

Concept of Justice, Utilitarianism and other Modern Approaches

***M.K. Vyas**

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(A) Introduction

Since the dawn of human civilization, in the whole range of our legal, political and moral theory, the notion of justice has always occupied a central place. Although any attempt to define the term precisely, scientifically and exhaustively has presented a baffling problem to scholars of all hues. Consequently on account of its multidimensionality, its nature and meaning has always been a dynamic affair. Besides, the problem of definition of justice is beset with the problem of its normative as well as empirical connotations. While in the normative sense it implies the idea of joining or fitting the idea of a bond or tie¹, in an empirical context, it has its relation with the concept of positive law with the result that law and justice becomes sister concepts.

It is owing to this affirmation that the fundamental purpose of law is said to be the quest for justice which is to be administered without passion as when it (passion) comes at the door, justice flies out of the window.²

However, notwithstanding the problem of defining the term Justice, precisely, scientifically and exhaustively, it is submitted that "Jurisprudence can not escape considering justice since justice is ideally - the matter of law. But what if justice can not be known? Justice appears to be overburdened idea. Sometimes it is reduced to a question of technique: it is thereby posed as the problem of what will guide the techniques of constructing social order. At other times it appears as a problem of legitimacy or put another way as an answer to the question of what will provide a rational framework. for judging the adequacy of the regulation of human relations."³

According to Kelsen⁴ there can not be a formal science of justice since even if a theory of justice were logically constructed, it would be based on emotive premises. It is not possible to identify in a scientific way the supreme values that a just order of social life should attempt to provide. It therefore, appears that the concept of justice is not amenable to rational determination. Consequently, notwithstanding the value and importance of the concept of justice today, one of the central conflicts in legal moral and political philosophy is between those who espouse rights based theories and those utilitarians in particular who put forward goal based theories. A requirement is rights based when generated by a concern for some individual interest and goal based when propagated by the desire to further something taken to be of interests to the community as a whole.

(B) Utilitarianism and notion of justice

Utilitarianism as an ethical political and legal theory is essentially a product of the English mind. It is essentially associated with Jermy Bentham and John Stuart Mill. The theory believes that man is social by nature and is always motivated in life chiefly by the desire to obtain happiness and avoid pain and that the happiness of each individual involves relations with other individuals which necessitates state regulation of mutual relations of men by legislation. Utilitarian philosophy is thus closely associated with practical ethics and practical politics. The object of legislation of the state is to promote and secure the greatest happiness of the greatest number. The criterion of right and wrong of good and bad which the state should apply is found in happiness and not in divine revelation, dictates of conscience or in the abstract principles of reason. It insisted that all political institutions and public offices must be judged by their fruits and not by their ideality, i.e., by their actual effects on the happiness of the people and not by their conformity to the theories of natural rights or absolute justice. Thus this theory is based on the psychological doctrine of hedonism which proceeds on the assumption that man is a sentient being, a creature of feeling and sensibility. The principle of utility or the greatest happiness of the greatest number is the measuring rod by which utilitarian measure and evaluate the public policies and legislative enactments of governments. The state is a necessity for the promotion of the greatest happiness of the greatest number and it is a means, not an end in itself.

Thus, Bentham does not recognize individual's human rights and therefore the idea of justice is merely a subordinate aspect of utility.⁵ His principle of justice is an implicit part of utility as incorporated in a legislation. It, therefore, seems that his theory of justice is justice according to law as laid down in a legislation. He was not prepared to recognize a general or specific human right to justice because he had no respect for natural rights. In his "Anarchical Fallacies", Bentham critically examined the French Declaration of the Rights of man and dubbed them as simple nonsense rhetorical nonsense, "nonsense upon stilts".⁶ Every just government, Bentham accordingly would have said, had he been writing the American Declaration of Independence, deprives its authority not from the consent of the governed but from the utility of its acts in promoting the happiness of its subjects. The happiness of the body politic consists in promoting security, substance, abundance and equality and these are the objects which legislator should keep in view while enacting a particular piece of legislation.

John Stuart Mill agreed generally with Bentham's doctrine but he slightly modified it and included qualitative pleasure along with quantitative one. He also insisted that the utilitarian doctrine of happiness was altruistic rather than egoistic, since its ideal was the happiness of all concerned. Within the utilitarians, one of the chief issues of legal philosophy to which Mill suggested an approach different from that of Bentham was the significance that should be attributed to the concept of justice. Bentham had spoken of justice in a deprecatory fashion and had subordinated it completely to the dictates of utility. At one place he observed:

*"Sometimes in order the better to conceal the cheat (from their own eyes doubtless as well as from others) they set up a phantom of their own, which they call 'Justice': whose dictates are to modify (which being explained means to oppose) the dictates of benevolence. But justice in the only sense in which it has a meaning, is an imaginary personage feigned for the convenience of discourse, whose dictates are the dictates of utility applied to certain particular cases."*⁷

Whereas Mill, although taking the position that the standard of justice should be grounded on utility, believed that the origin of the sense of justice must be sought in two sentiments other than utility namely, the impulse of self defense and feeling of sympathy.⁸ Differently expressed the feeling of justice is the urge to retaliate for a wrong, placed on a generalized basis.⁹ This feeling rebels against an injury, not solely for personal reasons, but also because it hurts other members of society with whom we sympathize and identify ourselves. The sense of justice, Mill pointed out, encompasses all those moral requirements, which are most essential for the well being of mankind and which human beings therefore regard as sacred and obligatory.¹⁰

Apart from the above differences, Bentham's notion of subordination of justice to utility is further evident by the fact that he was opposed to wide judicial discretion to be given to judges to interpret the laws. He counsels that judicial interpretation should have no other role than strict interpretation, not an activist interpretation which gets "rid of the intention clearly and plainly expressed" and substitutes judicial intention for the legislative one.¹¹

Bentham has characterized an activist judge as a charlatan who nourishes the spectators by making sweet and bitter run from the same cup.¹² While making a scathing attack of judicial activism, Bentham observed:

*"The serpent, it is said can pass his whole body whenever he can introduce his head. As respects legal tyranny, it is this subtle head of which we must take care, least presently we see it followed by all the tortious fields of abuse."*¹³

Prof. Upendra Baxi is of the opinion that Benthamite condemnation, of a Judge as usurper, who substitutes his will for that of the legislator as a conscious overtaker who produces and reproduces arbitrariness is clearly addressed to a context where the legislator has, in fact followed Bentham's Counsel of producing clear laws. It is only in such contexts that judicial activism, rightly thus stands condemned.¹⁴

Bentham's condemnation of Judges is not confined to mere usurpation of powers but he also condemned the delay and denial of justice on the part of Judges. He addressed them scornfully as "Judges and Co."¹⁵ and even advocated the abolition of House of Lords and Monarchy.¹⁶

It is, therefore, submitted that although Bentham does not formulate anywhere in the "Theory" a fully fledged justification of judicial review, Prof. Baxi opines that it is embedded in the notion of reciprocal dependence of three powers. "The principle of utility asks us to guard against all forms of usurpation of political (legislative) power."¹⁷

Thus, while recapitulating our discussion on Bentham's notion of justice, it is submitted that there is no elaborate and systematic theory of justice given by Bentham. His theory of justice is grounded in the happiness of individual and not that of society, which he never recognized. However, notwithstanding its incomplete and insufficient notion of justice it is submitted that the utilitarian concept of justice is a landmark in the evolution of the theory of justice. Its value lies in starting a rational inquiry with logical and analytical approach to the realization of truth and reality. It also gives objective and scientific approach to the concept of justice, which throws and opens the avenues for reform development and progress even by socialization of its shortcomings, errors and failures.

The great merit of utilitarian approach to justice is that it dissociates justice from theology, mysticism, imagination and speculation which leads to illusions unreal apprehensions and frustrations.

(C) Notion of Justice and other Modern Approaches

According to Kelson the longing for justice is men's eternal longing for happiness. It is happiness that man can not find alone, as an isolated individual and hence seeks in society. Justice is social happiness guaranteed by social order.¹⁸

The idea of attaining the just society is deeply problematic in modernity. In Nietzschean terms a settled conception of justice is difficult for the modern because the modern knows too much as a result finds pluralism and perspectivism in short, pragmatism towards truth. We are an historical epoch that knows the inevitability of change over stability whatever its theories of justice, late modernity is doomed to dynamic as opposed to static justice.¹⁹

(C) (1) - John Rawls Theories of Justice and Utilitarianism

One of the earliest thinking about justice is found in Aristotle. It was he who distinguished "Corrective Justice" and "Distributive Justice". However, the most contemporary writing about justice is about absolute justice, about the appropriate distribution of goods, which may be distributed according to needs or desert or moral virtue.²⁰ One of the most interesting modern attempts to defend principles of justice are found in John Rawls: A Theory of Justice²¹, as now reformulated in political liberalism. John Rawls sets out two basic moral principles of justice which a constitutional democracy should satisfy:

- 1- the maximization of liberty are essential for the protection of liberty itself;
- 2- equality for all, both in the basic liberties of social life and also in distribution of all other forms of social goods, subject only to the exception that inequalities may be permitted if they produce the greatest possible benefit for those least well off in a given scheme of inequality (the difference principle); and
- 3- fair equality of opportunity and the elimination of all inequalities of opportunity based on birth or wealth. Rawls theory differs from utilitarianism in three significant ways²²:

First, utilitarians can accept inequalities, social arrangements in which some benefits at the expense of others provided the benefits (or pleasures) exceed the costs (or pains) so that the outcome is the maximization of overall welfare level (the greatest happiness of the greatest number), secondly, while utilitarians defend liberty and political rights, they have no objection to limiting liberty or restricting political rights, provided doing so would promote greater well being. Rawls first principle (the equal maximization liberty principle) means that there are some rights

freedom of speech & association the right to vote and stand for public office liberty of conscience & freedom of thought, freedom of the person and the right to hold personal property, freedom from arbitrary arrest, which every system must respect. These are rights that may not be sacrificed to increase the aggregate welfare level.

Thirdly, Rawls conception of benefits is different from utilitarianism which is concerned with welfare. Rawls by contrast defines benefits in terms of "primary goods": liberty and opportunity, income and wealth and the bases of self respect. These need not be considered desirable in themselves but they give persons the opportunities rationally to further their own autonomy.

The above discussion has revealed that Rawls seems to lay down a contractarian theory of justice in which participation in the understanding of justice as fairness makes a type of government called constitutional democracy. The model which Rawls proposes as satisfying has two principles of justice. It is a constitutional democracy in which the government regulates a free economy in a certain way. More fully, if law and government act effectively to keep market competitive, resources fully employed, property and wealth widely distributed overtime and to maintain the appropriate social minimum, then if there is equality of opportunity, underwritten by education for all the resulting distribution will be just.²³

The idea of distributive justice in Rawls theory in simple terms requires that the courts should take a liberal view of the premises of law and so interpret them as to distribute benefits to the largest number of people so that the harsh effects of the technicalities of law are contained within the narrowest limits.²⁴

Thus, Rawls believes that a fully satisfying existential life requires justice. But an obvious problem arises: how are we to require whether the arrangements of any particular social ordering are just or unjust? Rawls intellectual predecessors are Kant (who provides among other things the idea of the primacy of the right over the good and the regulatory idea of the social contract) and John Stuart Mill (who provides the spirit of tolerance). Rawls thus chooses the right over the good - Kant wins over the Bentham.²⁵

In nutshell, Rawls is trying to balance the need for growth in wealth, with respect for the least well off in the society. Whilst the general aim of utilitarian justice is to maximize social wealth. Rawls holds his basic principles of justice based also upon a deontological respect for autonomy as checks upon such maximization.²⁶

(C) (ii) - Robert Nozick's Concept of Justice

As opposed to utilitarian thinkers, libertarian thinker like Nozick share, a profound distaste for all theories which promote any idea of a social group which legitimates centralized social administration. The political jurisprudence of Robert Nozick, characterized by his book 'Anarchy, State and Utopia (1974)' is the best known of the libertarian theories of justice. Nozick's writings develop a theory of justice which reinforces a radical free market approach and fits a so-called minimal or night watchman state. It is no surprise that he concludes: "The minimal state is the most extensive state than can be justified. Any state more extensive violates peoples rights."²⁷ Nozick develops an entitlement theory of justice, whereby economic goods arise in society already encumbered with rightful claims to their ownership.²⁸ The minimal state is limited in its legitimation of force to the protection of certain basic rights: it is the night watchman state of classical liberalism. Under utilitarianism, or the later theory of Rawls, we could have redistribution policies but no redistribution is legitimate in the minimal state.

In this context, Prof. Hart has rightly observed that "with the arrival of right based theories from thinkers like Robert Nozick and R. Dworkin, it may be that the epoch which Bentham opened is now closing: certainly among American political and legal philosophers. Utilitarianism is on the

defensive, if not on the run, in the face of theories of justice which in many ways resemble the doctrine of unalienable rights of man, and there are important conceptual connections between law and morality obscured by the positivistic tradition."²⁹

(C) (iii) - Ronald Dworkin's Notion of Justice

For both Rawls and Nozick, there is clear relationship between justice and rights, but it is Ronald Dworkin who can be said most clearly to ground justice in rights. To Dworkin rights are "trumps". They are grounded in a principle of equal concern and respect, so for a Judge to make a mistake about a legal right is "a matter of injustice." Further, the whole institution of rights rests on the conviction that "the invasion of relatively important right is a grave injustice. Dworkin sees rights as safeguards inserted into political and legal morality to prevent the conception of the equalitarian character of welfarist calculations by the introduction of external preferences."³⁰ Utilitarianism, Dworkin argues assigns critical weight to external preferences: it is accordingly not equalitarian since it will not respect the right of every one to be treated with equal concern and respect.³¹

In view of above right and goal based dichotomy pertaining to the notion of justice, it is submitted that if the weakness of utilitarian theories lies in their readiness to sacrifice individual rights on the altar of maximizing happiness that of right based moral theories are also experiencing great difficulties in producing arguments for the existence of rights.

(C) (iv) - Views of Communitarian Jurists and Displacement of Debate

over the respective priority of the Right and the Good

Communitarian Jurists like Michael Sandel has observed: "For liberals of the Kantian type such as Rawls, the priority of the right over the good means not only that one can not sacrifice individual rights in the name of the general good, but also that principles of justice can not be derived from a particular conception of the good life."³² This is a cardinal principle of liberalism, according to which there can not be a sole conception of eudemonia, i.e., of happiness.

The communitarians argue that one can not define the right prior to the good, since it is only through our participation in a community which defines the good that we can have a sense of what the right is and attain a living conception of justice, outside community there is no good and no right.³³ Communitarian therefore assert it is only within a specific community, defining itself by the good that it postulates that an individual with his rights can exist. It appears necessary for liberals to specify that the search for justice is partly a question of actively working for and intellectually defending particular images of political community.

They (i.e., communitarians) rightfully assert that "Justice is not a philosophical conception but it is an existential goal."³⁴

(C) (v) - Karl Marx Notions of Justice

Among the goal based theories of Justice, there are some commonalities between Bentham and Karl Marx. First, their tasks as social thinkers were to

clear men's minds as to the true character of human society and secondly, that human society and its legal structure which had worked so much human misery had been protected from criticism by myths, mysteries and illusions, not all of them intentionally generated, yet all of them profitable to interested parties.³⁵

However, while Bentham was a liberal and individualistic whereas Marx was a revolutionary communist. Marx's view of justice emerges most clearly in capital and the critique of the Gotha programme.

Both Bentham and Marx are opposed to the natural law conceptions of "Rights", however Marx differed from Bentham in the realm of distributive justice and opined that from each according to his ability to each according to his needs." On the notion of human rights Marx wrote of the so called rights of man as simply the rights of a member of a civil society, that is of egoistic man and separated from other man and from the community. Whereas Bentham's principles of justice are grounded in utility and in the greatest happiness of the greatest number ushered by parliamentary legislations. Marx talks of withering away of state as the promise of Marxism is that we may attain a state of being beyond justice, beyond any rational ideal.

(D) Conclusion

The above discussion of various approaches about the notion of justice has clearly revealed that we face an irresolvable pluralism of ideologies. If the structure of legalism embodies one dominant set of ideologies it will appear unjust from another perspective .

Kelson³⁶ has rightly concluded that there can not be a formal science of justice, since even if a theory of justice were logically constructed it would be based on emotive premises. It is not possible to identify in a scientific way the supreme values that a just order of social life should attempt to promote one person may regard the advancement of individual autonomy as the foremost aim of legal ordering another person may argue that law-makers should promote the goal of equality. Yet another may claim that security is the overriding interest and he is willing to sacrifice equality and freedom for the fullest resolution of this value. Therefore, it has rightly been concluded that the concept of justice is not amenable to rational determination.

Notes

- * Dr. M.K. Vyas, Professor, Faculty of Law, JNV University, Jodhpur
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 5. H.L.A. Hart. Essays on Bentham, Jurisprudence and Political Theory, Clarendon Press, Oxford, 1982, p. 51
 6. Anarchical Fallacies, Vol. II, pt. VIII
 7. Jermey Bentham. Morals and Legislation, pp. 125-126
 8. John S. Mill. Utilitarianism (edi.O. Piest), New York, 1957, p.63
 9. Id, p. 65
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 15. Lawrance C. Wanless. Gettel History of Thought, London, 1950, p. 313
 16. Sukhbir Singh. History of Political Thought, Rastogi Publications, 1999, p.22
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 20. LLoyds. Introduction to Jurisprudence (7th Edi.), M.D.A. Freeman, Sweet & Maxwell, 2001, p. 523
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 29. H.L.A. Hart. Essays on Bentham, Jurisprudence and Political Theory Clarondan Press, Oxford, 1982, p.53
 30. R. Dworkin. Taking Rights Seriously, 1978, p.28
 31. Quoted by LLoyds Introduction to Jurisprudence, p. 543
 32. Michael Sandel. "Liberalism and the limits of Justice" as quoted at supra 3 p. 413
 33. Ibid
 34. Id. at p. 414
 35. H.L.A. Hart. Supra 5 at pp. 25-26
 36. As quoted by Wayne Morrison, Supra 3 at p. 385