CHAPTER II

THE FORMAL CONCEPT OF JUSTICE
1. The Formal Concept of Justice in General

In order to know something about the formal concept of justice, it is necessary to know something about the concept of formal justice as we often get confused between these two. According to Heller, formal justice is one kind of justice. This is known from the writings of Max Weber. What Weber means by formal justice is: "...the formalization of just procedure, a relatively modern type of justice emerging with the rationalization of legal authority." According to Weber, it is formal rationality or purposive rationality that provides us with just procedure. Weber considers that reason is the guiding principle for any type of just procedure. Thus, it serves as a foundation for legal authority. Such a legal authority is considered to be supreme good as it enables us to attain desirable ends.

There are two important aspects in Weber's formal rationality. First of all, it is not possible to apprehend the actions of other men so accurately as we may be deceived sometimes. However, it is only through the human action we measure others since it is open to us. The second aspect is
the identification of the basic unity of the social action which Weber calls the atom. This atomic or single deliberate action of the individual affects the behaviour of one or more individuals. Intention is the essence of such actions. A society is the sum total of such social acts. This does not mean that society as a chaos. According to Weber, these acts are categorised and combined into various structures. The aim of such combinations is to arrive at a certain just procedure. In a nutshell this is what is called formal justice according to Weber.

Heller opines that such an analysis of formal justice (the concept of formal justice) is necessary to distinguish it from the formal concept of justice. The two important features of the formal concept of justice are as follows:

(1) It is defined in such a way that it subsumes the common properties of all types of justice.

(2) As a result of such subsumption, it is abstracted from its normative content, criteria, and procedures of justice. Not only that, it is also abstracted from the ideal types of justice which are reasonably construed by means of different combinations of content, criteria and procedures.

Thus the formal concept of justice is both formal and substantive. It is not a specific kind of justice. Unlike formal justice it implies a far higher level of abstraction.
An individual is said to have participated, says Heller, in the process of socialization provided he practises the norms and rules of that society in which he is a member. Broadly speaking, various sets of norms apply to different groups of people. The two important groups that emerge in the process of socialization are – (1) ingroup, and (2) outgroup. The members of the ingroup are supposed to know, practise, and expect certain norms and rules, whereas the members of the outgroup are supposed to know, and expect the same set of norms and rules without practising them. Thus the member of an outgroup does not take part in the process of socialization. To quote James W. Vander Zanden in this context:

In daily conversation we recognize the distinction between in-groups and out-groups in our use of the personal pronouns 'we' and 'they'. We can think of in-groups as 'we-groups' and out-groups as 'they-groups'.

In an ingroup, expectation and action of the same set of norms and rules are symmetrical in the sense that I expect you to do in relation to me exactly what you expect me to do in relation to you as we share and observe the same norms and rules. On the contrary, I expect you to do something different from what I do because we are supposed to observe different norms and rules. Thus the norms and
rules observed by you and I are asymmetrical. Heller says this is only a simple model, but social relations are much more complex than this.

It is normally the case that the notion of justice is always explained in terms of equality and inequality. This explanation of justice, claims Heller, has its roots in Aristotelian dictum, namely, just means treating equals equally and unequals unequally. Heller feels that this dictum is often interpreted out of its original context. Aristotle himself never believed that two persons can be each other's equal in all respects. While criticising Plato's *Republic* Aristotle argues that two persons cannot be equals as each person is unique. How can we compare them when they are unequal? It can be interpreted in the following way. For example, $P = Q = R$ equates one person with the other. But the question arises, are they equals in all respects? or are they equals in one respect? According to Heller, they are equals only in one respect. This is what even Aristotle had in his mind.

In order to present a proper analysis of the notion of justice Heller heavily relies on Perelman's notion of justice in the initial stages. According to Perelman,
there are at least three definitions for the formal concept of justice. They are as follows:

(1) Formal or abstract justice as a principle of action in accordance with which beings of one and the same essential category must be treated in the same way.

(2) Everyone is a member of the same essential category.

(3) Formal justice consists in observing a rule which lays down the obligation to treat in a certain way all persons belonging to a given category.

Heller accepts these three definitions as the starting-points of the formal concept of justice. But she modifies them for her own advantage. The way in which Perelman defines the notion of justice presupposes that there are certain essential categories or clusters to which the same rules apply. For example, equal employment opportunities must be given to all those who have completed eighteen years. Here all the members who completed eighteen years are considered to be a category or a cluster. In order to apply the same rules to this category or cluster we must presuppose this category. Not only that, for Perelman, rules alone constitute justice. On the contrary, Heller believes that it is a mistake to think of pre-existing categories or clusters. According to her, norms and rules
constitute justice. The application of these norms and rules to a certain cluster constitutes that cluster.

Coming to the question of norms and rules, Heller claims that it is a mistaken assumption that all social regulations assume a rule character. This is what is normally held by sociologists and modern philosophers. But rules without norms do not constitute justice at all. Heller differentiates norms from rules. A norm is that which is not flexible, whereas a rule is that which is flexible. A norm is something more than a mere description. A norm suggests us what 'ought' to be done. It can never be derived from 'is'. Thus Heller distinguishes 'ought' from 'is'.

Heller classifies norms into concrete and abstract norms. According to her, a concrete norm is rule-like, whereas an abstract norm is not. Concrete norms are rule-like but they are not rules. Concrete norms are derived from abstract norms. They suggest us as how to act in a given situation. Thus they demand the observance of custom. They are optative as well as imperative. For example 'help the poor' is considered to be a concrete norm. On the other hand, abstract norms serve as standard maxims. For example, 'love your neighbour', is considered to be an abstract norm.
These abstract norms, holds Heller, are transcultural. In other words, they are 'moral norms proper'. They are related to values. A value is something which satisfies human desire. All things that satisfy human desire have value. Hence, they are good. Heller calls these values "yardstick values". Apart from these values, there are also values that are considered to be virtuous. These values are called 'moral values'. These moral values ultimately become moral norms. As moral norms these values can prohibit us from doing certain actions.

In traditional societies, there was a gradual change in concrete norms. At times, these changes are hardly noticeable. Over a period of time these changes become conspicuous, all of a sudden, resulting in certain abstract norms which become new clustral norms. Heller calls such a process sedimentation or concretization of norms. These norms are taken for granted and observed by the members of the social clusters to which they are applied. However, in modern society such a sedimentation of abstract norms proved to be momentary. As Tugendhat puts it:

... concrete norms as norms which come about via the application of abstract norm (in action, decision and discourse), and describes this process as the moral learning - process par excellence he touches upon the most conspicuous feature of a pluralistic moral universe.
The essence of the above quotation is that the application of norms has always been the part of moral learning process of an individual. Normally, no new concrete norms are engendered in this process.

Rules, claims Heller, are flexible in the sense that they can be followed in a definite way. Not only that, rules are designed to interpret the maxim. For example, if rule 'A' is applicable to case 'B' then there can be doubt whether 'B' is the case. However, there cannot be any doubt concerning the ways and modes of following rule 'A' if 'B' is the case.

After analysing the nature of norms and rules, Heller turns her attention to the definition of the formal concept of justice. According to Heller:

... the formal concept of justice means the consistent and continuous application of the same norms and rules to each and every member of the social cluster to which norms and rules apply.

She considers that the formal concept of justice is the maxim of justice. She tries to illustrate the formal concept of justice in the following example. For example, every student who obtains 350 marks in his or her qualifying examination must be admitted to a law school of any university. This rule is applicable to that cluster of
students who obtained 350 marks in their qualifying examination. In spite of the fact that they belong to the same cluster they are not alike in all respects. However, rule equalizes them as it applies to all of them. If any student with 350 marks is not admitted to the law school, then it is injustice. There cannot be slightest doubt about this conclusion as the cluster in question is constituted by a rule, but not by a norm. On the contrary, preparing for the qualifying examination is a norm because different students prepare for their examination in different ways with different degrees of commitment.

From the above illustration of Heller the following conclusions follow:

(1) The formal concept of justice can be applied to procedures. Only then we can call a procedure just or unjust. There is no specific procedural justice opposed to the formal concept of justice. However, it has to be noted that if a particular rule or norm 'Y' applies to case 'X', we must find out whether 'X' is the case to apply that particular rule or norm.

(2) It is a moral imperative that the same norms and rules should be applied to each and every member
of a cluster to which the norms and rules in question apply irrespective of their moral nature. Deviation from this moral imperative is considered to be a moral offence.

(3) There may be a possibility that the norms and rules which constitute a social cluster can be declared unjust or the procedure followed to be in accordance with norms and rules may be declared unjust. But the formal concept of justice can never be tested and questioned.

2. The Virtue of Justice and "Humankind"

We tend to pass judgements on the actions that are meritorious and excellent; and also on those actions that are not meritorious. Every judgement is an action by itself unless it is kept to oneself. Thus judgements are speech acts. It appears that Heller got this idea of speech acts as a form of action from thinkers like Austin and Searle. For example, scolding and praising are speech acts, whereas punishing and rewarding are the acts other than speech acts. The speech act of judging may have a perlocutionary and an illocutionary power. A perlocutionary power of judgement may bring about certain kind of behavioural changes in the hearers. Whereas illocutionary power of judgement is
committed to something in the sense that it has performatory function. From the standpoint of norms and rules every judgement implies a kind of ranking of the persons upon whom the judgement is passed. A judgement cannot be just or unjust if there are no norms and rules that constitute a social cluster.

Judgements passed on merits and excellence are the acts of distribution. By praising or scolding someone we are distributing honour and shame. Speech acts are followed by actions. The speech act of scolding results in punishment, whereas the speech act of praising results in reward. Being just in this sense is to observe the norms and rules and applying them consistently. A person is called unjust when he does not care for the observance of the norms and rules being a member of that social cluster to which those norms and rules apply. Not only that, even the misapplication of the norms and rules by an individual makes him an unjust person.

Heller recognizes two kinds of inconsistency in the application of norms and rules. First inconsistency arises when the norms and rules are applied to some, but not to all. This kind of inconsistency is due to certain personal motivations such as liking and disliking. The
second inconsistency arises when the norms and rules are applied to one social group, but not to all the social groups belonging to the same social cluster. This is unjust because it contradicts the formal concept of justice. Heller opines that such inconsistency is due to the application of "double standards". If we apply two different standards to the members of different groups belonging to different clusters, then we are not guilty of applying double standards.

Justice, according to Heller, must be impartial and impersonal in the sense that justice must not be influenced by likes or dislikes, passion or interest. Also, it should not be influenced by charity, pity or goodness of heart. Both these stipulations are very important to uphold justice in society.

To be a just individual is to be a virtuous person. A society is called just where the justice is the rule and injustice is the exception. Heller argues that impartiality in our judgements presupposes our partiality towards norms and rules. Thus the fanaticism and justice do not exclude each other unless norms exclude fanaticism.

According to the formal concept of justice, just means the practice of given set of norms and rules.
Impartiality does not imply that one should not have his reservations with regard to objects in persons. But these reservations should not become impediments to the practice of justice. Normally, it is believed that people with strong emotions are less capable of practising justice.

Heller defines "humankind" as the sum total of 13 human beings who inhabit the earth. Every political action concerns every country and every cluster. In this sense world history has become the reality of our time. Different cultures and histories not only share the same planet, but also share the same fate of the earth. This fact has to be kept in mind when we think of "humankind". Philosophers of the modern times take extra effort to find out the essential elements of all existing possible human cultures. The notion of culture itself is a product of such an inquiry. The essential elements must include those propensities other than the visible ones. The essential features that are shared by all the human beings are called human universals.

Heller strongly feels that all political actors pay mere lip service to humankind today. On behalf of humankind we all act and undertake different sorts of things in this service. This is because we have different
interpretations of humankind in mind. Notably, says Heller, there are three important interpretations. First of all, it is claimed that acting on behalf of humankind is just. Thus every human action is considered to be just from the viewpoint of actors. The tendency of every actor is to justify and rationalize his or her actions. Secondly, the phrase "acting on behalf" is neither a definition nor a notion of justice. As a matter of fact, it has nothing to do with justice. Thirdly, one can be both just and unjust when he or she acts on behalf of humankind.

It is generally agreed that "the right to life" and "the right to liberty" are the natural rights of every human being. In other words, we are all subject to the authority of this same norm. If the right to life and liberty constitute the social cluster of humankind, then every member of this cluster must be treated according to these lines. Thus every individual should respect the life and liberty of all others ('to each the same'). Violation of such a norm results in punishment ('to each according to his or her offence'). Thus this norm serves as a regulative idea; but not as a constitutive one.

Another important feature is that the notion of "double standards" carries the meaning "unjust". This is
because the same norms and rules are not applied to all the members of a particular social cluster to which they are applied. The application of double standards is unjust because it contradicts the formal concept of justice. But the application of different standards to entirely different social clusters is not unjust.

This clearly brings out the point that we do not have such a yardstick called humankind. In order to have humankind as a social cluster we should dispense with the notion of double standards. There should be a common yardstick for comparing and ranking the members of the social cluster called humankind. All members of humankind must apply common norms equally. That is to say, to apply these norms to cases to which they should be applied is just and not applied is unjust. To apply them consistently is just and not applying them consistently unjust. Thus humankind as an essential social cluster is the unity of empirical humankind. It is empirical because it subsumes all the human beings, and it is an idea because the membership of the essential social cluster is constituted by universal and binding norms. This unity validates the formal concept of justice according to Heller.
3. The Rules of Static Justice and Social Conflicts viewed from the Perspective of Static Justice

Justice is often explained in terms of golden rule, according to which: "...I do unto you what I expect you to do unto me...." But this maxim drives us to an open question of what exactly it is that I should do. The golden rule can be interpreted in the following way: I do to you the same as I expect you to do to me. This in a way reminds us that it is possible only when the relations are symmetrical. Taking the cue from this maxim, Heller reinterprets the formal concept of justice. She holds: "...the norms and rules applying to a social cluster should be applied to each and every member of the cluster." Thus the static justice (the formal concept of justice) advises us how to act to be just. However, Heller distinguishes various formulae of the golden rule. They are as follows:

(1) I do unto you the same as I expect you to do unto me.

(2) I do unto you what you deserve; I expect you to do the same thing unto me if I deserve it.

(3) I do unto you what you deserve; you should do the same thing unto me if I deserve it.

The first among the three results in absolute reciprocity. Thus it presupposes equality but not proportionately. The second formula implies that when I express my gratitude for
something you have done to me I do not expect you to express gratitude to me unless I have done something of equal merit. In this formula it is the proportionality that is taken into consideration. Even in the third formula proportionality is taken into consideration, however, it is different from the second formula. Normally, this is applicable to the cases of punishment. For instance, I do not expect you to do something that deserves punishment. But I can punish only to the extent that the other should punish me if I deserve it. This formula does not imply that I expect you to do the same thing unto me that I do unto you.

Heller asserts that none of these formulae is applicable to asymmetrical human relations. For instance, a master cannot ask the slave to feed him (master) well because he feeds his slave. It is obvious that the golden rule cannot be applied to a social cluster where there are asymmetrical human relations. This does not mean that there are no abstract rules of justice that can be applied to asymmetrical human relations. The following abstract rules of justice can be applied to asymmetrical human relations:

1. I do 'X' unto you; I expect you to do 'Y' unto me.

2. I do 'X' unto you as you deserve. You should do 'Y' unto me, for I deserve it (because I did 'X' unto you).
3. I do 'X' unto you, which is due to you; I expect you to do 'Y' unto me because I have done what was due.

4. I do unto you something you deserve; you should accept it.

Heller opines that the first rule of abstract justice implies Confucius' definition of reciprocity. For example, what you do not want to be done to yourself do not do to others. To put it in other words, I serve my father as I wish that my son serves me. The second rule of abstract justice is applied by the higher cluster to the members of the lower cluster. For instance, I liberated you from slavery, because of that you should be faithful to me. Coming to third rule, it suggests us that since I followed you through all adversities I expect you to be kind to me because I have done what was due. Whereas the fourth rule insists on the just punishment which is not reciprocal.

However, Heller anticipates three major sources of conflict in the application of norms and rules. They are:

1. the inconsistent application of norms and rules pertaining to a social position;
2. an attempt to alter the width of the social cluster to which certain norms and rules apply;
3. asymmetry of ingroup and outgroup.
In the first source of social conflict, the formal concept of justice tries to strengthen the relation between an action and its consequences. The relation may not be a certainty but highly probable. The members of the ingroup will have the expectations of higher probability as they share the same norms and rules. However, in an outgroup "keeping a promise" is not regulated by norms and rules. Thus injustice can never be excluded as a possibility. Heller cautions us by saying that the relation between "the probability of expectation fulfilled" and "the possibility of expectation disappointed" is variable. This relation depends upon several factors. For example, one may say that the probability is very high in respect of the application of rules and less so in respect of the application of norms. Perhaps tyranny is the best example. It is a state of absolute injustice. Absolute injustice can be partial or complete. If the tyrant controls a social cluster, then it is partial. Heller strongly feels that Stalin's Russia is a good example of it. During his regime all expectations broke down. The causal nexus between the acts and the consequences of acts disappeared.

The second source of social conflict arises when an attempt is made to widen or narrow down social clusters.
It is an accepted view that norms and rules constitute a social cluster. The validity of the norms and rules is not questioned by the members of the social cluster. However, the non-application of certain norms and rules to certain groups within a social cluster is questioned. Thus equality and inequality are created by norms and rules. A certain set of norms and rules is applied to people to treat them equal in a social cluster. Whereas people are made unequal by applying different norms and rules in another social cluster. If the same norms and rules are applied to all the members of a society then everyone is made equal. The equalization process in a given social cluster takes three distinct forms. They are as follows:

(i) Norms and rules applied to an "upper cluster" may be applied to the "middle" and eventually also to the "lower" cluster (aristocracy, oligaracy and democracy).

(ii) Norms and rules until now (hitherto) applied only to the middle, and then to the lower cluster, may be applied to the upper cluster.

(iii) Norms and rules that until now have been applied only to the lower cluster only may be extended to the whole of society.
These problems cannot be resolved from the viewpoint of the formal concept of justice.

The third source of social conflict arises from the asymmetry of ingroup and outgroup. The members of ingroup are in an asymmetrical relation to the members of the outgroup. The members of ingroup are conditioned by certain norms and rules. The relationship between the members of the two different social clusters is socially unequal if different norms and rules are applied to different social clusters. If no common norms or rules are applied to two social clusters then the question of proportionality does not arise. Proportionality as a yardstick is meaningful only in a given social cluster.

Heller identifies two kinds of inequalities:

(i) Inequalities that arise due to the mere existence of lower and higher clusters. This results in the application of different sets of norms and rules.

(ii) Inequalities are also due to the fact that the members of the higher social cluster cannot be treated by the members of lower cluster either justly or unjustly.
Thus Heller highlights these types of social inequality prevalent in societies and her analysis is logical and consistent.

4. The Notions of Justice from the Perspective of the Formal Concept of Justice

Heller takes recourse to Perelman's notion of justice to explain various notions of justice from the viewpoint of the formal concept of justice. Perelman envisages the justice in the following way:

1. To each the same thing.
2. To each according to his merits.
3. To each according to his works.
4. To each according to his needs.
5. To each according to his rank.
6. To each according to his legal entitlement.

Heller writes that Perelman's first notion of justice treats every individual in the same way irrespective of their distinguishing features such as rich, poor, virtuous, etc.

The second notion of justice is diametrically opposite to the first one. It does not insist on the universal equality. Instead, it recommends proportional
equality based on intrinsic merit of each individual. But the question arises, according to Heller, how are we going to define this merit? She feels that we cannot arrive at any satisfactory answer to the question. Perhaps, an impartial judge will determine the merits and demerits of an individual after his or her death.

The third notion of justice calls for a proportional treatment of individuals based on their work. Like the previous notion of justice the present notion of justice cannot provide a proper scale to judge the work that is meritorious or non-meritorious. However, it has one important merit which is not found in the previous one, namely, applicability.

The fourth notion of justice suggests us that what should be the basic, essential needs of human beings. Thus it comes very close to charity. But people may differ with each other with regard to these basic essential needs. Thus, this notion has its own problems.

The fifth notion of justice is applicable only in a hierarchical society. This notion divides individuals into various categories. Different rules are applied to different categories.
The sixth notion of justice is the contribution made by Romans. Justice is explained in terms of legal entitlement. To be just means to accord to each person what the law entitles him to. This notion of justice enables us to say that a judge is impartial when he applies the laws to the same situation. However, there is no one universal legal code. Thus justice becomes relative to that law. In other words, to be just is to apply the rules of the given juridical system and to be unjust is to misapply them.

Heller is not satisfied with the way in which the notions of justice are envisaged by Perelman. Almost, on the similar grounds, she disqualifies the possible notions of distributive justice as envisaged by Nicholas Rescher. The following are the notions of distributive justice:

1. As equals (except possibly in the case of certain 'negative' distributions such as punishment).
2. According to their needs.
3. According to their ability.
4. According to their efforts and sacrifices.
5. According to their actual productive contribution.
6. According to their requirements of common good or public interest, or the welfare of mankind, or the greater good of the greater number.
According to a valuation of their socially useful services in terms of their scarcity in the essentially economic terms of supply and demand.

Heller tries to give a fresh impetus to the notion of justice. She opines that the notion of justice can be discussed at two levels — constitutive and regulative. The constitutive notion of justice prescribes certain norms of proportionality. For example, the notions involve in saying 'to each according to his merits, works, and rank' prescribe the way in which the proportionality is to be established. On the contrary, the notion 'to each the same thing' does not prescribe any proportionality. In the case of regulative notions, philosophies, social theories or ideologies prescribe methods of establishing proportionality in order to make a society just. Heller's main concern is with the notions of justice as a constitutive notion of justice.

The notions of justice, according to Heller, mediate between the substance of justice (norms and rules) and the criteria of justice (the values of justice). Eventhough Heller believes that Perelman's notions of justice are not satisfactory, she follows the way shown by Perelman by further analysing the notion 'to each the same thing'. She proposes that the same norms and rules are
applied to all humankind. Thus every individual will have the same rights and obligations. However, the notion 'to each the same thing' does not exclude the notion 'to each according to his merits' because different people could live up to more or less norms and could be judged proportionately. But it certainly excludes the notion 'to each according to his rank' which implies the exclusivity of certain rights and obligations.

Heller analyses the formal concept of justice by relying on the following notions of justice:

1. To each the same thing.
2. To each according to his merits.
3. To each according to his excellence (or works).
4. To each according to his rank.

According to her, the first three notions of justice can be applied to a social cluster where the relations among the individuals are symmetrical, whereas the fourth notion of justice can be applied to a social cluster where the relations among individuals are asymmetrical.

The paradox here is that Heller, on the one hand, proposes to include only those notions of justice that are applicable to humankind as a social cluster, on the
otherhand, she includes the notion of justice, namely, 'to each according to his rank' which presupposes certain amount of inequality among the individuals belonging to the social cluster called humankind.
NOTES

6. Agnes Heller, Beyond Justice, p.4.
9. Ibid., p.5.
10. Ibid., p.9.
11. Ibid.
12. Ibid., p.39.
13. Ibid., p.35.
15. Ibid.
16. Ibid., p.22.
19. Ibid.