

## RELEVANCE OF DISTRIBUTIVE JUSTICE IN THE MODERN SOCIETY LAW AND JUDICIAL EXPOSITION FROM INDIAN PERSPECTIVES

*Arti Aneja\**

*The notion of justice is a varying concept which depends upon the paradigm of the individual who is trying to define the concept of justice and the milieu in which one finds oneself. What is just at a particular point of time or milieu may not be just at another point of time or a different level of economic development of the society. Hence at the every interval of human history we find competing formulations and enunciation of theories of justice be that of the Plato's conception of justice to the present time. Philosophers have been trying to quantify the concept of justice in terms of distribution according to merits or need or in conformity to customs or equal opportunity for self development, utility, or balancing of interest or felt necessities of the people etc. But what is justice after all has to be defined afresh at each point of time. The concept of justice with a particular society is an injustice for another society and also at one point of time something is considered as to be just is a blatant injustice in another point of time. Under the present paper it has been tried to discuss the concept of justice as enunciated by Rawls in the Indian context trying to have to grips of an Indian experience.*

### I. INTRODUCTION

Justice is a concept involving the fair, moral and impartial treatment of all the persons. Often it is seen as continued effort to do what is right. The doctrine of justice asserts that there should be a just conciliation of the claims of all sections of the

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society. Justice is foundational concept within most system of law. In jurisprudence, justice is obligation that the legal system has towards individuals and the society as a whole.

The term justice is derived from the Latin word 'jus', which means just. So justice is what appears just to a reasonable man. Justice is both objective reality as well as an abstract quality outside and within the realm of law involving values and reality, ethics and morality, equality and liberty, individual freedom and social control conditioned by the need of individual good and community interest.<sup>1</sup> It is Janus<sup>2</sup> like concept looking both, to past and future conserving and reforming.

The ancient Indian, Greeks and Romans had postulated justice as an ideal standard derived from God or based on Dharma, truth, and equality. It is an eternal moral obligation to render everyone it's due the noblest ideal of all human laws. For instance, through Magna Carta (1215.A.D.) where the great people of England wrested their liberty, rights and other freedoms from the clutches of a dictatorial monarchy.

During Renaissance and Reformation period to control the power oriented sovereign various social contract theories were propounded as the basis of new social order was founded on justice and natural rights of man.

During 18<sup>th</sup> and 19<sup>th</sup> centuries a series of thinkers like David Hume, Mills, Spencer, Bentham and Kropotkin etc. expounded interests and justice in terms of desirable purposes, interest and values.

Similarly thinkers from Lincoln to Nehru, Marx to Mao and Mahatma to Martin Luther King Jr. have been blazing the trail of justice for 'downtrodden, poorest end lost'.

It was also during the latter half of 20<sup>th</sup> century under the aegis of U.N. Declaration of Human Right, 1948 that the basic fundamental human rights and the claims to justice, equality and human dignity, non discrimination etc. assumed sacrosanct national and international recognition and enforcement.

Although various contemporary social jurisprudential schools have emphasized the rights of individual founded on justice in a welfare state, the concept found its most vocal support from John Rawls.

## **II. RAWLS' THEORY OF JUSTICE**

The 1960s were an era of much unrest in America. American involvement in the Vietnam War had disillusioned the liberals the world over. The students' agitation, the challenge to the liberalism from the left and the issues relating to race relations in America brought to the forefront the need for a normative theory of justice.

The publication of Rawls' classical work titled 'A Theory of Justice' in 1971 was an event of great of significance in the history of western political thought. In A Theory of justice, Rawls attempts to solve the intractable problem of distributive justice by utilizing, *mutatis mutandis*, the familiar device of social contract. The resultant theory is known as 'Justice as fairness', from which Rawls derives his two principles of justice viz. Liberty principle, and the difference principle.

Rawls' primary objective in "A Theory of Justice" is to provide a solution to the problem of a political obligation or to put it another way, to explain how it is and under what circumstances citizens are obliged to obey the law which the state creates. He does this through the device of hypothetical agreement, made under the conditions of equality so that there are no disparities in bargaining power. This hypothetical agreement justifies the coercive use of state power because; guided by it a state would take a form which all would, under the condition of freedom, consent to. Rawls' called this theory of Justice as fairness.

Rawls follows social contract tradition but approach the subject with a slightly different view. Specially, Rawls posits that a just social contract is that which we agreed upon if we did not know in advance where we ourselves end up in the

society that we are agreeing to. This condition of ignorance is known as ‘original position’.<sup>3</sup>

### **III. THE “ORIGINAL POSITION”**

At this stage while trying to built-up his theory of Justice, Rawls introduced concept of ‘veil of ignorance’. According to him in a pre-political state of nature——

- i. No one knows his position of or place in society, his class or social status.
- ii. Nor does any one know his fortune in the distribution of natural resources or assets and liabilities, his intelligence, strength and the like.

Rawls even assumed that parties did not know their concept of Good and the principles of justice were chosen behind the veil of ignorance<sup>4</sup> from behind this veil of ignorance the principle on which a just order would be based can be discovered, since in pursuing their own advantages of all. Rawls’ social contract is ratified in a condition of perfect equality.

They are the principles that rational and free persons concerned to further their own interest would accept in an initial position or equality as defining the fundamentals of the terms of there association.<sup>5</sup>

The agreement that stems from the original position is both hypothetical and non-historical hypothetical in the sense that principles to be derived are what the parties could, or would, agree to, not what they have agreed to. In other words, Rawls seeks to persuade as through argument that the principles of justice that he derives are in fact what we would agree upon if we were in hypothetical situation of the original position.

Non-Historical in the sense that it is not supposed that the agreement has ever or indeed could actually be entered into as a matter of fact.

Rawls claimed that parties in the original position would adopt two such principles, which would then govern the assignment of rights and duties and regulate the distribution of social and economic advantages across society.<sup>6</sup>

#### **IV. TWO PRINCIPLE OF JUSTICE**

Considering that men are “rational”, they should opt for such a social order as is “just” and in which they feel that they would not have to suffer disadvantages. As free, equal and rational agents, they would agree on the following principles of justice.

**The First Principle of Justice** (The principle of greatest basic Liberty)

**First:** *Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.*<sup>7</sup>

The first principle of justice relates to the concept of basic liberty which would be of various kinds: Economic, Social, personal, intellectual and of course, political freedoms.<sup>8</sup> The 1<sup>st</sup> principle of Justice differs from classic liberal principle in that it protects not liberty in general but certain specific liberties. There are conventional civil liberties of political liberty i.e. to vote and run for office, freedom of speech and assembly liberty of conscience and freedom of thought, freedom of person along with right to hold property and freedom from arbitrary arrest.<sup>9</sup>

#### **The Second Principle of Justice**

**Second:** *Social and Economic inequalities are to be arranged so that they are both*

- (a) To the greatest benefit of the least advantaged, and
- (b) Attached to the offices and position open to all under condition of fair equality of opportunity.<sup>10</sup>

#### **(a) Difference Principle**

The 1<sup>st</sup> part of the 2<sup>nd</sup> principle of justice is called difference principle. It is departure from the equality. The principle

requires that inequalities in the distribution of resources must be justified by reference to the interest of least advantage group.

In Rawls' theory the least advantage group is explained as people belonging to the income class with the lowest expectations in a well ordered society where all citizens equal basic rights and liberties and fair opportunities are secure.<sup>11</sup>

Rawls in his "A Theory of Justice" gave the answer of the question that why rational person in original position would choose the difference principle as a basic principle of justice to regulate their society.

He explained that rational person in original position must choose principle of Justice, which will regulate the basic structure of the society, and so will fundamentally affect their own prospect in life, the resources and liberty that they will enjoy. But due to veil of ignorance they don't know their position that they will occupy in such a society, nor do they have enough information to, from a meaningful estimate of how probable it is that they will be among better —off or less well off. Due to seriousness of choice and paucity of information on which the choice must be based, the rational person will make their decision according to *Maximin Rule*.<sup>12</sup> This Rule holds that alternative options should be ranked in terms of their best worst outcomes.<sup>13</sup>

For example - The best outcome would be finding that one is in a most advantage group, and the worst outcome will be that in the least advantaged group. Since the difference principle permits increase in overall welfare only when these benefits the least advantaged group. It is necessarily true that the difference principle is most favourable to the interests of least advantage group. If therefore one has the best-worst outcome from point of view of original position. If when the veil of ignorance is lifted, it is discovered that rest assure everyone would be labouring for his benefits; since the difference principle permits other people to improve their material welfare only if in doing so they benefit the one.<sup>14</sup>

Rawls is prepared to allow a trade off between economic efficiency and strict distribute equality in a rather similar way to the utilitarian.

For example, managing director earn more money than car park attendants. This disparity is justified in Rawls view, because if a drop in the earnings of MD than they are present. This might be result if, say, high earning were necessary to attract able people into managing directorships and a fall in their earnings would result in efficiency, and a corresponding decline in the economy making everyone worse-off.

But in allowing trading off Rawls make a difference that whereas the utilitarian will allow differential earnings and incentive in order to increase the several or overall welfare, Rawls will allow such inequality only when they are necessary to increase welfare of least advantage group.<sup>15</sup>

***(b) Principle of fair equality of opportunity***

Economic and social inequalities acceptable under the operation of difference principle will only be just if they are attached to the offices and position that are open to all. A formal equality of opportunity requires that all have the same legal rights of access to all advantaged social positions. Rawls principle goes considerably further than this, there must be fair equality of opportunity, not only are jobs to be open to all with necessary qualifications but also to achieve fairness, the best possible education needs to be open to all, including remedial education to counteract disadvantages due to family or social back ground. All are to be given the chance to develop their potential.<sup>16</sup>

Although Rawls' theory of Justice was severally criticized by the Marxist and libertarians but he can take credit for developing a theory which meets challenges of the left and seeks to combine individual liberty with social justice. In essence it is a compromise theory and when we reach a compromise we have to accept something slightly different from what we really want.

## V. RAWLS' THEORY AND INDIAN EXPERIENCE

Rawls' principle of justice is very much relevant in developing country like India, where most of the population comprises downtrodden class and weaker section of the society. They have to be lifted to the extent from where they can live with dignity.

If we look at Rawls' first principle of Justice i.e. the principle of greatest equal liberty, the principle is targeted at those "Primary Social Goods" which are essential to foster a basic rights, liberties and powers. They encompass the freedom to participate in the political process i.e. the right to vote and to be eligible to public offices, freedom of speech and assembly (including freedom of press), liberty of conscience, freedom of thought (as defined in rule of law) and right to hold property and freedom from arbitrary arrest and seizure. Our constitutional provisions correspond with the Rawls' 1st principle. For instance right to freedom under Article 19 in our constitutional scheme is in direct consonance with the Rawls' 1st principle.

Freedom of speech and expression mentioned under Article 19(1) (a) has been bedrock of our civil and political liberties. The Supreme Court in its plethora of judgements has held that freedom of speech and expression, though not absolute is the pre-condition of civil liberties in an organized society. Justice Patanjali Shastri in *A.K. Gopalan Case*<sup>17</sup> observed man as a rational being desires to do many things, but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desire by other individuals. If we look into the statement the obvious conclusion is that apex court has tried to reconcile primary social goods which have been described as basic right, liberties and powers by Rawls'. Thus, before Rawls' theory, his concerns have already been addressed by the wisdom of enlightened judges.



In *Bennett Coleman's case*<sup>18</sup> the apex court held that freedom of the press is both quantitative and qualitative. Though, the question in case was regarding the rationing of newspaper rolls and restricting the number of pages to be printed. Supreme Court dwells upon the very basic question of freedom of speech and expression. It firmly held that freedom lies both in circulation and in content. Rawls' principle of primary social goods as the target found another expoundation in this case. The view of the Supreme Court in this regard goes down the rules of civil liberties that a citizen or entity are entitled for.

Apart from that *Express Newspaper v. Union of India*<sup>19</sup> and *R. Rajagopal v. State of Tamil Nadu*<sup>20</sup> etc. are some other cases where Rawls' theory found its expression in Indian legal pronouncement. Indeed, the pronouncement on the constitutional provisions<sup>21</sup> like freedom of peaceful assembly, to form association, of movement, to reside and to settle anywhere in the country and freedom of profession, occupation trade or business. We find that Rawls' first principle has been time and again employed by the Supreme Court to expound the fundamental rights.

Further, under Article 21 which envisage right to life and personal liberty which can't be taken away without the procedure established by law also take into account of what Rawls' first principle deal with. This is an Article which got broadest ever interpretation by the apex court to uphold political and civil liberties. The Article 21 is also in consonance with international covenant on civil and political rights, 1966.

The Supreme Court by allowing petitions has expounded the scope of Article 21 in *Maneka Gandhi v. Union of India*<sup>22</sup> and held that Article 21 protects the right of life and personal liberty of citizen not only from executive actions but from legislative actions also. Thus a safe conclusion would be that Article 21 insulates a citizen from state tyranny.

In this context, while examining the relevancy of Rawls' first principle vis-à-vis Indian Constitution, Article 22 cannot

be overlooked. Rawls' is of the view that greatest equal liberty principle is also targeted at the freedom of arbitrary arrest by the state machinery. Article 22 puts a shield between arbitrary arrests of the citizen without minimum procedural requirement. Hence, Article 22 subscribe to the basic theology of Rawls' principle. Therefore, in *Hussainara Khatun v. State of Bihar*<sup>23</sup> treating the post card as Public Interest Litigation the Supreme Court came heavily against arbitrary arrest of indigent persons without procedural requirement.

Slavery and human trafficking has been long held to be most grave infringement of civil liberties and rights in the legal and social forums. Rawls' has condemned this practice and advocated the idea of human life with dignity be an inalienable right for a citizen. Articles 23 and 24 of our Constitution addressed this social malady, hence allowed the percolation of Rawls' idea in our constitutional schemes.

In *Bandhua Mazdoor Mukti Morcha v. Union of India*<sup>24</sup> the Supreme Court held that bonded labour practices goes completely against the basic human rights and is detrimental to prosperities of a civilized and organized society. In fact Chapter III of our Constitution which deals with fundamental rights are dotted with the basic postulates of Rawls' first principle and the same can be viewed as the total application of Rawls' theory in our constitutional schemes.

Then, if we look at Second principle of Rawls' Theory of Justice, the first part of the second principle targeted at the distribution of income and wealth, where it has been laid that social & economic inequality should be greatest benefit to the least advantage people i.e. downtrodden and weaker sections of the society. It seems that what Rawls' proposal were inspired from the classical work of Greek philosopher Epicurus who pointed out that because of disparities of circumstances justice not necessarily demands the same result for everybody and ironically as it may sound arguments of Rawls' coincides with that of Epicurus wherein Rawls is of view that inequality of

treatment is not an exception but a rule of Justice.<sup>25</sup> The constitution envisages<sup>26</sup> a casteless and classless society, equality for all citizens with equality of treatment under Article 14. Article 14 pervades like a brooding omnipresence. The constitution provides the adopted policy of deliberate preferential treatment for historically disadvantaged peoples. First, untouchability was abolished, and its practice in any form was forbidden by Article. 17.

Again under Article 15, all citizens became entitled to equal access to shops, restaurants, hotels and places of entertainment, and to the use of wells, tanks bathing places, roads and place worship. No citizen, on grounds only of religion, race caste, sex, place of birth or any of them could be subjected to any disability. Further the constitution enabled parliament and state legislatures to formulate special provisions through ordinary law for the advancement of our socially and educationally backward classes of citizens and for SC and STs.<sup>27</sup>

Article 16 of the Constitution provides equality of opportunity to all its citizens but the Constitution enables the parliament and State legislatures to make special provisions for adequate representation in public employment for the advancement of socially and educationally backward classes of citizens or for SCs and STs.<sup>28</sup>

In *State of Kerala v. N.M. Thomas*<sup>29</sup> the apex court took a liberal view to give preferential treatment to SCs and STs under Article 16 (1) outside Article 16 (4) to help SC & STs. It had thrown in the melting pot the decision of *Devadasan case*<sup>30</sup> in which carry forward rule of reservation was not to exceed 50%.

In *ABSK (Sangh) Railway v. Union of India*<sup>31</sup> the Supreme Court following *Thomas case* upheld the validity of Railway Board circular under which reservations were made in the selection of posts for SCs & STs. It also upheld the carry forward rule under which 17% posts were reserved for those categories.

The apex court has consequently evolved clear indicators to be followed in respect of reservation for SCs. & STs by asserting protective discrimination for promoting social justice. In *K. C. Vasanth Kumar v. State of Karnataka*<sup>32</sup> the Hon'ble Court observed that:

- (i) The reservation in favour of Scheduled Castes and Scheduled Tribes must continue as at present that is without the application of a means test, for a further period not exceeding fifteen years. Another fifteen years will make it fifty years after the advent of the Constitution - a period reasonably long for the upper crust of the oppressed classes to overcome the baneful effects of social oppression and humiliation;
- (ii) The means test that is to say, the test of economic backwardness ought to be made applicable even to SCs and STs after the period mentioned in (i) above;
- (iii) So far as the backward classes were concerned, they should satisfy, two tests, namely, (a) that they should be comparable to the SCs and STs in the matter of their backwardness and (b) that they should satisfy the means test such as State Government may lay down in the context of the prevailing economic conditions;
- (iv) The policy of reservation in employment, education and legislative institutions should be reviewed every five years or so. That will at once afford an opportunity to the state to rectify distortions arising out of particular facets of the reservation policy and to the people, both backward and non-backward, to ventilate their views in a public debate on the practical impact of the policy of reservation.

In *Indra Sawhney v. Union of India*<sup>33</sup> the apex court held that affirmative action for upliftment of downtrodden is permissible. The court examined the scope and extent of

Article 16(4) and clarified various aspects on which there were differences of opinion in various earlier judgements. The majority opinion of the Supreme Court on various aspects of reservation provided. Article 16(4) may be summarized as:

1. Backward class of citizen in Article 16(4) can be identified on the basis of caste and not only on economic basis.
2. Article 16(4) is not an exception to Article 16(1). It is an instance of classification. Reservation can be made under Article 16(2).
3. Backward classes in Article 16(4) are not similar to as socially and educationally backward in Article 15(4).
4. Creamy layer must be excluded from backward class.
5. Article 16(4) permit classification of backward classes into backward and more backward classes.
6. A backward class of citizens can not be identified only exclusively with reference to economic criteria.
7. Reservation shall not exceed 50%.
8. Reservation can be made by executive order.
9. No reservation in promotion.
10. Permanent statutory body to examine complaints of over inclusion of under inclusion.
11. On Mandal Commission Report no opinion expressed.
12. Disputes regarding new criteria can be raised only in Supreme Court.

Besides these constitutional provisions and judicial decisions our political thinkers introduced schemes of Sarvodaya which talks about the welfare of all section of the society. Directive Principle of the State Policy also comprises of these schemes through -

Article 38 - State to secure a social order for the promotion of welfare of the people.

Under Article 39 - State are under mandate to direct their policies for the up-liftment of men and women equally, so that they shall possess same rights of livelihood. It also calls upon the state to formulate policies for the equal distribution of the income and resources.

Article 46 - promotion of educational and economic interests of ST, SCs and weaker section.

Article 47- Duty of the state to raise the level of nutrition and the standard of living and to improve public health.

On the basis of Directive Principles of State Policy the Government took so many corrective measures to alleviate downtrodden class and weaker sections. The Government had implemented various schemes like Swarnajayanti Gram Swarozgar Yojana, Samporna Garmeen Rozgar Yojana, Antyodaya Anna Yojana, Rural Employment Generation Programme, Prime Minister Rozgar Yojana, Indira Awas Yojana, Valmiki Ambedkar Awas Yojana, and Annapurna Scheme. Recently the Government had launched the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 which provides that State Government must provide 100 days of Guaranteed wage employment in every financial year to provide minimum employment to the rural poors. All these measures correspond with the first part of the second principle of Rawls' Theory.

If we look at 2<sup>nd</sup> part of the second principle of Rawls' Theory of Justice which targeted on fair equality of opportunity which talks about economic and social inequalities acceptable under operation of difference principle will only be just if they attached to the office and position that are open to all. In this context the Apex Court's decision in *K Thimmaapa v. Chairman, Central Board of Director SBI*<sup>34</sup> is worth examining. Their lordship importing Rawls' concept of justice held that classification must be found on intelligible differentia, which distinguished person or things that are grouped together from other left out of the group and the

differentia must have rational relation to the object sought to be achieved by the Act.

Apart from various decisions on this issue our constitutional provision mentioned above allow us to conclude safely that Rawls' theory especially the first part of the second principle applies in *toto*. The Indian legislature has realized the judgement in *Unni Krishnan, J.P., v. State of A.P. and Others*<sup>35</sup> and introduced right to education as a fundamental right through the eighty sixth Amendment Act to the Constitution which came into effect very recently from April, 2010 that provides free and compulsory education to children within age group of six to fourteen years. This also includes the second part of the second principle of Rawls' theory.

## **VI. CONCLUSION**

Viewed in its entirety, Rawls theory can be found engraved into our constitutional goals. Although, the 1st principle of the theory, is more or less absolute and may not be violated even where this would make for greater equality or even for the sake of 2<sup>nd</sup> principle. However because various basic liberties may conflict, it may be necessary to trade them off against each other for the sake of obtaining the largest possible system of rights. In our constitutional scheme Articles 14, 15, 16 and 19 can be taken as an evidence where conflicts of rights of individual and classes has been made compatible to achieve social equity. Judicial interpretation and pronouncement had helped in securing this sacrosanct object.

Though the principle enunciated by Rawls came into light in 1971, our constitutional fathers proved themselves to be far ahead of time in knowledge and wisdom by already including almost all of his postulates way back in 1950. It can be safely concluded that Rawls theory appears as a grand elaboration of constitutional goals envisioned by our forefathers for creating a welfare state.

**Notes**

1. C.K. Allen, *Aspects of Justice* 3-154 (Stevens & Sons Ltd., 1999).
2. It is a symbolic God of the Greeks having two opposite faces so that he could look opposite direction at the same time.
3. John Rawls, *Theory of Justice* 12 (Universal Publication, 2005).
4. John Rawls, *Justice as Fairness* 15 (Universal Publication, 2004).
5. *Supra* note 3 at p.11.
6. *Id.*, P. 60.
7. *Ibid*, and Pp. 201-257.
8. N.E. Simmonds, *Central issues in Jurisprudence*, 48-49 (Eastern Book Company, 2003).
9. Lloyd, *Introduction to Jurisprudence*, 569 (Sweet & Maxwell, 2008).
10. *Supra* note 3 at p. 303.
11. *Id.*, p. 98. and *Supra* note 4 at P. 59.
12. *Supra* note 8 at P. 42-47.
13. *Ibid*, *Supra* note 3at P. 152-153 and *Supra* note 4, p.97.
14. *Ibid*
15. *Ibid*.
16. *Supra* note 3 at p. 84.
17. AIR 1951 SC 21.
18. AIR 1973 SC 106.
19. 1986 SCC (1) 133.
20. 1994 SCC (6) 632.
21. Articles 19(1) (b), (c), (d), (e), and (g) of .the Constitution of India.
22. AIR 1978 SC 597.
23. AIR 1979 SC 1377.
24. AIR 1987 SC 2218.
25. Fali. S. Nariman, *Indian Legal System: can it be saved?* 63 (Penguin, 2006).
26. Articles 14, 15, 16, 17, 38, 39, 39A, 41, 43A, 46, 332 & 340 of the Constitution of India.



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27. 27 15 (3), 15(4) of the Constitution of India.
28. Article 16 (4) of the Constitution of India.
29. AIR 1976 SC 490.
30. *Devadasan v. Union of India* AIR 1964 SC 179.
31. AIR 1981 SC 298.
32. AIR 1985 SC 1495.
33. AIR 1993 SC 477.
34. AIR 2001 SC 467.
35. AIR 1993 SC 2178.





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