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Research Paper

## Justice For All: John Rawl's Theory Of Justice And Its Relevance In Indian Judicial System

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**ABSTRACT-** John Rawl's theory of Justice is one of the most important theories in the field of Jurisprudence and Political Science. His work has left a landmark, introducing a legal theory that aims for a society with liberty, equality and justice for all. Rawl's influence in the field is evident, as he attempted to provide a moral theory which is an alternative to utilitarianism and addresses the problem of distributive justice. The theory has its own set of merits and as well as some loopholes due to which its complete application in present day Indian legal system becomes difficult. This paper will try to understand the substance of Rawl's theory of justice and will deal with the conceptual as well as the practical perspectives of the concept of justice by examining the provisions of Rawl's theory and will try to analyze its application and relevance in present day Indian scenario.

**KEYWORDS-** Constitution, Equality, Justice, John Rawl's, Liberty, Social

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### I. INTRODUCTION

Man is a social animal and thus cannot live in isolation. This very nature of man has given rise to the creation of the state. While the state was created as a political entity, one of the several objectives was to create a political society where justice for all could be achieved. However, as the concept of justice is not static but is dynamic and ever changing it has undergone several transformations. With the changing times the needs of the society have also changed to a great extent. With the changes in the society, the concept of justice also changes from time to time. Justice is an evolutionary and constantly changing phenomena. Its notion has undergone various changes during the different phases in history throughout the globe.

To speak in the context of present day scenario, justice means the fulfillment of the legitimate expectations of the individuals under laws and to assure them the benefit promised therein by the laws and other rights. Justice tries to reconcile the individual rights with the social good. It stresses on the concept of equality. It requires that no discrimination should be made among the various members of the society. For achieving the true aim of justice, equality must be done and not just said to be done. Inequality in the society gives rise to friction in society and this friction leads to injustice and rise of crime. The values of liberty, equality and fraternity are important in any system of law and justice. These values exist in different proportions and there are conflicts between them too. In order to actually do justice, the main cause of problem in society shall be eliminated.

To understand justice, it is important to refer to the root idea of the word "Jus" meaning joining or fitting.<sup>1</sup> Thus, justice carries the meaning of bringing together and joining up human beings with one another without discriminating amongst them on the grounds of religion, race, caste, sex, color, place of birth or nationality. However, the concept of justice differs from one person to another, as that what is just for one may not be just for another. Therefore, for justice to be actually done it should be done in such a way that it caters the true needs of the society. Therefore, it can be said that there is need for a constant process of adjustment between the conflicting claims of these values in a society.

There are different kinds of justice, such as natural justice, economic justice, political justice, social justice and legal justice. In order to be able to do justice for all, it is important to achieve ends of all the different kinds of justice. John Rawls an American political philosopher has given us a theory of justice to cater the needs of the present day diverse society. His theory provides a moral theory as an alternative to utilitarianism and addresses the problem of distributive justice which aims for liberty and equality for all. Different judicial

systems throughout the world have made an attempt to adopt Rawl's theory of justice. Indian judicial system is one of them. Though Indian constitution came in force on 26<sup>th</sup> January 1950 almost 21 years prior to John Rawl's theory of justice however the essence of his theory can be seen in Indian judicial system to some extent. Hence, this paper will examine the provisions of Rawl's theory and will try to analyze its application and relevance in present day Indian scenario in order to understand the correlation between justice, law and social transition to be able to do justice for all.

## **II. JOHN RAWLS THEORY OF JUSTICE**

John Rawls an American political philosopher gave us his theory of justice as fairness in which he describes a society of free citizens holding equal basic rights and cooperating with each other within an egalitarian economic system. He was inspired by Kantian philosophy of justice. He attempted to establish a moral political theory by updating and altering Immanuel Kant's theory of justice and incorporating some principles of the social contract theory to address the problem of distributive justice with an aim of having socially just distribution of goods in society. He has elaborately explained his theory of distributive justice in his book "A Theory of justice" in 1971 and an essay titled "Justice as fairness" in 1985 by giving us two central principles of justice.<sup>ii</sup>

John Rawl's theory is believed to be an alternative to utilitarianism because it aims at three principles which have the utilitarian touch to them. Such as firstly he aims to structure the society in such a way that the greatest possible amount of liberty is given to its members while taking care that the liberty of any one member shall not infringe upon that of any other member. Secondly he allows social and economic inequalities in comparison to an equal distribution, provided that this arrangement should help the worst off to become the better off in the society. Lastly he believes that the aim behind such beneficial inequality should be to make it easy for those without resources to occupy the position of power in the public domain.<sup>iii</sup>

For the purpose of explaining his theory of justice, Rawl's takes resort to the social contract theory to some extent. He elaborately explains his principles of justice by making use of an imaginary original position, which is to some extent similar to the state of nature as is mentioned in the social contract theory. John Rawls places all the people in the society in this original position. When people in the society are placed in the original position they are according to Rawls standing behind a veil of ignorance. This 'veil' blindfolds all the people to such an extent that they become ignorant about all the facts about themselves, their social status including their place, class and position in the society. People when are behind this veil do not even know their fortune in the process of distribution of natural assets and abilities. This helps in avoiding the tailoring of benefits to one's own advantage. Which in turn leads to the distribution of benefits that are fair to all because if an individual does not know how he will end up in his own conceived society, he is likely not going to favor or grant privilege to any one class of people but on the other hand develop a scheme of justice that treats all fairly.<sup>iv</sup> This according to Rawls would maximize the benefits for the least well off in the society.

Further John Rawls explained his theory of justice by giving us two important principles of justice.

Firstly "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" he called this principle as the greatest equal liberty principle. Secondly "Social and economic inequalities are to be arranged so that they are both:  
(1) to the greatest benefit of the least advantaged, consistent with the just savings principle, Rawls called this principle as the difference principle and  
(2) attached to offices and positions open to all under conditions of fair equality of opportunity." This principle is called as the equal opportunity principle.<sup>v</sup>

According to Rawls the principles of justice have an order in sequence of their importance and applicability such as the greatest equal liberty principle takes priority, followed by the equal opportunity principle and finally the difference principle. The first principle must be satisfied before the equal opportunity principle, and the equal opportunity principle must be satisfied before the difference principle. As Rawls states: "A principle does not come into play until those previous to it are either fully met or do not apply."<sup>vi</sup> Therefore, the equal basic liberties protected in the first principle cannot be traded or sacrificed for greater social advantages or greater economic advantages.

Further Rawls elaborately explains each principle of justice in detail, according to him the main focus of the greatest equal liberty principle is with the distribution of rights and liberties. Under this principle he also identifies political liberty and liberty of conscience by including certain rights and freedoms such as the right to vote and hold public office, freedom of speech and assembly, liberty of conscience and freedom of thoughts, freedom of the person including freedom from psychological oppression and physical and freedom from arbitrary arrest respectively. While explaining the difference principle Rawls has adopted a more egalitarian approach. He aims for a society where the least advantaged members of the society are benefited more than those belonging to the more advantaged category. For achieving this, he even supports inequalities favoring the benefit of the least advantaged because he believes that morally arbitrary factors such as the family one is born

in or ones' caste, creed, race and such other factors shall not determine one's chances in life to get something better than what he originally has. However, at the same time Rawls has been enough thoughtful to even think about the future generations by including the just savings principle which requires that some sort of material respect is left for future generations and their wellbeing. Further while explaining the equal opportunity principle he again puts emphasis on the arrangement of Social and economic inequalities in order to create conditions of fair equality of opportunity attached to offices and positions open to all.

### **III. UNDER INDIAN JUDICIAL SYSTEM**

While looking at the present day world, it can be said that there are 195 countries and all of them are recognized as political states. Most of these states have common objectives of securing justice, equality and liberty for all of its citizens. India being one of these political entities has similar objectives of ensuring justice for all. The makers of the constitution of India while envisaging the need of the future society have aptly incorporated the principles of justice, liberty, equality and fraternity in the provisions of the Constitution of India right from the preamble, fundamental rights, directive principles of state policy and some other provisions too. Now we shall analyze these provisions of the Constitution of India and try to find out whether the theory of justice as propounded by John Rawls is applicable in Indian Scenario or not.

- 1) The Preamble which is in the form of a preface to the Indian Constitution, present to us the important principles of the Constitution briefly. Amongst the other principles it states that India seeks social, economic and political justice to ensure equality to its citizens. The justice as mentioned here stands for absence of arbitrariness, importance of rule of law and a system of equal rights, freedom and opportunities for all in the Indian society.<sup>vii</sup> These principles of justice as enshrined in the preamble form the very core of John Rawls theory of justice.
- 2) Article 14 of the Constitution of India provides for equality before the law or equal protection of the laws within the territory of India. It guarantees equality to all persons, including citizens, corporations, and foreigners. Equal protection of the Laws is one of the positive concepts of equality. It puts the positive obligation on the state to prevent the violation of rights. This can be done by bringing socio-economic changes. Equality before the law is considered as the negative concept of equality, it means everyone has access to justice. No one can be barred from access to justice. Here all should be treated equally in front of the judicial system. Further The right to equality prevents the arbitrary action of the state. This article speaks about the equal protection of the laws and it is against the doctrine of arbitrariness. For protection against arbitrariness, there are several restrictions put on every organ of the state. It is an important step to prevent the organs of the state from making any arbitrary decision. Thus by the term equality we mean social and economic equality. The state should ensure this social and economic justice at any cost. Article 14 permits classification, so long as it is 'reasonable', but forbids class legislation because in order to do justice for all it is very important to give equal treatment to those who belong to a similar class but at the same time it is also very important to avoid giving equal treatment to those who belong to different classes in altogether different circumstances.<sup>viii</sup> In order to achieve equality, special treatment needs to be given to the least advantaged people of the society to bring them at par with the advantaged people. This is exactly what John Rawls tries to achieve through his difference principle.
- 3) Article 15 states that the state shall not discriminate against any citizen on grounds only of race, religion, caste, sex, and place of birth. The word "discrimination" refers to making adverse distinctions with regard to or to distinguish un-favorably from others while the term 'only' means that discrimination can be done on the basis of other grounds such as special provisions to women and children and for socially and economically backward peoples or for Schedule Castes and Schedule Tribes. Article 16 of the Indian Constitution guarantees equal opportunity to all citizens in matters related to employment in the public sector and prohibits discrimination on the grounds of religion, race, caste, sex, descent, birthplace, residence, or any of them. At the same time, it provides for the reservation of services under the State in favor of the backward class of citizens. Thus it can be said that article 15 and 16 goes hand in hand with John Rawls theory of justice because he believes that arbitrary factors such as the family one is born in or one's caste, creed, race and such other factors shall not determine one's chances in life to get something better than what he originally has. However, in order to maximize the benefits for the least well off in the society he emphasizes on giving preferential treatment to those who are below average to bring them to the level of the average, to achieve equality in true sense and calls it as beneficial inequality. Further he mentions that the aim behind such beneficial inequality should be to make it easy for those without resources to occupy the position of power in the public domain and calls this as the equal opportunity principle.
- 4) Article 21 of the Constitution of India, provides that, "No person shall be deprived of his life or personal liberty except according to procedure established by law." 'Life' in this Article is not merely the physical act of breathing. It does not connote mere animal existence or continued drudgery through life. It has a

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much wider meaning which includes right to live with human dignity, right to livelihood, right to health, right to pollution free air, etc.<sup>18</sup> These rights are available to every person only on the ground of being born as a human being without any discrimination against anybody or any favor for anyone. This Article enshrines the core essence of equality, where basic human rights are granted to all simply on one common ground that all are born as human beings. John Rawls also envisages a society where there is equality and justice for all.

5) Further under the directive principles of state policy, Article 38 of the Indian Constitution directs the State to promote the welfare of the people by securing and protecting a social order in which justice, social, economic and political is established and to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities for all. Article 39 through its various provisions also aims at achieving justice for all by making the fair allocation of resources, and also by equal distribution of rights and duties.

Though the Indian Constitution was framed before Rawls wrote his book "A Theory of Justice. Our Constitution is on an equal footing with the theory of justice as propounded by Rawls and has provided different provisions for various under-privileged sects of society such as women, Scheduled Tribes, Scheduled Class and many others to draw a balance for 'Empowerment of Justice for all'.

### **IV. CONCLUSION**

Thus it can be concluded by saying that, in the past, justice had been conceptualized in a way that did not take into account the lives of the unprivileged people and thus the least advantaged people of the society routinely faced violence, discrimination and oppression. Consequently, such people faced several difficulties but their problems were until recently not adequately addressed by the legislation. However, the changing needs in the society and the changes in the social fabric brought up by the process of social transition compelled the legislature to enact laws which are suitable for tackling the problems of the underprivileged in achieving social justice for all.

Social justice refers to justice in terms of distribution of resources, opportunities and privileges within the society. John Rawl's concept of social justice means to take decision through the veil of ignorance. Veil of ignorance means to imagine ourselves in a condition where we don't know our position in terms of caste, religion, gender etc. and then take the decision. The concept here is that when we don't know our position then it is more likely that we take a rational decision for collective benefit of the society. This provides us an opportunity to solve issues impartially and rationally.

When a person is asked to frame rules for his society, he will in general circumstances choose only the rules that suit his own interests more often than choosing rules which would sever the society at large. However, if the person who is asked to frame the rules is unaware of his position in the society (while he is behind the veil of ignorance), he will frame the rules in such a way that even the worse off as well as privileged sections of the society will get justice, because he himself might belong to any section of the society. John Rawls felt that in this way, social justice will be ensured by rational thinking rather than by ambiguous notions of morality.

These principles of John Rawls have been applied in the Indian context in the form of reservations in public jobs for backward class people, differently abled people etc. because of them being in the worse-off position in the society, they need to be provided with reservations to ensure justice in opportunities. However, the amount of reservation must not be too high so that the privileged sections are excluded from opportunities. Hence, it can be said that John Rawls concept of social justice has helped in ensuring social justice to some extent in Indian society.

The Indian constitution imbues Rawls' principles of Justice in the Preamble by including the principles of equality, liberty and justice to all citizens and that can also be seen in Fundamental Rights and Directive Principles of State Policy. However, the law and reality are quite different because the disparities between the rich and poor will prevail even if the principles of fair equality of opportunity are applied. Further Rawls has stated that economic inequalities are acceptable if they are for everyone's advantage and if the institutions are open for all. These two phrases everyone's advantages and open to all are ambiguous and cannot be applied in a straight jacket formula in Indian society due to the extremes present here. For example, it is nearly impossible for an ordinary person deprived of all amenities and economic strength to contest for elections. The cost of election requires millions of rupees which an ordinary man cannot afford. This proves that even though the office is open for all, it does not prove to be for everyone's advantage.

Hence it can be said that protecting rights of the under privileged people of the society must be embedded in the laws of every country very firmly and must be based on international human rights standards. Equally important is that laws are implemented properly, such as through ready access to courts and an expectation of a fair hearing. The under privileged people need to know their rights and have the power to claim such rights. Social attitudes and stereotypes must be challenged and changed with the changing time. It is *prima facie* duty of all nation-states to work together for all round development of the under privileged people as millions of them are exposed to various threats on a day to day basis. The Indian legislature has strived hard to

ensure justice for all however with the ever changing social needs and constant social transition it can be said that there is still scope for the legislation to cope with the contemporary crises and do justice in reality for all.

<sup>i</sup> <https://dictionary.cambridge.org/dictionary/english/justice>, last visited 22/02/2021

<sup>ii</sup> Dr Vijay Ghormade, jurisprudence and legal theory, Hind Law Publication, Pune, 2016, P. 203

<sup>iii</sup> O.P.Gauba, western political thought,Shivani art press, Delhi, 2018, P.161

<sup>iv</sup> T.R.Sharma, Rawlsian Justice:Disjunction between choice and observation, 50 IJPS 28, 1989, p 33-34

<sup>v</sup> Supra Note 4, P. 36

<sup>vi</sup> Dr. N.V. Paranjpe, Studies in Jurisprudence and legal theory, Central law agency, 6<sup>th</sup> Edition, 2011, P 207

<sup>vii</sup> K.K. Ghai, Indian Government and Polity, Kalyani publishers, Noida, 12<sup>th</sup> Edition,2018, P.99-101

<sup>viii</sup> Dr. Awasthi, The Constitution of India, Dwivedi Law Agency, Allahabad, 2012, P 18-25

<sup>ix</sup> Supra Note 7 P. 101-108

## Bibliography

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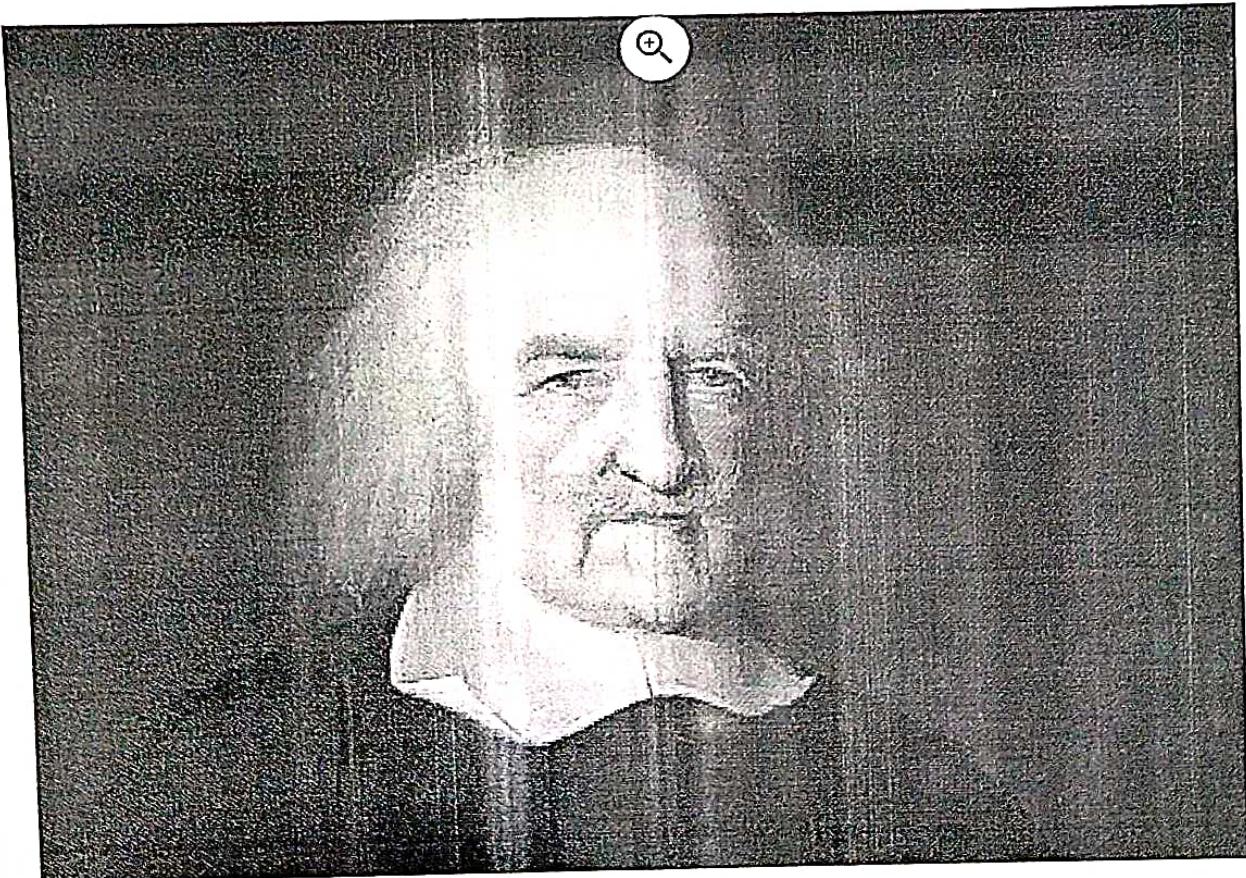
**social contract**

## 2nd Written Assignment

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Thomas Hobbes

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**social contract**, in political philosophy, an actual or hypothetical compact, or agreement, between the ruled or between the ruled and their rulers, defining the rights and duties of each. In primeval times, according to the theory, individuals were born into an anarchic state of nature, which was happy or unhappy according to the particular version of the theory. They then, by exercising natural reason, formed a society (and a government) by means of a social contract.

Although similar ideas can be traced to the Greek Sophists, social-contract theories had their greatest currency in the 17th and 18th centuries and are associated with the English philosophers Thomas Hobbes and John Locke and the French philosopher Jean-Jacques Rousseau. What distinguished these theories of political obligation from other doctrines of the period was their attempt to justify and delimit political authority on the grounds of individual self-interest and rational consent. By comparing the advantages of organized government with the disadvantages of the state of nature, they showed why and under what conditions government is useful and ought therefore to be accepted by all reasonable people as a voluntary obligation. These conclusions were then reduced to the form of a social contract, from which it was supposed that all the essential rights and duties of citizens could be logically deduced.

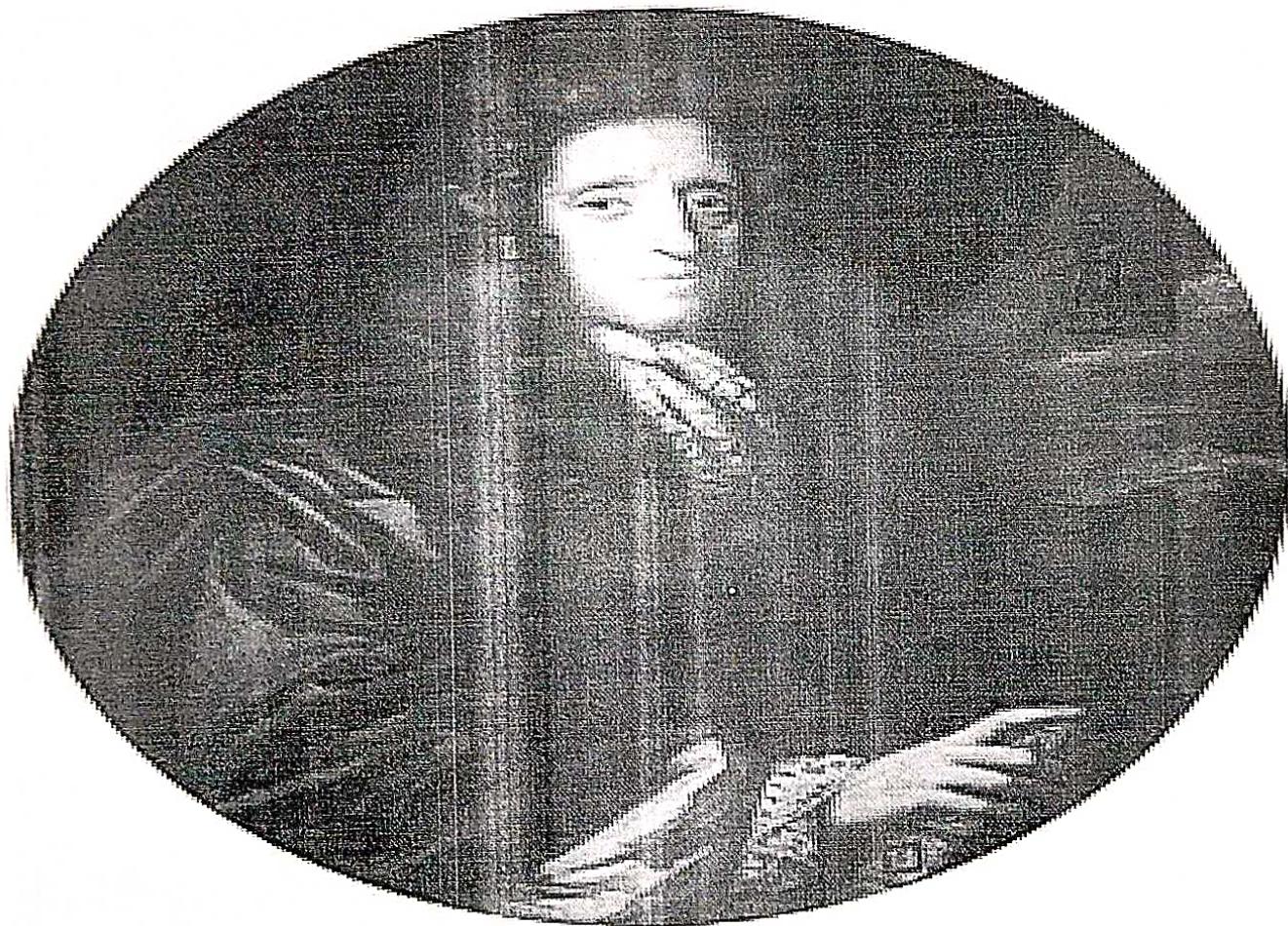
Theories of the social contract differed according to their purpose: some were designed to justify the power of the sovereign, while others were intended to safeguard the individual from oppression by a sovereign who was all too powerful.

### **The social contract in Hobbes**

According to Hobbes (*Leviathan*, 1651), the state of nature was one in which there were no enforceable criteria of right and wrong. People took for themselves all that they could, and human life was "solitary, poor, nasty, brutish and short." The state of nature was therefore a state of war, which could be ended only if individuals agreed (in a social contract) to give their liberty into the hands of a sovereign, on the sole condition that their lives were safeguarded by sovereign power.

For Hobbes the authority of the sovereign is absolute, in the sense that no authority is above the sovereign, whose will is law. That, however, does not mean that the power of the sovereign is all-encompassing: subjects remain free to act as they please in cases in which the sovereign is silent (in other words, when the law does not address the action concerned). The social contract allows individuals to leave the state of nature and enter civil society, but the former remains a threat and returns as soon as governmental power collapses. Because the power of Leviathan (the political state) is uncontested, however, its collapse is very unlikely and occurs only when it is no longer able to protect its subjects.

### The social contract in Locke



John Locke

Locke (in the second of the *Two Treatises of Government*, 1690) differed from Hobbes insofar as he conceived of the state of nature not as a condition of complete license but rather as a state in which humans, though free, equal, and independent, are obliged under the law of nature to respect each other's rights to life, liberty, and property. Individuals nevertheless agree to form a

commonwealth (and thereby to leave the state of nature) in order to institute an impartial power capable of arbitrating disputes and redressing injuries. Accordingly, Locke held that the obligation to obey civil government under the social contract was conditional upon the protection of the natural rights of each person, including the right to private property. Sovereigns who violated these terms could be justifiably overthrown.

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Locke thus stated one of the fundamental principles of political liberalism: that there can be no subjection to power without consent—though once political society has been founded, citizens are obligated to accept the decisions of a majority of their number. Such decisions are made on behalf of the majority by the legislature, though the ultimate power of choosing the legislature rests with the people; and even the powers of the legislature are not absolute, because the law of nature remains as a permanent standard and as a principle of protection against arbitrary authority.

# 3rd Written Assignment

## THE SOCIOLOGICAL JURISPRUDENCE OF ROSCOE POUND.\*

### Introduction -

To attempt within the confines of a paper of this length to summarize the thought of one of the most prolific of twentieth-century writers on jurisprudence may well seem an over-bold undertaking. A bibliography of Pound's writings compiled twenty years ago contained the titles of 15 books and of 241 major articles; and Pound's activity has not declined with advancing years. Fortunately perhaps for the reviewer of his work, much of what Pound has written and said is repetitious. This is particularly true of the publications of his later years, which, like so much of his printed work, were first delivered as addresses. The result is that it is possible to find in Pound's work a keynote, and certain recurring major themes. It is proposed in the succeeding pages (1) to expound and attempt to interpret certain of these themes, (2) to consider the major criticisms of Pound's views, and (3) to attempt to assess the value of Pound's theories as practical tools by sketching the application of certain of them to current legal and social problems. Inevitably there will be much left unsaid: Equally inevitably, as will no doubt appear to the reader, much of Pound's work has been left unread.<sup>1</sup>

The keynote of all Pound's work is to be found in a phrase used by Sir Maurice Amos in 1932 in his lecture on Pound at the London School of Economics,<sup>2</sup> a phrase which later received Pound's own approval:<sup>3</sup> "Jurisprudence cuts ice." Given that "law" has a purpose

\* This paper was originally prepared for a seminar of the Research School of Social Sciences at the Australian National University in August-November 1958. A revised version is to appear (together with other papers presented at the seminar) in a diplomat publication shortly to be distributed by that University. The paper has received some further revision (principally by way of fuller documentation) for publication in this REVIEW.

<sup>1</sup> Since the greater part of the work for this paper was done Pound's five-volume JURISPRUDENCE (St. Paul, 1959, hereafter cited simply as JURISPRUDENCE) has appeared and become available to the writer. Wherever possible reference to relevant passages of this work have been added.

<sup>2</sup> Roscoe Pound, in MODERN THEORIES OF LAW (London, 1933), 87, at 90.

<sup>3</sup> Sociology of Law and Sociological Jurisprudence, (1943) 5 U. OF TORONTO L.J. 1, at 20. It is true that Pound seems to have thought that the word "jurisprudence" was used by Amos as meaning only "sociological jurisprudence." Since one theme which Pound has developed is that in all ages jurisprudence has played an important part in marking out the tasks of law and in determining the content of law (see *infra*, note 5, and p. 308) it is fair to assume that he would still approve the phrase in its wider meaning.

to fulfil in society, Pound believes that human effort can be employed to make law more effective in fulfilling that purpose, and that the task of jurisprudence or legal philosophy—reflections about law—is to guide human effort in this direction.

But what is "law", and what is its purpose in society? Pound's views on these two questions must be considered first.

*The definition of "law" and the ends of law.*

Throughout the exposition of his legal philosophy Pound has spoken of "law" without attempting to define the term precisely. His typically pragmatic approach has been to assume that the nature of law may best be understood by what it does.

In three of his more recent series of addresses Pound sets forth<sup>4</sup> three apparently distinct ideas which have been described by the word "law":—

(1) "a regime of adjusting relations and ordering conduct by systematic and orderly application of the force of a politically organized society"—otherwise called the legal order.

(2) a "body of authoritative materials of or grounds of or guides to determination, whether judicial or administrative." This body of materials may be described more minutely as made up of authoritative precepts, an authoritative technique of development and application, and a background of received ideals<sup>5</sup> of the social and legal order.

(3) the judicial and administrative processes, the "process of determining causes and controversies according to the authoritative guides in order to uphold the legal order."

After pointing out that these are three distinct ideas, and that calling them by the one term has been a source of confusion in discussions on the nature of law, Pound says: "If the three meanings can be unified, it is by the idea of social control", and he goes on to put forward a tentative definition of law as "a highly specialized form of social control, carried on in accordance with a body of authoritative precepts,

<sup>4</sup> SOCIAL CONTROL THROUGH LAW (New Haven, 1942), 40-41; THE TASK OF LAW (Lancaster, Pa., 1944), 43-44, 52; JUSTICE ACCORDING TO LAW (New Haven, 1951) 48-50 (hereafter cited respectively as SOCIAL CONTROL, TASK, and JUSTICE); see now 1 JURISPRUDENCE, 12-14.

<sup>5</sup> It is as "received ideals" that the legal philosophies of the past have played their part in developing the law; and thus jurisprudence, in the larger sense, "cuts ice."

applied in a judicial and an administrative process." With a little tinkering, for example, by inserting in the first phrase a reference to the application of force, this tentative definition could be expanded into a comprehensive pragmatic and thoroughly "Poundian" (if the neologism may be pardoned) definition of law.

Given a definition of law as a highly specialized form of social control, what is its purpose? Pound would reply "social engineering"—a phrase he has used for nearly forty years.<sup>6</sup> Very broadly, one may distinguish between two classes of engineers. The job of the first is to keep existing machines running and to duplicate them where necessary. The task of the second is to design and construct new machinery for new purposes. The distinction between the two classes turns to a large extent on the availability of adequate tools and techniques. Pound's thesis of the five stages of legal development<sup>7</sup> is linked with an attempt to detect the end or ends of the law at each of these stages. One may apply the engineering metaphor to these by saying that as the tools and techniques of the law have developed the ends of the law have changed from those of the first class of engineer to those of the second.<sup>8</sup> In the "primitive stage" law was no more than a social instrument—indeed, the weakest of the three available social instruments—for keeping the peace, that is to say, ensuring that the machinery of society did not grind to a halt through excess of friction or break down through overstrain. It had neither the tools nor the techniques to do more. There followed a "stage of strict law", in which law had emerged as the prevailing agency to regulate society but operated solely through inelastic and inflexible rules: Its principal task was that of maintaining the general security by using the tools of certainty and formality to prevent and settle disputes. Next, in Pound's view, came the "stage of equity or natural law", in which the quest for certainty was modified by that for the ethical solution of controversies. One may say that the doing of justice, the satisfaction of the call for justice, appears as the

<sup>6</sup> Its first use appears to have been in *THE SPIRIT OF THE COMMON LAW* (Boston, 1921), 195-196; see also *INTERPRETATIONS OF LEGAL HISTORY* (Cambridge, 1923; hereafter cited simply as *INTERPRETATIONS*), c. vii, 141-165.

<sup>7</sup> *The End of Law as Developed in Legal Rules and Doctrines*, (1914) 27 HARV. L. REV. 195; see now 1 JURISPRUDENCE, 363-456.

<sup>8</sup> It seems clear, however, that law is not to be excused from its original task. In *SOCIAL CONTROL*, 64-65, Pound suggests that the "great task of social engineering" is "such an adjustment of relations and ordering of conduct as will make the goods of existence . . . go round as far as possible with the least friction and waste" (emphasis added). This sounds more like the job of a maintenance engineer (perhaps a "greaser") than of a design and construction engineer: Cf. *ibid.*, at 111-112.—"There is at any rate an engineering value in what serves to eliminate or to minimize friction and waste."

most efficient lubricant of the social machine. Fourth came the stage of "the maturity of law", in which the watchwords are "equality" and "security", which insists on property and contract as fundamental ideas, and which aims at releasing as far as possible individual energies for the development of society by permitting the maximum of individual self-assertion.

One would expect maturity to be the final stage of development, followed inevitably by senility and decay. But Pound adds a fifth stage, which he describes as that of the "socialization of law." It is at this stage that the task of law appears to have been enlarged. Law has been maturing in its role of "maintenance engineer." Even in the stage of maturity of law its function, characteristically described as that of "holding the ring", has been that of providing the stable social framework, or perhaps keeping the basic machinery of society running, so that other agencies of social development could operate. But this type of engineering is not enough for Pound. For him law in modern twentieth-century society must also play its part as an agency of social development. The task of law is now twofold. It is both to maintain and to further civilization.

What then is "civilization" and how may law advance it? For answer we turn to an exposition of the second of Pound's main themes to be discussed, that of the jural postulates of civilized society.

#### *Jural postulates of civilized society.*

A number of Pound's seminal ideas were borrowed from the German jurist Kohler.<sup>9</sup> From him Pound took the above idea of the twofold task of law, though Kohler seems to have thought that law at all stages has had this twofold task, while Pound recognizes it only in the last stage of legal development. From his writings comes the definition of "civilization" as "the social development of human powers toward their highest possible unfolding." From him finally come the ideas, first that the jurist, who is to lay out the lines of the creative activity of law, must have a clear picture whereby to do so, and second that such a picture may be gained by ascertaining and formulating the so-called "jural postulates of the civilization of the time and place." These postulates were described by Kohler as the ideas of right and justice which that civilization presupposes. Accordingly, the

<sup>9</sup> For Pound's debt to Kohler in this respect see INTERPRETATIONS, 143-144; see now 3 JURISPRUDENCE, 5-8.

# Legal Personality

## 11th Written Assignment

A juristic person is things, the mass of assets, a community of human beings or an organization on which one can apply the legal law. Juristic personality is the capability to have legal rights and duties. The nature of legal personality is a prior need for legal capacity and ability of any legal person to amend rights and duties. For the Judicial person, one has to incorporate in accordance with the law. On the other hand for the natural person, one has to acquire legal personhood by birth. Let us discuss the nature of personality in detail.

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## **persons- Nature of Personality**

According to Salmond, "A person is any being whom the law regards as capable of rights and bound by legal duties." There are two kinds of persons, Natural persons, and Legal persons.

Legal persons are juristic, fictitious or artificial persons and a natural person is a human being with a natural personality and as per law, is capable of rights and duties. A legal person has a real existence but its personality is fictitious, because such a thing does not exist in fact but which is deemed to exist in the eye of law.

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### **Legal Personality/ Juristic Personality**

We use the term “personality” for human beings alone because it is only them who can be the subject-matter of rights and duties, therefore of juristic personality. There are two essentials of a legal person such as corpus and the animus.

The corpus is the body into which the law infuses the animus on the other hand animus is the personality or the will of the person.

### **Nature of Legal Personality**

Legal personality is an artificial creation of law. Entities under the law are capable of being parties to a legal relationship. A natural person is a human being and legal persons are artificial persons, such as a corporation. Law creates such

corporation and gives certain legal rights and duties of a human being.

A legal personality is what provides a person or organization rights and responsibilities by the law. Usually, we automatically assume that Humans have a legal personality. This is so as such legal systems are built for the use of human beings. These days, the concept of legal personality is frequently a part of discussions about the rights or legal responsibility of the entities such as corporations that cannot be defined by a single person.



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## Solved Example on Nature of Personality

Explain the theories of the nature of legal personality?

Ans.

### 1. Fiction Theory

This theory says that the personality of a corporation is different from that of its members. Thus any change in the membership will not affect the existence of the corporation.

### 2. Concession Theory

It is concerned with the Sovereignty of a State. It pre-supposes that the corporation as a legal person has great importance because it is recognized by the State or the law. According to it, a juristic person is merely a concession or creation of the state.

### **3. Group Personality Theory**

This theory believes that every collective group has a real mind, a real will and a real power of action. So, a corporation has a real existence, irrespective of the fact whether it is recognized by the State or not.

### **4. The Bracket Theory or the Symbolist Theory**

It states that the conception of corporate personality is important and is an economic device by which we can simplify the task of coordinating legal relations. Thus, it emphasizes that the law should look behind the entity to discover the real state of affairs.

### **5. Purpose Theory or the theory of Zweck Vermogen**

It declares that only human beings can be a person and have rights. It also states that a juristic person is no person at all but merely a subject-less property meant for a particular purpose. There is ownership but no owner. Thus a juristic person is not constructed by a group of people but based on some object and purpose. Only living things can be the subject-matter of rights and duties.

### **6. Kelsen's Theory of Legal Personality**

According to it, there is no difference between the legal personality of a company and that of an individual. In the legal sense personality is only a technical personification of the norms with the assigned rights and duties.

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