

THE IDEA OF JUSTICE AND LEGAL PLURALISM IN PERSONAL LAW – A CRITICAL ANALYSIS OF SEN’S IDEOLOGY

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ABSTRACT

Since the first world war there has been revival of interest in the idea of justice and its relation with law and morality. The jurisprudential studies have also helped in understanding this concept. If we look it from the Jurisprudential perspective, we will find that there are many decisions and steps taken by various state which conflicts with the ideas of justice given by various jurisprudential legal philosophers in their work such as HLA Hartⁱ, E. Dowrickⁱⁱ, Amartya Senⁱⁱⁱ etc. If we talk about a state it can be as diverse as India or as homogenous as North Korea. In case of culturally homogenous countries, it is quite easier to maintain the law, order and justice but when it comes to a culturally diverse country like India, it is very difficult to not get into the conflict with various religions. The idea of justice can differ from one culture to another and one religion to another. Here, comes the importance of the legal pluralism in personal laws. It is the duty and obligation of law to be just and fair .so because of this duty and obligation of law, it becomes important to maintain the checks and balances between the legal plurality in personal laws and the idea of justice.

This paper is an attempt to understand the conflict with the idea of justice given by Amartya Sen and strike a balance with Amartya Sen ideology of justice and the legal pluralism in personal laws.

Keywords: Idea of justice, Amartya Sen, Religion, Diversity, Legal Pluralism.

INTRODUCTION

Concept of justice has always been a complex topic to understand, it has already consumed a lot scholarly ink, but till this time it remains enigmatic, cryptic and imprecise. Justice is a word of ambiguous import.^{iv} In order to understand Justice, it becomes very necessary to understand what injustice is and how to mitigate it. The history of mankind is full of such instances. For example, Mahatma Gandhi started his search for justice, when he himself felt the brunt of injustice, therefore, injustice is that equipment through which a person understands the importance of the justice. He starts associating himself with those persons who also went through the same brunt of injustice, so we can say that justice is an active, deliberate process which helps one to stop a process which is wrong. By experiencing injustice, a person tries to bring justice by rectification of that injustice or at least by other methods through which that injustice can be further prevented. This what lies in the heart of argument made by Amartya Sen in his book the Idea of justice. He talks about 'niti' and 'nayaya', first one relates to rules whereas the other one relates to its realization. In his work, he contradicted the Rawlsian concept of justice, which construed justice as the maximization of liberty, equality and opportunity. He sees 'Justice' in the light of 'fairness'.

When we talk about justice it becomes important to relate it with the conflicts which are going in the society. It helps in understanding the viability of the notion of justice given by Amartya Sen. One of the topics which can check its viability is the legal pluralism in the personal laws of India. Legal Pluralism refers to the coexistence of more than one regulatory order in the society.^vThe effect of legal pluralism in personal laws can be read to understand if it balanced with Sen's idea of justice. The concept of one law one nation make us think that is it justice which is given in a culturally diverse country like India, where we have personal laws. So, this paper will try to understand the idea of justice in the light of legal pluralism in the personal laws of India.

MEANING OF THE IDEA OF JUSTICE

What is the Idea of Justice given by Amartya Sen?

Political Philosophers like Aristotle have wrestled with the Concept of Justice although Justice is universally desired; it is very difficult to agree what it is. Sen in his book "The concept of

justice” gave his philosophical disclosure about what it is by not only drawing western philosophers but also using ancient wisdom of Asian Philosophers. He out rightly rejects the social – contract approach to justice in favor of the result based one that relies on the general understanding and acknowledging injustices^{vi} . He does that without attempting to create a perfectly just society unlike his predecessors. He also agrees that there must be different but equally legitimate views of what is just and unjust in particular cases. Sen encourages reasoned disclosure about the idea of justice and different ethical principles involved in it. This disclosure becomes an important element in moving towards a more just society. His capabilities approach to social justice has helped to form UN millennium goals as well as other policy expressions of both national and international political agencies. In his book the Idea of Justice, he argues that political philosophy should aim at clarifying and diagnosing evident injustices. It also covers a range of topics such as rationality, public reasoning, democratic deliberation, social choice theory, the place of democracy in classical Indian thought, and the understanding of well being, freedom and equality.^{vii} He clarifies his own approach to justice. He makes two powerful indictments of contemporary philosophy. 1. Political philosophers spend an enormous amount of time trying to understand the shape of the world with perfect justice. But theories of perfect justice, what he calls transcendental justice are entirely redundant.^{viii} We do not need a theory of perfect justice to know that it would be better if less people suffer from malnutrition and premature morbidity, or if government should not be corrupt or brutal. Moreover, He argues that theories of perfect justice offer us no practical guidance with respect to the choices we actually face . 2. The quest for perfect justice leads philosophers to embrace an unobtainable standard of theoretical completeness and consistency. Perfect justice will never leave a scope to discuss about justice.^{ix} Yet conflicts about values, justice are widely debated. He sharply contrasts about the search of transcendental theory of justice with his own comparative approach which is highly based on social choice theory. Comparative perspective about justice provides a mean of ranking alternatives. Humans are often misled by abstract nouns of their own making, and sometimes the bamboozlement can last centuries or more. Because one can say the word "justice", one might conclude that a singular thing or essence called "justice" actually exists. And so one could spend a life trying to figure out what this abstract animal called "justice" really is, and fail to pay much attention to problems of justice in the world. For Schopenhauer, injustice was the analytically primary term: justice was merely the absence of injustice. (There seems to be a primordial sense of injustice: animal researchers have observed chimpanzees and capuchin monkeys showing a

keen sense of when treats are distributed unfairly.) Schopenhauer does not make an appearance in this book, but Sen's approach is arguably Schopenhauerian to this extent: "A theory of justice that can serve as the basis of practical reasoning," he writes, "must include ways of judging how to reduce injustice and advance justice, rather than aiming only at the characterization of perfectly just societies."^x This may appear glaringly evident to a few. Aid laborers, attorneys, or compassionate NGOs may justifiably possess little energy for fussbudget equity talk as they continue on ahead. Sen contends that way of thinking could help, if it was not so an excessive amount of discuss equity in present day political way of thinking has, on the other hand, he has been worried about investigating a supernatural perfect of the splendidly just society. His primary objective right now John Rawls, who gave A Theory of Justice in 1975. Sen calls Rawls' strategy "transcendental institutionalism", as opposed to his own "similar" approach.^{xi} The very inclusiveness and generosity of Sen's thinking might invite criticism on the basis that his "capacious theory" is indeed so capacious, so concerned to be "open" rather than "closed", that there is nothing that could not, with a little tweaking, fit in it. The less a theory excludes, the more work is left up to the post-theoretical "practical reasoning". But Sen provides enough brilliant examples of such reasoning (with regard to famine, disability, disease and so on) that this comes to seem, on balance, a virtue. A second, tougher criticism might point to the apparent assumption throughout that the argument is essentially taking place between well-meaning liberals. He writes: "To argue that we do not really owe anything to others who are not in our neighborhood, even though it would be very virtuous if we were to be kind and charitable to them, would make the limits of our obligations very narrow indeed." For Sen, that appears to suffice as a dismissal, on the grounds of implausibility, of such a view; yet it appears to be the principle behind Republican efforts to stymie universal healthcare in the US, or Conservative hopes to offload more social provision on to charities.^{xii}

Hence, we can say that the idea of justice given by him might seem to be suffering from excess of niceness but it is surely preferable to the opposite.

MEANING OF LEGAL PLURALISM

What is legal pluralism in personal laws?

Meaning- “Legal pluralism refers to the idea that in any one geographical space defined by the conventional boundaries of a nation state, there is more than one law or legal system. This article examines several aspects of legal pluralism focusing on the relationship between the empirical facts of pluralism and its conceptual foundations. Variety of factors produces the perception of legal pluralism, which is reflected in intensified interest in the concept in contemporary scholarship. Legal philosophy and sociological approaches to law often still occupy quite separate scholarly terrains. Legal pluralism has been identified as a fruitful area for constructive engagement between legal philosophy and the sociology of law. This article emphasizes the fact that with the decline of nation states as the locus of political and legal power, it seems inevitable that traditional state-centered legal philosophy must give way to a different paradigm, which recognizes the plurality of law”^{xiii}.

In some Western countries with Muslim minorities, there has been debate in the last few years about the role of *Shari'a* in the context of domestic family law. In India there has been a negative response to the adoption of *Shari'a*, as this form of law has been seen as divisive, patriarchal, and inconsistent with the notion of the rule of law. Underlying these responses to *Shari'a* has been the implication that Islamic law was/is backward and patriarchal whereas Western law was/is both secular and egalitarian.^{xiv} The supreme court of India has revived the discussion on UCC while deciding the case of Jose Paulo Coutinho V. Maria Luzia Valentina Pereira (2019) and gave example of Goa which has uniform civil code applicable to all.^{xv} It is important to understand that the reality of legal pluralism in Goa is different. The Goa civil code of 1867 was given by Portuguese and uniformity does not only promise gender justice. Uniformity should also be in the case of Personal laws because India is the largest democratic country. It can't just kill the principles of the constitution and do injustice. When it comes to applying the concept of justice given by Amartya Sen with the religious pluralism in personal laws, we may find that there are many instances where the personal laws were doing grave injustice which was evident in the Shah Bano case. The recent triple Talaq judgment was a way to imply that constitutional principle and legal pluralism is above than the personal laws. Most of the personal laws in India are not in sync with the Common, western and egalitarian laws. It does not follow rule of law and many times the person who interpret these personal laws don't

have any idea about the rule of law and basic natural justice.^{xvi} There are many elements in personal laws which are not included in Shariat, so they should apply the principle of justice, equity and good conscience and abolish other norm which does not comply with it. For example- while dealing with Islamic personal laws, the judges need not necessarily be a Muslim, the hand of thief should not cut off and girls should have consent which is practical and not only exist in paper. If we talk about the source from which these countries derive authority in a legally plural country then, it is mainly from scriptures and religious authorities. If we look into the past we will find that Hindu and Muslim personal laws have made their impact on civil authorities in different ways and are shaped by secular elements to different degrees. Islamic laws have major closure with scriptures. But both the personal laws emerge from the sociopolitical considerations like any other laws.

SEN'S APPLICATION OF CONCEPT OF JUSTICE IN THE PERSONAL LAWS ALONG WITH THE IDEA OF LEGAL PLURALISM

What is the relevance of Amartya Sen ideology in understanding the religious pluralism?

Amartya Sen's says that to do justice, the person has to experience injustice. He is a rare individual who has achieved a leading status in his field as well as continuously pursuing to make ordinary people's life better. In his book Identity and violence, he trenchantly took a critical look at the British interpretation on multiculturalism. Sen Sees it as his mission is to rescue what he sees as valuable in the idea of multiculturalism from the prevailing British idea of "plural monoculturalism", which he takes to be damaging and divisive. What grates on Sen is the idea that individuals should be ushered like sheep into pens according to their religious faith, a mode of classification that too often trumps all others and ignores the fact that people are always complex, multi-faceted individuals who choose their identities from a wide range of economic, cultural and ideological alternatives...' What begins by giving people room to express themselves, he argues, may force people into an identity chosen by the authorities. Sen is also critical of the growing consultative power given to the religious organizations of Muslims, Sikhs and Hindus. It does, he believes, magnify the power and authority of religious leaders at the expense of a healthy democratic debate. 'Suddenly the Jewish, Hindu and Muslim organisations are in charge of all Jews, Hindus and Muslims. Whether you are an extremist

mullah or a moderate mullah, whether you're Blair's friend or Blair's enemy, you might relish the idea of being able to speak for all people with a Muslim background – no matter how religious they are – but this may be in direct competition with the role of Muslims in British civil society.”^{xvii} So, we can say that there is a lot of relevance in Sen's ideology when it comes to dealing with religious pluralism. He believes that the people can be given justice only when they come out of their shackles of identity politics and religious conservatisms. He says that a religious head should not decide for the whole community or affect a large number of communities. In his number of book such as “The argumentative Indian”, from 2005 has celebrated the multi culturism of India and how the Indian Constitution works against the ills of “solitarism” or the idea that human beings have one principle identity. He has often criticized the incumbent government for suspending the autonomous governance of the Muslim majority state of Jammu and Kashmir.^{xviii} He has said that the Indian government has taken a “quantum jump in the wrong direction” on poverty and health care.^{xix} He has said that the identity politics and to curtail the freedom of a secular nation is the most dangerous thing one can do in the largest democratic country of the World. He compares India's situation with Bangladesh and said that “Bangladesh has been, in many ways, more successful than India now. It used to have a life expectancy lower than that of India. Now it is five years longer. Women's literacy is higher than in India. And, in terms of the kind of narrowness of Hindu thinking, it is not reflected in a similar narrowness of Muslim thinking in Bangladesh. I think multiple identities have done a lot for Bangladesh. It was doing a lot for India, too, until there was a deliberate attempt to undermine it. That had been present earlier. In the nineteen-twenties, there was a strong pro-Hindu movement. Gandhi was shot by an R.S.S. [Rashtriya Swayamsevak Sangh, the Fascist Hindu movement] member, which is the dominant influence on the B.J.P. today. But they were not in office. We didn't feel threatened because they seemed like a fringe. But that fringe gradually became more dominant until the latest election, and they had a massive victory, a victory partially based on political effectiveness.”^{xx} The Indian constitution is pretty much based on a well analyzed constituent assembly, which had some of its finest discussion of what the constitution should be. India has committed secular democracy but the political parties these days support a particular ideology like of BJP (Hindutava Ideology) which can manipulate the situation pretty sharply. Indian Supreme Court is very slow and divided, and despite the good it has done, it has not been the guardian of pluralism in India.

India is a country of more than a billion people. Two hundred million of them are Muslim. Two hundred million of them are Dalit, or what used to be called untouchables. A hundred million are what used to be called scheduled tribes, and they get the worst deal in India, even worse than the Dalits. Then there is quite a large proportion of the Hindu population that is skeptical. Many of them have been shot. Many of them have been put in prison. In these circumstances, to say that a majority supports him would be difficult. It's a situation where there are many restrictions. The newspapers don't get government ads, and they probably don't get many private ads, either, if the government is against you. As a result, it is very hard to have independent TV or newspapers, because of difficulties created by the government.

SUGGESTIONS AND CONCLUSION

India is and has been a land of pluralism *par excellence*. Symbiotic co-existence of diverse forms of life, as a given, immutable fact associated with human existence, grounds every sphere of life, religious, legal, cultural, social, etc. Accommodation of diversity, neither to tame nor simply to tolerate it, but to allow it a natural flourishing, has always been the principal criteria for organising individual and social existence in India. Traditionally, acceptance of diversity and pluralism as internal criteria for social existence had ensured that different social groups or communities could enjoy, to the maximum extent, freedom to nurture diverse methods or ways for, organising, sustaining and perpetuating their particular forms of life. In other words, prevalence of these criteria enjoined that law could be seen and understood as what members of any community or group treat as law. This original and pluralistic outlook on the world and on society may explain that pre-colonial India did not move in the direction of what is understood as “modern law” which is characterized by a thrust towards uniformization and a “gardening” of society^{xxi} through a legal system that is abstracted from social life. Indeed, modern law is characterized by general and impersonal rules to be imposed in a uniform way by an external authority, the state, which holds the monopoly of legitimate violence. For a long time, the modern project of the rationalization of society's organization via state law and the walk towards uniformity, usually presented as a move towards universality, has been equated to civilization whereas pluralism was interpreted as a sign of allegedly ‘primitive’ societies.^{xxii}

Also, Sen's ideology can be a way of putting an end to identity politics and saving the legal pluralism in India which is its basic. Hence, the hypothesis of this paper that Sen's ideology radically attempts to shift the grounds of conversation (about justice altogether). It seeks to provide a counter framework rather than a counter theory. He also argues that the traditional strains of political philosophy, which seeks to identify a just or a single set of principle that then can be used to design perfectly just institutions for governing society, reveals little about how we can identify and reduce injustices in the here and now.^{xxiii} So keeping his ideology in mind and considering that Sen has a deeper understanding of religions particularly Jain, Buddhism, Islam and Hindus. So, it can be deduced that the concept of justice given by Amartya Sen can be helpful in mitigating the legal pluralism in the personal laws as his idea about justice is also based on his religious ideology which seems practical is true.

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