

## **Theories of Justice and Constitution of India**

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### **Abstract**

*Indian Constitution concerns of Justice, Liberty, Equality, Integrity and Dignity. Notion of Justice depends on the Interpretation of the Constitution. Constitution provides Justice i.e. Social Justice, Economic Justice and Legal Justice, which are part and parcel of doctrine of Distributive Justice. The 'Distributive Justice' phenomenon is based upon two important points: firstly, equal distribution, not only of, resources and materials, but rights, duties and liabilities also and secondly, Justice is a phenomenon, not only for people, who govern, but also for who are governed.*

*Indian Constitution talks about 'equality before Law' and 'Right to live with dignity' under Articles 14 & 21 respectively, which are soul of Governance of Constitution; Constitution prevails because it gives identity to its people. Identity in society is everything for Justice; we claim for our identity not merely for justice.*

*Many philosophers had provided different notions of Justice. Indian Constitution cannot be said to be based on one theory, rather, it is a resultant phenomenon of all the jurisprudential theories, which calls for realistic efforts for the social, individual, legal, economic and over all development.*

*The article provides a brief discussion on the different aspects of Justice; the way of defining is different, but the aim is to provide a meaning to 'Justice'.*

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## **Part I**

### **Introduction**

*I have the right to stand for what I believe in, I believe in truth, Justice and equality for all.*

Justice is simple, but the world is complicated, so the application of justice in the world contains a few intricacies.<sup>2</sup> The Justice is to guide the reflection of the citizen when we consider questions of Economic and Social policy. As per Amartya Sen in his book '*The idea of Justice*' Doctrine of Political economy must include an interpretation of the public good which is based on a conception of Justice. The theory of justice, that can serve as the basis of practical reasoning must include ways of judging how to reduce injustice and advance justice, rather than aiming only at the characterization of perfectly just societies- and exercise that is such a dominant feature of many theories of justice in political philosophy today.

Justice is not a matter of reasoning at all; it is one of being appropriately sensitive and having a right nose for injustice. The requirement of theory of justice includes bringing reason into play in the diagnosis of justice and injustice. The perennial dilemma before different theories of Justice is to discover a measure of right balance appropriate to the ever shifting tangle of human affairs. The question arises in the nature of the relation between 'justice' and 'injustice'; *whether the latter simply the absence of the former?*

As per HLA Hart, justice is far more complicated because of the shifting standard of relevant resemblance between different cases incorporated in it, is also varies with the type of subject to which it is applied.

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<sup>2</sup> Kolm, Serge- Christopher, *Modern theories of Justice*, MIT Press (2002).

## Part II

### Theories of Justice: Jurisprudential Analysis

Justice is for a matter of equitable relations between people in society. As McCoubrey and White put, 'justice is an aspiration which may be more or less closely approached by given societies but is unlikely ever to be perfectly attained in any human endeavor.' Such ideas are implicit in Aristotle's concept of human being as social and political animals and were stated very clearly by St. Thomas Aquinas in his view that justice is concerned with maintenance of the common welfare in the society composed of interactive individuals. The same idea may be argued implicit to underlie the general social contractarian notion of social order, which fundamentally concerns the jointure between individual claims and collective entitlements.

Many of the principal theories of Justice concentrate overwhelmingly on how to establish "just institutions" and give some derivative and subsidiary role of behavioral feature. For example, John Rawls<sup>3</sup> rightly celebrated approach of "Justice as fairness" yields a unique set of "principles of justice" that are exclusively concerned with setting up "just institutions" to constitute the basic structure of society, while requiring that people's behavior entirely with the demands of proper functioning of these institutions. On the one hand, Rawls stressed on the concept of just institution; on the other hand, the approach by Thomas Hobbes, which can be called "transcendental institutionalism", has two distinct features. Collectively, the attention is on what it identifies as perfect justice rather than on relative comparisons of justice and injustice. It tries only to identify social characteristics that cannot be transcended in terms of justice, and its focus is thus not on comparing feasible societies, all of which may fall short of ideals of perfection. The inquiring is aimed at identifying the nature of 'the just', rather than finding some criteria for alternative being 'less unjust' than another.

The standard of justice something being bound by Rule of Law but a criterion according to which the operation and application of law, *inter alia* must be judged with the balanced approach with social norms and mechanism.

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<sup>3</sup> Rawls, John, *A theory of Justice* (1971).

### Part III

#### Theory of Distributive Justice: Analysis of Rawls' Theory

Justice in one way or another concerned with issue of distribution. In modern discourse, this is a concept which has tended to be treated largely as a matter of distribution of wealth and materials goods. And whether this should be 'rights' or *laissez-faire* based. These are important arguments, but it is clear that a properly ordered society must involve some principles by which the relations of its members *inter se* and with the society itself will be regulated. The focus of concern is not only upon the distribution of material goods.<sup>4</sup> Distributive justice is concerned with the distribution of both material resources and legal rights to material resources.<sup>5</sup>

Distributive justice contains the elements of power. The distribution of goods of a community among its members is the responsibility of the individual entrusted with authority to distribute them, so distributive justice pertains to the exercise of power. Distributive justice is the basis of all other justice. Economic justice, whether in participation or distribution of wealth or property, would remain untouchable without distributive justice. Legal justice will be meaningless without access to it. Distributive justice can create a social condition where everyone will be able to receive legal justice. It is not mere distribution of wealth or property the distributive justice covers. Rather, in the present world, it would include education, employment and other necessities of life. Distributive justice, which conditions justice in other fields would help in removing inequalities and bring in social justice.

In the case of *Bowers vs. Hardwick*<sup>6</sup>, Mohr in Gays' justice, provided the idea that notion of homosexuality as a phenomenon is a sociological judgment, rather than a biological fact, one that is derived from the stereotyping of sexual roles.

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<sup>4</sup> Penner, J.E., *Justice Theory*, McCoubery & Whites Textbook jurisprudence (5<sup>th</sup> ed.).

<sup>5</sup> *Jurisprudence: a philosophy of law*, (2<sup>nd</sup> edition, Michael Doherty Ed., 2004).

<sup>6</sup> 478 U.S. 186 (1986).

Rawls employs a device of the original position, in which person who are to select the principle of justice are placed behind a 'veil of ignorance'. The specific deprivation of knowledge imposed by the 'veil of ignorance' are of (a) place of society, (b) class or social status, (natural assets or ability such as intelligence and strength), (d) personal conception of good, (e) personal life plan, (f) psychological inclination, (g) the economic and political situation of their society, (h) the level of civilization and culture attained by their society and (i) the generation to which they belong.<sup>7</sup>

The basic principle is that the choice of just principles for social organization is to be made by persons who do not know what actual position they are to occupy in society, or what their particular interest and inclination will be.

Rawls sets out two principles of justice; the first is that, "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

The second is that-

Social and economic inequalities are to be arranged so that they are both:

- (a) To the greatest benefit of the least advantaged, consistent with the just saving principles, and
- (b) Attached to offices and positions open to all under conditions of fair equality of opportunity.

The liberty may only be curtailed in order to defend liberties. The first principle will therefore always have priority over the second, but the second is always prior to 'efficiency', maximization of advantage, and the 'difference' principle *i.e.* the acceptance of inequality. Rawls argues that the value of liberty is proportional to the ability of individuals and groups to advance

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<sup>7</sup> *Supra* Note 2 p. 137.

their goals within the system concerned.<sup>8</sup> Rawls urges positive discrimination as a means of redressing past social injustice.

The difference between Rawls and Nozick is in their starting points: Rawls starts from a standpoint of equality, and asks for reasons why we should accept inequality, Nozick starts from the idea of right, with a consequence that a man owns the property he has worked for and created. For Rawls, the rich man must show why his wealth should not be taken; for Nozick, it cannot be taken without his consent. Wealth is created by individuals and they that create it have rights over it. Hence, Nozick maintains that one is not entitled to regards society's total wealth as a cake to be divided up.<sup>9</sup>

Rawls also urges that the principle of justice which he advances and, in particular, the priority of liberty, only become operative beyond a certain basic stage of social development. Liberty, and with it justice, seem to lose credibility if they become luxuries to be enjoyed only beyond a certain point of affluence. Rawls also urges that the principle of justice which he advances and, in particular, the priority of liberty, only become operative beyond a certain basic stage of social development. Liberty, and with it justice, seem to lose credibility if they become luxuries to be enjoyed only beyond a certain point of affluence. The principle of justice requires the arrangements of social and economical inequalities, 'to the greatest benefit of the least advantage', consistent with the just saving principles.<sup>10</sup>

Granted the priority to Fundamental rights over the duties, the outcome is assumed to be some form of constitutional democracy.<sup>11</sup> In distributive justice, there are two sets of obligations: (1) what a person owes to a community of which he is a member, and (2) what a community owes to its members. Having established a constitution, the next step is legislation in accordance with the principles of justice, as well as constitutional procedure. It is admitted that judging whether or not a law is just may be difficult, especially in the context of the inequalities of the difference principle, and that it may be easier simply to determine whether a law is not unjust.

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<sup>8</sup> *id* p. 204.

<sup>9</sup> *Supra* Note 4 p. 308.

<sup>10</sup> *Supra* Note 2 p. 302.

<sup>11</sup> *id* 2 p. 198.

The theory of justice developed by John Rawls constitutes another attempt to combine the values of freedom and equality in an analysis of the meaning of justice. Rawls' conception of justice is composed of two cardinal principle-: (1) each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others, (2) social and economic inequalities are to be arranged so that they can reasonably be expected to be to everyone's advantage and in such a manner that the positions and offices to which they attach are open to all.

## **Part IV**

### **Constitution of India and theory of Justice:**

The survival of India as a nation depends on how *we the people* implement the provisions of our constitution. Therefore all citizens need to have a closer look at, and understand its broader features, because the law of the constitution is not only for those who govern- or for the intellectual and scholarly- but also for the bulk of the people, especially for the common man, for whose benefit and safeguard the document of governance has been written and enacted. The people are influenced by what the judges in the country's highest court think and by what they say. One must never underestimate the power of the judiciary under a written constitution.

The Constitution of India, by and large is linked to the theory of Distributive justice. Distributive justice says that, "the procedure established by law must be not only having semblance of the attribution, but in reality and practice it must have connotation according to changing the values of society and human justice." Our Constitution provides justice *i.e.* Social justice, Legal justice and Economic justice on the basis of Social needs and societal environment. The meaning of distributive justice is justified not only on the fair distribution of goods and resources, but rights and duties also. Our Constitution, on par with the theory, has provided different provisions for different sects of the society; *i.e.* Women, children, Schedule Class, Schedule Tribes, or many; so that a balance can be established for 'Empowerment of Justice'.

Distributive justice is the base of all other justices. Economic justice, whether in participation or distribution of wealth, would remain unreachable without Distributive justice, because Distributive justice provides for adequate distribution of wealth, which gives an opportunity to develop and participate economically in the society. Legal justice will be meaningless without access to it; as distributive justice can create a social condition where everyone will be able to receive Legal justice. It is not merely the distribution of wealth and property that distributive justice covers; rather, in the present world, it would include education, employment and other necessities of life. Distributive justice, which conditions justice in other fields would help in removing inequalities and bring in social justice. Constitutional Amendments are evolved in the way of social revolutions and substantive democratization with the mission of realizing developments, distributive justice and social inclusions.

Indian constitution does not specifically guarantee to an accused person the right to speedy trial, yet the speedy disposal of cases is desired as an objective of a rule of law in India; the ethics of distributive justice in India also necessitate it. The very spirit and soul of Article 21 read in conjunction with Articles 14, 39, 39A make it a necessary concomitant of distributive justice promised in the preamble. Right of speedy trial being an internationally recognized human right is thus a part of our national ground norm by virtue of article 51 of the constitution.

Article 21 guarantees that the state shall not deprive any person of his life or personal liberty except according to procedure established by law. The procedure contemplated by this article must be just fair and reasonable one. The procedure established by law must be not only having a semblance of these attributions, but in reality and practice it must have connotation according to changing values of society and human justice.

The idea of Justice is deemed a legitimate object of rational enquiry, worthy of sustained attention by jurisprudential thinkers and social scientists? Aristotle stated that Distributive justice means each and every individual of a society should be given an opportunity to develop his inherent potentials. In the distribution of such material resources all person should have equal consideration and chances.

Indian Constitution is right-based and it evolved on the principle of Equality. A Scottish philosopher William Sorley, claimed that no satisfactory doctrine of justice could be developed without finding a place for both equality and freedom in the scheme of societal organization; a similar principle was evolved in *Vishakha v. State of Rajasthan*<sup>12</sup>, the Apex Court had held strongly against sexual harassment in working places. The only panacea to liberate women from the clutches of harassment and exploitation is empowering them so as to *create a congenial atmosphere to develop and progress*.

A fundamentally divergent attitude toward Justice was taken by the English philosopher and sociologist Herbert Spenser; the supreme value he linked to the idea of justice was not equality, but freedom. Each man should be allowed to assert his selfhood, acquire property, carry on a business or vocation of his choosing, move freely from place to place, and express his thoughts and religious feelings without hindrance. The liberty of each is to be limited only by equal liberty to all. Every person is free to do that which he wills, provided he infringes not the equal freedom of any other man.

Immanuel Kant took a position similar to that of Spenser. He defined justice as “the aggregate of those conditions under which the will of other person can be conjoined with the will of another in accordance with the universal law of freedom.

A much more egalitarian view of justice was advocated by the American sociologist Lester Ward, in his opinion, equal individual regardless of sex, race, nationality, class or social origin, was to be given a full chance to make good in life and lead a worthwhile existence. It was ward’s belief that this condition could be achieved only by deliberate educational schemes aimed at equalizing intelligence among the members of the upper and lower classes in the society.

It is the notion of justice which directs our attention to the fairness and reasonableness of the rules, principles and standards that are the component parts of the normative edifice. The aim of justice to satisfies the reasonable needs and claims of individuals and at the same time promote productive effort and that degree of cohesion which is necessary to maintain a civilized social

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<sup>12</sup> AIR 1997 SC 3011.

existence.<sup>13</sup> The mandate of 'reasonable opportunity of being heard' encompasses the *Principles of Natural Justice* which is a wider and elastic concept to accommodate a number of norms on fair hearing. Violation of *Principles of Natural Justice* enables the courts to set aside the disciplinary proceedings on grounds of *bias* and procedural defects.<sup>14</sup>

## Part V

### Conclusion

It is worthless to link the Indian Constitution with one theory of Justice, as it is a combined approach of all the Jurisprudential theories of justice. Constitution is an ideal, which calls for realistic efforts for the social, individual, legal, economic and over all development.

When we talk about Constitution, we often talk of Justice; as it concerns not only for the attainment of development but also for the attainment of peace, security and dignity of the individual; justice matter as it gives an identity to the person; the unlock space for openness to LGBT issues leading to a certain legitimacy to demand for more positive rights such as anti-discriminatory measures and socio-economic benefits. As Ward's theory is concurrence with Article 15 of the Constitution, we should apply an effective educational scheme for the equalizing intelligence among different classes of people in society.

Justice is fundamentally a matter of treating people as equal and then tries to show that to achieve this we should apply different criteria of distribution in different circumstances. It includes a range of rights such as freedom of expression and the right to vote that defines the

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<sup>13</sup> Beitz, C., *International liberalism and Distributive justice: A survey of recent thoughts: world politics* 51 (1999).

<sup>14</sup> Massey, I P, *Administrative Law* pp.161-212 (2003).

status of citizen, as well as, right to material resources that enable people to function effectively as citizens in the political sense.<sup>15</sup>

*Justice is not a fact but an attitude towards the facts that are needed to be executed for justification of our Constitution.*

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<sup>15</sup> Miller, David, *National responsibility and Global justice* p. 15 (2007).