



**UTTARAKHAND OPEN UNIVERSITY**

**SCHOOL OF SOCIAL SCIENCE**

**LM-107**

**न्यायिक प्रक्रिया**

**(JUDICIAL PROCESS)**



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**UTTARAKHAND OPEN UNIVERSITY  
HALDWANI**

***LL.M.-12***

**न्यायिक प्रक्रिया**

**(JUDICIAL PROCESS)**

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**Subject: JUDICIAL PROCESS**

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**Block I- Nature of judicial process**

**Unit-1- Judicial process as an instrument of social ordering; the tools and techniques of creativity and precedents**

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**STRUCTURE**

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**1.1 INTRODUCTION**

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**1.1 INTRODUCTION**

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The judiciary is one of the pillars on which the edifice of the constitution is built. It is the guiding pillar of democracy, what is happening inside it is a fascinating study. Its logbook shows that often the judgments of the Apex court degenerated into a dismal failure. There are many self inflicted wounds. This is the story of 59 years of the Supreme Court.

In this unit we shall discuss about the concept, definition, and nature of judicial process. We shall also read about the judicial process as an instrument of social ordering apart from that the tools and techniques of judicial precedents shall also be discussed so as to understand the whole concept of judicial process.

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**1.2 OBJECTIVES**

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After reading this unit you will be able to:

- ✓ Understand the concept, definition, and nature of judicial process.
- ✓ Discuss the judicial process as an instrument of social ordering.
- ✓ Describe the tools and techniques of judicial precedents in India.

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**1.3 WHAT IS Judicial process?**

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“Judicial Process” means any judicial proceeding in connection with the dispensation of justice by any court of competent jurisdiction and “Social Ordering” means activating the instrument of Judicial Process in setting right the wrong done or eliminating injustice from the society. But here we are mainly concerned with role of the

constitutional courts evolving new juristic principles during the course of judicial process for upholding social order keeping in view the need of fast changing society. Therefore, it would be appropriate to

examine as to whether Judicial Process, is an instrument of social ordering?

**So, what exactly judicial process is?**

Everything done by judge in the process of delivery of justice is called Judicial Process .It basically confines itself to the study of “is” to “ought” of the law.

**Or,**

Judicial process is basically “whole complex phenomenon of court working” and what went wrong with this phenomenon is the issue in my current project.

The judiciary is one of the pillars on which the edifice of the constitution is built. It is the guiding pillar of democracy, what is happening inside it is a fascinating study. Its logbook shows that often the judgments of the Apex court degenerated into a dismal failure. There are many self inflicted wounds. This is the story of 59 years of the Supreme Court.

Speaking of the Supreme Court of United States of America, Jackson J., of the court said,

***“we are final, not because we are infallible, we are infallible because we are final.” The judgments of the Supreme Court are final but not infallible. They require constructive criticism, especially to take them out of the morass of alien concept and ideas foreign to the land and culture. The Supreme Court is virtually the proverbial ivory tower, with the judges sitting on the top. Disturbed by some of its judgments, Pt. Nehru once said in a diatribe, “judges of the Supreme Court sits on ivory towers far removed from ordinary men and know nothing about them.” The Supreme Court is sometimes said to be beyond the reach of a common person.***

**Now, a question arises:**

What is justice? Is an age long question since the beginning of civilization? It is an elusive term. What appears justice to one person and from one viewpoint may be injustice to another or in another prospective. We cannot have such elusive concept as a yardstick. There must always be some objectives test to form a foundation of just society. Jurisprudence formulates that test as “justice according to rules”. Therefore, W. Freidman said, “justice is an irrational concept”. He concludes that justice as a generally valid concept is the goal to which every order aspires as a “purposeful enterprise”.

The question arises as to what actually went wrong to judicial process in India? Because the Supreme Court, instead of searching and basing its judgments on first principles or fundamentals of jurisprudence has sometimes has taken a shortcut by resorting to the supposed fiat of article 142. This article was employed as a tool to pass final decisions, apart from and without recourse to the law of the land. The concept of expanding universe is not confined to astronomy alone. There is fast expanding judicial firmament. The expansion of judicial world sometimes reads on fields occupied and reserved for others. It is very necessary that Supreme Court act with self restraint. Let us remember the proverb, “power corrupts and absolute power corrupts absolutely”.

**Critical analysis of the present system of Judicial Process****An introductory analysis of Indian judicial process:**

A vision of equal, expeditious and inexpensive justice for India’s millions, a passion for effective delivery of social justice for the victimized masses and a mission of constitutional fulfilment through a dynamic rule of law geared to democratic values, operated by a fearless judicial personnel with a positive people oriented jurisprudence broad based an access to a sensitive, streamlined, functional jurisprudence- that is the command of the Preamble to the Constitution and the categorical imperative of Article 39-A. Our socialist Republic now hungers for human justice through human law and staggers towards nowhere since courts have lost their credibility

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and are writing their own obituary through retiring chief justices. Today judicial justice has come to a grinding halt, the judicature has caricatured itself and the Bench and the Bar, alas, have become a law unto themselves, Indian humanity having alienated itself from the feudal forensic system and the cult of the robbed process. If all the judges and lawyers of India pull down the shutters of their law shops nationwide, injustice may not anymore escalate, if at all, litigative waste of human and material resources may be obviated.

Now, a situation arises that the entire Indian justice system is now under severe threat. With the police force that has been condemned by everyone as being incompetent and corrupt, with the prosecution system that is inept and selective and a judiciary that is corrupt where is the room for justice in the Indian context?

Indian Judicial system has collapsed totally. Be it the justice delivery system existent in criminal side or civil side, there is no hope for justice for common man. Entire fabric has been exploited and doomed. The condition of Indian judicial system worsened so much that Attorney General of India, Mr. Soli Sorabjee remarked, "Criminal Justice system in India is on the verge of collapse owing to inordinate delay in getting judicial verdict and many a potential litigant seem to take recourse to a parallel mafia dominated system of 'justice' that has sprung up in metros like Mumbai, Delhi etc".

"Hamlet's lament about the laws delays still haunts us in India and the horrendous arrears of cases in courts is a disgraceful blot on our legal system, especially the criminal justice delivery system," Striking an alarm bell, Sorabjee said: "criminal justice system is on the verge of collapse. Because Justice is not dispensed speedily, people have come to believe that there is no such thing as justice in courts.

"This perception has caused many a potential litigant who has been wronged to settle out of court on terms which are unfair to him or to secure justice by taking the law into his own hands or by recourse to a parallel mafia dominated system of 'justice' that has sprung up in metropolitan centers like Mumbai.

"The gravity of this development cannot be underestimated. Justice delayed will not only be justice denied, it will be the rule of law destroyed," he said. The Attorney General said the time has come to ask, "Have the ideals of justice, liberty, equality and fraternity proclaimed in the preamble in grandiloquent language been realised in the working of the Constitution during the last 53 years? Have we redeemed our tryst with destiny? Have fundamental rights been merely in the realm of empty rhetoric or have become living realities for the people of India." Mutual appreciation of society of judges and advocates constitute extra constitutional power and this lead to imbalance of power spectrum in society. What we need is, whatever the SC said, don't take it as gospel of God. We should be able to discover the truth; we should be able to analyze that whether the particular question is in conformity with Fundamental Rights. We should have the ability to identify what is wrong, where? Now, the analysis of governmental functioning is "the executive is failing, the legislature is failing and the judiciary has failed." Article 13(2) clearly provided "the state shall not make any law which take away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void." Now, question arises, who is the custodian of this right? The answer is President of India under Article 60 and Governor under Article 159. President is not bound to sign the Bill which is unconstitutional, as an obligation is imposed under Article 60 that he shall preserve, protect and defend the constitution and the law. There has to be unity of command to direct state and we have President and Governor for that purpose. Article 14 compels every functionary including the judges to decide according to the provisions of the Constitution.

According to professor Burgess, the idea of complete constitution is like this:

1. Amending power of the Constitution given under Article 368 of the Constitution.

2. Liberty: consist in three modules:

- i. Declaration of liberty
- ii. Guarantee of liberty
- iii. Suspension of liberty under Article 358 and 359

3. Organs of Governmental power: legislature, executive and judiciary.

Professor Bluntschli, added one more,

Presidential form of government has power to choose policy, what he required is only support from legislature.

If one analyze the recent opinion of CJI that judges are not bound to disclose their assets. What the CJI trying to do? He is just claiming unequal protection of law which is not guaranteed under Article 14 of the constitution as he is attempting to take more protection of law; therefore, the equality clause is violated by the judges.

Education and economic development are the only two methods mentioned of correctness under Article 46 of the Constitution. But in the recent decision of SC regarding reservation policy for weaker section of the society is totally a blunder created by it. Nobody has grievance that the weaker section of society should prosper, but it does not mean robbing upper strata of society of their opportunities and development. Forward section of society cannot be pulled down to promote weaker section of the society. The basic funda is “unless there is capacity building from primary level, reservation does not help.”

The answer of all the grievances are given under Article 14 of the Constitution but the judiciary lost the beauty of this particular Article through classification. By and large Courts failed to deliver complete justice. Article 14 talks of restitutive justice and restitutive justice has the touchstone of time count. Moreover, procedural complexities should not hamper the way to justice. As lay down by SC that if you move the High court under Article 226 then you can come to SC only under Article 136. What is this nonsense? Is it the denial to the people that by way of procedural complexities they cannot enforce their rights against the wrong doer? It is highly unconstitutional. Nobody can forfeit your right to move to SC under Article 32 if you

exhaust your first remedy under Article 226, because it is violative to the protection given under Article 14. What is wrong here is the manner of working, system is good enough to lead to equality.

### **Judicial Process under the Indian Constitution**

Judicial process is basically the path or the method of attaining “justice”. Justice is the approximation of the ‘is’ to ‘ought’. Judicial power is involved in the legal ordering of facts and is under the obligation to approximate ‘is’ with the ‘ought’. This ordering is nothing but the performance of administrative duties. Supremacy of law implies that it is equally applied and nobody is above the law. Everyone is equal in the eyes of law so that a level playing field is created in order to strengthen parity of power.

Indian Constitution adopted this principle in the form of Article 14 and the Preamble which provide equality of status and opportunity. Thus, Constitution ensues to establish parity of power which requires that every person must be on the same plane. The wording of Article 14 made it an ‘umbrella’ Article under which all other rights, both constitutional and statutory, find protection. This is so because all laws treat every individual with equality and the protection of laws is extended to all without any discrimination, then all others rights are automatically enforced. This duty to extend equality before the law and equal protection of the laws has been casts on the state.

Article 256 makes it obligatory upon the executive of every state to ensure compliance with the law made by Parliament and any existing law which applies in that state. The Union executive is empowered to give such directions to a state as may appear necessary to ensure the compliance of the laws by the state executive. Thus, according to Article 256, it is the duty of the executive to ensure compliance with the laws and that too in a manner that satisfies the mandate of Article 14.

Article 256, is in fact, the reflection of the true tradition of the Rajadharma Principles which regarded it the responsibility of the executive to deliver justice through affirmative executive action to

ensure strict compliance with the applicable law. Article 256 states the whole mechanism to ensure the implementation of every law by the executive power. It thus, envisages the delivery of justice through administrative mode. The administrative mechanism of providing justice as promised under Article 14 is provided in Article 256. It is well established that the judiciary is the outcome of the dissatisfaction of the working of the administrative machinery. The need for a dispassionate judgment of the executive action has given rise to judiciary. Essentially, the judiciary while resolving disputes is ensuring implementation of laws. Thus, its functions are basically administrative in nature. Law is always based on the policy when the judiciary implements or reverse the action of the executive, thus, judiciary acts as a policy controller. This view has been endorsed by Karl Lowenstein who held that adjudication is basically execution.[31]

But the present Indian judicial system is by all accounts unusual. The proceedings of the Courts are extra ordinary dilatory and comparatively expensive. A single issue is often fragmented into a multitude of court actions. Execution of the judgment is haphazard, the lawyer seem both incompetent and unethical; false evidence is often commonplace; and the probity of judges is habitually suspect. Above all, the courts often fail to bring the settlement of disputes that give rise to litigation. The basic reason for this state of affairs is that present mode of access to justice through courts operating in India is based on Adversarial legalism. This is where the power structure given in the Constitution has been distorted. As per Article 53(1) the executive of the power vested in the President, who has taken the oath to preserve, protect and defend the Constitution.

Therefore, we can say that effective justice dispensation through the Courts requires three elements: access to courts, effective decision making by judges, and the proper implementation of those decisions because the primary responsibility of judiciary is policy control and dispute resolution is only incidental to it.

### **Conclusion and Suggestions**

In today's era, it becomes crystal clear that our judicial process is on the verge of total collapse. The adversarial system which Indian legal system follows has failed to answer the test of Article 14 read with Article 256 as it is required party must do everything from paying court fees to execute the decree which actually is the task of the state.

Constitution is the supreme law of the land governing conduct of government and semi governmental institutions and their affairs. In ancient India king is the fountain head of justice. Sage Yajnavalkya declared that "the king, divested of anger and avarice, and associated with the learned should investigate judicial proceedings conformably to the sacred code of laws". In ancient India, legal procedure is governed by the principles of Rajadharma. All the Dharmas merged into the philosophy of 'Rajadharma' and it was paramount Dharma. It is a classic example of trans-personalized power system.

The adversarial system lacks dynamism because it has no lofty ideal to inspire. It has not been entrusted with a positive duty to discover the truth in the inquisitorial system. When the investigation are perfunctory and ineffective. Judges seldom take any initiative to remedy the situation. During the trial, the judges do not bother if relevant evidence is not produced and passive role as they don't have any duty to search for the truth. As the prosecution has to prove the case beyond reasonable doubt, the system appears to be skewed in favour of the accused. It is therefore, necessary to strengthen the adversarial system by adopting with suitable modifications some of the good and useful features of the inquisitorial system.

### **How to reform judicial process?**

An epilogic thought repeating what has been said earlier may be needed to strength our submission that the court will commit blunder if it does not guard its reputation more seriously. A post script in this prospective, may drive home my point, treating the Bench and the Bar as a complex agency of public justice. A learned Judge mild in

his words, who retired last year from the Supreme Court, wrote with restraint to a former colleague of his still on the High Court, what makes poignant reading: “the judiciary is sinking. The destruction is from within; it is for judges like you to restore the fast disappearing credibility of the High Courts and the Apex court.” Equal protection of the laws is the fundamental right of the citizen which has a forensic dimension and procedural projection. The obligation of every court from the summit to base is to afford the same facility for hearing of case to the rich and the poor, to the dubious billionaire to the bonded labourer. Now, there exists a mutual appreciation of society between judges and advocates which led to the failure of justice delivery system. The judiciary is the fiduciary of people’s justice and has accountability to the country for scrupulously equal judicial process. The crisis is not resolved by some martyrs from the class of advocates courting displeasure by exposure of oblique events but by a people’s movement which will compel the judges and advocates against the privatisation of judicial process. Your monopoly obligates accountability and if there is culpability it cannot be gagged by contempt proceedings. In our system, both the robe and the gown must remember is that the court is what the court does. The new dimension of justice delivery and new vision of alternative justicing will have to be explored and executed if the first promise of the Constitution were to be actualised. Therefore, today, in adversarial system of justice, what we need to reform are:

**Court fees to be abolished:**

The purpose of justice is delivering the promise of law and hence the role of state is not merely limited to establish the judicial institutions but also to fulfill the expectations of the people which they attached to the state while conferring role and seat of power. To charge fees for justice is like sealing the promise of law and flouting the constitutional duty of state to provide justice to the people at their door step, merely laying down the foundations of judicial shops and washing their hands of from the process of justice delivery is not warranted on the part of the state. To get revenue for the

enforcement of rights and to charge it in rigorous ways, failure to pay would entail the justice not access able to because one cannot afford it in terms of money, is the misery and apathy, the courts in India are continuing with. The proper course would be abolition of court fee because it seriously undermines the parity of power principles as it places the richer one in advantageous position which offends the spirit of Constitutional goals.

**Advocate fees to be abolished:**

As it is clearly provided under the provisions of Advocates Act that advocates are the officers of the Court, then why the clients are bound to pay hefty fees to lawyers for contesting thier cases. There should be provision for public advocates which are available to everyone and should be paid by state.

**Selection of Judges:**

CJI committed blunder when in one of the most controversial case he held that consultation by CJI means his consent. Here, by this observation the power of President is reduced to zero and whole spectrum of power given under the constitution is disturbed. The judges should be appointed by President only with the consultation of CJI and not by his consent.

Moreover, the provision of advocates becoming judges after certain required years of practise should be abolished. Judges and advocates are different profession and they should not be intermingled. There should not be any mutual appreciation of society.

**Adversarial system to be abolished:**

The present adversarial system should be abolished and replaced with inquisitorial system of justice. Judicial process is essentially deductive reasoning and it is to tell authoritatively what law is. The judge should take judicial notice of all the law. The judge is to investigate the case before him, by approximating 'is' to the 'ought', after the parties present their case. By virtue of Article 14 r/w 256, there should be an affirmative action by the policy implementing organ. It should protect the citizen with thier affirmative action, just



like the ancient Indian system. The present Indian legal system is continuing the colonial legacy where the ends justify the means, but since now, we are living under the umbrella of a controlling Constitution, the means should justify the ends.

**The Limitation Act should be struck down:**

The Limitation Act should be struck down as unconstitutional since it is violative of Article 14. Under Article 14 there is no distinction between state action and private action. If any person fundamental rights are infringe, how can the state fix a time limit to curtail the right to move the court for justice. It cannot withstand the test of Article 14, or the six counts of the power spectrum. Hence, Limitation Act, doctrine of Delay and Laches and procedural hassles are undoubtedly unconstitutional.

**Judges should not have any immunity:**

The judges should not have any immunity because the functions of a judge is twofold; the judicial function is only to state authoritatively what law is. All others are administrative functions. The fundamental law is the Constitution and it is the only supreme authority. If judges committed any negligence or there is dereliction of duty on their part, then such judges should be punished under Section 166 of the IPC because they are the public officers and hence liable for punishment for negligence of duty.

According to Rajadharma principles, the king himself is liable to be punished for an offence, one thousand times more penalty than what would be inflicted on an ordinary citizen. Perhaps, it is high time that this principle is getting working especially as under the Constitution none is above the law and there is no immunity for crime. If judges of the Superior Court in China and Japan can be prosecuted and punished for violations of law, why not in India which has a basic structure command to ensure equal subjection of all to the law.

**Delays should be avoided:**

The delays in our legal system are well known. There 30 million cases pending in various Courts. The average time span for dispute to be resolved through the court system is about 20 years. Litigation

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has become a convenient method for avoiding prompt retribution by many people on the wrong side of law. The Bible says that the path to hell is paved with good intention. The legal system is meant to punish the criminal and to protect the law abiding citizens. Many a time, the criminal exploits the legal process itself to escape punishment.

**Supreme Court to have Benches throughout the country:**

Article 130 of the Constitution provides that the SC shall sit in Delhi or in such other place or places, as the CJI may with the approval of President. From time to time appoint. This provision of the constitution has not been applied so far. If the SC has a seat on other places, that is seat in every state then it will be relief to the aggrieved and justice will be assessable to them, which will result in reduction of cost of litigation and will cause less hardship to the litigant.

**No presumption should be raised in favour of anyone:**

The presumption is always in the favour of constitutionality of statute, and it is a gross misapplication of a justice as it tends to presume the preponderance of power in favour of one party and tilts the balance unjustly. This totally upset the balance of parity of power, which is ensured through the guarantee of “equal protection of laws” under Article 14 as well as Article 13 (2) and (3) of the Constitution, respectively. The burden of justifying the constitutional validity of the law as well as the fact that the state action was in accordance with such law should be on the state, and not on the person who challenges its constitutional validity. Asking the injured party to prove the wrong or injury suffered destroyed the guarantee of equal protection of laws. Such an opinion of the part of court is extremely low on the ethical count of the power spectrum.

**Judges should play active and not passive role while deciding cases:**

Article 14 of the Indian Constitution made it obligatory on the state to provide justice to all at the door step. Thus, the Indian Constitution necessarily envisages inquisitorial mode. So, the judges should go a

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mile extra in deciding cases as the judges supervising the cases are independent and are bound by law to direct their inquiries either in favour or against the guilt of any suspect and play an active role while deciding cases.

**Accountability of Judges:**

In India, the judiciary is separate and independent organ of the state. The legislature and the executive are not allowed by the constitution to interfere in the functioning of the judiciary. The functioning of the judiciary is independent but it doesn't mean that it is not accountable to anyone. In a democracy the power lies with the people. The judiciary must concern with this fact while functioning. The high courts have the power of control over the subordinate courts under article 235 of the constitution of India. The high courts have the power of control over the subordinate courts under Article 235 of the Constitution of India. The SC has no such power over High court. The CJ of High courts/ India have no power to control or make accountable other judges of the Court.

**Reluctant approach of Supreme Court to accept petition under Article 32:**

The rule made by SC under article 145 laying down the procedure to be followed by the SC in performing its functions involves lot of technicalities. It is the duty of the SC to grant relief under Article 32 and it is mandatory as it is obvious from the word "the Supreme Court shall" in Article 32. But the SC is reluctant to perform its functions.

To conclude one can say that whatever may be the system the procedural laws must be minimum, simple and must be litigant friendly

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**1.4 Judicial process as an instrument of social ordering**

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**Article 32: Instrument of Social Ordering**

Article 32 of the Constitution empowers the Supreme Court to issue directions or orders or writs for enforcement of any right conferred

under the Constitution for securing social justice. The Supreme Court has granted great relief in cases of social injustice to the affected groups of the society under this provision. Article 32 is an important instrument of judicial process to enforce social ordering. Article 32 of the Constitution of India itself is a fundamental right, which accorded free hand to the Judicial Process enable the Supreme Court to take suitable action for the enforcement of social order. Deprivation of the fundamental rights often results in to social disorder. The Supreme Court is a sentinel of all fundamental rights, and we are satisfied to see that the Apex Court has taken recourse of judicial process effectively in every area of social disorder to set it right and granted relief for each type of evil prevailing in the society. The Supreme Court has played positive role in implementing social order.

Now it will be appropriate to examine the areas in which judicial process played a vital role in eliminating social dis-order:-

#### Backward Classes of the Society

In "Indra Sawhney v. Union of India", AIR 1993 SUPREME COURT 477, the Apex Court has innovated concept of 'creamy layer test' for securing benefit of social justice to the backward class, needy people, and excluded persons belonging to 'creamy layer .'

#### **BIGAMY**

Bigamy is a social evil which often creates social disorder. The Apex Court has tightened the noose over those avoiding punishment by taking plea of conversion to Islam. In "Lily Thomas v. Union of India", AIR 2000 S C 1650, it was held by the Apex Court that the second marriage of a Hindu husband after conversion to Islam without having his first marriage dissolved under law, would be invalid, the second marriage would be void in terms of the provisions of Section 494, IPC and the apostate-husband would be guilty of the offence punishable under Section 494, IPC. This verdict of the Apex Court would certainly be helpful in eliminating social evil of bigamy.

#### **Bride Burning**

In "Paniben v. State of Gujarat", AIR 1992 S C 1817, the Apex Court held that it would be a travesty of justice if sympathy is shown when cruel act like bride burning is committed. Undue sympathy would be harmful to the cause of justice. The Apex Court directed that in such cases heavy punishment should be awarded.

### **Bonded Labourers**

Bandhua Mukti Morcha v. Union of India", AIR 1984 S C 802, is a good example of social ordering by way of judicial process. The Apex Court has tried to eliminate socio-economic evil of bonded labour, including child labour and issued certain guide lines to be followed, so that recurring of such incidents be eliminated.

### **Caste system and Judicial Process**

In "Lata Singh v. State of U. P.", AIR 2006 SC 2522, the Apex Court has given protection to the major boy and girl who have solemnized inter-caste or inter-religious marriage.

### **Child Labour**

In "M.C. Mehta v. State of T.N.", AIR 1997 S C 699, the Supreme Court has issued direction the State Governments to ensure fulfillment of legislative intention behind the Child Labour (Prohibition and Regulation) Act (61 of 1986). Tackling the seriousness of this socio-economic problem the Supreme Court has directed the Offending employer to pay compensation, a sum of Rs. 20,000/ for every child employed.

### **Child Prostitution**

In Gaurav Jain v. U.O.I. AIR 1997 SC 3021, the Apex court issued directions for rescue and rehabilitation of child prostitutes and children of the prostitutes.

### **Dowry Death**

Dowry death is perhaps one of the worst social disorders prevailing in the society, which demands heavy hand of Judicial Process to root-out this social evil. In "Raja Lal Singh v. State of Jharkhand", the Supreme Court has laid down that there is a clear nexus between the death of Gayatri and the dowry related harassment inflicted on

her, therefore, even if Gayatri committed suicide, S. 304-B of the I. P. C. can still be attracted.

### **Equality: Man and Woman**

In AIR India v. Nargesh Meerza, AIR 1981 SC 1829, the Apex Court declared that – “the provision of AIR India Service Regulation 46 (i) (c)” or on first pregnancy whichever occurs earlier” is UN-constitutional, and is violative of Article 14 of the constitution.

### **Female Foeticide and Judicial Process.**

Leading to unhindered female infanticide affecting overall sex ratio in various states causing serious disorder in the society. In "Centre for Enquiry into Health and Allied Themes (CEHAT) v. Union of India", AIR 2001 S C 2007, the Apex Court has held that despite the PNDT Act being enacted by the Parliament five years back, neither the State Governments nor the Central Government has taken appropriate actions for its implementation. Hence, directions are issued by the Court for the proper implementation of the PNDT Act, for eliminating this Social evil.

### **Goal of Judicial Process**

Ultimate goal of Judicial Process , undoubtedly, is to ensure social order and to make the society safer for its people. Law cannot be effective and useful without taking recourse of judicial process in maintaining social order. Justice P. N. Bhagwati and Justice V. R. Krishna Iyer, both were of the opinion that law is an instrument of social change, social justice and social ordering. Justice Rangnath Mishra, former C.J.I., has rightly observed that ' Law is a means to an end and justice is the end.' Therefore, undoubtedly we can say that Judicial Process, which operate laws, is an instrument of social ordering.

### **Harassment of Woman**

The Apex Court in Vishaka v. State of Rajsthan (AIR 1997 SC 3011) created law of the land holding that the right to be free from sexual harassment is fundamental right guaranteed under Articles 14, 15 and 21 of the Constitution. The Court has issued guidelines to be

followed by employer for controlling harassment of woman at her work place.

### **Immoral trafficking**

Immoral trafficking has now become a widespread social disorder. This is a deep rooted social evil has to be controlled. The Apex Court is of the opinion that accused persons are to be dealt with heavy hands of the Judicial Process in such cases. In "State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain", AIR 2008 SUPREME COURT 155 , the Court has rejected application for anticipatory bail, in a case where a minor girl was driven to flesh trade by accused persons , comprised of police officers, politicians and all were absconding for long time.

### **Judicial Process and Social Order**

It is satisfying to see that achievements of Judicial Process in respect of social ordering has been significant . Judiciary has not shied away from its responsibility of enforcing social order. Looking to the need of hour and demands of the changing society, the Supreme Court has innovated various tools and techniques, for securing social order. One can see how the Supreme Court of India has innovated, case after case, various juristic principles and doctrines, for upgrading social order. Needless to say that , Articles 14, 15, 16, 17, 38, 39A and 42 to 47 of the Constitution of India deal with facets of social justice. Courts have played very wide role in interpreting the Connection for achievements of social justice.

### **Maintenance**

In Mohd. Ahmed Khan v. Shah Bano, AIR 1985 SC 945, the Apex Court , for the first time, granted maintenance to divorced Muslim woman under section 125 Cr. P. C., ignoring her personal law, keeping in view essence of equality before law.

In "Dimple Gupta v. Rajiv Gupta", AIR 2008 S C 239, the Apex Court has granted Maintenance to illegitimate child under S. 125 Cr. P.C. This path breaking judgment has given breath to the innocent children who were victim of no fault of their own. These verdicts are judicial instruments of social ordering.

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**Need of Judicial Process**

Noble preamble of our Constitution promises citizens of India to secure Justice, – inter alia , social justice, transforming social order. Judicial Process has played a significant role in order to deliver social justice, by eliminating socio-economic imbalance and social injustice from the society.

**Outraging Modesty of Woman**

Outraging the modesty of a woman is a serious social disorder has to be taken seriously by courts during the course of Judicial Process. In "Kanwar Pal S. Gill v. State (Admn. U. T. Chandigarh)", the accused slapped on the posterior of the prosecutrix, Mrs. Rupan Deol Bajaj, an I. A. S. officer , in the presence of other guests. The accused, who was then the D.G.P. of the State of Punjab. The CJM convicted him under Sections 354 and 509 IPC. Appeal filed by the accused was dismissed by the Apex Court. That by itself is setting a model for others and it is a good example in connection to social ordering.

**Prevention of Atrocity**

When members of the S. C. and S. T. assert their rights and demand statutory protection, vested interest try to cow them down. In these circumstances, anticipatory bail is not maintainable to persons who commit such offences, such a denial cannot be considered as violative of Article 14 as held in "State of M.P. v. R. K. Balothia", AIR 1995 S C 1198.

**Rape**

In "State of M.P. v. Babulal", AIR 2008 SUPREME COURT 582, the Court has laid down the principle that rape cases need to be dealt with sternly and severely. A socially sensitized Judge is a better armour in cases of crime against women. Once a person is convicted for an offence of rape, he should be treated with a heavy hand and must be imposed adequate sentence. This goes to show that how the Supreme Court is keen in eliminating social disorder by the heavy hands of judicial process.



**Conclusion**

Justice V. R. Krishna Iyer, has rightly observed that “ Law is not a brooding omnipotence in the sky but a pragmatic instrument of social order. Judicial Process is a means of enforcing law. In the light of the above discussion certainly it it would be perfectly right to say that Judicial Process is an instrument of social ordering. The prominent work of Indian Courts today may be seen as prosecuting poor people for petty crime. The main Role of courts continues to be, as in colonial times to (i) enforce law against (mostly poor) citizens; (ii) protect property rights(state and private) and (iii) uphold and protect the authority of state. On the other hand, in the immortal words of Supreme Court in S.P.Gupta Case THE CONSTITUTION has made a revolutionary change in the role of Indian Courts –from being an arm of the RAJ to being an instrument of SWARAJ, an “arm of social revolution”.

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**1.5 The tools and techniques of creativity and precedents**

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**[The Importance of Precedent](#)**

To understand how to make legal arguments, it is important to have an understanding of our court system. This section focuses on the Federal Court system. Every state has its own state court system, which is separate from the federal system.

**1. The Federal Court System**

The federal court system is not separated by state, but rather by “districts” and “circuits.” A federal suit begins in a United States District Court. The District Court is the trial court of the federal system. In total there are 94 U.S. District Courts. Some states, such as Alaska, only have one district. Others have several. New York, for example, is composed of four districts: the Northern, Western, Eastern, and Southern Districts. District Courts all have the name of a state in them, like the “Eastern District of New York.”

Someone who loses in the District Court has a legal right to appeal to the United States Circuit Court of Appeals. The Court of Appeals

is divided into regions called “circuits.” There are 11 circuits in the United States that have number names. Washington, D.C. is just known as the “D.C. Circuit” and does not have a number. Each Circuit Court contains a number of district courts. For instance, the “First Circuit” includes all the districts in Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico.

Someone who loses in the Court of Appeals can ask for review by the United States Supreme Court. This is called “petitioning for certiorari.” Generally, the Supreme Court can decide which decisions it wishes to review, called “granting cert.” and can refuse to review the others, called “denying cert.”

## **2. How Judges Interpret Laws on the Basis of Precedent**

Most of the claims we have talked about in this book are based on one of the Constitutional Amendments, which are reprinted in Appendix E at the back of this book. Amendments are very short and they are written in very broad and general terms. Courts decide what these general terms mean when they hear specific lawsuits or “cases.” For instance, you probably already know that the Eighth Amendment prohibits “cruel and unusual punishment.” However, there is no way to know from those four words exactly which kinds of punishments are allowed and which aren’t. For instance, you may think to yourself that that execution is very “cruel and unusual.” But, execution is legal in the United States. To understand how judges interpret “cruel and unusual punishment” you need to read cases in which other people, in the past, argued that one type of punishment or another was “cruel and unusual” and see how they turned out.

Each court decision is supposed to be based on an earlier decision, which is called “**precedent**.” To show that your constitutional rights have been violated, you point to good court decisions in earlier cases and describe how the facts in those cases are similar to the facts in your case. You should also show how the general principles of constitutional law presented in the earlier decisions apply to your situation.

Besides arguing from favorable precedent, you need to explain why bad court decisions which might appear to apply to your situation should not determine the decision in your case. Show how the facts in your case are different from the facts in the bad case. This is called “distinguishing” a case.

The most important precedent is a decision by the U.S. Supreme Court. Every court is supposed to follow this precedent. The next best precedent is a decision of the appeals court for the circuit in which your district court is located. This is called “**binding precedent**” because it *must* be followed.

The third-best precedent is an earlier decision by the district court which is considering your suit. This may be by the judge who is in charge of your suit or by a different judge from the same court.

Some questions in your case may never have been decided by the Supreme Court, the Circuit Court, or your District Court. If this is the case, then you can point to decisions by U.S. Appeals Courts from other circuits or by other U.S. District Courts. Although a district court is not required to follow these kinds of precedents, it should consider them seriously. This is called “**persuasive authority.**”

One complication is that you should only cite cases which remain “good law.” Good law means that a case has *not* been reversed on appeal, or overruled by a later case. For example, in Chapter Three we wrote at length about *Overton v. Bazzeta*, 539 U.S. 126 (2003), a Supreme Court case about prisoners’ rights to visits. Before the Supreme Court heard the case, the Sixth Circuit Court of Appeals heard the prison officials’ appeal from a district court decision finding that Michigan’s prison visit policy violated prisoners’ constitutional rights. The Sixth Circuit decision is reported at *Overton v. Bazzeta*, 286 F.3d 311 (6th Cir. 2002). The Sixth Circuit agreed with the district court that the plaintiffs’ constitutional rights were being violated, and wrote a wonderful decision. However, because the Supreme Court later granted cert and came to a different conclusion, you cannot rely on any of the parts of the (good) Sixth Circuit opinion that the Supreme Court reversed.

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**Order of Precedents:**

**Supreme Court (Strongest)**

↓

**Appeals Court for your Circuit**

↓

**District Court for your District**

↓

**Another Appeals Court**

↓

**Another District Court in your Circuit**

↓

**Another District Court outside your Circuit.** (Weakest, but still important)

Sometimes it is hard to tell, from reading a decision, whether the whole thing has been reversed or not. Some part of a lower court decision can remain good law after an appeal. If only one part of the case is appealed, while other claims are not, the portion of the lower court decision that was not appealed is still good law. You can cite it. And of course, if a case is affirmed on appeal, meaning that the Appellate court agrees with what the district court said, the district court decision is still good law, and you can cite to it. In that example, however, you may want to cite to the appellate decision instead, as an appellate decision is higher up in the order of precedent.

Let's go back to the *Overton v. Bazetta* example. In that case, plaintiffs argued before the district court that Michigan rules restricting visits violated their First and Eighth Amendment rights, as well as procedural due process. They had a trial at the district court and won. The appellate court "affirmed" or agreed with that decision. When the Supreme Court decided to hear the case it decided to review the First and Eighth Amendment claims. It went on to reverse on those claims, holding that Michigan's policies did not violate the First and Eighth Amendment. So, the Supreme Court

decision does not affect the lower courts' procedural due process decision. That part of the Sixth Circuit opinion is still "good law."

How do you find out if a case is still good law? Most lawyers today do it using an internet legal research system. In prison, you can do it using books called "Shepards." These books tell you whether any court has made a decision that affects a case that you want to rely on. They also list, to the exact page, every other court decision which mentions the decision you are checking. To research federal cases, you need Shepards Federal Citations. A booklet that comes with each set of citations explains in detail how to use them. It is very important for you to read that booklet and follow all of the directions. When you use Shepard's Citations, it is often called "shepardizing." Shepardizing a decision is the only way you can make sure that decision has not been reversed or overruled. It also can help you find cases on your topic. Be sure to check the smaller paperback "advance sheets" which come out before each hardbound volume.

### **3. Statutes**

Federal courts use the same method to interpret laws passed by the U.S. Congress. These laws are called "statutes." Judges interpret the words in these laws in court cases. This method also governs how judges apply the Federal Rules of Civil Procedure, which are made by the U.S. Supreme Court. Since statutes and rules are more specific than provisions in the Constitution, they leave less room for judicial interpretation.

### **4. Other Grounds for Court Decisions**

Sometimes no precedent will be very close to your case, or you will find conflicting precedent from equally important courts. Other times there may be weak precedent which you will want to argue against. In these situations it helps to explain why a decision in your favor would be good precedent for future cases and would benefit society in general. This is called an argument based on "policy."

You can refer to books and articles by legal scholars to back up your arguments. Sometimes when a judge writes an opinion to explain his decision, he will set forth his views about a whole area of law

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relevant to that decision. Although the judge's general views do not count as precedent, you can quote his view in support of your arguments just as you would quote a "legal treatise" or an article in a "law review." A "legal treatise" is a book about one area of the law and a "law review" is a magazine or journal that has essays about different parts of the law written by legal scholars.

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### **1.6 SUMMARY**

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The duty of the judge is to interpret and apply the law to the cases before him. When a judge decides a case, he does something more than simply applying a law; he interprets and moulds the law to fit in with the facts and circumstances of the case. According to Cardozo, while moulding the law, he may use the methods of philosophy, of history, of sociology or of analogy. He moulds the law so as to best serve the requirements of the society. The methods of philosophy, history, sociology and analogy are the tools using which a judge performs his duty. Using these methods, he fulfils his obligations towards the society which require him to give his view, his notion of law.

In this unit we have discussed about the concept, definition, and nature of judicial process. We have also learned about the judicial process as an instrument of social ordering apart from that the tools and techniques of judicial precedents have also been discussed so as to understand the whole concept of judicial process.

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### **1.7 SUGGESTED READINGS/REFERENCE MATERIAL**

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1. (1986)3 SCC 615
2. AIR 1978 SC 597
3. The Nature of the Judicial Process
4. Cardozo, 'The Nature of the Judicial Process' at page 141.
5. (1997) 6 SCC 241

6. (1995)3 SCC 635
7. AIR1995 SC 1531
8. AIR 2001 Del 126 and Union of India v. association for Democratic Reforms, JT 2002(4) SC 501
9. M.P. Jain, 'Indian Constitutional Law', Fifth Edition at page 1557
10. <http://sanamurtaza.blogspot.com/2011/05/judicial-process-as-instrument-of.html>
11. <http://jpinstrumentofsocialordering.blogspot.com/>

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**1.8 SELF ASSESSMENT QUESTIONS**

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1. What is judicial process?
2. What do you understand by the concept of judicial process; discuss its relation with social ordering?
3. Explain the nature of judicial process?
4. Write down a short note on judicial process under the Indian constitution.
5. How to reform judicial process?
6. Discuss the tools and techniques of judicial process.

**LL.M. Part-2**

**Subject: JUDICIAL PROCESS**

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**Block I- Nature of judicial process**

**Unit-1-Judicial process and creativity in law- common law model-Legal Reasoning and growth of law- change and stability**

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**STRUCTURE**

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**2.1 INTRODUCTION**

**2.2 OBJECTIVES**

**2.3 Judicial process and creativity in law**

**2.4. Legal Reasoning and growth of law**

**2.5 Importance of Precedents in Common law systems**

**2.6 SUMMARY**

**2.7 SUGGESTED READINGS/REFERENCE MATERIAL**

**2.8 SELF ASSESSMENT QUESTIONS**



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## 2.1 INTRODUCTION

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In the previous unit you have read about the concept, definition, and nature of judicial process. We have also learned about the judicial process as an instrument of social ordering apart from that the tools and techniques of judicial precedents have also been discussed so as to understand the whole concept of judicial process.

Judicial process is the method of attaining justice which seeks to achieve the desirables, and prohibit undesirables. Justice, is itself an irrational concept, However in a layman word justice means absence of fear which is possible only when there is - lack of arbitrariness , freedom of liberty, and equal access to the quick affordable satisfactory credible dispute settlement forum . The essence of justice lies in Rule of law which requires that law of land is stable and not arbitrary that is to say, law is not ruled by the changing government rather the government and its instrumentalities are ruled by the law.

In this unit we shall discuss about the creativity in law and the judicial process as Legal Reasoning and growth of law. We shall also read about the Importance of Precedents in Common law systems and describe the tools and techniques of judicial precedents in India so as to understand the whole concept of judicial process.

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## 2.2 OBJECTIVES

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After reading this unit you will be able to:

- ✓ Understand the creativity in law
- ✓ Discuss the judicial process as Legal Reasoning and growth of law.
- ✓ Discuss the Importance of Precedents in Common law systems

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- ✓ Describe the tools and techniques of judicial precedents in India.

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### **2.3 Judicial process and creativity in law**

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Judicial process is the method of attaining justice which seeks to achieve the desirables, and prohibit undesirables. Justice, is itself an irrational concept, However in a layman word justice means absence of fear which is possible only when there is - lack of arbitrariness , freedom of liberty, and equal access to the quick affordable satisfactory credible dispute settlement forum . The essence of justice lies in Rule of law which requires that law of land is stable and not arbitrary that is to say, law is not ruled by the changing government rather the government and its instrumentalities are ruled by the law. In the modern times there are two interpretations of the Rule of law, the first the more traditional view is that of the plenary adhering to the rules of the laws while the second view allows the encompassing of the ideal rules based on criteria of morality and justice within its province. Modern states follow the second principle of rule of law because a law which is stable becomes oppressive after some time, due to its failure to satisfy the needs of the progressive society.

The duty of the judge is to interpret and apply the law to the cases before him. When a judge decides a case, he does something more than simply applying a law; he interprets and moulds the law to fit in with the facts and circumstances of the case. According to Cardozo, while moulding the law, he may use the methods of philosophy, of history, of sociology or of analogy. He moulds the law so as to best serve the requirements of the society. The methods of philosophy, history, sociology and analogy are the tools using which a judge performs his duty. Using these methods, he fulfils his obligations towards the society which require him to give his view, his notion of law. The judge who moulds the law by the method of philosophy may

be satisfying an intellectual craving for symmetry of form and substance. But he is doing something more. He is keeping the law true in its response to a deep seated and imperious sentiment. By the method of philosophy, the judge makes use of his own reasoning and standards of public good. Under this method, the judge makes use of his own inner sub conscious element and gives to the society his own notion of right and wrong, of just and unjust, of equality, fairness and justice. By the method of history, it is meant that the judge makes use of the past decisions. He follows the doctrine of precedent. He compares the case he has in hand with the past decisions and makes use of the one which most closely resemble with the one he has to decide. The doctrine of precedent is based on the principle that like should be treated alike and that there is stability and certainty in law. However, while dealing with the precedents, the judge has to distinguish between those which are liberal and beneficial for the future and those which are oppressive to the society. The judge has to choose those precedents which best serve the purpose of the society. According to Cardozo, the method of sociology demands that within the narrow range of choice, the judge shall search for social justice. The judge has to see that his work leads to the attainment of social order. He has to provide for the welfare of the society. The judge has keep the welfare of the society as the ultimate aim of his work. He cannot attempt an action which would not be beneficial for the society at large.

By the method of analogy, it means that the judge makes use of the alien jurisprudences. It is a case where the judge borrows from other jurisprudences. While borrowing from other jurisprudences, the judge has to make use of the similarity in laws and prevailing social conditions of the region from where he borrows the provisions. The judge compares the case with similar problems in other regions. In the case of *Bijoe Emmanuel v. State of Kerala*[1], the Supreme Court of India made use of the law prevailing in other countries to decide the issue. In this case, the Supreme Court made reference of

the similar cases decided by the courts in Australia and U.S.A. to deal with the special case of a particular sect.

For a judge, law is never static. It is dynamic and keeps changing. The judge has to mould it in accordance with the needs of the society. The judge plays a very dynamic role in shaping the law so as to best serve the society.

The judge has to take care that the law is progressive and protects the interests of the society and is not oppressive and suffocating. The aim of judicial process is the attainment of social good. The judge has to see that the law helps the society at large and does not infringe the goals of justice and liberty.

Social order: the purpose of law There have been different approaches to law. According to Austin, law is the command of the sovereign. Bentham proposed his utilitarian calculus, according to which the aim of law is to bring about maximum good of the largest number. Bentham's hedonistic calculus was based on the concept of social utility. According to Roscoe Pound, the purpose of law is social engineering. Law aims to achieve social good. The welfare of the society is the paramount consideration of law. Law aspires to end all social evils and to bring about social order.

Cardozo has stated that the final cause of law is the welfare of society. When judges are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.

Law and society are interdependent and neither can be separated from the other. The good of the society is its greatest requirement. Law serves the role of protector of the social order. Law aims to attain the good and order in the society.

Social order is what the law aims to achieve. It is the ultimate object of all laws. Law has to provide social order in order to protect the society from disintegrating.

### **Role of judges in bringing about social order**

The ultimate aim of all law is to bring about social order. The judge is an important member of the legal institution. He plays an important

role in shaping the law to serve the social interest. For a judge, law is never static.

A judge is empowered to review the various provisions of law. He is an independent and impartial authority which can verify the reasonableness of a law. Being independent from the influence of the executive and the legislative machinery, a judge can form an unbiased opinion on any question of law.

A social problem requires a solution and judges have the role of resolving disputes. While settling a dispute, the judge is also required to take into consideration the various social requirements. Amongst the various options being available before him, a judge has to choose the one which best serves the interests of the society.

The welfare of the society must be the guiding force for a judge when he sits to perform his duty. His obligation towards the society is to fulfill the various social requirements of justice, order and security. He has to give the welfare of the society a paramount place while dealing with any issue. Being the interpreter of the society of its sense of law and justice, the judge has to be careful in his work as his decisions determine the rights and obligations of various members of the society and effect the people at large.

The judge provides for social order during his job as an interpreter. The various ways in which he can provide for social order are by the methods of interpretation, supplying of omissions, suggesting and recommending changes and new regulations and also through mediation process. These are the techniques by which a judge brings about social order.

### **(a) Interpretation**

The judge is the interpreter of the community of its sense of law and order and therefore, he must supply omissions, correct uncertainties and harmonies results with justice through a method of free decision. While dealing with a case, the judge is required to apply law on the facts. While applying law he may be faced with a question of law which requires him to interpret the various legal provisions placed before him.

While interpreting a statute, a judge can take either a literal approach or a liberal one. In literal interpretation, the judge sticks to the letter of the word and there is not much creativity in his job. Sometimes when a literal approach does not give a satisfactory result, that the judge goes for the liberal interpretation of the statute. In liberal interpretation, the judge makes use of his knowledge of various laws, the customs and his own creativity. One of the most important rules of interpretation is the mischief rule, in which the judge has to determine the mischief which the law had sought to make good. Using the mischief rule, the judge has to imagine and understand the problems in the society which required that a particular law be made.

Another important principle in interpretation is that there is a presumption of constitutionality of the statute. The judge has to presume that the statute is constitutional and the legislator had not intended to infringe the fundamental rights.

Further, there is the rule of harmonious interpretation, which states that all the provisions are to be interpreted harmoniously so as to give meaning to all the provisions. The rule of harmonious interpretation underlines the principle that all the provisions of a statute are complementary to each other and are not mutually destructive. While interpreting a statute, the judge has to take care that he gives such an interpretation to the provision that when the statute is read in its entirety, there is no conflict between the provisions.

The role of a judge as an interpreter requires great skill from his side. He is required to give such an interpretation to the legal provisions which best serve the interest of the society.

While interpreting the legal provisions, the judge has to think what purpose, what end of the society his interpretation would serve. He has to take the interest of the society as the paramount issue. The statutes affecting the society at large require the most careful interpretation as the interests of a large number of individuals may be lying at stake.

Thus, when a judge interprets a written Constitution, he has to take utmost care while expressing his view on the problem. The written Constitutions are generally given a very wide and liberal interpretation because they are the supreme laws of the land and all the other statutes owe their authority to the Constitution.

Using liberal interpretation, in the case of *Maneka Gandhi v. Union of India*[2], the Supreme Court enlarged the scope of right to life to mean a dignified life and not just mere animal existence.

While interpreting a law, the judge has to interpret it in a manner that it benefits the society at large.

### **(b) Filling up of blanks**

Sometimes a judge has to do something more than just simply interpret a statute. He may be required to correct all errors in it. He may further be required to fill in the missing blanks in a statute. It is not possible for the legislator to imagine each and every circumstance which could arise in the future. While interpreting a statute, a judge may be required to imagine what the legislator would have provided for that particular circumstance. When a judge starts to imagine what the legislator would have intended, he takes the place of the legislator. He has to act for the legislator, giving sense to the statute as a whole and making up what had been left behind.

A judge cannot legislate infinitely. According to Cardozo, "He legislates only between gaps. He fills the open spaces in the law." While interpreting any statute, the judge has to keep within the restraints laid down by the legislator. The role of the judge is not of legislating but of interpreting and applying the law. It is during his job as an interpreter that a judge maybe required to fill in the missing blanks in the statute. However, while filling up the blanks, a judge has to take precaution that what he supplies to the law protects the spirit of the law and does not destroy it.

A judge has to take care that he maintains the harmony between the various provisions of a statute. While supplying omissions, the judge has to protect and preserve the spirit of the law.

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According to Cardoz, “when the question is one of supplying the gaps in the law, it is not of logical deductions, it is rather of social needs, that we ask the solution.”

Thus, in order to fulfill the needs of the society, the judge supplies the gaps in the statutes. However, the law making work of a judge is restrained as “He is not a knight errant roaming at will in pursuit of his own ideals of beauty or of goodness. He is to draw his inspiration from consecrated principles.”

### **(c) Recommendations**

Often a judge may be required to give his recommendations or suggestions to enact the particular law which would serve the social need.

A judge plays a very important part in social ordering when he lays down suggestions or recommendations regarding any social problem.

Where the law is silent, the judge may be required to cross his bounds and take up the role of legislators. He may be required to give suggestions in order to resolve certain social problems. These suggestions play a very vital role in satisfying the various requirements of the society.

The public interest litigations play a very important role in protecting the interests of the society. By means of public interest litigations, the lawyers and judges attempt to eradicate certain social problems. Public interest litigations play a very useful role when the legislature and the executive fails to find out a solution for the existing problems. Public interest litigations are a recent creation of the courts by which they aim to provide the cure for the ills prevalent in the society. The judges are very instrumental in eradicating the social problems.

The judiciary took a very active role while laying down the procedural requirements required while making an arrest in the case of D.K. Basu v. State of West Bengal[5]. In this case the Apex Court laid down various guidelines which are to be followed by the policemen while making any arrest. The reason behind laying down such



provisions was that there were complaints of police atrocities in the police lock ups.

Similarly, in the case of Vishakha v. State of Rajasthan[6], the Supreme Court again laid down guidelines for the safety of working women. In this case, the instances of sexual harassment of working women at their workplace were an issue. The Supreme Court laid down various guidelines to be implemented by the employer for the protection of the working women. In this case, the court even declared that the sexual harassment of the female employees amounted to the violation of the right to work and is discriminatory against them.

In the case of Sarla Mudgal v. Union of India[7], while dealing with the problem of anomalies in different personal laws and people making use of these differences to defeat the end of justice, the Supreme Court had expressed a view that the uniform civil code should be implemented. In this

case also the judiciary tried to provide for the social requirement for a uniform civil code which would take care of all the problems relating to the differences in the personal laws.

The Supreme Court has also laid down certain rules to be followed when the adoption of an Indian child is made by any foreigner. The reason behind such recommendations was the presence of the menace of the use of young children in beggar and slavery. These rules help in protecting the child from economic, social, physical and sexual exploitation.

Further, in the case of Association for Democratic Reforms v. Union of India[8], the Delhi High court and on appeal the Supreme Court has given guidelines for cleansing of the electoral process from the impact of criminals and wealth and bringing about electoral reform in India.

Similarly, the courts have taken active parts in issues related to illegal constructions, anomalies in school admissions, ragging at university level( Lingdow committee report) and so on. The court had taken these steps in order to ensure social justice.

The judiciary may be required to take up the role of legislators when the legislative fails to provide sufficiently for the social requirement. This act of judiciary is known as judicial activism. The judiciary has acquired its activist power from its review power. The judicial activism has played an important role in attaining social order as it satisfies the various requirements of the society.

**(d) Mediation proceedings**

The social institution requires certain relationships to be protected and sanctified. In order to prevent minor problems developing into irresolvable issues, the judges take the role of mediators. The role of a judge as a mediator is a very recent one. Till date, judges used to solve the disputes. Now they try to prevent the disputes from arising. In cases of minor discords, the judges help in solving the issues before they take the form of major disputes.

The judges suggest out of court settlement of disputes in order to prevent certain relationships from breaking down.

In the present day society, judges suggest the use of mediation proceedings specially when the need is to protect an institution as sacred as the institution of marriage. Judges serve as the mediator in various cases to prevent a relationship from breaking down.

The law mandates mediation and the courts encourage and endorse it. It is a cheaper, simpler and more productive manner of dispute resolution. It helps to restore the broken relationships and focuses on improving the future and not on dissecting the past. The benefit of mediation is that it is a voluntary process and both the parties are able to assess their case and come up to an amicable solution. The judges play an active role in encouraging and endorsing mediation proceedings.

Conclusion A judge is the interpreter of the society. He makes visible the various laws.

While interpreting a law, the judge also corrects the errors present in the law, he supplies the omissions in the law. The main object of law is to bring about social order and the judges play an important part in attaining that objective.

The judiciary has taken an active role in attaining social order and justice. To serve the purpose of the social utility, the judge had to play the part of the legislator as well. A role, which has been much criticized but is very important for fulfilling the needs of the society.

A democracy needs a forum, other than the legislature and the executive, for redressing the legitimate grievances of the minorities-racial, religious, political or others. In India, at the present time, the Supreme Court is laying great emphasis on vindication of the rights of the poor and deprived people. The court has acknowledged this fact. Thus, in Punjab Rickshaw pullers' case[9], the Supreme Court had stated that "Judicial activism gets its highest bonus when its order wipes some tears from some eyes."

Thus, it can be concluded that judicial process has a very active and positive role in social ordering.

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#### **2.4. Legal Reasoning and growth of law**

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In India, in the wake of Kesavananda Bharati (1973), Maneka Gandhi (1978), ABSKS (1981) S.P. Gupta (1982) etc. have led to a democracy-fundamental rights enforcement cum-judicial independence syndrome which constitute the macro-jurisprudential sociological structure in the late nineties and even beyond. These developments in law and society have been possible on account of a free and independent judiciary which has been envisaging that all socio-legal transformation must take place within the framework of a free society and the Constitution. Accordingly judiciary has become not only corrective to legislative and executive excesses and irregularities, its power of judicial review has come as a boon to under privileged individuals or groups since its verdicts have been in consonance with basic freedoms and liberties of the people in the context of time and space. In justice delivery system the Courts have evolved new theories, principles and practices by elbowing out old notions and contradicting time tested traditional jurisprudential false beliefs like that judges do not make law, the doctrine of separation of

powers and the doctrine locus standi and have innovated new principles of combat socio-economic problems, promote collective rights and protect social interests in respect of consumerism and environmental hazards etc. Likewise the Supreme Court has evolved a new natural law doctrine over and beyond the Constitution in Kesavananda Bharati, which embodies the principles of higher natural law, cherished moral values, social and political goals in the backdrop of changing needs of social life of our democratic polity. As Justice Mathews puts it '..... the fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience..... that in building a just social order it is sometimes imperative that fundamental rights should be subordinated to directive principles.' In Maneka the Court evolved a liberal and pragmatist slant in human rights jurisprudence by injecting the U.S. due process of law into Article 21 overruling the Gopalan and subjecting enacted 'law' to due process of law in order to be just, fair and reasonable and not draconian and arbitrary. For, according to Justice Krishna Iyer,<sup>1</sup> '..... procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is largely the history of procedural safeguards and the right to hearing has a human right ring.....' and a fascinating subject of sociological relevance in many areas.' In Judges Transfer case, the Court declared the need of independence of judiciary vis-a-vis a committed judiciary which had required the judges to follow the social philosophy of the Governments. These juristic developments reflect the social realities of India of today so that law and legal theory could respond to meet effectively the needs of the poor and the oppressed.

Indeed a legal revolution is taking place in India within the framework of rule of law and the Constitution where judiciary is using legal and constitutional devices for providing the content and quality of justice-social, political and economic especially through public

interest litigation. While the Preamble enshrines goals and direction of social change in accordance with spirit and ethos of the Constitution it is the judiciary which has

explored a new meaning and content to such goals making them more effective and resilient to meet the ever changing requirements of Indian democracy. These are :

- 1- Independence of judiciary,
- 2- Social Justice and Equality—Mandalisation,
- 3- Dignity and freedom of the individual,
- 4- Secularism, and
- 5- Democracy.

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## **2.5 Importance of Precedents in Common law systems**

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### ***Independence of Judiciary***

An independent judiciary is the substratum on which the whole edifice of constitutional fabric, democratic way of life, the rule of law and legal process rest. The vitality of democratic processes and the ideals of justice, the imperatives of social change and other great values of human liberty, equality and freedoms are all dependent on the tenor and tone of the judiciary. Where judicial wings are clipped, trimmed or transgressed by way of politically motivated supersession or transfer to brow-beat the judges to follow the social philosophy of the Government rather than the philosophy of the Constitution the consequences of such a policy are disastrous to the Rule of Law and the Constitution. It is the judicial independence which ensures democratic form of government, the rule of law and basic rights and liberties of the citizens. According to International Commission of Jurists which met at Athens in 1955 declared :‘An independent judiciary is an indispensable requisite of a free society under the

Rule of Law. Such independence implies freedom from interference by the Executive or Legislature. Consequently the slightest erosion of judicial independence by way of brow-beating judges, or denigrating or scandalising, the judiciary is looked upon as a danger to the entire fabric of society and the Constitution itself as the judiciary is the sentinels of the Constitution and the rule of law and judicial independence is a basic feature, of the Constitution. In Krishna Swamy, the Court envisaged 'the need to keep the stream of justice clean and pure and the judges must be endowed with sterling character, impeccable integrity and upright behaviour. Erosion thereof would undermine the efficacy of the rule of law and the working of the constitution itself.' However, democracy, rule of law, individual liberties, legal and social justice are such vibrant noble concepts which are made purposive and meaningful and which grow and develop only under the canopy of a free and independent judiciary. It is a cardinal principle of the Constitution. There cannot be free society without a free independent judiciary. In the words of Justice Krishna Iyer, 'Independence of the Judiciary is not genuflexion nor is it opposition of Government'. At one point Justice Iyer characterised this concept as a 'Constitutional Religion.' According to Justice Pandian, 'this concept of independence of judiciary.... is a 'fixed star' in our constitutional consultation and its voice centres round the philosophy of the Constitution'—Justice Pandian quotes with approval observations, of Bhagwati, J. in Union of India v. Sakal Chand Himatlal Sethi wherein he remarked that : 'independence of the judiciary is a fighting faith of our Constitution. Fearless justice is the cardinal creed of our founding document..... But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence that it is much wider concept which takes within its sweep independence from many, other pressures and prejudices.' But its raison d'être is correctly pinpointed by Justice Sawant when he remarked : 'The rule of law is the foundation of the democratic society. The judiciary is the guardian of

the rule of law. Hence, judiciary is not only the third pillar, but the central pillar of the democratic State..... If the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted it, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise, the very corner-stone of our constitutional scheme will give way and with it will disappear the rule of law and civilised life in the society.... 'The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver the fearless and impartial justice.....'

### **SUGGESTIONS TO IMPROVE JUDICIAL PROCESS**

The effective judicial process requires the cooperative effort of all three organs of the Government. To this effect I suggest following reformation which should follow by the executive, judiciary and legislature –

Legislature: Legislature being policy formulator must perform following works-

(1) Parliament must in exercise of its power under article 32(3) empower the lower courts to exercise the writs jurisdiction within their local limits under, so that common people may have easy access to the justice.

(2) Parliament must in consultation with judiciary to frame a time limit within which the matter should be disposed of and its failure to attract the punishment.

(3) Parliament should make necessary amendment in advocate Act 1961 to prevent the frequent entry of incompetent person as lawyers.

(4) Alternative dispute resolution system must be proper funded and equipped with necessary infrastructure, So as to reduce the arrears of cases

(5) Parliament should by an act nullify the judgment given by Supreme Court in Ram Jawaya case and Re-presidential Reference case.

(6) Legislature by law must fix the rules according to which the quorum of the judges be fixed, so as to avoid the personal influence of the convening authority on the decision.

(7) Presently there is no supervisory jurisdiction of Supreme Court on the High court to prevent the misuse of their power except in appeal by quashing the judgment, So Parliament should empower the Supreme court to ask the explanation from a High court judge when it found that he had exercised his power illegally

(8)Parliament by a law establishes an independent body consisting of impartial legal experts to enquire into the conduct of judges whose decisions is quashed by Supreme Court or High Court in appeal.

(9)The parliament through a law should empower UPSC to hold an All India Judicial services examination to fill up the vacancies in High Courts and no judge of high court be appointed in his home state except chief justice of that high court (as he can run the administration more efficiently than non regional judges); so that the concept of uncle judges can be removed. The vacancy in Supreme court must be filled up by a selection committee having statutory competence, which consists of chief justice of India, prime minister, law minister, leader of opposition party in Lok Sabha and President. The decision must be taken by the majority of 3:2 and if it is 2:2 the decision of president should be final to elevate or not a high court judge in supreme court.

(10) An amendment in the constitution be made so as to make Article 39A as fundamental right, Article 13(3) should also be amended and the word personal contract should be inserted.

(11) Section 197CrPC should be repealed because it is against article 14 as it gives unequal protection to the corrupt officers and protect their illegal actions and hence is an hindrance in execution of 166 IPC.

(12) Distinction as to bailable and non-bailable offence under section 436 and 437 CrPC should be abolished because it is against article 14, 19, 21. There is no reasonable classification as accused is treated as per the convicted person beside this there is also violation



of presumption of innocence unless prove guilty. Denial of bail also amounts the complete denial of freedom protected under 19(1)(a)-(g) which is unconstitutional under article 13(1) .

(13) Guidelines given by the Supreme Court in D.K Basu and Joginder Singh cases should be incorporated in section 41 Cr.P.C for arrest without warrant

(14) An amendment in section 101, 102 and 103 of Indian Evidence Act be made so as to provide that it shall not be applicable under article 32 and 226. Under these Articles when Petition lies it shall be the state upon whom burden of proof shall lie that its act was constitutional. Because in absence of this amendment the petitioner who is already victim of wrong or injury or whose fundamental right is violated has to prove that all it happens against him which is against the ethical and coercion band of power spectrum.

**Executive:**

Role of executive is policy implementation and ordering of facts from is to ought. Delivery of justice is basically falls within the province of executive which is rendered through access to the administrative authorities. Article 14 casts an unconditional duty on the state to provide equal treatment of law and equal protection of laws to every person. Unfortunately due to lack of ineffective implementation of Article 256 read with 365 and 356, the state often does not fulfil their constitutional obligation, hence the union government should use these supervisory and consequential provision to compel the states to fulfil their duties. President and governor before giving his assent to an act must satisfy himself that the act is in consonance with the provision of the constitution because he has taken the oath under article 60 or 159 to preserve, protect and defend the constitution and the law.

The President under article 124 (3) (a) should also appoint the distinguished jurist as supreme court judges.

The Government should implement the guideline given by the Supreme Court in Prakash singh case, so as to separate the

investigating police from the law enforcing police and also to make the police free from frequent transfers, political interference etc.

The government should establish more fast track courts to remove the arrears of cases. It should also equip the judiciary with the modern technology like e-filing of suits, amendments, affidavits, etc. it should also enable the police with these modern technology.

### **Judiciary**

The role of judiciary is policy control which comes into picture when executive fails to deliver the justice. In order to make judicial process effective the court must observe following guidelines-Judiciary must keep in mind that its work is to say authoritatively what the law i.e. policy is controlling. Provisions of Article 142 and 226 of constitution, Section 482 Cr.P.C and 151 of C.P.C though gives inherent power to the supreme court and high court to render complete justice , it means only to fill the gap within the parameter of the constitution and statutes and it does not mean to supersede the constitution or statute as it did in Ramjawaya Kapoor and S.C Advocates on Records case. The decision that consultation means concurrence amount to the amendment in the constitution without procedure and the statement that Indian government system is based on Westminster form of government and not on advanced presidential form of government amounts to change the nature of government from republic democracy to oligarchic democracy which is not permitted to the judiciary.

When a petition is made to test the legality of the decision of any subordinate court/tribunal the court should only issue the writ of certiorari if grounds are satisfied, it must not issue other writs unless the statutory remedies are exhausted.

The chief justice of India in exercise of his power under Art 130 should constitute at least its four regular benches in and for the eastern, western , northern and southern regions to hear the appeals from the regional high courts . It will help the people to have easy access to the Supreme Court. It is also in consonance to the time , ethical , and influence bands of the power spectrum.

Judiciary must accept the norm of democracy that justice not only be done but it appears to be done. How government could fight against corruption if judiciary itself against the Right to Information Act, regarding disclosure of assets on ground of being not a public servant but constitutional authority. It amounts to double standing as on one hand they claim salaries and other benefits on ground of being public servant and denying the liability to disclose the assets by saying not a public servant . However true fact is that they are public servant within the meaning of sec 21 I.P.C Supreme Court must also correct its illegal wrong judgments which are still being followed in the country.They must provide the justice when the aggrieved party knocks its door and not try to compromise the dispute as it did in Maneka Gandhi case, because art 14 guarantees Restitutive Justice .Judges should play an active role in bringing the truth and not merely being a silent spectator of the dispute.

There should not be presumption of constitutionality of the Act because it tends to presume a preponderance of power in favour of one party and tilts the balance unjustly. This totally affects the principle of parity of power which is ensured through guaranty of equal protection of laws under article 14 as well as article 13(1) and 13(2) respectively, asking the injured party to prove the wrong or injury suffered destroys the guaranty of equal protection of laws. Such an opinion on part of court is extremely low on the ethical count of power spectrum.

### **OTHER REFORMATION**

Section 166 of IPC, 1860 should be enforced ‘ which provides –“ Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both. “. Under Article 14 of the Constitution it the duty of judiciary (Judiciary is a State as laid down in A.R. Antulay v R.S.Nayak AIR 1988 SC 1531) to render justice but

where it fails, it amounts injury under section 44 IPC. Judges being public servant within the meaning of section 21 of IPC, injury caused by them amounts offence under Section 166 and accordingly they should be punished.

Since section 197 Cr.P.C is hindrance and violative of equality provisions of art 14 it should be repelled by legislature.

Court fees Act should be abolished as art 14 imposes unqualified duty on the state to render justice not to do business with justice. Law of limitation act 1963 should be abolished as it is also against the Restitutive Justice envisaged by art 14. Alternative mode of adverbial system that is inquisitorial system should be implemented, as it is also envisaged by the art 14 and is in consonance with the objective of the preamble to secure justice social, economic and political because. , despite of above reformative measures it is difficult to avoid the interference of extra constitutional people (lawyers) to play with justice. In this context we can also take the help of inquisitorial system of French and Italy.

### **CONCLUSION**

On ground of above analysis of the Indian Judicial process under various heads the writer comes to the conclusion that present adversery judicial system is against the sprit of the constitution and is open violation of its Normative character. Judicial process is run by the persons (advocates), who have no where mention in the constitution (except under Article 22(1)) and justice is not done but is purchased.

All three organs of the state has failed to fulfill their constitutional obligation to render justice according to the mandate of the constitution as various laws which are unconstitutional are still operating in the Indian judicial process few examples of which are sec 302 I.P.C, Court fees Act 1867, law of limitation , sec 197 Cr.P.C etc .Judiciary as a state within the meaning of Article 12 is duty bound to do complete and Restitutive justice under Article 14 read with Article 142, but on several occasions it has acted as dispute settlement forum. It is also duty bound under section 57(1) of the

Indian Evidence Act 1872 to take judicial notice of all existing laws having force, whether it is mentioned in the plaint or not but judges deliberately fails to take notice of this section which proves their incapacity and misconduct to deal with the cases rendering them liable for punishment under section 166 IPC and for removal from the post by parliament, but still the legislature has fails to set an example of punishment by virtue of removal of any high/supreme court judge. Under constitutional power arrangement the work of judiciary is to say authoritatively what the law is i.e. policy controlling. Provisions of Article 142 and 226 of constitution, Section 482 CrPC and 151 of CPC though gives inherent power to the supreme court and high court to render complete justice, it means only to fill the gap within the parameter of the constitution and statute and it does not mean to supersede the constitution or statute as it did in Ramjawaya Kapoor and S.C Advocates on Records case. The decision that consultation means concurrence amount to the amendment in the constitution without procedure and the statement that Indian government system is based on Westminster form of government and not on advanced presidential form of government amounts to change the nature of government from republic to oligarchic which is not permitted to the judiciary.

The main reasons for the injustice is due to non supervisions of the working of laws in the states, even though the constitution has envisaged the method of supervision under article 256 read with article 365 and 356. The president and Governors has failed to full-fill their oath taken under Article 60 and 159.

Thus we see that present Indian judicial process is not working according to the constitution and there is a need for revival of the ancient inquisitorial system which is also the mandate of article 14. Inquisitorial method alone guarantees parity of arms and disposal of matters on pure legal basis. Individuals cannot overcome disability created due to unequal power balances created due to personal qualification, legal knowledge, and finance and so on. Inquisitorial mode of judicial process would help state to stand for the victim by

eliminating advocacy all together alongwith improved administrative inquiry into the matter concerned.

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## **2.8 SUMMARY**

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An independent judiciary is an indispensable requisite of a free society under the Rule of Law. Such independence implies freedom from interference by the Executive or Legislature. Consequently the slightest erosion of judicial independence by way of brow-beating judges, or denigrating or scandalising, the judiciary is looked upon as a danger to the entire fabric of society and the Constitution itself as the judiciary is the sentinals of the Constitution and the rule of law and judicial independence is a basic feature, of the Constitution. The duty of the judge is to interpret and apply the law to the cases before him. In this unit we have discussed about the nature of judicial process. We have also learned about the legal reasoning and the growth of law. Finally, we have also discussed the importance of judicial precedents so as to understand the whole concept of judicial process.

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## **2.9 SUGGESTED READINGS/REFERENCE MATERIAL**

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1. See also Unni Krishnan v. State of A.P., A.I.R. 1993 SC 2178.
2. Meneka Gandhi v. Union of India, AIR 1978 SC 597 at 658-59.
- 3.S.P. Gupta, 189.
4. In re: Vinay Chandra Mishra, AIR 1995 SC 2348.
5. Rajiv K. Garg v. Shanti Bhushan, AIR 1995 SC 573; Dalip
6. Singh Gill v. Union of India, AIR 1993 P&H 263.
7. G.C Kanungo v. State ofOrissa, AIR 1995 SC 1655.
- <sup>1</sup> Krishna Swamy v. Union of India, AIR 1993 SC 1407, See also Sub-Committee of Judicial Accountability v. Union of India, AIR 1992 SC 320.
- 8.Mainstream, Nov. 22, 1980.

9. S.C. Advocates-on-Record Assocn v. Union of India, AIR 1994 SC 268 at 314.

10. AIR 1977 SC 2328, See also All India Judges' Association v. Union of India, AIR 1992 SC165.

11. In re: Vinay Cliandra Mishra, 2366.

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## **2.10 SELF ASSESSMENT QUESTIONS**

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1. What do you understand by creativity in law?
2. Write a short note on Legal Reasoning and growth of law?
3. Discuss the Importance of Precedents in Common law systems?

**LL.M. Part-2**

**Subject: JUDICIAL PROCESS**

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**Block I- Nature of judicial process**

**Unit-3- Legal development and creativity through legal reasoning under statutory and codified systems**

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**STRUCTURE**

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**3.1 INTRODUCTION**

**3.2 OBJECTIVES**

**3.3 Judicial process and Development of Law**

**3.4. Creativity in Law through Legal Reasoning**

**3.5 Importance of Precedent in Statutory and Codified Systems**

**3.6 SUMMARY**

**3.7 SUGGESTED READINGS/REFERENCE MATERIAL**

**3.8 SELF ASSESSMENT QUESTIONS**



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### 3.1 INTRODUCTION

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In the previous unit you have read about the concept of the legal reasoning and the growth of law. We have also discussed the importance of judicial precedents so as to understand the whole concept of judicial process.

Judicial process is the method of attaining justice which seeks to achieve the desirables, and prohibit undesirables. Justice, is itself an irrational concept, However in a layman word justice means absence of fear which is possible only when there is - lack of arbitrariness , freedom of liberty, and equal access to the quick affordable satisfactory credible dispute settlement forum . The essence of justice lies in Rule of law which requires that law of land is stable and not arbitrary that is to say, law is not ruled by the changing government rather the government and its instrumentalities are ruled by the law.

In this unit we shall discuss about the creativity in law and the judicial process as Legal Reasoning and development of law. We shall also read about the Importance of Precedents in statutory and codified systems and describe the tools and techniques of judicial precedents in India so as to understand the whole concept of judicial process.

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### 3.2 OBJECTIVES

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After reading this unit you will be able to:

- ✓ Understand the creativity in law through legal reasoning
- ✓ Discuss the judicial process as Legal Reasoning and development of law.
- ✓ Discuss the Importance of Precedents in statutory and codified systems
- ✓ Describe the tools and techniques of judicial precedents in India.

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### **3.3 Judicial process and Development of Law**

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Judicial process is the method of attaining justice which seeks to achieve the desirables, and prohibit undesirables. Justice, is itself an irrational concept, However in a layman word justice means absence of fear which is possible only when there is - lack of arbitrariness , freedom of liberty, and equal access to the quick affordable satisfactory credible dispute settlement forum . The essence of justice lies in Rule of law which requires that law of land is stable and not arbitrary that is to say, law is not ruled by the changing government rather the government and its instrumentalities are ruled by the law. In the modern times there are two interpretations of the Rule of law, the first the more traditional view is that of the plenary adhering to the rules of the laws while the second view allows the encompassing of the ideal rules based on criteria of morality and justice within its province. Modern states follow the second principle of rule of law because a law which is stable becomes oppressive after some time , due to its failure to satisfy the needs of the progressive society. Justice V. R. Krishna Iyer, has rightly observed that “ Law is not a brooding omnipotence in the sky but a pragmatic instrument of social order. Judicial Process is a means of enforcing law. In the light of the above discussion certainly it it would be perfectly right to say that Judicial Process is an instrument of social ordering. The prominent work of Indian Courts today may be seen as prosecuting poor people for petty crime. The main Role of courts continues to be, as in colonial times to (i) enforce law against (mostly poor) citizens; (ii) protect property rights(state and private) and (iii) uphold and protect the authority of state. On the other hand, in the immortal words of Supreme Court in S.P.Gupta Case THE CONSTITUTION has made a revolutionary change in the role of Indian Courts –from being an arm of the RAJ to being an instrument of SWARAJ, an “arm of social revolution”.

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### **3.4. Creativity in Law through Legal Reasoning**

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The ideal notion of the rule of law can be traced in ancient Indian legal system which laid greater emphasis on the duty, by making the king as the head of administration. Dharma in ancient India did not denote any kind of religion or right but only the performance of the duties . Everyone had to perform his assigned Dharmas (Duties) .The duties assigned to the king was known as Rajadharma which was a combination of several Dharmas , hence it was considered as very pious and supreme Dharma. Although the king was the fountain head of the administration of justice, his powers were limited by the norms of Rajadharma . He neither could impose arbitrary taxes nor could favour his relatives, and if he deviated from the performance of the norms of Rajadharma , the punishment prescribed for him was thousands times more than an ordinary individual . There was no distinction between weaker and stronger and the weaker was able to prevail over stronger with the assistance of the king if his rights or liberty was encroached. This duty approach setup of Rajadharma was distorted with the coming of the Moughals and subsequently after the coming of Britishers.

Power is like a river, if controlled, it brings happiness and prosperity otherwise destruction and curse . Justice without power is inefficient, power without justice is tyranny So in order to make power of the government purposive, efficient and in interest of the people, India adopted a normative written constitution on 26th day of November 1949 demarcating the power arrangement between the three organs of the state namely executive, judiciary, and legislature. The constitution also kept few most cherished values of the humankind beyond the reach of these three organs. Constitution seeks to remove three kind of disparity namely social, economic and political , so that weaker can prevail over stronger with the help of law if his right is violated and, Each organ of the state is required to work in this context without violating the power arrangement of the constitution .

## **2. JUDICIAL PROCESS IN ANCIENT INDIA**

The Policy of self-restraint was the governing principle in ancient India, which was based on norms of righteous conduct named Dharma. There was no sanction and People used to follow Dharma on their own, because of its intrinsic merit. However this ideal stateless society didn't last for a long time as some person out of , selfish worldly desires, began to flout dharma and created a situation of 'Matsyanyaya' (big fish devouring small fish) . This situation forced the law abiding people to search for a remedy, which resulted in creation of the institution of kingship and formulation of "Rajadharma" (law governing kings), which was the synthesis of all Dharmas. The object of Rajadharma was to assist and support the achievement by individuals of the threefold ideals (Trivarga) ,and to ensure that they secure wealth (Artha) and fulfil their desires (Kama) in conformity with Dharma and do not transgress Dharma . Dharma had a very wide connotation involving social ,moral, legal religious aspect. Since Dharma was entirely dependent upon the effective implementation of Rajadharma it was considered as supreme dharma.

Dicey regarded supremacy of law is an essential of the "rule of law" in 1885 . This supremacy of Law has long before found prominence in the principles of Raja dharma , the constitutional law of ancient India . Rajadharma is a classic example of trans- personalized power system which did not allow any personalized or depersonalized power to take over the requirements of justice .

### **3. ATTRIBUTES OF ANCIENT LEGAL SYSTEM**

The main attributes of ancient Indian legal system as derived from social and legal literatures can be summarised as below:

There was rule of law. Unlike western kings whose command constituted the imperative law, in ancient India Dharma (law) was a command even to the king and was superior to the king . Rules of Dharma were not alterable according to the whims and fancies of the king . The prevalent doctrine was that 'the law is the king of kings'. The doctrine that 'the king can do no wrong' was never accepted in our ancient constitutional system. If the king violated the

Rajadharma the punishment prescribed for him was one thousand times more penalty than what would be inflicted on an ordinary citizen.

Sources of laws (Dharmas) were based on following priority orders –Vedas/Shrutis, Dharmasastras, The Smritis, Mimansa, Nibandhas or commentaries . Customs and sadhachars were also applied if they were in conformity to the Dharmas. There was separation of power. King had no legislative power; It was vested in a sabha (committee) of wise people. King had only corrective power, thus he could invalidate any custom if it was inconsistent with the Dharma but can't create a new law (Dharma). Though the court presided by the king was the highest court he had no direct role in judicial process where an elaborate system of judiciary consisting of royal courts and people's tribunal was operational. King was required to exercise his judicial authority in accordance with the opinion of the judicial officers of the court who were under a clear mandate not to connive with the King when he acted unjustly. The judges were under an obligation to protect the Dharma even if their decisions were against the wishes of the King. Thus in ancient India there was independent judiciary and independent legislature. Access to justice was very easy. Rajadharma envisaged a mechanism wherein the mere fact of information of violation of one's right was enough to set the law into motion. The King, under the codes of Rajadharma was bound to take cognizance, and therefore bringing a matter to his notice was enough to render it fit for judicial proceeding, to redress the grievances. Thus the king was supposed to restore the stolen property to its owner and if he failed in performance of his duties he had to pay the owner the actual cost of the stolen property. Procedures were not allowed to defeat the justice . Emphasis was on substance not on form. The method of inquiry was of inquisitorial nature where judge played an active role in bringing the truth and limited aliens (like modern advocates) were allowed so that parity of power can be maintained .,The principle of "the greatest good of the greatest number", according to which, in

order to secure the good of a large number of persons, injustice could be caused to a small number of persons had no application in Ancient India. The ideal laid down was that all the people should be happy (Sarve Janah Sukhino Bhavantu).

#### **4. PARITY OF POWERS AND CRATOLOGICAL ANALYSIS OF ANCIENT INDIAN LEGAL SYSTEM (JUDICIAL PROCESS).**

“Law is the king of the kings; nothing is superior to the law; the law aided by the power of the king enables the weak to prevail over the strong.” [20]

The beauty of this verse is that it emphasis on the parity of power between the parties and if there is no parity of power than it is the duty of the king i.e., executive to provide help to the disadvantaged so as effectuate the equality principle . It also shows that the law was recognised as a mighty instrument for the protection of the individual rights and liberties. Whenever the right or liberty of an individual was encroached upon by another, the injured individual could seek protection from the law with the assistance of the king, however, powerful the opponent (wrong doer) might be. Thus there was parity of powers between the individuals to seek the equal protection of laws.

#### **ANALYSIS OF ANCIENT JUDICIAL PROCESS**

If we analyze the ancient legal system on the basis of power spectrum , we can say that all six power spectrum bands are balanced in equilibrium to give a just legal system because head count was satisfied with a very high degree, time count was also satisfied because of quick contemporary judgments, ethical count is satisfied because law (Dharma) was the shared conviction of the society having maximum social and moral values , coercion band is satisfied because Praja (people) and Prajapalak(king) both were to follow the dharma in their conduct, interest and influence count is satisfied because vesting of power was in depersonalised manner avoiding the arbitrariness and king was subordinate to the Rajadharm, besides it just upholding the interest of the public and having positive influence to mass was the rule.

**5. JUDICIAL PROCESS IN MODERN INDIA**

After independence India adopted a normative constitution. The present Indian judicial process is governed by British imposed adversary system even though there is no mention of it in the constitution. Main attributes of this system can be understood under following heads:–

**(i) ACCESS TO JUSTICE**

The term access to justice is variable according to the variation of the definition of justice , earlier access to justice meant merely the aggrieved individuals formal right to litigate or defend a claim but now it means an equal right of having recourse to an affordable, quick, satisfactory settlement of disputes from a credible forum.[21] Modern access to justice can be categorized into formal and informal access to justice. The formal access to justice is basically adjudication of disputes by the courts which follow the rules of Civil and Criminal Procedure. Whereas informal access to justice includes alternative modes of dispute resolution such as Arbitration, Conciliation, Mediation, Lok adalats and Nyaya-Panchayats , which are merely of supplementary nature to the court system . They are not bound by the provisions of C.P.C and I.P.C but has to follow the principles of natural law. Informal and formal modes of justice both are against the principles of parity of law devised by Article 14 of the constitution, because in informal modes of access to justice one has to often compromise with his legal rights in interest of time, cost of money etc. which is very much against the guarantee of Article 14 and duty imposed on state therein .

**(ii) HURDLES IN ACCESS TO JUSTICE:**

Formal modes of access to justice also has many drawbacks which are discussed below-

1. Law of limitation: The aggrieved person has to satisfy first of all that his suit is not barred by the law of limitation act 1963 and if barred by law of limitation the judge may or may not entertain his suit . Thus it is absolutely denial of Article 14 which imposes unqualified duty on state to provide equal protection of laws , and is anathema

to any kind of arbitrariness . Law of limitation is nothing but a restatement of exploiting British imposed law of limitation act , thus it is also hit by Article 13(2) .

2.Court fees: With the institution of the suit a court fees is required which is determined by the court according to the provisions of the court fees act of 1870, and on failure to pay the court fees or postal charges the suit may be dismissed. This high cost of court fees compels the litigants to abandon their just claims and defences. Here justice is not given but sold.Thus court fees act is unconstitutional under Article 13(2) read with Article 14, which was originally a method of raising fund and exploitation by ruler on ruled so that there can be less accountability of the state .It also does not satisfy the ethical, time and other essentials of the power spectrum[24].

3. Advocacy: Advocates are inseparable part of the adversarial system , wherein the role of judge is like a referee who decides the case on account of the performance of the both parties advocates . He never intends to provide the justice by bringing the truth , but to award the best competitor . Thus in this situation , the determining factor for the judicial process and justice is the competency of lawyer which depends upon the financial capacity of the party , which results in absolute denial of the parity of power guaranteed by Article 14.

4.Procedural hurdles: After institution of the suit the aggrieved person has to go through the procedures of C.P.C or Cr.P.C which does not reflects the values of the constitution but the values chosen by the colonial masters. The main procedural hurdles can be summarised below -

**(A\*** The aggrieved person has to prove that legal wrong has been committed against him by the defendant.

**(B\***The aggrieved person has to pay the cost of all kinds of judicial processes. [25].

**(C\*** Under adversarial criminal system the rule is that unless a person proved guilty beyond reasonable doubt he is innocent but



these rule is violated by the courts, when court refuses to give the bail to the accused on ground of making a classification between Bail-able and non Bail-able offences under sec 436 and 437 Cr.P.C

**(\*DELAY :** The aggrieved party has to face inordinate delay in getting justice due to unnecessary excess time given in filing of written statement ,counter statement , amendments in plaints , filing of unnecessary affidavit , Adjournment at every stage of the proceeding , Professional interest of the lawyer in prolonging the life of the suit , vexatious issuing of interlocutory orders, huge arrears of cases are other reasons for causing delay in getting justice Even if the aggrieved person get the decree its execution is not easy. Now justice is a generation to generation fight over one's legal right . examples of delay can be seen in Bhopal gas tragedy case , Rudal Sah case[26] , Mohini jain case[27] etc.

### **(iii) DELIVERY OF JUSTICE**

Delivery of justice is basically the part and parcel of the executive branch of the government popularly identified as the access to justice through administrative authorities. Article 256

gives a supervisory power to the union over state for compliance of laws, and Article 356 read with Article 365 is the consequential result for non compliance of constitutional obligations by the state .But when the executive fails to perform his duty , the courts venture to deliver justice as a corrective measure. Article 14 casts a duty on the state which also includes judiciary to provide justice by giving equal protection of laws to all its citizens . But it has been seen that on many occasions judiciary has failed to provide the justice according to the provisions of constitution and statutes. It's analysis can be done through following

### **6. CASE ANALYSIS**

#### **S.C. Advocates- On- Record Association v/s Union of India[28]**

**FACTS:** In this case a class petition was filed by the petitioner with regard to filing of the vacancies in Supreme Court and high courts. The issue in this case was with regard to the role of chief justice of

India in appointment, transfer and fixation of number of judges in Supreme Court and high courts.

**JUDGMENT :** Supreme court held that –

(1\* The initiation for the appointment of the judges in supreme court and High courts shall be taken by a collegiums, wherein decision be taken by the chief justice of India after consultation with two senior most judges of supreme court . The President in matter of appointment of supreme court and high court Judges, is bound by the opinion of the chief justice of India , and the term consultation used in Article 124(2) and Article 217(1) means concurrence.

(2\* The opinion of chief justice of India does not have mere primacy but is determinative in the matter of transfer of judges of high courts under Article 222.

(3\* Number of judges in high courts is sufficient but Supreme Court is empowered to order the union to constitute a committee in future for fixation of number of judges.

**CRITICAL ANALYSIS OF THE JUDGMENT :**

This case is criticised on the following grounds –

(1)Supreme court has destroyed the power arrangement envisaged by the constitution, the Grund-norm of the country. It has exercised its authority beyond the power conferred by the court. The term consult cannot be interpreted as concurrence. Power lies in President, what is required is only that he shall consult to the chief justice in case of appointment of a Supreme Court judge. In case of appointment of a high court judge he is required to consult such number of high court and supreme court judges as it deem fit . our constitution is a normative constitution based on check and balance of powers among three branches of the government, which has been destroyed by this per-inquirium judgment . No doubt the Supreme Court is given the inherent power to render justice under art 142 but that power is only for approximation of is to ought within the parameter of the constitution and statute, not to override the constitution or statute.

(2) Making consultation as concurrence amount to amendment in the constitution without the procedure established by the constitution.

(3) Article 222 says that President may after consultation with chief justice of India transfer a high court judge . it means that the president is not bound by the opinion of the C.J.I , Thus the statement that the opinion of chief justice of India does not have mere primacy but is determinative in the matter of transfer of high courts judges ,is per aquarium .

(4) Determination of the number of judges in courts falls within the domain of the executive, not of the judiciary.

Thus we see that this judgment does not stand the test of constitutionality being an arbitrary, per aquarium decision, in violation of the art 14 and render the judges liable for punishment under section 166 of I.P.C for deliberately violating the provisions of constitution .

### **Maneka Gandhi v Union of India**

**FACTS:** In this case the passport of the Petitioner was seized on ground of interest of public by the central government under section 10(3)(c) of the Passport Act 1967 without giving her opportunity of any hearing . Hence she filed a writ petition under art 32 on following grounds –

(1\* Section 10(3)(c ) is violative of Article 21 as it does not prescribed any procedure for the seizure of the passport.

(2\* Section 10(3)(c) is violative. of Article 14 as power conferred to the delegate is excessive .

(3\* Section 10(3)(c) is violative of Article 19 (1)(a) and Article 19(1)(g) .

(4\* She was denied from the opportunity of hearing which amount to the arbitrary exercise of the power violating of Article 14.

**JUDGMENT:** in this case supreme court observed (not given the judgment) after assessing the evidences that the seizure of the passport was mala fide in violation of Article 14 , 19 , 21 . Procedure established by the law means a procedure which is just, fair and

reasonable. Rule of Audi Alteram Partem is a part of natural law protected under Article 21. Illegal seizure of passport violates Article 19 (1)(a) ,19(1)(g) having a direct bearing on right to food protected under art 21. Realising that there was fatal defect and decision of the court would render the central government's order, as void, the attorney general gave the assurance that - "The opportunity of hearing and representation shall be given to the petitioner within two weeks and representation will be dealt with expeditiously in accordance with the law ". On getting this assurance the Supreme Court disposed the case.

**CRITICAL ANALYSIS OF THE JUDGMENT:**

This case is criticised on the following grounds-

(1\* Duty of the supreme court is to render Restitutive Justice under art 14 but it failed to render the complete justice and hence, Article 142 remained unanswered.

(2\*The judgment of supreme court holds the authority of law under Article 141 , and so it is expected from it to resolve all the issues once for all ,in the form of judgment not observations. It is a justice delivery institution not to a compromise making body.

(3\* Supreme court failed to take the notice of Section 166 of IPC under Section 57(I) of the Indian Evidence Act 1872 , and punishing the wrongdoers .

**ADM Jabalpur v/s Shivkant Shukla**

**FACTS:** In 1975, the president on the advice of the P.M. declared emergency under Art 352 on the ground that the security of India was threatened by internal disturbance<sup>35</sup>. And also issued an order under Article 359<sup>36</sup> suspending the right to access to the courts to the enforcement of the fundamental rights. The questions which fall for consideration in this case was two- "Whether in view of the Presidential order under clause (1) of Article 359 of the constitution any writ petition under Article 226 before a H.C. for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in Compliance with the Act is maintainable or is vitiated by mala fides

factual or legal or is based on extraneous considerations . Second, if such a petition is maintainable, what is the scope or extent of judicial scrutiny”

**JUDGMENT :** Supreme court by majority (except Justice H.R. Khanna) held that emergency is declared to overcome certain imminent contingencies , and permission to enforce one’s fundamental right would frustrate the object of emergency , hence no person has locus standi to challenge the validity of his detention during the operation of art 359(1) ,however wrong his detention may be .

**CRITICAL ANALYSIS OF THE JUDGMENT :**

This case can be criticised on the following grounds –

**(1)** Rule of law is the antithesis of arbitrariness; the State has got no power to deprive a person from his life or liberty without the authority of law. The vesting of power of detention without trial in the executive, has the effect of making the same authority both the prosecutor as well as the judge and is bound to result in arbitrariness which is violative of Article 14 [33] read with Article 19 (1)(a)to (g), 20, 21 and 22 .

**(2)** A Presidential order under Article 359(1) can suspend during the period of emergency only the right to move any court for enforcement of the fundamental rights mentioned in the Order it can’t deny to avail the procedural safeguards in the preventive detention act .

**(3)** The court failed to take notice of the law of tort and IPC under sec 57(1)) of Indian evidence act regarding wrongful confinement of the petitioner and penalising the wrongful authorities.

**(4)** Nowhere in the constitution is prescribed that suspension of enforcement of fundamental rights means denial of testing the legality of exercise of the power under the constitution, hence supreme court and high court both are competent to issue the writ of habeas corpus under art 32 and art 226 respectively .

**Kasturilal v State of U.P**

**FACTS** : in this case the appellant was apprehended by police and some silver and gold were seized and deposited by the police in police Malkhana, from where the Gold was misappropriated by a constable who fled to the Pakistan .

**JUDGMENT**: The court held depositing of gold by police , in police Malkhana is a sovereign function and hence the government is not liable for the misappropriation of the gold.

**CRITICAL ANALYSIS**:

this was an absolutely wrong judgment because

(1 \* The court found that there was gross negligent on part of police authorities but it failed to punish the wrong authorities under section 166 of I.P.C[35].

(2 \* Neither keeping Gold in Malkhana nor its misappropriation amount to the sovereign function , sovereign function are those function which can be performed by the state only in comparison to a private person .

(3 \* Even if keeping gold was a sovereign function of the state , the state(judiciary) is duty bound to give Restitutive justice under Article 14 . The court also failed to take judicial notice of law of tort under sec 57(1) of Indian Evidence Act 1872, that where there is infringement of a legal right there exists remedy Thus in this case there was absolute denial of justice.

***Dhananjay Chatterjee alias Dhana v State of West Bengal and Ors***

**FACTS**:The Petitioner filed an appeal against the death penalty awarded by Calcutta high court for committing an offence under section 376 and 302 of I.P.C against a minor girl.

**JUDGMENT** : The court held that the act of petitioner amounts to the rarest of rare case and hence is liable for death penalty.

**CRITICAL ANALYSIS** :

(1 \* According to Article 21 , No person shall be deprived from his personal life and liberty except procedure established by 'law' and that Law must be just, fair and reasonable. Where a death penalty is

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given to a person, he cannot exercise the rights under Article 19(1)(a) to (g), because it amounts to the absolute restriction on those freedoms which is unconstitutional because law requires only reasonable restriction on those freedoms on grounds prescribed under Article 19(2) to (5). Besides it section 302 of I.P.C is a pre constitutional law which is also hit by the art 13(2) of the constitution.

(2) \* Doctrine of rarest of rare case does not have the quality of predictability according to law but life of a person is kept at the sweet will of the judge which is against the rule of law envisaged by the constitution under Article 14.

(3) \*Petitioner was given double punishment for the same offence in violation of the art 20(2) first punishment he faced was 14 years living in jail under death row and second was the capital punishment itself .

Examples of gross constitutional faults can also be seen in Ramjawaya Kapoor[37], A.K.Gopalan[38] , Champakam Dorairajan[39] cases.

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### **1.5 Importance of Precedent in Statutory and Codified Systems**

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In [common law legal systems](#), a **precedent** or **authority** is a principle or rule established in a previous [legal case](#) that is either binding on or persuasive for a [court](#) or other tribunal when deciding subsequent cases with similar issues or [facts](#). The general principle in [common law](#) legal systems is that similar cases should be decided so as to give similar and predictable outcomes, and the principle of precedent is the mechanism by which that goal is attained. [Black's Law Dictionary](#) defines "precedent" as a "rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases."<sup>[1]</sup> [Common law](#) precedent is a third kind of law, on equal footing with [statutory law](#) (statutes and codes enacted by legislative bodies), and [regulatory law](#) (regulations promulgated by executive branch agencies).

**Stare decisis** is a legal principle by which judges are obliged to respect the precedent established by prior decisions. The words originate from the phrasing of the principle in the [Latin](#) maxim *Stare decisis et non quieta movere*: "to stand by decisions and not disturb the undisturbed."<sup>[2]</sup> In a legal context, this is understood to mean that courts should generally abide by precedent and not disturb settled matters.<sup>[2]</sup>

**Case law** is the set of existing rulings which have made new interpretations of law and, therefore, can be cited as precedent. In most countries, including most European countries, the term is applied to any set of rulings on law which is guided by previous rulings, for example, previous decisions of a government agency - that is, precedential case law can arise from either a judicial ruling or a ruling of an adjudication within an executive branch agency. Trials and hearings that do not result in written decisions of a [court of record](#) do not create precedent for future court decisions.<sup>[3]</sup>

The principle of stare decisis can be divided into two components.

The first is the rule that a decision made by a superior court, or by the same court in an earlier decision, is [binding precedent](#) that the court itself and all its inferior courts are obligated to follow. The second is the principle that a court should not overturn its own precedent unless there is a strong reason to do so and should be guided by principles from lateral and inferior courts. The second principle, regarding [persuasive precedent](#), is an advisory one that courts can and do ignore occasionally.<sup>[4]</sup>

### **Case law in common law systems**

In the [common law](#) tradition, courts decide the law applicable to a case by interpreting statutes and applying precedent which record how and why prior [cases](#) have been decided. Unlike most civil law systems, [common law](#) systems follow the doctrine of [stare decisis](#), by which most courts are bound by their own previous decisions in similar cases, and all lower courts should make decisions consistent with previous decisions of higher courts.<sup>[5]</sup> For example, in England, the [High Court](#) and the [Court of Appeal](#) are each bound by their own



previous decisions, but the [Supreme Court of the United Kingdom](#) is able to deviate from its earlier decisions, although in practice it rarely does so.

Generally speaking, higher courts do not have direct oversight over the lower [courts of record](#), in that they cannot reach out on their own initiative (*sua sponte*) at any time to overrule judgments of the lower courts. Normally, the burden rests with litigants to appeal rulings (including those in clear violation of established case law) to the higher courts. If a judge acts against precedent and the case is not [appealed](#), the decision will stand.

A lower court may not rule against a binding precedent, even if it feels that it is unjust; it may only express the hope that a higher court or the legislature will reform the rule in question. If the court believes that developments or trends in legal reasoning render the precedent unhelpful, and wishes to evade it and help the law evolve, it may either hold that the precedent is inconsistent with subsequent authority, or that it should be *distinguished* by some material difference between the facts of the cases. If that judgment goes to appeal, the appellate court will have the opportunity to review both the precedent and the case under appeal, perhaps overruling the previous case law by setting a new precedent of higher authority. This may happen several times as the case works its way through successive appeals. [Lord Denning](#), first of the [High Court of Justice](#), later of the [Court of Appeal](#), provided a famous example of this evolutionary process in his development of the concept of [estoppel](#) starting in the *High Trees* case: [Central London Property Trust Ltd v. High Trees House Ltd](#) [1947] K.B. 130.

Judges may refer to various types of [persuasive authority](#) to reach a decision in a case. Widely cited non-binding sources include legal [encyclopedias](#) such as [Corpus Juris Secundum](#) and [Halsbury's Laws of England](#), or the published work of the [Law Commission](#) or the [American Law Institute](#). Some bodies are given statutory powers to issue Guidance with persuasive authority or similar statutory effect, such as the [Highway Code](#).

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In federal or multi-jurisdictional law systems there may exist conflicts between the various lower appellate courts. Sometimes these differences may not be resolved and it may be necessary to distinguish how the law is applied in one [district](#), province, division or [appellate department](#). Usually only an appeal accepted by the [court of last resort](#) will resolve such differences and, for many reasons, such appeals are often not granted. Any court may seek to distinguish its present case from that of a binding precedent, in order to reach a different conclusion. The validity of such a distinction may or may not be accepted on appeal. An appellate court may also propound an entirely new and different analysis from that of junior courts, and may or may not be bound by its own previous decisions, or in any case may distinguish them on the facts.

Where there are several members of a court, there may be one or more judgments given; only the ratio decidendi of the majority can constitute a binding precedent, but all may be cited as persuasive, or their reasoning may be adopted in argument. Quite apart from the rules of precedent, the weight actually given to any reported judgment may depend on the reputation of both the reporter and the judges.

### **Binding precedent**

Precedent that must be applied or followed is known as *binding precedent* (alternately *metaphorically precedent*, *mandatory* or *binding authority*, etc.). Under the doctrine of [stare decisis](#), a [lower court](#) must honor findings of law made by a higher court that is within the appeals path of cases the court hears. In state and federal courts in the United States of America, jurisdiction is often divided geographically among local trial courts, several of which fall under the territory of a regional appeals court. All appellate courts fall under a highest court (sometimes but not always called a "supreme court"). By definition, decisions of lower courts are not binding on courts higher in the system, nor are appeals court decisions binding on local courts that fall under a different appeals court. Further, courts must follow their own proclamations of law made earlier on

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other cases, and honor rulings made by other courts in disputes among the parties before them pertaining to the same pattern of facts or events, unless they have a strong reason to change these rulings (see [Law of the case](#) re: a court's previous holding being binding precedent for that court).

### **Binding precedent in English law**

Judges are bound by the law of binding precedent in [England and Wales](#) and other [common law](#) jurisdictions. This is a distinctive feature of the English legal system. In Scotland and many countries throughout the world, particularly in mainland Europe, civil law means that judges take case law into account in a similar way, but are not obliged to do so and are required to consider the precedent in terms of principle. Their fellow judges' decisions may be persuasive but are not binding. Under the English legal system, judges are not necessarily entitled to make their own decisions about the development or interpretations of the law. They may be bound by a decision reached in a previous case. Two facts are crucial to determining whether a precedent is binding:

1. The position in the court hierarchy of the court which decided the precedent, relative to the position in the court trying the current case.
2. Whether the facts of the current case come within the scope of the principle of law in previous decisions.

### **Persuasive precedent**

**Persuasive precedent**(also **persuasive authority** or **advisory precedent**) is precedent or other legal writing that is not [binding precedent](#) but that is useful or relevant and that may guide the judge in making the decision in a current case. Persuasive precedent includes cases decided by lower courts, by peer or higher courts from other geographic jurisdictions, cases made in other parallel systems (for example, military courts, administrative courts, indigenous/tribal courts, state courts versus federal courts in the United States), statements made in [dicta](#), [treatises](#) or academic [law](#)

[reviews](#), and in some exceptional circumstances, cases of other nations, treaties, world judicial bodies, etc.

In a [case of first impression](#), courts often rely on persuasive precedent from courts in other [jurisdictions](#) that have previously dealt with similar issues. Persuasive precedent may become binding through its adoption by a higher court.

In [Civil law](#) and [pluralist](#) systems, as under [Scots law](#), precedent is not binding but [case law](#) is taken into account by the courts.

### **Lower courts**

A lower court's opinion may be considered as persuasive authority if the judge believes they have applied the correct legal principle and reasoning.

### **Higher courts in other circuits**

A court may consider the ruling of a higher court that is not binding. For example, a [district court](#) in the United States First Circuit could consider a ruling made by the [United States Court of Appeals for the Ninth Circuit](#) as persuasive authority.

### **Horizontal courts**

Courts may consider rulings made in other courts that are of equivalent authority in the legal system. For example, an [appellate court](#) for one district could consider a ruling issued by an appeals court in another district.

### **Statements made in *obiter dicta***

Courts may consider [obiter dicta](#) in opinions of higher courts. Dicta of a higher court, though not binding, will often be persuasive to lower courts.

The *obiter dicta* is usually translated as "other things said", but due to the high number of judges and several personal decisions, it is often hard to distinguish from the *ratio decidendi* (reason for the decision).

For this reason, the obiter dicta may usually be taken into consideration.

### **Dissenting opinions**

A case decided by a multi-judge panel could result in a split decision. While only the majority opinion is considered precedential, an outvoted judge can still publish a dissenting opinion. A judge in a subsequent case, particularly in a different jurisdiction, could find the dissenting judge's reasoning persuasive. In the jurisdiction of the original decision, however, a judge should only overturn the holding of a court lower or equivalent in the hierarchy. A district court, for example, could not rely on a [Supreme Court](#) dissent as a rationale for ruling on the case at hand.

### **Development**

Early English [common law](#) did not have or require the stare decisis doctrine for a range of legal and technological reasons:

- During the formative period of the [common law](#), the royal courts constituted only one among many fora in which in the English could settle their disputes. The royal courts operated alongside and in competition with ecclesiastic, manorial, urban, mercantile, and local courts.
- Royal courts were not organised into a hierarchy, instead different royal courts (exchequer, common pleas, king's bench, and chancery) were in competition with each other.
- Substantial law on almost all matters was neither legislated nor codified, eliminating the need for courts to interpret legislation.
- Common law's main distinctive features and focus were not substantial law, which was customary law, but procedural.
- The practice of citing previous cases was not to find binding legal rules but as evidence of custom.
- Customary law was not a rational and consistent body of rules and does not require a system of binding precedent.
- Before the printing press, the state of the written records of cases rendered the stare decisis doctrine utterly impracticable.

These features changed over time, opening the door to the doctrine of stare decisis:

By the end of the eighteenth century, the [common law](#) courts had absorbed most of the business of their nonroyal competitors, although there was still internal competition among the different [common law](#) courts themselves. During the nineteenth century, legal reform movements in both England and the United States brought this to an end as well by merging the various [common law](#) courts into a unified system of courts with a formal hierarchical structure. This and the advent of reliable private case reporters made adherence to the doctrine of stare decisis practical and the practice soon evolved of holding judges to be bound by the decisions of courts of superior or equal status in their jurisdiction.<sup>[19]</sup>

### **English legal system**

The doctrine of binding precedent or stare decisis is basic to the English legal system, and to the legal systems that derived from it such as those of [Australia](#), [Canada](#), [Hong Kong](#), [New Zealand](#), [Pakistan](#), [Singapore](#), [Malaysia](#) and [South Africa](#). A precedent is a statement made of the law by a Judge in deciding a case. The doctrine states that within the hierarchy of the English courts a decision by a superior court will be binding on inferior courts. This means that when judges try cases they must check to see if similar cases have been tried by a court previously. If there was a precedent set by an equal or superior court, then a judge should obey that precedent. If there is a precedent set by an inferior court, a judge does not have to follow it, but may consider it. The Supreme Court (previously the House of Lords) however does not have to obey its own precedent.

Only the statements of law are binding. This is known as the reason for the decision or [ratio decidendi](#). All other reasons are "by the way" or [obiter dictum](#). See *Rondel v. Worsley* [1969] 1 AC 191. A precedent does not bind a court if it finds there was a lack of care in the original "Per Incuriam". For example, if a statutory provision or precedent had not been brought to the previous court's attention before its decision, the precedent would not be binding. Also, if a court finds a material difference between cases then it can choose

not to be bound by the precedent. Persuasive precedent includes decisions of courts lower in the hierarchy. They may be persuasive, but are not binding. Most importantly, precedent can be overruled by a subsequent decision by a superior court or by an Act of Parliament.

### **Interpretation**

Judges in the U.K use three primary rules for interpreting the law. The normal aids that a judge has include access to all previous cases in which a precedent has been set, and a good English dictionary.

Under the [literal rule](#), the judge should do what the actual legislation states rather than trying to do what the judge thinks that it means. The judge should use the plain everyday ordinary meaning of the words, even if this produces an unjust or undesirable outcome. A good example of problems with this method is *R v Maginnis* (1987) in which several judges found several different dictionary meanings of the word "supply". Another example might be [Fisher v Bell](#), where it was held that a shopkeeper who placed an illegal item in a shop window with a price tag did not make an offer to sell it, because of the specific meaning of "offer for sale" in [contract law](#). As a result of this case, Parliament amended the statute concerned to end this discrepancy.

The [golden rule](#) is used when use of the literal rule would obviously create an absurd result. The court must find genuine difficulties before it declines to use the literal rule. [\[verification needed\]](#) There are two ways in which the Golden Rule can be applied: the narrow method, and the broad method. Under the narrow method, when there are apparently two contradictory meanings to a word used in a legislative provision or it is ambiguous, the least absurd is to be used. For example, in *Adler v George* (1964), the defendant was found guilty under the Official Secrets Act of 1920. The act said it was an offence to obstruct HM Forces in the vicinity of a prohibited place. Mr. Adler argued that he was not in the *vicinity* of a prohibited

place but was actually *in* a prohibited place.<sup>[27]</sup> The court chose not to accept the wording literally. Under the broad method, the court may reinterpret the law at will when it is clear that there is only one way to read the statute. This occurred in *Re Sigsworth* (1935) where a man who murdered his mother was forbidden from inheriting her estate, despite a statute to the contrary.

The [mischief rule](#) is the most flexible of the interpretation methods. Stemming from [Heydon's Case](#) (1584), it allows the court to enforce what the statute is intended to remedy rather than what the words actually say. For example, in *Corkery v Carpenter* (1950), a man was found guilty of being drunk in charge of a carriage, although in fact he only had a bicycle.

In the United States, the courts have stated consistently that the text of the statute is read as it is written, using the ordinary meaning of the words of the statute.

- "[I]n interpreting a statute a court should always turn to one cardinal canon before all others. ... [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, [112 S. Ct. 1146, 1149](#) (1992). Indeed, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' "
- "A fundamental rule of statutory construction requires that every part of a statute be presumed to have some effect, and not be treated as meaningless unless absolutely necessary." *Raven Coal Corp. v. Absher*, [153 Va. 332](#), 149 S.E. 541 (1929).
- "In assessing statutory language, unless words have acquired a peculiar meaning, by virtue of statutory definition or judicial construction, they are to be construed in accordance with their common usage." *Muller v. BP Exploration (Alaska) Inc.*, 923 P.2d 783, 787–88 (Alaska 1996);

### **Practical application**



Although inferior courts are bound in theory by superior court precedent, in practice judges may sometimes attempt to evade precedent by distinguishing it on spurious grounds. The appeal of a decision that does not obey precedent might not occur, however, as the expense of an appeal may prevent the losing party from doing so. Thus the inferior court decision may remain in effect even though it does not obey the superior court decision, as the only way a decision can enter the appeal process is by application of one of the parties bound by it.

### **Pros and cons**

There is much discussion about the virtue or irrationality of using [case law](#) in the context of stare decisis. Supporters of the system, such as [minimalists](#), argue that obeying precedent makes decisions "predictable." For example, a business person can be reasonably assured of predicting a decision where the facts of his or her case are sufficiently similar to a case decided previously. This parallels the arguments against retroactive (ex post facto) laws banned by the U.S. Constitution. An argument often used against the system is that it is [undemocratic](#) as it allows judges, which may or may not be elected, to make law.

A counter-argument (in favor of the concept of stare decisis) is that if the [legislature](#) wishes to alter the case law (other than constitutional interpretations) by [statute](#), the legislature is empowered to do so.<sup>[33]</sup> Critics sometimes accuse particular judges of applying the doctrine selectively, invoking it to support precedent that the judge supported anyway, but ignoring it in order to change precedent with which the judge disagreed.

Regarding constitutional interpretations, there is concern that over-reliance on the doctrine of stare decisis can be subversive. An erroneous precedent may at first be only slightly inconsistent with the [Constitution](#), and then this error in interpretation can be propagated and increased by further precedent until a result is obtained that is greatly different from the original understanding of the Constitution. *Stare decisis* is not mandated by the Constitution,

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and if it causes unconstitutional results then the historical evidence of original understanding can be re-examined. In this opinion, predictable fidelity to the Constitution is more important than fidelity to unconstitutional precedent. See also the [living tree doctrine](#).

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### 3.8 SUMMARY

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In [common law legal systems](#), a **precedent** or **authority** is a principle or rule established in a previous [legal case](#) that is either binding on or persuasive for a [court](#) or other tribunal when deciding subsequent cases with similar issues or [facts](#). The general principle in [common law](#) legal systems is that similar cases should be decided so as to give similar and predictable outcomes, and the principle of precedent is the mechanism by which that goal is attained. [Black's Law Dictionary](#) defines "precedent" as a "rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases." [Common law](#) precedent is a third kind of law, on equal footing with [statutory law](#) (statutes and codes enacted by legislative bodies), and [regulatory law](#) (regulations promulgated by executive branch agencies). In this unit we have discussed about the creativity in law and the judicial process as Legal Reasoning and development of law. We have also read about the Importance of Precedents in statutory and codified systems and describe the tools and techniques of judicial precedents in India so as to understand the whole concept of judicial process.

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### 3.9 SUGGESTED READINGS/REFERENCE MATERIAL

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1. 'Justice is the fair and proper administration of laws' Black's law dictionary VII edition by west group pub. P.g. 869
2. Desirables includes principles of rule of law, natural justice, equity, equality , liberty etc
3. Examples of a good number of undesirables can be traced in the provisions of Indian Penal Code 1860.

4. The notion of justice evokes the cognition of the rule of law, of the resolution of conflicts, of institutions that make law and of those who enforce it; it expresses fairness and the implicit recognition of the principle of equality.

5. There can't be any universal definition of Justice as it varies from person to person.

6. "Dharma" is that which upholds, nourishes or supports the stability of the society, maintains the social order and secures the general well-being and progress of mankind" M. Rama jois, LEGAL AND CONSTITUTIONAL HISTORY OF INDIA: Ancient Legal, Judicial and Constitutional System", Universal Law Publishing Co. Pvt. Ltd p 25 .

7. Justice is a system specific we need to search for the meaning of justice from the Constitutional text itself. Therefore, justice means delivery of substantive promise of law and this substantive promise of law may be fulfilled by virtue of Article 14 of the Constitution as this provision says that " the State shall not deny the equal protection of laws within the territory of India."

8. Power is an ability to affect another by its exercise. However by considering the present arrangement of the power arrangement of the power structure, one question arises that is it separation of powers or separation of functions? If we look at the present situation we can see that the Government and Parliament are not separate. The Government is made of the same people who are also members of the Parliament. This system hinders the separation of powers. What is prevailing is a sort of separation of functions with shared powers.

9. The Preamble of the Constitution of India states that: WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity

and integrity of the Nation; IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION. See the Preamble of Indian Constitution 1950.

10. These most cherished values can be seen in part III of Indian constitution. See Ibid.

11. Dharma' is used to mean Justice (Nyaya), what is right in a given circumstance, moral values of life, pious obligations of individuals, righteous conduct in every sphere of activity, being helpful to other living beings, giving charity to individuals in need of it or to a public cause or alms to the needy, natural qualities or characteristics or properties of living beings and things, duty and law as also constitutional law. See supra no 6.

12. There was neither kingdom nor the king, neither punishment nor the guilty to be punished. People were acting according to dharma and thereby protecting one another.

13. 'According to Kautilya in Artshastras 'People suffering from anarchy, as illustrated by the proverbial tendency of the bigger fish to devour the small ones, first elected Manu, the Vaivasvata, to be their king, and allotted one-sixth of grains grown and one-tenth of merchandise as sovereign dues. Being fed by this payment, the kings took upon themselves the responsibility of assuring and maintaining the safety and security of their subjects (Yogakshemavahah) and of being answerable for the sins of their subjects when the principle of levying just punishment and taxes had been violated' P-22: (P 24 S)

14. All Dharmas are merged in Rajadharma, and it is therefore the Supreme Dharma ,Mahabharata shantiparva Ch.63, 24-25

15. Dharma ,Artha ,Kama are trivarg or three Purusharthas.

16. For e.g. - when the word 'Dharma' is used to indicate the giving of one's wealth for a public purpose, it means charity, when the word 'Dharma' is used in the contract of civil rights(civil law),it means that it is enforceable by the state, in the case of criminal offence(in criminal law),it means breach of duty which is punishable by the

state and when 'dharma' is used in the context of duties and powers of the king, it means constitutional law(Raj Dharma).

17. "Being free from anger, (Akrodaha) sharing one's wealth with others, (Samvibhagaha) forgiveness, (Kshama) truthfulness, procreation of children from ones wife alone, purity (in mind, though and deed), (shoucham) not betraying the trust or confidence reposed, (Adrohaha) absence of enmity, maintaining the persons dependent on oneself, these are the nine rules of Dharma to be followed by persons belonging to all sections of society". The Shanti Parva (60- 7 -8) in Mahabharatha

18. The law was the king of kings and nothing was superior to law. See Ramajois , supra no 6 at 24.

19. Kula (gathering or family councils), Shreni (corporation), Gana (assembly), Adhikrita (court appointed by king). Nripa (king himself). Among these each mention later is superior to the one mentioned earlier. Nar.p.6-

20. Justice M. Ramajois, "Seeds of Modern Public Law in Ancient Indian Jurisprudence and Human Rights-Bharatiya Values," (Lucknow, Published by Eastern Book Company, Edition, 200), p. 24.

21 P P Rao, Access to Justice and delay in disposal of cases, Indian Bar Review, vol-2003, p 208

23. O-vii R – 6 of Civil Procedure Code 1908 .

24. Ibid O- ix R 2 .

25. According to Julius stone there are six power bands through which we can determine the proper exercise of the power.

1.Coercion spectrum:- this band deals with the degree of coercion and sanctions behind a policy, decision (judicial or executive) and law. This count highlights the role of compulsions in the implementation or execution of any decision or law.

2. Ethical component spectrum:- this count deals with ethical and moral aspects of law and it emphasizes that every law, decision, or

policy must satisfy minimum standards of ethics and morality of the society, which differ from society to society. A uniform standard of ethics cannot be laid down for it differs from society to society.

3. Interest Affected Spectrum:- This count draws attention to the problems faced by the subject (yielder), as a consequence of improper exercise of power, that is when their interests are affected by and subordinated to the interests of power wielders. Interest affected band protects the interest of general masses by prescribing instances of improper exercise of power. Example, doctrine of reasonable classification.

4. Influence spectrum:- this band differs from the coercion band as influence is a positive concept and there is no necessity of sanction, but the former is a negative concept and sanction and fear are the operative force behind the law or decision. Influence is self-reflexive and has its independent existence whereas coercion is a nonentity without fear and sanction. This counts deals with the factors which influence any decision or law and are influenced by it.

5. Head count spectrum:- this count signifies the number of persons affected by any decision or law. The underlying idea of this band is to protect the interests of maximum number of persons.

6. Time Count:- this band has two facets. One, it highlights the fact that continuance and antiquity makes any law or a practice stronger. The second facet of time count is delay i.e., delay acts as an impediment to access and realization of justice and that preventive, as well as and protective remedies should be provided without delay. See Julius Stone, Social Dimensions of Law and Justice, Delhi University Law Pub. Co., 1999. p. 598.

25. See supra no 22 , Section 35, 35-A and 35-B .

26. Rudal Sah v. State of Bihar AIR 1983 SC 1086

27. Mohini Jain v. State of Karnataka (1992) 3 SCC 666

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**3.10 SELF ASSESSMENT QUESTIONS**

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1. What is creativity in law? What does it mean by legal reasoning?
2. What do you understand by creativity in law through legal reasoning?
3. Discuss the role of judicial process as Legal Reasoning and development of law.
4. Discuss the Importance of Precedents in statutory and codified systems?
5. Describe the tools and techniques of judicial precedents in India.

**LL.M. Part-2**

**Subject: JUDICIAL PROCESS**

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**Block- II- Special Dimensions of Judicial Process in Constitutional Adjudications**

**Unit-4- Notions of judicial review; Role in constitutional adjudication - various theories of judicial role**

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**STRUCTURE**

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**4.1 INTRODUCTION**

**4.2 OBJECTIVES**

**4.3 WHAT IS Judicial Review ?**

**4.4. Judicial Review in Constitutional Adjudication**

**4.5 Theories of Judicial Role**

**4.6 Relation between Judicial Process and Constitution**

**Adjudication: Indian Position**

**4.7 SUMMARY**

**4.8 SUGGESTED READINGS/REFERENCE MATERIAL**

**4.9 SELF ASSESSMENT QUESTIONS**



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## 4.1 INTRODUCTION

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In the previous unit we have discussed about the creativity in law and the judicial process as Legal Reasoning and development of law. We have also read about the Importance of Precedents in statutory and codified systems and describe the tools and techniques of judicial precedents in India so as to understand the whole concept of judicial process.

Judicial review is the doctrine under which legislative and executive actions are subject to review (and possible invalidation) by the judiciary. A specific court with judicial review power must annul the acts of the state when it finds them incompatible with a higher authority (such as the terms of a written constitution). Judicial review is an example of check and balances in a modern governmental system (where the judiciary checks the other branches of government). This principle is interpreted differently in different jurisdictions, which also have differing views on the different hierarchy of governmental norms. As a result, the procedure and scope of judicial review differs from country to country and state to state.

Judicial review is one of the main characteristics of government in the federal republic of the United States and other democratically elected governments. It can be understood in the context of two distinct—but parallel—legal systems (civil law and common law), and also by two distinct theories on democracy and how a government should be set up (the ideas of legislative supremacy and separation of powers). In this unit we will discuss about the definition, concept and notions of judicial review. We will also discuss its role in constitutional adjudication and various theories of judicial role in India.

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## 4.2 OBJECTIVES

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After reading this unit you will be able to:

- ✓ Understand the concept of judicial review.
- ✓ Explain the meaning of judicial review.
- ✓ Describe the role of judicial review in constitutional adjudication.
- ✓ Discuss the various theories of judicial role in India.

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### **4.3 WHAT IS Judicial Review ?**

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Judicial review is the doctrine under which legislative and executive actions are subject to review (and possible invalidation) by the judiciary. A specific court with judicial review power must annul the acts of the state when it finds them incompatible with a higher authority (such as the terms of a written constitution). Judicial review is an example of check and balances in a modern governmental system (where the judiciary checks the other branches of government). This principle is interpreted differently in different jurisdictions, which also have differing views on the different hierarchy of governmental norms. As a result, the procedure and scope of judicial review differs from country to country and state to state.

Judicial review is one of the main characteristics of government in the federal republic of the United States and other democratically elected governments. It can be understood in the context of two distinct—but parallel—legal systems (civil law and common law), and also by two distinct theories on democracy and how a government should be set up (the ideas of legislative supremacy and separation of powers). First, two distinct legal systems, civil Law and common law, have different views about judicial review. Common-law judges are seen as sources of law, capable of creating new legal rules, and also capable of rejecting legal rules that are no longer valid. In the civil-law tradition judges are seen as those who apply the law, with no power to create (or destroy) legal rules.

Secondly, the idea of separation of powers is another theory about how a democratic society's government should be organized. In

contrast to legislative supremacy, the idea of separation of powers was first introduced by Montesquieu; it was later institutionalized in the United States by the Supreme Court ruling in *Marbury v. Madison*. Separation of powers is based on the idea that no branch of government should be more powerful than any other; each branch of government should have a check on the powers of the other branches of government, thus creating a balance of power among all branches of government. The key to this idea is checks and balances. In the United States, judicial review is considered a key check on the powers of the other two branches of government by the judiciary (although the power itself is only implicitly granted). Differences in organizing "democratic" societies led to different views regarding judicial review, with societies based on common law and those stressing a separation of powers being the most likely to utilize judicial review. Nevertheless, many countries whose legal systems are based on the idea of legislative supremacy have learned the possible dangers and limitations of entrusting power exclusively to the legislative branch of government. Many countries with civil-law systems have adopted a form of judicial review to stem the tyranny of the majority.

Another reason why judicial review should be understood in the context of both the development of two distinct legal systems (civil law and common law) and the two theories of democracy (legislative supremacy and separation of powers) is that some countries with common-law systems do not have judicial review of primary legislation. Though a common-law system is present in the United Kingdom, the country still has a strong attachment to the idea of legislative supremacy; consequently, the judicial body in the United Kingdom does not have the power to strike down primary legislation. However, since the United Kingdom became a member of the European Union there has been tension between the UK's tendency toward legislative supremacy and the EU's legal system (which empowers the Court of Justice of the European Union with judicial review).

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Most modern legal systems allow the courts to review administrative acts (individual decisions of a public body, such as a decision to grant a subsidy or to withdraw a residence permit). In most systems, this also includes review of secondary legislation (legally-enforceable rules of general applicability adopted by administrative bodies). Some countries (notably France and Germany) have implemented a system of administrative courts which are charged with resolving disputes between members of the public and the administration. In other countries (including the United States, Scotland and the Netherlands), judicial review is carried out by regular civil courts although it may be delegated to specialized panels within these courts (such as the Administrative Court within the High Court of England and Wales). The United States employs a mixed system in which some administrative decisions are reviewed by the United States district courts (which are the general trial courts), some are reviewed directly by the United States courts of appeals and others are reviewed by specialized tribunals such as the United States Court of Appeals for Veterans Claims (which, despite its name, is not technically part of the federal judicial branch). It is quite common that before a request for judicial review of an administrative act is filed with a court, certain preliminary conditions (such as a complaint to the authority itself) must be fulfilled. In most countries, the courts apply special procedures in administrative cases. Within the English jurisdiction judicial review as of June 2012 is an arbitrary course of action as this avenue of appeal is now covered by the Judicial Review and Courts Act 2012.

**Judicial review of primary legislation**

There are three broad approaches to judicial review of the constitutionality of primary legislation—that is, laws passed directly by an elected legislature. Some countries do not permit a review of the validity of primary legislation. In the United Kingdom, statutes cannot be set aside under the doctrine of parliamentary sovereignty. Another example is the Netherlands, where the constitution

expressly forbids the courts to rule on the question of constitutionality of primary legislation.

In the United States, federal and state courts (at all levels, both appellate and trial) are able to review and declare the "constitutionality", or agreement with the Constitution (or lack thereof) of legislation that is relevant to any case properly within their jurisdiction. In American legal language, "judicial review" refers primarily to the adjudication of constitutionality of statutes, especially by the Supreme Court of the United States. This is commonly held to have been established in the case of *Marbury v. Madison*, which was argued before the Supreme Court in 1803. A similar system was also adopted in Australia.

#### ***Review by a specialized court***

In 1920, Czechoslovakia adopted a system of judicial review by a specialized court - the Constitutional Court. This system was later adopted by Austria and became known as the Austrian System, being taken over by a number of other countries. In these systems, other courts are not competent to question the constitutionality of primary legislation, they often may, however, initiate the process of review by the Constitutional Court.

Mixed model. Brazil adopts a mixed model since (as in the US) courts at all levels, both federal and state, are empowered to review primary legislation and declare its constitutionality; as in the Czech Republic, there is a constitutional court in charge of reviewing the constitutionality of primary legislation. The difference is that in the first case, the decision about the laws adequacy to the Brazilian Constitution only binds the parties to the lawsuit; in the second, the Court's decision must be followed by judges and government officials at all levels.

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#### **4.4. Judicial Review in Constitutional Adjudication**

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Adjudication is the legal process by which an arbiter or judge reviews evidence and argumentation including legal reasoning set

forth by opposing parties or litigants to come to a decision which determines rights and obligations between the parties involved. Three types of disputes are resolved through adjudication:

**Disputes between private parties, such as individuals or corporations.**

**Disputes between private parties and public officials.**

**Disputes between public officials or public bodies.**

**Other meanings**

Adjudication can also be the process (at dance competitions, in television game shows and at other competitive forums) by which competitors are evaluated and ranked and a winner is found.

In construction [edit]The relevant legislation in the UK is the Housing, Construction and Regeneration Act 1996, (1996 Chapter 53).

**In healthcare**

'Claims Adjudication' is a term used in the insurance industry to refer to the process of paying claims submitted or denying them after comparing claims to the benefit or coverage requirements. The adjudication process consists of receiving a claim from an insured person and then utilizing software to process the claims and make a decision or doing so manually. If it's done automatically using software or a web-based subscription, the claim process is called auto-adjudication. Automating claims often improves efficiency and reduces expenses required for manual claims adjudication. Many claims are submitted on paper and are processed manually by insurance workers. After the claims adjudication process is complete, the insurance company often sends a letter to the person filing the claim describing the outcome. The letter, which is sometimes referred to as remittance advice, includes a statement as to whether the claim was denied or approved. If the company denied the claim, it has to provide an explanation for the reason why under regional laws. The company also often sends an explanation of benefits that includes detailed information about how each service included in the claim was settled. Insurance companies will then send out payments

to the providers if the claims are approved or to the provider's billing service. The process of claims adjudication, in this context, is also referred to as "Medical Billing Advocacy".

### **Pertaining to Background Investigations**

Adjudication is the process directly following a background investigation where the investigation results are reviewed to determine if a candidate should be awarded a security clearance, or be suitable for a public trust or non-sensitive position.

From the United States Department of the Navy Central Adjudication Facility: "Adjudication is the review and consideration of all available information to ensure an individual's loyalty, reliability, and trustworthiness are such that entrusting an individual with national security information or assigning an individual to sensitive duties is clearly in the best interest of national security."

Emergency Response. Adjudication is the process of identifying, with reasonable certainty, the type or nature of material or device that set off an alarm and assessing the potential threat that the material or device might pose with corresponding implications for the need to take further action.

### **Referring to a minor**

Referring to a minor, the term adjudicated refers to children that are under a court's jurisdiction usually as a result of having engaged in delinquent behavior and not having a legal guardian that could be entrusted with being responsible for him or her.

Different states have different processes for declaring a child as adjudicated.

### **The Arizona State Legislature has this definition:**

"Dually adjudicated child' means a child who is found to be dependent or temporarily subject to court jurisdiction pending an adjudication of a dependency petition and who is alleged or found to have committed a delinquent or incorrigible act."

### **The 'Illinois General Assembly' has this definition:**

"Adjudicated' means that the Juvenile Court has entered an order declaring that a child is neglected, abused, dependent, a minor

requiring authoritative intervention, a delinquent minor or an addicted minor. "

Adjudication is a relatively new process introduced by the Government of Victoria in Australia, to allow for the rapid determination of progress claims under building contracts or sub-contracts and contracts for the supply of goods or services in the building industry. This process was designed to ensure cash flow to businesses in the building industry, without parties getting tied up in lengthy and expensive litigation or arbitration. It is regulated by the Building and Construction Industry Security of Payment Act 2002.

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#### **4.5 Theories of Judicial Role**

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##### **Definition:**

The kind of action or activity proper to the judiciary, particularly its responsibility for decision making, used only for discussions of the role of judges or courts in decision making, not routinely for individual court cases.

Theories of Judicial Role explains how the [judiciary](#) should interpret the [law](#), particularly [constitutional](#) documents and [legislation](#) (see [statutory interpretation](#)). An interpretation which results in or supports some form of law-making role for the judiciary in interpreting the law is sometimes pejoratively characterized as [judicial activism](#), the opposite of which is judicial lethargy, with [judicial restraint](#) somewhere in between.

In the [United States](#), there are various methods of constitutional interpretation:

- [Textualism](#) is when judges consult the actual language of the Constitution first, and perhaps last, according to government scholar John E. Finn, who added that the method has an "obvious appeal" for its simplicity but can be hampered when the language of the Constitution itself is ambiguous.<sup>[1]</sup>
- [Strict constructionism](#) is when a judge interprets the text only as it is spoken; once a clear meaning has been established,



there is no need for further analysis, and judges should avoid drawing inferences from previous statutes or the constitution and instead focus on exactly what was written.<sup>[2]</sup> For example, Justice [Hugo Black](#) argued that the First Amendment's wording in reference to certain civil rights that *Congress shall make no law* should mean exactly that: *no law, no exceptions, end of story*, according to Black.

- *Founders' Intent* is when judges try to gauge the intentions of the authors of the Constitution. Problems can arise when judges try to determine which particular Founders or Framers to consult, as well as try to determine what they meant based on often sparse and incomplete documentation.<sup>[1]</sup>
- [Originalism](#) is when judges try to apply the "original" meanings of various constitutional provisions.<sup>[1]</sup>
- *Balancing* happens when judges weigh one set of interests or rights against an opposing set, typically used to make rulings in [First Amendment](#) cases. But this approach was criticized by Supreme Court justice [Felix Frankfurter](#) who argued that the Constitution gives no guidance about how to weigh or measure divergent interests.<sup>[1]</sup>
- [Prudentialism](#) discourages judges from setting broad rules for possible future cases, and advises courts to play a limited role.<sup>[1]</sup>
- Doctrinalism considers how various parts of the Constitution have been "shaped by the Court's own jurisprudence", according to Finn.<sup>[1]</sup>
- *Precedent* is when judges decide a case by looking to the decision of a previous and similar case according to [stare decisis](#), and finds a rule or principle in the earlier case to guide the current case.<sup>[1]</sup>
- [Structuralism](#) is a method judges use by finding the meaning of a particular constitutional principle only by "reading it against the larger constitutional document or context," according to Finn.<sup>[1]</sup>

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**4.6 Relation between Judicial Process and Constitution  
Adjudication: Indian Position**

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In the pre-Constitution era Gandhiji had blazed the trail of higher law against State by expounding the doctrine of legitimacy of right means to achieve right ends. He never hesitated to disobey unjust laws, customs and traditions which were an affront to human liberty and dignity. The concept of higher law in so far as human dignity, liberty and equality is concerned is clearly epitomised in different Articles of the Constitution. Articles 19, 21 and 22 especially guarantee personal freedoms and civil liberties which are the very soul of democracy and of a free society. However, curbs on civil liberties and personal freedoms in free India are not uncommon. To curb communists or naxalities or communalists civil liberties have been curtailed and abrogated from time to time.

The Bombay Public Security Act, 1947, the Bihar Maintenance of Public Order Act, 1947, the West Bengal Security Act, 1948, The Preventive Detention Act, 1950, the Maintenance of Internal Security Act, 1971 (MISA), the National Security Act, 1980, etc. are such statutory measures which have been upheld by the courts being reasonable restrictions on Fundamental Rights guaranteeing civil liberties and personal freedoms. In *Gopalan*,<sup>2</sup> the constitutional validity of the Preventive Detention Act came for consideration wherein the Court was asked to pronounce upon true meaning of Article 21 of the Constitution guaranteeing right to life and right to personal freedom. The Court declared that the words 'according to procedure established by law' in Article 21 meant 'according to the substantive and procedural provisions of any enacted law.' If, therefore, a person was deprived of his life or personal liberty by law enacted by a legislature, however, drastic and unreasonable the law, he would be rightly deprived of his life and liberty. There would be no infringement of personal liberty or freedom in such a case. In effect

the Gopalan meant that in respect of civil liberties and personal liberty no person in India had any remedy against legislative action. In this connection Justice Mukherjee observed 'My conclusion, therefore, is that in Article 21 the word 'law' has been used in the sense of State-made law and not as an equivalent in the abstract or general sense embodying the principles of natural justice.' It was held the term 'law' has been used in Article 21 in the sense of *lex* (State made law). The Gopalan approach has been characterized as the 'high water mark of legal positivism.' The Supreme Court's approach was liberal, rigid and strict too much coloured positive or imperative (Austinian approach) theory of law. The similar attitude of the Court is discernable in the Habeas Corpus,<sup>3</sup> case wherein the Court revolves around Austinian positivism.

It was Subba Rao, Chief Justice of India who introduced the concept of natural law at its zenith in the *Golak Nath*,<sup>4</sup> during sixties. Its influence, however, diminished especially during the Internal Emergency of 1975. It has once again revived with greater vigour in the post-Emergency era. The Supreme Court in the *Maneka*,<sup>5</sup> corrected its error of the Gopalan case in which it had strictly interpreted the word 'law' and had not taken into consideration the 'procedure' which ought to be just, fair and reasonable. Both Bhagwati, J. and Krishna Iyer, J. are emphatic that the procedure in Article 21 means fair and reasonable procedure. The Court observed,<sup>6</sup> 'the ambit of personal liberty protected by Article 21 is wide and comprehensive. It embraces both substantive rights to personal liberty and procedure provided for their deprivation.' Thus *Maneka* has over-ruled *Gopalan*. *Maneka* rejects the theory that each fundamental right is a self-contained code itself. Bhagwati, J. and Krishna Iyer, J. have highlighted the need to keep in view the

synthesis of these rights while interpreting each right according to social milieu of changing times, place and situation.

Thus, a number of cases on personal liberty have enriched Indian jurisprudence on human rights. As already observed Maneka has enriched and enlarged personal liberty, Nandini<sup>7</sup> saves the poor suspects from terrorised and tortured into involuntary discrimination, Batra<sup>8</sup> rescues prisoners from solitary confinement and iron bars. Hosfcof,<sup>9</sup> gives the convict the fundamental right to file appeal and the legal aid needed to file such an appeal. Charles Sobraj,<sup>10</sup> has drawn the attention of the courts that imprisonment does not bid a farewell to Fundamental Rights, and Bhandidas,<sup>11</sup> protects the dignity of convicts laying down that conviction does not degrade a person into a non-person. Prem Shankar<sup>12</sup> too protects prisoners kept as undertrials from police brutalities and indignities. Moti Ram,<sup>13</sup> succeeds in expanding and liberalising age old concept of bail so as to make in, more responsive to the needy and poor and in Madhav,<sup>14</sup> the Supreme Court clarifies the larger questions who silently suffer behind the stone walls due to deprivation of liberty caused by unreasonableness, arbitrariness and unfair procedures. In Shivkumar,<sup>15</sup> the High Court of Allahabad sets aside the prosecution of the accused extolling naxalite activities and asking people to boycott elections. Mantoo Maztimdar<sup>16</sup> is an instance of callous detention of the prisoner not 90 days but 1900 days or more without bothering for the law of the land as the Supreme Court observed, 'If the salt hath lost its flavour wherewith shall it be salted? It he law officers charged with the obligation to protect the liberty of the persons are mindless of Constitutional mandate and Codes how can freedom survive for ordinary citizens. Hussainam<sup>17</sup> is another example of Supreme Court concern for men, women, and children

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who are behind prison bar for years waiting trials and the Supreme Court says 'speedy trial.....is an integral part of the fundamental right to life and liberty enshrined in article 21'.

In *Bachan Singh*<sup>18</sup> the Court through judicial interpretation ingrafted the concept of reasonableness in the entire fabric of the Constitution personal liberty would, therefore, have to stand the test of reasonableness, fairness and justice in order to be outside the inhibition of Article 21' : The Court thus laid down that death sentence can be inflicted only in the rare of the rarest cases when the 'alternative option is unquestionably foreclosed' or for 'special reasons' to be recorded. Of course 'special reasons' justifying capital punishment, in the absence of legislation or guiding principles are bound to vary from judge to judge,<sup>19</sup> depending upon his 'attitude and approaches, predilections and prejudices, habits of mind and thought and his social value system.' Although the Apex Court has justified the imposition of death sentence,<sup>20</sup> when according to the judge the nature of the crime is 'brutal', 'cold-blooded', 'deliberate', 'heinous', 'violent' etc. But prolonged delay in the execution of sentence of death is one such ground where it has been substituted by imprisonment for life. The Court unanimously accepted,<sup>21</sup> the view that undue delay in the execution of death sentences not only leads to inhuman suffering and dehumanising treatment but it is also unjust, unfair and unreasonable deprivation of life and liberty of a condemned prisoner and, therefore, infringes the mandate of Article 21 of the Constitution.

### **New Jurisprudence—New liberal setting**

Prior to 1973 the Court with great difficulty had to acquiesce with the prevailing view which existed since the adoption of the Constitution that Parliament is 'Sovereign' which even can replace the Constitution', or supremacy of the Executive vis-a-vis the Judiciary in the context of a so-called 'committed judiciary' during the days of

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Golak Nath case controversy. However, it was in Maneka together with Kesavananda Bharati that the Supreme Court expounded a new jurisprudence—some fundamental and higher principles of law which may endure and adapted to varying social and political situations in India. It is through judicial fiat or review that the judiciary has created both a philosophy of law and theory of politics inextricably based on values like reason, nature, morality, liberty, justice and restraint consistent with the spirit of the Constitution and traditions of the people. In Kesavandanda,<sup>22</sup> the Court rejects the positivistic instance that sovereign power lay with Parliament. Denying such claims the Court postulated what it described ‘the basic features, doctrine as an impenetrable bulwork against every assumption of despotic or unconstitutional exercise of power by the legislature and the executive. This indeed is a far-reaching development in the annals of Indian jurisprudence for meeting the challenges of troubling times and issues,<sup>23</sup> confronting our democratic and secular Republic.

The Maneka Gandhi,<sup>24</sup> is another landmark decision from the point of human rights and remedial jurisprudence in which Justice Bhagwati has beamed the ‘Lead Kindly light message’ admits the encircling gloom of State repression by emitting New Freedoms for making human rights a living reality for those denied or unable to exercise and enjoy such rights on account of poverty or ignorance. Through Maneka people now realise what State is if it is devoid of justice or denies liberty, human dignity, equality etc. to ordinary citizens under the garb of populist democracy, capsuled socialism and controlled freedoms. Deprecating absolutism of the Executive and its interference with individual freedom Justice Bhagwati declared:<sup>25</sup>

'We must reiterate here what was pointed out by the majority in E.P. Royappa v. T.N. Namely, that 'from the positivist point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic, while the other to the whims and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that is unequal both according to political logic and constitutional law and, therefore, violative of Article 14. Article 14 strikes at arbitrariness of State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive, otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied'.

In Chandrima Das,<sup>26</sup> the Supreme Court has broadened and greatly widened the meaning of the word 'LIFE' as adopted in International Covenants on Civil and Political Rights, the Covenants of Economic, Social and Cultural Rights including Universal Declaration of Human Rights 1948. On this principles even those who are not citizens of this country and come here as merely as tourists in this country.....will be entitled to the protection of their lives in accordance with the constitutional provisions. They also have a right to 'Life' in this country. Thus, they also have the right to live, so long as they are here, with human dignity, just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the life of the persons who are not citizens.'

### **Judicial Process—blending new values**

In the post-Emergency era under the dynamic leadership of judges like V.R. Krishna Iyer, Y.V. Chandrachud, P.N. Bhagwati, D.A.

Desai, O. Chinnappa Reddy and Kuldeep Singh like their counterparts Justices Holmes, Cardozo, Brandeis, Frankfurter in USA, have made their mark overwhelmingly upon great issues of human liberty, social justice and human rights,<sup>27</sup> as enshrined in the Constitution even by antagonising the Parliament and the Government of the day. These judges through their scintillating judgments made a bold departure from the traditional judicial role and sharply focused the debilitating effects of executive and legislative tyranny on individual autonomy and freedoms as was evident in Gopalan and Shivkant Shtikla.<sup>28</sup> They found a sanctuary in the Preamble, Parts III and IV of the Constitution for destroying barriers and fetters on individual liberty and henceforth assumed the role of philosopher, law-maker and defender of basic rights and needs of the little Indians. In a similar setting Justice O. Chinnappa Reddy declared,<sup>29</sup> that equal pay for equal work is not a 'mere demagogic slogan' but a constitutional goal which can be achieved through enforcement of fundamental rights. He specially hailed 'the rising social and political consciousness and the expectations as a consequence among the under-privileged who are now asking Court's intervention to protect and promote their rights.....the judges of the Court have a duty to redeem their constitutional oath and do justice no less to the pavement dweller than to the guest of the Five Star Hotel.'

Accordingly the Apex Court has been adopting organic, functional and sociological method of interpretation over the traditional mechanical method in the enforcement of the provision of the Constitution. By providing flesh and blood to political, social and economic rights instead of living in ivory tower the Court has become activist by compelling the executive and the political leadership not to turn volte-face in redeeming their pledges towards the hapless Indians in the true Gandhian spirit. Under the spell of new economic



liberalization and privatisation it is the judges who have been standing for the poor in their quest for justice and dignity. In this context, Justice V.R. Krishan Iyer exhorted<sup>30</sup> the judges:

‘Where doubts arise the Gandhian talisman becomes a toll of interpretation : whenever you are in doubt.....apply the following test. Recall the face of the poorest and the weakest whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him.’

Such is the constitutional promise and goal in favour of ‘We, the People of India’ that the Apex Court has been assiduously evolving in the post-Emergency era under the niche of Article 21 of the Constitution. Thus, Article 21 in conjunction with Articles 14, 19, 39 etc. have proved gold mine forvi Court in achieving the two objectives, namely, providing a shield on moral, humanitarian and constitutional grounds to the poor as a guarantee against executive action and of making new law for governing the life of citizens and regulating the functioning of the State in accordance with law of the land. A brief resume of judicial decisions in the realm of individual liberty, freedom, social justice and other human rights under Article 21 are capsuled to demonstrate the extent of judicial creativity in contemporary Indian jurisprudence.

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#### 4.7 SUMMARY

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Adjudication is the legal process by which an arbiter or judge reviews evidence and argumentation including legal reasoning set forth by opposing parties or litigants to come to a decision which determines rights and obligations between the parties involved. Three types of disputes are resolved through adjudication:

Disputes between private parties, such as individuals or **corporations.**

Disputes between private parties and public officials.

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Disputes between public officials or public bodies.

In this unit we have discussed about the definition, concept and notions of judicial review. We have also discussed its role in constitutional adjudication and various theories of judicial role in India.

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#### **4.8 SUGGESTED READINGS/REFERENCE MATERIAL**

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31. Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597.
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#### **4.9 SELF ASSESSMENT QUESTIONS**

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1. What do you understand by the concept of judicial review?
2. Describe the role of judicial review in constitutional adjudication?
3. Discuss the various theories of judicial role in India.

LL.M. Part-2

Subject: JUDICIAL PROCESS

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**Block-II-Special Dimensions of Judicial Process in Constitutional Adjudications**

**Unit-5-Tools and techniques in policy-making and creativity in constitutional adjudication**

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**STRUCTURE**

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**5.1 INTRODUCTION**

**5.2 OBJECTIVES**

**5.3 Precedent as a tools and technique of creativity and policy making**

**5.4. Role of Precedent in Constitutional Adjudication**

**5.5 Position in India**

**5.6 GLOSSARY**

**5.7 SUGGESTED READINGS/REFERENCE MATERIAL**

**5.8 SELF ASSESSMENT QUESTIONS**

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## 5.1 INTRODUCTION

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In the previous unit you have read about the concept and notions of judicial review. You have also read its role in constitutional adjudication and various theories of judicial role in India.

The duty of the judge is to interpret and apply the law to the cases before him. When a judge decides a case, he does something more than simply applying a law; he interprets and moulds the law to fit in with the facts and circumstances of the case. According to Cardozo, while molding the law, he may use the methods of philosophy, of history, of sociology or of analogy. He moulds the law so as to best serve the requirements of the society. The methods of philosophy, history, sociology and analogy are the tools using which a judge performs his duty. Using these methods, he fulfils his obligations towards the society which require him to give his view, his notion of law. In this unit we will discuss about the Tools and techniques in policy-making and creativity in constitutional adjudication.

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## 5.2 OBJECTIVES

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After reading this unit you will be able to:

- ✓ Describe the role of precedents as tools and techniques in policy-making.
- ✓ Discuss the role of precedents in judicial creativity and in constitutional adjudication.

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## 5.3 Precedent as a tools and technique of creativity and policy making

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The duty of the judge is to interpret and apply the law to the cases before him. When a judge decides a case, he does something more than simply applying a law; he interprets and moulds the law to fit in with the facts and circumstances of the case. According to Cardozo,

while moulding the law, he may use the methods of philosophy, of history, of sociology or of analogy. He moulds the law so as to best serve the requirements of the society. The methods of philosophy, history, sociology and analogy are the tools using which a judge performs his duty. Using these methods, he fulfils his obligations towards the society which require him to give his view, his notion of law. The judge who moulds the law by the method of philosophy may be satisfying an intellectual craving for symmetry of form and substance. But he is doing something more. He is keeping the law true in its response to a deep seated and imperious sentiment. By the method of philosophy, the judge makes use of his own reasoning and standards of public good. Under this method, the judge makes use of his own inner sub conscious element and gives to the society his own notion of right and wrong, of just and unjust, of equality, fairness and justice. By the method of history, it is meant that the judge makes use of the past decisions. He follows the doctrine of precedent. He compares the case he has in hand with the past decisions and makes use of the one which most closely resemble with the one he has to decide. The doctrine of precedent is based on the principle that like should be treated alike and that there is stability and certainty in law. However, while dealing with the precedents, the judge has to distinguish between those which are liberal and beneficial for the future and those which are oppressive to the society. The judge has to choose those precedents which best serve the purpose of the society.

According to Cardozo, the method of sociology demands that within the narrow range of choice, the judge shall search for social justice. The judge has to see that his work leads to the attainment of social order. He has to provide for the welfare of the society. The judge has keep the welfare of the society as the ultimate aim of his work. He cannot attempt an action which would not be beneficial for the society at large. By the method of analogy, it means that the judge makes use of the alien jurisprudences. It is a case where the judge borrows from other jurisprudences. While borrowing from other jurisprudences, the judge has to make use of the similarity in laws and prevailing social conditions of the region from where he borrows the provisions. The judge compares the case with similar problems

in other regions. In the case of *Bijoe Emmanuel v. State of Kerala*[1], the Supreme Court of India made use of the law prevailing in other countries to decide the issue. In this case, the Supreme Court made reference of the similar cases decided by the courts in Australia and U.S.A. to deal with the special case of a particular sect.

For a judge, law is never static. It is dynamic and keeps changing. The judge has to mould it in accordance with the needs of the society. The judge plays a very dynamic role in shaping the law so as to best serve the society. The judge has to take care that the law is progressive and protects the interests of the society and is not oppressive and suffocating. The aim of judicial process is the attainment of social good. The judge has to see that the law helps the society at large and does not infringe the goals of justice and liberty.

**Social order: the purpose of law**

There have been different approaches to law. According to Austin, law is the command of the sovereign. Bentham proposed his utilitarian calculus, according to which the aim of law is to bring about maximum good of the largest number. Bentham's hedonistic calculus was based on the concept of social utility. According to Roscoe Pound, the purpose of law is social engineering. Law aims to achieve social good. The welfare of the society is the paramount consideration of law. Law aspires to end all social evils and to bring about social order.

Cardozo has stated that the final cause of law is the welfare of society. When judges are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.

Law and society are interdependent and neither can be separated from the other. The good of the society is its greatest requirement. Law serves the role of protector of the social order. Law aims to attain the good and order in the society.



Social order is what the law aims to achieve. It is the ultimate object of all laws. Law has to provide social order in order to protect the society from disintegrating.

**Role of judges in bringing about social order**

The ultimate aim of all law is to bring about social order. The judge is an important member of the legal institution. He plays an important role in shaping the law to serve the social interest. For a judge, law is never static. A judge is empowered to review the various provisions of law. He is an independent and impartial authority which can verify the reasonableness of a law. Being independent from the influence of the executive and the legislative machinery, a judge can form an unbiased opinion on any question of law.

A social problem requires a solution and judges have the role of resolving disputes. While settling a dispute, the judge is also required to take into consideration the various social requirements. Amongst the various options being available before him, a judge has to choose the one which best serves the interests of the society.

The welfare of the society must be the guiding force for a judge when he sits to perform his duty. His obligation towards the society is to fulfill the various social requirements of justice, order and security. He has to give the welfare of the society a paramount place while dealing with any issue. Being the interpreter of the society of its sense of law and justice, the judge has to be careful in his work as his decisions determine the rights and obligations of various members of the society and effect the people at large.

The judge provides for social order during his job as an interpreter. The various ways in which he can provide for social order are by the methods of interpretation, supplying of omissions, suggesting and recommending changes and new regulations and also through mediation process. These are the techniques by which a judge brings about social order.

**(a) Interpretation**

The judge is the interpreter of the community of its sense of law and order and therefore, he must supply omissions, correct uncertainties and harmonise results with justice through a method of free decision. While dealing with a case, the judge is required to apply law on the facts. While applying law he may be faced with a question of law which requires him to interpret the various legal provisions placed before him. While interpreting a statute, a judge can take either a literal approach or a liberal one.

In literal interpretation, the judge sticks to the letter of the word and there is not much creativity in his job. Sometimes when a literal approach does not give a satisfactory result, that the judge goes for the liberal interpretation of the statute. In liberal interpretation, the judge makes use of his knowledge of various laws, the customs and his own creativity.

One of the most important rules of interpretation is the mischief rule, in which the judge has to determine the mischief which the law had sought to make good. Using the mischief rule, the judge has to imagine and understand the problems in the society which required that a particular law be made.

Another important principle in interpretation is that there a presumption of constitutionality of the statute. The judge has to presume that the statute is constitutional and the legislator had not intended to infringe the fundamental rights.

Further, there is the rule of harmonious interpretation, which states that all the provisions are to be interpreted harmoniously so as to give meaning to all the provisions. The rule of harmonious interpretation underlines the principle that all the provisions of a statute are complementary to each other and are not mutually destructive. While interpreting a statute, the judge has to take care that he gives such an interpretation to the provision that when the statute is read in its entirety, there is no conflict between the provisions.

The role of a judge as an interpreter requires great skill from his side. He is required to give such an interpretation to the legal provisions which best serve the interest of the society.

While interpreting the legal provisions, the judge has to think what purpose, what end of the society his interpretation would serve. He has to take the interest of the society as the paramount issue. The statutes affecting the society at large require the most careful interpretation as the interests of a large number of individuals may be lying at stake. Thus, when a judge interprets a written Constitution, he has to take utmost care while expressing his view on the problem. The written Constitutions are generally given a very wide and liberal interpretation because they are the supreme laws of the land and all the other statutes owe their authority to the Constitution. Using liberal interpretation, in the case of *Maneka Gandhi v. Union of India*[2], the Supreme Court enlarged the scope of right to life to mean a dignified life and not just mere animal existence. While interpreting a law, the judge has to interpret it in a manner that it benefits the society at large.

**(b) Filling up of blanks**

Sometimes a judge has to do something more than just simply interpret a statute. He may be required to correct all errors in it. He may further be required to fill in the missing blanks in a statute. It is not possible for the legislator to imagine each and every circumstance which could arise in the future. While interpreting a statute, a judge may be required to imagine what the legislator would have provided for that particular circumstance. When a judge starts to imagine what the legislator would have intended, he takes the place of the legislator. He has to act for the legislator, giving sense to the statute as a whole and making up what had been left behind. A judge cannot legislate infinitely. According to Cardozo, "He legislates only between gaps. He fills the open spaces in the law." While interpreting any statute, the judge has to keep within the restraints laid down by the legislator. The role of the judge is not of legislating but of interpreting and applying the law. It is during his

job as an interpreter that a judge maybe required to fill in the missing blanks in the statute. However, while filling up the blanks, a judge has to take precaution that what he supplies to the law protects the spirit of the law and does not destroy it.

A judge has to take care that he maintains the harmony between the various provisions of a statute. While supplying omissions, the judge has to protect and preserve the spirit of the law.

According to Cardozo[3], “when the question is one of supplying the gaps in the law, it is not of logical deductions, it is rather of social needs, that we ask the solution.”

Thus, in order to fulfill the needs of the society, the judge supplies the gaps in the statutes. However, the law making work of a judge is restrained as “He is not a knight errant roaming at will in pursuit of his own ideals of beauty or of goodness. He is to draw his inspiration from consecrated principles.”[4]

#### (c) Recommendations

Often a judge may be required to give his recommendations or suggestions to enact the particular law which would serve the social need. A judge plays a very important part in social ordering when he lays down suggestions or recommendations regarding any social problem. Where the law is silent, the judge may be required to cross his bounds and take up the role of legislators. He may be required to give suggestions in order to resolve certain social problems. These suggestions play a very vital role in satisfying the various requirements of the society. The public interest litigations play a very important role in protecting the interests of the society. By means of public interest litigations, the lawyers and judges attempt to eradicate certain social problems. Public interest litigations play a very useful role when the legislature and the executive fails to find out a solution for the existing problems. Public interest litigations are a recent creation of the courts by which they aim to provide the cure for the ills prevalent in the society. The judges are very instrumental in eradicating the social problems.

The judiciary took a very active role while laying down the procedural requirements required while making an arrest in the case of D.K. Basu v. State of West Bengal[5]. In this case the Apex Court laid down various guidelines which are to be followed by the policemen while making any arrest. The reason behind laying down such provisions was that there were complaints of police atrocities in the police lock ups. Similarly, in the case of Vishakha v. State of Rajasthan[6], the Supreme Court again laid down guidelines for the safety of working women. In this case, the instances of sexual harassment of working women at their workplace were an issue. The Supreme Court laid down various guidelines to be implemented by the employer for the protection of the working women. In this case, the court even declared that the sexual harassment of the female employees amounted to the violation of the right to work and is discriminatory against them.

In the case of Sarla Mudgal v. Union of India[7], while dealing with the problem of anomalies in different personal laws and people making use of these differences to defeat the end of justice, the Supreme Court had expressed a view that the uniform civil code should be implemented. In this

case also the judiciary tried to provide for the social requirement for a uniform civil code which would take care of all the problems relating to the differences in the personal laws. The Supreme Court has also laid down certain rules to be followed when the adoption of an Indian child is made by any foreigner. The reason behind such recommendations was the presence of the menace of the use of young children in beggar and slavery. These rules help in protecting the child from economic, social, physical and sexual exploitation.

Further, in the case of Association for Democratic Reforms v. Union of India[8], the Delhi High court and on appeal the Supreme Court has given guidelines for cleansing of the electoral process from the impact of criminals and wealth and bringing about electoral reform in India.

Similarly, the courts have taken active parts in issues related to illegal constructions, anomalies in school admissions, ragging at university level( Lingdow committee report) and so on. The court had taken these steps in order to ensure social justice.

The judiciary may be required to take up the role of legislators when the legislative fails to provide sufficiently for the social requirement. This act of judiciary is known as judicial activism. The judiciary has acquired its activist power from its review power. The judicial activism has played an important role in attaining social order as it satisfies the various requirements of the society.

#### **(d) Mediation proceedings**

The social institution requires certain relationships to be protected and sanctified. In order to prevent minor problems developing into irresolvable issues, the judges take the role of mediators. The role of a judge as a mediator is a very recent one. Till date, judges used to solve the disputes. Now they try to prevent the disputes from arising. In cases of minor discords, the judges help in solving the issues before they take the form of major disputes.

The judges suggest out of court settlement of disputes in order to prevent certain relationships from breaking down.

In the present day society, judges suggest the use of mediation proceedings specially when the need is to protect an institution as sacred as the institution of marriage. Judges serve as the mediator in various cases to prevent a relationship from breaking down. The law mandates mediation and the courts encourage and endorse it. It is a cheaper, simpler and more productive manner of dispute resolution. It helps to restore the broken relationships and focuses on improving the future and not on dissecting the past. The benefit of mediation is that it is a voluntary process and both the parties are able to assess their case and come up to an amicable solution. The judges play an active role in encouraging and endorsing mediation proceedings.

#### **Conclusion**

A judge is the interpreter of the society. He makes visible the various laws. While interpreting a law, the judge also corrects the errors present in the law, he supplies the omissions in the law. The main object of law is to bring about social order and the judges play an important part in attaining that objective. The judiciary has taken an active role in attaining social order and justice. To serve the purpose of the social utility, the judge had to play the part of the legislator as well. A role, which has been much criticized but is very important for fulfilling the needs of the society. A democracy needs a forum, other than the legislature and the executive, for redressing the legitimate grievances of the minorities- racial, religious, political or others. In India, at the present time, the Supreme Court is laying great emphasis on vindication of the rights of the poor and deprived people. The court has acknowledged this fact. Thus, in Punjab Rickshaw pullers' case[9], the Supreme Court had stated that "Judicial activism gets its highest bonus when its order wipes some tears from some eyes." Thus, it can be concluded that judicial process has a very active and positive role in social ordering.

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#### **5.4. Role of Precedent in Constitutional Adjudication**

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The need of the judicial interpretation has ever existed and persisted in every legal system of the world. Initially the judges in their eagerness to avoid the blasphemy of judicial legislation bounded themselves with the rule of literal interpretation which led to a number of absurd and inequitable results. Subsequently, in relation to the constitutional adjudication, the role of judges enlarged from literal interpretation to intent based interpretation and finally to declaration in cases of vacant spaces. However it was the Supreme Court of the United States of America, one of the oldest constitutional courts of the world, which bestowed upon itself the power of judicial review ; it was this power which made courts the gatekeepers of fundamental rights and provided for the power of a court to hold unconstitutional and hence unenforceable any law,

official action based on a law, or any other action by a public official, that it deems to be in conflict with the basic law, that is, the [Constitution](#).

In exercising the task of determining whether a violation is in fact justified the courts have evolved, educed and applied various rules of interpretation. The courts in such constitutional adjudication where the fundamental rights infringement were involved provided that these issues deserve an intense review. Several new tests evolved as an outcome of such need of intense review. One of the tests evoked and utilized by the court in such constitutional adjudication is in form of 'Strict Scrutiny' Test. This work emphasizes upon the meaning and genesis of 'strict scrutiny' test, elements of 'strict scrutiny' test, application of 'strict scrutiny' test in USA, applicability of test in Indian [Constitutional](#) interpretation and approaches of the courts in this regard lastly it testifies the need of the test in Indian [Constitutional](#) framework.

**II. 'Strict Scrutiny' Test: Its Intendment, Provenance And Elements** "We seek not just freedom but opportunity—not just legal equity but human ability—not just equality as a right and a theory, but equality as a fact and as a result."

**(A)Intendment**

When a government actor makes a decision that confers benefits or burdens based on a person's status or membership in a particular group or class, e.g., race, gender, or age, and that decision is challenged, the legality of the decision must be analyzed under one of three levels of judicial scrutiny—strict, intermediate, or weak. Strict scrutiny test in its ingenuous form can be said to be a standard of judicial review for a challenged policy in which the court presumes the policy to be invalid unless the government can demonstrate a compelling interest to justify the policy. Strict scrutiny test is one of the tests amongst the three tests utilized by the US courts, the other two as-

(a) the rational basis test, which is the lowest form of judicial scrutiny used in cases where a plaintiff alleges that the legislature has made



an arbitrary or irrational decision.  
(b) the heightened scrutiny test, which is used in cases involving matters of discrimination based on sex. According to Richard Fallon strict scrutiny test is a judicially crafted formula for implementing constitutional values which ranks among the most important doctrinal elements in constitutional law. Strict scrutiny test which evolved from the 'preferred freedom' test, which itself was a revitalized version of 'clear and present danger' test provided for a tripartite test as follows-

1. Where legislation or other statement of policy abridges a preferred freedom on its face, the usual presumption of constitutionality is reversed; that is, the statute or other enactment is assumed to be unconstitutional, and that presumption can be overcome only when the government has successfully discharged its burden of proof.

2. The government must show that the exercise of the fundamental right in question constitutes 'a clear and present danger' or that the legislation relating that liberty advances 'a compelling interest.'

3. The legislation must be drawn in such a way as to present a precisely tailored response to the problem and not burden basic liberty by its over breadth; that is, the policy adopted by the government must constitute the least restrictive alternative. According to Prof. John Ely, courts should strictly scrutinize statutes of the kind's most likely to trigger suspect-content tests. He points out that given the [Constitution](#)'s central commitment to political democracy, the crucial role of the courts is not to second-guess the substantive decisions of the political branches but to ensure the integrity of the democratic process. In applying the strict scrutiny to legislation containing suspect classification, the judges have used the above standards to judge laws infringing a preferred freedom. A statute that explicitly discriminates on the basis of race, for example, is presumed to be

unconstitutional. Government bears the burden of demonstrating that it has compelling interest for distinguishing among citizen on that basis. It must also show that no other basis for categorization in the law could serve that compelling interest as effectively.

Thus the term “strict scrutiny” refers to a test under which statutes will be pronounced unconstitutional unless they are “necessary” or “narrowly drawn” or “closely tailored” to serve a “compelling governmental interest”.

**(B) Provenance**

According to Fallon the modern strict scrutiny test developed during the 1960s as an innovation of Warren Courts. Before the 1960s, the idea had emerged that some constitutional rights deserved more protection than others, or appropriately triggered heightened judicial scrutiny, but no workable formula had emerged to implement this general idea, it was this need of workable formula that the strict scrutiny test was evolved. Fallon writes that strict judicial scrutiny--- which is a generic constitutional doctrine, capable of broad application---rose to prominence as the solution to a generic problem confronting the Warren Court. That problem involved the judicial enforcement of a regime of “preferred” or fundamental rights that were too important to be balanced away on an ad hoc basis or protected only by a rational basis test, on the one hand, but that the Court thought it impractical to define as wholly categorical or unyielding, on the other. The modern strict scrutiny test arose as a device to implement, or as the constitutional complement to, a closely related phenomenon of more primary significance: the Supreme Court’s solidifying commitment to a jurisprudential distinction between ordinary rights and liberties, which the government could regulate upon the showing of any rational justification, and more fundamental or “preferred” liberties entitled to more stringent judicial protection. The evolution and development of the strict scrutiny test will be emphasized more while dealing with the USA perspective.

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**(C)Elements**

According to Siegel Strict scrutiny varies from ordinary scrutiny by imposing three hurdles on the government. It shifts the “burden of proof” to the government; it requires the government to pursue a “compelling state interest;” and it demands that the regulation promoting the compelling interest be “narrowly tailored.” Thus, broadly there exist three elements of fulfillment in relation to strict scrutiny test which are discussed herewith.

(i) Burden of Proof: - Shifting the burden of proof is an expression of strict scrutiny’s assumption that in certain situations the judiciary should not accord the normal presumption of constitutionality to government action. The burden shifting aspect of strict scrutiny traces to the Supreme Court’s decision, in the late 1930s, to accord governmental action that burdened First Amendment liberties a reduced presumption of constitutionality.

(ii) Narrow Tailoring: - Narrow tailoring is the oldest branch of strict scrutiny. Tracing back to Gilded Age Commerce Clause adjudication, and frequently used in Lochner-era police power cases, the “narrow tailoring” doctrine gave meaningful protection to constitutional norms well before the development of either bifurcated review or modern strict scrutiny. By 1940, the New Deal Court had made narrow tailoring analysis a prominent part of First Amendment jurisprudence. The Warren Court made it a part of equal protection analysis in 1964. Strict scrutiny’s “narrow tailoring” requirement provides a means to examine the government’s “precision of regulation,” allowing the Court to uphold government action “only if ... it is necessary to achieve ... [the] compelling interest” that the government has asserted as the purpose of its action. Narrow tailoring demands that the fit between the government’s action and its asserted purpose be “as perfect as practicable.” Strict scrutiny’s narrow tailoring requirement means that in pursuing its goals, government action can be neither over- nor under-inclusive.

(iii) Compelling State Interest: - Siegel emphasizes that a compelling state interest is one of the central tenets of modern constitutional law. It comes into play, whenever government employs a suspect classification, burdens a fundamental interest, or adopts a content-based regulation of speech. According to him the compelling state interest standard was a comparatively late development in the evolution of bifurcated review. Further he says that the compelling state interest test has roots that reach into the 1940s; it first appeared in First Amendment litigation in the late-1950s and early 1960s. Its birthing process was not complete until 1963 at which time it coalesced with other doctrines to form modern strict scrutiny analysis. Initially confined to the First Amendment, it took another six years for all the component parts of strict scrutiny to migrate to the Equal Protection Clause. The compelling state interest standard was the last component to make the move. When it did, strict scrutiny rapidly blossomed into one of the late-twentieth century's most fundamental constitutional doctrines.

### **III. Progression Of Strict Scrutiny Test In United States Of America**

“there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the [Constitution](#)..” The words “strict scrutiny” appear nowhere in the US [Constitution](#). However a passing reference to “strict scrutiny” can be found in Skinner v. Oklahoma but the Supreme Court did not again use the term until the 1960s, meanwhile, the Court had spoken of applying “the most rigid scrutiny” to race-based classifications in Korematsu v. United States. The origin of this test can be traced to the decision in United States v Carolene Products in which Justice Harlan Stone noted that there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the [Constitution](#). Siegel on the roots of strict scrutiny opines that strict scrutiny's roots

back to First Amendment cases in the 1940s and 1950s, it establishes strict scrutiny as part of a constitutional paradigm in which, even for high protectionist Justices, no constitutional right was “beyond limitation,” and none could prevail over an appropriate subordinating governmental interest. According to him when Justice Brennan quoted Rutledge’s remark in *Sherbert v. Verner* , he announced the birth of modern strict scrutiny. According to Fallon the modern strict scrutiny test developed during 1960s. According to him it was need of a doctrinal structure which could impose discipline or at least the appearance of discipline on judicial decision making that paved way for strict scrutiny test. Subsequently the Supreme Court employed the test in various provisions of the [Constitution](#). The Court applied it in cases of race-based classifications under the Equal Protection Clause , in Free Speech Cases , in Freedom of Association Cases , and Strict Scrutiny under the Due Process Clause. Articulation of strict scrutiny test in affirmative action was first seen in *Regents of the University of California at Davis v. Bakke* in which Justice Powell observed that a race-conscious program survives strict scrutiny test if it is “precisely tailored” to serve a “compelling governmental interest”. The *Bakke* case considered whether the affirmative action admissions program at the University of California at Davis violated the Equal Protection Clause by granting preferential treatment in its admissions decisions to applicants of color.

However Elizabeth Anderson argues that the courts struck down race-based affirmative action programs on the basis of alleged failures to meet strict scrutiny of racial classifications, without having a clear grasp of the point of strict scrutiny and hence of how to apply it. According to her the arguments for affirmative action have actually helped perpetuate a confused conception of strict scrutiny and its purposes. She further emphasizes that the integrative rationales for affirmative action in higher education also could easily pass equal protection analysis, if only the point of strict scrutiny of racial

classifications were understood. She argues that there is no constitutional or moral basis for prohibiting state uses of racial means to remedy private-sector discrimination. Integrative affirmative action programs in educational contexts, which aim to remedy private-sector discrimination, can therefore meet the requirements of strict scrutiny, properly interpreted. Subsequently in *Grutter v. Bollinger*, the U.S. Supreme Court held that broadly defined student body diversity is a compelling interest that can justify the use of race in university admissions when the institution determines that such diversity is necessary to achieve its educational mission. However in *Gratz v. Bollinger*, the Court held that the University of Michigan's undergraduate admissions policy of automatically distributing twenty points to students from underrepresented minority groups was not narrowly tailored because it assumes that each member of a racial minority group makes the same contribution to the university based solely on race and forecloses the exercise of academic judgment on the potential contributions of an applicant based on all of his or her attributes. Thus the Supreme Court's approach in affirmative action was that the program should survive a strict scrutiny analysis if it were to continue.

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### 5.5 Position in India

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#### **IV. Strict Scrutiny Test: The Indian Experience**

"The purpose of the Fundamental Rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all."

#### **(A) Indian Constitution: A Backdrop**

India, a Union of States, is a sovereign, socialist, secular, democratic, republic with a parliamentary system of government. The [Constitution](#) offers all citizens, individually and collectively, some basic freedoms in the shape of fundamental rights that are

justiciable. These include freedom of conscience and freedom to profess, practice, and propagate religion; the right of any section of citizens to conserve their culture, language, or script; and the right of minorities to establish and administer educational institutions of their choice. However the absolute concept of liberty and equality are very difficult to achieve in modern welfare society. The form in which such rights have been provided is in the form of restrictions which the government is expected to follow in the governance of the country. Unlike the US [Constitution](#) the [Constitution](#) of India formulates the fundamental rights with inherent restrictions which permit the State to directly impose the limitations on the fundamental rights. Under the Indian [Constitution](#), the fundamental rights have been provided in different forms. In some cases there is an express declaration of rights while in others they are declared as prohibitions without any reference to any person or body to enforce them. Some of these rights take specific forms of restrictions on State action while some require state action. Some of them are also given in the form of positive declaration and simultaneously provide for restriction on them. Though the declaration of fundamental right has not been in a uniform pattern yet they seek to protect rights of individuals or groups of individual against the infringement of these rights within specific limits, express or implied with each right having different dimensions of facts.

### **(B) Affirmative Action & India**

The [Constitution](#) of India seems to be the first to have expressly provided for affirmative action. It is one major country in the world that has a longer history – a much longer history -- than the U.S. of designing and evaluating affirmative action programs. Since the adoption of its [Constitution](#) in 1950, India has afforded an extensive program of affirmative action to a set of caste groups known as Scheduled Castes and a set of tribal groups known as Scheduled Tribes, which together constitute about twenty-two percent of the total population. In addition, India has provided more selective

affirmative action measures to a number of groups within Indian society, defined by the constitution as “socially and educationally backward classes,” which have suffered from a history of economic exploitation and social segregation comparable in some measure to that suffered by the untouchables.

The constitution makers were aware of the fact that mere grant of freedom from restraints and liberty would not be sufficient enough to promote these disadvantaged group of the society, therefore they imposed obligations on the State to take positive steps to lift these sections to a level from where they can take advantage of their freedom and liberty on reasonably equal footing. In several decisions the Apex Court has emphasized that equality is a positive right and requires the State to minimize the existing inequalities and to treat unequals or unprivileged with special care as envisaged in the [Constitution](#).

**(C) Conspicuous Cases Involving Issue Of ‘Strict Scrutiny’ & Courts** **Observation**

Our constitution confers on the courts the power to scrutinize a law made by a legislature and to declare it to be void if it is found to be inconsistent with the provisions of the [Constitution](#). The courts over the years have resorted to the Principle of Reasonableness to testify the State action. The approach of the courts was clear in which they testified the actions on the basis of test for valid classification consisting primarily of intelligible differentia and the rational relation to the objective to be sort out. Indian constitutional adjudication contrary to the U.S.A. didn’t deal with the application of strict scrutiny in constitutional adjudication; however there are some of the cases where the urge for application of the test is conspicuously made and subsequently relied upon. It would be imperative to know what the courts observed in these cases.

At the outset it is to be noted that these cases are not exhaustive,



apart from it, there are cases where the courts have used the term strict scrutiny and proportionality inter alia. The precise content of 'strict scrutiny' and 'proportionality review' is deeply controversial in their respective jurisdictions. It is noteworthy that administrative action in India affecting fundamental freedoms has been tested on the anvil of 'proportionality' and therefore these cases do not fall within the ambit of present study.

In **Saurabh Chaudhary & Ors v. Union of India** the constitutional validity of reservation based on domicile or institution in the matter of admission into post graduate courses in government run medical colleges was questioned. In the case the appellants raised two contentions in support of the writ petition. It was submitted that in view of the equality clause contained in [Article](#) 14 and 15(1) of the [Constitution](#) of India, reservation whether based on domicile or institutional preference would be unconstitutional. Further it was contended that any reservation that would fall within the purview of 'suspected classification' must pass the 'strict scrutiny test' or 'intermediate scrutiny test'. While respondent, in contrast, submitted that the Apex Court has laid down the law that the constitutionality of a statute must be presumed and onus to prove that the statute is unconstitutional is upon the person who asserts the same. Only two tests, namely, as to whether the classification is reasonable and based on an intelligible differentia stood the test of time and there is no reason to deviate there from. The CJI V. N. Khare observed-

“The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America as argued by Shri Salve cannot be applied in this case. Such a test is not applied in Indian Courts. In any event, such a test may be applied in a case where a legislation ex facie is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy. This Court since its inception apart from a few cases where the legislation was found to be ex facie wholly

unreasonable proceeded on the doctrine that constitutionality of a statute is to be presumed and the burden to prove contra is on him who asserts the same.” Justice Sinha in concurrence opined that while considering the reasonableness of the institutional reservation, the Apex Court has taken into consideration the effect of equality clause contained in [Article](#) 14 and 15 of the [Constitution](#) of India. However in his opinion even applying strict scrutiny test, the institutional reservation should not be done away with having regard to the present day scenario. In **Anuj Garg & Ors v. Hotel Association of India & Ors** the constitutional validity of Section 30 of the Punjab Excise Act, 1914 prohibiting employment of "any man under the age of 25 years" or "any woman" in any part of such premises in which liquor or intoxicating drug is consumed by the was challenged. Justice Sinha in this case observed:- “Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until unless there is a compelling state purpose. Heightened level of scrutiny is the normative threshold for judicial review in such cases.” Further, “It is to be borne in mind those legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects.” In **Ashok Kumar Thakur v. Union of India & Ors** . the Apex Court through CJI observed that the decisions of the United States of Supreme Court were not applied in the Indian context as it was felt that the structure of the provisions under the two [Constitutions](#) and the social conditions as well as other factors are widely different in both the countries, there exists structural differences in the [Constitution](#) of India and the [Constitution](#) of the United States of America. Further in India, [Articles](#) 14 and 18 are differently structured and contain express provisions for special provision for the

advancement of SEBCs, STs and SCs. Moreover, in our [Constitution](#) there is a specific provision under the Directive Principles of State Policy in Part IV of the [Constitution](#) requiring the State to strive for justice social, economic and political and to minimize the inequalities of income and endeavour to eliminate inequalities in status, facilities and opportunities ([Article](#) 38). Earlier, there was a view that [Articles](#) 16(4) and 15(5) are exceptions to [Article](#) 16(1) and 15(1) respectively.

It was observed that the strict scrutiny test as applied by the Supreme Court of the United States of America cannot be applied directly to India as the gamut of affirmative action in India is fully supported by constitutional provisions and in India there is no application of the principles of "suspect legislation" and it has been followed that every legislation passed by the Parliament is presumed to be constitutionally valid unless otherwise proved. In **Naz Foundation v. Government of NCT of Delhi**, the [High Court](#) of Delhi attempted to harmonise the above two judgments of the Apex Court and observed that the Supreme Court must be interpreted to have laid down that the principle of 'strict scrutiny' would not apply to affirmative action under [Article](#) 15(5) but a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subject to strict scrutiny.

In **Subhash Chandra v. Delhi Subordinate Services Selection Board**, Sinha J. observed that since the facts of the Ashok Kumar Thakur case did not bear out an ex facie unreasonableness the court did not employ the strict scrutiny test. It was further observed that Ashok Kumar Thakur solely relies upon Saurabh Chaudri to clarify the applicability of strict scrutiny and does not make an independent sweeping observation in that regard. Further the court pointed out several cases where the said test may be applied:-

1. Where a statute or an action is patently unreasonable or arbitrary.
2. Where a statute is contrary to the constitutional scheme.

3. Where the general presumption as regards the constitutionality of the statute or action cannot be invoked.

4. Where a statute or execution action causes reverse discrimination.

5. Where a statute has been enacted restricting the rights of a citizen under [Article 14](#) or [Article 19](#) as for example clauses (1) to (6) of [Article 19](#) of the [Constitution](#) of India as in those cases, it would be for the State to justify the reasonableness thereof.

6. Where a statute seeks to take away a person's life and liberty which is protected under [Article 21](#) of the [Constitution](#) of India or otherwise infringes the core human right.

7. Where a statute is 'Expropriatory' or 'Confiscatory' in nature.

8. Where a statute prima facie seeks to interfere with sovereignty and integrity of India.

Further putting a note of caution it was said that, by no means, the list is exhaustive or may be held to be applicable in all situations. In *T Muralidhar Rao and others v. State of Andhra Pradesh* a seven judge bench of the [High Court](#) at Andhra Pradesh by a majority of 5:2 struck down the A.P. Reservation in Favor of Socially Educationally Backward Classes of Muslims Act, 2007 ("the Act") as unconstitutional describing the Act as "unsustainable" and "religion specific". It was observed that by reading *Ashoka Kumar Thakur* it is clear that though the learned Judges of the Supreme Court have observed that the law on strict scrutiny applied by the U.S. Supreme Court is inapplicable in our country, the judgments delivered by the U.S. Supreme Court on affirmative action have great persuasive value and may offer broad guidelines as to how we should tackle our prevailing condition. The court observed that on a careful consideration of the *Ashok Kumar Thakur* and *Saurabh Chaudhary* it could be said that when an affirmative action of the State providing reservations to backward classes was under challenge in the context of [Article 14](#), the Hon'ble Supreme Court had gone into the details of the basis for making the classification and gave its findings. However, it did not prescribe the level of scrutiny to be applied and

providing reservation on such affirmative action was tested on the standards of 'deeper scrutiny', 'in-depth scrutiny' or 'extreme care and caution', and in some cases the doctrine of 'strict scrutiny' was applied. All the judgments touching upon reservations consistently applied exacting scrutiny or rigorous scrutiny.

Further the court observed that on analyses of the Ashok Kumar Thakur, Saurabh Chaudhari & Shubash Chandra case it can be said that when affirmative action of the State is challenged as offending the equality injunctions of the [Constitution](#), particularly in the matter of reservations to SCs, STs and BCs, though there is a presumption as to the constitutionality of the statute, the Courts have examined such statutes rigorously, with great care and caution. Therefore, the contention advanced on behalf of the State that the standard of scrutiny actually applied in Archana Reddy does not suit the Indian conditions or is inconsistent with the law laid down in Ashoka Kumar Thakur, has to be rejected.

**(D) Scrutinizing The 'Strict Scrutiny' Test**

No doubt the [Constitution](#) of India through its framework consecrates for the advancement of the disadvantaged, yet such objective could never be achieved without the coordinative, integrative and pragmatic working of the three wings of the State. The State action subject to the judicial review should lead a pathway for such development & upliftment of the disadvantaged; however judicial review of a legislative act is also necessary in order to preserve individual liberties against the rule of the majority and to protect individuals and groups against invidious attacks by the public authorities or the departments of the Government. The courts in India while such judicial review seems to be in dilemma on the applicability of the strict scrutiny test. Here are some of the key issues which could aggravate such dilemma, and which require a provocative thought on applicability or inapplicability of the test.

i. Is there a concept of "Preferred" & "Non Preferred" Rights under Indian [Constitution](#)?

The strict scrutiny test which evolved from "Preferred Freedom" test

presupposes in the US context the notion of “preferred” and “non preferred” rights within the fundamental rights itself. However in Indian context, all fundamental rights are to be read together and there exist no such hierarchy or classification within the fundamental rights. Whether it would be appropriate to apply the test without fulfillment of its groundnorm is a question yet to be addressed by the court. Subsequently one must ponder over the argument that some of the rights are of more importance and are more fundamental over other, thus there exists a classification of “special rights” within the fundamental rights. As argued by Khaitan that a violation of the fundamental rights guaranteed by article 15(1), article 19(1)(a) and the negative rights under article 21, in the very least, deserve an intense review because these are very special rights, will it be appropriate to apply strict scrutiny test in the matter of violation of these special rights is a question which requires a sincere answer from the judicial fraternity.

ii. Does the court usurp the function of the executive and enter into the fields of policy and resource allocation while applying the test? While application of strict scrutiny test, the courts empower themselves to adjudicate whether a particular policy is narrowly tailored to serve the compelling interest, the court has the selectivity option with regards to various policies, at this instance, it may be said that the Court at this juncture pursues its own political agenda, in breach of the separation of powers and of the express intention of the [Constitution](#). The question arises whether the courts usurp the function of the executive and enter into the fields of policy and resource allocation.

iii. Is there a need to give up the principle of reasonableness and to embrace the strict scrutiny test? Decades back in State of Madras v. V. G. Rao , Patanjali Shastri, observed:

"It is important in this context to bear in mind that the test of reasonableness wherever prescribed should be applied to each individual Statute impugned and no abstract standard or general

pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, disproportion of the imposition, the prevailing conditions of the time should all enter into judicial verdict."

The Supreme Court after that elucidated the scope of permissible classification and applied the standards differently in various cases. For few decades the court has started incorporating higher standards of scrutiny by applying proportionality test and other constitutional borrowing. In Anuj Garg, Sinha J emphasized upon the need of heightened level of scrutiny as a normative threshold for judicial review in cases of protective discrimination. Again in Naz Foundation it was observed that a measure that disadvantages a vulnerable group defined on the basis of a characteristic that relates to personal autonomy must be subjected to strict scrutiny. In Subash Chandra Sinha J. urged that the strict scrutiny paves the way for a more searching judicial scrutiny to guard against invidious discriminations which could have made by the State against group of people in violation of the constitutional guaranty of just and equal laws. Keeping into these lines of argument, whether it would be proper to embrace the concept of strict scrutiny test or to pursue with 'deeper scrutiny', 'in-depth scrutiny' or 'extreme care and caution' is a key question. There is also a noteworthy suggestion of application of "rigorous standard of review" which should be look forth for its propriety and applicability.

### **Conclusion**

[Constitutional](#) interpretation across the globe is taking on an increasingly cosmopolitan character, no doubt the Apex court seems to be bewildered by this cosmopolitan character in recent year. It would be proper to say that the courts in India are perplexed in application of the test, it might be due to the comparative jurisprudence, differences in constitutional framework or it could be the pre-existing binding approaches of the court itself. It would be

advertent enough that the scrutiny should depend upon the subject matter of legislation and its impact upon legal or fundamental rights of one class of the society. When a law is enacted to help the disadvantaged class at the cost of another class of persons the court should enquire into whether the legitimate goal matches the means chosen, if there is an illegitimate means chosen by the state, such means should be struck down. Further it should be seen whether the purpose for which such an Act was enacted was, in fact, served and whether the conclusions on the basis of which the Act was enacted were correctly arrived at. If the reason for which a particular class was considered a disadvantaged class was not rightly arrived at, the enactment made to favour such a class at the cost of the general community would not be just, proper or valid. The strict scrutiny test acts as a device to “smoke out” illicit governmental motive. Justice O’Connor points out that the purpose of strict scrutiny is to “smoke out” illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen “fit” this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. Keeping in view the above substantial & majestic purpose it would not be improper to say that such test has vital importance. J. Sinha, a bird of different feather from the plover, has constantly argued for appropriate standard of review in constitutional cases, no doubt the Apex court in upcoming time, guided by this need of appropriate standard of review either comes up with new form of review or clings to the strict scrutiny test, the orderly progress towards the goal of sovereign democratic republic and secure justice, liberty, equality and fraternity to all citizens be ensured by such form of review.

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## 5.8 SUMMARY

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When a law is enacted to help the disadvantaged class at the cost of another class of persons the court should enquire into whether the legitimate goal matches the means chosen, if there is an illegitimate means chosen by the state, such means should be struck down. Further it should be seen whether the purpose for which such an Act was enacted was, in fact, served and whether the conclusions on the basis of which the Act was enacted were correctly arrived at. If the reason for which a particular class was considered a disadvantaged class was not rightly arrived at, the enactment made to favour such a class at the cost of the general community would not be just, proper or valid. In this unit we have discussed about the role of precedents as tools and techniques in policy-making and creativity in constitutional adjudication.

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#### 5.10 SUGGESTED READINGS/REFERENCE MATERIAL

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# Cardozo points out that no system of jus scriptum has been able to escape the need of interpretation. B. N. Cardozo., *The Nature of Judicial Process* 16 (Universal Law Publishing Co. Pvt. Ltd., 7th Ed, 2008).

# A.M. Ahmadi, "Judicial Process: Social Legitimacy and Institutional Viability.", (1996) 4 SCC (Jour) 1.

# Supra note 1 at 17.

# Chief Justice Marshall's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163-180 (1803).

# The test of reasonableness, the proportionality test, the heightened scrutiny test, the strict scrutiny test etc.

# President Lyndon B. Johnson, *To fulfill These Rights*, Speech at Howard University (June 4, 1965) reprinted in *Kranz Rachael, Affirmative Action* 16 (Facts On File, Inc., New York, 2002).

# *Affirmative Action - A Legal Primer*, *Standing Our Ground: A Guidebook for STEM Educators in the Post-Michigan Era*, at p. 15, available at:

[http://www.aaas.org/standingourground/PDFs/4\\_Legal\\_Primer.pdf](http://www.aaas.org/standingourground/PDFs/4_Legal_Primer.pdf)

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(Visited on October 29, 2010).  
# Richard H, Fallon "Strict Judicial Scrutiny," 54 UCLA Law Review 1267 (2007).

# Merriam Webster's Law Dictionary defines strict scrutiny as the standard used to determine whether a classification of a group of persons (such as a racial group) or a fundamental right (such as the right to vote) violates due process and equal protection rights under the United States [Constitution](#). Strict scrutiny is used to establish whether there is a compelling need that justifies the law being enacted, Merriam Webster's New World Law Dictionary, Wiley Publishing, 2006.

# J. Rutledge in Thomson v. Collins who toughened 'clear and present danger' test by reversing customary burden of proof as to constitutionality and by requiring that legislation regulating freedom of speech be precisely tailored to the evil at hand thus revitalizing 'clear and present' danger test as 'preferred freedom' test, Ducat Craig R., [Constitutional](#) Interpretation, Rights of the Individual, (II) 842 (Wadsworth # Publication, 7th Ed., 2000). the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the [Constitution](#), such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth, See (304

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### 5.11 SELF ASSESSMENT QUESTIONS

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1. Describe the role of precedents as tools and techniques in policy-making.
2. Discuss the role of precedents in judicial creativity and in constitutional adjudication.

**LL.M. Part-2**

**Subject: JUDICIAL PROCESS**

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**Block-II-Special Dimensions of Judicial Process in Constitutional Adjudications**

**Unit-6- Problems of accountability and judicial law-making**

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**STRUCTURE**

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**6.1 INTRODUCTION**

**6.2 OBJECTIVES**

**6.3 WHAT IS Judicial Accountability?**

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**6.1 INTRODUCTION**

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In the previous unit you have read about the role of precedents as tools and techniques in policy-making and creativity in constitutional adjudication. In the case of the judiciary safeguards are needed to ensure that Judges are free to make their judicial decisions without fear or favour and thus to preserve their independence. For example, if a politician or senior judge felt able to sack a particular judge, or remove him or her from a case, simply because they did not like the decision reached, the principle of judicial independence would be greatly undermined and there could be no possibility of a fair trial. It could also lead judges to make decisions they felt might be more acceptable to whoever had the right to decide whether they should continue serving as judges or be promoted. If, for instance, the permanent or continued appointment of a part-time temporary judge was in some way determined by one of the parties to the case, there would be a real risk that independent and impartial judicial decision-making could be subverted by self-interest.

In this unit we will discuss about the definition concept and benefits of plant patenting. We will also discuss the sui generis protection of plant varieties in India.

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**6.2 OBJECTIVES**

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After reading this unit you will be able to:

- ✓ What is Judicial Accountability?
- ✓ Understand the Problems of judicial accountability.
- ✓ Discuss the Role of judicial accountability in judicial law-making,

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**6.3 WHAT IS Judicial Accountability?**

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We must first ask what it means to say someone is accountable for their actions. In many areas accountability means that, just like

football managers, an individual who fails to perform satisfactorily in their job should be sacked or should resign. Some people have called this form of accountability, 'sacrificial accountability', meaning that the only solution is for the individual concerned to no longer continue in their role. In the case of the judiciary, however, safeguards are needed to ensure that Judges are free to make their judicial decisions without fear or favour and thus to preserve their independence. For example, if a politician or senior judge felt able to sack a particular judge, or remove him or her from a case, simply because they did not like the decision reached, the principle of judicial independence would be greatly undermined and there could be no possibility of a fair trial. It could also lead judges to make decisions they felt might be more acceptable to whoever had the right to decide whether they should continue serving as judges or be promoted. If, for instance, the permanent or continued appointment of a part-time temporary judge was in some way determined by one of the parties to the case, there would be a real risk that independent and impartial judicial decision-making could be subverted by self-interest. Prior to 2000 this was the position in Scotland in respect of temporary criminal court judges, or sheriffs, who were appointed for a fixed period of twelve months and the renewal of their appointment was effectively at the discretion of the Lord Advocate, a government minister who is the head of the prosecuting authority. In other words there might well be a risk that such judges could improperly favour the prosecuting authority with an eye to securing a permanent appointment. The Scottish Courts recognised this in 1999 in *Starrs v Ruxton* [2000] SCCR 136. This risk is perhaps best demonstrated – albeit as an extreme example – in dictatorships where judges are often appointed specifically because of their loyalty to the regime, and will almost always make decisions in favour of it, regardless of the interests of the individual, the facts and the law. The independence and transparency of the appointments process in England and Wales rebuts any suggestion that such factors could be relevant to the appointment of judicial office holders in this

jurisdiction. We have stated that judges who commit a criminal offence may be subject to an investigation by the Office for Judicial Complaints and may be subject to a disciplinary sanction in accordance with the relevant statutory provisions. Apart from this, however, it is clear that judges are not subject to this 'sacrificial accountability'. However, they are subject to a different form of accountability, which has been referred to as 'explanatory accountability'. Put simply this form of accountability means that individuals can be asked to give an account as to why they have behaved in a particular way. The judiciary is subject to this form of accountability in a multitude of ways. Taken together, these ensure a considerable degree of accountability. The following pages set out briefly some elements of this form of accountability. A more detailed overview is contained in the Judicial Executive Board's paper, *The Accountability of Judiciary*.

The emergence of Realism in jurisprudence—the study of law as it works and functions, contributed to the growth of skepticism towards law and its administration and accordingly subjected law to realities of social life. The trial of such realism was blazed by Holmes, Gray, Cardozo, Pound—the 'mental fathers,<sup>31</sup> of Realist Movement'—who highlighted on the functional and realistic study of law not as it contained in legislative statute or enactment but as finally interpreted and laid down by the Courts in a judicial decision while adjudicating disputes. Gray in his *The Nature and Sources of Law* raises<sup>32</sup> a question mark against legislation and remarks : "The law of a great nation means the opinions of a half-a-dozen old gentlemen', for 'if those half-a-dozen old gentlemen from the highest judicial tribunal of a country then no rule or principle which they refuse to follow is law in that country'. While Gray had prepared the ground of a more skeptical approach towards statute law i.e., legislation it is Holmes who is truly described as spiritual father of modern legal realism. It is

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Holmes who openly raised the banner of revolt and doubt against the existing belief of legal certainty and conceptualism. Thus modern realists draw their support and inspiration from Holmes who in his work, *The path of Law expounded*,<sup>33</sup> the skeptical definition of law as : 'Take the fundamental question, what constitutes law? You will find some text writers telling you that is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of either or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does not want to know what the Massachusetts or English Courts are to do in fact. I am much of his and. The prophecies of what the Courts will do in fact, and nothing more pretentious, are what I mean by the law'. It may be noted that the modern realists deny the title 'realist' to Cardozo, Pound, Gray and Ihering but accept Holmes as their patron saint from whom they have derived the gospel of realise At best Cardozo, Pound, and others can be the trend setters who studied in law in terms of existing social situations. That is why the modern realistic jurisprudence can be described as the left wing of the sociological jurisprudence.

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#### **6.4. Judicial Law-making process**

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It is an interesting development in juristic thought during 1930s with a group of legal scholars styling themselves as 'realists'. No myths and preconceived notions are accepted by them and seek fidelity to stern realities. In the words,<sup>34</sup> of Professor Pound, 'By realism they mean fidelity to nature, accurate recording of things as they are, as contrasted with things as they are imagined to "or wished to be, or as one feels they ought to be'. The 'realism' is anti-thesis of

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'idealism' and accordingly the realist jurists desire to be realistic at all costs while it is not possible to classify them as a 'school' at best it is said to represent,<sup>35</sup> a movement, an attach wider than the number of its adherents'. Indeed they do not agree in calling each other 'realists' or call their craft as 'realism Bingham, Douglas, Frank, Radin etc. speak of 'realists'. Cc prefers to speak 'scientific approach to law', Judge Clark sp "fact research". Professor Corbin talks about, 'What Courts Oliphant describes 'Objective method', and John Dickinson speaks of 'the skeptical movement'. The realists do not claim membership to any 'school'. However, the fundamental thesis the realists on which all emphasise equally is what judges do is different from what they say. They attack upon the formalist; demonstrate that judicial law is judge-made and not judge discovered. They neglect the legislative law and look upon law as genuine only if it is judge-made. They tell us that order coherence in the legal system are a said illusion. Certainty of, is a 'basic myth', a childish dream. 'No certainty in the law what the often repeated word of Jerome Frank and Llewellyn plainly seem to mean. 'For any particular lay person' says<sup>36</sup> Frankm "the law, with respect to any particular set of facts, is a decision of a Court with respect to those facts so far as that decision affects that particular person. Until a Court has passed on those facts on law on that subject is yet in existence. Prior to such a decision, the only law available is opinion of lawyers as to the law relating to that person and to those facts. Such opinion is not actually only a guess as to what a Court will decide". A similar view is expressed,<sup>37</sup> by Professor Llewellyn in his interesting work The Bramble Bush. "This doing of something about disputes, this doing of. it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or



sheriffs or clerks or jailors or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself".<sup>38</sup>

### **The Importance of Precedent**

To understand how to make legal arguments, it is important to have an understanding of our court system. This section focuses on the Federal Court system. Every state has its own state court system, which is separate from the federal system.

### **The Federal Court System**

The federal court system is not separated by state, but rather by "districts" and "circuits." A federal suit begins in a United States District Court. The District Court is the trial court of the federal system. In total there are 94 U.S. District Courts. Some states, such as Alaska, only have one district. Others have several. New York, for example, is composed of four districts: the Northern, Western, Eastern, and Southern Districts. District Courts all have the name of a state in them, like the "Eastern District of New York."

Someone who loses in the District Court has a legal right to appeal to the United States Circuit Court of Appeals. The Court of Appeals is divided into regions called "circuits." There are 11 circuits in the United States that have number names. Washington, D.C. is just known as the "D.C. Circuit" and does not have a number. Each Circuit Court contains a number of district courts. For instance, the "First Circuit" includes all the districts in Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico.

Someone who loses in the Court of Appeals can ask for review by the United States Supreme Court. This is called "petitioning for certiorari." Generally, the Supreme Court can decide which decisions it wishes to review, called "granting cert." and can refuse to review the others, called "denying cert."

## **2. How Judges Interpret Laws on the Basis of Precedent**

Most of the claims we have talked about in this book are based on one of the Constitutional Amendments, which are reprinted in

Appendix E at the back of this book. Amendments are very short and they are written in very broad and general terms. Courts decide what these general terms mean when they hear specific lawsuits or “cases.” For instance, you probably already know that the Eighth Amendment prohibits “cruel and unusual punishment.” However, there is no way to know from those four words exactly which kinds of punishments are allowed and which aren’t. For instance, you may think to yourself that that execution is very “cruel and unusual.” But, execution is legal in the United States. To understand how judges interpret “cruel and unusual punishment” you need to read cases in which other people, in the past, argued that one type of punishment or another was “cruel and unusual” and see how they turned out.

Each court decision is supposed to be based on an earlier decision, which is called “**precedent**.” To show that your constitutional rights have been violated, you point to good court decisions in earlier cases and describe how the facts in those cases are similar to the facts in your case. You should also show how the general principles of constitutional law presented in the earlier decisions apply to your situation. Besides arguing from favorable precedent, you need to explain why bad court decisions which might appear to apply to your situation should not determine the decision in your case. Show how the facts in your case are different from the facts in the bad case. This is called “distinguishing” a case.

The most important precedent is a decision by the U.S. Supreme Court. Every court is supposed to follow this precedent. The next best precedent is a decision of the appeals court for the circuit in which your district court is located. This is called “**binding precedent**” because it must be followed. The third-best precedent is an earlier decision by the district court which is considering your suit. This may be by the judge who is in charge of your suit or by a different judge from the same court.

Some questions in your case may never have been decided by the Supreme Court, the Circuit Court, or your District Court. If this is the case, then you can point to decisions by U.S. Appeals Courts from

other circuits or by other U.S. District Courts. Although a district court is not required to follow these kinds of precedents, it should consider them seriously. This is called “**persuasive authority.**”

One complication is that you should only cite cases which remain “good law.” Good law means that a case has not been reversed on appeal, or overruled by a later case. For example, in Chapter Three we wrote at length about *Overton v. Bazzeta*, 539 U.S. 126 (2003), a Supreme Court case about prisoners’ rights to visits. Before the Supreme Court heard the case, the Sixth Circuit Court of Appeals heard the prison officials’ appeal from a district court decision finding that Michigan’s prison visit policy violated prisoners’ constitutional rights. The Sixth Circuit decision is reported at *Overton v. Bazzeta*, 286 F.3d 311 (6th Cir. 2002). The Sixth Circuit agreed with the district court that the plaintiffs’ constitutional rights were being violated, and wrote a wonderful decision. However, because the Supreme Court later granted cert and came to a different conclusion, you cannot rely on any of the parts of the (good) Sixth Circuit opinion that the Supreme Court reversed.

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## 6.5 Different opinions of various Realistic Jurists

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### Features—Realistic Jurisprudence

Professor Goodhart has enumerated the basic features of realistic jurisprudence in the following way •.:—

1. The realist school depends for its importance, not upon any definition of law but upon the emphasis it places on certain features of law and its administration. The most striking feature of this school is the stress they place upon uncertainty of law as a series of single decision. Frank rightly remarks,<sup>39</sup> ‘The physicists, indeed have just announced the principle of Uncertainty or Indeterminacy (where a high degree of

quantitative exactness is possible). If there can be nothing like complete definiteness in natural sciences, it is surely absurd to expect to realise even approximate certainty and predictability in law, dealing as it does with the vagaries of complicated human adjustments’.

2. The second feature of the realist school is its attack on the use of formal logic in law, which they term ‘medieval scholasticism’. According to them the judge in deciding a case reaches his decision on ‘emotive’ rather than on logical grounds.
3. The third feature of the realist school is the great weight they place on modern psychology with strong leaning towards behaviourism.
4. The fourth feature of the realist school is the attack they have made on the value of legal terminology, for according to them, these terms are a convenient method of hiding uncertainty of our law. Professor Green ‘Protests’,<sup>40</sup> against the part which sacred words, taboo words, continue to play in our law’.
5. Finally, the realists stress,<sup>41</sup> ‘an evaluation of any part of law in terms of its effects, and an insistence on the worth-whileness of trying to find these effects’.

### **Karl Llewellyn (1893-1962)**

Professor Karl Llewellyn has been a Professor of Jurisprudence at Columbia. He is an important thinker of realist movement and admits that he speaks of ‘the realists’ as a group, there is no ‘school’ of realists. He says, ‘realists’ comprise a movement inter-stimulated but independent. According to him there are basic common points,<sup>42</sup> on

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which all realists seem to agree. He says a juristic inquiry must proceed on the basis of:

1. that law is inconstant state of flux,
2. that it is a means to a social end,
3. that society to whose ends law is a means, is in a state of] even faster flux than the law,
4. that for the purpose of these inquiries the jurists should look merely at what courts and officials and citizens do without reference to what they ought to do. There should be a temporary divorce of the 'is' and the 'ought' for purposes of study,
5. the juristic inquiry must regard with suspicion the assumption that legal rules as they are formally enunciated or inscribed in books represent what the courts and people are actually doing,
6. that the realist must regard with equal suspicion the assumption that rules of law formally enunciated actually do produce the decisions which purports to based on them, and
7. finally, every part of law is to be valued in terms of its actual effects rather than in terms of the symmetry of its traditional rules.

In short Llewellyn philosophy of law is based on the realistic institutional view and he says jurisprudence must expand its ken beyond the rules of law proper to consider the techniques, the ideology and the unspoken ideals. 'The theory,<sup>43</sup> that rules decided cases seems for a century to have fooled, not only library ridden recluses, but judges'. He, therefore, suggested that focal point of

legal research should be shifted from the study of rules the observance of the real behaviour of law officials, particularly the judges. More attention, therefore, has to be given to judicial tradition on which court decisions rest.

**Jerome N. Frank (1889-1957)**

Jerome Frank was a practising lawyer since 1912 who served in many Government posts during 1935-1941. In 1941 he became a Judge in United States Circuit Court. He also taught in a number of universities and was visiting Professor at Yale Law School. Among his important works include *Law and the Modern Mind*, (1930), // *Men Were Angels* (1942), and *Courts on Trial* (1949).

However, it is *Law and the Modern Mind* first published in 1930 that contains Frank's jurisprudential thought on realism. It is in this work that Frank makes an attempt to demolish what he calls the 'basic myths' about law. The idea that law is continuous, uniform, certain and invariable is 'basic myth'. According to him, the illusion of certainty of law is a 'basic myth' to conceal the unwelcome fact of uncertainty of law. Thus, "basic myth' assumes that law is certain as a perfect body of rules and principles and the task of the judge is merely to discover the appropriate principle and its application to the facts. Frank questions the 'basic myth' that Judges do not make law they only discover it. He is certain in no uncertain terms that Judges do make law and attacks the 'basic legal myth' that law is completely settled and defined from which originates the myth that judges never make law. On the other hand, for Frank law consists of decisions. To most people legal norms direct the judgment whereas to Frank not the legal norm but judgment itself, is the law. The individual decision, then, is the law par excellence. Like Judge Hutcheson, Jerome Frank believes that a judge may start with conclusions and work back to suitable premises and in this way Judge feels or 'hunches' out his decision. It is a myth that rules are impersonal unaffected by human emotions and behaviour. However, Frank asserts emotions

and behaviour are key factors in understanding The judicial process. Frank observes,<sup>44</sup> that a Judge's decisions are the outcome of his entire life history. His friends, his family, vocations, schools, religion—all these factors are influential and all are buried or unknown to everyone save the judge himself. As a matter of fact judge is unaware of his prejudices. It is the personal likes, dislikes, intuition, temperament, experiences and other personal characteristics, which are all important and accepted as 'hunching' and mechanistic law, illusory precedents" and sundry myths are left to gather rust. Frank wants us to study the law in action. The court-room, not the library should be our laboratory.

After Frank became the Judge to the Bench of a Federal Appellate Court, he concentrated his attention from the rule aspect of the law to the scrutiny of the fact-finding process in the trial courts. Thus, from a rule-skeptic Frank turned to be fact-skeptic. Trial Court fact finding, Frank declared, constituted the key factor in the administration of justice. With unrelenting zest, he probed into innumerable sources of error which may enter into a determination of the facts by a trial court. 'There may be perjured witnesses, coached witnesses, biased witnesses, witnesses mistaken in their observation of the facts to which they testify.... missing dead witnesses, missing destroyed documents, crooked lawyers, stupid lawyers, stupid jurors, trial judges who are stupid or biogated or biased'. Among other factors, the unique personality of the judge, make every law suit a highly subjective and thus there is always a good deal of element of irrationality, chance and guess work involved in judicial fact-finding making predictability of the outcome of law suits well-nigh impossible. Thus, with lower-court fact-finding as the centre of his legal universe—Frank admitted that legal rules and precedents have considerable value.<sup>45</sup> He recognised the necessity of legal rules as guide-posts for making decisions and

maintained that the rules embody important policies and moral ideals. But maintained that the objective legal norms and in many instances frustrated by the 'secret, unconscious, private, idiosyncratic norm's,<sup>46</sup> applied in the fact-finding process by trial judges or jurors. Thurman Wesley Arnold (1891) is a practicing lawyer in Washington D.C. He was successively Dean of the Law College, West Virginia University, Professor of Law at Yale, Assistant Attorney-General of the United States in charge of Anti-trust Division of the Department of Justice and Associate Justice of the United States Court of Appeals for the District of Columbia. His works include *The Symbols of Government* (1935), *Cases on Trials, Judgment and Appeals* (1936), *The Folklore of Capitalism* (1937), *The Bottlenecks of Business* (1940), and *Democracy and Free Enterprise* (1942).

Thurman Wesley Arnold is devoted to dissecting economics, politics and the field of social science as well as law and study them as social institutions based on habits and acceptance of common values. Every social institution including law, according to Arnold, is based upon common elements of : (1) creed, (2) a set of attitudes which makes the creed effective, (3) a set of institutional habits, (4) and mythological or historical tradition. So Government and the Constitution is a creed about which have grown up certain fixed attitudes and habits which give it its influence over the people. To law, Arnold gives no greater credence than to any other institution. His jurisprudence is 'vast metaphysical literature' of law defining law's principles in terms sufficiently broad to comprehend all the contradictory ideals a 'logical heaven behind the courts'. The rule of law is best preserved, in his opinion, by the co-existence of various and conflicting symbolism and ideologies. The ideal legal system loses in prestige and influence when ever great, popular and single minded sweep a people of its feet. Arnold feels only value skepticism



and value pluralism can prevent, the rise of intolerant and totalitarian political regimes.

### **Scandinavian Legal Realism**

The Scandinavian Realist Movement has focussed jurisprudential inquiry on the facts of legal life while eliminating all metaphysical notions from law. According to Professor Alien,<sup>47</sup> 'If American realism is rule skeptic', Scandinavian realism may be described as 'metaphysical skeptical'. It insists vehemently on dissociating all legal phenomena from 'metaphysics' which Ross following Hagerstrom considers to be largely derived from primitive 'magic' and on regarding them as social facts, ascertained by empirical science. Again and again this principle is asserted. According to Ross,<sup>48</sup> 'Legal notions must be interpreted as conceptions of social reality, the behaviour of man in society and as nothing else'. All positive law is thus a social technique. Every method of reasoning which is not purely empirical is valueless and illusory, being based on a priori, preconceptions for which there is no 'scientific basis'. For Olivecrona 'Law is nothing but a set of social facts'. In short, the Scandinavian realists insist on banishing from law a priori notions of natural law, abstract justice and all such ideologies as being metaphysical and therefore, empty. The essence of the Scandinavian realism is summed up in Ross's dictum that 'all metaphysics are, a chimera and there is no cognition other than empirical'. Law in all its form is a social reality eschewed of doctrinal jurisprudential conceptions like morality, natural law, idealism and metaphysical notions of 'right', 'duty', 'command', 'sovereignty' which are the pillars of analytical jurisprudence. Bodenheimer, however, brings out marked difference between Scandinavian and American realism in two ways<sup>49</sup> : first, it is more speculative in its approach to jurisprudential problems, and second, it devotes less attention to

peculiarly judicial behaviour and psychology unlike their counterpart the American realists. It shares with American legal realism a radically empiricist attitude towards law and life. The chief exponents of the Scandinavian realism are Axel Hagerstorm, Vilhelm Lundsted, Karl Olivecrona, and Alf Ross.

### **Axel Hagerstorm (1896-1939)**

Hagerstorm is the father of Scandinavian realist movement in Sweden and was the Professor of Philosophy in the University of Upsala who greatly influenced the philosophy of Lundsted, Olivecrona and Ross. Hagerstorm sets out to destroy the notion that right-duty relations and legal obligations have any objective existence. It was no more than a feeling which could be explained psychologically. Similarly, he denied the existence of such things as 'goodness' and 'badness' and remarked that they represent simply emotional attitudes of approval or disapproval respectively towards certain facts and situations. Further he denies the possibility of any science of the 'ought' and says all questions of justice, aims, purposes of law are matters of personal evaluation not susceptible to any scientific process of examination. He pleads for an examination of the actual use of legal concepts and analysis of the mental attitude involved in the conception of law in the present times.

### **V. Lundsted (1882-1955)**

Lundsted is the most extreme of the three Nordic jurists and is extremely intolerant towards metaphysical ideas. According to him nothing exists which cannot be proved as fact. He ridiculed at most of the English theories of law and rejected the idea of law as a means of securing justice which is chimerical. It is not founded on justice, but on social needs and pressures. Instead Lundsted says, law at any time and place in any society is guided and determined by 'social welfare' which is the 'guiding motive for legal activities'.

These are, namely, the encouragement in the best possible way of that, which people in general actually strive to attain. Judges should think in terms of social aims not rights. According to Lundsted the area of 'social welfare' postulates general sense of security which leads him to expound the doctrine of strict liability in tort, contract and criminal law to prevent social disruption.

### **K. Olivecrona (1897-)**

Professor Olivecrona is the more acceptable among the Scandinavian realists who stressed that law must be studied as a social fact. As already observed Olivecrona remarks, 'Law is nothing but a set of social facts'. The rules of law are in no sense the will of the State in the sense of commands but are 'independent imperatives' issued from time to time by various constitutional agencies and their sole effect is that they 'operate on the mind of the judge' and lead to certain applications of law which are the facts of the legal system.

### **Alf Ross (1899)**

Alf Ross is the Danish realist jurist who like Olivecrona also insists that laws need to be interpreted in the light of social facts by excluding all metaphysical ideals from it. 'Legal notions' says Ross 'must be interpreted as conceptions of social reality, the behaviour of man in society and as nothing else'. Ross, however, dismisses Lundsted theory of 'social welfare' as being metaphysical. Like the American realists Ross tends to highlight the position of courts. 'A norm', says Ross, 'is a directive which stands in relation of correspondence to social facts'. To say,<sup>50</sup> that norm exists means, that a certain social fact exists and this in turn means that the directive is followed in the majority of cases by the people who feel bound to do so. The principal feature of legal norms is that they are directives addressed to the courts. A norm may derive from past

decision, but it follows from this view that all norms including those of legislation should be viewed as directives to Courts. Norms of law may be further divided into 'norms of conduct' which deal with behaviour and 'norms of competence or procedure' which direct that norms brought into existence according to a declared mode of procedure shall be regarded as norms of conduct. Thus, norms of competence are indirectly expressed forms of conduct. It is Ross who has stressed on the problem of the validity of law. He takes the assumption that law provides the norms for the behaviour of Courts, and not private individuals. Ross reaches the conclusion that a norm of law is 'valid' if the prediction can be made that a Court will apply it in future. In making this prediction, Ross declares, not only the past actual behaviour of the judge but also the set of normative ideas by which he is governed and motivated must be taken into account.

As to the impact of Scandinavian realist movement Friedmann writes,<sup>51</sup> 'Its main contribution has been to pursue the detection of open or hidden legal ideologies beyond the usual criticism of natural law doctrines into positivists concepts of command, sovereignty, rights and duties. By implication, rather than as a matter of articulate philosophy, the Scandinavian 'realists' have demonstrated that any legal order must be conditioned upon a certain scale of values, which can be assessed not in absolute terms but with regard to the social needs changing with times, notions and circumstances. Whether law is described as a 'fact', as a 'machinery in action' or 'in any other manner, it is directed to certain ends.'

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## 6.6 SUMMARY

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The emergence of Realism in jurisprudence—the study of law as it works and functions, contributed to the growth of skepticism towards law and its administration and accordingly subjected law to realities of social life. The trial of such realism was blazed by Holmes, Gray,

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Cardozo, Pound—the ‘mental fathers,’<sup>52</sup> of Realist Movement—who highlighted on the functional and realistic study of law not as it contained in legislative statute or enactment but as finally interpreted and laid down by the Courts in a judicial decision while adjudicating disputes. The modern realists deny the title ‘realist’ to Cardozo, Pound, Gray and Lhering but accept Holmes as their patron saint from whom they have derived the gospel of realise At best Cardozo, Pound, and others can be the trend setters who studied in law in terms of existing social situations. That is why the modern realistic jurisprudence can be described as the left wing of the sociological jurisprudence. In this unit we have discussed about the concept of Judicial Accountability and we learned about different problems of judicial accountability. We also discussed the role of judicial accountability in judicial law-making.

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### 6.7 SUGGESTED READINGS/REFERENCE MATERIAL

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2. Ibid, p. 82.
3. The Path of Law, p. 457 at pp. 459-461 (1897).
4. Pound, ‘The Call for a Realist Jurisprudence’, 44 H.L. Rev. 697 (1931).
5. Llewellyn, Some Realism about Realism—Responding to Dear Pound, 44 H.L. 1222, 1234, 1256 (1931).
6. Law and the Modern Mind. D. 46 (1930).
7. Columbia University School of Law. 1930, p. 3.
8. Some American Interpretations of Law, Modern Theories of Law, pp. 10-20 (1963); see also. Stone, Province and Function of Jurisprudence, p. 415-416 (1946).
9. Law and the Modern Mind, p. 7.
10. Professor Leon Green, The Duty Problem in Negligence Cases (1928), 28 Col. L. Rev. P-104 at p. 1016.

- 11.K.N. Llewellyn, Some Realism about Realism, (1931) 44 H.L. Rev. 1222.
- 12.Stone, Julius, Province and Function of Law, pp. 415-416 (1946).
- 13.The Constitution as an Institution, 34 Col. L. Rev. 1 at 7 (1934).
- 14.Ibid., Chap. XII.
- 15.Quoted by Bodenheimer, E., Jurisprudence, (1961) p. 199.
- 16.Ibid.
- 17.Alien, law in the Making, (1964) pp. 48-49.
- 18.Ibid.
- <sup>19</sup>Bodenheimer, Jurisprudence, (1962) p. 120.
- 20.See Dias, p. 648 (1976).
- 21.Friedmann, Legal Theory, p. 311 (1967, 5th edn.).

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## **6.8 SELF ASSESSMENT QUESTIONS**

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1. What is Judicial Accountability?
2. What do you understand by the Problems of judicial accountability?
3. Discuss the Role of judicial accountability in judicial law-making,

**LL.M. Part-2**

**Subject: JUDICIAL PROCESS**

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**Block-III-** The Concepts of Justice

**Unit-7-** The concept of justice or Dharma in Indian thought; Dharma as the foundation of legal ordering in Indian thought and sources.

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**STRUCTURE**

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**7.1 INTRODUCTION**

**7.2 OBJECTIVES**

**7.3 WHAT IS Concept of Justice?**

**7.4. Justice or Dharma in Indian thought**

**7.5 Dharma as the foundation of legal ordering in Indian thought and sources**

**7.6 SUMMARY**

**7.7 SUGGESTED READINGS/REFERENCE MATERIAL**

**7.8 SELF ASSESSMENT QUESTIONS**

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## 7.1 INTRODUCTION

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In the previous unit you have read about the concept of Judicial Accountability and learned about different problems of judicial accountability. You also learned about the role of judicial accountability in judicial law-making. In India justice has been extolled as the very embodiment of God itself whose sole mission is also to uphold justice, truth and righteousness. In Ramayana the sage Valmiki says: 'In this universe truth alone is God. Dharma lies in truth. Truth is root of all virtues. There is nothing greater than truth'. Likewise Lord Krishna says, 'Whenever there is decay of righteousness and there is exaltation of unrighteousness, then I myself come forth, for the protection of good, for the destruction of evil doers, for the sake of firmly establishing righteousness, I am born from age to age.' Indeed the immortal epics Ramayana and Mahabharata record and reflect the spirit and those of Hindu thought and life in the tales of Rama versus Ravana and Pandavas versus Kauravas which magnificently portray the moral supremacy and victory of good over evil, or justice over injustice and of dharma over adharma. These epics along with Vedas demonstrate the deep commitment and faith of our sages towards justice. In this unit we will discuss about the concept of justice or Dharma in Indian thought and Dharma as the foundation of legal ordering in Indian thought and sources.

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## 7.2 OBJECTIVES

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**After reading this unit you will be able to:**

- ✓ Understand the concept of justice or Dharma in Indian thought.
- ✓ Explain the meaning of Dharma and its foundation of legal ordering in Indian thought and sources.



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### 7.3 WHAT IS Concept of Justice?

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#### Justice — Indian Heritage

Law and morality are mutually helpful instruments for sensitising and promoting justice. In every human society ancient or modern the history bears testimony of inseparable and eternal relationship between this trinity. All the three in their meaning, content and perception have been rightly interchangeably used, understood and interpreted inter alia for a good social order which is possible by a harmonious observance and blending of these concepts. It is rightly said 'Law without morality is a tree without fruit and morality without law is a tree without root.' Law and morality are the social tools which make justice accessible to individuals free from personal and vested prejudices as is evident from Hindu scriptures, shastras, Hebrew and Christian Bibles and Islamic and Buddhistic scriptures. The basis raison d'être of law and morality has been to seek and promote justice varyingly described as truth, righteousness, even-mindedness, moral virtue, true happiness, equality, equilibrium, duty, etc.

#### Justice — Vedic Perception

In India justice has been extolled as the very embodiment of God itself whose sole mission is also to uphold justice, truth and righteousness. In Ramayana the sage Valmiki says: 'In this universe truth alone is God. Dharma lies in truth. Truth is root of all virtues. There is nothing greater than truth'. Likewise Lord Krishna says, 'Whenever there is decay of righteousness and there is exaltation of unrighteousness, then I myself come forth, for the protection of good, for the destruction of evil doers, for the sake of firmly establishing righteousness, I am born from age to age.' Indeed the immortal epics Ramayana and Mahabharata record and reflect the spirit and those of Hindu thought and life in the tales of Rama versus Ravana and Pandavas versus Kauravas which magnificently portray

the moral supremacy and victory of good over evil, or justice over injustice and of dharma over adharma. These epics alongwith Vedas demonstrate the deep commitment and faith of our sages towards justice. In the whole eighteen Puranas the great sage Vyasa has said but two things : ‘Doing good to another is right, causing injury to another is wrong. ‘ Similarly, all the four Vedas insist on equality and respect for human dignity as is evident from Yajurveda — ‘Yon are Ours and we are Yours —

### **Buddhistic Notion of Justice**

However, in the intervening period when there was transgression and deviation from Vedic philosophy it was Lord Buddha who once again re-adopted the philosophy of middle path — the madhyama marga as a way out to seek justice for the humanity. He declared to us the Eight-fold path of Morality — as a necessary basis for a good life and a just society. It consisted of : Right Views, Right aspiration, Right speech, Right conduct. Right livelihood. Right effort, Right mindfulness and Right contemplation. The Middle Path exhorted the people not to deny due desire of body but shun activities of the wrong type life excessively selfish desires which cause pain and suffering to society. Lord Buddha’s message of Cease to do evil, Learn to do good, and Cleanse your own heart — had been given a practical shape by the great King Ashoka who promulgated Buddhistic morality in the administration of justice. Ashoka’s mission for equal and impartial justice is evidently clear from his directives to his governors in Kalinga Edict 7 which reads : ‘All men are my children. Just as I seek the welfare and happiness of my own children in this world and the next, I seek the same things for all men Sometimes, in the administration of justice a person will suffer imprisonment or torture, When this happens, he sometimes dies accidentally and many other people will suffer because of this. In such circumstances you must try to follow the middle path (that is justice or moderation). Envy, anger, cruelty, impatience, laziness,

fatigue interfere with attainment of this middle path. Therefore, each of you should try to be sure that you are not possessed by those passions.’ It was Buddha and Ashoka who really preached and practised equality amongst all classes, men or women and prohibited cruelty to animals. In fact, Buddhism was a revolt against the old Brahminical faith which had degraded women and shudras—especially for the latter once-born the old Hindu law books prescribed no justice. They could not own property and serving the twice-born was their main dharma or duty. Therefore, Buddhism rejected discrimination on grounds of caste, sex, religion or profession and espoused the doctrine of equality as the sheet anchor of religious-cum-temporal philosophy.

### **Post-Vedic Concept of Justice**

It is the various law-givers like Manu, Gautama, Yajnavalkya, Narda, Brahaspati, Katyayana and others who shed adequate light on the nature and quality of justice of the ancient Hindus. The Hindu society basically being what it was marked for its unequal and class character which had one set of laws for the twice-born and the other for the once-born, and one set of laws for men and other for women, one set of laws for sons and other for the daughters and so on. Thus quintessence of justice—equality and non-discrimination, respect for human dignity and person, non-exploitation of poor by strong were unknown to ancient Hindu social system. The parameters of justice of course were based on strict conformity to observance of caste rules and their strict enforcement within the prescribed norms was justice and their violation or disregard attracted punishment.

### **(a) Code of Manu—And Justice**

The Code of Manu—Manusmriti—is considered the authoritative work of law of the Hindus. It is the work of Manu which introduced a distinct legal theory to shield Hindu society from the onslaughts of Buddhistic and other religious cults. This he did by carving a socio-

legal framework which appears to be anachronistic and undemocratic and non-egalitarian in form and content. Hence the quality of justice conditioned by his stricter law in particular was anti-women and anti-s/n<dras. However, Manu set for each caste a standard of good conduct Varna dharma which the judge was supposed to enforce and the king to execute faithfully and impartially. The quality of just and justice was not what it ought to be from general point of view but what was just in the view of Brahmins and the priests and in accordance with the interest and happiness of their Varna or Caste. Manu says, 'A king who knows the sacred law, must inquire into the law of the caste (jati) of districts, of guilds and of families and thus, settle the particular law of each'.<sup>53</sup> This is summed up as justice and was given a high place in Hindu social system. He declares, 'Justice being violated, destroys; justice being preserved, preserves, therefore, justice must not be violated, lest violated justice destroys us.'<sup>54</sup> Another equal rival of Manu was Chanakya known also as Kautilya who was contemporary of Plato and Aristotle and a practical statesman who engineered a coup d'etat that overthrew the Magadh Empire in 321 B.C. and established Mauryan dynasty which ruled India for more than three centuries. In his Arthashastra the women and shudras are given equal treatment alongwith men. It does not suffer from infirmities with which our Smritis suffer. Of course, Kautilya also emphasised on the need of promotion dharma with king as its ultimate defender and preserver. According to him when all dharmas perish, the King becomes the promulgator of dharma for the establishment of the four-fold Varna system and the protection of morality. The dominant purposes and functions which moved the king of ancient India were the attainment of dharma, artha and kama i.e., maintenance of justice, use of property and enjoyment of family life.

### **Doctrine of Matsyanyaya:**

<sup>53</sup> Institute of Manu, Chapter VIII, 41.

<sup>54</sup> Ibid., Chapter VIII, 15.

Pre-political order in Hindu texts is styled as Matsyanyaya. It is analogous to 'state of nature' of Hobbes. Literally it means the fish rule that is the system of life in the aquatic regions where bigger fish devour the small. The earliest traces of the idea of the concept,<sup>55</sup> of Matsyanyaya is found in Santiparva of Mahabharata on the subject of Rajdharma or duties of the king or government. Yudhisthra—the chief of Pandava asks Bhishma the grand old man of their race, 'How is it that King who is one is obeyed by the subjects who are many?' This question became the starting point of an enquiry into the nature of state authority, its rationale and justification. Bhishman points out that without State there would be Matsyanayaya, the rule of big fish swallowing the smaller fish. In other words, State was symbolic of certain moral values i.e. righteousness, happiness, tolerance and harmony. According to the ancient Hindu legal system kingship was created as inevitable institution to protect one and all and maintain dharma. Law, State and Justice were inter-twined as the Vedic precept declared a just law was true protector and preserver of order and happiness in society. "The law,<sup>56</sup> alone is the Governor that maintains order among the people. The Law alone is their protector. The Law keeps awake whilst all the people are fast asleep; the wise, therefore, look upon law as Dharma or Right. When rightly administered, the Law makes all men happy, but when administered wrongly, that is, without due consideration as to the requirements of justice, it ruins the King—all order would come to an end and there would be nothing but chaos and corruption if Laws are not properly enforced—Where the Law striking fear into the hearts of people, preventing them from committing crimes, rules supreme, there the people never go astray and consequently live in happiness, if it be administered, by just and learned men...'

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<sup>56</sup> Quoted by Pulparampil, John K., Indian Political System, pp. 17-18 (1976).

Whether it is Mahabharata,<sup>57</sup> or Arthasashtra,<sup>58</sup> or Mann's Institute,<sup>59</sup> or Narada,<sup>60</sup> there is great emphasis on the institution kingship and Rajdharma in order to escape from political disorder, social chaos and injustice. Of course, support to kingship is not absolute but conditional provided king conforms to dharma or justice and least deviation from it permitted people to revolt and rebel against an unjust king. In fact, Mahabharata's Santiparvam is a glorious testimony of the maturity and democratic nature of kingship, guided and regulated by the consideration of Righteousness (justice) called dharma which is the sole source of happiness on earth and of salvation in the heaven. Hence, promotion of justice was the sole and substance of kingship unlike the British Austinians and the so-called progressive jurists who prided in dubbing ancient Indian legal system as ephemeral, primitive and phantom of imagination. On the contrary, Austinians were only moving from substance to shadow, from content to form leading to tyranny of despotism and irresponsible kingship which ancient Indian jurists deftly designed to escape and avoid by denouncing it as Matsyanyaya. It is surprising that the British positivists hailed the law and State devoid of moral values and justice as a mark of progressive society thereby permitting Matsyanyaya—the rule of might over right.

### **Justice—Muslim Era**

During the Muslim rule in India—especially in the pre-Moghul period—there were a series of cultural, social and political stresses and strains on the style and way of life of the Hindus. The Muslim rulers in India were fundamentalists and despotic who forced upon the Hindus their own laws, customs and religious practices. Hindus were not treated in law at par with Muslims—the latter being the conquerors and the former the Kafirs the non-believers. Special

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<sup>57</sup> Santiparvam, 89,33.

<sup>58</sup> Kautilya's Arthshashtra, IV, XI, 229.

<sup>59</sup> Manusmriti, Chapter VII, 19.

<sup>60</sup> Narada Smriti, XVIII, 20-21.

disabilities like Jezia—poll tax, were imposed on Hindus. It was only such conquered Hindus who paid Jezia and revenue legally acquired legal rights over land. Both in theory and practice there was discrimination against Hindus vis-a-vis Muslims. Muslim rule in India was not founded on the basic principles of human dignity, equality and justice and was essentially autocratic, theocratic and irresponsible devoid of the iota of rule of law, morality, justice, tolerance and social harmony. Such was the essence of justice—called Kazi Justice—wholly arbitrary inconsistent with principles of minimum morality and elementary justice. The Moghul rulers—especially Akbar the great—brought about the basic change in the style of Moghul administration. He adopted a tactical policy of tolerance and non-discrimination towards Hindus and saw that no injustice is committed in his realm. However, the Moghul rule too depended mainly on the personal character of the ruler, his military power lacked sanction of popular support and strength.

### **Justice—British period**

The early British rulers in India adopted a policy of status quo with little or least change in the administration or laws of the Hindus and Muslims. They were more governed by economic-drain theory than acceleration of political change and social justice. Particularly, after the Mutiny in 1857 the British rulers adopted the stance to oppose all new reforms or changes. This attitude was summed up in a Calcutta newspaper in 1873 in these words : ‘Avoid change, by removing obstruction rather than by supplying new stimulants, slowly develop, but do not violently upheave native society, leave the rich and poor to themselves and their natural relations within the limits that prevent oppression’. Such was the unmistakable official policy of the British Indian Government for the remaining ninety years of its rule in India. However, the impact of the British heritage on Indian political life and legal system was of far reaching significance. The development of modern democratic institutions, the notion of representative

assemblies and responsible government, the secularisation of administration with independence of judiciary, the inception of the doctrine of the rule of law, of equality before law, substitution of new medium of instruction of English galvanised the forces and processes of social and political change which finally culminated in the Independence of the country in 1947. During this long colonial domination Indians had come to realise that there can be no justice without liberty and liberty without justice. It was the Britishers who had grafted in India lock, stock and barrel the elaborate machinery of English law and justice—both substantive and procedural which they had evolved and nourished in the interest of administration of justice. Hence the idea of rule of law, freedom of person, civil liberties, natural justice, equality before law in modern India are essentially of British origin both in form and spirit which find a pride place in the Constitution of free India. It were these principles the back-bone of British notion of justice for which Gandhi and others fought to secure for Indians as well. It may be pointed out that rejection of British rule was not a rejection of aforesaid English legal values and ideals concerning human liberty, equality and justice.

### **Constitution of India and Penumbras of Justice**

Justice is a generic term which includes both procedural and substantive justice—the former embodying the basic procedure and spirit what is generally known as natural justice and the latter containing provisions concerning social aid, assistance, benefits, facilities concessions, extra privileges and rights for the welfare of those who need or deserve such help described by the omnibus term social justice. The Constitution of India abounds with natural and social justice as is evident from the Preamble and Parts III and IV of the Constitution. Indeed the Constitution has been repeatedly amended for the protection of liberties and promotion of social justice to remove the scars of injustice and inequality. The courts have given a powerful support to these rights by invoking the power



of judicial review. These are rooted in our democratic egalitarian social and political order and are basic and fundamental in the governance of the country as expounded in Kesavananda Bharati—'the Indian Constitution of the future'.

### **Natural Justice—Indian Legal Theory**

Natural justice occupies a key place in Indian legal theory and in constitutional philosophy. However its ethico-legal ethos is rooted on the foundation of Anglo-American jurisprudence and shares in great measures the broad and vague parameters of higher law so that majestic principles of natural justice may remain eternally a bulwork and a powerful counter against tyranny, injustice and arbitrary power. Such penumbras of natural justice are its *raison d'être* to meet the perilous situation of changing times and places. The ends of natural justice are to render every one his due or delaying of justice means denial of justice, or let no one be judge in his own cause or treat like cases alike and different cases differently etc. These are the principles of natural justice which are deeply embedded in modern human rights,<sup>61</sup> jurisprudence also. Modern administrative law too has evolved great safeguard that power can be exercised,<sup>62</sup> only in conformity with principles of natural justice. The two main rules of natural justice which have been evolved through judicial process are : (1) no one shall be judge in his own cause (*Nemo debet esse iudex in propria sua causa*) and (ii) no one is to be condemned unheard without his being made aware in good time of the case he has to meet (*Audi Alteram Partem*). The Donoghue Committee on Ministers' Powers 1932 added a third principle that a party is entitled to know the reason for the decision on which it is based. These rules are applicable not only in a court of justice but also before an administrative tribunal or authority. Just as the principle of due process of law in USA guarantees to a citizen

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<sup>61</sup> Maneka Gandhi, AIR 1978 SC 597.

<sup>62</sup> Sangram Singh v. Election Tribunal, AIR 1955 SC 425.

protection against arbitrary action by executive and administrative action, the rules of natural justice in India provide legal foundation on which administrative procedure rest. The Supreme Court has held,<sup>63</sup> that even administrative orders must precede by notice and hearing if the proceedings will have adverse civil consequences upon a person. The Court remarked<sup>64</sup>: "The aim of the rules of natural justice is to secure justice or put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by law validly made. In other words, they do not supplant the law of the land but supplement it. The concept of natural justice had undergone a great deal of change in recent years.....An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry.....the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the frame-work of the law under which enquiry is held and the constitution of the tribunal or body of persons appointed for that purpose.' However, after the Maneka there has been a sea-change,<sup>65</sup> in the spirit and form of natural justice which cannot be put in a strait-jacket or defined like a pigeon-hole theory. The rigid view that principles of natural justice applied to judicial and quasi-judicial acts and not to administrative acts no longer holds the field. Justice Bhagwati views natural justice as a 'great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule..... The soul of natural justice is 'fair play in action, and that is why it has received widest recognition throughout the Democratic World....' After this epoch making decision the judiciary has expounded the

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<sup>63</sup> A.K. Kraipak v. Union of India, AIR 1970 SC 150.

<sup>64</sup> Ibid., para 20; see also Union of India v. Indo Afghan Agencies, AIR 1968 SC 718.

<sup>65</sup> Maneka Gandhi v. Union of India, 1978 SC 597 at 616, Mohinder Singh v. Chief Election Commissioner, AIR 1978 SC 851; Delhi Transport Corp. v. D.T.C. Mnzdoor Union, AIR 1991 SC 101; Supreme Court Legal Aid Committee v. Union of India, AIR 1994 SCW 5115.

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rule liberally whereby natural justice has now become an effective tool of justice to those who had been denied their liberty or freedom.

### **Natural Justice—Jurisprudence Paradigms**

Together with *Kraipak* (1970) *Kesavananda Bharati*, (1973) and *Maneka Gandhi* (1978) became an essay for Indian jurists and judges in defence of human liberty, freedom and natural justice. Since then the ideals of human rights and natural justice have been vigorously pursued reminding and educating Indians the underlying purposes and goals of the Preamble and the Bill of Rights under the Constitution. The Supreme Court has declared in these judgments that the Constitution to do not envisage a sovereign government but a government under law with constitutional limitation and 'We the People of India<sup>1</sup> being the Sovereign Power. As, Constitution is the supreme law of the land, laws of the Union and the States must be in pursuance of the Constitution wherein judiciary is the protector and guarantor of the Fundamental Rights of the citizens. The Supreme Court is empowered to issue appropriate writs in the nature of Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo Waranto for the enforcement of fundamental rights and any person can move the Court for appropriate remedy whenever there is a violation of such rights by legislative or executive body<sup>66</sup>. Article 226 empowers the High Courts to issue writs for the enforcement of fundamental rights. In the interest of justice the courts have relaxed the rule of locus standi in favour of those who for want of poverty, ignorance, illiteracy, deprivation and exploitation are unable to approach the Court for appropriate relief. While expanding the scope of access to justice the Indian judiciary has initiated a veritable revolution in our political and social system by achieving its grand purpose—the protection of the poor and exploited individuals or contracts upon their liberty protected by procedure,<sup>67</sup> established by

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<sup>66</sup> *S.P. Gupta v. Union of India*, AIR 1982 SC 149.

<sup>67</sup> *Maneka Gandhi v. Union of India*, 1978 SC 597.

law or due process theory. It is for this reason that natural justice is a brooding omnipresence although of varying form and facet. According to Justice Krishna Iyer,<sup>68</sup> 'Indeed natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication to make fairness a creed of life. It has many colours and shades, many forms and shapes and save where valid law excludes, it applies when people are affected by valid authority..... Indeed from the legendary days of Adam—and of Kautilya's Arthashastra—the rule of law has had the stamp of natural justice which makes it social justice.....that the roots of natural justice and its foliage are noble and not new-fangled.....Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.' Justice Iyer explaining further the nuances of natural justice observed,<sup>69</sup>: 'Today in our jurisprudence, the advances made by natural justice far exceed old frontiers and if judicial creativity belights penumbral areas it is only for improving the quality of government by injecting fair play into its wheels.....Law cannot be divorced from life and so it is that the life of law is not logic but experience.....Law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong it is wrong except where it is overborne by dire social necessity. Such is the sensible perspective we should adopt if ad hoc or haphazard solutions should be eschewed.'

Justice Iyer summing up the ethos of natural justice concluded:<sup>70</sup>

'that the content of natural justice is dependent variable not an easy casualty.' In short, since the rejection<sup>71</sup> of Austinian and Diceyan concept of law and rule of law in Maneka,<sup>72</sup> Articles 14 and 21 have

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<sup>68</sup> Mohinder Singh v. Chief Election Cominr., AIR 1978 SC 851 at 870.

<sup>69</sup> Ibid., at 873.

<sup>70</sup> Ibid., 876.

<sup>71</sup> A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

<sup>72</sup> AIR 1978 SC 659.

assumed new dimensions especially after the introduction of due process in Indian constitutional jurisprudence by making the doctrine of natural justice an effective sword and shield both against executive actions and legislative inroads against life and liberty of a person. The new interpretation given to these provisions is a far reaching development in India's constitutional and criminal jurisprudence for providing easy access to justice to the underprivileged under the vast and panoramic canopy of natural justice.<sup>73</sup> It is around the principles of natural justice that the Supreme Court of India has evolved new Indian jurisprudence with new legal ideology and techniques which links judicial process with social change. Since Maneka and Mohinder Singh it is the judiciary which has been the harbinger of social revolution in bringing about a new social order in which justice—social, economic and political—informs all the institutions of contemporary Indian society.

### **Social Justice—Indian Context**

In India, social justice is the new dream of liberals, Gandhians, socialists, marxists and others who are inspired and aspire for an egalitarian politico-social order where no one is exploited, where every one is liberated and where every one is equal and free from hunger and poverty. In such a social order liberty is not made a casualty over security or vice-versa and balance is maintained

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<sup>73</sup> R.D. Shetty v. International Airport Authority, AIR 1987 SC 1628; Kasturi Lal v. State of J & K, AIR 1987 SC 1992; R.S. Dass v. Union of India, AIR 1987 SC 850 at 858; Ashok Kumar Yadav v. State of Haryana, AIR 1987 SC 454 at 468; Sheonandan Paswan v. State of Bihar, AIR 1987 SC 877; Vaidyanath Malmpatra v. State of Orissa, AIR 1989 SC 2218; Neelima Mishra v. Harinder Knur, AIR 1990, SC 1402; Delhi Transport Corpn. v. D.T.C. Mazdoor (Congress), AIR 1991 SC 101; D.V. Bakshi v. Union of India, (1993) 3 SCC 663; O.K. Yadav v. f.M.A. Industries, (1993) 3 SCC 258; Union of India v. W.N. Chadha, AIR 1993 SC 1843; Union of India v. V.P. Setlhi, AIR 1994 SC 1261; Premium Granites v. State of Tamil Nadu, AIR 1994 SC 1233; Khedat Mazdoor Committee Sangh v. State of MP, AIR 1995 SC 31; M.f. Sivani v. State of Karnataka, AIR 1995 SC 1770; Lawyers Initiative Through RS Bains v. State of Punjab, AIR 1996 P & H 1; Kamalapati Bralunmarao v. State of Karnataka, AIR 1996 Kar 37; Wariyam Singh v. State of U.P., AIR 1996 SC 305; J.N. Banavalikar v. Municipal Corpn. Delhi, AIR 1996 SC 326; Union of India v. M/s. Jesus Sales Corpn. AIR 1996 SC 1508; Baburao Vishwanath Mathpati v. State, AIR 1996 Bom 228; State Bank of Patna v. S.K. Sltarma, AIR 1996 SC 1669.

without curtailing the rights of the individual with supremacy of the Constitution as expounded in the basic structure theory which contain the cardinal principles of democracy, human rights and social justice. The Constitution<sup>74</sup> being more a social document rather than political makes the legislature, the executive and the judiciary for the advancement of liberties and welfare of the people and the courts are to harmonise conflicts consistent with social philosophy of the Constitution. Such a strand is echoed by Justice Krishna Iyer when he remarked<sup>75</sup> : 'Our thesis is that dialectics of social justice should not be missed if the synthesis of Part III and Part IV is to influence State action and Court pronouncements.' The Court has abandoned the initial hesitation when it failed to recognise,<sup>76</sup> the compatibility between Part III and Part IV by making the former transcendental beyond the reach of the Parliament. However since the days of *Kesavananda Bharati* it has been consistently adopting the approach,<sup>77</sup> that Fundamental Rights and Directive Principles are supplementary and complimentary to each other and that the provisions of Part III should be interpreted having regard to the Preamble and the Directive Principles of State Policy. The basic law of the country has adopted and accepted democracy and liberty with social justice as the way of life. The judgments of the Court only reflect and respect of collective judgement of the We the People of India and their commitment to social, economic and political democracy so that social justice and human rights are effectively realised peacefully without violence through democratic process. The architects of the Constitution, the Father of the Nation

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<sup>74</sup> *Raghu Nath v. Union of India*, AIR 1993 SC 1267 at 1305; *R.C. Poudyal v. Union of India*, AIR 1993 SC 1804, *R.K. Jain v. Union of India*, AIR 1993 SC 1769.

<sup>75</sup> *State of Karnataka v. Ranganath Reddy*, AIR 1978 SC 215 at 234.

<sup>76</sup> *Golak Nath v. State of Punjab*, AIR 1967 SC 1643.

<sup>77</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *D.S. Nakara v. Union of India*, AIR 1983 SC 130; *Bandtma Mukti Morcha v. Union of India*, AIR 1984 SC 802; *Vincent v. Union of India*, AIR 1987 SC 990; *A.R. Antulay v. R.S. Naik*, AIR 1992 SC 1872, *Unni Krishnan v. State of A.P.*, AIR 1993 SC 2178; *State of Maharashtra v. Manubhai P. Vashi*, AIR 1996 SC 1.

and makers of modern India had kept in mind the words of Mr Atlee, the former Prime Minister of Britain when he remarked:

‘If a free society cannot help the many who are poor, it cannot save the few who are rich.’ Gandhian Talisman and Social Justice—Initial Judicial Hurdles Of course, the Constitution fully reflects the Gandhian ethos in its Preamble and Parts III and IV towards creation of just and democratic society in India. By such a society Gandhiji meant<sup>78</sup> ‘...the levelling down of the few rich in whom is concentrated the bulk of the nation’s wealth, on the one hand, and levelling up the semi-naked millions, on the other. A non-violent system of government is clearly an impossibility so long as the wealth gulf between the rich and the hungry million persists. The contrast between the places of New Delhi and the miserable hovels of the poor labouring class nearby cannot last a day in a free India in which the poor will enjoy the same power of the riches in the land.’ For the alleviation of yawning gap between the rich and poor Gandhiji suggested definite and humane policy indicators. As he put<sup>79</sup> it: ‘I will give you a talisman. Whenever you are in doubt or when the self becomes too much with you, apply the following test. Recall the face of the poorest and the weakest man whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him. Will he gain anything by it? Will it restore him to control over his own life and destiny. In other words, will it lead to Sivaraj for the hungry and spiritually starving millions?

**Then you will find your doubt and yourself melting away.’**

The Swaraj of Gandhiji’s conception is truly enshrined in the Preamble and parts III & IV of the Constitution. Such has been the thrust of welfare legislation for socio-economic reforms in India since 1950 which led to several constitutional amendments for the

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<sup>78</sup> International Conference on Interpreting South African Bill of Rights, AIR Journal, Section 145 at 146, Oct. 1993.

<sup>79</sup> Kashyap Submsli C. Human Rights and Parliament 94 Metropolitan Book Co New Delhi 1978.

implementation of land reform measures which had been held up because of fundamental right to property and equality. The judgments,<sup>80</sup> of the courts hindered agrarian reforms, nationalisation of big industries and banking business and abolition of privy purses. A conflict ensued between vested interests supported by the Courts and the Government of India—the architect of social change and social justice. The charge that the Supreme Court was insensitive to the cause of common welfare and social justice programme came no less than from the Prime Minister Jawaharlal Nehru himself as agrarian statutes were struck down unconstitutional. So was the fate of State Monopoly Bills and Nationalisation schemes which fell at the altar of fundamental rights. As several schemes or legislative measures—fiscal, agrarian, social and educational—invariably went to the Court and no one could predict what this ‘third house’ might do. Accordingly Nehru exhorted the judges to come down from the ‘ivory tower’ and sympathise with the legislatures which had to do a thousand things urgently needed by an awakened but deprived people. Like the criticism of U.S. Supreme Court as ‘nine-old men’ by President Franklin Roosevelt Nehru echoed similar dig at the Apex judiciary when he remarked<sup>81</sup>:

‘No Supreme Court and no judiciary can stand in the judgment over sovereign will of Parliament representing the will of the entire community. If we go wrong here and there, it can point out, but in the ultimate analysis where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of the Parliament. ...it is obvious that no system of judiciary can function in the nature of a third house, as a kind of third house of correction.’

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<sup>80</sup> *Knmeswari v. State of Bihar*, AIR 1951 Pat 91; *State of West Bengal v. Subodhi Chakrabarti*, AIR 1954 SC 92, *Dwarkadas v. Sliolapur Spinning & Weaving Co*, AIR 1954 SC 119; *Saghir Ahmed v. State of U.P.*, AIR 1954 SC 728, *State of West Bengal v. Beta Banerjee*, AIR 1954 SC 170; *State of Gujarat v. Sitwanti Lal*, AIR 1965 SC 1017; *R.C. Cooper v. Union of India*, AIR 1970 SC 564.

<sup>81</sup> Krishna Iyer VR, *Law and the People* 172-173 Peoples Publishing House 1972 see also Iyer, Krishna V.R. *Some Half Hidden Aspects of Indian Social Justice* 80-81 Eastern Book Co. 1979.



However, the judiciary did not adopt a more modern liberal and progressive outlook and declared,<sup>82</sup> property as a sacrosanct fundamental right resulting in making fundamental rights immutable, transcendental and beyond the reach of Parliament. Subba Rao C.J. declared<sup>83</sup>: 'We declare that Parliament will have no power from the date of this decision to amend any provision of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein'. Since the amendments in the Constitution were necessary to give effect to the purpose enshrined in the Preamble and Directives of the Constitution but the Apex Court being conservative came in the way of removal of poverty and in the establishment of social justice. It appeared as if the Court was trying to protect vested interests and becoming an obstacle in creation of more humane and just social order as was evident in the Bank Nationalisation<sup>84</sup> case and Privy Purses,<sup>85</sup> case. The main problem before the Supreme Court during the 1950-71 was that it failed to uphold, promote and establish social justice with democracy as envisaged in the Constitution.

### **Supreme Court and Social Justice—A Copernican Change.**

Hitherto the Supreme Court had been striking down all the laws and legislation meant for the amelioration of condition of rural and urban poor. It appeared as if judiciary had failed in ensuring distributive justice. A new generation of progressive judges came on the scene who castigated Oxford-oriented judges who declared law illegal without regard to the social and economic consequences of their decisions. Consequently hereafter laws enacted in furtherance of the Directive Principles of State Policy contained in Article 39 (b) and (c) were upheld against all attacks notwithstanding the basic structure theory of Kesavananda Bharati. This period witnessed the

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<sup>82</sup> Golak Nath v. State of Punjab, AIR 1967 SC 1643.

<sup>83</sup> Ibid., para 53.

<sup>84</sup> R.C. Cooper v. Union of India, AIR 1970 SC 564.

<sup>85</sup> Madhav Rao Scindia v. Union of India, AIR 1971 SC 530.

emergence of new Indian jurisprudence with more socialist content including the addition of the word 'socialist' in the Preamble of the Constitution in 1976 coupled with some progressive judges fully alive to the cause of social justice and ever responsive to the social philosophy of the Constitution. The founding fathers of Indian Constitution too had envisaged,<sup>86</sup> the Supreme Court 'to be an arm of social revolution' and the national goals enshrined therein were addressed,<sup>87</sup> as much to be judiciary as to the legislature and the executive. As Krishna Iyer J. observed,<sup>88</sup> 'Our Constitution is a tryst with destiny, preambled with luscious solemnity in the words 'Justice-social economic and political.' The three great branches of Government, as creatures of the Constitution, must remember this promise in their functional role and forget it at their peril, for to do so will be a betrayal of those high values and goals which this nation set for itself in its Objective Resolution and whose elaborate summation is in Part IV of the paramount parchment..... While contemplating the meaning of the Articles of the Organic Law, the Supreme Court shall not disown social justice.' Consequently after 1976,<sup>89</sup> there was a solemn commitment on the part of Supreme Court to promote social change for bringing about a new egalitarian order in furtherance of the Directive Principles of State policy. The Supreme Court in *Minerva Mills* remarked<sup>90</sup> :The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution..... They are like a twin formula for achieving the social revolution.... The Indian Constitution is founded on the

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<sup>86</sup> Austin, Granville, *the Indian Constitution Cornerstone of a Nation*, 164 1st Indian ed. 1972.

<sup>87</sup> Per Hidayatullah J. (as then he was) in *Colak Nath*.

<sup>88</sup> *D.G. Mahajan v. State of Maharashtra*, AIR 1977 SC 915 at 934.

<sup>89</sup> *State of Kerala v. N.M. Thomas*, AIR 1976 SC 690.

<sup>90</sup> *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789 at 1806-7.

bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb harmony of the Constitution. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution. Those rights are not an end in themselves but are the means to an end. The end is specified in Part IV.’ Accordingly the Apex Court has been fully alive to the cause of social justice and has been responsible to the claims to social justice of the poor and disadvantaged persons.<sup>91</sup> The sensitivity of the contemporary, Indian judicial process to the social justice claims of the poor because of their exploitation at the hands of State,<sup>92</sup> or powerful sections,<sup>93</sup> of the community the Supreme Court has been successful in counteracting social injustice despite the criticism that it has usurped the powers which rightly pertain to Executive and Legislature. In the face of Himalayan poverty the Apex Court has not waived or looked back in advancing and promoting social justice to the poor, the miserable and the weaker. In 1976 the Supreme Court of India observed<sup>94</sup>. ‘Social Justice is the conscience of our Constitution, the State is the promoter of economic justice, the foundation faith which sustains the Constitution and the country..... The Public Sector is a model employer with a social conscience not an artificial person without a soul. Law and Justice must be on talking terms and what matter under our constitutional scheme is not merciless Law but Human legality. The true strength and stability of our policy is in Social justice.’

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<sup>91</sup> Municipal Council Ratlam v. Vardiclwnd, AIR 1980 SC 1622; ABSK v. Union of India, AIR 1981 SC 298; U.S. Nakara v. Union of India, AIR 1983 SC 130; K.C. Vasanth Kumar v. State of Karnataka, AIR 1985 SC 1495; Olga Tellis v. Bombay Municipal Coloration, AIR 1986 SC 567; Unni Krislman J.P. v. State of A.P., AIR 1993 SC 2178; State of Karnataka v. Appa Bull ‘nylnle, AIR 1993 SC 1126; Consumer Edu., Research Centre v. Union of India. AIH-1J95 SC 922.

<sup>92</sup> State of Haryana v. Darshana Devi AIR 1979 SC 855; Women’s Resource Centre v. Commissioner of Police, AIR 1990 SC 513.

<sup>93</sup> Bishan Devi v. Sirbakash Singh, AIR 1979 SC 1862; State of Karnataka v. Appa Balu Ingale, AIR 1993 SC.

<sup>94</sup> State of Kerala v. Tliomas. AIR 1976 SC 490.

Likewise in the same strain but with greater concern and vigour the Supreme Court (K. Ramaswamy J.) expounds the new fabric of social justice in the current social milieu of 1995. It declares<sup>95</sup> : “The Preamble and Article 38 of the Constitution of India—the supreme law envisions social justice as its arch to ensure life to be meaningful and liveable with human dignity..... The Constitution commands justice, liberty, equality and fraternity as supreme values to usher in egalitarian social, economic and political democracy.....Social justice is a dynamic device to mitigate the sufferings of the poor, weaks, Scheduled Castes (Dalits), Tribals and deprived sections of society and to elevate them to the level of equality to live a life with dignity of a person. Social justice is not a simple or single ideal of a society but is an essential part of complex of social change to relieve the poor etc. from handicaps, penury to ward off distress, and to make their life liable, for greater good of society at large..... The Constitution, therefore, mandates the State to accord justice to all members of the society in all facets of human activity. The concepts of social justice imbeds equality to flavour and enliven practical content of ‘life’. Social justice and equality are complimentary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results.’

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## 7.8 SUMMARY

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In India, social justice is the new dream of liberals, Gandhians, socialists, marxists and others who are inspired and aspire for an egalitarian politico-social order where no one is exploited, where every one is liberated and where every one is equal and free from hunger and poverty. In such a social order liberty is not made a casualty over security or vice-versa and balance is maintained without curtailing the rights of the individual with supremacy of the

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<sup>95</sup> Consumer Education & Research Centre v. Union of India, AIR 1995 SC 923 at 938.

Constitution as expounded in the basic structure theory which contain the cardinal principles of democracy, human rights and social justice.

In this unit we have discussed about the concept of Dharma and the concept of justice or Dharma in Indian thought. We have also learned about the the meaning of Dharma and its foundation of legal ordering in Indian thought and sources.

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### 7.9 SUGGESTED READINGS/REFERENCE MATERIAL

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1. R.C. Cooper v. Union of India, AIR 1970 SC 564.
- <sup>1</sup> Madhav Rao Scindia v. Union of India, AIR 1971 SC 530.
- <sup>1</sup> Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.
- <sup>1</sup> Austin, Granville, the Indian Constitution Cornerstone of a Nation, 164 1st Indian ed. 1972.
- <sup>1</sup> Per Hidayatullah J. (as then he was) in Colak Nath.
- <sup>1</sup> D.G. Mahajan v. State of Maharashtra, AIR 1977 SC 915 at 934.
- <sup>1</sup> State of Kerala v. N.M. Thomas, AIR 1976 SC 690.
- <sup>1</sup> Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789 at 1806-7.
- <sup>1</sup> Municipal Council Ratlam v. Vardiclwnd, AIR 1980 SC 1622; ABSK v. Union of India, AIR 1981 SC 298; U.S. Nakara v. Union of India, AIR 1983 SC 130; K.C. Vasanth Kumar v. State of Karnataka, AIR 1985 SC 1495; Olga Tellis v. Bombay Municipal Coloration, AIR 1986 SC 567; Unni Krislman J.P. v. State of A.P., AIR 1993 SC 2178; State of Karnataka v. Appa Bull 'nynle, AIR 1993 SC 1126; Consumer Edu., Research Centre v. Union of India. AIH-1J95 SC 922.
- <sup>1</sup> State of Haryana v. Darshana Devi AIR 1979 SC 855; Women's Resource Centre v. Commissioner of Police, AIR 1990 SC 513.
- <sup>1</sup> Bishan Devi v. Sirbakash Singh, AIR 1979 SC 1862; State of Karnataka v. Appa Balu Ingale, AIR 1993 SC.
- <sup>1</sup> State of Kerala v. Tliomas. AIR 1976 SC 490.
- <sup>1</sup> Consumer Education & Research Centre v. Union of India, AIR 1995 SC 923 at 938.

- <sup>1</sup> Articles 14,15,16,17,38,39,39A, 41,43A, 46,332 and 340.
- <sup>1</sup> AIR 1951 SC 226.
- <sup>1</sup> Balaji v. State of Mysore, AIR 1963 SC 469.
- <sup>1</sup> Devadasan v. Union of India, AIR 1964 SC 179.
- <sup>1</sup> State of Kerala v. N.M. Thomas, AIR 1976 SC 490.
- <sup>1</sup> ABSK(Sangh) Raihoay v. Union of India, AIR 1981 SC 298.
- <sup>1</sup> ABSK (Sangh) Railway v. Union of India, AIR 1981 SC 298.
- <sup>1</sup> Ibid.
- <sup>1</sup> K.C. Vasanth Kumar v. State of Karnataka, AIR 1985 SC, 1495.
- <sup>1</sup> K.C. Vasanth Kumar v. State ofKarnataka, AIR 1985 S.C. 1495 at 1529.
- <sup>1</sup> Ibid.
- <sup>1</sup> Indra Sawlmey v. Union of India, AIR 1993 SC 447.
- <sup>1</sup> Indra Snwlmey v. Union cf India, AIR 1993 SC 447 at 514.
- <sup>1</sup> Infra Sawhney v. Union of India, AIR 1993 SC 447 at 575.
- <sup>1</sup> Ibid., 577-78.
- <sup>1</sup> Ibid., 573.
- <sup>1</sup> e.g. Ashoka Kumar Thakur v. State of Bihar, (1995) 2 SCC 403  
The Supreme Court quashing economic criteria laid down by Bihar and U.P. Govt. for identifying 'Creamy layers' amongst OBCs.
- <sup>1</sup> Indra Sawhney v. Union of India, AIR 1993 SC 477 at 593.

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### 7.10 SELF ASSESSMENT QUESTIONS

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1. What is Dharma?
2. What do you understand by the concept of justice or Dharma in Indian thought?
3. Explain the meaning of Dharma and its foundation of legal ordering in Indian thought and sources.

**LL.M. Part-2**

**Subject: JUDICIAL PROCESS**

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**Block-III-** The Concepts of Justice

**Unit-8-** The concept and various theories of justice in the western thought.

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**STRUCTURE**

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**8.1 INTRODUCTION**

**8.2 OBJECTIVES**

**8.3 What is Western Concept of Justice?**

**8.4.Various western theories of justice**

**8.5 SUMMARY**

**8.7 SUGGESTED READINGS/REFERENCE MATERIAL**

**8.8 SELF ASSESSMENT QUESTIONS**

**8.1 INTRODUCTION**

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In the previous unit you have read about the meaning and concept of Dharma and the concept of justice or Dharma in Indian thought. You have also learned about the Dharma and its foundation of legal ordering in Indian thought and sources.

The notion of justice varies with time and place. What is just at a particular given time has not been generally considered at another. What should be good or right or just at a particular epoch is conditioned by social milieu and moral ethos of each community. Hence, search for justice is an eternal quest and no attempt to delineate its contour can succeed. Nevertheless this concept continues to be of abiding interest of thinkers and philosophers, jurist and judges. At every interval of human history we find competing formulations and enunciations of theories of justice. Philosophers have been measuring in terms of distribution according to merit, capacity or need or in conformity to custom or equal opportunity for self development, utility or morality or as balancing of interest or felt-necessities of the people etc. There is no unanimity among thinkers as to what 'justice is?'

In this unit we will discuss about the concept and various theories of justice in the western thought.

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**8.2 OBJECTIVES**

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**After reading this unit you will be able to:**

- ✓ Understand the concept of justice.
- ✓ Describe various theories of justice in the western thought.



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### 8.3 What is Western Concept of Justice?

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Justice is one of the most important moral and political concepts. The word comes from the Latin *jus*, meaning right or law. The *Oxford English Dictionary* defines the “just” person as one who typically “does what is morally right” and is disposed to “giving everyone his or her due,” offering the word “fair” as a synonym. But philosophers want to get beyond etymology and dictionary definitions to consider, for example, the nature of justice as both a moral virtue of character and a desirable quality of political society, as well as how it applies to ethical and social decision-making. This article will focus on Western philosophical conceptions of justice. These will be the greatest theories of ancient Greece (those of Plato and Aristotle) and of medieval Christianity (Augustine and Aquinas), two early modern ones (Hobbes and Hume), two from more recent modern times (Kant and Mill), and some contemporary ones (Rawls and several successors). Typically the article considers not only their theories of justice but also how philosophers apply their own theories to controversial social issues—for example, to civil disobedience, punishment, equal opportunity for women, slavery, war, property rights, and international relations.

For Plato, justice is a virtue establishing rational order, with each part performing its appropriate role and not interfering with the proper functioning of other parts. Aristotle says justice consists in what is lawful and fair, with fairness involving equitable distributions and the correction of what is inequitable. For Augustine, the cardinal virtue of justice requires that we try to give all people their due; for Aquinas, justice is that rational mean between opposite sorts of injustice, involving proportional distributions and reciprocal transactions. Hobbes believed justice is an artificial virtue, necessary for civil society, a function of the voluntary agreements of the social contract; for Hume, justice essentially serves public utility by protecting property (broadly understood). For Kant, it is a virtue whereby we respect others’ freedom, autonomy, and dignity by not

interfering with their voluntary actions, so long as those do not violate others' rights; Mill said justice is a collective name for the most important social utilities, which are conducive to fostering and protecting human liberty. Rawls analyzed justice in terms of maximum equal liberty regarding basic rights and duties for all members of society, with socio-economic inequalities requiring moral justification in terms of equal opportunity and beneficial results for all; and various post-Rawlsian philosophers develop alternative conceptions. Western philosophers generally regard justice as the most fundamental of all virtues for ordering interpersonal relations and establishing and maintaining a stable political society. By tracking the historical interplay of these theories, what will be advocated is a developing understanding of justice in terms of respecting persons as free, rational agents. One may disagree about the nature, basis, and legitimate application of justice, but this is its core.

**Justice—relative and varying ideal**

The notion of justice varies with time and place. What is just at a particular given time has not been generally considered at another. What should be good or right or just at a particular epoch is conditioned by social milieu and moral ethos of each community. Hence, search for justice is an eternal quest and no attempt to delineate its contour can succeed. Nevertheless this concept continues to be of abiding interest of thinkers and philosophers, jurist and judges. At every interval of human history we find competing formulations and enunciations of theories of justice. Philosophers have been measuring in terms of distribution according to merit, capacity or need or in conformity to custom or equal opportunity for self development, utility or morality or as balancing of interest or felt-necessities of the people etc. There is no unanimity among thinkers as to what 'justice is? Lord Wright asserts that justice is what

appears just to a reasonable man. In this regard he declares,<sup>96</sup> 'I am not afraid of being accused of sloppiness of thought when I say that the guiding principle of a judge in deciding cases is to do justice; that is justice according to law, but still justice. I have not found any satisfactory definition of justice... What is just in any particular case appears to be just to the just man, in the same way as what is reasonable is what appears to be reasonable to the reasonable man.' Hans Kelsen similarly pin-points the difficulty in defining the eternal question: what justice is? He says<sup>97</sup>:

'No other question has been discussed so passionately, no other question has caused so much precious blood and so many bitter tears to be shed, no other question has been the object of so much intensive thinking by the most illustrious from Plato to Kant, and yet this question is today as unanswered as it ever was. It seems that it is one of those questions to which the resigned wisdom applies that man cannot find a definite answer, but only try to improve the question.' The ancient Indians, Greeks and Romans had postulated justice as an ideal standard derived from God or based on Dharma, truth equality, righteousness and similar higher moral values of lasting validity. It is an eternal moral obligation to render everyone his due—the noblest ideal of all human laws. In the narrow or practical sense justice signify a cluster of ideals and principles for common good and welfare without the least hope or opportunity of injustice, inequality an discrimination. For instance, Magna Carta—the great Charter of human liberty is the first example which people of England wrested from John the King of England on June 15, 1215 who was threatening their liberty, rights and other freedoms. The King promised: "To no one will we sell, or to no one will we deny or delay right or justice.' During Renaissance and Reformation to control power oriented sovereigns varying social contract theories were propounded as the basis of new social order founded on

justice and natural rights of man. French philosopher Pascal insisted that justice and power must be brought together, so that whatever is just way be powerful and whatever powerful may be just.' Sydney Smith likewise highlighting the importance of justice observed; "The only way to make mass of mankind see the beauty of justice is by showing them, in pretty plain terms the consequences of injustice. During eighteenth and nineteenth centuries a series of thinkers like David Hume, Mills, Spencer, Bentham and Kropotkin have been expounding the concept of justice in terms of desirable purposes, interests or values. Similarly, the great statemen and national leaders and thinkers from Abraham Lincoln to Jawaharlal Nehru, Marx to Mao and Mahahna to Rev. Martin Luther King Jr. have been blazing the trail of justice, equality and liberty for, the 'lowliest, poorest and the lost'. During the latter half of the twentieth century under the aegis of U.N. Declaration of Human Rights 1948 and under the provisions of the Constitutions which were enacted in the post World War II period the basic fundamental human rights and the claims to justice, equality, human dignity, non-discrimination etc. have assumed national and international recognition and enforcement. Indeed the expanding horizon and explosion of claims to justice—social, political and economic cover the whole spectrum of humane development. It is now fully realised that the lasting peace can be established only if it is based upon social justice and poverty anywhere constitutes a danger to prosperity everywhere. Accordingly through the plank of human rights philosophy and jurisprudence there is a concerted attempt to build bridges of understanding between men and among nations based upon justice and equal rights. The Tehran Conference on Human Rights 1966 candidly admitted when it declared.<sup>98</sup> 'In our day, political rights without social rights, justice under law without social justice, and political democracy without economic democracy no longer have any meaning.'

When the world community is on the threshold of the twenty first century determined to build a new world order based on justice and human rights it is obligatory and binding to incorporate and implement it 'through legal and political process in order to avoid and escape human catastrophe and national and global holocaust. All people and societies must reflect on the problem of realisation of justice and heed the prophetic warning sounded by Robert Ingersol when he observed.<sup>99</sup> 'A government founded on anything except liberty and justice cannot stand. All the wrecks of great cities and all the nations that have passed away—all are a warning that no nation founded upon injustice can stand. From the sand enshrouded Egypt, and from every fallen or crumbling stone of the once mighty Rome, comes a wail as it wail, the cry that no nation founded on injustice can permanently stand.' Similarly, Gandhiji had underscored the need of establishing a just society where there would be no rich and no poor, no high, none low in India. Such a Ramrajya or Swarajya of his conception was necessary ideal for India's survival as an independent and vibrant nation. Thus declared Gandhiji:<sup>100</sup> 'I shall work for an India in which the poorest shall feel that it is their country in whose making they have an effective voice, an India in which there shall be no high class and low class of people; an India in which all communities shall live in perfect harmony..... There can be no room in such India or the curse of untouchability or the curse of intoxicating drinks and drugs..... Women will enjoy the same rights as men..... This is the India of my dream.' Jawaharlal Nehru too highlighted the paramount need of social justice which must be Mantra for resolving India's chronic poverty. He told the Constituent Assembly:<sup>101</sup> "The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye.

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That may be beyond us, but as long as there are tears and suffering so long our work will not be over.'

### **Justice—Legal meaning**

The notion of Justice is comparatively more ancient than that of law. The Latin form of the term justice is Justus or justia and it is from these terms that the word jus is derived having varying meanings such as truth, morality, righteousness, equality, fairness, mercy, impartiality, Tightness, law etc. This expression is again cognate with justum—meaning what is ordered. In Roman law it means right, justice or law. In ancient Indian law and Dharma (justice) were not distinct concepts. In Dharmasastras, Smritis and Arthasastra the concept of justice, law and religion were not distinguished and invariably justice,<sup>102</sup> was equated to Dharma and vice-versa. Likewise in Mosaic law of Israel,<sup>103</sup> the idea of justice and law are inextricably interwoven. The classical legal definition of justice mean rendering every one his own-sumumcuique tribuere. But what is rightly any body's own is precisely the problem of law which it should determine according to some principle of equality or equality before law. That has to be administered justly, fairly and faithfully without bias or partiality. It also means that delay of justice but equality is the core norm which sustains and upholds justice. It is also the legal criterion for judging a law as good or just law otherwise it would be jungle law or mastsyanyana. Prof. Hart too considers justice as 'a distinct segment of morality' to which the law must conform. He quotes St. Augustine : 'What are States without justice but rubber-bands enlarged? However, justice according to Jethrow Brown means a mere conformity to law. To Rudolf Von Ihering,<sup>104</sup> and Kant law is a scheme to realise justice as something inherent in the very constitution and structure of law. Stammler too maintains that 'all positive law is an attempt to the just law.'

The concept of justice is of imponderable import and has been the watchword of all major social and political reform movements since time immemorial. All social thinkers from Plato to Gandhiji and others have been making supreme endless efforts in quest of justice in order to abolish injustice, tyranny and exploitation. All their energies whether material, mental or moral have been devoted to the sole cause of justice ..... States whether ancient or modern, capitalists or socialists, democratic or authoritarian have been self-proclaiming to be guided and governed by the yard scales of justice and take pride in being styled as a just state with just law and just social order. However, what is 'justice' is an imponderable problem. Justice is generally equated with truthfulness, righteousness, goodness, equality, mercy, charity etc. and all these expressions being relative and vague have been eulogised universally as worthy of emulation and application in the ordering of human relations. However, what constitutes 'justice' at a particular time and place is not definite. The standard of reasonableness, truth, and justice has to be measured necessarily on the basis of such shared values which are common to mankind. Therefore, justice is that makes man to live honestly, not to injure any one and to give every one his due. As such justice is not a mere fantasy but a necessary and desirable goal of law and society. For, Bible says 'Husband justice so that you may garner peace'. 'Blessed' it says : 'are they that hunger and thirst after justice.' It repeats "Justice, Justice, shalt thou pursue.' Moreover, the need for providing justice to poor and rich, weak and powerful alike, is not a modern problem alone.<sup>105</sup> People of all ages and places have never ceased to hope and survive for it. It exhorts<sup>106</sup> : 'Ye shall do no unrighteousness in judgement : thou shalt not respect the person of the poor, nor honour the person of the mighty : but in righteousness shalt thou judge thy neighbour.'

Justice is both an objective reality as well as an abstract quality outside and within the realm of law involving values and reality, ethics and morality, equality and liberty, individual freedom and social control conditioned by the need of individual good and community interest. It is Janus,<sup>107</sup> like concept looking both to past and future conserving and reforming. It is the credo of all societies ancient or modern, capitalists or socialists for both of them the moral issues revolve round justice or injustice—' that is freedom versus bread, liberty versus equality and right versus duty. Of course justice cannot be defined as the interest of the stronger as defined by a Greek thinker Thrasymachu,<sup>108</sup> nor it is a device to eliminate the chasm between 'is' and 'ought' nor it can be a completely senseless idea as described by Lundstedt,<sup>109</sup> or an irrational idea as observed<sup>110</sup> by Hans Kelsen.

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#### **8.4. Various western theories of justice**

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##### **a. Plato**

Plato's masterful *Republic* (to which we have already referred) is most obviously a careful analysis of justice, although the book is far more wide-ranging than that would suggest. Socrates, Plato's teacher and primary spokesman in the dialogue, gets critically involved in a discussion of that very issue with three interlocutors early on. Socrates provokes Cephalus to say something which he spins into the view that justice simply boils down to always telling the truth and repaying one's debts. Socrates easily demolishes this simplistic view with the effective logical technique of a counter-example: if a friend lends you weapons, when he is sane, but then wants them back to do great harm with them, because he has become insane, surely you should not return them at that time and

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should even lie to him, if necessary to prevent great harm. Secondly, Polemarchus, the son of Cephalus, jumps into the discussion, espousing the familiar, traditional view that justice is all about giving people what is their due. But the problem with this bromide is that of determining who deserves what. Polemarchus may reflect the cultural influence of the Sophists, in specifying that it depends on whether people are our friends, deserving good from us, or foes, deserving harm. It takes more effort for Socrates to destroy this conventional theory, but he proceeds in stages: (1) we are all fallible regarding who are true friends, as opposed to true enemies, so that appearance versus reality makes it difficult to say how we should treat people; (2) it seems at least as significant whether people are good or bad as whether they are our friends or our foes; and (3) it is not at all clear that justice should excuse, let alone require, our deliberately harming anyone (*Republic*, pp. 5-11; 331b-335e). If the first inadequate theory of justice was too simplistic, this second one was downright dangerous. The third, and final, inadequate account presented here is that of the Sophist Thrasymachus. He roars into the discussion, expressing his contempt for all the poppycock produced thus far and boldly asserting that justice is relative to whatever is advantageous to the stronger people (what we sometimes call the “might makes right” theory). But who are the “stronger” people? Thrasymachus cannot mean physically stronger, for then inferior humans would be superior to finer folks like them. He clarifies his idea that he is referring to politically powerful people in leadership positions. But, next, even the strongest leaders are sometimes mistaken about what is to their own advantage, raising the question of whether people ought to do what leaders suppose is to their own advantage or only what actually is so. (Had Thrasymachus phrased this in terms of what serves the interest of society itself, the same appearance versus reality distinction would apply.) But, beyond this, Socrates rejects the exploitation model of leadership, which sees political superiors as properly exploiting inferiors (Thrasymachus uses the example of

a shepherd fattening up and protecting his flock of sheep for his own selfish gain), substituting a service model in its place (his example is of the good medical doctor, who practices his craft primarily for the welfare of patients). So, now, if anything like this is to be accepted as our model for interpersonal relations, then Thrasymachus embraces the “injustice” of self-interest as better than serving the interests of others in the name of “justice.” Well, then, how are we to interpret whether the life of justice or that of injustice is better? Socrates suggests three criteria for judgment: which is the smarter, which is the more secure, and which is the happier way of life; he argues that the just life is better on all three counts. Thus, by the end of the first book, it looks as if Socrates has trounced all three of these inadequate views of justice, although he himself claims to be dissatisfied because we have only shown what justice is not, with no persuasive account of its actual nature (ibid., pp. 14-21, 25-31; 338c-345b, 349c-354c). Likewise, in *Gorgias*, Plato has Callicles espouse the view that, whatever conventions might seem to dictate, natural justice dictates that superior people should rule over and derive greater benefits than inferior people, that society artificially levels people because of a bias in favor of equality. Socrates is then made to criticize this theory by analyzing what sort of superiority would be relevant and then arguing that Callicles is erroneously advocating *in*justice, a false value, rather than the genuine one of true justice (*Gorgias*, pp. 52-66; 482d-493c; see, also, *Laws*, pp. 100-101, 172; 663, 714 for another articulation of something like Thrasymachus’ position). In the second book of Plato’s *Republic*, his brothers, Glaucon and Adeimantus, take over the role of primary interlocutors. They quickly make it clear that they are not satisfied with Socrates’ defense of justice. Glaucon reminds us that there are three different sorts of goods—intrinsic ones, such as joy, merely instrumental ones, such as money-making, and ones that are both instrumentally and intrinsically valuable, such as health—in order to ask which type of good is justice. Socrates responds that justice belongs in the third category, rendering it the richest sort of good. In

that case, Glaucon protests, Socrates has failed to prove his point. If his debate with Thrasymachus accomplished anything at all, it nevertheless did not establish any intrinsic value in justice. So Glaucon will play devil's advocate and resurrect the Sophist position, in order to challenge Socrates to refute it in its strongest form. He proposes to do this in three steps: first, he will argue that justice is merely a conventional compromise (between harming others with impunity and being their helpless victims), agreed to by people for their own selfish good and socially enforced (this is a crude version of what will later become the social contract theory of justice in Hobbes); second, he illustrates our allegedly natural selfish preference for being unjust if we can get away with it by the haunting story of the ring of Gyges, which provides its wearer with the power to become invisible at will and, thus, to get away with the most wicked of injustices—to which temptation everyone would, sooner or later, rationally succumb; and, third, he tries to show that it is better to live unjustly than justly if one can by contrasting the unjust person whom everyone thinks just with the just person who is thought to be unjust, claiming that, of course, it would be better to be the former than the latter. Almost as soon as Glaucon finishes, his brother Adeimantus jumps in to add two more points to the case against justice: first, parents instruct their children to behave justly not because it is good in itself but merely because it tends to pay off for them; and, secondly, religious teachings are ineffective in encouraging us to avoid injustice because the gods will punish it and to pursue justice because the gods will reward it, since the gods may not even exist or, if they do, they may well not care about us or, if they are concerned about human behavior, they can be flattered with prayers and bribed with sacrifices to let us get away with wrongdoing (*Republic*, pp. 33-42; 357b-366e). So the challenge for Socrates posed by Plato's brothers is to show the true nature of justice and that it is intrinsically valuable rather than only desirable for its contingent consequences.

In defending justice against this Sophist critique, Plato has Socrates construct his own positive theory. This is set up by means of an analogy comparing justice, on the large scale, as it applies to society, and on a smaller scale, as it applies to an individual soul. Thus justice is seen as an essential virtue of both a good political state and a good personal character. The strategy hinges on the idea that the state is like the individual writ large—each comprising three main parts such that it is crucial how they are interrelated—and that analyzing justice on the large scale will facilitate our doing so on the smaller one. In Book IV, after cobbling together his blueprint of the ideal republic, Socrates asks Glaucon where justice is to be found, but they agree they will have to search for it together. They agree that, if they have succeeded in establishing the foundations of a “completely good” society, it would have to comprise four pivotal virtues: wisdom, courage, temperance, and justice. If they can properly identify the other three of those four, whatever remains that is essential to a completely good society must be justice. Wisdom is held to be prudent judgment among leaders; courage is the quality in defenders or protectors whereby they remain steadfast in their convictions and commitments in the face of fear; and temperance (or moderation) is the virtue to be found in all three classes of citizens, but especially in the producers, allowing them all to agree harmoniously that the leaders should lead and everyone else follow. So now, by this process-of-elimination analysis, whatever is left that is essential to a “completely good” society will allegedly be justice. It then turns out that “justice is doing one’s own work and not meddling with what isn’t one’s own.” So the positive side of socio-political justice is each person doing the tasks assigned to him or her; the negative side is not interfering with others doing their appointed tasks. Now we move from this macro-level of political society to the psychological micro-level of an individual soul, pressing the analogy mentioned above. Plato has Socrates present an argument designed to show that reason in the soul, corresponding to the leaders or “guardians” of the state, is different from both the

appetites, corresponding to the productive class, and the spirited part of the soul, corresponding to the state's defenders or "auxiliaries" and that the appetites are different from spirit. Having established the parallel between the three classes of the state and the three parts of the soul, the analogy suggests that a "completely good" soul would also have to have the same four pivotal virtues. A good soul is wise, in having good judgment whereby reason rules; it is courageous in that its spirited part is ready, willing, and able to fight for its convictions in the face of fear; and it is temperate or moderate, harmoniously integrated because all of its parts, especially its dangerous appetitive desires, agree that it should be always under the command of reason. And, again, what is left that is essential is justice, whereby each part of the soul does the work intended by nature, none of them interfering with the functioning of any other parts. We are also told in passing that, corresponding to these four pivotal virtues of the moral life, there are four pivotal vices, foolishness, cowardice, self-indulgence, and injustice. One crucial question remains unanswered: can we show that justice, thus understood, is better than injustice in itself and not merely for its likely consequences? The answer is that, of course, we can because justice is the health of the soul. Just as health is intrinsically and not just instrumentally good, so is justice; injustice is a disease—bad and to be avoided even if it isn't yet having any undesirable consequences, even if nobody is aware of it (ibid., pp. 43, 102-121; 368d, 427d-445b; it can readily be inferred that this conception of justice is non-egalitarian; but, to see this point made explicitly, see *Laws*, pp. 229-230; 756-757). Now let us quickly see how Plato applies this theory of justice to a particular social issue, before briefly considering the theory critically. In a remarkably progressive passage in Book V of his *Republic*, Plato argues for equal opportunity for women. He holds that, even though women tend to be physically weaker than men, this should not prove an insuperable barrier to their being educated for the same socio-political functions as men, including those of the top echelons of

leadership responsibility. While the body has a gender, it is the soul that is virtuous or vicious. Despite their different roles in procreation, child-bearing, giving birth, and nursing babies, there is no reason, in principle, why a woman should not be as intelligent and virtuous—including as just—as men, if properly trained. As much as possible, men and women should share the workload in common (*Republic*, pp. 125-131; 451d-457d). We should note, however, that the rationale is the common good of the community rather than any appeal to what we might consider women's rights. Nevertheless, many of us today are sympathetic to this application of justice in support of a view that would not become popular for another two millennia. What of Plato's theory of justice itself? The negative part of it—his critique of inadequate views of justice—is a masterful series of arguments against attempts to reduce justice to a couple of simplistic rules (Cephalus), to treating people merely in accord with how we feel about them (Polemarchus), and to the power-politics mentality of exploiting them for our own selfish purposes (Thrasymachus). All of these views of a just person or society introduce the sort of relativism and/or subjectivism we have identified with the Sophists. Thus, in refuting them, Plato, in effect, is refuting the Sophists. However, after the big buildup, the positive part—what he himself maintains justice is—turns out to be a letdown. His conception of justice reduces it to order. While some objective sense of order is relevant to justice, this does not adequately capture the idea of respecting all persons, individually and collectively, as free rational agents. The analogy between the state and the soul is far too fragile to support the claim that they must agree in each having three "parts." The process-of-elimination approach to determining the nature of justice only works if those four virtues exhaust the list of what is essential here. But do they? What, for example, of the Christian virtue of love or the secular virtue of benevolence? Finally, the argument from analogy, showing that justice must be intrinsically, and not merely instrumentally, valuable (because it is like the combination good of health) proves, on critical

consideration, to fail. Plato's theory is far more impressive than the impressionistic view of the Sophists; and it would prove extremely influential in advocating justice as an objective, disinterested value. Nevertheless, one cannot help hoping that a more cogent theory might yet be developed.

### **b. Aristotle**

After working with Plato at his Academy for a couple of decades, Aristotle was understandably most influenced by his teacher, also adopting, for example, a virtue theory of ethics. Yet part of Aristotle's greatness stems from his capacity for critical appropriation, and he became arguably Plato's most able critic as well as his most famous follower in wanting to develop a credible alternative to Sophism. Book V of his great *Nicomachean Ethics* deals in considerable depth with the moral and political virtue of justice. It begins vacuously enough with the circular claim that it is the condition that renders us just agents inclined to desire and practice justice. But his analysis soon becomes more illuminating when he specifies it in terms of what is lawful and fair. What is in accordance with the law of a state is thought to be conducive to the common good and/or to that of its rulers. In general, citizens should obey such law in order to be just. The problem is that civil law can itself be unjust in the sense of being unfair to some, so that we need to consider special justice as a function of fairness. He analyzes this into two sorts: distributive justice involves dividing benefits and burdens fairly among members of a community, while corrective justice requires us, in some circumstances, to try to restore a fair balance in interpersonal relations where it has been lost. If a member of a community has been unfairly benefited or burdened with more or less than is deserved in the way of social distributions, then corrective justice can be required, as, for example, by a court of law. Notice that Aristotle is no more an egalitarian than Plato was—while a sort of social reciprocity may be needed, it must be of a

proportional sort rather than equal. Like all moral virtues, for Aristotle, justice is a rational mean between bad extremes. Proportional equality or equity involves the “intermediate” position between someone’s unfairly getting “less” than is deserved and unfairly getting “more” at another’s expense. The “mean” of justice lies between the vices of getting too much and getting too little, relative to what one deserves, these being two opposite types of injustice, one of “disproportionate excess,” the other of disproportionate “deficiency” (*Nicomachean*, pp. 67-74, 76; 1129a-1132b, 1134a). Political justice, of both the lawful and the fair sort, is held to apply only to those who are citizens of a political community (a *polis*) by virtue of being “free and either proportionately or numerically equal,” those whose interpersonal relations are governed by the rule of law, for law is a prerequisite of political justice and injustice. But, since individuals tend to be selfishly biased, the law should be a product of reason rather than of particular rulers. Aristotle is prepared to distinguish between what is naturally just and unjust, on the one hand, such as whom one may legitimately kill, and what is merely conventionally just or unjust, on the other, such as a particular system of taxation for some particular society. But the Sophists are wrong to suggest that all political justice is the artificial result of legal convention and to discount all universal natural justice (*ibid.*, pp. 77-78; 1134a-1135a; cf. *Rhetoric*, pp. 105-106; 1374a-b). What is allegedly at stake here is our developing a moral virtue that is essential to the well-being of society, as well as to the flourishing of any human being. Another valuable dimension of Aristotle’s discussion here is his treatment of the relationship between justice and decency, for sometimes following the letter of the law would violate fairness or reasonable equity. A decent person might selfishly benefit from being a stickler regarding following the law exactly but decide to take less or give more for the sake of the common good. In this way, decency can correct the limitations of the law and represents a higher form of justice (*Nicomachean*, pp. 83-84; 1137a-1138a).



In his *Politics*, Aristotle further considers political justice and its relation to equality. We can admit that the former involves the latter but must carefully specify by maintaining that justice involves equality “not for everyone, only *for equals*.” He agrees with Plato that political democracy is intrinsically unjust because, by its very nature, it tries to treat unequals as if they were equals. Justice rather requires *inequality* for people who are *unequal*. But, then, oligarchy is also intrinsically unjust insofar as it involves treating equals as unequal because of some contingent disparity, of birth, wealth, etc. Rather, those in a just political society who contribute the most to the common good will receive a larger share, because they thus exhibit more political virtue, than those who are inferior in that respect; it would be simply wrong, from the perspective of political justice, for them to receive equal shares. Thus political justice must be viewed as a function of the common good of a community. It is the attempt to specify the equality or inequality among people, he admits, that constitutes a key “problem” of “political philosophy.” He thinks we can all readily agree that political justice requires “proportional” rather than numerical equality. But inferiors have a vested interest in thinking that those who are equal in some respect should be equal in all respects, while superiors are biased, in the opposite direction, to imagine that those who are unequal in some way should be unequal in all ways. Thus, for instance, those who are equally citizens are not necessarily equal in political virtue, and those who are financially richer are not necessarily morally or mentally superior. What is relevant here is “equality is according to merit,” though Aristotle cannot precisely specify what, exactly, counts as merit, for how much it must count, who is to measure it, and by what standard. All he can suggest, for example in some of his comments on the desirable aristocratic government, is that it must involve moral and intellectual virtue (*Politics*, pp. 79, 81, 86, 134, 136, 151, 153; 1280a, 1281a, 1282b, 1301a-1302a, 1307a, 1308a).

Let us now consider how Aristotle applies his own theory of justice to the social problem of alleged superiors and inferiors, before attempting a brief critique of that theory. While Plato accepted slavery as a legitimate social institution but argued for equal opportunity for women, in his *Politics*, Aristotle accepts sexual inequality while actively defending slavery. Anyone who is inferior intellectually and morally is properly socio-politically inferior in a well-ordered *polis*. A human being can be naturally autonomous or not, “a natural slave” being defective in rationality and morality, and thus naturally fit to belong to a superior; such a human can rightly be regarded as “a piece of property,” or another person’s “tool for action.” Given natural human inequality, it is allegedly inappropriate that all should rule or share in ruling. Aristotle holds that some are marked as superior and fit to rule from birth, while others are inferior and marked from birth to be ruled by others. This supposedly applies not only to ethnic groups, but also to the genders, and he unequivocally asserts that males are “naturally superior” and females “naturally inferior,” the former being fit to rule and the latter to be ruled. The claim is that it is naturally better for women themselves that they be ruled by men, as it is better for “natural slaves” that they should be ruled by those who are “naturally free.” Now Aristotle does argue only for natural slavery. It was the custom (notice the distinction, used here, between custom and nature) in antiquity to make slaves of conquered enemies who become prisoners of war. But Aristotle (like Plato) believes that Greeks are born for free and rational self-rule, unlike non-Greeks (“barbarians”), who are naturally inferior and incapable of it. So the fact that a human being is defeated or captured is no assurance that he is fit for slavery, as an unjust war may have been imposed on a nobler society by a more primitive one. While granting that Greeks and non-Greeks, as well as men and women, are all truly human, Aristotle justifies the alleged inequality among them based on what he calls the “deliberative” capacity of their rational souls. The natural slave’s rational soul supposedly lacks this, a woman has it but it

lacks the authority for her to be autonomous, a (free male) child has it in some developmental stage, and a naturally superior free male has it developed and available for governance (ibid., pp. 7-11, 23; 1254a-1255a, 1260a). This application creates a helpful path to a critique of Aristotle's theory of justice. If we feel that it is unjust to discriminate against people merely on account of their gender and/or ethnic origin, as philosophers, we try to identify the rational root of the problem. If our moral intuitions are correct against Aristotle (and some would even call his views here sexist and racist), he may be mistaken about a matter of fact or about a value judgment or both. Surely he is wrong about all women and non-Greeks, as such, being essentially inferior to Greek males in relevant ways, for cultural history has demonstrated that, when given opportunities, women and non-Greeks have shown themselves to be significantly equal. But it appears that Aristotle may also have been wrong in leaping from the factual claim of inequality to the value judgment that it is therefore right that inferiors ought to be socially, legally, politically, and economically subordinate—like Plato and others of his culture (for which he is an apologist here), Aristotle seems to have no conception of human rights as such. Like Plato, he is arguing for an objective theory of personal and social justice as a preferable alternative to the relativistic one of the Sophists. Even though there is something attractive about Aristotle's empirical (as opposed to Plato's idealistic) approach to justice, it condemns him to the dubious position of needing to derive claims about how things ought to be from factual claims about the way things actually are. It also leaves Aristotle with little viable means of establishing a universal perspective that will respect the equal dignity of all humans, as such. Thus his theory, like Plato's, fails adequately to respect all persons as free, rational agents. They were so focused on the ways in which people are *unequal*, that they could not appreciate any fundamental moral equality that might provide a platform for natural human rights.

**Stammler's Principles of Justice**

Stammler classifies the principles of justice into two categories, namely, the principles of respect and the principles of participation. The first category has to do with respect for human person, while the second has to do with means of existence.

**The principles of respect are :**

1. The will of one person must not be made subject to the arbitrary will of another.
2. Every legal demand can only be maintained in so far as the person obligated can still remain his own neighbour.

**The principles of participation are:**

1. No member of a legal community shall be arbitrarily excluded from it.
2. Every power of disposing can be exclusive only to the extent that the person excluded can still remain his own neighbour.

To remain one's own neighbour means in the first context, to maintain one's human dignity, and, in the second context, to be able to maintain his existence as a human being. As justice involves manifold ideals and principles its forms are also chaotic such as, legal justice, natural justice, moral justice social justice, political justice, democratic justice, totalitarian justice, racial justice, distributive justice, cumulative justice, personal justice and public justice. These divisions are not exhaustive but merely illustrative and are mentioned only to emphasise the problem in understanding the nature and content of justice. Similarly, various theories have been propounded to explain the genesis or nature of justice. For instance, J.S. Mill remarks :

‘Justice implies something which is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right. No one has a moral right to our generosity or beneficence because we are not morally bound to practise those virtues towards any given individual.’

Thus, utilitarian philosophers like Hume and Bentham consider utility—the greatest good of the greatest number—as the sole origin of justice. However, the utilitarian thinkers overlook the interest of the individual who should also receive his due as his interests are not accommodated by the theory of utility. Hence, John Rawls contractual theory comes in recognition to the claims of individual with his right to dignity and inviolability of person founded on justice which even the welfare state cannot over-ride.

### **The Contractual Theory of Justice—John Rawls**

As already stressed John Rawls contractual theory of justice merged to remedy to deficiencies of utilitarianism. He sums up his dissatisfaction with utilitarianism as he observes:<sup>111</sup>

‘If then we believe that as a matter of principle each member of the society, has an inviolability founded on justice which even the welfare of every one else cannot override, and that a loss of freedom for some is not made right by a greater sum of satisfactions enjoyed by many we shall have to look for another account of principles of justice.’ Indeed John Rawls contractual theory of justice is a recognition that utilitarianism cannot accommodate the firm conviction that ‘each person possesses an inviolability founded on justice that even the welfare of society as whole cannot override.’ To replace utilitarian concept Rawls proposes the general conception of justice<sup>112</sup>:

‘All social primary goods—liberty and opportunity, income and wealth, and the bases of self respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured. To be more precise, Rawls’ concept of justice is expressed in the following two principles<sup>113</sup>:

1. Each person is to have an equal right to the most extensive basic liberty for others.
2. Social and economic inequalities are to be arranged so that they are both—
  - i. to the greatest benefit of the least advantaged, and
  - ii. attached to the offices and positions open to all under condition of fair equality of opportunity.

### **Hans Kelsen—Justice irrational ideal**

Like John Austin and other positivists Hans Kelsen too wanted to free law from social sciences which had widened the boundaries of jurisprudence. To him a theory of law must be free from ethics, politics, sociology, history etc., it must be in other words ‘pure’ (rein). He, therefore, attempted to insulate the positive law from every kind of natural law, justice and ideology. Pure theory of law is a theory of positive law which endeavours to answer the question, what is the law? But not the question, what ought to be law? Justice connotes an absolute value. Its content cannot be ascertained by Pure Theory of Law. However, to Kelsen most questions of justice pertain to the domain of ethics and religion which are unanalysable. Hence, he observes<sup>114</sup>:

To determine whether this or that order is 'just' is not possible. Justice is an irrational ideal. It is not viable by reason? But Kelsen would not deny the weighing of factors as a worthwhile moral exercise. He remarks,<sup>115</sup> "The view that moral principles constitute only relative values does not mean that they constitute no value at all, it means that there is no moral system, but that there are several different ones, and that, consequently, a choice must be made among them. Thus relativism imposes upon the individual the difficult task of deciding for himself what is right or what is wrong. Thus, of course, implies a very serious responsibility, the most serious moral responsibility a man can assume. If men were too weak to bear this responsibility, they shift it to an authority above them, and in the last instance to God.'

### **Hart's Positivism—Theory of Justice**

Professor Hart too has rejected the traditional imperative theory of law like a gunman backed by threats being inadequate and unjust. Instead he defines law as a union of primary and secondary rules thereby making morality or justice as a necessary component of law via rule of recognition. Hart is aware that sometimes cases arise that are not fully covered by any law. This is due in large measure to what he calls the 'open texture of law' the 'penumbral' areas in every rule of law where it is not clear what the rule requires or whether it applies at all in borderline cases. In such situations or cases Hart says judges have limited discretion or freedom to decide to look outside the law for standards to guide them in supplementing old legal rules or creating new ones according to their own individual or community's ideal of morality or justice. In short, justice is a complex and dynamic concept which was well-known to Plato and Aristotle and evidently remains the goal of contemporary and even of future communities—a 'just man' a 'just law' and a 'just government'. It would be unwise to structure social ordering backed

by coercive legal action and that would be unfair, arbitrary and unjust. However, therefore, is the quality of justice which can be achieved by reason and wisdom by giving equal access to all to seek justice as of right without delay or denial in conformity to the laws. Krishna Iyer J. rightly observes<sup>116</sup>: ‘Law is a means to an end and justice is that end. Law and justice are distant neighbours, sometimes even strange hostiles. If law shoots justice the people shoot down law and lawlessness paralyses development, disrupt order and retards progress.’

### **Perception of Justice—Major strands**

Justice is the ideal which has been the undying craze of Kings and commoners, philosophers and poets, saints and statesmen social reformers and thinker’s, judges and jurists for establishing a humane society founded on liberty and equality, universal harmony and peace. The pursuit of justice is a fascinating exercise which directly or indirectly contain within it the whole plethora of jurisprudence and the panoramic insights of world’s philosophy and religions. Like the modern Constitutions the codes of ancient people vividly reflect their commitment of justice. The great King of Babylon Hammurabi (2124-2083 B.C.) proclaimed ‘to establish justice in the world to destroy the bad and the evil, to stop the strong exploiting the weak, to develop knowledge and welfare of the people.’ The Code of Manu constructed between 200 B.C. and A.D. 200 the first legal code of Hindus enshrines both philosophy of life and of law with special stress on morality, danda (punishment) and justice. With regard to justice Manu declares: ‘Justice being violated, destroys; justice being preserved, preserves; therefore, justice must not be violated lest violated justice destroys us.

Gautama Siddhartha (563-483 B.C.) propounds his Eight-fold path,<sup>117</sup> to lay down the foundations of a just society. The Chinese



sage Confucius also envisaged certain moral virtues to be followed by the king and his subject in order to established good government necessary for justice. The Western philosophers like Plato, Aristotle, Ulpian etc. expounded with great distinction the meaning, concept and philosophy of justice and have analysed the close relation between law and justice. The modern thinkers, jurists and philosophers too have speculated on the idea of justice, the ends of law and the means to secure justice. To sum up like the story of God the story of justice is a continuous and a never ending exercise for it being the foundation of moral-cum-legal and social ordering. For what is law but the enforcement of justice amongst men. Therefore, an attempt is made herein to unveil some of the major strands of justice as conceived by different philosophers and thinkers in different periods, cultures and civilisations.

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## 8.8 SUMMARY

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Justice is the ideal which has been the undying craze of Kings and commoners, philosophers and poets, saints and statesmen social reformers and thinker's, judges and jurists for establishing a humane society founded on liberty and equality, universal harmony and peace. The pursuit of justice is a fascinating exercise which directly or indirectly contains within it the whole plethora of jurisprudence and the panoramic insights of world's philosophy and religions.

In this unit we have discussed about the concept of justice in the western thought.

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## 8.10 SUGGESTED READINGS/REFERENCE MATERIAL

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<sup>1</sup> Future of Common Law

<sup>1</sup> Quoted by Iyer VR Krishna, of Law and Life 79 Vikas Publishing House, 1979.

<sup>1</sup> Pratap, Subhas, International Workshop on Human Rights AIR Journal 113 at 114 August 1992.

<sup>1</sup> Quoted by Ranganath Mishra C.J. in All India Judges Association v. Union of India, AIR 1992 SC 165 at 177.

<sup>1</sup> Deshpande, M.S. Light of India—Message of Maliatma, 172 Wilco Pub. House 1950.

<sup>1</sup> Iyer, VR Krishna, Human Rights and the Law, Vedpal Law House, 1994.

<sup>1</sup> Sen-Gupta, NC, Evolution of Ancient Indian Law, 336 Calcutta, 1954.

<sup>1</sup> Julius Stone, Human Law and Human Justice, 22.

<sup>1</sup> Hart, HLA, The Concept of Law, 152-53 :1972.

<sup>1</sup> Wu, John CH, Cases and Materials on Jurisprudence, 482, West Publishing Co. 1958.

<sup>1</sup> Ibid.

<sup>1</sup> It is a mythological God of the Greeks having two opposite faces so that he could look in opposite directions at the same time.

<sup>1</sup> Bodenheimer, Edgar, Jurisprudence, 178,1951.

<sup>1</sup> 50 Law. Q. Rev. 474; W. Bishin & CD Stone, Law, Language and Ethics 39 New York 1952.

<sup>1</sup> Quoted from Miller, David, Social Justice, 40,1976.

<sup>1</sup> Ibid., 40-41.

<sup>1</sup> Rawls, John, A Theory of Justice, 303 Oxford 1972.

<sup>1</sup> Pure Theory of Law, 50 L.Q.R. 474 at 482.

<sup>1</sup> What is Justice? 22 (1971).

<sup>1</sup> All India Judges' Association v. Union of India, AIR 1992 SC 165 at 176.

<sup>1</sup> e.g. Right views; Right aspirations; Right speech; Right conduct, Right livelihood. Right effort, Right mindfulness and Right contemplation.

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### 8.11 SELF ASSESSMENT QUESTIONS

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1. What do you understand by the concept of justice?
2. Describe various theories of justice in the western thought?

**LL.M. Part-2**

**Subject: JUDICIAL PROCESS**

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**Block-III-** The Concepts of Justice

**Unit-9-** Various theoretical bases of justice: the liberal contractual tradition, the liberal; utilitarian tradition and the liberal moral tradition

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**STRUCTURE**

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**9.1 INTRODUCTION**

**9.2 OBJECTIVES**

**9.3 Various theoretical basis of Justice**

**9.4. The liberal Contractual tradition**

**9.5 The liberal Utilitarian tradition**

**9.6 Liberal Moral tradition**

**9.7 SUMMARY**

**9.8 SUGGESTED READINGS/REFERENCE MATERIAL**

**9.9 SELF ASSESSMENT QUESTIONS**

**9.1 INTRODUCTION**

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In the previous unit you have read about the concept of justice in the western thought. The Roman concept of justice is at variance with Greek—the former being legalistic than philosophical. Romans identified law and justice and viewed justice as the goal or law and society. The Roman notion of justice as set-forth in Justinian's Corpus Juris is based on Ulpian's definition who in turn derived the meaning of justice from Cicero. According to Ulpian 'Justice is the constant and perpetual will, to render every one his due'. That is, justice is giving to each man what is proper to him. In fact, 'what is due' to each person (sum cuique) was not laid down in fixed terms and being relative was to change from time to time according to requirements of different states. In this unit we will discuss about various theoretical bases of justice: the liberal contractual tradition, the liberal; utilitarian tradition and the liberal moral tradition.

**9.2 OBJECTIVES**

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After reading this unit you will be able to:

- ✓ Understand Various theoretical bases of justice
- ✓ Understand the liberal contractual tradition, the liberal; utilitarian tradition and the liberal moral tradition

**9.3 Various theoretical basis of Justice**

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**GREEK AND INDIAN VIEW OF JUSTICE**

Plato's philosopher king as guardian of citizens' liberty freedom and moral order is an exercise in justice. In fact Plato Republic is generally believed to be a discussion on justice. He rejects the legalistic view that 'justice is the giving to each man what is proper to

him'. To Plato, justice is harmony of man's in life or with body politic. Harmony, according to Plato, is the quality of justice and it is to be achieved by reason and wisdom presiding over desires and keeping them in place with indispensable aid of temperance and courage.

### **Problem of Justice—Aristotle**

A more realistic analysis and interpretation of justice is found in Aristotle which has been subsequently followed by St. Thomas Aquinas and Del Vecchio in his work on Justice. For Aristotle in his Nicomachean Ethics, justice,<sup>118</sup> is 'a moral state' : '...that in virtue of which the just man is said to be a doer, by choice, of that which is just'. Or again,<sup>119</sup> a 'state of character which makes people dispose to do what is just and makes them act justly and wish for what just'. In functional legal sense justice according to him consists in 'some sort of equality'. It consists in establishing proportionate equality both on need and Merit basis. It is not merely a particular virtue but an imperative requisite for welfare of the State. He enunciated the doctrine of justice as giving equal share to equal persons and unequal share to unequal persons. What he meant by this is that benefits and responsibilities should be proportionate to worth and ability of those who receive them. As Aristotle puts it 'if flutes are to be disturbed, they should go only to those who have a capacity for flute playing and similarly a share in ruling should be given only to those who are capable of rule'. It follows geometrical proportion i.e. sharing of benefits and profits on the basis of comparative merit or worth.

### **Distributive and Corrective Justice**

Aristotle in his Nicomachean Ethics divides justice according to law into two kinds—distributive and corrective. In modern legal language they are respectively understood as social justice and penal or

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<sup>118</sup> The Words of Aristotle by W.D. Ross (1954) Vol. IX, p. 1134.

<sup>119</sup> Ibid., p. 106.

criminal justice. Distributive justice deals with distribution of honour or money or other things and corrective justice is that which deals with maintenance of status quo by protecting the things wrongfully taken and restoring the goods to individual so wronged. Thus what he calls distributive justice is 'equal things should be given to equal persons and unequal things to unequal persons'. Distributive justice as such is based on worth, merit or ability. The other type of justice in Aristotelian sense is corrective justice (or remedial or cumulative justice) which requires the restoration of things of one person owes to another, the reparation of loss caused to another and restitution in cases of unjust enrichment. It follows arithmetical proportion i.e. sharing of profits or losses or injury on equal basis. Thus, arithmetical equality gives equal share to all alike irrespective of worth. In the language of Aristotle it gives equal shares both to equals and unequals or to echo Jeremy Bentham, it says that 'every body is to count for one, nobody for more than one'. Aristotle regards this as mistaken principle which he would replace to geometrical proportionate equality by treating equals alike and not discriminating between them on any ground as they are placed on the same footing.

### **Roman Concept of Justice**

The Roman concept of justice is at variance with Greek—the former being legalistic than philosophical. Romans identified law and justice and viewed justice as the goal or law and society. The Roman notion of justice as set-forth in Justinian's Corpus Juris is based on Ulpian's definition who in turn derived the meaning of justice from Cicero. According to Ulpian 'Justice is the constant and perpetual will, to render every one his due'. That is, justice is giving to each man what is proper to him. In fact, 'what is due' to each person (sum cuique) was not laid down in fixed terms and being relative was to change from time to time according to requirements of different states.

### **Christian Era : Notion of Justice**

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Ulpian's definition of justice was followed in the Christian era during the middle ages. Justice was regarded at all times as a quality of will and purpose. But it was not until the rise of the Church fathers that justice became to be identified with the will of God. St. Augustine thought that there can be no justice if it is not based upon Christian law of God as well as the law of nature. It was this absolute standard which St. Augustine provided for measuring justice or injustice. However, it was St. Thomas Aquinas who modified the medieval concept of justice and once again founded justice both on Aristotelian and Ciceroian principles by emphasising that law is an expression of human reason for the purpose of achieving justice. All human laws which are contrary to reason are unjust and have no force. Therefore, according to St. Thomas, the judge in seeking to do justice many times has to look beyond the written law to equity which the legislator desired to attain. St. Thomas had departed from the Churchmen who had identified law as an expression of justice based on Christian God. He, thereby, secularised law and justice which he founded upon reason.

### **Utilitarian Concept of Justice**

According to Utilitarian thinkers like Hume, Bentham and James Mill the problem of common good and general interest is also an important aspect of justice. Justice is defined by them with reference to the principle of 'the greatest good of greatest number.' Public utility as such is the sole origin, justification and criteria of justice. The above Hedonistic Calculus became the major standard during the nineteenth and twentieth centuries and even in the twenty-first century for determining the contours of justice including egalitarian or social justice. The notion of 'purpose' or 'end' of justice the arch-point of utility is similar to Plato's idea of justice to promote goodness, virtues, pleasures and to avoid sin, evil, pain and unhappiness. Such a view of utility is morally good which ought to be pursued as the supreme end of life and law.

**Justice—Gandhian Theory**

Gandhi's life is a saga of fighting injustice, tyranny and inequality in order to establish a new socio-economic order based on truth, equality and non-exploitation. He fought racialism in South Africa and imperial British rulers in India because both of these evils were contrary to the principles of human liberty, dignity and equality. His crusade for the liberation of oppressed classes in India is the testimony of his commitment to equality and social justice. In short, he was against all kinds of unjust social, economic and political order. He believed in the supremacy of ethical values and Sarvodaya (the good of all) which inculcates the virtues of truth, love and justice towards all human beings. The roots of justice and truth originate from the Yajurveda which says:

'Isavasyamidam Sarva Yat Kimchit jagatyam jagat

**Tena tyaktena bhunjitha, ma gradha Kasyasvid dhanam?**

'It means God pervades this moving world and all the changing phenomena. So enjoy it by renouncing it and covet not anybody's wealth.' Adhering to such philosophy of human equality and justice for all, Gandhi spiritualised politics, economic and social philosophy and advocated socialism by wise renunciation of wealth. He subscribed to the Marxian formula 'to each according to his needs,' to be translated by love and not violence, by persuasion and not by coercion. He would not allow coercion or sanction to make people good. His theory of  $\hat{\text{I}}^{\text{ffft}} \text{TfIT}$ : (or goods of all beings) is opposed to Marxian theory of class-struggle, Benthamite theory of greatest good of the greatest number. Like Plato's Republic Gandhi believed in Ramrajya—or the Kingdom of Righteousness on earth. Hence, non-co-operation with evil and passive resistance to injustice and unjust social and political order is the cardinal feature of Gandhian justice. Non-Co-operation and passive-resistance are the means in



Gandhian scheme for establishing liberty and justice for the exploited oppressed mankind.

To Gandhi the ancient Hindu law giver Manu was great sinner whose legal philosophy polluted the Hindu mind in regard to position of women and Harijans ignoring the basic tenets of Hindu social thoughts of equality and human dignity. The just cause of women and Harijans was very dear to him and he fought for their mukti (emancipation). According to Gandhi,<sup>120</sup>: 'Untouchability, as it is practised in Hinduism today is, in my opinion, a sin against God and man and is, therefore, like poison slowly eating into the very vitals of Hinduism. In my opinion, it has no sanction whatsoever in Hindu Shastras taken as a whole'. In short, Gandhi's mission in life was a mission for justice— to seek justice for all the weak, the poor and the oppressed — be it labour, women, or untouchables. His crusade against cowslaughter, prohibition, child marriage etc. has been solely guided to secure justice, equality and dignity to millions of Indians who had been denied justice for centuries. He rightly remarks he is one who is experimenting the use of soul force for battling with the wrong and misery in this world. 'My soul refuses to be satisfied', says Gandhi,<sup>121</sup> 'so long as it is a helpless witness of a single wrong. I know that I shall never know God if I do not wrestle with and against evil, even at the cost of life itself. My mission, therefore, is to teach by example and precept the use of matchless weapon of Satyagraha. We may use this weapon in any sphere of life and to get redress of any grievance. The weapon purifies one who uses it, as against whom it is used.'

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#### **9.4. The liberal Contractual tradition**

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##### ***Contractual Theory of Justice***

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In the fifteenth and sixteenth centuries because of religious wars and political uncertainty led to resurgence of Reformation and Renaissance culminating in the natural rights and freedoms of individuals as well as of States. This new political philosophy was ushered by Jean Bodin and Thomas Hobbes who in their search for justice enunciated the doctrine that Justice is the keeping of covenants'. Law during this period became an expression of people's agreement or contract or will and had their approbation in the form of varying social contracts entered into to achieve justice. Rousseau declared that justice could be found only in the State in which political authority rests upon the force of opinion which is really public and general. The theories of social contract and their modus operandi are made to seek justice and to maintain order and peace in society.

### **Human Liberty—An aspect of Justice**

Herbert Spencer and Immanuel Kant linked the ideal of justice with human freedom and liberty. Spencer described the essence of justice in his celebrated doctrine 'every man is free to do that which he wills provide he infringes not the equal freedom of any other man'. To him expansion of individual liberty and sanctity of contract were necessary concomitants of justice. Kant also preferred liberty in place of equality for determining the matrix of justice. He interpreted justice in terms conformity with Categorical Imperative—i.e. Act in such a way that the maxim of your action can be made the maxim of an universal law general action.' Rudolf Stammler carried further the Kantian idea of justice which according to him is possible within a community of free willing individuals conditioned by place and time. Hence, ideal of justice varies with timer and place. Stammler classifies the principles of justice into two categories—the principles of respect and the principles of participation. The first category has to do with respect for human person, while the second has to do with means of existence. It is in this spirit that the framers of the

Constitution of U.S.A. understood the concept of justice. The authors of Federalist declared 'Justice is the end of government and it is the end of civil society'. The realisation of justice involves the ceaseless task of subordinating the selfish interest of each part of the people to the common and permanent interests of the whole society. While initially the framers of the Constitution thought that the core problem of achieving justice is the preservation of human liberty it is only in the subsequent period that maintenance of equality and preservation of liberty have become indispensable requirements for achieving true justice.

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## **9.5 The liberal Utilitarian tradition**

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### **(1) Utilitarianism**

A society, according to Utilitarianism, is just to the extent that its laws and institutions are such as to promote the greatest overall or average happiness of its members. How do we determine the aggregate, or overall, happiness of the members of a society? This would seem to present a real problem. For happiness is not, like temperature or weight, directly measurable by any means that we have available. So utilitarians must approach the matter indirectly. They will have to rely on indirect measures, in other words. What would these be, and how can they be identified? The traditional idea at this point is to rely upon (a) a theory of the human good (i.e., of what is good for human beings, of what is required for them to flourish) and (b) an account of the social conditions and forms of organization essential to the realization of that good. People, of course, do not agree on what kind of life would be the most desirable. Intellectuals, artists, ministers, politicians, corporate bureaucrats, financiers, soldiers, athletes, salespersons, workers: all these different types of people, and more besides, will certainly not agree completely on what is a happy, satisfying, or desirable life. Very likely they will disagree on some quite important points.

All is not lost, however. For there may yet be substantial agreement-enough, anyway, for the purposes of a theory of justice --about the general conditions requisite to human flourishing in all these otherwise disparate kinds of life. First of all there are at minimum certain basic needs that must be satisfied in any desirable kind of life. Basic needs, says James Sterba, are those needs "that must be satisfied in order not to seriously endanger a person's mental or physical well-being." Basic needs, if not satisfied, lead to lacks and deficiencies with respect to a standard of mental and physical well-being. A person's needs for food, shelter, medical care, protection, companionship, and self-development are, at least in part, needs of this sort. [Sterba, *Contemporary Social and Political Philosophy* (Belmont, CA: Wadsworth Publishing Co., 1995). A basic-needs minimum, then, is the minimum wherewithal required for a person to meet his or her basic needs. Such needs are universal. People will be alike in having such needs, however much they diverge in regard to the other needs, desires, or ends that they may have. We may develop this common ground further by resorting to some of Aristotle's ideas on this question of the nature of a happy and satisfying life. Aristotle holds that humans are rational beings and that a human life is essentially rational activity, by which he means that human beings live their lives by making choices on the basis of reasons and then acting on those choices. All reasoning about what to do proceeds from premises relating to the agent's beliefs and desires. Desire is the motive for action and the practical syllogism (Aristotle's label for the reasoning by which people decide what to do) is its translation into choice. Your choices are dictated by your beliefs and desires--provided you are rational. Such choices, the reasoning that leads to them, and the actions that result from them are what Aristotle chiefly means by the sort of rational activity that makes up a human life. We may fairly sum up this point of view by saying that people are "rational end-choosers."

If Aristotle is at all on the right track, then it is clear that a basic-needs minimum is a prerequisite to any desirable kind of life, and further that to live a desirable kind of life a person must be free to determine his or her own ends and have the wherewithal--the means, the opportunities--to have a realistic chance of achieving those ends. (Some of these Aristotelian points are perhaps implicitly included in Sterba's list of basic needs, under the head of self-development.) So what does all this do for Utilitarianism? Quite a lot. We have filled in some of item (a) above: the theory of the human good, the general conditions essential to a happy or desirable life. The Utilitarian may plausibly claim to be trying to promote the overall happiness of people in his society, therefore, when he tries to improve such things as rate of employment, per capita income, distribution of wealth and opportunity, the amount of leisure, general availability and level of education, poverty rates, social mobility, and the like. The justification for thinking these things relevant should be pretty plain. They are measures of the amount and the distribution of the means and opportunities by which people can realize their various conception of a desirable life. With these things clearly in mind the Utilitarian is in a position to argue about item (b), the sorts of social arrangements that will deliver the means and opportunities for people to achieve their conception of a desirable life. John Stuart Mill, one of the three most important 19th century Utilitarians (the other two were Jeremy Bentham and Henry Sidgwick), argued that freedom or liberty, both political and economic, were indispensable requisites for happiness. Basing his view upon much the same interpretation of human beings and human life as Aristotle, Mill argued that democracy and the basic political liberties--freedom of speech (and the press), of assembly, of worship--were essential to the happiness of rational end-choosers; for without them they would be prevented from effectively pursuing their own conception of a good and satisfying life. Similarly he argued that some degree of economic prosperity--wealth--was indispensable to having a realistic chance of living such a life, of realizing one's ends.

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So, according to Utilitarianism, the just society should be so organized in its institutions--its government, its laws, and its economy--that as many people as possible shall have the means and opportunity to achieve their chosen conception of a desirable life. To reform the institutions of one's society toward this goal, in the utilitarian view, is to pursue greater justice. Some of the institutions that utilitarians have championed over the years are:

(1) A public education system open to all and funded by public money, i.e., taxes.

(2) A competitive, "free" market economy. In the 19th century utilitarians often argued for a laissez faire capitalist economy. More recently some of them have argued for a "mixed" economy, i.e., a state regulated market system. Mill, interestingly, argued at the beginning of the 19th century for an unregulated capitalist economy, but at the end argued for a socialist economy (which is not the same thing as a "mixed economy").

(3) The protection of the sorts of liberties that were guaranteed in the United States by the Bill of Rights in our Constitution.

(4) Democratic forms of government generally.

The utilitarian rationale for each of these institutional arrangements should be fairly obvious, but it would probably contribute significantly to our understanding of utilitarianism to review, in more detail, some utilitarian arguments for (2) "free" market capitalism. This we shall do later, in the next section. What do you think a Utilitarian would say about universal medical care? Would he or she be for it or against it? What about affirmative action programs, anti-hate crime legislation, welfare, a graduated income tax, anti-trust laws? For or against? What would decide the issue for a utilitarian?

(2) Utilitarianism and Competitive Capitalism The key claim about market capitalism for the utilitarian is that free, unregulated markets efficiently allocate resources--chiefly labor and capital--in the production of goods.

By a market is meant only any pattern of economic activity in which buyers do business with sellers. In the classical system of economics competition is presupposed among producers or sellers. Toward the end of the nineteenth century writers began to make explicit...that competition required that there be a considerable number of sellers in any trade or industry in informed communication with each other. In more recent times this has been crystallized into the notion of many sellers doing business with many buyers. Each is well informed as to the prices at which others are selling and buying--there is a going price of which everyone is aware. Most important of all, no buyer or seller is large enough to control or exercise an appreciable influence on the common price. The notion of efficiency as applied to an economic system is many-sided. It can be viewed merely as a matter of getting the most for the least....There is also the problem of getting the particular things that are wanted by the community in the particular amounts in which they are wanted. In addition, if an economy is to be efficient some reasonably full use must be made of the available, or at least the willing, labor supply. There must be some satisfactory allocation of resources between present and future production--between what is produced for consumption and what is invested in new plant and processes to enlarge future consumption. There must also be appropriate incentive to change; the adoption of new and more efficient methods of production must be encouraged. Finally--a somewhat different requirement and one that went long unrecognized--there must be adequate provision for the research and technological development which brings new methods and new products into existence. All this makes a large bill of requirements.

The peculiar fascination of the competitive model was that, given its particular form of competition--that of many sellers, none of whom was large enough to influence the price--all the requirements for efficiency, with the exception of the very last, were met. No producer...could gain additional revenue for himself by raising or otherwise manipulating his price. This opportunity was denied to him

by the kind of competition which was assumed, the competition of producers no one of whom was large enough in relation to all to influence the common price. He could gain an advantage only by reducing costs. Were there even a few ambitious men in the business he would have to do so to survive, for if he neglected his opportunities others would seize them. If there are already many in a business it can be assumed that there is no serious bar to others entering it. Given an opportunity for improving efficiency of production, those who seized it, and the imitators they would attract from within and without [the industry in question], would expand production and lower prices. The rest, to survive at these lower prices, would have to conform to the best and most efficient practices. In such a manner a Darwinian struggle for business survival concentrated all energies on the reduction of costs and prices. In this model, producer effort and consumer wants were also effectively related by the price that no producer and no consumer controlled or influenced. The price that would just compensate some producer for added labor, or justify some other cost, was also the one which it was just worth the while of some consumer to pay for the product in question. Any diminution in consumer desire for the item would be impersonally communicated through lower price to producers. By no longer paying for marginal labor or other productive resources the consumer would free these resources for other employment on more wanted products. Thus energies were also efficiently concentrated on producing what was most desired. When the taste of the consumer waned for one product it waxed for another; the higher price for the second product communicated to the producers in that industry the information that they could profitably expand their production and employment. They took in the slack that had been created in the first industry. [John Kenneth Galbraith, in *American Capitalism*, Revised Edition (Cambridge, MA: Houghton-Mifflin Company, 1956), pp. 14, 17, 18, 19]



I have quoted this at length because of the clarity, compactness, and absence of technicalities in its explanation of the role of competition in classical economic theory. For purposes of argument I shall now extract some of the salient points from these passages.

The kind of competition in question here, "pure competition," exists in a market if and only if it meets the following conditions:

(1) There are sufficient numbers of buyers and sellers so that no single firm by itself can affect the prices it pays suppliers or the prices it charges its buyers, regardless of how much or little it produces.

(2) There are no entry or exit barriers to the market, i.e., the market is one into which new firms can move with ease and out of which unsuccessful firms can easily exit.

(3) The outputs or products of the firms competing in the market are undifferentiated.

When pure competition exists in a market, when, that is, the market meets conditions (1)-(3), then the following important consequences will follow:

(4) Resources--chiefly capital and labor--will be efficiently employed: they will be used to produce goods at the lowest possible prices, and there will be adequate incentive for producers to do this and to seek more efficient (cheaper) methods of production.

(5) Resources will be efficiently allocated: the "particular things that are wanted by the community" will be provided "in the particular amounts in which they are wanted." For, again, producers have adequate incentives to accommodate to consumer demand.

(6) Reasonably full employment for all willing workers will be maintained.

It should be clear why an economy of pure competition would recommend itself to utilitarians. Such a form of economic organization would provide the goods that consumers wanted, at the prices at which consumers were willing to pay for them, and in the quantities in which they were wanted; and in doing so it would create the needed employment for all willing workers. It would do so

because it provided adequate pecuniary incentives to producers to accommodate consumer preferences. The competition among producers for greater profit would--"as if by an invisible hand," Adam Smith said--bring about a situation that was good for the society in general, and not just for the individual producers.

### (3) Objections to the Utilitarian Argument for Unregulated Competition

It should be noted that the conditions (1)-(3) for pure competition are an idealization. They have rarely been jointly met in fact. But where they are not all realized, it cannot be argued that the operation of the market is guaranteed to yield the beneficent consequences (4)-(6). Writing in the mid-nineteen fifties, Galbraith noted that "in the production of motor vehicles, agricultural machinery, rubber tires, cigarettes, aluminum, liquor, meat products, copper, tin containers and office machinery the largest three firms in 1947 did two thirds or more of all business" (ibid., p. 39). For other products, "steel, glass industrial chemicals, and dairy products, the largest six accounted for two thirds" (ibid.). The situation has changed somewhat over the intervening half century; you would not find the same list of firms at the top of these industries now as then. There have been mergers and buyouts, and international competition has increased. But the basic fact of a few large firms dominating the market has not changed in these industries.

When there is great consolidation within an industry, condition (1) is obviously violated: there will no longer be sufficiently many sellers doing business with sufficiently many sellers. But condition (2) typically is no longer satisfied either. Very large firms in an industry will have been able to take advantage of economies of scale; production, to be competitive, will have to proceed on a comparable scale. Thus there will be very high start-up costs--a considerable barrier to the entry of new firms into the industry. The few giants that dominate the industry will have some control over the quantity of production and hence over prices.

All this is easy to see in the extreme case: the case of monopoly, of one firm in the industry. The monopolist has no competitors, a condition that could not last for long if there were not significant barriers to the entry of new firms. Without competition the monopolist will have considerable control over the quantity of production and hence over his prices. Indeed he can be expected, so far as he is able, to decide on the quantity of production by determining at what quantity he can achieve the maximum profit. This is quite different from the case of pure competition in which no producer has control over his prices. For in that case the market sets them, by the laws of supply and demand. If the firms currently in the industry cannot meet demand or cannot meet it fast enough, prices will sharply rise. This will attract new firms to the market; supply will thus increase and prices decrease. Prices will eventually stabilize when, roughly, the costs of expanding production are no longer covered by the going price. A word should be said about condition (3): product differentiation, or rather the lack thereof. In one of the standard textbook examples the product is corn, the producers the corn growers. The product is undifferentiated; that is, the identity of the producer, the grower, is not discernible or identifiable from the product itself. It is therefore not a determinant of consumer preference or therefore price (though modern salesmanship, specifically advertising, has striven to make at least some of the characteristics of the producer relevant to price even for agricultural products). At the opposite extreme, where it has been for some time, is the market for automobiles. Product differentiation is very advanced in this case. Different makes and models of automobiles have long been important to consumer behavior. For some luxury cars the identity of the producing firm (e.g., Rolls Royce) has, all by itself, an appeal--a snob appeal--that significantly affects consumer preference. Something similar holds for clothing. In its effects on the economists' efforts to create a general theory of price product differentiation is a tremendous complication; it brings in a host of further motives, besides price, for consumer demand. To my

knowledge there is no sound general theory of price determination for products that are differentiated. It remains an open area of research. The significance of product differentiation for the utilitarian argument in favor of competitive markets is that with product differentiation there is no guarantee that competition in such markets will drive down prices or lead to technical improvements in production. Competition is more apt to drive producers to diversify or develop their line of products. And here we reach the threshold of another problem for the utilitarian argument; namely, that firms in such markets cannot always be plausibly regarded as producing in response to prior, or independently existing, consumer demand. Rather they sometimes are more plausibly regarded as attempting, through advertising and salesmanship, to create consumer demand. For the utilitarian, if not for the ordinary economist, this raises questions about the urgency or importance of the consumer demand that firms seek to satisfy. For it is no longer a demand that exists independently of the process of production itself. Firms would appear, in the relevant cases, to be endeavoring to satisfy demands that they themselves have to some extent created and that would not exist independently of their efforts. Now a new question can arise as to the desirability of that demand. If the demand is no longer a given, we may wonder whether it might not be better if there were no such demand. Perhaps it would be better if, instead of trying to stimulate demand for the products, we devoted our resources to other ends. These objections merely touch on much larger issues about the nature of the modern economy, which in its main parts does not fit the classical picture.

#### (4) Problems for Utilitarianism

The objections, just reviewed, to the Utilitarian Argument in favor of competitive markets are not objections to Utilitarianism itself. They reveal no fault in Utilitarianism but only with a certain argument that presupposes Utilitarianism. The fault revealed is in the argument's assumption that the modern economy consists of markets in which there is pure competition. I want now to consider an objection to

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Utilitarianism itself as a theory of justice. Utilitarians look at the means or opportunities available to people to achieve the kinds of lives they find desirable. Let us introduce the term "utility" for all of the things--such as income--that people might desire for the pursuit of their happiness. What the utilitarian aims at directly, then, is an overall increase of utility or utilities. The utilitarian looks to increase the average utility, i.e., the aggregate amount of utility created in the society, divided by the number of people in the society. The utilitarian thinks a just society should seek to maximize average utility in order to promote the happiness of its members or at least to enable its members, with increasing success, to achieve their own happiness.

But this way of evaluating forms of social organization is arguably defective because it may lead to unjust institutional arrangements. John Rawls famously stated the objection in his *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 23-4, as follows: there is...a way of thinking of society which makes it very easy to suppose that the most rational conception of justice is utilitarian. For consider: each man in realizing his own interests is certainly free to balance his own losses against his own gains. We may impose a sacrifice on ourselves now for the sake of a greater advantage later. A person quite properly acts, at least when others are not affected, to achieve his own greatest good, to advance his rational ends as far as possible. Now why should not a society act on precisely the same principle applied to the group and therefore regard that [decision-making procedure] which is rational for one man as right for an association of men? Just as the well-being of a person is constructed from the series of satisfactions that are experienced at different moments in the course of his life, so in very much the same way the well-being of society is to be constructed from the fulfillment of the systems of desires of the many individuals who belong to it. Since the principle for an individual is to advance as far as possible his own welfare, his own system of desires, the principle for society is to advance as far as possible the welfare of

the group, to realize to the greatest extent the comprehensive system of desire arrived at from the desires of its members. Just as an individual balances present and future gains against present and future losses, so a society may balance satisfactions and dissatisfactions between different individuals. And so by these reflections one reaches the principle of utility in a natural way: a society is properly arranged when its institutions maximize the net balance of satisfaction. Notice the critical difference, pointed out by Rawls, between the cases of an individual and of a social group attempting to maximize their welfare. In the case of an individual it will always be the same person who experiences both the losses and the gains. In the case of the social group it may not be the same people who experience both the losses and the gains. Some may experience the losses and others the gains, or the losses may fall disproportionately on some and the gains go disproportionately to others. Thus, Rawls argues, questions of fairness or justice arise in the case of the social group that do not arise in the case of the single individual, and utilitarianism is unprepared to address these. The problem, as Rawls puts it, is that Utilitarianism does not properly recognize "the separateness of persons"--the fact that the losses and gains may be experienced by separate--and hence different--persons. The striking feature of the utilitarian view of justice is that it does not matter, except indirectly, how this sum of satisfactions is distributed among individuals any more than it matters, except indirectly, how one man distributes his satisfactions over time. The correct distribution in either case is that which yields the maximum fulfillment. Society must allocate its means of satisfaction whatever these are, rights and duties, opportunities and privileges, and various forms of wealth, so as to achieve this maximum if it can....Thus there is no reason in principle why the greater gains of some should not compensate for the lesser losses of others or more importantly, why the violation of the liberty of a few might not be made right by the greater good shared by many....For just as it is rational for one man to maximize the fulfillment of his system of

desires, it is right for a society to maximize the net balance of satisfaction taken over all its members. [Ibid., p. 26.] It should be becoming clearer what the problem here is. There are two aspects to the problem. First, Utilitarianism, in the light of Rawls's objection, may appear to permit or, in some circumstances, even require that a society adopt unfair, exploitative forms of organization to promote its overall welfare, the average utility. If the welfare or happiness can be maximized by a form of social organization in which some few are exploited--if no other form of social organization can produce greater overall welfare or happiness--then adoption of the exploitative form of organization would be justified according to Utilitarianism.

To this most utilitarians respond that "under most conditions, at least in a reasonably advanced stage of civilization, the greatest sum of advantages is not attained in this way," i.e., by exploitation. This may or may not be so. The second aspect of the problem raised by Rawls has to do with the inappropriateness of the kinds of arguments by which Utilitarians reject various discriminatory or exploitative forms of social organization. The utilitarians reject such forms of organization, as we have just seen, on the ground that they don't in fact succeed in maximizing the happiness or welfare of the social group. But what if they did succeed in maximizing the happiness or welfare of the social group? Would that show that they really were just? Rawls argues that it clearly would not. Consider the institution of slavery, which is as clearly unjust as an institution can be. It is never an excuse or justification for slavery, Rawls says, "that it is sufficiently advantageous to the slaveholder to outweigh the disadvantages to the slave and to society. A person who argues in this way is not perhaps making a wildly irrelevant remark; but he is guilty of a moral fallacy" (Rawls, "Justice as Reciprocity," reprinted in *Great Traditions in Ethics*, Ninth Edition, edited by Theodore C. Denise et. al. (Belmont, CA: Wadsworth Publishing Co., 1999), p. 342). But Utilitarianism, Rawls points out, "permits one to argue that slavery is unjust on the grounds that the advantages to the slaveholder as slaveholder do not counterbalance the disadvantages

to the slave and to society at large, burdened by a comparatively inefficient system of labor." And in fact this is the only way that the Utilitarian may argue that slavery is unjust. For the utilitarian conception of justice "implies that judging the justice of a practice is always, in principle at least, a matter of weighing up advantages and disadvantages....[So] utilitarianism cannot account for...the fact that it would be recognized as irrelevant in defeating the accusation of [slavery's] injustice for [the slaveholder] to say to [the slave]...that nevertheless [slavery] allowed of the greatest [general, overall] satisfaction of desire. The charge of injustice cannot be rebutted in this way." (Ibid., pp. 340, 341. Rebutting the charge of injustice in this way is what Rawls earlier characterized as a moral fallacy.)

Let's attempt to summarize the arguments against Utilitarianism. The first argument goes as follows. (1) Utilitarianism implies that a society is just if it is so organized that the overall or average happiness or well-being of its members is maximized. (2) A society so organized can nevertheless be unjust or unfair. Therefore (3) Utilitarianism is incorrect as a theory of social justice. This is the main line of argument against Utilitarianism as a theory of social justice. Much of our discussion of Rawls was in support of premise (2). We saw that Utilitarianism, with its aggregative conception of the welfare of the social group, would permit the average happiness or well-being of the social group to be increased by (what independently seemed to be) unfair trade-offs between the interests of its members. There is another argument against Utilitarianism that emerged from our discussion of Rawls. This is as follows. (1\*) Utilitarianism implies that the justice of a form of social organization is a function of the efficiency with which the overall or average happiness of the social group is promoted by that form of organization. But (2\*) the justice of a form of organization is not a function solely of the efficiency with which that form of organization promotes the well-being of the social group; other considerations, left out by Utilitarianism, are relevant. Therefore (3\*) Utilitarianism provides an incorrect account of the nature of social justice.



Again much of our discussion was in support of the second premise. We saw that exploitative forms of social organization cannot be shown to be just by being shown to maximize the average well-being of the members of the social group that has adopted them.

These are important criticisms of Utilitarianism as a theory of social justice. They show that it is seriously flawed.

#### (5) A Final Note about Utilitarians and a Suggested Revision

Historically Utilitarians were no friends or supporters of slavery and were often strenuous advocates for greater democracy in the organization of society. Jeremy Bentham, in particular, actively opposed the institution of slavery in England and also advocated prison reforms. Mill was a notable defender of freedom of speech. He also supported the expansion of suffrage and late in his life became, like Henry Sidgwick (another Utilitarian), an advocate of Women's rights. And these are only some of the pro-democratic positions taken by Utilitarians.

The objections to Utilitarianism are not, then, objections to the Utilitarians themselves or to the positions they adopted on particular issues. The objections aim rather to show inadequacies in the underlying Utilitarian conception of justice as a function of efficiency in promoting overall happiness.

Convinced of the inadequacy of the Utilitarian conception of justice, one might still feel some attraction to Utilitarianism and wonder whether some sort of revision of the position might not save it from the criticisms we have made of it. I now consider one revision, as follows: A society is just to the extent that "all social values--liberty and opportunity, income and wealth...--are distributed equally except where an unequal distribution of any, or all, of these values works to everyone's advantage." ((Quoted material is from Rawls, A Theory of Justice, p. 62.) What are here spoken of as social values are the very things that earlier we called the means and opportunities--the shares of utility--required for a desirable kind of life. So what this revision says is that, while a society should aim to promote the overall happiness of its members by increasing its stock of "social

values," it cannot do so by means of trade-offs that improve the lot of some people at the expense of others. As the principle clearly says, inequalities in the distribution of social values are permissible only when everyone somehow benefits from the unequal distribution. As a society acts to increase the shares of utility available to its members, it is allowable that some should possess larger shares of utility than others, but this will be allowable only if everyone is made better off by the arrangement permitting the inequalities than they would be under the arrangement that did not permit them. Thus the objectionable sorts of trade-offs allowed by our original formulation of Utilitarianism would be blocked. So far all this has been at a rather lofty level, and you might be wishing for an example of a form of social organization which permits inequalities that work to everyone's advantage. Again capitalism has had its supporter as a form of economic organization that, to provide adequate incentives to producers, must allow substantial income inequalities in the form of higher profits to successful entrepreneurs. The profit motive, it is argued, is essential to the working of the capitalist system. Without it the system would not yield the beneficial consequences (4)-(6) mentioned in section (2) above, but with the profit motive operative in the system the general level of material prosperity would be increased well above where it would be in a system that did not permit such inequalities. Some would do much better than others under such an economic system--there would be inequality in wealth--but all would do better than they would if the economic inequalities required as incentives to producers were not operative. The notion of fairness that recommends the revised formulation of Utilitarianism over its initial formulation is yet without adequate support or motivation from anything within Utilitarianism itself. Indeed it seems a quite alien addition to Utilitarianism, which, as we saw, takes justice to be a function solely of a kind of efficiency. This fact forces a question: Though it may be a superior position, does the revised formulation amount to an abandonment of Utilitarianism itself in favor of some hybrid position?

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**9.6 Liberal Moral tradition**

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**Egalitarian Justice—Sociological Aspect**

The Kantian and Utilitarian concept of justice had cumulative impact on Dean Pound and other American contemporary legal thinkers who also propounded the theory of distributive justice within the framework of law, legal ideals and values. They did not see any confrontation or contradiction between law and justice and envisaged that distributive or egalitarian justice can also be realised on the principle of community's or public interest through the instrumentality of law and due process of law. It is the ideal of distributive justice which sustains law in its application to social ordering or human engineering. Human freedom, individual liberty, dignity and social equality are synthesized through law with an over-emphasis on law to secure the interests of personality, possession and transactions by balancing the individual interests with those of community interests from the point of the community rather than that of individual. It is in this respect that Justice Holmes observed that law must be interpreted in terms of 'felt necessities of people' in order to achieve justice. Other realists focus on the importance of functional approach of law to realise social justice. Of course, justice is not a matter of a slot machine. It is the duty of the judges to rationalise justice in such a manner that individual remains a free full man without being exploited or exploiting and justice whether legal or distributive is readily available to every one so that people are not forced to seek justice in the streets and not in the courts.

Another aspect of egalitarian justice is procedural justice which consists in employing correct methods to develop rules of conduct to ascertain facts into final dispositive judgment. A body of well established rules of procedural justice called by other name as natural justice consists of rules to justify the confidence of the general public in what is called justice not only done but seem to be done. The doctrine of bias is wide enough to ensure unbiased justice

leaving little or no chance at all to interested or arbitrary or high handed justice. In fact, reform in these as well as reforms in judicial mechanism has gone a long way in democratic countries to assume fair play, impartiality and equality to the individuals vis-a-vis groups, associations, government and State. It is the dependability on such rules, of general public interest which is the only guarantee in the realisation of both procedural and substantive justice. The spirit of procedural justice is embodied in two principles of audi alteram partem (hear the other side) and suum cuique tribuere (give every man his due). In short, procedural justice forms the integral part of substantive justice—the latter being the concept and former the form constitute the core of the concept of justice in all democratic and egalitarian societies committed to both rule of law and social justice.

### **Communist Justice**

The basic proposition of communist theory is that economic forces determine the character of law and that it is not the result of free activity of legislators, judges and jurists. The material conditions of production determine the social conditions which find expression in laws, religion, justice, metaphysics, etc. of the people. Hence, the conception of justice in the communist society is conditioned by forces which bring about equality 'from each according to his ability, to each according to his needs'. The communist theory combines two principles in explaining the idea of justice, namely, 'to each according to his ability', and 'to each according to his needs'. Thus, 'merit' and 'needs' principles do not contradict each other but strive in establishing a practical equality which does not ignore merit yet satisfies the needs irrespective of capacity or work. In other words, individual's merit or desert gets recognition yet his needs are also taken care. Hence, 'every man according to his needs' can be summed up as justice in the communist sense. Marx and Engels, therefore, allowed no place to 'justice' which is solely based on 'rights' or 'natural law' which according to them is a mere mark of

capitalist exploitation and hypocrisy. According to them main defects of capitalist system of justice are that capitalist system itself being 'unjust' it cannot abolish or reduce inequalities or maldistribution of goods and it further diverts the exploited forces—the workers from the path of revolution. So both Marx and Engels ridiculed the idea of 'justice' in their examination and analysis of economic rules. At best for both of them there can be no idea of justice without equality i.e. economic equality without which justice would be a myth. The Soviet jurists do not employ the term 'justice' as a concept of juristic value and instead use the phrase 'socialist legality'. The term 'socialist legality' connotes the establishment of a classless society based on the principles of real equality, non-exploitation, ownership of the means of production in the hands of the State, etc. The function of law and courts in the communist society is to defend and further the interest of the working class and promote the progress of the socialist society what is described as 'social legality' is anti-thesis of capitalist justice which aims at reconciling interests- of the rich and poor, strong and weak on false legal equality in so far as economically and socially weak sections of society are concerned and treats the rich and the poor by the same scale. In short, Soviet concept of justice is a historical concept which relates to the idea about morality or immorality, the good and the bad, the just and the unjust judges on the matrix of economic determinism and not deduced from the so-called eternal principles of reason or human nature.

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## 9.8 SUMMARY

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A society, according to Utilitarianism, is just to the extent that its laws and institutions are such as to promote the greatest overall or average happiness of its members. How do we determine the aggregate, or overall, happiness of the members of a society? This would seem to present a real problem. For happiness is not, like temperature or weight, directly measurable by any means that we

have available. So utilitarian's must approach the matter indirectly. They will have to rely on indirect measures, in other words. What would these be, and how can they be identified? In this unit we have discussed about various theoretical bases of justice: the liberal contractual tradition, the liberal; utilitarian tradition and the liberal moral tradition.

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**9.10 SUGGESTED READINGS/REFERENCE MATERIAL**

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<sup>1</sup> The Words of Aristotle by W.D. Ross (1954) Vol. IX, p. 1134.

<sup>1</sup> Ibid., p. 106.

<sup>1</sup> In Search of the Supreme, p. 149 (Vol. III Navjivan Publication, 1962).

<sup>1</sup> Deshpande, M.S., Light of India—Message of the Mahatma, p. 34 (1950)

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**9.11 SELF ASSESSMENT QUESTIONS**

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1. What do you understand by theoretical bases of justice?
2. Discuss various theoretical bases of justice?
3. Describe the liberal contractual tradition, the liberal; utilitarian tradition and the liberal moral tradition?

**LL.M. Part-2**

**Subject: JUDICIAL PROCESS**

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**Block-IV**-Relation between Law and Justice

**Unit-10-** Equivalence Theories - Justice as nothing more than the positive law of the stronger class

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**STRUCTURE**

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**10.1 INTRODUCTION**

**1.02 OBJECTIVES**

**10.3 What is the Relation between law and Justice?**

**10.4. Equivalence theories of law and justice**

**10.5 Justice as positive law of stronger class**

**10.6 SUMMARY**

**10.7 SUGGESTED READINGS/REFERENCE MATERIAL**

**10.8 SELF ASSESSMENT QUESTIONS**

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**10.1 INTRODUCTION**

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In the previous unit you have read about various theoretical bases of justice: the liberal contractual tradition, the liberal; utilitarian tradition and the liberal moral tradition. Justice is the concept of moral rightness based on ethics, rationality, law, natural law, fairness, religion and/or equity. Justice is the result of the fair and proper administration of law. It is the quality of being just; in conformity to truth and reality in expressing opinions and in conduct; honesty; fidelity; impartiality or just treatment; fair representation of facts respecting merit or demerit. In this unit we will discuss about the Equivalence Theories - Justice as nothing more than the positive law of the stronger class.

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**10.2 OBJECTIVES**

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**After reading this unit you will be able to:**

- ✓ Discuss what is the Relation between law and Justice?
- ✓ Understand the concept of Equivalence Theories of law and justice.
- ✓ Describe Justice as positive law of the stronger class.

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**10.3 What is the Relation between law and Justice?**

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The system of **law** is a set of rules of conduct of any organized society that are enforced by threat of punishment if they are violated. **Justice** is the concept of moral rightness based on ethics, rationality, law, natural law, fairness, religion and/or equity. Justice is the result of the fair and proper administration of law. It is the quality of being just; in conformity to truth and reality in expressing opinions and in conduct; honesty; fidelity; impartiality or just treatment; fair representation of facts respecting merit or demerit.



**Distributive justice**

Thomas Aquinas said that a just law was one that served the common good, distributed burdens fairly, promoted religion, and was within the lawmaker's authority. However, what are "the common good" and a "fair distribution of burdens" and what is the position of religious values in a secular legal system? Later philosophers have developed the concept of Distributive Justice has produced other theories of justice.

**Utilitarianism**

Utilitarianism as a theory of justice is based on a principle of utility, approving every action that increases human happiness (by increasing pleasure and/or decreasing pain, those being the two "sovereign masters" of man) and disapproving every action that diminishes it. A utilitarian view is that justice should seek to create the greatest happiness of the greatest number. A law is just if it results in a net gain in happiness, even at the expense of minorities. The problem here is that minorities may not form part of the "greater number". This is a particular problem in a pluralist society. Utilitarianism still plays a major part in the democratic decision-making process; it is a secular theory requiring no reference to any natural rights or other abstract religious principles defensible only by faith. The idea of maximising the total happiness of the community is often applied on a national political level and in ordinary dealings among friends. In marginal cases; the theory breaks down and produces results far removed from those that most people would consider right. In an Economic Theory of Justice, there is conflict between the views of the individual and the collective view, sometimes referred to as the, social contract. Such conflict can be seen by asking how a doctor with £100,000 to spend should chose between 100 patients with a minor condition; he can treat all of them, or 1 very sick person who would take all his resources. There is no legal requirement that the National Health Service distributes its assets evenly. This can produce results that anger the majority, who respond emotionally; the case of Child B produced national

anger, fuelled by newspaper reports. Jaymee Bowen (Child B) has come to epitomise the dilemmas involved in making tragic choices in health care. When 11 year-old Jaymee needed life-saving cancer treatment for the third time, the hospital refused funding in **R v Cambridge Heath Authority ex parte B [1995] CA** the Court of Appeal upheld the hospital's decision. Medical advice that Jaymee had only a 2.5 per cent chance of survival was basically that the £75,000 it would cost to carry on her treatment would be wasted and could be put to better use for others. An anonymous benefactor stepped in and paid for Jaymee to receive the treatment privately, she died 16 months later. T S Eliot famously remarked, "Human kind cannot take very much reality".

### **Harm principle**

Jeremy Bentham and John Stuart Mill believed that the law should not interfere with private actions unless they caused harm to others. JS Mill writing in "On Liberty" said that private acts of immorality increase the pleasure of those who indulge in them and cause little pain to others. Their net effect is to increase the sum of human happiness and laws prohibiting them would be unjust.

The idea that wealth should be distributed evenly denies the possibility that individuals will be stimulated to improve their own income and thereby increasing the wealth available to all. The theory that we all live in a society from which we draw benefits and to which we contribute is called the "social contract". Bentham said that the "social contract" and its claim to natural rights is "nonsense on stilts" that inhibits desirable social changes. Bentham might argue that compelling people to have their babies vaccinated using the MMR vaccine, would be morally preferable than leaving such a decision to the discretion of parents because it would drastically reduce the incidence of measles, mumps and rubella (and their horrible consequences) within the population at large.

### **Liberal-Natural Rights theories**

The Liberal-Natural rights view of justice is measured according to the extent minorities and the most vulnerable are protected. It uses a notion of natural rights, the minimum rights to which all are entitled.

**What are these 'basic rights'?**

Rawls' hypothesis of the 'original position' (see below) gives some guidance on what these basic rights are. It can be argued that this simply returns us to the statement that what is just, is what is fair'?

**Libertarian-market theories**

The libertarian-market view holds that any interference in market distribution of benefits and burdens is an unjust restriction on individual freedom, and that justice should only allow limited intervention to prevent unjust enrichment, by which they mean basically theft and fraud and exploitation. 'What is justice?' is as much a political question as a legal or philosophical one.

**Marx, Perelman, Nozick, Hart and compensation**

In "The Concept of Law", Hart linked the idea of justice with that of morality. Like cases, he said, should be treated alike. This is a common theme in all theories of justice, which has its origins with Aristotle. Aristotle believed that like should be treated alike and unlike treated accordingly. In this case, Aristotle was referring to people of similar class and status, free men should be treated alike, but not treated the same as slaves. A slave was entitled to be treated like any other slave. In less structured societies, it raises the question "what makes cases alike or different?" In terms of sentencing and defences such as insanity, it raises other questions dealt with under "Corrective Justice", below.

**"To each according to..."**

In the Bible (Romans 2), there is reference to "to each according to his works". Marx believed that a communal society would operate under the slogan: "From each according to his ability, to each according to his need." Other Marxists, such as Perelman have developed this idea. To each according to his works/needs/merit/rank/entitlement/means/ etc.

Most people would agree that most of the system of distribution supported by law in the UK is just and leads to just results most of the time. Marxists would disagree; the Marxist perspective is that distributive justice favours capital and therefore works against the interests of the working classes (the proletariat).

### **Rawls and the original position**

American jurist John Rawls in "A Theory of Justice" (1971) analysed law on the basis that a rational person will pay for those things wanted badly enough. His theory rejects utilitarianism, which was based on maximising happiness and constructs a social contract aimed at establishing principles of justice. Free and rational persons concerned to further their own interests adopt principles of justice, which define the basis of their association. His analysis is purely hypothetical. It holds that the concept of the rational choice as one that could help our understanding of what justice might require. In practice, all human beings are born into a particular society with no option.

### **"Veil of ignorance" the original position**

In making the hypothetical choice, Rawls insisted that the individual should operate behind a "veil of ignorance" where they do not know their sex, class, religion or social position or whether they are strong, clever or stupid, the state or period in history in which they exist. Rawls then predicted that any such society would exhibit two essential features. First, people in the original position would agree that each person should have an equal right to certain basic liberties, such as freedom of person, freedom of speech and thought, freedom to participate in government, and freedom to possess property, to the greatest extent compatible with the enjoyment of the same basic liberties by others.

Second, social and economic inequalities, and differences of treatment, would be acceptable only insofar as they were available in principle to anyone, and were for the benefit of the least well off members of the society.

Thus, for example people would agree that doctors should be paid higher than average incomes, because this would encourage able people to qualify as doctors and so benefit everyone in the long run. On 'lifting the veil', anyone could be at the bottom of the social hierarchy. Rawls considers that there are two principles of justice namely; liberty and equality, and they would select liberty over equality. Liberty (ensures an equal right to basic liberties). Equality (economic and social inequalities arranged for the benefit of the least advantaged, and equality of opportunity).

Rawls is criticised for not explaining why liberty would be selected before equality or why natural talents to be treated as collective assets.

### **Nozick and historical entitlement**

To Robert Nozick in "Anarchy State and Utopia" (1974) Justice is based on rights. One of these rights is the right to retain our own property, even against the state. He would claim that we have no obligation to help those worse off unless we had obtained our wealth from them improperly. There could therefore be no question of redistribution of wealth for social purposes. This philosophy heavily influenced the thinking of Margaret Thatcher, who was determined to "Roll back the State". Therefore, Rawls' theory of distributive justice involved interference with the inherent rights of individuals.

### **Justice – does it have boundaries?**

Justice is, perhaps giving people what they are due. In this context, one can ask, "To whom (or what) is justice owed?" Historically, full political equality has expanded slowly for example, recognition of white property owning males, recognition of white females, immigrants, members of minority and ethnic groups, gays and lesbians. What then is the scope of justice? Justice is not only about what courts and legal systems do there are some fundamental philosophical questions that need to be addressed. Are fetuses "persons"? What rights do children have? Can claims of justice be made on behalf of the dead or even on behalf of generations of people as yet unborn (concerning, for example, claims to the

preservation of natural resources)? What is the moral standing of nonhuman animals, whether as whole species or even as individual living creatures?

A further set of problems concerns the significance of geographical boundaries, state boundaries. As UK subjects, we are increasingly challenged to think of ourselves as citizens of Europe and perhaps citizens of the world and not just as subjects of the UK. If we consider, and act on, what others are due, the question of what human beings in other countries are due becomes increasingly important. Are there basic human rights? If so, do such rights require supranational legal institutions to see that they are recognized? Should we be considering these questions in the same legal and philosophical way as we view domestic theories of distributive justice? In particular, in a utilitarian sense, based on Rawls entitlement should justice be concerned with larger community issues, perhaps globally?

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#### **10.4. Equivalence theories of law and justice**

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This chapter provides a summary review of the theories influencing the work for social justice. It is a reflection on the theories and people who have actively worked for social justice, reform, transformation, emancipation and revolution in and out of the academy. There are three important commonalities shared by social justice activists in the social sciences and education: (1) education and research are not neutral; (2) society can be transformed by the engagement of politically conscious persons; and (3) praxis connects liberatory education with social transformation. Social Justice Theoreticians generally focus their research and pedagogical efforts toward the ways in which class, race, gender, sexual orientations and systems of power influence our conceptions of knowledge, the knowing subject, and practices of inquiry and justification. One common aim of engaged inquiry identifies ways in which dominant conceptions and practices of knowledge

systematically disadvantage subordinated groups. Claims of objectivity consistently benefit specific power holder interests. Engaged educators strive to reform these conceptions and practices so that they serve the interests of social justice and social equality. Dominant knowledge practices disadvantage subordinate groups by

- (1) excluding them from inquiry,
- (2) denying them epistemic authority,
- (3) denigrating their cognitive styles and modes of knowledge,
- (4) producing theories that represent them as inferior, deviant, or significant only in the ways they serve elite interests,
- (5) producing theories of social phenomena that render their activities and interests, or power relations, invisible, and
- (6) producing knowledge (science and technology) that is damaging at worst and not useful at best for people in subordinate positions, thus reinforcing subjugation, exploitation and other social hierarchies.

One of the basic problems that social justice theoreticians pose and expose is the manner in which the academy in the USA is a foundational site for the maintenance of social and economic inequalities. That universities were developed historically excluding women, the indigenous, Africans, and the poor is historical fact. In, *Notes Toward an Understanding of Revolutionary Politics Today*, James Petras says that intellectuals, including academics, are sharply divided across generations between those who have in many ways embraced, however critically, 'neo-liberalism' or have prostrated themselves before "the most successful ideology in world history" and its "coherent and systematic vision" and those who have been actively writing, struggling and building alternatives (Petras 2001). Gramsci offered a theoretical paradigm combining the social world and the economic world. He stressed the complexity of social formations as a plurality of conflicts. Politics was assigned a constitutive role in direct relation to ideology as a key prerequisite for political action in so far as it served to 'cement and unify' a "social bloc'. Without this consciousness, there was no action (Martin 2002).

One of the most important and the most complex concepts that Gramsci analyzed, is "hegemony". The concept of hegemony is crucial to Gramsci's theories and to understanding the critique in this study. By 'ideological hegemony' Gramsci means the process whereby a dominant class contrives to retain political power by manipulating public opinion, creating what Gramsci refers to as the 'popular consensus' (Boyce 2003). Through its exploitation of religion, education and elements of popular national culture a ruling class can impose its world-view and have it come to be accepted as common sense (Boyce 2003). So total is the 'hegemony' established by bourgeois society over mind and spirit that it is almost never perceived as such at all. It strikes the mind as 'normality' (reification) (Boyce 2003). To counter this Gramsci proposes an ideological struggle as a vital element in political struggles. In such hegemonic struggles for the minds and hearts of the people, intellectuals clearly have a vital role (Boyce 2003). Gramsci taught that the key index for analyzing a social formation was the interaction of economic relations with cultural, political and ideological practices or the 'historical bloc'. As such, the interconnections between state and economy and society were viewed processionally, as a mutually determined whole (Martin 2002). By emphasizing the configuration of the social formation Gramsci was able to dwell on the points at which the elements of the social were linked. For example Gramsci showed how intellectuals in Italy were engaged in the enterprise of legitimizing the bourgeoisie state's power to the agrarian elite, in other words at the service of or as agents of the bourgeoisie state (Martin 2002). In the same manner that a historical bloc could serve elite interests Gramsci posited that a historical bloc could counter an historical bloc. Revolution was conceived as the gradual formation of the collective will, an intellectual and moral framework that would unite a diverse range of groups and classes through an organic relation between leaders and the praxis of subjects. This was a conception of revolution as issuing from the immanent will of the



people wherein praxis constituted the very process of history itself (Martin 2002).

Gramsci's theory posed that domination by an economic class grows as they successfully embed economic activity (e.g., profit before people) as a universal principle (Martin 2002). He identified how domination was accomplished in conjunction with what he called 'organic crisis' in which the various points of contact between the dominant economic class intersected with other classes, specifically with the help of intellectuals in institutions of education that link the classes in a common identity (e.g., a nation) (Martin 2002). Gramsci believed this same program could be countered using similar methods within the non-dominant classes and groups. Thus a popular identity could be fostered by using organic crisis to link groups with the help of organic intellectuals guiding and guided by vanguard intelligentsia creating a community with a popular identity such as "the party". Using this model would mean building a universalizing identity drawn from the praxis of the proletariat, by which to supplant the bourgeoisie (Martin 2002).

Theoretically and practically, the terms and phrases such as "organic intellectual," and "historical bloc" are Gramscian. Gramsci's organic intellectual is someone whose knowledge is derived through firsthand experience, and whose life-learning is complemented by self education and other alternative forms of learning. The organic intellectual emerges from a social class to speak against the established order in a manner directly connected to the goals of a political movement and a community (Martin 2002).

Gramsci identified how the various cultural and economic structures force and reinforce people's consent to subjugation. Methodologically, Gramsci proposed education as a process of dialogue that would bring the working classes together in projects and organizations politically and would develop a base of worker intellectuals who would inform the intelligentsia of the Vanguard Party. Gramsci advocated reflexivity as a mode for counterhegemonic discourse and identified its importance as

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foundational for cultural revolution (Gramsci 1971). One of Gramsci's insights was about cultural dialogue: Consciousness of a self which is opposed to others, which is differentiated and, once having set itself a goal, can judge facts and events other than in themselves or for themselves but also in so far as they tend to drive history forward or backward. To know oneself means to be oneself, to be master of oneself, to distinguish oneself, to free oneself from a state of chaos, to exist as an element of order-but of one's own order and one's own discipline in striving for an ideal. And we cannot be successful in this unless we also know others, their history, the successive efforts they have made to be what they are, to create the civilization they have created and which we seek to replace with our own . . . And we must learn all this without losing sight of the ultimate aim: to know oneself better through others and to know others better through oneself. (Gramsci 1971) Gramsci held that each individual was the synthesis of an "ensemble of relations" and also a history of these relations . . . the constitution of the subject, then, is the result of a complex interplay of "individuals" and larger-scale social forces (Hartsock 1998). The process by which the observations that we make are dependent upon our prior understandings of the subject of our observations-that they 'refer back' to past experiences based on class, culture, etc. are of central importance in praxis. The Gramscian leitmotif of reflexivity served as a counterhegemonic method fostering liberatory alliance among oppressed and exploited people. The intent of the reflexive methods of revolutionaries and radicals was to give voice to the lived experiences of exploitation and to expose and incite action against oppressors (Fanon 1963). Reflexive methodologies were intended to focus on the experiences and interpretations of the oppressed toward the aims of increased understanding of peoples relationships to power structures as they play themselves out in social relations. Historically the ruling class and appointed privileged class intelligentsia have defined and constructed meanings and interpreted the world for the poor, the labor class and middle class. In its literal sense, the term reflection

derives from the Latin verb reflectere, which literally means "to bend back." Reflexive emancipatory methods require that people claim the positions they already occupy, and account for what working from and for such positions means-in particular, in terms of what ends these positions advance and what interests these positions serve (Campbell 2001).

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### **10.6 Justice as positive law of stronger class**

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The increasing disparity between rich and poor along with increasing global control through overt and covert wars in Latin America led to dialogues in the Catholic church about faith, transformation and liberation. The Second Vatican Council produced a theological atmosphere characterized by creativity influenced by the times (decolonization, independence struggles, and a proliferation of socialist ideologies, Marxism and revolutionary and liberation theorists post WWII) (Boff and Clodovis 2001). This creative theological atmosphere could be seen at work among both Catholic and Protestant thinkers with the emergence of the group Church and Society in Latin America (ISAL) taking a prominent role. There were frequent meetings between Catholic theologians such as Gustavo Gutiérrez, Segundo Galilea, Juan Luis Segundo, Lucio Gera, to name a few. This movement led to intensified reflections on the relationship between faith and poverty and the gospel and social justice. In Brazil, between 1959 and 1964, the Catholic Left produced a series of basic texts on the need for a Christian ideal of history, linked to popular action, with a methodology that foreshadowed that of liberation theology. They urged personal engagement in the world, backed up by studies of social and liberal sciences, and illustrated by the universal principles of Christianity. (Boff and Clodovis 2001)

The foundational work defining a liberation theology praxis came from Gustavo Gutiérrez who described theology as critical reflection

on praxis. Liberation theology begins with the premise that all theology is biased-that is, particular theologies reflect the economic and social classes of those who developed them. Accordingly, the traditional theology predominant in North America and Europe is said to "perpetuate the interests of white, North American/European, capitalist males." This theology allegedly "supports and legitimates a political and economic system-democratic capitalism-which is responsible for exploiting and impoverishing the Third World" (Gutierrez 1971). Liberation theologians say theology must start with a "view from below"-that is, with the sufferings of the oppressed. Within this broad framework, different liberation theologians have developed distinctive methodologies for "doing" theology (Boff and Clodovis 2001). Gutierrez rejects the idea that theology is a systematic collection of timeless and culture-transcending truths that remains static for all generations. He views theology as a fluid process, a dynamic and ongoing movement of human beings providing insights into knowledge, humanity, and history. Emphasizing that theology is not just to be learned, it is to be done he says that "praxis" is the starting point for theology. Praxis involves revolutionary action on behalf of the poor and oppressed-and out of this, theological perceptions will continually emerge. The theologian must therefore be immersed in the struggle for transforming society and proclaim the message from that point. In the theological process, then, praxis must always be the first stage; theology is the second stage. Theologians are not to be mere theoreticians, but practitioners who participate in the ongoing struggle to liberate the oppressed (Gutierrez 1971). In this context, all social justice praxis must be immersed in the struggle for transforming society as revolutionary action on behalf of the poor and oppressed.

Using methodologies such as Gutierrez's and Baro's, liberationists interpret sin not primarily from an individual, private perspective, but from a social and economic perspective. Gutierrez explains that "sin is not considered an individual, private, or merely interior reality. Sin

is regarded as a social, historical fact, the absence of brotherhood and love in relationships among men" (Gutierrez 1996). Liberationists view present-day capitalism as sinful specifically because it has embedded systems of oppression and exploitation encompassing the majority of the world's people. Capitalists have become prosperous at the expense of impoverishing people. This is often referred to as "dependency theory"-that is, the development of the rich depends on the underdevelopment of the poor (Gutierrez 1996). There is another side to sin in liberation theology. Those who are oppressed can and do sin by acquiescing to their bondage. To go along passively with oppression rather than resisting and attempting to overthrow it-by violent means if necessary-is sin (Gutierrez 1996). To go along passively takes many forms but certainly the most consistent form is by participating in the production of knowledge that benefits the production of both material and psychological weapons of mass destruction. However, another form of destructive knowledge production is the contribution to mass media and educational propaganda which "dumbs down" the people's development as critical thinkers and critical knowers.

The use of violence has been one of the most controversial aspects of the liberation theology and liberation psychology of the 1960s through the 1980s. Using violence to free oneself from oppression was not considered sinful or psychologically damaging if it is used for resisting oppression. Indeed, certain liberation theologians will in some cases regard a particular action as sin if an oppressor commits it, but not if it is committed by the oppressed in the struggle to remove inequities (Gutierrez 1996). The removal of inequities is believed to result in the removal of the occasion of sin as well" (Gutierrez 1996). This praxis too has seen some shifts in the past two decades from radical to pacifistic approaches.

Jose Ignacio Martin Baro was strongly influenced by Gutierrez, and lived and worked in El Salvador. He developed a praxis model described in his book, *Writings for a Liberation Psychology*. He used the term "de-alienating social consciousness" as a core focus for

dialogue. There are three aspects to this process in the theoretical paradigm of Liberation Psychology: (1) Dialogue-human beings are transformed through changing their reality. This is a dialectical process that only happens through dialogue, conversation about our thoughts and feelings in relationship to our world and our history. (2) Decoding-through the gradual decoding of their world, people grasp the mechanisms of oppression and dehumanization. This crumbles the consciousness that posits a situation of oppression as natural, and opens up the horizon to new possibilities for action (Baro 1994). The individual's critical consciousness of others and the surrounding reality brings with it the possibility of a new praxis, which at the same time makes possible new forms of consciousness (Baro 1994), and, (3) Social Identity-people's knowledge of their surrounding reality carries them to a new understanding of themselves and, most important, of their social identity (Baro 1994). They begin to discover themselves in their action that transforms the problematic and in their active role in relation to others. Thus, the recovery of their historical memory offers a base for a more autonomous determination of their future (Baro 1994). Baro says that liberation theory asks us to respond to oppression on the social level in three specific ways: (1) by promoting a critical consciousness of the objective and subjective roots of social alienation (like the socioeconomic mechanisms that cement the structures of injustice) and the fatalistic thought processes and accompanying behaviors that give ideological sustenance to the alienation of the popular majorities such as women, children, elderly, the impoverished and colonized peoples of the world (Baro 1994). (2) By breaking down the machinery of the relationships of dominance and submission through dialogue and relationship. The dialectical process that fosters individual self-knowledge and self-acceptance presupposes a radical change in social relations, to a condition where there would be neither oppressors nor oppressed, and this change applies whether we are talking about formal schooling, production in a factory, or everyday work in a service institution (Baro 1994), and (3)

by reclaiming our past, by experiencing the present and by projecting that into a personal and national plan we cast ourselves in our social and national context, thereby setting forth the problem of one's authenticity as a member of a group, part of a culture, a citizen of a country (Baro 1994).

### **Education and Liberation**

Brazilian educator Paulo Freire also understood poverty from first hand experience and was influenced by Liberationist methodologies in Latin America. His life and work as an educator was full of hope in spite of poverty, imprisonment, and exile. He was a world leader in the struggle for the liberation of the poor and a great teacher to many who are teaching using the model he developed. Paulo Freire worked to instill the strengths and skills necessary for men and women living in poverty to overcome their sense of powerlessness to act in their own behalf. Freire believed that freedom through critical literacy necessitates carefully conceived ethnographic research of a given community, and this means, again, becoming one with the people. That is, the ethnographer must learn to "respect the reality" of the people in order to minimize the distance between the people and him or herself so as to be positioned to effectively work in their reality. He gave practical instructions for educational praxis with his insistence that dialogue involves respect (Olson 1992). Freire observed and experienced intense repression and oppression in Latin America (Brazil, Chile, and Nicaragua). He developed and practiced a radical approach to education that, as Gramsci had also identified as necessary, must be linked to social movements. Paulo, starting from a psychology of oppression influenced by the works of psychotherapists such as Freud, Jung, Adler, Fanon and Fromm, developed a "Pedagogy of the Oppressed." He believed that education could improve the human condition, counteracting the effects of a psychology of oppression, and ultimately contributing to what he considered the ontological vocation of humankind: humanization. In the introduction to his widely-acclaimed *Pedagogy of the Oppressed*, he argued that: "From these pages I hope at least

the following will endure: my trust in the people, and my faith in men and women and in the creation of a world in which it will be easier to love." Pedagogy of the Oppressed, which has been influenced by a myriad of philosophical currents including Phenomenology, Existentialism, Christian Personalism, Marxism and Hegelianism, calls for dialogue and ultimately conscientization as a way to overcome domination and oppression among and between human beings. Interestingly enough, one of the last books that Paulo wrote, Pedagogy of Hope, offers an appraisal of the conditions of implementation of his Pedagogy of the Oppressed in our days. (Godotti 1997). Freire also was concerned with praxis. He thought that dialogue isn't just about deepening understanding-but is part of making a difference in the world. Dialogue in itself is a co-operative activity involving respect that has the potential to foster a community of people who work together for community well being. Freire's attention to naming the world has been of great significance to those educators who have traditionally worked with those who do not have a voice and who are oppressed (Smith 2001). The idea of building "pedagogy of the oppressed" or a "pedagogy of hope" and how this may be carried forward has formed a significant impetus to those of us seeking ways to develop a consciousness that is understood to have the power to transform reality. Freire's insistence on situating all educational activity in the lived experience of people has opened up a series of possibilities for the way activists and educators can approach practices in research and pedagogy (Smith 2001). Several generations of educators, anthropologists, social scientists and political scientists, and professionals in the sciences and business, felt Freire's influence and helped to construct pedagogy based in liberation. What he wrote became a part of the lives of an entire generation that learned to dream about a world of equality and justice that fought and continues to fight for this world today. Many will continue his work, even though he did not leave behind 'disciples.' In fact, there could be nothing less Freirean than the idea of a disciple, a follower of ideas. He always challenged us

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to 'reinvent' the world, pursue the truth, and refrain from copying ideas. Paulo Freire leaves us with roots, wings, and dreams. (Godotti 1997) For Freire, naming one's experience and placing that voiced experience in context is the essence of dialogue (Freire 1970). Freire distinguished discussion from dialogue which is characterized as a kind of speech that is humble, open, and focused on collaborative learning. It is communication that can awaken consciousness and prepares people for collective action. A generative theme is one that emerges from the lives of learners as they engage a course of study. It presents a point of entry for learning that has meaning and relevance to a particular group of learners at a particular time.

There are four aspects of Paulo Freire's work that were used in the early praxis of the primary case study program and are practiced in the writing of this study. Freire had seen the effects of vanguardism and elitism in the academy and even community organizing and felt very strongly that dialogue was about people working with each other (Smith 2001). Second, Freire was concerned with praxis-action that is informed (and linked to certain values). Dialogue wasn't just about deepening understanding-but was part of making a difference in the world. Dialogue in itself is a co-operative activity involving respect. The process is important and can be seen as enhancing community and building social capital, and to leading us to act in ways that make for justice and human flourishing (Smith 2001). Third, Freire's attention to naming the world has been of great significance to those educators who have traditionally worked with those who do not have a voice, and who are oppressed. The idea of building a 'pedagogy of the oppressed' or a 'pedagogy of hope' and how this may be carried forward has formed a significant impetus to those seeking ways to develop consciousness, the consciousness that is understood to have the power to transform reality (Smith 2001). Fourth, Freire's insistence on situating educational activity in the lived experience of people has opened up a series of possibilities for the way activist educators can approach practice

(Smith 2001). Thick description is an ethnographic research method developed by anthropologists. In her analysis of culture and morality entitled, "Fieldwork in Familiar Places," Michelle Moody-Adams posits that thick description means going beneath the surface, showing the complexity behind social "facts" (or fictions) and social actions. Thick description is commentary on more than just the facts themselves. Thick description involves interpreting intentions and expectations, and especially the intricate public structures of meaning within which it is possible to form intentions and actions on complex expectations. Thick description is thus interpretation of those structures that constitute the complex contexts within which meaningful action become possible (Moody-Adams 1997). Thus, the questions must be called: What ideologies and theories informed our practice? What are our expectations? What do we actually do? What do we actually accomplish? Who sponsors and benefits? There are multiple interpretations and ideological frameworks from which these questions may be answered. Geertz says that the principle tasks of ethnography should be defined by reference to just such interpretive efforts to identify intentions and expectations. Ethnography in his view is interpretive science "in search of meaning" (Geertz 1973).

### **Critical Theory**

Critical theorists claim that Gramsci's notion of hegemony is fundamental for critical research (Kincheloe and McLaren 2000). Gramsci understood that dominant power is exercised by physical force and through social psychological attempts to win people's consent through cultural institutions like schools (Kincheloe and McLaren 2000). Criticalists claim that the formation of hegemony cannot be separate from the production of ideology, a highly articulated world view, master narrative, discursive regime, or organizing scheme for collective symbolic production (Kincheloe and McLaren 2000). Criticalists claim that hegemony's subordinates, employed as gatekeepers, developed a set of tacit rules about what can and cannot be said, who can and cannot speak and who must

listen, whose social constructions are valid and whose are erroneous and unimportant (Kincheloe and McLaren 2000). Academic institutional gatekeepers become "agents of the state" given the power to provide academic sandboxes in which activist educators and researchers are allowed to play. This provides an illusion of academic free inquiry while maintaining the status quo. Kincheloe and McLaren state that the key to successful counter-hegemonic cultural research involves (a) the ability to link the production of representation, images and signs of hypereality to power in the political economy; and, (b) the capacity, once this linkage is exposed and described to delineate highly complex effects of the reception of these images and signs on individuals located at various race, class, gender, and sexual coordinates in the web of reality (Kincheloe and McLaren 2000). One of my teachers said regularly, "We are the people we serve" and I would add, "We are the people we study." Those committed to social justice praxis would thus intervene in whatever areas of influence they find open to them. They would accept whatever opportunities arise to encourage social justice.

The injustice fostered by those attempting to dominate and own the world produces rage and distress while destroying peoples lives around the globe. We weep and keen for those incested in their own homes; beaten in the home next door; starved on the streets; despised in their poverty one neighborhood over; in training to torture in the programs of local academies and the military base in the next town; testing weapons in the labs of campuses; manufacturing weapons in the regions of home states; imprisoned in rural areas making Starbucks cups and Victoria's Secret "teddies"; shipping weapons of mass destruction from our borders; and sending poor and working class boys and girls to invade and terrorize people in their own homes and lands in Iraq, Afghanistan, Palestine, and a hundred other countries. Getting a glimpse of our own impotence, we consent to be diverted and distracted by the consumerism, narcissism and egoism consistently promoted and sold to us. Distress and distractions with how to pay the rent or

mortgage, the food, the water, the utilities, the upgrades to the cell phones, the lap tops, cars, the list is endless, dominates lives in the USA. The oppressor-invader requires distress and impotence and the isolating behaviors with which we can and do distract ourselves in a virtual world. The more we know and practice how to have humanizing relationships creating concrete ties of solidarity we resist distress, disease, despair and destruction. Breaking the isolation of the academic department, the classroom, the lab, the field, the practice and creating solidarity among the "haves" and "have nots" requires a commitment towards an activism that no longer operates "against" life but rather "for" life-- a liberation praxis. Liberation praxis encourages multiple resistance methodologies and millions of practices creating the networks that will take us out of isolation. Resistance methodologies identify the manner in which we recognize where we are at in our particular level of commitment: knowing, on the one hand, what degree of commitment one has, and, on the other, what side of the struggle one is committed to. Engendering resistance methodologies against oppression and exploitation revolves us to the core of liberation and self-determination. According to Hans Georg Gadamer, our past influences "everything we want, hope for, and fear in the future" and only as we are "possessed" by our past are we "opened to the new, the different and the true" (1976) Yet university-based research has been slow to acknowledge the legitimacy and importance of personal history as a way of understanding the world. This section provides you with a summary review of the theories influencing my teaching, research and activism. It is a reflection on the theories and people who have actively worked for social justice, reform, transformation, emancipation and revolution in and out of the academy. My understanding of praxis methodologies shows that reformers, liberationists, radicals, feminists and criticalists in the USA have at least three basic assumptions in common about methodologies in the social sciences and education: (1) education and research are not neutral; (2) society can be transformed by the

engagement of politically conscious persons; and (3) praxis connects liberatory education with social transformation. Traditionally qualitative research attempts to describe and interpret discourse, symbols, behaviors, culture, environment and relationships of participants or subjects under observation. The qualitative interpretive process is described as inductive as the researcher theorizes from specific examples observed to general examples observed attempting to make the strange familiar or the familiar strange (Renner 2001). Using a mixed methods research strategy is a common choice for many contemporary activist researchers. It offers us some creativity in responding to required qualitative research designs and leads to multilayered themes because topics are investigated from a multiplicity of different approaches. One common aim of engaged methodologies (emancipatory, liberationist, critical, radical, social justice, action oriented, activist, and feminist) identifies ways in which dominant conceptions and practices of knowledge attribution, acquisition, and justification systematically disadvantage subordinated groups. Conceptions of objectivity criticized by activist researchers identify objectivity with a single point of view that dismisses all other points of view as false or biased. These claims of objectivity consistently benefit specific power holder interests. Engaged educators strive to reform these conceptions and practices so that they serve the interests of social justice and social equality. Various practitioners in academic engaged fields of study argue that dominant knowledge practices target certain groups based on color, class, gender and creed by (1) excluding them from inquiry, (2) denying them epistemic authority, (3) denigrating their cognitive styles and modes of knowledge, (4) producing theories that represent them as inferior, deviant, or significant only in the ways they serve elite interests, (5) producing theories of social phenomena that render their activities and interests, or power relations, invisible, and (6) producing knowledge (science and technology) that is damaging at worst and not useful at best for people in subordinate positions, thus

reinforcing subjugation, exploitation and other social hierarchies. Some engaged researchers trace these failures to flawed conceptions of knowledge, knower's, objectivity, and scientific methodology. They offer diverse accounts of how to overcome these failures. They also aim to (1) explain why the entry of alternative epistemic scholars (scholars of color, working class scholars, organic intellectuals, and women) into all academic disciplines, especially in biology and the social sciences, has generated new questions, theories, and methods, (2) claim that inclusion of diverse scholars across class, race, and sex has and will play a causal role in the transformation of academic disciplinary approaches, and (3) defend these changes as fundamentally cognitive, not just social, advances. Using theoretical principles of liberation theology and psychology, ethnography, thick description, reflexivity, and critical hermeneutics, my intent for our class is on theory building in praxis to advance the goals of engaged methodologies rather than theory testing. One of the basic problems that engaged theoreticians in educational and social science research pose and expose is the manner in which the academy in the USA is a foundational site for the maintenance of social and economic inequalities. Inequality is an inescapable outcome and an essential condition of the successful economic functioning of capitalism (Panitch and Gindin 2004).

In, Notes Toward an Understanding of Revolutionary Politics Today, James Petras says that intellectuals, including academics, are sharply divided across generations between those who have in many ways embraced, however critically, 'neo-liberalism' or have prostrated themselves before "the most successful ideology in world history" and its "coherent and systematic vision" and those who have been actively writing, struggling and building alternatives (Petras 2001). The active struggle to resist oppression and build alternatives occurs when a person reflects upon theory in the light of praxis or practical judgment; the form of knowledge that results is personal or tacit knowledge. This tacit knowledge can be acquired through the process of reflection (Grundy 1982). In fact, many activist

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researchers and educators using engaged methodologies found in emancipatory, liberationist, critical and feminist theories identify the writings of Gramsci as foundational guides for praxis. Although Gramsci is not well known or studied much in the USA it is fair to say that he greatly influenced social justice movements and activist educators in the West whether or not they are aware that their ideas historically originate from his writings. Refusing to separate culture from systemic relations of power, or politics from the production of knowledge and identities, Gramsci redefined how politics bore upon everyday life through the force of its pedagogical (teaching and research) practices, relations, and discourses (Giroux 1999). Perhaps it was Gramsci who first posited that the "personal is political," a slogan much used by feminist academics in the USA. Gramsci offered a theoretical model combining the social world and the economic world. He stressed the complexity of social formations such as class and race as a plurality of conflicts. Politics was assigned a constitutive role in direct relation to ideology as a key prerequisite for political action in so far as it served to 'cement and unify' a "social bloc'. Without this consciousness, there was no action (Martin 2002).

In such hegemonic struggles for the minds and hearts of the people, intellectuals clearly have a vital role (Boyce 2003). Gramsci taught that the key index for analyzing a social formation was the interaction of economic relations with cultural, political and ideological practices or the 'historical bloc'. In the case of our study, you the students are an historical bloc. As such, the interconnections between state and economy and society were viewed processionally, as a mutually determined whole (Martin 2002). By emphasizing the configuration of the social formation Gramsci was able to dwell on the points at which the elements of the social were linked. For example Gramsci showed how intellectuals in Italy were engaged in the enterprise of legitimizing the state's power to the agrarian elite (rich land-owners), in other words the scholars

were serving the state to change things to benefit the rich (Martin 2002). In the same manner that a historical bloc (such as students and teachers) could serve elite interests Gramsci posited that a historical bloc could counter the elite (also an historical bloc). Revolution was conceived as the gradual formation of the collective will, an intellectual and moral framework that would unite a diverse range of groups and classes through an organic relation between leaders and the praxis of subjects. This was a conception of revolution as issuing from the immanent will of the people wherein praxis constituted the very process of history itself (Martin 2002). For example, when teachers have an organic intellectual relationship with students and their theories and action combine to shift power for social justice this constitutes a process of social change historically. Using Gramsci's innovation to abolish the liberal distinction between public and private that he applied to the praxis of factory production through workplace solidarity is a concept extended by some activist researchers applying it as counter hegemonic work in educational and social science studies such as justice studies. Where Gramsci posited a worker's "higher consciousness" as integral parts of an organic whole I posit a student's consciousness raising process that would unite them as a bloc. Gramsci's theory posed that domination by an economic class grows as they successfully embed economic activity (e.g., profit before people) as a universal principle (Martin 2002). He identified how domination was accomplished in conjunction with what he called 'organic crisis' in which the various points of contact between the dominant economic class intersected with other classes, specifically with the help of intellectuals in institutions of education that link the classes in a common identity (e.g., a nation) (Martin 2002). Gramsci believed this same program could be countered using similar methods within the non-dominant classes and groups. Thus a popular identity among students could be fostered by using organic crisis (such as the present terror wars) to link groups with the help of organic intellectuals (you, the student) guiding and guided by vanguard intelligentsia (the teacher) creating



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a community with a popular identity such as "the movement" as Gramsci hoped to maintain and "the brotherhood". Using this model would mean building a universalizing identity drawn from the praxis of the students, by which to supplant the ruling class (Martin 2002). For the purpose of our study, both theoretically and practically, the terms and phrases such as "organic intellectual," and "historical bloc" are Gramscian. Gramsci's organic intellectual is someone whose knowledge is derived through firsthand experience, and whose life-learning is complemented by self education and other alternative forms of learning. The organic intellectual emerges from a social class to speak against the established order in a manner directly connected to the goals of a political movement and a community (Martin 2002). For example, I as activist researcher am an organic intellectual emerged from the working class to speak against the established order in a manner directly connected to anti-capitalist movements. Gramsci identified how the various cultural and economic structures force and reinforce people's consent to subjugation. This point goes to the heart of our research. How and why do students, after gaining access to the academy in the USA concede to taking the paths that are counter to the aims of social justice? Methodologically, Gramsci proposed education as a process of dialogue that would bring the working classes together in projects and organizations politically and would develop a base of worker intellectuals who would inform the intelligentsia of the Vanguard Party (those who know and practice theories of social justice). Will the practices identified in our research bring students together or develop a base of student intellectuals informing praxis? Gramsci advocated reflexivity as a mode for counter hegemonic discourse and identified its importance as foundational for Cultural Revolution (Gramsci 1971). Gramsci summarizes this important concept: Consciousness of a self which is opposed to others, which is differentiated and, once having set itself a goal, can judge facts and events other than in themselves or for themselves but also in so far as they tend to drive history forward or backward. To know

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oneself means to be oneself, to be master of oneself, to distinguish oneself, to free oneself from a state of chaos, to exist as an element of order-but of one's own order and one's own discipline in striving for an ideal. And we cannot be successful in this unless we also know others, their history, the successive efforts they have made to be what they are, to create the civilization they have created and which we seek to replace with our own . . . And we must learn all this without losing sight of the ultimate aim: to know oneself better through others and to know others better through oneself. (Gramsci 1971) Reflexivity is said to be as relevant to the macro-contexts of knowledge production as it is to the micro-context of research design. As such, we must acknowledge the double hermeneutic (the development and study of theories of the interpretation and understanding of texts) nature of social science. When we learn about people and about social events, the process is complex (Siraj-Blatchford 1997).The Gramscian leitmotif of reflexivity served as a counter hegemonic method fostering liberatory alliance among oppressed and exploited people. Reflexive methodologies are intended to focus on the experiences and interpretations of the oppressed toward the aims of increased understanding of peoples relationships to power structures as they play themselves out in social relations. Historically the ruling class and appointed privileged class intelligentsia have defined and constructed meanings and interpreted the world for the poor, the labor class and middle class. In its literal sense, the term reflection derives from the Latin verb reflectere, which literally means "to bend back." Reflexive emancipatory methods require that people in the roles of researcher and subject ( such as students) claim the positions they already occupy, and account for what working from and for such positions means-in particular, in terms of what ends these positions advance and what interests these positions serve (Campbell 2002). In other words, who benefits if you learn research methods wherein you study yourselves and your peers as a historical bloc for social justice? Researchers represent positions, ends, and interests as is

evidenced in their individual articulations and actions in and out of the field. Engaged methods such as reflexive ones are intended to produce conscious participation in praxis advancing aims as effectively as possible for direct, immediate and relevant ways that end oppression and exploitation. Emancipatory reflexivity is a methodology wherein people take up the complexities of place and biography; deconstruct the dualities of power and antipower, hegemony and resistance, and insider and outsider constructs revealing the variety of experiences and interpretations across class, race, and gender. Reflexive methodological trends have described and ascribed representations of the worlds of the exploited. When confronting the problems and issues of social and economic justice praxis in education, reflexive methodology invites us to explore and analyze while hearing the voices and understanding the thinking of the marginalized, exploited, and oppressed. An engaged analysis requires our thinking as researcher and educator to be challenged-to be made problematic so that we can locate that which in material relations gives rise to various interpretations and points of view. In this mode we are called to assess relations in the context of whether they are liberating or dehumanizing.

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## **10.8 SUMMARY**

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Utilitarianism as a theory of justice is based on a principle of utility, approving every action that increases human happiness (by increasing pleasure and/or decreasing pain, those being the two "sovereign masters" of man) and disapproving every action that diminishes it. A utilitarian view is that justice should seek to create the greatest happiness of the greatest number. A law is just if it results in a net gain in happiness, even at the expense of minorities. The problem here is that minorities may not form part of the "greater number". This is a particular problem in a pluralist society.

In this unit we have discussed about the concept of Equivalence Theories and Justice as nothing more than the positive law of the stronger class.

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### 10.10 SUGGESTED READINGS/REFERENCE MATERIAL

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### **10.11 SELF ASSESSMENT QUESTIONS**

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1. Discuss what is the Relation between law and Justice?
2. What do you Understand the concept of Equivalence Theories of law and justice.
3. Describe Justice as positive law of the stronger class.

**LL.M. Part-2**

**Subject: JUDICIAL PROCESS**

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**Block-IV**-Relation between Law and Justice

**Unit-11**- Dependency theories - For its realization justice depends on law, but justice is not the same as law

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**STRUCTURE**

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**11.1 INTRODUCTION**

**11.2 OBJECTIVES**

**11.3 WHAT are the Dependency theories of Justice?**

**11.4. Whether Justice depends on law? - Various opinions**

**11.5 SUMMARY**

**11.6 SUGGESTED READINGS/REFERENCE MATERIAL**

**11.7 SELF ASSESSMENT QUESTIONS**

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**11.1 INTRODUCTION**

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In the previous unit you have read about the concept of Equivalence Theories and Justice as nothing more than the positive law of the stronger class.

Law and justice depend on each other for their realization. This is what is commonly known as the dependency theory of justice.

Different people give different views on justice. Yet, to understand justice from the legal philosophy point of view, we must understand the basic soul of justice. Justice is an act of imparting fair relief to the disputing parties in order to achieve universal good to the humanity on the whole. Justice is always taken to be the end and law as well as legal processes work as means to that end. Earlier, it was believed that peace is the ultimate end for human good, and later it was thought that security is the real ultimate end. But when we look at the social structure and the end-means structure of goals that lead us to a well organized balanced society, we find that justice plays a very vital role. In this unit we will discuss about the Dependency theories of law and justice and for its realization justice depends on law, but justice is not the same as law.

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**11.2 OBJECTIVES**

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After reading this unit you will be able to:

- ✓ Understand the concept of Dependency theories of law and justice.
- ✓ Describe whether justice depends on law?
- ✓ Discuss justice is not the same as law.

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**11.3 WHAT are the Dependency theories of Justice?**

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**Dependency theory of justice**

Law and justice depend on each other for their realization. This is what is commonly known as the dependency theory of justice.

Different people give different views on justice. Yet, to understand justice from the legal philosophy point of view, we must understand the basic soul of justice. Justice is an act of imparting fair relief to the disputing parties in order to achieve universal good to the humanity on the whole.

**Justice in the end-means context:**

Justice is always taken to be the end and law as well as legal processes work as means to that end. Earlier, it was believed that peace is the ultimate end for human good, and later it was thought that security is the real ultimate end. But when we look at the social structure and the end-means structure of goals that lead us to a well organized balanced society, we find that justice plays a very vital role. Justice depends on law and security of many in the society depend on justice and peace depends on the sense of security in people and the general well-being depends on the peace in society. As a result, justice is an end that law seeks, but justice is not the same as law.

Also, at times, justice happens or is done even in the absence of law. Law is something that has to be executed while justice is something that has to be achieved.

Dependency theory of Justice:

The theory that says that justice and law have a dependency relation that exists for the well being and harmony of the society is known as the dependency theory of justice.

This theory proposes that justice depends on law but is not the same as law. Justice is imparted by judiciary of the state as per law, but this is not the only way in which justice is imparted.

At times, some events happen in accordance of the laws of nature that are never unique to any one single state, and as a result of those happenings, the parties do receive justice that may not be

imparted by the judiciary, but that may have been a result of the work of laws of nature.

Yet, even such a justice is seen to depend on the laws created by nature. In short, justice that is a means to the final ends of security, peace and general well being, is an end that law seeks by working to be its means.

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#### **11.4. Whether Justice depends on law? - Various opinions**

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Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits. The English jurist John Austin (1790-1859) formulated it thus: "The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry." (1832, p. 157) The positivist thesis does not say that law's merits are unintelligible, unimportant, or peripheral to the philosophy of law. It says that they do not determine whether laws or legal systems *exist*. Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law. What laws are in force in that system depends on what social standards its officials recognize as authoritative; for example, legislative enactments, judicial decisions, or social customs. The fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it. According to positivism, law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc.); as we might say in a more modern idiom, positivism is the view that law is a social construction. Austin thought the thesis "simple and glaring." While it is probably the dominant view among analytically inclined philosophers of law, it is also the subject of competing interpretations together with persistent criticisms and misunderstandings.

**1. Development and Influence**

Legal positivism has a long history and a broad influence. It has antecedents in ancient political philosophy and is discussed, and the term itself introduced, in mediaeval legal and political thought (see Finnis 1996). The modern doctrine, however, owes little to these forbears. Its most important roots lie in the conventionalist political philosophies of Hobbes and Hume, and its first full elaboration is due to Jeremy Bentham (1748-1832) whose account Austin adopted, modified, and popularized. For much of the next century an amalgam of their views, according to which law is the command of a sovereign backed by force, dominated legal positivism and English philosophical reflection about law. By the mid-twentieth century, however, this account had lost its influence among working legal philosophers. Its emphasis on legislative institutions was replaced by a focus on law-applying institutions such as courts, and its insistence of the role of coercive force gave way to theories emphasizing the systematic and normative character of law. The most important architects of this revised positivism are the Austrian jurist Hans Kelsen (1881-1973) and the two dominating figures in the analytic philosophy of law, H.L.A. Hart (1907-92) and Joseph Raz among whom there are clear lines of influence, but also important contrasts. Legal positivism's importance, however, is not confined to the philosophy of law. It can be seen throughout social theory, particularly in the works of Marx, Weber, and Durkheim, and also (though here unwittingly) among many lawyers, including the American "legal realists" and most contemporary feminist scholars. Although they disagree on many other points, these writers all acknowledge that law is essentially a matter of social fact. Some of them are, it is true, uncomfortable with the label "legal positivism" and therefore hope to escape it. Their discomfort is sometimes the product of confusion. Lawyers often use "positivist" abusively, to condemn a formalistic doctrine according to which law is always clear and, however pointless or wrong, is to be rigorously applied by officials and obeyed by subjects. It is doubtful that anyone ever held

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this view; but it is in any case false, it has nothing to do with legal positivism, and it is expressly rejected by all leading positivists. Among the philosophically literate another, more intelligible, misunderstanding may interfere. Legal positivism is here sometimes associated with the homonymic but independent doctrines of logical positivism (the meaning of a sentence is its mode of verification) or sociological positivism (social phenomena can be studied only through the methods of natural science). While there are historical connections, and also commonalities of temper, among these ideas, they are essentially different. The view that the existence of law depends on social facts does not rest on a particular semantic thesis, and it is compatible with a range of theories about how one investigates social facts, including non-naturalistic accounts. To say that the existence of law depends on facts and not on its merits is a thesis about the *relation* among laws, facts, and merits, and not otherwise a thesis about the individual relata. Hence, most traditional “natural law” moral doctrines--including the belief in a universal, objective morality grounded in human nature--do not contradict legal positivism. The only influential positivist *moral* theories are the views that moral norms are valid only if they have a source in divine commands or in social conventions. Such theists and relativists apply to morality the constraints that legal positivists think hold for law.

## **2. The Existence and Sources of Law**

Every human society has some form of social order, some way of marking and encouraging approved behavior, deterring disapproved behavior, and resolving disputes. What then is distinctive of societies with legal systems and, within those societies, of their law? Before exploring some positivist answers, it bears emphasizing that these are not the only questions worth asking. While an understanding of the nature of law requires an account of what makes law distinctive, it also requires an understanding of what it has *in common* with other forms of social control. Some Marxists are positivists about the nature of law while insisting that its distinguishing characteristics

matter less than its role in replicating and facilitating other forms of domination. (Though other Marxists disagree: see Pashukanis). They think that the specific nature of law casts little light on their primary concerns. But one can hardly know that in advance; it depends on what the nature of law actually is.

According to Bentham and Austin, law is a phenomenon of large societies with a *sovereign*: a determinate person or group who have supreme and absolute *de facto* power -- they are obeyed by all or most others but do not themselves similarly obey anyone else. The laws in that society are a subset of the sovereign's *commands*: general orders that apply to classes of actions and people and that are backed up by threat of force or "sanction." This imperatival theory is positivist, for it identifies the existence of legal systems with patterns of command and obedience that can be ascertained without considering whether the sovereign has a moral right to rule or whether his commands are meritorious. It has two other distinctive features. The theory is *monistic*: it represents all laws as having a single form, imposing obligations on their subjects, though not on the sovereign himself. The imperativalist acknowledges that ultimate legislative power may be self-limiting, or limited externally by what public opinion will tolerate, and also that legal systems contain provisions that are not imperatives (for example, permissions, definitions, and so on). But they regard these as part of the non-legal material that is necessary for, and part of, every legal system. (Austin is a bit more liberal on this point). The theory is also *reductivist*, for it maintains that the normative language used in describing and stating the law -- talk of authority, rights, obligations, and so on -- can all be analyzed without remainder in non-normative terms, ultimately as concatenations of statements about power and obedience. Imperatival theories are now without influence in legal philosophy (but see Ladenson and Morison). What survives of their outlook is the idea that legal theory must ultimately be rooted in some account of the political system, an insight that came to be shared by all major positivists save Kelsen. Their particular



conception of a society under a sovereign commander, however, is friendless (except among Foucauldians, who strangely take this relic as the ideal-type of what they call “juridical” power). It is clear that in complex societies there may be no one who has all the attributes of sovereignty, for ultimate authority may be divided among organs and may itself be limited by law. Moreover, even when “sovereignty” is not being used in its legal sense it is nonetheless a normative concept. A legislator is one who has *authority* to make laws, and not merely someone with great social power, and it is doubtful that “habits of obedience” is a candidate reduction for explaining authority. Obedience is a normative concept. To distinguish it from coincidental compliance we need something like the idea of subjects being oriented to, or guided by, the commands. Explicating this will carry us far from the power-based notions with which classical positivism hoped to work. The imperativists' account of obligation is also subject to decisive objections (Hart, 1994, pp. 26-78; and Hacker). Treating all laws as commands conceals important differences in their social functions, in the ways they operate in practical reasoning, and in the sort of justifications to which they are liable. For instance, laws conferring the power to marry command nothing; they do not obligate people to marry, or even to marry according to the prescribed formalities. Nor is reductivism any more plausible here: we speak of legal obligations when there is no probability of sanctions being applied and when there is no provision for sanctions (as in the duty of the highest courts to apply the law). Moreover, we take the existence of legal obligations to be a *reason for* imposing sanctions, not merely a consequence of it.

Hans Kelsen retains the imperativists' monism but abandons their reductivism. On his view, law is characterized by a *basic form* and *basic norm*. The form of every law is that of a conditional order, directed at the courts, to apply sanctions if a certain behavior (the “delict”) is performed. On this view, law is an indirect system of guidance: it does not tell subjects what to do; it tells *officials* what to do to its subjects under certain conditions. Thus, what we ordinarily

regard as the legal duty not to steal is for Kelsen merely a logical correlate of the primary norm which stipulates a sanction for stealing (1945, p. 61). The objections to imperatival monism apply also to this more sophisticated version: the reduction misses important facts, such as the point of having a prohibition on theft. (The courts are not indifferent between, on the one hand, people not stealing and, on the other, stealing and suffering the sanctions.) But in one respect the conditional sanction theory is in worse shape than is imperativalism, for it has no principled way to fix on the delict as the duty-defining condition of the sanction -- that is but one of a large number of relevant antecedent conditions, including the legal capacity of the offender, the jurisdiction of the judge, the constitutionality of the offense, and so forth. Which among all these is the content of a legal duty?

Kelsen's most important contribution lies in his attack on reductivism and his doctrine of the "basic norm." He maintains that law is normative and must be understood as such. Might does not make right - - not even legal right -- so the philosophy of law must explain the fact that law is taken to impose obligations on its subjects. Moreover, law is a normative *system*: "Law is not, as it is sometimes said, a rule. It is a set of rules having the kind of unity we understand by a system" (1945, p. 3). For the imperativalists, the unity of a legal system consists in the fact that all its laws are commanded by one sovereign. For Kelsen, it consists in the fact that they are all links in one chain of authority. For example, a by-law is legally valid because it is created by a corporation lawfully exercising the powers conferred on it by the legislature, which confers those powers in a manner provided by the constitution, which was itself created in a way provided by an earlier constitution. But what about the very first constitution, historically speaking? Its authority, says Kelsen, is "presupposed." The condition for interpreting any legal norm as binding is that the first constitution is validated by the following "basic norm:" "*the original constitution is to be obeyed.*" Now, the basic norm cannot be a legal norm -- we cannot fully explain the

bindingness of law by reference to more law. Nor can it be a social fact, for Kelsen maintains that the reason for the validity of a norm must always be another norm -- no ought from is. It follows, then, that a legal system must consist of norms all the way down. It bottoms in a hypothetical, transcendental norm that is the condition of the intelligibility of any (and all) other norms as binding. To "presuppose" this basic norm is not to endorse it as good or just -- resupposition is a cognitive stance only -- but it is, Kelsen thinks, the necessary precondition for a non-reductivist account of law as a normative system.

There are many difficulties with this, not least of which is the fact that if we are willing to tolerate the basic norm as a solution it is not clear why we thought there was a problem in the first place. One cannot say both that the basic norm is the norm presupposing which validates all inferior norms and also that an inferior norm is part of the legal system only if it is connected by a chain of validity to the basic norm. We need a way into the circle. Moreover, it draws the boundaries of legal systems incorrectly. The Canadian Constitution of 1982 was lawfully created by an Act of the U.K. Parliament, and on that basis Canadian law and English law should be parts of a single legal system, rooted in one basic norm: 'The (first) U.K. constitution is to be obeyed.' Yet no English law is binding in Canada, and a purported repeal of the Constitution Act by the U.K. would be without legal effect in Canada.

If law cannot ultimately be grounded in force, or in law, or in a presupposed norm, on what does its authority rest? The most influential solution is now H.L.A. Hart's. His solution resembles Kelsen's in its emphasis on the normative foundations of legal systems, but Hart rejects Kelsen's transcendentalist, Kantian view of authority in favour of an empirical, Weberian one. For Hart, the authority of law is social. The ultimate criterion of validity in a legal system is neither a legal norm nor a presupposed norm, but a social rule that exists only because it is actually *practiced*. Law ultimately rests on custom: customs about who shall have the authority to

decide disputes, what they shall treat as binding reasons for decision, i.e. as sources of law, and how customs may be changed. Of these three “secondary rules,” as Hart calls them, the source-determining *rule of recognition* is most important, for it specifies the ultimate criteria of validity in the legal system. It exists only because it is practiced by officials, and it is not only the recognition rule (or rules) that best explains their practice, it is rule to which they actually appeal in arguments about what standards they are bound to apply. Hart's account is therefore conventionalist (see Marmor, and Coleman, 2001): ultimate legal rules are social norms, although they are neither the product of express agreement nor even conventions in the Schelling-Lewis sense (see Green 1999). Thus for Hart too the legal system is norms all the way down, but at its root is a social norm that has the kind of normative force that customs have. It is a regularity of behavior towards which officials take “the internal point of view:” they use it as a standard for guiding and evaluating their own and others' behavior, and this use is displayed in their conduct and speech, including the resort to various forms of social pressure to support the rule and the ready application of normative terms such as “duty” and “obligation” when invoking it.

It is an important feature of Hart's account that the rule of recognition is an *official* custom, and not a standard necessarily shared by the broader community. If the imperativists' picture of the political system was pyramidal power, Hart's is more like Weber's rational bureaucracy. Law is normally a technical enterprise, characterized by a division of labour. Ordinary subjects' contribution to the existence of law may therefore amount to no more than passive compliance. Thus, Hart's necessary and sufficient conditions for the existence of a legal system are that “those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and ... its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials” (1994, p. 116). And this division of labour is

not a normatively neutral fact about law; it is politically charged, for it sets up the possibility of law becoming remote from the life of a society, a hazard to which Hart is acutely alert (1994, p. 117; cf. Waldron).

Although Hart introduces the rule of recognition through a speculative anthropology of how it might emerge in response to certain deficiencies in a customary social order, he is not committed to the view that law is a cultural achievement. To the contrary, the idea that legal order is always a good thing, and that societies without it are deficient, is a familiar element of many *anti-positivist* views, beginning with Henry Maine's criticism of Austin on the ground that his theory would not apply to certain Indian villages. The objection embraces the error it seeks to avoid. It imperialistically assumes that it is always a bad thing to lack law, and then makes a dazzling inference from ought to is: if it is good to have law, then each society must have it, and the concept of law must be adjusted to show that it does. If one thinks that law is a many splendored thing, one will be tempted by a very wide concept of law, for it would seem improper to charge others with missing out. Positivism simply releases the harness. Law is a distinctive form of political order, not a moral achievement, and whether it is necessary or even useful depends entirely on its content and context. Societies without law may be perfectly adapted to their environments, missing nothing.

A positivist account of the existence and content of law, along any of the above lines, offers a theory of the *validity* of law in one of the two main senses of that term (see Harris, pp. 107-111). Kelsen says that validity is the specific mode of existence of a norm. An invalid marriage is not a special kind of marriage having the property of invalidity; it is not a marriage at all. In this sense a valid law is one that is *systemically valid* in the jurisdiction -- it is part of the legal system. This is the question that positivists answer by reference to social sources. It is distinct from the idea of validity as moral propriety, i.e. a sound justification for respecting the norm. For the positivist, this depends on its merits. One indication that these

senses differ is that one may know that a society has a legal system, and know what its laws are, without having any idea whether they are morally justified. For example, one may know that the law of ancient Athens included the punishment of ostracism without knowing whether it was justified, because one does not know enough about its effects, about the social context, and so forth.

No legal positivist argues that the *systemic validity* of law establishes its *moral validity*, i.e. that it should be obeyed by subjects or applied by judges. Even Hobbes, to whom this view is sometimes ascribed, required that law actually be able to keep the peace, failing which we owe it nothing. Bentham and Austin, as utilitarians, hold that such questions always turn on the consequences and both acknowledge that disobedience is therefore sometimes fully justified. Kelsen insists that "The science of law does not prescribe that one ought to obey the commands of the creator of the constitution" (1967, p. 204). Hart thinks that there is only a *prima facie* duty to obey, grounded in and thus limited by fairness -- so there is no obligation to unfair or pointless laws (Hart 1955). Raz goes further still, arguing that there isn't even a *prima facie* duty to obey the law, not even in a just state (Raz 1979, pp. 233-49). The peculiar accusation that positivists believe the law is always to be obeyed is without foundation. Hart's own view is that an overweening deference to law consorts more easily with theories that imbue it with moral ideals, permitting "an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: 'Ought this law to be obeyed?'" (Hart 1958, p. 75).

### **3. Moral Principles and the Boundaries of Law**

The most influential criticisms of legal positivism all flow, in one way or another, from the suspicion that it fails to give morality its due. A theory that insists on the facticity of law seems to contribute little to our understanding that law has important functions in making human life go well, that the rule of law is a prized ideal, and that the language and practice of law is highly moralized. Accordingly,

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positivism's critics maintain that the most important features of law are not to be found in its source-based character, but in law's capacity to advance the common good, to secure human rights, or to govern with integrity. (It is a curious fact about anti-positivist theories that, while they all insist on the moral nature of law, without exception they take its moral nature to be something *good*. The idea that law might of its very nature be morally problematic does not seem to have occurred to them.)

It is beyond doubt that moral and political considerations bear on legal philosophy. As Finnis says, the reasons we have for establishing, maintaining or reforming law include moral reasons, and these reasons therefore shape our legal concepts (p. 204). But *which* concepts? Once one concedes, as Finnis does, that the existence and content of law can be identified without recourse to moral argument, and that "human law is artefact and artifice; and not a conclusion from moral premises," (p. 205) the Thomistic apparatus he tries to resuscitate is largely irrelevant to the truth of legal positivism. This vitiates also Lon Fuller's criticisms of Hart (Fuller, 1958 and 1969). Apart from some confused claims about adjudication, Fuller has two main points. First, he thinks that it isn't enough for a legal system to rest on customary social rules, since law could not guide behavior without also being at least minimally clear, consistent, public, prospective and so on -- that is, without exhibiting to some degree those virtues collectively called "the rule of law." It suffices to note that this is perfectly consistent with law being source-based. Even if moral properties were identical with, or supervened upon, these rule-of-law properties, they do so in virtue of their rule-like character, and not their law-like character. Whatever virtues inhere in or follow from clear, consistent, prospective, and open practices can be found not only in law but in all other social practices with those features, including custom and positive morality. And these virtues are minor: there is little to be said in favour of a clear, consistent, prospective, public and impartially administered system of racial segregation, for example. Fuller's second worry is

that if law is a matter of fact, then we are without an explanation of the duty to obey. He gloatingly asks how “an amoral datum called law could have the peculiar quality of creating an obligation to obey it” (Fuller, 1958). One possibility he neglects is that it doesn't. The fact that law *claims* to obligate is, of course, a different matter and is susceptible to other explanations (Green 2001). But even if Fuller is right in his unargued assumption, the “peculiar quality” whose existence he doubts is a familiar feature of many moral practices. Compare promises: whether a society has a practice of promising, and what someone has promised to do, are matters of social fact. Yet promising creates moral obligations of performance or compensation. An “amoral datum” may indeed figure, together with other premises, in a sound argument to moral conclusions.

While Finnis and Fuller's views are thus compatible with the positivist thesis, the same cannot be said of Ronald Dworkin's important works (Dworkin 1978 and 1986). Positivism's most significant critic rejects the theory on every conceivable level. He denies that there can be *any* general theory of the existence and content of law; he denies that local theories of particular legal systems can identify law without recourse to its merits, and he rejects the whole institutional focus of positivism. A theory of law is for Dworkin a theory of how cases ought to be decided and it begins, not with an account of political organization, but with an abstract ideal regulating the conditions under which governments may use coercive force over their subjects. Force must only be deployed, he claims, in accordance with principles laid down *in advance*. A society has a legal system only when, and to the extent that, it honors this ideal, and its law is the set of all considerations that the courts of such a society would be morally justified in applying, whether or not those considerations are determined by any source. To identify the law of a given society we must engage in moral and political argument, for the law is whatever requirements are consistent with an interpretation of its legal practices (subject to a threshold condition of fit) that shows them to be best justified in light of the



animating ideal. In addition to those philosophical considerations, Dworkin invokes two features of the phenomenology of judging, as he sees it. He finds deep *controversy* among lawyers and judges about how important cases should be decided, and he finds *diversity* in the considerations that they hold relevant to deciding them. The controversy suggests to him that law cannot rest on an official consensus, and the diversity suggests that there is no single social rule that validates all relevant reasons, moral and non-moral, for judicial decisions.

Dworkin's rich and complex arguments have attracted various lines of reply from positivists. One response denies the relevance of the phenomenological claims. Controversy is a matter of degree, and a consensus-defeating amount of it is not proved by the existence of adversarial argument in the high courts, or indeed in any courts. As important is the broad range of settled law that gives rise to few doubts and which guides social life *outside* the courtroom. As for the diversity argument, so far from being a refutation of positivism, this is an entailment of it. Positivism identifies law, not with all valid reasons for decision, but only with the source-based subset of them. It is no part of the positivist claim that the rule of recognition tells us how to decide cases, or even tells us all the relevant reasons for decision. Positivists accept that moral, political or economic considerations are properly operative in some legal decisions, just as linguistic or logical ones are. *Modus ponens* holds in court as much as outside, but not because it was enacted by the legislature or decided by the judges, and the fact that there is no social rule that validates both *modus ponens* and also the Municipalities Act is true but irrelevant. The authority of principles of logic (or morality) is not something to be explained by legal philosophy; the authority of acts of Parliament must be; and accounting for the difference is a central task of the philosophy of law.

Other positivists respond differently to Dworkin's phenomenological points, accepting their relevance but modifying the theory to accommodate them. So-called "inclusive positivists" (e.g., Waluchow

(to whom the term is due), Coleman, Soper and Lyons) argue that the merit-based considerations may indeed be part of the law, if they are explicitly or implicitly made so by source-based considerations. For example, Canada's constitution explicitly authorizes for breach of Charter rights, "such remedy as the court considers appropriate and just in the circumstances." In determining which remedies might be legally valid, judges are thus expressly told to take into account their morality. And judges may develop a settled practice of doing this whether or not it is required by any enactment; it may become customary practice in certain types of cases. Reference to moral principles may also be implicit in the web of judge-made law, for instance in the common law principle that no one should profit from his own wrongdoing. Such moral considerations, inclusivists claim, are part of the law *because the sources make it so*, and thus Dworkin is right that the existence and content of law turns on its merits, and wrong only in his explanation of this fact. Legal validity depends on morality, not because of the interpretative consequences of some ideal about how the government may use force, but because that is one of the things that may be customarily recognized as an ultimate determinant of legal validity. It is the sources that *make* the merits relevant.

To understand and assess this response, some preliminary clarifications are needed. First, it is not plausible to hold that the merits are relevant to a judicial decision *only* when the sources make it so. It would be odd to think that justice is a reason for decision only because some *source* directs an official to decide justly. It is of the nature of justice that it properly bears on certain controversies. In legal decisions, especially important ones, moral and political considerations are present of their own authority; they do not need sources to propel them into action. On the contrary, we expect to see a source—a statute, a decision, or a convention—when judges are constrained *not* to appeal directly to the merits. Second, the fact that there is moral language in judicial decisions does not establish the presence of moral tests for law, for sources come in various

guises. What sounds like moral reasoning in the courts is sometimes really source-based reasoning. For example, when the Supreme Court of Canada says that a publication is criminally “obscene” only if it is harmful, it is not applying J.S. Mill's harm principle, for what that court means by “harmful” is that it is regarded by the community as degrading or intolerable. Those are source-based matters, not moral ones. This is just one of many appeals to *positive* morality, i.e. to the moral customs actually practiced by a given society, and no one denies that positive morality may be a source of law. Moreover, it is important to remember that law is dynamic and that even a decision that does apply morality itself *becomes* a source of law, in the first instance for the parties and possibly for others as well. Over time, by the doctrine of precedent where it exists or through the gradual emergence of an interpretative convention where it does not, this gives a factual edge to normative terms. Thus, if a court decides that money damages are in some instances *not* a “just remedy” then this fact will join with others in fixing what “justice” means for these purposes. This process may ultimately detach legal concepts from their moral analogs (thus, legal “murder” may require no intention to kill, legal “fault” no moral blameworthiness, an “equitable” remedy may be manifestly unfair, etc.)

Bearing in mind these complications, however, there undeniably remains a great deal of moral reasoning in adjudication. Courts are often called on to decide what would be reasonable, fair, just, cruel, etc. by explicit or implicit requirement of statute or common law, or because this is the only proper or intelligible way to decide. Hart sees this as happening pre-eminently in hard cases in which, owing to the indeterminacy of legal rules or conflicts among them, judges are left with the *discretion* to make new law. “Discretion,” however, may be a potentially misleading term here. First, discretionary judgments are not arbitrary: they are guided by merit-based considerations, and they may also be guided by law even though not fully determined by it -- judges may be empowered to make certain decisions and yet under a legal duty to make them in a particular

way, say, in conformity with the spirit of preexisting law or with certain moral principles (Raz 1994, pp. 238-53). Second, Hart's account might wrongly be taken to suggest that there are fundamentally two kinds of cases, easy ones and hard ones, distinguished by the sorts of reasoning appropriate to each. A more perspicuous way of putting it would be to say that there are two kinds of *reasons* that are operative in every case: source-based reasons and non-source-based reasons. Law application and law creation are continuous activities for, as Kelsen correctly argued, *every* legal decision is partly determined by law and partly underdetermined: "The higher norm cannot bind in every direction the act by which it is applied. There must always be more or less room for discretion, so that the higher norm in relation to the lower one can only have the character of a frame to be filled by this act" (1967, p. 349). This is a general truth about norms. There are infinitely many ways of complying with a command to "close the door" (quickly or slowly, with one's right hand or left, etc.) Thus, even an "easy case" will contain discretionary elements. Sometimes such residual discretion is of little importance; sometimes it is central; and a shift from marginal to major can happen in a flash with changes in social or technological circumstances. That is one of the reasons for rejecting a strict doctrine of separation of powers -- Austin called it a "childish fiction" -- according to which judges only apply and never make the law, and with it any literal interpretation of Dworkin's ideal that coercion be deployed only according to principles laid down in advance. It has to be said, however, that Hart himself does not consistently view legal references to morality as marking a zone of discretion. In a passing remark in the first edition of *The Concept of Law*, he writes, "In some legal systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values ..." (1994, p. 204). This thought sits uneasily with other doctrines of importance to his theory. For Hart also says that when judges exercise moral judgment in the penumbra of legal rules to suppose that their results were already

part of existing law is “in effect, an *invitation* to revise our concept of what a legal rule is ...” (1958, p. 72). The concept of a legal rule, that is, does not include all correctly reasoned elaborations or determinations of that rule. Later, however, Hart comes to see his remark about the U.S. constitution as foreshadowing inclusive positivism (“soft positivism,” as he calls it). Hart's reasons for this shift are obscure (Green 1996). He remained clear about how we should understand ordinary statutory interpretation, for instance, where the legislature has directed that an applicant should have a “reasonable time” or that a regulator may permit only a “fair price:” these grant a bounded discretion to decide the cases on their merits. Why then does Hart -- and even more insistently, Waluchow and Coleman -- come to regard constitutional adjudication differently? Is there any reason to think that a constitution permitting only a “just remedy” requires a different analysis than a statute permitting only a “fair rate?”

One might hazard the following guess. Some of these philosophers think that constitutional law expresses the ultimate criteria of legal validity: because unjust remedies are constitutionally invalid and void *ab initio*, legally speaking they never existed (Waluchow). That being so, morality sometimes determines the existence or content of law. If this is the underlying intuition, it is misleading, for the rule of recognition is not to be found in constitutions. The rule of recognition is the *ultimate* criterion (or set of criteria) of legal validity. If one knows what the constitution of a country is, one knows some of its law; but one may know what the rule of recognition is without knowing *any* of its laws. You may know that acts of the Bundestag are a source of law in Germany but not be able to name or interpret a single one of them. And constitutional law is itself *subject* to the ultimate criteria of systemic validity. Whether a statute, decision or convention is part of a country's constitution can only be determined by applying the rule of recognition. The provisions of the 14<sup>th</sup> Amendment to the U.S. constitution, for example, are not the rule of recognition in the U.S., for there is an intra-systemic answer to the

question why that Amendment is valid law. The U.S. constitution, like that of all other countries, is law only because it was created in ways provided by law (through amendment or court decision) or in ways that came to be accepted as creating law (by constitutional convention and custom). Constitutional cases thus raise no philosophical issue not already present in ordinary statutory interpretation, where inclusive positivists seem content with the theory of judicial discretion. It is, of course, open to them to adopt a unified view and treat *every* explicit or implicit legal reference to morality -- in cases, statutes, constitutions, and customs -- as establishing moral tests for the existence of law. (Although at that point it is unclear how their view would differ from Dworkin's.) So we should consider the wider question: why not regard as law everything referred to by law?

Exclusive positivists offer three main arguments for stopping at social sources. The first and most important is that it captures and systematizes distinctions we regularly make and that we have good reason to continue to make. We assign blame and responsibility differently when we think that a bad decision was mandated by the sources than we do when we think that it flowed from a judge's exercise of moral or political judgement. When considering who should be appointed to the judiciary, we are concerned not only with their acumen as jurists, but also with their morality and politics--and we take different things as evidence of these traits. These are deeply entrenched distinctions, and there is no reason to abandon them. The second reason for stopping at sources is that this is demonstrably consistent with key features of law's role in practical reasoning. The most important argument to this conclusion is due to Raz (1994, pp. 210-37). For a related argument see Shapiro. For criticism see Perry, Waluchow, Coleman 2001, and Himma.) Although law does not necessarily have legitimate authority, it lays claim to it, and can intelligibly do so only if it is the kind of thing that *could* have legitimate authority. It may fail, therefore, in certain ways only, for example, by being unjust, pointless, or ineffective. But law

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cannot fail to be a *candidate* authority, for it is constituted in that role by our political practices. According to Raz, practical authorities mediate between subjects and the ultimate reasons for which they should act. Authorities' directives should be based on such reasons, and they are justified only when compliance with the directives makes it more likely that people will comply with the underlying reasons that apply to them. But they can do *that* only if it is possible to know what the directives require independent of appeal to those underlying reasons. Consider an example. Suppose we agree to resolve a dispute by consensus, but that after much discussion find ourselves in disagreement about whether some point is in fact part of the consensus view. It will do nothing to say that we should adopt it if it is indeed properly part of the consensus. On the other hand, we could agree to adopt it if it were endorsed by a majority vote, for we could determine the outcome of a vote without appeal to our ideas about what the consensus should be. Social sources can play this mediating role between persons and ultimate reasons, and because the nature of law is partly determined by its role in giving practical guidance, there is a theoretical reason for stopping at source-based considerations.

The third argument challenges an underlying idea of inclusive positivism, what we might call the Midas Principle. “Just as everything King Midas touched turned into gold, everything to which law refers becomes law ... ” (Kelsen 1967, p. 161). Kelsen thought that it followed from this principle that “It is ... possible for the legal order, by obliging the law-creating organs to respect or apply certain moral norms or political principles or opinions of experts to transform these norms, principles, or opinions into legal norms, and thus into sources of law” (Kelsen 1945, p. 132). (Though he regarded this transformation as effected by a sort of tacit legislation.) If sound, the Midas Principle holds in general and not only with respect to morality, as Kelsen makes clear. Suppose then that the Income Tax Act penalizes overdue accounts at 8% per annum. In a relevant case, an official can determine the content of a legal obligation only

by calculating compound interest. Does this make mathematics part of the law? A contrary indication is that it is not subject to the rules of change in a legal system -- neither courts nor legislators can repeal or amend the law of commutativity. The same holds of other social norms, including the norms of foreign legal systems. A conflict-of-laws rule may direct a Canadian judge to apply Mexican law in a Canadian case. The *conflicts rule* is obviously part of the Canadian legal system. But the rule of Mexican law is not, for although Canadian officials can decide whether or not to apply it, they can neither change it nor repeal it, and best explanation for its existence and content makes no reference to Canadian society or its political system. In like manner, moral standards, logic, mathematics, principles of statistical inference, or English grammar, though all properly applied in cases, are not themselves the law, for legal organs have applicative but not creative power over them. The inclusivist thesis is actually groping towards an important, but different, truth. Law is an *open* normative system (Raz 1975, pp. 152-54): it adopts and enforces many other standards, including moral norms and the rules of social groups. There is no warrant for adopting the Midas Principle to explain how or why it does this.

#### **4. Law and Its Merits**

It may clarify the philosophical stakes in legal positivism by comparing it to a number of other theses with which it is sometimes wrongly identified, and not only by its opponents. (See also Hart, 1958, Fuesser, and Schauer.)

##### **4.1 The Fallibility Thesis**

Law does not necessarily satisfy the conditions by which it is appropriately assessed (Lyons 1984, p. 63, Hart 1994, pp. 185-6). Law should be just, but it may not be; it should promote the common good, but sometimes it doesn't; it should protect moral rights, but it may fail miserably. This we may call the moral fallibility thesis. The thesis is correct, but it is not the exclusive property of positivism. Aquinas accepts it, Fuller accepts it, Finnis accepts it, and Dworkin accepts it. Only a crude misunderstanding of ideas like Aquinas's



claim that “an unjust law seems to be no law at all” might suggest the contrary. Law may have an essentially moral character and yet be morally deficient. Even if every law always does one kind of justice (formal justice; justice according to law), this does not entail that it does every kind of justice. Even if every law has a prima facie claim to be applied or obeyed, it does not follow that it has such a claim all things considered. The gap between these partial and conclusive judgments is all a natural law theory needs to accommodate the fallibility thesis. It is sometimes said that positivism gives a more secure *grasp* on the fallibility of law, for once we see that it is a social construction we will be less likely to accord it inappropriate deference and better prepared to engage in a clear-headed moral appraisal of the law. This claim has appealed to several positivists, including Bentham and Hart. But while this might follow from the truth of positivism, it cannot provide an argument for it. If law has an essentially moral character then it is obfuscating, not clarifying, to describe it as a source-based structure of governance.

#### **4.2 The Separability Thesis**

At one point, Hart identifies legal positivism with “the simple contention that it is no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so” (1994, pp. 185-86). Many other philosophers, encouraged also by the title of Hart’s famous essay, “Positivism and the Separation of Law and Morals,” (1958) treat the theory as the denial that there is a necessary connection between law and morality -- they must be in some sense “separable” even if not in fact separate (Coleman, 1982). The separability thesis is generally construed so as to tolerate any *contingent* connection between morality and law, provided only that it is *conceivable* that the connection might fail. Thus, the separability thesis is consistent with all of the following: (i) moral principles are part of the law; (ii) law is usually, or even always in fact, valuable; (iii) the best explanation for the content of a society’s laws includes reference to the moral ideals current in that society; and (iv) a legal system cannot survive unless it is seen to

be, and thus in some measure actually is, just. All four claims are counted by the separability thesis as contingent connections only; they do not hold of all *possible* legal systems -- they probably don't even hold of all historical legal systems. As merely contingent truths, it is imagined that they do not affect the concept of law itself. (This is a defective view of concept-formation, but we may ignore that for these purposes.) If we think of the positivist thesis this way, we might interpret the difference between exclusive and inclusive positivism in terms of the scope of the modal operator:

(EP) It is necessarily the case that there is no connection between law and morality.

(IP) It is not necessarily the case that there is a connection between law and morality.

In reality, however, legal positivism is not to be identified with either thesis and each of them is false. There are many necessary "connections," trivial and non-trivial, between law and morality. As John Gardner notes, legal positivism takes a position only one of them, it rejects any *dependence* of the existence of law on its merits (Gardner 2001). And with respect to this dependency relation, legal positivists are concerned with much more than the relationship between law and *morality*, for in the only sense in which they insist on a separation of law and morals they must insist also--and for the same reasons--on a separation of law and economics.

To exclude this dependency relation, however, is to leave intact many other interesting possibilities. For instance, it is possible that moral value *derives* from the sheer existence of law (Raz 1990, 165-70) If Hobbes is right, any order is better than chaos and in some circumstances order may be achievable only through positive law. Or perhaps in a Hegelian way every existing legal system expresses deliberate governance in a world otherwise dominated by chance; law is the spirit of the community come to self-consciousness. Notice that these claims are consistent with the fallibility thesis, for they do not deny that these supposedly good things might also bring evils, such as too much order or the will to power. Perhaps such derivative

connections between law and morality are thought innocuous on the ground that they show more about human nature than they do about the nature of law. The same cannot be said of the following necessary connections between law and morality, each of which goes right to the heart of our concept of law:

(1) Necessarily, law deals with moral matters.

Kelsen writes, "Just as natural and positive law govern the same subject-matter, and relate, therefore, to the same norm-object, namely the mutual relationships of men -- so both also have in common the universal form of this governance, namely *obligation*." (Kelsen 1928, p. 34) This is a matter of the content of all legal systems. Where there is law there is also morality, and they regulate the same matters by analogous techniques. Of course to say that law deals with morality's subject matter is not to say that it does so well, and to say that all legal systems create obligations is not to endorse the duties so created. This is broader than Hart's "minimum content" thesis according to which there are basic rules governing violence, property, fidelity, and kinship that any legal system must encompass if it aims at the survival of social creatures like ourselves (Hart 1994, pp. 193-200). Hart regards this as a matter of "natural necessity" and in that measure is willing to qualify his endorsement of the separability thesis. But even a society that prefers national glory or the worship of gods to survival will charge its legal system with the same tasks its morality pursues, so the necessary content of law is not dependent, as Hart thinks it is, on assuming certain facts about human nature and certain aims of social existence. He fails to notice that if human nature and life were different, then morality would be too and if law had any role in that society, it would inevitably deal with morality's subject matter. Unlike the rules of a health club, law has broad scope and reaches to the most important things in any society, whatever they may be. Indeed, our most urgent political worries about law and its claims flow from just this capacity to regulate our most vital interests, and law's wide reach

must figure in any argument about its legitimacy and its claim to obedience.

(2) Necessarily, law makes moral claims on its subjects.

The law tells us what we *must* do, not merely what it would be virtuous or advantageous to do, and it requires us to act without regard to our individual self-interest but in the interests of other individuals, or in the public interest more generally (except when law itself permits otherwise). That is to say, law purports to obligate us. But to make categorical demands that people should act in the interests of others is to make moral demands on them. These demands may be misguided or unjustified for law is fallible; they may be made in a spirit that is cynical or half-hearted; but they must be the kind of thing that can be offered as, and possibly taken as, obligation-imposing requirements. For this reason neither a regime of “stark imperatives” (see Kramer, pp. 83-9) nor a price system would be a system of law, for neither could even lay claim to obligate its subjects. As with many other social institutions, what law, though its officials, claims determines its character independent of the truth or validity of those claims. Popes, for example, claim apostolic succession from St. Peter. The fact that they claim this partly determines what it is to be a Pope, even if it is a fiction, and even the Pope himself doubts its truth. The nature of law is similarly shaped by the self-image it adopts and projects to its subjects. To make moral demands on their compliance is to stake out a certain territory, to invite certain kinds of support and, possibly, opposition. It is precisely because law makes these claims that doctrines of legitimacy and political obligation take the shape and importance that they do.

(3) Necessarily, law is justice-apt.

In view of the normative function of law in creating and enforcing obligations and rights, it always makes sense to ask *whether* law is just, and where it is found deficient to demand reform. Legal systems are therefore the kind of thing that is *apt for* appraisal as just or unjust. This is a very significant feature of law. Not all human

practices are justice-apt. It makes no sense to ask whether a certain fugue is just or to demand that it become so. The musical standards of fugal excellence are preeminently internal -- a good fugue is a good example of its genre; it should be melodic, interesting, inventive etc. -- and the further we get from these internal standards the less secure evaluative judgments about it become. While some formalists flirt with similar ideas about law, this is in fact inconsistent with law's place amongst human practices. Even if law has internal standards of merit -- virtues uniquely its own that inhere in its law-like character -- these cannot preclude or displace its assessment on independent criteria of justice. A fugue may be at its best when it has all the virtues of fugacity; but law is *not* best when it excels in legality; law must also be just. A society may therefore suffer not only from too little of the rule of law, but also from too much of it. This does not presuppose that justice is the only, or even the first, virtue of a legal system. It means that our concern for its justice as one of its virtues cannot be sidelined by any claim of the sort that law's purpose is to be law, to its most excellent degree. Law stands continuously exposed to demands for justification, and that too shapes its nature and role in our lives and culture.

These three theses establish connections between law and morality that are both necessary and highly significant. Each of them is consistent with the positivist thesis that the existence and content of law depends on social facts, not on its merits. Each of them contributes to an understanding of the nature of law. The familiar idea that legal positivism insists on the separability of law and morality is therefore significantly mistaken.

#### **4.3 The Neutrality Thesis**

The necessary content thesis and the justice-aptitude thesis together establish that *law* is not value-neutral. Although some lawyers regard this idea as a revelation (and others as provocation) it is in fact banal. The thought that law could be value neutral does not even rise to falsity -- it is simply incoherent. Law is a normative system, promoting certain values and repressing others. Law is not

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neutral between victim and murderer or between owner and thief. When people complain of the law's lack of neutrality, they are in fact voicing very different aspirations, such as the demand that it be fair, just, impartial, and so forth. A condition of law's achieving any of these ideals is that it is not neutral in either its aims or its effects.

Positivism is however sometimes more credibly associated with the idea that *legal philosophy* is or should be value-neutral. Kelsen, for example, says, "the function of the science of law is not the evaluation of its subject, but its value-free description" (1967, p. 68) and Hart at one point described his work as "descriptive sociology" (1994, p. v). Since it is well known that there are convincing arguments for the ineliminability of values in the social sciences, those who have taken on board Quinian holisms, Kuhnian paradigms, or Foucauldian epistemes, may suppose that positivism should be rejected *a priori*, as promising something that no theory can deliver.

There are complex questions here, but some advance may be made by noticing that Kelsen's alternatives are a false dichotomy. Legal positivism is indeed not an "evaluation of its subject", i.e., an evaluation of *the law*. And to say that the existence of law depends on social facts does not commit one to thinking that it is a good thing that this is so. (Nor does it preclude it: see MacCormick and Campbell) Thus far Kelsen is on secure ground. But it does not follow that legal philosophy therefore offers a "value-free description" of its subject. There can be no such thing. Whatever the relation between facts and values, there is no doubt about the relationship between *descriptions* and values. Every description is value-laden. It selects and systematizes only a subset of the infinite number of facts about its subject. To describe law as resting on customary social rules is to omit many other truths about it including, for example, truths about its connection to the demand for paper or silk. Our warrant for doing this must rest on the view that the former facts are more important than the latter. In this way, all descriptions express choices about what is salient or significant, and these in turn cannot

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be understood without reference to values. So legal philosophy, even if not directly an evaluation of its subject is nonetheless “indirectly evaluative” (Dickson, 2001). Moreover, “law” itself is an anthropocentric subject, dependent not merely on our sensory embodiment but also, as its necessary connections to morality show, on our moral sense and capacities. Legal kinds such as courts, decisions, and rules will not appear in a purely physical description of the universe and may not even appear in every social description. (This may limit the prospects for a “naturalized” jurisprudence; though for a spirited defense of the contrary view, see Leiter)

It may seem, however, that legal positivism at least requires a stand on the so-called “fact-value” problem. There is no doubt that certain positivists, especially Kelsen, believe this to be so. In reality, positivism may cohabit with a range of views here -- value statements may be entailed by factual statements; values may supervene on facts; values may be kind of fact. Legal positivism requires only that it be in virtue of its facticity rather than its meritoriousness that something is law, and that we can describe that facticity without assessing its merits. In this regard, it is important to bear in mind that not every kind of evaluative statement would count among the merits of a given rule; its merits are only those values that could bear on its justification.

Evaluative argument is, of course, central to the philosophy of law more generally. No legal philosopher can be *only* a legal positivist. A complete theory of law requires also an account of what kinds of things could possibly count as merits of law (must law be efficient or elegant as well as just?); of what role law should play in adjudication (should valid law always be applied?); of what claim law has on our obedience (is there a duty to obey?); and also of the pivotal questions of what laws we should have and whether we should have law at all. Legal positivism does not aspire to answer these questions, though its claim that the existence and content of law depends only on social facts does give them shape.

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**11.5 SUMMARY**

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The theory that says that justice and law have a dependency relation that exists for the well being and harmony of the society is known as the dependency theory of justice. This theory proposes that justice depends on law but is not the same as law. Justice is imparted by judiciary of the state as per law, but this is not the only way in which justice is imparted.

In this unit we have discussed about the concept of Dependency theories of law and justice and for its realization justice depends on law, but justice is not the same as law.

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### 11.7 SELF ASSESSMENT QUESTIONS

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1. What do you understand by the concept of the concept of Dependency theories of law and justice?
2. Describe whether justice depends on law?
3. Discuss that justice is not the same as law.

**LL.M. Part-2**

**Subject: JUDICIAL PROCESS**

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**Block-IV**-Relation between Law and Justice

**Unit-12**-The independence of justice theories - means to end relationship of law and justice; the relationship in the context of the Indian constitutional ordering

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**STRUCTURE**

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**12.1 INTRODUCTION**

**12.2 OBJECTIVES**

**12.3 WHAT are the Independence theories of justice?**

**12.4. Means to end relationship of law and justice**

**12.5 Indian Concept**

**12.6 SUMMARY**

**12.7 SUGGESTED READINGS/REFERENCE MATERIAL**

**12.8 SELF ASSESSMENT QUESTIONS**

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## 12.1 INTRODUCTION

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In the previous unit you have read about the concept of Dependency theories of law and justice and for its realization justice depends on law, but justice is not the same as law. Justice and its independence constantly cause nourished and impassioned debates. Admittedly, the subject is sensitive since it touches at the same time law and the judiciary, politics and its users, society and its citizens. Curiously, any approach on the independence of justice is invariably declined towards two other subjects: the independence of the judicial power and that of the judges. In this unit we will discuss about the independence of justice theories - means to end relationship of law and justice and their relationship in the context of the Indian constitutional ordering.

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## 12.2 OBJECTIVES

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After reading this unit you will be able to:

- ✓ Understand the concept of the independence of justice theories.
- ✓ Explain the means to end relationship of law and justice.
- ✓ Describe the relationship between law and justice in the context of the Indian constitutional ordering.

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## 12.3 WHAT are the Independence theories of justice?

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### ***The Independence of Justice***

Justice and its independence constantly cause nourished and impassioned debates. Admittedly, the subject is sensitive since it touches at the same time law and the judiciary, politics and its users, society and its citizens. Curiously, any approach on the independence of justice is invariably declined towards two other subjects: the independence of the judicial power and that of the judges.

I - Independent Justice or Independence of the Judicial Power?

A) The Concept of Independent Justice and Independence of the Judicial Power. The concept of independent justice and judicial power is comprehended in a confused way by a public which has difficulties to dissociate them. However the distinction is of importance. To speak about justice is to apprehend the system as a whole. Justice, in its traditional meaning, is a body of judges, but also of auxiliaries and judicial officers. It is a whole material organisation and it is an overall system at the service of the public! Justice can be multiform. Thus it can have a scientific connotation: civil, penal, military or international. Justice is not only that of the judges and the lawyers. It can, indeed, be of a philosophical, religious or clannish nature. Justice is also a common act of the everyday life, such as repairing the injustice of having unevenly shared the cake between children... the topic of the independence of justice is very extendable. Consequently in this context, the logic commands us to turn to the independence of the judicial power.

Since Locke and Montesquieu in the 17th and 18th centuries, the concept of State takes as a starting point the theory of the separation of powers between the legislature, the executive and the judiciary. However, Locke (1690) made the distinction in the variation of the powers, as to distinguish between the legislative power, the executive power and the federative power or the capacity to start a war and to sign treaties. Montesquieu (1748), however considered as the inspirer of the three powers, stated in his "Spirit of the laws": "There are in each State three kinds of powers: the legislative power, the executive power of the things which depend on the law of nations, and the executive power of those who depend on the civil law". This hesitation to sanctify the judicial power and its independence has lasted ever since. Thus, in France, the Constitution of 1958 only instituted, next to an executive power and a legislative power, a judicial "authority".

Moreover, as it was pointed out recently by a high-ranking judge at the time of an international conference, "the independence of justice

is always proclaimed but remains subjected, in many countries, to the omnipotence of the sovereignty of the State". It will be noticed that the terms of "independence of the judicial authority" and of "independence of justice" are indistinctly employed. This persistent confusion does not influence the heart of the matter, i.e. the nature of the relations between the executive and the judiciary.

### **B) The Independence of the Judicial Power**

The mutual intrusion of the two powers - executive and judicial - in their respective spheres of influence is often stigmatised. The political State speaks about "the power of the judges" while the judges denounce "the interventionism of the State". In fact, all depends on the applicable mode and the concept which one adopts, which postulates for two options:

one which founds a true judicial power where the president of the Supreme Court is at the same time the chief of the highest jurisdiction and the manager who governs the functioning of all the legal body. He enjoys a great autonomy and occupies a hierarchical row in the State, equal to that of the chief of the government.

the other which institutes a supreme jurisdiction: the Supreme Court of appeal which function only consists in judging in law. At his side is a minister of justice who has high capacities in the legal organisation and in the appointment of the judges, particularly those of the public prosecutor's department. A Council of judges decides of the career of the judges and a Constitutional Council ensures the respect of the constitutionality of laws.

This formula is far from giving satisfaction, because it unceasingly calls into question the fine line between the political power and the independence of the judges.

II-The independence of justice: a constitutional value shared between the judge and the judicial officer

The independence of justice cannot be understood under the only benefit of the independence of the judicial power, in other words the capacity of the judges.

A) The independence of the auxiliaries of justice and the members of the legal profession: a necessary complement. In a conference relating to the independence of justice, Mr Abderham Diouf, prosecuting attorney at the Supreme court of appeal of Senegal, declared: "The independence of justice is about the independence of the judges and its natural corollary: the lawyer".

In same time, Mr. Ancel, president of a chamber at the Court of cassation of Paris stressed that the independence of justice was to go beyond the judge to take into account two consubstantial elements:

**-the access to the judge,**

**-the specific enforcement of judgements.**

It is understood that under the only angle of the judicial power, the concept of independence of justice appears very reducing. And as a matter of fact, the work of justice does not stop with the intervention of the judge, nor even when the judgement is given, which makes the professor Duple, of the University of Laval in Quebec, state that "the concept of the Rule of Law rests on the principle whereby the judge has as a function to judge, lawyer to represent the parties" and, would we add, judicial officer to carry out court decisions. This last precision leads us to add the following remark. Too many times it is considered that justice has fulfilled its role once the judgement is given. The judges themselves do not mark but a minor interest in the fate of their decision and rare are those who wonder about the capacity of the parties to even understand or to interpret their judgements. More seriously, enforcement only causes a very minor interest. Fortunately, things are changing... Gradually the political sector, the legal world, as well as the economic operators express an increasing concern about enforcement of legal titles. Initially, it is the European Union which put on orbit, since the Council of Tampere in 1999, the area of freedom, security and justice and published not less than seven European instruments concerning enforcement and judicial procedures. Then, it was the turn of the European Court of Human Rights which, by the means of article 6.1



of the European Convention on Human Rights, posed the principle, in the wake of the *Hornsby v. Greece* case of March 19, 1997, of a right to an enforcement of judgements, which turned, due to the evolution of jurisprudence, into a true autonomous right of enforcement. Finally, the Council of Europe, under the terms of a Recommendation of September 9, 2003 (Rec2003(17)), proposes the implementation of common standards in the field of the trans-national enforcement and which in addition delivers a catalogue of normative measures intended to promote a harmonization of the statute of the European judicial officer.

**B) The liberal judicial officer: and independent actor essential to an independent justice**

The aim set by the Council of Europe is to support - it is a truism - the creation of an occupation of judicial officer, if not uniform, at least harmonised on the basis of common standard. This concept of the judicial officer is to be compared to the doctrines of the UIHJ which preaches the introduction of a statute of the liberal and independent judicial officer. In this respect, let us recall that the whole of the national chambers or orders of judicial officers of Africa of the OHADA zone, which represents 16 Member States, filed in under the aegis of the International Union a project of unified statute, conceived according to the criteria of independence and freedom of exercise such as mentioned.

As it was many times proved, the liberal and independent judicial officer is a pledge of independence of justice. What would be a justice which would be proclaimed independent if the judgements, once given, were to pile up in the cupboards without being carried out? The question is not an innocent one. The facts are actual and known. A State which does not ensure the enforcement of its judgements is a State which weakens its legal security and cultivates the grounds for corruption and discourages economic operators. To guaranty an effective and quality enforcement the liberal and independent judicial officer becomes, consequently, an essential element of the judicial chain. The judicial officer, like the judge, must

be independent: i.e. independent from the power, and safe from all sources of influence. An independent judicial officer is submitted to no hierarchy. He must only yield with his authority of discipline and act under the control of the Public Prosecutor's Department. The judge should not interfere in the action of the judicial officer because his prerogatives must be limited to judge litigations and to take measures when seized. The procedure of execution must be left to the free will of the parties. For a justice to be worthy of its independence it is important to proscribe any interference between the executive power and the judicial officer. It is intolerable that today still, in a number of countries, the authorities of the State, with the contempt of the principle of the separation of power intervene under fallacious pretexts, to stop the course of enforcement or to modify its range. It is inadmissible that members of government of a State, which presents itself as a strong promoter of democracy, Rule of Law, and Human Rights, can suspend or dismiss judicial officers who refuse to yield to the pressure to draw up an illegal act.

It is necessary to condemn with the most extreme strength the decisions of governments which unilaterally issue the extinction of all the enforcement procedures, or which push the population to resist the injunctions of the judicial officers. How many of our fellow-members had to undergo vexations, sanctions, or even were imprisoned for having resisted intimidating and unlawful manoeuvres, whereas they were only concerned about fulfilling the noble mission which fell to them: that to carry out a judgement for the people or the Republic. Yes, the independence of justice passes by the respect of the given decision and a full support for the judicial officer who is the only agent in charge of the operations of enforcement. To deny this would result in ignoring the decisions of the European Court of Human Rights, proclaiming in a case of June 22, 2004, that the judicial officer "is an essential element of the Rule of Law". Lastly, and such will be my conclusion, where court decisions remain dead letters for lack of a body of liberal and independent judicial officers, there comes insecurity and there

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settles private justice, in other words the laws of the strong against the weak and of the powerful against the impecunious. The un-enforcement of decisions then becomes a true attack against democracy. To reach a true independent justice, it is thus advisable to have not only an independent judicial power but also an independent and liberal body of judicial officers.

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#### **12.4. Means to end relationship of law and justice**

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The concept of natural law—higher moral law over and above the positive law embodying certain values of universal validity like dharma (righteousness) artha (wealth), kama (desires) and moksha (salvation) were expounded by ancient Indian philosophers and thinkers 5000 years ago with a view to establish a harmonious social order by striking a balance between inner and outer, spiritual and material aspects of life. The quest for equilibrium, harmony, knowledge and truth inspired the Indian minds more than their counterparts the Greeks and the Romans. The major goals of life were to be attained, controlled and regulated according to the dictate and direction of dharma. The immortal Veda Vyasa declared Artha and Kama flow from dharma and so why not follow dharma? In other words that is first follow dharma and dharma will also give artha and Kama. Thus ethos of Indian way of life was characterized by an all pervading law—dharma. It is this law of dharma—the Hindu's natural law was neither a cult or creed nor a code in the Western sense but the right law of life and true ideal of living and social ordering. It is this law of dharma which is neither static nor rigid nor absolute but relative, dynamic and evolving—always changing according to the needs and development of society. Thus, philosophical ideals and constructing scientific concepts and methods which have deeply influenced the law and life of people. The spirit of intellectual inquiry which possessed the Hindu mind led them to question experience, to question the envioning world, to question their gods and the tenets and of their traditional faith. They were not hampered by the

tyranny of religious dogmas or political authority or even pressure of public opinion. They sought and elaborated the law of dharma and truth with single-minded devotion rare in the history of spiritual thoughts and theology. As Yajurveda declared i.e. son of immorality all should listen the message of Truth. In the words<sup>122</sup> of Max Muller (Six Systems of Indian Philosophy). 'It is surely astounding that such a system as the Vedanata should have been slowly elaborated by the indefatigable and intrepid thinkers of India thousands of years ago, as system that even now makes us feel giddy, as in mounting the last steps of swaying spire of an ancient Gothic Cathedral. None of our philosophers, not excepting Heraclitus, Plato, Kant or Hegel has ventured to erect such a spire, never frightened by storms or lightnings. Stone follows on stone after regular succession after once the first step has been made, after once it has been clearly seen that in the beginning there can have been but one, as there will be but one in the end, whether, we call it At man or Brahman.

### **Personal Liberty**

In the pre-Constitution era Gandhiji had blazed the trail of higher law against State by expounding the doctrine of legitimacy of right means to achieve right ends. He never hesitated to disobey unjust laws, customs and traditions which were an affront to human liberty and dignity. The concept of higher law in so far as human dignity, liberty and equality is concerned is clearly epitomised in different Articles of the Constitution. Articles 19, 21 and 22 especially guarantee personal freedoms and civil liberties which are the very soul of democracy and of a free society. However, curbs on civil liberties and personal freedoms in free India are not uncommon. To curb communists or naxalities or communalists civil liberties have been curtailed and abrogated from time to time.

The Bombay Public Security Act, 1947, the Bihar Maintenance of Public Order Act, 1947, the West Bengal Security Act, 1948, The Preventive Detention Act, 1950, the Maintenance of Internal Security Act, 1971 (MISA), the National Security Act, 1980, etc. are such statutory measures which have been upheld by the courts being reasonable restrictions on Fundamental Rights guaranteeing civil liberties and personal freedoms. In *Gopalan*,<sup>123</sup> the constitutional validity of the Preventive Detention Act came for consideration wherein the Court was asked to pronounce upon true meaning of Article 21 of the Constitution guaranteeing right to life and right to personal freedom. The Court declared that the words 'according to procedure established by law' in Article 21 meant 'according to the substantive and procedural provisions of any enacted law.' If, therefore, a person was deprived of his life or personal liberty by law enacted by a legislature, however, drastic and unreasonable the law, he would be rightly deprived of his life and liberty. There would be no infringement of personal liberty or freedom in such a case. In effect the *Gopalan* meant that in respect of civil liberties and personal liberty no person in India had any remedy against legislative action. In this connection Justice Mukherjee observed 'My conclusion, therefore, is that in Article 21 the word 'law' has been used in the sense of State-made law and not as an equivalent in the abstract or general sense embodying the principles of natural justice.' It was held the term 'law' has been used in Article 21 in the sense of *lex* (State made law). The *Gopalan* approach has been characterized as the 'high water mark of legal positivism.' The Supreme Court's approach was liberal, rigid and strict too much coloured positive or imperative (Austinian approach) theory of law. The similar attitude of the Court is discernable in the *Habeas Corpus*,<sup>124</sup> case wherein the Court revolves around Austinian positivism.

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<sup>124</sup> *A.D.M. Jabalpur v. Shivakant Shukla*, A.I.R. 1976 S.C. 1207; *A.K. Roy v. Union of India*, A.I.R. 1982 S.C. 710.

It was Subba Rao, Chief Justice of India who introduced the concept of natural law at its zenith in the *Golak Nath*,<sup>125</sup> during sixties. Its influence, however, diminished especially during the Internal Emergency of 1975. It has once again revived with greater vigour in the post-Emergency era. The Supreme Court in the *Maneka*,<sup>126</sup> corrected its error of the *Gopalan* case in which it had strictly interpreted the word 'law' and had not taken into consideration the 'procedure' which ought to be just, fair and reasonable. Both Bhagwati, J. and Krishna Iyer, J. are emphatic that the procedure in Article 21 means fair and reasonable procedure. The Court observed,<sup>127</sup> 'the ambit of personal liberty protected by Article 21 is wide and comprehensive. It embraces both substantive rights to personal liberty and procedure provided for their deprivation.' Thus *Maneka* has over-ruled *Gopalan*. *Maneka* rejects the theory that each fundamental right is a self-contained code itself. Bhagwati, J. and Krishna Iyer, J. have highlighted the need to keep in view the synthesis of these rights while interpreting each right according to social milieu of changing times, place and situation. Thus, a number of cases on personal liberty have enriched Indian jurisprudence on human rights. As already observed *Maneka* has enriched and enlarged personal liberty, *Nandini*<sup>128</sup> saves the poor suspects from terrorised and tortured into involuntary discrimination, *Batra*<sup>129</sup> rescues prisoners from solitary confinement and iron bars. *Hoskote*,<sup>130</sup> gives the convict the fundamental right to file appeal and the legal aid needed to file such an appeal. *Charles Sobraj*,<sup>131</sup> has drawn the attention of the courts that imprisonment does not bid a farewell to Fundamental Rights, and *Bhantidas*,<sup>132</sup> protects the

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<sup>125</sup> *Golak Nath v. State of Punjab*, A.I.R. 1967 S.C. 1643 at 1656.

<sup>126</sup> *Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Nandini Satpathy v. P.L. Dani*, A.I.R. 1978 S.C. 1025.

<sup>129</sup> *Sunil Batra v. Delhi Administration*, A.I.R. 1978 S.C. 1675.

<sup>130</sup> *Hoskote v. Maharashtra*, A.I.R. 1978 S.C. 1548.

<sup>131</sup> *Charles Sobraj v. Superintendent Central Jail*, A.I.R. 1978 S.C. 1514.

<sup>132</sup> *Union of India v. Bhanudas*, A.I.R. 1978 S.C. 1027.

dignity of convicts laying down that conviction does not degrade a person into a non-person. Prem Shankar<sup>133</sup> too protects prisoners kept as undertrials from police brutalities and indignities. Moti Ram,<sup>134</sup> succeeds in expanding and liberalising age old concept of bail so as to make in, more responsive to the needy and poor and in Madhav,<sup>135</sup> the Supreme Court clarifies the larger questions who silently suffer behind the stone walls due to deprivation of liberty caused by unreasonableness, arbitrariness and unfair procedures. In Shivkumar,<sup>136</sup> the High Court of Allahabad sets aside the prosecution of the accused extolling naxalite activities and asking people to boycott elections. Mantoo Maztimdar<sup>137</sup> is an instance of callous detention of the prisoner not 90 days but 1900 days or more without bothering for the law of the land as the Supreme Court observed, 'If the salt hath lost its flavour wherewith shall it be salted? It he law officers charged with the obligation to protect the liberty of the persons are mindless of Constitutional mandate and Codes how can freedom survive for ordinary citizens. Hussainam<sup>138</sup> is another example of Supreme Court concern for men, women, and children who are behind prison bar for years waiting trials and the Supreme Court says 'speedy trial.....is an integral part of the fundamental right to life and liberty enshrined in article 21'. In Bachan Singh<sup>139</sup> the Court through judicial interpretation ingrafted the concept of reasonableness in the entire fabric of the Constitution as it remarked 'every facet of law which deprives a person of life or personal liberty would, therefore, have to stand the test of reasonableness, fairness and justice in order to be outside the inhabitation of Article 21' : The Court thus laid down that death sentence can be inflicted only in the

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<sup>133</sup> Prem Shankar v. Delhi Administration, A.I.R. 1980 S.C. 1535, Raghbir Singh v. State of Haryana, A.I.R. 1980 S.C. 1087.

<sup>134</sup> Moti Ram v. State of M.P. A.I.R. 1978 S.C. 1594.

<sup>135</sup> Supra Note 35.

<sup>136</sup> Shiv Kumar Mishra v. State of U.P., 1978 Cri. L.J. 701.

<sup>137</sup> Mintoo Mazumdar v. State of Bihar, A.I.R. 1980 S.C. 847.

<sup>138</sup> Hussainara Khatoun v. Home Secy. State of Bihar, A.I.R. 1979 S.C. 1360,1819.

<sup>139</sup> Bachan Singh v. State of Punjab, AIR 1980 SC 267, 898,1355.

rare of the rarest cases when the 'alternative option is unquestionably foreclosed' or for 'special reasons' to be recorded. Of course 'special reasons' justifying capital punishment, in the absence of legislation or guiding principles are bound to vary from judge to judge,<sup>140</sup> depending upon his 'attitude and approaches, predilections and prejudices, habits of mind and thought and his social value system.' Although the Apex Court has justified the imposition of death sentence,<sup>141</sup> when according to the judge the nature of the crime is 'brutal', 'cold-blooded', 'deliberate', 'heinous', 'violent' etc. But prolonged delay in the execution of sentence of death is one such ground where it has been substituted by imprisonment for life. The Court unanimously accepted,<sup>142</sup> the view that undue delay in the execution of death sentences not only leads to inhuman suffering and dehumanising treatment but it is also unjust, unfair and unreasonable deprivation of life and liberty of a condemned prisoner and, therefore, infringes the mandate of Article 21 of the Constitution.

### **New Jurisprudence—New liberal setting**

Prior to 1973 the Court with great difficulty had to acquiesce with the prevailing view which existed since the adoption of the Constitution that Parliament is 'Sovereign' which even can replace the Constitution', or supremacy of the Executive vis-a-vis the Judiciary in the context of a so-called 'committed judiciary' during the days of Golak Nath case controversy. However, it was in Maneka together with Kesavananda Bharati that the Supreme Court expounded a new jurisprudence—some fundamental and higher principles of law which may endure and adapted to varying social and political

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<sup>140</sup> Bachan at 1375-76 in Lachman Devi execution of death sentence by public hanging was declared barbaric and violative of Article 21—Attorney Gen. of India v. Lachma Devi, AIR 1987 SC 487.

<sup>141</sup> See also Blacksheid, AR Capital Punishment in India 21JILI139-174 (1979).

<sup>142</sup> Javed Ammed v. State of Maharashtra, AIR 1985 SC 231; Madhu Mehta v. State of Gujarat, AIR 1989 SC 1335; Triveni Ben v. State of Gujarat, AIR 1989 SC 142, Brij Mohan v. State of Rajasthan, AIR 1994 SC 739.



situations in India. It is through judicial fiat or review that the judiciary has created both a philosophy of law and theory of politics inextricably based on values like reason, nature, morality, liberty, justice and restraint consistent with the spirit of the Constitution and traditions of the people. In *Kesavandanda*,<sup>143</sup> the Court rejects the positivistic instance that sovereign power lay with Parliament. Denying such claims the Court postulated what it described 'the basic features, doctrine as an impenetrable bulwork against every assumption of despotic or unconstitutional exercise of power by the legislature and the executive. This indeed is a far-reaching development in the annals of Indian jurisprudence for meeting the challenges of troubling times and issues,<sup>144</sup> confronting our democratic and secular Republic. The *Maneka Gandhi*,<sup>145</sup> is another landmark decision from the point of human rights and remedial jurisprudence in which Justice Bhagwati has beamed the 'Lead Kindly light message' admits the encircling gloom of State repression by emitting New Freedoms for making human rights a living reality for those denied or unable to exercise and enjoy such rights on account of poverty or ignorance. Through *Maneka* people now realise what State is if it is devoid of justice or denies liberty, human dignity, equality etc. to ordinary citizens under the garb of populist democracy, capsuled socialism and controlled freedoms. Deprecating absolutism of the Executive and its interference with individual freedom Justice Bhagwati declared:<sup>146</sup>

'We must reiterate here what was pointed out by the majority in *E.P. Royappa v. T.N.* Namely, that 'from the positivist point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies, one belongs to the rule of law in a

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<sup>143</sup> *Kesavananda* is not 'merely a reported case.....but it is the Indian Constitution of the future' Baxi, U, (1967) 9 JILI, 323.

<sup>144</sup> *S.R. Bommai v. Union of India*, AIR 1994 SC 1918; *M. Ismail v. Union of India*, AIR 1995 SC 605.

<sup>145</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

<sup>146</sup> *Ibid.*, 624.

republic, while the other to the whims and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that is unequal both according to political logic and constitutional law and, therefore, violative of Article 14. Article 14 strikes at arbitrariness of State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive, otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied'. In Chandrima Das,<sup>147</sup> the Supreme Court has broadened and greatly widened the meaning of the word 'LIFE' as adopted in International Covenants on Civil and Political Rights, the Covenants of Economic, Social and Cultural Rights including Universal Declaration of Human Rights 1948. On this principles even those who are not citizens of this country and come here as merely as tourists in this country.....will be entitled to the protection of their lives in accordance with the constitutional provisions. They also have a right to 'Life' in this country. Thus, they also have the right to live, so long as they are here, with human dignity, just as the State is under an obligation to protect the life of every citizen in this country, so also the State is under an obligation to protect the life of the persons who are not citizens.'

### **Judicial Process—blending new values**

In the post-Emergency era under the dynamic leadership of judges like V.R. Krishna Iyer, Y.V. Chandrachud, P.N. Bhagwati, D.A. Desai, O. Chinnappa Reddy and Kuldeep Singh like their counterparts Justices Holmes, Cardozo, Brandeis, Frankfurter in USA, have made their mark overwhelmingly upon great issues of

human liberty, social justice and human rights,<sup>148</sup> as enshrined in the Constitution even by antagonising the Parliament and the Government of the day. These judges through their scintillating judgments made a bold departure from the traditional judicial role and sharply focused the debilitating effects of executive and legislative tyranny on individual autonomy and freedoms as was evident in *Gopalan and Shivkant Shtikla*.<sup>149</sup> They found a sanctuary in the Preamble, Parts III and IV of the Constitution for destroying barriers and fetters on individual liberty and henceforth assumed the role of philosopher, law-maker and defender of basic rights and needs of the little Indians. In a similar setting Justice O. Chinnappa Reddy declared,<sup>150</sup> that equal pay for equal work is not a 'mere demagogic slogan' but a constitutional goal which can be achieved through enforcement of fundamental rights. He specially hailed 'the rising social and political consciousness and the expectations as a consequence among the under-privileged who are now asking Court's intervention to protect and promote their rights.....the judges of the Court have a duty to redeem their constitutional oath and do justice no less to the pavement dweller than to the guest of the Five Star Hotel.' Accordingly the Apex Court has been adopting organic, functional and sociological method of interpretation over the traditional mechanical method in the enforcement of the provision of the Constitution. By providing flesh and blood to political, social and economic rights instead of living in ivory tower the Court has become activist by compelling the executive and the political leadership not to turn volte-face in redeeming their pledges towards the hapless Indians in the true Gandhian spirit. Under the spell of new economic liberalization and privatisation it is the judges who have been

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<sup>148</sup> By 'human rights' means rights of individuals have or ought to have against the government under the 'fundamental' constitutional law.

<sup>149</sup> *A.D.M. Jubalpur v. Shivkant Shukla*, AIR 1976 SC 1207.

<sup>150</sup> *Randhir Singh v. Union of India*, AIR 1982 SC 879; *GB Mutliamma v. Union of India*, AIR 1979 SC 1868, *Air India v. Nargesh Meerza*, AIR 1981 SC 1829.

standing for the poor in their quest for justice and dignity. In this context, Justice V.R. Krishan Iyer exhorted<sup>151</sup> the judges:

‘Where doubts arise the Gandhian talisman becomes a toll of interpretation : whenever you are in doubt.....apply the following test. Recall the face of the poorest and the weakest whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him.’ Such is the constitutional promise and goal in favour of ‘We, the People of India’ that the Apex Court has been assiduously evolving in the post-Emergency era under the niche of Article 21 of the Constitution. Thus, Article 21 in conjunction with Articles 14, 19, 39 etc. have proved gold mine for Court in achieving the two objectives, namely, providing a shield on moral, humanitarian and constitutional grounds to the poor as a guarantee against executive action and of making new law for governing the life of citizens and regulating the functioning of the State in accordance with law of the land. A brief resume of judicial decisions in the realm of individual liberty, freedom, social justice and other human rights under Article 21 are capsuled to demonstrate the extent of judicial creativity in contemporary Indian jurisprudence.

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### **12.5 Indian Concept**

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Much earlier to Greeks and Romans the early Rigvedic thinkers were also deeply impressed by the forces and powers of nature. They began to wonder at the natural forces like the sun, the moon, the rains, the storms, lightning, etc. They felt they were surrounded on all sides by the mysteries of the universe and that they were naturally dependent on these natural phenomena. They began to put themselves the original questions such as ‘where is the sun by night?’, ‘Where go the stars by day?’, ‘Why does the sun not fall down?’, etc.’ They thought that the forces of nature were all represented by mysterious divine forces. They began to posit a God

for each of these natural powers and forces of the universe e.g. Mitra (agent of bright sky and day), Vanma (the agent of dark sky and evening), Surya (agent of sun), etc. It is the God Vanma who was very important and extolled by Vedic sages. He is considered in the Vedas as the apostle of justice, virtue and righteousness in the universe. He is the chief guardian of Rita in Vedas. Rita is cosmic order, the ordered course of things in the universe as revealed regular alteration of day and night, the pageantry of seasons and all other disciplines as represented by laws of uniformity of nature and universal causation. Rita also means moral order in the individuals in society. It is the Truth, the truth of the world, in men and matter included. The contrast of Rita is Anrita—i.e. lie, untruth falsehood. Rita is Sati/a and dharma—truth, justice and equity. The Vedic gods are not only the maintainers of the Cosmic order but also the upholders of Moral Law. They have the double responsibility of maintaining both physical and moral orders. God Vanma is considered the accredited trustee of this Rita. He has fixed the laws of the physical universe. The sea does not flow back into rivers, nor does the wind cease to blow. So also he is holding the reins of righteousness in men. He is the guardian and champion of Rita. However, Vedic seers were not polytheistic but they also moved to monotheism and pantheism and still further to find out the source of this entire universe, of all being and existence. Thus, the Vedas represent at an early stage in the history of man, the worship of the great powers of nature personified. The ideal of Rigvedic man is to become like Gods not only through worship but also by way of life. Virtue is obedience to the Law of God which includes love of man also. Vice is disobedience to law. Rita furnishes the measure of morals. It is Satya, Anrita is opposite of Rita, the opposite of truth. It is disorder or disquietude. An ordered conduct is Vrata. Vanma is the guardian of Rita and himself a person of unalterable ways. All good habits like speaking the truth, self-restraint, benevolence to neighbours, charity, kindness, etc. are considered virtues. All

malpractices like adultery, seduction, sorcery, witchcraft, etc. are considered as evils. Even gambling is denounced.

### **Dominant Trends—Indian way of life**

In substance there are three predominant trends of Indian way of life. First, the Indian social tendency from time immemorial has been to subordinate the individual to the claims of society. Second, the Indian religious and spiritual thought and traditions have always been individualistic—the individual's claim to inquiry, to discover and exercise his spiritual freedom and greatness and moral splendour—the first great charter of the ideal of humanity promulgated by Vedic seers. Third, it is in India that religion and morality have always been the sheet anchor of polity, economy and administration. At no time in the history of India the ruler could be a dictator or despot unmindful of traditions,; dharmashastras and majority public opinion (lokmat). Thus natural law and ethics have always occupied the central place in law and politics. Efforts of so-called western jurist like Austin and his tribe to separate morality from law and politics have resulted in tyranny, intolerance, regimentation, exploitation, discrimination and power hunger as is evident from the Second World War and other post-War developments in South Africa, Vietnam War, Black Movement in U.S.A. and East-West confrontation etc. In the ultimate reality it is the Indian tradition of Dharma which alone is the path breaker to search and stipulate for individual his righteous goals and rebel against such! Adharmik law (unjust law) and to re-assert the natural law of his' Maker. At no time of history of man is discovery and reinstatement of ancient Indian natural law more urgent than it is today.

### **Government—Judiciary Conflict—and Natural Law**

In the pre-Golak Nath era in a number of cases it had become amply clear that a situation was developing, on account of Supreme Court's nullifying the progressive legislation, which was irksome both

to Parliament and the Executive? There were a series of cases where the government lost and these were also the decisions which were linked to enforcement of fundamental rights. The Supreme Court in all such cases adopted ideal, moral or natural law approach in order to invalidate the various legislative measures,<sup>152</sup> under the canopy of fundamental rights especially in post-Nehru period. In the *Golak Nath*,<sup>153</sup> the Court ruled that Parliament has no power to amend the Constitution so as to take away or abridge the fundamental rights. The majority held,<sup>154</sup> that 'the fundamental rights enshrined in Part III were intended to be finally and immutably settled and determined once for all and were beyond the reach of any future Parliament'. Similarly, the Supreme Court held the bank nationalisation,<sup>155</sup> law and Privy purses abolition,<sup>156</sup> law unconstitutional. These judgments led to a mid-term poll. The Fifth Parliament passed the 25th Amendment of the Constitution in 1971 to establish supremacy of the Directive Principles contained in clauses (b) and (c) of Article 39 over Fundamental Rights as specified in Articles 14, 19 and 31. The validity of the 24th and 25th Amendments was challenged before the Supreme Court in *Hzs Holiness Kesavananda Bharati v. State of Kerala*,<sup>157</sup> which was heard by 13 Judges with 11 judgments. While the Court did not specifically consider fundamental rights as a basic feature of the Constitution it declared,<sup>158</sup> that 'every provision of the Constitution can be amended provided in the result basic foundation and structure of the Constitution remains the same.' The basic structure or feature may be said to consist of the following features:

1. Supremacy of the Constitution;

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<sup>152</sup> Agrarian slum clearance, Town Planning, Labour Legislation, etc.

<sup>153</sup> *Golak Nath v. State of Punjab*, A.I.R. 1967 S.C. 1643.

<sup>154</sup> *Ibid.*, at 1954.

<sup>155</sup> *R.C. Cooper v. Union of India*, A.I.R. 1970 S.C. 564.

<sup>156</sup> *Madliav Rao Scindia v. Union of India*, A.I.R. 1971 S.C. 530.

<sup>157</sup> A.I.R. 1973 S.C. 1461.

<sup>158</sup> *Ibid.*, pp. 1462-63 per Sikri, C.J.

2. Republican and Democratic form of Government;
3. Secular character of the Constitution;
4. Separation of powers between the legislature, executive and judiciary, and
5. Federal character of the Constitution.

Thus, in *Kesavananda Bharati* the Supreme Court modified its attitude towards fundamental rights which it now declared to be relative and not absolute, changeable and not immutable or transcendental. As Mathew, J. aptly remarked 'In building a just social order, it is sometimes imperative that the Fundamental Rights should be subordinated to the Directive Principles..... The economic goals have a contestable claim for priority over ideological ones on the ground that excellence comes only after existence. It is only if men exist that there can be fundamental rights.' Justice Mathew further observed,<sup>159</sup> 'The Fundamental Rights themselves have no fixed content; most of them are mere empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgment, curtailment, and even abrogation of these rights in circumstances not visualised by the Constitution-makers might become necessary; their claim to supremacy or priority is liable to be over-borne at particular stages in the history of the nation by the moral claims embodied in Part IV. Whether at a particular moment in the history of the nation, a particular Fundamental Rights should have priority over the moral claim embodied in Part IV or must yield to them is a matter which must be left to be decided by each generation in the light of its experience and values.'

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<sup>159</sup> His Highness *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1462-63.



The validity of the Constitution (Forty-second Amendment) Act, 1976 was challenged in *Minerva Mills case*,<sup>160</sup> in which the Supreme Court reiterated the doctrine of basic structure which it had laid down in *Kesavananda Bharati case*. However, the Court insisted on the need of harmonious construction. Chief Justice Chandrachud rightly remarked,<sup>161</sup> 'The Indian Constitution is founded on the bed-rock of the balance 3 between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution. The goals set out in Part IV have to be achieved without the abrogation of the means provided for by Part III. It is in this sense that Parts III and IV together constitute the core of our Constitution and combine to form its conscience. Anything that destroys the balance between the two parts will ipso facto destroy an essential element of the basic structure of our Constitution.' Such is also the ratio decidendi of the *Waman Rao*,<sup>162</sup> wherein the Supreme Court reaffirmed the basic structure doctrine. Of course, basic structure doctrine is no deterrent on the welfare policies and postures of the executive or legislature. However, if the sensibilities and sensitivities of the emergency period are to be healed along with restoring of common man's faith in fairness and equity and constitutional property the only symbol of higher law not only for preserving the Constitution but also for protecting the ordinary man against legislative tyranny and executive despotism is the basic structure doctrine. Therefore, in India in the last quarter of the twentieth century and in the early 21st century we find the resurgence of new natural law in the garb of basic structure doctrine for preserving and promoting democratic human values, human rights and social justice. This doctrine has become a sheet anchor of

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<sup>160</sup> *Minerva Mills Ltd. v. Union of India*, A.I.R. 1980 S.C. 1789.

<sup>161</sup> *Ibid.*, at pp. 1806,1807.

individual liberty and social justice and has impelled us to revise our old ideas and ideals in jurisprudence which had hitherto been Austinian in form, spirit and content. Kesavananda has given a Copernican turn to Indian jurisprudence and has postulated new ideals and values which may feed back democratic ideals of free society and further the constitutional goals and commitment of ending poverty, exploitation and injustice.

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### **12.8 SUMMARY**

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Justice can be multiform. Thus it can have a scientific connotation: civil, penal, military or international. Justice is not only that of the judges and the lawyers. It can, indeed, be of a philosophical, religious or clannish nature. Justice is also a common act of the everyday life, such as repairing the injustice of having unevenly shared the cake between children... the topic of the independence of justice is very extendable. Consequently in this context, the logic commands us to turn to the independence of the judicial power. In this unit we have discussed about the concept of the independence of justice theories - means to end relationship of law and justice and their relationship in the context of the Indian constitutional ordering.

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### **12.10 SUGGESTED READINGS/REFERENCE MATERIAL**

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- Institute of Manu, Chapter VIII, 41.
- Ibid., Chapter VIII, 15.
- Goswami Tulsidas Ramayana also refers this concept in Chapter II, 57.
- Quoted by Pulparampil, John K., Indian Political System, pp. 17-18 (1976).
- Santiparvam, 89,33.
- Kautilya's Arthshashtra, IV, XI, 229.
- Manusmriti, Chapter VII, 19.

- Narada Smriti, XVIII, 20-21.
- Maneka Gandhi, AIR 1978 SC 597.
- Sangram Singh v. Election Tribunal, AIR 1955 SC 425.
- A.K. Kraipak v. Union of India, AIR 1970 SC 150.
- Ibid., para 20; see also Union of India v. Indo Afghan Agencies, AIR 1968 SC 718.
- Maneka Gandhi v. Union of India, 1978 SC 597 at 616, Mohinder Singh v. Chief Election Commissioner, AIR 1978 SC 851; Delhi Transport Corp. v. D.T.C. Mnzdoor Union, AIR 1991 SC 101; Supreme Court Legal Aid Committee v. Union of India, AIR 1994 SCW 5115.
- S.P. Gupta v. Union of India, AIR 1982 SC 149.
- Maneka Gandhi v. Union of India, 1978 SC 597.
- Mohinder Singh v. Chief Election Cominr., AIR 1978 SC 851 at 870.
- Ibid., at 873.
- Ibid., 876.
- A.K. Gopalan v. State of Madras, AIR 1950 SC 27.
- AIR 1978 SC 659.
- R.D. Shetty v. International Airport Authority, AIR 1987 SC 1628; Kasturi Lal v. State of J & K, AIR 1987 SC 1992; R.S. Dass v. Union of India, AIR 1987 SC 850 at 858; Ashok Kuinar Yadav v. State of Haryana, AIR 1987 SC 454 at 468; Sheonandan Paswan v. State of Bihar, AIR 1987 SC 877; Vaidyanatli Malmpatra v. State of Orissa, AIR 1989 SC 2218; Neelima Mishra v. Harinder Knur, AIR 1990, SC 1402; Delhi Transport Corpn. v. D.T.C. Mazdoor (Congress), AIR 1991 SC 101; D.V. Bakshi v. Union of India, (1993) 3 SCC 663; O.K. Yadav v. f.M.A. Industries, (1993) 3 SCC 258; Union of India v. W.N. Chadlm, AIR 1993 SC 1843; Union of India v. V.P. Setlii, AIR 1994 SC 1261; Premium Granites v. State of Tamil Nadu, AIR 1994 SC 1233; Khedat Mazdoor Cltetna Sangh v. State of MP, AIR 1995 SC 31; M.f. Sivani v. State of

Karnataka, AIR 1995 SC 1770; Lawyers Initiative Through RS Bains v. State of Punjab, AIR 1996 P & H 1; Kammalapati Bralunmarao v. State of Karnataka, AIR 1996 Kar 37; Wariyam Singh v. State of U.P., AIR 1996 SC 305; J.N. Banavalikar v. Municipal Corpn. Delhi, AIR 1996 SC 326; Union of India v. M/s. Jesus Sales Corpn. AIR 1996 SC 1508; Baburao Vishwananth Mathpati v. State, AIR 1996 Bom 228; State Bank of Pntinhi v. S.K. Sltarma, AIR 1996 SC 1669.

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### 12.11 SELF ASSESSMENT QUESTIONS

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1. What do you understand by the concept of the independence of justice theories?
2. Explain the means to end relationship of law and justice?
3. Describe the relationship between law and justice in the context of the Indian constitutional ordering?

**LL.M. Part-2**

**Subject: JUDICIAL PROCESS**

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**Block-IV**-Relation between Law and Justice

**Unit-13**- Analysis of selected cases of the Supreme Court where the judicial process can be; seen as influenced by theories of justice

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**STRUCTURE**

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**13.1 INTRODUCTION**

**13.2 OBJECTIVES**

**13.3 Role of Judicial process in Indian Judiciary as an instrument of social ordering**

**13.4. Selected Cases of Supreme Court of India which are influenced by theories of Justice**

**13.5 SUMMARY**

**13.6 SUGGESTED READINGS/REFERENCE MATERIAL**

**1.7 SELF ASSESSMENT QUESTIONS**

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### 13.1 INTRODUCTION

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In the previous unit you have read about the concept of the independence of justice theories - means to end relationship of law and justice and their relationship in the context of the Indian constitutional ordering. In India, social justice is the new dream of liberals, Gandhians, socialists, marxists and others who are inspired and aspire for an egalitarian politico-social order where no one is exploited, where every one is liberated and where every one is equal and free from hunger and poverty. In such a social order liberty is not made a casualty over security or vice-versa and balance is maintained without curtailing the rights of the individual with supremacy of the Constitution as expounded in the basic structure theory which contain the cardinal principles of democracy, human rights and social justice. In this unit we will discuss the role of judicial process in Indian Judiciary as an instrument of social ordering. We will also analyze selected cases of the Supreme Court where the judicial process can be; seen as influenced by theories of justice.

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### 13.2 OBJECTIVES

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After reading this unit you will be able to:

- ✓ Discuss the role of judicial process in Indian Judiciary as an instrument of social ordering.
- ✓ Understand and analyze selected cases of the Supreme Court where the judicial process can be; seen as influenced by theories of justice.

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### 13.3 Role of Judicial process in Indian Judiciary as an instrument of social ordering

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#### **Jurisprudence Paradigms**

Together with Kraipak (1970) Kesavananda Bharati, (1973) and Maneka Gandhi (1978) became an essay for Indian jurists and

judges in defence of human liberty, freedom and natural justice. Since then the ideals of human rights and natural justice have been vigorously pursued reminding and educating Indians the underlying purposes and goals of the Preamble and the Bill of Rights under the Constitution. The Supreme Court has declared in these judgments that the Constitution to do not envisage a sovereign government but a government under law with constitutional limitation and 'We the People of India<sup>1</sup> being the Sovereign Power. As, Constitution is the supreme law of the land, laws of the Union and the States must be in pursuance of the Constitution wherein judiciary is the protector and guarantor of the Fundamental Rights of the citizens. The Supreme Court is empowered to issue appropriate writs in the nature of Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo Waranto for the enforcement of fundamental rights and any person can move the Court for appropriate remedy whenever there is a violation of such rights by legislative or executive body<sup>163</sup>. Article 226 empowers the High Courts to issue writs for the enforcement of fundamental rights. In the interest of justice the courts have relaxed the rule of locus standi in favour of those who for want of poverty, ignorance, illiteracy, deprivation and exploitation are unable to approach the Court for appropriate relief. While expanding the scope of access to justice the Indian judiciary has initiated a veritable revolution in our political and social system by achieving its grand purpose—the protection of the poor and exploited individuals or contracts upon their liberty protected by procedure,<sup>164</sup> established by law or due process theory. It is for this reason that natural justice is a brooding omnipresence although of varying form and facet. According to Justice Krishna Iyer,<sup>165</sup> 'Indeed natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication to make fairness a creed of life. It has many colours and shades, many forms and shapes and

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save where valid law excludes, it applies when people are affected by valid authority..... Indeed from the legendary days of Adam—and of

Kautilya's Arthashastra—the rule of law has had the stamp of natural justice which makes it social justice.....that the roots of natural justice and its foliage are noble and not new-fangled.....Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.'Justice Iyer explaining further the nuances of natural justice observed,<sup>166</sup>:Today in our jurisprudence, the advances made by natural justice far exceed old frontiers and if judicial creativity belights penumbral areas it is only for improving the quality of government by injecting fair play into its wheels.....Law cannot be divorced from life and so it is that the life of law is not logic but experience.....Law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong it is wrong except where it is overborne by dire social necessity. Such is the sensible perspective we should adopt if ad hoc or haphazard solutions should be eschewed.'Justice Iyer summing up the ethos of natural justice concluded:<sup>167</sup>.that the content of natural justice is dependent variable not an easy casualty.'

In short, since the rejection<sup>168</sup> of Austinian and Diceyan concept of law and rule of law in Maneka,<sup>169</sup> Articles 14 and 21 have assumed new dimensions especially after the introduction of due process in Indian constitutional jurisprudence by making the doctrine of natural justice an effective sword and shield both against executive actions and legislative inroads against life and liberty of a person. The new interpretation given to these provisions is a far reaching development in India's constitutional and criminal jurisprudence for



providing easy access to justice to the under-privileged under the vast and panoramic canopy of natural justice.<sup>170</sup> It is around the principles of natural justice that the Supreme Court of India has evolved new Indian jurisprudence with new legal ideology and techniques which links judicial process with social change. Since Maneka and Mohinder Singh it is the judiciary which has been the harbinger of social revolution in bringing about a new social order in which justice—social, economic and political—informs all the institutions of contemporary Indian society.

### **Social Justice—Indian Context**

In India, social justice is the new dream of liberals, Gandhians, socialists, marxists and others who are inspired and aspire for an egalitarian politico-social order where no one is exploited, where every one is liberated and where every one is equal and free from hunger and poverty. In such a social order liberty is not made a casualty over security or vice-versa and balance is maintained without curtailing the rights of the individual with supremacy of the Constitution as expounded in the basic structure theory which contain the cardinal principles of democracy, human rights and social justice. The Constitution<sup>171</sup> being more a social document rather than political makes the legislature, the executive and the judiciary for the advancement of liberties and welfare of the people and the courts are to harmonise conflicts consistent with social philosophy of the Constitution. Such a strand is echoed by Justice Krishna Iyer when he remarked<sup>172</sup> : ‘Our thesis is that dialectics of social justice should not be missed if the synthesis of Part III and Part IV is to influence State action and Court pronouncements.’ The Court has abandoned the initial hesitation when it failed to recognise,<sup>173</sup> the compatibility between Part III and Part IV by

making the former transcendental beyond the reach of the Parliament. However since the days of Kesavananda Bharati it has been consistently adopting the approach,<sup>174</sup> that Fundamental Rights and Directive Principles are supplementary and complimentary to each other and that the provisions of Part III should be interpreted having regard to the Preamble and the Directive Principles of State Policy. The basic law of the country has adopted and accepted democracy and liberty with social justice as the way of life. The judgments of the Court only reflect and respect of collective judgement of the We the People of India and their commitment to social, economic and political democracy so that social justice and human rights are effectively realised peacefully without violence through democratic process. The architects of the Constitution, the Father of the Nation and makers of modern India had kept in mind the words of Mr Atlee, the former Prime Minister of Britain when he remarked: 'If a free society cannot help the many who are poor, it cannot save the few who are rich.' Gandhian Talisman and Social Justice—Initial Judicial Hurdles Of course, the Constitution fully reflects the Gandhian ethos in its Preamble and Parts III and IV towards creation of just and democratic society in India. By such a society Gandhiji meant<sup>175</sup> '...the levelling down of the few rich in whom is concentrated the bulk of the nation's wealth, on the one hand, and levelling up the semi-naked millions, on the other. A non-violent system of government is clearly an impossibility so long as the wealth gulf between the rich and the hungry million persists. The contrast between the places of New Delhi and the miserable hovels of the poor labouring class nearby cannot last a day in a free India in which the poor will enjoy the same power of the riches in the land.'

For the alleviation of yawning gap between the rich and poor Gandhiji suggested definite and humane policy indicators. As he

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put'<sup>176</sup> it: 'I will give you a talisman. Whenever you are in doubt or when the self becomes too much with you, apply the following test. Recall the face of the poorest and the weakest man whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him. Will he gain anything by it? Will it restore him to control over his own life and destiny. In other words, will it lead to Sivaraj for the hungry and spiritually starving millions?

**Then you will find your doubt and yourself melting away.'**

The Swaraj of Gandhiji's conception is truly enshrined in the Preamble and parts III & IV of the Constitution. Such has been the thrust of welfare legislation for socio-economic reforms in India since 1950 which led to several constitutional amendments for the implementation of land reform measures which had been held up because of fundamental right to property and equality. The judgments,<sup>177</sup> of the courts hindered agrarian reforms, nationalisation of big industries and banking business and abolition of privy purses. A conflict ensued between vested interests supported by the Courts and the Government of India—the architect of social change and social justice. The charge that the Supreme Court was insensitive to the cause of common welfare and social justice programme came no less than from the Prime Minister Jawaharlal Nehru himself as agrarian statutes were struck down unconstitutional. So was the fate of State Monopoly Bills and Nationalisation schemes which fell at the altar of fundamental rights. As several schemes or legislative measures—fiscal, agrarian, social and educational—invariably went to the Court and no one could predict what this 'third house' might do. Accordingly Nehru exhorted the judges to come down from the 'ivory tower' and sympathise with the legislatures which had to do a thousand things urgently needed by an awakened but deprived people. Like the criticism of U.S.

Supreme Court as 'nine-old men' by President Franklin Roosevelt Nehru echoed similar dig at the Apex judiciary when he remarked<sup>178</sup>: 'No Supreme Court and no judiciary can stand in the judgment over sovereign will of Parliament representing the will of the entire community. If we go wrong here and there, it can point out, but in the ultimate analysis where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, ultimately the whole Constitution is a creature of the Parliament. ...it is obvious that no system of judiciary can function in the nature of a third house, as a kind of third house of correction.' However, the judiciary did not adopt a more modern liberal and progressive outlook and declared,<sup>179</sup> property as a sacrosanct fundamental right resulting in making fundamental rights immutable, transcendental and beyond the reach of Parliament. Subba Rao C.J. declared<sup>180</sup>: 'We declare that Parliament will have no power from the date of this decision to amend any provision of Part III of the Constitution so as to take away or abridge the fundamental rights enshrined therein'. Since the amendments in the Constitution were necessary to give effect to the purpose enshrined in the Preamble and Directives of the Constitution but the Apex Court being conservative came in the way of removal of poverty and in the establishment of social justice. It appeared as if the Court was trying to protect vested interests and becoming an obstacle in creation of more humane and just social order as was evident in the Bank Nationalisation<sup>181</sup> case and Privy Purses,<sup>182</sup> case. The main problem before the Supreme Court during the 1950-71 was that it failed to uphold, promote and establish social justice with democracy as envisaged in the Constitution.

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#### **13.4. Selected Cases of Supreme Court of India which are influenced by theories of Justice**

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**Kesavananda Bharati—Basic Structure Theory**

When 24th, 25th, 26th and 29th Constitution Amendments were enacted by the Parliament after 1971 general elections their validity was challenged on the authority of Golak Nath in Kesavananda Bharati.<sup>183</sup> The majority of judges held that the view taken in Golak Nath that the word 'law' in Article 13 included a constitutional amendment could not be upheld. The said decision was, therefore, overruled. However, the 13 Judges Bench was sharply divided on the question whether the word 'amend' in Article 368 included the power to alter the basic features or repeal the Constitution itself. Six Judges led by Sikri CJ. were of the view that the Constitution could not be amended so as to abrogate or emasculate the basic features of the Constitution which could not be touched by Parliament.

**Supreme Court and Social Justice—A Copernican Change.**

Hitherto the Supreme Court had been striking down all the laws and legislation meant for the amelioration of condition of rural and urban poor. It appeared as if judiciary had failed in ensuring distributive justice. A new generation of progressive judges came on the scene who castigated Oxford-oriented judges who declared law illegal without regard to the social and economic consequences of their decisions. Consequently hereafter laws enacted in furtherance of the Directive Principles of State Policy contained in Article 39 (b) and (c) were upheld against all attacks notwithstanding the basic structure theory of Kesavananda Bharati. This period witnessed the emergence of new Indian jurisprudence with more socialist content including the addition of the word 'socialist' in the Preamble of the Constitution in 1976 coupled with some progressive judges fully alive to the cause of social justice and ever responsive to the social philosophy of the Constitution. The founding fathers of Indian Constitution too had envisaged,<sup>184</sup> the Supreme Court 'to be an arm

of social revolution' and the national goals enshrined therein were addressed,<sup>185</sup> as much to be judiciary as to the legislature and the executive. As Krishna Iyer J. observed,<sup>186</sup> 'Our Constitution is a tryst with destiny, preambled with luscious solemnity in the words 'Justice-social economic and political.' The three great branches of Government, as creatures of the Constitution, must remember this promise in their functional role and forget it at their peril, for to do so will be a betrayal of those high values and goals which this nation set for itself in its Objective Resolution and whose elaborate summation is in Part IV of the paramount parchment..... While contemplating the meaning of the Articles of the Organic Law, the Supreme Court shall not disown social justice.' Consequently after 1976,<sup>187</sup> there was a solemn commitment on the part of Supreme Court to promote social change for bringing about a new egalitarian order in furtherance of the Directive Principles of State policy. The Supreme Court in *Minerva Mills* remarked<sup>188</sup> :The significance of the perception that Parts III and IV together constitute the core of commitment to social revolution and they together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution..... They are like a twin formula for achieving the social revolution.... The Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb harmony of the Constitution. This harmony and balance between Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution. Those rights are not an end in themselves but are the means to an end. The end is specified in Part IV.' Accordingly the Apex Court has been fully alive to the cause of social justice and has been responsible to the claims

to social justice of the poor and disadvantaged persons.<sup>189</sup> The sensitivity of the contemporary, Indian judicial process to the social justice claims of poors because of their exploitation at the hands of State,<sup>190</sup> or powerful sections,<sup>191</sup> of the community the Supreme Court has been successful in counteracting social injustice despite the criticism that it has usurped the powers which rightly pertain to Executive and Legislature. In the face of Himalayan poverty the Apex Court has not waived or looked back in advancing and promoting social justice to the poor, the miserable and the weaker. In 1976 the Supreme Court of India observed<sup>192</sup>: 'Social Justice is the conscience of our Constitution, the State is the promoter of economic justice, the foundation faith which sustains the Constitution and the country..... The Public Sector is a model employer with a social conscience not an artificial person without a soul. Law and Justice must be on talking terms and what matter under our constitutional scheme is not merciless Law but Human legality. The true strength and stability of our policy is in Social justice.' Likewise in the same strain but with greater concern and vigour the Supreme Court (K. Ramaswamy J.) expounds the new fabric of social justice in the current social milieu of 1995. It declares<sup>193</sup> : "The Preamble and Article 38 of the Constitution of India—the supreme law envisions social justice as its arch to ensure life to be meaningful and liveable with human dignity..... The Constitution. Commands justice, liberty, equality and fraternity as supreme values to usher in egalitarian social, economic and political democracy..... Social justice is a dynamic device to mitigate the sufferings of the poor, weaks, Scheduled Castes (Dalits), Tribals and deprived sections of society and to elevate them to the level of equality to live a life with dignity of a person. Social justice is not a

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simple or single ideal of a society but is an essential part of complex of social change to relieve the poor etc. from handicaps, penury to ward off distress, and to make their life liable, for greater good of society at large..... The Constitution, therefore, mandates the State to accord justice to all members of the society in all facets of human activity. The concepts of social justice imbeds equality to flavour and enliven practical content of 'life'. Social justice and equality are complimentary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results.'

### **Dialectics of Social Justice and the Constitution**

The Constitution envisages,<sup>194</sup> a casteless and classless society equality to all citizens with equality of treatment under Article 14 which 'pervades like a brooding omnipresence.' However, in the interest of social justice it retains the concept of 'Scheduled Castes; and 'Scheduled Tribes' as a caste for extending to them protective discrimination because these castes had suffered in the past from certain historical and social disabilities. Such a concern for their upliftment and regeneration have been expressed through several constitutional amendments and court decisions from time to time. At the same time demand for affirmative action was also raised for extending reservation in government and public sector employment for a large 'intermediary section' of society vaguely called Socially and Educationally Backward Classes (SEBCs) or Other Backward Class (OBCs) who constitute about 52% of the population of India. In political jargaon of SCs, STs and OBCs are compendiously described as 'weaker sections of the people.' It is for their advancement that the Constitution in Articles 15, 16, 38 and 46 makes provision so that these communities cross the rubicon.



Article 15 (1) and (2) prohibit discrimination between citizens on grounds of religion, race, caste, sex, place of birth etc. with the underlying ideal to eradicate anachronistic disabilities of Hindu social system to pave way for an egalitarian casteless society. However, clauses (3) and (4) of Article 15 constitute exceptions to Article 15 (1) and (2) to make provision for the advancement of socially and educationally backward classes of citizens or SCs and STs. Article 15 (3) makes exception in favour of women and children and Article 15 (4) is also an exception to Article 15 (1) and (2). added by the Constitution (1st Amendment) Act, 1951 which has overruled the decision of the Supreme Court in *State of Madras v. Champakam Dorairajan*.<sup>195</sup> In short, it is an enabling measure for facilitating the making of special provisions for backward classes. However, the Supreme Court invalidated,<sup>196</sup> the classification of backwards into 'Backward Classes' and 'More Backward classes' for purposes of Article 15 (4) which is similar to Article 16 (4) of the Constitution. In *Devadasan*,<sup>197</sup> the Court overruled the rule of carry forward as unconstitutional, in these cases the Court had set it face against excessive reservation in the interest of merit and efficiency. However, in *Thomas*<sup>198</sup> the court took a liberal view to give preferential treatment to SCs and STs under Article 16 (1) outside Article 16 (4) to help SCs and STs. It had thrown in the melting pot the decision in *Devadasan* in which the carry forward rule of reservation was not to exceed 50%. In *ABSK*,<sup>199</sup> the Supreme Court following *Thomas* upheld the validity of the Railway Board Circular under which reservations were made in selection posts for SCs and STs. It also upheld the carry-forward rule under which 17% posts

were reserved for those categories. Justice Krishna Iyer thus summed,<sup>200</sup> up to overall thrust of social justice.

The dynamics and dialectics of social justice vis-a-vis the special provisions of the Constitution calculated to accelerate the prospects of employment of the harijans and girijans in the civil services with particular emphasis on promotions of these categories in the Indian Railway—that in all these cases, is the cynosure of judicial scrutiny, from the angle of constitutionality in the context of guarantee of caste-free equality to every person.’

Justice Iyer reminds the people on the urgency of social justice dispensation which the Founding Fathers dreamt, as he puts it:<sup>201</sup>

The authentic voice of our culture voiced by all the great builders of modern India stood for the abolition of hardships of the pariah, the malecha, the bonded labour, the hungry, hardworking half-slave whose liberation was integral to our Independence. To interpret the Constitution rightly the Courts must understand the people for whom it is made the finer ethos, the frustrations, the aspirations, the parameters set by the constitutional interpretation if alienation from the people were not to afflict the justicing process.’ The Apex Court have consequently evolved clear indicators to be followed in respect of reservations for SCs and STs by asserting protective discrimination as a tool for promoting social justice. In K.C. Vasanth,<sup>202</sup> the 5—Judge Constitution Bench—with Chandrachud C.J., D.A. Desai, O. Chinnappa Reddy, A.P. Sen and Venkataramiah, J.J. dealt the subject comprehensively with a slant to social justice to weaker sections of society. The Chief Justice accordingly laid down the policy propositions thereto:

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- (i) the reservation in favour of Scheduled Castes and Scheduled Tribes must continue as at present, that is without the application of a means test, for a further period not exceeding fifteen years. Another fifteen years will make it fifty years after the advent of the Constitution—a period reasonably long for the upper crust of the oppressed classes to overcome the baneful effects of social oppression and humiliation;
  - (ii) the means test that is to say, the test of economic backwardness ought to be made applicable even to SCs and STs after the period mentioned in (i) above;
  - (iii) so far as the backward classes were concerned, they should satisfy, two tests, namely, (a) that they should be comparable to the SCs and STs in the matter of their backwardness and (b) that they should satisfy the means test such as a State Government may lay down in the context of the prevailing economic conditions;
  - (iv) the policy of reservation in employment, education and legislative institutions should be reviewed every five years or so. That will at once afford an opportunity to the State to rectify distortions arising out of particular facets of the reservation policy and to the people, both backward and non-backward, to ventilate their views in a public debate on the practical impact of the policy of reservation.

Justice D.A. Desai, on the other hand, advocated the application of economic criteria for identifying socially and educationally backward classes. He noted with concern how the use of caste as a criterion of the backwardness had created vested interest in remaining or being identified as backward. On the contrary Justice O. Chinnappa Reddy did not agree to individual poverty as a criterion of social backwardness. Instead he favoured poverty as well as social and

educational backwardness. But mere poverty,<sup>203</sup> it seems is not enough to enough the constitutional branding, because the vast majority of the people of our country are poverty-struck but some among them are socially and educationally forward and others backwards. The judge further observed<sup>204</sup>: 'Class poverty, not individual poverty, is therefore the primary test. Other ancillary tests are the way of life, the standard of living, the place in the society hierarchy, the habits and customs etc.....Notwithstanding our antipathy to caste and sub-regionalism these are facts of life which cannot be wished away.' Indra Sawhney and Social Justice to OBCs—The Mandal Case. The momentous Indra Sawhney was an aftermath of the controversial recommendations of the Mandal imbroglio which had led to caste tensions, ethnic dissensions and wide-spjead violence in Hindu society. Moreover, the Mandal Commission recommendations became contentious legal and political issue which Prime Minister V.P. Singh also used as a clock to increase his vote-bank amongst Socially and Educationally Backward Classes (SEBCs) by espousing social justice to weaker sections of society. Indeed the Mandal Commission recommendations had rocked the nation, the Government of V.P. Singh and the Parliament and their constitutionality even did not go unchallenged in the Supreme Court wherein a battery of best legal brains and great legal luminaries fought legal and constitutional battles culminating in what is known as Indra Smvhney,<sup>205</sup> case (the Mandal case)—an acme on social justice.

### **The Mandal Commission—A Background**

The need for a commission to investigate the condition of backward classes is set forth in Article 340 of the Constitution. The First Backward Classes Commission (Kelkar Commission) was appointed on January 29, 1953 to investigate the condition of socially and

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educationally backward classes within the territory of India. The Commission submitted its report on March 30, 1955. Its recommendations were not accepted by the Government for a variety of reasons including inconsistencies in the collection of data, dissensions amongst its members coupled with dissent of the Chairman himself. It was during the Prime Minister Morarji Desai that the Second Backward Classes Commission was appointed by President Neelam Sanjiv Reddy on March 21, 1979 with B.P. Mandal M.P. as its Chairman—the Commission popularly known as the Mandal Commission. The terms of reference of the said Commission inter-alia were:

- (i) to determine the criteria for defining the socially and educationally backward classes;
- (ii) to recommend steps to be taken for the advancement of socially and educationally backward classes of citizens so identified; and
- (iii) to examine its desirability of making provision for the reservation of appointments or posts in favour of such backward classes which are not adequately represented in public services of the Union or State etc.

The Commission finally submitted its report on December 31, 1980. Of course Mandal Commission was mainly moved by the consideration of achieving social justice for a multiple undulating society like ours. It identified as many as 1743 castes as socially and educationally backward constituting 52 percent of the population. Accordingly it recommended reservation of 27 per cent Government jobs for SEBCs. However, Prime Minister Indira Gandhi did not implement the Mandal Commission recommendations as its data were based on 1931 census besides apprehending social turmoil and the report remained shelved over 10 years until Prime Minister V.P. Singh of the Janata Dal national Front took a gigantic leap

towards implementation of Mandal recommendations. He bemoaned,<sup>206</sup> 'What I want to convey is that treating unequals as equals is the greatest injustice. And the correction of this injustice is very important.....Let us forget that the poor are begging for some crumbs. They have suffered it for thousands of years. They are now fighting. Now they are fighting for their honour as a human being.'

### **Office Memorandums—Challenged**

Accordingly V.P. Singh issued Office Memorandum on August 13, 1990 implementing one part of Mandal recommendations, namely, establishing a job reservation quota of 27 per cent for Central Government jobs for Socially and Educationally Backward classes (SEBCs). This triggered a major political explosion in India including self-immolation by forward caste youths. Writ petitions were filed in the Supreme Court questioning the legality of the said Memorandum along with applications for staying the operation of the Memorandum which was stayed by the Court. In the meantime National Front Government collapsed due to defections and in 1991 General Elections the Congress led by P.V. Narsimha Rao Government came to power in the Centre. The Narsimha Rao Government with immediate effect decided to amend the Office Memorandum of August 13, 1990 and issued another Office Memorandum of September 25, 1991 which modified the earlier Memorandum mainly as below:

- (i) Preference to poorer to SEBCs (OBCs)—The Memorandum introduced economic criterion while granting reservation to poorer sections of the SEBCs in 27 per cent quota as allotted by Mandal Commission.
- (ii) The backward class candidates recruited on the basis of merit in open competition along with general candidates

are not to be adjusted against the quota of 27% reserved for them.

- (iii) Reservation of 10 percent quota for other economically backward sections of the people who are not covered by any of the existing schemes of reservation.

The aforesaid writ petitions were heard in the first instance by a Constitution Bench presided over by the then Chief Justice Ranganath Mishra who after hearing them for sometime referred them to a Special Bench of 9-Judges to finally settle the constitutional position relating to reservation. The 9-Judges Constitution Bench of the Supreme Court was sharply divided over the correctness of the Mandal Commission report. While the majority did not express any opinion on the correctness or adequacy of Mandal report the minority of three judges Mr. Justice T.K. Thommen, Kuldip Singh and R.M. Sahai held Mandal report as unconstitutional and recommended for the appointment of another Commission for identifying the SEBCs of citizens. These judges accordingly held the two Office Memorandums unconstitutional.

### **Mandal Dispute—Supreme Court**

However, 6 of the majority of the judges consisting of M.H. Kania C.J., M.N. Venkatachaliah, S. Ratnavel Pandian, A.M. Ahmadi, P.B. Sawant, B.P. Jeevan Reddy J.J. concurred through separate judgements and upheld the decision of the Union Government to reserve 27 percent of the government jobs for SEBCs with some modification.

(1) The Court interpreted the various facets and aspects of Article 16 (4) and held as valid the Office Memorandum of August 13,1990 reserving 27% of Central Government jobs to SEBCs subject to the 'creamy layer' or to exclusion of such socially advanced persons of the backwards 'the creamy layer or top layers or the forward among

the backwards depending upon the means test. After excluding them alone, would the class be a compact class.

(2) The Court observed that reservation is not anti-meritarian but at the same time the judges admitted,<sup>207</sup> that the very idea of reservation implies of a less meritorious person. At the same time, we recognise that this much cost has to be paid if constitutional promise of social justice is to be redeemed.' It stipulated,<sup>208</sup> that sub-classification of backward classes into more backward and backward for purposes of Article 16 (4) can be done. The object of the clause is to provide a preference in favour of more backward among the 'socially and educationally backward class.'

(3) The Court further held that said reservation is only confined to initial appointment and not promotion. It remarked,<sup>209</sup> '.....At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service efficiency of administration demands that those members too compete with others and earn promotion like all others.....Crutches cannot be provided throughout one's career. That would not be in the interest of efficiency of administration nor in the larger interest of the nation.'

(4) As to the limit of reservation the Court held that reservations contemplated in clause (4) of Article 16 should not exceed 50%. The plea that reservation in favour of backward class should be more than 50% because of the population of backward classes is more than 50% is not tenable. Clause (4) of Article 16 speaks of adequate representation and not proportionate representation and adequate representation cannot be read as proportionate representation. However, the carry forward rule of unfilled reserve vacancies is not per se unconstitutional provided such rule does not result in breach of 50% rule.



(5) The Court struck down 10% reservation on the posts in favour of 'other economically backward sections of the people who are not covered by any of the existing schemes of reservation' made by the Office Memorandum of 1991. It declared such a reservation inconsistent with guarantee of equal opportunity held out by clause (1) of Article 16.

(6) According to the Apex Court there are certain services and posts which it may not be advisable to apply the rule of reservation in matters of super specialities in medicine engineering and other courses in physical sciences, in defence services, professors, pilots, scientists, technicians in space and nuclear application.

The Apex Court with considerable toil and trouble have finally settled the notion of social justice in respect of job reservation which has been a recurring problem since the very inception of the Constitution. Through decision-making process and judicial self restraint the judges have been successful in deciding delicate and emotional questions steep in controversy truly in the national spirit and the mandate of the Constitution. However the Executive through its willy and nilly decision has once again tampered with Indra Sawhney wherein the Apex Court had ruled out reservation in promotion. The Constitution (77th Amendment) Act, 1995 has been passed hurriedly to allow reservation in promotion for SCs and STs leaving out the SEBCs. Such an amendment is not without political considerations which the OBCs may also demand in future. This leaves a gray area for the politicians making reservation a political ploy to perpetuate caste-politics and use caste to increase their vote bank,<sup>210</sup> to remain in power. In short, Indra Sawhney reads like the Bible on social justice and social equality. It is both history and story of contemporary Indian conspectus of social justice. It takes a copricon perspective peeping back to hoary past at our gory traditions and looks ahead to 21st century where all citizens are

blessed with essential human dignity, equality, social justice etc. where goals and values of the Preamble are not more theoretical rhetorics but are the cementing beams of a just nation took a difficult challenging juristic just task of interpreting a cluster of old and new values over which there was a clash in Hindu society. It tried to project and protect with great care and clarity new values of freedom, justice and human dignity overtruncated values of past centuries. Interpreting the constitutional provision such as Articles 14, 15, 16, 17, 38, 46, 338 and 340 designed to redress the centuries of old pent up grievances of the weaker sections the Court was expounding modern constitutional jurisprudence in defence of rights of the weak with no more tears, sweat and blood. Thus, declares,<sup>211</sup> Justice S.R. Pandian: ‘No one can be permitted to invoke the Constitution either as a sword for an offence or as a shield for anticipatory defence, in the sense no one under the guise of interpreting the Constitution can cause irrevertible injustice and irredeemable inequalities to any section of the people or can protect those unethically claiming unquestionable dynastic monopoly over constitutional benefits. Therefore, the Judges who are entrusted with the task of fostering an advanced social policy in terms of the constitutional mandates cannot afford to sit in ivory towers keeping Olympian unnoticed and uncaring of the storms and stresses that affect the society. It may be a journey of thousand miles in achieving equality of status and of opportunity yet it must begin with a single step. So let the socially backward people take their first step in that endeavour and march on and on. When new societal conditions and factual situations demand the Judges to speak, without professing the tradition of judicial lock-jaw, must, speak out—so I speak.

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### 13.5 SUMMARY

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Social Justice is the conscience of our Constitution; the State is the promoter of economic justice, the foundation faith which sustains the Constitution and the country.....

In this unit we have discussed the role of judicial process in Indian Judiciary as an instrument of social ordering. We have also analyzed selected cases of the Supreme Court where the judicial process can be seen as influenced by theories of justice.

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### 13.7 SELF ASSESSMENT QUESTIONS

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1. Discuss the role of judicial process in Indian Judiciary as an instrument of social ordering?
2. Discuss and analyze selected cases of the Supreme Court where the judicial process can be; seen as influenced by theories of justice?