



Struggling with Injustices

TOOLS OF JUSTICE: NON-DISCRIMINATION AND THE INDIAN CONSTITUTION

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In the contemporary historical moment any agenda of emancipation through human rights is viewed with deep suspicion. This suspicion stems from the fact of appropriation of the very language and logic of human rights by the instrumentalities of the state or state apparatus. The postcolonial thinkers have even drawn a similarity between the contemporary vocabularies of human rights with that of the discourse of the White Man's Burden of the colonial era with its possibility of turning into

another kind of 'social Darwinism—the fittest must shoulder the burden of righting the wrongs of the unfit'¹. Thus, it poses a perennial challenge for social activists to articulate and conceptualize the voices of suffering of the deprived, dispossessed and disenfranchised communities in the language of human rights or constitutional rights.

Tools of Justice is a welcome effort at visualizing the vocabulary of rights from the standpoint of the oppressed. It voices for the people who are either ruthlessly relegated to the margins of the society or are constantly engaged in the struggle for inaugurating the right to 'be and remain human'.² The author begins the work by radicalizing the notion of constitutionalism which challenges and deconstructs the Byzantine structure of state power which hampers the possibilities of justice which it otherwise aspires to fulfill. The author attempts to make it possible to seek justice within the framework of the Constitution by invocation of what she calls 'insurgent constitutionalism'. This approach imagines the progressive interpretation of the constitutional text as a tool of justice giving 'voice to counter-hegemonic imaginations of justice, rooted in the resistance movements and argumentative traditions that have blossomed in the region at different points in history' (p. 3). The work thus 'explores the possibilities of using the constituting power of the Constitution to offer a dynamic interpretation of non-discrimination in the law' (p. 2). The strength of this work lies in its ability to transfuse various disciplinary dimensions of social sciences and initiate a dialogue between history, sociology and processes of juridical interpretation in order to fully address, and more importantly understand, the injustices and structures of discrimination that constitute the very foundations of our social fabric.

Amartya Sen, in his foundational work on legal theory *The Idea of Justice*, has critiqued grand theorizations done by political and moral philosophers about the concept of 'justice'. His theory of justice confines itself to 'address questions of enhancing justice and removing injustice, rather than to offer resolutions of questions about the nature of perfect justice.'³ Tools of Justice in a somewhat similar vein attempts to unmask and voice the injustices of discrimination and 'exclusionary violence [that exists] against a series of marginalized groups...the disabled, the untouchables, the trans-genders, the tribals (notified and de-notified, primitive and assimilated, forest and nomadic), the minorities, and so on' (p. 2).

The book employs the theoretical categories of Discrimination and Loss of Liberty/Violence to understand the logic of social exclusion on the one hand and the possibilities of progressive constitutional interpretation on the other. In the space below we will move into some of the specific categories of exclusionary groups that the author analyses.

The first signpost of these categories is the woefully inadequate rights of the disabled within the contours of the Constitution. The rigid constitutional framework fails to recognize disability as a constitutional category of discrimination! The conspicuous absence of 'disability' as a prohibited form of discrimination in the anti-discrimination clause of the Indian Constitution (Article 15) remains painfully agonizing and marks the moment of foundational violence of the Indian Constitution. The implication of denial of political voice has serious consequences for the differently abled sections of the society. The non-recognition of discrimination as a constitutional category, the author argues, leads to loss of liberty for this section of the population. The claims of disabled people become couched in the vocabulary of tolerance and not of recognizable rights and calls for justice. An example would clarify this point: The author illustrates how the legislation dealing with persons with disabilities recognizes the aversion that employers might have against employing them. Thus, it provides incentives to the employers for employing such persons (Section 41 of Persons with Disabilities Act). Here she asks a very pertinent rhetorical question: 'Whereas reservation is a part of the right against discrimination for any of the stated grounds of discrimination under Article 15, in case of disability, reservation is framed in the language of tolerance. Incentives are the medium through which tolerance is fostered...leaving public morality firmly in place' (p. 54, emphasis supplied).

Such foundational violence of the Constitution stares in the face of burgeoning theorists of disability jurisprudence and poses challenges of dealing with what Walter Benjamin describes as law-making and law-preserving violence.⁴ The fascinating analysis of cases, laws and practices of interpretation further throws light on how the 'constitutionally inarticulate index' of disability' (p. 446, emphasis in original) is informed by the assumptions of able-bodied-normativity further leading to their exclusion.

The next category of caste analysed in the book provides a wealth of insights from the discipline of sociology, history as well as legal theory. The chapter devoted to understanding the sociology of caste within the Indian context (pp. 124-162) provides a foundational ground for understanding caste in India. It goes to the credit and scholarship of the author that she provides such a rich variety of sociological material which becomes the backdrop in order to fully understand the controversial juridical and political debate on caste and reservations. The next chapter deals with the history of reservation/affirmative action debate from a constitutional standpoint. These concepts are dexterously articulated by the author. She not only provides a descriptive analysis but also takes some uncompromising positions on the matters of perennial

 

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controversy within Indian political theory. To take a couple of instances, the author emphatically advocates reservation as a fundamental claim-right which thereby creates a corresponding duty on the government to make provisions for reservation for the depressed sections of the

society. At present reservation in law is not a matter of claim-right which creates a corresponding duty on government to reserve seats. It is interpreted by courts merely as an enabling provision whereby government may or may not reserve seats depending upon the sociological and

other factors in a particular state. Next, the author entirely rejects the notion of the 'creamy layer' (a concept that allows for excluding the economically well-off from some sections of reserved category from the benefits of reservation) by calling it 'an exercise in dominance' which segregates discrimination and narrows its articulation down to economic status alone' (p. 201). The author argues that the concept of 'creamy layer' is based on an 'anti-historical view of discrimination' (p. 202) rejecting the relevance of violent exclusion and lived experience of the oppressed communities. The above viewpoints remain controversial in the present political and constitutional theory, but certainly call for a closer analysis and serious-minded debate. It speaks of the erudite scholarship of the author to take unflinching and non-compromising stands on such controversial matters.

Given the constraints of space it is impossible to discuss at length the categories of exclusion of religious minorities (with a focus on the Muslim community), scheduled tribes, sexual minorities etc., which the author describes with rigorous details in the latter half of the book. In the limited space it would be pertinent to discuss the notion of 'sexual assault and Right to Liberty' given its alarming relevance in India of 2013.

The discussion on 'sexual assault' inaugurates the historical and sociological origins of gender-based violence. With exceptional clarity, the author demonstrates the patriarchal, caste-based, hetero-normative and colonial semantics that inform gender based violence in India. The analysis reveals the flawed conceptualization of law relating to sexual offences in India. The fact that rape of the wife by her husband is no rape in India and the anachronistic nature of peno-vaginal intercourse remains necessary for rape determines the patriarchal norms that define the notion of sexual access by a man over a woman's body. Further, not just the flawed rape laws but the violent interpretation and insensitive judicial discourse in cases of sexual assault signals the impossibility of justice within the domain of criminal law in India. With an analysis of various cases the author demonstrates how 'the criminal justice system is underwritten by codes of cultural hegemony and patriarchal delegation that disable any possibility of any active engagement by women with systems of justice' (p.386). As this review goes for print the horrific atrocity of the Delhi gang-rape on a female student in a moving bus indelibly haunts the collective psyche of Indian society. A careful and sustained reading of these pages is imperative, if not compulsory, for anyone concerned with understanding and unmasking the horrific face of systemic violence and insensitivity of juridical discourses that informs the law of sexual assault in India.

Throughout the book the author invokes numerous juristic techniques by evoking possibilities of progressive constitutional interpretation that can be used to ensure access to justice for the forgotten millions and worst off-citizens. Concepts such as 'hostile environments'—ranging from harassment and hate speech to assault and atrocity—which are discussed opens up the scope for 'jurisprudence that takes note of multiple discriminations' (p. 461) and in turn opens a potentiality of what the author calls 'transformative constitutionalism' (p. 444).

It is this potentiality that the book seeks to turn into an actuality by employing the tools of justice. These tools, in the absence of anything better, remain the logic and vocabulary of rights jurisprudence reading it in a radically transformative fashion. It is this possibility of people's struggle with and against injustices informing the contours of rights that can possibly re-imagine the contents of constitutionalism putting restraints on state power. In her own words, 'Exploring the idea of insurgency, recovering it from the monopoly of statist military discourse and thereby revalorizing it, helps resurrect and develop the radical possibilities of constitutionalism' (pp. 5-6). This forms the core of 'insurgent constitutionalism' that the author seeks to inaugurate in this book as a primary tool of justice or sites of struggle against various forms of discriminations and injustices.

Reference 1 Gayatri Spivak, Righting Wrongs, South Atlantic Quarterly Spring/Summer 2004 (1032-3): 523-581 at p. 524. 2 To borrow the phrase from Upendra Baxi, The Future of Human Rights (2002). 3 Amartya Sen, The Idea of Justice (2009) p. ix 4 Walter Benjamin, 'Critique of Violence' in Selected Writings Vol. I (Bullock & Jennings ed., 1996). Amit Bindal Assistant Professor & Assistant Director, Centre for Penology, Criminal Justice & Police Studies, Jindal Global Law School, O.P. Jindal Global University. He can be reached at amit@bindals.net ; abindal@jgu.edu.in

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