

AMARTYA SEN'S IDEA OF JUSTICE: A JUST IDEA BUT AN UNJUST APPLICATION TO PERSONS WITH DISABILITIES

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Introduction

It is an oft repeated credo in scholastic circles that scholarship is a community exercise. For thinking to even occur, let alone flourish, you need other minds. It is this need for engagement which is largely forgotten in most proposals for promotion of research and writing in the Indian Academy. This point needs to be especially made in relation to legal scholarship because the most major effort to promote teaching and research in law has been undertaken in the exclusive portals of National Law Schools. It may well be asked whether such a disengaged existence can be the progenitor of excellence in either teaching or research. These foundational questions around legal scholarship have possibly been triggered by the fact that this piece seeks to review Amartya Sen's Idea of Justice.

Even as questions of justice are larger than law, there is an inextricable relationship between law and justice. In order to address questions of justice, Sen holds that there needs to be active engagement with the lived realities of people and the inadequacies of one set of lives can be demonstrated by comparing them with other lives. Sen proceeds on the premise that social choice is a community exercise. For informed choices to be made there needs to be engagement with other minds, other ways of living. These comparative exercises have been rendered more difficult for National Law Schools, which have been conceptualized as isolated islands of excellence. In current times when the crisis of legal education is being addressed in various ways by several forums¹ Amartya Sen's Idea of Justice provides a unique ideational opportunity to the legal community to acknowledge the widening gap between law and justice and to devise appropriate structural reforms and scholastic strategies to close this divide.

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1. National Knowledge Commission <http://www.knowledgecommission.gov.in/focus/legal.asp>; http://www.knowledgecommission.gov.in/downloads/documents/wg_legal.pdf (last visited June 20, 2010) Committee on Renovation and Rejuvenation of Higher Education (Yash Pal Committee) <http://www.academics-india.com/Yashpal-committee-report.pdf> (last visited June 20, 2010); <http://www.barcouncilofindia.org/about/vision-statement-2010-2012>.

Sen's Idea of Justice

My other reason for referring to scholastic communities in the introduction to this review stems from the nature of Sen's book. This book cannot be read in isolation; it has to be read in tandem with the work of several other scholars, and most notably with John Rawls Theory of Justice. Sen has posited his Idea of Justice in contradistinction to Rawls' Theory, on the reasoning that to address manifest injustice, you do not need a theory, just an idea of justice suffices.² According to Sen, Rawls has put forth a transcendental theory of justice which provides vision of a just society without engaging with existing manifest injustice. A person living in miserable circumstances is primarily interested in interventions that would lessen the misery of those circumstances. The most perfect picture of a just society would leave him cold if that misery is not addressed. Rawls' vision, according to Sen, is of little utility in addressing the existing difficulties of people.

Sen's proposition is no doubt provocative whether or not one agrees with it. I have had umpteen classroom discussions on the value of Rawlsian vision and the guidance, albeit utopian, which a theory of justice offers. Since many of these discussions have happened in Poverty Law courses, we were required to ask along with Sen that if justice is thought of in transcendental terms then who pays the cost of such utopian thinking. Evidently, the transcendental sport can be primarily played by people in comfortable positions as people in miserable situations cannot afford such luxury. For people in miserable conditions, any intervention which improves their piteous condition would be welcome. Those persons would thus be in agreement with Sen that to address manifest injustice an idea of justice suffices. It is not like Sen is only seeking a one notch improvement in the lives of people, only in his opinion, in the real world, situations improve notch by notch. More importantly, Sen links his idea of justice to the real lives of people, and it is those lives that he aims to improve. Thus, Sen's idea of justice requires a continuous struggle against real life situations of injustice in order to promote justice.

Sen continues his engagement with Rawls by setting up a major critique of Rawls original position where people entered into the social contract under a veil of ignorance. Sen questions both the utility and the impartiality of the original position. The veil of ignorance may guard against class based advancement of interest; it cannot engender the richness of discourse which engagement with people and situations different from one's own may do.

2. Amartya Sen, *Idea of Justice* (Allen Lane London 2009) at p. 9.

The veil of ignorance seems to presume upon a unique and singular truth, whereas truth may well have more plural manifestations. Consequently, Sen finds the impartiality of Rawls original position barren in comparison with the device of impartial spectator suggested by Adam Smith. Taking inspiration from Adam Smith, Sen puts in place an elaborate scheme on the people who need to be consulted whilst arriving at any major policy. Justice, he holds, does not need to be blind-folded rather it should have the facility of multiple lenses through which it views reality.

It is difficult to differ with the procedure for informed participation proposed by Sen. It can be said that to put around the table, persons affected and not affected by an issue would be a far from easy exercise. At the same time the richness of the ensuing discourse is undeniable. Further, just the effort of setting up a dialogue between stakeholders and impartial spectators would build the capability to settle contentious questions through reasoned dialogue – a capability which needs to be developed if questions of justice are to be peaceably settled and not violently resolved.

I find both the idea of justice that Sen puts out and the procedure he posits to implement it to be unexceptionable. My difficulty with the book primarily arises when Sen starts to apply his model to specific situations. Sen had the choice to apply this model to those issues that he knows well and on which he has done deep empirical work. Sen uses his methodology to good effect by referring to his studies on famines, child mortality and universal education. He effectively employs the region and gender specific findings of these studies to advance the comparative understanding he promotes in the book.

Where Sen flounders is when he applies his idea of justice to persons with disabilities – a constituency with whose concerns he is not so familiar. Whilst Sen could put forth his own opinion as that of an impartial spectator engaging with the issue, to be true to his own methodology, he also needed to examine the question of disability rights from the stand point of persons with disabilities which is what he fails to do. With this failure Sen does not meet his own standards of deliberation and rationality in making social choices. In what follows, I demonstrate how Sen's failure to follow his own procedures results in injustice to persons with disabilities.

The Preventive Paradigm and Justice for Persons with Disabilities

Sen first refers to disability when he uses disability as an example to demonstrate the limitations of the income based approach to measure

poverty. An income based approach he points out would not take into account the higher amounts persons with disabilities need to expend to convert capabilities into functionings.³ The veracity of Sen's contention is undeniable. My difficulty is with the static nature of the contention. Sen makes the argument of higher conversion rates as an inflexible perennial truth, whereas the fact of the matter is that the adoption of universal design would bring down the rates of conversion.⁴ The necessity of making this additional argument has not been felt by Sen; even as higher conversion rates without more could delay if not deny the just entitlements of persons with disabilities.⁵ Sen's failure to refer to the jurisprudence of universal design could well be categorized as a sin of omission which can be easily corrected by persons with disabilities and disability rights activists. The greater difficulty arises from Sen's sin of commission whereby he sets up the case for the rights of persons with disabilities within the paradigm of prevention. According to Sen "it is extremely important to understand that many disabilities are preventable, and much can be done not only to diminish the penalty of disability but also to reduce its incidence. Indeed, only a fairly moderate proportion of the 600 million people living with disabilities were doomed to these conditions at conception, or even at birth".⁶ He then goes on to recount the various causes of disabilities which are preventable such as: maternal malnutrition, childhood under nourishment, polio, measles, AIDS, road accidents, injuries at work and land mine disasters.⁷

From here on Sen goes on to contend that "social intervention against disability has to include prevention as well as management and alleviation".

Sen has thus set up his argument for disability rights on the triad of prevention-management-alleviation. A natural consequence of this linkage is that it in no way challenges the devalued existence of a disabled life rather

3. Id. at p. 258 when he specially refers to Wiebke Kuklys Amartya Sen's capability Approach: Theoretical Insights and Empirical Applications (Springer-Verlag New York 2005).

4. A large part of the higher conversion costs emerges from the fact that the world has not been constructed taking into account the existence of persons with disabilities. Hence the infrastructure the non disabled presume upon has to be individually created by persons with disabilities. This quantum of the conversion cost can be effectively reduced by universal design which is a concept that requires the real and the virtual world to be created keeping in view the existence of persons with disabilities.

5. The real nature of this danger is demonstrated by all the crusades that are being fought around social economic rights. The denial of justiciability, the requirement of progressive realization, are all conditionalities which have been attached to socio-economic rights because their realization has been viewed as resource intensive.

6. Supra note 2 at p. 259.

7. Ibid.

it reinforces the diminished value.⁸ It perceives disability as deficit, contends that this deficit has been caused by social inaction and asks society to compensate for the harm it failed to prevent. Disability rights arising from such an outlook fail to respect the dignity of persons with disabilities as persons who need to be valued for themselves. Disability Human Rights on the other hand perceives disability as an integral part of human diversity.⁹ The difference of disability should not result in persons with disabilities being denied the development of human capabilities. And persons with disabilities have a right to develop their capabilities on an equal basis with others.

The prevention paradigm primarily arose from experts and non-disabled people looking at disability. The discourse of disability human rights has primarily arisen from persons with disabilities. The Convention on the Rights of Persons with Disabilities (hereinafter CRPD) is a binding international articulation of disability human rights. Significantly this Convention does not speak of preventing primary disability, but the prevention of secondary disability is an integral part of the right to health of persons with disabilities.¹⁰ All efforts to include a primary prevention provision in the CRPD were shot down by persons with disabilities during the negotiations for the Convention on the reasoning that disability prevention is a common concern of human development but could not be viewed as a part of disability rights. A prevention provision in a disability rights convention is almost contending that persons with disabilities are unwelcome members of the human community. Persons with disabilities along with the rest of humanity desire that all human beings should have access to safe drinking water, nutritious diets, safe work environments, and a war free world. These objectives need to be fought for by all of humanity for their own sake. It is unfair and inequitable that persons with disabilities should be required to lead these campaigns on the reasoning that if these rightful activities are not undertaken then persons with disabilities could be the undesired result.

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8. An effect which Sen magnifies by the verbs and adjectives he uses to describe disability. Thus, disability is "impairing feature of humanity", "tragic consequences of disability." Such like use of words is all the more problematic when it comes from Sen because Sen is both conscious of the power of language and observant of its everyday use. For example the distinction he makes at p. 31 between "being well" and being good is a case in point.
 9. It is this sentiment which has found recognition in Para m of the Convention on the Rights of Persons with Disabilities which recognizes "the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities...".
 10. See Article 25 (b) of the CRPD which mandates states to "provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons".

Amartya Sen could have distinguished between the need for prevention and the case for disability rights, if he had consulted the writings of disabled people and their organizations¹¹, or even looked at the negotiations surrounding the CRPD¹² or looked at Nussbaum's exposition on disability rights.¹³ However, Sen contrary to his own dictum of consulting the stakeholder decided to preach on disability rather than listen to persons with disabilities. Thus, the humility he seeks from public policy makers whilst arriving at social choices goes missing in his own exposition on disability.

Conclusion

It has often been found that small incremental changes that can improve the real lives of people are blocked by arguments for comprehensive reforms. Since comprehensive reforms are time consuming and difficult to obtain, the diehard radical often inadvertently or otherwise lands up supporting the status quo. Amartya Sen in his Idea of Justice is asking each one of us to test our recommendations for social change on the touchstone of the practical and possible. This practical should be an evolving standard. Yet in specifying this possible for persons with disabilities, Sen has reduced the issue of disability to a statistic, which could easily have been lower if societies had been more vigilant. The impact of this argument on the self hood, dignity and personality of persons with disabilities escapes Sen. The Idea of Justice provides useful ideas for blueprinting justice agendas, even as it slips up whilst setting up arguments for the justice rights of persons with disabilities.

11. See for example <http://www.inclusion-international.org/self-advocacy/my-voice/> (last visited June 20, 2010), The declaration of the Disabled People International <http://v1.dpi.org/lang-en/index?page=18> (last visited June 20, 2010).

12. <http://www.un.org/disabilities/default.asp?id=1423> (last visited June 20, 2010).

13. Martha Nussbaum, *Frontiers of Justice Disability Nationality and Species Membership* (Oxford University Press New Delhi 2006).