



RETHINKING THEORY : THE QUESTION OF DISTRIBUTIVE JUSTICE IN JURISPRUDENCE

Arvind Radhakrishnan*

Abstract

In recent years, there has been a growing debate on the nature of Jurisprudence. Conventionally understood as the theory and philosophy of law, Jurisprudence in the modern era, has had to deal with issues manating from the more 'earthy' realms of political obligation and discourses on the 'nature of the state'. The great diversity of legal systems we see around the world, themselves pose a complex challenge when it comes to defining the 'province' of Jurisprudence. This paper seeks to examine certain basic questions like-What is the best legal system we can possibly hope for? Will these systems safeguard the basic rights of marginalized communities in conditions where there is an aggressive display of 'majoritarian will'? In order to answer these questions this paper will be looking at the contributions of various legal theorists, in particular those of Ronald Dworkin and John Rawls. Dworkin posits the idea of 'entrenching' certain rights, so that these rights are not undermined or destroyed through legislative prejudices. Rawls who in some senses represents the best traditions of the 'welfare

* Assistant Professor, School of Law, Christ University, Bangalore.

liberals', elaborates on the idea of 'justice as fairness' and notions of distributive justice. The moot questions are –can these models be prescribed in the Indian context? Or is there a prospect of an indigenous theory which broadens the horizons of Jurisprudence?

"If the system is fair and caters genuinely for the vital interests of all those from whom it demands obedience, it may retain their allegiance for most of the time and will accordingly be stable. However a narrow and exclusive system run in the interests of the dominant group.....may be made continually more repressive and unstable with the latent threat of upheaval."

-H.L.A Hart¹

Jurisprudence has always been concerned with the nature of law and its working. It is in many senses the 'heart and soul' of law. There have been many theorists and thinkers who have expounded on issues related to jurisprudence. However the key question still remains-"What is the Law?". My quest is fundamentally a philosophical one. I am concerned with the relationship law has with ethics and morality. The reason why I think this is important is because the law has been always been perceived to be a coercive entity. This unfortunate allusion can be attributed to the fact that the State has been the agency so closely associated with the law and legal institutions.

Humanity has borne witness to many legal systems in different parts of the world. While most of them have upheld the principles of justice and humanism, many have not. The legal system of the Fascists in Germany or that of the Bolsheviks in the Soviet Union contained laws that were clearly unjust. In such societies the judiciary was never independent and was merely a tool for the State to persecute its opponents. This raises the question as to whether these cruel systems can actually be recognized as legal systems at all.

Legal theorists have been divided on this issue. Lon Fuller would argue that such wicked systems cannot be recognized as legal systems. Fuller argues that any legal system in order to be recognized as one needs to possess some minimum moral requirements.² Hart would disagree by stating that the Nazi system was still a legal system albeit a very wicked one. People do not have a moral obligation to follow such a system. However who decides when a system has overstepped its limits? The question of political obligation thus becomes crucial to any theoretical postulation in jurisprudence. Which is the best legal system that people can follow? How does one ensure that the basic human rights of communities and individuals are safeguarded? How does one ensure that such rights are not swept away by the force of 'majoritarian will'?

Ronald Dworkin has tried to answer some of these queries. On the question of policies he understands them as collective goals which entails trade-offs of benefits and burdens within a community in order to produce some overall benefit for the community. He is of the view that certain principles and rights may be sacrificed in the cause of collective welfare by the legislature, but not by the judiciary.³ However this raises the question as to how this would protect rights against legislative interference. The role of the judiciary as protector of individuals rights would be hampered if the ruling government could simply take away those rights through an act of legislation.

Dworkin is aware of this when he talks about 'consequentialist' grounds. He argues that rights cannot be overridden by governments using simple pragmatic calculations of what is best for the community.

"But those Constitutional rights that we call fundamental like the right of free speech, are supposed to represent rights against the Government in the strong sense....if citizens have a right of free speech, then governments would do wrong to repeal the First Amendment that guarantees it, even if they were persuaded that the majority would be better off if speech were curtailed."⁴

The import of Dworkin's theory lies not in stressing the importance of judicial protection of established rights, but rather in the domain of 'entrenching' certain rights. These rights may be against the government, say the right to free speech or between individuals. Hence it becomes necessary not only to be able to identify what rights an individual has against the Government and against other individuals, but also to be able to identify the degree to which each right is entrenched within a given legal system. The more entrenched a right is, the less a government would be able to enact legislation which would undermine or probably destroy that right. Dworkin elaborates on the distinction between abstract or background rights and institutional or concrete rights –

"Any adequate theory will distinguish between background rights, which are rights that provide a justification for political decisions by society in the abstract, and institutional rights, that provide a justification for a decision by some particular and specified political institution."⁵

It is this discourse on Rights that leads me to John Rawls. Rawls is undoubtedly the leading thinker in the field of Jurisprudence, specially concerning questions of social justice. His seminal contributions remain without doubt A Theory of Justice (1971) and Political Liberalism (1993). The neo liberal world order that seems to dominate societies today has severely undermined human rights for millions of

people. India is no exception to this trend. The Indian government openly embraced free market policies when it chose to 'liberalize' its economy. The state had begun its 'retreat' from its social commitments. The income disparities between the 'haves' and the 'have-nots' began to increase in a vulgar fashion.

According to World Bank reports 42% of Indians fall below the international poverty line of 1.25\$ a day.⁶ The number of poor people living in India has increased from 421 million to 456 million from the years 1981 to 2005. Millions of Indians die due to lack of health care and basic nourishment. 42.5% of its children are underweight and suffer seriously from malnutrition.⁷ Paradoxically India boasts of its billionaires who are getting richer by the day. How does one account for such disparities? How can there be social justice in such a system, which is virtually blind to the needs of its weaker sections. These are very worrying questions to which solutions can prove very elusive. It is the view of the author that Rawls can provide some of the answers that we are seeking.

Rawls is viewed as a scholar belonging to the liberal tradition. Liberalism is very often interpreted differently by various scholars. It would be interesting to analyse the liberal tradition that Rawls would identify with. The foundations of liberalism are very often a matter of theoretical dispute. Most Marxists would posit that liberalism had its origins in capitalism and its need for free markets and control of the means of production. However scholars of both the left and right agree that it is John Locke's account of the origins of private property in a state of nature, that is considered as the foundation of liberalism. This naturally seems to endorse the view that liberalism is primarily an economic doctrine.

However Rawls who sees Locke as the seminal figure in liberalism would borrow from certain 'non-economic' tenets of Locke. Rawls would identify very closely with the Lockean idea of freedom. Locke's declaration that all men are born free with certain inalienable liberties and that governments have a duty to protect these liberties and diversities especially with regard to matters of faith seem to be the most important principle for Rawls. He also incorporates Locke's view on the nature of political power which has to always be exercised for the common good.⁸ Rawls would see the historical origins of liberalism in the European wars over religion fought in the 16th and 17th century. They gave rise to the idea that religious differences have to be tolerated. Locke's writings gave a theoretical justification for a limited constitutional government that respected personal liberties.

The Lockean idea that all men are born free and equal would make it difficult for some liberal theorists to dispute the idea that all members of society ought to be treated as equal citizens irrespective of their gender, race, religion or property qualifications. Rawls idea of social justice or what he terms as "justice as fairness"

entails certain basic liberties that allow individuals to freely exercise their conscience and lead their chosen way of life. He elaborates in his first principle of justice –

“Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all, and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.”⁹

The idea of the first principle is that there are certain basic rights and freedoms of the individual that are more important than others. This principle aims to define the democratic ideal of free citizens who have equal civic status with powers to influence legislation and take part in public life. This bears a striking resemblance to the Rousseauian idea of democracy as the deliberation of equal citizens on justice and common good.

It would be useful at this stage to look at two streams of liberalism-The high liberal tradition and the tradition of classical liberalism. The high liberal tradition can be traced back to Immanuel Kant while classical liberalism can be traced to the ideas of David Hume and Adam Smith. Rawls makes a useful distinction here between “liberalisms of freedom” and “liberalisms of happiness”.¹⁰ Classical liberalism primarily differs from high liberalism in placing greater emphasis upon economic rights of property, trade and the freedom of consumption. The high liberal tradition on the other hand sees the freedom and independence of the person as the primary end of justice, while classical liberalism sees them more as a means that are instrumental to the primary end of individual happiness.

Rawls views on ‘the original position’ and ‘veil of ignorance’ are rather well known to require an elaboration here. Instead the author wishes to examine his two principles of justice. The first principle alludes to the idea that certain rights and liberties are more important than others. Rawls considers five sets of basic liberties-

1. Liberty of conscience and freedom of thought
2. Freedom of association
3. Equal political liberties
4. Rights that protect the integrity and freedom of the person
5. Rights and liberties covered by rule of law

The key question Rawls poses is how do we decide which liberties are basic and which are not?and more importantly how do we decide conflicts between basic

liberties? In these five sets of rights he has mentioned exists a whole gamut of liberties which any self respecting nation and government would have to respect. Applying the first principle to India one wonders if we would as a nation-state qualify as a 'liberal democracy'. The sad plight of scores of human rights defenders languishing in Indian prisons is testimony to the authoritarian nature of the Indian state. These Rawlsian freedoms and rights seem to be the monopoly of the upwardly mobile middle classes and the super rich in India.

Large parts of the country are facing 'insurgencies' by 'terrorists'. One naturally wonders who these terrorists are? Nearly all of them are tribals from some of the poorest sections of Indian society. Why are they fighting a liberal democratic state like India? The main reason is the rhetoric of 'development' which has become a national slogan. This developmental agenda seeks to 'modernise' India and this is to be done by displacing millions of tribals from their habitats.¹¹ Would these tribals be covered under the Rawlsian first principle?

The Indian State has virtually declared a war on its tribal population. In the name of fighting 'terrorism' it has fostered the growth of 'civil militias'. A classic case is that of 'Salwa Judum', a civil militia drawn from the adivasi community. Organised as Village Defence Committees (VDC) many of these tribals are forced fight by the certain vested interests. This has resulted in the militarization of the Adivasi society.¹² It has pitted tribal against tribal. Is it not ironic to see starving people fighting each other when the 'comprador'¹³ sections look on as spectators while they go on exploiting the natural resources of this country? This begs the question -is there any notion of social justice that informs our understanding of jurisprudence and how inclusive is it.

When one raises the question of how inclusive the realm of jurisprudence is, one is really talking about how extensive civil, economic and political rights are in a given society. It is rather ironic-as evinced throughout history- that it is usually citizens themselves who want rights to be curtailed in the name of security.¹⁴ This is happening with the middle class urban sections in India, who are very often convinced by the State's rhetoric when it comes to violation of basic human rights in the name of countering terrorism.

Rawls elaborates his worldview of social justice in his second principle –

"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 savings principle and

- b) attached to offices and positions open to all under conditions of fair equality of opportunity

He is talking about the idea of 'distributive justice' in his second principle- a just or fair distribution of income and wealth. Society has a responsibility to ensure that there is a fair distribution of national wealth and resources. The duty to support the poor is nothing new in political philosophy or jurisprudence. Infact it can be seen in all major religions as well. Thomas Hobbes says in his magnum opus Leviathan " men...unable to maintain themselves by their labour...are to be provided for by the Laws of the Commonwealth."¹⁵ This view is shared by many liberal thinkers as well be it Locke, Kant, Mill and so on who felt that the government had to provide for the poorest members of its society who were unable to provide for themselves.

Where Rawls seems to clearly differ from the other liberal thinkers is that unlike them he does not view distributive justice as an act of 'public charity'. He views it as a right that the poor can claim without fear. In this Rawls has a lot in common with socialist thinkers rather than the liberals who he is usually identified with. This idea of distributive justice as a 'right' and not an act of 'public charity' originated as late as the 19th century. Massive industrialization had created great disparities of wealth between owners and workers. Some French socialists felt that since the workers were responsible for production they deserved a greater share than what the capitalists gave them. In other words a 'fair distribution' instead of an 'equal distribution'. This was dismissed as useless 'moralizing' by the scientific socialists. Karl Marx infact ridiculed the French socialists idea of 'fair distribution' as "absolute verbal rubbish", because it entailed an appeal to the capitalist's sense of justice rather than a proactive organized revolt by the working classes.¹⁶

Rawl's difference principle demands that society maximize the share that goes to the least advantaged. Here the author feels that Rawls has a lot in common with the French socialists than the Marxists. Neo-liberalism has been a very destructive economic (free markets and speculative capital) and political philosophy (libertarianism and minimalism) for the poor and marginalized sections of society. How does one expect the poor to fight this mammoth apparatus of global capital? Is political violence the only way out for these oppressed classes? If we are to avoid a civil war scenario in most nation states, policy makers would have to take Rawls a lot more seriously. The first principle is an absolute must for any democratic society worth its salt-for without political liberty nothing is possible. The second principle however requires some rethinking in the humble view of the author. The time has come for policy makers around the world to seriously consider the question of distribution as being the key to social well being.

The question of ownership is another key question. Is it alright for monopoly capitalists to control key natural resources of any country. The Rawlsian idea of distributive justice while clearly being different from the liberal idea of 'public charity', falls short of the idea of 'social justice'. This is a serious limitation of the second principle. In the age of tyrannical neo-liberalism one has to posit a new jurisprudence in order to come up with solutions to social problems like poverty, starvation and deprivation.

Joseph Raz once wrote "It is the goal of all political action to enable individuals to pursue valid conceptions of the good and to discourage evil or empty ones."¹⁷ Raz was certainly an expert when it came to the theory of practical reasons and norms and his analysis of authority. The fundamental nature of law will be questioned by the 'subalterns'¹⁸ of every society. A neo-liberal world order which impoverishes millions will end up shaking the very foundations on which political and legal obligations are built on. The idea of distributive justice is a very bold attempt to address the question of social justice in jurisprudence, however it leaves much to be desired. Rawls has only shown us a path, it is now upto us to take his ethical project further.

Endnotes

- ¹ Hart, H.L.A., *The Concept of Law* 2nd Edition (Oxford : Clarendon Press, 1994) p197.
- ² Fuller, Lon L, *Positivism and fidelity to law*, *Harvard Law Review* (1958), 71.
- ³ Dworkin, R.M, *Taking Rights Seriously* (London : Duckworth, 1977) p 90.
- ⁴ *Ibid.*, p 191-2.
- ⁵ *Ibid.*, p 93.
- ⁶ Ravillion, Martin, *The developing World is poorer than we thought*, *World Bank Report on Poverty*, (Washington, 2008).
- ⁷ Sengupta, Somini, *As Indian growth soars, Child hunger persists*, *New York Times*, March 12, 2009.
- ⁸ Rawls, John, *Political Liberalism*, (New york, Columbia University Press, 1993) p 25.
- ⁹ *Ibid.*, p 5.
- ¹⁰ Rawls, John, *Lectures on the History of Moral Philosophy*, (Cambridge, Harvard University Press, 2000) p 366.
- ¹¹ Roy, Arundhati, *Listening to Grasshoppers*, (Boston, Hamish Hamilton, 2009).
- ¹² Joint Report by PU DR (Delhi), APDR (West Bengal) and PUCL (Chhattisgarh) titled 'When the State makes war on its own people: A report on the violation of people's rights in Chhattisgarh', April, 2006.

- ¹³ Comprador refers to native agents who are in the service of global capital and imperialism. They do not have any loyalty or any sense of obligation to their own nation-state.
- ¹⁴ Dershowitz ,Alan ,Rights from Wrongs, (New York, Basic Books, 2004) p 156
- ¹⁵ Hobbes, Thomas, Leviathan, (New York, Viking Penguin, 1986) p 239
- ¹⁶ Rawls, John, Lectures on the History of Political Philosophy, (Cambridge, Harvard University Press, 2007)
- ¹⁷ Raz, Joseph, The Morality of Freedom, (Oxford, Clarendon Press, 1986) p.133
- ¹⁸ Subaltern refers to marginalized groups and classes that are excluded from a hegemonic power structure. Refer to Robert Young, Postcolonialism :An Introduction, (New York, Oxford University Press, 2003).