THE CONCEPT OF JUSTICE IN COMPARATIVE PERSPECTIVE

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Dedication

To Im and Segujja who walked every inch in writing this thesis. And to my parents: who raised me unselfishly and brought me this far.

CONTENTS

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INTRODUCTION

> "Social justice begins with conflict and ends with reconciliation. A world without conflict is a world in which social justice is not an issue; a world with unreconciled conflicts is a world in which justice has not been achieved".[1]

The concept of justice is about the consideration of parallel issues, concerns, needs, deserts and entitlements of people and worlds in various circumstances. And the significance of justice is to ensure that there is a justly balanced order of things and the way entitlements, needs, deserts, merit and burdens are distributed across time, peoples and worlds. This involves a conflict, and the consideration of such conflict, is what calls for theories of justice.

Why I say theories and not a theory, is because no single theory so far has managed to successfully solve the justice question. Each theory comes with its new conflict to the existent theories. Perhaps considering and examining a wide spectrum of issues in existing theories can help us to see more clearly how the justice question and the resultant conflict could be solved.

And, since the concept of justice is about competing claims, then we must consider and examine its theories and how they vary and interrelate with each other. It is in this

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1 L. C. Backer, `Economic Justice: Three Problems', in Thomas Morawetz, *Justice*. (Aldershot: Dartmouth Publishing Co. Ltd., 1991) p. 386.

way that we can be able to come out with a balanced concept or some sort of universal approach by which everyone can get their due (what is best for them vis-a-vis what is best for others) and not what is in their interest only.

The ideas that have theorised the concept of justice are in two groups: chronologically and by approach. Chronologically, we have classical theory and modern theory. While classical theory relies heavily on virtue in analysing justice, modern theory is on the whole based on rationalism.

In approach, there are those theories which consider the interests, rights and liberties of the individual (`self interests' theories), and there are those which consider the basic rights and entitlements of all. And, though chronologically modern theory follows after classical theory, it definitely has its own culture of theorising justice and can be distinguished from classical culture. But fundamentally, justice has always been discussed on two planes: rational and natural dialecticism and metaphysical dialecticism.

These are the same planes that were used by the earliest known philosophers on the concept of justice. Because modern culture is witnessing a surge in the writings on justice, modern theories of justice invariably take up the lion's share in this thesis. Of major concern, are the prolific writings on justice in the latter half of this century particularly those of Rawls, Nozick, Kelsen, Honore, Brian Barry and Miller and a spate of articles in learned journals.

And then there is the problem of justice and internationalism, and justice and gender. This is a new area of growing concern in matters of justice, and I will explain a little bit of it here before examining it in detail. Under international justice, the discourse is about rights to fair co-operation in international trade and commerce, in international relations and in the use of world resources on the high seas, international waters or inland.

In this discourse, the argument is about existence of a just international order in which nations and multinationals act responsibly. This is a call for all nations to act as agents for global welfare. But this also operates under certain conditions of justice. These are: that states have to show and act with an inclination towards global justice, operate within principles of mutual (global) responsibility and give due consideration to the basic needs of particular nations and peoples especially in the third world. All these are discussed within the role of modern theories and one or two classical theories.

In discussing modern theory of justice vis-a-vis the idea of international justice, Rawls's theory of justice is mainly the subject of discussion. This is because, the question of international justice is about the need for redistribution of economic and social welfare. But because international justice also concerns consideration of the entitlements to national resources, Rawls's theory is compared and contrasted with Nozick's theory of entitlement.

The discussion of Nozick's theory of entitlement also helps us to question the feasibility of the theory of interaction, intervention and the principles of co-operative reciprocity in issues of international justice. In addition, we also discuss and weigh the views of cosmopolitan and communitarian justice. Both of these, have certain reservations for international justice. Cosmopolitans believe in the interests of individuals and want to see people's interests furthered, whatever the consequences on the global level. Communitarians argue that people belong to certain communities and it is this they want to improve in the global order.

My argument is that, in issues of international justice, two principles are indispensable: justice as fair reciprocity and justice as mutual responsibility of nations. From the angle of moral responsibility, nations have to understand that the question of justice between countries is like that between individuals: it operates under a presumption of moral equality.

Under the principle of fair reciprocity, justice between nations operates via the dictates of interdependence. In one way or the other, we need to reciprocate or else, some countries will be emprovished by others. In fact, justice as fair reciprocity requires that those nations of the North which once conquered and exploited the South, must distribute part of their economic development through equitable terms to benefit the emproverished South.

This is because, in the past, people in the third world "through domination and exploitation", have been made worse off by the imperial and colonial policies of countries of the North.

> "They have been driven into bargains they would not have made if they had not been driven to the wall. They are plainly being coerced and they are surely not being treated as moral equals".[2]

The vital issue to consider is that nations are naturally interdependent, that the scarce resources for basic needs have been unfairly placed and that the necessity for massive redistribution of international wealth and welfare is the inevitable mode of international justice.

Feminists too have challenged the existent notion of justice. Their argument is that current trends in law and justice neglect important feminist ideals. This is particularly because, for centuries, many theories of justice and the literature on justice have taken women's rights for granted and do not address them as equals with men.

Like the argument for countries of the South in international justice, the concern for feminists is that women have not got their dues for far too long. There is thus a need to address the question of justice in view of the feminist critique of law and justice. Again, like in international justice, this requires us to recognise the fact that some kind

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[2] Nielsen. K., `Global Justice, Capitalism and the Third world' in R. Attfield and B. Wilkins (eds), *International Justice and the Third World.* (Newyork: Routledge, 1992) 28.

of redistributive theory has to be considered before women can be brought within current mainstream justice.

But, whatever the theory of redistribution, the important thing to consider and which I hope will be realised in this thesis is that the existent theories of justice are not without problems: They are inconsistent, inadequate, implausible and contradictory. Take for example Rawls's theory which is based on a very assumptive premise that to understand justice we need to be similarly situated and ignorant of our particular interests. Or, Nozick's theory of entitlements which is too rigid to facilitate a balancing of people's claims. Or, consider that of Kelsen which begins with arguments for relativity but ends up in absolutist assertions, etc.

Therefore, in the wake of all this, it is relevant and I believe necessary, to discuss and analyse in detail, the various theories of justice, and then consider whether a concern for the variations between them can possibly lead to a more adequate theory of justice.

Methodology

This thesis investigates the concept of justice through the study of various works on justice, particularly through an analysis of the major philosophical and theoretical formulations on the subject. The selection of theories and formulations of justice discussed in this thesis is based on their relevancy to the contemporary debate on

justice, the conflicts they pose to the already existing writings on the subject and the criticism they incite for the consideration of `burning' issues of justice in modern times.

In discussing the theories examined in this thesis, I have attempted to arrange the discourse in a historic sequence so that we can see and compare how the ideas emerge and flow with time. This is basically in regard to classical and modern theories of justice. But, because utilitarianism, Marxism and Islamic justice are distinctly unique, I have chosen not to discuss them under this sequence but preferred to analyse them separately.

Generally, this thesis seeks to answer the following questions:

i. What criteria and formulae are followed in defining the concept of justice?

ii. How do established tradition and literature in jurisprudence and legal theory approach the concept of justice?

iii. What are the difficulties and inadequacies to consider in this tradition?

iv. What are the variations, conflicts and interrelations in the different theories and formulations on the concept of justice and what do they point at?

v. What is the future of the justice question in law and theory? In view of the inadequacies, conflicts and interrelationship between theories of justice, how far is it possible to suggest (formulate) a feasible and more adequate concept of justice in modern times?

Essentially, a substantial portion of this thesis is devoted to illustrating that almost all theories of justice are quite varied and yet similar in one way or the other, sometimes speaking of justice in a common vocal cord with different tones, and at other times talking justice in utterly different cords with the same tones.

Chapter I introduces and briefly discusses selected approaches to an explanation and definition of justice, as well as analysing the central features and themes of what justice entails.

Chapter II discusses the principle theories of justice viz: classical and modern theories and the particular conflicts and variations. Throughout this chapter, a critical discourse is emphasised. Chapter III is an analysis of the Utilitarian and Marxist views on justice and their interrelation.

Chapter IV is devoted to a discussion of the grand theory Islam presents in explaining justice. The fulcrum of our discussion here will be Shari'a (Islamic Law) and philosophy. This will involve an examination of Qur'anic and prophetic injunctions on justice, as well as an analysis of the views of Muslim scholars - both modern and medieval.

Chapter V and VI discuss the critique of the concept of justice in modern issues, particularly, under the feminist critique of law and justice, and the demand for a more just global co-existence.

Chapter VII discusses the general similarities and differences between major theories of justice and the contributions that can arise from such a comparison in so far as the meaning of justice is concerned.

Chapter VIII discusses the existence of a universal conception of justice. In this chapter I shall argue that the natural and plausible conception of justice is that one which functions under the dictates of the universe and the natural ties of human kind. This basically means that a single but comprehensive, constant and consistent approach to justice must be reached.

I shall conclude by arguing that if there is to be a successful and true conception of justice, then both reason and nature ought to be given a harmonised view in any theory that attempts to explain the meaning of justice. This, I propose, is perhaps the right approach to justice.

CHAPTER I

DEFINING JUSTICE

Abstract

The idea of justice can be identified in six forms; legal, philosophical, ethical, theological, political and social justice. In the legal sense of the word, justice can be defined as that measure, scale or standard which binds and weighs human conduct. This is by creating entitlements and rights which bind a person with another and with society. In this context, justice is that by which ideals are put into practice and it stems from rationalisation and human reason.

Philosophically, and ethically, justice is contained in `expressions of expectations' which make it a mere ideal viewed in the `ought'. In the ethical sense, justice is the expression of human virtues derived from laws (of nature and God). Therefore, ethically, justice resides and is to be found in that which aligns with the highest virtue. That is to say, justice is no more than that standard which conforms people to the highest (conduct of) virtues. This makes justice itself a virtue of the highest eminence.[1]

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1 Aristotle.Nichomachean Ethics V(I), at 174(Thomson J.K. Trans. 1953).

In the philosophical sense, justice is also a standard measure but is one that is only determinable and intelligible by reason. Both ethical and philosophical conceptions categorise justice into natural, divine and rational justice. The distinction between ethical and philosophical conceptions is largely rooted in the idea that ethically, justice is conceived in terms of moral and religious terms, while philosophical conceptions are hugely dependent on reason. For example, ethically, Islam equates justice with righteousness and therefore sees that which is just (in the ethical sense) as that scale prevalent in religious (divine) obligations, duties, rights, morals: theistic love and beauty[2] etc.

Theologically, justice is resident in the realisation of God's (divine) essence and perfection of human beings. This is twofold. A person's innate nature possesses a free will; he or she can choose to tread the path of evil and wrong doing (injustice) or that of doing good and righteousness (Justice). To achieve the latter, a person has to strive to live his or her life and conduct as a translation of God's commands and prohibitions into a reality.[3] This, in other words, perfects those who walk their life with God's essence translated into their conduct in life. This involves people taking full responsibility for the acts of their free will.

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2 The Islamic mysticism (sufism) see justice as that which stems in the maintenance of moral values which repel evil and create goodness.

3 A Yusuf Ali, *The Holy Qur'an Translation and Commentary*. (Maryland: Amana Corp., 1983), 8:53, 10:45, 17:47.

Justice can also be defined in the political and social sense. Politically, it can be defined as that standard measure determined by the `sovereign' in the government of human affairs. This may be in the sovereign constitution of the state, the Parliament, the absolute monarchy, e.t.c. Whoever it may be, political justice demands that the measure of governing human affairs is by the law of the sovereign. This equates justice to conformity with the law of the sovereign.

In the social sense, justice is positive in nature and has been defined in distributive terms. It is usually definable according to human experience and acceptable (established) convention. Social justice is now the most popular and debatable concept. All in all, the task of defining `justice' revolves around one key word: balance, standard, scale or measure. The problem of finding justice has been not so much the crux of distribution but rather its content. In this regard many approaches have been adopted in the quest to define justice.

Some have tackled the question of justice by way of the metaphysics of virtue, others through a reasoned and rationalistic analysis of values. Plato is among those who tried to approach justice from a metaphysical mind - that is, considering justice as an absolute moral concept metaphysically perceived under a dialectic cognition. This is perhaps because (as can be seen in The Republic II) he considers justice as the absolute good that can only be attained by a return to the natural arrangement of things.

order in which every one is an independent member of a universal order which operates within an organic unity of a whole. In such order all individuals have a specific function to perform and justice is attainable by each doing their proper function.

Aristotle viewed justice under ethical perception and represents the rationalistic approach to justice. His view is that what is lawful, or fair, is 'just'.[4] To Aristotle, defining justice is something identifiable in equality and equitable dealings which is distinguished in the distributive and corrective forms of justice. Defining justice in the natural sense requires rediscovering natural law and finding justice. This is where justice falls within the universal dictate. But conventionally, justice stems from authority and positive law which begs us to approach justice from a legal calculus.

In the distributive form, Aristotle argues that justice means rewards, rights and honours, according to proportionate equality. But in the corrective form, justice is to be defined in terms of that which guarantees such equitable allocations, and manifests restoration or maintenance of the status quo. Other philosophers have tended to explain justice in terms of precise values such as freedom, equality and entitlement or giving each their due.

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4 For example, Aristotle saw nothing wrong with slavery in his slave society so long as the proper persons, as according to law and tradition are the ones that are made slaves.

St. Aquinas argued on a similar note postulating that: "Justice is a habit of rendering each their due under a perpetual will".[5] Herbert Spencer describes it more precisely: the cardinal definition of justice is in equal freedoms and justice is in "Everyone doing that which he [or she] wills provided he [or she] infringes not on the equal freedom of others."[6]

This is closer to Kantism, for, a broad understanding of Kant's categorical imperative requires that just persons conduct themselves with a view that harm to others' rights and aspirations must be avoided. Basically, to the Greeks the law was very important since in it is contained the content of justice and the latter was seen as the end of the law. But generally, ancient Greek philosophers as fathers of the search for the meaning of justice employed maxims such as good for good, evil for evil and each according to their due, as channels from which the content of justice can be derived. These maxims and many others are but absolute self evident elements of nature.

From the religious (particularly Judaic-christian-moslem) conceptions, justice is agian seen in terms of the ideal perfect Law. But religious conceptions are limited to subjectivity. After all, religion is a matter of the heart as the seat of human emotions and control. Once the heart is under control then a universal, humane and divine postulate is most ideal. Islam attempts to show that justice is contained in that perfect

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5 De Jouvenel, Translated by J.F. Huntington, *Sovereignty. An Inquiry into the Political Good*. (2nd ed., Chicago: The University of Chicago Press 1959), 139-163.

6 D. Miller, *Social Justice* (Oxford University 1979), 190.

law which is extra human, but acts as the beacon light showing the way to human perfection.[7]

Such perfection is attainable through a community of believers who transcend any class distinctions in the conduct of human affairs. The whole human race is a single indivisible order rooted in upholding the truth and righteousness as the basic scales of right conduct. Thus, in defining justice among individuals, religious notions in this manner will urge distinctions in terms of functions, only the best being that who is foremost in righteousness. This is the just conduct and is only realisable by following the letter of the ideal - perfect Law of God.

Basically, this is a matter of faith and can only be expressed by existence of a community of people who collectively and individually believe in the divine law as the source of perfect judgement. But leaping through the works of modern philosophers it can be seen that it is the influence of classical philosophers that still controls the debate on justice. It is through this vein that current theorists have come out with better and rationally acceptable alternative definitions of justice.

For example, Aristotle's division of justice into distributive and commutative branches, which is hitherto unsurpassed has been at the helm of the development of new theories. Thus, from Marxism, Humism, Utililatarianism and Egalitarianism to current theories of the twentieth century, the concept of distribution of wealth and property has taken

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7 A. Yusuf Ali, *The Holy Qur'an Translation and commentary* - 2:1.

the lion's share of the search to justice so much so that, in contemporary times when we talk of `justice and fairness', the finger inevitably points at entitlement to and allocation of rights and rewards, rather than seeking to find the inner content of this seemingly illusive and undefinable virtue.

However, in all attempts to define justice, one feature remains illuminatively striking: the debate on justice is one that reflects a disturbing tension between conflicting demands commonly claimed and what justice seeks to do is to draw a line between these demands through a measure that strikes a balance.

Therefore, to arrive at a meaningful conception of justice would require that we examine all possible rational classifications of justice; whether commutative, distributive, substantive or procedural. But in emphasising this requirement, we must not forget that the root of analysing justice, like all other analysises of virtues, begins with its content. Not far long ago, the utilitarians sought to show that defining justice is seen in the results of human conduct and postulated that justice means valuing human behaviour in terms of its effects. That which aims at producing the greatest possible sum of happiness is not only the best but also the just conduct.

This is because, the architects of utilitarianism thought that all human strives are for happiness and happiness itself is the absolute moral principle of conduct. So, to them the key to defining justice is in the general happiness of a given community. No body is entitled to anything either by conduct or otherwise, unless the same derives

happiness in those terms. This, as shall be seen later on, carries with it a lot of questions. In as much as justice is tended to be explained in terms of pleasure it then becomes a matter of subjective interests, whether geographically, conceptually or contextually.

More recently, modern theorists, like Rawls and Brian Barry have come forward and explained justice in rational terms - nothing new but a sort of backhanding on the old approach to defining justice. Besides these two, Honore's attempt to explain the always nagging question about justice goes along the same line and falls within the same critique: backhanding an old approach with nothing absolutely new in the new approach. Nevertheless, it is an illuminating adventure to analyze the theories that these people strive to present as an attempt to further explain the meaning of what justice is. Perhaps it would be more helpful for us to have a quick look at the principles of justice (Honorean style) and what they offer in defining justice before we go into a deep analysis of these theories.

Principles of Justice - The Honorean Stance

The Honorean Stance is that no single formula can display the meaning of the concept of justice, for it is illusionary to believe and imagine that a single formula of justice must exist before we can explain what is just or not. What are seen as principles of justice are but secondary aspects of justice. So, Honore puts forward the argument

that justice is a matter of equal claims to equal shares in all advantages which are commonly desired and which are conclusive to human welfare.[8] This seems to be the main principle through which justice can be explained. Because people are mainly equal in nature, this principle (of equal claims) therefore seems the only one that is just, for it leads to social stability. This is because such principle contains the requirement of affirmative discriminatory treatment in favour of the less privileged so as to bring people closer to equality with others. But the explanation of justice in these terms does not equate to a claim for equal treatment, for practically all people are greatly varied although such variation is not great enough to overshadow the argument for justice as claims to equal opportunity. That is, it is natural that people must have equal claims, but it is natural too that such claims may be dissimilar.

Along these lines, Honore attempts to define justice in social terms by putting up two propositions:

a) All people are entitled, both as human beings and from their conduct or choice, to have a claim to and an equal share in the advantages which are generally desired and which are conclusive to their wellbeing. This is the basic principle which explains justice as equal entitlement to basic needs.[9]

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8 A. M. Honore, `Social Justice' (1962) 8 *McGill Law Journal* 78.

9 Honore ibid. p. 78.

b) There is a limited set of factors which can justify departure from principles embodied in the basic principle. This provides the principles of discrimination which modify the claim that people are entitled to equal shares in all advantages.[10]

The principles of discrimination rotate around the choice and conduct of the claimant and are ideally realisable in securing equalisation through the secondary aspects of justice which are:

i) conformity to rule.[11]

ii) justice according to need.[12]

iii) justice according to merit or desert.[13]

iv) justice according to choice.[14]

v) justice according to special relations.[15]

vi) justice as restoration of status quo.[16]

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10 Ibid, p. 79.

11 Ibid, p. 82-6.

12 Ibid, p. 91-3.

13 Ibid, p. 86-91.

14 Ibid, p. 93-4.

15 Ibid, p. 81-2.

16 Ibid, p. 80-1.

These aspects of justice operate as exceptions to arguments of equal claims. Under the principle of conformity to the rule, justice is seen as a matter of leaving things as they are or maintaining the status quo. This makes justice pervade the regular and habitual conduct of affairs in a given society. When such habit changes then justice too will undergo change.

Conformity to rule, therefore, as an aspect of justice depends on the existence of regular practices which gives the impression to those affected that the rule (practice) ought to be adhered to. In the Honerean terms, conformity to rule manifests justice under the premise that: `expectations reasonably entertained ought to be respected and that there should be consistent treatment.' This is what reflects justice as a matter of treating everyone equally (by conforming to rules) through the maxim `treat like cases alike' - which simply means that people falling under the same prescriptions must be treated alike, not that cases alike in some other respect should be so treated. So to Honore it appears that conformity to rule as a matter of justice does not entail treating unlike[17] cases differently, albeit it equals to giving each his or her due. But Honore accepts the idea of conformity to rules as an element of social justice although he argues that the rules must not be unfair.[18]

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17 H.L.A. Hart disagrees and argues that treating unlike cases unlike is part of conformity to rule, or giving each their due. Honore sees this as only part of principles of discrimination and not part of the notion of justice. See A. M. Honore, `Social Justice' (1962) 8 *McGill Law Journal*, 83-6.

18 Ibid, p. 82 and 86.

Justice as a matter of restoring the status quo, Honore argues, is rectifying justice and makes no distinction between person and person, or person and state.[19] All that matters is restoring the identical thing transfigured, either in value or physical form. In essence, the justice according to restoring the status quo is only interested in restitution or restoring the original position and does not lead to a fair allocation of rewards. So in this way it perhaps appears just to invoke an eye for an eye without further inquiries.

Under the justice of special relations and that of choice, the pointer of justice has to be traced from particular situations. Under choice, justice is to be traced in voluntariness. We consider whether this treatment matches with a person's voluntary acts. Under special relations justice is restricted to obligations between close associations. Here people are not considered as person per se but as closely related members of society, e.g. father and child.

On justice as a matter of desert or merit, Honore argues that here the principle is in the allocation of rewards according to capacity and performance, be it actual or potential.[20] That is to say each is to be treated according to his or her conduct and ability. Good for good and evil for evil.

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19 Ibid, p. 80-1.

20 This is also how Aristotle sees justice from the angle of merit.

Justice as a matter of merit is therefore weighing reward in terms of proportion to conduct and ability as well as the act of being supplemented by priority among competing claims. Thus, where there are competing claims the principle of desert dictates that justice will be derived by giving prior right of entitlement to the person who has the highest merit.

Thus, under desert, justice is the fair treatment according to what one deserves. But this does not extend to demerits like punishment. The major problem of defining justice in these terms lies in how to determine merit and demerit and how to fix the levels of deserts to each.

Moreover, it is vital to note that the rules by which the principle of desert is to be applied must be just. Therefore, justice as a matter of desert, argues Honore, needs the aid of some other principle that can make it possible so as to have fair claims as members of society and not in singular form as such. This is because everyone deserves as little disadvantages and as much advantages as can be managed.[21]

Moreover, seen in distributive terms, the justice of deserts fails to have a wide spectrum of allocation of advantages and cannot sufficiently show how a fair allocation of residual surplus can be availed. For example, under justice as a matter of desert, how can we arrive at a fair conclusion of who deserves to live and who doesn't? Alternatively, if all deserve to live, how much of life should each deserve?

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21 A. M. Honore, 'Social Justice' (1962) 8 *McGill Law Journal* 91.

All in all, Honore sees desert as a principle of justice if approached from a broad view, but not so if tackled from a narrow perspective. It is a principle of justice because it is based on the argument that each has a right to entitlement according to his or her contribution in the society. It is not a principle of justice because it allocates rewards according to particular conduct or contribution and not considerations of humanity. This invariably brings in the requirement of justice according to need. Under this principle, considerations of merit or contribution and ability are outweighed by considerations of fundamental requirements of persons (need fulfilment) in defining justice.

That is why Honore argues that in understanding justice in this manner, the principle of need is more fundamental than that of merit.

> "It is more fundamental in the sense that it is held to out weigh the latter principle when those advantages which are of fundamental importance, that is, those which are most generally esteemed and are most conclusive to a full existence, are concerned, e.g. life, health, shelter and food."[22]

Thus, the claim of justice that derives from need requires entitlement of rights to the basic necessities to anybody who is in want of the same. This obliges others to contribute so as to relieve those in need. But need must be objective.[23]

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22 Ibid, p. 93.

23 Ibid, p. 92.

So, Honore argues that, like merit, need too, as a principle of justice, relies on the allocation of advantages and disadvantages. But here what matters most is the fundamental advantage which leads basic human survival and welfare. Basically, justice derived along the need principle resides in the fact that there are certain fundamental advantages which are generally desired and which if not provided will mean the end of existence and welfare to those that are desirous of the same.

Therefore, in the Honorean terms, justice according to need means that people must be entitled to claim those advantages which they objectively lack when seen to be in need. This need is limited in time and space but can be cited in anything that is essential for human existence and decent continuation of life.

Therefore, to determine what amounts to need; we have to see how much a thing is essential to human welfare and existence (life). The more indesipensible it is, the more it becomes a crucial aspect of justice that it's absence will mean to listen to a cry for justice.

So it appears truly sensible for Honore to consider, need, a corollary aspect of justice but it is misleading to judge what amounts to need in terms of merely what people commonly regard as desirable or what they generally think leads to welfare! This will make need elusively relative. Since need must be conceived in objective terms, it can therefore not be subjected to the majoritarian tide! In other respects, Honore also

argues that justice is within the confine of goods and advantages and that its essence is definable and could be found in equality of opportunity which require that:

> "Each man as man and not as member of society, has a prior claim to at least certain essential advantages and this entails a distribution or equalisation of at least certain advantages.[24]

This is because not all advantages can be availed to each and every individual, but once everyone is afforded equal opportunity to all advantages, then equity in distribution of advantages will ensue. Equality of opportunity manifests in giving each that which makes it possible to compete fairly in acquiring desired happiness. It does not mean acquiring the same facilities.

This means there ought to be equal claims for all in as far as means and facilities of acquiring available opportunities are concerned. This infers existence of an absolute postulate of justice only alterable through secondary aspects of social justice. Honore sums it in different style:

> "Each should have an equal claim to all advantage, subject to discrimination based on the principle of desert and equality of opportunity".[25]

So in a nutshell, Honore tells us that justice is a demand for equal entitlements and equal shares in advantages. This means that discrimination is intolerable unless it is used to modify the imbalance and reinforce the demand for equalisation of entitlement.

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[24] Ibid, p. 100.

[25] Ibid, p. 103.

This works along the secondary principle aspects of justice among which need appears to be by far the most influential for it operates under the premise that certain needs are prior to others and dictate that justice requires a reallocation and equalisation of advantages, so as to put each in the same position before any kind of discrimination is established.

Basically, justice concerns the balancing and equitable (fair) exchange of claims in a world of competing interests. This is the role, but what is the goal? I would venture to think that the answer to this lies in the desire to remove all arbitrary inequalities and the need to maintain a social order based on social wellbeing for all.

Justice can also be looked at from two angles: `justice as mutual advantage' and `justice as impartiality'. This is the view of Brian Barry. Justice as mutual advantage requires the recognition that humans are self-interested individuals who must depend on mutual co-operation to achieve a balanced order; while justice as impartially essentially means fairness in terms of what is generally acceptable to rational beings.[26]

Justice: A case of equalitarian and non equalitarian approaches

Equalitarianists approach justice from the presumption principle of equality. Under this we find Aristotle's dictum: "Treat equal cases equally and unequal cases

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26 See W. Nelson's review of Brian Barry's *Theories of Justice* in `Theories of Justice' (1992) 101 *The Philosophical Review.*

unequally". In it too lies divine arguments of justice based on a view of human equality. Since equalitarian approaches to justice are based on a presumption of human equality their argument is that justice is in treating people with exact equality. This principle works along two premises:

1) Treat all as equals

2) Unless and until there are good reasons to justify a departure from equal treatment.

This means that under equalitarian principle, justice should be perceived as the art of viewing individuals from the outset as equals and not entertaining any differentiations whatsoever until sound reasons come into play to dictate otherwise. But Aristotelian equalitarianism is different. For him there is a pre-existing presumption that individuals are alike and different and therefore the just principle is that which categories them into two:

> Treating some (equals) equally and others (the unlike) differently, i.e. unequally.

Feinburg explains that the equalitarian principle ought to operate on the premise that every basis of its approach needs justification. That is:

> Both the departure from treating (seemingly) like people as such and, the departure from treating unequally, people who seem or are alike,

> need material justification or else justice fails to exist in the sense of equality.[27]

Basically, equalitarianism works on the basis that people possess certain traits which group them in certain categories that require similar or dissimilar approach to how they are to be treated. This has been termed a presumptive basis.

> "The presumption in favour of equal treatment holds when the individuals involved are believed, assumed or expected to be equal in the relevant respects, whereas the presumption in favour of unequal treatment holds when the individuals involved are expected to be different in the relevant respects".[28]

This is very true, but it doesn't hold for all equalitarian approaches to justice. For instance Islam is one of those divine religions that tackle the question of justice from an equalitarian principle but Islam does not hold much on the relevant aspects of like or unlike. Equalitarianism in Islam, as we shall see, revolves around uniformity of presumptive principles.

Equalitarianism, as a principle of social justice, has its core or roots in the belief in the idea of perfect equality. This in turn is based on the belief that the very nature and characteristics of human beings demand that justice be seen as that which maintains, reinforces or preserves the equality of people. Again this argument is most acceptable in divine or religious theories of justice. However, in Aristotle's justice of proportionate equality, we cannot live the strict (in the true sense of the word)

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27 Feinburg J. *Social Philosophy* (1973), pp. 100-1.

28 Ibid, p. 101.

equalitarian principle of justice as some scholars have postulated.[29] For in Aristotelanism, it is not so much the humanity of mankind that counts but its status or category.

Strictly, equalitarianism, if given its true meaning, requires that there be absolute equality of treatment. This is what and how the equalitarian principle of justice is relevant to the concept of justice. But strict equalitarianism on its own will make discussions on justice impossible to ascertain. After all, just as we presume and see that people are equal in nature and characteristics, so we can also assume that they are different too. This can be in either their characteristics or mannerisms.

With this in view, equalitarian principles then need to adjust from the strict stance and move to moderation. This relieves the problem of justice for then we can define justice under equalitarian principles but with room for the categorisation of people's natures and characteristics. This is what accommodates the Aristotelian `desert principle' within the equalitarian principle of justice. But even under moderate equalitarianism, justice still remains restricted to assumptions of a single equality. This further demands that justice be defined under numerous principles and not through a sole basic principle of equality.

Take for example, a case where there are some handicapped individuals and some normal (unhandicapped) persons. The principle of absolute equality will not define

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[29] Ibid, p. 109.

justice here without causing harm. Neither can we say that moderate equalitarianism will solve the problem. For if we are to say that let us apply the dictum: treat like cases alike and unlike cases unlike; what if among the unlike (the handicapped) are further differences which are singularly unique? Even among the like cases such differences may exist. There are many criteria of classifying people and it seems wrong to argue that under the doctrine of classification of people into equals and unequals justice will be done. This is because among every single group of people there are infinite differences and similarities.

Thus, individuals have unique biological, social and psychological differences which dictate that, although equality is a basic principle of justice, it is not the only vital principle. All people share much in common with others but some are stronger, hard working individuals, while others are lazy and idle, yet some may be hard working and lucky and others hard working and unlucky such as those business persons who happen to have natural disasters, etc.[30]

These reasons bring us to the second principle of justice; which is the non-equalitarian principle. Under this principle justice can be defined in terms of merit and need. The latter involves lesser component principles and unlike the former cannot be extended to include such aspects as ability, effort, achievement, etc.

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30 Feinburg, Opt. cit. p. 117.

That is, need is a description of the absence of natural necessities which everyone ought to have, while merit presupposes the absence of a corresponding entitlement resulting from people's inputs or conduct. But under strict equalitarianism, the concept of need is not a principle of justice, for, strict-equalitarianism presupposes absolute similarity of individuals.

Yet the concept of need mandates that some people may be entitled to more allocations than others; so as to do away with the distinction between the haves and have nots. And I think it is because of this requirement, that need as a concept can be used to rectify the pitfalls of strict equalitarianism. This is one way in which need can be considered part of the principles of equalitarian justice. The other way is where we understand need as a matter so essential to human existence that its absence means material harm to those who lack it.[31] In this case also, need will be used as a principle of justice by treating individuals differently in accordance to what they lack so as to bring them in line with those others who have it. Eventually, by evening the haves and have nots, the concept of need then becomes a principles of equalitarian justice.

Therefore, Feinburg is right to say that:

> " ... to distribute goods in proportion to basic needs is not really to depart from a standard of equality, but rather to bring those with some greater initial burden of deficit up to the same level as their fellows".[32]

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31 Also see Feinburg, ibid, p. 111.

32 Feinburg, opt. cit., p. 111.

This is where we can align with Feinburg for here his argument is that there are certain basic needs that are present in all (normal) human beings which means that in this regard all are equal and the basic approach to justice would be the equalitarian application of (basic) needs.[33] Effort and contribution are closely related aspects of the non-equalitarian principle of justice. This is because in one way or the other, they all attempt to define justice under the concept of merit. It all depends on what we understand by the concept of merit.

For Feinburg, merit is separable from the other two principles of equalitarianism. This is because, he argues, merit unlike effort and contribution, defines justice according to what a person is instead of what he or she does.[34] I find this puzzling, for, the two major features of merit are the skills and virtues a person carries, yet we cannot merit or demerit a person unless he or she expresses the skills and virtues he or she possesses.

Thus, having skills or virtues per se does not determine where one falls, for it matters most what he or she does with them (particularly the skills). Then it follows that merit is inevitably intertwined with effort and contribution. Moreover, as Feinburg hints: as a matter of illustration no justice can be defined through that which punishes people

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33 Feinburg divides needs into natural and artificial. The former are natural human necessities and the latter are all those needs imparted in people by their surroundings or by up-bringing. This (artificial needs) perhaps appears, in the Feinburg's view to fall in the non-equalitarian camp.

34 Feinburg, op. cit., pp. 114-6.

for what they are instead of what they do![35] We cannot consider a matter of merit, having certain natural traits as just or unjust -such traits must be put into material application before being entitled to the appellation.[36]

Thus contribution and effort come into play. According to Feinburg, contribution is not a principle of mere desert but works along the lines of commutative justice effecting proportionate returns. Put in marxist arguments, it is a principle which defines justice in terms of abilities.[37] For example, in a situation of equal abilities those who do more or better will get better and more entitlements. But in a situation of uneven abilities, each will be treated according to how far his or her capacities can reach. It means, that none will be given a burden beyond what his or her capacities can bear and none will receive rewards beyond what his or her real needs are. Thus, broadly, contribution as a mini principle of equality should be seen in such a way in which everyone's effort (contribution) is weighed as part and parcel of the resultant aggregate which all share. In this regard, need will be added to contribution in matters of distributive justice.

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35 Ibid, p. 113.

36 However, merit can be used to define justice in terms of allocation of dues. Here Feinburg's interpretation of merit holds. This is because according to meritocracy each has his or her position. So those with certain skills and virtues, for example, are entitled to what is theirs in that regard, as opposed to their counterparts.

37 Feinburg op cit. pp. 114-6.

This is under the argument that if we only consider contribution without need - then ultimately there will be no contribution at all, for the contributors have needs crucial to sustain their ability to contribute. Effort as a principle of justice works under the basis of individual toil. One would merit the rewards and burdens according to one's toil. However, as Feinburg rightly argues, the principle of effort like that of contribution cannot afford a broad approach to defining justice, for it falls short of fair play and fair opportunity. This is because there are those who for causes not of their own making, cannot just toil or contribute even if they desire to do so.[38] This further seeks the mini principle of need. Nevertheless, altogether it ought to be seen that basically non-equalitarian, the need principle, is crucial to all approaches to a definition of justice, be they perfect equalitarian approaches or strict non-equalitarian approaches. On either side, there has got to be a mediating aspect before an absolute definition of justice is attempted.

Generally, to embark on a definition of justice we must give a strong consideration to the question of rights in our midst and rights outside. In simple language it means adopting some sort of a Kantian approach: Considering your rights and those of others, but this entails and means putting yourself in others' shoes without forgetting your own. Then the principles cardinal to a definition of justice are in the resultant conduct that emerges from this approach. It is a conduct that is guided by the objective right.

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[38] Ibid, p. 117.

This means that to define justice is a question of considering the meaning of objective conduct. That is, when one deals with issues concerning appropriate right conduct. It is that conduct which watches over and stands between competing needs, desires, efforts, etc. and rewards each in accordance to the objective right. It is this that determines which issues are to be considered most and with what emphasis.

Justice must therefore be discussed under realistic terms for that is what it is: A real value aimed at real issues for real beings. So justice is not something imaginable and therefore it always fails to be conceived in things unattainable or models incapable of being translated into reality.

Justice and the concept of rights.

Here justice can be defined in three ways: as redistributive, as restoration and as intervention. However, generally, the concept of rights introduces the idea that justice is respecting what is ours as well as what is others'. That is to say, we need to understand and accept the mutual intersection of entitlements. This prima facie postulates justice as a matter of dues; giving each what they deserve or what is theirs. However, on a deeper examination, this concept also introduces the idea of an external warden who always stands between claims so as to establish, maintain and define the dues of each. This warden is in terms of an ideal law or ideal social system that oversees the functioning of entitlements. This then is what connects law to justice as

it also does between government and justice. That is, the ideal law under ideal social systems, ensures that each is given his or her entitlements and treated justly. These ideal social systems are the perfect government of social justice.

Justice as redistribution means bringing back the exclusive rights of individuals or group of individuals. Defined in substantive terms, this equates justice with restoration. To borrow de Jouvenel's model it is a justice that can be illustrated in the claim: This is peter's (peter lacks it) give it to him.[39] Here `Peter lacks it' signifies deprivation and not need based justice. Otherwise, in justice as rights or entitlement, it may not matter whether persons crave for what is theirs or not. In any case, what is his or hers, belongs to him or her and must be given to him or her.

However, under the same illustration we can say; this is Peter's but peter unnecessarily has it (does not need it). John lacks it, give it to him (John). This introduces justice as lawful intervention. As lawful intervention justice is thus a need-based social concept which still works upon giving each their dues, the dues being compartmentalised into societal dues and individual dues. Thus, on the face of it, justice as a matter of rights is to accord each what is theirs, but deep inside, humanity or society also has dues and it is here that justice stops to operate along a single principle and admits of many others such as need, effort, merit, welfare, etc.

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39 De Jouvenel, *Sovereignty. An Inquiry into the political good* (2nd ed., Chicago: The University of Chicago Press 1959), 141.

Justice and the idea of social perfection

Here the concept of justice operates under the premise that we need to align it with the `ought'. In questions about justice therefore, instead of asking `what is' we ask `what ought to be'. This means that justice is an already pre-existing order of things and how they ought to be. Adjusting things to this ought is what creates the ideal (perfect) social order; which in effect is a state of perfecting existing social arrangements to the ought. In this, everything is catered for in its entirety as well as in its particularity.

It is thus important to construe justice not just as part of social perfection but the perfection itself, for its sole concern is about "repulsion of discord" and the restoration of perfect order. This is what makes it an ideal and objective equilibrium. However, such an equilibrium does not exist unless there are perfect conditions upon which its functions are guided. This again is what relates justice to a state of action according to law if at all the law is perfect and not merely positive in nature.

The theological standpoint is that the law in this regard must command faith and belief in its entirely. Then it becomes clear to see why all theologians agree to the postulates that what is just is that which accords to God's commandments and what is unjust is that which contradicts these commandments. The philosophical and the juristic standpoint is also uniquely related to this. For (secular) philosophers and jurists who may not be believers in religion as such, also accept the postulate that there is something in the law which makes justice discoverable.

We see then, that justice as conformity to the law has many followers and is very relative. However, it is most stable in the theological conceptions, for here justice does not change according to circumstances, but rather, the opposite happens: circumstances change in tune to the law.[40] This is the real justice as conformity to the law. This is because in theology, particularly Islamic theology, the law is constant and therefore justice as conformity to the law is always known and predictable. Otherwise justice as a matter of rational exertion alone is not in line with perfection for reason changes with circumstances and therefore cannot postulate the ideal in isolation of other relevant factors and circumstances.

Justice as a relative and emotional feeling

Justice as a feeling is both universal and rational as well as emotional inclinations to the subjective good. In this latter sense it becomes a relative and diverse conception. However, generally justice as relativity, is both objective and subjective. This means that justice is having an objectively common stand on common issues, for all beings are commonly similar in feeling. But it also means standing in different positions given varied circumstances.

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[40] This counter argues the notion of the positivistic basis of defining justice. For when it is identified with positive law then it becomes the law and not justice as such. After all, what is law today may become illegal tomorrow and so justice too becomes elusively difficult to define. This is how justice as conformity to positive law fails to fit in the approach to the issue through a perfectionist conception of justice.

It makes a single concept in principle, but one which varies in application. That is why justice is a relative feeling, sense, or arrangement of things, etc. It does not mean that justice exists in different people differently, depending on their emotions, for then a billion people will have a billion conceptions of justice and a thousand people a thousand conceptions, etc. This makes it impossible to find justice.

Justice, entitlement, liberty and desert

Defining justice in terms of entitlement presupposes the existence of rights and therefore demands that it is in a conception which takes rights seriously. This resides in intertwining distinct and shared rights between individuals and society. Justice as entitlement however requires and again presupposes a law (whether written, or otherwise) which determines what is due and how it is applied. In other words, entitlement is "justice displayed by the law but not limited to the law".[41] That is, it relies on the existence of the law or general rules of behaviour for its application.

Justice as entitlement extracts principles of justice in terms of a rights conception and in this way relates to a conception of deserts. This in essence means that to explain justice through an entitlement premise, we have to look at justice as that which gives rightful dues of each and everyone. In other words, it means that justice as entitlement dictates that which one is allocated by certain outside prescription.

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41 Thomas Morawetz, *Justice, The International Library of Essays in Law and Legal Theory, School 2*, (Dartmouth: Dartmouth publishing Company Ltd 1991), 36.

This means that there is only a thin distinction between justice as desert and justice as entitlement.[42] For the latter, in deriving justice, governs the former. Thus in so far as justice is concerned, desert only differs from entitlement because desert includes a prescription which stems from the inner or basic unique characteristics of a person. But even here entitlement comes in, for these two contain certain aspects of justice such as rights.

It can also be argued that in defining justice, desert and entitlement should be seen as opposite sides of the same coin. This is because, while entitlement examines justice by assigning rewards only, desert goes further and explains justice by both positive and negative assignments to the individual, state or group of persons. For example, in everyday language we say; they deserve the rewards, or are entitled to the rewards, but one cannot say that they are entitled to the burdens or entitled to punishment as one would say that they deserve the burdens or the punishment. It is here that the (thin) distinction occurs. For desert unlike entitlement, signifies a contribution that is attached to a moral responsibility. It is more associated with both merit and demerit which extends also to general character and achievement than entitlement does.[43] In justice, entitlement then is limited to advantages while desert extends to

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[42] Professor Weinreb argues that there is a distinction between desert and entitlement, on the basis that the latter arises from a rule while the former arises from moral responsibility. But viewed from a wider perspective, entitlement too arises from responsibility, just as desert can arise from a rule. This is more vivid through theological conceptions. For example all revealed religions agree that when one is responsible in the way he or she conducts himself or herself, then he or she is entitled to a good life in this world and hereafter.

[43] Morawetz, op. cit. p. 45.

both advantages and disadvantages. This means that unlike in desert, justice in entitlement is only a positive claim.

Under the concept of right, justice can also be discussed as that which determines entitlement and desert. What one deserves and what one is entitled to are what we point to as aspects of justice - but these can exist without the concept of right. So we normally ask before entitlement and desert, whether it is right to entitle such and such or deserve this or that. This is what makes justice a complex moral question which exhausts morality itself for anything moral cannot be unjust.[44]

As for liberty, it means a prescription of dues and entitlements. For example, to say that one is to do or enjoy what they are entitled to is signifying a liberty and also to say that one is to be what they deserve to be is a signification of liberty too. Thus justice as liberty does not mean a state of unrestricted will to do whatever one desires. This is because justice presupposes a harmony and such a conception of liberty creates discord. Thus, while in defining justice, entitlement and desert are central principles, liberty can only be so if conceived in a way fixed to its basics. On the whole, true justice is derived from that which strikes a harmony between the relevant principles of justice -it is some sort of a complex unity of conflicting questions. It means combining desert with entitlement, liberty with equality, need with merit, and freedom with responsibility, etc.

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[44] Weinreb holds a contrary view on the basis that a lack of morality does not infer a corresponding lack of justice (Morawetz, ibid, p. 38-45).

For this way, principles of justice direct us towards an objective conception of justice. This is the concrete approach in which there is no preference for one principle to the other, for all are collectively and objectively required to the discovering of justice. Therefore, it goes without saying that an introduction to the idea of justice presupposes existence of objective principles of justice.

Justice and the conception of the good

In defining justice, it becomes inevitable that one has to argue the meaning of what justice is in terms of what is good. This combines both the individualistic conception of justice with communitarian conceptions as well as the meritorious conceptions of justice with the equalitarian conceptions. And it unites the abstract with the practical, for justice requires a symbiosis of both. This makes justice both a means and an end, the latter being the theoretical good aimed at by the individual and the public, while the former remains the practical method that attains this (end as the) good.

But, it would be wrong to argue that justice stems from specific circumstances of discord in society, for this commits conceptions of justice only to the primary ends of the general public. There are those who would (like Rawls) oppose this argument because of the belief that justice is fundamentally private and resides in a consensus on equal liberties. This is wrong. Elsewhere, it can be argued that since humanbeings have both individualistic and social characteristics, it is only possible to derive justice

from the conception of the good based on a symbiosis of both people's natures as individuals and their natures as a community.[45] Thus, all those theorists like Rawls who in wholesale, neglect the conception of people's nature, also neglect the conception of the good which is so indispensable to finding justice.

In defining justice vis-a-vis the conception of the good, many other correlatives such as law and reason come into view. However, they are relevant to defining justice not to legitimising postulates of it. This is where an examination of the ideas of Plato, Aristotle and Rawls, or in a word, classical and modern theorists, should be related to justice as the good. Classical philosophies, particularly those of Plato and Aristotle, hold a conception of the good but this is overshadowed by the fact that they presuppose existence of political states and positive law to legitimize what is good vis-a-vis what is justice. The reverse ought to be the better approach that can derive a real, and true meaning of justice in the good. On the other hand, modern philosophers such as Rawls and Sandel, rely heavily on reason alone and thus also overshadow the controlling conception of the good, thereby subjecting justice to the authority of reason. Here too, justice ought to be merely a derivative of reason.

Thus when philosophers neglect reason or law, emphasising one above the other they in effect end up neglecting the conception of the good and thus miss the real chariot of justice. For justice demands that there be a unity of all conflicting demands and approaches or methods in terms of the good. Knowing the good then becomes

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[45] See Harold Berman's argument which is relatively similar to this standpoint see Morawetz T. *Justice* op. cit. pp. 92-3.

knowing the just. For the good is also in terms of the law and in terms of reason as well as in terms of the individual and in terms of the public; which in essence means that it is in reference to the particular as well as the general, etc, with the absolute aim of attaining good in itself as a goal.

And, it can also be suggested that justice will not be understood until we adopt a historical consideration of the idea of what it entails. But, the major dilemma here is how are we going to answer the questions: whose history? and what history?[46] True it is, that in answering these questions we derive a whole range of conceptions of justice; but don't they lead us to far more relativity than the idea of the good vis-a-vis what justice requires? For example, ancient theories are in the ancient history of ideas and modern theories are in the modern. But there is the terse intervening between these two eras, this is where lies the history of religions.[47] Those who argue that justice is merely part of the good, and is not an all embracing or comprehensive vision of the good, are actually confusing justice with virtue.[48]

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46 See also Thomas Morawetz, (ed)., *Justice. The International Library of Essays in Law and Legal Theory, School 2*. opt. cit. p. 97-99.

47 For a historical analysis of justice see Harold Berman in Thomas Morawetz, *Justice* op. cit., p. 92-117.

48 Rawls is one of the chief advocates of this argument; but his inclination to this is overthrown by his agreement to the contention that justice entails a balance of competing claims (see Rawls, *A Theory of Justice*, 1971, p. 306).

CHAPTER II

THEORIES OF JUSTICE

Modern theory starts in the 16th century and 18th century. The central issue that distinguishes it from classical theory is the relation of justice to liberty, freedom, equality and human rights. These, particularly the first three, were hinted on by classical writers. But they come out most prominently in the justice of modern theories. For example, without the concept of equality, Aristotle's justice cannot be discussed. But similarly, without equality and fairness, justice in the modern sense too cannot be discussed either.

Basically what unites classical theories of justice with those of modern times is the degree of the use of reason and such concepts as equality and inequality in the approach to defining justice. The same degree can be used as an issue of distinction between the two sets of theories. Between classical and religious theories of justice, the common factor is the conceptualisation of justice as an ideal. The main concepts which are commonly used here are: legality, nature or naturalism, reason and metaphysics.

However, the prominence of reason is not so much a unifying or identifying factor in the relationship of religious (divine) justice and classical justice, as can be seen between the religious and modern conceptions of justice. The keynote here is that

the way reason or rationality is used in both modern and religious conceptions is fundamentally distinct. In religious theories of justice, reason is limited by the power of metaphysics, while in modern theories this is fundamentally absent.

There is also the consideration of justice as a matter of rights and the wellbeing of all humans. This exists in both modern and classical theories as well as religious ones. But here too, it is in modern theories that we distinctly see a stronger idea of justice as rights and wellbeing. Perhaps it is in the religious approach that there is some similarity of emphasis. The nascent or current modern theories are now at the helm of any debate on justice. However, the attention that current theories hold, has its roots and anchorage in the provoking wisdom of ancient theories.

CLASSICAL THEORY.

Plato (427 - 347 BC)

Plato's justice lies in the virtue of morality. In his `Dialogues', he asserts that justice is the highest moral virtue discoverable only in an ideal society. This invariably postulates that to derive justice, we have to find an ideal society. He then defines an ideal society as that in which everything is placed in its natural proper place of occupation.[1]

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1 *Plato's Republic* II p. 341 and IV p. 433 (Buchanan (ed), *The Portable Plato*, Auckland: The Viking Press 1976).

Therefore, Platonian justice aims at preserving the status quo by placing everyone in their natural place: "A man should do his work in the station of life to which he is called by his capacities".[2]

This calls into play the enforcement of a class system based on (natural) abilities and not accident of birth. Those naturally destined to be what they are, should remain as such. Lawyers, or teachers, etc. should remain as such. This, in Plato's conception, is justice because doing so will maintain an ordered society in which everyone performs his or her natural role.[3] Since everyone is assigned a duty by nature, performance of roles would be obeying natural laws and hence doing justice.

Here, Plato like Aristotle does not question whether all `natural laws' are just laws and thus seems to equate justice to law though in different words. Hence, Plato's sense of justice resides in the maintenance of the inequalities of nature as seen in people's unequal abilities.

In simple terms, what Plato does is to search for justice via the mirror of an ideal society. Therefore, in a just society everyone is where they are fatted and fitted by their natural capacities. Plato arrives at this conclusion because his justice is based on promotion of an amicable society and he thinks that by placing each where he or she fits, peaceful co-existence will prevail and hence forth justice will be attained.

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2 Ibid IV, p. 435.

3 Ibid IV p. 435.

Thus, his justice can be compared to an aristocracy or feudalism with the only distinction being that Plato does not accept placement of people according to birth.[4]

Like Aristotle, Plato too has been blamed for not giving room to considerations of need, freedom, liberty and benevolence in his conception of justice. He asserts that justice is a moral virtue but neither does he give a conclusive definition of morality nor is he willing to accept that morality as a virtue includes feelings of sympathy and benevolence.

His positive contribution and credit can perhaps be found in his realisation of justice as a supreme virtue. But this is blurred as soon as he asserts that justice cannot be explained rationally and that it resides in the law of natural inequalities of people's capacities. In a nutshell, Plato's justice can be stated as a postulate which advocates that everyone should stay in her or his own natural position. And that such position is determined by placing people where their capacities suit them best.

Aristotle (384 - 322 BC)

Aristotle put forward a rationalistic definition of justice by analysing his division of justice into commutative and distributive justice. Distributive justice concerns the way allocation of shares or rewards (benefits and burdens) is conducted and commutative refers to a restoration of a disturbed equilibrium.

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[4] Ibid, p. 185.

His theory is based on the principle of desert which is rooted in the belief that people should be treated according to merit. That is, giving each his or her due. He thus looks at justice as a moving equilibrium through which competing demands are balanced.

Basically, he defines justice by equating it to that which conforms to the law.[5] So, to him, justice is in what is lawful. This is what he calls general justice or righteousness.[6] So, to him, what is lawful is that which is prescribed by the law and obeying the law means deriving justice. This is perhaps because he believes the law is the unwritten custom and hence its content is the province of Justice.

In the distribution of honours and burdens, he advocates proportionate equality as the rule by which justice is derived among competing claims. This means that people are to be rewarded according to the principle of desert: each to be treated in accordance with his or her natural position. He thus believes in both equality and proportionate treatment under the Maxim: Treat like cases alike and unlike cases differently. Thus, Aristotle would oppose George Orwell's contention that `all animals are equal' but he would (I think) agree, in the assertion that `some animals are more equal than others'. So on this ground, he would reaffirm his maxim in the treatment between slave and

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5 Aristotle, *Nichomachean Ethics* V(I), at 172 (Thomson J. K. Trans. 1953). If Aristotle were asked to analyze Socrates' position in deciding to drink the poison cup, I think that under this premise, he would consider such action as an act of justice.

6 Ibid. V(I), p. 172-174. He also looks at justice as particular justice in the sense that it concerns balancing competing demands.

master, rich and poor, or man and woman, by distributing resources according to desert. In corrective justice, he believes that justice is derived by restoring natural equilibrium through equal retribution before the law.[7]

His greatest credit appears to lie in his divisions of justice. By dividing justice into distributive and commutative justice, Aristotle helped clear the way for further discovery of what justice entails. Also, in his `logic', he rightly construed the world as a totality of nature of which mankind is part. Hence he set up the necessary categorisation of justice into natural and conventional classifications which facilitate us with a universal and comprehensive conception of justice.

However, his major theory is not without faults. By strictly limiting the distribution of honours and burdens to the principle of merit, Aristotle neglects need based factors and questions of morality which are so vital to justice. Treating equals equally does not always correspond to the doing of justice. Moreover, he overemphasises the idea of `treatment' which as a matter of form (only) blurs the real idea (content) of justice. For example, it can be argued that equal opportunity of representation in a court of law amounts to equal treatment before the law. But does that mean that the law itself is just? What if the judgment itself is unjust? Thus, by looking at equal treatment as the essential element of justice, he, in this regard subjects justice to mere conformity to rules of law. The unfortunate result from his theory is that people will invoke

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[7] Ibid V(iii), p. 176, (iv).

dictates of invalid or unjust laws in the name of justice. His conception of justice thus completely neglects questions of morality.

Therefore, Aristotle ought to have equally emphasised both formal and substantive justice as inseparable elements of any rational definition of justice. This is because the formal element is the means by which substantive justice is attained. Formal justice stands for impartial treatment, while substantive justice stands as the guiding standard that determines what direction this treatment is to follow. The absence of an operative marriage of these two will render any definition of justice a stagnant application.

On the question of desert, Aristotle held that each is to receive according to their due, but he makes no attempt to define how much amounts to desert. How much is each person's due or how are we to measure what quantity amounts to one's due? Moreover, there is no agreement on what constitutes merit. To some, it is a matter of contribution. To others, it is a question of talent. Indeed (defining) merit is too relative to be used as a yardstick of justice and even if it were to be non relative, it is still an inadequate way to define justice because it is restrictive, where as justice demands comprehensive apprehension.

Thus, by emphasising the equation of justice to questions of merit and conformity with the law, Aristotle failed to realise the need to balance the `is' with the `ought' as an object of justice. Subsequently, he failed to realise that questions of justice cannot be

answered by simply emphasising equal treatment based on group categories. Even among equals, unequal treatment may be the best way to derive justice.

MODERN THEORIES

David Hume (1711 - 76)

Hume advanced a theory of justice based on an analysis of the nature of virtue.[8] He says that justice is that virtue which is contained in the ability to respect conventional rights to property. Thus, to him justice is no more than respect of the unchangeable, but conventionally established rules of entitlement to that which one possesses.

This means that his concept of justice rotates around property and rights to entitlement without which no questions of justice would arise, i.e. if there were no property claims - no claims of justice would arise. For Hume, rules of justice are, therefore, mere ascriptions to possession of material wealth. Hence, justice is conformity to this dictate of ascription.

His equation of justice to rights to property is rooted in the belief that there is a natural relationship of human beings to material wealth which dictates that justice means

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8 Hume. D. *A Treatise of Human Nature* III(2). P. 483-4 (Selby-Biggie L.A (ed) Oxford: Clarendon Press 1960).

respect of people's rights to the property possessed by them. However, he also believes that we allocate property in the ways we do because of the utility of those ways. This adds a utilitarian flavour to his theory of justice. Hume says that a person's property is that which "the rules" give him or her alone a right to use. In determining the rules, `we must have recourse to statutes, customs, precedents, analogies, and a hundred other circumstances.[9]

In section three of *The Enquiry*, Hume argues that public utility is the sole reason why justice is a virtue. He reinforces this argument by imagining various circumstances in which justice would not be of any use and thus concludes that in such situations justice would not exist because there would be no need for it. One such circumstance is where there is so much benevolence that people feel no more concern for their own interests than they do for others.[10]

As a virtue, justice, in Hume's theory is an artificial virtue contained in principles governing human action and its origin is rooted in conventional rules of practice.[11] This makes Hume accept the contention that justice is that which gives each his or her due. In fact, he does say that justice is to be defined as `a constant and perfectual will of giving everyone his due'. This essentially means: `give each man that which the conventions demand that he be given.' Thus, in his justice, there is no such thing as

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9 Harrison, J., *Hume's Theory of Justice*, 1981, p. 284.

10 Ibid, p. 284.

11 Hume, *An Enquiry Concerning the principle of morals*, 1983, p. 204.

benevolence or the natural inspiration to be just since to him, justice is a matter of traditional establishments.

Therefore, Hume defines justice through the description of an individual in relation to a present right to property ascribed by established possession. In the *Enquiry*, he assembles eight situations which make justice necessary and unnecessary. Two such situations will be examined here - viz: that absolute security and unlimited supply of goods, and that abundance of human feelings for each other (absolute benevolence) make justice unnecessary. So Hume thinks that there is no need for (rules of) justice in a society where there is absolute scarcity or absolute abundance because no good will come from such rules. This is a fallacy. Even if people were so necessitous as inevitably to perish of starvation and thirst (for instance, as seen today in Somalia, the Sudan and Bangladesh), rules of justice would be necessary in order to ensure that at the very least, they perished in an orderly way.[12]

Moreover, whether in abundance or scarcity, we still require justice to govern society so as to ensure just entitlement and avoid the abuse of rights. Afterall, justice is not only about property, that is why Hume's rejection of benevolence is untenable. Hume's credit lies in his emphasis on justice as a supreme virtue without which no stable society can exist.

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[12] See also Harrison, op. cit., p. 266.

> "Without justice, society must immediately dissolve and everyone must go into that savage and solitary condition, which is worse than the worst situation that can possibly be supposed in society".[13]

His strongest weakness is in his insistence that justice is identifiable with established possession and in his restriction of the meaning of justice to a respect for entitlement (rights) to property.

Hume thinks that justice is fixed by human conventions. In the *Treatise* he seems to believe that the law mentions only general considerations, and that rules too mention general consideration,[14] and then insists (in the *Enquiry* and also in the *Treatise*) that for justice to reign, society must follow rules of convention and that it does not matter what sort of rules they are. So is he asserting that justice is following the law without questioning whether the law is just? I think so!

So for Hume then, justice is in convention and injustice in their breach.[15] In this vein, he believes that all value judgments are in some way tied to the rules of conventions. So what is right and permissible resides in what is conventional? But he ironically approves of prudence also and says thus: "Every man may ... provide himself the means which prudence can dictate".[16] However, it can be observed that it is not prudent to follow conventions, not withstanding anything else.

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13 Hume D. *A Treatise of Human Nature*. Op. cit., II, p. 202.

14 Harrison J, op. cit., pp. 288-9.

15 David Hume. *An Enquiry Concerning the principles of morals*, 1983, p. 311.

16 Ibid, p. 186.

Hume's rules of Justice

Hume arrives at five rules of justice which he says are at the core of the virtue of justice, because it is these rules that stabilise property. These are possession, occupation, prescription, accession and succession.

Present possession, occupation and prescription

According to this rule, Hume says that in a perfect property system, justice is derived through the postulate: each has a right over that property which he or she is found to be in possession of. The rule of occupation operates through original possession.[17] By tracing the original possession through a chain of possessors, we can arrive at the rule of prescription which prescribes just entitlement under possession.

It is by tracing the original possessor that we can prescribe who is entitled to the presently possessed property. In essence, everything revolves around the circle of possession. In this way, Hume tries to fight critics who charge that his rule of present possession permits thieves and fraudulent possessors to own property through illegality.

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[17] David Miller op. cit., p. 163. Here Miller argues that this rule contradicts that of prescription.

Access

This rule gives just entitlement by attaching property to all its correlative results. That is, it gives rights in regard to what is directly or ultimately attached to the property presently possessed. For example, one in possession of a slave, automatically has just entitlement to the child of this slave! Or one who is found to be in possession of a piece of land is entitled to all its products.

This rule poses thought provoking debate on issues like those involving squatters found to be in (established) possession of public land rich in minerals. Who is to own the minerals? - the public or the squatter found in possession? I venture to think that Hume in such circumstances would give everything to the possessing squatter, unless original possession is traceable in someone else, for he would argue that:

> "We acquire the property of objects, by possession, when they are connected in an ultimate manner with objects that are already our property, and at the same time inferior to them. Thus, the fruits of our gardens, the offspring to our cattle and the work of our slaves, are all of them esteemed our property, even before possession."[18]

Succession

This rule postulates the idea that just entitlement evolves from parent to progeny. That is, each has a right to possess that property which accrues to him or her by virtue of

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[18] Hume, D. *A Treatise of Human Nature*. Op. cit., III(2), p. 509.

birth. This would seem intolerable to Plato whose justice maintains status quo based on natural capacities and not accident of birth.

However, this rule is rational in as far as inheritance laws are concerned, but it fails to tell us exactly what measures we are to follow in allocation of property among many children with similar claims to property of the same parent. This rule, like classical theories of justice, also has the unfortunate effect of neglecting concepts of need in the distribution of property and gives no chance to parental or deceased's will in the law of inheritance.

Application of his theory and rules

Hume's theory relies on the contention that, the substance of justice is in self love and can best be advanced through the furtherance of individual interests. He illuminates this idea when he contends that it harms a person more to be disposed of that which was for so long under his or her possession than it would benefit the true owner who never had (physical) possession of the property.[19]

Thus, possession has been construed by Hume in such absurd terms that blur the distinctions between justice and injustice. After all, possession per se, will not rule out the existence of illegality even where original possession is traced. The only traceable original possessor, may well be the very illegal occupant!

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[19] Ibid III(2) p. 501-8.

Moreover, the concept of original possession gives invalid claims to squatters and postulates an unjust estoppel to true owners who may have lost touch with their property through faults which are not of their own making. Basically, Hume's theory of justice cannot be wholly applied except in the world of imperfections, full of scarcity but not that of abundance.

In fact, Hume asserts that in a world of absolute abundance, there is no need for justice. So, his justice is rooted in the need to deal with problems of scarcity and the need to stabilise property. This is achievable by relating justice to a person's habitual reliance on social conventions, restricting individuals to fixed rules of distribution of entitlements.

Here, like positivist and classical theorists such as Aristotle, Hume fails to realise that restricting a person's behaviour to fixed rules does not per se derive justice. We need to ask whether such rules are themselves just. Thus, I agree with the suggestion that Hume ought to have referred to his rules of justice as principles of justice.[20]

Herbert Spencer (1820 -1903)

Spencer looks at justice in terms of happiness and freedom between interpersonal demands. But his major work on justice is postulated through an examination of the nature of personal freedom. He equates absolute freedom to the law of equal freedom

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20 David Miller, op. cit., p. 163.

for all and believes that justice is derived by granting and protecting people's freedoms.[21]

The implications of this formula are far and wide in terms of deriving justice. First, it means that to attain justice, there must be enjoyment of maximum equal freedom for all and only least interference in the (equal) freedom of others. He infers, from this formula that freedom is affordable through avoidance of physical coercion in the way people choose to derive pleasure.

Thus, to Spencer, justice is in the harmonious co-existence. This however, is overshadowed by his major theme that justice is to be conceived as a survival value which requires that each is to reap according to his or her natural conduct in society.[22] In essence, this means that each person is to get rewards and harms in correspondence to his or her natural deserts passed over from generations to generations.

In fact, his formula equates to the idea of survival of the fittest as a constituent nature of the gregariousness of human species and as a basis of the evolution of human justice from subhuman justice.[23] His concept of social justice therefore, relies on Darwinian biological evolution of human species and the idea of natural selection.[24]

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21 Spencer, *The Principle of Ethics* (Indianapolis: Liberty Classics, 1978) p. 81-2.

22 Ibid, II, pp. 26, 30-35 and 76. See also Miller David, *Social Justice*, p. 186-9.

23 Ibid, p. 76.

24 Ibid, pp. 33-4.

In his formula, each person is to live according to the natural results of his or her conduct and external interference is only justifiable if it is extended to maintain such results. This means that only nature and people's abilities will determine his justice. This has Platonic and Aristotelian overtones. His concept dictates that people should be treated according to where their conduct carries them. But conduct depends on the natural capacity possessed. His conception of justice can also be interpreted to mean that justice depends on the merit based effort resulting from natural conduct.

Basically, his conception of justice, elevates the strong and intelligent and dumps the weak, feeble and handicapped. Instead of saying that right is might, in Spencerian justice we are required to hold the opposite view: might is right.

Under the notion of survival of the fittest, those best fitted to natural conditions will survive and prosper while the misfits will be phased out and a strong and capable society will be maintained generation after generation. So much for justice in Spencer's world! In summary, justice here is looked at from two angles; justice in the moral sense and justice in the evolutionary sense. From the evolutionary sense, justice is seen as the capacity to compete for the limited means of survival.

From the moral sense, he equates justice to a medium through which the greatest happiness can be attained. Like Plato, his justice in based on an ideal society except that for Spencer, the ideal society is built upon the existence of peaceful social intercourse, self coercion, voluntary cooperation and perfect pleasure. In an ideal

society. Spencer's formula of justice is postulated to be a success because there will be no imperfections and hence no limit to people's natural activities and subsequently freedom and happiness will be attained to the maximum possible extent.

Criticisms

Perhaps Spencer's theory of justice merits maximum criticism because of his reliance on evolutionary theory. By basing his justice on evolution and ideal society, he has closed the doors of deriving justice based on rational morality. By subjecting justice to the rule: `everyone is entitled to act in anyway he pleases as long as he does not infringe upon the equal freedom of others',[25] Spencer elevates freedom higher and above the virtue of justice. In this he forgets that freedom can in fact be a deterrence to justice. When he refers to notions of `like freedoms', he invariably limits justice to particular freedoms. But justice is more and indeed greater than freedoms of the individual.

Moreover, in his formula, as we have seen, the weak are destined to fail and the strong to succeed. Thus, his justice amounts to saying that as long as there is no infringement on equal freedoms of others, in an ideal society, any other kind of infringement on people's rights is just. By overemphasising equal freedom, he forgets that he is destroying his foundation of justice of an ideal society, for this may well mean a right to violence for all.

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25 Miller, D. *Social Justice*, op. cit., p. 170.

In his advocacy for pure justice, in which each is to receive rewards according to natural results of his or her conduct. Spencer neglects the artificial inequalities which are inevitable realities of man that will hinder the application of his formula. His emphasis on natural capacities and his refusal to accept regulation of nature's harshness leaves the poor, the needy and the destitute with nothing to lean on.

While justice is about balancing conflicting demands, his theory is in effect widening gaps of inequality. Proportioning justice to the dictates of nature and effort, falls short of pure and perfect justice. So, basically Spencer's faults lie in his heavy reliance on the evolutionary theory and his failure to concede to artificial realities. For he believed that law is inherited through blood which means that the concept of justice evolves differently in various peoples and societies. This is misleading and it is what people like Hitler used to oppress others!

And, he dwells too much on the present and gives little attention to the needs of future generations. He assumes that the past is the same as the present, for his justice sees the present in terms of the past. For example, by attaching justice to the consequences of people's abilities, it seems that under his theory some persons may receive rewards and burdens according to what is passed on from generation to generation.[2] But what about those who come into the world with nothing passed on to them?

His belief in evolution would today put him under fire, for the theory of evolution is highly debatable particularly from divine theologians. Moreover, justice is not a

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[2] See Miller, D., op. cit., p. 186-7.

matter of organic biology, it is rather an issue of ethics which depends on natural as well as artificial relativism.

Thus, his belief in deriving justice from the gregarious nature of human species through survival of the fittest, runs into debatable justification. Survival is not the sole element of justice, for sometimes sacrifice can compete with survival. In his consideration of pleasure as an element of justice, he fails to draw a distinction between the quality and the quantity of pleasure.

This failure is grounded in his conception of an ideal society in which he thinks that self sustaining actions are elements of justice which lead to pleasure. This is wrong. Sometimes saving a life may be a misery enhancing act. For example, in the Mosaic law of an eye for an eye or the drug laws prescribing mandatory death for offenders; it may be that life sustaining actions of offenders are misery enhancing actions for others.

On this note we can safely conclude that one overwhelming shortcoming of Spencerian justice is in his emphasis on survival of the individual without a balanced argument for societal or familial feelings. This shortcoming is derived from his thinking that communal survival solely depends on individual survival without giving standard evaluation of various values. His belief in freedom and struggle for the fittest overlooks natural human feelings and obligations such as parent-child affection and care.

Kelsenian justice (1881 - 1973)

As an ethical relativist, Kelsen views justice as a relative value and although he does not deny the existence of a definition of justice, he refuses to accept that there is an absolute conception of justice. This is because he thinks that an absolute standard of justice is an irrational ideal which cannot be attained through scientific justification.[27] Therefore, he comes out with a relativistic theory of justice the content of which is to be found in the morality of tolerance. To him, justice like beauty, is a matter of value judgment.

So, he asserts that there is no possibility of arriving at an objective standard of justice, for what is just or unjust, refers to an ultimate end and such a value judgment is by nature subjective because it depends on emotional appeal of personal feelings; all of which are things that cannot be verified scientifically.

Thus in defining justice, Kelsen outrightly rejects absolutism because he holds that justice being a value judgment cannot be objectively tested through verification of facts.[28] As such, in attempting to devise an approach to a formula of justice, he succumbs to sociological relativism.

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27 See Kelsen, *Pure Theory of Law*, 1970, p. 63-4 and 67.

28 Ibid, p. 63-7.

He tries to define justice by attempting to compare what different people in various social orders believe to be just at different times. This is what leads him into embracing the normative claim that there is no absolute criterion of justice applicable to all. So, to him, justice as a fact, is merely based on various standards adopted by different individuals in various situations.

But ethical absolutists charge that, justice cannot be defined by equating it to people's belief, and that Kelsen ought to distinguish between what is just and what people believe to be just. What is just is a matter of standards and what people believe to be just is a question of emotional appeal. So, to say that justice is what people believe to be just, is like invoking Hume's rules of justice or Aristotle's equation of justice to obeying the law without questioning whether such beliefs, rules or laws are just.

Furthermore, Kelsen emphasizes that, to arrive at a definition of justice, we must give justice a subjective meaning.[29] However, since he says that justice cannot be defined by deriving the ought from the is, it is a contradiction for him to think that justice can exist in facts or standards expressed in various polities.[30]

I think this contradiction arises because Kelsen attaches strong regard to verification of acts and issues. Since people's acts can be verified through what they express,

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29 Ibid, p. 67.

30 B Jarup Jes, "Kelsen's Theory of Law and Philosophy of Justice" in *Essays on Kelsen*, 1986, p. 300-2.

Kelsen then reduces these expressions to what people believe in as the standards of justice.

Thus, basically, Kelsen's justice resides in his belief in (albeit rigid and contradictory) relative truths and relative value judgments as the only avenue to a meaningful and acceptable definition of justice. Thus, his failure is in his contradictions about the approach to defining justice.

He ends his quest to define justice with a bang on the table asserting that this is my justice: `the justice of peace, freedom, democracy and tolerance - the justice of all rational beings'.[31] This is absolutism of sorts. Therefore, there are two indispensable criticisms of his theory: inconsistency and contradiction. He assumes to be an ethical relativist but in concluding his views he takes his personal conception of justice to be the justice of all rational beings. This covers his theory of justice with an absolutist mantle!

In his condemnation of ethical absolutism, he asserts that the moral principle is to be preferred above the latter (ethical absolutism) and yet he alleges that justice exists in the self-evident values of the morality of tolerance, freedom and democracy, which are to be preferred over and above anarchy, slavery, autocracy and intolerance.[32]

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31 Ibid, p. 302.

32 Ibid, p. 302.

This does not only expose Kelsen to contradiction and inconsistency, it also puts him in the position of `a disguised absolutist'. By claiming that his (seemingly) relativist moral principle of justice is the rational principle, he elevates his concept of justice to a higher plane of universalism and is thus rightly blamed for creating juristic imperialism.[33]

H.L.A. Hart (1907 - 93).

Professor Hart in his celebrated work: *The concept of Law*, looks at justice as a segment of morality concerned with inter strata treatment. He asserts that, as a virtue, justice is the most popular, public and most legal.[34] Thus, to him, justice is constituted in the moral virtue, `whose primary concern is examining the way classes of individuals are treated'.

This argument is based on the postulate that "the principles of justice do not exhaust morality and not all criticisms of law made on moral grounds are made in the name of justice".[35] Therefore, it appears that belief in general morality includes the derivation of justice as a particular component of morality.

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[33] Ibid, p. 303.

[34] Hart, H. L. A. *The Concept of Law*, 1961, p. 151-62.

[35] Ibid, p. 156-9.

As such, his major theme in the definition of justice is to be found in his views about morality. His conception of justice relies much on the distributive aspect of justice vis-a-vis the analysis of Aristotelian arguments of treating equal (like) cases alike! He thus, defines just distribution as that which gives an impartial (fair) attention to and consideration of competing demands. This inevitably marries him to the Rawlsian equation of justice with fairness.

In distribution of wealth, Hart welcomes the notion of differential treatment among different classes of people and the subjugation of interests of one class by another if such is done under a principle of prior impartial consideration of claims of all people.[36]

He therefore, argues that, to favour one set of claims without a prior impartial consideration of all claims of other sections of the society, is an injustice. Here, we can see Hart equating justice to the principle of the common good. That is to say: choosing among competing claims should be done within the realm of the common good for all. So, to favour one set of claims against all others after a prior impartial consideration of all sections of society, is what entails the doing of justice.

In examining the idea of justice, he grades it into two: justice as a uniform or constant structure, and justice as a changing criterion. In the former, the rule is to treat like cases alike, while in the latter, justice refers to standards which vary in accordance with the subject upon which they are applied. Therefore, in questions of justice,

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[36] Ibid, p. 156-9.

resemblance or differences (relativity) do not only apply to the content of the law but also to the way it is applied. So, it is not enough to look at justice in the law; we must also seek justice in the application of the law. This is because a law may be applied fairly and justly, yet its content is unjust or a just law may be applied in an unjust manner.

On distributive justice, he argues that, human beings are entitled to equal treatment and that no irrelevant differences can whatsoever justify differential or unequal treatment. But he does not give regard to the fact that what is relevant or irrelevant is highly subjective. He ought to give a precise and universal definition of relevant difference that justifies unequal treatment.

In so far as distributive justice is concerned, Hart's postulate resembles Rawls's differential principle but under the guise of relevant difference to justify unequal distribution. His central idea in the analysis of treating like cases alike and unlike cases differently, as a core element in his conception of justice, is also based on notions of relevant resemblance and relevant difference. So, upon this, he asserts that humans in some ways, commonly resemble and in others, completely differ.

Therefore, he argues that any kind of discrimination must be based upon and shown by relevant difference. This argument is well taken and deserves credit. But as to the point of relevant difference, I would add that such relevance must be rational and justifiable and not merely relevant as such.

This is because, it is not good enough for everyone to assert that justice demands that we treat people alike or differently simply because there is a relevant difference or resemblance. What makes such difference or resemblance relevant needs to have rational justification, for not every difference or resemblance is justifiable. To do otherwise, would be a rash conclusion.

Thus, his examination of the traditional theory of treating like cases alike and unlike cases differently based on morality, is what makes him arrive at these rash conclusions. His desire and primary objective of creating moral and artificial equality so as to offset the inequalities of nature, has lead him to embrace a conception of justice based on application and distribution, rather than on substance.

Hence, like Rawls, Hart too equates justice to what is fair without giving a concrete definition of fairness and merely emphasizes that people prima facie deserve to be treated equally. His refusal to clearly distinguish justice as a single supreme virtue and his stance on examining justice as a segment of morality are quite disturbing. For anything moral cannot escape the inclusion into the supremacy of virtue. However, his attack on identifying justice with the law is anti Aristotelian in nature and is a point that deserves credit, since it helps illuminate the distinction between what is just and what is lawful.

All in all, Hart's conception of justice is largely similar to that of Rawls, and is based on a view of justice as morality - discoverable by human reason. Does this mean that

all immoral laws are unjust? What would be his answer to those who hold that justice as an immutable virtue is the principle behind morality? Can morality exist without justice? His answer to the last question would most surely be easy. But isn't morality (being a rational concept) rooted in relative rules of conduct? Hart's work on justice, though small, is quite provoking.

John Rawls (1921 -)

John Rawls postulates an argument of justice rooted in rationality and his basic ideas of defining justice are based on rationality of preservation of the overriding values of liberty and social equity. His basic concept of justice relies on the assumption that the best principles of justice are those that generate equality based on liberty.

He argues that to arrive at a meaningful definition of justice, we must apply principles of rationality. In doing so, the rational principles must be derived through positions that give us room to achieve rational decisions not based on considerations of self interests. Rawls asserts that this sort of affair only arises if people deliberate over questions of justice under `a veil of ignorance'.[37] These two, `people in the original position' and `the veil of ignorance':[38] are the models of justification that Rawls presents to illustrate and explain his theory.

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37 Rawls, *A Theory of Justice*, 1971, p. 136 & 141.

38 Ibid, p. 11-12 & 17-21.

The original position and the veil of ignorance

Under the original position, people decide their affairs under a veil of ignorance which does not allow them to know, let alone consideration of their vested interests, in arriving at certain decisions.[39] Therefore, people in the original position are well suited to answer questions of justice because they are unaware of their own interests and level in society. `They do not know their position or the level of cultural and economic development of their social setting'.[40]

It is under this situation that people in the original position will derive perfect justice without bias. From this stance, Rawls derives his theory of justice. He thus argues that `people in the original position' is a model that affords a rational approach to justice. This approach culminates into and entails two basic principles:

a) That `each person is to have an equal opportunity to the most extensive total system of basic liberties compatible with a similar system of liberty for all'. This is his primary principle of justice.[41]

b) That `social and economic inequalities are to be arranged so that they are both; reasonably expected to be to everyone's advantage and attached to positions and

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39 Ibid, p. 136-7.

40 Ibid, p. 137.

41 Ibid, p. 60.

offices open to all; save where inequality is to benefit the least well-off'.[42] This is the principle of fair equality and just inequality. In it, is contained his other major principle; the `difference principle'. This principle advocates for equal distribution of wealth and fair exposure to opportunities open to all.

The original position

The original position is premised on implicit contract between free and equal individuals. Its features, as explained by Rawls himself, are the following:

> That all are similarly situated individuals, who deliberate in ignorance of: any particulars of individual plans of life, any conception of the good and any knowledge of particular alternatives or circumstances, but that they evaluate every thing based on general facts of political affairs, principles of economic theory and the laws of human psychology and the basis of social organisation.[43]

In analysing this model, Pettit has devised four questions under which a thorough examination of what goes on in the original position can be discussed. They are: Who chooses? What is chosen? The basis of choice? And under what motivation this choice is made?[44]

He explains that under the first question, what Rawls moots is a finality of inter-generations representatives. That is to say, the people in the original position are

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42 Ibid, p. 60-1.

43 Ibid, pp. 136-7.

44 Pettit, *Judging Justice*, 1980, p. 150-4.

picked and drawn from a single generation, but the situation they occupy and the principles contracted, represent all coming generations. So the big question here is that since situations change will people still remain under the control of the original position, even after the original contractors fade away? How long can the trend of ignorance be passed over to new generations and can it last? Thus, unless the original position is similar to what theological covenants such as the Israel's and Christianity represent, its participants cannot last long and cannot pass on what they represent.[45]

On the second question of what is chosen, it is explained that what Rawls clearly intends to derive is the extraction of general principles of universal application particularly across time and generations.

The third situation of the original position is the basis of its operation. What Rawls envisages here, is the use of general facts to derive general principles of justice and the denial of particular facts (force of ignorance) to rule out arbitrary self inclined extraction of principles of justice.

The major question here will be whether denial of knowledge is not denial of justice? Can real and true justice flourish in darkness or ignorance?

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[45] For example, the idea of the original sin in christianity claims that since the first man failed to keep his promise with God, he was unjust to himself and that reflects on his procreation or progeny.

The fourth situation has motivational bearing on the original position. Here, as Pettit explains, what motivates the participants in the original position to arrive at principles of justice, is the notion that they lack self desires and work for attaining general desires. These are generally in terms of the idea of primary goods: Particularly rights, liberties, equalities etc. But since they operate under the veil of ignorance that is forced upon them, we cannot really call this motivational: for motivation is something that comes voluntarily from within the person and it is hardly possible for all people to always have the same motivation, generation after generation.

It must be emphasised that generally, the original position creates problems for itself mainly because it suppresses people's conceptions of the good through forced restrictions on knowledge. The aim is to foster unanimity, but the end result is an individualistic and presumptive conception of justice that substitutes reality with implausibility. Thus, the original position seems to presuppose not just a neutral theory of the good, but a liberal individualistic conception, according to which the best that can be wished for someone is the unimpeded pursuit of one's own path, provided it does not interfere with others' rights.[20]

However, it is argued that even here, this theory cannot be described as fair since there are many conceptions of the good that it forces upon people, while there are others it suppresses and prevents them from being conceived within the original

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[20] Murphy and Solomon, *What is Justice? Classical and Modern Readings*, 1991, p. 309-12.

position. Put in the real world, the P.O.P will become frustrated with the choices imposed by ignorance. Won't this change the whole Rawlsian scenario? Thus, the mistake Rawls makes is that just for the want of unanimity, people must be denied self knowledge.

One suggestion to remove this problem is that Rawls should allow P.O.P to have knowledge of everyone's preference and conception of the good without allowing them knowledge of who they are.[47] However, this suggestion may be worse than Rawls' original conceptions for it may foster the entry of hatred and envy and lead to bad results. Moreover, it does not remove the real restriction: the force of the veil of ignorance.

In Rawls's justice, the original position is a model conception of moral citizens of a just society. It does this by demonstrating that in issues of justice, just individuals are portrayed by the manners of the people in the original position (p.o.p). These individuals (p.o.p) derive principles of justice by working under constant constraints which make them choose rightly. These constraints are in the model of a veil of ignorance.

The persons in the original position thus operate under a powerful sense of justice for they represent and form a society in which members view each other as equal and free agreeing individuals: `they are all equally rational and equally ignorant' and thus share

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[47] Ibid, p. 309-12.

a common method of choices to principles of justice.[48] The reason and conclusions reached by p.o.p are thus rational for they are free of self interests. This portrays their justice as a rationality of modern society.[49]

The individuals in the original position are ones with family sympathies and do not represent institutional individuals. When they choose, people in the original position choose similarly, and always choose those principles that comprise justice as fairness.[50] Their choice is always in lexical order: with the overriding priority of allowing liberty to be restricted only for the sake of liberty alone.[51] To deal with and resolve conflicting demands, the principles that are chosen by the p.o.p are thus of general norm, universal application and are publicly recognised.

This is because in the original position, each individual makes a rational choice and asks a rational question leading to a situation where all provide rational principles of justice which are alike and in agreement. This is where Rawls' theory creates universal principles. For example, we are all supposed to imagine that we are in the original position, and once there, we must ask one and the same question: Which principle of justice would I rationally accept? The answers we provide are no less

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48 Kukathas and Pettit, *Rawls, A Theory of Justice and its critics*, 1990, p. 127.

49 Miller, David, op. cit. p. 341-2.

50 Rawls, J. *A Theory of Justice*, 1971, pp. 129-300.

51 Ibid, p. 301-3.

constrained for we are all similarly situated under the same veil of ignorance that regulates our conclusions towards rational consensus. Why is this?

> "The P.O.P brings down a veil of ignorance to ensure that reasoning cannot be influenced by inequalities of wealth, status, or talent, and the persons are taken to have a preference of the primary goods ... because these are the goods necessary for the exercise of morality and achievement of goals".[52]

Thus, in the original position, `parties are behind a veil of ignorance, they do not know what alternatives will affect their interests and are obliged to take up only interests of general considerations'. Under the veil of ignorance people in the original position are only aware of the general truths about humankind or human nature and social organisation.

> "... 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 does anyone know his conception of the good, the particulars of his rational plan of life, ... More than this, ... parties do not know the particular circumstances of their own society".[53]

So under a veil of ignorance, people in the original position are left with no choice but to choose those options which are in line with general truths. And these are (in Rawls's view) the most sensible and just options. This is the screen which the veil of ignorance provides in order to derive the best possible and just (social) arrangement.

To apply his model, Rawls says that people in the original position choose basic

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52 Kukathas and Pettit, op. cit. p. 128.

53 Rawls, op. cit. pp. 136-7.

structure principles in a constitutional convention and apply these principles to select a governing law (constitution). Law makers thus select laws in accordance with this law and principles of the basic structure. Throughout the process, the people in the original position are constrained from A to Z and as they go on, they act rationally, moving from the general to the specific and as this happens, the veil of ignorance becomes thinner and constraints to their reasonableness become weaker. This is more evident at the stage of interpretation of principles at the judicial level.[54]

Well, doesn't this seem to turn Rawls's theory upside down or go round about? For when the veil of ignorance becomes thinner, will the persons in the original position remain disinterested ones, or unaware of their self interests? Moreover, it can still be pointed out that it does not matter whether the veil of ignorance becomes thinner or not, for its aim of creating just arrangements devoid of self interests is one that is covered up with blind assumptions. If not, why should Rawls talk of a veil of ignorance that becomes thinner? He surely seems to be aware that the veil of ignorance is hazardous to just conclusions and that is why he talks of its need to become thinner.

In matters of justice, we identify people according to their interests and goals, and how they pursue these goals and interests. What we have in the original position and the veil of ignorance is a failure to recognise this reality. Rawls's theory neglects the true workings of human nature. No real person can ever stand adamant of self interests,

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[4] See Kukathas and Pettit, op. cit. p. 31.

harm and desire, etc. Therefore, it is not surprising that in general, Rawls's theory has been criticised as one that is inadequate, untenable and unfeasible.[55] This has come from all quarters: from libertarians, liberals, communitarians, etc.

For example, it is now a generally widespread criticism of Rawls to assert that the original position, as a model, fails to account for the practical realisations of justice because in such position (O.P) persons are incapable of any reflective deliberations. The conclusions persons reach in the O.P are as a result of options forced upon them by the veil of ignorance. Thus in the original position, Rawls's person is raped of the ability to choose freely and from their own point of view.

Rawls says, when asked to choose principles of justice, people in the original position will choose the right principles because they are free from self interests. But how can their choice represent the right principles when their position is tailored in such a way that they have to or must choose as such? In the original position, people cannot choose rightly for they are in no position to deliberate and reflect (realistically) on questions of each's individual life.[56] All they look at is the general trend of life. This is not the whole of life. Moreover:

> "Logically there can be only one person in the original position. Any agreement `they' reach cannot be agreement with each other to live

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55 See Reiman, *Justice and Modern Moral Philosophy*, 1990, p. 273-5.

56 Sandel, M. *Liberalism and The Limits of Justice*, 1982, p. 129.

certain principles. for there are no others. At best. there is only a metaphorical agreement ...".[57]

In reply. Rawls argues that in the original position there is room for reflective deliberations among the P.O.P. because they are always aware of facts of general knowiedge. The people in the original position have no self desires and in their deliberations they identify desires and match them with the rational principles of justice. Sandel insists that as long as they remain isolated. people in the original position are incapable of properly choosing the right (rational) principles of justice.[58]

To put it more simply, using the original position is like picking 100 blind persons before 100 red oranges. All will pick the same colour and the same orange. not withstanding their inhibited preferences. Should the veil (of blindness) be removed. some or all of them may not even choose a single orange! For then they would know what is in their interest and what is not.

It is in the original position that cracks to Rawls's theory of justice are more vivid. Nozick. himself a liberal like Rawls. albeit a principled libertarian, opposed this position (O.P), arguing that it restricts the fundamental rights of individual entitlement to property. Chandran Kukathas and Philip Pettit have attempted to defend Rawls's theory here by counter arguing that the rights Nozick is emphasising (Lockean

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57 Ibid. p. 129.

58 Kukathas and Pettit. op. cit. p. 100.

fundamental rights) are not the only serious rights to countenance in questions of justice. That is to say, although important, they are not uniquely salient.[59]

However, it must be remembered that what Nozick points out is this: these are fundamental rights that express the separateness of persons and yet it is exactly this that Rawls's theory disfigures. A further counter argument to Nozick's critique could be in the Question: why prefer such rights over others or such separateness over interdependence of persons? Do these fundamental rights generate more or better justice or do they elevate the individual to higher levels than what Rawls's theory does? Moreover, Rawls does not really disregard rights to entitlement but only subjects them to what he calls the `fairness' test. Rawls' principles of justice have been described as mooted to:

> "Ensure that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favour his particular condition, the principles of justice are the results of a fair agreement or bargain".[60]

This rationalisation of Rawls's theory helps us question whether his principles are those of social cooperation and not of justice. After all, isn't there a difference between the two? But first, let us examine the features that characterise these principles.

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59 Ibid, p. 87.

60 Robert Nozick, *Anarchy State and Utopia*, 1974, p. 189.

Principles of Justice

The first fundamental feature in Rawls's principles of justice is the nature of their ordering which is described as being lexical. This means that one of the two principles (i.e. the first one) takes precedence over the other. Put in other words, it means that if one situation is preferred in the first principle, it will be the better one even if considerations of the second principle are brought in. "Only if two situations are equally good when the first principle is applied, will the second principle be brought into play to break the tie".[61] This explanation of Rawls's principles of justice reduces the second principle to an arbitrating functionary and the first one to a domineering functionary. But what Rawls intended to explain as the starting feature of his two principles, is that one justifies the other, while at the same time, the one is part of the other. That is, both principles are part and parcel of the whole theory of justice.

The First Principle of Justice

Brian Barry among all others, is the only one who appears to have had a better and simpler examination of the features of Rawls's principles of justice and I will follow his divisions of justice. The key feature here is the presupposition of the existence of equal liberties that all ought to enjoy without hinderance. This correlates and requires the observance of three issues:

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61 Brian Barry, *The Liberal Theory of Justice*, 1973, p. 52.

a) The most extensive total system (of equal liberties). What this means is that the ideal principle of justice in Rawls' theory requires not merely equal liberties but equal liberties which fit in the most extensive total system of equal liberties. This, I think is aimed at pointing to the need for comprehensivity.

b) Total system (of equal liberties). This feature as I understand it, is a demand for a complete system upon which a standard principle of justice can be based. The question which we are required to ask is what are the contents of a total system of equal liberties?[62] The answer which Rawls appears to give here is "Basic Liberties" and these are fundamentally, political liberty and the rule of law. The latter presupposes many things including allowing each to do what he or she feels (believes) is right of equal liberty of conscience, acting within the law, etc. The former emphasises justice as equal right of participation. Both these features involve a difficulty, since Rawls' principles are built upon the control of the representational structure of people in the original position. So how could there be real equal participation when the original position is merely a model of sample participants? Thus, there will be no such thing as equal liberty, meaning people doing what they believe is right, for right is predetermined by the features of the original position and personal beliefs are out matched by this position. Afterall, it is the original position which derives features of Rawls's principles.

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62 Ibid, p. 35.

c) Equal right and equal basic liberties - the feature of equality. "Each person is to have an equal right to equal basic liberties ..." What does equal represent here? No doubt `equal' here signifies a feature of the first principle. But how are we to understand this feature? Brian Barry says that equal in this case shows the egalitarian nature of Rawls's first principle of justice. That is, it means that no decrease in one's liberty can be justified simply because it leads to an increase in others' liberty and henceforth the sum total of liberty.[63] But as Barry himself admits, we cannot cry egalitarianism because a principle embodies this implication.[64] So what is the feature that the word `equal' carries with it in Rawls' principles? I think what it means is simply `liberty' - that no body is to be denied what he or she ought to have when others are allowed to have what they ought to have. It presupposes the maxim: Liberty is the limit or that liberty limits liberty.

The Second Principle of Justice

There are about five questions whose answers signify the features of the second principle of justice. Basically this principle addresses the nature in which inequalities can be arranged so as to be part of the meaning of justice. Analysed in detail, this requires an interplay of both equality and inequality; but first let us look at the questions that point to the features of this principle.

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63 Ibid, p. 41.

64 Ibid, p. 42.

a) What are social and economic inequalities?

b) What is the greatest benefit and who are the least advantaged?

c) What savings principle is just?

d) What do we understand by offices and positions open to all?

e) What is fair equality and which are the conditions attached to it?

These same questions can be reduced to smaller headings such as inequality and equality, greatest benefit for the least advantaged, and the just savings principle: Fair equality and justifiable inequality.

a) Social and economic inequalities here are in references to the differences in wealth incomes and power not status.

b) The greatest benefit of the least advantaged is that which secures for them the primary goods as required by the basic structure that is derived from the decisions of the P.O.P. We also have to know the least advantaged as those persons who lack what everyone ought to have under the structure stemming from the P.O.P.

c) the just savings principle is that which caters for intergenerational equity.

d) `offices and positions open to all' requires that there should be a merit exposition to talents. But there is a difficulty. Does he mean that there are certain positions which are not open to all? I think so.

e) `Fair equality of opportunity'. This also invokes merit - based applications. The conditions of fair equality are however difficult to determine. Some have argued that this is very absurd for it means that everything must be related to the maintenance of a single family which could practice differential advantages.[65] I do not think it is satisfactory to explain fair equality only in such terms.

Two difficulties are worth noting in the second principle: It is rather impossible to define the boarder line between social and economic inequalities for both are inseparably interrelated. Secondly, it is also extremely difficult to define with exactitude at what line people become least advantaged.

Under the second principle, which is known as the difference principle, Rawls argues that unequal treatment is part of equal distribution of wealth as long as such inequality is for the advantage of the least well-off. So, Rawls allows redistribution of wealth for the benefit of the poor and least advantaged. In this way, he postulates that only by advancing the position of the least well-off, will a fair and stable advancement of social order emerge.

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65 Ibid, p. 51.

The difference principle rules that to achieve justice we must redistribute wealth to promote equality through unequal treatment in favour of the least advantaged. So, what he is putting forward is that to promote equal distribution of wealth, it is a principle of justice that we should never tolerate any inequality, except in so far as such inequality is to benefit the least well-off and provided that the same is attached to offices and positions equally open to all. Thus, to Rawls, no other reasons whatsoever can justify inequality.

General evaluation

In putting forward his theory of justice, Rawls categorises his two basic principles into domineering and subjected categories. To him, in matters of justice, liberty is most paramount and the community is the indicator of what sort of compromise or balance will bring justice for the individual:

> "Individual liberty can only be restricted in the interest of greater liberty for all".[66]

So under this argument, it seems that in normal circumstances, Rawls' theory would place liberty and equality at the higher plane of virtues. In this way, questions of need are given little room, for equality and liberty cannot be sacrificed for material prosperity or efficacy. He proposes that to promote equality and maximise liberty; political, social and individual freedoms must be guaranteed. However, this can be

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[66] See Rawls, *A Theory of Justice*, 1971, p. 204.

criticised as a narrow view, for there are many other means through which liberty and equality can be maintained.

His greatest credit lies in the fact that he has sparked off a revival of the vital search for a universal and objective approach to defining justice. Rawls is not only concerned about the justice of those in the here and now, but even justice of those in future generations. In this way he provides a better alternative to the loopholes of classical theories of justice.

His difference principal and his emphasis of equal liberty for all would no doubt help alleviate the mess created by utilitarianism and egalitarianism. His assumptive model of `people in the original position' helps us to appreciate the fact that, it is only when a person ignores self interests that an honest and sincere view of justice can be derived. This is attainable if we discuss principles of justice as if we are unaware of our interests and circumstances.

General Criticism

The strongest criticism of Rawls' theory emerges from his equation of justice with fairness and his postulation of an assumptive model of `people in the original position' for he believes that the best principles of justice are those contained in pronouncements of justice based on decisions of `people in the original position'. In equating justice

to fairness, Rawls is criticised for failing to define what is fairness and for forgetting to realise that fairness is merely a matter of the judgment that justice has been done.[67]

In putting up the assumptive model of `people in the original position' as a tool of justifying and illustrating his theory, Rawls has postulated a great practical impossibility. In this way, like medieval theorists, he neglects the inevitable realities of a practical world in which we live and instead dwells in a world of what could have been. Since we live in a world of practical realities, the environment and circumstances around us will undoubtedly influence our conception of justice irrespective of the model of illustration that accompanies the principles followed in this conception.

So, it is difficult to see how one can arrive at meaningful principles of justice devoid of the circumstances affecting us unless we are in another world - perhaps a conceptual one! Therefore, `people in the original position' as a model of application, fails rationality albeit as a model of justification, is one that is well taken.

This is because it runs counter to rules of rationality to argue that people can decide rationally when their decisions are based on ignorance. To arrive at rationally meaningful conclusions requires the existence of such knowledge as can be considered crucial to the principle to be derived. People's interests and positions are a matter of vitality in questions on justice.

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[67] Fiebleman, *Justice, Law and Culture*, 1985, p. 192.

This means that a possible counter argument to Rawls's model of people in the original position is that, those who decide in ignorance may swiftly alter their stand as soon as they become aware of their true position. Of course, Rawls's answer to criticisms of his model of people in the original position would perhaps be that he did not intend it for practical application, but rather as one for illustrating his theory. I submit that this is an escapist answer.

Nozick attacks Rawls's difference principle, charging that it treats people as means and not as ends. In this, Nozick too turns Kantian. He further charges that the difference principle treats natural talents and possessions as collective property for all which must be redistributed for the benefit of all. In this Nozick again sees in Rawls' theory as a defilement of the inviolability and separateness of the individual.

He also charges that the difference principle creates two conflicts of interests; between those at the top and those at the bottom; and between those in the middle and those at bottom, for if those at bottom were gone, the difference principle might apply to improve the position of those in the middle who would then become the new bottom group whose position is to be maximised.[68] This criticism is perhaps based on Nozick's belief that the role of Rawls's theory or principles of justice is aimed at social cooperation. He explains that Rawls imagines rational, mutually disinterested individuals meeting in a certain hypothetical situation (the original position) and choose principles of justice.

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[68] Nozick, op. cit., p. 209.

In *Rawls: A Theory of justice and its critics*, Chandran Kukathas and Philip Pettit put it more subtly: Nozick charges Rawls's theory of treating all natural endowments as `manna from heaven'; meaning that we all come into the world with nothing and find things already there arbitrarily possessed waiting to be distributed.[69]

Generally, what Nozick objects to is a theory of justice (such as that of Rawls) which intervenes in people's natural rights or economic lives, particularly in so far as property entitlements are concerned. He therefore, dismisses Rawls's theory as one that cannot be (permanently) applied, particularly because it lives by constant intervention in people's (rights and) lives. Nevertheless, we must be reminded that Nozick in his criticism forgets to remember that Rawls's theory is only meant for occasional readjustment to fairness, when and if circumstances warrant.[70]

H. L. Hart inter alia charges Rawls of inadequacy and ambiguity in his theory. He points out that Rawls calls for a principle of greatest liberty for all, while at the same time, he insists on defending certain-specific liberties. Hart reminds us that a close examination of Rawls's theory shows that his real interest is in basic liberties.

In the Turner lectures we are told that Rawls agrees to this insisting that his theory follows a tradition of democratic notions, which emphasises not liberty as a priority but

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69 Kukathas, C. and Pettit, P. op. cit., p. 89.

70 Ibid, p. 89.

certain basic liberties.[71] So now Rawls very clearly seems to be revising (from the outside) his *Theory of Justice*. Furthermore, other critics have charged that by emphasizing a priority for the least well-off, Rawls provides incentives to the poor sections of society and denies the same to the rich sections. This slows down the morale of development and advancement in the rich sectors of society.

On this note, I would defend Rawls; since his differential treatment is not aimed at permanent operation for particular sections of society. Once the aims of this principle are attained, the least well-off will no longer be least advantaged. Another criticism of Rawls theory is on his argument for principles of justice based on rationality. In this, he forgets that not everything derived through rationality is right and just. In fact, rationality can be used to defeat claims to equality and liberty. Also, in his theory, Rawls has over emphasized the concept of liberty to make it appear even above justice itself.

In today's world of strife for economic development, this concept of liberty would deter one's need to achieve national industrialisation. This is because industrialisation involves sacrifice of certain liberties. For example, in many countries vital nationalisation schemes greatly but inevitably disturb individual liberty. Rawls would only suggest tampering with people's liberty if it would enhance the enjoyment of equal liberties for all, or if it promotes the benefit of the least well-off.

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[71] Ibid. p. 130.

So, in this regard, Rawls would appear to allow industrialisation and sacrifice liberty until desired prosperity is attained. Perhaps what prompts Rawls to give this concession is the realisation that economic development may generally enhance equal liberty for all and uplift the position of the least well-off.

But even in his concession, there is still a danger: he does not state what will indicate attainment of desired prosperity. So, where does prosperity end and liberty (or justice) begin? Thus, it has been argued that, this sort of concession gives room to politicians for abuse of individual liberty in the name of striving for desired prosperity that will enhance equal liberty for all.

Further, under his `just saving' principle, Rawls advocates distribution and management of resources (wealth) in light of what will benefit the least well-off here and now and those of the day after tomorrow (between generations). This is a point well taken, but it is blurred when he refuses to tolerate any conservation of wealth or reservation of resources, because he thinks this exploits the least well-off in the here and now. On this note, I think that in his theory of justice, Rawls is too harsh on the rich and yet over emphasizes the priority of those in the least advantaged position in society (the poor).

Rawls can also be blamed for putting up universal questions through a universal model to answer and provide universal solutions without intending to do so.

This is because he insists that his theory is not meant for universal conception.but is built on foundations of reason so as to provide rational answers to the demand of justice. But rational answers need to dwell in the clear sunlight of knowledge and reality, not in the dim light shadows of imaginations and presumptions.

Thus, although his work is a formidable attempt to deal with the difficult task of providing a well meaning conception of justice, Rawls's theory of justice is built on hard to believe models and presumptions: The original position, its people, and the veil of ignorance under which they operate are some of the major `hard to crack' dilemmas that surround `*A theory of justice*'. The two major principles of this theory are ideas that deserve insurmountable credit if and only if the models that postulate these principles were not attached to them.

Rawls' Principles of justice: A Comparison

Rawls approaches justice from a contractarian theory of social cooperation in which he asserts that justice is fairness. This results in the doctrine of social contract which envisages fair terms of social cooperation between free and equal individuals born and living in a society they find themselves in.[72] Such position is what moots a hypothetical original position that portrays a basic structure of Kantian constructivism.

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[72] Morwatez Thomas, (ed) *Justice*. The International Library of Essays in Law and Legal Theory, School 2. England: Dartmouth Co. Ltd., 1991, p. 15.

which aims at securing an acceptable constitution structure of basic principles, that command unanimity based on rational and reasonable distinctions.

These principles are basically two applicational means that aim to provide an alternative to the obstacles of utilitarian approaches to justice. They are: the principles of basic liberty, which is the priority principle and the difference principle, which is the principle governing social distributions of interactions. Both of these principles concern: Liberties, basic rights, opportunities and equality. They are aimed at providing a more acceptable and secure basic structure of society and are therefore intended to argue for a basic structure that governs assignments of rights, liberties and duties, which regulate social-economic distributions of advantages. [73]

The two principles hold his conception of justice and both represent and depict justice as fairness. From the standpoint of the original position, justice here and in this case entails that all primary goods are to be distributed equally. This is the primary principle which also means and entails that there is establishment of equal liberty and equal opportunity for all. But people in the original position may encounter situations which demand that they consider the outcomes of the primary criterion of justice. This only happens when and if equality leads to a dampening of the situation of the least well-off members of the general community. This is what introduces adoption of the second principle of justice which then commands that "inequalities are

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[73] Ibid, pp. 6 & 48.

permissible when they maximise, or at least all contribute to the long-term expectations of the least fortunate group in society".

This has two basic meanings: one is that Rawls' theory of justice is basically equalitarian, or at least emphasizes equality first and fore most and the other is that in analysing justice we have a finality of two principles only namely: one that allows people to view justice from a fixed standpoint and the other that varies this view. One accords equal advantages and the other special advantages, while both stand for equality albeit in different ways.

Thus it appears true to assert that in the original position, parties start and handle questions of justice with a principle of equality for all, but advance by establishing greater equality for some, so as to foster real equalities and that this operates when there is necessary - inequality in the basic structure which works to improve everyone's situation.[74] This is premised under the principal argument that;

> "since there is no way for anyone to win special advantage for himself each might consider it reasonable to acknowledge equality as an initial principle. There is, however, no reason why they should regard this position final; for if there are inequalities which satisfy the second principle, the immediate gain which equality would allow can be considered as intelligently invested in view of its future return".[75]

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[74] Murphy and Solomon, *What is Justice? Classic and Contemporary Readings*, 1991, p. 310.

[75] Ibid, p. 309-10.

This futurist and result ended argument could be one reason why Rawls's principles of justice are seen as a quest to improve upon and provide for modified utilitarian alternatives. What it also means is that his primary principle only applies when there is equality, otherwise it is the second principle which will be in operation.

This prompts the argument that his first principle will always be redundant because there is no day (in the real world) when such equality will happen. In return then this also prompts the argument that the real Rawlsian principle that can be in operation is the second one. This brings us into accepting of the assertion that the difference principle is the governing principle of social justice and really not that of basic liberties or equality.

The basic feature of this governing principle is that there has to be redistribution of goods and that such redistribution runs from the better offs to the worst offs. This is continuous until redistribution fails to raise the long term absolute shares of the worst off. Put in other words: it is a principle premised on the basis that sacrifices which lessen inequality are just, but those which increase inequality are not.[76] Thus the difference principle is not only a governing principle of justice, it is also a principle rooted in and aimed at promoting egalitarianism. This is because through inequality its aim is to attain equality, or if not that, then at least a unanimous feeling of equality.

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[76] Ibid, p. 273.

However, the difference principle like the original position from which it stems has been bitterly opposed as implausible, complex and unrealistic.[77] It is a principle that treats people in a way that neglects their real differences, forgetting as Sandel argues, that as a matter of want, even where fair opportunity is the rule, these differences naturally persist.[78]

Thus, the practical argument is that artificial differences can be remedied through certain principles but not the natural differences. The difference principle neglects this for in its treatment of natural talents as common assets, it allows people to reside in each others' genetic and cultural advantages and thereby sidetracks the idea of merit and desert, which are vital as far as justice is concerned in this regard.[79] But it would be wrong for Sandel to think that cultural differences are as forceful and unchangeable as genetic ones!

The better argument made by Sandel against Rawls's difference principles, is that based on the force and nature of genetics.

> "The more inequality turns out to be genetic but not culturally included, the less society can do about it. Given a fair system, some will advance

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77 See Reiman, *Justice and Modern Moral Philosophy*, 1990, p. 273-5.

78 Philip Pettit also blames Rawls for this, arguing that the difference principle like utilitarianism, does not take seriously the distinctions between persons. Is this why it treats people as means? (See Pettit, *Judging Justice*, 1980, p. 131).

79 See Sandel, *Liberalism and the Limits of Justice*, 1982, p. 72-5.

> more successfully than others and there comes a point when even the most enlightened society can do nothing to alter this fact".[80]

Thus, Sandel is right in so far as he argues that justice is not in the reduction of natural differences (genetic ones) but in the way we deal with these differences. If these differences are talked of as merely natural, then the argument must be different because then the difference principle may be applicable to non genetic, but natural differences such as those brought about by cultural inclinations. Take for example the Malaysian social system. Colonial cultural heritage and Malay kingship created disadvantaged and advantaged classes of people. This can be, and is actually changeable, and not natural.

Rawls' reply to these problems appears to be in the assertion that the difference principle is a principle of mutual benefit through which people do not gain at the expense of each other, since only reciprocal advantages are allowed. Therefore, the difference principle will be accepted to both groups: the advantaged as well as the disadvantaged because it operates under the view that no one deserves his or her place in the distribution of native endowments.[81] However, as Reiman argues, this is an unconvincing and unsatisfactory a reply, for even if people are not entitled to what they naturally have, it does not follow that acquisition of benefits has to be in a way that maximises the welfare of others - thus prima facie, Rawls's difference principle

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80 Ibid, p. 75.

81 Reiman, *Justice and Modern Moral Philosophy*, 1990, p. 274.

depicts a confusion of justice with benevolence.[82] Moreover, as Reiman again shows, the difference principle operates in such a way that allows the least well-off to acquire advantages in a manner that does not improve the welfare of others.

This, in itself, does not only make the difference principle lopsided towards the poor and less fortunate and thus becoming biased against the rich and well to do, but it also makes this principle a self defeating theory which runs counter to its very stand point: that no one should benefit in ways that do not benefit others, or which worsen the conditions of others.

Reiman suggests that this problem can be removed if the difference principle takes the labour theory of moral value as its justifying stand point. This labour theory argues that benefits of the well to do are - a result of labours (efforts) of the worst off. On this basis the distributive theory of the difference principle is acceptable without question because it balances the two by reasoning that the rich are what they are because of the poor and therefore removing wealth from them to the poor is no fault at all. Under this argument the least well off are thus justified to receive additions from the better off because the latter also received the former's labours (so as to be in that position).[83] This labour theory seems convincing but it also does not deal exhaustively with the troubles that the difference principle is faced with. For example

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82 Ibid, p. 274.

83 Ibid, p. 274-5.

it cannot quash Sandel's critique that the principle is a fallacy in so far as it treats talents as common assets.

Generally, Rawls argues for his difference principle on the premise that its practising inequality works to the advantage of all directly or indirectly and that the aim is not to eradicate the different variations of office, status, positions etc,but the attachments corresponding to them.[84] So won't Rawls's theory under this argument allow slaves and master to stay as such, so long as the corresponding attachments are varied to work to the advantage of the worst off (i.e. the slaves)? I think it can do so. And in this way his theory does not question the status or position one holds, but the attachments and advantages corresponding to it. However, we have to know that justice is not distributions alone, but the basis upon which these distributions are based.

Brian Barry's Concept of Justice

In *A Treatise on Social Justice*, Brian Barry embraces, discusses and counters the various theories of justice to extract his own theory of justice which is justice as impartiality and justice as mutual advantage. This he does no better anywhere else than in the analysis of the theories of David hume and John Rawls. The model he borrows is in that of Rawls' original position.

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84 Rawls, *A Theory of Justice*, 1971, p. 307.

His work is in three volumes, but for the purpose of this thesis it is volume one that is analysed in detail, for the other two volumes are meant to build upon the conclusion of the first one. In this treatise Barry adopts Rawls' original position with a thin theory of the veil of ignorance under which rational individuals can derive principles of justice. Under this model Barry modifies and limits Rawls model of people in the original position through an increase in the knowledge people need to derive principles of justice.[85] Therefore, although the model upon which he builds his principles of justice is Rawls', it is also one where people are allowed to have self interests but are denied knowledge of self identity. All knowledge is availed to them while at the same time their identity is concealed from them also. This puts them in an egoistic bargaining position as well as an impartial one at the same time. The result is a two-tiered theory of justice, based on both constructionists and contractualist base lines.

This seems to suggest two things, that in deriving justice there are co- operative and non cooperative starting points from which parties bargain their way towards agreement to just principles. But it also suggests that there is no agreement point in which principles are discussed from an already set situation that only guides towards just conclusions. This is where a marriage of Rawls' theory to that of Brian Barry comes into sharp focus for both embrace thinly varied original positions with fixed characteristic features intended to derive principles of justice.

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85 See Barry, *A Treatise of Social Justice* Volume I, pp. 304, 327 and 331.

Both argue that to derive justice, parties have to be put in similarly set situations with the only difference being that Barry, unlike Rawls, builds his theory on a round about analysis of many theories whose models he reforms and reformulates into direct and indirect approaches to justice. These, he terms the intuitionist and constructivist approaches respectively.

Barry's three approaches

In his *A Treatise On Social Justice*, Brian Barry provides three approaches to justice. These are modelled under the triple theory of games, fights and debates,[86] but generally portray a variant of Rawls's model in *A Theory of Justice*.

The first approach is that which realises justice as a matter of mutual advantage and is in terms of a game construction. What it does is basically to create a game in which the major question is: What would rational self interested individuals (players) agree to and conclude. Barry explains that this approach involves a theory of co-operation in which members interact by each doing their best and presenting to one another their best challenges. The principles that emerge are those that are based on a rational and acceptable analysis.

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86 Ibid, Chapter 3, pp. 112 and 371.

The second and third approaches are those which realise justice as a matter of acting impartially. Thus there are basically two approaches albeit two in three.[87]

The second approach is one that involves a kind of Rawlsian veil of ignorance. The unique position here is that parties are not similarly situated as such for they are allowed to pursue self interests as effectively as possible.[88] The word `possible' here is crucial to Barry's approach. For this is where the veil of ignorance is operational. In this approach although parties are allowed to pursue self interests, this is controlled by a veil which covers their capability to know who they are. Thus although they know what interests that are pre-existing and the conflicts involved, they do not know who they are and are therefore incapable of relating these interests for the advancement of particularly distinctive self interests or choices. This then places them in an impartial position for all are placed in a situation of uncertainty. The real problem which exists is (as Barry himself hints) that of decision. How are parties to decide principles of justice in an uncertain situation, while at the same time there is pursuit of self interests?

The third approach is what Barry calls the Rapoport Debates situation. Here, Barry explains that this is an approach which involves the requirement to aim at convincing each other,[89] making each other see things as others see them, or in a word: the

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87 Ibid, pp. 369-72.

88 Ibid, p. 304-7 and p. 369-72.

89 Ibid, p. 371.

readiness (acceptance) to convince and be convinced. This too puts the parties in an impartial situation which leads to impartial inclinations, provided that the debate is done in good faith. This necessitates that members (parties) accept `good' argument even where it turns against their interests. However, if this is to be connected to the veil of ignorance of the second approach it becomes difficult to see how parties can see what is good if they cannot know who they are. For goodness need be connected to the individual's identity. Moreover, how are they to know it runs against them if they do not know their own identities? Barry's answer seems to be in the device he adopts towards the third approach which he breaks into two situations:[90]

a) First situation here is that the approach requires parties to reach agreement on principles that nobody could reasonably reject.

b) Second situation is the provision that parties `do not operate under a veil of ignorance', albeit they can (in a subordinate structure) invoke it.[91] This is confusing and contradictory. For once parties invoke it, ignorance will automatically become operational. What we must observe here is that the first part of the third approach is the real approach which realises justice as impartiality. For as Barry himself explains, the approach that brings about impartial conclusions is that which operates under the requirements that everybody must be given (due) consideration and that everyone has authority

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90 Ibid, p. 371.

91 Ibid, p. 371.

over principles of justice proposed, unless it would be `reasonable' for that person to accept such principles. The hard to crack questions here are (however): what is reasonable and who determines it? The test that Barry provides in answer to these questions is the requirement: We have to see whether the principle itself is impartial - that is to say, whether it could not be `reasonably' rejected by anyone covered by it.[92] But there is still a problem. The approaches that Barry constructs are a double edged sword, for they are not only confusing and contradictory but may also be self defeating. In fact, Barry himself seems to admit there is a problem and argues that the reasoning surrounding these approaches can if carried too far, become misleading:

> "On one side, we want to insist that the parties have interests and values that they are concerned, up to a point, to defend. But we do not want this to reduce the third construction to the first, where parties utilize whatever strategic advantages they have in order to advance their interests. On the other side, we want to say that the parties are prepared to accept that it would be unreasonable to hold out against some proposal merely because it is relatively disadvantageous. But we do not want to say that their sense of what is reasonable is so strong that it leads them directly to identical conclusions about what is just".[93]

Justice as impartiality

Barry argues that justice (as a virtue) is derived by sticking to the requirements of being just. In justice as impartiality it means adopting an impartial stand point in

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92 Ibid, p. 372.

93 Ibid, p. 372.

which the interests of all are taken care of in the choice of principles of justice. This is similar to the other concept of justice as devoting a mutually advantageous stand in so far as it admits to agreement. However the same similarity is overthrown by the requirement that in justice as impartiality, bargaining seems to have no place (if any at all) and that it is not so much the outcome that matters.

To understand justice as impartiality, Barry provides a number of desiderata which must be satisfied. But first, we must note that the whole concept of justice as impartiality is grounded in two views. One is a world in which it is accepted that justice is motivated by self interests; and the other is a world in which it is accepted that it is rational to do things in pursuit of justice contrary to one's self interests.[94] To comprehend justice as impartiality, Barry argues, these two worlds must be contrasted.

There is also the argument that impartiality is given fulfilment through having a sense of being just and the regard that in justice lies the reason for avoiding unjust acts.[95] This argument, when combined with the above two views, makes justice as impartiality an abstract and constructivist concept. Barry's basic idea of justice as impartiality is some sort of a Kantian approach: putting one's self in another's shoes and asking the question: How would you like to be treated in the way you are proposing to treat others? He suggests that this can be done in either of these two ways:

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[94] Ibid. p. 364.

[95] Ibid. p. 366.

a) One is to ask: What some people would support if they did not know their positions.[96] Here the aim is to rule out self interestedness and bias so as to assert an impartial feeling or stand point. However, this is a highly Rawlsian postulate, purely attributed to Barry.

b) The other, is to ask parties (in the hypothetical situation) to propose principles of distribution of benefits and burdens that might be acceptable to everyone -not merely as preferable to outcomes arising out of lack of agreement, but under conditions in which that kind of bargaining pressure is removed.[97]

Thus, what Barry means by justice as impartiality, is that kind of situation in which an impartial observer (what Barry calls a person with no stake in the case) would approve of. Such a situation must manifest the following features:

a) There must be absence of the assumption that people will be unmoved by self interests.

b) Rejection of contention that efficient principles of justice reflect power relations.

c) Non existence of a non-agreement position as a sorting print except in non controlling (subordinate) position.

d) Non translation of superior bargaining power into advantageous outcomes.

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[96] P. 366-369, 371.

[97] Id. 366-372.

These features, in order to realise justice as impartiality, operate under a three-in-one approach which, in the Barry world view, is the general theory of justice:

> "It is an approach in which the motivation of being just is in the desire to act in ways that can be defended to oneself and others without appealing to personal advantage".[98]

This reduces `justice as impartiality' to acting in ways capable of being defended impartially. Barry also argues that `justice as impartiality' has a core of morality, for the quality of being impartial involves a moral sentiment of acting with objectivity and without fear or favour. Thus, in putting forward a principle that could not reasonably be rejected by impartial spectators, Barry moots a theory of justice based on a moral sentiment which then makes justice as impartiality the core of morality or moral principles of justice. This is perhaps because Barry argues that: "Morality includes an impartially defensible core, and that justice is wholly contained within that impartial core".[99]

Hence, the conception of justice as impartiality also rotates around the postulate that there is an intimate linkage between justice as a moral feeling and justice as the desire to do what would reasonably not be rejected. Thus, principles of justice, from an impartial stand point, are not only impartial principles of justice, they are also principles of morality. However, Barry counters this analysis with what appears to be a self contradiction of his position. He says that:

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[98] Ibid, p. 361.

[99] Ibid, p. 291.

> "If the principles are agreed upon by normal human beings from normal human conditions, we would surely expect them to prescribe impartiality in some contexts and allow (or even mandate) partiality in others.[1]

Justice as Mutual Advantage

The central issue here is justice as co-operation within a hypothetical situation which requires a move from non-agreement, to what Barry calls the `pareto frontier' (how gains of cooperation are to be shared).[2] So, Barry argues that the just terms are those term of co-operation and agreement between self interested individuals.[3] This in turn means that justice is that which channels the motive of self interests towards actual agreement to signal mutual advantage. In this case it means that justice is that which underwrites mutually advantageous cooperative arrangements, whether they arise from explicit agreements or not.[4] In other words, justice here infers co-operation and it does not matter from where co-operation is derived!

However, Barry simultaneously asserts that once justice as mutual advantage is operationalised, a variety of a contractarian theory of justice is derived, but this is only in so far as he thinks of justice as a matter of institutionalised compliance.[5] This then

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1 Ibid, p. 291.

2 Ibid, pp. 369-70.

3 Ibid, pp. 369-70.

4 Ibid, p. 367.

5 Ibid, p. 369.

makes justice as mutual advantage a contractivist theory which arises from agreement of individuals to maximise their self interests within the armpit of mutual advantageousness.

This works with a model of contractivism which requires, as Barry explains, a setting up of interactions between hypothetical people in hypothetical positions and thus becomes a model of the theory of justice. This model represents people bargaining advantages and disadvantages so as to generate consensus. In justice as mutual advantage, the demands of justice are thus answered by constructing models of human interaction in a certain context also. And the emphasis here too is in the nature of outcomes.

Thus, like in justice as impartiality, here too, the aim is to identify what would people agree to as principles of just institutions, and, the question they ask is: does the construction derive acceptable principles?

The major point of distinction is the non-co-operative starting point which justice as mutual advantage largely embraces. Here the idea is that everyone should deal as well for themselves as they can with "a resultant non-co-operative payoff", but provided that circumstances hold parties by moving away from the non agreement point so as to derive what Barry calls a co-operative surplus.[6] This ultimately calls into action the prospective advantageousness which is also the basis of justice as mutual advantage.

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[6] Ibid, p. 369.

Nevertheless, in so far as they stress agreement, both of Barry's approaches to and forms of justice can be characterised under contractivist and constructivist theory. In terms of motive, they again share the same goal: to extract principles of justice based on the test of reasonable terms which emphasize fair dealing or fair play.

On another front, it can be seen that both approaches share in common the theories of modern and classical philosophies of justice. Justice as impartiality is basically a combination of views of Rawls, Hume and the Stoics, while justice as mutual advantage brings together the views of Hobbes and the Sophists.

One major critique that can be brought forward against the theory of Barry in this regard is the implausibility and inconsistency his arguments exhibit. He says that justice as mutual advantage is in adopting a rational course in which each carries out undertakings because of their advantages. And he also insists that justice is in everyone doing their part in mutually advantageous-co-operative arrangements. So he seems to refute his earlier notion by arguing that advantages are only motivations to justice and that it is not merely doing whatever one views as advantageous that will derive justice.

Moreover, even if we accept this sudden change of argument, it can still be seen that justice as mutual advantage has a problem because it entails bargaining, those with superior power are destined to flourish and the maxim `might is right' can through persuasion be translated into justice under the guise of what is mutually advantageous

to all. Furthermore, as it has been noted, both justice as impartiality and justice as mutual advantage operate under the derivation of justice in real terms.

Finally, it can also be recalled that the ground work of justice in the Barry world view is that based on institutionalised compliance. That is, he asserts that the basis of justice is in (just) institutions because they offer compliance. However, institutions are artificial creations of humans and cannot, I think, be taken to be superior to the natural (innate) sense of justice which ought to be the starting point on all issues on justice.

Barry's approaches compared

In justice as impartiality we have noticed that there are fundamentally two approaches to justice. The first one is where people are allowed to pursue their own interests or advantages, but are denied certain knowledge, so as to prevent abuse of superior bargaining power. Here, we realise that the first general approach used in justice as mutual advantage is still in active operation, albeit under a thin veil of ignorance.

The second approach is where parties are put under a hypothetical situation in which the sole aim is the search to reach agreement on principles of justice that nobody could reasonably reject. Here one fundamental feature to observe is that, unlike the approach in justice as mutual advantage, this approach totally, or almost totally, drops the situation of self interest.

Moreover, as Barry explains, what we see in both justice as impartiality and justice as mutual advantage, is the use of self interests under utterly different roles. In justice as mutual advantage, self interest plays the role of representing people as they really are (self interested individuals). While in justice as impartiality, the role of self interest is reduced to only aiding in bringing about an impartial stand point.

It is also rightly elaborated (by Barry) that the two approaches are largely similar, particularly in so far as they emphasize achieving agreement from the pursuit of self interest (to constitute justice). The only puzzle of this remark is, that how can pursuit of self interests derive real justice? I think what is practically possible, is the contention that justice can be derived only hypothetically if we are to connect it to and extract it from real pursuit of self interests. Nevertheless, it is true to point out that the real difference between these two approaches, whether of impartiality or of mutual advantage, is in the way they single out certain conditions which characterise self interests. That is, veiled self interests and unveiled or free self interests. Put in other words; the impartial approach puts restrictions on people's knowledge of self interests vis-a-vis their identities and asks the question: how would you like it if you did not know how you would be affected? The mutually advantageous position or approach, leaves open the case for knowledge, so as to maximise gain.

Justice as a Subject

In conclusion to volume one of his *Treatise on Social Justice*, Brian Barry provides three important questions that are indispensable to any theory of justice. They are:

a) What is justice?

b) Why be just? and

c) How do we go about determining what justice demands?

These are crucial questions on justice, whether Barry answers them rightly is another question. The first one has been asked since Plato and is still being asked. We shall examine it first.

a) **What is justice?**

Brian Barry suggests that there are a variety of contexts in which this question can be answered. However, he inclines towards that which describes justice in social terms as an institutional distribution of benefits and burdens. He also says that justice can be described as an attribute of individual legal decisions, but insists that as a subject, social justice incites distribution which invariably requires and means that justice is an attribute of institutions. This is because institutions are considered to be the creator of benefits and burdens.

So what Barry seems to propose is that when we talk of justice we think of the way an institution distributes benefits and burdens and that "when we ask about the justice of an institution, we are inquiring about the way it distributes benefits and burdens.[7] The benefits and burdens in Barry's view are things like: rights and disabilities, privileges and disadvantages, equal and unequal opportunities, power and dependence, wealth (control of resources) and poverty, etc.

Well, there are two key faults with this conception. One is that Barry's ideas in this regard restrict the subject of justice to the social-distributive enclave. But justice is more than this. Secondly, even in social terms, justice cannot be limited to institutional conceptions. There is the innate feature of justice that can be related to distributions.

b) **Why be just?**

This question presupposes a conception of justice based on what motivates people to be just or put in other words, the various inclinations towards being just. Thus, Barry suggests that there is always an inseparable affinity between justice and the motivation of being just. This infers that the meaning of justice is attached to why people are just. It also means that a theory of justice can be answered or explained in a theory of motivation.

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7 Ibid, p. 355.

The argument is in the assertion that "because of the practical nature of justice, a theory of the motivation for being just must at the same time be a theory of what justice is". For the content of justice is such that people will have a reason for being just.[8] For example, this explains why Barry postulates justice as mutual advantage and as impartiality. In the latter there is justice because of the desire to act in ways capable of being defensible by an impartial stand point. In the former, justice is brought about by its advantageousness. This makes justice as Barry says,[9] that which every one finds to be advantageous or, that which appeals to impartiality.

Altogether, we then see that justice cannot be derived in a situation where the why is not connected to the what. But the paradox is that normally the what comes before the why!

What I can see in the motivational explanation of justice is in the postulate that why be just does, as a question, explain what is justice only in so far as it leads to the requirements of justice. Barry also somehow puts forward this argument. But the problem with him is that he overemphasizes the requirements of justice as being the requirements to comply with the dictates of the (ju$_S$t) institutions of distribution of benefits and burdens.[10] This leads

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8 Ibid, p. 359.

9 Ibid, pp. 361-366

10 Ibid, p. 359.

to requirements of justice. But indeed as Barry himself hints justice is both an individual virtue and an institutional virtue! It would therefore be wrong to say that justice is merely a disposition or desire or motive to conform to the requirements of a just institution.

c) **How do we go about determining what justice demands?**

In answering this question Barry suggests that we adopt a method in which we contrast approaches to justice. So the approaches he puts forward for contrasting are those which are based on the hypothesis of what parties or people would eventually agree to.

This, as we have already seen, is in the result of principles of mutual advantage and impartiality.

CHAPTER III

UTILITARIANISM, JUSTICE AND MARXISM

In Bentham's terms, the single object of justice is to seek pleasure and shun pain, therefore an act of justice is to be judged in terms of its contributions to pleasure.[1] In this regard, anything pleasurable is good and just. But as we shall see later in this chapter, there is no standard evaluation of what constitutes pleasure. Moreover, Bentham's two principles - desire for pleasure (as the goal behind every action) and universal benevolence as a master scale of just acts in a community, come in eminent contradiction.

This is because pleasure stems in self interests and yet his theory looks at the justice in pleasure under a general overall measure which actually diametrically contradicts the natural self interestedness of individuals, at least in the psychological sense. This can be vividly seen in Bentham's failure to recognise the relative nature of pain and pleasure as the standard measure of right and wrong. This failure is clear in his statement that:

> "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 one hand, the standard of right and wrong, on the other hand the chain of cause and effects, are fastened to their throne"[2]

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1 Bentham, *An Introduction to the Principles of Morals*, p. 1.

2 Ibid, p. 1.

Generally, there are basically two utilitarian views. One is that an act is right or wrong according to the consequences it brings forth. The second one is that acts are judged or weighed through the nature of consequences of the rule that actors follow.[3] These are what can be called act and rule utilitarianism respectively. Whatever the view, in any case the utilitarian principle is clearly the same: justice is a matter of pleasure derived in the consequences of an act. Thus, fundamentally the utilitarian stand point is this: An act is just if the consequences resulting from it derive the maximum possible satisfaction, or happiness for the greatest possible majority.

I have come to feel that this is rather absurd, in the first place, it neglects the content of the act itself let alone the state of mind of the actors themselves. Moreover, such a proposition is highly subjective for what may be pleasurable to the greatest majority of people may in itself be inherently immoral and unjust as well as harmful to others (minority). Both the act itself and the individual are either given negligible attention or are utterally left out by the utilitarian dogma.

In theorising justice, utilitarianism therefore seeks to emphasise communal-majoritarian supremacy over individual rights. Its roots are in the belief that justice and the value of human life are contained in the dictates of pain and pleasure. Therefore, classical utilitarianism postulates a concept of justice based on the belief that an act is good, right or just because it produces `the greatest possible ration of good to evil over all.

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[3] Smart and Williams, *Utilitarianism, For and Against*, 1973, p. 9.

In the light of justice, utilitarian concepts look at a definition of justice in terms of the general good for the general public resulting from an act. It does not matter if the general good is contained in an evil motive or action as long as the subsequent results give the `greatest pleasure (happiness) for the greatest majority'.

This means that, things like war, cheating, fraud, murder, assault and slavery can be considered just not withstanding the suffering inflicted on a few victims, as long as maximum satisfaction (good) can be achieved for the greatest majority. This is the classical theory of utilitarian justice. John Stuart Mill as a disciple of Jeremy Bentham advanced upon the classical theory by advocating that in utilitarianism, justice is derived by considering the immediate and ultimate consequences arising from an act vis-a-vis the maximisation of pleasure for the greatest number of people.

The difference between Bentham and Mill is that, while the former does not distinguish between particular acts vis-a-vis utility; the latter lays emphasis on evaluating the utility of various acts and their general effects. However, both Stuart Mill and Jeremy Bentham are committed utilitarians whose theories are derived from consequentialistic conceptions.

To classical utilitarians, a socially just allocation of goods is that which brings the greatest satisfaction for the greatest number of people. Modern utilitarians would agree to this though with little analytical alteration. The problem with utilitarianism

is that, there is no precise measure of pleasure, happiness or satisfaction and one cannot simply equate justice with that which satisfies the greatest number of people!

It is an illusion to think that justice is only attainable through maximisation of pleasure for the greatest number of people. This is because happiness, pain, pleasure and satisfaction are dependable on personal (immeasurable) feelings. So, what is satisfaction to one group of people or a single individual, may be painful to the other.

The Utilitarian conception of justice considers consequences and not the process of the idea of what is just. Thus, the just measure in utilitarian terms is that which weighs up things in regard to the results. The standard with the largest overall (net) balance of happiness is the just standard, the collateral harm not withstanding. It means that in considering competing claims or rights, that which leads to the largest total sum of general welfare will be the one that shall be considered most.

Therefore, it seems that utilitarianism may not give strong regard to those claims which do not generate maximum general happiness - no matter how vital they may be to some people. The state can also take away any individual entitlement or rights if the same is required in the maximisation of general (net) happiness. This is the good side of utilitarianism, for it cares for general welfare. The bad side is that it does not care whether the methodology is harmful to others or immoral.

A good example here is slavery. For the utilitarian, slavery can be good and just if its use is crucial to the maximisation of happiness. Thus, if (as it was) the whole world is in need of human labour for its industries, so as to increase social economic development and thus happiness overall, utilitarianism will accept the taking of a few million slaves to generate this aim for the many other millions or billion people. Therefore, utilitarianism would be totally unacceptable to all those moralists and believers in a rights thesis, like Ronald Dworkin, who argue that justice equals morality and taking rights seriously.[4]

Put in other words, utilitarians seek to explain justice in terms of that which maximises human welfare. This is derivable in weighing up pleasure against pain seen in the consequences of an act. The action which produces the maximum possible amount of welfare (happiness) overall is thus the just and right act. This postulate, just or unjust, is the basic premise of utilitarianism.

If we consider it in terms of its possible effect on the overall welfare, justice in utilitarian terms refers to and concerns that which promotes the overall maximisation of welfare and is futuristic in nature. This is because utilitarianism evaluates actions and behaviour in terms of the foreseeable results that generate maximisation of welfare. That is, it does not give strong regard to whether the act itself is good or not, what it is concerned with is whether an act will derive maximum overall pleasure.

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[4] See Ronald Dworkin: *Taking Rights Seriously*, Chapter VII and for a Dworkinian argument on utilitarianism in this regard, see Chapter IX of this book particularly pp. 232-7.

So, to the utilitarian, such acts as murder, theft, burglary, etc, do not worry them, what matters is their expected result on the maximisation of overall happiness. On this note Simmonds gives an illuminating example: in utilitarianism a promise is not binding because of its having been made *per se,* but rather, because of any anticipatable consequences that can be foreseen for the results of its being broken.[5] If breaking the promise will derive maximum overall welfare then it's alright; but if the same will result in injurious consequences on the maximum welfare, then it becomes binding to follow the promise taking the injury into no account.

Utilitarianism is basically contained in the maximisation of welfare, no matter what the distribution is. To the utilitarian, the rightness and wrongness of something is traceable in the anticipated consequences or present consequences of the thing itself and not its nature. Moreover, the consequences must be such that they are interpreted in terms of their effect on overall welfare. Thus, prostitution and slavery for example, may be generally seen as immoral and unjust acts in the way they exploit the human body, but to the utilitarian, such acts are just and good if they derive maximum pleasure and welfare for the general majority not withstanding the individual harm involved.

Along this premise, classical utilitarians like Jeremy Bentham have stood to explain the utilitarian postulate: it is because of pleasure, they argue, that acts are assembled into

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5 Simmonds, N. E., *Central issues in Jurisprudence* (1986), p. 18.

motion.[6] Therefore pleasure being the end, the purpose and product of all human acts, it is the sole criterion of right and wrong. To arrive at this criterion entails and requires ascertainment of the maximum total balance of pleasure over pain involved in the consequence of an act. This means justifying maximum pleasure and trading off the corresponding pain.

To capture this so as to identify and manifest justice, classical utilitarians explain that we have to assess the likely consequences of an act to all individuals in terms of pleasurable experiences of such consequences vis-a-vis the present or likely pain involved. If the pleasure involved maximises overall welfare and outweighs the pain (overall) traded off, then the act is a just act if put in motion. This clearly shows that utilitarianism gives no attention to justice as a content of the act per se but rather to justice as a matter of the results of an action.

Questions like whether doing or not doing the act will be an injustice are left unattended. Moreover, how can we precisely know overall pleasurable and gainful experiences? This renders justice in utilitarianism a matter of questionable subjectivism contained in component experiences of the individuals overall.

Furthermore, it appears absurd and quite disturbing to view justice in terms of the subjective good as can be seen from Bentham's "pleasures of Malevolence".[7] That is,

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[6] Ibid, p. 20.

[7] Ibid, p. 21.

how can we see justice in acts of cruelty and sadism simply because the actor(s) derive(s) pleasurable (maximum) experience from them? Therefore, it is quite fitting to criticize utilitarianism for failing to see that justice is beyond mere individual conceptions of the good. Though goodness is a wider concept than justice, what is just and right cannot be viewed in terms of what is good alone. For justice is a function of many things; it is a function goodness, it is a function of pleasure, happiness, social order, etc.

In its classical form, utilitarianism stands for the good overall and marginalises the individual appeal. In this, the utilitarian postulate remains emphatic: maximisation of welfare and not equality of welfare is -what derives justice. This means that unlike popular theories of justice, utilitarianism is not concerned with welfare in the distributive sense but rather in terms of maximisation. What utilitarianism stands to offer and advocates for, is a society in which the total welfare is higher, and not necessarily the equitable distribution of social welfare. That is to say, the question utilitarians tend to always ask is: how much welfare there is and not how equitable is the welfare spread?

Nevertheless, utilitarian justice in this sense may entail the equal distribution of resources which involves maximisation of welfare. This means that under utilitarianism too we can redistribute wealth so long as the same leads to a maximisation of welfare being the sole goal of redistribution. In this way, equal distribution is merely the means and maximisation of welfare the goal of the utilitarian

notion of justice. For example, utilitarians would accept the idea of redistributing resources from the rich to the poor simply because by doing so the harm traded off is outweighed by the pleasure (welfare) maximised or felt by the poor recipients.

Therefore, in utilitarianism, it is the end that is looked at and not so much the means. In it, justice is seen as a matter of pleasure expressed in maximum overall welfare. This makes the demand for general happiness (maximised) as the demand for justice. But, it can be argued that this does not mean an equation of utilitarianism to "universal egoism". After all, utilitarianism urges the consideration of the effect on each and all by the consequences of an act before the same can be judged as right or wrong.

But utilitarianism can be criticised for not providing a stable standard measurement upon which precise evaluations can be held. For example, it has been argued that a society of utilitarians is bound to collapse, for each may trample upon the general principle when he or she tries to speculate what can lead to maximum welfare. There is no precise way in which to weigh what and how the maximum welfare will be attained from the consequences of an act!

To this problem, utilitarians may perhaps provide the answer in the postulate of what is termed as ideal and actual rule utilitarianism. Basically, the argument here is that we ought to observe the rules which refer to utility. Under actual rule utilitarianism, the argument is that each should regulate himself or herself in accordance to the generally acceptable rule of compliance which fosters perfect utility. The question to

be asked here is, what if such rules do not exist? What is to be done? Under ideal rule utilitarianism the argument is that the society should conduct itself according to those rules which appear to be such that if they were to be generally observed, a maximisation of welfare would subsist. The problem here, like in the other rule-utilitarianism, is that there is too much reliance on assumption conception.

Furthermore, classical utilitarianism has been blamed for being non-liberal. This however, can be tackled by new dimensions of utilitarianism which emphasize the honour and satisfaction of people's preferences. Nevertheless, the critique persists: by building a society based on individual preferences, utilitarianism displays a lack of independent guiding standard measure of values, even in so far as asserting what entails maximum welfare is concerned.

Thus, it can be rightly observed that by perceiving justice in terms of that which maximises (the greatest) welfare realisable in maximum pleasure, utilitarianism fails to see an important fact: pleasure as happiness is not all that justice seeks to find but is merely part of the few goods that constitute the aims of justice.

Moreover, it is difficult to measure how much good equals to maximum general welfare. It is also a noteworthy critique of utilitarianism to argue that, under utilitarian notions of justice there is little respect for individuality, for the individual may most usually be used for the sake of the general welfare, anything to the contrary not withstanding!

It can also follow that there is little moral concern in utilitarian theory of justice. And, when broadly examined, we can see there is a clear absence of a superior conception of the good and right in utilitarianism. After all, there is no better judge of what makes each happy except the individuals themselves and everyone's effort to maximise self happiness ought to be upheld. This is because in tracing overall maximum welfare or happiness we have to start with the individual.

Marx

In Marx's writings, justice is implicity discussed in terms of the relationship between distribution of conditions of production and the mode of production itself. From this angle, Marxist concept of distributive justice is argued in these terms:

> "The structure of distribution is completely determined by the structure of production. Distribution is itself a product, not only in its object, in that only the results of production can be distributed, but also in its form, in that the specific kind of participation in production determines the specific forms of distribution".[3]

Thus, though it may be right to argue that fundamentally, Marxism is not based on a passion for justice,[9] it is clearly evident that Marx was concerned with the grave inequality between the methods of acquisition of entitlement and their ownership. That is why he did not condemn capitalism per excellence but because of the inequality (in the mode of production) it was associated with. Therefore the Marxist analysis of a theory of distributive justice in regard to desert is in terms of effort and reward vis-a-vis the mode of production. In *Capital* chapter twenty one, Marx thus argues:

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3 Karl Marx, *Grundrisse*, 95 (Nicolous. Trans. 1973) cited in Baxi, U. *Marx, Law and Justice* (1993), p. 55.

9 Tucker, R.C. *The Marxist Revolutionary Idea*, pp. 34, 35, 36 and 37.

> "It is a self evident principle of natural justice that a man who borrows money with a view of making a profit by it should give some portion of his profit to the lender."[10]

Thus, under the Marxist theory, the concept of (distributive) justice, is not just about conditions of production, but also the existence of fair dealing in which no one is exploited of his or her due.

> "The owners of goods must [therefore] behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of an act done with consent".[11]

Hence, the idea in Marxist theory is that in transactions between peoples, it is impossible to discuss the concept of justice or how it is derived or what it entails without considering the mode of production. What is a just distribution must therefore be based on the present mode of production.[12]

This means that in Marxist philosophy, social justice entails examination of the mode of production and it does not matter what system we are faced with. It could be a capitalist system, or an Islamic system or a communist one, - whatever it is, "if distribution corresponds with the mode of production" [in that system], it is just, if it does not, - it is unjust.[13]

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10 Marx *Capital*. 7. Chapter 21. Vol. 3. See also *Capital*. 2. at 339-40.

11 Ibid. I: p. 88.

12 *Critique of the Gotha Programme* 18 and 19 and *Capital* I. at 188. See also Tucker R.C. *The Marxian Revolutionary Idea*.

13 Baxi *Marx, Law and Justice*, (Bombay: Tripathi Private Ltd. 1993) 57.

For example, if we consider justice from or within the capitalist mode of production, we see that people can be used as merely means for the interests of the industrialists: their labour can be hired for very poor prices and under very bad health conditions so as to produce massive profits for a single employer. The relation between this mode of production and the corresponding distribution has results that are oppressive, exploitative and with no regard for human rights.[14] This is unjust.

Therefore, the marxist theory requires that justice be conceived relatively and in view of the prevailing mode of production.[15] It would henceforth appear wrong to argue that under Marxism we can wholly universalise or idealise the concept of justice. Like utilitarians, marxists are opposed to views of justice based on meritocracy or desert. For, their conception of justice is need-based and social equity oriented. They advocate distribution based on need but production based on ability. So, to marxists and communist theories of justice, there is an assumption that sufficient resources can be created to meet individual needs.

Thus, while utilitarians would support private property, marxists and communists are for the justice of collectivism. This is because, utilitarians see private property as one major way in which efficient maximisation of general satisfaction can be derived, while marxists view collectivism as the best avenue for ensuring social justice and

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4 Ibid, p. 57-8.

5 Lloyd, *Post Modern Jurisprudence*, 1994, p. 858.

equity. Therefore, in some way both marxists and utilitarianists share a majoritarian touch.

However, both utilitarianism and marxism can be criticised for trampling upon fundamental individual rights and freedoms: utilitarians neglect individual needs by emphasising majoritarian priority. Marxists over emphasize social equity and they too trample upon the needs and freedoms of the individual.

Basically, the marxists talk of a justice of a classless society in which equality and liberty of opportunity for all is sustained. This is because, capacity is only to be considered in terms of production but need is important in considering distribution. So, in Marxism it appears that burdens are shared according to ability, but rewards are according to need.[16]

To Marxists, any classification or stratification of people into various categories is a catalogue for exploitation and goes against the true nature of humankind. In this way, Marxism emphasizes the natural inequality of people rather than the opposite, and urges a shared consumption of any surplus value otherwise the existence of surplus is considered exploitative. This, looked at from Rawls's just savings principle, comes to terms with Rawlsian justice, at least methodologically or in approach.

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16 It has been rightly contended that Marx's concept of justice is in the slogans "From each according to ability, to each according to needs"! See William Lean McBride, "The concept of Justice in Marx, Engels and others". *Ethics*, 1974, Vol. 85, p. 203-18.

Moreover, in as far as Marxism advocates the liberty of the proletariate, as opposed to the well to do industrialist, it can be said that it too seems to fight for a welfare social order in which those at the periphery of the social ladder are the main focus of attention in equalisation principles of justice. Thus, Marxist justice is a social bargain between the proletariat and the bourgeois.

Marxism is a failure principally because it erred in its conception of humankind. This is because, in the examination of society and production, the whole marxist philosophy seems to have assumed that persons are responsible for their situation since they have the power to produce. Therefore, marxists argued that when society is organised to the extent that there is a collective ownership of the means of production, then justice will prevail for people will be able to avail themselves with what they need and there will be a classless social order. However, it is not always true that whenever society is in control of the primary means of production (resources) the needs of the individual will automatically flow therefrom.

Moreover, justice transcends mere physical needs of people's social engineering through the industrial process. Furthermore, there is no such thing as a classless social order. It is unattainable and beyond the true natural creation of peoples. For, there are always situations when people need to be put in certain categories in order to deliver justice. For example, in the case of affirmative action, there has to be a category or class of people that will be distributed certain things that others may not receive. What may be true is that a good social order can exist if people are not

graded in unfair discriminatory classes. Classes can exist between people if such will help redress the prevailing injustice and put back the real stamp of justice in society.

Marxism has a narrow view of life and therefore cannot give us a complete theory of justice. It looks at life as a matter of material needs and as a constant struggle between classes for the control of the means of production. It therefore appears interesting and absurd to note that, to the marxists, justice is attained when at the end of the struggle one class is triumphant: "the worker". This is not justice but politics!

CHAPTER IV

ISLAMIC JUSTICE

Islam approaches the concept of justice from both a universalistic -metaphysical and rational conception which is based on wilful submission to divine law expressed in the inward and outward human behavior. It is both absolute and relative in nature but walks along the veins of a single, and unadulterable universal law that governs human affairs.

In general Islamic language, justice is couched in terms derived from the revelation such as; *Al Mizaan* (the correct measure), *Al Sirat al mustaqiim* (the straight path), *Istiqama* (steadyfastness or straight forwardness), *Al Wasat* (the middle course) or *Al Furqan* (the criterion between right and wrong).[1] Literally, these terms show that justice is to be conceived as the best measure between two extremes. Basically, Islamic justice can be divided into three categories: justice as righteous behaviour, as living according to the shariah and justice as leading a life based on a totally free, equitable and responsible sense of distribution of burdens and rewards.

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1 For example it is indicated that the Qur'an is the Criterion of right and wrong (al Furqan) and that God is the one who created all things and ordained them in due proportion. (Al Qur'an. 25:1).

Justice as righteousness

Justice as righteousness can mean many things. It is leading a peaceful life within and between individuals, and it also refers to being upright in conduct or following a rightly guided sense of direction or dispelling discord and establishing social order, etc. Fundamentally, for all these meanings to hold, one must live "a complete" way of life free from discord and evil. From the textual language of the Qur'an, justice is thus identified through the implications of the word *Zulm* (wrong doing).[2] Therefore, Qur'anically speaking, justice in this regard is perceivable from both the correlatives of right and wrong as seen from the implications of the terms *zulm* and *`adil;* which equate justice to equity and fairness and injustice to inequity and imbalance. Such equation ties justice to expressions of equality[3] and uprightness as principles of righteousness and the moral good.

From this angle we can also say that justice in the revelational sense generally refers to the furtherance of good morals and righteousness. And this is what we may literally call revelational justice. For it resides in and is derived from the values of uprightness, equity, righteousness, moderation, temperance etc. To this affect the Qur'an is not only replete with condemnations of wrongdoing but it has in no uncertain terms invoked moral values as the umbra of justice.[4]

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[2] Al Qur'an, 5: 45 and 4: 49.

[3] Khadduri Majid, *Islamic Conception of Justice* 1984, pp. 7-8.

[4] See Al Qur'an, 2:42-4, 4:127-9, 5:8, 6:151-2, 17:23-38, etc.

It must be emphasised therefore, that in Qur'anic ethics, justice as righteousness is best conceived in the expressions of the consequences of wrong doing (*zulm)* which is the other word for injustice (*Jawr*). Both these terms are synonymous in meaning and it is difficult to draw a distinction between the two. For example through both terms, the Qur'an expresses injustice as anything that inflicts harm (in the religious sense) on one's self (soul) as well as on interpersonal relations.

But it is in the Qur'anic concept of *zulm* (wrongdoing or evil) that a better and simpler view of justice can be perceived. This is perhaps because from the implications of `*zulm*' (wrongdoing) justice is explained as doing the right thing and injustice as anything that strays from the right path of the divine scheme of things. So anything that departs from the divinely prescribed behavior is wrong and henceforth unjust. And anything that conforms to the divine prescriptions is righteous and thus just.[5]

Thus, in Islam, justice as righteousness is a morality based disposition to do good. This not only makes it an ethical matter of following religious duties and obligations, but requires the existence of an immutable code of ethics to determine the right or the just. In this code, is where lies the perfect mean (*Al Wasat*) which is the Islamic equivalent of the Aristotelian "golden mean". But in Islam, following the mean is not enough. This is because, while the law lays down what is right, good and just, it is the proper use of the law that affords the comprehension

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[5] Basically, "*zulm*" can be defined as putting things in the improper (wrong) place. It concerns intra-self wrongdoing (*zulm al nafs)* and interpersonal or social evil (*zulm al nas*). See Al Qur'an 3:135 and 2:57.

and distinction of justice.[6] In Muslim philosophy, like in Plato and Aristotle, it is therefore believed that justice exists only when there is an ideal order in which perfect interpretation of the laws subsists. For example: while Ibn Khaldun[7] argued that for justice to prevail there has to be `a great society' based on solidarity not self interests, both Al Farabi[8] and Ibn Rushid[9] saw justice as that which prevails in a virtuous (political) order and following the guidance of (its) virtuous leader who is the best person endowed with the best qualities of knowing the right and the wrong. In Plato's terms this is what is called a philosopher king or in Dworkinian reasoning; the super-judge-Hercules who possesses the right answers.[10]

It then follows that since justice means righteousness or doing the right thing, it can not be realised until there is a righteous (ideal) social order in which every one is accorded their rightful roles and dues. This means that in Islam too, like in

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6 This is why some scholar have argued that justice in Islam is not merely the establishment of an ideal order but following the direction of a rightly guided leader possessed with the best knowledge of rationalising the meaning of the law. (See notes 8, 9 & 10).

7 See Khaduri Majid, *The Islamic Conception of Justice*, 1984, p. 81-2.

8 See Al Farabi's *Political Regime* (*Al-siyaasa al Madaniya*) PP. 69-70, also cited in Khadduri Majid, Ibid, p. 85.

9 See Khadduri Majid op. cit., pp. 99-101, citing Ibn Rushid's *Commentary on Plato's Laws*, p. 157.

10 Compare with Ibn Sina who contends that justice is not in following the directions of a virtuous leader, but that in `a just city', justice is derived by establishing that order which is agreed upon by the citizens (under a social contract between them and the leader). See Khadduri Majid op. cit., pp. 88-92. Also see Lapidus, S. M, *A History of Islamic Societies* (Cambridge: Cambridge University Press, 1991) 186-91.

Aristotelianism and Platoism. justice entails the excellence of virtues and the treatment of people according to deserts.

But in Islam, it is not enough to equate justice to the excellence of virtues alone or placing people in a middle position. In Islam, if and when justice is equated to the idea of the mean, or deserts, it means the existence of the promotion of fairness, self control, self preservation and social balance in accordance with divine prescriptions. Therefore on this note it can be seen that in Islam, defining justice revolves around one thing: following the divine order of things. Afterall, the divine order is the only one that is accepted as the perfect order, because God who is its author is perfectly placed. For He alone places, and Has placed everything in a state of perfection (proper order).[11] Going against this order is wrongdoing (and thus unjust) since it creates a distorted order based on human whims and fancies. This creates suffering and evil leading to injustice.

In other words, justice as righteousness is in obeying divine law[12] because, by so doing one keeps evil and good to be in peace with each other and allows every thing to remain in its properly placed order.[13] But it is also extra legal because it is not only

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11 George Malek, "Islamic Justice vs. Christian justification" (1992) 8 *Journal of the Institute of Muslim Minority Affairs*, 237.

12 This makes it possible for Islamic justice to meet with Aristotelian contention that justice is that which conforms to the law of the social order. The fundamental difference here is that Islam cares to answer the questions: what law and whose order?

13 This too allows muslims to accept Plato's argument that justice is in the placing of things in their orders. The difference is that Plato limits justice to people's capacity and station in life. This seems to be unacceptable to Islam

in the dos and do nots of legal rules since it involves the excellence of moral character and habits. This is where a distinction can be made between justice as righteousness and justice as conformity to the law.

Justice as conformity of the law

In Islam, legally speaking justice is that which is in line with the *Shariah* and whose application is in conformity to the dictates of *Shariah* (Islamic Law). This is because justice (in Islam) is not only the goal of the law but the law itself is the pathway of justice.[14] Therefore in Islam too like in Aristotelianism, obeying and observing the law is comprehending justice.[15]

But in Islam conformity with the law which equals to justice is not blind conformity. This is because the *Shariah* which provides guidance upon which justice is to be achieved is quite comprehensive and its content includes divine revelation and human reason expressible in the *Qur'an*, *Sunna*, *Ijma* (consensus), *Qiyas* (analogical

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for its justice transcends people's capacity and social establishments.

14 In fact *Shariah* generally means "pathway" to be followed or in a more literary sense, the road to a watering place. Basically, for the purposes of this thesis, *Shariah* should be understood as that law which is the totality of God's law which regulates people's life so as to program a perfect social order.

15 In the Qur'an we read: "Those who do not judge by that which Allah has revealed (*Shar'ah*) they are the (disobedient) unbelievers, they are wrong doers (*Zalmun*), they are the transgressors (*Fasqun*) sura Al Maeda 5: verses: 44, 45, 47.

deduction) and *`urif* (customs acceptable to divine revelation). All those help us to indicate the principles of justice both through the revelation and by way of the distinguishing faculty (wisdom) which tells us the right from the wrong and the just from the unjust.

But specifically, it is under Qur'anic phrases like *al-Mizan* (the just measure) and *al-Furqan* (the criterion), that justice is conceived as a matter of following divine law in interpersonal human conduct. This law is contained in the injunctions of the Qur'an and Sunnah as the unbiased standards that inspire us to deal with each other under the principles of equality, tolerance, freedom and togetherness which are the cardinal pillars of justice.

This is further illustrated in the Qur'anic maxims of: *`Khayr umma'* (the best community), *`ummaton wasat'* (moderate community) and *`Ummaton Wahid'* (the single belonging) all of which conceive justice in terms of solidarity and social equity, guided upon a single law of God.

Under these three maxims, justice is thus expressed in terms of that conduct in which every one cares for others as part of the obligation to promote a familial social order. This means that to realise justice the individual has to conduct himself or herself with a view that she or he is part and parcel of a single entity of brothers and sisters tied by divine injunctions.

Therefore, the guiding principle which derives justice in Islam is the existence of oneness[16] of purpose and commitment by adhering to the Laws of God and distinguishing between people in accordance with divine regulations. This requires that members of a social order do observe and enjoin upon each other the doing of good acts and avoidance of evil by fulfilling divine obligations. This operates through the use of reason and revelation which afford a moderation of human direction.

Thus, it would appear right to argue that the proper enforcement of God's Law in society will also derive justice for it is His Law and religion that prescribe the "just".[17] This is because the nature of the Divine Lawgiver is not unjust and justice is His attribute.[18]

And, since His laws are for just ends, whatever He commands is just and that which He prohibits is unjust. In this way, Islam postulates justice as conformity with the law and meets with Aristotelianism but only partially for while Aristotle does not question the justness of the law to be followed, Islam presents before its believers the

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16 The oneness which realises justice is that where people have a mutual - feeling for each other - behaving like parts of the human body would do; "if one part is afflicted with sickness, the whole body feels the pain", and if another one achieves joy or success, the rest of the body shares in the happiness.

17 Ibn Khalidun and Ibn al Azraq on Social Justice; see Khadduri Majid, *The Islamic Conception of Justice*, 1984, pp. 185-7.

18 It can also be rightly argued that justice is not merely a matter of human approval and disapproval for being an attribute of God's very nature it is implanted in people by divine guidance and knowledge. See George Malek, op. cit., p. 237.

postulate that divine law is the just law and that this is the very reason why its observance equates with a sense of being just.[19]

This being the case, it thus follows that the substance of justice in Islam, is a resident of the ultimate principles of *Shari'ah* which express the ultimate aim of the law as the province of justice. These principles have been identified as three fold in nature viz: the general good (public interest), happiness and good character.[20]

Under the principle of the general good, justice is derived in the avoidance of any wrongdoing that may harm the public welfare and prevent the promotion of public interest (*maslahah*). This can only be done if people obey God's Laws since only He knows what is in the best interest of all. It is only through this guidance that things like corruption, exploitation and oppression can be avoided and public welfare attained.

Imam Ghazzali[21] explains that the reason why the general good (*maslahah*) is an element of justice in Islam is because as a principle of Islamic Law it averts evil which causes suffering and encourages the doing of good which promotes common welfare. In this way, the general good becomes an ultimate end of the law which is the content of justice itself.

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19 Al Quran 6:153 "Verily, this is my way leading straight: follow it, Follow not other (paths) They will scatter you about".

20 Khadduri Majid, op. cit., pp. 135-7.

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Other jurists have considered the public good (*maslahah*) as an overriding element in any conception of justice since it is the public good itself which is the ultimate end of the law.[22] Such an argument appears to be quite absurd for it is difficult to see how considerations of the general good can outweigh all other considerations. To submit to such a contention is tantamount to equating justice with anything that serves the general good per se.

How would this reconcile the Islamic principle of deserts? Perhaps the answer lies in the contention that in Islam everything belongs to the Lawgiver and Creator. Therefore under the Law of God who is the absolute Owner and Creator, it is a prescription that each shall own only in trust to God and that this is best manifested in those actions which further the general good of all "creation".

Therefore, for the furtherance of common welfare, God has presented divine Laws as guidance for disposing and enjoying private possessions. This guidance lays down the method of redistribution of wealth which postulates that private ownership exists side by side with the rights of the general public. Under this divine law of redistribution of wealth, the rule is that justice resides in observing the maxim: *in the wealth of the rich and the well to do is a right of the poor and less fortunate*. This rests on the

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22 For example Najm al-Din al-Tawfi leans towards this argument. See Khadduri, *The Islamic Conception of Justice*, op. cit., p. 181-2.

injunction that "[a person is not a Muslim if he or she] goes to bed with a full stomach while [his or her] neighbour is hungry".[23]

Islam also like utilitarianism, conceives justice in terms of the element of pleasure or happiness. The argument here is that justice is a matter of deriving permanent pleasure through the intentions of divine law. But unlike utilitarianism, this has to operate under the requirement that the pleasure that derives justice is only in such things which are good and pure.[24]

Thus, again, unlike utilitarianism, in equating justice to the attainment of pleasure, Islam considers not just the trade off between pain and pleasure, but also the treatment of people according to deserts. This is because in Islam unlike in utilitarianism, justice as a matter of pleasure involves both the respect for common shares (the general good) as well as the preservation of private rights.

Al Farabi[25] in examining this postulate, explained that happiness as the ultimate end of human life is the content of justice itself. Like greek philosophers[26] he therefore

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[23] See Heine. P, "Europe and the orient. Islam's confrontation with European Modernism". (1993) 2 *Universitas*. 121.

[24] Al Qur'an, 2:168 and 23:51.

[25] See Al Farabi's *Al siyasa al Madaniyya (The Political Regime)* in Khadduri Majid, *The Islamic conception of Justice*, pp. 81-86.

[26] Aristotle also believed that justice as the highest virtue leads to happiness for it is not part of virtue but the whole of virtue just like injustice is the whole of vice.

argued that since justice is a supreme virtue, any happiness can only be realised through cultivation of virtues. These virtues are attainable through the observance of God's Laws. This requires the observance of good characters.

Under the principle of good characters, justice is contained in legal rules which prescribe good conduct of human relations such as kindness, benevolence, mercy, generosity, tolerance and sympathy. Through these rules, Islam conceives justice as a matter of maintaining moral order based on the observance and love of divine guidance. Those who conduct themselves in obedience to God's Laws are the just ones and the Qur'an described them as the best.[27]

On the whole, we can say that Islamic justice, particularly as righteousness and as conformity the law or legal order, resembles that of classical Greece. But this is only in form and it does not extend to the grounds on which it is based. For example, it is true that in the application of Islamic justice , it is a requirement (like in Plato and Aristotle) that there be existence of a political order[28] under the direction of a virtuous leader[29] - philosopher king. But there is a distinction also: in Islam, both the politics

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[27] In Al Qur'an 49:13 God admonishes that: "The best Among you is that one who is God fearing".

[28] Al Farabi, *Political Regime (Al-Siyaasa Al-Madaniya)* op. cit., pp. 69-70. (cited in Khadduri Majid, *The Islamic conception of justice*, op. cit., p. 85).

[29] Ibid, pp. 69-70.

upon which society is ordered and the virtues of the leader must be in constant harmony with revealed prescriptions.[30]

Thus in Islam unlike in classical theory, justice requires answering the question: whose law what order? This is vital for all the conceptualisations of justice in Islam whether it is justice as "the golden mean" (*Al Wasat*), or as an amalgamation of virtues, or as putting people in their rightful places, it all must be within the dictates of revealed law.

Distributive (Social) Justice in Islam

In analysing social values, Islam gives a strong position to the rights of the individual as well as those of the society. And under this analysis, the argument is in this:

> "Justice is the greatest of all the foundations of Islam; but justice is not always concerned to serve the interests of the individual. Justice is for the individual, but it is for the society also, if we are willing to tread the middle way; and so we must have in our life justice in all its shapes and forms."[31] (emphasis added).

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30 Al Qur'an: 4:59. Urges that in the ordinary government of human affairs, there should be a co-ordinated obedience to the laws of the Qur'an, the tradition and practice of the prophet, and the rules and regulations of those in charge of authority in society. But, where this co-ordination meets a conflict, the "best and most suitable" arbiter is to be found in devine law (Qur'an and sunna). This is the righteous order because it is based on righteous prescriptions. It was also the way followed by the four orthodox caliphs after the prophet. For example Abu Bakar the first caliph is reported to have admonished his followers thus: "If I govern well, you should help me. If I govern badly, you should correct me ... It is your duty to obey me only so long as I obey God and His prophet. Were I to disobey them, you owe me no obedience".

31 Sayyid Qutb, *Social Justice in Islam*, 1970, pp. 103-4.

This type of justice is found by living in peace with one's self and with others and is based on righteousness which entails the doing of right and avoidance of evil. But righteousness has to be objective and subjective also. It is objective because all Muslim societies; have to guide their conduct by the dictates and within the realm of the Qur'an and Sunnah as the undoubtable signals that direct independent human reason to determine social behavior between persons.

It is subjective if doing right includes the direction of human conduct in accordance to the public good (*maslahah*) of a given society or in accordance with unique situations one may be found in. This calls for an interplay of rules of convention (`urf), independent legal reasoning (*ijtihad*), analogical deduction (*Qiyas*) and consensus (*Ijma*) in deciding social issues of a given society.[32]

Basically, social justice in Islam is realisable in the comprehensive and all embracing nature of Islam which avails no room for distorted orders. In this case, social justice too is an all encompassing virtue which seeks to redress the artificial inequalities and redeploy the universal order (of God). This brings into light, the call for redistribution of wealth and income as the central piece upon which Islam bases social justice. Under this conception of social justice, Islam presents eradication of poverty, need fulfillment and total alienation of any kind of status quo as the goals of any meaningful and perfect social order.

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32 For detailed analysis of the use of rules of interpretation in Islamic Law, see Kamali, M.H. *Principles of Islamic Jurisprudence*, 1989. pp. 211. 248. 309, 359 and 463.

Examining the idea of social justice, Sayyid Qutb in his book *Social Justice in Islam* argues that justice in Islam is an all embracing concept that emphasises a unity of the soul with the body, the spiritual with the material; and the communal with the individual.[33] This can be realised best in a theory of justice such as that of Islam which is comprehensive and coherent, and in which the integrity and universality of values subsists.

The best way to understand justice and social issues in Islam is therefore to start from the universal theory which Islam presents as the answer to all human questions. This theory is to be found in the Qur'an and traditions of the prophet (sunna) which are the basic sources of Islamic law and the immutable guide of human conduct.

Through these sources, Qutb explains, Islam has laid down the perfect nature of relations whether of deserts, entitlement, need or merit, etc. It is from these sources that all things must be ordered so as to establish a society in which there is no crookedness. It is in such an order that social justice thrives since in it all are one and the same and are mutually interconnected.[34]

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33 For a detailed examination of this view, see Adnan Musallam "Sayyid Qutb and social Justice (1945 -1948)" (1992), 4, *Journal of Islamic Studies*, p. 52-70.

34 Also see Sayyid Qutb, *Social Justice in Islam*, op. cit., p. 19.

Such makes it possible for people to establish justice because in that order there is harmony between mankind and nature, and individuals are allowed to live in purity and perfection.

Under this view, Islamic justice therefore argues that the true conception of justice is that which realises this: `that [people have to] lead a complete life and this resides in a single world of individuals in which the natural and artificial distinctions between mankind do not give way to discrimination but rather perfect the unity of purpose that exists amongst [their global] environment'.[35]

Thus, the differences in people and their locations should not be used to promote inequality and discrimination, but rather to emphasise the unity (of purpose) and interdependence that exists between them. This is because the Qur'an clearly prescribes that all people, men and women were not created or made into variations of races and nations to despise or exploit each other, but rather to know [and recognise the consideration for] one another.[36]

It is this sort of unity which ought to explain the true nature of justice for in it resides the perfect order of God. It is a unity which sets a lasting harmony between competing desires and strikes a perfect balance between opposing ends.

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35 Adnan Musallam, "Sayyid Qutb and Social Justice", op. cit., pp. 20-21.

36 Al Qur'an, 49:13.

In it lies the perfect rights and responsibilities as well as duties which explain the varied nature of persons and balances their natural distinctions through a single, immutable and complete law.[37] It is in such a community that social justice thrives for it is based on perfect guidance. This means that, social justice in Islam is to be sought in absolute unity of existence and general humanity.[38] It also means that Islam recognises that there is a basic equality of people and that all are to be regulated under one stable basic law of conduct. It is in this vein that the spirit of social security, peace and togetherness is enjoyed by all in society. Justice therefore is to be found in the fundamental equality of individuals.

However, although Islam "acknowledges the fundamental equality of all [peoples], and a fundamental justice among all, it leaves the door open for achievement of prominence through hard work, just as it lays in the balance values other than the economic".[39] Fundamentally, what Islam postulates is that in matters of social justice there should be equal opportunity to all and that natural abilities and talents must be used for the benefit of the individual as well as the community. On this point, the Islamic theory of justice, like that of Rawls would probably meet fierce criticism (from libertarians such as Nozick) that it tramples on the invisible rights and liberty of persons by treating their entitlements as collective property.

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37 Ibid. 2:213.

38 Sayyid Qutb, op. cit., p. 25.

39 Ibid. p. 27 (Emphasis added).

However, compared to Rawls's theory, it can be argued that though both Rawls and Islam agree to the use of people's talents and possessions for the (common) welfare of others, Islam goes further than this, for it recognises the sacred right of individual entitlement more than Rawls's theory does. Individuals are free to utilise and enjoy the fruits of their own labour and talents.

What Islam forbids however, is the misuse of natural endowments and efforts to create false standards that promote injustice. This is because Islam recognises that people in their natures are prone to avarice and therefore need constant divine guidance so as to realise complete justice between each other. In matters of justice therefore, Islam envisages a single life, a single community, a single nation and a single universe in which there is a comprehensive and interrelated unity of all.[40] Neither race nor geographical orientation or accident of birth, etc, can be an acceptable part of the social justice Islam stands to promote.

Foundation of Social Justice

In illustrating the comprehensive nature of justice, Islam urges for the operation of three pillars of social justice: freedom of conscience, absolute equality and mutual responsibility.[41]

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40 Ibid, p. 28.

41 Ibid, pp. 47-55.

Freedom of Conscience

According to Qutb, freedom of conscience is that which liberates the individual from all those entanglements of human nature. By attaining this freedom the individual becomes able to free himself or herself from all kinds of fears and can therefore be in position to appreciate and obey the perfect laws from which justice can be derived. In this way, there will be a harmony between peoples and their environment. This means that with a freed conscience, the individual (and indeed nations) gains complete respect of all the rights, duties, responsibilities and entitlement that guarantee social justice.

With this in operation, justice is set to be in motion for a nation or people who fully are conscious of their place and role in this world are always free from all sorts of false controls, self desires and despair. So in the truly Muslim situation, justice has to prevail since when people are under the law of God they are free from the dangers of self desires.

Therefore, with a freed conscience, peoples and nations are higher and above the powers of their instinct. This is because they are always confident, hopeful and able to shake off all fears and desires that are destructive to the emblem of justice in society. With this in mind, the Muslim, (whether as a nation or individual) is then aware of the need to put his or her rights and duties in practice. In this lies a strong foundation stone of justice in society since the individual is completely free from

feelings of fear and desire whether of livelihood, power, poverty, life , or station in life, etc.

Thus, with freedom of conscience, the individual is well armed to establish justice. He or she, can and will take that which is his or her due, and will attain or fight for their right. Neither will they be proud of or misuse their station in life nor forget their duty to themselves, to the community and to the world. Hence, no matter what, the people with a freed conscience will always do the right thing. This is because their will to be just is unshakebale and it is based on the belief that "nothing will come upon us save what's [already been] prescribed ...."[42]

So, what is required is ~~that we~~ control our instinct so as to gain hope and confidence and stand firm in justice whether it be for or against the kin and kith,[43] or our nation or their nation or the world in general. Under freedom of conscience, justice demands us to subdue our ego or greed and realise the worthless nature of artificial controls such as rank, wealth and power. In essence, it requires the readiness to comprehend and practice absolute equality and oneness with others .

This is affordable because in Islam when the conscience is freed then ~~the~~individual is able to practically realise the steel bars of social justice : firm belief in the absolute will of God and conscious and wilful righteous conduct in society. This need to

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42 Al Qur'an: 64:11.

43 See also Al Qur'an: 4:135.

subdue self interest or control is what relates Islamic justice to Rawls's model of the veil of ignorance which also requires that self interests be kept at bay in rationalisations of justice.

But, freedom of conscience is an equipment for that vital knowledge which is necessary to realise the single equality of all. Therefore, persons with a freed conscience are always ready to establish justice because they stand on a firm ground governed by the laws of the universe and those of their nature. They can share with others for example, not because they expect a reciprocity of some kind, but for the sake of necessity of justice in society. In the same vein, they can kill and be killed not because they hate and dislike this or that, but because that is what is required of them and is in harmony with the divine will and perfection.

Absolute equality

In justice as absolute equality, Islam stands for the demolition of all artificial distinctions and establishment of a single equality. In this lies the second pillar of social justice in Islam. It is an equality that springs from and is manifested in the nature of human creation and origin. In it, all are equal in nature, decent and purpose- and every one is addressed as one and the same as well as in one and the same manner.

This is because social justice in Islam means: one people, one God, one law, one end (goal) and one origin.[44] And it revolves in the command; "O you people reverence your Lord who made you from a single soul".[45] This reverence and worship is realised through righteous conduct in which is contained the manifestation of this human equality. Under this equality all are of the same blood and all share common feelings, desires and fears. Only the styles differ.

In it, all possess a single belonging whose compass of equality transcends false discriminations such as patriotism, nationalism, tribalism or even geographical and physical distinctions. However, meaningful and sensible distinctions are well taken.[46] But generally the physical variations of persons are only meant for general appreciation and understanding of each other.[47] It is upon this standard that Islam stands to explain the justice of the absolute equality of persons. This explanation is in the fact that Islam envisages that justice entails absolute equality of treatment since each and every individual is as sacred as the other.[48]

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44 See Sayyid Qutb, op. cit., p. 45.

45 Al Qur'an, 4:1. See also Qutb, op. cit., p. 45.

46 In Islam like in Aristotelianism, the law of equality also recognises the doctrine of treating like cases alike and unlike cases differently: For example in the law of murder and retaliation, there is the prescription of "[an injury for an injury equal and similar in nature], the free for the free, the slave for the slave, the woman for the woman", etc. See Al Qur'an: 2:178.

47 Ibid, 49:13.

48 Ibid, 2:178-9 & 17:33.

The equality that manifests justice is therefore resident in the unique oneness of human value. Any differences in human treatment must hence realise this: that no one's life is entitled to a higher value than that of others. That is why Islam has put up stringent laws that preserve the absolute equality of human sanctity. Thus, there is a life for a life, an injury for an injury equal and similar in nature, a slave for a slave, etc, no matter who is involved.[49]

This is because, the Islamic standard of justice is built on an un-amendable and firm human equality which admits no false or worldly discriminations whether between man and woman or Muslim and non Muslim, etc. But there are those who could argue that Islam fails its own equality when in its laws it accords superior and inferior status between genders. In fact, it can be noted that the most common criticism of Islamic justice[50] is in the way it treats women particularly in the allocation of shares of inheritance and the giving of evidence. In reply, Ismail Al-Faruqi argues that Islam's answer to this is two fold:[51]

a) In Islam, a woman is always entitled to the support of a male relative as a guardian regardless of her wealth.[52]

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49 Ibid, 42:42.

50 Ismail al-Faruqi, "Islam and Human Rights" (1983) 27 *The Islamic Quarterly* 28.

51 Ibid, p. 28.

52 This would be opposed by feminist conceptions of justice between gender. Feminists argue that to see women in terms of male support and protection is to subject them to male domination, dependence and subordination which is unjust because what all this points at is the requirement that women's needs

b) And the Shariah regards a woman's evidence as full and equal to that of a man in cases regarding legitimacy, descendence and family relations which are the areas most women are familiar with. The area in which the woman gets 1/2 a share,is that in which she is less familiar compared to the male: civil, administrative and criminal.

I find this quite flawed. If we base issues of justice on who is more familiar with this field or that, we will always be in a state of imbalance - for, now the women are as knowledgeable as and sometimes more familiar than men in these fields.

According to Qutb,[53] the answer to such criticisms appears to be in the wisdom of the Islamic system of laws that manifests the standard of justice it preaches. The Islamic laws of justice are not for false or artificial discriminations but are intended to establish relevant equality based on duties and responsibilities rooted in the different divine endowments. Those who have more than others whether in physical strength, intellect or wealth have to perform different obligations compared to their counter parts. So the woman for example, explains Qutb, shares weak physique and higher emotional ability than the man.[54] That is one reason why Islam gives her different rights, duties and responsibilities as compared to those of the man.

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shall be determined by and in accordance to male standards.

53 Sayyid Qutb, op, cit., p. 45-50.

54 Ibid, p. 45-50.

And in the Islamic law of inheritance the daughter of the deceased gets half the share of her brother because, in perfect Islamic society, the girl upon marriage will be taken care of by the husband while the boy upon reaching maturity will have to shoulder the sole responsibility of looking after his wife and the whole family.[55] But what if the girl does not get married? To this we could argue that in an Islamic society marriage is highly valued that no woman or man will want to remain unmarried for the prophet has admonished that "marriage is half of faith".

The Islamic law of evidence also provides that two women witnesses are required where one male stands to give evidence. The reason here is that while men are stronger and firm, women are of a high "emotional" tide.[56] But it is only essential and not a matter of male superiority that Islam requires that there should be two females in the giving of evidence "so if one of them goes astray the other can remind her".[57] But this is not in all cases.

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55 Ibid. p. 45-50.

56 Ibid. p. 45-50.

57 Al Qur'an. 2:282. Interpreting this verse. Amina Wadud takes a different and perhaps the better view: She argues that in the recording of evidence here, the Qur'an does not intend to mean that "one male witness is equal to two female witnesses or that one male [is generally] equivalent to, or as good as, two females". Basically there are two witnesses: one the man and the other, is one of the two women. Thus, though there are two women, in giving of evidence, "both function differently": one is the witness and the other "acts as a corroborator" to remind the witness. See Amina Wadud. *Qur'an and Woman*. 1992. p. 85.

Therefore, in gender distinction, Islam only emphasises the physical and natural differences as well as the duties and responsibilities that culminate from these differences. It does not allow this distinction to degenerate into social corruption and injustice. In any case, the Islamic stand is in the argument that although different in the physical and emotional make up, and although they share different duties and responsibilities, men and women are equal and the same. They both stand on the same standard measure of justice: if anyone does good works, man or woman they shall get the best reward due to them and no one will suffer any injustice.[58]

Justice as social responsibility

> Under mutual responsibility Islam grants individual freedom in the most perfect form, and human equality in the most exacting sense, but it does not leave these two things uncontrolled, society has its interests, human nature has its claims but a value attaches also to the lofty aims of religion. So Islam sets the principle of individual responsibility over that of individual freedom, and besides them both it sets the principle of social responsibility which demands alike on the individual and society.[59]

Through mutual responsibility, Islam thus tops up the pillars of justice in society. This is because in mutual responsibility there arises a moderately controlled discipline of all human desires and belongings. This means that social justice involves the assignment and undertaking of various shades of roles, responsibility and

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[58] Ibid. 4:124.

[59] Sayyid Qutb, op. cit., p. 56. (Emphasis added).

accountability. It includes the responsibility of the individual and the soul, the individuals and their family, as well as that between communities and nations. However, mutual responsibility stems from individual responsibility for if one is irresponsible to one's own self, there can be no complete social responsibility and ultimately no social justice.

From this, it can be argued that in Islam, each individual has to carry two personalities; keeping watch on one's self and keeping watch on one another.[60] In this way we see that in order to realise complete justice, all the essentials of social justice have to be brought together. That is, people have to be mindful of their interdependence and their variations: neither forgetting our dues as individuals, nor neglecting them as a community.

Each individual is responsible for his [or her] welfare and his [or her] predicaments and `No soul shall bear a burden beyond that which it can hold. Each soul is held in pledge of what it has earned. What it has gained stands to its credit and what it has piled up stands against it,' [in essence]; no burden bearer can bear the burden of another and people get no more than that which they strive for.[61]

So, people are responsible for their fate or burdens and rewards. This is the justice of the individual. But the same is attached to the rights of the community and there can

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60 Ibid, p. 57.

61 Al Qur'an, 2:286, 17:15, 23:62 and 7:42. See also Qutb, op. cit., p. 58. (Emphasis added).

be no justice to the individual unless persons strike a balance between their needs and desires, and the interests of their family, their neighbourhood, and the interests of society at large. This means that like in Barry's "justice as mutual advantage" and "justice as impartiality", in Islam too, justice can be conceived with the recognition of the absence and presence self interests.

Thus, in order to realise social justice in Islam, individuals have to be mutually responsible to each other and not only for their self interests. To achieve this, Islam provides a system of laws that governs and enforces social responsibility. For instance, the Qur'an is replete with exhortations of the duty to social welfare through acts of benevolence, kindness, liberality, consideration, charity, etc, in otherwords, through acts of responsibility to the world around us.

This makes it a matter of binding social responsibility that in an Islamic community, justice will not exist in its entirety unless people care for general welfare whether between parents and children,[62] or citizens and foreigners etc. This responsibility overthrows any injustice that may exist in the possibility of having a society with abandoned children, the old aged, the homeless, or displaced destitutes. In Islam, refusing to be responsible for the general welfare of society is not only an act of disobedience to divine law, but it is also an injustice that leads to social corruption and suffering. And since divine law is perfect law, justice as social responsibility can only be realised by living according to divine law.

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[62] Ibid, 31:14 and 24:22.

For example there is the family law of inheritance which Islam put forward to maintain the bond of relationship between blood relatives. Here, Islam also exhorts that in making bequests, part of the deceased's property should be left aside for the aid to society. This creates social responsibility in the family unit as well as the community at large.

Now, regarding general responsibility, Islam demands that each and every individual is responsible for the safety, peace, and welfare of all in the community. This is attainable by each doing their duty as decreed by [divine] law modelled under the postulate: "Every one is a watch man [or watchwoman] and every one is responsible for his [or her] ward".[63] The justice Islam preaches here, is that based on mutual help rooted in righteousness and requires that: there be a community of people exhorting to good, urging to virtue, and restraining from evil conduct.[64]

Therefore, in Islam, mutual responsibility that realises justice is contained in this: that just as persons are required to be in mutual help of one a another, so they are also required to be mutually responsible in restraining each other from evil so as to promote fair dealing. This can best be realised by practicing the prophet's injunction:

> Whoever among you sees any evil doing, should change it with their hand, and if they can not do that, let them change it with their tongue.

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63 Al Hadith (Prophet's tradition). See Qutb, op. cit., p. 62. Another version of this Hadith is translated as : "Each of you is shepherd and each one of you is answerable for his [or her] flock".

64 Al Qur'an, 3:104.

> and if they can not do that, let them change it with their heart, (detest it within themselves) and that is the weakest of faith.[65]

On this note, Qutb elaborates that, each and every social evil is an injustice of and belongs to that society. If the society does not take mutual responsibility over its evils then each and all are well on the course to their own destruction.[66] This, and other similar illustrations demonstrate that, justice as mutual responsibility, is more than merely helping each other and extends to restraining each other from the forces of social evil and corruption. For, each and every one's evil is the whole community's evil and each and every one's good is the whole community's good. In such good is contained social justice and in such evil is contained social injustice.

This sort of justice and injustice includes all things, even if it be the sympathising with the good or the evil. This is because, the just community is mutually together and mutually responsible; sharing all in one. Such community is one in which individuals always manifest a single identity and feel all things common: whatever happens to one of its members the remainder of the members are also affected.

To create such an establishment and realise justice, Islam therefore argues that those who have more than the basic necessities are duty bound to give part of what they possess for the benefit of society as a whole.[67] In a just society therefore, no body is

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65 Hadith. See also Sayyid Qutb, op. cit., p. 63.

66 Ibid, p. 64.

67 Al Qur'an, 3:92.

supposed to be enjoying luxuriantly while others are in suffering and misery for Islamic justice is built on a single, interrelated and interdependent ~~brotherhood and sisterhood~~.

The application of social justice in Islam

To achieve complete social justice, Islam puts forward a system of laws that is extensively comprehensive and all encompassing. Through these laws all are protected and secure. This is because the Islamic legal system as a moral fabric, is not just a religion but a complete way of life. And it is also because, Islam, through the use of its laws, envisages a complete human justice in which "human conscience" allows the individual to rise beyond legal requirements and economic needs.[68]

It is also because, justice in Islam is a comprehensive concept whose attainment arises out of the honour of humankind both as an individual and as a community. As shown by the Qur'an, the laws that attain justice must therefore also be comprehensively immutable. In this way, human sanctity which is at the core of justice will be protected in all its entirety. This requires absolute moral excellence of both the individual and society through self-respect, honour, and regard for one another - which is what Islam preaches in its laws.

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68 Sayyid Qutb, opt. cit., p. 69.

The Qur'an therefore, has always as a matter of emphasis exhorted upon the Muslims and mankind in general, to respect the sanctity of persons if justice is to be realised. Therefore, all such behaviours that defile the honour, self-esteem and will of the individual in particular and society as a whole, are acts of injustice and hence abhorred in Islam.

This means that, from the Qur'anic point of view, good character is of profound importance in the application of justice. So, it is a requirement in Islam that people have to excel in character in order to achieve justice in society. And the model to be followed here is in the tradition and practice of the prophet[69] and the historical community he established. This is because the prophet had and instituted the best pattern of conduct[70] society. This pattern represents in practice, the perfect laws of social justice. Therefore, to practically comprehend justice in the Islamic sense of the word, the followers must have belief in God, His laws and all His representations. This prepares their hearts and bodies to stand for and live in justice.

All this is put in real practice by doing that which the prophet did or enjoined to do and avoiding that which he didn't do or prohibited or discouraged from being done. To realise and apply justice in the Islamic sense, we must therefore learn to accept divine laws "making our will consonant to the Universal Will."[71] This means that in order

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69 Al Qur'an 33:21 and 33:45-6.

70 Ibid, 33:21.

71 See Yusuf, Ali. A *The Holy Qur'an. Translation and Commentary* (New Jersey: Amanah Publication, 1983) Commentary No. 3721 at p. 1117.

to institute the character which will realise justice in society,, nobody is to fail one's self or society in anyway.

Society or the individual, both deserve the honour and respect that is due to them; and this is a cardinal requisite in the application of social justice in Islam. After all, in Islam, respect for the individual is respect for the society and vice-versa. And respect for both, is respect for the perfect laws (of justice). This is achieved by following an immutable and balanced system of laws in which human honour and sanctity is protected, preserved and promoted.

Prominent among these, is the poor tax (zakat) which is a due to the least well off. As a due to the least well off, zakat is not just charity[72] but operates as a way of mutual responsibility. For it is a binding method of redistribution of wealth from the well to do to the least well off. The community instituted in the paying of Zakat is therefore not one that is merely charitable. It is in those who consciously construe and appreciate the interdependence and spirit of togetherness.intended in these dues.

To apply this justice, the Muslim therefore is not supposed to allow any poverty or material constraint to come in his or her way of ensuring mutual help and responsibility. Neither is he or she to wait until he or she possesses in excess of desires and needs. "What is spent in alms will be paid back to you in full measure".[73]

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72 See Al Qur'an, 3:92.

73 Ibid, 2:274.

This shows that the idea of reciprocity is a treasured part of the methods of social justice in Islam.

It is this repayment and hope that keeps justice alive in all the acts of charity of which Zakat is the prominent. It is a repayment that resides in the gifts material and extra material and only accrues to those who involve in good dealing and lenience with one another.[74] (emphasis mine). Those who fail to practice good dealing and lenience with each other, lack the just hand of Islamic law. In this, they are unjust to themselves and the society they live in and are a handwork to their destruction.

This destruction is what a charitable society stands to prevent. It is a destruction that expresses itself through disobedience to perfect (divine) laws, and a destruction that is manifested in the products of a selfish world that breeds a cruel, careless and unsympathetic society full of decay and suffering.

Islam and Entitlement

Like in the (majority of) secular theories of justice, (particularly classical theories) Islam also recognises that people have deserts and are therefore entitled to certain claims exclusive to them. This means that in Islam, there is a ratification of the right to individual possession for all but this manifests itself in the right to receive and the

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[74] Sayyid Qutb, op. cit., p. 87.

obligation to give out of what we possess. This is because, in Islam there is no "absolute" ownership of anything by any one. Islam conceives entitlement only in terms of the responsible possession of whatever one possesses, be it from their own effort or through the endowments of nature. This means that in questions of justice, entitlement means the right to possess and obligation to dispossess for the common good of all. The absolute owner of all property is God.[75]

This is the true meaning of entitlement for it realises the needs of both the individual and those of the society and thereby enforces the perfect justice Islam preaches. And it spreads to a wide spectrum of things which rotates around the fundamental principles of acquisition and spending.

Under acquisition, Islam entitles all individuals to acquire the use of those things needed in deriving the basic necessities of life. This is rooted in the tradition of the prophet: "[People] share in three things; water, herbage and fire."[76] Stretched to modern conditions however, necessities in Islam may vary (in form) depending on time and place. But one thing must remain clear, in Islam, necessities are outside the exclusive right of individual possessions.

Nevertheless, Islam permits and indeed encourages the earning of these things and those which are none basics through the efforts of individual labour and intellect.

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75 Al Qur'an, 4:126 and 131.

76 Sayyid Qutb, op. cit., p. 109.

Those who are unable to acquire these necessities are then entitled to a right of deriving them from the pockets (possessions) of others who have in excess. This is binding.[77]

But individuals can and are encouraged to redistribute to the needy even if there are no excess possessions. Thus, acquisition as a method of applying justice in Islam operates in two ways: we acquire through our own work and labour, and from what we are entitled to in alms (charity). However alms are not for every body :

> "Alms are for (those who are) poor, destitute, the tax collector, those whose hearts have been reconciled to the truth (righteousness), for the ransom of those in bondage (slaves), the relief of debts, for spending in the way of Allah and for the way farer."[78]

But it is through work that Islam prefers its believers to attain justice in so far as acquisition is concerned. This is particularly because the reward from own labour protects human honour and dignity. However, on the general level, the concept of desert in Islam operates under the premise that both the individual and society in general have interlocking rights which must be balanced.

The principle behind such entitlement is that of need fulfillment for all. After all, the prophet has always emphasised that, "no [person] has a right to possess more than

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[77] Al Qur'an, 2:267.

[78] Al Qur'an, 9:60.

three things; the house in which he [or she] lives, the garment which covers his [or her] nakedness and the crust of bread and water".[79]

This does not mean that in questions of justice, people must live by the basics alone. What it means is that in possessions, people are duty bound to spend all that which is over and above their basic needs for the benefit of all. This is why Islam dictates that since we hold in stewardship to God, in what we possess is a right for society at large. What we possess is not only for ourselves and our families, it also belongs to others who are not related to us in blood or friendship.

Even upon death the demands of justice in Islam require that we are indebted to society in what we leave behind. This may be in the real debts we owe to others, or it may be in the inheritance rights Islam entitles to prescribed beneficiaries. The deceased like the living, have rights and obligations in their property. These, transfer to the immediate members of their family who must then use such property in such ways that realise mutual responsibility and henceforth, complete social justice. It is in these ways that other members of the society will continue to benefit from what the deceased left behind.

Therefore, entitlement to property in Islam is as sacred as the human life itself, for each and every entitlement must be protected in its entirety. Just as no body should

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79 Al Hadith, also cited in Qutb, *Social Justice in Islam*, p. 109.

violate the human life that God has made sacred, so is the case for the sacred shares of one another in the earthly possessions.

Enjoyment of property must thus be moderately spread to meet the needs of all for if this is not done, each and every one feels the effect. To prevent this and apply complete social justice, Islam demands that both the individual and society must conduct the enjoyment of their property responsibly.

> "The individual must realise that he [or she] is no more than the steward of this property, which is fundamentally the possession of society; this must make him [or her] accept the restrictions which the (Islamic) system lays upon his [or her] liberty, and the bounds which limit his [or her] rights of disposal. On the other hand, society must realise its fundamental rights to such property, and must thus become bolder in prescribing the regulations and laying down laws which concern it. This is the only way we arrive at principles which will ensure complete social justice in the profitable use of property, which cannot be the end in itself, nor an object of any [individual's] purely personal possessions".[80]

The fundamental principle is therefore that in Islam, property generally belongs to society at large, and the individuals can enjoy their rights in what they possess although in so doing they cannot go to such limits as will defile the perfect interests of a perfect order which the Islamic society constitutes.

To achieve true entitlement, Islam therefore requires that both the individual and society must discern all excesses. This is why Islam has put limits on what and how we acquire and expend property. "Some property is held in common and this no

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[80] Sayyid Qutb, op. cit., p. 106.

individual can possess". From all property is a due to the social needs of society which make the society to stay together thereby preserving its health and perfection. For this reason, acquisition, expending and all types of rights have been put under strict regulations in Islam so as to endorse the stamp of justice which realises the true entitlement.

The individual is free to acquire and expend that which he or she rightly possesses but they must not exceed the limits of the law. Society too must operate within these limits. In all this, the principle is that of social responsibility and social accountability. Thus, justice as entitlement also means the attainment of equal claim (or right) to the ideal necessities which are two fold in nature: the physical well being and capacity to fulfil moral obligations.

These necessities are: food, clothing , education , shelter and healthcare but may vary in accordance to the standard of living of a given society, for while a television set may be a basic necessity for education or a refrigerator for food in one community, the same may be a luxury in another community.[31] This is one way in which the consideration of custom (urf) as a rule of justice has to be considered in order to achieve true entitlement in various societies.

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[31] Also see Ziauddin Ahmad. *Islam, poverty and Income distribution*. 1991. op. cit., pp. 19-20.

In sum, we can thus say that, in Islam, the goal of justice in the entitlement to wealth is in the proper distribution of those things that will refine and moderate the quality of life for all in the public (social) order.[82] But these are secondary correlatives of justice and will only be required after the bear necessities are availed to all and when there is abundant wealth to warrant doing so.

Basically, the Islamic restrictions on the conduct of wealth in society operate upon the premise that, in Islam all property belongs to the Ummah (general community) and each is merely a possessor whom God has treasured with wealth just as a test and trust. The test is to see who is good in conduct[83] and the trust is in the fact that the individual is no absolute owner but possesses as a vicegerent for the general good.[84] Thus, in Islam the concept of property upon which social justice greatly dwells is limited to the divine will and the idea of absolute monopoly does not exist.

Under the requirements of social justice in Islam, people must therefore be moderate in the conduct of their possessions for they do not belong to them alone. They must

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82 In Arabic terminology, these can be categorised as *Zaruriyat* (necessities), *Hajiyyat* (conveniences) and *Tahsiniyat* (refinements). See Ziauddin Ahmad, op. cit., p. 108.

83 In Islam redistribution of wealth is a divine command and since the best in conduct is that Muslim who is most obedient to God - distribution of income according to divine law elevates people to high conduct. See, Al Qur'an 3:92 and 49:13.

84 Al Qur'an 2:30, 33:72-73.

neither spend their wealth in wanton prodigalness[85] nor hold it back niggardly under selfish intentions. Their income and wealth ought to be spent under a measure that puts individuals and society in harmony with each other, for the two are a unity within a diversity and have interlocking rights upon each other.

For such conduct to thrive, Islam advocates for a social order under the guidance of righteous leadership who enforce the shari'ah.[86] Under this leadership justice will prevail by the leader ensuring that divine law is followed[87] by all, and by the ruled consulting with the ruler to ensure that it is upon divine guidance that their order is run.[88]

Seen from this perspective, Islamic justice can thus be viewed as a matter of human rights[89] contained in the *Shari'ah* which rules that each be righteous unto himself or herself and to others. This calls for the existence of an ideal political-social order in which righteousness is enforced both by and upon the ruler and the ruled in accordance to the dictates of the *Shari'ah*.

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85 Al Qur'an 17:26 God urges people to distributes wealth to the less fortunate but warns that we should not be extravagant so as to erode our own welfare and that of society.

86 Al Qur'an 21:105 "My Righteous Servants will inherit the earth".

87 Al Qur'an, 4:59, 42:42.

88 Al Qur'an 42:38. "[The just people are those who] conduct their affairs by mutual consultations".

89 Human rights here are embraced in the concept of equality and entitlement both to the individual and society - which also includes the principle of public interest (maslahah).

The justice that Islam preaches therefore is that which recognises the equalities and inequalities of people. But, no kind of inequality will be accepted in Islam unless it expresses itself in the designs of a perfect order (based on divine law) which dictates that there should not be a trade off of one person by the other or one community by the other. Such order is realisable when and where everyone is vigilant in the enforcement of each other's rights and entitlement and when their natural interdependence is in practical operation.

This order is what in Muslim-Qur'anic terminology is called the Islamic ummah (righteous community) which is the perfect order because it is based on doing right and avoiding evil.[90] In this community, the stamp of justice is endorsed by each treading the middle course based on *Shari'ah*. In this way a moderate community is established and justice is promoted through right conduct mooted in tolerance, temperance and mutual care.

Finally, it must be remembered that in Islam, social justice can also be conceived in terms of political law (*siyasa shar'iya*) which expresses the service of *maslahah* (the common good or public interest). Through the promotion of *maslahah* (common good) as the ultimate goal of social order, political law helps to realise the meaning of social justice by emphasising that obedience to divine law improves social order and closes

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[90] The Qur'an refers to this order in these terms: "You're the best community (*Khayr Umma*) that has ever been raised up: you enjoin the doing of good (Justice) and forbid evil". See Al Qur'an, 3:110.

the gap between any artificial inequalities such as those between ruler and ruled, rich and poor etc.[91]

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[91] This concept of social justice is somehow similar to what Ibn Taymiya (1325) and Najm al Din Tawfi (1316) considered in their deliberations on justice. They both emphasised justice as a content of the just order which is that order whose end is realisation of Maslahah (public interest). In fact al Tawfi went to extremes and emphasised Maslahah (public interest) as the overriding principle of a just order. This in effect reduces social justice to social welfare. For a brief examination of Justice according to Ibn Taymiya and al Tawfi see Khadduri Majid: *The Islamic Conception of Justice*, op. cit., pp. 177-179.

CHAPTER V

INTERNATIONAL JUSTICE

One of the major concerns of justice particularly in modern jurisprudence is the relations between the developed-industrialised world and the less or underdeveloped nations. It is a major concern because in questions of justice there is the assumption that people share a rough equality in the quality of life they need for basic survival. This is what prompts the idea that justice requires us to look at people from how they fare in a global perspective vis-a-vis the principles of desert, merit and entitlement or the way social welfare ought to be shared around the globe. For this to happen, there are certain conditions to consider in the application of international justice. They are: the assumption that people are equal, that there must be an international co-operation under reciprocal advantage and that every nation operates under the presumption of moderate scarcity of resources.[1]

Under the condition of equality, international justice is argued from the premise that there is a natural equality between persons which demands that the basic needs of people around the globe ought to be similarly satisfied. This condition, like that of co-operation, works well if viewed under the Kantian concept of categorical imperative as we shall see later in this chapter.

Kai Nielsen, 'Global justice, capitalism and the Third World', in Attfield and Wilkins (eds) *International Justice and the Third World* (Newyork: Routledge, 1992) p. 25-6.

The condition of co-operative-reciprocal advantage applies under the argument that in international relations, people are generally interdependent and that, since they gain from each other, nations have to work for the enhancement of the welfare of all persons in the globe. Thus, to talk of internationalism and justice, we need a pre-existing situation where people and nations are similarly placed under conditions of mutual co-operation.[2]

Under the condition of moderate scarcity, international justice operates through the presumption that each nation moderately suffers from or lacks certain goods and resources which others may have. Thus, it becomes necessary that those who have what others need and lack, should fairly deal with other nations in the share and distribution of scarce resources or needs. This inevitably merges the condition of moderate scarcity with that of mutual co-operative reciprocity. Therefore, the fundamental argument is this:

> "For principles of justice to function, there must be enough reciprocity around for people to find some balance of reciprocal advantage. If they cannot find that, they have no basis for regulating their conduct in accordance with the principles of justice".[3]

But there is a problem in this, because if these really are the circumstances of justice, it looks at least as if we can have no global justice, for the richest nations do not

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2 Ibid, p. 26.

3 Ibid, p. 26.

seem to be related to the poorest ones in such a way that the rich nations secure reciprocal advantage if justice is done.[4]

Co-operative reciprocity is not therefore always the realistic circumstance of international justice, because if it is, the rich nations of the advanced world will then be allowed to exploit the other nations which are less developed. This is because under such circumstances, the developed North, will succeed in the claim that we cannot redistribute global resources to benefit the South, since the latter is in no position to adequately reciprocate. After all, the real world `is not a co-operative scheme'.[5]

Moreover, the international organisations we have today are not really for schemes of mutual support since there is no real co-operative support from the North to the South, and vice versa. For example, in international trade, there is a complex network in which poor countries are only allowed to be in very tied up relations of interdependence with the richer developed world. The rich nations of the North, trade reciprocally and are interdependent between each other but not with the South.

A case in point is the way terms, conditions and market prices are fixed for the flow of goods and services between the developed world and the so called third world. The third world has the prices of its commodities determined by the developed nations of the North. And, through `North' based multinationals like the international monetary

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4 Ibid, p. 26.

5 Ibid, p. 26.

fund and the world Bank, countries of the South are given terms that never lift them out of the begging position. Therefore, the loans from such multinationals and countries of the North are liabilities to peoples of the South. For, they come with stringent strings attached to them and very rigid requirements as to how and in which areas they are to benefit the recipient countries. Yet this may not be how the basic needs of peoples may be satisfied in the recipient countries.

Thus, what is required in international justice and what all nations have to realise is that the needs of the poor peoples of the world cannot be pre-determined by other nations who are not lacking those needs. And rightly, it can be argued that moral reciprocity and not co-operative mutual advantage is what can deliver justice between nations.[6] Otherwise, if we argue for strict reciprocity, then there has to be a perpendicular compensation for the exploitation countries of the North inflicted on those in the South - all the way from the loss of human resources through slave trade to that of mineral resources through colonialisation and imperialism.

But I think what is fitting in global issues and justice, is to adopt a Kantian approach to mutual co-existence. In order to conceive the existence of international justice, a broad conception of Kant's categorical imperative is thus necessary. For, it requires that we are to treat each other (whether between nations or individuals) as we would reasonably wish to be treated ourselves.[7] This means that in global issues whenever

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Ibid, p. 27.

Ibid, p. 27.

we talk of justice for our nations, we inevitably must think of the situation of other nations also, and how the furtherance of our designs may affect justice for other nations.

Thus, in international relations, before we take advantage of the situation in other nations, before we fix world prices and market forces and before we establish terms and conditions of international assistance to other nations we have to ask: how would we feel if the situation was reversed and our feet are now in their shoes? For example those in the North could ask: would we wish to see our children or ourselves suffer from war, hunger, famine and disease aggravated by unfair terms of trade and development in the globe?[8] And those in the South could also ask: How would we feel if we were the ones giving aid to countries whose leaders misallocate and misuse international aid through corruption and embezzlement?[9] This is how Kant's categorical imperative becomes extremely important to issues of international justice. It means that, instead of considering what advantages can be gained from international co-operation, each nation should put her self in the position of other nations and thus consider that if in such circumstances, `we would not will it for ourselves, we cannot will it for them either'.[10]

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8 Ibid, p. 27-9.

9 Ibid, p. 28.

10 Ibid, p. 28.

Theories of international justice

Theories of international justice postulate that there has got to be a world community of states in which universal co-operation and mutual respect are the norm. Some require that, for practical existence of international justice, the principle of redistribution of income, social welfare and resources has to apply. Others argue that to apply such principles is to interfere with the rights and liberties of sovereign states. To support the principle of redistribution here, we have to argue that unless this happens, the gap in incomes and social welfare between peoples of the world will remain wider. And, for the non interference argument to apply, it has to be emphasised that the basic entitlements and moral equality of peoples of the world must remain in equilibrium. There are three situations to consider here: Rawls's theory of redistribution vis-a-vis Nozick's theory of entitlement, cosmopolitan theory vis-a-vis communitarianism, and the just interaction theory vis-a-vis the just war theory.

Rawls's Theory vs Nozick

Under Rawls's theory of redistribution, international justice will be served by advocating that people's and national wealth and abilities be shared within the dictates of the `difference principle'. This means that global wealth has to be redistributed in such a way that will be to the advantage of the least well off peoples or nations.

But there are problems with this kind of argument especially when `people in a national society are assumed to have an identity with each other, a common bond, which people in international society lack'.[11]

Yet, Rawls, under his difference principle and the veil of ignorance, presupposes that individuals - national and international, are commonly placed, unaware of who they are, and do not know their particular interests. Therefore, when they approach issues of justice, between nations, they do so without regard to their national interests or identity. But, as Sandel points out, in the international world, people belong to particular nations and have national interests which precede international desires.[12] This is because, in reality people and nations are seriously self inclined. This makes it difficult to see how international justice can be achieved under the Rawlsian principle of redistribution which emphasises justice as the blindness to self interests.

> `For if individuals and groups are primarily concerned with the pursuit of their own projects, then they are not likely to favour a policy which threatens their property, pursuits or idea of the good for the sake of a universal redistribution of resources. Such a prescription is an unjust limitation on their liberty'.[13]

This is where the Islamic theory of justice and Nozick's theory of entitlement come in. For, while Rawls's theory denies people a wide particular identity, under the Islamic theory of justice people exist as a collective entity with common beliefs and

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11 Ibid, p. 104.

12 Ibid, p. 104.

13 Kai Nielsen, `Global Justice', op. cit., p. 31.

aims but they can also operate as separate identities responsible for their failures and success.[14]

Nozick's entitlement theory comes in by way of opposition to Rawls's theory of redistributive justice. For, unlike Rawls, Nozick believes that where people's liberties and entitlements are concerned, the principle of non interference is paramount. This is similar to the position of those cosmopolitarians and communitarians who oppose international justice based on the argument that its interference with particular welfare, rights and liberties of nations is unacceptable. Basically, both communitarians and cosmopolitans[15] differ from Rawls because they (both) do not believe that it is unacceptable to have a concept of global justice in which people `have' no interests of their own or aims of their own.[16]

Cosmopolitan theory and communitarianism

Cosmopolitan theory urges international justice under the concept of a federation of world states. This is evolutionary. It evolves from economic and political developments around the world which inevitably make national governments realise the importance of governing their affairs under a commonwealth. This in turn leads to the

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14 See Yusuf Ali, *The Holy Qur'an. Translation and Commentary* (Maryland: Amana Corp. 1983), 49:10, 17:15, 2:143.

15 For a concise discussion of cosmopolitanism and communitarianism, see J. Thompson, (ed) *Justice and World Order. A Philosophical Inquiry*. (Newyork: Routledge, 1992) 104-7.

16 Ibid, p. 104-7.

creation of non-governmental organisations (N.G.O) as world regulatory functionaries run by representatives from all states.

Gradually, under these organisations and their regulations, a lot of global affairs become integrated, and as this happens and begins to bear fruits, people will then realise that they belong to a larger world - which is the world of these regulations and not merely their particular states or nations.

The people belonging to these organisations will form a universal conception of justice, for, they will be able to realise how indispensable or interdependent each nation is. "As individuals become more and more aware of their dependence on others - they will come to regard themselves as first and foremost world citizens". This, and the integration of various world affairs in various states, will lead to the demand for global governance of people's affairs thereby leading to a federation of world states in which rights, duties and responsibilities of states will be seriously revised and redistributed to reflect a more balanced and universal co-existence.

Inevitably, a universal conception of justice will emerge and become the basis by which world affairs are run. This will make it practically possible for the application of universal redistributive principles of justice in the enjoyment of world resources, opportunities and services etc. In this way, universal justice will be attained, since everyone's welfare, rights and entitlements will be equally respected and fulfilled.

This is the concept of universal justice according cosmopolitarians. But, their concept is not without problems or inadequacies.

Like Rawls's model in *A Theory of Justice*, the cosmopolitan formulation of universal justice can be criticised for being implausible and very assumptive. It assumes that people and indeed governments can easily abandon national pride and national identity or interests for the sake of universalism.

And, though it argues that under a world justice, states will continue to exist and pursue policies or laws for their people, it is impractical to think that in a global federation of states, countries will not pursue those particular interests harmful to the concept of universal justice. And, while cosmopolitan theory urges us to conceive global belonging first before national identity, the reality of modern federations says otherwise. For example in Canada, the problem of cultural diversity and the struggle for power and control among states (particularly Quebec) makes it difficult to see why on global level, universal justice will not be injured by the concept of federation of states.

Therefore, it is unrealistic to argue that a global government of affairs is practical merely because we already live in pluralist society with cultural and ideological variations.[17] Furthermore, the idea of a federation of world states is mainly based on the concept of interdependence. But, we need to realise that "people must not only

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[17] Janna Thompson, *Justice World Order*, (Routledge: London, 1992) p, 94.

have relations of mutual dependence, they must be aware of them, value them and value the institutions which make them possible".[18] And I might add, they have to be ready, able and willing to defend them.

And, under the communitarian critique, the idea of international justice in terms of a world state is definitely unacceptable. This is because communitarians see justice in terms of the absolute preservation of rights and identities of particular nations or societies. To say that a global government or regulatory body be instituted to redistribute general welfare among states would destroy these rights and identities. Thus, though the cosmopolitan theory of international justice under the idea of a world state helps us to see how and why a theory of global justice is necessary, it is not adequate enough to be a workable concept of justice.

The just interaction theory and the just war theory

Both the just interaction and the just war theories base their argument for international justice on the idea of sovereignty. Under the just interaction theory the argument is hat international justice will prevail when the integrity of each state is preserved.

Therefore, the only way redistribution can occur between states is in those cases where state owes something to another - no state is duty bound to help those it has not

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Ibid, p. 102.

injured. In this way, the just interaction theory helps to further justice between states by outlawing war, intervention and exploitation of nations. For example history shows that some of those countries that were disturbed by external war, heavy terms of trade or colonialism have had to cope with resultant poverty and impoverished economies. Thus, the just interaction theory further urges and argues that for there to be just world order, nations have to pay back for the injuries they have caused to other peoples and states.

This again is the other way in which an extensive theory of global redistribution of welfare can be effected under the just interaction theory. For, almost all nations owe one another in some way or the other particularly, countries of the North. Countries of the North have through colonialism and economic imperialism imposed massive exploitation of the South. And, through collateral industrial effects, and the damping of industrial waste into the high seas, countries of the South and the whole globe have suffered serious environmental damage.

All this, goes a long way to dampen the chances of poor countries ever becoming well off. This is unjust. So. the idea of reparations for damages caused is in the right direction of alleviating this injustice. But, the problem with it is that it inflicts unnecessary burden to future generations who did not in any way contribute to the injury caused to other nations or peoples. Nevertheless, if we take the mistakes of our parents as a debt for us to shoulder for us then it is no problem to argue that:

And moreover, people are not always the ones who cause injuries to other nations -it is the political systems that govern them. This means that at certain instances the concept of reparations may backfire when people refuse to pay for the injuries caused by their leaders. And when this happens, the just interaction theory may fail, for, war will emerge thereby destroying national integrity between states. This is exactly what happened between Germany and the league of nations after the Versailles peace treaty (1919) which imposed heavy reparations that Germans later rejected.

And even if it was possible to get countries to receive their dues in reparations from those who injured them, how would we measure the amount or value of these reparations or how would we insure that these reparations would be used appropriately for the furtherance of international justice? For example, look at the reparations for the injury caused by slavery or colonialism, how would we measure it and how would we ensure that those to pay are really the ones who enslaved our nations? So, this is a serious inadequacy in the just interaction theory and the furtherance of justice between nations.

Furthermore, the conditions under which the just interaction theory operates make it implausible also. For, it is required that under this theory: all states act as responsible agents in global affairs, that they be able to act freely, have just institutions and that all states have enough resources so as to satisfy the basic needs of all peoples and prevent those acts of desperate people who may do whatever it takes to disrupt other nations in order to get what they need.

These conditions are good, but, (like the theory they are intended for) are implausible. Firstly, it is general knowledge that not all states have sufficient resources needed to satisfy the basic needs of peoples. That's one reason why we see so much suffering in countries such as the Sudan, Somalia or Bangladesh (just for example).

Secondly, it is general knowledge also that not every country can act as it would wish. Today many countries cannot do what they would want for their people or what their people want them to do because the whole globe is at the mercy and under the policy of the economic and military super powers. Otherwise, the whole of Panama (for example) would not standby and watch as America captured and judged its leader (Noriega) when there are courts in Panama itself!

Finally, it is impossible to ensure that all states will act responsibly in global affairs unless perhaps we adopt some kind of a cosmopolitan federation of states with institutions to monitor and oversee this. Thus on the whole, the just interaction theory is implausible and inadequate: it pays little attention to the requirements of justice such as the considerations based on need, capacity, merit, etc. This is because it relies too much on the concept of justice as paying back people's debts only or tit for tat principles. But tit for tat creates more conflicts and less reconciliation. The just war theory perhaps helps to solve some of the problems of the just interaction theory, but, it is not without conflicts either.

The just war theory considers that it is necessary to intervene in global affairs in order to defend the rights, entitlements and sovereignty of nations. So, the respect for sovereignty of states and the rights to determine their political, social and economic systems is what promotes justice among nations under a just war theory. Intervention is to be avoided unless it is based on very good reasons.

Thus, under this theory, the just acts in a world society are those acts that promote, defend or preserve people's rights to self determination and the respect for national sovereignty.[19] Therefore, unless there are clear indications for the need to defend these rights, nations are to remain impartial agents for peace in global affairs.

One of the serious difficulties this theory poses is that, like the just interaction theory, the just war theory is very inconsiderate to the issue of global inequality. By looking at justice in terms of rights to national sovereignty, it rules out the need to interfere in other nations' affairs in order to consider the requirement of global redistribution of welfare.

Thus, in this way a just war theory leaves everyone in his or her position -letting everything where it lies: the poor remaining poorer and the rich richer. This in turn also promotes the idea of respecting global status quo of nations which is unjustly imbalanced. Under this, we can see that countries which have achieved sovereign

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19 See Rawls *A Theory of Justice*. Op. cit. p. 378-9. See also Janna Thompson, *Justice and World Order*, op. cit., p. 12.

status over others' lands may end up maintaining their colonial schemes without hinderance. For example British Bermuda or Chinese controlled Mongolia will remain as such. Thus unlike the just interaction theory which at least considers the `debt' owed by one country to another, the just war theory "takes the entitlements of sovereignty for granted".[20]

Furthermore, though both of these theories need to strongly reassess the reality of modern interdependence of states vis-a-vis their account of justice, it is the just war theory which must strongly consider the role interdependence plays in global welfare. The just interaction theory does (though in a limited way) consider the importance of international interdependence in issues of justice by urging that nations pay for their past injuries to others.

But as Thompson says, the just war theory does not adequately address the balancing of relations between states, for it pays no regard to past global injustices or injuries between states.[21] And, the just war theory pays little attention to other non armed interferences in the national welfare of peoples[22] such as injustices that accompany economic embargoes, undue surveillance which can go a long way to harm the wellbeing of citizens as is the case now with the United Nations imposed embargo on Iraq.

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20 Janna Thompson, *Justice and World Order*, op. cit., p. 17.

21 Ibid, p. 77.

22 Ibid, p. 77-8.

All in all, the just interaction approach clearly makes more demands on states than the just war theory does. "But they are both motivated by the same reasoning, [for] they take the same basic idea that cosmopolitans share: that it is unjust to cause harm to individuals or to violate their individual and political rights".[23]

In conclusion, the concept of justice whether in issues between gender or nations requires the respect for peoples' dues and entitlements. It is not a tit for tat theory or reciprocity, like some would argue. And we do not have to wait until there is a global village to which every one belongs before we can attain full international justice as cosmopolitans would argue, nor do we have to stick to particularised worlds in order to concretise it. Justice, for men or for women, for nations or the globe is one and the same thing - mutual co-existence, and involves the acceptance of the fact that each and everyone of us has to be given his or her entitlements, burdens and rewards before we can attain full international justice.

Other scholars have argued that international justice is not workable because it presupposes existence of a mutually interested international order.[24] This can be solved by religious beliefs which actually create such order through common faith and aspirations as seen under the Islamic theory of justice (above).[25]

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23 Ibid, p. 78.

24 Ibid, p. 105.

25 See - Chapter 4.

> "To move towards corrective imbalances between North and South we will have to move to a collective ownership and control of the means of production, for otherwise, economic power becomes concentrated in the hands of few and they will dominate and exploit others".[26]

This means that we require to introduce a limited concept of Marxist conception of justice. I say `limited' because, an existence of full scale Marxist justice would in turn lead to an overwhelming suppression of the individuals rights,[27] which in a way are very crucial to the preservation of international justice. Interference (in matters of global concerns) should not disturb the essential or basic interests of nations and peoples. It should only occur to reinstate these matters which are the crucial needs of peoples and nations - against disease, poverty, ignorance and homelessness, etc. Again, this further means that there can't be international justice without extensive international redistribution between North and South.

> "To overcome the great disparities between North and South, even to put an end to conditions of immiseration in the South -starvation, malnutrition, lack of work, extreme poverty - there would have to be significant and varied redistribution from North to South. In doing this we would have to give rather more weight to the rights of fair co-operation than to rights of non interference".[28]

No single theory of justice will therefore suffice in helping us attain a just world of redistribution in the international arena. We would have to select principles of

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26 Thompson, *Justice and World Order* op. cit., p. 105.

27 See kai Nielsen, `Global Justice, Capitalism and the Third World', op. cit., p. 30.

28 Ibid., ~~Kai Nielsen, `Global justice', op. cit.~~, p. 30.

redistribution from a wide spectrum of theories of justice. Islamic justice would for example help us in balancing a clash between non-subordination and non interference.

Rawlsian theory of justice, particularly the difference principle and the just savings principle would be immeasurably essential in answering the needs of intergenerational imbalances and those of the least welloff in the international world. Nozick's theory of entitlement would not be of much help to international justice, except, in so far as it accepts redistribution to restore lost entitlements of nations.

Otherwise, his theory seriously protects capitalistic behaviour which has caused so much injustice in international social order.[29] This is because, Nozick argues that people are entitled to rights against non interference. But he forgets to realise that in the same way, people, and indeed nations, have rights to fair distribution of international welfare not only for resources in zones of territorial neutrality (like in the law of the sea), but in all areas where the basic needs of nations are concerned.

The problem with Nozick is that he believes so much in people's or national liberty that he won't compromise any loss of it. The better view, particularly for international justice, is to think like Rawls does, that nations or peoples interact fairly between one another. This strikes a balance between international interference and preservation of national rights to certain entitlements. In other words, it means the existence of rights

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[29] Aristotle's theory and that of Rawls help to alleviate this problem by advocating redistribution.

to fair co-operation between nations. This is where both Rawls and Kant meet in issues of international justice. For, both believe that people's or nations' liberty to pursue own interests, must be adjusted in view of the rights to fair co-operation and co-existence.

Other liberal egalitarians like Ronald Dworkin would also be in favour of an international redistribution of welfare in order to establish a just international order. However, for them, and especially Dworkin, the vital requirement is not the equivalence in people's liberties, or the superiority of people's entitlements, but the equality of resources.[30]

Thus, in conceptualising the theory of international justice we need to take only those theories or principles which help us to think that the world is my country and not the reverse. For this not only helps us in overcoming those conflicting demands of cosmopolitanism and communitarianism, but it also makes it possible to identify ourselves with a global belonging which makes international justice realistically attainable.

Dworkin. R. `What is Equality' (1981) 10 *Philosophy and Public Affair*, pp. 201-5 and 281-9.

CHAPTER VI

JUSTICE AND THE FEMINIST CRITIQUE

It is a requirement of justice that all peoples and nations be entitled to certain basic needs necessary for a decent enjoyment of life and preferences important to them as rights or deserts or merits for them as they are: men, women, children or nations, vis-a-vis the global situation - past and present.

The goal of this chapter is to examine how justice between the sexes has fared, is faring and perhaps how it could be improved upon. Basically, the issue is that in matters of gender and justice, there has been and there is a serious imbalance in the way entitlements are distributed and enjoyed between the two sexes. It is the women who have suffered from discrimination and lack of adequate entitlements and are always called the weaker sex.

In gender justice, therefore, the problem has been with the traditional method of conceptualisation of justice. According to Moller Okin,[1] this is because it has always been the tradition to discuss justice in terms of idealised and relativised concepts. *Under relativised* concepts, justice is perceived through context, tradition and history which do not endorse change; under idealised concepts, justice is abstracted from the particularity of persons which is blind to difference.[2]

Okin, S.M. "Justice and Gender" in Morwatez T. *Justice*, p. 172.

Ibid. p. 172.

Thus, whenever a theory of justice argues for sticking to tradition or history or context in which the concept of justice has been channelled, it fails to eradicate the evils of established convention. For justice and gender, this is where the problem of sexism (particularly male chauvinism) comes in.

Therefore, if we are to follow the context or history of the tradition of conceptions of justice, there is no way we can escape doing an injustice to gender. And even if we were to follow the strict relativistic argument that leads us to consider each in relative view, or particularity, we will still be gender biased. After all, we live in gendered society. Traditional legal theory, feminists argue, does not care to consider the importance of both sexes in the methods and formulations of justice for it hardly discusses justice through nongenderised norms and standards.

And though modern theory attempts to have some kind of a more fair approach to conceptions of justice between the sexes, it is also gender biased. This is particularly because instead of questioning the "inevitability of sex differentiations" in issues of justice, some modern approaches to justice between the sexes have remained in the footprints of traditionalism by interpreting laws in terms of differences between the sexes.

Such a conception of gender justice is unacceptable to feminist legal theory because it bases its arguments on abstract divisions between the sexes without questioning whether these or what differences are necessarily relevant.

Restricting women to one single sphere and men to a different sphere creates an abstract universality that is not cognizant of the shared sameness or similarity which exists between human species. According to feminist theory, requirements for justice between genders are in the argument that albeit there are numerous ("infinite") similarities and difference between the sexes, not all of them need be considered; - there are those we must discern and those we have to discard.

For example, to say that the women's place is in the home (private sphere) to mother and tend to the children and carry out wifely duties[3] is an arbitrary deference that is not relevant to the furtherance of justice between the sexes.[4] This is because to make such an assertion is to say that the woman is just biology but not the man. Yet we know that both the woman as a wife and the man as a husband are similarly situated: they both have a place in and belong to the home (private) sphere.

Therefore, from a feminist viewpoint, we can argue that there is nothing so different about a woman to make her place of occupation mainly a matter of home affairs and nothing so special about a man to make his place of occupation a matter of things outside the home: bread winner and wife protector. Traditionally, perhaps such kind of differentiation would be tenable if we adopt some sort of a Spencerian argument for

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3 For a modern perspective on this issue, see Neave, M "From Difference to Sameness - Law and Women's Work" (1992) 18 *Melbourne University Law Review*, p. 769-70, 789 and Wasserstorm, R.A. "Racism, Sexism and Preferential. An Approach to the Topics", (1977) 24 *UCLA Law Review*, p. 588-9.

4 See R.A. Wasserstorm in "Racism, Sexism and Preferential treatment: An Approach to the Topics" (1977) 24 *UCLA L.R.*, p. 588-9.

justice as a matter of survival of the fittest. That is, since traditionally men were considered to be stronger in physique, and since family support and protection was based on and required physical fitness, it would seem right to argue that for the sake of family survival, the man's place would be to support and defend the family while that of the woman would be different.

But under modern circumstances, it is no longer tenable to argue in this way.[5] In the industrial world of today, with modern weaponry and technology, both the woman and the man are similarly situated to adequately defend and support the family without recourse to differentiations based on physical fitness. Moreover, even in traditional times, the argument for differentiated occupations based on sex would not hold since there could have been (as there are today) women who are stronger and better in physique than men.

But because there are situations (such as pregnancy) that make the woman so distinctly unique as to require "special rights" and entitlements, there is a need to consider the differences between the sexes before justice and gender can be balanced. And, we cannot generalise, otherwise we will create stereotypes that can endanger the true meaning of justice between the sexes.

This is one reason why some feminists argue for absolute equality of sexes. See, Scales, Ann. C. "Feminist Jurisprudence" (1981) 56 *Indiana Law Journal* 428 where it is argued that the industrial revolution rendered it impossible to distinguish sex roles in terms of physical strength.

This means that every single difference and every single similarity between the sexes must be considered according to the facts of the case. For example, the case of pregnancy demands that some (not all) women shall be treated differently from all other humans.

Thus, in arguments for justice between genders, it must be emphasised that feminists do not deny the existence of differences between the sexes nor do they oppose the need to discuss justice and gender based on differences between the sexes. This is because feminism recognises the fact that "somewhere in the nature of things there must be a list of sex differences that matter and those that do not matter".[6] What they do not accept however, is the use of "abstract universality" to arrive at a list of such differences. Feminist critique therefore demands that to foster real and meaningful conceptions of justice between the sexes, we must distinguish the relevant differences [and similarities] among people (but particularly between gender) from the non relevant ones.[7]

To identify what differences [and invariably what similarities] are relevant, Ann Scales proposes that we need to consider the following questions:[8]

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6 Scales, Ann. C. "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 *Yale Law Journal*, p. 1377.

7 Ibid, pp. 1386, 1387, 1395 and 1396.

8 Ibid, p. 1375.

i) which differences between the sexes are or should be relevant for legal purposes?

ii) How does one tell what the differences are?

iii) Does it matter whether the differences are relevant or the result of upbringing?

iv) Is it enough to distinguish between accurate and inaccurate stereotyped differences? Or are there situations where differences are sufficiently `real' and permanent to demand social accommodation?

By answering these questions we can show that women have certain rights which indicate the existence of real differences as compared to the other sex. And it would be fair and proper to add that where there is a demonstrable existence of such rights for men, then the same indication applies. These rights can be called special rights or equality rights.

By answering these questions we can also achieve modified application of Aristotelian classification of justice under the maxim: treat equals equally and unequals differently. I say "modified application" because under the feminist critique we question the relevance under which peoples are considered equal or unequal before being entitled to the application. This modification or relevance is adopted from Hart's relevance approach to equality.

The three views of feminist theory

There are three views that have been advanced in the conception of approaches to feminist justice. They are: the Millian - Liberal view, the assimilationist - absolute equality view and the "unique physical difference" doctrine or what Scales calls the "Bivalent" view of equality.

The Liberal View

The Liberal view is championed by John Stuart Mill[9] and is based on the rejection of classification of burdens and rewards between men and women according to their gender - physical or biological differences. Therefore liberal feminists argue that all formal constraints that divided the chances of equal competition between the sexes have to be removed in order to give justice a chance - particularly for the woman who has been denied (through such classification) the role to determine her own course of things. "The liberal feminist believes that [justice between gender means that the woman as an individual], should be able to determine her social role with as great a freedom as does a man"[10] and that achievement of equal opportunity for individuals whether men or women, is what matters in issues of justice between the sexes.[11]

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9 See Mill, J.S. *The Subjection of women* 7. (2nd ed. 1869) cited in Scales, `Towards a Feminist Jurisprudence' (1981) 56 *Indiana Law Journal*, p. 426.

10 Scales, Ann. C. `Feminist Jurisprudence' (1981) 56 *Indiana Law Journal*, p. 426-7.

11 Ibid, p. 427.

Generally, the liberal feminist view of justice based on the concept of (absolute) equality is shaped by their reliance on the argument that between the sexes, things have been always determined according to the male as the norm.

However, liberal feminism has been criticised for using the male norm to `analogise' justice and gender; a thing which stagnates the struggle to remove barriers of achieving true equality between genders.[12] And, reliance on arguments based on the call for equal opportunities does not also fully embrace the problems of justice and gender. For, as Scales demonstrates, true equality does not only require that women be like men in some way, or operate men's institutions per se, true equality demands the existence of proper and fair operation of all institutions.

> "To demand only the chance to compete is to embrace the status quo in a way that tends to sanction - oppressive arrangements [and] to ask only for equal opportunities to compete is to obscure the fact that the restrictions presently imposed on individual women are functions of class characteristics".[13]

The Assimilationist view

As if to cure the faults and pitfalls in the liberal feminist theory of equality, assimilationists present a more extreme version of equality between gender. According to the assimilationist theory, in issues between gender, there is no justice and equality

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12 Ibid, p. 427-8.

13 Ibid, p. 427.

if and where distinctions are made on the basis of sex.[14] Their thesis is therefore for the existence of a sexless social, political and economic order where differences between the sexes - whether biological,[15] physiological,[16] emotional or psychological, etc, should be given no relevance in deciding the issues: roles, rights or entitlements of persons. In the words of scales, what assimilationists want us to look at in sex and justice is this: treat the sexual characteristics and differences like the eye colour of individuals in society: no distinction of justice would be based on eye colour. It is a matter that is just incidental to the description or identity of person just as skin colour is - so the same should be the case of sex.

Thus, if liberal feminism is an absolutism of all sorts, assimilationism is its extreme form. For, in an assimilationist society, there are no sex roles nor accommodation of the demands of natural differences. Their argument is for a society that similarly assimilates all differences whether by any means available or by striving to find such means so that people are freed from the tyranny of sexual distinction. This is because,

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14 Ibid, p. 428. See also Wasserstorm, "Racism, sexism and preferential Treatment: An Approach to the Topics". (1977) 24 *U.C.L.A Law Review*, p. 581 & 604.

15 Because assimilationist theory wants to see absolute equality or similarity between the sexes it argues that even pregnancy can not be used as a unique distinction to enforce different treatment between the sexes since through - advanced medical knowledge such as "artificial reproduction [and] extra uterine - gestation" this can be avoided. See Scales, "Feminist Jurisprudence", (1981) 56 *Indiana Law Journal*, 429. See also Wasserstorm R.A., "Racism, Sexism, and Preferential Treatment" (1977) 24, *U.C.L.A Law Review*, 612.

16 For example, see Wasserstorm, R.A, "Racism, Sexism, and Preferential Treatment" (1977) 24 *U.C.L.A Law Review* at 611 where assimilationist argue that: "The industrial revolution has certainly made any of the general differences in strength between the sexes capable of being ignored by the good society in virtually all activities".

assimilationists argue that distinctions based on sex, necessarily impose limits - and restrictions on what one can do, be or become.[17]

As we can see, assimilationists arguments of justice between the sexes are open and quite exposed to serious criticism. First, it can be argued that the notion of absolute equality is "frighteningly" unreal for it is blind to the nature of persons and the world they live in. Even among women there are differences that are worth calling for consideration. There are things we can not change. Moreover, when we identify sexual distinctions to consider in issues of justice it does not mean to be biased in the negative sense.

As we noted earlier, to treat people on the basis of sexual distinction per se is not an injustice,[18] what is wrong is to use these distinctions by one gender to dominate, oppress and subordinate the other - as has been the case in general legal and non legal tradition. Thus to argue that the right thing is only for all to be similar is unnatural and it "trivializes sex differences which in fact have [significantly necessary] repercussions".[19]

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17 Scales, Ann. C. `Feminist Jurisprudence' (1981) 56 *Indiana Law Journal*, p. 430.

18 Compare with Wasserstorm's arguments for and against assimilationism in "Racism, Sexism and Preferential Treatment: Approach to the Topics". Op. cit., pp. 605-11.

19 Scales Ann, "Feminist Jurisprudence" (1981) 56 *Indiana Law journal*, 429.

And, by insisting on the need to `nullify' certain inherent sexual differences like pregnancy is to insult the relevance of particular natural human function of the sexes. Therefore like liberal feminism, assimilationist theory is also inadequate because it relies on conceiving justice in terms of (equivalence) to the male norm. For example, as Scales[20] demonstrates, to argue that pregnancy should be nullified so as to make the female similar to the male is like saying that males should be equipped with the means to conceive and bear children!

The Unique Differences Doctrine - ("Bivalent View")

Perhaps by arguing that the treatment between the sexes be cognizant of real significant gender difference is what could provide an alternative to both the liberal and assimilationist theory. This is what the `bivalent' view represents for it is based on the premise that between the sexes, there are differences that are unique enough to call for application of justice based on a non-abstract use of the physiological, biological and other relevant characteristics of each sex. This is because it is neither vital nor necessary to nullify or disregard certain particular differences of the sexes. After all, "it may be more possible for us to treat people of different sexes alike than it is for us to treat a baby as an adult, or elderly man as a youth. Some differences can not be discounted".[21]

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20 Ibid, p. 430.

21 Ibid, p. 431. Compare this with the argument that we cannot heavily rely on justice based on difference between the sex, for, those differences which appear natural and right in one generation or culture may not be so in the next culture or period. See "Toward A Redefinition of Sexual equality" (1981) 95

Thus, the bivalent view bases its argument on the fact that it is irrational to think that by disregarding differences between the sexes, justice and pure equality will result. Therefore, it proposes in the alternative: that we recognise that between the sexes there are certain gender distinctions that command the need to assign special rights related only to these distinctions. This means that under the bivalent view, political and social arrangements should be (to some extent) based on the differences between the sexes.

The argument here is that between the two sexes, equalisation of the sexes is an unrealistic phenomenon. This means that to deliver justice between gender, the law should take into consideration the fact that: "the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both".[22] A view of justice in terms of recognition of unique sexual differences is vital. But the problem with this view is that it does not tell us which differences to regard and disregard, or how to determine which distinctions are relevant or not. Thus, though the bivalent view gives regard to historical situation of the sexes, it fails to provide a concrete alternative to the other two.

Theories of justice and feminism: some observations

Though it is easy to argue that feminist critique of law and legal theory is an emerging field of its own which is part of what is now called post modern jurisprudence, it is

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Harvard Law Review, p. 497.

22 Ibid, p. 432.

also important to note how influential existing writings on law and justice have been in determining this emergence.

For example, if we start with Plato and Aristotle we realise that though they have been blamed for their "declarations on woman as partial man",[23] it is their theories that form the background in the methods of feminist formulations of justice between gender. For instance, through Aristotle's argument that conceptions of justice be cognizant of difference and similarity (sameness) of persons, feminist reaction has managed to come out with an argument for justice based on similar but modified lines.

The noticeable difference between these two is that while Aristotle only emphasises reliance on treating equals equally and unequals differently, feminists insist that it is not enough in gender justice to rely on the differences and similarities of people: we have to question whether these classification are relevant. But generally legal feminism agrees with Aristotle when it conceives the law in terms of the doctrine of classification as an important method of social justice. This is particularly vivid under the assertion that the "law, like the language which is its medium, is a system of classification" and that to characterize similarities and differences among situations is a key step in legal judgements.

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23 Scales, Ann, "The emergence of Feminist Jurisprudence. An Essay". (1986), 95, *Yale Law Journal* 1374.

Thus, feminism like Aristotelianism is in this regard "a theory of differentiation", but unlike Aristotle, its authors are more concerned about the "moral crux" upon which this theory is based than about differentiations per se.[24] This is (I think) why feminist critique of law and justice has combined Aristotle's doctrine of classification with Hart's relevant difference and relevant similarity approach. Through the use of Aristotle's doctrine of classification, legal feminism acquires a basis to argue for a consideration of "special rights" unique to women and by adding to it Hart's relevance approach,it manages to keep at bay the arbitrary use of human differences and similarities to further inequality.

In retrospect, under feminism the requirement is that where women are within determinably and relevantly similar situations like men, treat everyone the same. But where there are determinable and relevant differences between the two, then we treat them differently. Consider the case of pregnancy. Because women are the only ones that are biologically suited to bear children in the wombs, and because pregnancy calls for unique health needs, this is a sex difference which is relevant for consideration of different approaches to justice between women and men.

Following Aristotle, these differences (it seems any difference) would of course justify unequal treatment between male and females since as we have seen, he does not care which difference is relevant or not. Another thing that we can consider under Aristotelianism in relation to feminism is the equation of justice to conformity with the

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[24] Ibid, p. 1387.

law. Here too, if we apply the Aristotelian justice to issues between the sexes, we have to adopt some kind of modification. This is because in his conception of justice as conformity to the law, Aristotle fails to realise that we are living in a genderised society in which it has been the tradition to formulate the law and justice according to male terms, norms and standards.

Similarly, under Plato's conception of justice in terms of placement according to capacity, it can be argued that gender justice would both be promoted and undermined. It is promoted when we adopt a moderate application of the doctrine: place everyone according to where their capacity suit them best. This too, (like in the modified Aristotelian doctrine) requires the need to recognise relevant differences in terms of burdens and rewards of the various capacities involved.

If there are certain capacities which are akin to one sex, but impose or are associated with particular burdens or rewards which would create unfair imbalances between the sexes; then feminist arguments would require the assignment of special rights to cater for this imbalance. Again, a case in point here is that of pregnancy and child birth.

During pregnancy and after child birth, a woman's body health requirements may demand that the female be treated or placed differently from the male. This is because at this time her capacity to function as normally as others would do is different. This for example, may justify giving maternity allowances or leave to women instead of paternity allowances or leave to men. But if we apply a strict use of Plato's argument

of placements (entitlements) according to capacity, then situations like this where the sexes are not similarly situated, will leave some people adversely disadvantaged where others enjoy the same conditions.

Even in situations where women and men are similarly situated, it cannot be held that abstract application of justice according to capacity will deliver the true meaning of justice between the sexes. This is because, in the genderised society of today, men have made a giant leap ahead of women not based on Plato's yardstick of achievement according to capacity, but because of the traditionally institutionalised gender system. And it is interesting to note that under this system women have been dominated and impoverished because they were relegated to the "private sphere" generally because of arguments based on capacity. For, under such arguments women have always been perceived as the weaker sex or just "mothers and wives" whose proper place of occupation is in the home. But not so has been the case for men. Men have always been considered the stronger sex - not just husbands but as the family heads and bread winners whose proper place of occupation should therefore be beyond the home.

Now, Plato's doctrine of desert according to capacity does not consider whether one is a woman or man - which is good in a way. But in gender justice, we cannot apply it whole sale without regard to prevailing positions and situations between the sexes. In view of the imbalance created by the traditional institutionalisation of gender, any concept of justice in relation to gender issues has to pay some regard to the need to restore women to that station in which they ought to be as equals with other human

beings. Of course this calls for some consideration of the Aristotelian restitutional justice. But more importantly, it is what brings us to the world of modern theory whose emphasis is the requirement to redistribute burdens and rewards so that the least welloffs are brought in line with the better-offs.

However, it must be realised that contemporary theory, though more `sympathetic' to gender justice, has also found it difficult to escape the feminist critique. Thus, a close examination of major twentieth century theories of justice reveals not just an inclination to the use of male generic terms in postulating justice but a male oriented conception of justice. Take for instance Rawls's *A Theory of Justice*. In explaining the model of people in the original position (P.O.P), Rawls assumes that it is just and right for the male term `he' to represent the rational conception of justice. So he uses such terms as: "his place in society", "his rational plan of life", "his conception of good", etc, to explain the rational model in *A Theory of Justice*.[25]

And, though elsewhere in his *A Theory of Justice*, Rawls discusses the concept of justice in non gendered language, it can still be argued that these terms of reference make us ask: "Does this theory of justice apply to women or not"?[26] Moreover, from gendered language, Rawls still reflects a gendered tradition in the way he argues the workings of the original position.

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25 J. Rawls, *A Theory of Justice*, (Cambridge: Harvard University Press, 1971), p. 137. See also S. Moller Okin, op. cit. p. 173.

26 S. Moller Okin, op. cit., p. 172.

For example according to Susan Okin,[27] Rawls's discussion of justice within the family disregards real disparities between gender. This can be seen where Rawls assumes that in the original position and when the veil of ignorance is removed, all parties will be participants in the paid labour market. Yet, the reality is that many women's labour particularly in the `third world' is unpaid or underpaid as compared to men. And, as Okin further shows when we look at the family as part of the basic structure, Rawls's assumption then will be that, in the original position people do not reach agreement as members of the family but as "heads of the family" who represent the rest of the family.[28]

There are two or three problems with this. Supposing heads of the families are those who are influenced by a gender biased culture, whether they are women or not, their decisions and agreement will not be in the interest of gender justice but the culture that influences them. The unfortunate thing is that such decisions, will by way of representation, be imposed on all members of the family even though there may be among them some who would want them to be otherwise.

And there is the argument that Rawls's concept of family justice inadvertently assumes a male head and not a female head. This is particularly evident when Rawls refers to a female head only in those instances where a male member is absent -

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27 Ibid, p. 172-3.

28 J. Rawls, *A Theory of Justice*, op. cit., p. 128. See also Okin, `Justice and Gender', op. cit., p. 173.

giving the impression that families with male members are headed by males and not females.[29]

But on the other hand, when we consider Rawls's theory beyond semantic impressions and terminology, it can be argued that it reveals a concern for gender justice. For example, under the difference principle, the requirement of equal basic liberty and that of fair equality it can be seen that Rawls's theory would not stick to the requirements of a gendered social tradition, history or context.

Instead, under these principles and requirements , Rawls would only entertain gender bias if it would be of the greatest advantage to the least well offs - who as we know, in gender relations are the women. Thus, generally, Rawls's theory of justice departs from that of a gendered tradition in which women are subordinated and suppressed. For, it argues for fair distribution of opportunities and the respect for basic liberty between men and women.

Let us also consider a situation where justice is conceived through a set of ideal standards. Here the argument is in looking at issues in a uniform manner - that is, "justice as blindness to difference". The problem is, when we come to the application of justice between gender, we realise that there are certain things we need to consider if gender justice is to ensue. The reality is that women, whether in the developed world or not, are living under institutionalised dependence which subjugates and

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29 Okin, `Justice and Gender', op. cit., p. 174.

victimises them. And the family structure is such that, there are two spheres in gender justice: the private sphere to which women are generally restricted, and the public sphere which men control and reserve for themselves.

In the real world, women have little control over the means of acquiring a decent life but they hold heavy family commitments. This puts them in a vulnerable position under which they can not successfully claim or attain their dues. Yet in the world we live in today, "a woman who has no adequate entitlements of her own and insecure rights to share in family property or income, will not always be coerced but is always vulnerable".[30]

Thus, the woman of these days operates under unjust institutions in which "those who control her means also control her rights to justice". Particularly in the developing world, the woman is unable to earn as men do, or if she does, she does not enjoy what she earns as her male partner does, since she is expected to be more in charge of the family than men. This makes her more vulnerable to injustice and subordination. In the more developed world, though women can earn and have some kind of level to set terms with men, they still lack membership to the status quo to which men belong, and are still dependent in the assignment of roles and tasks.

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30 Janna Thompson, *Justice and World Order*. (Routledge: London, 1992), p. 71.

Therefore, whether in the developed world or in the less developed nations, the application of gender justice demands that we recognise the vulnerability, dependence and subjugation to which women have been subjected. This means we have to revise all those theories which idealise justice as a concept that is blind to particular differences.

Women are different and unequal to men, not in the biological or physical sense. They are different and unequal because, over the years, they have been victimised by institutionalised discrimination. In order to restore women equality with men, both idealised and relativised concepts of justice have to change. This is because, by shunning the concept of a shared world with shared principles of justice, relativised theories of justice legitimate women's vulnerability and become an injustice to gender. And, by neglecting the concept of difference, idealised concepts neglect women's vulnerability and they too become an injustice to gender relations.

Feminist Justice: A Summary

The discourse on gender and justice is an argument for equal shares between peoples of different sex. And like any discussions on justice it is triggered by the existing relations between peoples which are seen as unfair to one group. These relations have been of dominance, suppression and alienation or subjugation of females by the males - hence, the existence of a male standard and norm as the window of justice.

> Men and women are taught to see men as independent, capable and powerful; men and women are taught to see women as dependent, limited in abilities, and passive.[31] That is why the law and nature herself has always recognised a wide difference in the respective spheres and destines of man and woman. That is why the man must be the protector and defender of the family, and the woman a timid and delicate being whose proper office is the function of home tasks: as wife and mother.[32]

This is the traditional culture of justice between the sexes. It is (or has been) a culture in which there is the deliberate refusal to recognise the relevant similarity between men and women, but one that is also based on the obstinate denial and benign neglect of unique difference of persons as men and as women.

There is no new culture - nothing much has changed. What is emerging however, is an intense struggle to dismantle traditional culture and institute a more favourable and fair tradition. The methods have been as varied as the struggle has been intense. One way has been to approach the issue by bringing women in line with the men's world: asking no more than for "the adoption of traditional male roles and equal share of rewards and burdens between men and women. Thus women are convinced to demand no more as long as they are allowed to assimilate with men".[33]

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31 Wasserstom, R.A. "Racism, sexism, and preferential treatment", *UCLA Law Review*, op. cit., p. 588.

32 Scales, Ann. C. "The Emergence of Feminist jurisprudence", *Indiana Law Journal*, op. cit., p. 1378. (Emphasis added).

33 "Toward a Redefinition of sexual equality", (1981) 195 *Havard Law Review*, p. 487.

The other way is to argue for the need to liberalise the traditional relations between the sexes by a moderate equalisation of women with the male world. Where men are allowed to be what they are or determine what they want to be, the same should be the case for women. Here too the emphasis is that we must look at the existing world: the male's world in order to know what the woman's world should be like. But just as one can assert that people be treated equally because they are extremely similar in nature, we can also argue that these same people have unique characteristics which make them remarkably different.

Therefore, the right approach to justice between gender would seem to be one which is based on the argument that as long as we are not "over inclusive" or "under inclusive" of the similarities and differences between the sexes, it is vital to take into account the relevance of unique gender characteristics if justice is to prevail. It is not enough to call for the right to be treated as an equal (to men) or to be treated in the same way like men; or tailor women's rights in accordance with (to match) the rights and roles of men.

Sometimes the right to be treated differently is no less important than the right to be treated as an equal or that of entitlement to equal treatment. An assumption of absolute equality between the sexes is therefore wrong because it presumes complete sameness of individuals - men and women. Yet "equality does not mean sameness"[34] for, as

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[34] Ibid, p. 417.

Aristotle illustrates, "injustice [will arise] when equals are treated unequally and when unequals are treated equally".[35]

Therefore, the issue of justice and gender is an intricate matter which requires that we need to realise and consider the interrelations between the two sexes. It does not require the complete differentiation of the sexes nor does it mean that "little girls shall be boys" or vice versa. What it requires is the consideration of diminished rights of women or children as human beings. In other words, it means that sometimes we must consider and weigh classification "in terms of the real world". "What is at stake is not a right to be free from classifications, but rather a right not to be classified in a degrading [or better say unfair] manner".[36] Thus, though justice between gender means looking at people as human beings with human (not female or male) needs, rewards and burdens, it also means due attention to the cry: please treat me as what I am: a woman or would you please stop viewing me in male glasses. The reverse is also true.

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35 Aristotle, *Nicomachean Ethics*, V also cited by Scales, Ann. C. "Feminist Jurisprudence", (1981) 56 *Indiana Law Journal*, p. 431.

36 Scales, Ann. C. "Feminist Jurisprudence" (1981) 56 *Indiana Law Journal*, p. 435.

CHAPTER VII

GENERAL COMPARISON

While there are various interpretations of the core meaning of justice there is also a web of relationships between the different views and approaches to justice. This is because all views and theories of justice are born through definite cultural settings.

First there is the classical culture dominated by purely Greek - Roman conceptions; then there is the judaic-christian and Islamic cultures in which some religious (divine) approaches are channelled. And lastly comes what can be termed the modern cultural setting, in which dominance shifts from Greece and Rome, to English, German, French and the American thoughts. This is what is now called modern western thought. However, this latter is a small branch of classical culture. The religious culture is the only most prominently distinguishable among these three.

With the exception of a few areas in modern culture, all the cultural settings on justice, view the subject from a central idea. For example, while there is a little cross cultural identity or agreement on equality and inequality, as component aspects of justice, all theories of justice seem to agree on construing justice from the basic premise of giving people what is theirs or what they ought to have. This introduces the idea of dues or desert as a cardinal aspect of all theories

of justice. What differentiates one theory from another is the way in which justice is extracted from this aspect.

For example, under the notion of desert we see a meeting between for Aristotelian views and religious (divine) views on justice. Both believe in law as the measure which determines who takes what. But it (desert) is also a meeting place for disagreement. After all, Aristotle understands law as positive law while the divine law of justice is different. The desert then becomes a matter of whose law and what order - and so does the concept of justice.

Then there is the basic idea of naturalism. This too is evident in almost all theories of justice. In Aristotle and religion, it is in the conception of justice as a virtue. This is so because if justice as a virtue is the seat of perfection; then it has to be latently natural or innate. Thus, when religions and Aristotelianism talk of justice as perfect virtue, in a way they rule out distortion. And in a way this brings in these two to relate to the platonic argument of putting things in their orders.

In this too is a tripartite ground for agreement between Islamic justice, Aritotelianism and Plato's justice, (as maintaining proper orders, putting each in its place and proportionate distribution). This argument is most prominent when we examine the two as basic ideas. Thus, ideally, putting everyone where they fit whether by and according to their capacity or status, is very similar to (if not the same as) treating

individuals according to what class they fall in: "Equals equally and unequal unequally".

This is where we see a state of harmony between all theories of justice, because from here all agree that justice entails equality and inequality. This is true in all situations whether we stress freedom, equity, truth, rights, liberty, etc, for in any case this creates groupings which place people entitlements according to different resultant situations from such concepts. However, although there is always a basic idea in most conceptions of justice, it is the idea of particular contextualisation of various theories that creates departures from the basic idea.

This is for example, because both modern and religious approaches have rationalised rights either as a divine or as a universality-based approach to justice. This can be seen in utilitarianism which has left rights wide open in order to portray justice as welfare. It is also true of marxism, which opposes individualisation of rights, and a communitarian stance towards justice as wellbeing. Both religious (particularly Islamic) theories and classical (especially Aristotelian) conceptions of justice lack this extreme trend. For them the idea of moderation directs the meaning of justice in rights and human wellbeing.

However, it is the religious and modern theories that emphasize more than the classical approach justice as rights and welfare, in terms of not only social rights but economic ones too. Under the idea of freedom and liberty there is no conception of justice which

vehemently rotates around them, other than Nozick's libertarian entitlement theory and that of utilitarian philosophy.

However, although these two are together under this argument, they differ in context. Thus, while Nozick's theory of justice is in this regard individualistic, that of utilitarianism ignores individualism in so far as it overemphasises justice as overall happiness. This means that modernistic approaches to justice, more than classical and religious approaches, emphasize both individualism and communitarianism. This is more vividly seen in Rawls's principles of justice; Nozick's theory, Marxist philosophy, Hume's rules of property, and to a lesser extent, utilitarianism.

For example, while Rawls sees justice as equality and fairness, Nozick sees it as liberty. And while Utilitarianism and Marxism see it as the welfare of the community, Spencer sees it in respect for individual freedoms. And yet all these are and can be grounded in a space of five closely following centuries of legal thought. We can see that Rawls' principle of redistribution has more socialistic tendencies of liberality, as compared to Nozick's entitlement theory, which leans towards open competition and represents more of capitalistic justice.

All this manifests one fact: justice today unlike the past, is not so much based on the content or qualities of virtue as a matter of the moral mind of social inclinations. De Jouvenel agrees:

> "... Justice today is not a habit of the mind which each of us can acquire in proportion to our virtue; rather it is an organisation or arrangement of things. For this reason the first part of the classical definitions which link justice with the human being, no longer finds a place in modern preoccupation, which link justice with society. People no longer say with Aristotle that justice is the moral attitude of the just, or with the jurists that it is a certain exercise of the will, for these talk of an innate quality of the soul. The justice now recommended is a quality not of a person and people's actions, but of a certain configuration of things in social geometry, no matter by what means it is brought about".[1]

Perhaps, with the exception of Islam, what seems to be the major theme among all theories of justice is the problem of property and entitlement. But even within Islam the concept of entitlement, appears to be constantly domineering. The major theme in all theories revolves around the idea of entitlement and property.

Hume's theory is quasi egalitarian and quasi utilitarian. He is against practical equality but accepts both utilitarianism and egalitarianism on grounds of morality. For example, he says that whenever we depart from the equality of goods, we rob the poor more satisfaction than we give to the rich. But he also asserts that any frivolous vanity which gratifies the individual, costs others dearly and is thus unjust.[2]

To provide an alternative to egalitarianism, he advocates evaluating entitlement, based on his rules of possession, accession, occupation, succession and prescription. As a moralist, Hume is therefore a utilitarian in so far as his rules of justice are concerned.

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1 De Juveneile, *Sovereignty. An Inquiry Into The Political Good*. Chicago: The University of Chicago Press, 1972, p. 140.

2 David Miller, 1979, *Social Justice*, p. 170.

This is because these rules portray a utilitarian picture of society.[3] But unlike classical utilitarians, Hume looks at justice as a matter of public welfare and will sacrifice maximisation of satisfaction for the general good of all. This is apparent from his argument that in times of scarcity, his rules of justice can be abandoned for the general good of all.

Both, Hume and Aristotle consider justice a virtue of overwhelming stature. The difference is that Aristotle's consideration of justice as a virtue is on an individual and natural context based on ideas of merit, while Hume relates it to artificial mechanics contained in established conventions. For Hume, it is not merit or desert that determines justice; justice is contained in conventions which individuals habitually adopt.

Hume views the allocation of entitlement based on merit as a thing which will destabilise property and therefore he rejects merit in toto. So when Hume asserts that; `It is necessary to know our rank and station in the world', he is in effect explaining justice with Platonic overtone. That is, he echoes Plato's conception of justice as maintaining the status quo: fitting oneself where natural abilities fated him or her to be.

Strictly observed; Hume, Aristotle and Plato are philosophers whose theories are based on and promote a world in which there is no competition or conflict. This is the justice of an 'ordered' social community and stable property: talking about preserving the

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3 Ibid, p. 170.

natural order in different tongues.[4] Aristotle viewed the society of just property as one in which everyone is accorded their due, Plato as that where everyone fits where they were naturally destined and Hume as that in which entitlement is based on established rules of convention. So, all the three had in some way a belief in positivist dictates.

The difference is that while both Aristotle and Plato are influenced by belief in natural forces, Hume holds strongly to the force of artificial virtues habitually developed by human conventions.[5] Rawls approaches justice from a universalistic conception. In this, he meets Kantian arguments of justice mirrored in universal perception. In his distinction of absolutist notions of justice into particular and general categories, Rawls is building upon Aristotelian conceptions. In fact, seen from a wide view of contending conflicts, Rawls is a disguised Aristotelian for in normal circumstances and in absence of the least advantaged, he would appear to prefer meritocracy to other systems.

Rawls, like Aristotle and Plato, attempts to find and postulates a universal principle of justice. But for him, his arguments are wholly based on rational justifications. This is the only way we can put him in a quasi universalistic conception of justice.

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4 Aristotle's opposition to (natural) heredity would put Hume's rules of succession to task.

5 Islam, Rawls, Barry and Nozick are different; for they accept competition, albeit the first three accept it so far as it fits within certain limits.

Conceptually, Rawls has been considered a disguised utilitarian.[6] However, I think this is greatly diluted by his basic principles of justice.

In claiming that in normal circumstances, equal liberty for all is the supreme guiding approach to justice, Rawls succumbs to egalitarianism. His embrace for egalitarianism is further seen in his argument that we should allow incentives and assistance to the weaker sections of society, even though that appears to reduce the well being of the wealthy sections.

So, his difference principle would definitely be opposed by Aristotle because it neglects merit. Perhaps Plato would also disregard it because it pays little attention to one's `status quo' of abilities. But, the argument that careers should be opened to talents based on equal exposure to available opportunities raises questions of merit. This is somehow echoed in Rawls's principle that each is to have equal opportunity to the most extensive basic liberties.

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6 To utilitarians unfair distribution of wealth is okey as long as it derives the greatest satisfaction for the greatest majority. To Rawls, sacrificing the pleasure of the few for the joy of others would only be acceptable if it works for promoting equal liberty and/or advancement (betterment) of the least well-off. It is a question of utility only if this proviso is required. To the Utilitarians it is not merely a proviso, it is the basis of their theory. If it is absent, the whole theory becomes non-existent. See also Kamenka & Tay, *Justice*, 1979, p. 185.

Nevertheless, Rawls is to be considered a liberal[7] advocate of justice based on the promotion of individual liberty equal to all, albeit his theory works under exceptions that promote equality. So, he argues that liberty is supreme but equality and just inequality are inevitably vital. But, Rawls's theory is repugnant to the ideas of egalitarians and libertarians whose theory of justice entails the propagation of free enterprise and the condemnation of interference in the rights and freedoms of the individual. So, the notion that there should be redistribution of wealth is met with strong resistance based on the fact that such will deter individual rights and liberties.

Nozick argues that the conflict between liberty and equality cannot be reconciled. To him, freedom is an end in itself. Justice based on equality or redistribution, to benefit the least well off, would be like imposing a non existent moral duty to protect the poor. In Islamic view, Rawls' argument for redistribution of wealth conforms, at least in principle, to Quranic justice. But his model of justice is unacceptable to the justice of Islam. After all, Islam disallows putting hands on one's face so as to act upon ignorance and thereby follow that which is not perceived.[8]

Utilitarian and marxist theories harbour collectivistic notions of justice which give priority to the society. In this, these two conform to Hobbe's argument that the

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7 Liberal theorist are those who believes in the redistribution of wealth, social welfare and social engineering to maintain equality.

8 The Qur'an Commands: "Follow not that where thou hast no knowledge". See Al Qur'an, 17:36.

general will always prevail over the individual. In the same sense, collectivist notions of justice become compatible with those of Islamic conceptions of justice.[9]

However, under utilitarian and marxist theory the individual is used as a means to attain familial or societal goals. This is objectionable to Kelsenian theory of justice. Kelsen would also oppose Rawls's differential principle because in it individuals (the rich) are used as means but not ends. However, Kelsen would oppose almost all those who tend to approach justice with a universalistic view. Thus, views of Aristotle, Rawls and Kant: universalistic concepts of justice, would be intolerable to Kelsen.

In summary, we can also look at theories of justice in the light of positivist and universalist perceptions. Positivists view justice as a relative term that is uniquely variable. Their cause is perhaps chaired by Kelsen. The positivist argument seems unacceptable to the universal and general views of Rawls and Aristotle. To positivists, justice is a highly subjective concept incapable of absolute and eternal conception.

To Rawls and Classical theorists, like Aristotle and Plato, justice is within absolutely determinable reach. However, for Rawls, in a just society in which his two principles are fully effective, he would seem to come to terms with positivists. This is because in a just society like this; Rawls would not give chance to any disobedience to the law. This brings us back to Aristotelian. Islam too does not seem to conceive justice along

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9 This can be seen in the strong position Islam attaches to the concept of "*Maslahah*" (Public good). But it must be remembered that in justice, Islam aims at striking a balance between the two; ie. the individual and the society.

positivistic lines of argument and thus opts for universalism also. However, Islam's universalism here, is uniquely different and dissimilar to that of Kantism, Rawlsianism and Marxism.

Comparing Islam with communism, one prominent scholar has argued that Islam is the undying goodness of humanity which approaches human life under a comprehensive view that unites one's spiritual desires with their bodily appetites, and one's moral needs with their spiritual needs.[10] Therefore, unlike other systems, Islam is seen here as the only system in which justice is accorded an all embracive perception in which life is always interdependent and entails such things as mercy, love, help and mutual responsibility among all individuals and societies.[11]

Marxism too approaches justice in view of social responsibility and collective consideration but the approach here like in other theories is different from that of Islam. In Islam, justice is a matter of human equality and balancing values, both visible and invisible, as well as material, economic, bodily and spiritual. Justice includes all values moderately attained and balanced. Islamic or not Islamic, all (practically surviving) theories of justice have in some way conceived justice as a sort of human social order that realises both the existence of human differences and human universality.

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10 Qutb, *Social Justice in Islam*, 1970, p. 24.

11 Ibid, p. 24.

From a contractarion point of view justice is derived when people are similarly situated in positions that help them extract general principles of justice. This is similar to Judaic-Christian and Islamic contractarianism. This is because in these religions, there is a stress on communality of situation and goals. However the difference is that in Judaic-Christian and Islamic contractarianism unlike in other contractarianism, people are not placed in hypothetical situations, but are in real practical positions based on in-depth beliefs.

For example, though Rawls's device of the original position is only for justification, it is implausible to think of any people who will really operate in the resultant Rawlsian contractarianism, behind a veil of ignorance which forces them to shun self interestedness, and foster mutual interestedness so as to extract rational principles of justice. In Judaic-Christian and Islamic contractarianism, people are placed under divine covenants, which are real facts between the profane and the divine, and are contracts that bring believers together in faith and law without the need of force.

Finally, there is the field of post modern legal theory of justice and gender and justice and internationalism. Here, the fundamental comparison we can make is mainly this: that both traditional and modern theory have neglected women's due place in the conceptions of justice. Only a few theories particularly redistributive theories such as that of Rawls have provided a broad formulation through which justice can be channelled to all.

But generally all theories have in language and norm been guilty of gender bias in their conception of justice. But in so far as theories have formulated universal-based conceptions, the demand for consideration of the issues of justice and internationalism has not been neglected. What is lacking here, is the need to incorporate issues of international concern into the realm of the major theories of justice.

CHAPTER VIII

TOWARDS A UNIVERSAL CONCEPTION OF JUSTICE

Most Jurists, in their attempt to define justice, have restricted themselves to either the `is' or the `ought', the real or the ideal, or "confuse" a combination of either of these two concepts. This has placed the conception of justice in a twilight zone in which its identity becomes as illusive as ever. Therefore, if we are to define justice with exactitude, then the answer lies in formulas that lead to a universal conception of justice. Perhaps the Kantian categorical imperative theory[1] and Aristotle's division of justice into general and particular justice would be of use if and only we build on these views and theories, in light of conceiving justice as a whole virtue.

Justice is a universal phenomenon, which admits of no boundaries. It is not that which is in our interests or enhances our interests. Justice in fact is more of that which dictates our interests and is therefore not limited to our interests and welfare.

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1 Emanuel Kant's argument in categorical imperative postulates that an act is just only if it is the same thing that others would do when placed in the same situation as yours. This can be compared to the theological universalisation of justice contained in the maxim: "Do not do that which you would not wish to be done to thyself".

So when countries like the U.S.A. today label others such as Sudan to be unfit for U.N international aid simply because they are associated with terrorism which affects American interests, it distorts the real meaning of justice. For here justice is then limited to our good and not to what is good for others. Justice is transcendental and entails considerations of all interests, ours as well as others'.

One way of achieving this is to take justice as basically an ethical matter that is all bound and exists with superiority over all values. Looking at justice as an all encompassing virtue will therefore automatically rule out any irrationally restricted conceptions. In this way, justice is contained in both the `is' and the `ought'; as well as in the `real' and the `ideal'.

Thus, as an ideal, justice carries a correlative element of reality that can only be realised through a marriage between the is and the ought. This element of justice must then be seen as that which allows one to attain the purpose of their existence in relation to the world they live in. This purpose is uniquely similar in every person and its attainment will not mean a dismantling of the universality of justice. For example, the justice of the soul is contained in each person's duty to do justice to himself or herself. This is what we may call spiritual justice which exists in everyone.

Justice resides in the commonalty of the humanbeing - inwardly and outwardly. The natural feelings and desires of rational beings have a common pointer and justice is contained in adjustment of all pointers to conflicting interests artificially created.

Therefore, it is not surprising that some commentators have considered justice as the will of God[2] or that of cosmic forces and providence that regulates the designs of individuals.[3]

However, the transcendence of justice should not be perceived in religious terms for this will limit justice to relative conceptions; religion being a question of faith. Transcendence here refers to the recognition of the fact that justice as a matter of substantial value contains an element of inherent commonalty unsurpassable whatsoever.

To find this element, we have to apply that which strikes a balance and promotes natural rights. For example, the right to life is sensed similarly in all rational beings. Thus, as an ideal, justice is that which must walk along all social orders with rationally perceivable clarity and force.

Justice is that which invalidates or validates all rationally immoral orders of people, whether social, political or otherwise. This is because in the inner self of the individual, justice commonly resides as a moral value. But this should not mean to elevate concepts of morality above the virtue of justice.

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2 Khadduri Majid, *The Islamic Conception of Justice*, 1984 p. 3.

3 Kamenka and Tay, *Justice*, 1979, p. 1.

Therefore, to arrive at an ideal conception of justice, we must recognise that all social arrangements ought to have a dependence on natural factors of the common belonging of humans. This is illuminated in the familial nature of humans and their dependence on common conscience and common feelings.

Thus, justice invariably resides in the recognition of logical, empirical and psychological priorities to all. This is to say that justice is that which sorts out the logically fundamental priorities equally needed by all. Under a common order of humans, an objectively acceptable concept of justice can hence emerge. Therefore, justice as an idea should be perceived in terms of all intelligible laws of nature - with justice being the end for which nature subjects people to the laws.

That is to say, justice being the end of human endeavour, it aims at attaining rational equality of individuals. This does not mean that justice simply is the existence of a state of equivalence among people. But rather, the realisation of that virtue whose essence forms the end and core of meaningful human existence. Such realisation may as a matter of formality entail the employment of various methods; some through inequality and others through equality. In terms of balancing claims, justice must be conceived as the virtue of all moral claims. That is, it is that virtue which gives meaning to all morally valid claims. Put in other words, it is that which defines moral behaviour, moral aims, moral laws, and their moral applications etc.

Therefore, it would not be wrong to assert that justice resides in the ascertainment of right from wrong or affirmation of equality of consideration, in which case, human beings are viewed as ends in themselves and not as means. In the broad sense of the word, justice consists in the governing of human relations under objectively `acceptable' standards. For this acceptability to exist, there must be some external force which commonly subsumes people's feeling. For example, the role of natural common conscience in humans or the idea of God in theologians.

Generally, all humans share certain internal perceptions that subject them to certain standards and therefore, the essence of justice must (on this basis) rely on the very nature of the common wealth of persons. This rests in the sentimentality of virtues; justice being the primary virtue. This may appear to equate justice to human equality. What it means is that the individual as a familial animal, shares common but fundamental feelings, which dictate a universal perception of the virtue of justice.

Thus, the real meaning of justice is not in the furtherance of equality, but in the basis of equality and fair play - discoverable in the common nature of humans. Under this argument there are certain elements of justice to consider in order to have fair play. For human beings have internal common feelings. This is where the conditions of need, effort, merit, desert, etc, have to be operative forming part of the avenue of justice as a whole, and not just singularly.

Justice cannot be limited to relative notions. In the same vein it cannot be objectively argued that justice is limitable to the attainment of equality or the preservation of liberty and freedom. Justice is an all encompassing virtue to which all values must be subjected. It is a virtue `concerned with problems of balancing and adjustment'[4] and not emphasising priority of rights or freedoms, society or the individual, etc. Its province is in the balancing and redefinition of natural rights against artificial establishments. Thus, justice can be equated to righteousness alone. In this way, justice as a concept is accorded the broad and eternal meaning that it deserves.

Afterall, substantially, justice is an ideal concept whose value is the end of all rational laws. In fact, scholars are right when they argue that justice is the end of the law. Thus, justice precedes the law and cannot therefore be limited to meanings of the law. Laws are mere means by which justice may be attained. There are other ways in which justice can be attained. So it cannot be said that the law is justice and justice is the law. For example, justice can be looked at in the character or habits of individuals even when such character or habit is not bound by or derived from the law.

As an idea, justice is contained in the way of doing things which begins from questions of substance. From the idea, we emerge into the form and application of attaining the objectives of justice.

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4 Ibid, p. 59.

In sum, justice is a rational and universal idea whose province is in the fundamental structure of reality[5] and human nature. It transcends human convention and cannot be identified in the naturally irrational ways or habits of humans. It is an intelligible and ideally universal virtue whose conception must be sought in the very fundamental structure, nature and meaning of the universe.

CONCLUSION

Justice is therefore, a transcendental measure based on knowledge. It is trans-rational, trans-cultural and trans-pragmatic and resides both in the equal and varied or diverse nature of humans under the universal dictates of the universe. Its meaning and value can best be derived by examining and understanding the common edifice of humanity as a lonely singular being.

In secular theories of justice we can attempt to achieve a universal conception of justice through the concept of juris Naturale, which is related to the equalisation of things ie: aequitas. This works under the natural and common nature of persons which dictates that justice has to be living in accordance to the equal nature of humans and natural equity. This means that where we need to treat people differently, we should

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[5] It has been argued that this reality is manifested in the fact that justice is grounded in the rational and social structure of humanity. See Sturm, "Natural law, Liberal Religion and freedom of Association", *The Journal of Religious Ethics*, 1992, Vol 20(1), p. 182.

only do so if such treatment is fair and equitable and recognises the basic needs natural and common to the welfare of all humans. This also means that we have to adopt some kind of modified stoic philosophy.[6] This then allows us to operate under a universal rationalisation of concepts. However, it also requires a basic plane upon which this universalisation operates.

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6 Stoic philosophy has the central idea of justice as behaviour in accordance to natural law, but at the same time allows this to operate under dictates to special circumstances. This latter concession permits unfair inequalities to be entertained.

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