RESEARCH ARTICLE

PAST AND PRESENT OF THEORY OF JUSTICE: THINKING BEYOND CONTEMPORARY DISTRIBUTIVE MODEL.

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Abstract

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In this paper, I have tryied to move beyond the traditional conceptualisation of justice like desert, virtue and fairness attempted to bring into the fold of justice the emerging concepts like capabilitarianism, functioning, feminist conception and recognition discourse. The contemporary literature around justice since 1971 with the publication of Theory of Justice is generally in dialogue or in contrast with John Rawls. Nancy Fraser, B.R. Ambedkar, Akeel Bilgrami, Axel Honneth, Iris M. Young's bought diverse perspective on justice at the level of cognition and recognition, should be seen as a new attempt in the field without necessarily in conversation with Rawls. This paper will also explore Amartya Sen at length who is attempting to pursue similar venture by bringing Capability to the Rawlsian distributive framework only. Overall this paper is a project not to discard the distributive framework of justice but to think of manifold methodologies to make it more inclusive.

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Introduction:-

From Plato, Aristotle, Kant, Avicenna, Rawls, Gandhi to Amartya Sen the central issue in concept of justice is the unequal relationship between people in society in terms of social power, social standing and command over natural resources/ social goods argues philosopher Aakash S. Rathore. The theories of justice are widespread, global throughout the human history, differ over different cultures, different places and different periods. The theories of justice are widespread, global throughout the human history in different different forms. An earlier one was presented in Plato's Republic where Justice is referred to as dikaiosune and debated between Socrates and other interlocutors of the dialogue. On the one hand where modern conceptions like those of John Rawls, Amartya Sen are much more egalitarian and liberal components to it, Rawls sees justice as primary virtue of the society. On the other hand in Plato's conception or Aristotle's conception or other Greek conceptions, the primary virtue will be wisdom rather, argues Rathore. Even throughout ancient oriental philosophy the notion keeps changing, for example for Confucius the primary virtue for justice is 'Ren' which is universal benevolence leading to overall societal harmony, Persian philosophers like Avicenna considered justice as part of moral theology, in contemporary times, Gandhi combines the principle of non-violence and concept of not doing harm to others, to formulate the principle of Justice. For Amartya Sen concrete manifestation of justice is capability, for Nancy Fraser it needs an important addition like recognition. For philosopher Prasenjit Biswas interestingly justice is a "matter of geography"[1] in post-colonial India, for Ambedkar it is annihilation of caste structure. In short, there are all kinds of different

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[1] Patrick Hoenig, Navsharan Singh, (ed.) *Landscapes of Fear: Understanding Impunity in India,* Zubaan, 2014

interpretations of the theories of justice, in all different geographical locations and historical eras. To understand the normative concept of justice we need to look at some of the representative interpretations of the concept given by prominent political thinkers of the past.

Greek Period: Plato- Justice as Moral Conduct

Concept of Justice as moral conduct by individuals and Social Classes as interpreted by Plato. Plato's Republic mainly deals with the idea of justice where Plato is engaging with an ethical problem whether we shall seek righteousness or We shall seek power? Responding to which Plato considered Justice as both a principle of Individual Right Conduct and An Ideal Social Order. First he found in three faculties of an individual and second one in the three social classes. He seeks the basis of the a just-social order in the very nature of human beings. This means- if each individual does what one is best suited for there will be no interference leading to harmony. Lewis Nettleship in his Lectures on Republic of Plato summarises it well- "Justice in Plato's sense is the power of individual concentration on duty" which means justice is when each individual devotes himself to that one function in the state for which he was by nature best suited. Then the obvious question how one would know what is the best work for oneself? Plato replied it with 'Trilogy of Soul' -- Reason, Spirit and Appetite. Three different faculties which the soul possessed. Corresponding to the three virtues/faculties of the soul he suggested three classes-- Philosopher King, Soldiers and Artisans. Justice is what each class does as per the dominant faculty. Resulting in specialisation, excellence and efficiency. To institute an ideal state Plato argued in favour of rule of reason i.e. philosopher's rule. Therefore, one can summarise that Plato's justice is distributive justice and seeks to provide moral and ideal criteria for both individual and Ideal social conduct. At the same time there are a lot of criticism of Plato's notion of justice. Plato's categorisation of soul is not based on any rational criteria and rather related with 'myth of noble lie' A myth that philosopher kings are made of gold, soldiers of silver and artisans/producers are of bronze. It is pretty much similar to Indian caste system origin- Head/ Mouth (Brahman), Shoulder (Kshatriya), Thigh (Vaishya) and Feet (Shudra). But there is difference as well of flexibility as there can be change of one class to another depending on the change of faculty. Also, Karl Popper in The Open Society and Its Enemies treated Plato as an Enemy of Open Society and his ideas as 'unmitigated authoritarianism'.

Aristotle: Nicomachean Ethics- The Distributive Model

Aristotle's aim was to find out principles of distributive justice. Distributive justice is the principle which helps in distribution of offices, wealth, reward as per their contribution to the state. Aristotle's famous statement is-- 'Injustice arises when equals are treated unequally and also when unequals are treated equally' suggests that he advocated 'proportionate equality' But the obvious problem then arises is if rewards are to be in proportion to contributions, it is necessary to determine the criteria for deciding contributions of each class to the polity. If there are three classes as per Aristotle-Aristocrat, Oligarchs and Democrats, their interpretation will be different as to who contributed what and what is more important. According to Barker Aristotle identified three types of justice: First one is Distributive Justice based on proportional equality which applies in political arena. Second one is Corrective Justice based on remedy for wrong done which applies in civil arena. Third one is Commutative Justice which based on justice in exchange of goods and services which applies in the realm of economic transactions. In short, one can say Aristotle is seeking to find out practical solutions to political problems of how to distribute offices and positions. Comparatively speaking, Aristotle is seeking principle that can be applied in a practical state whereas Plato seeks principles to be applied in an ideal state. Now we will proceed with the most influential name in contemporary times for his theory of justice- John Rawls. With the publication of Rawl's book Theory of Justice in 1971 the moral and social philosophers came out of their fixation with meta-ethics to the normative issues of distributive justice.

John Rawls: Justice as Fairness

In the chapter 'Fairness through Ignorance'[2] on John Rawls, Nigel Warburton attempted to explain justice in a simplest possible argument that if there is true justice in the world then no children would starve and some children have enormous amount of money that they don't know what to do with it. Therefore basically Justice is all about treating people fairly. According to Nigel, John Rawls, who fought in the second World War and he was present in the Pacific when the atom bomb was dropped on Hiroshima got deeply affected. When Rawls tried to imagine a better world to live in, he realised that human nature works in a way that people have a tendency to think their own position while articulating the place they wish to live in. These prejudices lead to a biased idea of a peaceful world. Therefore, Rawls came with a thought experiment called original position where you will be behind a veil of

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[2] Nigel Warburton, *A Little History of Philosophy,* Yale University Press, 2011, p. 228

ignorance unaware of your position in the world. Through this device Rawls developed his theory of justice which was based on two principles- Liberty principle and Difference principle. Liberty principle suggested that everyone has basic liberties which should not be taken away from them even if restricting them improves the life of majority leading to utilitarian principle of maximum happiness. Rawls second principle, the difference principle is basically about equality. A formula in which the most disadvantaged too will get proportionate benefit. Nigel puts it simply that "no one would earn huge bonuses unless the poorest got more money as a result."[3] Nigel concluded that Rawls inspired a range of contemporary philosophers dealing with the philosophical underpinnings of the theory of justice including Michael Sandel, Thomas Pogge, Martha Nussbaum and Will Kymlicka, inspired to believe that the purpose of philosophy is "actually change how we live, not just change how we discuss how we live."[4] Therefore the emphasis on bringing actual change should be an important underlying idea while thinking a workable theory of justice.

Justice: Post-Rawls

American Philosopher Richard Arneson while trying to define justice in terms of fairness draws on four broad principles[5] first one is what counts as "fair distribution" and second, how to conceive of benefits and loss. Infact, building largely on first two principles, Arneson argued that the idea of justice have priority over other normative ideas. If there is injustice in the functioning of the society then that is the first thing to be corrected regardless of the fact that how it will affect other functionings in the society. Arneson's arguments is close to the thought experiment articulated by John Rawls. According to Arneson, John Rawls after the writings of Hobbes provided the most profound substantial alternative to Utilitarianism which was the dominant mode of thinking about social justice within the liberal intellectuals. Arneson first of all questions the utilitarian philosophy of justice which remains one of the most sought after explanation of how things should be in the society. Utility principle of justice is that one should follow those moral acts which will bring the most aggregate utility. Maximization of utility is being seen as the standard of justice as law principle, in building institutions, in imagining social practices etc. Rawls asserted that Utilitarianism "at its root"[6] is not a liberal theory as it fails to safeguard the rights of the individual. Utilitarianism ignores the "distinction between the persons"[7] argued Arneson. So if we always want to look for the aggregate benefit of the maximum it also opens up the possibility that an individual's interest will be ignored if it leads to the pleasure of many. Therefore Rawls indulged in a thought experiment to identify the "substance of justice" as free and rational person called original position under a veil of ignorance.[8]

According to Arneson the central emphasis of Rawls was on having just institutions since just institutions will distribute social goods fairly. In Rawls scheme of fair distribution means the rich and the poor both get proportionate social goods. Now the important departure in Amartya Sen's scheme is that he is not merely interested in the fair

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[3] Ibid. P. 229

[4] Ibid. P .233

[5] Richard Arneson in the book edited by David Estlund, *The Oxford handbook of Political Philosophy* in third chapter on Justice argues that there are four major ideas which are the base of developing any theory of justice - (a) what counts as a "fair" distribution, (b) how to conceive of benefits and burdens, (c) what the necessary and sufficient conditions for being a person (a being whose condition matters for purposes of justice) are, and (d) what the relevant individuation conditions for a society are, or, alternatively put, what the spatial and temporal scope of justice principles is.

[6] Ibid. P. 60

[7] John Rawls, *Theory of Justice,* 1999, p.24

[8] Amartya Sen contested this understanding with a simple day to day anecdote to contest the theoretical claims made by doyens of justice theory. "Imagine two persons who have equal holdings of primary social goods such as income and wealth. One is legless, and one has fully functioning legs; otherwise they are similar. The former must spend most of her income to gain mobility, which the latter receives naturally and for free. Amartya Sen points out that according to the primary social goods standard, the condition of the two is the same, but for justice purposes, this is not right: The legless person is clearly seriously disadvantaged. More generally, individuals vary widely in the quality of their personal traits that bear on their ability to achieve worthwhile aims, and the relevant measure of a person's condition for purposes of justice is accordingly not her resource share but what she is enabled to be and do that she has reason to value, given her resources, personal traits, and other circumstances." Therefore in Sen's framework of justice the basis for defining justice is an individual's capability to achieve the functionings. The point is further elaborated in David Estlund edited volume *The Oxford handbook of Political Philosophy* (2012) in third chapter on Justice.

distribution of social goods but he is equally concerned about the physical and psychological status of the individual. Sen suggested that if an individual is born with different "physical and psychological propensities"[9] s/he will be generally inefficient in transforming the social goods into what s/he desires.[10]

Therefore, Sen is bringing a very important change in the way we have imagined justice till Rawls. That, it is not just about the institutions it's also about the capability of the individual whether she got the capability to achieve the social good which Rawls is trying to justly distribute.

For Rawls the theory of justice assumes that all the individual of the society are fully functioning, "fully contributing members" of the society. Rawls responded to it, as per Arneson, by suggesting that once the social primary good is evenly distributed then it is upto the individual to plan it further and theory of justice won't be measuring it. But this response still doesn't answer the ground level problem that there are differences in people's capabilities, talents etc. "among all persons". This point raised by Sen strikes a chord with almost all the contemporary theoreticians on justice. But Arneson contested Sen as well suggesting that there are "enormous numbers of capabilities to function, and they vary from the trivial to the momentously important"[11] therefore capabilities need some kind of ranking which was later developed by Martha Nussbaum.

Amartya Sen's Capabilitarianism: Beyond Standard Distributional Theory
Amartya Sen on the other hand, tried to develop a justice theory which takes distribution seriously and equally seriously moves beyond to look at capability. The basic argument of the capabilitarianism is justice should not only be about how distribution of goods is taking place but also how people function with it. It is about a person's opportunities "to do and to be." Amartya Sen successfully shifted the focus of the justice debate from traditional indicators to agency, well-being and functioning.

The point for Sen is to move away from a sole concern with the amount of goods we get, and to examine what those goods do for us; he opens Development as Freedom by comparing classic Sanskrit and Greek texts, including Aristotle's point that 'wealth is evidently not the good we are seeking; for it is merely useful and for the sake of something else.'[12]

David puts it very succinctly that Sen's approach examines our "specific capabilities" which means those things which assist us to translate basic goods into the functioning of human life. Sen deployed this concept of capability to compare "quality of life" mainly in developing nations. Which he argued should be the indicator for development instead of GNP.[13] The need for valuation of important functionings can't be done by looking at happiness index or desire fulfilment or proper distribution of primary goods. Now what are these valuable functionings? Functionings as articulated by Sen is various 'doings and beings' which can be eating/ reading/being healthy.

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[9] John S. Dryzek, Bonnie Honig, Anne Phillips, *Handbook Political Theory*, Oxford University Press, USA, 2006, P. 50

[10] Amartya Sen argues- Consider two individuals with the same allotments of primary social goods. One is fit, hardy, and quick-witted; the other is lame, illness-prone, lacking in physical coordination, and slow-witted. In any terms that we care about, the condition of the two people is unequal, but a primary social goods metric does not register the disparity. Sen proposes that we should look beyond the distribution of opportunities and income and other primary goods and see to what extent individuals are able to be and do with their primary goods allotments given their circumstances.

[11] John S. Dryzek, Bonnie Honig, Anne Phillips, *Handbook Political Theory*, Oxford University Press, USA, 2006, P. 51

[12] Ibid. P. 15

[13] In contrast to the economic indicators generally used to measure the development of developing nations Sen argues- "The central feature of well-being is the ability to achieve valuable functionings. The need for identification and valuation of the important functionings cannot be avoided by looking at something else, such as happiness, desire fulfillment, opulence, or command over primary good" (Sen 1985: 200). Functionings refer to various doings and beings: these could be activities (like eating or reading or seeing), or states of existence or being (being well nourished, being free from disease) (p. 197). This approach 'concentrates on the opportunity to be able to have combinations of functionings . . . and the person is free to make use of this opportunity or not. A capability reflects the alternative combinations of functionings from which the person can choose one combination' (Sen 2005: 154)"

Capability approach suggests that people should have the opportunity to be able to have "combination of functionings" and people should have a choice to choose from among those combinations. Capability means that people can or cannot use that combination of functionings. Capability means people can choose from among the combinations, any combination. Therefore capability approach asserts that the basic measure of justice is not how much one is having but is that is enough to lead a life we choose to reason. Both Sen and Nussbaum elaborated in details the qualities that "enable individuals to have a fully functioning life." In the words of David - "Broadly put, the focus of this notion of justice is on what it is that either enables or interrupts a living system in its ability to transform primary goods (if they are available) into functionings. For example, if reading is a functioning, then literacy and being educated are the capabilities necessary for that functioning." Capabilities may come as a responsibility of state distribution but Sen's focus is on functioning of citizens. Therefore one can safely claim that Sen is not just focussing on the distribution of material goods only. But the question is what exactly are those capabilities needed for functioning of a citizen? Sen is little unclear on this question.[14] Nussbaum chalks out a more detailed capability set.[15] But with this elaborately defined list by Sen followed by Nussbaum got criticised of being "paternalistic and perfectionist." Séverine Deneulin argues that such listing amounts to objective good. He argues that this list is from the perspective of the theorist. He argues that "The theory is then accused of focusing not on the functionings that people 'choose', but rather on those that people have a good reason to do or be."[16] Amartya Sen while responding to such charges refuse to publish any such elaborated list as did by Nussbaum. David argues to this that the development programs happening all around on the basis of capability approach needs and using such elaborated list.

Amartya Sen in his book Human Rights and Capabilities argued that he is reluctant to elaborate on any such list because of two reasons mainly. One, it is difficult to determine without the "appropriate specification of the context" that what will be there in the list and with what weightage. Secondly, the "top-down paternalistic approach" would undermine the public reasoning and public deliberation. Without such public discussions no appropriate list can be generated. He argued that the problem is not with suggesting important capabilities but a predetermined canonical list which is developed by few theorists without any public discussion. Sen argues that to hold such a list "emanating entirely from pure theory" will amount to negation of public participation.

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[14] "Sen mentions five basic concepts and freedoms that help advance the general capability of people: political freedoms,economic facilities, social opportunities, transparency guarantees, andprotective security (1999b: 10). Here, he notes that since 'political and civil freedoms are constitutive elements of human freedom, their denial is a handicap in itself' (pp. 16–17)"

[15]David elaborates what Nussbaum suggested as capabilities for fully functioning life:
Life: being able to live to the end of a human life of normal length.
Bodily health: including health, nourishment, and shelter.
Bodily integrity: being able to move freely, having sovereign body boundaries, security against assault, opportunity for sexual satisfaction, and reproductive choice.
Senses imagination and thought: basically being able to use human intelligence and creativity; this includes adequate education, freedom of expression, and freedom of religious exercise.
Emotions: 'in general, to love, to grieve, to experience longing, gratitude, and justified anger'.
Practical reason: the basic liberal right to determine one's own notion of the good life.
Affiliation: two parts here. It starts with recognition, or 'being able to live with and toward others, to recognize and show concern for other human beings' and 'to be able to imagine the situation of another and to have compassion for that situation. . . .' Also includes 'having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others.' Nussbaum explicitly notes that this requires protecting institutions that constitute and nourish such forms of affiliation.
Other species: being able to 'live with concern for and in relation to animals, plants, and the world of nature'.
Play: 'being able to laugh, to play, to enjoy recreational activities'.
Control over one's environment: both political, which includes the right of political participation, and material, which includes the real opportunity to own and control property on an equal basis with others.
"Importantly, notes Nussbaum, these are separate components, so that having a lot of one capability does not negate the need to attain all of the others. Many of them are what Rawls calls 'natural goods', which are determined, in a substantial amount, by the luck of the genetic and social draw. Governments, however, are to 'deliver the social basis of these capabilities' (Nussbaum 2000: 81)."

[16] David Schlosberg, *Defining Environmental Justice- Theories, Movements and Nature*, Oxford University Press, 2007, p. 32

But the attempt here is to place capabilities in the larger framework of justice discourse. The most important contribution of Sen is that he expanded the "distributional realm" as he is not only limiting himself to the distribution of goods needed for flourishing but also on the "process we depend on for that flourishing to occur." Injustice for Sen is not limited to denial of certain social primary goods but with the "capability that is limited." In Sen's capability approach of justice, the idea of justice is not merely "distribution based" but there is a "linked approach". Linked to the concepts like recognition, functioning and participation. The only difference between what Fraser or Young and Sen's capability approach is that Sen's approach is thoroughly linked to the idea of distribution as well where is Young is critiquing the traditional distributive aspect of justice. For example Nussbaum's capability approach talks about bodily integrity, health and recognition as necessary capabilities. This methodology links the distributional aspect of justice with "cultural and institutional components" of justice theorisation. Kevin Olson argues that the central goal of capability is to push agency to simultaneously address both economic inequality and cultural issues.[17] Whereas Ingrid Robeyns argues that capability theory accommodates both distributive and recognition aspect of justice theorisation but still goes way beyond both.

Conclusion: Moving Beyond Contemporary Distributive Model of Justice
In this paper, I attempted to move beyond the traditional conceptualisation of justice like desert, virtue, fairness and trying to bring into the fold of justice the emerging concepts like capabilitarianism, functioning and recognition. The contemporary literature around justice since 1971 with the publication of Theory of Justice is generally in dialogue or in contrast with John Rawls. Nancy Fraser's perspective on justice as recognition should be seen as a new attempt in the field without necessarily in conversation with Rawls. But it's unfair to discount one of the finest modern scholars on justice. Therefore I engaged with Rawls as well vis-à-vis Amartya Sen and also bringing Akeel Bilgrami and Nancy Fraser for newer perspective on justice discourse. One can safely say that justice post-Rawls is being dominantly seen as distribution of primary goods but Akeel Bilgrami, Nancy Fraser, Axel Honneth, Ambedkar, Young proposed to see justice at the level of cognition, recognition and beyond. Moreover, Amartya Sen along with Nussbaum not only are interested in the distribution of the primary goods but also focussing on the capability of the individual to actually avail those benefits.

One of the major lacks in the justice theorisation post-Rawls is on a plank of distributive justice with less focus on distribution of recognition and the capability of the individual to avail it in real life. David Schlosberg argues that the link of recognition with contemporary liberal theories of justice is under theorised. The publication of Rawls Theory of Justice led to development of "micro-industry" with political theorisation which see justice in terms of fairness, impartiality etc. Schlosberg is trying to see justice in "political practice" as a balance of interlinked elements like distribution, recognition, participation and capability. He argues that empirically this is the case but in academic study there is an imbalance with regard to overemphasis on distribution. He qualifies himself that this linkage doesn't amount to dismiss distribution but to develop a comprehensive understanding.

In the past nearly four decades of the literature of political theory, justice has been defined almost exclusively as a question of equity in the distribution of social goods. Brian Barry (1999) insists that the concept of justice only applies where some distributive consideration comes into play; other issues are merely questions of right and wrong.[18] Similarly, Brighouse claims that the "subject of justice, then, is the very basic structure of a society; it defines how we distribute various rights, goods, and liberties, and how we define and regulate social and economic equality and inequality."[19] John Rawls emphasised that justice is the assessment of the "distributive aspect of the basic structure of the society". The basic point of John Rawls notion of 'justice as fairness' through his imaginary original position behind the veil of ignorance is just-distribution or "the rules that govern a just distribution". This is a proceduralist approach in contrast to consequentialist theories of justice like utilitarianism. Utilitarianism is interested in the 'outcome' of distributive process whereas other theories are more interested in what is to be distributed and what are the rules through which distribution will take place. The overall argument of Schlosberg is that "the distributive approach to justice has been the dominant discourse in justice theory over the past few decades."[20]

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[17] http://cohering.net/re/Olson2001.pdf Accessed on 10 April 2019

[18] David Schlosberg, *Defining Environmental Justice- Theories, Movements and Nature*, Oxford University Press, 2007, P. 12

[19] Ibid. P.12

[20] Ibid. P.13

Schlosberg under the subheading Justice as Recognition that this traditional distributional way got challenged with the emerging scholars like Iris Young and Nancy Fraser. Where we can add more names like Amartya Sen, Martha Nussbaum, Akeel Bilgrami, Ambedkar etc. The important critique by David, of Rawls is that "these critiques of distributional theory are thoroughly influenced by the real world of political injustice, rather than the imagined realm of an original position." With their day to day experience of practice these theorists start arguing that unfair distribution is not the sole problem for making a just-society. This becomes more clear when we start analysing who all are getting left out in this unfair distribution scheme and why? For David recognition is a central element of justice theorisation. With the emerging scholars like Nancy Fraser, Iris Young, Axel Honneth, B.R. Ambedkar and Charles Taylor the debate around recognition got strengthened. Lack of recognition demonstrated by "insults, degradation, and devaluation at both the individual and cultural level, inflicts damage to oppressed individuals and communities in the political and cultural realms." David argues that this is a gross injustice not because it is "constraining" but also because   it is "foundation" of distributive justice. When Rawls and the following theorists focus on ideal schemes of justice in liberal society scholars like Sen, Fraser etc. are exploring the key impediments in real life to such schemes. Iris Young in her book Justice and the Politics of Difference contested the idea of justice solely based on issue of distribution, ignoring the social context of injustice. She insisted that oppression is the starting point for any theorisation of justice. Young argues that distributive justice outlines procedures for distribution but not serious enough for "social, cultural, symbolic, and institutional conditions underlying poor distributions in the first place." Young made an important argument that distributive theories take goods as "static" not as a resultant of "social and institutional relations." David putting it simply suggests that distributional aspect is crucial but justice should not be reduced to distribution. Young claims that injustice is a resultant of "social structures, cultural beliefs, and institutional contexts."

Similarly, Nancy Fraser argues that both distribution and recognition requires due attention as both are linked in practice. "Examining the context of oppression—rather than simply either existing distributions, better distributions, or ideal procedures to procure just distributions—is central to Fraser's justice project."[21] Amartya Sen is also attempting to pursue similar venture but by bringing Capability to the distributive framework. Concludingly speaking, all the above discussed scholars have a project not to discard the distributive framework of justice but to make it more inclusive. To achieve this inclusivity it is important to chalk out a theory of justice inconsonance with the lived experience of the masses and adding hitherto neglected areana beyond overemphasised distributive model of justice.

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