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DISTRIBUTIVE JUSTICE THROUGH CONSTITUTION

By

—P. SASIKALA, M.Com., L.L.M.

Upon 18th century, justice and natural law concepts were almost treated as synonymous. During the last three centuries, the trend was that 'although Natural Law thought' was a force to be reckoned with, attention to the broader ambit of 'Justice' as such has come to the fore. A theory of justice depends upon several factors like 'social values' which constantly change from time to time. The pragmatic approach to justice goes further. It proposes as a practical test of justice, the capacity of the law to achieve the purposes which men demand of it. Thus the theory of justice represents a study of the purposes or ideals which men seek to realise through law. 'The quest for justice' observes Prof. *Dias*, 'has been as challenging as the quest for the Holy grail and as elusive.

That the observation of Prof. *Dias* regarding the concept of justice is true would be clear when we consider the following:

'Distributive justice' is based on the principle that there has to be equal distribution among equals. To some, this is because justice is a *will-o'-wisp*, to others it is too vast to be encompassed by one mind. The master mind of *Aristotle* (384-322 B.C.) was superior to most people's and his pioneer analysis still serves as a crucible into which even modern craftsmen continue to pour problems of the 20th century in hope that an acceptable brew will emerge. In dealing with the 'Particular justice' as distinct from 'universal justice', he distinguished between 'distributive' and 'corrective' justice.

Corrective justice seeks to restore equality when distributive justice has been disturbed. *Eg.*, wrong doing, which assumes that the situation that has been upset was distributively just. *Aristotle* spoke of the distribution of honours or money or the other things that fall to be divided among those who have a share in the Constitution.

Equal distribution among equals means that according to a given criterion of discrimination unequal cases are to be treated differently, which still leaves open the question whether it is just to select that particular criterion.

If we speak of the 'sense of injustice', it is true that persons with grievances are more who raise the question of justice. Therefore, there is much to be said for this angle of approach, but the problem goes deeper. It is not enough to work out a just scheme of distribution, from whatever point of view; but there is the further problem of getting it accepted and keeping it acceptable, which requires constant redistribution according to changing circumstances.

In the Aristotelian view, it is clear that justice and equality are considered synonymous. But whereas equality is one of the factors only which constitute the concept of justice. 'Justice is a process, a complex and shifting balance between many factors of which equality is one'. As *Friedrich* rightly remarks: 'Justice is never given, it is always a task to be achieved.'

The concept of justice mainly centres round the following aspects:

- (a) The allocation of advantages and disadvantages,
- (b) Preventing the abuse of power and liberty,
- (c) Deciding disputes, and
- (d) Adopting to change.

Aristotle's 'distributive justice' would be associated mainly with the allocation of advantages and disadvantages. His corrective deals mainly with the deciding disputes.

But, modern writers approach of justice is of different from *Aristotle*.

For instance Prof. *Honare* suggests that it would at least be 'refreshing to look at justice, not from the Aristotelian point of view of the 'Just Man' but from that of the citizen to whom just treatment is due. From a similar point of view *Cahn* speaks of the 'Just Scheme of Distribution', it depends on people feeling that the scheme is atleast 'not unjust'. Prof. *Honare* observes 'what is at one time a luxury becomes at another time a necessity and need'. Accordingly, all schemes of distributive justice will be brought to nought if the more that is given the more is demanded 'as of right'. To recall the lines of *Oliver Goldsmith*:

"Ill fares the land, to hastening ills a prey where wealth accumulates, and men decay." (The Deserted Village)

The aspect of distributive justice mainly concerned with the allocation of advantages and disadvantages. It concerns with the "things" that fall to be distributed. *Dias* remarks "It is not enough to refer to them simply as advantages and disadvantages". All such terms need to be categorised more precisely.

Advantages may be divided into claims, liberties, powers and immunities. With regard to claims, these can be divided into claims against individuals and claims against the State. The allocation of the former presents no difficulty since the fulfillment of the duties rest largely on choice, eg. contractual claims and duties. The allocation of the later type of claim depends on State policies, eg., that the State shall provide basic subsistence. The advantages which are generally desired and are in fact conducive to their well-being things as life, health, food, shelter, clothing, places to live in, opportunities for acquiring knowledge and skill for showing in the process of making decisions for recreation, travel, etc. Men not only have a claim to these things but to an equal share in them. The Directive Principles of State Policy incorporated in Part IV of the Indian Constitution are noteworthy in this connection.

Under Article 38, the State shall strive to secure "a social order for promotion of the welfare of the people, a social order in which justice, social, economic and political shall inform all the institutions of the national life".

After claims, with regard to liberties the problem is not one of equal distribution but whether some should be allowed at all. eg: liberties to kill, maim steal and if they are allowed, how their abuse can be prevented. In the unrestrained exercise of liberties lies the greatest threat to the scheme of distributive justice. Article 21 of the Constitution of India, for instance lays down that "no person shall be deprived of his life or personal liberty except according to procedure established by law". American Constitution provides "no person shall be deprived of life, liberty or property without due process of law". It is, therefore clear that even the rights to life and personal liberty are subject to limitations like due process of law.

The distributive justice in regard to powers are subject to wholly different considerations. There should be equal distribution of some *e.g.*, power to contract, subject of course to obvious denials *e.g.*, to the insane. Other kinds of power cannot in their nature be equally distributed *e.g.*, the power to decide what are basic needs when they are satisfied and what is a just distribution and such others come to fore-front in this regard. The point is that decisions on such questions as these can not depend on a formula and the allocation of power to decide them can hardly be determined on a principle of equality. To give it to one person is to court tyranny to give it to all is not possible. With powers, therefore the question of justice is not one of equal distribution, but of preventing their abuse. Article 50 of the Indian Constitution lays down; "The State shall take steps to separate the judiciary from the executive in the public services of the State".

Next we come to the distribution of immunities. This aspect has a different angle from that of claims. Claims are demandable by all so that denial in a special (immunity) case needs to be justified, whereas it is not denial in a special immunity that requires justification. It may be mentioned that the Indian Constitution subjects fundamental rights in Part-III to reasonable restrictions and makes provisions for special treatment wherever required in favour of weaker sections of community and women for the purpose of achieving social justice. Thus Article 16 deals with equality of opportunity for all citizens, in matters of public employment. Clause (4) of the Article however lays down:- 'nothing in the Article shall prevent the State from making any provision for reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the service under the State.'

Different considerations apply to distribution between individuals and over the communities and sense of injustice works differently with different kinds of advantages and disadvantages.

Disadvantages:—The most abundant of these are duties and liabilities. Their distribution assumes various forms and various criteria are adopted to justify the unequal or equal distribution of these disadvantages. The following may be mentioned as examples in this connection.

- (a) Imposition of scaled taxation,
- (b) The liability to rationing in times of shortage,
- (c) Expropriation or destruction of property in emergencies, *etc.*

In *Roberts v. Hopwood*, the House of Lords invalidated a scheme drawn up by a local Council, on the ground that it distributed the financial burden of it unequally among rate payers, with regard to disabilities when these affect large numbers of people the question of justice concerns their removal so as to produce equality of advantages rather than their imposition, *E.g.*, those formerly attaching to jews, catholics, agnostics and even today to members of certain races in countries where a racial policy obtains. Article 17 of the Indian Constitution may be noted in this connection which reads:- 'untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law.'

It may be pointed out in this connection that certain fundamental duties have been imposed on every citizen by the 42nd Amendment Act, 1976. These include: Respect for the Constitution, respect for National Flag and National Anthem, Duty

to defend the Country, to safeguard public property, to abjure violence to promote brotherhood and dignity of women, to develop a scientific temper and to strive for excellence. The object is to make every citizen realise that he has certain duties towards society. The correlative right is in the society. The inspiration for the part dealings with fundamental duties is the Constitution of USSR. The Soviet Constitution requires its citizens 'to respect the Constitution, observe the law, maintain labour discipline and honesty in the performance of public duties and to respect the rules of the socialist community.'

The duties and the liabilities are to be distributed in such a way as to minimise inequalities.

Part-III of the Constitution dealing with Fundamental Right is a great chapter of liberty. It has made our Constitution sublime by guaranteeing against State interference, certain rights vital to the freedom and well-being of the people. At the same time, it must be pointed out that all the Fundamental Rights guaranteed are subject to reasonable restrictions. In fact, there is a general criticism that 'under

Part-III of the Constitution, the fundamental rights are riddled with so many exceptions that the exceptions have eaten up right altogether.'

To avoid abuse of rights and liberties, to establish a socialistic pattern of society and to preserve the integrity and sovereignty of the Nation, such restrictions are not only desirable, but also necessary.

Foot Notes:

1. *Holy Grail* :—The holy vessel containing the last drops of christ's blood brought to England by *Joseph of Armathea* and being afterwards, lost eagerly sought for by king *Arthur's Kings*.
2. *Nice Machean Ethics V (Trams Rackh)*.
3. *Homore* 'Social Justice' in Legal Philosophy, (ed summers). 61 at 68-69.
4. *Nicomacheam Ethics v.2*.
5. *Caln the dense of Justice* (1949).
6. *Reoberts v. Hopwood* (1925) AC 578.

EXTENT OF AGENT'S AUTHORITY UNDER THE INDIAN CONTRACT ACT SECTION 188

By

—A. RAJESH KUMAR, B.Com., LL.M
Advocate, Hyderabad

The extent of Agent's authority under Section 188 has an vital impact on contractual obligations under the Indian Contract Act. An agent having an authority to carry on business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting

such business, implied authority decided on circumstances of each case, *Shah Moham v. Ahmed Ali*, AIR 1935 Oudh 170 (173). If a case falls within the section, the third person can hold the principal liable on the Act or contract itself, because by the term of the section the agent's authority to bind the