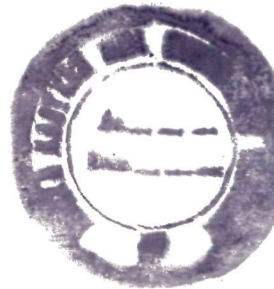


THE CONCEPT OF JUSTICE : A CRITICAL STUDY

THESIS SUBMITTED TO THE BERHAMPUR UNIVERSITY
FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY IN PHILOSOPHY



UNDER THE SUPERVISION OF
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CERTIFICATE

Certified that this thesis — entitled
"THE CONCEPT OF JUSTICE: A CRITICAL STUDY", is the
result of original and bonafide research carried out
by Sri Dibakar Sahoo under my guidance and supervision
and that no part of this thesis has been submitted for
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such help or resource of information as have been
availed of in this thesis are duly acknowledged.

SHILLONG

The 22nd Nov, 1985


(Dr. N. Malla)
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DIBAKAR SAHOO 22.11.1985.

INTRODUCTION

An humble attempt will be made through the chapters of the dissertation to explore and analyse the concept of justice. The main thrust is not an empirical investigation but a conceptual exploration. Further our objective is not to prescribe a juristic, moral or legal standard. It is not to prescribe or recommend an ideal form of justice. It is to show, among other things, the conceptual links between justice, liberty and morality and certain other neighbouring concepts. Besides, it is partly expository and partly analytical. To do this I will present my views (if at all any) through exposition and examination of different theories of justice.

The concept of justice can be studied from various stand-points. One can make an empirical study of it. One can raise such questions as how did the concept of justice originate in human society, what is the impact of this concept on other allied and related concepts and how has the concept influenced life and society in the human world at large?

One comes across the earliest account of justice in the Rg Veda and in the writings of the ancient Greek thinkers. The earliest Vedic conception of R̥ta as the divine principle of an organised universe finds its counterpart in Greek philosophy. R̥ta has been treated as the cosmic principle

which pervades the universe. The concept of cosmic justice as contemplated by Anaximander and Heraclitus may be likened to the R̥ta of the R̥g Veda. According to these philosophers, there are three basic elements in the world. These are: fire, earth and water. But each of the elements perpetually struggle to dominate the other.

"The inexorable law of nature is busy, out of necessity, with redressing the balance. The primordial substance, which is the reservoir of this balance, is charged with the duty of obviating a chaos, by keeping each element within its bounds so that a complete victory of one over the other is precluded."¹

It will be argued out in the course of the dissertation that justice is a value-concept as opposed to a descriptive one. Being a value-concept it is related to ideologies.²

Like equality, liberty and right, justice has sometimes been regarded as a social value. The contractualists like Hobbes, Locke and Rousseau maintain that a society logically presupposes the concept of justice. It is debatable whether the civil society evolved out of the state of nature. But the fact remains that the concept of society cannot be explained without the concept of justice. It can be said that the depiction of the state of nature is not historical but logical. The social contract theory may be regarded as a logical assessment of the concept of society

but not an historical account of it. Social contract may be interpreted as the restatement of the conceptual point that contract, justice and society are interlinked.

To men living in the state of nature justice has no meaning. Justice and injustice are meaningful only in the context of a society.

"In a natural state there is nothing which can be called just or unjust, but only in a civil state."

The idea of contract by the people portrays the limits to human liberty and right which depict a sense of justice. The concepts of justice and civil society can be said to go together. It may not be out of place here to quote John Rawls:

"The various conceptions of justice are the outgrowth of different notions of society against the background of opposing views of the natural necessities and opportunities of human life."²

The conception of social justice provides a standard of distribution. It determines the shares of different individuals in the distributive aspect of the society. It regulates the entire walks of life of man. It keeps a balance between the competing claims of individuals in the society. It harmonizes the conflicting interests and tends to bring about a balance in the society. Rawls points out:

"The concept of justice I take to be defined, then, by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages."3

In course of time justice becomes the guiding principle of life of man in the society. It seeks to control the passions and emotions of man. It is used to judge the actions to be right or wrong.

Justice is sometimes conceived as a religious ideal. Religion has been construed as standing for divine justice. In the concept of divine justice, one sees the supernatural power as supreme and man as the passive recipient of favours and commands. In a wider sense, justice is not only affirmed as an attribute, but is identified with the very essence of Divinity. The justice of God must, therefore, be understood as inherent in Himself.

"In all things of nature there is traceable an order, or a series of congruencies, which as fulfillment of the Divine commands, may, in a wide sense, be called justice."

"In the oriental world, especially in the Jewish Christian world, dominated by a monotheistic and ethical conception of the universe, the quality of justice is ascribed above all to God Himself, to denote the infallible proportion and intrinsic harmony of His will."4

The gospels of Christ are regarded as the gospels of justice. "You shall not kill", "You shall not commit adultery", "You

shall not bear false witness against your neighbour" etc. are regarded at the same time as the gospels of religion and of justice. One comes across plenty examples in which religion and justice are fused together. The Bible is an instance to the point: "He that ruleth over men must be just"; "Defend the poor and fatherless, do justice to the afflicted and needy"; "Masters, give unto your servants that which is just and equal" etc.

God is considered as the absolute. So it is argued that divine dispensation must be justice absolute in nature which is eternal and unchangeable. Divine justice is transcendental in nature. It is sometimes argued that the transcendental God and His divine justice are inaccessible to human knowledge of ordinary kind. It is amenable only to faith. Divine justice, though incomprehensible to rational consideration, is not so to religious faith.

"Justice is a mystery, one of the many mysteries - of the faith."⁵

God's wisdom which implies his justice - is a mystery. It is only through faith that we realise this justice which is beyond rational consideration.

Providential justice has a better representation in the Hindu theory of Karma. It is the singular feature of

this doctrine that it leaves the individual as an active and free agent. The individual is not considered as a tool in the hands of God. He is the architect of his own fate. Man is his own retriever and retributor and the mechanism of justice operates in an impersonal manner without reference to any external God. The Nishkāma Karma of the *Gītā* is a fine example of such a type of justice. Man is free to choose the course of his life. Accordingly, he is the sole maker of his own destiny. As a necessity, his good actions reap a better future for him and bad actions a worse one. The idea that man is ultimately responsible for the consequences of his own actions is singularly found in the Hindu thought.

The fusion of religiosity and justice are also found in the Dharmasāstras of Manu, Jājñavalkya, and Kautilya. 'Dharma' is derived from the root *dhṛ* (to uphold, to support, to nourish). Sometimes, the word has been used in the sense of 'upholder', 'supporter' or 'sustainer' as in the *R̥g Veda*.⁶ In most cases, dharma stands for religious ordinances or rites. 'Dharma' has also been used to stand for the specific duties of the āshrama or station in life. 'Dharma' was also used sometimes to stand for the privileges, duties and obligations of man, his standard of conduct as a member of the Aryan community, as a member of one of the castes and as a person in a particular stage of life. This sense of 'Dharma'

is also found in the Bhagavadgītā (Svadharme nidhanam sreyah); it is better to court death while performing one's duties; Jaimini defines 'Dharma' as "a desirable goal or result that is indicated by injunctive (Vedic) passages".⁷ The Vaisesika Sutra defines dharma as "that from which results happiness and final beauty." ⁸ "ahimsā paramo dharmah"⁹ "ācharah paramo dharmah"¹⁰ The Vanaparva of Mahābhārata and the Manu Smriti define dharma as non-injury and good conduct respectively. It is argued that performance of one's duties leads to Dharma (Justice) and dereliction of it leads to Adharma (injustice).

Justice is sometimes conceived as a legal ideal. When taken in a narrower sense it is considered as a subjective expression. It is pointed out that the subjectivity in relation to justice is untenable. It leads to conflict and contradiction. Attempts have been made to give a foothold to it in an impersonal order.

"This change of meaning of the concept of justice goes hand in hand with the tendency to withdraw the problem of justice from the insecure realm of subjective judgements of value, and to establish it on the secure ground of a given social order."¹¹

In this sense, justice is regarded as an impersonal legal norm. Justice, in this sense of legality, refers not

to the contents of a positive legal order, but to the application of it in the society. Any positive legal order is just if it is in accordance with the legal norm and is unjust if it is not in accordance with it.

Some representatives of the positivist school of jurisprudence identify justice with legality. John Austin, for example, has said,

"By the epithet just, we mean that a given object, to which we apply the epithet, accords with a given law to which we refer it as to a test.....
By the epithet unjust, we mean that the given object conforms not to the given law."¹²

This positivist school of jurisprudence accepts law as the standard of justice. Hans Kelsen argues that justice, in any scientifically meaningful sense, must be adjudged a quality that relates not to the content of a positive order, but to its application.

"'Justice' means the maintenance of a positive order by conscientious application of it."¹³

This idea is also advocated by Alf Ross, who declares:

"The idea of justice resolves itself into the demand that a decision should be the result of the application of a general rule. Justice is the correct application of a law, as opposed to arbitrariness."¹⁴

This sort of interpretation of justice is at variance with the usual meanings and ideas which mankind has associated with the term justice. It seems very difficult to agree to the proposal to equate law with justice. There are laws which are unjust and should be repealed. Political and social revolutions have taken place in the history of human civilization in the name of a higher justice.

"The entire history of the law, including the rise of equity jurisprudence as an antidote to the strict, formal law of the state, and the struggle for progress and law reform, would be incomprehensible and meaningless if justice and status quo legality were synonymous."¹⁵

Thus we see that justice and legality cannot be treated as identical. This does not mean that they are contradictories. Justice cannot be derived from law, for justice is

"an underived, primal order of things established by no human law-givers."¹⁶

Justice has also been treated as a moral ideal. Morality is concerned with the question as to what is good and bad, right or wrong, in the conduct of human beings. A moral standard approves or disapproves human actions according to a particular normative standard. The problem of justice also evaluates the conduct of man and it also approves or disapproves human actions. This shows that justice and morality are connected in some way or other.

When we say, for instance, that a given law is bad, or that one judicial decision is unjust or better than another, we naturally refer to something moral. The final justification of laws or governmental actions lies in morality.

Justice is treated as a moral ideal in the ancient Greek Philosophy. Philosophers like Plato and Aristotle have treated justice as co-extensive with morality. To them, justice is nothing but morality itself. Justice without morality or righteousness is inconceivable.

"No one can fail to recognize the breadth and profundity of this doctrine which makes justice one with harmony, with perfection and with beauty."

Indeed, the Platonic conception of justice has been construed as controlling all the walks of life and acting as the regulative principle of the whole of life.

"In Plato the moral and the juridical valuations are fused. Politics is not distinguished from Ethics, nor even from Psychology. ... 'just' is applied alike to the inner life of the individual and to his social interconnections."¹⁷

Aristotle also considers justice as the whole of virtue. He argues that in its abstract ethical conception, the whole of justice is the whole of virtue, and he quotes the proverb,

"in justice is all virtue together."¹⁸

The objective of fusing justice with morality by the Greek thinkers perhaps was to uphold the social equilibrium. Throughout history, men have set up ethical systems with the aim of creating tolerable conditions in social relations. Men have to live together and to solve many problems common to them. The tenets of morality are designed to curb and subdue those physiological and emotional tendencies which could, in the absence of these, disturb the harmony of the society. It is the goal of morality to substitute peaceful behaviour for violence, good faith for fraud. In this way, morality teaches us to

"moderate our impulses and adjust our demands so as to reconcile them as far as possible with those of our fellows."¹⁹

Thus we see that morality acts as an adhesive which keeps men of varied temperaments united. It upholds a civilization and culture. It prolongs human relations and keeps a chain of connection among various cultures.

"Morality enjoins men to live with that degree of wisdom and justice and kindness without which life, in any age or in any society, is intolerable."²⁰

The tenets of the Dharmasāstras are considered as the gospels of morality and at the same time of justice.

Any violation of the social customs and traditions makes one unjust, illegal and immoral. Some of the injunctions set forth in the Ten Commandments are typical examples of normative prescriptions which have moral as well as legal significance. "Thou shalt not kill," "Thou shalt not steal" etc. are imperatives whose infringement makes one subject to moral as well as legal censure. The forbidden acts are at the same time considered unjust, unlawful and immoral.

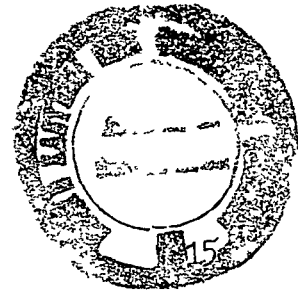
Such is the domain of morality with its far stretching roots which engulfs the whole of human life.

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CHAPTER - II



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IDEALISTIC APPROACH TO JUSTICE

The idealistic group of thinkers too treat justice as an ideal. They consider justice as a value concept. Justice to them is like righteousness and virtue. Justice is regarded as something supreme. According to this group of thinkers, the intentional actions of rational beings can only be considered to be just or unjust. Actions of non-rational beings are beyond the scope of such a standard.

The arguments of the idealistic thinkers may be summarised as follows: Man as a human being has got its importance. No standard of judgement can overlook this innate importance of human life. Nobody should be sacrificed for anything, however great the cause may be. We have to honour each man as an end in himself. No government should neglect any citizen. No one should be sacrificed for an end beyond himself. To sacrifice the interest of a man or making a man as a means for a greater end may fetch good results for the majority, but the majority do not have the right to subdue a man only because they are majority. Every man has got its own dignity. Dignity has meaning only when one's personality is honoured. No Government has got any right to dishonour

a man's personality by exploiting him without looking to his own interests. Instead, it is argued that everyone should be given his own due. A Government, while making laws, should consider man as an end.

All legal codes should take note of this aspect of human beings into consideration. The enactments of a Government should be treated just or unjust keeping only the human beings as an end in view. Even if a law neglects a single individual, it should be treated as unjust. Laws should aim at fulfilling the human ends and values.

Plato, one of the forerunners of the idealistic concept of justice, considers it as a value concept. In envisaging a theory of justice, he divides the entire society into three classes, viz., the ruling class, the soldier class and the class of producers representing the most wise class, the most valiant class and the most appetitive class respectively. Such a division of the society is being done on the basis of functional specialisation. Furthermore, specialisation is done on the basis of innate potentialities. The division, therefore, operates according to the nature of man. Plato considers the soul of man as the abode of three qualities. They are: reason, spirit, and appetite. Book IV of 'The Republic' corroborates to this:

"Is passion different from reason also, or only a kind of reason; in which latter case, instead of three principles in the soul, there will only be two, the rational and the concupiscent; or rather, as the state was composed of three classes, traders, auxiliaries, counsellors, so may there not be in the individual soul a third element which is passion or spirit, and when not corrupted by bad education is the natural auxiliary of reason?"

Yes, he said, there must be a third."¹

And the discussion between Glaucon and Socrates went on till they agreed:

"And so after much tossing, we have reached land, and are fairly agreed that the same principles which exist in the State exist also in the individual, and that they are three in number."²

Men whose souls are dominated by reason are regarded as the most rational and wise class; those whose souls are dominated by spirit are regarded as the most spirited and valiant class, and whose souls are dominated by appetite or desire are regarded as the most appetitive class. Such a division of the society is regulated as per the dictates of the soul of man. Men are stationed in the society according to their inborn nature and potentialities. Society cannot put an individual in the station of life, to which he does not fit in. This is how man's dignity is honoured and respected and he gets his due.

Plato's concept of justice has got two aspects. One aspect speaks of social justice and the other speaks of individual justice. Social justice is achieved when each class of the society performs its specified duties for which they are best fitted by nature and nurture without interfering with the duties of others.

"Seeing then, I said, that there are three distinct classes, any meddling of one with other, or the change of one into another, is the greatest harm to the State, and may be most justly termed evil doing? Precisely."³

Social justice is achieved when all classes perform their duties in unison. Thus, harmony and peace prevail in the society. This perfect balance and equilibrium among the three classes give rise to virtues. Virtue is justice.

"This then is justice; and on the other hand when the trader, the auxiliary, and the guardian each do their own business, that is justice, and will make the city just."⁴

Thus, we see, the social justice is a natural upshot of virtue done by each of the classes at the same time. Even if a single class fails to achieve virtue by not performing its duties in the most perfect manner, society will fall short of achieving social justice. Social justice is, therefore, a product of the joint venture of the three classes in the society.

Individual justice, on the other hand, is presupposed by social justice. As each of the classes helps in achieving justice, so also each member of the class achieves individual justice to himself. Plato maintains that man's soul has the qualities like reason, spirit and appetite. Individual justice prevails when there is balance and harmony in the soul of a man. Discord and chaos hinders the purpose of man. Only when man succeeds in setting each of the components of his soul in their proper sphere, only then he is virtuous and being virtuous is just.

An individual can be just, unsupported by others. His ultimate purpose is to act according to the dictate of his own soul. The dictates of the soul are nothing but the dictate of the inner nature of man. Individual justice is achieved when one acts in accordance with one's own nature, for which one is best fitted by nature and nurture. A just manifestation of a soul achieves individual justice. A soldier doing the action of a philosopher-king acts contrary to the nature of the soul, thereby inviting chaos and turmoil. Interference with the action of another or acting contrary to the dictate of the soul is not only detrimental to the individual himself, but also to the society at large. Plato's purpose is to confine each

individual to his own sphere of action. To say that an individual is just is to say that he is unfolding his own nature and acting in accordance with the dictates of his own soul. Such a conformity makes man virtuous. Man fails to achieve perfection, virtue or justice if he goes against the nature of his own soul.

Individuals, acting in conformity with their nature, achieve not only individual justice for themselves but also social justice simultaneously. Therefore, social justice presupposes individual justice. Social justice is inconceivable without individual justice. There cannot be a just society without just individuals. This shows the importance given by Plato to the dignity of man. Individual justice and social justice are complementary to each other. At the same time, society is not ignored. As an organism cannot function properly without different organs of it, so also society becomes defunct without individual human beings. Each individual acts both as a means and an end to himself. He is a means in so far as others are benefited out of his individual action. Further, he is an end to the extent he is benefited by the acts of others. An individual, according to Plato, is insufficient by himself. Such insufficiency can be overcome only when individuals work to fulfill reciprocal needs. Each man,

therefore, acts as a means for others and by the by, becomes an end in himself. Plato, therefore, considers man, both as a means and an end.

Plato's theory of justice speaks only of should and ought. It is, in this sense, visionary and utopian in nature. It speaks of moral righteousness. It looks into the inner perfection of man. Laws are unnecessary for a disciplined mass who are very much conscious of their duties. They know where justice lies. Justice is not an external fact that can be controlled by law. It is nothing but the external manifestation of the feelings of a righteous soul. External law has no part to play in Plato. Plato appeals to the conscience of man to perform duties most perfectly. It is the dictates of the soul, not external laws, that guide man. For Plato, morality is the only standard of judgement in matter of justice. Being moral is just and right. Being immoral is unjust and wrong.

Thus, Plato's theory of justice has moral overtone. It upholds moral righteousness and inner perfection. It believes in the infallibility of human reason and conscience. It believes in realisation rather than in coercion and imposition. No law can reform the soul. It is

realisation on the part of human beings that matters. It does not believe in man-made legal codes bereft of morality. It depreciates external laws and coercion and treats them to be redundant and superfluous.

With the theory of justice worked out by Aristotle, we pass to a theory rich in legal content. It is its basic character that distinguishes it from the Platonic conception of justice as complete virtue devoid of any reference to law. But Aristotle gives a theory which is concerned in large part with justice as an application of law as opposed to the whole of virtue.

Aristotle distinguishes between three kinds of justice; (i) general or universal justice, (ii) particular justice, and (iii) commutative justice. He identifies the former with the whole of righteousness or complete virtue. According to Aristotle, the law of the land covers the whole range of human activities. General justice lies in the conformity to the law of the land. Therefore, the just could be considered identical with the lawful. Aristotle remains silent as to how the law can conform to morality or complete virtue. The tendency to identify moral justice with legal justice is one of the major characteristics of Greek thought.

"... Aristotle's 'General' justice appears in what is called legal or social justice. Its business is to direct action towards the common good... Its function is to define the general principles of social organisation."⁵

"In the abstract sense, therefore, the just can be identified with all law and therefore with all morality... This kind of justice is not a part of virtue, but the whole of virtue."⁶

Particular justice is of two types: distributive and corrective or remedial.

"Distributive justice is exercised in the distribution of honour, wealth, and the other divisible assets of the community, which may be allotted among its members in equal or unequal shares."⁷

Here Aristotle introduces the important principle of proportionate equality. It is a principle of geometrical proportion. If A and B are two persons and C and D are shares to be given, then according to distributive justice, it should be given according to their merit. It is unjust to treat unequals equally and equals unequally. In the Nicomachean Ethics, merit is taken to be the basis for distributive justice. Whatever equality is taken as the basis, awards must be proportionate to it. However, in nature there are no two individuals who are

equal. In fact, there is no equality in nature, Equality is a social category. When we say that two individuals are socially equal, it does not mean that they have no difference of any other kind among themselves. Some differences do really exist between them. But these differences like sex, race etc., are of no relevance.

Corrective justice is the rule of law on particular cases of violence and is a matter for the judiciary. It is concerned with restoring a law. It deals with private transactions between persons. It takes account cases of unequal distribution and of loss and gain. It tries to strike a balance. The judge is the mediator who divides the shares or gifts equally between the two fighting persons. Corrective justice applies to voluntary and involuntary transactions as well. Voluntary transactions are fraud or theft which correspond to violation of contract or tort in English law. The role of the judge is not to punish but to redress. The involuntary transactions are deeds which relate not only to individuals, but also to the state.

Corrective justice comes into operation when the standards created by distributive justice are violated. It may manifest itself either in the form of reparation

or of punishment. Thus, distributive justice is the creation of a system of rights according to the principle of 'equality of consideration', and corrective justice is the effort to maintain this system.

"...corrective justice is designed to maintain the system which distributive justice has created."⁸

The third kind of justice according to Aristotle, is commutative justice. Its aim is to regulate fair transactions and exchanges considering the skill of the parties and the corresponding worth of their products. It is otherwise known as 'commercial justice.' It operates in the field of exchange of goods of different kinds, generally, between persons who are different and may be unequal in merit. It may so happen that the worth of a party's product is more than that of others. Therefore, the disparity in the worth of commodities, has to be equalised. To make bartering equal, there must be a common standard. Though demand of the parties, is in reality taken to be the standard, it is "conventionally represented by money." Money is treated as,

"the measure of all things, and so of their superior or inferior value, that is to say, how many shoes are equivalent to a house or to a given quantity of

food. As therefore a builder to a shoemaker, so must such and such a number of shoes be to a house (or to a given quantity of food); for without this reciprocal proportion, there can be no exchange and no association; and it cannot be secured unless the commodities in question be equal in a sense."9

Thus, Aristotle's three forms of justice have got their respective functions and responsibilities. General justice, which is identified with submission to the law of the land is virtue itself. Justice is the embodiment of virtue. It identifies law with virtue and therefore, with justice. To be law-abiding is to act justly. Law prescribes certain conduct and general justice looks into adherence to such conduct by the individuals. It controls the conduct of people according to the moral prescriptions of the law of the land. Distributive justice, which comes under particular justice, looks into the fair distribution of assets, wealth, and honour, taking the proportional merits and contributions of the individuals into consideration. Corrective justice, the second kind of particular justice, looks after the maintenance of fair distribution worked out by distributive justice. In case of violation of the principle of distribution, it effects a balance by compensation or by punishment. It brings proportional equality by a remedial method.

Commutative or commercial justice, the third kind, operates in the sphere of exchange of goods among the parties in their individual transactions and maintains fairness by equalising the values of different products by a common standard of measurement.

Kant has given a rational interpretation of morality. He upholds the supremacy and legitimacy of reason. Reason is infallible. The dictates of reason are the most rational, therefore, the most moral and just. Kant calls the dictate of reason to be the categorical imperative. It is the unconditional command of reason which teaches morality and which in fact, is morality itself. He, thus, identifies reason with morality. To act as per the dictate of reason is to act justly and to be instinctive is to act unjustly. Categorical imperative teaches man and directs him to move through the right path. The universal reason is present in each man. It is this component in man that shows the light as to what should be done and what should not be done.

Kant, most interestingly, also has identified law with morality. Of course, he says, laws operate in external sphere and morality in the internal sphere. A law is nothing but the manifestation of reason; the dictates of

the categorical imperative. The law of the land is the commands of reason of the law makers. Laws are rational. These laws make man most free. Man should act according to the categorical imperatives. He gets the maximum freedom by that. A disciplined citizen finds no problem in obeying the laws of the state, because, the laws are, at the same time, the dictates of his own reason. It is his own categorical imperative that is non-different from the commands of the law-makers. For an undisciplined citizen, law teaches what should be and what should not be done; it teaches what is the true nature of reason. Law teaches a man by forcing him to obey the law who does not know his true freedom.

Thus, in Kant, law is morality in its entirety. There is no conflict between positive law and moral law. Though law takes the external actions into consideration, still then, it does not conflict with morality. Law and morality originate from the same source, that is, reason or categorical imperative. Law, in Kant, is the most just and moral. There is nothing like unjust and immoral law in Kant. The infallible reason is the source of both law and morality. A man who is moral is also lawful and therefore, just. The categorical imperative operates in

the internal sphere and in the external sphere too. It manifests as morality in the internal sphere and exposes itself, in the form of laws in the external sphere. Though morality is tinged with subjectivity, still then, it is objective in the sense that it is itself the categorical imperative. Morality is not linked with the external consequences of an action or its effects upon other persons. Kant has associated morality exclusively with the inner attitude of a person towards his acts. In the words of Karl Mannheim, Kant places,

"all the moral emphasis not upon objective and overt behaviour and its visible consequences, but upon the intention of the doer."¹⁰

Justice and law, according to Kant, operate in the external sphere only. These are concerned with the external relation of man with his fellow beings in the society and the transactions of society.

"Whatever is juridically in accordance with External Laws, is said to be Just...; and whatever is not juridically in accordance with External Laws, is Unjust."¹¹

A man who harbours a good intention is moral though his acts bring grievous consequences for the society. Hence,

"the state of mind of the Agent or Doer of a deed makes a difference in imputing its consequences, according as he did it in passion or performed it with coolness and deliberation."¹²

A man who with a refined mind harbours the best of intentions, but because of awkwardness and unskillfulness brings about disastrous consequences, is no doubt moral though unlawful and unjust.

Kant gives importance to the intention of the doer. He matters the nature of the will much. The will should be good. It should be a rational will of a rational man. It should be the will in accordance with the categorical imperative. It should not be a relative, selfish will arising out of hypothetical imperative. The good will is the universal will. It is the objective will; the will of all. As men are rational, each possesses this rational good will which corresponds with the will of all rational men. Such good, objective will differs from the individual subjective will which is nothing but the manifestation of irrational instinctive will.

The objective good will is the means to achieve an objective end; the end of humanity. It is the aim of good will to achieve moral perfection. Such an end is

given by reason itself, not by reason at the service of inclination.

"These ends must be valid for every rational being; they must be objective ends, not merely subjective ones; they must be absolute and not relative; they must have an absolute and not a relative worth, being good in themselves and not merely good for a particular kind of agent. To say this, is to say that they must be ends in themselves."¹³

Kant, therefore, tells,

"So act as to use humanity, both in your own person and in the person of every other, always at the same time as an end, never simply as a means."¹⁴

The good rational will acts as a means to the furtherance of moral perfection as an end. This absolute end acts as the ground of the categorical imperative as relative ends act as the ground of hypothetical imperatives. The categorical imperative or good objective will is present in every rational being. So, man should be treated always as an end in himself. He should not be treated as a means to an end whose value, instead of being rational, absolute, objective and universal becomes relative and instinctive, if so treated.

Rational man is regarded by Kant as an absolute value. Value is intrinsic to man. In no case such an inherent value should be neglected. Such a value should never be used as a means to an end external to the personality of man. To consider man as only a means to an external end is to subordinate an absolute, objectively universal and supreme value to a value relative and subjective. It is to neglect the human worth and dignity. Kant, therefore, treats rational beings to be the ideal ends of society. We ought to seek such ends.

Accepting rational human beings to be values, Kant upholds them as ends in themselves. The laws of the state should aim at this end: honouring of human values and dignity. Actions ought to be guided by a set of universal laws which are the manifestation of the categorical imperative. Human acts should be at par with such universal objective laws. Private ends are not the ideals before us. The Kingdom of ends are the universal ends. Private ends should be sought only when they are compatible with the categorical imperative or the universal laws.

The idealistic notion of justice got an absolutistic touch in the hands of Hegel. Hegel treats the state as the absolute in all matters of social life. It is the

embodiment of spirit, reason or mind. Perfection reaches its zenith in the objectification of the state. All contradictions and differences are subsumed under the state. State is nothing but mind, reason or spirit objectified through a triadic rational way. State is rational. It is rational in its actions and volitions. State is the divine idea as it exists on the Earth. State is the supreme and the most perfect and the just manifestation of the spirit. The voice of the state is, therefore, rational. It is the voice of the spirit objectified in the form of the state. State is the supreme as it is the most harmonious manifestation in which the substantive spirit realises its real form.

Man is an element in the spiritual hierarchy. Every man is a spiritual entity participating in the spiritual display of the Absolute spirit. Of course, man is not the perfect manifestation of the spirit; still then, man possesses that rational and spiritual aptitude as he is a partial manifestation of spirit. Man owes everything to the all comprehensive state. Man can be understood and conceived only in reference to the state. State is an absolute organism engulfing all the stages of the manifesting spirit in itself. It is the most

rational, the most moral, the most just because it is the most perfect stage of the unfolding spirit.

Law is the voice of the substantive will or spirit ingrained in the state. The rational attitude of the state is reflected in the form of laws and therefore, laws are moral and rational. It is the most perfect and ethical reflection of the most perfect substantive spirit of the state. Not only in laws, but also in all rational arrangements the pulse of the spirit is felt.

Justice lies in submitting to such rational wills of the state, i.e. to the laws. Hegel emphasizes that in submitting the private interests to the laws of the state, men submit their passions to the control of reason. In such cases, a less rational will obeys the most rational will and gets an opportunity to enjoy the products of rational deliberations. Furthermore, the individual subjective will is reconciled with the objective will in the obedience of the law. Man's freedom and liberty are compatible with the submission to laws because it is the same substantive spirit reflected in the form of subjective will and the laws. True freedom lies in the willing acceptance of the acts and legislations of the state. By doing this one is not coerced,

rather dictated by his own reason, as a member of the rational fabric. Hegel also justifies coercion in cases when man is guided by his instincts, rather than by his rational insight. Coercion does not enslave man, rather ignites his dormant rational will in teaching the true sense of freedom.

Man's chief glory is his personality. A personality is a unit of freedom quite aware of its rights and independence. Freedom, is

"just as fundamental a character of the subjective will as weight is of bodies... free entity is the will. Will without freedom is an empty word, while freedom is actual only as will, as subject."¹⁵

The all inclusive spirit does not impede the exhibition of human freedom in the form of rights. It is an objectified substantive spirit giving vent to the free expression and execution of the rational rights of man. Freedom to such rights does not ever contradict the rational activities of the state because they stem from the same source. The basis of rights is the free individual will. The will is free and therefore, freedom is the substance of right and its ultimate goal. Rights of humanbeings are nothing but their freedom made actual. Freedom

becomes explicit when it takes the form of rights in the social organism. Man unfolds his true nature only when he establishes his freedom in stressing upon his inviolable rights. In demanding rights, man does not go contrary to the objective will but moves most symmetrically. He obeys the counsel of reason. It is only because

"right is the embodiment of the absolute concept or of the self-conscious freedom that it is something sacrosanct."¹⁶

The personality of a man and his rights are inseparable. It is inconceivable and contradictory to say that there is a person who does not possess freedom to his rights. By the mere reason that man is a link in the chain of rational manifestation of the absolute free spirit, he possesses the freedom to implement his inalienable rights - the right to live as a human being. Of course, human reason is fallible being subjected sometimes to his instincts. Therefore, the state, being the most perfect embodiment of reason stands supreme in all matters. Individual personality is better protected under the supervision of the state. Man is subordinate to the state and he should dedicate himself to the ethical whole for the proper security of his immanent freedom.

Hegel succeeded most interestingly in compromising the supremacy of the state and individual freedom. Absolute reason is never erroneous. Laws which are the objectified spirit, are therefore, most rational and moral. Laws cannot go against the rational will of the human beings in protecting their fundamental rights. Justice lies in the obedience to such laws. In obeying the laws framed by the rational state, man does not obey anybody else but his own reason, because the subjective will and the will of the state are non-different. Degradation of human personality arises only when man is guided by an extraneous authority. Hegel made man the architect of his own fortune in leading a free social life according to his immanent freedom. Nonetheless, Hegel says that as man is subordinate to the ethical state, he should act according to the advice and order of it and even if

"the state claims life, the individual must surrender it."¹⁷

But I wish to point out that demanding the life of a human person is not an act of reason. It is incompatible with the nature of the highest ideal - the state. If in any case, the state claims the life of an individual, this should be treated as an act of injustice. Human person should not be sacrificed for an ulterior end, however noble it may be.

Idealism in its different form grew in the first half of the twentieth century in Italy and Germany. It was the absolutistic trend perpetrated by no less than men like Mussolini and Hitler. Inspired by the Hegelian dialectic of the supremacy of the state, they idolized and glorified Italy and Germany as the states and nations having life of its own and being the moral end of everything. Liberalism, democracy and socialism were thrown aside, and in their place arose a novel fabric of absolutism and totalitarianism. The novelty consists essentially in the repudiation of the assumptions, ideals and the methods of democracy, liberalism, and socialism. None of these methods aims at the end of the society or the nation. Either they look to the interests of the individuals or the interests of the economic classes. The interest of the state is not the summation of private interests nor is it the general will of Rousseau, but the state has its own will and life. Individuals form an organic part of the state. They are the means, the instruments for the advancement of the nation. The state and the nation are ends in themselves.

Fascism and Nazism are the twin by-products of such a nationalistic and totalitarian outburst in the twenties of the twentieth century. Being victims of the treaty of Versailles of 1919, the nationalistic spirit of the Italians and Germans were subdued. It was the flaring words of Mussolini and Hitler that could inspire the spirit of a lofty nationalism in the hearts of the people which could engulf the entire Europe for at least two and a half decades and its echo is still heard in the nook and corner of the entire world. It was an anomic society which readily reacted to the call in a period of crisis for reassurance and promise for reestablishing the rights of the mass only to be deceived very soon. Human personality was ignored and trampled by the totalitarian feet of the two dictators.

Fascism is identified with the political upheaval which prevailed in Italy from 1922 to 1945 under the dynamic leadership of Benito Mussolini, the Duce. This period witnessed many deviations from the traditional trend and the admission of many new ideas. It saw the abolition of individual liberty of the liberalists, the abolition of the socialistic distribution of the state economy of the socialists and the subjugation of the free-voice of the democrats. On the grave of these, there

arose a sense of strong nationalism which admitted

"Everything for the state; nothing against the state; nothing outside the state."

Establishing the party, Mussolini wanted to have an ideology of Fascism. For this, Giovanni Gentile, the idealist, following the Hegelian theory introduced the same to Fascism. As a result, Fascism became an upshot of Hegelian Idealism. The basic theory of Hegel aims at glorification and idolisation of the state. The state is the highest manifestation of the divine spirit. It is the embodiment of morality, reason and of the highest ethical values. Gentile, not having enough time to chalk out an independent ideology, introduced the theory in hand to Fascism.

For Fascism, the state is the absolute. It is

"... an organic entity which embodied in itself all the noblest spiritual reality of the people as a whole..."¹⁸

In the Article 1 of the Labour Charter of 1927, the Italian Nation was described as an

"organism having ends, a life and means superior in power and duration to the single individuals or groups of individuals composing it."¹⁹

Every one is to be inspired by the moral sentiment of the fatherland and by national solidarity. As every one belongs to the state, therefore, the interest of every individual and class ought to aim at the firm consolidation of the state. Devotion to one's liberty, equality and happiness ought to be replaced by devotion and submission to the state as a moral end that includes or overrides all individual goods. Every interest and value are to be controlled by the state. Everything is to be judged from the interest of the state. All legislations and enactments were made to suit the Fascists' absolutistic ideology. It was argued that the spiritual faculties of men could be developed to a finer degree not by submitting to the individualistic and instinctive rights and liberties, but by surrendering and merging themselves to larger organisms - the family, the church, and finally the state.

Fascism deprecates human liberties let loose. It denies liberties to men to do what they think fit. It denies licensed liberties to men. The liberty that it sanctions is the categorical submission of every one to the dictates of the all pervasive and all powerful state. Submission to the ethical will of the state is sacred.

It very much resembles the Hobbesian sense of liberty when he says that liberty is "subjection to law" and as a "concession by the state." Human rights and liberties are only honoured and counted when they are conferred by the state and only when they "coincide with the will of the state."²⁰ Liberty is simply subjection. Freedom is enjoyable by voluntary submission to the state policy supposed to be moral and just. Though it seems paradoxical, as we find in Rousseau, human rights, liberties and freedom go hand in hand in keeping faith in the state. To act in a nationalistic spirit is just. To be motivated by the idea of national solidarity is to behave morally and justly. Justice lies in the unconditional submission of man without interference with the state policy and attaching firm faith to the lofty idealism of the Fascists.

Fascism went to the extent of controlling the economy of the state as a whole. It denied the individualistic standard of private ownership of property. It also denied the fruit of the labour as contemplated by the socialists or the idea regarding the distribution of profit according to merit and sacrifice. It considered all economic questions from the stand-point of national

utility. Profits and gains, production and distribution of wealth are primary matters of national and not of private concern. As a result, it repudiates both laissez-faire and public ownership as its dominant economic policy.

"Thus it is the explicit aim of Fascism to displace the enfeebling creeds of individual equality, freedom, and right, by its own orderly doctrine of an organic, hierarchically constituted nation, whose few verile and discerning citizens hold the multitude of commonplace individuals in subservience to the realization of destinies more important and permanent than their limited hopes and beliefs can contemplate."²¹

Such an absolutistic conception of state justifies human actions only when they satisfy the national interest in contributing to national solidarity. Action, however sublime may be, is unjust which does not contribute to the well-being of the state. As state is an "ethic state," the incarnation of morality and values, it does no wrong. Obeying the policy of the state, conducting one's activities according to the Fascists' programme and submitting to the will of the Duce when he so desires, is to move in the most refined path to achieve justice.

Fascism, no doubt, had succeeded in perpetrating absolutism of the state in the Hegelian line. But it falls short of the cream of Hegelian thought. The Fascists' state was not an "ethic state" or an embodiment of morality in the true sense of the term. Rather, it was a pseudo moral state characterized arbitrarily as an "ethic state." Though Italy did not witness the ghastly genocide enacted so faithfully by Hitler's followers, and even though "at its worst, Fascism never robbed the Italians of their humanity,"²² still then the liberty of the Italians was ignored. Voice of the people was silenced and they were forced "to follow without question the orders of the Duce."

Individualism was sacrificed for the end of the state. People were made the means and instruments not for their own end but for an extraneous end - the end of the state. People's personality, liberty and rights had some meaning if at all they served for a national end. Restricting human talents and liberties only to the end of the state is nothing but a flagrant violation of a human sense of justice. Every man has got his own worth and value, and is in possession of some inalienable rights, which a Duce cannot annul. Such human values

and rights are logically inseparable from the personality of man. Anything contrary to this, does nothing else but snatches away the very essence of humanity. Subduing the individuals by a mightier force of the state and keeping men in awe are against the dignity of man. Dethroning human beings from their basic rights is incompatible with their nature. Justice lies not in destroying human values, not in hindering human free expressions, but in providing congenial conditions for a fearless exhibition of their rights and liberties. It is an act of injustice on the part of a state to treat man just as a means for the ulterior end of the state. Every man is a value in itself which ought to be respected. It ought not to be sacrificed for a utilitarian and absolutistic end. Man is an end, and end in itself.

The Nazism of Hitler which influenced political power in Germany for at least two decades from 1925 to 1945 functioned in a way more barbarous and inhuman than that of Fascism. The sole aim of the concentration and extermination camps was to demonstrate that

"man's soul, his dignity, and his self-respect can be reduced to dirt and ashes..."²³

The non-Germans, specially the Jews, were viewed with contempt and Hitler upheld the extermination camps as the "final solution to the problems of the Jews." He was so faithful to his race and confident of its superiority that he attributed the growth of human culture only to the Aryan race. Hitler declared in Mein Kampf:

"It was the Aryan who laid the groundwork and erected the walls of every great structure in human culture."²⁴

Hitler's absolutistic national socialism turned very soon towards a totalitarian trend when he identified the nation with himself. He rejected all human values as debased. Under a state policy of terror and murder, he kept human personality and individuality constantly at bay. Such a nihilistic tendency had only one aim: to throttle the human qualities which were not acceptable to the Nazi principles. By a constant process of state legislation, Nazism perpetrated a systematic degradation of human personality and human worth. Hitler was so deeply imbued with the totalitarian sense of state that his twelve years' dictatorship was

"barren of all ideas save one- the further extension of his own power and that of the nation with which he had identified himself."²⁵

The totalitarian regime of Hitler neglected all human feelings and emotions. He sacrificed human dignity in the struggle for dominance. He treated genius of individual to be primary and decisive. And on this stand, the voice of the majority can be subdued. Nazism stamped down a reign of constant annihilation of human personality in the struggle for power. Hitler contends:

"The genius of the individual is decisive, not the spirit of the masses. All life is bound up in three theses: struggle is the father of all things, virtue lies in blood, leadership is primary and decisive."26

And Hitler in his firing speeches reverberates:

"One creature drinks the blood of another. The death of one nourishes the other. One should not dribble about human feelings... the struggle goes on."27

Nazism did not take note of any human liberty. Human liberty was regarded incompatible with the totalitarianism of Nazism. Man was sanctioned only with the solitary liberty - the liberty to submit unconditionally to the authoritarian state. I wish to point out that a nation, not honouring the dignity of human beings, can never be justified. To cancel human values like liberty, right, freedom, is to arrest the natural tendency of man.

Man should be left to himself. He should be the maker of his own destiny. Justice does not lie in determining the destiny of one by the forceful hand of others. Men should not be discriminated by the station of their birth. From the stand-point of human values, Aryans are as good as non-Aryans or the Jews.

I have put Plato, Aristotle, Kant, Hegel, Hitler and Mussolini under one head. All of them, in the dissertation, have been treated as idealists. The reason for putting them together is the following: All of them advance a theory of justice which can be characterised as idealistic. Idealism treats justice as an end in itself. Justice is absolute and indivisible. It is an end, but not a means. The utilitarians and pragmatists treat justice as a means. It is a means to some higher end. To the extent, it secures the desired end, to that extent it is acceptable. But for the idealists, justice knows no other end than itself. It is the supreme end. All other considerations are extraneous, and so, irrelevant to it.

But the idealists, I wish to point out, have not emphasized the value element in the concept of man. Plato and Aristotle emphasize the rational element in

man. Plato even goes to the extent of identifying justice with morality. Aristotle identifies justice with righteousness, so far as general or universal justice is concerned. Kant relates justice to categorical imperatives. This means that no compromise can be made in the name of justice. Persons are to be respected, because they are the centres of categorical imperative. Hegel, following the idealistic line, treats justice as indivisible and absolute. But he places justice, not in the person, but in the state. The locus of justice, according to Hegel, lies not in the person, but in the state. That is why, Hegel proclaims that freedom is obedience to the state. This means that to the extent a person obeys the order of the state, to that extent he is free. Obedience, freedom and justice go together. Hitler and Mussolini, following the footprints of the idealistic thinkers, treated justice as absolute. But both of them made human persons subordinate and subservient to the state. This is how they treated state as primary, and persons as secondary. On the other hand, I wish to argue that persons are primary and state or government is secondary. Further, 'person' being a value concept cannot be made subservient to the state. Almost all the idealists seem to have overlooked this point. But their argument that justice is absolute and

indivisible, is quite reasonable. As I have pointed out earlier, justice is central to understanding human society. The positivistic concept of society is not adequate. It stands in need of certain other modes of understanding. Understanding of human society in terms of justice is such a mode. It provides a way of understanding human society in terms of reason, value, morality and justice. Above all, such notions cannot stand in isolation. They need human persons for instantiations. It is only in this sense that human persons can be said to be primary. Kant, while advocating respect for persons, approximates to this position. To quote his own words:

"But rational beings, on the other hand, we call persons, since by their very nature they exist as ends in themselves, never to be treated simply as things. A person is an object of respect; thus we cannot treat him in any arbitrary fashion. He is not simply a subjective end, as though his value rested solely on our desires; he is an objective end, one who exists in himself as an end. We cannot make him a mere means to some end substituted in his place. If a rational being be not such an end, nothing whatsoever has absolute value. But if everything has only relative contingent value, then there can be no supreme principle of practical reason."²⁸

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CHAPTER - III

CONTRACTUALISTIC APPROACH TO JUSTICE

Justice is viewed from a different angle by the group of social contractualists like, Hobbes, Locke and Rousseau. Their writings give the impression as if they are talking of the origin of society or state through a contract made by men living in a state of nature. The state of nature, where people were guided by no law or by some natural law as the case may be has been depicted as quite different from civil society. The description of the state of nature, though suggests some merits of it yet it is not free from certain grievous and disastrous consequences. As a result, men in the state of nature try to give up such a nasty state of existence and to come over to civil society. This transition is important in the sense that it paves the way for establishment of a legal code.

The social contractualists in general talk of natural laws and natural rights. Both Locke and Rousseau recognise the importance of natural laws and natural rights. They lay emphasis on obedience to such laws and the protection of the rights which are more fundamental than the civil laws and civil rights. Hobbes differs from them in treating positive or civil law the most supreme. Anything in accordance with the positive law is

just, otherwise unjust. On the other hand, Locke and Rousseau find their final resort in natural laws and natural rights. Whatever may be the ultimate reference, all of them treat justice as a social concept which can only be thought of in a state of social life or in a social organism.

Both Locke and Rousseau regard the precontractual life to be social, though not civil or political. People in the state of nature, live according to a standard provided and protected by the laws of nature. They enjoy their inalienable natural rights. Though legal justice is a product of civil society, justice as the supreme virtue is prior to it. Furthermore, civil society not only presupposes justice but is the product of a contract which is nothing but a code of justice. Hobbes differs from Locke and Rousseau in very many ways when he argues that justice means legal justice which is a product of civil society, not a presupposition of it.

Thomas Hobbes is a celebrated exponent of social contract theory. This theory is basically meant to give an explanation of the hypothetical origin of the civil society or state. Before civil society was formed, men were living in a state of nature. There was no law, no

authority to maintain peace in that state of nature. Man was guided solely by his instinct of self-preservation. The man of nature is no one else but the hypothetical irrational brute, whose basic nature is instinctive. Such brutes, in the absence of a coercive authority, were no less dangerous than the deadly animals. 'Might is right', was the prevailing principle which made the state of nature a state of constant war. The infinite and unrestrained natural right that man enjoyed in the state of nature, made his life "solitary, poor, nasty, brutish and short."¹

Men decided to leave this nasty state of nature by a social contract made by themselves. This contract paved the way for a smooth transition from the life in the state of nature to a civil life. It also established a monarch which was the sovereign in all matters of society. While all men in the society are restrained by the conditions of the covenant/contract, the monarch stands above it. His voice is supreme and he is the authority for making and interpreting laws. He is that coercive force which can very easily set people right. Hobbes argues that a covenant without sword is useless. The monarch who is no less than the Leviathan is the

source of all law, all justice, and the source of all powers. His voice is law, his interpretation is the just interpretation and he is the incarnation of justice. The dependence of justice upon the existence of a superior power is supported by the following argument:

"If we could suppose a great multitude of men to consent in the observation of justice.... without a common power to keep them all in awe, we might, as well, suppose all mankind to do the same; and then there neither would be nor need to be any civil government or commonwealth at all."²

The contractualists, in general, are the exponents of natural law and natural right. Natural law is the supreme. Positive law is valid only so far as it corresponds to the natural law. Any set of positive laws created by customs/conventions or stipulated by human legislators, which are contrary to natural law, are considered invalid and unjust. However, Hobbes deviates from this general trend of the natural law theorists. According to Hobbes, the voice of the Leviathan or the monarch is the positive law which is non-different from the natural law. Hobbes maintains that there is no contradiction between positive law and natural law.

"The law of nature and the civil law contain each other, and are of equal extent.... The law of nature.... is a part of the civil law in all commonwealths of the world. Reciprocally also, the civil law is a part of the dictates of Nature.... every subject in a commonwealth has covenanted to obey the civil law....and therefore obedience to the civil law is part also of the law of nature."3

Thus, Hobbes maintains that positive law can never be against the law of nature. Hobbes has accorded supremacy to positive laws with the obvious reason of making the Leviathan or the monarch the sovereign in all matters.

The concept of justice acquires a different meaning in the hands of Hobbes. He defends the stand that justice depends on positive law. That which is lawful is just, otherwise unjust. So, the question of justice or injustice can be raised only when there is positive law. In the pre-social state of nature, there was no positive law. Law comes into being only with the formation of the commonwealth. Prior to it, nothing can be said about justice or injustice. Justice or injustice presupposes a civil society. In other words, justice and injustice depend upon law, hence are the work of a civil society and relative to it. Without society, i.e., in a state of nature, there is no justice.

This makes justice differ from society to society. In other words, the code of conduct of one society will differ from those of other societies on this assumption. An action which is treated as just in the context of one society may be unjust in the context of another. Kelsen points out:

"A man is just if his behaviour conforms to the norms of a social order supposed to be just."⁴

Hobbes' thesis, I wish to point out, makes the concept of justice relative.

Hobbes further maintains that law is independent of justice. It is not necessary for a law to be just. To be just or unjust is not a criterion that determines the validity of a positive law. It is not even the objective of positive laws to fulfill this end. To accept a set of laws means to treat it valid.

Leviathan can do no wrong or injustice. It is the source of all law. It is above all sorts of evaluations. It is the law-making power and is the source of justice.

Hobbes appears to be talking in terms of legal justice when he says that what is lawful is just and

what is just is lawful. Righteousness, reason, and morality, were conspicuously absent in Hobbes. Instead he upheld the supremacy of the arbitrary dictates of the Leviathan who is guided more by instinct than by reason. Hobbes maintains that a law, whether good or bad, is just. Justice lies in the unconditional submission to this law. Justice is accomplished by the unconditional obedience to the sovereign's dictates.

Locke tries to give a liberal colour to the theory of justice through social contract. His theory of social contract is an attempt at the explanation of the origin of political society. Political society is formed as a result of an agreement among individuals living in the state of nature. Life of man, in the state of nature was not difficult. Men were leading a life of peace and cooperation. They were obeying the laws of nature and honouring the natural rights of their fellow inhabitants. Though, men were endowed with instinctive passion, still then they were rational in consideration. This made the life of man, in the state of nature, a life of peace and cooperation, tranquility and mutual love. In spite of these advantages, there was no ruler to see to the proper interpretation of the law of nature, to protect the

natural rights of man and to pass objective judgements in case of violations of it. Of course, such violations were not prevalent in the Lockean state of nature. It was not the irrational and instinctively guided brute of Hobbes, but the rational animal of Locke who could respect the natural laws and rights in the state of nature. Notwithstanding all such congenial social attitude of man to maintain peace and order, the state of nature was lacking in some political authority.

In the absence of such a political authority, the life of man in the state of nature was not free from occasional difficulties. However, men in that state-of-affairs possessed natural right to punish the transgressor of natural law. But how to pass objective judgements in the absence of law enforcing agency? The need for such an agency was greatly felt. Therefore, men came to form one organic society instead of leading solitary and individualistic life, where their natural rights would be better protected, their property would be well looked after and objective judgements could be made possible.

Unlike Hobbes, Locke advocates that justice is not a product of social contract. Rather, social contract presupposes the concept of justice. The ideas of just

actions and unjust actions were very much there before men agreed to form society through a pact. Men were quite conscious of the natural laws and their natural rights. They accepted those to be the guiding principles of a moral and just life. Of course, there used to be sporadic violation of the laws of nature, thereby making life difficult. Still then, life in that state was quite balanced because people knew what should be and should not be done. Each of them respected other's rights and in turn, expected the same. Above all, each of them possessed the aptitude to judge actions according to the natural laws and natural rights, though objectivity was sometimes disrupted by some unruly few. People were competent to pass judgements.

I wish to suggest in this connection that justice is inseparable from human life, whether precontract or post-contract. Furthermore, justice is not a product of social life, rather social life presupposes justice. Social life is possible only because people obey a code of conduct, written or unwritten.

Justice being a pre-requisite of social life and of the social contract, is neither a product of society nor of contract. Positive law established in the society,

is a product of the pact or contract. Justice is independent of positive law. Even the idea of justice cannot be delinked from the state of nature for the simple reason that it consists of human beings, and the ideas of man and justice are interlinked. Justice is also presupposed by positive laws. Locke by treating justice not as a product of the pact or of society or of the Leviathan, has upheld its supremacy even over the so called Leviathan or the sovereign. The negligible and the Leviathan, all come under justice. Positive laws are framed by the government. These

"laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at Court, and the countryman at plough."5

How do we validate such laws? What justifies these laws? I wish to suggest in this connection that it is justice works as the fountain head of all positive laws. So, instead of justice depending on law, law depends on 'justice'. A set of positive laws are valid and just only when they correspond to the dictates of morality or reason which is nothing but 'justice'. A law can be just or unjust. The concept of law, therefore, presupposes a superior idea 'justice' in reference to which it can be

valued and judged. In his second Treatise of Government, Locke has rightly pointed out:

"The obligations of the law of nature cease not in society, but only in many cases are drawn closer, and have by human laws known penalties annexed to them to enforce their observation. Thus the law of nature stands as an eternal rule to all men, legislators as well as others. The rules they make for other men's actions must....be conformable to the law of nature....and the fundamental law of nature being the preservation of mankind, no human sanction can be good or valid against it."6

Locke differs from Hobbes in arguing for 'Justice' with the help of natural laws than with the positive laws. Justice is not treated as a product of society. In the state of nature, even in the absence of society, actions are also considered to be just or unjust. That is why Locke makes it clear that justice does not depend on positive laws made after the society is formed but depends on natural laws which make people morally bound to obey it. These natural laws, therefore, can be said to be above justice. The natural laws are regarded as the ultimate standards. Though there is no written natural law, still then, its moral force is much more persuasive than the physical coercion of the written positive laws. Positive laws are just or unjust to the extent of their approximation to the natural laws.

Furthermore, Locke is the first contractualist to base the civil rights of citizens on natural rights.

"Every man being....naturally free, and nothing being able to put him into subjection to any earthly power, but only his own consent, it is to be considered what shall be understood **to be a sufficient** declaration of a man's consent to make him subject to the laws of any government."⁷

To Locke, rights like the right to estate, life and liberty are co-eval with the birth of man. Man is born with natural rights as he is born with rationality. These rights are inalienable.

"Man being born,...., with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of nature, equally with any other man,...., hath by nature a power.... to preserve his property, that is, his life, liberty and estate, against the injuries and attempts of other men..."⁸

Each man is endowed with such rights by virtue of his being born as a human being. Under no circumstances, these inborn natural rights can be looked down upon. Any one who does this behaves not only in unmanlike manner, but also makes others unmanlike.

Locke, unlike Hobbes, does not identify justice-as-such with legal justice. Of course, the spirit of justice as the supreme virtue is also reflected in Lockean legal justice, which makes it (legal justice) a manifestation of justice as the supreme virtue.

Though, justice sometimes is found to be accompanied with elements of physical coercion, yet people are usually forced by their conscience to act justly. It is not the physical force that successfully persuades individuals, but the moral obligation that impells individuals to act justly. They act justly not because of the fact that some physical punishment is attached to its violation, but because they are conscious of their moral obligation and what ought to be done. Therefore, it is not always the physical sanction, but the moral sanction that is counted. Moral sanctions are felt to be more effective than the physical ones.

Locke does not talk of degrees in justice. Justice is an absolute value. It is a norm. It is not relative to different positive law codes in different social institutions at different time. Justice, in this sense, is regarded by Locke as a universal value seeking to protect human values and ideals. It treats man as an end

in itself and never as a means. Human ideals are universal. As justice aims at fulfilling such human values, so, it is a universal virtue not confined to any state or any time. It stands supreme, as the ultimate value, as the first, basic and fundamental norm whose validity can never be doubted.

Justice as such upholds the dignity of man. Its sole aim is to seek the betterment of humanity and to protect human ideals and to respect man. That is why, Locke invests the supreme power not with any government, but with the community. It is a government of the people, seeking the end of humanity. Nothing should be done which goes against humanity. A government or a ruler is just only when he treats man as an end, never as a means. Man should be regarded as an ideal, as a value, as an end in himself.

Rousseau is unique among the contractualists. He does not want to go into the question of the historical origin of society. His purpose is more to show how society should be organised so as to help individuals to perfect their nature. Nonetheless, he gives a hypothetical depiction of the life of man in the pre-societal state. The transition from the life in the state of nature to

the societal life was probably due to a few clever people, who had grown rich and were anxious to legitimise and perpetuate their dominion over the poor. Such people with cleverly disguised arguments were able to convince the poor to join in their attempt to establish a commonwealth. This first society is rejected by Rousseau as a product of pride which is contrary to human nature. Pride is a degenerated form of human instinct. Man is endowed with some natural virtues like self-love and sympathy around which conscience and reason weave their fabric of culture which alone can keep them within their proper limitations. Pride is the source and root cause of all evils and chaos of the world. When pride is able to seduce reason, the elemental and noble instincts get enchained and distorted to create unbearable consequences. It deflects man from his natural growth. Thus the so called art and culture which are built up under the sway of pride, gradually degenerate men.

Society hinders man's natural growth. Instead of enriching man, the art and culture of the society dehumanise him and take him away from the right path as demanded by his nature. According to Rousseau, therefore, man is not born evil; rather, he is made to be an evil creature under the impact of wrong art and culture.

Rousseau contends that if men want to save themselves, if they wish to reach their natural destiny of being perfect, they must renounce pride and adhere to self-love and sympathy controlled by conscience and reason which alone can show them the beacon light to the world of perfection and morality, where they can live as human beings with dignity, where they can find a natural development of their talents, instead of getting them thwarted.

Man is born free. Freedom is his natural right. That society is just and legitimate which alone can provide maximum freedom to the individuals, which is alone compatible with human nature, which alone can respect and protect the natural rights of men and which alone can provide congenial atmosphere to the natural perfection of human potentialities. Rousseau's quest, is thus, for the right and just principles of social and political institutions which can make society a nest rather than a cage.

Rousseau depicts the formation of civil society thus: People joined together in a civil society by a social pact with the sole aim of protecting their person and property by the unified support and strength of the community; and enjoying the maximum freedom possible which was hindered in the state of nature.

"The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before."⁹

Thus, a society is formed with the vow,

"Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an **indivisible** part of the whole."¹⁰

As a result of such a pact among human beings a society is formed which is regarded by Rousseau as "a moral and collective body."¹¹

It is argued that such an association is indispensable for the perfection of human nature. It is through such an association that man can get the scope to perfect himself and to discard all impurities from his self. No doubt, man has to give up all his natural rights and liberties to form such an association, but in turn, he gets much more rights and liberties in a moral organism like the society or state.

"What man loses by the social contract is his natural liberty and an unlimited right to everything....; What he gains is civil liberty and the proprietorship of all he possesses."¹²

"....what man acquires in the civil state, is moral liberty, which alone makes him truly master of himself; for the mere impulse of appetite is slavery, while obedience to a law which we prescribe to ourselves is liberty."¹³

Thus, according to Rousseau, justice and morality are the products of social association. No act of individual in the state of nature can be considered just or unjust, moral or immoral. The act of association endows human deeds with morality or immorality. Social contract is a prerequisite of moral and just deeds. All human deeds before such a contract, are devoid of ethical character.

Rousseau conceives of an ideal society where man uniting himself with all and surrendering all his natural rights and liberties to the community, still becomes the ruler of himself, the architect of his own fate. This is possible only through what is known as the general will. General will is the will and interest of all; it is the universal rational will common to all human beings which should be distinguished from the particular wills of individuals. It is this will that makes man a social being, that gives moral life to man in the society.

General will is the Leviathan of Rousseau with a moral head. It is the sovereign which instead of looking to the interest of a few, hankers after the total upliftment of all, because people are the sovereign and the sovereign is the people. Sovereignty lies with the general will which is the moral and rational will of every social being. Therefore, each individual, in a sense, is the sovereign. It is this peculiar twist in Rousseau's thought that makes man the sovereign and the sovereign of himself.

Man can be analysed into two aspects - the aspect of the ruler and the aspect of the ruled. When he is active, he is the ruler and when passive, the ruled. The community, therefore, is an active body of sovereigns and a passive body of the subjects. It is the most distinctive feature in Rousseau's thought which succeeded in uniting the aspects of the ruler and the ruled in one personality.

General will, when executed, becomes law. Law is nothing but the execution of the universal voice - the voice of reason and morality. It cannot be unjust because the executors of law are themselves the law-makers. The law-makers can never make laws which are harmful in any manner. Thus, law is the voice of general will. The general will is the universal rational will which is itself

moral. How can a rational moral entity like the general will think of something contrary to its own interests? Law can never be unjust and immoral.

"...whose business it is to make laws, since they are acts of the general will; nor whether the prince is above the law, since he is a member of the state; nor whether the law can be unjust, since no one is unjust to himself;..."¹⁴

General will, the common will of all rational beings, the universal voice of the community, and the law are all identical which can never be unjust. To talk law to be unjust is to talk inconsistently. Justness is the very essence of law. They are co-extensive. The two concepts 'Justice' and 'Law' are logically inseparable. One is inconceivable without the other. To act according to law is to act justly. It is also true to say that to act justly or lawfully is to act morally. A lawful and just act is also an act of morality. Law is the dictate of reason; it is the rational and universal voice seeking its external manifestation. The moral character of each contracting party refrains them from being immoral towards themselves and others as well. It is the sovereign the General will of Rousseau which does not commit mistake and whose acts are always tinged with a sense of morality.

The sovereign is the philosopher-king of Plato which is the most wise, the most rational, the most moral, and the most virtuous. Above all, the sovereign is such that it does not have the aptitude to act immorally as it is nothing but a band of rational human beings. How can the acts of the sovereign be immoral when they are directed to its own end? An act of sovereignty is

"legitimate, because based on the social contract, and equitable, because common to all; useful, because it can have no other object than the general good, and stable, because guaranteed by the public force and the supreme power."¹⁵

The act of the sovereign who is an incarnation of morality, is thus, just, perfect, moral, righteous and virtuous. The sovereign can do no wrong. It always does justice.

Justice accrues to the individual in his obedience of the laws of the state. Unconditional submission to the laws of the state makes a man just. As law is never unjust, mere submission to the laws is an act of justice and acting contrary to the laws is an act of injustice.

Further, it is argued that in surrendering to the laws, man does not enslave him, rather, makes himself a free being for the laws are nothing but his own rational

voice. Freedom emanates not from unconditional obedience to an alien authority, rather in acting according to one's own will. Freedom is a license that man acquires by virtue of his birth as a human being. It is not a sanctioned right. Freedom is not accidental to man. It is natural to him. Man enjoys natural freedom only when he is the sovereign of himself without being directed by any alien authority with a super-imposed code of conduct. Man is the maker of his own code of conduct and in obeying such a self-imposed code he is free. Law is nothing but a self-imposed code of conduct. Law is man's own will, an instrument to fulfill his aim which instead of encaging, provides him rather a nest where there is no one over him to pass orders; where he becomes the monarch of all that he surveys and finds ample opportunity to fulfill his own ambitions most satisfactorily without fear.

Justice is obligatory. It is not any coercive authority that makes man to act justly, but his moral obligation, his own natural inclination. Man finds the only way to enjoy maximum freedom of his basic natural rights by subjugating himself to law. It is his moral conscience that dictates him to act justly. Justice has no external sanction other than its own moral sanction which is more impelling than the might of the physical sanctions. If

one does not act according to the dictates of his nature, he will be forced by law to act in the manner in which his nature demands. This does not make a man a servant of law but teaches him that freedom lies in obedience against it. Man is morally obliged to act in the manner which his nature demands.

It is quite evident from Rousseau's thought that though he agrees with the positive law theorists in making laws supreme, nonetheless, he was imbued with the spirit of the proponents of the social good theory of justice. Instead of making man an instrument of the state, he regards state to be an instrument, a means for no other end than the end of humanity. The state cannot have any other aim but to protect the natural rights and property of the people. As people are the sovereign as well as the subjects, the acts of sovereignty have to be directed to their own end only. The sovereign cannot think of anything other than its own interest. It cannot impose upon its subjects any fetters that are not beneficial to the community, nor can it even wish to do so. Anything contrary to the interests of the subjects is regarded as null and void and unjust. The nature of the sovereign is such that it can only look to its own well-being, there by to the well-being of the subjects. In no case, the subjects be

made the means to the end of anything else. The individual ought not be sacrificed for the end of the state or of majority. Every man in the community should be respected and his opinion be taken into account. His will should be the general will. In no case, the genuine will of an individual, however negligible he may be, be looked down upon.

The general will to be really such, must be general in its object as well as in its essence. It must come from all and apply to all. It loses its natural rectitude when it is directed to some particular and determinate objects. Just as a particular will cannot stand for the general will, the general will, in turn, changes its own nature, when its object is particular. The general will is not the will of the majority. The dignity of every individual should be protected and respected. Every one should be treated as the end of the state and of the acts of the sovereign. The majority have no reason to enjoy the benefits of the contract alone, subjugating the minority. The natural rights and the dignity of all should be protected at any rate, for the simple reason that they are born as human beings. People are united by the pact not to be treated as means but as ends in themselves.

"Instead of a renunciation, they have made an advantageous exchange: instead of an uncertain and precarious way of living they have got one that is better and more secure; instead of natural independence they have got liberty, instead of the power to harm others security for themselves, and instead of their strength, which others might overcome, a right which social union makes invincible."¹⁶

The acts of the sovereign should be directed to the end of the subjects. That Government is just which treats its subjects as the ultimate end of all its legislations. Thus, Rousseau not only protects the basic natural rights and liberties of the people, but treats them to be more fundamental than anything else.

All the contractualists i.e., Hobbes, Locke and Rousseau have made use of the term 'Contract'. What does it mean? Does contract signify that at a particular period of time our ancestors came to a contract and signed a deed? How do we understand the term 'Contract' in the context of Hobbes, Locke and Rousseau? Does it mean by 'Contract' the actual contract signed in the dim past? Even if people signed a contract in the past, what is the way of verifying it? In other words, the historicity of contract poses fresh problems. Even if some people in the past signed a contract, is it imperative on us to abide

by it? From the fact that my ancestors signed a contract, does it follow that I have to abide by it? The contractu-
lists have no answer to this question. In fact, I wish to
suggest that the concept of contract is intimately connec-
ted with another important concept - the concept of poli-
tical obligation. Seen in this light, the question rela-
ting to social contract stands a need of reformulation.
It can be rephrased as follows: What is the basis and
source of political obligation? How do we justify it?
Hobbes, Locke and Rousseau have answered the question by
invoking social contract. Political obligation rests on
contract. One is obliged to the state/government, because
a contract has been signed on his behalf. All the thinkers
are concerned with the relationship between state and
individual. The historical contingencies might have
influenced their doctrines. But the fact remains that the
main thrust of their doctrine was the relationship between
the state and the individual. Justice is important to the
extent it helps in maintaining cordial relationship
between the individual and the state. In this sense, there
is a mutual obligation between two parties i.e. individual
and the state. Justice is contractarian in nature. To
understand justice is to understand contract. I wish to
point out in this connection that social contract does not

refer to a point of time in history. In other words, it has been invoked to elucidate the concept of political obligation. Some people in the past might have signed a contract, but this fact has nothing to do with the concept of political obligation.

I wish to point out in this connection that the contractualists, like the idealists, have not paid sufficient attention to the concept of 'person'. In other words, they have not treated it as a value concept. As a matter of fact, they have treated it as a concept explicable in terms of contract. Hobbes treats persons as a party to the contract and the ruler as the upholder of the same. The contract is to be upheld and safeguarded. The function of the state/government ends there. Though Locke seeks to protect certain natural rights of man, yet he argues in the same vein as that of Hobbes. It is Rousseau who is inclined to treat persons as ends in advocating and upholding the supremacy of the general will. But he is not explicit on this point. The general will, according to Rousseau, is not the particular or contingent will. It is the universal will. Hobhouse seems to be very harsh in criticizing general will as neither general nor a will. The concept of general will provides

justification for political obligation. Further, it morally binds both the individual and the state/government. Revolution or revolt is justified in case of mutilation/violation of general will. The general will, being rational, can also be treated as moral. To go against general will is to go against reason, and ultimately to go against persons. The concept of general will, thus, places man in the centre. This aspect in Rousseau's doctrine has not been adequately highlighted. Locke, investing persons with certain natural/fundamental rights, seeks to protect the autonomy of man. But ultimately, he accords the place of primacy to contract and not to persons. In fact, all the contractualists have not, for some reason or other, paid sufficient attention to the concept of person in their study of society.

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THE UTILITARIAN APPROACH TO JUSTICE

The utilitarians approach justice from a different stand-point. They treat utility as the ultimate standard of morality. Utilitarianism, as an ethical theory signifies that the ultimate end is and ought to be general happiness, and that those actions are treated to be right and just which bring the greatest happiness for the greatest number of people.

It was James Mill who first enunciated such a principle which took a clear form in the hands of his successors. Even Leibniz is sometimes regarded as the precursor of utilitarianism when he speaks that the general good or happiness is the end of law and of morality. Utilitarianism as a moral theory was first formulated distinctly by Bentham, followed by a fundamental modification in the hands of J.S. Mill. Sidgwick opines,

"By utilitarianism is here meant the ethical theory that the conduct which, under any given circumstances is objectively right, is that which will produce the greatest amount of happiness on the whole; that is, taking into account all whose happiness is affected by the conduct."¹

By happiness Sidgwick means pleasure and absence of pain; he defines pleasure as,

"feeling which the sentient individual at the time of feeling it implicitly or explicitly apprehends to be desirable; - desirable, that is when considered merely as feeling."2

Hedonism is a general term which includes all systems of ethics accepting pleasure as the end of life. When pleasure is accepted to be an end which people really seek, it is regarded as psychological hedonism dealing with whether people really run after pleasure or not. But when we are interested in whether people ought or ought not to seek pleasure, we are dealing with ethical hedonism. Ethical hedonism is the doctrine, which instead of involving itself with what man actually wants, involves itself what man ought to want. A moralist is not concerned with what actually is, but what ought to be. He is not concerned with whether people actually seek pleasure, but whether pleasure ought to be treated as the end of life. According to ethical hedonism, pleasure should be the ideal which should be the guiding principle both of the individual and of the society.

Utilitarianism is the revival of hedonism in the late eighteenth and nineteenth centuries by the English thinkers like James Mill, Bentham and J. S. Mill. Hedonism in its gross form seeks only the individual's self-

interest. But that form of hedonism known to be altruistic hedonism takes the name of utilitarianism in the hands of the English philosophers. Utilitarianism as a theory of morals and values seeks to maintain that pleasure or general happiness should be the end of a moral life. Morality lies in the conduciveness of an action to general happiness. It does not take into considerations the psychological factors. It does not tell us whether men do really seek the general happiness but that it provides a norm that speaks that man ought to act in a manner which instead of seeking only the individualistic interests to be fulfilled, hankers after fulfilling the general happiness - the greatest happiness of the greatest number. It is a peculiar feature with almost all the earlier utilitarians that they base the theory of the general happiness on the psychological assumption that man always desires pleasure.

Utilitarianism as a theory of justice regards actions of a rational creature to be just when it achieves the general happiness. Actions of individual human beings and of the state can be treated as just, virtuous, moral or legal if their activities bring general happiness. Actions are judged on the merit of their consequences. If the consequences are useful for the general mass or if

it brings about the general improvement, then actions are treated as just, otherwise unjust. An action detrimental to the social good or the general good is rejected as unjust, and therefore immoral. Justness and morality of an action depend on its being socially good and beneficial. In a sense, utilitarianism identifies utility or general good with justice and morality. Being just and moral is virtuous. To seek general happiness is to seek the virtue.

In its days, utilitarianism got its importance in the field of legislation. The legislations of the state are generally directed to the sole aim of achieving the general good. They bear the essential feature of being useful to the social good. A legislation is, therefore, just when it has the only aim of fulfilling the general happiness of the society. A law which is just should aim at the fulfillment of the general happiness. To treat a law as just and at the same time not to seek the general happiness is to involve in self-contradiction. Justice is not dependent on positive law. Justice does not lose significance even where there is no organized positive law. Law depends on the norm provided by justice. Thus, a positive law may be just or unjust as it corresponds or does not correspond to the norm provided by the utilitarian standard of justice in bringing about the social

good in general. In the like manner, a government is considered just or unjust depending on its correspondence to the norm of justice. A government which neglects the welfare of the people at large and looks to the well-being of a few or of the ruling class can be regarded as going against the norm of justice, thereby making itself unjust. Thus, law and government presuppose justice.

Furthermore, most of the utilitarians, except a few, judge actions and with reference to the end alone. With the solitary exception of J. S. Mill who respects and tries to protect the liberties of individuals at any cost, all others, neglect the means and confine their attention to the end only. Actions are considered right and thereby just, if at the end they promote or tend to promote the general happiness. Means are irrelevant to moral and juridical considerations. Means are never objects of moral and juridical judgements according to the utilitarians. They are outside the purview of such discussions. The moral worth of an act depends not on the motive that prompts it, but upon its effects on society as a whole. An end catering to the general happiness and utility is justified, however ignoble the means may be. But however noble and virtuous the means may be, if the end, instead

of achieving general happiness for the state, incurs the reverse of it, the action of an individual or of the state is to be treated as unjust and immoral. Therefore, justice derives exclusively from society and consists ultimately in promoting the social good.

Most utilitarians with the aim of accelerating the social good, sometimes sacrifice the natural rights and liberties of human individuals. They make all natural rights and liberties subservient to social good. Rights and duties are justified in so far as they achieve or try to achieve the social good. They do not base justice on natural rights. In the case of utilitarianism, natural rights presuppose justice rather than justice presupposing natural rights. Natural rights, instead of being the ultimate referent of justice, are made depend on it. Most of the utilitarians, therefore, neglect the dignity and importance of human individuality by overriding the natural rights. Actions of individuals or of the government are ultimately judged not in terms of natural rights and liberties, but in terms of social good and the general happiness of the society. By making man subservient to the goal of the general happiness, it robs man of his intrinsic worth subjecting him to an alien end wherein,

instead of being a free agent he becomes a puppet in the hands of the government seeking general good.

The most characteristic expression of such a utilitarian view is found in Bentham's works who is regarded as the founder of utilitarianism. Bentham expresses the principle of utility as follows:

"Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand, the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think:"³

This position is called the principle of utility. An action conforms to the principle of utility when it tends to increase the happiness of the individual concerned and the community at large. The principle of utility has further been described by Bentham as follows:

"which approves and disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question.... I say of every action whatsoever; and therefore not only of every action of a private individual, but of every measure of government."⁴

Utility is that property of an act or object which tends to produce benefit, advantage, pleasure, good or happiness. It prevents the happening of mischief, pain, evil, or unhappiness to the people in the entire community. The justification of the principle of utility lies in the "greatest happiness of the greatest number." It was Bentham who in fact, borrowed the phrase "the greatest happiness of the greatest number" from Priestley's Essay on Government, a pamphlet published in 1768.

The principle of the greatest happiness of the greatest number is a principle of morality and virtue and at the same time of legislation. The act which brings or is capable of bringing more balance of pleasure than pain is regarded as fitting to the principle of utilitarianism. Since pleasure is good and pain is evil, the consequences rather than the motives are taken to be more important in moral considerations. The end is always considered to be good or bad. If the end is pleasurable, then the action is justified. The means is never taken into account. The motives may be evil, but the end should be pleasurable. If the motives are good or evil, it is on account of the consequences. They are good when they tend to produce pleasure; evil when they lead to pain. Consequences, in

terms of pleasure and pain, determine whether an act is good or evil. Instead of means justifying the end and motive justifying the consequence; it is end or consequence that justifies the means.

An action, then, may be said to be conformable to the principle of utility only when it brings or helps in bringing happiness to the community which is greater than the pain that would have stemmed from the action. The proper ethical attitude is to calculate carefully the amount of pleasure and the amount of pain any act might produce. If there is a balance in favour of pleasure, the act is taken to be a good, just and moral.

Measures of government are also subservient to the principle of utility. Such measures as would bring social good or general happiness for the community should be implemented. Government and its measures presuppose the principle of utility in the sense that they owe their justification to it. A measure of government that seeks something contrary to the maximum pleasure of the maximum number or the social good, has to be treated as unjust and immoral. The government rests on its benevolent works. If the measures of the government fulfill only the needs of the ruling class and does not look after the

needs of the entire community, they are taken to be the unjust measures of an unjust government.

The state legislations should also be based on the principle of utility. A law is useless when it does not look to the interest of the community at large. The spirit of law should be in favour of the greatest happiness of the greatest number. General happiness or social good should be the essential feature of a law. Once law is assumed to be the dictate of the principle of utility, then law stands as the standard of measuring the justness of actions. An act, conformable to such dictate of utility which is law, is supposed to be just; otherwise unjust, and

"is one that ought to be done, or at least that it is not one that ought not to be done. One may say also, that it is right it should be done; at least that it is not wrong it should be done: that is a right action; at least that it is not a wrong action."5

Bentham accepts the principle of utility to be self-evident, the rectitude and purity of which is never doubted. It is the principle, according to Bentham, that stands supreme over all others and which is presupposed by all other principles of morality. There is no other

principle which can stand superior to it. The principle that is self-evident, the principle that is just in itself, needs no justification. The principle of utility is itself the principle of justice and morality which requires no proof, but can stand as the proof for all others. The utility principle does not presuppose, rather is presupposed by all other principles of morality. The utility principle is not susceptible to any direct proof for

"that which is used to prove everything else, cannot be proved: a chain of proofs must have their commencement somewhere. To give such proof is as impossible as it is needless."⁶

Bentham's utilitarianism is based purely on a quantitative ground, which takes into account the strength or the amount of pleasure and the number of persons involved. Anything that gives a quantitatively greater balance of pleasure over pain is better than anything giving a lesser balance - the quantity of pleasure being equal, pushpin is as good as poetry. Quite consistently, Bentham disallowed any difference in quality in pleasure. The total quantity of pleasure attendant on an act should be considered. An act is moral and thereby just which brings more quantitative pleasure than pain for the individual and for the community as a whole.

Bentham makes no difference between kinds of pains and pleasures or between persons who are affected by it. The maxim, each is to count for one, and none for more than one, goes equally for persons and various kinds of pleasures and pains. For him, there is no difference between the pleasure derived out of hearing a superb symphony or reading a divine poem and the pleasure derived out of watching a boxing match or reading a detective novel. The worth or value of all such pleasures is equal. It is most important to note:

"Bentham's table of 'pleasure' was by no means limited to pleasures of the senses; and if, even then, he did not give enough weight to pleasures of the heart and mind, this may be the fault of insufficient psychological knowledge rather than any necessary limits of his principle of utility."⁷

According to Bentham, the problem of quantity versus quality is not a fundamental problem in the field of morality. It is the greatest quantitative pleasure or happiness of the greatest number that provides justification to an act. In order that the calculation of pleasure and pain should be scientific, Bentham has devised an elaborate calculus known as the hedonistic calculus which is summed up in the following verse:

"Intense, long, certain, speedy, fruitful, pure, such marks in pleasures and in pains endure. Such pleasures seek, if private be thy end: If it be public, wide let them extend. Such pains avoid, whichever be thy view: If pains must come, let them extend to few."

The elements of pleasure or happiness are:

1. Intensity, whether they are strong or weak;
2. duration, whether they are lengthy or short in temporal existence;
3. certainty, or the degree of probability that they will occur;
4. propinquity, or nearness in time;
5. fecundity, or the chance that they will be followed by more of the same kind of sensations;
6. purity, or the likelihood that they will not be mixed with or followed by sensations of the opposite kind (pain); and
7. extent, or the number of persons who will be affected.

The first six characteristics are relevant and sufficient to show the greatest pleasure concerning an individual. But when an act has social implication, the legislator must keep in mind all these elements of pleasure

with the aim of deriving the greatest happiness of the greatest number out of its own legislations. An act, either of an individual or of the government, is moral and just if the pleasure that it derives corresponds to the seven elements of pleasure or happiness. This precision and clearness of mathematical calculation was first introduced by Bentham into the field of morals and justice.

To keep men in their proper path, to achieve the end of the principle of utility, Bentham's utilitarianism provides a set of sanctions of checks and balances on their acts. The sole objective is to convert, by any means, the selfish attitude of man to an altruistic end; to achieve the greatest good of the greatest number, instead of achieving the good of the actor. The so called sanctions are designed to motivate the actors to fulfill the end of life, the good of the community. It regulates the motives of the individuals and of the governing class. A sanction then,

"is a source of obligatory powers & motives; that is, of pains and pleasures; which, according as they are connected with such or such modes of conduct, operate, and are indeed the only things which can operate, as motives."⁸

Bentham's view on sanctions is summarised by himself in the following passage:

"It has been shown that the happiness of the individuals, of whom a community is composed, that is their pleasures and their security, is the end and the sole end which the legislator ought to have in view: the sole standard, in conformity to which each individual ought, as far as depends upon the legislator, to be made to fashion his behaviour. But whether it be this or anything else that is to be done, there is nothing by which a man can ultimately to be made to do it, but either pain or pleasure.... There are four distinguishable sources from which pleasure and pain are in use to flow: considered separately, they may be termed the physical, the political, the moral, and the religious: and inasmuch as the pleasures and pains belonging to each of them are capable of giving a binding force to any law or rule of conduct, they may all of them be termed sanctions."9

Sanctions or punishments should not go against the very end for which they are framed. They should bear in themselves the spirit of protecting and upholding the ideal and the only end of human life. Therefore, the justification of the sanctions lies in the fulfillment of the greatest good of the greatest number. The sanction, which instead of bringing pleasure or happiness, brings pain in turn, should not be accepted as just. According to Bentham,

"the purpose and justification of penal laws were not different from those of the secondary principles of morality - they required justification by the general happiness principle. Penal laws differed from moral principles only in their provenance - being the commands of an Austinian sovereign and in having a political sanction instead of, or in addition to, the physical, moral and legal sanctions that other norms might have. Punishment, being the infliction of pain, is in itself a bad thing. Therefore, legislators will be justified in passing a penal law only if the general happiness it causes greatly outweighs the evil of punishment for its non-observance. Now since the act made illegal would be done only if the doing of it would maximise the agent's happiness in the absence of a penal sanction, the task of the legislator in framing the penal sanction must be to impose the minimum sanction that will outweigh the advantage of performing the act;....."¹⁰

J. S. Mill paid a lip service to the Benthamite principle of utility. He brought about a drastic transformation of the utilitarian position of Bentham. He changed the very foundation of utility-principle. Mills, realizing the defects in Bentham's principle, modified it accordingly so as to keep the utility principle still the first principle of all justifications and the ultimate appeal of all actions.

Mill distinguished himself sharply from his predecessors in advocating that it is not only quantity, but

also the quality of pleasures that counts in moral judgments. Pleasures differ in quality too. Some pleasures are qualitatively such that they are different from other pleasures and that they should be preferred to other pleasures which may have got greater quantitative merits.

"It is quite compatible with the principle of utility to recognize the fact, that some kinds of pleasure are more desirable and more valuable than others."¹¹

and again, Mill maintains,

"It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied."¹²

A person whose faculties are more developed is capable of higher pleasures and once a man is accustomed to pleasures of mind, he can never really afford to stoop so low to the pleasures of the senses. As Sorley says, "Mill claimed for utilitarianism", that

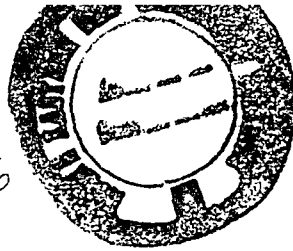
"...it is not sensual, because it recognizes the superior value of intellectual, artistic, and social pleasures as compared with those of the senses."¹³

Mill further differs from Bentham in treating man not as a self-centered but as an altruistic being imbued with the motive of sacrifice. He identifies self-interest with the interest of the community. People are happy only when they aim at something beyond their own happiness - the happiness of others, the improvement of mankind, even the pursuit of art and music as ideal ends. Mill contends,

"the happiness which forms the utilitarian standard of what is right in conduct, is not the agent's own happiness, but that of all concerned. As between his own happiness and that of others, utilitarianism requires him to be as strictly impartial as a disinterested and benevolent spectator. In the golden rule of the Jesus of Nazareth, we read the complete spirit of the ethics of utility. To do as one would be done by, and to love one's neighbour as oneself, constitute the ideal perfection of utilitarian morality."¹⁴

The utilitarian morality recognises the good in human beings as the good for others. It only refuses to admit that the sacrifice is itself a good. A sacrifice which does not increase, or tend to increase, the sum total of happiness, is considered as wasted.

Unlike Bentham, Mill pays much importance to the motive of an agent. In considering actions, both the



motive and the end should be taken into account. Mill finds no justification in neglecting motives and honouring the consequences only. The individuality of a man, in no case, be sacrificed for the community. Mill holds up the banner of liberty of the individuals. He has given a powerful defence of individualism as follows:

"a defence of the right of the individual to hold his own opinions and to give free expression to them and his right to live in such a way as deemed fit himself, so long his mode of living did not interfere with rights and liberties of others."15

Human liberties should not be sacrificed. A man is a human being only because he possesses some basic inalienable liberties. His natural rights and liberties should not be fettered and infringed. The government should give protection to such rights and liberties by legislation. The civil rights and liberties of every individual should be honoured, however insignificant he may be. Man has his own dignity. No man should be subjected to foreign control which does not honour his natural and civil liberties and rights. The government or the ruling class do not have any right to suppress the free opinion of an individual. Mere superior might or majority voice is no justification in depriving an individual of his natural and civil rights

and liberties or making him a means for an alien end. In the words of Mill,

"If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind."¹⁶

The only purpose for which power can be exercised rightfully over any member of the community, against his will, is to prevent harm to others. As the community should not overlook the individuality of a man, so also an individual should not hamper the interest of the community. The society may control individual actions which affect others. But it should not interfere with the rights and liberties which are basic to an individual. The only part of the conduct of the individual for which he is subjected to social control,

"is that which concerns others. In the past which merely concerns himself, his independence is, or right, absolute. Over himself, over his own body and mind, the individual is sovereign."¹⁷

"Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right

by a greater good shared by others....
Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests."¹⁸

Human liberties, like the liberties of conscience, of thought and feeling and of freedom of opinion, are inseparable from him. A society in which these liberties are not respected, is not free and just and the individuals in it are enchained and subjected to miseries. To disrespect the basic liberties of human beings is as good as robbing the human race of its very worth.

Though, Bentham and Mill differ as regards quantity and quality of pleasure, yet both of them lay emphasis on utility. Everything else is to be determined in terms of utility. It is utility, but not justice which plays a decisive role in human society. Utility is the primary concept. All other concepts are to be explained in terms of utility. Thus, justice is to be understood in the light of utility. Morality, virtue, obedience, obligation and such other higher values, have to be referred to utility. Political obligation is measured in terms of utility and so also is the case with justice. I wish to suggest in this connection that justice is basic to understanding human

society. A human society is different from an object of nature. Natural objects may be understood in terms of utility, whereas, society cannot be so understood. Further, the concept of justice is not utilitarian in nature. It is not even a juristic concept. In other words, it is a moral concept. This means that to understand human society is to understand it in terms of morals.

Human society consists of individual persons. What are the persons? How do we understand a person? According to the utilitarians, a person can be understood in terms of utility alone. However, Bentham dittoes this line of thought. Mill wavers between utility and basic liberty. He introduces non-utilitarian principles like liberty and right. Mill accords the highest importance to self-expression. One expresses oneself in diverse ways. In other words, self-expression assumes different forms. Literature, art, music and etc. are some of these forms of expression. One can also express oneself or give opinion on matters, social and political. How do we go about it? Shall we suppress public opinion or honour it? Mill maintains that public opinion/the opinion of others has to be respected. What are the reasons for it? Why shall we respect public opinion? It can be said in this connection

that respect for public opinion is not in consonance with the utilitarian principle. The autonomy of the individual owes its origin to Kant. Mill, in his attempt to protect the liberty of the individual, echoes the voice of Kant.

The utilitarians are also empiricists. Their empiricistic bias is reflected in their attempt to measure pleasure in concrete terms. This shows their eagerness to study human society in scientific terms. I wish to suggest in this connection that human society cannot be adequately understood in scientific and causal terms. It stands in need of a non-causal mode of understanding. The utilitarians have treated human person as means. Though Mill advances the cause of liberty, he does it within the broad framework of utilitarianism.

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THE PRAGMATIC APPROACH TO JUSTICE

With the pragmatic notion of justice, we pass to a theory rejecting the age-old traditional ideologies and values as out-dated and unproductive. Instead, it built in their place a facade of truths which instead of being vacuous abstractions, reflected the scientific temper, workability and utility. Concepts like justice, law, right, freedom, good, truth and above all, the concept of humanity, bore a new colour and had to pass through "the corridor of **pragmatism**" as the young Italian pragmatist Papini has pointed out.

Pragmatism, as a movement emerged towards the end of the nineteenth century and had kept the conscientious mind under the spell of its far-sweeping consequences at least for the first quarter of the twentieth century. Pragmatism as a concept was first enunciated by Charles S. Peirce to be widely circulated by the brilliant and lucid essays and lectures of William James and finally took a clear form in the dissemination of its germs by John Dewey and F.C.S. Schiller in the institutional life of America.

It was Peirce who coined the word 'Pragmatism'. It is derived from the original word 'Pragma', meaning

act or deed. The sole aim of giving such a name to the new movement is to show that words are meaningful only when they have some practical bearing. Meaning of a word does not lie in evaluation but in successful practical activity.

Pragmatism was first enunciated as a method, — a method to test words and ideas. It does not involve itself in hair-splitting discussion nor does it intrude into the sphere of abstractions and traditional dogmas. It wanders in the field of concreteness and actions. It hovers around words, theories, ideals and norms which are translatable to action of some sort. It is this practical attitude towards the social problems that constitutes the method of pragmatism.

"It has no dogmas, and no doctrines
save its method."¹

Though grouped under one banner, the founders of such a thought do touch different aspects of pragmatism. Even, they are sometimes not in unison when each of them propound pragmatism of different kind. Peirce specially confines himself to the field of logic and science; James to the field of psychology, religion and truth, and Dewey absorbs himself with the principal questions of ethics,

education, and social thought. In spite of these differences, they are not detached from the basic thread of the pragmatic temperament when they disdained theoretical constructions and filled up the barrenness of the age-old dogmas with a practical touch by revamping them in the spirit of their new method. They argue that there must be a close connection between thought and practice. Thought without practice is meaningless and must be abandoned. The pragmatist

"turns away from abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action and towards power."2

Pragmatism is found at the cross-road of empiricism, utilitarianism and science in one hand, and the rationalistic and idealistic trend on the other. It tries to justify theoretical enterprise on the ground that thought has to terminate in action of some sort. It brings about harmony between the two prominent philosophical trends: empiricism and rationalism, by unifying the realms of fact and value to establish a creative and progressive philosophy in the place of a stagnant one.

In this chapter, I wish to confine my discussion to the pragmatic theory of justice of William James and of John Dewey. Neither James nor Dewey, nowhere in their writings, have explicitly treated the concept of justice. An humble attempt is being made to reconstruct the pragmatic theory of justice. The Pragmatists are against the static morals and customs. Any moral that grows or changes at the demand of the time is to be treated as just. Actions of an individual or of a state can be justified if they fulfill the need of the community, and ameliorate the miseries of man. Actions are adjudged as per the social need. A social norm, a set of morals or for that matter any action cannot be just in itself. Justness is not an inherent quality of a social norm or a moral code or of an action. Justness does not belong to them, rather it is attributed. They are just, not because they are intrinsically so, but because they acquire it as a quality.

Therefore, for the pragmatists like James and Dewey, concepts like "Justice" and "Injustice" are products of society and are relative to it. What is just for a society at one time, may not be so at another and what is unjust for one society may not be so for another. The concept "Justice" is, therefore, relative in nature.

The pragmatists accept 'justice' to be a social concept. It is not a presupposition of the society rather a product of it. With the change in the social system, the concept bears different colour. The conceptual variance of 'justice', therefore, is proportionate to social change. As a concept, 'justice' grows by acquiring different meanings at different time and place, shedding its outworn and outdated feathers. As 'Truth' grows, likewise 'Justice' grows. It is not like the 'Absolute Spirit' of Hegel that subsumes all differences and contradictions under it. It is something which is a unity in diversity. The pragmatic 'justice' does not grow in the Hegelian sense. Rather, it casts off the useless elements in it as it grows.

As justice is relative to the society which transforms itself at the need of time and place, it is not a supreme virtue. It may be one of the virtues. Justice is not absolute. It is not objective, rather subjective to the social need. The pragmatists do not admit of a fixed, objective, static and supreme conception of justice. They feel at home with a concept which is mobile, constructive, receptive to social changes, and which is capable of growing like a snowball as it glides further. Justice is relative to different social organisms. What is just

at one time and in one society may not be just at other time and in other society. To the pragmatists, justice is not the supreme, static, fixed and objective virtue of the idealistic thinkers. It is not that societal behaviour is supported by justice, but that justice gets its support from social needs. A pragmatic conception of justice is not self-evident and self-justifying.

James has talked much about social and moral values. But nowhere he has made the concept of justice explicit. A Jamesian conception of justice can be extracted from the core of his philosophical contributions.

Even though, an anti-rationalist in attitude, James does not altogether do away with the values and ideals of the rationalists. He filters out the residues from the rationalistic ideals through the empiricistic principles. As a method, said James, pragmatism rejects rationalism chiefly because, it is dogmatic and presumed to give conclusive answers about the world in terms that frequently left the issues of life untouched. Ideals and conceptions, abstractions and a **priori reasons are to be considered from their "practical consequences", "usefulness", and "workability"**. In several pronouncements, James has asserted that truth of values and facts, consists

in what works. He is so radical that he has described the meaning of words as their "cash-value". What is expedient to the social good, is just and moral. The value of true ideas, is therefore, derived from the practical importance.

As expediency is the best policy in pragmatic thought, it is obvious that there is no fixed and definite code of conduct for all times. A code of social conduct which is expedient for the time being may not be beneficial always. In the face of a better code of conduct emanating greater benefit and practical consequences for the society, the old gets rejected as outdated. Codes and values, thus, are considered on their positive significance. Codes of conduct vary with the change of social goals. A sense of justice or morality is also dependent on such goals. With the change of temperament of the people, the concepts change. Concepts like, justice, morality, law, right and freedom are nothing but the concretion of the temporal social goals. So, concepts must be the incarnation of the pragmatic bearings of the society.

James has repudiated most of the philosophical theories as devoid of any direct bearing to fact and experience. He measures everything according to his

method. The method is his basis of standardization. Anything that works well in a better fashion than the existing one is welcomed as just. Actions of human beings fulfilling this aim are just and state legislations to be made must aim at and be weighed by this pragmatic standard.

The eternal values like justice are made to be the result of the will of individuals or that of the state. James seems to make justice subjective. But I wish to suggest that it is a value concept, not a descriptive one which can be translated into factual experiences. It is a value to which all social values have to approximate. Different social values can be rated in so far as they approximate to the supreme virtue - Justice. It is not something which can be validated. It is itself valid.

If the Jamesian stand-point is to be taken for granted, then validity will be confined only to the present. Anything past is outdated and rejected which must recede to oblivion and abstraction, to the world of dogmas. How can a set of principles which are valid at one time be invalid at another? Does James take the temperament of the people to judge what is just or unjust, valid

or invalid, right or wrong, good or bad? I wish to suggest that an emotive standard is not a genuine scale to measure values. The pragmatic concept of justice treats the same thing to be just at one time and unjust at another. 'Justice' is not something like a chameleon that changes its colour at the demand of the surroundings. Is there nothing called universal or intrinsic value? Are all social values, including justice, puppets in the clutches of time? Does their importance vary in accordance with human emotions and temperaments? Do they carry different meaning at different time?

In pragmatism, conventions and traditions are not taken into account if they do not have any constructive role. But conventions upholding the human values should not be ignored for the sake of an extraneous end. A theory overruling the humanistic tendencies is not amenable to human reason and should be treated as unjust.

For the pragmatists, truth and validity of ideals rest in their verifiability. Ideals are not true and just by their merit. They can be revealed if at all they can be reduced to experiential facts of some sort. Pragmatism, in rejecting the transcendental status of values and ideals, has put the cart before the horse. It justifies an ideal

by its end. I wish to suggest that something which is not just and moral by itself cannot acquire the same from vacuum when it is put to actual practice. This shows that justness belongs to, and not acquired by the values. It is not that values are just, because they are translatable to some constructive practices, but because they are just and moral in themselves. The process of verification just confirms their validity. A rationalist will characterise the principle of verification as follows:

"merely signs of its being, merely our lame ways of ascertaining after the fact, which of our ideas already has possessed the wondrous quality."³

An anti-idealist in attitude, James leans towards utilitarian stand-point when he intends to subdue the fundamental rights and liberties of man to the pressure of his pragmatic outlook. To the pragmatists, human values are meaningful not by their essences but by their uses. This is the mistake committed by James in treating such eternal and noble values to be secondary. Human personality, his liberty, and right should be protected at any cost. Man is a value concept. As such, a human being should be treated as an end but not as a means. To subject human values to a gross pragmatic test, is the most debased thing

on the earth. They should not be measured from a quantitative stand-point of profit and loss and should not be subjected to a method of trial and error to unravel their practical utility. They stand aloft as supreme ideals, far away being amenable to the pragmatic method. A fluctuating concept of pragmatic justice fails to stand.

John Dewey squares no better with his moral concepts. Possessing strong confidence in human potentialities, he offers a modified optimistic theory. He admits and respects human values. For him, values cannot be treated in isolation. They must be viewed in and through experience. By contrast, Dewey offers an experimental empiricism drawn from the method of science

"which finds values to be identical with goods that are the fruits of intelligently directed activity."

This theory could succeed in bridging the most persistent and noxious of "dualism" - the separation of science and values, knowledge and morals. His outlook is shaped by a philosophy of change, progress and dynamism in contrast to morbid and static ideals.

Dewey emphasizes upon a scientific approach to ethical problems and insists that statements of value are

meaningful only when they make reference to verifiable practical consequences. This is as good as saying that moral judgements are capable of some sort of empirical confirmation. Values are to be settled by experientiable facts. This has excited Brand Blanshard, when he asks,

"Does Dewey mean that problems of value are merely problems of fact, that questions of duty, or right and wrong, of better and worse, are to be settled by observation in the same sense that the question can be so settled whether a chair has four legs?"

and then he concludes,

"The answer is yes, he does."⁴

Dewey ventured to have a naturalistic and reflective definition of moral values.

Inspired by the dynamism of Hegel and the Darwinian naturalistic interpretation of man, Dewey chalks out his new theory of values and morals. He has got a strong confidence in human potentialities, specially his intelligence. Man changes his behaviour, and reacts suitably to the changed problems of life. Value is not transcendental. Values change. Customs, cultures and above all, the desires of men change with the change of time.

Moral standards arise out of customs and need of the people. To do this, is to stop deifying the eternal rules by which human beings will be governed for all times to come. Temperaments change. Attitudes, desires, and the aims of life change from time to time which fail to cope with an unchangeable social norm. With the change of social behaviour, the norms must change. They must be transformed proportionately to suit the changed climate. Or else, an irreparable cleavage will remain which will become very difficult to be patched up - to keep correlation between values and its applicability. Dewey further points out that it is not that values change of their own accord, but the scientific intelligence takes **resort** to new values, rejecting the old ones. As conditions change, rules may become outmoded and the conduct they prescribe no longer serve the needs of society. When this happens, their critical revision becomes imperative. According to Dewey, moral and social values,

"Instead of being rigidly fixed, they would be treated as intellectual instruments to be tested and confirmed - and altered - through consequences effected by acting upon them. They will lose all pretence of finality - the ulterior source of dogmatism."⁵

Human mind is not bestowed with a set of ultimate ends and social values to deal effectively with social problems. Rather, it discovers ideals by the help of his intelligence to fight with the new problems. Dewey is allergic to any theory of values or static moral code, whether social, political or economic. He is critical of the "essence" and the "transcendence" of such values.

"A moral law, like a law in physics, is not something to swear by and stick to at all hazards; it is a formula of the way to respond when specified conditions present themselves. Its soundness and pertinence are tested by what happens when it is acted upon. Its claim or authority rests finally upon the imperativeness of the situation that has to be dealt with, not upon its own intrinsic nature..."⁶

For Dewey, any ideal that is detrimental to social progress is to be abandoned. In such cases, it is the foremost duty of the social reformers to reconstruct the guiding principles in the light of the changed conditions by distilling out the impurities in the previous set of principles.

According to Dewey, all moral and social values have only one aim - the progress and unified growth of the society. Growth lies in achieving the maximum good

for the community. This prevails in the society when every individual enjoys maximum freedom - freedom to operate his critical intellect. As a result, social good is achieved in unison. Good consists in the growth of the individual as well as the community and it is the function of morality to promote this end. A moral principle is just if it pursues the good of the individual and of the community. And such a just moral principle must be verifiable from an empirical stand-point and be supported by reason and facts.

The sense of 'justice' lies, though nowhere Dewey explicitly defines any, in fulfilling such a good - the well-being of the individuals and the community as a whole. Any action that is conducive to such a pragmatic ideal is treated as just. Human liberties and freedom are justified if they are not contrary to such an end. Action of any sort, either of the individual or of the community, to be treated as just, must be inspired by the lofty pragmatic ideal. Human values in the field of ethics, politics and economics will be protected and adhered to if and only if they do not miss this end in their mission. Individuals or the state to be just, must direct actions or legislations towards the sole end of social good. Thus the aim of law and justice, according to Dewey is as follows:

"It is the law of justice (with other such laws) that makes society; that is, it is those active relations which find expression in these laws that unify individuals so that they have a common end... To imagine the abolition of these laws is to imagine the abolition of society;..."⁷

Though Dewey gives primary importance to human talent and has strong confidence in his adjustment to the changed circumstances suitably, its feasibility may be doubted. Men are not of equal standard; they differ in their potentialities. So, it may so happen that the less talented few may fail to cope with the new circumstances so abruptly lodged upon them. Shall they be treated as misfits? Shall they be ignored? If so, can Dewey treat his theory of justice, as bringing about the greatest good of the greatest number? Is he a utilitarian in his stand-point? If it is the case, what right has the community got to deprive a few of their free expression? What right the majority have got to burden an unwilling few with a system allergic to them? I wish to suggest that justice does not lie in suppression but in freedom. It does not lie in overlooking and neglecting a section of the community in depriving them of free expressions. Justice prevails when the talent of everyone is honoured and a social goal is followed so as to suit each and all in equal manner.

Both James and Dewey seek to define social and political concepts in terms of pragmatic uses. Besides laying emphasis on pragmatic uses, Dewey also treats ideas and persons as instruments. The doctrine is otherwise known as instrumentalism. Both the utilitarians and the pragmatists treat persons as means to some other end. They are means either to utility or to pragmatic uses. The pragmatists claim that understanding of society can be adequately done in pragmatic terms. The so called individual and social values are nothing but means to some other end. I wish to point out in this connection that the pragmatists, like the utilitarians, put the cart before the horse. Instead of defining and explaining society and other related concepts in terms of justice, they seek to define justice in terms of utilities or pragmatic values. The pragmatists, like the utilitarians, treat it as a means to some other end.

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CHAPTER - VI

JOHN RAWLS' CONCEPT OF JUSTICE

With the intention of providing a viable alternative to the traditional theories of justice like Utilitarianism and Intuitionism, John Rawls formulated a theory known as "Justice as Fairness." Utilitarianism, specially, had to bear the onslaught of Rawls which is reflected throughout his long work A Theory of Justice. In the process of pointing out the lacunae and criticizing the utilitarian stand-point, he gives way to his own conception of justice. His theory is very much akin to the contractarian theory of justice, specially, advocated by Rousseau and Kant. To quote his own words:

"My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant."¹

His theory can be treated as a modified version of the contractarian theory of justice, of course, differing in certain major respects. He has borrowed some important aspects like autonomy of the rational human beings from the contract theory of Rousseau and Kant. He is indebted to Kant to a great extent in treating justice as the "first virtue of social institutions."²

The aim of Rawls is not to construct a theory which could explain the origin of society, rather to elucidate a natural situation in which all would agree to a set of principles of justice which would make the life of all, peaceful and advantageous. The aim is to depict a social structure which can uphold the basic rights and liberties of all in equal manner for the benefit of one and all, specially for the well-being of the least advantaged group of the society. His aim is not to provide a juristic or moral standard referring to which actions and social institutions can be adjudged. He is averse to teleological theories.

Rawls wishes to construct a theory of justice which is not based on historicity of situations. The putatively historical situation which he describes is purely hypothetical. It is not that people ever agreed to a contract to guide their life, right, liberties, and social institutions like property, power, position etc. in an initial situation that was fair. But Rawls' intention is to show what would be their primary goods and the principle of justice provided people had agreed in an initial situation of equality. His theory rests on many assumptions. Though his hypothetical explanation

is a deductive one, the conception of justice is an intuitive product of the nature of initial rational human beings.

Beholding from an abstract hypothetical angle, Rawls tries to put forth his own theory of justice. Modifying relentlessly other theories, he has given the final shape to his conception of justice as follows:

First Principle -

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second Principle -

Social and economic inequalities are to be arranged so that they are both:

- (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
- (b) attached to offices and positions open to all under conditions of fair equality of opportunity.³

Hypothetically, Rawls puts men in an initial situation or original position which is fair. It is fair because the parties are rational and moral and mutually disinterested. Disinterestedness does not mean selfishness. They are disinterested in the affair of others because they know nothing of others and even of their own. Though men in this hypothetical stage are not conscious of their differences, some are born with more wealth, power and status and a greater amount of intelligence. They are the fortunate people who inherit greater shares by virtue of their fate. These are the vital natural contingencies and discrepancies which corrode civility, and can be regulated by the principles of justice for the benefit of all.

The veil of ignorance puts men at odds. They are quite ignorant of their rights, liberties, status, ability, aim of life, power and the natural resources surrounding them. They are unaware of their relation to others.

"...no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength and the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life,..."⁴

Though people lack the knowledge of their own talents and due, still they possess a sense of justice which they could extend at the time of necessity. Of course, their sense of justice differs from each other. But they would agree, at least, on the issue of establishing a set of guiding principles **where** their security could be assured and well-being achieved. As man is assumed to be rational and moral, he is able to lead a rational and planned life. Lacking a sense of benevolence, he would never sacrifice his own sense of justice to others. He will never agree to a situation where his opinion will be sacrificed for the end of others.

In such an original position, men are equal. They are equal not in the sense in which the natural-right upholders treat men equal. Rawls says,

"...equality cannot rest on natural attributes. There is no natural feature with respect to which all human beings are equal, that is, which everyone has (or which sufficiently many have) to the same degree."⁵

Though the Rawlsian position is purely hypothetical, still then denying natural rights to human beings is the palpable defect in his theory. Why should a man depend on the mercy of an external agency to enjoy rights and

liberties which are natural to him? Basic human rights like right to liberty of thought and freedom and right to property, are innate to man. It will not be out of place to quote Kant:

"Natural right rests upon pure rational principles a'priori..."⁶

Kant further goes on:

"There is, indeed, an innate Equality belonging to every man which consists in his Right to be independent of being bound by others to anything more than that to which he may also reciprocally bind them. It is, consequently, the inborn quality of every man in virtue of which he ought to be his own master by Right."⁷

According to Rawls, men are equal in the original position in two senses. They are equal because, they all possess the right to freedom of speech; and as moral and rational creatures, they all are free to have their own conception of good and sense of justice.

Keeping men under the veil of ignorance in the original position, Rawls constructs his own theory of justice by the intuitive construction of the parties in the original position. But it is marked by conflict as well as an identity of interests. There is identity

because men agree on a corporate life and there is conflict because their conceptions of good vary and each demands a greater share to a lesser one in the distribution of benefits. When mutually disinterested persons put their conflicting claims, there arises the necessity of justice. In the absence of such conflict, a procedural justice is hard to be established. In such a state of ignorance of one another's interests, a conception of justice emerges out of the reflective intuition of man.

"The parties are effectively forced to stick to general principles, understanding the notion here in an intuitive way."⁸

As everyone is ignorant of one's life prospects, there is no possibility to mould the guiding principles in one's favour. Rawls accepts ignorance to be a bliss for the formation of the principle of justice.

The conception of justice that emerged, is fair because,

"one excludes the knowledge of those contingencies which sets men at odds and allows them to be guided by their prejudices."⁹

Individual conceptions of justice are compared and duly pruned by reflective equilibrium to bring out the best principles of justice. The process emerges as a state of equilibrium. Once the general principle is devised and agreed to by all in an initial situation of ignorance, it sets moving. There is no necessity of any alteration, because it is the product of rational deliberation. The government is to look into its proper implementation by its legislatures. It has to guide its institutions for the benefit of all and for the protection of the primary human goods through the procedure dictated by the two principles of justice.

The first principle, agreed to, speaks:

"Each person is to have an equal right to the most extensive total system of equal liberties compatible with a similar system of liberty for all."

Everyman is to be provided with equal rights and equal liberties which must be compatible with those of others. No one is to be treated as privileged. Certain rights and liberties, like political liberty, liberty of conscience and freedom of thought, right to personal property etc, are quite necessary to further one's rational plan of life in achieving one's primary goods. They

provide the avenue for a better life. If man is not provided with certain basic rights over his fundamental liberties, it amounts to oppression. Liberties should not be hindered. They ought not to be restricted for an alien end. Liberty cannot be sacrificed for an alien end. Liberty can be sacrificed only for the sake of liberty.

"Liberty can be restricted only for the sake of liberty itself."¹⁰

To regulate liberty for the sake of something else, is to arrest the natural growth of human personality. Most of the traditional theories like utilitarianism, further liberty for an alien end. Utilitarianism seeks to subjugate liberty for the greatest benefit of the greatest number. To subject liberty for a teleological end, is to deny liberty by taking away its very essence.

"The liberties of equal citizenship are insecure when founded upon teleological principles."¹¹

Justice as fairness, strongly protects the liberty of conscience. Conscience, sometimes, demands self-respect. It can never be sacrificed for anything other than itself. Liberty of conscience is restricted in so far as it affects the public order and security maintained by

the government. Man should enjoy the liberty of belief and of religious practice. He should be allowed to choose any religion and be free to nourish any view so long as it does not disturb social harmony. Man should also enjoy political liberty in taking part in the formation of the principles of justice which ultimately guides social institutions. Minimum property is also necessary as a prerequisite. One can sustain oneself by such minimum of wealth. These are the minimum of liberties which are required to make the life of man secured. Without these, the rational plan of life gets blocked. So, liberties are the minimum requisites for a rational and moral life.

Rawls, though attaches much importance to the basic liberties of man, has repeatedly said,

"...although these (liberties) may be regulated as always by the state's interest in public order and security."¹²

Further he argues that liberty is not for its own sake, but for a teleological end i.e. the interest of public order and security. Validity and the worth of liberty do not lie in itself, but in the fulfillment of public order and security. Subjecting liberty to other than

itself is subjugation. Liberties of human persons are uncompromising with any superior end. They are ends in themselves. They cannot be treated as means. The idea of controlled liberty leads to universal suppression. Liberties are intrinsic to man. Only when they are exercised freely, the rational plan of the moral being is fulfilled. Or else, it will get nipped in the bud. It is unjust on the part of the government to restrict and control basic human liberties to its end.

It is not reasonable to allow liberties in different proportions to people. Liberty cannot vary in degree. To sanction more liberties to a section, is to subordinate others. Utilitarianism justifies the loss of liberty of a few for the greatest benefit of the greatest number. I wish to suggest that such teleological calculations are contrary to the value of human liberty. Human personalities cannot be sacrificed for the advantage of the majority. Neither the government nor the majority have any right, and therefore not justified, to debar a few from their basic rights and to suppress them by the rule of majority. It is damaging to restrict human liberties and still more damaging to suppress them.

The second principle of justice enunciated by Rawls deals with the basic structure of society. It looks into the inequalities and natural contingencies in the original position, and seeks to regulate them in a suitable manner so as to bring advantage to all, specially the least advantaged. It runs like this:

"Social and economic inequalities are to be arranged so that they are both:

- (a) to the greatest benefit of the least advantaged, consistent with the just saving principle, and
- (b) attached to offices and positions open to all under conditions of fair equality of opportunity."

Inequalities are there in the original position, though people are ignorant of it. Some are better gifted and some are less advantaged. Some possess more wealth, assets, position and power by the mere fact that they are born to such privileges. Such discrepancies in natural gifts cannot be curbed altogether, but can be regulated for the benefit of all. Justice lies, not in inequalities, but in regulating the inequalities to the benefit of one and all, specially in the improvement of the overall conditions of the less advantaged man. Rawls says:

"Injustice, then, is simply, inequalities that are not to the benefit of all."¹³

Inequalities of certain type are natural facts. They will be there in the society. There is no need to eliminate them. They can only be eliminated when their continuance is harmful to the well-being of all or it fails to keep harmony within the conflicting claims of individuals. According to Rawls, their elimination is not necessary. Rather, such natural contingencies, natural aristocracy, or natural lottery (as coined by Rawls), can be utilized for a greater end in bringing up the socially least well-off people. Natural aristocracy is not just or unjust. They are facts of nature. In the words of Rawls:

"The natural distribution is neither just nor unjust; nor is it unjust that men are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts."¹⁴

The primary subject of justice is not the natural inequalities. Such inequalities will continue to be there. But they should be regulated for the benefit of all. This principle of justice admits inequalities with respect to natural endowments. Men naturally differ in their endowments. Some are gifted with more talent and capabilities. Some inherit greater wealth and status though all are equal in respect to the liberties and human worth. The

main objective of the principle of justice is to regulate such inequalities through a pure procedural justice which is fair and to set the social institutions so as to delimit the inequalities for the well-being of the least well-off people in the society. These least well-off people always depend on the better-placed one. Mercy corrupts those who extend it and degenerates more grievously who receives it. Self-respect, being the **central and vital** good, ought not to be sacrificed at any cost. Receiving what is not one's due speaks on one's self-respect. Though adjustment of benefits gives material success, it fails to protect the dignity of man as an autonomous human personality.

While designing social institutions, inequalities are accepted as established facts. The social institutions try to bring out the maximum benefits out of such natural accidents. The society treats those to be assets which can be utilized for the social benefit. The two principles, not only look to the establishment of equal citizenship, but also control the inequalities going too far. They control and regulate such inequalities in wealth and power for the benefit of all, keeping in view the human worth. Society and social institutions corresponding to such principles of justice are treated as just, otherwise,

unjust. Inequalities in wealth and power, devoid of a rational plan, lead to capitalism. Inequalities reduced to equal share for all lead to socialism. The Rawlsian theory of justice occupies a middle position. Neither does it leave inequalities for the sake of inequalities, nor does it distribute wealth and power equally. Rather, it accepts inequalities; respects, regulates, and guides them for the upliftment of the poor and naturally less endowed. By doing this, the wealth and power from the gifted few are not snatched away. They are honoured; and with a rational plan and a pure procedural justice, the two principles of justice are combined to mould the inequalities cleverly so as to benefit all.

The mere fact that someone is born into a high family or has inherited more wealth and power, does not entitle him to demand more advantage. His demand of more is justified only in respect to the social benefit. Those better-circumstanced, can have their greater fortune and advantages only under a scheme in which it works out for the benefit of the less fortunate. Thus, Rawls very aptly has found out solutions to 'arbitrariness of fortune' by his two principles of justice. His theory of justice is the great leveller, nay, the great benefactor. The greater endowments and abilities of the naturally advantaged few

are regarded as social assets to be used for the common advantage. The basic structure of the social organism is to be so arranged that the natural contingencies work for the good of the least fortunate. Social system is to be set up in such a way that no one will gain or lose something out of it. The naturally gifted people will never feel losing something nor will they expect any compensation for their sacrifice in return.. In sacrificing something to ameliorate the conditions of the least advantaged in the society, the more advantaged people rather will feel proud of guiding their rational plan of life not only for their own well-being but also for one and all. They cannot keep themselves aloof from the society and for a development of it, they will feel that their sacrifice is necessary. There is no harm in it if they regulate their lives for the advantage of all. Social well-being is a mutual venture. The two principles of justice look into it.

The validity of the two principles of justice does not lie in the consequences only i.e. in bringing about the improvement of all, specially of the least favoured. It does not measure its validity only through the consequences as the traditional utilitarians insist. Justice

refers both to means and consequences. The means must be quite just or the procedural justice must be fair and pure. The intended social good must be just. The social good is the means through which the advantages for all can be secured by a pure procedural justice. To quote Rawls' own words:

"... the soundness of the theory of justice is shown as much in its consequences as in the prima facie acceptability of its premises."¹⁵

Justice lies not only in its social consequences, but also in the validity of the social assumptions or social goods.

The social structure and the distribution of inequalities must be in consonance with the just saving principle. It is a principle that tells us to leave some gain of the present generation as a security and saving for the posterity as we have inherited from our previous generation. Justice does not require that each generation saves, so that the coming generation will be more rich. Just saving is regarded as a condition for a just society with just institutions for the fair play of liberty. It simply tells us to bequeath something to the next generation. The subsequent generation is to grow on the legacy left by the present.

Is it justified that the present generation saves for the future which it cannot enjoy? What justification the subsequent generation has to ask the previous generation to save something for them (the former)? Kant will certainly disagree to such a situation where one generation becomes a means for another. Saving for the posterity is justified if it is not incompatible with the prosperity of the present generation. Saving for the sake of saving for the coming generation should be abandoned and be treated as unjust. A generation is unjust that does not stand by itself, but wishes to be a parasite on others. One should not expect something which is not his due. Undue expectations are unjust. It corrupts not only the minds of the dependants, but also the very basis of the social life. Parasitic tendencies degenerate the self-respect of man. A generation is an aggregate of human values. Such human values should be upheld and the dignity of mankind be protected at any cost. The sacrifice of one generation cannot be justified in the name of the welfare of another.

The second part of the second principle of justice speaks that social and economic inequalities are to be arranged so that they are attached to offices and positions which are open to all under conditions of fair

equality of opportunity. Inequalities are inevitable in the social arrangements. People are not only unequal in wealth, but also in ability and talent. The better endowed usually get a fair chance of gaining offices and positions of command. Rawls does not confine such positions to these naturally privileged group. He keeps these offices open to all under fair equality of opportunity. Every one, the better or the less endowed, should get the chance of achieving such positions of command. Rawls attaches more importance to the ability of man. Merit becomes the criterion. Rawls says:

"This form of social order follows the principle of careers open to talents and uses equality of opportunity as a way of releasing men's energies in the pursuit of economic prosperity and political dominion."¹⁶

According to Rawls, it does not lead to meritocracy. Talents are utilized for national prosperity. Every man gets a scope to unravel the latent abilities in him, not only for his own, but also for the benefit of the entire community, specially the less fortunate working class. But as some are endowed with less abilities, they will fail to compete with the better endowed. As a result, positions of command will always be confined to the hands

of the more privileged, and the less privileged will continue to be less privileged; always falling back in the field of competition. Society should create suitable social conditions and institutions to uplift the standard and competence of the less endowed. Or else a perennial cleavage will continue to be there between the privileged and the unprivileged. Though Rawls seeks to provide equal opportunity to all yet there are no good reasons that the principle will be implemented. I wish to suggest in this connection that the aspirations of the underprivileged will always remain as aspirations. Their cherished hopes can never be materialized in the absence of a well chalked out strategy. Equal chance does not bring the result. Effort and ability are necessary. No doubt, this provision of the second part of the second principle provides incentives and arouses the consciousness of the least well-off people to compete with the better-off class. "Equality of opportunity", as Rawls claims,

"means an equal chance to leave the less fortunate behind in the personal quest for influence and social position."¹⁷

The Rawlsian principle, at least, succeeds in enlivening the spirit of the less fortunate. But still then, Rawls

is not justified in subordinating the less **gifted** to the more gifted people.

Rawls seeks to provide a suitable legal system to sustain the principles of justice. Justice, according to him, is legal justice maintained by a legal system supposed to contain the precepts of the two principles of justice. But it is not the legal system that identifies legality with virtue or righteousness. The legal system also does not bear the spirit of the natural laws. Rather, it treats law as a juristic concept, not a moral one.

Rawls defines legal system as,

"a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation."¹⁸

These lines best approximate to his conceptions of justice, law and punishment. His legal system is guided by the idea of a cooperative venture which is basic to the two principles of justice. His system does not aim at protecting the fundamental equality among persons, rather it aims at perpetuating the inborn inequalities in them. Though the objective of the legal system is to maintain a social system arranged according to the precepts of

justice, it neglects many of the inviolable rights of man. Instead of basing justice on the natural rights of man, Rawls establishes it on an insecure foundation of legislator's legal code.

Rawls maintains that laws or rules of a civil society are of such type that a reasonable human person will not hesitate to obey. Rules are to be followed impartially and regularly. Similar cases are to be treated similarly. There will be no discrimination. The principle, that like decisions are to be given in like cases of violations, limits the discretion of the judges.

The legal system, further, stresses upon the fact that no one can be the judge of his own actions which may lead to much complicacies. Trials and hearings are to be fairly done and the adjudicators are to be guided strictly by the public system of rules and not by public opinion.

In general, to protect the system of rules on a secure basis, the government attaches a coercive instrument to it. Coercive authority is necessary for social integration. The aim of a penal code is not to scare people away from committing crimes, rather to serve as a security for the claims of men over others. An ideal

society needs a penal code to cure the social ills and help stabilizing it firmly. Though this system has the aim of protecting the rights and liberties of the citizens in modern democracies, yet it tries to protect rights and liberties, sanctioned by the government, not by reason or morality. Sanctioned rights and liberties are limited by an authority. The authority guides them with the purpose of bringing about social coherence. Human actions fitting to this teleological end are treated as just, otherwise, unjust. But I wish to suggest in this connection that rights and liberties should not be treated as means. They are ends-in-themselves. Only when rights and liberties become ends-in-themselves (in the sense of natural rights) and virtue (morality) the foundation of the legal codes, society can get rid of the attendant perils.

Individuals differ in respect of their plan of life. Everyone has got his own way to deal with the social circumstances. Justice as such does not interfere with different plans of the lives of people in general. They are supposed to be rational and so also their plans. Once the principles of justice are established at the initial situation or original position, society is set accordingly and left to go in its own way so long as the conception

of justice is adhered to. Everyone is endowed with the primary good liberty to chalk out his own plan of life that best suits him. Sharing of primary goods, specially, wealth, power, status and social position, and self-respect in greater proportion, is justified so long as it improves the condition of those who have less. It is needless to look into the value of different plans of life. It is also unwarranted on the part of society to regulate different plans of life and life prospects. Rawls says,

"There is no necessity to compare the worth of the conceptions of different persons once it is supposed they are compatible with the principles of justice."¹⁹

People, as rational beings and as quite conscious of one another's liberty are expected to guide their lives as per the objective of justice. Everyone is assured of an equal liberty to choose his own rational desire of life so long as it does not foil the demand of justice. No one's plan of life is to be baffled as long as it is in consonance with the principle of justice.

Primary goods are social background conditions which are normally necessary for developing and exercising moral powers and for effectively pursuing a conception

of the good. These goods are the prerequisites of man's life. These goods allow a person to achieve his goal of life by implementing his plan which he cannot contemplate otherwise. They provide the avenues for the fulfillment of man's rational desire. They are the means for the end of a moral life - a complete life. Without these, human plans remain unfulfilled and reels under suffocation. They are treated as the minimum of rational life.

Though the veil of ignorance keeps men ignorant, yet men prefer a greater good to a lesser one. They also know, as rational and moral creatures, how to advance their claims for the successful execution of their sanguine desires. Human beings feel the necessity of the basic goods and values without which their plans of life will have stunted growth. Kant holds the autonomy of humanity to be supreme. Such autonomy ought to be respected and be left to its own path of progress. When man is allowed to be the architect of his own plan of life, his autonomy is expressed in the most possible adequate manner as a free and equal rational being.

Thus, it seems that justice as fairness is a theory of human justice. It is the duty of the society or a government to provide congenial atmosphere for the

fulfillment of these noble ends of humanity. The government should mould and regulate its institutions with the sole aim of fulfilling the end of humanity i.e. the concretisation of human values. The two principles of justice have this objective in view. Primary goods are the legitimate demands of man. A government, not looking to such noble ends, is an unjust institution and ought to be ousted. Social institutions, ignoring these primary goods for which they are framed, ought to be modified and revised. Deviation of any sort from such a sacred end ought to be treated as injustice against humanity.

The fundamental primary goods are: Liberty and opportunity, income and wealth, and self-respect. The Rawlsian theory specifically explains these goods. Liberty provides man to exercise his talents in very many constructive ways for a better moral life.

In Rawls' theory of justice, wealth is regarded as a primary good. Man, as a social being, needs wealth or private property to develop and exercise his moral power within the framework of a well ordered society. Rawls argues that wealth being,

"...(legal) command over exchangeable means for satisfying human needs and interests, it is hard to see how **wealth** can fail to be a primary good, for if we have no command over such items, we cannot carry out our plans."²⁰

Man acquires this right to private property from the original position. Men vary in their inheritance. Thus, the society contains men of unequal property. Some are rich and some are poor as per their inheritance and station of birth. Presumably, the most advantaged class of the community possesses the largest share of income and wealth. Rawls bases wealth or private property on inheritance. John Salmond says:

"Private property, if we are not wrong, defines the position of ownership of property. Ownership by definition is inheritable."²¹

People in the original position inherit such a right to property. But inheritance should not be a license to wealth. The mere fact that someone is born to a family, should not entitle him to spend his wealth in a manner what pleases him. Seen from a higher level of morality, this does not seem sound and just. Wealth which is the output of one's skill and labour be legitimately claimed. But,

"Birth is not something a person does. Hence, there can be no place of institution of private property in Rawlsian ideal state."²²

From a moral perspective, it looks arbitrary to establish ownership of property by mere accidents of birth. Above all, ownership to private property is incompatible with conception of the greatest equal liberty for all. H.L.A. Hart argues that to own anything privately is to have an absolute right over it, which implies that the rights of others are limited by that absolute right.

Self-respect is regarded as the most important primary good. It follows from Rawls' first principle of justice, giving equal shares in the system of basic liberties which ensures self-respect. It elevates the human worth. It is one's self-esteem that demands recognition from others. Self-respect is an inviolable attribute found in every human personality that is most vital. It has got two aspects. Rawls defines it in the following manner:

"First of all... it includes a person's sense of his own value, his secure conviction that his conception of his good, his plan of life, is worth carrying out. And second, self-respect implies a confidence in one's ability so far as it is within one's power, to fulfill one's intentions."²³

Self-respect, being the greatest good of man, emerges when his plan of life is properly executed without any hindrance. It emerges when a man realizes that he has the ability to secure a better life in consonance with the plan of his fellow-beings.

Self-respect or self-esteem is the good that gives worth to human personality. Without it, man fails to realize his importance or value as a human person. The condition that undermines man's self respects can never be agreed to. Kant's "Internal Mine and Thine" tells us that human personality has its own autonomy and ought to be respected. Hindrance to self expression strikes blows at one's self-respect. It is a value which should be kept aloft.

Human personality can be said to be respected when his plan of life is allowed to run parallel to similar rational plans of others without any collision. This becomes possible when man guides his rational plan of life as per the counsel of the principles of justice. Kant points out that man gets self-respect when he guides himself according to the enlightened categorical imperative or practical reason in him. It makes man the most

free and the most rational creature. Man is a value in himself. He has his own worth as a moral and rational creature. The inviolability that is in him, demands recognition and respect. Man as a human personality is vital which demands respect. A socially able, and a socially unfit, ought to be respected equally. It is not workmanship or ability, but human autonomy that demands mutual respect and self-esteem. No one should neglect such an autonomy of human personality. Governmental institutions and legislations should cherish this end. Any institution and legislation, not honouring the autonomy or self-respect of the citizens, ought to be abandoned. They are to be framed in the light of the inalienable self-esteem and worth of human personality.

John Rawls' theory of justice is an attempt to bring a compromise between the two conflicting trends - capitalism and socialism. Trying to bring a balance between the two, he harps on the very social arrangements of modern democracies. He wants to have a drastic change in the very social set up. Rawls feels that the major ills of the modern societies can be eradicated by modifying and revising the basic social structure. Though hypothetical throughout, his theory of justice has got an ample pragmatic value.

Assuming, hypothetically, inequalities in wealth, talent and position in the original state of society, Rawls proves them to be established facts of society. Kantian in spirit, though his theory purports to provide a humanistic conception of justice, yet fails to achieve it at the end. Rawls fails to bridge the ever-widening gap between the haves and the have-nots. He perpetuates the cleavage between the two classes. The bourgeois is born as a bourgeois and a proletariat as a proletariat. Seeking to protect the under-privileged under the tutelage of the privileged, Rawls ultimately fails to uphold the self-respect of the former.

Rawls' theory of justice has been widely discussed. Commentaries and reviews in the form of articles and books have been published. Brian Barry's book The Liberal Theory of Justice is one such book-length discussion on John Rawls. Whatever may be the merits of John Rawls A Theory of Justice, including Barry's commentary on it, both Rawls and Barry have missed one point i.e. they have not recognised the centrality of man as a value in study of society. Rawls, by and large is a Kantian. He has accepted the initial state of society as depicted by the contractualists. From the hypothetical state of society he

builds up his theory. He seeks to calculate and depict the course of society, given the initial state. Rawls details out the methods that are necessary to safeguard the liberty of man. The doctrine of primary goods and just constitution are among such measures.

Rawls talks of justice. In fact, he introduces two principles of justice. But he does not give explicit answer to the question, 'why shall a society be just and individuals be treated on equal footing in respect of primary goods and opportunities?' The fact that justice at the core is a moral concept, human society can ultimately be explained in terms of justice and persons are the centres of such morality, seems to have escaped Rawls' attention.

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CHAPTER - VII

LAW, LIBERTY, EQUALITY AND JUSTICE

The concept 'Justice' is surrounded by a host of other concepts, like law, right, liberty, equality, punishment and etc. They are interwoven in such a fashion that they are hardly separable from each other. In this chapter, I shall confine my discussion to some of these concepts only and show the conceptual link between them. Above all, I wish to show that concepts like law, liberty and equality are primarily moral concepts.

Law is a principle that refers to the operational way of things or a principle that guides man either as an individual in the state of nature or as a member of any social organism. The former refers to the natural laws and the latter to the prescriptive or civil laws. The term 'natural law' is ambiguous. It sometimes means the laws of nature. In this sense the law of gravitation can be said to be a natural law. Laws of nature in this acceptance, refer to the laws that operate in the world of nature. The laws of nature in this sense will not be discussed in the dissertation. However, 'natural laws', have also a different connotation. They sometimes stand for laws that operate in the human world. Natural laws in this sense are closely linked to the concept of natural right. In

other words, natural law, natural right, and natural justice are close conceptual neighbours. Natural law as being related to natural right and natural justice will be discussed in the chapter.

Roughly speaking, natural laws, concerning man, describe the way man acts in the state of nature. These laws are natural because they correspond to the nature of man as a rational human being. These laws are founded on a firm basis of morality. They reflect both the ways man acts and ought to act. These laws are valid in themselves. Validity is inherent to them. These laws are as such valid independent of any other external standard. They are

"recognised by Reason a priori even without an external legislation..."¹

They constitute a consistent, valid, supreme, and independent standard. They are intrinsic to the nature of human beings. Man does not acquire such laws; he is born with them. Man and the natural laws are co-eval.

As natural laws relating to natural rights are universal in nature, they are the same everywhere and for all time. They do not differ from place to place, from time to time, or from person to person. They are valid for all time to come. Such natural laws are universal

because they owe their origin to the very nature of human beings which extend to all mankind. They are absolute, not relative.

These laws are in a way conceptually linked with the very nature of human being. Man does not acquire them as an external quality like the positive laws. Positive laws always presuppose a maker of it. It is either a monarch, or a group of men or one man or governmental agency that frames the positive laws which are binding on those for whom they are made. But there is no maker of natural laws. They can be said to be eternal since they belong to the very nature of beings as cosmic principles or "Sanātana Dharma" (eternal laws) as depicted by the "Dharma Sāstras" (religious texts) of India.

Natural laws, as objectively existing, are independent of any human existence. Whether there are human beings or not, these laws can be said to continue to exist. Their existence does not depend on their being discovered. Rather, the discovery if any reveals the nature of human beings. Their existence does not depend on human perception or apprehension. The harmony of the universe is independent of any human existence. The nature of man is the bearer of such an equilibrium. No positive law, no command

of authority, no coercion is necessary for things to go their own way. They move quite harmoniously by the merit of their innate nature to make the universe a united one. Things are of such a nature and are endowed with such potentialities that they by themselves make a balanced universe. There is no necessity of presupposing a supreme architect like God. Things, including human beings, are the perfect embodiments of balance which, in turn, sustains the universe. Natural laws are those which make such a harmony possible in the world.

A parallel concept of natural law, in the form of 'ṛta', is found in the "Dharma Sāstras" (religious texts) of India. In Ṛg veda, ṛta points to the supreme transcendental law or cosmic principle or immanent order which subsumes under its control the entire universe, even including the gods. Everything is controlled and governed by ṛta. In the Ṛg Veda, it is described as:

"The Sindhus (rivers) follow the ṛta of Varuna";²

the wheel of ṛta (i.e. the year) revolves round the sky with twelve spokes;

"the dawn, the daughter of heaven, correctly follows the path of ṛta",³

"the young woman (Usas) does not destroy the light of rta,"⁴

"the sun is the bright and lovely face of rta."⁵

Speaking on the importance and superiority of rta, Berolzheimer says:

"... 'rita', ... is at once the organized principle of the universe and the divine ordering of earthly life; as the former it regulates the appearance of the sun and the moon, of day and night and embodies the unchangeable principle that pervades the succession of phenomena; as the latter it is afflicted with purpose and human benefit and is exemplified in the flow of the rivers which fertilize the fields; in the cattle useful to men; in the institutions of marriage, of the monarchical state, of the patriarchal home; and in man's sense of responsibility for his sins."⁶

Things, by their own nature, go in their own way without hindering the progress of others. Natural laws, being all pervasive, operate in the most equal manner without any discrimination. Perfect equality in nature and natural phenomena is maintained by the ingrained laws in them.

Prescriptive laws, on the other hand, lack most of the important qualities of natural laws. They are also known as positive laws or civil laws. These laws are made

by men. They emerge either from legislation or from the voice of a monarch who is viewed with awe and adoration as the perfect embodiment of law or in the form of customs and traditions. Prescriptive laws are mostly written and conventional. These laws come into existence only in a social organization. Therefore, these laws are the products of society. They are dependent on human society, not pre-suppositions of it. With the birth of society, they evolve; with the abolition of society, they perish. They are made with the obvious aim of upliftment of the entire society or for the benefit of a section of it. Whatever the case may be, these laws are framed in a social setting to suit the needs of men.

The positive laws are relative. They are not universal in application as they are confined to different social settings at different places and times. A legal code which operates very effectively in one society may square very badly in other societies. Further, a legal code of the present may not fare better with the change of time. Positive laws are best understood in a definite social perspective. Without this, they stand isolated and meaningless. They carry weight and importance only in a society.

One of the important features of the positive laws is that they are always presumed to be good and just. They are supposed to be so because they sometimes work nicely in a social setting. For the pragmatists, they work properly. For the utilitarians, they bring the maximum pleasure for the maximum number. For the democrats, they secure the fundamental liberties. Or they are good and just because they suit the needs of society. In fact, they are justified by their end results.

These positive laws are always supported and supplemented by a coercive standard. Infringement of these laws leads to punishment of some sort. Punishment may either be deterrent, retributive or reformative. The sole aim of such a supplement is to uphold the fabric of legal codes by the fear of punishment.

Though coercion and fear of punishment may succeed in certain cases in erecting a firm basis for the positive laws, still then, their validity can always be doubted. How can a set of legal codes which differs from place to place and time to time, and which is viewed with suspicion, fear and abhorrence, be treated as good and just? A law that does not emerge from the reason and morality of man is no law at all. A law may withstand the revolt of reason

far away from human emotions, passions and errors. They are objective and absolute; supreme in their dispositions. These laws are self-justifying and positive. Laws depend on them for their ultimate justification.

Man is a social animal. But the society should not burden him with an alien load of laws. He should be governed by laws as his nature demands as a rational human being. As man's nature demands that he should be governed by laws which correspond to his nature, so, the society should bear these laws. Society is a harmonious aggregate of human individuals. So, as per the cravings of human nature, the social laws, civil laws, or the positive laws should be guided by the natural laws. A society to be a just one, ought to bear these natural laws or bear at least laws akin to them. It follows from the nature of man as a part of the social organism, that he should be governed by laws of his own nature.

All prescriptive or positive laws ought to aim at fulfilling the end of human nature. Their validity does not lie in themselves, rather lies in their conformity with the natural laws. Kant rightly says:

"... but a merely empirical system (positive laws) that is void of rational principles is, like the wooden head in the fable of Phaedrus, fine enough in appearance, but unfortunately it wants brain."7

The natural laws exist permanently behind the laws of this or that state; and they serve as the ideal excellences towards which the civil laws should tend and approximate.

Any positive law , contrary to natural laws, should be treated as null and void. They are to be repealed because their spirit goes against the very nature of beings for whom they are made. The aim of law is to control and guide human beings for the fulfillment of their nature in the most perfect manner. If a law, instead of providing congenial atmosphere for the fullest manifestation of man throttles human latent talent, it should be immediately revised in the light of the natural laws. Positive laws should be treated just only when they agree with the aim of the entire human race. Positive laws owe all their justification to the natural laws which are just, moral and right in themselves. A law, however beneficial may be, should be abandoned when a single individual man is not benefited out of it. Positive laws should not be contradictory, rather should be the corollary of the natural laws.

Cultures, brought up by positive laws, devoid of morality and the sense of justice, corrupt man and corrode the essence in him, as Rousseau says.

Positive laws which operate in society in the form of civil laws, differ from society to society. Every society remains firm and claims to be justified on its own stand-point. Societies usually give prime importance to their civil laws and fail to see the shaky foundation of such laws. How can, altogether different sets of civil laws be valid and just at the same time? They may be just (in a legal sense), but not from the moral point of view. The framers of such civil laws are always duped with an illusion of a supposition. The civil laws are assumed to be just and valid, though in fact they are not so. Therefore, civil laws should pass through the test of the natural laws and should be scrutinized intermittently in the light of the latter, so that they do not miss the objective for which they are made.

The moralized civil laws provide civil rights to the social beings within a social organism. Such civil laws act as the upholder and protector of the rights conferred upon human individuals. These rights which are sanctioned by law should be in harmony with the nature of

man. Man inheres some rights in him being born as a human individual. They are the natural rights which man enjoys even before the formation of the society, being protected by the natural laws.

By "natural" may be meant what is "original" as opposed to what is acquired. Kant contends:

"Natural Right rests upon pure rational principles a priori. Positive or Statutory Right is what proceeds from the Will of a Legislator."⁸

Natural rights spring from the natural laws. Such rights are co-eval with the birth of man and are inseparable from his personality, because no one has conferred such rights on him. These are the inviolable rights which man possesses in the state of nature and continues to possess them firmly, because he is still the same natural man living in a different setting. Man's rights should not be measured by the calculus of loss and gain, as most of the utilitarians and contractualists uphold. Man has nothing to surrender. To surrender some rights to an alien authority is to restrict one's own nature.

Natural rights are same everywhere and always the same for all men. Man, primarily, is a being of nature and accidentally a being in the society. He enters into the

society with all his worth and personality. It is not that they have to surrender rights in order to form a society as the contractualists say. To deny man of his inherited rights is to take away the worth and value of his personality. As the natural rights are not sanctioned by any authority, the authority has got no right to deprive man of his rights.

"To base natural or fundamental rights on external authority of any kind may seem to involve an obvious contradiction, because the natural rights are supposed to be the very criterion by which the worth of the external authority itself can be judged. If the end of the government be the preservation of certain natural rights, we cannot let government itself determine what their rights are."⁹

Natural rights cannot be justified by the laws of the government. Rather, the very existence of governments can be justified only by natural rights. The government is supposed to protect and preserve what are extended from the natural state to the society. Man is a value in itself, and the rights and liberties constitute his inherent worth. Natural rights are valid, moral and just by themselves. They are regarded as more fundamental and more basic than the other civil rights. The so called civil rights are deduced as auxiliaries from the basic ones. Natural rights are the innate rights of man and are independent of any other standard. Kant opines:

"Innate Right is that Right which belongs to every one by Nature, independent of all juridical acts of experience."¹⁰

They are self-justifying and supreme. They should be the goals of the civil rights. The morality of a society should be implemented and protected by laws. This is possible only when morality is reflected in legality. A moral right is a potential claim of man on his fellow-beings irrespective of its recognition by the government. It is a right which not only claims what the law of the land usually does not recognise but also does what the latter positively forbids.

Society presupposes the natural rights. Natural rights antedate the formation of civil society. Natural rights being inalienable, man cannot surrender it to society. Seen in this light, the views of the contractualists, specially the views of Hobbes, seem untenable. Every individual is expected to live upto his rational and moral nature. His potentialities should not be curbed. The only sanction against the moral nature is the agent's approbation or disapprobation. Civil rights sometimes fall short of such an objective. The fact of the matter is that the civil rights can be treated as the products of the society. Civil laws operate only within the ambit of society and

they come into force with the formation of it. Man acquires them as a member of the society. In the state of nature, distinction between custom and law, between moral (natural) and legal rights cannot be said to exist. Civil rights can be justified only when they bear the immanent importance of the natural rights. Man should be allowed to live with rights which he possesses by virtue of being a human being. He should be allowed to live as a man.

The rights sanctioned in an organized society are the legal rights. A legal right is defined as one man's capacity of influencing the acts of another, by means, not of his own strength, but of the community as a whole. Legal rights constitute the legal personality of man. This determines the status and power of man within the society as a legal personality. The sole aim of the legal personality should be to maintain social conditions for the complete development of the moral personality of man. Both the aspects of the personality should be harmonized. Legal personality should not conflict with the moral one, nor should the moral personality conflict with the legal one. Conflict and contradiction between the two are precluded when both the personalities become one and identical. When legality becomes the voice of morality, only then, a

society can get rid of the evils and perilous consequences of the immoral legal codes, and man's moral growth, instead of being thwarted, will get a favourable moralized climate for a just utilization of his rational liberties.

Liberties are the natural upshot of man's basic rights. Liberties are licensed by rights. Law acts as the protector of them. A civil society is expected to provide liberties to each and everyman in equal manner, treating him as a free moral agent, capable of developing his own capacities in the best possible manner so as not to hinder the progress of his fellow beings. Liberties exercised in proper manner, not only help in developing the innate personality of man, but also help contributing to the moral harmony of a society as a whole. Liberties properly utilized without any transgression, move in harmony with the like liberties of others.

As legal rights derive their sustenance from natural rights and as rights justify the possession of liberties, therefore, liberties are basic to the nature of man. Man is endowed with certain inviolable liberties, not by any government, but by the virtue of being born as a rational animal. As truth belongs to propositions, liberties belong to human personality. Human personality

and his liberties are complementary to each other. Human personality is inconceivable without liberty and vice versa. Man is an end-value. So, he should not be treated as a means-value. His liberties should not be treated and utilized as a means for an extraneous end. It can be said in this connection that what is good to one individual is good for all and for the entire state; because they all possess the same rights and liberties. Unequal distribution of liberties on the basis of caste, colour, sex and origin, can only bring disastrous consequences to the state, as a section of the citizens are suppressed and deprived of contributing to the national good.

Human liberties are uncompromising in nature. How can they be separated from his personality? Man inherits these liberties as a natural man. Instead of curbing, the state should provide favourable conditions for the full flowering of human liberties. Civil laws should not overlook the natural liberties of man. The so called liberties provided by the state should conform to this. A state or government, missing this ultimate end of human liberties in its legislation, can be said to be an unjust one. Any legislation, not incarnated with the garb of fundamental liberties of man, is to be treated as unjust and immoral. It is immoral because it burdens human beings with a

principle of guidance that does not agree with their innate nature. It not only plunges man into utter confusion and pessimism, but brings about disharmony to the state.

Thomas Hobbes is justified with his hypothetical description of man's maximum natural rights and liberties. Man was left with the liberty of choosing between the life of the state of nature and the social life. To enter the society, he had to surrender all his rights and liberties to the Leviathan except the right to self-preservation. Hobbes is stern in denying the basic liberties to man in the social organism. Locke and Rousseau talk of surrendering of rights and liberties, but men surrender it not to any authority other than themselves. Both of them, in this sense, adopt a lenient view towards the liberties of man.

Bentham subordinates human liberties to his hedonistic calculus. But I wish to suggest that liberties should not be measured through profit and loss from the stand-point of utility. The Benthamian utilitarianism fails to stand before the moral strength of the natural liberties of man. Liberties cannot be measured by a gross standard as devised by Bentham. Mill seems to be doing some justice to the liberties of man when he says that

liberties are basic to man and ordinarily, they should not be taken out of them. Interference is justified only when liberty of one harms the well-being of others. In such a case, man can be rightfully prevented in doing harm to others. Mill's mistake lies in confining rightful and just actions to those which do not harm others. Actions which deviate from the moral way of life can be and ought to be treated as unjust and immoral even if it does not harm others.

Legal liberties like civil, political and economic, cannot be justified as absolute and unconditional. As a matter of fact, legal liberty should conform to the fundamental natural liberties of man. I wish to suggest that liberty is a principle of justice and of morality. The pivotal task of the state is to discover the liberties in which the true significance of man lies. The difficult task, however, is to reconcile the liberty of one with the liberties of others through the instrument of law, keeping moral principles in view.

Law is supposed to safeguard the liberties of men. Equality is supposed to be maintained by law. It is a concept which cannot be treated as a product of society, but presupposes it. Society can be said to have been based on

equality. The contractualists treat men to be equal. In the state of nature, they were equal in the sense that they were in possession of equal number of natural rights and liberties. This feature of the state of nature endows men with equality. Equality can be said to be emanating from the very nature of man. It is appropriate here to quote Kant:

"There is, indeed, an innate Equality belonging to every man which consists in his Right to be independent of being bound by others to anything more than that to which he may also reciprocally bind them. It is, consequently, the inborn quality of every man in virtue of which he ought to be his own master by Right..."¹¹

Men, by birth, are equal. Equality is a fundamental element in the very nature of man. Therefore, they should be treated equally, always and everywhere. There should not be any distinction between the haves and have-nots, between the ruler and the ruled. To treat equals unequally is an act of injustice and immorality.

Equality is as fundamental a concept as man's rights and liberties. It is a category that signifies the status of men in their interrelations in matters of social relation. It determines the criterion of social treatment

and distribution of gain and loss of the state. It keeps men on equal footing, treating them equally. According to Hobbes, men were equal in the state of nature. But such equality was vitiated due to ignorance of the value of human life at the initial state. Further, a sense of equality emerged in them when their life became insecure. Society was formed primarily on the basis of equality.

Locke and Rousseau, not only talk of equality within the society, they also maintain that people were imbued so deeply with the idea of equality that there was harmony even in the state of nature. People were quite conscious of their natural rights and liberties which they possessed in equal manner. Equality stretched to greater extent led to unbearable consequences which happened very often in the state of nature. Society was formed on the presupposition that men were equal and they were to surrender equal number of rights.

Kant also upholds the equality of the rational beings. He accords supremacy to individual dignity. He respects all men as equal in the sense that they are all end-values. Human beings should not be treated as means-value. Kant treats man as a value concept. For Plato, men are endowed with qualities in different proportions.

Some are born wise, some valiant and some others appetitive. The division of society broadly into three classes shows the inequality in innate potentialities. But they are equal in the sense that they are expected to contribute in like manner to achieve social virtue. A member of the producing class has that much of contribution to the social good as a philosopher-king has. Aristotle does not give equal status to men. According to him, some are born superior with noble qualities and some others with base and gross qualities. He admits natural inequalities in men. The Greek race is superior to the barbarians. The latter are born to be slaves. Aristotle is not justified in treating some as barbarians and slaves. A section of people might be possessing less developed faculties; they might not be refined in their outlook and dispositions; yet this does not mean that they have to be reduced to the class of slaves. I wish to suggest in this connection that the government should provide congenial social atmosphere for the development of the talents of the so called slaves. They should be educated and inculcated with noble ideas. Discrimination of any sort is certainly detrimental to human growth and a gross injustice against human equality.

The division of society into four classes (Varnāshrama) in ancient India exhibits the inequalities in human talents. Men with refined and religious attitude were identified as the "Brāhmins", with valour and courage as the "Kshyatriyas", with commercial attitude of earning wealth as the "Vaishyas" and with an attitude to serve other classes as the "Sudras". No doubt, this division exemplifies the inequality in natural endowments of man, yet, they are treated equal in so far as they perform their assigned duties most perfectly to perpetuate social harmony and to achieve ultimate bliss or liberation. Men are all equal in the sense that their souls bear the aptitude of being liberated from the earthly bondage.

Civil society is regulated by certain civil laws. Civil laws look to the protection of the civil rights and seek to protect the equalities of the social beings. Laws are expected to maintain the social equilibrium. But sometimes the equilibrium is vitiated and disturbed by the unlawful activities of a few offenders. The social set up, therefore, contains in itself a coercive instrument so that people can be restrained from transgressing their own limitations. For a mass of rational beings, coercion is unnecessary. Their innate reason is sufficient to regulate

their conduct in the most reasonable manner. Reason and morality need no guide; they are the guide of themselves. Rather, they are the regulative principles for others. An ideal society with ideal men, guided by reason and moral prescriptions, is hardly instantiated. Law is just a meaningless verbal expression for the unlawful instinctive citizens. Foreseeing such a possibility, the government has erected a network of punishment to maintain social balance. It is not out of context to quote Hobbes:

"Covenants without the sword are
but words."¹²

Punishment is a social concept and a product of the society. Men in the state of nature were being guided by natural laws - the laws of their own nature. To break the natural law is to go against one's own nature. Infringement of natural laws does not incur punishment; it is regarded as an act of injustice and immorality, because natural laws are moral precepts. Violation of the civil laws leads to punishment. It is sometimes argued that to safeguard justice, punishment is necessary. Justice and punishment go together. Accordingly, different theories of punishments have been advanced.

Exemplary or deterrent punishment is expected to deter offenders from committing similar offenses in future. Instead of punishing proportionately the wrong committed, the offender is required to undergo serious and undeserved punishment, with the aim of keeping away other potential offenders and criminals from committing crimes. I wish to suggest in this connection that this theory treats the human person as a mere thing. It makes man a means of reaching an end external to himself with the aim of intimidating future offenders from doing similar crimes. Human person is used as an example for the end of others. Others are to be benefited out of the exemplary punishment. Sometimes for a small fault, the offender has to undergo a serious and dreaded punishment with the aim, not of his betterment, but of that of others. Man is regarded just as a tool to be played and experimented. But he is not a thing which can be utilized for an external end. Man is a value in himself. The law of the land has no right to treat him as a means for the end of others. A human person should not be sacrificed for others. Justice does not lie in treating man as an instrument for the end of others. Once implemented, this kind of punishment brings irreparable loss to human personality which can never be redressed. A theory with the aim of benefiting others at the cost of

the offender, can never be justified and should be rejected as immoral and unjust. Expediency cannot be involved in punishment.

Capital punishment is also self-defeating. Such kind of punishments were rampant in ancient days and still are found to be repeated in the twentieth century in different corners of the globe. Punishment of such a kind should be abandoned as it annuls the basic human rights. Right to life or self-preservation is the most fundamental human right. Life cannot be spared for the sake of punishment. To take away the life of the offender is an act of injustice as it destroys the essence of human life. The offender should not be deprived of his natural rights like right to life. A higher moral and juridical consciousness will never approve such an act to be just and moral. It not only degrades the offender, but also the adjudicator. A higher moral order,

"... transforms or abolishes those forms of punishment which wound the essence of human personality and degrade not only him who suffers them but also, and perhaps to a greater extent, him who inflicts them."13

The utilitarians fare no better in their treatment of the concept of punishment. Considerations of utility

predominate their views. Utility decides whom to punish and for what action. It maintains that no one should be punished unless it brings about valuable consequences. Punishments which will not engender good consequences, ought to be given up. It always justifies punishment in terms of results. If the result is satisfactory, punishment is just; otherwise unjust. I wish to suggest in this connection that the offender should not be treated as a means for the greater satisfaction of others. Human person is an end in himself. He should not be subdued for an alien end. How can the personality of a man be measured on the basis of profit and loss? Everything should be judged by human values. In the utilitarian scheme of things, there is every chance of an innocent being punished. If by punishing an innocent, for no fault of his, brings pleasant consequences, the punishment is justified by the utilitarians. How do they justify the suffering of an innocent for a greater end? Innocent persons are, no doubt, human beings with human values. Human values should, in no case, be sacrificed for an end exterior, however pleasant may be.

"Punishing the innocent people is not punishment, it is judicial error or terrorism."¹⁴

Human personality should not be measured by quantitative gains. To subordinate human values to the hedonistic calculus in way of punishment is the gross kind of thing, and is base and unjust.

The retributivists, who treat punishment for the sake of punishment, are often charged with vindictive barbarism. It does not take anything other than punishment, to be the end of it. It is argued that the offender is to be punished as he violates the law. Infringement of law automatically leads to punishment. Consequences are not taken into consideration. Punishing the law breakers is sufficient to justify punishment. Guilt is a logical pre-supposition of punishment. It constitutes the necessary condition for it. The guilty is to be punished. That the offender has committed a guilt, is sufficient to justify infliction of punishment. Retributive theory takes law in its strictest sense and seeks to award punishment proportionate to the violation of law. Infringement of law leads to only one result, i.e. punishment.

The theory of retribution does not take morality into consideration. Conscience has no part to play. Mercy fails to break the logical link between guilt and punishment. Just because someone is guilty, he is to be punished. That is all. This shows that retributive theory;

"... is not a moral but a logical doctrine, and that it does not provide a moral justification of the infliction of punishment but an elucidation of the use of word."¹⁵

The retributivists ignore other factors which should be taken into account to determine the justness of punishment. They overlook the regulative role of reason and morality. A theory, based on strict legality in its rigorous form, should not be treated as just and moral. It ought to be regulated by morality. Or else, it may not hesitate to take away the essence of humanity in the name of punishment. There is every possibility of human values falling prey to the tentacles of strict punishment, because it is blind with the logical link between guilt and punishment. A theory, not respecting overtly the moral nature and values in human personality, should be viewed with suspicion and ought to be abandoned as unjust.

The ancient India had developed a detailed theory of punishment. As depicted in the religious texts (Dharma Sāstras), punishment (Danda) is inflicted on the guilty to purify them of their guilt. Punishment is awarded in accordance with the caste of the offender. These texts, therefore, admit degree of punishment. A Brahmin, abusing a Sudra has to pay no fine. But a Sudra, doing so has to

undergo a corporal punishment. The sanctity with which the Brahmins are endowed, denies them to receive corporal punishment. Thus the ancient Indian law makers recognise degrees in punishment. Punishment (Danda) is raised to the status of divinity in Manusmrit. In the code of Manu, punishment is personified as a god with black hue and red eyes. It is regarded as the incarnation of law (Dharma). The whole world is under the heel of punishment (Danda), for it is difficult to find a man who is pure by nature. Punishment (Danda) has the only aim to keep the individuals and the nation within the bounds of law (Dharma); and to punish the law-breaker for the good effect of all and the protection of all beings. Punishment is expected to keep

"the whole world in order, since without it the stronger would oppress the weaker and roast them, like fish on a spit; the crow would eat the consecrated rice; the dog would lick the burnt oblation; ownership would not remain with any one; and all barriers would be broken through."¹⁶

Capital punishment, in various forms, was prevalent in ancient India. Forging a royal document used to lead to capital punishment. It even took various aggravated forms - like impaling on a stake, trampling to death by an elephant, burning, cutting to pieces, devouring by dogs and mutilations, even for comparatively mild offenses. As

depicted, punishments of such type cannot be justified because it recognises degree of punishment and upholds award of grievous punishments even for minor offences. It is argued that this sort of punishment is inflicted for an expedient end; to keep men away from committing sin. I wish to suggest that, capital punishment is not justifiable on any ground. A fear psychosis degenerates man and its values. Further, the different theories of punishment, in their zeal to protect and preserve justice have sacrificed it in the process.

In this chapter, I have been defending the natural right doctrine. One may raise the following objection to it. Who has conferred the natural rights on man and when? When were the natural rights enforced? How many natural rights are there and etc.? It might be suggested that a natural right is no right at all, for the simple reason that the author of the natural rights cannot be identified. Rights come into force, become obsolete and sometimes they get repealed. In this sense, a right enshrined in a constitution can be treated as a right, because it has a creator; it can be obsolete and can also be repealed. But no such thing can be said to happen to natural rights. It might be argued that the idea of a natural right is a myth. The only rights are municipal rights or constitutional rights.

In this connection, I wish to suggest the following: It is not reasonable to suppose that a "right" qua right is bound to be positive in nature. That is to say, a genuine right must have its author and positive legal sanction behind it. Further, it is equally unreasonable to suppose that political rights are basic and natural rights are secondary or derivative. As a matter of fact, to dispel the misunderstanding about natural right, one has to spell out its nature. It may be pointed out in this connection that natural rights are not on par with political rights. But they (natural rights) constitute the basis of all kinds of rights. That is to say, natural rights provide justification to all kinds of rights. The natural rights work as the spring board for political rights. Political rights draw their sustenance from natural rights. Every conscious human action stands in need of justification. How do we justify a particular action? In answer to this question, it can be said that a particular action is justified by a higher principle and this higher principle, can again be justified by a still higher principle. But this process cannot go on ad infinitum. Therefore, one has to stop at certain principles which do not stand in need of any other justification at all. In other words, these principles must be basic and fundamental in nature. Natural rights embody such principles.

They are basic only in this sense. The concept of natural right, not only gives sanctions to individual liberty but also enjoins upon the rulers to protect such rights. The concept of natural right provides the basis not only for political obligation, but inspires the rulers to protect and safeguard the individual subject. This is how the doctrine of natural right can be characterised as providing a basis for political life in general.

Political phenomenon is a variety of social phenomenon. All social activities, including the political ones, stand in need of justification. Conscious and deliberate human actions can ultimately be justified on moral grounds. Natural rights are meant for providing justification for all kinds of political activities. It is only in this sense that natural rights are basic, fundamental and primary.

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CHAPTER - VIII

CONCLUSION

I have argued out in the course of the dissertation that justice at the core, is not a legal or juristic concept. It is, in other words, a moral concept. Law is a social institution. Like all other social institutions, it stands in need of justification. I have maintained throughout the dissertation that morality provides the ultimate justification of all deliberate human actions and social institutions. Further, laws can be just or unjust. I wish to maintain that the justness and unjustness of a law lie in its conformity or non-conformity to the moral standard. H.L.A. Hart, on the other hand, maintains that the justness of a law does not lie in its conformity to morality but in conforming to certain accepted legal procedures. To quote Hart:

"To say that the law against murder is justly applied is to say that it is impartially applied to all those and only those who are alike in having done what the law forbids; as prejudice or interest has deflected the administrator from treating them 'equally'. Consistently with this, the procedural standards such as 'aud alteram partem', 'let no one be a judge in his own cause' are thought of as requirements of justice, and in England and America are often referred to as principles of Natural Justice. This is so because they are guarantees of impartiality or objectivity, designed to secure that the law is applied to all those and only to those who are alike on the relevant respect marked out by the law itself."¹

The passage suggests that according to Hart, just and unjust are not moral concepts, but legal ones. In other words, they refer to the mode of application of law to particular cases. A law is justly applied if appropriate legal procedures are followed and is said to be unjustly applied if such rules or procedures are violated. It may not be out of context to further quote Hart:

"A man guilty of gross cruelty to his child would often be judged to have done something morally wrong, bad, and even wicked or to have disregarded his moral obligation or duty to his child. But it would be strange to criticize his conduct as unjust. This is not because the word 'unjust' is too weak in condemnatory force, but because the point of moral criticism in terms of justice or injustice is usually different from, and more specific than, the other types of general moral criticism which are appropriate in this particular case, and are expressed by words like 'wrong', 'bad', or 'wicked'. 'Unjust' would become appropriate if the man had arbitrarily selected one of his children for severer punishment than those given to others guilty of the same fault or if he had punished the child for some offence without taking steps to see that he really was the wrong doer."²

This is to reiterate that Hart does not treat just and unjust as moral concepts at the core, though they might have some links with morality. He maintains:

"That just and unjust are more specific forms of moral criticism than good and bad or right and wrong, is plain from the fact that we might intelligibly claim that a law was good because it was just, or that it was bad because it was unjust, but not that it was just because good, or unjust because bad."³

Hart even goes to the extent of treating justice as,

"the most public and the most legal of the virtues."⁴

Reflections on ordinary language does not support Hart's views. 'Just' and 'Unjust' are used in two different senses. Sometimes, 'just' and 'unjust' are used to refer to particular applications of law. Suppose in a country there is a law that persons earning more than twelve thousand rupees per annum have to pay income tax. Mr. X's annual income is more than twenty thousand; he does not pay income tax; is sued in the court of law, but ultimately is acquitted on the ground of his being a member of a particular religious order. We may call it as an unjust application of law. A just application of law, on the contrary, would mean compliance with an appropriate legal procedure. In this sense, the meanings of just and unjust, justice and injustice, are determined in reference

to particular cases of application. As a matter of fact, 'just' and 'unjust', 'justice' and 'injustice' refer to the mode of application of a particular law. But the common parlance also suggests another sense of 'just' and 'unjust', 'justice' and 'injustice'. In this sense, 'justice' and 'injustice' do not apply to certain modes of the application of a particular law, but to the basis or justification of the laws. A particular law might be enshrined in the legal code of a country, yet it may be characterised as unjust. Let us take the following hypothetical example: suppose in a country, apartheid is sanctioned by law, that is to say that coloured people are discriminated. Maybe, it cannot be challenged in the court of law, yet one can say that it is unjust. What for apartheid is unjust? What are the reasons? Why shall it be treated as unjust? The answer to these questions is that the law can be subjected to moral evaluation. Not only laws, but all social institutions can be subjected to moral evaluation. In other words, morality provides ultimate justification to all deliberate human actions and social institutions. The basis of laws, including other social institutions, are bound to be moral in nature. Morality provides ultimate justification to all such actions.

Justice is the supreme value of society. It is integral to society. All other values cluster round this supreme value. Justice, in this sense, is different from legality. While legality relates to positive laws, justice is identified with supreme virtue, righteousness and morality.

The juridical sense of justice differs from the moral sense of it. The former is determined by the external laws and the latter by reason itself. Juridical justice regulates the external activities, whereas, moral or ethical justice regulates both the external and internal exercise of the will of the individual. The moral sense of justice is the infallible reason itself. It guides man's activities in all spheres. It is befitting here to quote Kant:

"The agreement of an action with Juridical Laws, is its Legality; the agreement of an action with Ethical Laws, is its Morality. The Freedom to which the former laws refer, can only be Freedom in external practice; but the Freedom to which the latter laws refer, is Freedom in the internal as well as the external exercise of the activity of the Will in so far as it is determined by Laws of Reasons."⁵

I wish to suggest in this connection that these moral values are bound to be absolute and universal in

nature. The ultimate values and morals cannot be relative for the simple reason that this will lead us ad infinitum. Justification requires justificatory reasons and these justificatory reasons in the end are bound to be ultimate and universal in order to escape the fallacy of infinite regress.

Man is a value concept; so also is the society. What does it mean? What does it mean to say that man is a value concept? One may say that man is nothing but a conglomerate of flesh and blood, bones and sinews and etc. He is an object among all other objects of nature. In other words, man is a natural object. My reaction to this sort of argument is as follows: It is true that man's body is a natural object. In this sense, man can be said to be an object of nature. But this is not all. How do we understand man? Is it simply to understand him in terms of digestive system, blood circulation and etc? The answer to this question is an emphatic no. Man cannot be understood exhaustively and adequately in terms of flesh, blood and sinews. The scientific understanding of man is very much necessary. But it is not the only kind of understanding. To understand man is to understand his aspirations, ideas, ideologies and above all, his values. And to understand all these, is to understand in reference to

morals or values. Therefore, man cannot be completely understood without reference to values.

What is a society? Is it just an aggregate of discrete and different individual atoms? My answer to this question is in the negative. A society is not just a combination of human atoms. It is a congregation or cluster of values, norms, ideals, attitudes and beliefs.

A value is distinct from a fact or a natural object. A natural object belongs to the spatio-temporal world. A value, on the other hand, is non-spatial and non-temporal. What does it mean to say that values are non-spatial and non-temporal? A value stands for a norm, a principle and it is logically odd to say that norms are at par with natural object or things. If values are facts, they are a different sort of facts altogether. I have already pointed out that justice is central to understanding society. Why is it so? Why is justice central to understanding of human society? In answer to these questions, I wish to suggest the following: There is a sense in which a society can be defined as a concatenation of various social relations. It is a network of relations. Human persons enter into relations with each other. This is how a society comes into being. A human individual is

not one among other natural objects. He is an autonomous individual. A human individual can be characterised as an embodiment of end-values. How to treat other individuals? What should be our attitude towards each other in matters of social, political, and economic transactions? Our answer to these questions is the following: Human individuals are persons and persons are to be respected. Persons, in other words, are ends in themselves — to borrow a phrase from Kant's.

The concept of natural right provides justification for treating the individuals as end in themselves. Natural right is distinct from a political right in that the former stands for a moral principle and the latter for actually sanctioned rights. In this sense, the concept of natural right provides justificatory reasons to treat individual human beings as ends.

Justice, in its moral sense, is conceptually connected with natural rights. Natural rights are the rights which human beings possess by virtue of their humanity. Morality being the upshot of reason in man, requires that human beings should not be deprived of their moral rights. Natural rights and moral rights are synonymous. They uphold the reason of man to be infallible and human personality to be uncompromising.

Man, by virtue of possessing an unfettered reason, which demands that he should be free of all determinations and limitations, stands above as an ideal entity and as a value. Reason and morality require that man should be treated as an end in himself. He is an end because, he is a value, not a fact to be determined and regulated to certain end other than itself. Man's importance lies within him. His importance lies within because he has his own worth, by the mere reason that morality required that man should, in no case, be deprived of his inviolable natural rights. The concept of natural right is a conception of pure reason, which is nothing but morality and justice.

Human personality, with its moral essentials like the natural rights, constitutes the moral personality. A moral personality is free from determinations of any sort. Kant says:

"Moral personality is, therefore, nothing but the Freedom of a rational being under Moral Laws; ... Hence it follows that a person is properly subject to no other laws than those he lays down for himself, either alone or in conjunction with others."⁶

H.L.A. Hart contends that if at all men have any natural right, then it is their natural right to freedom.⁷ Hart further says:

"Rights are typically conceived of as possessed or owned by or belonging to individuals, and these expressions reflect the conception of moral rules as not only prescribing conduct but as forming a kind of moral property of individuals to which they are as individuals entitled; only when rules are conceived in this way can we speak of rights and wrongs as well as right and wrong actions."⁸

Hart, too, pays much importance to the innate morality of human personality.

Natural rights are basic to man. He has the birth right to rights like, right to freedom, life, liberty, property, equality and many others. These are the inborn rights which are not sanctioned by any authority. They are not limited to the will and emotion of the law maker. Civil rights are of this nature. They always presuppose a sanctioning authority. In this sense, natural rights do not presuppose any sanctioning authority, because they come into being with the birth of man and constitute the justifying ground of all sanctioned rights. Natural rights need no prescriptive approval, save moral approval. They are the conceptions of morality and reason, which stand above any earthly determination and approval. They are self-justifying and need no external approval. Man's importance lies in possession of these valuable and sacred natural rights.

The judiciary should look into the protection of the fundamental natural rights of man. Protection of natural rights should be given priority in all considerations. In no case, they can be sacrificed, however noble the end may be. These rights are to be treated as ends in themselves, never as a means to anything else other than themselves. Justice lies in upholding such sacred rights of man. A social system, not honouring these noble basic rights, falls short of justice and morality. All social systems should keep in view this ideal end — the end of the protection of the inborn natural rights. All legislations and social systems should be regulated and controlled to fulfill this end of humanity.

Man is an end in himself. He should be respected for the simple reason that he is the bearer of the sacred and noble natural rights and the upholder of reason and morality. All social systems should regulate their basic structures, in such a way that, instead of erecting obstacles in the way of the natural growth of human talents, it provides congenial conditions for their free manifestation. Kant's view is that man should never be treated as a means, but should be treated as an end in himself. Instead of channelling human talents to the furtherance of the social end, the social structure should be regulated

to uphold humanity as an end. It is appropriate to quote J.S. Mill, when he says:

"Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing."⁹

The innate right to freedom makes man free from all subjections and creates checks on the inhibiting principles. It is this natural right, the moral right to be free that leaves man unfettered and unchained by any social custom. It is this natural right that puts everything under the obligation to act to the end of humanity.

Justice, being the first virtue of society, is uncompromising. It is uncompromising because it is based on the natural rights of human beings which are inalienable. Justice, in this sense of moral natural rights, can never be bartered for any other end. To barter justice is to view it on par with something else. There is nothing as important as justice which can be exchanged with it. As Kant has said:

"Justice would cease to be Justice, if it were bartered away for any consideration whatever."¹⁰

It is not expediency, but morality that demands that a government should honour the natural rights of man. Everything of the state and governmental acts should be determined by these rights. Government should provide favourable conditions to honour and uphold the human values, like right to liberty, equality, freedom and property. These human values are vital in the sense that they should be the moral ends of everybody. A government, which throttles the rights of man, encages his liberties, views equals unequally and unequals equally, creating obstacles for free display of the unfettered reason. Justice is integral to humanity and to society. It is integral in the sense that it is based on the inborn natural rights. To do away with these, is as good as robbing humanity of its worth. As Kant says,

"For if Justice and Righteousness perish, human life would no longer have any value in the world."¹¹

But I wish to point out that human persons are basic and fundamental to social institutions. They are to be treated as end-values, not means-values. They possess certain natural rights by their nature, irrespective of social, legal and political institutions. Reason demonstrates the fact that human persons and natural rights

are inseparable, and can be treated as synonymous. Natural rights are intrinsic to human nature. Man is born with natural rights as he is born with reason. Natural rights move with human personality and are unbounded and unfettered by any social, legal or political institution. They admit no limitation except the consent of the possessor; nay, the possessor also fails to go against what his nature demands. Neither can natural rights be limited by itself nor can there prevail a higher claim against them. Being deducible from the very nature of man, natural rights are valid universally.

Such objective precedence of natural rights has been criticized by the positivists. They are of the opinion that equality, in respect with natural rights, makes social process impossible. They contend that if the principles equally ultimate, absolute and reasonable, conflict with each other, there is no higher principle to solve it, because the conflicting principles are supposed to be ultimates. They are of the opinion that natural rights are vague on this score.

Some others who are against the notion of natural rights, are of the opinion that rights can only be deduced from some rules based on expediency. Rights can

only be established when conformed by rules. There can be no right without a rule. To abstract human person from social contexts is to abstract him from the social rules, and therefore to make discussion of natural rights irrelevant. This group of thinkers further say that every right must be justified in terms of some social end and could not be achieved without the social recognition of it. Natural rights, in the sense of having supra-mundane status, are said to be non-social.

I wish to point out that the anti-natural right theorists do not fare well on their stand. They see natural rights only in a social context. Their folly lies in giving precedence to society and its rules over natural rights. But as a matter of fact, natural rights precede the former. Conceptually, man is prior to society and therefore, society is inconceivable without man. A society without human beings cannot be thought of. Further, this group of thinkers treat society as primary.

Those who criticise natural rights as myths and non-rights miss the point. To say that human beings have certain natural rights is not to say that the rights have been granted to them by some authority at a particular period of time, but to draw attention to the value dimension

of the concept of man. So the concept of natural right gives us a guideline to treat man not as an object, but as a value. The positive-law theorists seem to have not taken note of this aspect of natural right. The concept of natural right is meant to provide justification and basis to all legal codes and practices. How to justify a legal code in case of competing claims? How to choose one type of law in lieu of another? In other words, what is the basis of a legal choice? How to choose one legal code over another? To say that a particular legal code is accepted, because it is the embodiment of law, is to move in a circle. The so called legal codes cannot be justified in reference to laws. In other words, a legal code has to be justified on extra legal grounds; that is to say, a legal code has to be justified in terms of non-legal. Natural right theorists seek to provide such a basis for legal codes including legal practices. This is to show that legality ultimately stands in need of morality for justification. The concept of natural right, in this sense, has the positive function of providing justification to legal codes.

Natural justice is closely connected with the concept of natural right. There is a sense in which it can be

said that both natural right and natural justice are two sides of the same coin. If natural right tells us to treat human persons as ends, natural justice tells us the same thing in the cases of adjudications. What should be the attitude of the judge towards a person tried in the court of law? How the legal proceedings are to be carried on? What punishment is to be inflicted on the guilty? All these questions crop up in connection with adjudication of cases in the court of law. It is true that while adjudicating a case, the judge takes into account the legal code and the sanctions contained therein. But at the same time, the fact remains that the judge may be harsh, emotional, partial and so on towards a particular person or group of persons in certain cases. The concept of natural justice is meant to provide guidelines to the judges so as not to forget the fact that human persons are ends. Therefore, it can be said in this connection that the concept of natural right is relevant to the formulation of laws and the concept of natural justice is relevant to adjudication of cases. Natural justice is justice which is natural. That is to say, it is a kind of justice given to man, not by any particular court of law, but by nature. What does it mean to say that justice is endowed on man by nature? What does nature stand for? 'Nature' and

'natural justice' do not stand for aggregate of natural objects. Nature, in this sense, refers to the value aspect universally present in man. To say that somebody is denied natural justice may be interpreted in two different ways: (1) To say that somebody is denied natural justice is to say that one is not allowed to take resort to the sanctioned legal means available in the country within its legal code. (2) It may mean that the legal code of a country does not treat individuals as respectable persons. In this sense, natural justice comes closer to individual dignity and autonomy of human persons.

✓ Man as an individual has to be treated equally without discrimination. His nature demands that he should be treated as a respectable person keeping aside differences in race, colour, caste, creed and sex. He has to be treated with honour irrespective of differences in social, legal and political frameworks. The cry for natural justice becomes prominent in cases where man is treated otherwise. Unjust treatment sometimes leads man to revolt. The most vehement opposition of this kind and the demand for natural justice become vociferous usually in racist regimes. Apartheid is viewed with abhorrence and treated as an unjust institution. I wish to point out that human

persons can be said to constitute only one society; — the world society; the society which precludes discrimination of any sort between man and man. Natural contingencies and accidents should not be treated as fundamental to human society. (John Rawls does not treat man justly when he accepts such discriminations as naturally established facts.)

Natural justice is an upshot of the nature of man and is guided by the immanent principles in him. It needs no external legislation or any adjudicator. The nature of man justifies it. Natural justice is self-regulative. It demands that man should always be treated as a man and juridical sense of justice should always uphold such an ideal.

Natural justice is sometimes identified with providential justice. In the case of excess of sin and guilt, when something detrimental happens, we attribute it to providence. It is said that Providence keeps society from degeneration. It maintains balance and harmony in the order of the universe. It maintains that sin and guilt are punished by the cosmic principle. The Providential justice is sometimes identified with poetic justice. The positivists will reject this concept of justice outright

with the plea that it is not amenable to observation. But the concept of Providential/poetic justice, like natural justice embodies a regulative principle. I have already suggested that enters into understanding of human society. Human society differs very much from natural objects. Therefore, the methods of studying human society is bound to be different from those of natural objects. Description (sometimes prediction) sets the limits to study of nature. It is within these parameters that the study of nature has to be conducted. But the society cannot be exhaustively made with the concepts and methods used by the natural sciences. The concept of justice (along with natural right and natural justice) provides such a parameter to study of human society. It is only in this sense that justice is a regulative concept. It is meant to guide social action. Its action guiding-nature endows it with supremacy among all other concepts used in study of human society.

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