridical principle, same with other constructed norms such as sexual conduct enables her to make non-discrimination the cardinal principle of a just society.

This is of course not a new idea. There have been moves in the history of the struggles for rights, including the 1992 declaration against discrimination of minorities, to make non-discrimination the basis of justice. Yet the way the author links these efforts with the history of Article 15 of the Constitution and more importantly, links countless popular struggles for justice by adivasis, minorities, dalits, and women for non-discrimination with it, makes her analysis fruitful. Even the categories of civil and political or economic and social are shown as inadequate in the way she draws the topography of non-discrimination as the basis of rights. In that light one can now realise the significance of the evolving disability jurisprudence or the jurisprudence against sexual minorities. Kannabiran has found for all of us the mirror in which we can see our own history of struggles for rights. The other is no longer a psychic or cultural category. In the *Tools of Justice* the other is the mirror that is necessarily present in and for our own articulation of rights. In this way the rights of the “disabled” become the mirror in which we can understand the dynamics of various other rights against non-discrimination.

Commencement of Justice

These six case studies in their collective impact allow us to put this dialectical ploy in larger relief. If as the author argues the Constitution needs popular struggles and the incipient sense of justice to fire rebellious imaginations, and if on the other hand popular struggles latch onto constitutional ideas of liberty or equality, to stoke up passions for non-discrimination and justice, then we need to formulate a deeper notion of negativity. Can justice then be at all called a positive concept? Rawls as we know went to the limits of analysis to found the principles of justice on a self-sufficient ground. Yet that has remained a marvel of a logical exercise, nothing more. On the other hand, what is the consequence

of arguing for non-discrimination as the cardinal tool of justice? The consequence is to say the least enormous. It helps us to understand why justice for people always begins with a struggle against injustice. The realisation about injustice and the effort at redress is the point where an articulation for justice commences. Non-discrimination is the negativity on the basis of which some of our important rights are continuously articulating themselves. The six studies bring out the operation of negativity in different ways. The analysis of jurisprudence confirms the findings of some of the profound ethnographies of justice, carried out for instance by the Calcutta Research Group in its four volume report on *State of Justice in India* (Sage, 2009) which show that there is rarely any a priori popular idea of justice. All popular ideas of justice begin with acknowledgements of injustice in one form or another.

This leads to an even more significant question raised by Kannabiran. If insurgent constitutionalism, which is inspired by a rebellious form of jurisprudence, points to a more profound story of rights, this needs to be recounted in this analysis of the interface of constitutional ideas and struggles for justice. *Tools of Justice* is a story of contentions, presented variously in this study. The truth of the contentious story of rights was recalled by the late Charles Tilly when he had raised the question, “Where do rights come from?” and asserted that rights did not originate in any institutionalised form of democracy or from a pre-existing legal arrangement, but from collective claim makings, and the resultant process of rights and obligations. Kannabiran in a significant chapter “Genealogies of Resistance to Sex Discrimination in India” (chapter 9) charts out this contentious path and goes beyond Tilly’s framework. For while Tilly’s story revolved around the founding story of two intertwining phenomena of modern state and citizenship, where law plays a minor role and the social interface of claims and obligations is the supreme factor, Kannabiran brings back law as the exacerbating element in the continuing story of contention. Jurisprudence in this way becomes

a contentious discourse – unfinished, raw, a body of mutually conflictive dispositions, and full with possibilities, precisely because of the unfinished nature of the discursive nature of law, which she terms as insurgent jurisprudence. This understanding enables her to identify and stand on the theoretical ground prepared in the writings of K G Kannabiran and Upendra Baxi and point towards the way in which we can take the story of popular constitutionalism further.

The Mirror

In this narrative of popular constitutionalism her accounts of administrators fired with missionary zeal for justice, the indignation of a judge at an instance of gross injustice, the battle of a lawyer pleading for landless peasants, the campaign of a group of civil rights activists appearing for marginal people subjected to discriminations that impact on their right to life (Article 21), publication by a citizen-reporter of say an account of derogation of rights, and finally interrogations and reinterpretations of constitutional provisions of rights by jurists become significant elements. Collectively they project constitutional imagination as the other, the mirror, in which the existing constitution must validate itself. The constitution is not what it thinks itself to be, as the book, as a legal text, as a basic law, but as the people imagine it to be through its daily struggles and momentous upheavals – as the desired law, desired but present. This presence of an existing reality, which is but the form of a desire, is built up through an insurgent discourse of constitutionalism. She argues that Ambedkar in many ways symbolised that position, and thus has remained as a permanent fountainhead of militant jurisprudence.

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This is so because, as she explains, these interventions are aware of what jurists call the “hostile environments”, which force “subaltern interpretations of constitutional morality” (p 445) to take the form of insurgent thought. Noting in this way the power of the idea of freedom, Kannabiran also suggests perhaps less clearly another way out of the closure of our constitutional thinking on rights. The constituent power, following Antonio Negri she argues, does not die with constituting the society. The constituted power must now work under the genealogical shadow of the constituent power, hence must keep on engaging with the desire that this genealogy constantly produces. The labour of desire will now face the practice of power. Therefore she cites K G Kannabiran from *Wages of Impunity* (2005),

(Should)...the colonial interpretation of the laws be followed while interpreting the Constitution? Did the constitution imply a break with past, at least with reference to the people and the state and its government? Does the transformation of a person from the status of a ‘subject’ to that of ‘citizen’ mean anything at all, when interpreting the scope of the entrenched rights in the Constitution?

Of course with this question we enter into a difficult problem. If constitutional thinking as an apparatus moulds our subjectivity, and becomes a critical factor in the production of the justice-seeking subject, then how do we as those justice seeking subjects escape the confines of that apparatus? That apparatus which has helped this injustice to continue? Shall we need other concepts of justice born out of other practices? Overwhelmed as we are by the great shadow of the constitution, how shall we seek out those dialogic forms, which have escaped the dominance of constitutional thinking? Shall we then need an alternative vision of legal pluralism – not in the sense of bowing to the un-codified customs, but in the sense of plural notions of justice and just arrangements for plurality? *Tools of Justice* in taking up the six cases of discrimination and the alternative forms of jurisprudence on them points to that direction of exploration. That direction is towards several other encounters, whose lingering origins are present in society in the same way as the origin of insurgent constitutionalism.

Yet, and notwithstanding this great pending task, *Tools of Justice* will be treated as a profound book – a difficult book, demanding our attention on the several cases and the jurisprudence built around them which she cites, but in the end rewarding for the patience one will need to read through this massive book. For those who study citizenship it will be even more rewarding as the book demonstrates that there is no complete separation between the citizen and the non-citizen, or the entitled and the non-entitled, but like the disabled, the adivasi, the dalit, the individual of a religious minority, the woman, and the sexually marginalised, they are forever citizens trying to escape their non-citizen status. Through struggles as these, the society – their societies – becomes increasingly political. The condition of such transformation is not in sidestepping the problematic of law, but in encountering law, unsettling it forever in newer imaginations.

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