

SYSTEM OF DISTRIBUTIVE JUSTICE IN INDIA WITH REFERENCE TO THEORIES OF JUSTICE¹

INTRODUCTION

“At the stroke of the midnight hour, when the world sleeps, India will awake to life and freedom”², or so we were made to believe. Today, after more than 70 years of “awakening”, the irony of this anecdote is that it makes more sense with the words ‘India’ and ‘world’ swapped. The ‘life and freedom’ of India and her people has always been at the mercy of the prevailing political power at that point in time. Even a slight glance at how the access to justice and equality by entrepreneurs, refugees, and the poor of the country has changed since 1947 makes the interdependency of justice and politics apparent. As ‘national’ ideologies change, so do a nation’s priorities, which almost always entails a change in the peoples’ rights and privileges. As this delivery of justice in India is claimed to be largely ‘distributive’, its journey through the different ideological and political changes of the country necessitates an analysis with reference to the overarching theories of justice to understand the nuances of the functioning of the system of distributive justice in India. To this effect, this paper would study, compare and contrast the trends of distributive justice as its operation fluctuates with the ideological changes of the late 20th century. This sociological and political study of distribution of justice will be analysed under the broader light of John Rawls’ and Robert Nozick’s theories of justice, while keeping in mind both, the economic and social distribution of power and its access by individuals.

Distributive justice in its strict sense entails a distribution of goods and opportunities based on the situation the beneficiaries find themselves in. This distribution is far from concerning a mere material economic disparity and accounts for the social distribution of power, rights and liberty as well. In doing so, the possible structures of domination are analysed with respect to their relationship with the people.³ The two theories of justice that relate most closely to the Indian system of distributive justice are proposed by John Rawls and Robert Nozick. In India, both these theories have taken the form of contesting ideologies in the tussle for political power and can be best understood through their differences.

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² Jawaharlal Nehru, ‘Tryst with destiny’ (1947).

³ Rainer Forst, 'Two Pictures of Justice', *Justification and Critique: Towards a Critical Theory of Politics* (2014).

UNDERSTANDING THE THEORIES OF JUSTICE

Firstly, Rawls' theory places prime importance on social rights while Robert Nozick deems individual rights to surpass these social rights. Having lived through the horrors of WWII, John Rawls realised that the apparent presence of inequality and people's inability to exercise proactive empathy is characteristic of every society. In such circumstances, what the desired system of justice is, depends on a lot of selfish factors. While selfishness in itself is not to be blamed, it is selfishness aimed towards depriving others of benefits that concerns delivery of justice in a society. As Gurcharan Das pointed out, "We in India think that we have to snatch something from the neighbour to succeed, it never occurs to us that both could get ahead."⁴ So powerful is the influence of politics in our life that we're compelled to accumulate 'contacts' for even a simple seat in a school or college. But are the people of India to be blamed? Were there ever enough desks for all?

To remedy this selfish desire of maintaining the status quo, Rawls formulated a thought experiment built upon the idea of a social contract called the 'veil of ignorance'. He claimed that when a person, in a conscious intelligent state (the original position), is detached from any knowledge of their present or future circumstances, they will choose a conception of justice (a social order) that exposes them to the least risk of being disadvantaged or deprived. However, in India, this informed and empathetic 'choice' is not made by individuals as it has already been made *for* them. The power dynamics of our society spare the better off the need to empathise while making the choice and bar the lesser off from influencing the choice made, or worse, makes them believe that the choice made is actually in their best interest. Like the unmatched corruption and the 'Garibi Hatao' campaign went hand in hand, like the NRC debate and the fight for H1-B visas exists simultaneously, the Indian system of Justice fails on many levels to deliver 'distributive' justice in the New Social Order that it promises under Article 38 of the Indian Constitution.

There are two broad principles that Rawls lays down, first of all, the equal liberty principle, in equally assigning rights to people and second, the difference principle, an arrangement of inequalities in a way that everyone reasonably benefits from them. The second principle draws considerable significance in the Indian Constitution and legal system and is often criticised as not recognizing the differences in productive contributions or distinguishing between real needs and manifested needs. It can be seen in the concept of affirmative action that runs through

⁴ Das G, *India Unbound* (PENGUIN BOOKS 20n.d.).

the preamble of our constitution to the appointment of public officials and even bleeds into the education system. But is this far reaching effect of a system of distributive justice really what it claims to be? Does meritocracy rank so low on our elements of Justice? Isn't a person entitled to his/her product of labour? These are the questions that lead us to Robert Nozick's theory of Justice wherein he argues that justice is exclusively concerned with rights and these rights are determined by the historical 'acquisition' and 'transfer' of property among individuals. In the event of injustice in this acquisition or transfer, 'rectification' of the same is another right necessary to serve overall justice.⁵ While he agrees that inequalities exist, he doesn't believe that individuals, by reason of their presence in a society must be required to alienate the product of their labour for the upliftment of others. This task of 'redistribution', Nozick believes, is the state's responsibility and must be undertaken by the same. Hence, the second point where Rawls and Nozick disagree is the responsibility of 'redistribution'. While Rawls argues that it is the society's responsibility, Nozick believes that the state, being a welfare state and sovereign must undertake this responsibility solely. Thirdly, Rawls' idea of sacrifice as something certain individuals *must* do for the general welfare of the society differs blatantly from Nozick's emphasis on consent of the individual. The primacy given to consent is apparent when he says that justice "precludes imposing losses upon individuals for the sake of *any* conception of the overall social good—including deeply distribution-sensitive conceptions."⁶ Hence, the only precursor to undisturbed possession and enjoyment of Private property is its permissible acquisition. Economically speaking, a healthy cohesion of both these theories was seen when after independence the government, in its effort to ensure distributive justice, redistributed Zamindari lands held by the Zamindari estate. It is imperative to note that these lands were not the private property of either the prince or the Zamindar. Hence, this policy subscribed to Rawls' difference principle and at the same time steered clear of violating the concept of private property. But this cohesive, bona-fide application of both theories in our 'mixed-economy' model was an exception rather than being the rule and had its own corruption in practice.⁷ Hence, a historical, sociological analysis of the last few decades is necessitated to fully understand the nuances of the Indian system of distributive justice.

⁵ Robert Nozick, *Distributive Justice*, 3 *Philosophy & Public affairs*, Princeton University Press, 45 (Autumn 1973).

⁶ 'Robert Nozick's Political Philosophy', *Stanford Encyclopedia of Philosophy* (2014).

⁷ Kumar A, "Why Land Reforms Remained an Unfinished Task in Bihar" *22 IOSR Journal Of Humanities And Social Science* <<http://www.iosrjournals.org/iosr-jhss/papers/Vol. 22 Issue6/Version-7/N2206079199.pdf>>

THE INDIAN POSITION

On the face of it, it seems that till 1991, the policies of the government very closely followed Rawls' prominence on positive autonomy of subjects who are free, equal and able to regard justice as a morally given fact that is viewed as an expression of social self-determination.⁸ On the flip side, if we look at Nozick's theory as a response to that of Rawls', it very closely relates to the events that transpired in India in the 1990s. India was built on ideologies that Pt. Jawaharlal Nehru created and his daughter, Indira Gandhi perfected; a closed economy with a license Raj. From being a 'mixed economy' at the time of Independence, Indira Gandhi amended the constitution of India in 1976 to add that India was a sovereign *socialist* secular democratic republic. The most apparent reason for such an amendment was to increase the power of the state in regulating the social, economic and political spheres of the economy. The fact that this was done during the infamous Emergency does not help Gandhi's case either. This is a prime example of how the rhetoric of 'distributive justice' was used by the Indian Politicians to exploit the rich and the poor alike in the name of the poor's welfare. Banks were nationalised to save people from 'high interest rates', only to subject them to pervasive corruption that made the opening of a bank account so difficult and costly that the 'high interest' rates no longer exploited them. The courts witnessed the theoretical battle over Private property as discussed above in real life. The journey of the right to property under the Indian Constitution as it degraded from being a fundamental right to a constitutional right, was justified by reasons of public welfare under land acquisition and redistribution, but even a scanty reading of recent history suggests how this was merely a move to exert the Executive's power over the Judiciary.⁹

The Judiciary being the only saviour of the people in this situation, went through an impressive and much needed phase of PILs¹⁰ which made the hypocrisy of Congress' rhetoric of 'distributive justice' a little more apparent with every passing court order. In this tussle between the executive and the judiciary with the opposition parties also factoring in, the essence of distributive justice was lost. It had little utility outside of being a means of justifying the state's pervasive presence as a 'middle man' of redistribution. The constitutional provisions of affirmative action, though were necessary, were subjected to the same bureaucracy and hence,

⁸ Rainer Forst, 'Two Pictures Of Justice', Justification and Critique: Towards a Critical Theory of Politics (2014).

⁹ "Legislature versus Judiciary" (PSR India October 4, 2011) <<https://www.prsindia.org/theprsblog/legislature-versus-judiciary>>

¹⁰ Hussain Ara v. State of Bihar, AIR 1979 SC 1360; M.C. Mehta v. Union of India, AIR 1988 SC 1037.

its benefits were often reaped by the already privileged sections of the society.¹¹ The historically deprived people in whose name these social reforms were carried out in the first place, continued to be subjected to the same economic and social disadvantage due to problems of access and corruption. On the other hand, the growing rhetoric of libertarianism led to their further social exploitation as the concept of ‘social responsibility’ for redistribution was slowly being discredited.

This social and economic exploitation led to the disability of the nation as a whole and in the 90s, Manmohan Singh broke it to us that our reserves were down to two weeks of import and only a loan from International Monetary Fund could save us, for which we had to prove our worthiness to the highly neo-liberal institution that the IMF was. In 1991, we opened up our economy and abolished the license Raj and, in the process, submitted ourselves to a libertarian World-view. As opposed to socialist-liberalism that we followed earlier, Libertarians give utmost importance to the liberty of an individual and disregard the notion of social liberalism as the whirlpool of distributive justice. Proponents of Libertarianism argue that individuals do not have any obligation to uplift others. It is interesting to look at how the concept of tax fares in such a scenario. Libertarians view tax as an obligation and would instead support something like a voluntary donation to source and fund public welfare. This change can be seen in the 1991 liberalisation reforms of India and how the Tax regimes were drastically changed under the pressure from IMF. Acts like the Monopolies and Restrictive Trade Practices Act, 1969 that forced industrialists to pay more than 70% of their earnings towards tax were relaxed and commerce was promoted.¹² The license Raj had come to an end and with it came a certain degree of equality of operative rights and access to institutions. However, an important fact, that is often overlooked is that the inspector Raj was still prevalent and the planners of yesterday had become the liberators of tomorrow. Hence, corruption still found its way into the Indian Justice system and its enforcement. One thing that can be said for sure is that after the Indian economy took a libertarian stance, the state’s rule and role shrunk to a large extent. This type of minimalistic (weak) state is what Nozick supported to further justice. Rawls’ theory of benefits for the dis-advantaged, doesn’t find place in Nozick’s work. Rather, he places importance on the *proper* acquisition of property and any distributions by the holder ought to be seen as benevolence rather than a societal duty.

¹¹ Mishra S and Sharma V, “Reservation to the Economically Backward Class — Indian Constitutional Perspective” [2019] Manupatra <<https://www.scconline.com/blog/post/2019/06/16/reservation-to-the-economically-backward-class-indian-constitutional-perspective/>>

¹² Das G, *India Unbound* (PENGUIN BOOKS 20n.d.).

ANALYSING THE INDIAN POSITION AND ITS DRAWBACKS

If we follow the above-mentioned line of reasoning, some of the apparent inequalities created by the 1991 reforms had nothing unjust about them. For example, the license Raj ended and while that meant better access to entrepreneurship and greater choice for the consumers, there was nothing to stop the existing holders of capital from accumulating even more wealth. This is a classic example of how libertarianism conveniently overlooks the apparent consequences of its version of justice. By calling everyone 'equal' and creating a field where everyone has the 'possibility' of success and welfare (both economic and social) does not necessarily mean that everyone will *actually attain* equality or welfare. It is like saying a pauper is a free man and has the option to eat out of a gold plate and no one can stop him. A realist evaluation of this statement will point out numerous reasons why this abstract statement has no value as it disregards the varying contexts that people find themselves in and how that affects their access to and interest in such abstract notions of welfare. Even as Multi-National Corporations gained dominance over the economy and Government investment in Public Sector Undertakings declined, the rhetoric deemed it to be a good move as it promoted employment but the fact that this only created short term employment and in fact deprived people of job opportunities by monopolizing the quantity and quality of business (introduction of all pervasive technology and machines etc) was conveniently left out of the dialogue. Even the state could not create equivalent employment as it lacked ammunition after being reduced to a minimalist state. This trend of 'omission' is characteristic of the implicit domination that libertarianism as an ideology and Nozick's theory of Justice as a proposition propagates. As a result, jobs are being taken away *and* the poor are becoming poorer *and* there is no equivalent redistribution on the part of the state to compensate. Is what we have achieved then, the worst of both worlds?

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varying contexts that people find themselves in and how that affects their access to and interest in such abstract notions of welfare. Even as MNCs gained dominance over the economy and Government investment in PSUs declined, the rhetoric deemed it to be a good move as it promoted employment but the fact that this only created short term employment and in fact deprived people of job opportunities by monopolizing the quantity and quality of business (introduction of all pervasive technology and machines etc) was conveniently left out of the dialogue. Even the state could not create equivalent employment as it lacked ammunition after being reduced to a minimalist state. This trend of 'omission' is characteristic of the implicit domination that libertarianism as an ideology and Nozick's theory of Justice as a proposition propagates. As a result, jobs are being taken away and the poor are becoming poorer and there is no equivalent redistribution on the part of the state to compensate. Is what we have achieved then, the worst of both worlds?

It must not be overlooked that distributive justice *has* found bona-fide application in the Indian Justice system. Articles 142, 144 and the Fundamental Rights enshrined in Part III of the Constitution like Article 14, 15 and 16 provide for a just and fair society while ensuring the delivery of distributive justice in addition to this, the various environmental issues that initiated litigation, highlight in the judgement, the Supreme Court's move towards establishing a system of 'distributive justice' and 'corrective justice'. To name a few such instances, the application of 'Polluter Pays Principle'¹³ and the 'Public Trust Doctrine'¹⁴ as operative rules of law have correctly 'redistributed' the burden of environmental responsibility. Even the emergence of the concept of Corporate Social responsibility is a leap towards harmonizing the theories of Nozick and Rawls in a way that they most suitably apply to the Indian context. CSR as a concept of sustainable development necessitates businesses to account for the inequalities created by them in order to exercise their right over their Private property and labour product. Hence, it is a harmonious construction of the two theories discussed above. The emphasis placed on 'due process of law' in the case of *Maneka Gandhi v. Union of India*¹⁵ as opposed to the earlier position of 'procedure established by law' being the standard of analysis also highlights the shifting attitude of the courts to rectify the problems in the application and enforcement of Distributive justice as mentioned in the earlier half of this paper.

¹³ M.C. Mehta v. UOI, AIR 1987 SC 1086; Indian Council for Enviro-Legal Action v. UOI, (1996) 3 SCC 212; Vellore Citizen's Welfare Forum v. UOI, (1996) 5 SCC 647; Rio Declaration, Principle 16, 1992.

¹⁴ M.C. Mehta v. Kamalnath, (1997) 1 SCC (736); K.M. Chinappa v. UOI, AIR 2003 SC 724

¹⁵ (1978) AIR 597

CONCLUSION

It must be noted that in India, it is not equality that is our prime motive that does not ensure happiness or welfare. It is the distribution of certain basic amenities equally and justly that is necessary and as Rawls pointed out perhaps, we will be able to afford these basics as a society. It is theories like that of Amartya Sen, wherein he highlights the importance of 'purchasing power' to keep the economic and social system running, that really fill the blanks of Rawls' and Nozick's theories of Justice to be applicable to India. A fully Libertarian or Socialist liberal outlook has not and will face grave difficulties of bureaucracy and exploitation in India (as discussed above) and hence, a common ground must be sought. The problem with the veil, as promoted by Rawls is that it gets increasingly difficult to truly put oneself in a position where they can think without bias. To remedy this, tools must be devised. Tools relating to how the policies apply to the policy makers can be an example. To be effective, the policy maker must not feel 'unaffected' by the policy that he's formulating. To do this, the mechanisms saving the people in power must be abolished. Every majority needs a minority to exist which is why the power relations and dynamics in our society are the way they are. Exploitation takes on different tones of economic, social and cultural expropriation and hegemony. While the concept of justice cannot be completely detached from these phenomena of the real world, the least we can do is be aware of their effect on the delivery of justice. We must look beyond the rhetoric and try to achieve a critical outlook on the system of Justice to remedy the apparent injustices that post-Independence India has witnessed.