CHAPTER- I

CONCEPT OF JUSTICE

Justice is a dynamic concept beyond any general meaning applicable for all times. The wealth of terminology, exuberance of examination and re-examination suggest that there is hardly any aspect of human life where the notion of justice does not enter; in all our dealings, in every kind of conduct regulated by law or social morality, in private economics and in our innermost conscious, one cannot escape this mentor. Although it is said that man is the only subject and object of justice yet its prompting can be found even in relation to the brute animals that perish.

The essence of justice is giving each individual or group his or its due. This dispensation further depends upon need, merit and capacity of the individual as well as that of the group. Justice in itself is the end to be achieved through various instruments like law, social morality (codes), conventions, customs and precedents. James Madison considered justice as the end of government and that of civil society. He opines that it will be pursued until obtained or liberty is lost in that pursuit.¹

Justice has passed through a number of stages before coming to the present refined notion of equal treatment of equal persons in equal or essentially similar circumstances. In the primitive society when any wrong

¹ Madison, James et. al., The Federalist or The New Constitution (New York: The Heritage Press), 1945, pp. 588-89.
was done against any individual, he had to resort to self-help because retaliation has been the craving of nature in men who found justice in recovering like value to compensate for the like loss. It might tantamount to taking of an eye for an eye or rupee for a rupee. For instance when a child grabs a pencil or breaks a toy of another child or slaps another child on the face, the (contra party) child by sheer instinctive pull tries to reply in the same coin by setting for an exact replacement of his own article or with matching stroke a blow on the assailant. Justice has thus been the natural spring of the instinct of revenge in human beings.

Formulation of the doctrine of justice in the context of a philosophy of life and ideals of socio-political existence of men is a brain work of western thinkers. The debate about ‘What is Justice?’ sprang up first in Greece. This debate is still going on in the West, without coming to any generally acceptable definition with finality. It seems that writers agree to disagree on this respect.

Infact, the concept of justice is mainly a combination of ethical, social, political and psychological aspects of human life. Any definition, theory or method which tries to define justice ignoring even one out of these is bound to be insufficient or incomplete in its attempt.

The idea of justice in the Holy Christian scriptures is a transcendental one. It is not known through reason rather regarded as a mystery of a faith. As per both the Old Testament and the New Testament justice has two opposing elements-redistribution and love. Christ and his disciples also differ in their approach. Christ’s doctrine of justice denies recognition to the authority of positive law and state whereas St. Paul
recognizes such authority. According to Paul, “There is relative human justice which is identical with the positive law and an absolute divine justice which is in secret of faith.”

In the Greek philosophy, justice first came into view as a kind of metaphysical cosmological principle regulating the operation of the forces of nature, securing balance and harmony among all the constituents. For idea of justice less obscure than this, philosophy has to go a long way till Pythagoreans. Their notion of justice as equality has remained woven in all philosophies about justice. The Pythagoreans’ particular application took the form of retaliation but in broader sense included reward of good human action commensurate to its degree of goodness and punishment of bad action matching its degree of badness.

This human application was incidental to retaliation in cosmic adjustment. Mathematicians’ mystique further distorted this and claimed that justice is like a square number giving back the same for the same and so is the same multiplied by the same.

In Greek philosophy, it was Plato who brought the notion of justice into ethical principles involving human conduct. Plato identifies justice with retribution, it being an instrument for attainment of good. But for practical purpose, according to Plato, justice is proper performance of one’s

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2 Hans, Kelsen, What is Justice? (Berkely: University of California Press), 1957, p. 81
3 Stone, J., Human Law and Human Justice (Standford: Standford University Press), 1966, p. 11.
4 Ibid., p. 12.
functions. In his doctrine, justice derives the whole of its value from the idea of good. However, to know how the good is to be determined, Plato does not come to any help rather resort to myth.

Aristotle takes justice as righteousness. Happiness is the starting point of his ethics and supreme good. He opines that there are two aspects of justice-lawfulness and equality. Lawfulness is a broader concept whereas equality is a narrower concept. Every unlawful act may not be unequal act but every unequal act is unlawful. So justice includes whole of lawfulness—perfect virtue. Lawfulness means conformity to positive law, asserts Aristotle and anyone who breaks the law is unjust whereas law abiding is just.

According to Aristotle, justice requires that the things of the world be equitably distributed among all the members of the community or state and this distribution shall be maintained by law as against any violation. Aristotle’s concept of justice has two fold function i.e. distribution and corrective. Distributive justice demands that, rights, offices, honours and goods should be distributed among members of the community equitably rather than equally. Corrective function of justice is called corrective justice. The main function of the courts is to apply justice in a corrective sense. In a just system of law, on the one hand, there are rules to bring

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about equitable distribution and on the other hand, there are specific rules to the application of corrective justice by courts.

Aristotle distinguishes between the two kinds of justice; one is general justice and the other is particular justice. Particular justice may further be divided into distributive and corrective justice. Aristotle supports proportional equality and hence the state, while distributing honours, offices etc., look to the differences in the individuals; treating unequals as unequal is just and not unjust. In his book ‘Nichomachen Ethics’ the standard set out of distributive justice is merit. Corrective justice deals with restoration of equality that has arisen due to violation of law and applies to voluntary transactions like selling, lending etc.

In cases of offences against the state, Aristotle calls for principle of general justice and application of arithmetic proportion. He claims that the law looks only to the differences created by the injury, the parties themselves being treated as equal.8

Aristotle also brings out a third kind of justice called commutative justice. It governs the exchange of commodities and considers the skills of the parties and the corresponding value of their product.

Turning to dictionary is a common reaction for seeking the definition or meaning of any word. In the present case also, it is quite helpful in revealing words, which, in the English language, evokes the general concept of justice. The Concise Oxford Dictionary declares the adjective just to mean ‘equitable’ with respect to person or conduct, ‘fair’ and ‘deserved’ treatment, and adds reference to ‘well-grounded’, ‘right’ and

‘proper’. The word as an adverb has connotations of exactness, getting things ‘just right’. The noun justice, in the sense of conduct, refers to ‘fairness’, or the exercise of authority in maintenance of ‘right’. To do justice is to treat fairly, to show due appreciation of somebody or something. To justify means to show the justice or rightness of something. Thus justice, in simple words involves treating people right or fairly, in a calculated way.

Going by the etymology of the word, in justice, we find a notion of joining, of binding or fitting or trying together. It not only ties together the men but now in further contention, it is joining of the principles. It joins and knits together the claims of the principles of liberty with those of principles of equality and both with that of the principles of fraternity or cooperation; it adjusts them to one another in a right order of their relations.

Justice has been called as a term of synthesis as it reconciles conflicts and joins together not only different principles but also the conflicts arising within the area of a single principle due to interpretations.

The Cambridge Dictionary of Philosophy defines justice as “each getting what he or she is due.” So, if the act of justice is to give anyone his due, then the act of justice is preceded by a number of other acts

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whereby something becomes due. For example, A does a job for B, say, he does same labour work. By doing this act, something due to him (A) has come into being which the other man (B) must give him (to A). This act of giving is the act of Justice.

An Encyclopaedic Dictionary of Philosophy describes justice as “the quality of being right and fair. It is the principle which allocates and distributes the social benefits and burdens in such a way as to make the position of the least well-off as good as it can be. A common basis is that person should be treated equally unless reasons for inequality exist.”

According to Encyclopaedia of the Social Science, “the term justice is currently used in two senses: as representing, on one hand, the faithful realisation of existing law as against any arbitrary infraction of it; and as representing, on the other hand, the ideal element in all law - the idea which the law tends to subserve.”

Sidwick, another distinguished authority on the subject opines that the main idea of justice is “that society is rightly ordered and, therefore, just when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it.”

Justice is thus looked upon as a principle of rational prudence applied to an aggregative conception of the welfare of the group.

John Rawls defines justice as equivalent to fairness. He proposes general conception of justice as: “All social primary goods—liberty and opportunity, income and wealth and the bases of self-respect are to be distributed equally unless an unequal distribution of any or all these goods is to the advantage of the least favoured.”

Rawls divides justice into three categories—perfect procedural justice, imperfect procedural justice and pure procedural justice. Perfect procedural justice requires the existence of - in division of goods or anything else - independent criterion of a fair distribution and a procedure certain to result in fair outcome. Imperfect procedural justice exists where there is independent criterion of a fair outcome but there is no method which can certainly produce that outcome. In cases of pure procedural justice, there is no independent criterion of a fair outcome but only criteria for fair methods and procedures.

Cicero defines justice as that sentiments which assign to each his own and maintains with generosity and equity human solidarity and alliance. He claims that justice is one; it binds all human society and is based on law, which is right reason applied to command and prohibition. Whoever does not know this law, whether it has been recorded in writing anywhere or not, is without justice.

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Thus justice being a complex concept, is difficult to pen down its comprehensive definition. It is the widest vision conceptualized by human beings in the process of their evolution.

But to call something just means to approve that thing in that particular way. On the one hand, it is concerned with the order of the society as a whole whereas on the other hand, it is the expression of the rights of individuals. According to D. D. Raphael\textsuperscript{17} it can be divided into three mutually exclusive or contradictory groups:

(a) Justice of law and of social morality;
(b) Order of the society as a whole and expression of rights of individuals;
(c) Conservative and reformative principles.

Law denotes the general behaviour of a thing, person or a group of persons. It has its utility because it normally gets conformity and occasionally departed from by its followers. The fallibility of law has similar utility and its fixity. “A process which knows no lapse and in which there inheres the impossibility of deviation, cannot be law, since in the impossibility of its being escaped, there can never be an occasion for its enforcement.”\textsuperscript{18}

\textsuperscript{18} Chaturvedi, R. G., Philosophy of Law (Jaipur: The Institute for Research and Advanced Studies), 1984, p. 172.
In law justice governs the whole field of principles and procedures to be followed. It is because of this aspect that the system of law is sometimes called system of justice. Here justice does not concern with the moral duties of generosity rather it protects the rights of individuals and enforces duties corresponding to their rights.

But it is not possible to say that anything and everything going on in the courts (through which justice is dispensed) has to be called just. Sometimes, it can be criticised from a moral as well as legal point of view or for failing to meet moral ideas of justice prevalent in the society or for failing to rise to the standards of fairness required by the procedure of legal system.

Justice, as considered in law also, does not cover the whole field of principles and actions considered to be right. Although it is the foundation of morality yet certainly it is not the whole of social morality. It is opposite to generosity which goes beyond mere justice.

Justice, both in legal and moral sense, is concerned with general ordering of society. A breach of that order is breach of justice and penalties are imposed for that.

Sometimes conflict may arise between rights of individuals and that of general social order. In such cases, justice protects rights of individuals against general social order and individuals’ rights are represented under the concept of justice. For instance, a person innocent of breaking any law, may not be justly subjected to punishment although, in a few circumstances, this might be conducive to the general interest and maintenance of public order, as at the beginning of Second World War, in
Britain, the German nationals were confined to detention camps or the persons suffering from dangerous contagious diseases are isolated from general public.

Utility, also, sometimes overrides justice. For example, a person guilty of committing a crime, which is becoming widespread, is imposed exemplary punishment though the individual does not deserve that much heavy punishment. In plain terms this is injustice, and individuals' rights are violated but here utility prevails over justice and hence it is accepted as a form of justice.

Justice by various names, of nature and humanity, science and conscience, logical and morals, political economy, politics, history, literature, arts etc., governs the world. But whatever name is given it to signify, it is the most primitive in the human soul, most basic in the structure of the society and the most revered among ideas. It is the fountainhead of religion, sum total of rationale, secret object of faith and that of knowledge as well. Nothing is more universal, more strong and more complete than justice. It is based on the premise, what the majority of impartial people consider as fair.

Justice, in its true spirit, is opposed to the idea that everybody is to count for one, nobody more than one, because ‘what is due to anyone’ cannot be ascertained by absolute standards. Rather it depends upon the time, place, needs, merit and capacity of the individual as well as that of that group.

Justice does not mean only just distribution rather it relates with the reasonable requirements of the body, mind and spirit. It involves both the
means and the end, the process as well as the product. It tries to attain justice by just means. Unjust means may satisfy some but more often result into injustice to others and further lead to a chain reaction of unjust consequences.

Further, justice is to all and not to a favoured class. It does not introduce class conflict but seeks to improve the society with a view to avoid imbalances. It constitutes a central value in all the normative disciplines which directly or indirectly govern actions with respect to others.

It is sometimes taken to be synonymous with or equivalent to law, sometimes to be distinct from law and superior to it. In one aspect, it is held to consist in conformity with law but it is also asserted that law must confirm to justice.

The main theories of justice are:

(i) Positive Law Theory of Justice
(ii) Social Good Theory of Justice
(iii) The Contractual Theory of Justice
(iv) Marxian Theory of Justice

**Positive Law Theory of Justice**

The Positive Law Theory of Justice propounded mainly by Austin, Hegal, Hobbes, Holmes and Salmond consists of two parts: one, on account of justice in terms of positive law, and second, a theory of meaning that
explains other normative uses of the term as indeterminate and subjective. The heart of the theory lies in the claim that positive law can explain all the important uses of the term ‘justice’.

According to this theory, it is the basic norm of the society that determines justice and injustice. Existence of a society is a condition precedent as these justice and injustice depend upon law and are the work of civil society; more particularly in the state of nature, the question of either justice or injustice does not arise. In such a situation where no law exists, there would be no common power, no organised society capable of issuing commands and subsequently enforcing them, men would oppose each other only as individuals seeking their own advantage, gain, safety and reputation. But individuals being almost equal in power will not enjoy any advantage, safety or security. Life of all is solitary, poor, nasty, brutish and short. In this state of nature, every man is at war against everyone else.

In the state of nature, everyman has a right to do everything and anything on the basis of his volition. There is no mine and thine, no property, which in Hobbes’s opinion means, “the rules whereby everyman may know what good he may enjoy and what action he may do without being molested by any of his fellow subjects.” Hobbes continues that where there is no own, that is no property, there is no injustice; and where there is no coercive power erected, that is where there is no common wealth, there is no property, all men having right to all things. Therefore, where there is no commonwealth, there is nothing unjust.

20 Ibid., pp. 110-111.
According to this theory, no positive law is legally unjust, for positive law is the measure or test of legal justice and injustice. Kelsen declares that the question whether a given law is just or not cannot be answered scientifically at all.\(^{21}\)

The Positive Law Theory requires that justice be objective and determinate to provide a precise criterion for testing whether an action is just or not. Law also provides this determining factor as positive law only is determinate and objective. The theory holds that justice cannot be said to be a standard or ideal for the legislators. With regard to law, justice can provide a standard only in relation to its execution and application, not for its making as such. Kelsen writes, “Justice, in the sense of legality, is a quality which relates not only to the contents of positive order, but also to its application...and means the maintenance of a positive order by conscientious application of it.”\(^{22}\)

Hence state cannot be just or unjust anymore than laws can, because state is the law making power and itself is the fountain head of justice. Hobbes supports this when he claims that nothing the sovereign representative can do to a subject on what pretense so ever, can properly be called injustice or injury, because every subject is the author of every act the sovereign does.\(^{23}\)

The Positive Law Theory holds that justice consists in conformity to law. Hobbes declares that “nothing is reputed unjust that is not contrary to

\(^{22}\) Ibid., p. 14.
\(^{23}\) Hobbes, T., The Leviathan, op. cit., p. 163.
some law." He equates injustice with crime identified as the committing, by deed or by the word, of that which the law forbids or the omission of what it has commanded. Austin, in this regard, writes that law is itself the standard of justice. Whenever it is uttered with a determinate meaning, it is uttered with relation to a determinate law which the speaker assumes as a standard of comparison.

In advocating justice with conformity to law, the theory denies that adequacy of the ancient and common definition of justice as rendering to each his own. The theory admits that an action may be legal without its being approved as it is normal for people to disapprove of those who take advantage of the law for their personal gain and comfort. This action may be bad but it is certainly legal. Thus on the basis of Positive Law Theory, which bases justice on law, to say that A is just is to say not only that A is legal but also approving A in that specific way.

Since justice is identified with legality, so, it not only enjoys all the might of law but also the sanction of personal approval. To the question what kind of right is involved in justice, under Positive Law Theory the answer is two fold; first a punitive ought and second an approbative ought. Punitive ought is founded on the physical sanction of the law. So, A ought to do X, because if A does not, he will be punished. Under approbative ought: A ought to do X because it is something approved of by A.

Therefore, there are seven identifying propositions of this theory:

24 Ibid., p. 204.
25 Ibid., p. 224.
a. Existence of society is a condition precedent for justice;
b. Justice and injustice are dependent on positive law;
c. Law itself is independent of justice;
d. Justice consists in conformity to positive law;
e. Justice apart from legality is merely a subjective norm;
f. Justice is obligatory ultimately only because of legal sanctions;
g. The virtue of justice is identical with obedience.

Social Good Theory of Justice

The Social Good Theory of Justice propounded by Bentham, Blanshard, Hume, Rosco Pound, Mill, Sidwick and others is a dialectical construction. A writer is counted as a proponent of this theory if his theory of justice approaches it as a limit or as an ideal. The inclusion of writers - Bentham, Mill and Sidwick - in proponents list shows that it may closely resemble with that theory held by the classical utilitarian philosophers. But it cannot be named as such because of inclusion of writers like Blanshard who deny that social good is contained in the greatest good of the greatest number.

The central theme of the theory is that all questions of justice must ultimately be decided in terms of social utility as justice is a social norm applicable to men in their relation with each other. The theory goes one step further and asserts that in the good of society lies the origin and basis of justice. The concept of justice arises in the course of men striving to work out a common life in co-operation. Had it been possible for men to live
apart from society, there would have been no justice and no morality. Hence, justice under this theory is evolved by the society in its efforts to meet the demands of its constituents.

The theory emphasizes upon the social situation of man and his needs as social animal. An individual is in no way naturally just rather he is made so by and in society. According to this theory, there is no natural right as such underlying justice and its duties. The need for justice arises only from the special situation in which man finds himself. “The rules of equity or justice, writes Hume, depend entirely on the particular condition in which men are placed.”

Hume’s concept of justice is bound up with that of property which is taken to be natural instinct of extension of one’s personality. It may be defined as the rule of justice are conventions whereby material goods are ascribed to particular individuals; and the justice of virtue consists in respecting this ascription, by refraining from appropriating the goods of others and ensuring that wrongly appropriated goods are returned to their owners. This goes very close to what Hume says when read between the lines but according to Hume’s account, the two concepts - justice and property - are entirely interdependent. In the absence of any rule of justice, there is no property but only possession. Individuals have no rights to objects but have them because of their power. In his opinion, human conventions are the sole origin of justice, rights and property.

Hume sees men as mixture of self-love and benevolence. Had they been entirely benevolent, there would have been no need of justice and each would have been willing to give his neighbour what he needed. He rests foundation of justice on self-love and says that even every individual person finds himself a gainer on balancing the account; since without justice, society must immediately dissolve, and everyone must fall into that savage and solitary condition, which is infinitely worse than the worst situation that can possibly be supposed in the society.\(^{29}\)

According to Mill, there are two essential ingredients of justice; first, the desire to punish a person who has done harm and secondly, the knowledge or belief that there is some definite individual or individuals to whom this harm has been done. The desire to punish is a spontaneous result of two sentiments- the impulse of self defense and feeling of sympathy. Mill holds that it is natural to resent, and to repel or repudiate any harm done or attempted against ourselves or against those with whom we sympathise.\(^{30}\) He attributes to sympathy the function of socializing because otherwise it could be self-regarding feeling of self-defence and retaliation.

Roscoe Pound asserts that justice is not an individual virtue nor an ideal relation among men, but such an adjustment of relations and ordering of conduct to make the good of existence.\(^{31}\)


The assertion that justice originates and depends entirely upon the society implies that there is no such thing as a natural right having its basis in man as man. Thus the theory denies that nature provides a basis for justice.

The Social Good Theory does not mean by justice as mere conformity to law. This is based on three reasons; firstly, failure to conform to law does not always make one unjust; secondly, our notion of justice furnishes a standard with which we compare the actual laws and call them just or unjust; and thirdly, there is part of just conduct outside the ambit of law. For example, a mother may be just or unjust to her children in matters where the law leaves her free. These reasons, according to Social Good Theory, are suffice to show that justice is a wider notion than law and transcends it.

For Hume, society and justice precede government, and state of society without government is not only conceivable but “it is also one of the most natural state of man.”32 In such a state, contrary to Hobbes, Social Good Theory says that justice is absolutely necessary. Hume writes that though it be possible for men to maintain a small uncultivated society without governments, it is impossible that they should maintain a society of any kind without justice.

Under Social Good Theory, justice is to serve and promote social good. This means that good of society comes first to both law and right, in the basic meaning of justice. The theory advocates that law itself is just or

unjust depending upon whether it serves or fails to serve the good of society.

Mill holds that the idea of justice supposes two things: a rule of conduct and a sentiment which sanctions the rules. Sidwick claims that both Mill and Hume overemphasize the place of sentiments in their analysis. The theory does not accept the traditional Roman definition of justice which says that justice is rendering to each what is his own, his right or his due. This definition is wrong, writes Hume, because it supposes rights and property independent of justice.33 He asserts that property, right and obligations are all dependent upon justice and not the other way round, while justice itself depends on utility.34

Importance of equality is not denied by this theory in the analysis of justice but it certainly denies it to be basic. Mill claims that equality of treatment and impartiality can be looked upon as corollary from other principles of justice in-as-much as they are in part instrumental, being a necessary condition of the fulfillment of the other obligations of justice.35

Justice, according to Social Good Theory, imposes a serious and distinct moral obligations. What is just, ought to be done and merely because of failure to do that will qualify for the sanctions of law and of society, resting on their responsibility in the interest of social good. Thus the basic postulates of the theory may be summarized as:

33 Ibid., p. 526.
34 Ibid., pp. 490-491.
35 Mill, J., Utilitarianism, op. cit., p. 76.
a. Justice is a wider notion than law;
b. Justice is absolutely natural state of man;
c. Good of society comes first to both law and right in the basic meaning of justice;
d. Property, rights and obligations are all dependent upon justice; and

e. Equality of treatment and impartiality are corollary of justice.

The Contractual Theory of Justice

The proponent of this theory is John Rawls. The theory is based upon the conception that each individual possesses an inviolability founded on justice which even the welfare of society as a whole cannot over-ride. This is what the utilitarian theory cannot accommodate. Rawls says, “All social primary goods- liberty and opportunity, income and wealth and the bases of self-respect are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured.”

He assumes an imaginary situation where a number of rational and mutually self-interested persons situated in an initial position of equal liberty engaged in proposing and acknowledging before others general principles applicable to their common institutions as standard by which their complaints against those institutions are to be judged. From this situation, he derives two basic principles of justice:

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“a. Each person participating in the political and social system or affected by it has an equal right to the most extensive liberty compatible with a like liberty for all; and
b. inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone’s advantage and provided that the positions and offices to which they attach or from which they may be gained, are open to all.”37

Rawl’s use of social contract makes justice subordinate to society in such a way that all its principles are made ultimately dependent upon the society; this brings him under the ambit of Social Good Theory. He maintains that we must view each person as an individual sovereign, engaged in deciding with others how they are to lead a life together.38

Justice under this theory is considered as the virtue of social institutions. The theory does not deal with justice as a virtue of particular actions or of persons rather justice is taken in its customary sense. This is not to be confused with an inclusive vision of good society but it is only a part of such conception.

Rawls’ conception of justice may be expressed in two principles: first, each person participating in a practice or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all; and second, inequalities are arbitrary unless it is reasonable to expect that they will workout for everyone’s advantage and provided the position and

38 Ibid., p. 304.
offices to which they attach or from which they may be gained, are open to all. Therefore, Rawls supports that goods should be distributed in whatever way they create the most beneficial situation for the least advantaged member of the society and further that ability and skill will determine the positions and offices to be assigned.

Rawls opines that the two principles would be chosen by any rational actor in a situation who is placed in such situation and did certain things about himself, because these two principles are in consonance with common-sense notion.

Rawls categorises justice in three ways:

a. Perfect procedural justice
b. Imperfect procedural justice.
c. Pure procedural justice.

This division is based on the existence of two principles: first, method of an independent criterion of a fair outcome; and secondly, a method which makes that outcome certain. In perfect procedural justice, both the methods are there; in imperfect procedural justice there is no method which can make the outcome certain; whereas in the third category, a criterion for fair methods and procedure is there.

The theory allows inequalities provided they result into advantage of every party engaged in it. The contract theory assumes that the rational individuals, being members of society, must choose together, in one joint act, what is to be just and unjust among them. They are the sole unit to decide about their opinions and arguments.

39 Ibid., pp. 302-303.
The aim of the contract doctrine is precisely to account for the strictness of justice by supposing that its principles arise from an agreement among free and independent persons in an original position of equality and hence reflect the integrity and equal sovereignty of the rational persons who are the contractors.\textsuperscript{40}

Thus basic postulates of contractual theory may be summarized as:

a. Principles of Justice are consonant with common sense notion.

b. There are certain rights of individuals which even the social good cannot override.

c. Rational individuals are the sole units to decide about their opinions and arguments.

d. Justice is the virtue of social institutions.

\textbf{Marxian Theory of Justice}

Although Marx did not develop a specific theory of justice yet he implicitly approaches it. Marx’s discussion asserts that justice of transactions, institutions and structures is to be determined primarily from the mode of production. Each mode of production has its peculiar characteristics; what may be considered just in one mode may not be so in another. Marx rejects the abstract, universal generalization about justice and

insists that ideas about justice are to be framed from a close and continual examination of the modes of production.41

The famous slogan ‘from each according to his ability, to each according to his need’ can be considered as the fountainhead of the Marx Theory of Justice but one thing to be kept in mind is that this maxim is of distributive justice which can only be realised in a true communist society of Marx’s dream. It has no place in communist society which is in its first phase. Moreover, the slogan expresses the vision of a perfect society which will also be a just society.

In Marxist interpretation, essence of justice lies in the field of economics. The doctrine being impregnated with materialistic view, considers the positive law of the state as imposed on its members by authority, capitalist class controlling almost all the means of production. The wishes of proletariat will be reflected only after revolution takes place, according to this interpretation.

Marx has in fact no place for justice. For him, it was a mask of capitalist exploitation and not more than that. This exploitation, in turn, was the outcome of capitalist system of production and its end was not possible without destroying the capitalist mode of production.

Proudhon asserts that economic exchange should be based on strict demand of justice.42 But Marx sees otherwise and observes that exchange arises from necessity of economic relations and not from anything else. As

42 Ibid., pp. 507-8.
it is not possible for commodities to go to market and strike out their own exchange, this results into economic necessities of exchange. The owners of commodities “must behave in such a way that each does not appropriate the commodity of the others and parts with his own, except by means of an act done with mutual consent.”

In capital society, Marx denied the talk of social justice and criticized the socialists like Proudhon, who preached social justice, as misguided and dangerous. Misguided because he failed to realise the irrelevance of the idea in relation to social problems and dangerous because this approach will lead to a no-win policy in class struggle.

Marx perceived the danger that dominant notion of justice of capitalist mode in the name of just and fair distribution may become diction, preventing the very question of capitalist exploitation. Marx raises his doubt about fair distribution and asks “do not the bourgeoisie assert that the present distribution is fair? And it is not, in fact the only fair distribution on the basis of present day mode of production?…Have not also the socialist sectarians the most varied notions about fair distribution?”

Marx insists that these class interests are irreconcilable. The concept of distributive justice in Capitalist society is irrelevant if not dangerous. He is more concerned with mode of production as it determines the relation of production. Law and political institutions are founded on this super


Justice in capitalist society is based on the capitalist mode of production and capitalist relations of production. So, justice has meaning and relevance only for those who own the means of production. Justice, in any form, in such society, becomes injustice in reality for the toiling masses. Justice for working class is possible only when means of production are collectivized and the exploiters are expropriated.

**Indian Concept of Justice**

It is true that the formulation of the doctrine of justice in the currently practiced sense is a result of the western thinking but the western mind could not see justice as a whole rather they particularized it in different streams. This, perhaps, may be because they tried to unravel the mystery only through reason and could not realise that reason alone is not sufficient to know the concept in its full dimension, which is ingrained in the sum total of human life.

Indian concept of Dharma is more capable of defining the term justice in wider way, taking the whole human life as one unit. Basically, ‘Nayaya’ or the so-called justice is neither the root nor the fruit of Indian thoughts and culture but a consistent enquiry about truth or knowledge. The word has no theological and metaphysical basis in Vedic literature. Yama, who is considered as god of justice is called Dharmaraj and not Nayaya-raj. Thus the word, Dharma, or law of Indian concept, was inclusive of justice. Dharama in all the three senses - justice, law and duty - is the fundamental basis on which rests a well ordered state.
The highest reality to Indian mind is ‘Brahman’, the unchanging, indefinable and undying reality. When described in its aspects, it becomes Sachidanand i.e. existence, consciousness and bliss. So, in Indian thought, feeling and will are considered with a total view of reality. “Truth, reason, impartiality and duty are important from the point of view of knowledge of justice. Order, harmony, security, punishment and prosperity are important from the point of view of action of justice, and happiness, freedom and welfare are important from the point of view of ethics.”

Justice, in ancient Indian concept, was dharma and so justice in deed as well as in truth, to be so, must confirm to the reality of human life. Kautilaya saw justice as basis of law and an instrument of maintaining social harmony and social order. He asserted that Justice is the discrimination of good from bad, right from wrong. It demands that offenders or deviators from the path of righteousness must be punished. But “punishment ill awarded under the influence of greed and anger, excite fury even among hermits and ascetics not to speak of households.” So, whoever imposes punishment as is deserved becomes respectable because whoever imposes severe punishment becomes repulsive to the people, while he who awards mild punishment becomes contemptible. The ruler

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46 Sharma, R. S., Political Ideas and Institutions in Ancient India (Delhi: Bhartiya Vidya Bhawan), 1968, p. 167.
just with the rod is honoured. In Kautilya’s opinion, justice promotes the common good and punishment has a regulative value for the people of the society. It helps men keep to their respective duties and occupations, makes them work for the production of wealth, enjoyment and devote them to righteousness as well. As a preventive aspect, punishment deters man from committing act of sin and vice.

Justice, in Indian concept, was to be studied from its three elements: Knowledge (Gyana), action or power (Shakti and Karma) and Bliss (Annanda). Justice as knowledge lies in truth (Sat), reason (Viveka) and in impartial performance of one’s own duty (Dharma). As a theory of action, justice becomes power (Shakti), with action (Karma) and positive justice (dandniti) as its two elements. Justice, as per Indian concept, was also considered as bliss, the highest end of law.

Truth and Justice

‘Sat’ means existence; when it is present in social, moral and jural life, this is called Satya (truth). Truth is equally important for an individual as well as society. The bond of truth brings individuals together, joins them on the basis of love. In this sense, when truth operates upon the facts and propositions of law for practical purposes, it becomes justice in action.

In judicial idealism, truth is engrained in India and the ancient Indian law can be interpreted or rediscovered on the premise of the theory of truth.

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48 Ibid., p. 7.
Thoughts and actions are convertible aspects of men’s life. The difference between Satya and Dharma is that Satya is the speaking of truth while dharma is the observance of truth in action. “While ‘Rita’ denotes the mental perception and realisation of truth and ‘Satya’ denotes the exact expression of words of truth as perceived by mind. Dharma is observance of truth in conduct of life.”

Dharma is the wider expression and executes the truth perceived by men in action. Thus in the Indian concept, ‘dharma’ and ‘truth’ are interchangeable and denotes the aspirations of man, which is the pursuit of, thought, word and deed. Men’s idea of justice or injustice is based upon the certain definite facts and opinions which may change with the change of attitude. This dynamism of Indian concept has helped to do away certain evils of history because of their failure on the ground of rationality. It has been observed by the Indian mind that evils of ‘Karmakanda’, ‘formalism’, superstitions, mechanical trial ordeals etc are not based on the truth which can transcend through ages.

**Reason (Vivek): As a Base of Justice**

Truth as perceived by Indian mind is not static, it is like a flowing river and includes changing events of human life. For dealing with justice, truth is to be considered as living truth and not as a lifeless thought. For example, a lie to a dying person to save his life, and political lies to keep...

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morale of fighting soldiers high are qualified to be called justice on the above basis. The deriving force here is the good of individual and society served through falsehood. In the same way, legal fictions and presumptions, are allowed in the interest of workability of any legal system. But at the same time there shall be a limit to which these may be allowed.

Reason reduces the intensity of the rigour of truth. It was only because of reason, that Mimansakas, in ancient India made workable the legal system based on the Vedas and the Smritis. This helped them to keep alive the spirit of justice by rejecting the obsolete customs and concepts and adopting the new ones.

Reason is a means to achieve justice. Any theory which formulates law to regulate the conduct of society as a whole has to undergo a severe test of rationality. It has to be redefined and scrutinized by way of reason to avoid any kind of injustice.

Reason, as a broader concept, embraces the whole field of enquiry and provides grounds for our opinions. The relevant facts are weighed and conclusions justified by the yardstick of reason only. This way, reason becomes an instrument of Dharma or justice.

The standard of rationality is applied without being partial to seek the solution of any problem. It is the reason with which all the consciousness of the limitations of human capacities and capabilities are taken care of. Vivek or reason helped the ancient jurists to choose properly between Dharma and Artha. It was on this basis that women were given equal rights. The Vedas prescribed practice of Niyoga and widows were permitted to remarry. Due to change of attitude, the woman lost her status
and she was regarded as inferior to man; this was also facilitated by reason only. Thus reason has the power to change the idea of justice with corresponding change in any social situation.

For ancient Indians, only reason was not an end but also a means to achieve the greater ends of justice. If the means were good, end was bound to be good. Man was considered as spirit and integral whole with reason as part of his capacity. “When Dharma is not knowable through other sources; when it is not possible what is justice and injustice; the only alternative is to leave it to one’s judgement and experience. To this extent, it is submitted dharma or justice is a dynamic concept.”

**Justice Through Courts: Nyaya**

Courts are the dispensers of justice. Manu asserts that justice consists in application of law to the cases arising between the members of a state. According to Sukra, justice consists of two elements: discrimination of good from the bad and utilitarian basis.

The king was the fountain head of justice. According to Manu, the highest Dharma of the king was to protect the subjects from internal as well as external aggression. Hindu mythology says that king was authorized to use force to administer justice but that use of force must not be arbitrary.

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50 Purohit, S. K., Ancient Indian Legal Philosophy, op. cit., p. 172.
52 Ibid., pp. 242-43.
Manu opines that a king who punishes those who donot deserve to be punished incures great oblique and goes to hell.53

Thus the justice, as per this aspect, is enforcement of law laid down or directed by dharmashastras. Courts are its dispensers with impartiality, farsightedness and wisdom as its elements.

**Justice as Performance of One’s Duty**

In society, nobody is self-sufficient, he has to direct his functions in relation to society as a whole. Individuals function to contribute to the upkeep of the society as a ground of complete development. Justice is not only impartiality and rationality but also a duty and obligation. Men’s fulfillment lies in following one’s own nature. The Gita says that ‘devoted each to his own duty, man attains perfection’ and so knowing was work done also by the men of old who sought liberation. Therefore, do thou also work as the ancients did in former times:

Evam jnatva krtam karma
Purvair api mumuksuh
Kuru karma va tasmat tvam
Purvaiḥ purvataram kṛtam.54

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At another place, it is said; Better is one’s own Dharma though imperfectly carried out, than the Dharma of another carried out perfectly;

\[ \text{Sreyan svadharma vigunah} \]
\[ \text{Pardharmat svanusthitat}^{55} \]

Thus justice is the duty to follow and function according to varna-system, which was based upon one’s own aptitudes and nature. This concept of justice is also supported by Plato, “in reply to the question, what then is justice and where is the place of its habitation?” It is answered that the will to fulfill the duties of one’s station and not to meddle with duties of another’s station is justice.\(^{56}\)

**Karma: The Basis of Natural Justice**

Justice has its origin in the law of Karma (action). The theory is based on the concept that where the order of the society is disturbed by any action of its constituents, there arises the need of justice. In such a scenario, the function of justice is to re-establish order of the society and to punish the wrong doer whose action has violated the set norms. This also compensates those who have suffered in such a disturbance. This way, justice becomes theory of punishment (dandniti).

The theory provides a link between the wrong done and the corresponding punishment based upon the logical or rational justification.

\(^{55}\) Ibid., p. 162.

Under this theory, reality, which is both order and existence has its own utility.

As per the doctrine of karma, future is to depend upon present action and conduct. If a man sows thistles, thus goes the famous maxim, he must not expect a crop of sweet grapes: if he plants prickly cactus, he must not expect to gather juicy apples. This is karma and a man knowing, sows the seed of the thing he wants to reap.\(^5\)

The law of karma governs the life of the individual as well as that of society. The classification of society on the basis of the doctrine of karma is not absolute. Man can reverse the course of regression by knowledge and right conduct. As a law of practical reason, it can bring about moral regeneration.

The doctrine of karma has been developed out of the Vedic concept of rta which meant cosmic order or law of nature. In Hindu mythology, it is said that man is reborn in superior or inferior womb on the basis of good or evil karmas. Thus a man’s present status in life is the result of previous birth and his karma. It is said that after death, the God of justice or Dharma, Yama judges men’s actions when brought to his court by his messengers and accordingly their re-birth is determined. Karma done under ignorance brings about bondage while the same done in the light of true knowledge delivers a man from rebirth and consequent suffering.\(^5\)

\(^{57}\) Sanatan Dharma, A Text Book Published by Central Hindu College, Benaras (Allahabad: Indian Press), p. 37.

\(^{58}\) Radhakrishnan, Sarvepali, The Bhagvadgita, op. cit., p. 163.
According to the Gita, two views about karma are possible. First, in wider sense, it is the creative force which brings into existence and the whole existing world is the karma of the absolute. Secondly, karmas are the actions of individual soul according to their ‘prakriti’ or nature. The Gita by its concept of ‘daiva’ advocates the theory of divine justice. This means that in anything and everything which comes into existence, there is one common element i.e. Daiva. Dr. S. Radhakrishnan says, “Daiva or super personal fate is the general cosmic necessity, the resultant of all that has happened in the past...... It works in the individuals or its own incalculable purpose.”59

These karmas are to bind the man so that he does not fall prey to any bad desire. Lokamanya Tilak interpreted the doctrine of karma as a principle of collective justice. He said, “in-as-much as every human being is born in some family, some community or some country, it has to some extent suffer on account of the actions not only of itself but also of the community and society such as family etc. to which it belongs.”60

Artha and Justice:

Ancient Indian mind studies human life as a single unit of various elements. Although the life was divided into various aspects yet the division was not water-tight. Activities of one aspect were to affect the result of other parts.

59 Ibid., p. 356.
60 Divata, H. V., Art of Life in Gita (Bombay: Bhartiya Vidya Bhawan), 1970, p. 89.
There were four ends of life—Dharma, Arth, Kama and Moksha. The first and the fourth were related to spiritual benefits whereas the second and the third related to that of the existing world. Arth included all the economic and material conditions of life. Arth in law is concerned with action, plaint and petition; in politics, it served the interest of the state; and in life, it represented utility. Artha “means the whole range of tangible objects that can be possessed, enjoyed and last work we require in daily life for the upkeep of the household, raising of family and discharge of religious duties i.e. for virtuous fulfilment of life’s obligations.”

Arth, as an end of individual’s life, has an indispensable influence on the concept of justice. Kautilya considered wealth as source of the whole world and the root cause of all evils. He said that among wealth, virtue and enjoyment, it is better to secure that which is mentioned first than which is subsequently mentioned in order of enumeration. Mahabharta declares that the one who robs another of wealth robs him of his dharma and poverty befalls on such a person.

But one salient aspect of Indian mind is that although artha was accorded due importance yet it was not allowed to violate the ‘dharma’. The balance between the two was emphasised. Manu said that the “wealth should be acquired for livelihood. If in pursuit of arth, one causes harm or loss to others then it is not right.”

63 Iyer, K. Balasubarmania, Hindu Ideals, op. cit., p. 20
Indian concept of justice was not to treat the man in an exclusive, compartmentalized stream of life i.e. man only as social animal, man as economic unit etc. rather man was taken as whole single unit of life composed of spiritual, political, economic and social aspects. Justice in different fields did not mean different things, rather it was such a wide decision based on truth, reason, actions and performance of one’s duty along with social responsibility. On the one hand, it regulated the conduct of individual vis-à-vis society and on the other hand, it was to take perfect care of the highest ideal of life-moksha. Once a person who had caused murder was brought to Yudhishtira and Duryodhana to suggest to inflict punishment on him. Duryodhana advocated that his head should be chopped off without considering anything else. But Yudhishtira said that first of all it should be ascertained as to the status of that person in the society as per society’s hierarchy and then the circumstances should be found out in which he had to resort to such an act and then only after due consideration of all the facts coupled with his previous conduct, the present reaction would determine appropriate justice to be done to him. Such was the view in consonance with Indian concept of justice.

The purpose of verifying status, previous conduct and present reaction seems to be to know the duties of that individual towards the society. The individual was punished to the extent he had failed to comply with the duties enjoined upon him.

Law as a means to attain justice was to be suited to the needs of the people whose social relations it had to adjust and regulate. Although the ancient Indian society was familiar with specific rights such as father’s
right over the son’s person and property, girl’s right to choose her husband etc. yet the ancient scriptures are replete with one’s duties rather than rights. The start from individual rights, in the West, led to clashes and conflicts of interests tending to disintegration of family, disharmony and fanning of antagonism in society by multiplying group conflicts, functional antipathies and resulting in disharmony and mal-functioning.

The higher moral law over and above the positive law and authority of political power embodying values of universal validity such as dharma (righteousness), artha (wealth), kama (desires) and moksha (salvation) was expounded in ancient India. This was with a view to create a harmonious social order by striking a balance between inner and outer, spiritual and material aspects of life. The major goals of life were to be attained, controlled and regulated according to the dictates and direction of dharma.

This kind of Indian natural law was neither a cult, nor creed, nor also a code in the western sense but the right law of life and true ideal of living and social ordering. It aimed to provide anyone and everyone complete freedom with himself within the parameters of overall development of body, mind and spirit. It was neither static nor rigid nor absolute but relative, dynamic and evolving – always changing according to the needs and development of society as a whole.

It is in the Indian concept where religion and morality have always been the sheet-anchor of polity, economy and administration. At no time in India could the ruler be a dictator or despot, unmindful of traditions, dharmastra and majority public opinion. Natural law and ethics as means to attain justice in true spirit have always occupied the central place.
Law, as a means to attain justice, not only aimed at correcting the wrong done but also tried to change the attitude of the wrong doer. Justice has not been a process but a culminating result of the fair and truthful enquiry. It was not that justice was done only at the end of the enquiry rather than the true and fair process of inquiry stressed at every movement—vibrating the inner self of the disputants resulting into either of them or both of them helping the process of which they were one of the sources.

Kinds of Justice

Modern concept of justice is a transition from the relative to the absolute justice. The transition has come about through various stages in conception of justice which successively succeeded one another, in the wake of developing civilisation. This realisation has been depicted through the medium of laws and rules framed accordingly. Law is prognosis of the infringement of any right, and justice, according to law is a system to ascertain the nature of the things to be done in such circumstances.

Law has changed the concept of justice from rudimentary stage to sophisticated regulated stage. As the law is brought about and derived by human agency on the basis of common intention to achieve a desired goal, it becomes invented and not natural. Individuals are more concerned with their rights and status in the society which has now been determined and regulated by the legislative process.
In State of U.P. vs. Md. Nooh\textsuperscript{64}, it was observed by the Supreme Court of India that justice should be administered in a common sense, liberal way and should be based upon human values rather than narrow restricted considerations hedged round with hair-splitting technicalities.

Justice is mainly of two kinds - natural or moral justice and legal justice. Natural justice is the justice in itself, in its absolute and perfect sense to which legal justice endeavours to approximate. It undertakes to strike a balance between the reality and the appearance of justice.

In primitive times, natural justice among men was only an attribute of the state of nature. An equal recompense in any form was the basic criteria of justice. Manu, the Mahabharta and Kautilya, all were alluded with the state of Matsya-Nyaya where the stronger thrived upon the lives of the weaker. This is nothing but the state of nature.

Natural justice is the set of those principles which constitute the minimum requirement of justice in any situation. All the laws of man aim to secure justice. While enacting any law, the law makers, based on their own conceptions and public opinion, express their thoughts and ideas about the ways to secure the end of law i.e. justice. But no human expression has been able to express human thoughts adequately and this lacuna of communication sometime results in not only confusion but also injustice.

Natural justice is fiction of law which tries to fill the gaps of human expressions to fulfill its desired end. The term natural justice is not defined anywhere, it is just given a meaning by implication. It is said that nature of

\textsuperscript{64} AIR 1958, S.C., p. 86.
man is infused into his heart, so it is the man’s heart where we can find a
correct expression of natural justice.

In recent years ‘natural justice’ has gained an increasing importance.
It was observed by the Supreme Court in A. K. Kraipak vs. Union of India⁶⁵
that the aim of the rules of natural justice is to secure justice or to put it
negatively to prevent miscarriage of justice. These rules….donot supplant
the law of the land but supplement it…Natural justice is great humanizing
principles intended to invest law with fairness and to secure justice, and
over the years, it has grown into a widely pervasive rule affecting large area
of administrative action as observed in Maneka Gandhi’s case.⁶⁶

The basic principles of natural justice can be summarised as:

a. No-body shall act as a judge in his own case.
b. No body shall be condemned un-heard.
c. The accused person should know about the nature of accusation
   made against him.
d. Justice should not only be done but should also appear to have been
done.
e. The dispenser of justice should be a detached person free from any
   bias.
f. The quintessence of natural justice is not extra legal but extra
   legislative.
g. Principles of natural justice are unwritten.

Law, in modern times, has become the medium through which the general behaviour of a thing, an individual or a community of persons is regulated. It has its utility because it works in specified circumstances and seldom departed from. Enforceability of such law requires a definite procedure as pre-requisite. It is this procedural part through which justice appears to have been done. The rights and responsibilities may be of any kind but procedure is public and uniform.

In its positive sense, law means the rules which are capable of being enforced by an individual against another or against society as a whole. The utility of law lies in its enforceability with political sanctions of the state. A law which is unenforceable rule is redundant.

When any statute prescribes a certain procedure to be adopted, conformity to it is nothing but necessity and justice reflected in this conformity is legal justice. Whatever is formulated in law becomes legal justice and the rest is natural justice. Whenever the provisions of any statute are eloquent as regard to procedure and approach to be taken, their compliance provide legal justice but non-compliance with such procedure and approach is not a breach of natural justice rather it is the breach of legal principles.

Legal justice is the authoritative formulation of natural justice by the organised government. Salmond says that natural justice when authoritatively formulated by law becomes legal justice. But the two

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concepts are not water tight classification. Both aim to secure justice and when one fails the other helps to achieve it.

Natural justice is the super-structure and legal justice is a part of it. When in the opinion of the state some portions of natural justice are too important to be left to the option of observance, “it formulates them in the form of legal rules which are obligatory on the part of the subjects.” These formulated legal rules are called legal justice as the subjects having them as their right can have them enforced through the court of law.

General principles of legal justice may be formulated as:

a. These are authoritative formulation of natural justice.
b. These have political sanction of the state.
c. These are part of natural justice and not separate from it.
d. Whatever is formulated in law is to be dispensed through courts and becomes legal justice.
e. These are in written form.

Legal justice may be categorized further into social, political and economic justice depending upon the way how the social conduct, rights and duties of the constituents of any organised society and things of material nature are to be distributed. Civil and criminal are also the two more aspects of legal justice.

Although it might be tempting to try to unpack the concept of legal justice into social, political and economic justice yet this would become a

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sterile exercise in definition, compounded by obvious inter-dependence of different attributes. That distribution in one sphere influences the distribution in another and vice-versa. According to Arthur and Shaw, “Justice in general and social justice in particular involves the distribution of benefits and burdens but distributive justice has come to be synonymous with economic justice that is, with the distribution of economic benefits and burdens. Social justice includes but is not identical to economic justice, although both are concerned in part with how to distribute things that people care about. Political powers and liberties may be distributed unjustly, yet this is not a problem of economic justice as such unless, perhaps the political injustice in question results from a particular economic distribution.”69