
RELEVANCE OF JURISPRUDENTIAL ANALYSIS OF 'THEORY OF JUSTICE' IN REALM OF LAW

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ABSTRACT

The philosophy of Law has been a dynamic field which is evolving and constantly changing with the passage of time. The seminal contribution of scholars such as Jeremy Bentham, John Rawls, Robert Nozick, Immanuel Kant and Rudolf Stammler has shaped the legal jurisprudence and has been a lighthouse in guiding the scholars in the quest to understand and interpret law for the betterment of humanity. In light of the catena of cases surfacing before the Hon'ble Courts of Law, the seminal contribution of the legal scholars and philosophers have been the quintessential pillar in the quest for knowledge and know-how which shaped the legal systems of this era. The instant paper is an attempt to delve into the vast and dynamic facets of legal jurisprudence from the perspective of passing the extant provisions of the touchstone of the Constitution of India in view of studies from Comparative Law. The ever changing and dynamic influence of varied sectors of technology, science, society, culture, philosophy, psychology and management has been the bedrock for the genesis of various innovations and creativity which is has been witnessed by humanity. History is replete with examples, which had been testimony to the fact that evolving dimensions of jurisprudence has been bulwark of creativity and innovativeness in legal parlance. The evolving instruments and tools to meet the ends of justice *inter alia* vide Alternate Dispute Resolution techniques, Intellectual Property Laws, *sui generis* mode of legislature, Competition Laws and preventing adverse effect of healthy competition, Environmental Laws and Administrative Laws have opened vistas of opportunities where the applicability and relevance of legal jurisprudence has been on the rise.

Keywords: Theory of Justice; Competing Equality; Affirmative Actions; Constitution of India; Veil of Ignorance; Social Contract Theory; Pareto optimality; Thought experiment.

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Introduction

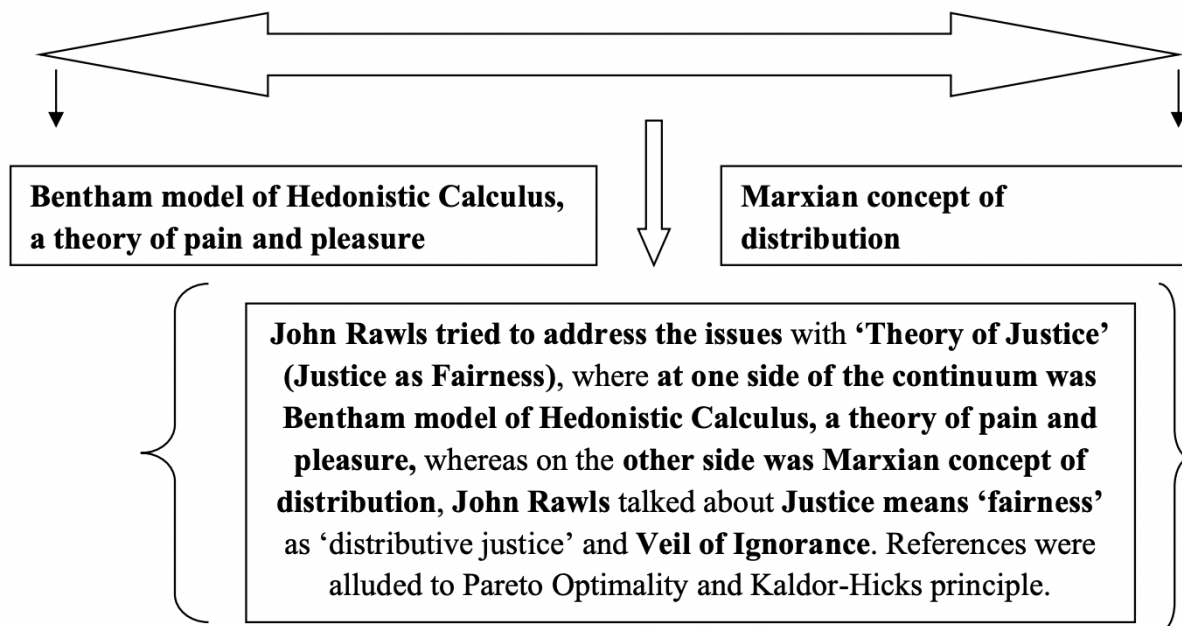
Assumptions and Postulates of '*Theory of Justice*' of John Rawls⁴ and its comparison with the 'Utilitarian theory', 'Hedonistic Calculus' of Jeremy Bentham are seminal in the realm of legal jurisprudence. The first principle of Justice by John Rawls⁵, known as Liberty principle, every individual of the society is extended the same form of equality that other individual in society is entitled to. Instead of looking at the principle from the Marxian point of view of egalitarian order, he talks about liberty to do things in tandem with the philosophy of Immanuel Kant⁶, when he says that a fellow individual should not feel that he/she is not a part of that conglomerate. The Second principle of Justice would operate if there is a situation of 'least well off'. John Rawls tried to address the issues with the consideration of '*Competing Equality*', where at one side of the continuum was Jeremy Bentham's model of Hedonistic Calculus, a theory of pain and pleasure, whereas on the other side was Marxian concept of distribution, which was 'equal', devoid of any class distinction. His seminal contribution involved towards evolving a moral theory alternative to utilitarianism, at the same time which addresses the problem of distributive justice. Bentham⁷ was a philosopher and a reformer strongly viewed that a theory of Utilitarianism is on the premise and edifice that 'Greatest happiness for the greatest number' is the basic benchmark and the milestone to be aspired for. Jeremy Bentham's theory of 'Hedonistic Calculus' is criticised on lacking the principle of fairness which is imperatively conceived in embodiment of justice. Bentham emphasised that a theory of 'Hedonistic Calculus' is possible. This is one of the vital points in comparison to the 'Theory of Justice' by John Rawls. In this context, John Rawls tried to address the issues from the perspective of theory of justice, where liberty becomes the central emphasis. Liberty is the sphere of activity where law has left the individual alone. So, the basis postulate is each and every individual is entitled to most extensive form of liberty to which other individuals are also entitled to.

⁴ John Rawls, an American philosopher who did a seminal contribution to the ethics and political philosophy, with his book '*A theory of Justice*' in the year 1971. A reappraisal of the work finds its appearance in 1985 essay named, '*Justice as fairness*'. In 2001, he published a follow-up study which was called '*Justice as Fairness: A Restatement*'.

⁵ In 1993, John Rawls book '*Political Liberalism*' are an array or rather a panoply of eclectic literature of great immense from the stand point of principle of justice and a strong building block towards the science of jurisprudence in the history of seminal contributions in the sphere of the realm of justice.

⁶ A German Philosopher and thinkers delved into Metaphysics and Philosophy

⁷ Jeremy Bentham, an English philosopher and proponent of 'Utilitarian theory', 'Hedonistic Calculus' with 'Pain and Pleasure theory'



Diagrammatically explicating how Rawlsian ‘Theory of Justice’ differs from Benthamite Utilitarian view

‘Theory of Justice’ propounded by Prof. John Rawls

Philosopher John Rawls opined that there is a way to bring synergy between what is a socially just distribution of goods in a society and at the same time, the essence of ‘fairness’. The theory evolved a mechanism of justice delivery with the basis underpinning of economic understanding. He talked about 'Equiminimal distribution, forming the basis of Principles of Justice'. In this context, he brought the references to '*Pareto optimality*'⁸, which was further delved upon in Hicks Kaldor effect and logical efficiency in distribution of resources as worked on by Prof. Samuelson. The basis postulate advanced by John Rawls has to be seen from the prism of ‘thought experiment’ where one forgets everything while making the choices, which are ‘self-interest preserving for oneself and also for the society’. The Society is not aware of choices and experiences as they lay down the principles, not aware of liking and disliking for an individual, the state of ‘amnesia’, an attempt to recreate ‘*social contract theory*’ along with ‘*thought experiment*’. The ‘*Veil of Ignorance*’ which whips out the thought of liking and disliking, which takes the centre stage for two promising theories in the form of Recreating

⁸ Pareto efficiency, also called as '*Pareto optimality*' is a situation where "*no individual or preference criterion can be made better off, in the process without making atleast one individual or preference criterion worse off or without any loss thereof...*"

social contract theory with thought experiment and Principles of Justice leading to the basis of science of Jurisprudence.

In John Rawls's analysis, there is understanding of distributive justice considering that there existing asymmetry of information. Also, that the demand is unlimited, considering there is pressure on the supply side, with supply being limited because of limited availability of resources. So, the Question comes, is it possible to pick and choose, to provide ration to poor (say in the doorsteps as done by some of the State Governments in India, for distribution of rations to the 'Below the Poverty line' individuals, whether the primacy is to distribute resources to those individuals who need it more. Efforts of Immanuel Kant⁹ and Rudolf Stammler¹⁰, becomes seminal, lays down the principles of legal norms and principles, states that if an individual feels that he/she is not a member of society, then a sense of alienation creeps in and there is a feeling that the singled individual is not a fellow member of 'society'. To exemplify, In *Plessy v. Ferguson*¹¹, U.S. Supreme Court held that, "*racial segregation laws did not violate the U.S. Constitution considering whereby, the facilities for each race were equal in quality, whereby a doctrine that came to be well-known as separate but equal...*" In another case, *Brown v. Board of Education of Topeka*¹², U.S. Supreme Court ruled that "*U.S. state laws establishing racial segregation in public schools are unconstitutional, even though the segregated schools are otherwise equal in quality for facilities for education...*"

Exceptions to the Equiminimal Principle as 'Principles of Justice' has taken various forms in the contextual parlance of understanding and its ramification as, firstly, Protective reservation/discrimination; secondly, Competing Equality; and thirdly, Affirmative Actions. To illustrate the aforesaid points, it is pertinent to mention that can there be a training provided to underprivileged sections of society so that they are equipped with enough skills and talents required for excelling in the domain of competing job opportunities for say, a son of a sweeper to become CEO of a company. John Rawls, seminal contribution was resultant of the conclusive efforts to correction of the centuries of inequality posed to the disadvantaged or underprivileged section of society, which John Rawls calls it as 'least well-off sections of the society'. In Constitution¹³, this is contemplated in Article 15(4) and Article 16(4). Cases in

⁹ Propounded 'Things-in-themselves' in realm of Philosophy

¹⁰ A German philosopher and Neo-Kantian scholar

¹¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896)

¹² *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

¹³ Constitution of India, 1950

point in Indian context are, *M Nagaraj v. Union of India*, (2006) 8 SCC 212 and *State of Kerala & Anr. vs N. M. Thomas & Ors*¹⁴ 1976 AIR 490.

In *M Nagaraj v. Union of India*¹⁵, Hon'ble Supreme Court of India has taken the stance of Locke's social contract theory, when it interprets fundamental rights is of intrinsic value to all humans by their existence. The Hon'ble Court has observed that, "*A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges. Individuals possess basic human rights independently of any constitution by reason of basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part-III of the Constitution confers fundamental rights. It confirms their existence and gives them protection. Every foundational value is put in Part-III as fundamental right as it has intrinsic value...*"

However, it is important to understand that what John Rawls was alluding by his seminal contribution was mechanism via. training or institutional process to bring the 'underprivileged to a position where they could compete with the privileged or forward sections of society', devoid of any parochial understanding beyond that of class, creed or sex/gender. The 'underprivileged' in Indian context, can be interpreted as not having enough or Lack of access to information or resources to set lab in case of say, Fermi Lab or The Large Hadron Collider or Supercomputing Facility for genome analysis software.

Robert Nozick's criticism of 'John Rawls Theory'

Robert Nozick¹⁶ had questioned John Rawls on multiple competing parameters including, what is the function of the State? Is it that the Taxes distribution of the underprivileged the ultimate objective or role of the state? What is the basic role of the State? Is the state's role not limited to act as night watchman, whereby the State cardinal role is not to interfere with the distribution of resources? Robert Nozick strongly emphasised that the role of state has to be limited to two vital activities that is Interpretation and Protection of property with interference as deemed fit

¹⁴ State of Kerala & Anr vs N. M. Thomas & Ors 1976 AIR 490

¹⁵ M Nagaraj v. Union of India, (2006) 8 SCC 212

¹⁶ An American rightist philosopher

based on context and circumstances. Nozick¹⁷ seminal contribution includes that of the books 'Philosophical Explanations' written in the year 1981, which included his counterfactual theory of knowledge, and *Anarchy, State, and Utopia* (1974), a rightist answer to John Rawls theories in the book 'A Theory of Justice', which came out in year 1971. His theory was on the basis of free choice making of the rules of the society by individuals. It is pertinent to mention that for Locke, morality is one specific area besides mathematics wherein human reasoning can attain a level of rational certitude. Robert Nozick understanding was underpinning on addressing issue related to two vital aspects, firstly, 'Liberty Principle; and secondly, least well-off sections of society. At one end if Robert Nozick is talking about 'Minimal State', there is another view of 'Municipal form of governance' by Friedrich Engels as extreme leftist theory.

Robert Nozick's view on State

As per Robert Nozick, the extending function of State beyond that as contemplated or analysed by Locke's social contract theory is 'intrinsically immoral'. If John Rawls is talking about creating a system, where even the son of a cleaning staff could become CEO, CFO or CXOs of companies, then the suitable conditions and training has to be provided so that the 'least well off' is elevated to that level and then perform 'equally' as distributive justice is meet to him/her in society. Robert Nozick, a rightist in his ideology, had emphasised upon the need of *laissezfaire*, where the policy of leaving things to take its own course, without interfering or where the incentivization of hard work and discouraging lazy person is becoming the important point where 'survival of fittest' becomes the norm. Nozick relies on Locke's theory where people were happy in 'state of nature' and State had the role of 'Interpretation' and 'Protection of property', but Nozick questions as to 'Competence of System'. Nozick questions, what about the competence of individuals when it comes to ability of effective delivery, work and implementation? Nozick theory if extended to recruitment in Family based or proprietary law firms, then even in strict form of capitalist economic functioning, can there be a system which works with perfection without favouring nepotism or favouritism to members of the family when it comes to employment opportunities in those firms. This has been challenged or criticised by various scholars and jurisprudential experts.

¹⁷ Robert Nozick, a scholar from Oxford University with Fulbright scholarship, felt that philosophy behind 'Theory of Minimal State' is based on Locke's social theory, where morality is centre stage of all other functions

Conclusion

As these theories were after-thought and whether there was a ‘social contract theory or not’ is unknown. John Rawls is recreating social contract theory through a ‘Thought experiment’ and narrated the ‘Veil of Ignorance’ and from there deduced the theory of distributive justice. When application of theory is concerned, liberty becomes equality in its understanding. While at one side, Robert Nozick, an American rightist philosopher is talking about ‘Minimal State’, there is another view of ‘Municipal form of governance’ by Friedrich Engels as extreme leftist theory. Nonetheless, the philosophy and propounded theories had a seminal contribution to the social contract theory and a progressive building block in the broader, inclusive and holistic understanding of the gamut of things related to ‘Jurisprudential understanding’ in the realm of equity, justice and good conscience.