

Law and Ideas of Justice

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1

I feel very privileged to be here at this Law and Literature Conference at the distinguished John Jay College.¹ I take the liberty of beginning with a conversation in a Sanskrit play from the 4th century, called *Mricchakatika*, written by a hugely talented and quite radical playwright called Shudraka; *Mricchakatika* means “a little clay cart.” It was one of the leading plays in the golden age of Sanskrit drama—in the middle of the first millennium. At one level, this is a moving love story, involving an upright but not wealthy citizen, called Carudatta, and Vasantasena, a beautiful and kindly courtesan. Their love for each other makes them face many social barriers, but despite them, they are ultimately united. This is the principal romantic theme of the play. But the play is enormously involved with people’s suffering from the social malpractices of the rich and the powerful, who behave atrociously towards the less privileged, including trying to kill both Carudatta and Vasantasena. The play is certainly a powerful social critique, in addition to the romantic story it tells.

Towards the end of *Mricchakatika*, the misrule and abuse of power is successfully challenged and defeated, and the play ends at the time for the judgment of the overthrown tyrants and villains. In the new regime, Carudatta is given the power to govern the local territory, and asked to judge what punishment should be given to the culprit who had earlier attempted to murder him. Carudatta understands that the villain could indeed be severely penalized given the punishment that is supposed to fit his crime. But he orders that the criminal—now repentant and abjectly asking for forgiveness—should be set free. Carudatta explains, in an expression that I thought was truly memorable when I first read this Sanskrit play at the age of fourteen or so: “it is our duty to kill him with benefaction.” I found the beautiful Sanskrit phrase—*upkarhatasta kartavya*—to be quite intriguing, but immensely thought provoking.

The pardoned would-be murderer expresses his grateful delight and leaves as a free man. In the closing remark with which this play ends, Carudatta makes clear that his main priority is not tit-for-tat justice, but to make the world go well—with prosperity, happiness, and security for all. It is fair to guess that the idea of “killing by benefaction” (Sudraka 174)²—*upkarhatasta kartavya*—represents an idea that is a part of Carudatta’s program of reform, restraining the temptation to mete out just desserts to all.

1. A lecture given at John Jay College on March 29, 2012.

When an English translation of *Mricchakatika*, *The Little Clay Cart*, was staged in New York in 1924, the drama critic of the *Nation* (Joseph Wood Crutch) noted, in a rave review, that he found the drama “profoundly moving,” and went on to declare his deep admiration for the play in rather stunning terms: “Nowhere in our European past do we find....a work more completely civilized.” Crutch pointed to the understanding that “passions” are being “reconciled with decisions of an intellect.” And yet, in a complicated statement, he says that he found the play to be “wholly artificial,” but explains that it was “wholly artificial yet profoundly moving,” precisely “because it is not realistic but real” (ctd. in Nehru 164).

There is, I suppose, a sharp distinction to be made between being “real” as opposed to “realistic,” but I am not going to enter into examining that intricate hypothesis in this lecture. Rather, what I am going to pursue, as a kind of an introduction to my talk on “Law and Ideas of Justice,” is the contrast between two ideas of justice both of which can be found plentifully in ancient Indian discussions of justice. Since I have made use of that distinction in my book *The Idea of Justice* (2009)—a book that will be subjected to critical scrutiny in the conference that will get into full gear tomorrow—there is perhaps a case for me to focus a bit on that conceptual distinction here.

2

A good point to start is the contrast between two concepts of justice, identified as “*niti*” and “*nyaya*,” both of which stand for “justice” in Sanskrit, but in rather different ways.³ Among the principal uses of the term *niti* are organizational propriety and behavioral correctness. In contrast with *niti*, the term *nyaya* stands for a comprehensive concept of realized justice. In that line of vision, the roles of institutions, rules, and organization, important as they are, have to be assessed in the broader and more inclusive perspective of *nyaya*, which must take into account the nature of the world that actually emerges, not just the institutions or rules we happen to have. I am interpreting Carudatta’s priority to be the pursuit of *nyaya* for a good world, rather than obeying the *niti* of fixed rules, including required punishments that are supposed to fit the crime in question.

2. William Ryder, in his translation, elected to spell the male protagonist’s name “Charudatta,” whereas Sen’s translation from the Sanskrit has rendered the name with an English spelling of “Carudatta” [the Editors].

3. There are also several other words in Sanskrit that stand broadly for what can be called “justice” in English, but these alleged “synonyms” are never quite that, since they have varying connotations and functions (just as “*niti*” and “*nyaya*” do).

To consider a particular application, early Indian legal theorists talked disparagingly of what they called *matsyanyaya*, “justice in the world of fish,” where a big fish can freely devour a small fish. We are warned that avoiding *matsyanyaya* must be an essential part of justice, and it is crucial to make sure that the “justice of fish” is not allowed to invade the world of human beings. The central recognition here is that the realization of justice in the sense of *nyaya* is not just a matter of judging institutions and rules, but of judging the societies themselves. No matter how proper the established organizations might be: if a big fish could still devour a small fish at will, then that must be a patent violation of human justice as *nyaya*.

Let me consider an example, which I have analyzed more extensively in my book, *The Idea of Justice*, to make the distinction between *niti* and *nyaya* clearer. Ferdinand I, the Holy Roman emperor, famously claimed in the sixteenth century: *Fiat justitia, et pereat mundus*, which can be translated as: “Let justice be done, though the world perish.” This severe maxim could figure as a *niti*—a very austere *niti*—that is advocated by some: indeed, Emperor Ferdinand did precisely that. However, when we understand justice in the broader form of *nyaya*, it would be hard to accommodate a total catastrophe as an example of a just world. If indeed the world does perish, there would be nothing much to celebrate in that accomplishment, even though the stern and severe *niti* leading to this extreme result could conceivably be defended with very sophisticated arguments of a different kind.

As the example of *matsyanyaya* also makes clear, the subject of justice is not merely about trying to achieve—or dreaming about achieving—some perfectly just society or social arrangements, but about preventing manifestly severe injustice (such as avoiding the dreadful state of *matsyanyaya*). For example, it was the diagnosis of an intolerable injustice in slavery that made abolition an overwhelming priority, and this did not require the search for a consensus on what a perfectly just society would look like. We need a comparative approach that can identify the benefits from the removal of a particular injustice even though the world after that removal would still not be, in any obvious sense, perfectly just.

3

It is easy to accept that the pursuit of justice is a critically important virtue, and law must somehow be geared to that pursuit. And yet, there are many different—and competing—ways of thinking about justice. There is, of course, quite a large literature on justice in formal philosophy, going back at least to Thomas Hobbes in the seventeenth century. We can ask: how much help can we get from this intellectually rich literature on the philosophy of justice? I have argued in *The Idea of Justice* that the answer is: we do get some help, especially in terms of inspiration, but we do not get an adequate theory of justice for practical reason from the Hobbesian approach (and from its many modern versions), and we have to work towards a real departure from the established traditions of theories of justice. And that is what my book, *The Idea of Justice*, is principally about.

The need for such a departure arises both from considerations that are immediately practical—in the most obvious sense—as well as deeply foundational. The distinction between *nyaya* and *niti* is, I would argue, quite central to identifying what departure we may actually need from the leading theories of justice in mainstream philosophy (not only Rawls’s “justice as fairness,” but also the theories of justice presented by Robert Nozick, Ronald Dworkin, David Gauthier and others).

There is, to start with, something of a tension between the theories of justice in political philosophy and the use made of the idea in public debates and practical reasoning. Formal theories of justice, since the days of Thomas Hobbes in the seventeenth century all the way to the contemporary theories of justice, have been dominated by the idea of a “social contract”—a contract between the citizens of a state that all the citizens would have reason to endorse. The social contract would outline certain agreed “principles of justice,” which would identify perfectly just institutions to be set up in any particular country, to be supplemented by perfectly compliant behavior of all the citizens. This way of seeing justice is woven around the idea of an imagined contract that the population of a sovereign state could be imagined to have endorsed and embraced.

It is, however, not at all obvious that this is a really good way to proceed. Even if we could identify—and agree on—what would be a unique set of perfectly just institutions (they may be what a perfect *niti* may demand), that need not tell us much about how to compare different realizations of *nyaya*, which must be sen-

sitive to the different states of affairs all of which may fall short of perfection—as all actual possibilities would tend to do. The real exercise of practical significance is about ranking and choosing between various *non-ideal* states of affairs, and the theory of the “ideal” can only be of limited help in ranking the actual possibilities.

There are two distinct issues here. First, our focus need not be only on *institutions*, as it is in the social contract approach, supplemented by some kind of a hope of perfectly compliant behavior by all (on the rather abstract ground of assuming that they must behave right since they can see themselves as parties to the hypothetical social contract). We can go beyond institutions—important as they are—to pay direct attention to the nature of the lives that people are actually able to lead and the actual freedoms they enjoy, which would depend on a variety of influences—not just institutions. Of course, institutions must always be among the important determinants of what happens, and sometime, they would be constitutively related to the acceptability of the lives that we are able to lead. We cannot withdraw altogether from judging injustice partly by how people’s lives actually go—taking all dimensions into account. Justice cannot be indifferent to what actually happens, and terrible outcomes cannot be made to look acceptable because they resulted from what were taken to be “ideal institutions.”

Second, rather than following the contractarian tradition of beginning the exercise by asking what is “perfect justice,” or what principles should govern the choice of perfectly *just institutions* for the society, we can argue for asking about the identification of clear cases of injustice on which agreement could emerge on the basis of public reasoning (even in the absence of an agreement on the nature of “perfect justice”).

With that introduction, let me then go on to discuss an alternative line of reasoning that I have tried to present in my book. After that, I will try briefly to address the question of how the differences in the ideas of justice—and indeed of theories of justice—may have some bearing on law and on legal theory.

4

The social contract approach concentrates on identifying perfectly just social arrangements, thus taking the characterization of “just institutions,” along with compliant human behavior, to be the principal—and often the only identified—task of the theory of justice. After being pioneered by Thomas Hobbes in

the seventeenth century, this approach received major contributions from John Locke, Jean-Jacques Rousseau, and Immanuel Kant, among others (even though Kant's reasoning on ethics and political philosophy had many other elements as well, on which we can draw—as I myself have done—even if we do not wish to take the social contract route).

The contractarian approach has been the dominant influence also in modern mainstream political philosophy, led by perhaps the greatest political philosopher of our time, John Rawls, whose classic book, *A Theory of Justice*, published in 1971, includes a definitive presentation of the social contract approach to justice.⁴ The principal theories of justice in contemporary political philosophy—coming not only from Rawls but also from Robert Nozick, Ronald Dworkin, David Gauthier and others—though different from each other in specific content, draw in general on the social contract approach, and concentrate on the search for ideal social institutions.

In contrast with contractarian theorists, a number of other Enlightenment thinkers (beginning with Adam Smith, the Marquis de Condorcet, and Mary Wollstonecraft, and extending later to John Stuart Mill, Karl Marx, and Henry Sidgwick, among others) took a variety of approaches that differed in many ways from each other, but shared a common interest in making comparisons between different ways in which people's lives may go, jointly influenced by the working of institutions, people's actual behavior, their social interactions, and other factors that significantly impact on what actually happens.

In arguing, for example, for the abolition of slavery, as the Marquis de Condorcet, Adam Smith, and Mary Wollstonecraft all did, they did not have to seek an agreement on the nature of the perfectly just society, or the characteristics of ideally just social institutions. We can agree on the manifest injustice of particular institutions and behavior patterns even without having the same view of an ideally just society, or of perfectly just institutions. Interestingly enough, when Karl Marx asked himself in volume I of *Capital* (1867), what could be described as “the one great event of contemporary history,” he answered it by identifying the American civil war and the abolition of slavery (ch. 10, sect. 3, 240). If this was an enhancement of justice in Marx's view (in fact, the only one he found worth mentioning), this did not prevent him from asking for many further changes in pursuit of jus-

4. See also his *Political Liberalism*.

tice, including altering exploitative employment relations in the labor market, and changes in the distribution of freedoms and privileges that a capitalist society gives to different people. One does not have to seek perfection in recommending a change as an enhancement of justice.

The analytical—and rather mathematical—discipline of “social choice theory,” which had its origin in the works of French mathematicians in the eighteenth century, in particular the Marquis de Condorcet, but also others like Jean-Charles de Borda, and which has been revived and reformulated in our times by Kenneth Arrow, belongs robustly to this second line of investigation. And it is this line of reasoning—both in terms of theory and in the context of practical applications—that I have tried to develop and present in my book on justice.

I must confess that I have been very involved in the development and use of social choice theory along with Eric Maskin, Kotaro Suzumura, Prasanta Pattanaik, Peter Hammond and others. Even though I had the occasion to bring out some impossibility theorems, the main focus of my own work has been on the exploration of the constructive possibilities of the approach (going beyond, in that particular respect, from Kenneth Arrow’s focus on impossibility results). In my Nobel Lecture at Stockholm in 1998 (called “The Possibility of Social Choice”), I have discussed various lines of reasoning that lead to constructive possibilities. These constructive possibilities make room for the analyses of the demands of justice. And in a broad sense, what may be called the “social choice approach” also allows developments of the insights of the non-contractarian Enlightenment thinkers such as Smith, Condorcet, Wollstonecraft, and others (see Sen, *Ideas*). The approach looks not for just institutions but for “social realizations” that include actual outcomes (along with taking note of the acceptability of institutional processes), but searches for ways and means of an aggregative ranking—complete or partial—of social realizations (rather than looking for something like an “ideal” social state) and conducts this search through being guided by the reasoned priorities of the people involved (who need not be confined to members only of a single nationality).

5

Let me comment briefly on one particular contrast between my understanding of the demands of a theory of justice (within a broadly “social choice” framework) and what we get from the Hobbesian “social contract” approach. Unlike the social contract approach which, by construction, must be confined to the

people of a particular sovereign state, the alternative approach I am trying to present can involve people from anywhere in the world, since the focus is on reasoned agreement on certain identifiable injustices (within and across borders), rather than on a state-based social contract to install ideal institutions for that state. The departure of relying on open public reasoning makes grounded discussion of “global justice” possible (and possibly momentous), and this is essential for addressing such problems as global economic crises, or global warming, or the prevention and management of global pandemics such as the AIDS epidemic. Our agreements may be only partial, even after as much public reasoning as we can have—across the boundaries of states, but also within each country itself. And the ways and means of the implementation of the reasoned agreements can also involve considerable plurality. Mary Wollstonecraft had pioneering discussion in the eighteenth century on how the rights of women—and of men—can be pursued not just through the laws of a sovereign state, but also by many other means, particularly public discussion, including the part that the media can play.

Let me, then, move on to the question of what kind of reasoned agreement—based on imagined impartial reasoning—on which a social decision about justice could be based. Reasoning is, of course, fundamental to arrive at a scrutinized agreement, but so is impartiality, including abstinence from the influence of our vested interests, for reasons that both Kant and Smith have discussed so illuminatingly, as has John Rawls (that is not a point of difference between us).

However, not all our differences arise from the influence of our vested interests. We can have different conceptions of impartial adjudication. For example, Karl Marx who argues so eloquently against exploitation, and by implication what could be seen as the “right to one’s labor,” came round to the view later that this is really what he called a “bourgeois right,” to be ultimately rejected in favour of “distribution according to needs”—a point of view he developed with much force in his last substantial work, *The Critique of the Gotha Program* (1875).⁵

Faced with conflict of fundamental values, we may not be able to decide what would be the nature of perfect justice, everything considered. Perfection is a hard demand, and the identification of perfect societies, or even of perfect institutions, is a rather grandiose starting point for an exercise of the evaluation of justice and injustice. And even if each person individually is able to sort out completely his or her priorities for perfect justice, there is no guarantee at all that

5. The importance of this dichotomy is discussed in my book, *On Economic Inequality*. See also G.A. Cohen, *History, Labour and Freedom: Themes from Marx*.

different people—though all quite reasonable—should necessarily be able to agree between themselves on what institutional combination would be perfectly just, or what a perfectly just society would look like. This is so even when we are able to remove ourselves from our respective self-interests through some mechanism of “fair procedure,” and theories of justice have many such procedures to suggest—like Rawls’s use of the hypothetical state of primordial equality in the so-called “original position.” This is not to deny that our disagreements do often arise from our different vested interests, but there can be other disagreements that reflect distinctions of impersonal priorities, such as the relative importance of *economic equity* compared with *personal liberty*, or the relative priority of people’s *needs* compared with what people have “earned” through blood, sweat, and tears.

However, the absence of an agreement on perfection needs not preclude a reasoned consensus that many things that happen in the world are altogether unjust and demand immediate rectification. A theory of justice has to deal with the discipline of reasoning about identifying cases of injustice, which is not the same thing as seeking unanimity on the nature of perfect justice. It is ultimately a question regarding what a theory of justice should be really about. An agreement on the nature of “the perfectly just” is not necessary—either in practice or in theory—for a reasoned agreement on a number of clearly identifiable changes that could be seen as radically reducing major injustices in the world. As was discussed already, a reasoned agreement that slavery is unjust and must be abolished immediately can be arrived at even without agreement on what a perfectly just society would look like, or what exact combination of institutions would be perfectly just for the world—or even for a particular country.

Similarly, today, we can reasonably agree that the fact that hundreds of millions of children in the world do not receive elementary education, or have even barely adequate nutrition, or receive any kind of real health care, identify cases of injustice that should be eliminated as quickly as we can. We can also agree on the injustice involved in the continuation of famines and pandemics, and of underprivileged people dying of illnesses for which medicine can be very cheaply produced, but is not produced because of institutional barriers. To take another example, the prevalence of torture, often practised by the pillars of the global establishment, can also be seen as injustice on which reasoned agreement is possible and practical elimination feasible.

All this suggests the need for a different way of thinking about justice and concentrating on reasoning that helps to identify manifest injustices that can be removed or very substantially decreased. To get there, we need not to begin by seeking an agreement on an all-encompassing social contract. Nor do we need an exact balance of the relative weights to be attached to the competing concerns, for example, between the diverse pulls of the priority of liberties and the importance of economic equity. The diagnoses of many injustices do not really depend on the exact balance of competing concerns.

6

Let me turn now to the implications of all this for the role of law and the discipline of legal theory, including the reading of constitutions—a subject that is generating considerable discussion right now. One implication of being concerned with *nyaya*, rather than only with *niti*, is to be able to judge the motivation behind laws in terms of their impact on the lives and freedoms of people, rather than only through some organizational rules of propriety. This has a clear bearing on the understanding of human rights in the context of law, which contrasts with the dismissal of such pre-legal rights as being based on an unsustainable idea. Jeremy Bentham denounced the French “declaration of the rights of man” to be absolutely nonsensical, describing such rights to be “simple nonsense,” and went on to describe “natural and imprescriptible rights” as “rhetorical nonsense, nonsense upon stilts” (*Fallacies* 501). For Bentham, there cannot be any useful concept of pre-legal rights, since rights are, as he put it, “the child of law” (523).

If, however, the idea of human rights—and the class of what are seen as “moral rights”—is understood as expressions of social judgments of what is needed for the society, then surely we have reason to go not with Bentham, but with that great Oxford legal theorist, Herbert Hart, who argued that people “speak of their moral rights mainly when advocating their incorporation in a legal system” (“Rights” 79). Hart went on to add that the concept of a right “belongs to that branch of morality which is specifically concerned to determine when one person’s freedom may be limited by another’s and so to determine what actions may appropriately be made the subject of coercive legal rules.” Rather than seeing rights, as Bentham had, as a “child of law,” Hart’s view takes the form, in effect, of seeing human or natural rights as “parents of law,” since they are characterized as *moral demands* for legislation.

Generating arguments and inspiration for legislation is certainly one way in which the ethical and political force of human rights has been constructively deployed. For example, The Universal Declaration of Human Rights in 1948 by the newly established United Nations was seen by its sponsors, particularly Eleanor Roosevelt, as a template for actual legislation to be taken on board by individual states. And to a considerable—though limited—extent, that has actually happened, in addition to other motivating influence of that powerful international declaration (see Sen, “Power”).

In my Herbert Hart memorial lecture at Oxford in 2010,⁶ I have argued that we can accept Hart’s interpretation of moral rights or human rights, but actually go beyond it, since the achievement of good social realizations can be enhanced not only by fresh legislation, but also by other means, such as public discussion and political agitation, and even by naming and shaming. But that does not reduce in any way the relevance of Hart’s point that many acts of legislation are motivated by ideas of what *should* be seen as rights of people. I would argue that this can be extremely important even in terms of interpreting laws as they exist, including even the constitution.

7

There is, understandably, considerable debate on how much freedom—and indeed duty—the judges should have, in order to bring about appropriate reorientation in the application of existing laws through their legal interpretations reflected in their judgments. There have been serious arguments presented by judges as legal theorists for making more room for “here and now” in legal decisions in the contemporary world. Justice Stephen Breyer, for example, has powerfully argued, in his book *Active Liberty*, in favor of paying attention to “the purpose and consequence” of existing laws, including constitutional provisions, in interpreting existing laws (115).

On the other side, the school of thought known as the “originalist philosophy” insists that the original content of the constitution must be preserved, thereby firmly constraining the liberty that can be taken in contemporary judicial decisions. The question that does, however, arise is what is preserved from the original constitutional process—the intentions behind it, or the specific words chosen in the constitution. It was the former route that was taken by the found-

6. Published as “Rights, Laws and Language.”

ing “intellectual grandfather of originalism” (as he is called by Stephen Calabresi, *Originalism* 14), namely Judge Robert H. Bork. The views that Bork presents include the insistence that the judges today must “interpret the [Constitution’s] words according to the intentions of those who drafted, proposed and ratified” them (*ibid.*). Against that, Stephen Calabresi has argued for sticking to the exact words used, rather than intentions behind them:

The meaning of these words and their application to present-day problem depends, in the end, on what the American people think they mean acting over a long period of time through our three branch process of constitutional interpretation. (29)

The primacy of words, with shifting meaning over time, would indeed be a direct denial of the “intentionalist” interpretation of the Constitution.

The line I am trying to present is somewhat closer to Bork’s than to Calabresi’s, to the extent that originalism is involved. I do accept Calabresi’s scepticism of the gravity of “intentions.” Indeed, as he argues: “The original public meaning of the Constitution’s words is certainly law, but there is no reason to think that the un-enacted idiosyncratic intentions of particular Framers are law” (15). Intentions, as the idea is normally understood, could be vague, even frivolous and not so clearly scrutinized.

However, we can look for something more substantial—what in my Hart lecture I called “the constitutional motivation,” a concept for which the systematic search for *nyaya* would surely play a major part. This approach of looking for constitutional motivation, rather than for the current meaning of the old words, can be seen, I would argue, in line with the purpose of the Constitution—more than mere faithfulness to the exact words would yield. As Dr. Samuel Johnson noted in his Preface to *A Dictionary of the English Language* (1755): “Language is only the instrument of science, and words are but signs of ideas” (Johnson xi).

There are clearly two distinct evolutions that are going on over time:

- (1) the development of *particular values and priorities* that are compatible with what I would call “constitutional motivation”—in the American case, particularly of facilitating a democratic, tolerant, and participatory society, and
- (2) the progression of *language and rules for the use of words*, applied in particular to the words that the constitution used in the text.

The two processes will almost certainly be linked within a given country and culture (the relevance of arguments coming from elsewhere will be taken up later), but it would be rather credulous to expect that the two must be, in some clear sense, always congruent, even within a given country. Therefore, if we insist on concentrating exclusively on the evolution of rules of language and words to interpret the Constitution, we are abdicating what is primarily a valuation exercise to a rather different domain of human thought and practice, namely the evolution of linguistic convention over time.

In placing ourselves in the hands of the contemporary meaning of words and texts, we are being asked to leave the choice of substantive ideas to the evolution of linguistic rules. There is surely a substantial issue here, in anchoring central matters of valuation merely on linguistic development without paying attention to the motivation behind the making of the constitution. It is useful here to take note of the philosophical understanding, clarified in particular by Ludwig Wittgenstein, that the meaning of words have to be seen in terms of the “rules” that govern their use (*Philosophical Investigations*). What we have in the form of a constitution seen as a book is a collection of words, and we can, plausibly enough, treat the words as the “fixed point,” but acknowledge the varying meanings of these words over time, reflected in the varying rules governing their use. Calabresi’s version of originalism will make us go by contemporary meaning—reflected in the current rules of language—governing the use of those words that happened to be used in the Constitution. We can understand the same words completely differently as the linguistic conventions actually alter over time. Is that really being faithful to the Constitution?

I should make clear what I am trying to say in this concluding part of my talk related to “originalism.” I have not said anything on whether originalism as a general approach is sound or not, but I have been discussing what of the original would seem to be sensible to preserve. The choices considered are: (1) the words (taking them to mean whatever these old words mean now, as suggested by Calabresi), (2) the intentions of the framers of the Constitution (as presented by Bork), and (3) the constitutional motivation that led to the formulation and signing of the Constitution—taking note of the purposes underlying it. I have argued for the third route, focusing on the relevance of the motivation underlying a constitution.

If legislation is motivated by some purpose for which laws are sought, then we have to look at those purposes in understanding what was legislated (and here ideas surrounding the concept of *nyaya* would be extremely important). The same purpose may call for differences in the details in what is needed today since we live in a very different world, and the faithfulness that may be demanded is the fulfilment of the purposes, rather than either their exact translation into details of exact demands, or (as in Calabresi's interpretation of originalism) of the current meaning of the old words as they have changed over time. The choice is not only between going by the frivolity of psychological intentions, on the one hand, and incarceration in the fragile meaning of nominal words (what Dr. Johnson warned us are merely "signs of ideas," which are "apt to decay"; xi). And if indeed we look for the basic ideas behind the Constitution, rather than the fragile signs of the words chosen or the mental intentions spurring us on, then there has to be a deep connection between the picture of *nyaya* as seen in the process of formulation of the Constitution and the way it can be sensibly interpreted today. This is one of the ways in which philosophy and law can interconnect with each other.

Works Cited

- Bentham, Jeremy. "Anarchical Fallacies: A Critical Examination of the Declaration of Rights." *The Works of Jeremy Bentham. Published under the Superintendence of his Executor, John Bowring*. Vol. 2. Edinburgh; Simpkin, Marshall, & Co, 1843.
- Breyer, Stephen. *Active Liberty: Interpreting Our Democratic Constitution*. Knopf, 2005.
- Calabresi, Stephen. *Originalism: A Quarter-Century of Debate*. Regnery Publishing, 2007.
- Cohen, G.A. *History, Labour and Freedom: Themes from Marx*. Clarendon Press, 1988.
- Hart, H.L.A. "Are There Any Natural Rights?" *The Philosophical Review*, vol. 64, April 1955. Jeremy Waldron (ed.), *Theories of Rights*, Oxford UP, 1984, p. 79.
- Johnson, Samuel. Preface. *A Dictionary of the English Language*. Vol. 1. London; Longman, Hurst, Rees, Horne, and Brown, 1818.
- Marx, Karl. *Capital*. Vol. 1. London, Sonnenschein, 1887.
- Nehru, Jawaharlal. *The Discovery of India*. 1946. Jawaharlal Neru Fund and Oxford UP, 1981.
- Rawls, John. *Political Liberalism*. Columbia UP, 1993.
- . *A Theory of Justice*. Harvard UP, 1971.

Sen, Amartya. "Rights, Laws and Language." *Oxford Journal of Legal Studies*, vol. 31, no. 3, September 2011, pp. 437-53. Also published in *The New Republic*, October 2010.

---. *On Economic Inequality*. Clarendon Press, 1973.

---. *The Idea of Justice*. Harvard UP, 2009.

---. "The Possibility of Social Choice." *American Economic Review*, vol. 89, June 1999. Also published in *Les Prix Nobel* 1998, The Nobel Foundation, 1999.

---. "The Power of a Declaration." *The New Republic*, February 2009.

Sudraka. *The Little Clay Cart* [MRCCHAKATIKA]. Translated by Arthur William Ryder, Harvard U, 1905.

Wittgenstein, Ludwig. *Philosophical Investigations*. 2nd ed., Blackwell, 1958.

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