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# **THE DYNAMIC ROLE OF LAW IN RELATION WITH THE IDEA OF JUSTICE**

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## **Abstract**

Law regulates social relations, marriage, contracts, property in our society. Law brings about social changes and gets itself amended from time to time. Therefore law being instrumental in social changes has been defined by various jurists and legal experts. One of the aims of law is to deliver justice. But the idea of justice has always remained fluid and elusive in many ways. Many legal philosophers tried to examine the concept of justice and studied it in relation with law.

**Key words-** Law, justice, society, legal system, rights

## **Law and its Dynamic Role**

Once we begin to think of society, it appears that it is the aggregate people living together in an organized manner following certain notions, rules and customs. Naturally in a civilized society people exchange goods, get engaged with each other in relationships, inherit property and so forth. This leads to the matters such as family, marriage, succession, possession, contracts, and property. Ehrlich asserts that these matters are “legal affairs unthinkable without a law.”<sup>1</sup> They are inscribed within the law and law regulates them in a particular society. Ehrlich further contends that the social order rests on these fundamental social institutions such as marriage, family and law; consequently, the stability of the social order depends on the proper settlement of the issues of possession of property, contracts, and succession. Brian Tamanaha endorses the same view stating that law is a mirror of society and the major function of law is to maintain social order.<sup>2</sup> Lawrence Friedman, a legal historian, follows the same line of thinking arguing that “legal systems do not float in some cultural void, free of space and time and social context: necessarily they reflect what is happening in their societies.”<sup>3</sup> These social institutions are not perceptible as such but are experienced when persons in their social

relations perform some act in their dealings according to the established norms and rules (laws). It implies that a great deal of law arises thereafter in society in order to regulate social relations, performance of contracts, family relations, marriages, succession and property. At the same time it is pertinent to note that social order is always in a state of flux and does not remain unchangeable. It is capable of being refashioned from time to time. It means that the law undergoes modifications and complete alterations/peel in response to the changes in the current social and political values of the dominant culture.

Law, being so varied, complex and hotly disputed for centuries together, it is almost impossible to present its systematic and rigorous analysis here within a small space. However it would be appropriate to throw some light on the concept of law in the context of the present article briefly as it is clear from the above deliberation that law plays a significant role in social order. A layman can have a plethora of fundamental questions about law: What is law? Where does it come from? How is it binding? Does law differ from morality? What is a legal system? How does law seem to be an independent institution in the society? And how does it work? These questions need to be responded in the present research as it is an interdisciplinary work and general readers may not be able to grasp the thread of the argument in the absence of the discussion about the concept of law.

Law is a rather complicated socio-political institution. It has been there in every society in some form or the other since the ancient times. Roscoe Pound makes a point about how Greeks looked at law by citing Demosthenes' address to an Athenian jury. Demosthenes asserts that men ought to obey law because laws are prescribed by God; they were traditions coming from wise men based on old customs; they are principles from an eternal and immutable code and they were agreements of men with each other binding them as a sort of moral duty to keep their promises.<sup>4</sup> The Greeks considered no distinction between law and morals. The three points made by Demosthenes were behind following the law strictly and they give us an idea as to how law was considered earlier and why even today some people claim that law is self-sufficient and independent.

Romans considered law somewhat in the same way. They lived by the laws developed by way of customs that they lived by. Later these customs were transformed into written laws in order to remove disparity and confusion. This led to the development of natural law applicable to the people of the nation and it was based upon common principles and reasoning that humankind

and societies live by and share among themselves. The Roman lawyer, Cicero argues that the true law is right reason in consonance with Nature. Laws need to be in conformity with reason or they would be invalid. Rules and principles percolated from the writings of Cicero, Gaius, Paulus and others and became the framework for life. What was at the centre for the Romans is that rules come from law and law from justice and not the opposite. Justice comes before law and therefore they believed that Nature prevails over law.<sup>5</sup> The Emperor of Rome, Justinian, contributed immensely to the compilation of the Roman civil laws which has shaped the Western society. These laws have a lot of influence on the Western Europe and to some extent on the English common legal system, which has massively impacted the American law.

Given the views of the Western ancient cultures about law, it is abundantly clear that law finds its origin in society. Besides, it is also very clear that law and justice are also closely connected with each other. Nature precedes law in terms of its existence, which has led to a strong debate about the distinction between positive law and natural law among jurists and scholars in the last one hundred years or so. Aristotle does not draw any distinction like this in respect of law. In his *Nichomachean ethics*, he states that law is what is just in itself, may be by nature or by an idea in itself and it may be in custom or enactment. Pound believes that Nature for all these Greeks was a perfect object expressing completely a perfect idea of a thing giving complete development to their subject (10). But it is essential to note that natural law gave us natural rights inherent in human beings and demonstrated by reason. Similarly, Americans believed that natural law is derived from free government leading to the belief that natural rights are in the datum of individual free will. And some legal thinkers turned to the belief that the legislator should make law by a principle of utility, meaning thereby the greatest total happiness of an individual was to be the aim of law making process. Pound further asserts that at the end of the nineteenth century the utilitarian theory of law was also superseded by positivist sociological thinkers and they emphasised that all phenomena determined by natural law would be followed by observation. This actually resulted in controlling all moral, social and legal aspects that were governed by laws and remained beyond the power of conscious human control (Pound 21-22). If we consider this entire debate, it helps us understand how law has been shaped and defined by many scholars and in many dictionaries. William Blackstone, English jurist, in his *Commentaries on the Laws of England*, defines law as “a rule of conduct prescribed by the supreme power in a state commanding what is right and prohibiting what is wrong”. John Austin defines law in *Province of Jurisprudence Determined* (1832) as “a body of rules fixed and enforced by a sovereign political authority.” Kelsen states “law is the primary norm which

stipulates the sanction.”<sup>6</sup> It would be also appropriate to consider how the term, law, has been defined in legal dictionaries. The Longman Dictionary of Law comprehensively defines law as “the written and unwritten body of rules largely derived from custom and formal enactment which are recognized as binding among those persons who constitute a community or state, so that they will be imposed upon and enforced among those persons by appropriate sanctions.”<sup>7</sup> The Oxford Dictionary of Law (2002) defines it as “the enforceable body of rules that govern any society.”<sup>8</sup> Merriam Webster Dictionary (2008) considers it as “the whole system or set of rules made by the government of a town, state, country etc.” or “a binding custom or practice of community: a rule of conduct or action prescribed or formally recognised as binding or enforced by a controlling authority.”

If all the definitions given above are taken into account carefully, it appears that there are three crucial factors in them: rules or a set of rules, conduct or action of a person or practice and sovereign authority or state that is the rule enforcing agency. When the element of conduct or action or practice emerges, it means that whatever is right or legal is upheld and whatever is wrong or prohibited in every manner in the eyes of law has to be prevented and is not to be permitted. It clearly implies that in order to do so, there has to be a system for its implementation. The system that implements this entire process is recognised as a legal system. Therefore the legal system means a procedure or process for interpreting and enforcing the law and which elaborates the rights and responsibilities of citizens. In a wider sense it includes various legislations, executive authorities, judiciary, lawyers, the police and so forth. It is used for both criminal and civil laws. When it comes to states, it is referred to by the name of that nation for the reason that laws, the hierarchy of courts and political structure may be different in different states- the American legal system, the Indian legal system, the English legal system.

Both law and the legal system exist in society and work together. However people generally use the term, law, for everything in respect of civil and criminal laws, courts and justice. Interestingly law substitutes justice in its practical sense for people. People tend to believe that when something goes against them and someone violates their rights, they already presume that *law is there* (emphasis added), meaning thereby law will protect them and administer justice in a legal manner and truth will always prevail. Law seems to be an embodiment of justice and consequently justice is an embodiment of truth. So the notions of justice and truth are supposed to be metaphysical absolutes for law. This is absolutely misleading and a kind of misconception, though the term law is wider in its nature. Moreover, while deliberating upon

criminal trials, Theodore L. Kubicek implies in his book, *Adversarial Justice* (2006) that “truth and justice are not synonymous” (4). In this way there are general ideas of about law, that is, what law is and what it does. The author of the paper follows the argument that justice and law are profoundly co-related with each other but vehemently refutes that they are one and the same and this refutation is a core part of the entire argument in the present research. In order to streamline the investigation properly further and to examine the above statement in the light of literature, particularly the selected novels, the researcher now would like to look into the concept of justice.

### **The Idea of Justice**

Plato (in his *Republic*) and Aristotle (in his *Politics*) believed that a politically democratic society is intrinsically unjust and the equal are treated as if they are unequal because of their wealth, birth, knowledge and the like, which is actually true. Therefore, the society is always in conflict and in want of justice. Hence it is essential to consider what justice is exactly. It has to be remembered in the first place that justice precedes law. Justice, being a crucial moral and political concept, its nature has been widely studied by philosophers and political thinkers since the ancient times. It comes from a Latin word, *jus*, which means right or law which was supposed to be synonymous with justice. However, the Oxford Dictionary of Law defines justice as “a moral ideal that the law seeks to uphold in the protection of rights and punishment of wrongs.” Longman's Dictionary of Law says that the basic value underlying a system of law, or the objective which that system seeks to attain. Merriam Webster Dictionary (2008) defines it in an objective way saying that “the maintenance or administration of what is just especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments.” The ninth edition of Black's Law Dictionary puts it in a succinct manner by stating that justice means the fair and proper administration of laws. All the definitions indicate solving the disputes in an objective manner by applying laws.

Different ideas and intuitions of justice have been represented and shared by people from time to time as it has been believed for long that the capacity for a sense of justice lies with human beings only due to their use of language. In the ancient times the idea of justice was not related to the concept of freedom and equality but it was rather related to vengeance or retribution in a very restricted sense (Johnston 15-16).<sup>9</sup> Considering the society's terrain, that is, the structural map of society in respect of hierarchical relationships in it, Johnston comprehends it from the perspective of the recent developments in the theoretical understanding of justice. Hence, he

writes that the imbalanced structure of society in relation to entitlements and obligations of its members creating reciprocal inequalities among them has been the genuine base behind the conception of justice (34-36). Along with the dictionary meanings of justice, it appears to be pertinent to trace its historical understandings in brief.

Since the concept of justice was quite closely related to ethics in the Greek times, Plato in his book, the *Republic*, reflecting the argument with Socrates, considers justice as a virtue of individuals and societies. All human beings possess diverse capabilities and they should devote themselves to their performance so that they could develop a just city. For Plato it is an ideal state of human beings. Aristotle is quite practical and rational rather than becoming egalitarian in his meaning of justice. He states that justice is a social virtue consisting in what is fair and what is the good of others. Justice being fairness is against any bad end/evil and he relates it to a good life. He believed that there are two types of justice- distributive and corrective justice. In his classification of justice he considers the principle of equality and contends that distributive justice resides in the distribution of property, goods and such other elements to the citizens on the equal basis. To him, corrective justice means compensating the loss of a person to whom the wrong has been committed.<sup>10</sup> Aristotle contends that the rights of the citizens need to be protected and there should be an equal distribution of goods, offices and opportunities among the public in their proportional shares, thereby suggesting the notion of equality embedded in the idea of justice. Cicero also contends about justice that since all human beings possess reason, they try to have understandings of justice that is rooted in nature. Human beings are obliged to have just dealings with one another and to be just among themselves. Therefore justice is universal (Johnston 95).

The concept of justice has been a focal point of discussion among modern thinkers of political and legal philosophy. Particularly utilitarians think of it rather differently. Bentham, a legal philosopher and follower of Hume, believes that society is a matter of human conventions and human beings are capable of promoting their ends. He says, “justice, in the only sense in which it has a meaning, is an imaginary personage ... whose dictates are the dictates of utility, applied to certain particular cases.”<sup>11</sup> Whatever people perform, they do it with the purpose of pleasure. Hence he notes at the very beginning of his popular book, “Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do.”<sup>12</sup> In order to obtain pleasure we eliminate or minimize evil or pain. Therefore, he is the one who states in his *A Fragment*

on *Government*, “it is the greatest happiness of the greatest number that is the measure of right and wrong” (quoted in Johnston 132-33). Johnston interprets this principle in relation with the intention of laws that, “The laws in general and penal laws in particular should be evaluated ‘from the point of view of whether or not they conduce to the greatest happiness shared among the greater number.’”(Johnston 132) In a sense, if the utility of an action or thing increases pleasure, benefits or advantage, it should be allowed by the law and if not, it should be discarded forthwith.<sup>13</sup> So, the idea of justice was connected with the principle of utility.

J S Mill and Henry Sidgwick made a substantial contribution to these theoretical underpinnings. Their concept of justice is based on the norms to be followed by persons and on the institutions to implement them in order to have the greatest happiness. The institutions should try to maximize the happiness of their members by using people’s efforts in the most productive manner. Then they propose the moral requirement for this that a person who will commit an act of injustice will face punishment. (Miller). But Mill makes a crucial point in view of the nineteenth century socio-political conditions that in order to increase pleasure, a human being should be allowed freedom for self-development or expressing themselves (Warnock 10). This is how justice and utility are connected for utilitarians in the notion of human well-being or maximizing the happiness of an individual or of society in the respective matters, as the case may be. However, judging the rightness or wrongness of a case or policy on the basis of its consequential contribution to the well-being of the society came under severe attack from critics later. This is how they moved to the general rule of morality in their idea of justice.

### Conclusion

The meaning of justice stated in the dictionaries above directly and indirectly implies the protection of rights of individuals and settling their claims through the proper administration of cases and laws and policies. However, when it comes to the point of rights and duties of human beings, it raises the concern with the protection of them and punishing criminals for committing criminal wrongs. In this context the idea of rights in relation with justice had remained sadly unexplored till Immanuel Kant came up with a brilliant conception of human being. He finds flaws in the utilitarian concept of the greatest happiness and discards it as it does not promote justice truly among all.

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