# CRIMINAL JUSTICE SYSTEM AND HUMAN RIGHTS

## MASTER OF ARTS IN HUMAN RIGHTS

## UTTARAKHAND OPEN UNIVERSITY

**UNIT WRITING**

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Edition- 2025, Pre-Publication copy for Limited Circulation ISBN- XXXX
Publication- Directorate of Studies and Publication, Uttarakhand Open University, Haldwani, Nainital.
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# UNIT -1
# INTRODUCTION OF CRIMINAL JUSTICE SYSTEM



## 1.1 INTRODUCTION.

An understanding of criminal justice necessitates an overview of the entire gamut of crimes, criminal law and criminal justice process and administration. It is a complex phenomenon dominated by different social and political systems and the values underlying them. In this module, an attempt has been made to introduce the basic aspects underlying criminal justice with focus on the purposes, approaches, models and fundamentals of the same. They may differ from country to country; nevertheless, these reflect the larger thought process governing criminal justice

## 1.2 OBJECTIVE

- To make the learners understand the aims and purposes of criminal justice.
- To make the learners acquainted with the fundamental of criminal justice.
- To make the learners understand the process and approaches to criminal justice.

## 1.3 AIMS OF CRIMINAL LAW AND CRIMINAL JUSTICE

Personal safety, particularly the security of life, liberty and property, is of utmost importance to any individual. Maintenance of peace and order is essential in any society for human beings to live peacefully and without fear of injury to life, limbs, and property (Vibhute, 2012). The instrument by which this task is maintained is undoubtedly the criminal law of the land. Criminal Law is an instrument of social control. It tends to regulate harmful, pernicious and anti- social behaviour in society. It, thereby, prohibits undesirable and harmful human conduct and punishes the perpetrators for the violations so committed. Pillai maintains that the essential object of criminal law is to protect society against criminals and lawbreakers. For this purpose, the law holds out threats of punishment to prospective law breakers as well as attempts to make the actual offender suffer the prescribed punishments for the crime (Pillai, 2014).

Nigel Walker lists out the purposes of criminal law to include the following ( Walker, 1969):

- The protection of the human person against intentional violence
- The protection of people against some forms of unintended harm
- The protection of easily persuadable classes of people against abuse of their persons or property
- The prevention of acts which are regarded as _unnatural‘.
- The prevention of acts which tend to shock other people
- The discouragement of behaviour which might provoke disorder
- The protection of property against theft, fraud or damage
- The defence of the state
- The protection of social institutions.

Criminal Law thus seeks to prohibit behaviour that represents a serious wrong against an individual or against some fundamental social value or institution. The responsibility is on the State to ensure the regulation of the society in accordance with the laws and thereby protect individuals and property etc. as well as prevent the occurrence of such behaviour. A set of agencies and processes are thus formulated by the state to achieve the end. Criminal Justice refers to the set of agencies and processes established by governments to control crime and impose penalties on those who violate laws. The purpose of the Criminal Justice System is to deliver justice for all, by convicting and punishing the guilty and helping them to stop offending, while protecting the innocent. It seeks to deliver an efficient, effective, accountable and fair justice process for the public. Andrew Sanders and Richard Young's writes, Criminal Justice 'is... a complex social institution which regulates potential, alleged and actual criminal activity within procedural limits supposed to protect people from wrongful treatment and wrongful conviction'.

## 1.4 AGENCIES OF CRIMINAL JUSTICE

As Davies, Croall and Tyrer stated, the criminal law does not enforce itself. Rather people working in particular agencies enforce it (Davies, Croall, & Tyrer, 2005). Most criminal justice systems have five agencies- police, prosecution, defence lawyers, courts and correctional administration. Of these, four are established and maintained by the State, namely the **police, prosecution, courts** and **corrections**. Defence advocates are a group of private practitioners who are engaged by the accused to defend the case. The State definitely has a responsibility to ensure that the accused is adequately represented in criminal trials and therefore, may allow, in specific instances and on the request of the accused, the services of an advocate at the expenses of the State to represent the accused.

The **Police** are primarily engaged in the task of prevention, detection and investigation of crimes. They take reports for crimes and investigate them. The police are empowered to arrest offenders, interrogate them, conduct search and seizures and thereby, gather evidences for the crime.

**Prosecutors** are lawyers who are appointed by the state to represent the latter in criminal cases. They review the evidences brought before them by the police and proceed with the filing of charges before the court. They present evidence in court, question witnesses and press the guilt of the accused.

The **defence lawyers** defend the accused against the charges drawn against him by the State. They are generally hired by the accused themselves, except in exceptional cases, where they are assigned by the court. While the prosecutor represents the state, the defence lawyer represents the accused at the trial.

The **courts** are the agencies which are entitled to decide on the innocence or guilt of the accused. They ensure that appropriate charges are put on the accused, evaluate the law and evidences put forth before them, and finally, pass an appropriate order based on appreciation of facts, law and evidence. They determine the sentence to be imposed on convicts as well as decide on issues of release of offenders on bail, probation etc.

## 1.5 CORRECTIONAL ADMINISTRATION

Refer to the system established by the state for the custody of convicted offenders. The correction officers are entrusted with the task of supervising the prisons or correctional homes where the convicted prisoners serve the custodial sentences passed by courts. They are required to ensure the safety and security of the convicts, as well as provide adequate facilities for their reformation and rehabilitation.

## 1.6 ADVERSARIAL AND INQUISITORIAL SYSTEMS

There are two broad approaches to criminal justice fact finding- the adversarial and the

inquisitorial. Adversarial criminal justice is associated with common law systems, in countries such as Australia, New Zealand, United States, Canada, United Kingdom and India. Inquisitorial criminal justice is associated with civil law systems in countries such as Germany and France In an inquisitorial system, the dominant role in conducting a criminal inquiry is supposed to be played by the court. A dossier is prepared to enable the Judge taking the case to master its details. The judge then makes decisions about which witnesses to call and examines them in person, with the prosecution and the defence lawyers consigned to a subsidiary role. In some inquisitorial systems, the dossier is prepared by an examining magistrate, with wide investigative powers but more frequently, this is done by the prosecutor and police (Sanders, Young, & Burton, 2010).

In the adversarial system, the burden of preparing the case falls on the parties themselves. The judge acts as an umpire, listening to the evidence produced by the parties, ensuring that the proceedings are conducted with procedural propriety, and announcing a decision at the conclusion of the case. If the parties choose not to call a certain witness, then however relevant that person's evidence might have been, there is nothing the court can do about it. Indeed, it is sometimes said that adversarial systems focus on proof, and inquisitorial systems on truth. However, adversary system holds that _truth is best discovered by powerful statements on both sides of the question which are then evaluated by a passive and impartial adjudicator (Sanders et al., 2010).

In simple terms, the adversarial approach indicates that the two parties in the case - the prosecution and the defence —bring evidence before a magistrate, who decides the case based on the evidence and argument presented by the parties. Whereas in the other, the prosecutor or police officer assembles the case (or dossier), but the judge calls witnesses and examines them.

## 1.7 MODELS OF CRIMINAL JUSTICE

Herbert Packer developed two models of the criminal justice process, namely, the **Crime Control Model** and the **Due Process Model** in order to illuminate what he saw as the conflicting value systems that competed for priority in the operating of the criminal process. Neither purported to describe any specific system, and neither was to be taken as ideal. Rather, they represented extremes on a spectrum of possible ways of doing criminal justice (Sanders et al., 2010). The value system that underlies the Crime Control Model is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process. The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and thence to the disappearance of an important condition of human freedom. If the laws go unenforced—which is to say, if it is perceived that there is a high percentage of failure to apprehend and convict in the criminal process—a general disregard for legal controls tends to develop. The law- abiding citizen then becomes the victim of all sorts of unjustifiable invasions of his interests. His security of person and property is sharply diminished, and, therefore, so is his liberty to function as a member of society. The claim ultimately is that the criminal process is a positive guarantor of social freedom. In order to achieve this high purpose, the Crime Control Model requires that primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions

of persons convicted of crime.(Packer, 1964) The term efficiency in this context refers to the capacity of the system to apprehend, try, convict and dispose of a high proportion of criminal offenders. The criminal process, in this model, is seen as a screening process in which each successive state—pre-arrest investigation, arrest, post-arrest investigation, preparation for trial, trial or entry of plea, conviction, and disposition involves a series of routinized operations whose success is gauged primarily by their tendency to pass the case along to a successful conclusion. The presumption of guilt is what makes it possible for the system to deal efficiently with large numbers, as the Crime Control Model demands. The supposition is that the screening processes operated by police and prosecutors are reliable indicators of probable guilt. Once a man has been arrested and investigated without being found to be probably innocent, or, to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty.

The ideology of due process is far more deeply impressed on the formal structure of the law than is the ideology of crime control. The Due Process Model stresses on the possibility of error. People are notoriously poor observers of disturbing events—the more emotion-arousing the context, the greater the possibility that recollection will be incorrect; confessions and admissions by persons in police custody may be induced by physical or psychological coercion; witnesses may be animated by bias or interest. Considerations of this kind all lead to a rejection of informal fact-finding processes as definitive of factual guilt and to an insistence on formal, adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him (Packer, 1964). Judicial officers are supposed to operate on a presumption of innocence, meaning that, they must _ignore the presumption of guilt ‘in their treatment of the accused. The Due Process model distinguishes between the factually and legally guilty. Factual guilt is based on evidence of a person‘s commission of a crime, whereas legal guilt is based not only on this evidence, but also that the State has acted legally in obtaining evidence and proving its case (Daly, 2012). Packer thus depicted two value systems in the criminal process- the Crime Control which is concerned with efficiency of the criminal process and the Due Process which is concerned with accuracy and reliability of the decisions made.

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## 1.9 FUNDAMENTALS OF CRIMINAL JUSTICE

It is often customary to start a discussion on the fundamentals of criminal justice on the maxim

_*nullum crimen sine lege, nullum poena sine lege'*, _no crime without law, no punishment without law', known as the principle of legality. It signifies that an individual may not be criminally punished for an act that was not clearly condemned in a statute prior to the time that the individual committed the act. In other words, all wrongful behaviour must be criminalised and all punishments established before the commencement of any criminal prosecution. Dicey wrote, ―Englishmen are ruled by law alone; a man may with us be punished for a breach of law but can be punished for nothing else.‖(Nigam, 1965) Hall treats _legality' as synonymous with _rule of law'. He states that it is in some ways the most fundamental of the principles since it qualifies the meaning of both crime and punishment and is, thus presupposed in all of criminal theory (Hall, 1947). The principle of legality is a phrase which is powerfully righteous and invoked in its minimal sense of _being governed by rules which are fixed, knowable and certain'- thereby enhancing liberty and reducing arbitrariness by the State's organs. This is a fundamental principle, with both procedural and substantive implications (Ashworth & Horder, 2013).

The connotations of the principle of legality are wide ranging. Hall discusses the three basic elements of the principle which fall under the maxim *nulla poena sine lege.* The maxim demands, first, that no conduct may be held criminal unless it is precisely defined in a penal law. A corollary of this element is the requirement that penal statutes be strictly construed. Finally, the maxim commands that penal laws are not to be given retroactive effect. These requirements are subsumed under the proposition that: "The citizen must be able to ascertain beforehand how he stands with regard to the criminal law."' The three sub-propositions of the principle of legality amount to a requirement of fair notice of what the law is and what will happen if an individual violates the law (Potts, 1982). Hallevy adds a fourth principle to it, and which is basic to criminal justice, the presumption of innocence (Hallevy, 2010).

**The principle of non- retroactivity**. It means that no person shall be punished except in pursuance of a statute which fixes a penalty for a criminal conduct. This principle is of ancient origin and may be traced to the ancient Greeks. The underlying reason for the revulsion against retroactive penal law is that it is unjust that what was legal when done should be subsequently held criminal, that was punishable with a certain sanction when committed should later on be punished more severely, that procedural changes seriously disadvantageous to an accused should be applied retrospectively (Nigam, 1965). As stated by Hobbes: No law, made after a fact done, can make it a crime…for before the law, there is no transgression of the law.

**The Principle of Maximum Certainty.** If the law is certain and definite, people can regulate their conduct or behaviour in order to avoid the hazard of falling within the grip of penal law. This principle lays down an injunction to the legislators not to lay down the law in broad general terms so that anybody and everybody could be brought within its ambit at the whim of the prosecuting authorities or the judge. As stated by Lord Macaulay, ―uniformity where you can have it; diversity where you must have it; but in all cases certainty.

This principle of certainty emphasises on predictability, certainty and fair warning which guarantees

respect for a citizen as a rational and autonomous individual. He is not caught unawares, but is warned of the criminal law provisions. Certainty also ensures that the police and other agencies involved in criminal justice administration do not misuse the powers bestowed on them but are clearly and unambiguously limited within the confines of the criminal law provisions. When criminal offences are drafted in vague and ambiguous ways, citizens are not only faced with unpredictable behaviour by enforcement officials, they are also denied a fair opportunity to avoid punishment. Such a denial flouts, in the words of Ashworth, ―an incontrovertible minimum of respect for the principle of autonomy‖ (Claes & Krolikowski, 2009)

**The Principle of Strict Construction**. This is the third principle under the umbrella of legality. This principle relates to the courts'task of interpreting legislation. The general rule is that a penal statute should be strictly interpreted, that is, if two possible and reasonable constructions can be put upon a penal provision, the court must lean towards a construction which exempts the subject from penalty rather than the one which imposes a penalty. It is not competent for the court to stretch the meaning of an expression used by the legislature in order to carry out the intention of the legislature. It is for the legislature and not for the court to define a crime and provide for its punishment (Vepa, 2010).
The rule as stated in as under (*The Gauntlet*, 1872):

―No doubt all penal statutes are to be construed strictly- that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used; must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*; that the thing is so clearly within the mischief that it must have been intended to be included, and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, though within the words is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument.

According to the fair common-sense meaning of the language used; and the court is not to find or make any doubt or ambiguity in the language of a penal statute where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument. Thereby, the principle attempts to preclude the law from being construed to the detriment of the accused. Observance of this canon is chiefly invoked to prevent the creation of offences by construction, that is, to restrain the courts from usurping the functions of the legislature by extending the words of a statute to acts or omissions not within its plain terms or manifest intention (Russell & Turner, 1958).

**Presumption of Innocence**. The presumption of Innocence is a fundamental principle of criminal jurisprudence which asserts that a person should be presumed innocent unless and until proved guilty. As stated by Sankey LC (*Woolmington v. DPP*, 1935), throughout the web of English criminal law, one golden thread is always to be seen- that it is the duty of the prosecution to prove the prisoner's guilt. It is a principle of procedural fairness in criminal law, whose justifications may be found in the social and legal consequences of being convicted of a crime, in which context

the principle constitutes a measure of protection against error in the process and a counterweight to the immense power and resources of the State compared to the position of the defendant. Justice Dickson laid down that the presumption of innocence is a hallowed principle lying at the very heart of criminal law. The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.(*R. v. Oakes*, 1986 The rule, as it stands, enumerates that a person who is charged must be proved guilty, the accused stands innocent until he is proved guilty and his proof of guilt must displace all reasonable doubt. In saying that the accused person shall be proved guilty, it says also that he shall not be presumed guilty; that he shall be convicted only upon legal evidence, not tried upon prejudice; that he shall not be made the victim of the circumstances of suspicion which surround him, the effect of which it is always so difficult to shake off, circumstances which, if there were no emphatic rule of law upon the subject would be sure to operate heavily against him. He shall be convicted, this rule says, not upon any mere presumption, any taking matters for granted on the strength of these circumstances of suspicion; but he shall be proved guilty by legal evidence, and by legal evidence which is peculiarly clear and strong-clear beyond a reasonable doubt. The whole matter is summed up and neatly put by Chief-Justice Shaw in Webster's case "The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favour of innocence, and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal."(Thayer, 1897)

Apart from these, there are certain other basic considerations which govern the working of the criminal justice process. These include the rule against double jeopardy, the right against self-incrimination and fair trial.

**Double Jeopardy.** This principle is based on the common law maxim, *nemo debet proeadem causa bis vexari*, which means that a man cannot be put twice in jeopardy for the same offence. It has been stated by Hawkins to mean that ―A man shall not be brought into danger for one and the same offence more than once.‖(Nigam, 1965). In *R. v. Miles* (1890), the court held that where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence. In order to determine whether in a particular case such a plea would be available, it is necessary to ask three questions, namely, first, was the accused in jeopardy on the first indictment? Secondly, was there a final verdict? And thirdly, was the previous charge substantially the same

as the present one? If the answers to these questions are in the affirmative, the plea will succeed. The Court in Di Francesco(*United States v. Di Francesco*, 1980) referred to six different purposes served by the double jeopardy bar, namely, preserving the finality of judgments, protection against embarrassment, expense and ordeal of second trial, protection of the acquitted defendant, protection against prosecutorial manipulation to procure a second opportunity for the prosecution, protection of the valued right of retaining the first jury and the protection against multiple punishments(Pillai, 1988).

**Right against Self Incrimination.** An ancillary to the presumption of innocence is the right to silence. The right to silence is a principle of common law which means that normally courts or tribunals of fact should not be invited or encouraged to conclude, by parties or prosecutors, that a suspect or an accused is guilty merely because he has refused to respond to questions put to him by the police or the court. It is based on the principle, *nemo debet, prodere ipsum*, the privilege against self-incrimination. The privilege against self-incrimination confers immunity from an obligation to provide information tending to prove one‘s own guilt. A person is not bound to answer any question or produce any document or thing if that material would have the tendency to expose the person to conviction for a crime. As explained, the privilege is a prerogative of a defendant not to take the stand in his own prosecution; it is also an option of a witness not to disclose self-incriminating knowledge in a criminal case. It may also be a privilege to suppress substances removed from the body or admissions made in prior judicial proceedings or to the police.(McNaughton, 1960). It thereby prevents ― the employment of the legal process to extract from the person‘s own lips an admission of his guilt; which will thus take the place of other evidence…it exists mainly in order to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused‘s testimony extracted by the force of law.‖(Kreitzberg, 1994) A number of rationales justify the existence of the privilege. It is intended to maintain a proper balance between the powers of the state and the rights and interests of citizens‖.(McDougall, 2008) Historically, in societies where freedom from self- incrimination is not available, coercive means have been used to compel a person to speak. The privilege is also intended to protect the adversarial system of criminal justice. The presumption of innocence until proven guilty underpins the privilege against self-incrimination. Those who allege an individual‘s guilt should not be able to compel them to give evidence against themselves. Further individuals are to be protected from being confronted by the ―cruel trilemma‘of punishment which refers to witness having to choose between refusing to answer questions (thereby risking punishment for contempt), answering honestly (thereby providing evidence of guilt), or lying (thereby risking punishment for perjury). The modern rationale frames the privilege in terms of human rights: specifically, the right to dignity, privacy and freedom. As stated by Murphy J.(*Rochfort v. Trade Practices Commission*, 1982) [T]he privilege against self-incrimination is a human right, based on the desire to protect personal freedom and human dignity‖.

**Fair Trial.** One principal object of criminal law is to protect society by punishing the offenders. However, justice and fair play require that no one be punished without a fair trial. A person might

be under thick cloud of suspicion of guilt, he might have been caught red- handed, and yet he is not to be punished unless and until he is tried and adjudged to be guilty by a competent court. In the administration of justice, it is of prime importance that justice should not only be done but must also appear to have been done. Therefore, it becomes imperative that every person accused of crime is brought before the court for trial and that all the evidence appearing against him is made available to the court for deciding as to his guilt or innocence (Pillai, 2014). There is no easy answer to the question as to what makes a trial fair. The concept encapsulates within it a broad range of rights which spreads throughout the pre-trial, trial and sentencing stage. At the core of these rights is the fact that the parties to a case must have equal opportunity of being heard. There should not be any discrimination or bias in the process and the system should respond fairly to both the parties. That being so, in criminal trials, fairness is attached with the presumption of innocence of the accused, and therefore, unless the charges are proved beyond reasonable doubt in a court of law by means of admissible legal evidence, the accused is entitled to an acquittal. Furthermore, the presumption of innocence implies a right to be treated in accordance with the principle. It is, therefore, the duty of the authorities to refrain from pre-judging the outcome of the trial or act in a manner discriminatory to the accused. Fairness also emphasizes on information, accessibility and fair treatment. Hence, the accused is entitled to know, as of right, the charges framed against him. He must be communicated, at the time of arrest, the exact grounds on which he is being arrested. Another concomitant is the requirement of adequate representation of the accused in court. Any person accused of an offence before a criminal court has the right to be defended by a lawyer. Such right extends not only at the time the proceedings are actually going on, but also prior to the initiation of the same. He should have reasonable opportunity, if in the custody of the police, of getting into communication with his legal adviser for the purposes of preparing his defence. If the accused is in police custody, he should be given access to legal advice. Thirdly, even in the course of a criminal investigation and trial, the accused continues to enjoy the fundamental rights and freedoms, albeit with some limitations. The accused has to be treated with dignity and respect, no inhuman treatment can be meted out to him in course of the proceedings. It also signifies that persons arrested, detained, or otherwise in the hands of the police or prosecuting authorities for purposes of interrogation into alleged criminal activities, either as suspects or witnesses, have the right to be treated in a humane manner and without being subjected to any psychological or physical violence, duress or intimidation.

In India, each of these basic principles have been incorporated in the criminal justice system of the country. Thus, Art 20(3) of the Constitution of India provides for non- retrospectivity, double jeopardy and self-incrimination. An accused has a constitutional right to challenge any law or provision thereof which violates any of the above. The provisions of the Code of criminal Procedure, 1973 and the Indian Evidence Act 1872 incorporate various provisions which provide lays down the basis of fair trial and investigation as well as rules of evidence in criminal trials.

## 1.10 CONCLUSION

An exploration of criminal justice, thus, forays into myriad terrains of crime, criminal law, liability

etc. It requires a deep understanding of the values governing the system and the working of the agencies. Criminal Justice also requires an appreciation of the fundamental principles. Since the very nature of criminal 'law is deterrent and repressive, it becomes important that the system acts with fairness. Protecting the interests of individuals and society on the one hand and that of the accused, on the other, provides a challenging task for the criminal justice and an effective balancing of conflicting interests require that due recognition be given to the principles of legality, self-incrimination, double jeopardy etc.

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# UNIT-2

# THE CONCEPT OF JUSTICE OR DHARMA IN INDIAN THOUGHT; DHARMA AS THE FOUNDATION OF LEGAL ORDERING IN INDIAN THOUGHT AND SOURCES.



## 2.1 INTRODUCTION

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. Dlwrma lies in truth. Truth is root of all virtues. There is nothing greater than truth'. Likewise Lord Krishna says, _Whenever there is decacy 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.

## 2.2 OBJECTIVES

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.

## 2.3 WHAT IS CONCEPT OF JUSTICE?

Justice — Indian Heritage

Law and morality are mutually helpful instruments for sensitizing 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'etre 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. Dlwrma lies in truth. Truth is root of all virtues. There is nothing greater than truth'. Likewise Lord Krishna says, Whenever there is decacy 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 the whole eighteen Puranas the great sage Vyasa has said but two things: Doing well 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

## 2.4 JUSTICE OR DHARMA IN INDIAN THOUGHT

## 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 Brahaminical 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 '.[53] 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. '[54] 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 along with men. It does not suffer from infirmities with which our Smritis suffer. Of course, Kautilya also emphasized 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 Matsya**

Hindu texts of 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, 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 in 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,[56] 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...'Whether it is Mahabharata, or Arthasashtra, or Mann's Institute, or Narada, 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 part with Muslims—the latter being the conquerors and the former the Kafirs the non-believers. Special 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 mat 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 secularization 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 galvanized 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 egalitarinan 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'etre to meet the perilous situation of changing times and places. The ends of natural justice are to render everyone 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,[61] jurisprudence also. Modern administrative law too has evolved great safeguard that power can be exercised, 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 judex 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 Donoughe 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 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, that even administrative orders must precede by notice and hearing if the proceedings will have adverse civil consequences upon a person. The Court remarked[64]: ―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, 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 humanizing 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 Supreme Court Legal Aid Committee v. Union of India, AIR 1994 SCW 5115. 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 India1 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[66].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,[67] 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, 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 colors 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 Arthasastra—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 O u r
Jurisprudence has sanctioned its prevalence even like the Anglo- American system. 'Justice Iyer explaining further the nuances of natural justice observed,[69]: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 that the content of natural justice is dependent variable not an easy casualty. 'In short, since the rejection[71] of Austinian and Diceyian concept of law and rule of law in Maneka, 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.[73] 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 everyone is liberated and where everyone 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[74] 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 harmonize conflicts consistent with social philosophy of the Constitution. Such a strand is echoed by Justice Krishna Iyer when he remarked[75] : _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,[76] 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,[77] 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 realized 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[78] _...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 laboring 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 ‘[79] 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,[80] of the courts hindered agrarian reforms, nationalization 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 as agrarian statutes were struck down unconstitutional. So was the fate of State Monopoly Bills and Nationalization 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 sympathize 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· 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, property as a sacrosanct fundamental right resulting in making fundamental rights immutable, transcendental and beyond the reach of Parliament. Subba Rao C.J. declared[83]:_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[84] case and Privy Purses,[85] 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 strucking 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,[86] the Supreme Court _to be an arm of social revolution 'and the national goals enshrined therein were addressed,[87] as much to be judiciary as to the legislature and the executive. As Krishna Iyer J. observed,[88] _Our Constitution is a tryst with destiny, preambled with luscent 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,[89] 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[90]: The significance of the perception that Parts **values to usher in egalitarian social, economic and political democracy Social justice** 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.[91] The sensitivity of the contemporary, Indian judicial process to the social justice claims of poors because of their exploitation at the hands of State,[92] or powerful sections,[93] 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 waivered 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[94]. _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 ―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 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. '

## 2.5 SUMMARY

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 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.

## 2.6 SELF ASSESSMENT QUESTIONS

**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

# UNIT-3
# THE CONCEPT AND VARIOUS THEORIES OF JUSTICE IN THE WESTERN THOUGHT.



## 3.1 INTRODUCTION

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.

## 3.2 OBJECTIVES

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

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

## 3.3 What is Western Concept of Justice?

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 together and 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,tocivil 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. 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 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 Dharnia, 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.[98] _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 catastrophy 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. 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:[100] _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: 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. 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 was equated to Dharma and vice-versa. Likewise in Mosaic Law of Israel, the idea of justice and law are inextricably interwoven. The classical legal definition of justice mean rendering everyone 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, 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 eulogized 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 everyone 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.[105] People of all ages and places have never ceased to hope and survive for it. It exhorts 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 neighbor.

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,[107] 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,[108] 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,[109] or an irrational idea as observed by Hans Kelsen.

## 3.4. Various western theories of justice

### 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 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, an final, inadequate account present edhere is that of The Sophist Thrasymachus. Her oars 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, justiceisa 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 *un*equal, 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 emphasize 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 practice 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 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 everyone 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 ·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 favored. To be more precise, Rawls 'concept of justice is expressed in the following two principles

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 offences 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 endeavors 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 unanalyzable. Hence, he observes 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, 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 _penumberal' 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 ust law'and a just government'. It would be unwise to structure social ordering backedby 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[116]: _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,[117] 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 analyzed 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.

## 3.5 SUMMARY

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.

## 3.6 SELF ASSESSMENT QUESTIONS

What do you understand by the concept of justice?

Describe various theories of justice in the western thought?

# UNIT-4
# VARIOUS THEORETICAL BASES OF JUSTICE: THE LIBERAL CONTRACTUAL TRADITION, THE LIBERAL; UTILITARIAN TRADITION AND THE LIBERAL MORAL TRADITION



## 4.1 INTRODUCTION

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 Ulpain _Justice is the constant and perpetual will, to render everyone 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.

## 4.2 OBJECTIVES

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

## 4.3 VARIOUS THEORETICAL BASIS OF JUSTICE

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. H rejects the legalistic view that justice is the giving to each man what is proper to him. According 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 wit 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, 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, 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 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 unequal’s or to echo Jeremy Bentham, it says that everybody 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 Ulpain _Justice is the constant and perpetual will, to render everyone 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 differents states.

**Christian Era : Notion of Justice**

Ulpain‘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. Sfe 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 an 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 _purpose1 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 ^ l^ffft TflT: (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,[120]: _Untouchability, as it is practiced 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 cow slaughter, 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,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.'

## 4 .4. THE LIBERAL CONTRACTUAL TRADITION

***Contractual Theory of Justice***

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.

## 4.5 THE LIBERAL UTILITARIAN TRADITION

### (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.

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:

A public education system open to all and funded by public money, i.e., taxes.

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").
The protection of the sorts of liberties that were guaranteed in the United States by the Bill of Rights in our Constitution.
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?
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 here 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 the 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:

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.

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.

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:

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.

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.

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. 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.

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 Utilitarianism itself as a theory of justice. Utilitarian’s 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.

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 Utilitarian's. The objections to Utilitarianism are not, then, objections to the Utilitarian's 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?

## 4.6 LIBERAL MORAL TRADITION

**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 realized 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 realize social justice. Of course, justice is not a matter of a slot machine. It is the duty of the judges to rationalize 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 everyone 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 cuiqui 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 ‘ w h i c h 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.

## 4.7 SUMMARY

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.

## 4.8 SELF ASSESSMENT QUESTIONS

What do you understand by theoretical bases of justice?

Discuss various theoretical bases of justice?

Describe the liberal contractual tradition, the liberal; utilitarian tradition and the liberal moral traditionn?

# UNIT-5
# STRUCTURE OF CRIMINAL JUSTICE SYSTEM IN INDIA



## 5.1 INTRODUCTION

The criminal justice system of any state is the set of agencies and processes established by governments for administration of criminal justice aimed at controlling crime and imposing punishment on persons who violate the law. The Union of India is a Federal State currently consisting of the Central government and the State governments in the twenty nine states. The states have their own powers and functioning under the Constitution of India. The Police and Prison are the state subjects. However, the Federal laws are followed by the Police, Judiciary, and Correctional Institutes, which form the basic organs of the Criminal Justice System. The system followed in India for dispensation of criminal justice is the adversarial system of common law inherited from the British Colonial Rulers. In the Indian Criminal Justice Administration, the Police investigate, while the Judge's role is like a neutral umpire and a fact finder and he also imposes the sentence. The execution of the sentence is bestowed on the Correctional institutes

## 5.2 OBJECTIVE

- To make the learners understand the structure of the police in India
- To acquaint the learners with the structure of the courts

To make the learners understand the structure of the Prison

## 5.3 STRUCTURE OF CRIMINAL JUSTICE SYSTEM

The structure of Criminal Justice system consists of the four main pillars namely, investigation by Police, Prosecution of case by the Prosecutors, determination of guilt by the Courts and finally the correction through prisons system. Article 246 of the Constitution of India places the police, public order, courts, prisons, reformatories, borstal and other allied institutions in the State List. Investigation by Police The very crux of the Criminal trial is laid down by the investigation done by the police. The information of the offence is registered in the local police station under Section 161 of the Code of Criminal Procedure 1973(CrPC). Thereafter the police starts the investigation under section 156 CrPC. Section 161CrPC empowers the investigation officer to examine any person supposed to be acquainted with the facts and circumstances of the case and record the statement in writing. However, section 162 of the Code provides that it is only the accused that can make use of such a statement. So far as the prosecution is concerned, the statement can be used only to contradict the maker of the statement in accordance with Section 145 of the Evidence Act. Any confession made by the accused before the Police officer is not admissible and cannot be made use of during the trial of the case. The statement of the accused recorded by the police can be used as provided under Section 27 of the Evidence Act to the limited extent that led to the discovery of any fact. (Malimath Comittee Report, 2003). The police can arrest a person for commission of cognizable offence under section 41CrPc in accordance to the procedure given under section 46 CrPC. In the course of investigation, the Police officer may search any premise under sections 165 and 166 where there is an expectation to anything (documents, materials) in connection with a cognizable offence. Any such items may be seized by the police under section 102 CrPC. Police has the discretion to discharge a person arrested on executing a bond under section 169 CrPc , in case the officer feels that there is not enough incriminating materials against such persons. Finally, all such statements of the witnesses, and the evidence collected through the investigation along with the copy of the First Information Report is made into a Police report and submitted under section 173 to the Magistrate for taking cognizance there upon. Apart from this the Police also conducts the inquest where an information of death is received under section 174 CrPC The police is a state subject and its organization and working are governed by rules and regulations framed by the state governments. These rules and regulations are outlined in the Police Manuals of the state police forces. Each State/Union Territory has its separate police force. Despite the diversity of police forces, there is a good deal that is common amongst them. This is due to four main reasons: Š The structure and working of the State Police Forces are governed by the Police Act of 1861, which is applicable in most parts of the country, or by the State Police Acts modeled mostly on the 1861 legislation. The Indian Police Service (IPS) is an All-India Service, which is recruited, trained and managed by the Central Government and which provides the bulk

of senior officers to the State Police Forces. Š The quasi-federal character of the Indian polity, with specific provisions in the Constitution, allows a coordinating and counseling role for the Centre in police matters and even authorizes it to set up certain central police organizations (Commonwealth Human Rights Initiatives, 2001). Superintendence over the police force in the state is exercised by the State Government (Section 3, The Police Act, 1861). The head of the police force in the state is the Director General of Police (DGP), who is responsible to the state government for the administration of the police force in the state and for advising the government on police matters. Field Establishment States are divided territorially into administrative units known as districts. An officer of the rank of Superintendent of Police heads the district police force. A group of districts form a range, which is looked after by an officer of the rank of Deputy Inspector General of Police. Some states have zones comprising two or more ranges, under the charge of an officer of the rank of an Inspector General of Police Every district is divided into sub-divisions. A sub-division is under the charge of an officer of the rank of ASP/ Dy.S.P. Every sub-division is further divided into a number of police stations, depending on its area, population and volume of crime. Between the police station and the subdivision, there are police circles in some states - each circle headed generally by an Inspector of Police. The police station is the basic unit of police administration in a district. Under the Criminal Procedure Code, all crime has to be recorded at the police station and all preventive, investigative and law and order work is done from there. A police station is divided into a number of beats, which are assigned to constables for patrolling, surveillance, collection of intelligence etc. The officer in charge of a police station is an Inspector of Police, particularly in cities and metropolitan areas. Even in other places, the bigger police stations, in terms of area, population, crime or law and order problems, are placed under the charge of an Inspector of Police. In rural areas or smaller police stations, the officer in charge is usually a Sub-Inspector of Police.

## 5.4 COMMISSIONERATE SYSTEM OF POLICING

The Commissionerate system of policing was introduced by in certain metropolitan areas like Calcutta, Bombay, Madras and Hyderabad. Under this system, the

responsibility for policing the city/area is vested in the Commissioner of Police. While the Commissionerate system initially existed in four cities in the last century, it has been extended to many areas since Independence (Commonwealth Human Rights Initiatives, 2001).

## 5.5 CRIMINAL INVESTIGATION DEPARTMENT (CID)

Criminal Investigation Departments or CIDs, as they are popularly known, are specialized branches of the police force. They have two main components - the Crime Branch and the Special Branch. The officer in charge of the CID generally supervises the work of both branches, though some states appoint a separate officer in charge of the Special Branch. The Crime Branch is the most important investigation agency of the state police. It investigates certain specialized crimes like counterfeiting of

currency, professional cheating, activities of criminal gangs, crimes with interdistrict or inter-state

ramifications etc. In fact, when certain major crimes remain unsolved or when the public demands investigation by an agency other than the local police, the government or the head of the police force transfers cases for investigation from the district police to the CID. The Special Branch, on the other hand, collects, collates and disseminates intelligence from the security point of view. Its main role is to keep a watch over the subversive activities of persons, parties and organizations and keep all concerned informed (Commonwealth Human Rights Initiatives, 2001).

## 5.6 CENTRAL BUREAU OF INVESTIGATION (CBI)

What is known today as the CBI was originally set up as the Special Police Establishment (SPE) in 1941 to investigate cases of bribery and corruption involving the employees of the War and Supply Department of the Government of India during the Second World War. Even after the war was over, the need to continue the agency to investigate corruption charges involving government servants was felt. The Delhi Special Police Establishment Act was passed in 1946 to give the organization a statutory base. Its jurisdiction was extended to cover cases of corruption involving employees of all departments of the Government of India. The role of the SPE was gradually extended and by 1963, it was authorized to investigate offences under 97 Sections of the Indian Penal Code, offences under the Prevention of Corruption Act and 16 other Central Acts. In 1963, the Government of India set up the Central Bureau of Investigation (constituted by the Government of India's Resolution No. 4/ 31/61-T dated April 1, 1963). This new organization's charter included not only the work done by the Delhi Special Police Establishment but also additional investigation work relating to breach of central fiscal laws, major frauds in central government departments, public joint stock companies, passport frauds, crimes on the high seas and in the air and organized crimes committed by professional gangs. It was also given the work of maintaining crime statistics, collecting intelligence relating to certain types of crimes, working as the National Crime Bureau (NCB) of the country for the International Police Organization (INTERPOL) (Commonwealth Human Rights Initiatives, 2001).

Presently, the CBI consists of the following divisions:

- Anti-Corruption Division
- Economic Offences Division
- Special Crimes Division
- Legal Division v. Coordination Division
- Administration Division
- Policy and Organization Division
- Technical Division
- Central Forensic Science Laboratory

The legal powers of investigation of the CBI are derived from the Delhi Special Police Establishment Act, 1946 (DPSE Act). The organization can investigate only such offences as are

notified by the central government under Section 3 of the DPSE Act. The powers, duties, privileges and liabilities of the members of the organization are the same as those of the police officers of the union territories in relation to the notified offences. While exercising such powers, members of the CBI of and above the rank of Sub-Inspectors are deemed to be officers in charge of the police station. The Central Government is authorized to extend the powers and jurisdiction of the members of CBI to any area, including railway areas, for the investigation of offences notified under Section 3 of the District Special Police Establishment Act, subject to the consent of the government of the concerned state (Commonwealth Human Rights Initiatives, 2001)

## 5.7 ROLE OF THE PROSECUTOR

Prior to the enactment of the Criminal Procedure Code of 1973, public prosecutors were attached to the police department and they were responsible to the District Superintendent of Police. However, after the new Code of Criminal Procedure came into force in 1973, the prosecution wing has been totally detached from the police department. The prosecution wing in a state is now headed by an officer designated as the Director of Prosecutions under section 25A of CrPC. In Sessions Courts, the cases are prosecuted by Public Prosecutors. The District Magistrate prepares a panel of suitable lawyers in consultation with the Sessions Judge to be appointed as public prosecutors. The state government appoints public prosecutors out of the panel prepared by the District Magistrate and the Sessions Judge. It is important to mention that public prosecutors who prosecute cases in the Sessions Courts do not fall under the jurisdiction and control of the Director of Prosecutions (Sharma, Madan Lal). Prepared by the District Magistrate and the Sessions Judge. It is important to mention that public prosecutors who prosecute cases in the Sessions Courts do not fall under the jurisdiction and control of the Director of Prosecutions (Sharma, Madan Lal). The state government also appoints public prosecutors in the High Court. The appointments are made in consultation with the High Court as per section 24 of the Code. The most senior law officer in a state is the Advocate General who is a constitutional authority. He is appointed by the governor of a state under Article 165. He has the authority to address any court in the state. The Assistant Public Prosecutors, Grade-I and Grade-II, are appointed by a state government under section 25 CrPC on the basis of a competitive examination conducted by the State Public Service Commission (Sharma, Madan Lal).

Public prosecution is an important component of the Criminal Justice System. Prosecution of an offender is the duty of the executive which is carried out through the institution of the Public Prosecutor. The Supreme Court of India has defined the role and functions of a public prosecutor in *Shiv Nandan Paswan vs. State of Bihar & Others (*AIR 1983 SC 1994) as under: The Prosecution of an offender is the duty of the executive which is carried out through the institution of the Public Prosecutor.

Withdrawal from prosecution is an executive function of the Public Prosecutor (section 321 CrPC).

Discretion to withdraw from prosecution is that of the Public Prosecutor and that of none else and he cannot surrender this discretion to anyone.

The Government may suggest to the Public Prosecutor to withdraw a case, but it cannot compel him and ultimately the discretion and judgement of the Public Prosecutor would prevail.

The Public Prosecutor may withdraw from prosecution not only on the ground of paucity of evidence but also on other relevant grounds in order to further the broad ends of public justice,

Public order and peace.

The Public Prosecutor is an officer of the Court and is responsible to it.

The prosecutor has a very significant role. To start with there is a presumption of innocence in favour of the accused. On the basis of the facts proved by the oral, documentary and forensic evidence, the public prosecutor tries to substantiate the charges against the accused and tries to drive home the guilt against him. If there is a statutory law regarding presumptions against the accused, the public prosecutor draws the court's attention towards that and meshes it with other evidence on record. Throughout the trial he has the burden of proof and the standard of such proof is quite high in India, as it has to be beyond a reasonable ground. He has to prove the circumstances, and then he has to draw the inferences and convince the court that the arraigned accused alone is guilty of the offences that he has been charged with.

## 5.8 JUDICIARY

The role of the judge or the Court in India starts from the stage of taking cognizance of the criminal case under section 190 CrPc, followed by making over of the case (section 192) to the appropriate court having jurisdiction to try the case or commitment to the Court of sessions under section 209 CrPC. This is followed by the issue of process under section 204 either by summons or warrant as the case may be. Once all the actors of the Criminal Justice Administration, that is the accused represented by the defence counsel, the prosecutor representing the Sate as well as the victim and the Judge come face to face, the trial unfolds. At this stage the Court frames the charge if the evidence submitted to it and from the opening statements and the two sides, it comes to the conclusion that the evidence is sufficient enough to start the trial. Conversely, discharges the accused person if the evidence is not sufficient. During the whole process of trial, the court's duty is finding of the facts that are relevant from the evidence presented by the prosecutor and the defence and come to the conclusion of the guilt by making a balance sheet of the aggravating and mitigating factors. Once the judgment is reached and in case it is a guilty verdict, the Court proceeds to pronounce the sentence applying its discretion based again on the aggravating and mitigating factors, the antecedents and probability of reform of the offender.

**Structure of the Judiciary**

The Judiciary has the Supreme Court (S.C) at the apex having three-fold jurisdiction namely, original, appellate and advisory. Supreme Courts and High Courts have only appellate criminal jurisdiction. Below the S.C are the High Courts at state level, followed by subordinate courts in the districts. The courts of session exercise both original and appellate jurisdiction. Major

offences like murder, dacoity, robbery, rape etc. cannot be tried in a court below the sessions. The appellate jurisdiction of the S.C. covers constitutional, civil and criminal cases. In criminal matters, an appeal lies to the Supreme Court from any judgement or order of the High Court if the latter (a) has on appeal reversed an order of acquittal and sentenced the accused to death or imprisonment for life or for a period of not less than 10 years; or (b) has withdrawn for trial before itself any case and has in such trial sentenced the accused person to death; (c) certified that the case is fit for appeal. In any case, the Supreme Court, under Article 136 of the Constitution, can grant special leave to appeal from any judgment, decree, determination, sentence or order in any matter passed or made by any court or tribunal in the territory of India. The consultative jurisdiction of the S.C. is in respect of matters, which are referred for its opinion and advice by the President of India under Article 143 of the Constitution (Commonwealth Human Rights Initiatives, 2001). The High Court exercises appellate jurisdiction in criminal cases under section 374(appeal from an order of conviction) and section 378 (appeal from an order of acquittal). Apart from that the High Court also have inherent powers under section 482 to give effect to an order under the Code, to prevent abuse of the process of Court and to otherwise secure the ends of justice. The jurisdiction of the trial courts is determined on the basis of the sentencing jurisdiction of the courts in accordance to sections 28 and 29CrPC

**Correctional (Prison) system** The Court determines the guilt of the accused and pronounces the appropriate sentence. In case the court comes to the conclusion owing to the facts and circumstances of the case as well as the convict that it is better for the rehabilitative prospect of the person to release him on probation under the Probation of offenders Act 1958 read with section 360 of CrPC, then the court may release such convict under probation. However, in case a sentence of imprisonment is pronounced then the final wing of the Criminal Justice System is activated, that is the correctional wing through the prisons system. The sentence of imprisonment in India is not punitive rather it is for using the period of incarceration for the reformation and rehabilitation of the prisoner. This is achieved through therapeutic treatment of education, labour, vocational training and yoga and meditation, so that the prisoner is reformed internally not to choose the path of crime once he goes out of the prison. Prison and its administration is a State Subject as it is covered by item 4 under List II in Schedule VII of the Constitution of India. Prison Establishments in different States/UTs comprise several tiers of jails. The most common and standard jail institutions which are in existence in the States/UTs are better known as central jails, district jails and sub jails. The other types of jail establishments are women jails, borstal schools, open jails and special jails (Crime in India, 2014) Prison and its administration is a State Subject as it is covered by item 4 under List II in Schedule VII of the Constitution of India. Prison Establishments in different States/UTs comprise several tiers of jails. The most common and standard jail institutions which are in existence in the States/UTs are better known as central jails, district jails and sub jails. The other types of jail establishments are women jails, borstal schools, open jails and special jails(Crime in India, 2014).

District jails serve as the main prisons in some of the States/UTs. States which have considerable number of district jails are Uttar Pradesh (56) followed by Madhya Pradesh (33), Bihar (31),

Rajasthan (25), Maharashtra (27), Assam (22), Karnataka (19), Jharkhand (17), Haryana (16) and West Bengal (12) (Prison Statistics in India, 2014).

Nine States have reported comparatively higher number of sub-jails revealing a well-organized prison set-up even at lower formation. These States are Maharashtra (100), Andhra Pradesh (99), Tamil Nadu (96), Madhya Pradesh (78), Odisha (73), Karnataka (70), Rajasthan (60) and West Bengal & Telangana (33 each) while 7 States/UTs have no sub-jails (namely Arunachal Pradesh, Haryana, Meghalaya, Mizoram, Sikkim, Chandigarh and Delhi) (Prison Statistics in India, 2014).

Women jails exclusively for women prisoners exist only in 13 States/UT (Table 1.2). Tamil Nadu & Kerala have 3 women jails each and Rajasthan & West Bengal have 2 women jails each. Andhra Pradesh, Bihar, Gujarat, Maharashtra, Odisha, Punjab, Telangana, Uttar Pradesh and Delhi have one women jail each (Prison Statistics, 2014). Special jail means any prison provided for the confinement of a particular class or particular classes of prisoners which are broadly as follows: i) Prisoners who have committed serious violations of prison discipline. ii) Prisoners showing tendencies towards violence and aggression. iii) Difficult discipline cases of habitual offenders. iv) Difficult discipline cases from a group of professional/organized criminals (Prison Statistics, 2014)

The Custodial staffs in the prison is responsible for the maintenance of discipline and compliance of prison rules. At the very top is the Inspector General of police and the deputies. The custodial staffs which remain present inside the prison premises is headed by the superintendent of Prisons, Jailor and warder.

The non-custodial staffs in the prison who are responsible for the well-being of the inmates include the medical staffs, and the treatment staffs, who ensure that the inmates are reformed and rehabilitated during their stay in the prison.

## 5.9 CONCLUSION

The functioning of the criminal justice system is the true reflection of the peace and order that the members of the state are enjoying. The Indian Criminal Justice System, although of a common law origin but in its structure and functioning both it has now evolved into a hybridized system. It has inculcated many inquisitorial elements where the judges have the power of inquiry and through that they are actually, participating in the truth finding process rather than the being mere fact finders. The archaic laws like the Police Act of 1861 still govern the structure and functioning of the police and so is the Prison Act 1894 in case of the prisons, which affects the efficiency dimensions of the Criminal Justice system. In every State the Criminal Justice System is expected to provide the maximum sense of security to the people at large by tackling crimes and criminals effectively, quickly and legally. More specifically, the aim is to reduce the level of crime in society by ensuring maximum detection of reported crimes, apprehension of the accused, conviction of the accused persons without delay, awarding appropriate punishments to the convicted to meet the ends of justice and their proper treatment in the prison to prevent recidivism. Clearly defined

hierarchy and roles of the different actors of the various wings of the Criminal Justice System is very significant and a proper coordination between all the wings of the Criminal Justice System is the key to an efficient system

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# UNIT 6:
# FUNDAMENTALS OF CRIMINAL LAW AND CRIMINAL JUSTICE



## 6.1 INTRODUCTION

It has been a matter of contemplation among scholars always as to whether Man is more disposed to crime as a savage or as part of civilized society. However, what is settled factually is that man has always shown the potential to work against established rules of social order. In other words, while the propensity of human beings to commit crimes may vary relatively from one stage to another, it is an established fact that they always have the ability to commit crimes.

## 6.2 OBJECTIVE

- To explain the history of the growth of Criminal Law
- To discuss landmark developments in Criminal Law
- To discuss the evolution of Criminal Law in various societies and across various legal systems of the world
- To understand the genesis of the concept of crime as opposed to the idea of a civil wrong

## 6.3 EVOLUTION OF CRIMINAL LAW IN PRIMITIVE SOCIETY

Rules of commission and omission have always been part of all civilised societies. Civilisation has always been known to depend on certain principles and norms, the absence of which makes society savage.

Whether a certain series of acts will be punished and which of such acts will be punishable has always depended on public opinion, beliefs and social standards of rejection or acceptance.

A set of beliefs, values, norms, public opinion and customs as well as traditions have always had an impact on the shaping of law. Likewise, their impact has also been significant in the shaping of Criminal Law. For example, in primitive society retribution or deterrence as models of punishment were more popular than the more modern punishment models like rehabilitation and reformation of the accused.

The focus of punishment was on severity as the idea was to render a permanent incapacity among people to repeat commission of crimes so that no scope of repetition was left. The history of criminal law is very fascinating from this perspective. The gradual transition of punishment from mutilation of limbs of the offender to his reformation is interesting.

The idea of self-preservation is the natural instinct of man. The development of Criminal Law is a reflection of the growth of discipline at the levels of the individual and the family. The natural instinct of man to preserve himself has been emphasised in family from which, over a period of time, clans developed. Criminal Law at that point of time drew its strength from disciplining the family which gradually developed into disciplining the clans and thereby, indirectly disciplining the society.

According to Maine, Criminal law was not different from Civil law in primitive ages. On the other hand, according to Diamond the distinction between criminal and civil law was always visible even in the early stages of society. In the first and second agricultural grades of society, courts seem to have appeared first. In these courts, rudimentary criminal law seems to have been in practice. However, the range of actions that comes within the domain of Criminal Law was highly limited. There were no systematic trials at this stage. Chiefly, the crimes that were made punishable at this stage were witchcraft, incest and bestiality. According to Diamond, these crimes were not acts that could be committed without mens rea.

## 6.4 THE AGE OF CODES

As society progressed, it became more compact. Primitive society gradually progressed to the Era of Codes and Criminal Law was codified. The earliest codification of criminal law was in the form of the Code of Hammurabi which was developed in 1754 BC. It was a small volume of Criminal Law. There was more emphasis on civil wrongs in this codification with some anti-social acts being given the status of crimes. The degree of seriousness of these acts determined whether or not they received the status of crimes. For example, disloyalty towards the King was considered to be a crime under the Code. Resistance to the power of the King was considered to be an assault on the King's dignity and qualified as criminal conduct.

The administration of Criminal Justice was primarily through King's Courts. Such offences which were designated as criminal were tried by King's Courts. Victims were compensated on the basis of their degree of vengeance.

The history of Criminal Law passed through four stages: The first stage was one where the idea of injury was towards the state or collective injury. The state permitted the wronged individual to avenge himself. In the second stage, as the occurrence of crimes increased and their frequency multiplied, the state delegated powers to commissions which were entrusted with the task of investigating the crime and punishing perpetrators. In the third stage the need for having permanent commissions to deal with crimes was felt and so, such commissions were created and appointed by the state. In the fourth stage, the permanent commissions gave way to permanent benches called Quaestiones. At this stage, specific offences and their corresponding penalties were also listed.

It is to be noted that in all these stages of development, Criminal Law had a limited area of operation. The well-known offences during this time were Witchcraft, etc. Punishment methods were guided by the principle of eradication of these crimes rather than rehabilitation.

The history of Criminal Law is closely connected with the development of the law of homicide. Homicide was considered to be a civil wrong which was addressed by civil actions and not prosecutions. Intentional homicide was punished by death and confiscation of goods. In the Hebrew Code, Capital Punishment was provided for Homicide.

## 6.5 ROMAN CRIMINAL LAW

The Roman Jurisprudence has impacted all systems of law everywhere in the world. The oldest part of Criminal Law has been captured in Twelve Tables in 420 B.C. The eighth table also known as De Delectis dealt with the Law of Crimes. There are 26 items in this table which deal with various crimes.

Roman lawyers divided crimes into three categories: publica judicia, extra ordinaria criminal, private delicta.

The Publica Judicia deals with crimes which are specifically forbidden by particular laws under serious penalties like the death sentence. The second category of crimes were known as extra ordinaria criminal for which no special punishment was provided. Punishments for this category of crimes were left to the discretion of the judge. Under this category, family offences were included as well as offences like introduction of a new religion, raising the price of corn, etc. were included.The third category of crimes was called Publica Judicia. It included those offences which were prohibited by various laws that were passed from time to time.

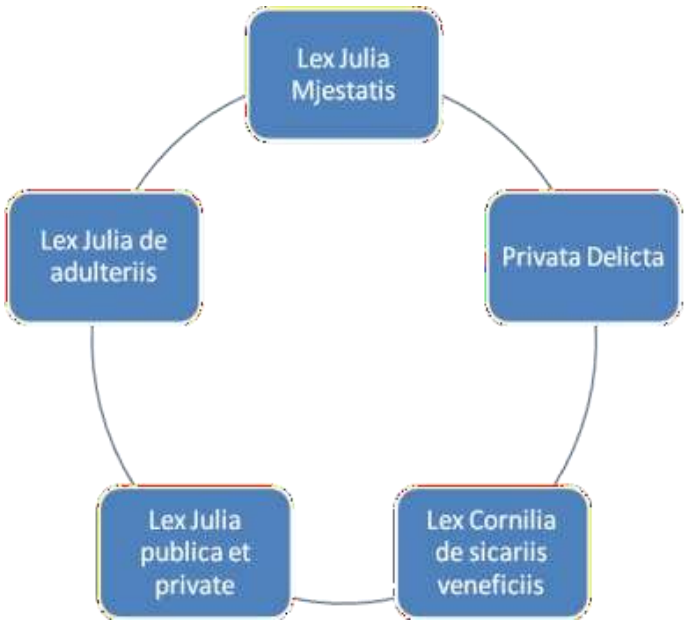
In its more advanced form, Roman Law also consolidated crimes in several codified documents:

- Lex Julia Mjestatis: This included offences against the state.
- Lex Julia de adulteriis: These laws covered sexual offences of all categories.
- Lex Julia de VI publica et private: This Act consolidated several earlier laws which penalised acts of violence but did not fall under the category of offences against the state.
- Lex Cornilia de sicariis veneficiis: This set of laws included Homicide but excluded from its domain killing by negligence. However, killing by administering poison was included within its purview.

- Privata Delicta: This consisted of private wrongs like theft, i.e. taking away movables or valuable security. In order to constitute the offence of theft, it was to be shown that the stolen article was in possession of the same person. Under Roman Law, taking property by impersonation also amounted to theft.

  The principle of punishment was not very objective and depended on the feelings of the victim.

**Roman System of Criminal Law**




## 6.6 CRIMINAL LAW IN ENGLAND

It is difficult to find early traces of English Criminal Law. According to Stephen, the reason behind such difficulty is the scarce availability of authentic resources in this area. However, the influence of Roman jurisprudence on English Criminal Law has been established. Scholars have not been able to identify the definition of Crimes in English laws although various provisions indicate reference to several offences which have a bearing on the law of punishments. The earliest offences recorded in English laws are offences connected to royalty, e.g. conspiring against the King, endangering the life of the King, treason, breach of the King's protection, etc. There is also reference to offences which are against public morality like adultery, incest, fornication, etc.i another category of offences that finds mention is against public justice, e.g. perjury. Similarly, there is reference to offences which are against the body of individuals like Homicide, Rape and Assaults.ii An important characteristic of early records of offences found in English Criminal law is the absence of a definition of these offences. While there are terms denoting a variety of

offences, there is no reference to the exact components of the crime. A perusal of records suggests that although undefined, the definition of these offences and their connotation was presumed in early English society.

Scholars also notice that English laws differentiate between certain similar offences like murder and death by negligence. Punishments have also been prescribed for offences. Punishments are in the nature of fines or are corporal in nature. Prescription for death, mutilation and flogging as forms of punishment is also to be found in English penal laws. However, imprisonment as a modality of punishment was interestingly, not recognised.

Monetary penalties were in the nature of bot, wer or wite. Wer was a price fixed on a person's life according to his social status. It was applied for monetary compensation in a variety of offences. For example, if a man was killed, the convict had to pay an appropriate "wer" to the victim's family depending on the victim's price which was to be derived from his social status. For theft, the convict had to pay "bot" iiiwhich was compensation to a person injured by the crime. Bot could be at a fixed rate or could also be the equivalent of the market rate of the stolen goods. Wite referred to the fine that was to be paid by the convict to the King. All the three categories of fines or monetary compensation were to be paid upon first compensation. Punishments upon second conviction were more severe and were generally punished with death or mutilation.

**Trials under the English Criminal Justice system:**

Procedure for trial under the English Criminal Justice system had a simple structure which was divided into two stages: Accusation and Trial. With the advancement of English society, two primary methods of criminal trial took place: Trial by Jury and Trial by Battle. Trial by jury did not conclusively originate in England but two different kinds of jury were traced in England: petty jury and grand jury. Apart from trial by jury, trial by battle was also in vogue which was introduced by William the Conqueror.

**Documents, Records and Treatises on English Criminal Law:**

Many important treatises on Criminal Law are to be found. Of these, the most prominent one is Mirror of Justice, which was originally written in 1066 A.D. and is believed to be the oldest book on Criminal Law. Another important book was written by Glanville in 1187 A.D. titled A Treatise on Laws and Customs of England. Apart from these books, Laws of England, Pleas of the Crown, Abridgment of the Law were other prominent treatises. Commentaries written by Edmund Plowden in the sixteenth century are also a significant contribution to the field of Criminal Law in England. Other than that, Sir Edward Coke's Institutes in the seventeenth century is a prominent work which has made a significant contribution to the comprehension of English Criminal Law.iv

## 6.7 CRIMINAL LAW IN HINDU SOCIETY

Hindu laws have their roots in ancient Vedic systems. Being a complete and independent development in itself, the laws of Hindu society were organised and their systematic arrangement was also reflected in the domain of Criminal Law. The ancient principle of Rajadharma dominated the development of Hindu legal system including the criminal legal system. Ancient Vedic society predominantly vested powers in an individual, the King or Monarch who was the central figurehead representing the authority of the state. Hindus placed immense emphasis on the shaping

of the personality of the King and a lot of emphasis was placed on sharpening his moral and intellectual character apart from strengthening his physical prowess.

**Important Treatises on Criminal Law in Hindu Society:**




There is significant literature in the area of Hindu systems of criminal jurisprudence. Vedic society has emphasises on core patterns of moral conduct in society, the violation of which was severely discouraged in ancient times. Arthashastra, Yajnavalkya Smriti, Manu Smriti, etc. are important treatises revealing elements of Criminal Law. Chapter VIII of the Code of Manu or Manu Smritiv, as it is commonly called, refers to a secular method of trial and also lays down rules which must be followed by the King for trying offences. Manu Smriti also lays down that it is the solemn duty of the King to try offences personally and in cases where he is not in a position to do so he must appoint learned Brahmanas to settle disputes. This reflects the emphasis of Vedic society on adjudication of disputes and prescription of penalties for the commission of offences.

Manu Smriti also refers to several types of crimes like assault, battery, gambling, defamation, theft, robbery, etc. Added to these are offences like cheating, trespass, transgressions and fornication.

After making a mention of offences, Manu also prescribes punishments for them. It is interesting to find that Hindu conceptions of Criminal Law also provided for exceptions, in the presence of which, the unlawful acts would not lead to fixing of culpability on the offender. Like in modern times, the defences of necessity, infancy, insanity were known to Hindu scholars.

Methods of punishment in Hindu system of Criminal law were premised on well-developed and logical principles. The idea of proportionality was embedded in Hindu philosophy and there seems to have been a graded pattern of punishment. For example, there is reference to various types of punishment like Censure, Rebuke, Fine, Forfeiture of Property as well as Corporal Punishment. Corporal Punishment as a method of punishment was resorted in cases where crimes committed

were grave and serious. Corporal punishment included imprisonment, banishment, mutilation as well as death penalty. Various principles were laid down and several factors had to be taken into consideration before deciding whether or not a certain punishment was to be imposed. The idea was to ensure a fair and reasonable standard of punishment which was commensurate with the then prevailing standards of justice.

The various factors which were taken into consideration were nature of the offence, the time, place and manner in which the offence was committed, the strength, age, occupation and wealth of the accused as well as the victim.

## 6.8 ISLAMIC CRIMINAL LAW

Since Islamic law is a book-based law, i.e. it derives its form and content from the Quran, its prescriptions pertaining to Criminal Law are also derived from the Quran. Other than that, various other sources of Islamic law like Hadith or Sunnat, Ijm and Qiyas also contribute to the development of substantive Criminal Law. A three-fold punishment pattern is to be seen in the Islamic system of Cirminal law, namely, retaliation, composition and deterrence. Apart from these three modalities, personal retaliation was also permitted. The office of the Qazi or Judge was hereditary in ancient Muslim society. There were well-defined provisions for punishment and they included mutilation, death and fines.

## 6.9 DEVELOPMENT OF CRIMINAL LAW IN BRITISH INDIA

When the British entered India, the system of Criminal justice in place was Mohammedan. According to Stephen, laws administered in India at that point of time were utterly confusing and indeterminate. In 1773, the very first attempt was made to impose the English system of laws in India and accordingly, new courts were set up with a different hierarchical structure to ensure smooth implementation of the laws. Further reforms in justice administration were made in 1793 which included the setting up of Appellate Courts in four major towns: Calcutta, Dacca, Patna and Murshidabad.

The most significant development in the domain of Criminal Law, however, was the enactment of the Indian Penal Code. Short penal codes had been drawn out for Bombay and Punjab earlier. However, under the Charter Act of 1833, a single legislature was introduced for the whole of India. In 1837, the Draft Penal Code was submitted. After a lot of changes, finally, in 1860 the Code was adopted in India.vi

## 6.10 CONCLUSION

Thus, the development of Criminal Law as we see in its modern form today has undergone a slow and interesting phase of transition. From mutilation as a form of punishment to rehabilitation and reformation as punishment mechanisms, the change has been fascinating.

## 6.11 SUMMARY:

- In the primitive age and initial days of development of Criminal Law, the focus of punishment was on severity of the penalty as the idea was to ensure that people were permanently incapable of committing crimes.

- The development of Criminal Law is based on the premise that self-preservation is a natural instinct of man.
- Criminal Law evolved by way of preservation of the family and then by way of preservation of clans. From there, it evolved into preservation of the state.
- The oldest part of Criminal Law has been captured in Twelve Tables in 420 B.C. The eighth table also known as De Delectis dealt with the Law of Crimes and it consists of are 26 items which deal with various crimes.
- Many important treatises on Criminal Law are to be found in English Law. Of these, the most prominent one is Mirror of Justice, which was written in 1066 A.D. and it is believed to be the oldest book in Criminal Law.
- Hindu and Muslim systems of Jurisprudence have also impacted the development of Criminal Law.

# UNIT 7:
# STAGES OF CRIME

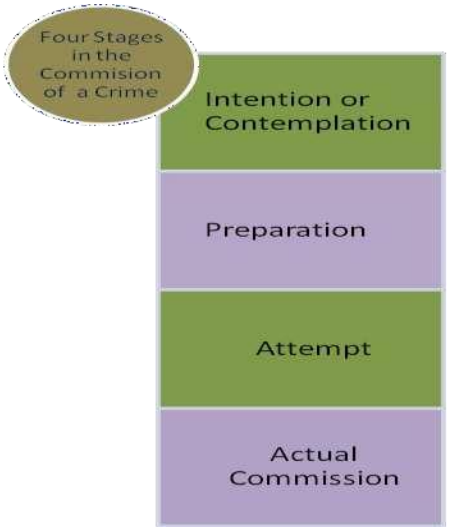


## 7.1 INTRODUCTION

The commission of a crime involves a variety of actions which can be classified into different stages in terms of their relevance in determining their liability of a person. It is important to understand what are the different stages involved in the commission of a crime and what are the legal liabilities, if any, attached to these different stages.

The following are generally identified as the four sequential stages in the commission of a crime;

1. Intention or Contemplation
2. Preparation
3. Attempt



4. Actual Commission

## 7.2 OBJECTIVE

- To have an overview of the various stages involved in the commission of a crime.
- To understand the nuances of the stage of intention.
- To understand the meaning of preparation and the legal consequences attached to the preparation of a crime.
- To understand the meaning of attempt and to appreciate the difference between preparation and attempt.
- To appreciate the different tests which have evolved to differentiate between preparation and attempt.
- To find out if the attempt to do an impossible act is punishable in law

## 7.3 INTENTION OR CONTEMPLATION

The first stage in the commission of a crime is to contemplate its commission. This is the stage where the intention to commit a crime germinates in the minds of the offender and takes a concrete shape. This is the mental state which is generally described subsequently as the requisite mens rea to commit an offence.

Generally, having an intention to commit a crime is not punishable in law.2 There are a number of reasons because of which the contemplation of a crime in the mind of a person is not punishable. Firstly, no harm is caused to anybody by a person thinking to do something. Mere thoughts unless accompanied by over acts do not cause any kind of injury to anybody.

To understand this proposition, lets consider an example;

X is at the house of his friend Y for a party and notices an expensive watch lying on the table of Y. X has a huge weakness for watches and maintains a small private collection of different variety of watches in his house. The minute he notices the watch, he develops a desire to steal and take it along with him.

At this point, though X has decided to steal the watch of Y, Y has suffered no harm due to X harbouring such thoughts. Y will suffer a loss only if X in furtherance of his decision steals the watch.

Secondly, thoughts are fleeting and temporary. a thousand thoughts can come up in our mind in a day and a person can change his thoughts in an instant. Thus, unless the person harbouring the thought has shown a commitment to it by engaging in an overt act in furtherance of the thought, it does not make sense for such person to be punished simply for having a thought.

To understand this proposition, lets consider an example;

X and Y have a history of personal feud. One day when X is travelling with four of his friend in a car, he notices Y coming alone in a bike from the opposite end of the road. Watching Y, X's first thought is to beat him up taking advantage of the fact that he is alone right now and X is with his friends. However, it occurs to him that such an act will only increase the bitterness of feud which may be harmful him or his family in the future. Thus, he lets Y be on his way.

Here, punishing X for his initial thought of beating up Y would be plainly premature and unfair as he has immediately changed his mind as well.

Thirdly, human race is yet to develop techniques where the thoughts of person can be reliably investigated and proved. What goes on inside the mind of a human mind is mystery to all but himself. It is impossible to know for certain what a person is thinking unless we have some evidence of the same through his external conduct. The mere intention of a person unaccompanied by any external action is a thing of supposition and not of fact. A person is punished for the facts that are proved against him and not because of the suppositions held against him.

To understand this proposition, lets consider an example;

In a party, X, a man, notices a beautiful girl, Y. Bewitched by Y's beauty, X wants to have carnal knowledge of her at any cost. Y has consumed a lot of alcohol and by a stroke of change, the host of the party requests X to drop Y home. On their way back, as X is driving his car, Y passes out in the seat next to him. X decides to take advantage of this situation and have sexual intercourse with her while she is unconscious due to the effect of alcohol.

If X were to be apprehended at this exact point of time where he is yet to commit an overt act in furtherance of his decision, what evidence can be adduced to prove that he intended to rape Y? X can very well contend that he was merely dropping Y as a good citizen at the request of his friend. There would be no way to reliably prove what was running in the mind of X unless there is some external conduct which indicates his state of mind.

There are certain exceptional situations however, where the evidence of the intention of a person, if available, makes him criminally liable. For example, under section 503 of the Indian Penal Code, when X threatens Y of injury to get Y to do something which Y is not legally bound to do, X commits the crime of criminal intimidation. Thus the crime of criminal intimidation does not consist of the actual infliction of injury on another person but the communication of one's intention to cause injury to another person.

## 7.4 PREPARATION

After the stage of intention to commit a crime comes the stage of preparation for committing the crime so intended. Preparation refers to the stage where the person intending to commit the crime seeks to make the necessary arrangements to enable himself to commit the crime so intended.3 Preparation may involve the procurement of the necessary tools for the commission of a crime or may also involve planning of the manner in which the person seeks to execute the crime.

Lets consider the example below;

X knowing that Y has kept gold jewellery in his house decides to rob him. In order to do so, X purchases a gun from a known contact, Z.

Till the time X had only decided to rob Y, the crime was only at the stage of intention. The minute X initiates contact with Z to buy a gun for the purpose of robbing Y, it enters the stage of preparation. Here X has sought to procure the necessary tools in order to commit the crime that he has in his mind.

Lets consider the same example in a modified form;

X knowing that Y has kept gold jewellery in his house decides to rob him. X already owns a gun.

He conducts surveillance on Y's house for a couple of nights to acquaint himself with the sleeping pattern and other habits of Y, Y's family members and also of Y's neighbours.

Here, the preparation does not involve the procurement of the tools for the commission of the crime. Here, the preparation consists of determining the manner in which the crime would be committed.

Generally, preparation for the commission of a crime is not punishable. Firstly, like the stage of intention, preparation does not indicate the certainty that the person so preparing will definitely commit the crime. A person might make full preparation and yet not commit the crime with a change of heart.4 Secondly, it is very difficult to judge from the preparation whether the person intends to commit a criminal act or an otherwise innocent act.5

Lets consider the example below;

X goes to the market and buys rat poison.

Here, X's act of purchasing rat poison definitely indicates a preparatory stage. However, how can it be known for certain if X intends to poison his wife Y or use it in his home as he has a genuine rat infestation problem?

In such circumstances, making preparation punishable will lead to mostly unjust results. Many regular acts of individuals in the daily course of life are capable of being interpreted as being the preparation for a criminal conduct. Regular acts like going on a drive in a secluded road can be interpreted as the preparation to kill the co-passenger and dump the body in a deserted space. A simple act of buying a knife can be interpreted as preparation for killing somebody. Purchasing combustible fuel like petrol or diesel can be interpreted as preparation for committing arson. Purchasing a hockey stick can be interpreted as the preparation to assault somebody.

If preparation were to be made punishable, it will lead to a lot of harassment of innocent individuals due to the fact that almost every action of a human being can be suspected as being the preparation for the commission of a crime.

It is for these reasons that generally, the preparatory stage of a crime has not been made punishable under the law. However, there exist certain exceptional situations where even the preparatory stage of a crime has been made classified as a crime in itself and made punishable under law. These are primarily such situations where the crime for which preparation is being made is grave in nature or poses a significant threat to the general safety of the public or to public order. In certain other cases, where the nature of the preparation leaves no scope of the preparation being for the purpose of any innocent activity.7 Thus, preparation to wage war against the government is classified as a crime and has been made punishable under law. Preparation to commit the crime of dacoity is also punishable under law.

## 7.5 ATTEMPT

The initial two stages in the commission of a crime; intention and preparation are generally not punishable. The stage of attempt is subsequent to the stage of preparation and is punishable under law. The stage of attempt refers to the effort made by an individual in furtherance of his intention and on the basis of his preparation to commit the crime. It is the overt action on the part of the

individual seeking to fulfil his contemplation.

It needs to be noted that a person is held liable for attempt only when his efforts to commit the intended crime are unsuccessful. When he succeeds in his effort, he is punished for the actual commission of the offence.

Lets consider the example below;

X intends to kill Y because of some insulting things which Y had said about X's father. In order to kill Y, X procures a gun and approaches his house and knocks on his door. When Y opens the door, X points the gun at Y's head and pulls the trigger.

In this case, if the gun fires and Y is killed, X will be liable for culpable homicide amounting to murder. However, if for some reason the gun does not fire and X runs away from the place, he will be liable for attempt to commit culpable homicide amounting to murder.

In the scheme of Indian Penal Code, the issue of attempt as a crime in itself has been dealt in primarily four different ways. Firstly, on certain occasions, the crime and the attempt to commit the crime have been dealt with in the same section. An example of this is the offences against the State under section 122, 123 etc. Secondly, on certain other occasions, the definition of the crime has been provided in one section and the attempt to commit the crime has been made punishable under another section. One example of this is the attempt to commit murder which has been made punishable under section 307. Thirdly, there is one situation where only the attempt to do something is punishable but not the actual commission itself. Section 309 makes it a crime to attempt to commit suicide. For obvious reasons, actual commission of suicide is not punishable as it would be impossible to punish the person who is already dead. Fourthly, section 511 of the Indian Penal Code provides for the general rule regarding attempt which is applicable in all such cases where attempt to commit has not been specifically described as a crime and punishment for the same has not been prescribed. It is important to remember that section 511 is applicable to only to the attempt to commit such offences which are punishable with imprisonment for life or other imprisonment. Section 511 provides that whenever any person attempts to commit an offence which is punishable with imprisonment for life or other imprisonment and no express provisions has been made in the Indian Penal Code for the punishment of such an attempt, such person shall be punished with imprisonment of any description provide for the offence attempted to be committed by him for a term which may extend to one-half of the imprisonment for life or as the case may be, one-half of the longest term of imprisonment provided for the offence being attempted by him or with such fine as is provided for as a punishment for such offence or with both.

**Distinction between Attempt and Preparation**

The major challenge in the law regarding attempt is to determine properly when the conduct of the individual has matured from the stage of preparation to the stage of attempt.9 It is to be noted that 'attempt' has not been defined under the Indian Penal Code. It is generally understood that when a person commits an act which is considered to be beyond mere preparation and is considered as an effort to commit the crime itself, the same is deemed as an attempt. However, the challenge is to identify the specific point at which the acts of the individuals stops being mere preparation and

becomes an attempt to commit the crime. Being able to maintain the distinction between preparation and attempt is crucial as in one case, the individual would be criminally liable whereas in the other case, he would not generally be liable.

One view is that the cue lies in the term 'mere preparation'.10 According to this view, one needs to consider whether the individual has commenced the execution of the crime. Thus, attempt begins when the individual has progressed beyond 'mere preparation' and is engaged in a conduct which can be considered in furtherance of the actual commission of the crime. Preparation involves everything a person may do in order to facilitate the commission of the intended crime but it turns into attempt the minute the person seeks to execute the commission of the crime.

Thus, in the example given above about X wanting to shoot Y, the attempt begins only when Y opens the door and X points the gun at him in order to shoot him. Knocking on the door of Y cannot be considered as an attempt to murder Y and has to be identified as preparation. On the other hand, pointing the gun at Y and pulling the trigger can definitively be classified as attempt.

Different tests have been forwarded to distinguish between the stage of preparation and the stage of attempt. While none of these tests are either accepted or applied as a rigid rule, it is important to have a clear understanding in order to better appreciate the distinction between preparation and attempt.

**Test of Proximity**

This test is based on the proposition that an act will qualify as an attempt if it proximate to the commission of the offence.11 This principle can be illustrated in the form of the following example;

X seeks to set fire to a stack of hay belonging to Y. He lights the matchstick but realises that he is being watched by Z, the neighbour of Y. He puts out the matchstick.

In this situation, X will be held liable for attempt as his act of lighting the matchstick is directly proximate to his intended crime of setting the hay stack on fire.

Thus, when a person has committed himself to an act which is proximate to the ultimate act that he has intended, it can be safely said that he has begun the attempt to execute the crime.

**Locus Poenitentiae**

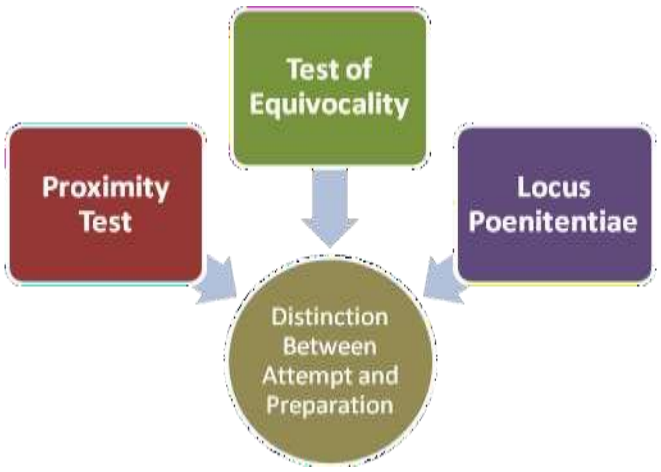
This doctrine is based on the proposition that a person can change his mind about committing an act even in the last possible minute. According to the doctrine, the relevant fact for determining whether the act of the accused constitute preparation or attempt is to consider the nature of consequences which would have followed if the accused had changed his mind after committing the act.12 If the consequence would be harmless then the act can be reasonably said to be in category of preparation. On the other hand, if the act has the potential to lead to harmful consequences, then it more fittingly deserves to be classified as an attempt.

**Test of Equivocality**

The test of equivocality is based on the premise that a man should not be punished unless his actions reflect a clear and unambiguous intention to commit the crime. Thus, an act will be considered as attempt if it unequivocally points to the intention of the individual to commit the crime. Thus a man will be punished only if there is no doubt about the consequences he sought to

achieve through his conduct.

It is important to remember that all the tests described above are indicative and not definitive. Whether a particular conduct qualified as attempt or preparation is for the court to determine depending on the peculiar facts and circumstances of each individual case. The court may refer to these tests in order to aid itself in the process of determination but is not bound by the confines of these tests and principles.




**Attempt to do an Impossible Act**

It may sometimes happen that the accused might be trying to do something which is impossible, either by reason of physical impossibility, legal impossibility or out of sheer inefficiency. For example, X is trying to shoot Y, who is at least 1000 metres away with a gun which has a range of only 500 metres. In this case, what X is trying to achieve is physically impossible. The question is whether he can be punished for attempt when he was clearly intending to commit a crime but the commission was impossible due to physical factors. The answer is in affirmative. The impossibility of the act does not detract from the mens rea of the accused and from the fact that he has committed an act which is an effort to execute his intentions.13 This proposition is confirmed by illustrations (a) and (b) of section 511 as well where impossibility of an act does not neutralise the liability for having attempted it.

## 7.6 ACTUAL COMMISSION

The final and last stage of a crime is when the attempt to commit the crime is successful and the crime is said to have been committed. In the case of commission of a crime, the offender is always liable.

## 7.7 SUMMARY

- The four stages in the commission of a crime are Intention, Preparation, Attempt and Commission.

- The first stage in the commission of a crime is to contemplate its commission. This is the stage where the intention to commit a crime germinates in the minds of the offender and takes a concrete shape.
- Generally, having an intention to commit a crime is not punishable in law.
- After the stage of intention to commit a crime comes the stage of preparation for committing the crime so intended. Preparation refers to the stage where the person intending to commit the crime seeks to makethe necessary arrangements to enable himself to commit the crime so intended.
- Generally, preparation for the commission of a crime is not punishable.
- However, there exist certain exceptional situations where even the preparatory stage of a crime has been made classified as a crime in itself and made punishable under law.
- The stage of attempt is subsequent to the stage of preparation and is punishable under law. The stage of attempt refers to the effort made by an individual in furtherance of his intention and on the basis of his preparation to commit the crime.
- Preparation involves everything a person may do in order to facilitate the commission of the intended crime but it turns into attempt the minute the person seeks to execute the commission of the crime.
- The impossibility of an act does not neutralise the liability for having attempted it.
- The final and last stage of a crime is when the attempt to commit the crime is successful and the crime is aid to have been committed. In the case of commission of a crime, the offender is always liable.

# UNIT 8:
# FUNDAMENTALS OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE



## 8.1 INTRODUCTION

The word vulnerable contains the Latin words “vulnerare” and “abilities”. It means “able to be wounded”. It relates to all such people or victims who have experienced an invasion into the self with emotional, physical and/ or financial damage.1 In the words of Kirchhoff, “if victims were not vulnerable, they were not victims.” Vulnerability carries with it an element of risk. „The vulnerable victims“ was developed by Nils Christie, the Norwegian sociologist.

Criminal Justice System is a mechanism of social control through repression of the wrong doer. Traditionally the victim is not the centre of the system. It is an offender oriented system, though it primarily aims to protect the victim. There are two aspects of the victim being victimized and associated with the criminal justice system. First, if the victim is subject to violation of his rights, and approaches the criminal justice system for justice. Second, when the victim in course of interaction with the criminal justice system, faces victimization. In every case, the potentiality of being victimized increases due to the element of vulnerability.

People with impaired decision-making capacity are among the most vulnerable within our community. Such people are unlikely to be aware of criminal justice services, how to access them and may be unable to assist a police investigation or suffer from insufficient financial or emotional

resources. At times such vulnerable victims do not even realize that a crime has been committed against them. As a result, as observed by Howard and Brien (2009), such persons are at greater risk than the others.2 In the opinion of Newburn (2003) cases of domestic violence, sexual offences and child abuse particularly brought vulnerable victims under spotlight.3 Due to various socio-economic and physical causes such groups of people face limitations and are unable to protect and preserve themselves. Such kinds of vulnerable groups who face discrimination and disability include-

- **Women,**
- **Children,**
- **Elderly,**
- **Scheduled Castes (SC), Scheduled Tribes (ST),**
- **Disabled,**
- **Internally Displaced and Disaster victims**
- **Minority groups and weaker sections**

## 8.2 OBJECTIVES

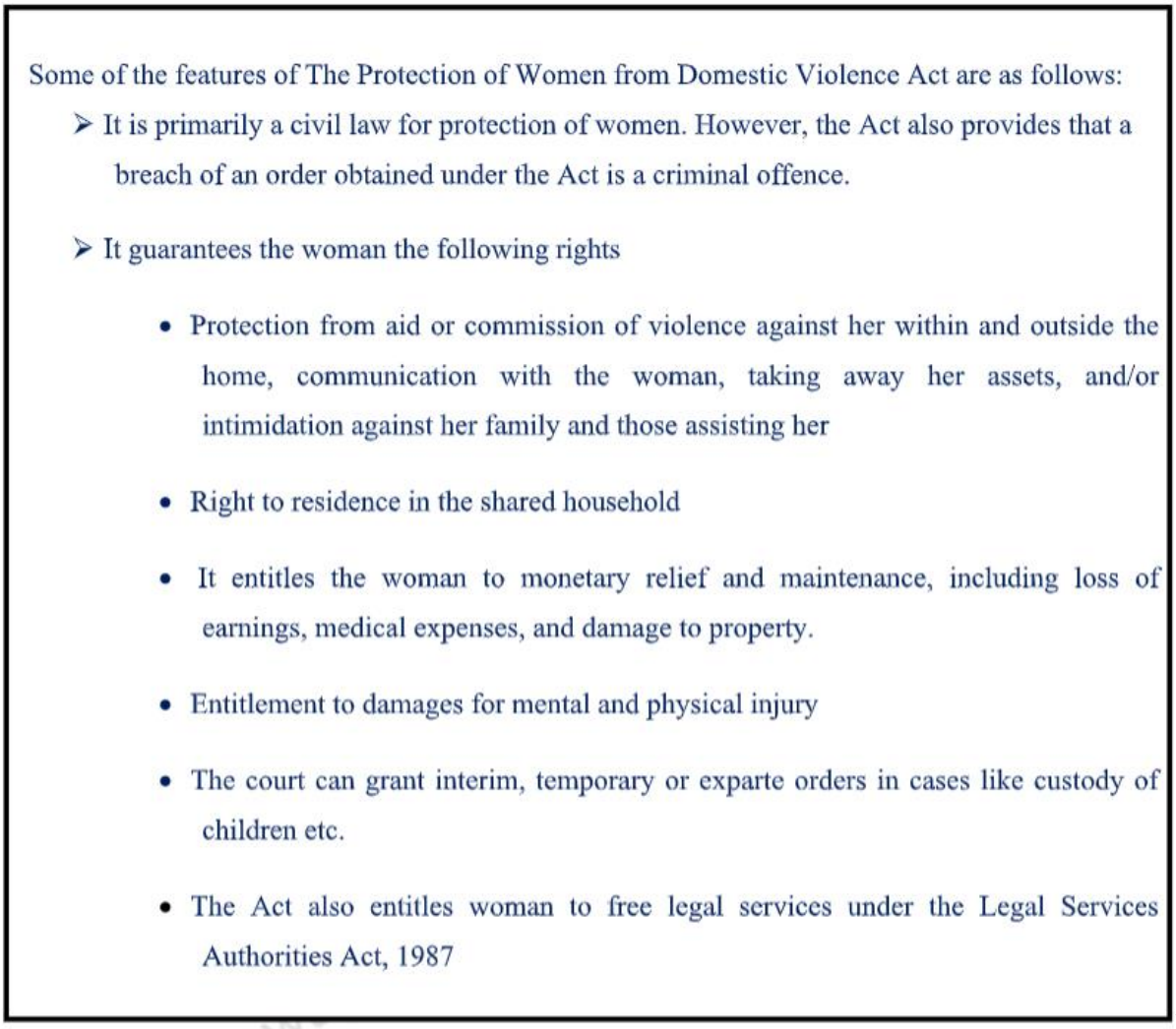
- To make students aware about the vulnerable section of the society
- To analyse the position of vulnerable victims in the criminal justice system
- To assess the response of the criminal justice system in ensuring sufficient right and protection to the vulnerable.

## 8.2.1 WOMEN

Generally female victimization is considered to be restricted to sex related offences. But this narrow observation causes gross mistreatment to the victims who are in more than one occasion subject to victimization on grounds apart from sex. The discrimination that a woman is subject to at her work place in her professional growth, the disparity in wages that she suffers, the ill treatment done to women in homes behind closed doors are not manifestations of sexual offences but are definitely quite vocal about the vast range of victimizations of various nature to which she is subject. It majorly reflects the power imbalance in a patriarchal society. The male superiority and insecurity gets reflected in such kinds of victimization in every field of human life which ultimately calls for a special treatment and protection for women. The Dowry Prohibition Act, 1961, Immoral Traffic (Prevention) Act, 1986, Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection ) Act, 1994 are few such legislations which aims at curbing various social vices like, dowry, trafficking, declining sex-ratio. All these laws ultimately aim at protecting and respecting the rights of women and womanhood.

The Protection of Women from Domestic Violence Act, 2005, was enacted for the protection of women from being victims of domestic violence. This law has addressed all sorts of abuses against women within the household i.e. physical, psychological, sexual and economic. It has provisions which speak of various relief measures to such victims like monetary relief, protection orders,

residence order, conduct in camera proceedings etc. It states, “"monetary relief" means the compensation which the Magistrate may order the respondent to pay to the aggrieved person, at any stage during the hearing of an application seeking any relief under this Act”. The statute also provides that the Magistrate may pass interim orders which may include, “An order for interim monetary relief, including but not limited to payment of rent for the premises of the shared household, maintenance for you and your Domestic Violence Rules, 2005.



Some of the features of The Protection of Women from Domestic Violence Act are as follows:

- It is primarily a civil law for protection of women. However, the Act also provides that a breach of an order obtained under the Act is a criminal offence.
- It guarantees the woman the following rights
  - Protection from aid or commission of violence against her within and outside the home, communication with the woman, taking away her assets, and/or intimidation against her family and those assisting her
  - Right to residence in the shared household
  - It entitles the woman to monetary relief and maintenance, including loss of earnings, medical expenses, and damage to property.
  - Entitlement to damages for mental and physical injury
  - The court can grant interim, temporary or exparte orders in cases like custody of children etc.
  - The Act also entitles woman to free legal services under the Legal Services Authorities Act, 1987

In Vimlaben Ajitbhai v. Vatslaben the apex Court stated that the Act [rovides for a higher right for the wife. She not only has the right to be maintained but also acquires a right to residence, which is a higher right. In Jovita Olga Ignesia v. Ranjan Maria it was stated that the expression “domestic violence” has a very wide amplitude and it includes physical abuse, sexual abuse, verbal and emotional abuse, economic abuse which in turn, interalia, includes deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under the order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved persons and her children, if any, stridhan, the property jointly or separately owned by the aggrieved person,

The employer is to take action within 60 days of the receipt of the recommendation.

payment of rental to the shared household and maintenance.

**The Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Act, 2013** confers upon Women the Right to protection against Sexual Harassment along with ensuring their right to Livelihood. It also addresses the issue of prevention and redressal of complaints related to sexual harassment at workplace. The guidelines laid down by the Supreme Court in Vishaka vs. State of Rajasthan6 were the first initiative of its kind in India, which addressed the issue in conformity with the international standards as stipulated in Convention on the Elimination of all forms of Discrimination against Women (CEDWAW), 1979. The Supreme Court in the judgment prescribed preventive steps and provided for a complaints mechanism.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, which seeks to protect women from sexual harassment at their place of work, was ultimately passed by the Lok Sabha on September 3, 2012 and subsequently by the Rajya Sabha on February 26, 2013. The Act came into force on 22nd April, 2013 and replaced the Vishakha guidelines of 1997. It took around 16 years for the law to be enacted and finally the Delhi Gang rape incident of December 2012, finally speeded up the process.7

Some of the distinguishes features of the law:

- The Act brings within its ambit a vast category of employees which includes regular, temporary, ad-hoc, contractual worker, trainee, probationer etc.
- The term "workplace" is also defined very elaborately and includes all departments, undertakings, establishments, organizations, enterprises, institutions, offices, branches. It includes both public and private sector, whether organized and unorganized.
- The Act provides for Internal Complaints Committee and Local Complaints Committee.

**WORKING OF THE MECHANIS**

Internal Complaints Committee is to be constituted by every employer in every administrative units or offices and the Local Complaints Committee is to be set up by appropriate Governments at District levels to receive complains of sexual harassment from establishments which do not have an Internal Complaints Committee on account of having less than ten workers.

The victim is required to make a complaint to either of the two committees within three months of the incident and subsequently the relevant committee can forward the prima facie case to the police under section 509 IPC.

Factors like the mental distress, capacity of the accused to pay; medical expense etc shall be considered while determining the quantity of the compensation. However, in case of a false complaint, the woman too can be subject to action in accordance with service rules or as per the recommendation of the relevant committee.[8]

Other relevant laws on this aspect are the Indecent Representation of Women (Prohibition) Act, 1987 and section 67 of the Information Technology Act, 2000.

The Indian Penal Code has numerous provisions which try to combat various kinds of offences committed against women. These provisions have been subject to Amendments over the period of time. A quick glance through these provisions:

**Sec 375-377:** RAPE, CUSTODIAL RAPE, UNNATURAL OFFENCES
**Sec 359-373:** KIDNAPPING AND ABDUCTION
**Sec 304B:** DOWRY DEATH
**Sec 509&354:** WORDS GESTURES OR ACTS INTENDED TO INSULT THE MODESTY OF A WOMAN
**Sec 354 A&B:** SEXUAL HARRASSMENT
**Sec 366B:** IMPORTATION OF GIRLS (upto 21 years)
**Sec 498A:** MATERIMONAL CURELITY
**Sec 354C:** VOYEURISM
**Sec 354D:** STALKING

## 8.2.2 CHILDREN

Children are supposed to be the most vulnerable section of the society. Their biological age and physical and mental development makes them most vulnerable. They get subject to various types of victimization in the form of physical abuse, sexual abuse, economic exploitation. Some of the chronic concerns of the society centering child exploitation are child labour, child trafficking, child rape, child marriage etc. Criminal justice System has been responsive to the gravity of the issue and the administration, legislature and judiciary has been proactively responding to the needs of the hour.

The Juvenile Justice (Care and Protection of Children) Act, 2000, the primary ambition of which was to create for children within the criminal justice system a child friendly environment which will always work keeping in mind the best interest of the child and primarily focus on reformation and rehabilitation of child in need of care and protection rather than victimize the child in the course of criminal justice administration has been repealed by The Juvenile Justice (Care and Protection of Children) Act, 2015 which came into effect from 16th day of January, 2016. The

Bill was passed by Lok Sabha on 7th day of May, 2015 and Rajya Sabha on 22nd day of December, 2015. The final Presidential assent was received on 31st day of December, 2015. The law came into light as an after effect of the massive outrage post nirbhaya incident of 2012 in New Delhi, where one of the accused was few months short of eighteen years.

**HIGHLIGHTS OF JJ ACT, 2015**

- The word „juvenile" is substituted with the word „child" throughout the Act.
- Special provisions for heinous offences committed by children above the age of sixteen year have been included. Accused children of 16 years or above are to be tried as adults in case of heinous offences i.e. offences which are punishable with imprisonment of seven years or more
- Juvenile Justice Boards and Child Welfare Committees to be set up in every district. "The Juvenile Justice Board is given the option to transfer cases of heinous offences by such children to a Children"s Court (Court of Session) after conducting preliminary assessment. The provisions provide for placing children in a „place of safety" both during and after the trial till they attain the age of 21 years after which an evaluation of the child shall be conducted by the Children"s Court. After the evaluation, the child is either released on probation and if the child is not reformed then the child will be sent to a jail for remaining term. The law will act as a deterrent for child offenders committing heinous offences such as rape and murder and will protect the rights of victim".9
- Central Adoption Resource Authority (CARA) has been elevated to the status of a statutory body. Provisions related to adoption have been made more detailed and stringent.
- Numerous rehabilitation and social reintegration measures have been laid out for children in conflict with law and in need of care and protection. Various services including education, health, nutrition, de-addiction, treatment of diseases, vocational training, skill development, life skill education, counselling, etc are provided to children under institutional care to enable them to assume a constructive role in the society. The non-institutional provisions include: sponsorship and foster care for placing children in a family environment, which has to be selected, qualified, approved and supervised
- Several new offences like sale and procurement of children for any purpose including illegal adoption, corporal punishment in child care institutions, use of child by militant groups, offences against disabled children and, kidnapping and abduction of children, which were not adequately penalised in other laws have been brought within the ambit of the new legislation.

**The Prohibition Of Child Marriage Act, 2006**

As documented in the Handbook on The Prohibition Of Child Marriage Act, 2006, which came into force on 1st of November, 2007, "more than half of the women in India are married before the legal minimum age of 18. By contrast, men in the same age group get married at a median age of 23.4 years. Sixteen percent of men aged 20-49 are married by age 18 and 28 percent by age 20." The Child Marriage Restraint Act, 1929 tried to restrain solemnisation of child marriages in instead of preventing or prohibiting it. THE PROHIBITION OF CHILD MARRIAGE ACT, 2006 is enacted with the object to prevent child marriage making solemnization of child marriage a non bailable and cognizable offence. According to this Act, child marriage (i.e. bride being below 18 and groom being below 21 years of age) shall be declared to be void at the desire

of either the bride or the groom.

It provides clear provisions for:

- Providing maintenance to the bride by the groom or his parents or guardians until the court pronounces the decree
- It also provides for the custody and maintenance of children who may have been born out of such a child marriage
- At the time of granting nullity to marriage the Court can order for the return of gifts and ornaments received at the time of marriage.
- It has strict penal provisions in case of a adult male marrying a child and for persons performing, abetting, promoting, attending, etc., a child marriage
- It declares child marriages to be automatically void in cases like the minor being is sold for the purpose of marriage, minor after being married is sold or trafficked or used for immoral purposes, etc.
- The Court has been bestowed with the power to grant injunction to prevent child marriages

**The Protection of Children from Sexual Offence Act, 2012** aims to protect sexual victimization of children. This Act was passed by the Lok Sabha on 22nd of May, 2012. Prior the enactment of this Act, issues concerning sexual offences against children was taken care of IPC and there was no distinction between such offences being committed against children and adults.

Some of the salient features of this Act are:

- It protects children from offences which are in nature of sexual assault, sexual harassment and pornography
- The Act has made an elaborate categorization of various degrees of sexual assault on children. They are:
- Penetrative Sexual Assault,
- Aggravated Penetrative Sexual Assault,
- Sexual Assault,
- Aggravated Sexual Assault,
- Sexual Harassment of the Child,
- Use of Child for Pornographic Purposes
- Act provides that in appropriate cases, the Special Court may, in addition to the punishment, direct payment of compensation to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.
- The Act adopts a child friendly approach and the best interest principle
- In camera trial
- No detention of the child in police custody at night
- Medical examination of a girl child to be conducted by a woman doctor and such examination in case of any child to be conducted in presence of their parents or any person in whom the child has trust.

Set up in March 2007, The National Commission for Protection of Child Rights (NCPCR),

under the Commissions for Protection of Child Rights Act, 2005, aims to ensure that the relevant Laws, Policies, Programmes, and Administrative

Mechanisms are framed keeping in mind the Child Rights perspective, contained in the Indian Constitution and the UN Convention on the Rights of the Child.

Section 67B of The Information Technology Act, 2000, provides punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form up to five years and with a fine which may extend to ten lakh rupees for first conviction and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees, are few such examples which tries to protect the rights of children and prevent child victimization. The Child Labour (Prohibition and Regulation) Amendment Bill, 2012 seeks to introduce some very strong amendments to Child Labour (Prohibition and Regulation) Act, 1986. The proposed amendment strongly forbids employment of children below fourteen years of age, except in non- hazardous family enterprises or the entertainment industry, unlike the law of 1986 which has provisions prohibiting children to be employed in hazardous industries only. Adolescents (14 and 18 years of age) are prohibited from being employed in hazardous occupations and processes.

In Re. Exploitation of Children in Orphanages in the State of Tamil Nadu V. Union of India (UOI) and Ors.11 it has been stated, "It is but obvious that the rights of children can be secured adequately only if the monitoring and controlling provisions contained in the three Acts, namely, The Commissions for Protection of Child Rights Act, 2005, The Right of Children to Free and Compulsory Education Act, 2009 and the Protection of Children from Sexual Offences Act, 2012 read with the Juvenile Justice (Care and Protection of Children) Act, 2000, are fully implemented."

The apex Court in Salil Bali v. Union of India (UOI) and Anr. (AIR2013SC3743) stated, "India developed its own jurisprudence relating to children and the recognition of their rights. With the adoption of the Constitution on 26thNovember 1949, constitutional safeguards, as far as weaker sections of the society, including children, were provided for. The Constitution has guaranteed several rights to children, such as equality before the law, free and compulsory primary education to children between the age group of six to fourteen years, prohibition of trafficking and forced labour of children and prohibition of employment of children below the age of fourteen years in factories, mines or hazardous occupations. The Constitution enables the State Governments to make special provisions for children. To prevent female foeticide, the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act was enacted in 1994. One of the latest enactments by Parliament is the Protection of Children from Sexual Offences Act, 2012".

## 8.2.3 ELDERLY

The obligations of the Government to protect the human rights of the elders and to ensure them the highest possible standard of health, dignity of life, free from neglect and all type of physical and mental abuse has been echoed in the United Nation"s commitment in the UN Charter and International Bill of Human Rights, Universal Declaration of Human Rights, International Covenant on Economic Social and Cultural Rights, International Covenant on Civil and Political

Rights, Convention on the Elimination of All Forms of Discrimination Against Women as well as in Vienna and Madrid Plan of Action in 1982 and 2002 respectively. India in 2007 has brought into light a central legislation for maintenance, welfare and care of the elderly by their children.
The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 aims to ensure maintenance and welfare of Parents and Senior Citizens. It upholds the basic principles guaranteed and recognized under the Indian Constitution. The drafters of the Constitution of India had considered the interest of the elderly people and accordingly incorporated Article 41 and 46 in the Constitution. Constitution of India under Directive Principles of State Policy under Article 41 clearly and specifically states: "The State shall within its limits of economic capacity and development make effective provisions for securing the right to work, to education and public assistance in case of unemployment, old age, sickness and disablement and in other cases of undeserved want." Article 46 aims to promote education and economic interest of other weaker sections by stating. "The State shall promote with special care the educational and economic interests of the weaker sections of the society… and shall protect them from social injustice and all forms of exploitation". As the elderly fall within the category of vulnerable class of the society who easily fall prey to victimization since they generally loose power, specially economic power, with age, the obligation of the State to ensure their protection and security is also covered under Art 46. Though, section 125 of the Criminal Procedure Code, 1973 also makes it obligatory for a person who has sufficient means to maintain his parents who are unable to maintain themselves. The most striking feature of the Act is to make the maintenance of parents by their family a matter of legal obligation. The Act mainly focuses on maintenance, care and protection of the senior citizen by setting up Tribunals in every district. The Tribunal is required to ensure payment of maintenance by the children to the elderly parents and senior citizens. It also deals with complaints of neglect, physical injury, mental cruelty, desertion or separation from family and its restoration and other enquires requiring redressal. The interventions of various departments and authorized agencies play a significant role in time bound proceedings and speedy justice delivery mechanism against the guilty.

## 8.2.4 SCHEDULED CASTES (SC), SCHEDULED TRIBES (ST)

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is one such legislation which focuses on the rights and interests of a particular section of the society who are considered to be under privileged and deprived. The Act tries to prevent the offences leading to atrocities committed against the Scheduled Castes and the Scheduled Tribes. It provides for Special Courts for conducting such trial, for the grant of relief and rehabilitation of the victims of such offences and other matters related to such issue. 12 However, section 3 of the Act clearly provides, "Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe" thereby meaning that not only does the legislation try to prevent victimization of category of people but also forbids them from being prosecuted under this law, even if an act committed by the member of this community victimizes another member of the same community.

## 8.2.5 DISABLED

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 defines „person with disability"as a person suffering from not less than forty per cent of any disability as certified by a medical authority. Further, section 2(i) of the Act, explaining the meaning of disability, includes blindness, low vision, leprosy-cured, hearing impairment, locomotor disability, mental retardation, mental illness within the concept of disability. According to the 2001 Census of India, 2.19 crore people were reported to be disabled constituting 2.13 per cent of the total population. This figure reached 26,814,994 according to 2011 Census.

The risk of being victimized is much higher for people suffering with disability when compared with others. Disabled women, children, elderly people, especially if they are not financially secure, are subject to maltreatment and harassment. In some cases, even if they are economically secure, they are exploited by their kith and kin, taking advantage of their vulnerability. Ratification of the UN Convention on Rights of Persons with Disabilities makes it obligatory for India to create an environment where people with disability can enjoy a status of a normal individual enjoying their basic human rights including legal rights, moral rights etc . It requires all the four disability-specific legislations i.e. The Mental Health Act 1987, Rehabilitation Council of India Act 1992, Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 and the National Trust Act 1999 to be harmonized in tune with the scope and spirit of UNCRPD. According to the Convention, "the states should provide disabled friendly voting machines to enable them to exercise their right to adult franchise, providing access to poverty reduction programs to enhance better standards of living, ensure right to health, education and work without discrimination based on disability. Compulsory sterilization of disabled persons needs to be prohibited and their right to adopt children ensured. Law and policy governing the disabled should be gender sensitive".

Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 was passed by Loksabha in 12th day of December, 1995 and came into force on 7th day of February,1996. This is the principal law governing the limited rights available to persons with disabilities and the obligations of the State.

The Act aims to

- Define responsibility of the state towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities;
- To create a barrier free environment;

- To counteract any situation of abuse and exploitation of persons; and

- To make special provision for the integration of disabled persons into the society.

However, the Statute is subject to some of the following criticisms:

- It is not a „rights based" legislation.
- The Act fails to impose mandatory obligations on the appropriate government and leaves the realization of opportunities to the discretion of the various state governments.
- The rights for the disabled women and children provided in the convention for full and equal enjoyment of human rights are rights like right to privacy, reproductive rights, right to family, health care, prohibition of discrimination on grounds of disability in employment, political rights of right to vote and contest etc. are not adequately provided in the Act.
- The term „Disabilities" is narrowly defined and includes only blindness, low vision, leprosy-cured, hearing impairment, locomotor disability, mental retardation and mental illness, leading to labeling tendencies.
- It lacks any penal provisions for the non-implementation of the law.

The Rights of Persons with Disabilities Bill, 2014 was introduced in the Rajya Sabha on February 7, 2013 by the Minister of Social Justice and Empowerment, Mr. Mallikarjun Kharge. The Bill repeals the Persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995.14 The Act of 1995 is silent on silent on issues related to response of agencies of State on victimization of people with disability. The Bill of 2014 does contain measures to be taken by appropriate Government to protect disabled persons from violence, abuse and exploitation. However, it fails is laying down clear provisions for access, support and relief from the Criminal Justice System for the disabled.

Supreme Court in a recent judgment (Rajeev Kumar Gupta & Others Vs Union of India & Others, 2016) for the disabled has directed Government to extend 3 percent reservation for disabled persons in all posts.15 In Union of India & Anr. V. National Federation of the Blind & Ors., 2013, the Apex Court opined that, "The Union of India, the State Governments as well as the Union Territories have a categorical obligation under the Constitution of India and under various International treaties relating to human rights in general and treaties for disabled persons in particular, to protect the rights of disabled persons. Even though the Act was enacted way back in 1995, the disabled people have failed to get required benefit until today". It further observed, "the computation of reservation for persons with disabilities has to be computed in case of Group A, B, C and D posts in an identical manner viz., "computing 3% reservation on total number of vacancies in the cadre strength" which is the intention of the legislature. "It also stated, "That the non-observance of the scheme of reservation for persons with disabilities should be considered as an act of non-obedience and Nodal Officer in department/public sector undertakings/Government companies, responsible for the proper strict implementation of reservation for person with

disabilities, be departmentally proceeded against for the default."

The Code of Criminal Procedure, 1973 does not provide any mandatory method of recording of statements of people with disability that the Magistrates are required to follow during inquiry or trial. The environment of Indian jails, too, is not friendly for people with disability. It does not pay any special attention for the needs of such people. Certain initiatives of the Criminal Law (Amendment) Act, 2013 is very promising though are very limited in scope. The amendment mandates video graphing of a woman victim with disability‟s statement in presence of an interpreter or special educator in cases of rape, acid attack, sexual harassment, stalking and the like.

## 8.2.6 INTERNALLY DISPLACED AND DISASTER VICTIMS

Supreme Court while discussing the issue of compensation to the displaced victims had said that rehabilitation does not only concern about providing food, clothes and shelter but also includes extension of support to help such victims rebuild their livelihood. It was said to be a corollary to Art 21 (Narmada Bachao Andolan v. Union of India, 2000). The Supreme Court had also observed that the high projected benefits from the dam should not be considered as an explanation to deny the people who are ousted from their land their basic fundamental right and their rehabilitated should be at the earliest (1992 Supp (3) SCC 93).

Severe public concern on Land Acquisition issues and absence of a national law to provide for the rehabilitation, resettlement and compensation for loss of livelihood of those who are dependent on the land being acquired for facilitating land acquisition for industrialisation, infrastructure development and urbanisation caused the coming into existence of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

Act came into force on 01.01.2014 by repealing the Land Acquisition Act, 1894. It is the first National Law on the subject of Rehabilitation & Resettlement of families affected and displaced as a result of land acquisition. The rehabilitation and resettlement provisions under this Act come into operation when:

- Government acquires land for its own use, hold and control
- Government acquires land with the ultimate purpose to transfer it for the use of private companies for stated public purpose
- Government acquires land for Public Private Partnership Projects

However, in order to remove various impediments faced in the application of the Act, certain amendments were made in the Act while further strengthening the provisions to protect the interests of the „affected families". In view of the urgency, these were brought about by an Ordinance on 31.12.2014. Subsequently, on 10.03.2015 the Lok Sabha passed the Amendment Bill to replace the Ordinance. Changes in the provisions of the Act will facilitate farmers to get better compensation and rehabilitation and resettlement benefits in lieu of land compulsorily acquired by the appropriate Government.

Disaster Management Act enacted in 2005 focus on creating an enabling legislative environment to enhance the degree of preparedness and tries to adopt an approach which is more proactive preventive, mitigating and preparedness-driven. The Government of India through this Act tried to create a necessary institutional mechanism for monitoring and implementing disaster management plans. The Act provides for setting up of a National Disaster Management Authority (NDMA) under the Chairmanship of the Prime Minister, State Disaster Management Authorities (SDMAs) under the Chairmanship of the Chief Ministers, District Disaster Management Authorities (DDMAs) under the Chairmanship of Collectors/District Magistrates/Deputy Commissioners. The Act further provides for the constitution of different Executive Committee at national and state levels. Under its aegis, the National Institute of Disaster Management (NIDM) for capacity building and National Disaster Response Force (NDRF) for response purpose have been set up. It also mandates the concerned Ministries and Departments to draw up their own plans in accordance with the National Plan. The Act further contains the provisions for financial mechanisms such as creation of funds for response, National Disaster Mitigation Fund and similar funds at the state and district levels for the purpose of disaster management. The Act also provides specific roles to local bodies in disaster management. Our legislation or policy concerning disaster management has nowhere recognized the legal rights of the victims to claim compensation from state, unlike many of the other countries. The compensation which is granted to such victims is entirely based on the ex gratia principle.

## 8.2.7 MINORITY GROUPS AND WEAKER SECTIONS

Minority rights have gained greater visibility and relevance all over the world. India is no exception to it being a multi-ethnic, multi-religious, multi-linguistic and multi- cultural society. Diversity of all types is the very soul of India. It is in this context that minority rights have assumed added significance in post-independence India. When

> India attained independence after its division on religious lines, religious minorities became very apprehensive of their identity. According to a survey (2001) at that time there were 11.67 per cent Muslims, 2.32 per cent Christians, 1.79 per cent Sikhs and considerable number of Buddhists (0.77 per cent), Parsees (0.4 per cent) and Jains (0.43 per cent) in India. The Constitution of free India has give recognition to a number of languages in the Eighth Schedule and there are five religious groups which have been given the official status of National Minorities, namely, Muslims, Christians, Sikhs, Buddhists and Parsees. The framers of the Constitution bestowed considerable thought and attention upon the minority problem in all its facets and provided constitutional safeguards; yet the issue has evaded solution till today.

United Nations Minorities Declaration of 1992 states, “minorities as based on national or ethnic, cultural, religious and linguistic identity, and provides that States should protect their existence”.

No definition has been unanimously agreed upon describing which group constitutes minorities. Characterized by their own „national, ethnic, linguistic or religious identity" almost every state has a number of minority groups within their state distinguishably different from the majority population. Existence of a minority is a question of fact and definition should include both objective factors (like the existence of a shared ethnicity, language or religion) and subjective factors (including that individuals must identify themselves as members of a minority).

The Indian Constitution and several international human rights instruments have specifically provided for the protection of religious and ethnic minorities. Due to the pluralistic nature of the Indian society consisting of a large number of ethnic and religious groups it is imperative for the Criminal Justice System, to consider the Constitutional goals of secularism, humanism and common brotherhood. Criminal Justice System should be very sensitive and careful in its approach to avoid communal bias in matters involving two or more communities. Since minorities are more vulnerable of being victimized the criminal justice system should be very prompt and specially trained and equipped to deal with such cases. "It is desirable to evolve a „Best Practices Code" to be followed in difficult situations involving communal conflicts, to give minorities the confidence in the system in place. Special Prosecutors and Special Courts with specially trained staff may be entrusted to conduct criminal proceedings in the cases of violence against minorities and similar vulnerable groups."

The National Commission for Minorities (NCM) was set up under the National Commission for Minorities Act, 1992. Muslims, Christians, Sikhs, Buddhists and Zoroastrians (Parsis) have been notified as minority communities by the Union Government. Further according to notification on 27th Jan 2014, Jains have also been included within the group of notified minority communities. The Commission comprises of one Chairperson and five Members representing the different communities. State Minorities Commissions have been set up in various states like Andhra Pradesh , Assam , Bihar, Chattisgarh, Delhi, Jharkhand, Karnataka, Maharashtra, Madhya Pradesh, Manipur, Rajasthan, Tamil Nadu, Uttarakhand, Uttar Pradesh and West Bengal. These Commissions function to safeguard and protect the interests of minorities. Aggrieved persons belonging to the minority communities may approach the National Commission for Minorities, after exhausting all remedies available to them.20

PREVENTION OF COMMUNAL AND TARGETED VIOLENCE (ACCESS TO JUSTICE AND REPARATIONS) BILL, 2011, was drafted post godhra riots to check riots taking place between majority and minorities. The Bill provides for relief, reparation, restitution and compensation. Compensation ranges from two lakhs to fifteen lakhs subject to the multiplier system provided in the Appendix I of the Bill. It also provides express provisions for the rights of the victims during the trial, protection of victims, informants and witnesses.

The draft Bill has faced acidic criticism on account of it itself being communal in nature in the garb of being anti communal.

**Some of the criticisms are:**

- The provision of the Bill tries to protect minority communities based on religion and language along with Scheduled Castes and Scheduled Tribes. In the opinion of critics it simple tries to „target the majority" in course of protecting the minority.
- It is said to curb freedom of expression by stating, "Notwithstanding anything contained in any other law for the time being in force, whoever publishes, communicates or disseminates by words, either spoken or written, or by signs or by visible representation or otherwise acts inciting hatred causing clear and present danger of violence against a group or persons belonging to that group, in general or specifically, or disseminates or broadcasts any information, or publishes or displays any advertisement or notice, that could reasonably be construed to demonstrate an intention to promote or incite hatred or expose or is likely to expose the group or persons belonging to that group to such hatred, is said to be guilty of hate propaganda."
- It is believed the Bill if passed in the present form will hit the federal structure of the country. Law and order is a part of subject list and if Centre usurps this power and frames legislation on this aspect, it will lead to an unconstitutional Act and lead to regionalist tendencies subsequently.
- The offences under this law have been made to be non-bailable and cognizable, even if they are not so under IPC.

## 8.3 CONCLUSION

To conclude it can be said that the approach of the society should not be merely sympathetic but should rather be empathetic. It should be ensured that they are given their due rights as a matter of „right" rather than on ex gratia basis. Legislative framework and policy should focus on the particular needs of such vulnerable groups and draft accordingly. Vulnerables of the society need our support and respect and do not deserve neglect and apathy.

# UNIT-9-
# VARIOUS THEORETICAL BASES OF JUSTICE: THE LIBERAL CONTRACTUAL TRADITION, THE LIBERAL; UTILITARIAN TRADITION AND THE LIBERAL MORAL TRADITION



## 9.1 INTRODUCTION

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 Ulpain _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 differents 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

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

### 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. H 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 wit 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, 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, 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 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 unequal’s or to echo Jeremy Bentham, it says that everybody 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 Ulpain _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 differents states.

**Christian Era : Notion of Justice**

Ulpain‘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. Sfe 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 an 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 _purpose1 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 ^ l^ffft TflT: (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,[120]: _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 cow slaughter, 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,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.

## 9.4. The liberal Contractual tradition

***Contractual Theory of Justice***

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.

## 9.5 The liberal Utilitarian tradition

**(2) 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.

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:
A public education system open to all and funded by public money, i.e., taxes.
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").

The protection of the sorts of liberties that were guaranteed in the United States by the Bill of Rights in our Constitution.

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?

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 buyer 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 the 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:

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.

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.

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:

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.

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.
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. 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.

**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 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.
(3). 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?

## 9.6 Liberal Moral tradition

**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 cuiqui 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.

## 9.7 SUMMARY

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.

## 9.8 SELF ASSESSMENT QUESTIONS

What do you understand by theoretical bases of justice?

Discuss various theoretical bases of justice?

Describe the liberal contractual tradition, the liberal; utilitarian tradition and the liberal moral traditionn?

# UNIT-10-

# EQUIVALENCE THEORIES - JUSTICE AS NOTHING MORE THAN THE POSITIVE LAW OF THE STRONGER CLASS



## 10.1 INTRODUCTION

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.

## 10.2 OBJECTIVES

**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.

## 10.3 WHAT IS THE RELATION BETWEEN LAW AND JUSTICE?

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 counties 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?

## 10.4. EQUIVALENCE THEORIES OF LAW AND JUSTICE

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

excluding them from inquiry,

denying them epistemic authority,

denigrating their cognitive styles and modes of knowledge,

producing theories that represent them as inferior, deviant, or significant only in the ways

they serve

elite interests, producing theories of social phenomena that render their activities and interests, or power relations, invisible, and 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 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 meth ds 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).

## 10.5 Justice as positive law of stronger class

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. Sinis 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 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 lifes 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 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 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 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.

## 10.6 SUMMARY

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.

## 10.7 SELF ASSESSMENT QUESTIONS

- Discuss what is the Relation between law and Justice?
- What do you Understand the concept of Equivalence Theories of law and justice.
- Describe Justice as positive law of the stronger class.

## Unit-11-

# Dependency theories - For its realization justice depends on law, but justice is not the same as law



## 11.1INTRODUCTION

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.

## 11.2OBJECTIVES

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.

## 11.3 WHAT ARE THE DEPENDENCY THEORIES OF JUSTICE?

**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,l 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.

## 11.4. WHETHER JUSTICE DEPENDS ON LAW? - VARIOUS OPINIONS

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.

**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 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.

**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 imperativalists' 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 imperativalists' 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 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 imperativalists' 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).

## 1. 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, 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 sourceÑa statute, a decision, or a conventionÑwhen 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 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 14th 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 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 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.

## 2. 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.)

### 2.1 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.

**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:

**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.

**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.

**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.

**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 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 espistemes, 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 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

## 11.5 SUMMARY

The theory that says that justice and law have a dependency relation that exists for the wellbeing

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.

## 11.6 SELF ASSESSMENT QUESTIONS

What do you understand by the concept of the concept of Dependency theories of law and justice?

Describe whether justice depends on law?

Discuss that justice is not the same as law.

# Unit 12:
# Role of Supreme Court in Enforcement of Fundamental Rights or Human Rights



## 12.1 Introduction

Supreme Court of India is the apex of large number of courts functioning across the country. The court has been bestowed with the power of formulating the rules and procedures applicable to all the courts. In a way within the apparatus of judiciary, the Supreme Court to a large extent, determines the nature and quality of dispensing the justice. Hence around the role of Supreme Court, the question of enforcement of human rights discussed. The module provides a brief description of interrelationship between law, executive and supreme court and their impact on the enforcement of human rights in the first part of the module. After brief review of historical context of constitution making and its impact on the drafting of fundamental rights, the independence of judiciary and its power of judicial review of constitutional validity of laws are discussed in order to lay down the foundational arrangements

for enforcement of rights. In the second part of the module, the role of Supreme Court in democratizing the rule of law and expanding it towards protecting various fundamental rights are discussed.

## 12.2 Foundational Arrangements for Human Rights

Modern states have taken upon themselves the task of enforcing human rights. The ability of state to implement the rights of citizens gives the legitimacy to it as a democratic dispensation. Rights of citizens are to be enforced by the state. This task of state requires clearly specified laws and regulations and mechanisms in place.

The enforceable and justiciable rights derive from the laws. But beginning a debate on enforcement of human rights within the framework of ordinary statutes is inadequate as most unacceptable regimes of past like colonialism and racialism were also legal. Among the set of laws that govern a society, foundational laws are different. While ordinary laws are made from time to time depending on the social and political requirements of the society, Constitutions, the mother of all laws is made during important historical transformations of society which define the nature of future social order. The Indian Constitution was made under the influence of such historical struggles and national aspirations against the colonialism.

## 12.3 Historical Context

In modern times all the governments are governments of laws but not of socially and economically powerful people. The concept of limited government has its origin in the struggle against unlimited powers of kings and aristocrats in the medieval period. The status societies of medieval period were governed by the laws of religion, patriarchy and aristocracy in which the rights of individuals are subjected to age old traditions. The medieval societies were organized on the basis of traditional rules and laws, which structured different social groups in hierarchical model. In this model individuals were non-entities and had no rights, apart from the social status of their communities. The kings governed the society on the basis of these traditional rules and customs. The revolt of freedom loving individuals and communities against the traditional inequalities gradually forced the powerful to accept the written constitutions as the consensual and foundational laws to govern the affairs of society. Thus constitutions emerged as the limitations on the powers of the state. The separation of powers between different organs of the state- executive, legislature and judiciary are organized, distributed and limited by the constitutions. The nature of these arrangements is determined by the particular historical context in which the constitutions are framed.

## 12.4 Indian Context

Indian constitution was framed after a long historical struggle of independence movement against the British colonialism. The right against racial inequality, right to political independence, right against repression by the state and right to freedom of expression are the important aspirations that united the diverse social masses of the Indian subcontinent against the British colonialism. The notion of independence from British was not only an emotionally abstract idea but also a concrete one in terms of better future for all individuals and social groups. The memories of suppression of civil liberties by colonial state, communal violence during partition of subcontinent into India and Pakistan and horrors of world war were fresh

and determining factors during framing of constitution.

The constituent assembly considered Supreme Court as the watchdog of democracy and as an instrument to guarantee the fundamental rights of citizens from the executive. This high expectation of constitution makers consequently resulted in granting the supreme court the jurisdiction of widest amplitude. According to Law Commission of India, "the Supreme Court of India enjoys widest jurisdiction including the novel jurisdiction hitherto not enjoyed by any court in any country of having original jurisdiction to grant relief in case of violation of fundamental rights. And the right to move court itself is guaranteed as fundamental right" (Para 1.3 of LCI 125: Supreme Court: A Fresh Look 1988). The court further expanded its jurisdiction by conferring upon itself the epistolary jurisdiction to entertain the social action litigation. This particular jurisdiction of the court to protect the fundamental rights of citizens is considered to have made the Supreme Court of India into Supreme of Court of People.

## 12.5 Independence of Judiciary

The constituent assembly's expectation from the Supreme Court also determined its relationship with the executive and legislature. Thus Assembly debated about the separation of judiciary and executive and rejected the proposal to elect the judges through the two-thirds majority in the parliament. The trend of interfering into the administration of justice by the executive was observed during colonial period and checks against it were proposed. It ruled out the possibility of election of chief justice of India by the council of states as it would be giving primacy to the legislature over the judiciary. It also prevented the possibility of acceptance of any office of profit after retirement by judges in order to ensure their integrity and avoid quid pro quo between two organs. To secure impartiality in the appointment, tenure and transfer of judges, appropriate provisions are made. After prolonged debate, it was accepted that the judges of Supreme Court should be appointed by the president in consultation with the chief justice of India. This was proposed by Dr. Ambedkar to ensure the independence of the judiciary and that was intended to achieve superiority of neither executive nor the judiciary.

## 12.6 Right to Constitutional Remedies: Article 32

The part of III of the Constitution provides for fundamental rights of the citizens. The law of fundamental rights will remain a mere statement of intent unless a specified mechanism to enforce the rights is not provided. To fulfil this requirement, article 32 of the constitution provided the citizens the right to move the Supreme Court for the enforcement of the rights. This right to move the apex court can be considered as the mother of all rights given its vital importance. The Court has been given power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, for the enforcement of the rights conferred by the constitution. The citizens can appeal to Supreme Court by a special leave petition under article 136 of the Constitution. Under article 134(1)(c), the court can entertain criminal appeals in the cases in which a substantial question of law of general importance are involved. Though the parliament has the power to confer the powers of Supreme Court on any other court, the superiority of Supreme Court in enforcing the rights of

citizens has been respected. This right to constitutional remedy through Supreme Court cannot be suspended by the parliament under any circumstances except as provided by the constitution itself.

The Constitution-makers' expectation of Supreme as the guardian of democracy and constitutional order had taken serious beating during the internal Emergency of 1975. The Presidential order of 27 June 1975 under article 359 imposing Emergency resulted in repression of thousands of political dissidents and their arrests under Maintenance of Internal Security Act, 1971. The fundamental rights of the citizens were suspended and constitutional remedies under articles 32 and 226 of the constitution were also removed by the government. Unfortunately, the Supreme Court could not stand by the convictions of the constitution makers and citizens. In ADM Jabalpur v Shivakant Shukla, 1976 (AIR 1976 SC 1207) case, popularly known as habeas carpus case, the court held that "no person has any locus standi to move any writ petition under Article 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality". It also upheld constitutional validity of the section 16A (9) of the Maintenance of Internal Security

Act. The people of India considered that the Supreme Court seriously compromised its independence as well as the rights of the citizens.

## 12.7 The Power of Judicial Review

The judiciary enforces the fundamental rights on the basis of statutes, which in turn depends on the principles of the Constitution. The Constitution also delineates the powers of judiciary and fundamental rights of the citizens. While enforcement of human rights depends on the law, the one crucial question we have to ask is what if the law itself is violative of fundamental rights of citizens? The article 32 (4) of the constitution mandates that the rights guaranteed by the article 32 should not be suspended except as provided for by the constitution. Under the article 32, the Supreme Court went on exercising the power of judicial review of constitutional validity of laws made by the government of India. For instance the legislations of land regulation had been struck down by Supreme Court in the name of protection of individual right to property. The power of the judiciary was seen as an obstacle by then executive-government. In order to take away the power of judicial review, the government of India amended the constitution through 42 Amendment Act 1976.

The Forty-second Amendment Act 1976 inserted 32A baring the Supreme Court from considering the constitutional validity of any state law in the proceedings for the enforcement of fundamental rights. Insertion of article 131A and 226A deprived the High Courts of their jurisdiction to decide the constitutional validity of any central law. Article 228A stipulated at least five judges for deciding constitutional validity of any state law and mandated a special majority for a judgment invalidating such a law. These restrictions seriously compromise the independence of judiciary and consequently the rights of citizens are also in danger. The same constitutional legislation also conferred sweeping powers on parliament to make laws in the name of anti-national activities. All the changes made to Constitution under this Amendment were repealed through the Constitution (forty-third amendment) Act, 1977 in order to protect the intent of constitutional makers and ensure the independence of judiciary.

In L. Chandra Kumar vs Union Of India And Others, 1997, the Supreme Court held that the power of judicial review of the Supreme Court under article 32 and of the High Courts under Articles 226/227 cannot be excluded as they form part of the inviolable basic structure of the Constitution. The first ingredient of this principle is that the power of the High Courts and of the Supreme Court to test the constitutional validity of legislation can never be ousted or excluded.

## 12.8 The Power to Make laws: Article 141

The process of making constitution and statutes do not exhaust the need for making new laws to meet the demands of changing society and rights of individuals. The constitutional makers thought the apex court can also discover vacuum in the statutes in the process of adjudication and undertake the responsibility of filling it. Article 141 of the Constitution confers the legislative power on the Supreme Court, until the parliament enacts a new law to fill the gap. Such law declared by the Supreme Court is binding on all the courts within the territory of India. Similarly under article 412, the Supreme Court has the power to pass any order to do complete justice in any matter pending before it. The judgments of D. K. Basu and Visaka Guidelines, right to education and right to legal aid are the best example of enforcement of human rights of citizens in the absence of any specific law for the purpose.

The apex court recognized the vulnerability of the persons in police custody and rampant misuse of power of arrest in this regard by the state. It also took cognizance of the fact that all accused are innocent until proved otherwise in the court of law and are entitled for all the fundamental rights enlisted in part three of the constitution. But there was no specific statute to ensure the right to life and dignity of the citizens in the specific circumstances of the custody. To ensure the constitutional right to life and dignity, the apex court felt that there is a need for specific rules and to fill the void it laid down the detailed guidelines in DK Basu Judgment. These guidelines were followed by the enforcement agencies and some of them later were incorporated as part of the law by the parliament.

Similarly the apex court recognized the possibility of rampant sexual harassment of women at work places. Often the sexual harassments are subtle and invisible but their effects are real and tangible. The harassment violates rights of women in terms of their career, physical and psychological harm and depressions. Democratizing work spaces to ensure the right to dignity and equality of women is necessary but there was no specific law that penalizes sexual harassment. More over there is need to recognize particular forms of these violations which are beyond the reach of law. The Supreme Court understood the working conditions of women even in modern spaces and laid down guideline in Visaka judgment and provided for a mechanism to enforce the rights of women.

In Vishakha v. State of Rajasthan[x], (AIR 1997 SC 3011 : (1997) 6 SCC 241) the Supreme Court has declared sexual harassment of a working woman at her work as amounting to violation of rights of gender equality and rights to life and liberty which is clear violation of Articles 14, 15 and 21 of the Constitution. In the landmark judgment, the court in the absence of enacted law to provide for effective enforcement of basic human rights of gender equality and guarantee against sexual harassment laid down the guidelines.

## 12.9 Expansion of Right to Life: the Ark of all fundamental Rights

In this section, the specific role of Supreme Court in the protection and enforcement of human rights with reference most important right to life is discussed. Its role as expansive interpreter of meaning of law and its making are touched.

## 12.10 Principle of interpretations

All laws including constitutions are made at particular times, social contexts and for political needs. The original intent of the framers of constitution are determined by those historical times but over a period of time, new contexts demand fresh look at the meaning of law but the power to interpret is bestowed on the shoulders of Supreme Court by the Constitution. But what could be the principle of interpretation to be followed by the court? It cannot be in a constricted sense. It has to be wide and liberal to accommodate the changing circumstances and purposes. This is also necessary if the provisions of constitution do not become atrophied but remain flexible enough to adapt to new challenges posed by the society from time to time. The American Constitutional expert Ronald Dworkin felt that for meaningful interpretation of Constitution, the judges needed to be aware of historical and sociological process of society and just the knowledge of law was not enough. This perspective of interpretation of law is more applicable to right to life of citizens and communities more than any other provisions of law. The broad and expansive spirit with which the court interpreted the provision of right to life has actually invested it with significance and vitality to endure for years. It has enhanced the dignity and worth of citizens in principle. (Francis Coralie Mullin vs The Administrator, Union ... on 13 January, 1981 )

## 12.11 Right to Life and Role of Supreme Court

The article 21 has been regarded as the heart and soul of Indian Constitution. It reads as follows: “No person shall be deprived of his life or personal liberty except according to a procedure established by law.” The right has several components in it. This right is applicable to all 'persons' but not just to citizens of this country. It secures two rights: life and liberty. It also implicitly guarantees all persons the right to rule of law. The word deprivation connotes it can only be claimed when a person is denied her life and personal liberty by the state. The meaning of the state is covered by article 12 of the constitution.

Indian Supreme court has never been as creative as with the interpretation of this article. It has actively opened-up a new angle to it when it said in Maneka Gandhi's Case that the article is not only a guarantee against the actions of the state without law, but is also a restriction on the nature of law made. The fundamental question raised is whether any law is enough to justify the deprivation of right to life and liberty of persons? What if that law is undemocratic in terms of procedures followed and not in conformity with procedures of principles of natural justice? It is not just some semblance of law that is required to be complied with article 21. The court made it clear that the procedure prescribed by law must be reasonable, fair and just. If the law does not reflect these qualities, it would be void as violating the guarantee of article 21. The expansion of the scope of the right to life and personal liberty further widened the possibility for enlarging other fundamental rights.

**What constitutes deprivation of right to liberty?**

Life and personal liberty are integral to each other. One cannot be imagined without the other. The constitutional makers perhaps rightly conceived the organic link between life and personal liberty of persons and provided for both of them in the same article. It is difficult to identify them distinctively from each other. Imagining right to dignified life being intact while the personal liberty of persons is treated cruelly is very hard. The right to personal liberty is more often at risk from the actions of the executive than the right to life per se, though the later bound to suffer.

In the popular imagination, the deprivation of personal liberty by the executive does not go beyond the gates of police station and prisons. The court rightly pointed out that deprivation is not an act which is complete once and for all. In fact the deprivation of personal liberty begins at the gates of executive but lasts as long as the persons are in their custody. The deprivation can only be physical deprivation of personal liberty and it cannot inflict any damage to any limb or faculties of thinking and feeling. Hence any action of the executive, which injures or interferes with the use of any faculties of the person in custody attracts the article 21. The physical deprivation of personal liberty should ensure the preservation of dignified life of the person. Once the tone and tenor of its approach towards right to life was set, the apex court invoked it on all issues of paramount importance to expand and ground the fundamental rights. The right to minimum wages, social security and protection of family, right against handcuffing, right to education, right against illegal detention and right to clean environment are some of the important rights which were interpreted by the court in the light of expansion of right to life. An elaborated discussion of the expansion of the rights would be taken up another module that follows.

## 12.12 Summary

All modern democracies emerged against the arbitrary powers of erstwhile regimes. The constitutional democracies are based on separation of powers between executive, legislature and judiciary. Indian constitution provided prominent position for Supreme Court as the guardian of democracy. The powers of restricting arbitrary actions and legislations of government are entrusted to the Supreme Court. It has travelled far from the criticism in 1960s and 1970s that its decisions created road blocks in the way of improving the conditions of the tillers of the soils by blocking zamindari abolition statutes and persons of humble origin and low economic status were unlikely to get justice to public interest litigations. It tried to creatively interpret the article 21 and expand its ambit from human rights perspective.