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AN ANALYSIS OF THEORETICAL APPROACHES TO JUSTICE AND MORALITY: WITH SPECIAL REFERENCE TO INDIAN CONSTITUTION AND JUDICIAL ACTIVISM IN INDIA’’

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CHAPTER 1: INTRODUCTION

Justice is simple, but the world is complicated, so application of the justice in the world contains a few intricacies[1]. Understanding the field of existing, possible and necessary conception of justice and social ethics is much helped by first minimally investing in the consideration of its necessary basic structures. Whether Justice and morality have rationale implementation in the social life, or these both Justice and Morality are the vague connotations, As there has been inherent debate on the point that whether justice could be accessed rationally or access of justice does not provide rationale application of legal and social norms[2].

There is also an ongoing debate that whether the term Justice is the one of the aspects of the term Morality, or something more than that. Justice has its different connotations

[1] SERGE-CHRISTOPHE KOLM, MODERN THEORIES OF JUSTICE 31(2nd ed., 1998).
[2] *Id.*

which have been given by various philosophers and jurists in different epoch. Justice in the words of Aristotle is distributive and from the approach of utilitarianism justice is an instrument which provides maximum happiness to the maximum number of the people. In theory of utility[3], Justice had been narrated from the view point of pain and pleasure which was not pro moral in its application.

Hence, Justice and morality to some extent were excluded from the society in their practical implementation. However, the theory of Rawls has in part rescued a community of scholars misled by utilitarianism back to the standard modern ethics of liberty, equality, fraternity (he emphasized voluntary adhesion of the rules of justice and peaceful coexistence of communities), and has inspiring analysis.

Indeed, the theory of Rawls[4] has somehow given the different connotation of Justice from the perspective of liberty, equality and fraternity which have been become the polar star of the western justice galaxy. However, the original position in providing justice in Rawls' theory and his institutional transcendentalism has also been beautifully criticized by Amartya Sen in his idea of justice.

Amartya Sen[5] has made good attempt to define justice and also how a legal framework should more consider the occurrence of injustices in the society and to remove it than to establish the legal institutions and arrangement of legal rules and principles.

On the other hand, there are few philosophers who have emphasized on importance of economy for a prosperous legal system which would provide justice to each class equally and would promote the ethical sentiments among the people. Karl Marx and Mahatma Gandhi have viewed their ideology from the economic perspective.

However, Gandhi has also discussed justice as non-violence[6]. The idea that non-violence was of a piece with the search for truth was central to what I have called his integrity' and to these more ambitious and abstract considerations than the ones I have just discussed Gandhi was explicit about this, even in the terminology he adopted, linking ahimsa (non-violence) with satyagraha (literally, truth-force', or more liberally, a tenacity in the pursuit of truth).

There is a standard and entrenched reading of Gandhi which understands the link as follows (and I am quoting from what is perhaps the most widely read textbook of modern Indian history, Sumit Sarkar's, Modern India): Non-violence or ahimsa and satyagraha to Gandhi personally constituted a deeply-felt and worked-out philosophy owing something to Emerson, Thoreau and Tolstoy but also revealing considerable originality[7]. The search

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[3] N. E. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE , JUSTICE, LAW AND RIGHTS 15 (Eastern Book Company 2003).
[4] *Id.*
[5] *Id.*
[6] Akeel Bilgrami, *Gandhi and Marx,* 40 SOCIAL SCIENTIST (2012).
[7] Akeel Bilgrami, *Gandhi, the philosopher*, 4 ECONOMIC AND POLITICAL WEEKLY(2003).

for truth was the goal of human life, and as no one could ever be sure of having attained the truth, use of violence to enforce one's own view of it was sinful.[8]
Gandhi has said we should not make criticism of any ideas because criticism came from our impure heart, rather we should resist the ideas of others. This idea odd Gandhi to some extent have link with that of J.S. Mill in his article on Liberty Mill has said that the old beliefs have often been turned to be wrong and this is making grounds for thinking that our current opinions which have truthfulness might be wrong in future. We should therefore be tolerant for dissent not to repress the dissent.

The philosophy of Gandhi has some sense of moral values which prohibit us to make criticism of ongoing beliefs. Gandhi was basically inspired by the philosophy of Thoreau and Tolstoy that said The search for truth was the goal of human life, and as no one could ever be sure of having attained the truth, use of violence to enforce one's own view of it was sinful. Take the wrong view of moral value and judgment, and you will inevitably encourage violence in society[9]. There is no other way to understand his insistence that the satyagrahi has not eschewed violence until he has removed criticism from his lips and heart and mind.

Now it has been well established that justice and morality are being understood something more than only liberty and quality what western philosophies have taught us. This paper has made a thorough study of all these philosophies for justice and ultimately has tried to reconcile the conflicting approaches of Rawls and Amartya Sen[10] in reducing injustices and promoting justice in the society. The principle of morality could not be excluded in a legal order where people expect open-eyed and informed objectivity not blindfolded egoism in justice. Justice cannot be promoted and be given an individual while excluding the ethical or moral sense in the implementation of the legal norms[11].

Hence, It becomes pertinent also for the researcher to also discuss the principle of the morality and its application while providing justice. Justice must have its justification and morality will play a pivotal role to give justice various justifications. The popular debate which this paper has dealt with that whether law could exist in isolation of morality, or law must have moral justification for its implementation[12].
For more clarity on the subject, this research has also referred that Hart and Fuller debate on law and morality and their critics. Ultimately, the purpose of this research is to emphasis that irrationality is common phenomenon which occurs while doing justice with someone and at the same time protecting the moral principles in the society. This

[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

research at the end has placed the Constitutional provisions and their interpretation by the judiciary in the access of justice and maintaining the moral standard in the society. Indian Constitution in its preamble as well as in other parts has enshrined the idea of justice and morality to some extent. However, in society where people have also settled their own traditional norms which sometimes come under the confliction with Constitutional provisions. Hence, this research has placed an idea to reconcile these conflicting notions which somehow tend towards justice delivery mechanism.

1.1 STATEMENT OF THE PROBLEM:

Functioning of legal institutions to minimize injustices from the society and provide justices to the individuals irrespective of their classes in the society has been a matter of great concerned since the advent of human life. However, Institutional transcendentalism has been inclined towards few groups while providing justices during the implementation of legal norms which has tendency to exclude few classes of the society. This has become ongoing problem with functioning of legal institutions, this study perceives an idea that legal institutions ignore the rationality of morality and justice while implementing the legal norms which resulted into a great loss of well being of the individual and development of the human race. This research also looks into the problems which have been raised in the society due to the conflict between social well established norms and judicial activism.

1.2 AIMS AND OBJECTIVES OF THE STUDY

It has been observed that there is large scale of the ignorance of principles of justice and morality in functioning of law, especially in application of Constitutional provisions. Hence, people in general suffer from unreasonable and unjust implementation of those laws in ignorance moral standards of the society.

Therefore, the primary objective of this research is to find out practical theory of justice and morality and its implementation in functioning of legal rules. The secondary aim and objective of this research is to offer viable suggestions for making, applying and interpretation of the legal rules in consonance with the principle of justice and morality.

1.3 HYPOTHESIS:

Although the legal institutions have always been attempted to provide Justice to all and promote the moral values in the society. The functioning of the legal institutions have numerous intricacies to provide justice to each class under society and maintain

the societal moral standard. And Justice has different meaning for different classes which vehemently infer that Justice is a relative concept.

1.4 RESEARCH QUESTIONS:

I. Whether Justice and Morality are the irrational concepts, or There may be minimum rationality in Justice and Morality?
II. Whether Justice and Morality is the same construct or something more than that?.
III. Whether injustices in the society can be uprooted through transcendental institutionalism, or Legal institutions are not competent to deliver Justice to the society ?
IV. Whether Justice has different meaning than the western philosophy of justice based on Equality and Liberty?.
V. Whether Marxist philosophy of economic Justice will provide rationality in Justice System, or it is at all utopian narrative?.
VI. Whether Gandhian philosophy of non-violence has provided meaningful answer to the question of proper implementation of Justice and Morality?.

1.5 RESEARCH METHODOLOGY:

Researcher has based his research on doctrinaire research methodology. Researcher has gone through existing legislation as a primary sources and different literatures and philosophies as a secondary source which provides meaningful help for this research.

1.6 IMPORTANCE OF THE RESEARCH

Study on justice and morality in a legal system will provide a new dimension to know the applicability of these connotations in actual functioning of the legal tools. As this research has gone through number of philosophies and judicial interpretations of Constitutional provisions which have come with new ideas and ways of implementation of principles of justice morality in legal system.

1.7 SCOPE AND LIMITATIONS

Through this doctrinal and non-empirical research, the researcher aim is to study the development as well as application of theories of justice and morality in legal system. To this end, the researcher tries to study the early historical development of the theories of justice and morality and their lacunas and implementation in legal system as well. This

research is also inclined to find out the application of principles of morality and justice in Indian Constitution and recent judgments of the court as well. For this end, researcher has limited his research to the existing philosophical theories, Constitutional provisions and recent judgments which inclined to promote justice and morality in the legal system.

1.8 MODE OF CITATION

The researcher has adopted uniform citation of Bluebook standard form of citation throughout this dissertation.

1.9 SCHEME OF STUDY AND ITS PRESENTATION

The results of this study will be presented in six chapters the First chapter on Introduction and the last chapter on Conclusion and suggestions.

1.9.1 In the First Chapter an attempt is made to define the problem with a view to state the objectives of the study, and hypothesis to define the importance of the study, and to elucidate the methodology adopted. The researcher has adopted descriptive as well as analytical methods of research.

1.9.2 In the second Chapter, Literature Review , an attempt is made to list the summary of some of prominent books and articles relating to notions of justice and morality and Constitutional provisions and their interpretations.

1.9.3 The third Chapter, The Concept of Justice, explores the concept and notion of justice and at the same time it has placed few philosophies which have narrated the theoretical approach on justice. . it has discussed the utilitarian philosophy of maximizing the happiness will establish a welfare society. And a welfare society would have proper distribution of resources which will result into a just society and just legal regime. This chapter has also discussed the issues which have not been solved by the utilitarian and the critics of the utilitarian philosophy of justice. The researcher has adopted analytical method of study under this Chapter.

This Chapter is also discussing the Rawlsian notion of justice under which the researcher has discussed all the practical approach of Rawls of justice. This chapter has taken the notion of justice from the book A theory of justice of John Rawls. In this chapter has researcher has discussed the original position and veil of ignorance principles of Rawls and their critics as well. The method of study for this Chapter is based upon analytical method of study.

The Chapter has also been devoted to the philosophy of Harvard university professor Amartya Sen which specially emphasis the critics of John Rawls A theory of justice. This

chapter focuses on the idea of Sen of the independent spectator and also the critics of the idea of veil of ignorance of Rawls. For this Chapter researcher has adopted analytical method of study.

This Chapter has also been devoted for the philosophy of Karl Marx and Mahatma Gandhi where researcher has discuss the justice from the view of point of economics and non-violence. The philosophy of Marx of public ownership as a means to justice had positive influenced in era when it came into vogue but with passes of time it converted into utopian approach, this chapter has discussed all these debatable issues under descriptive and analytical methods of study.

1.9.4 In the Fourth Chapter, The Concept of Morality an attempt has been made to study the notion and concept of morality and social values which come through the societal beliefs. This research has under this chapter placed the idea of social judgments, social values and the societal moral norms and the way in which society has developed among the people all these notions has also been discussed.

1.9.5 In the Fifth Chapter, The Justice and Morality is the same or different construct an attempt has been made by the researcher to see justice and morality sometimes are the same construct and sometimes as the different construct. For that purpose this research has discussed classical and contemporary theories of morality and for this purpose researcher has adopted descriptive and analytical methods of study.

1.9.6 In the Sixth Chapter, Constitutional provisions and Judicial Activism an attempt has been made to focus on the Constitutional provisions and their judicial interpretations and has also placed an idea through which the conflict between social morality and Constitutional morality might be reconciled.

1.9.7 In the Chapter Seven an attempt has been made to conclude the entire thesis and have also tried to give some viable suggestions with a view to implementation of morality and to end of justice.

CHAPTER 2 REVIEW OF LITERATURE

The researcher has selected a few books and articles for the review of literature in order to present a nutshell of the areas that the dissertation intends to analyze and explore.

The modern theories of justice a book written by Serge-christophe Kolm has been referred in this research which has basically helped in writing the introduction part of this research. It focuses on the basic idea of justice, liberty and equality in functioning of legal norms.

For understanding the theories of justice propounded by utilitarian and John Rawls, this research has explored the study material from the book Central Issues in Jurisprudence (Justice, Law and Rights) by N.E. Simmonds (Eastern Book Publication).

This research has made an endeavor to study the basic notion of justice of Amartya Sen through the book The idea justice and Argumentative Indians for critically analyzing the idea of justice placed by modern economist and philosopher Amartya Sen.
This research with a view to find out relation between Justice and morality and whether they are same or different constructs has made an attempt through the article named Morality and Justice by Linda J. Skitka, Christopher W. Bauman, and Elizabeth Mullen.
This research has made an endeavor to study the idea of justice of Marx through the article named Marx's view on justice with a view to critically analyze the philosophy of Marx in respect of justice and morality. The article Marx's view on justice has been contributed by Donald van.
This research has made an attempt to study the Gandhian philosophy of Justice an d morality through the article Gandhi, the philosopher to explain the Gandhian idea of justice through non-violence and satyagrah, this article has been contributed by Akeel Bilgrami.
This article has critically analyzed the Gandhian idea of morality and justice and somehow tried to place the idea of non-violence and satygrah to access the justice which is very different to the western idea of liberty and equality to access the justice.
This research has explored the judicial interpretations of Constitutional provisions in the path of justice delivery system and protection of moral values in the society.

CHAPTER 3 CONCEPTION OF JUSTICE

Justice has been seen and interpreted by different philosophers in different ways and has ultimately been developed in the society in order to make society a just society. To define justice is a herculean task which could not be easily done by any individual, this is the reason due to which justice has been given different shape by different philosophers. The legal order which is fair in its structural sense and reasonable in the application of its norms, then only one may say that legal order has justice in their norms.
The law making institutions in any society only gives a structure under that society has to run and the legal norms of the society have to come into play but when the same society shows some fairness in its norms and reasonableness in their interpretations, then only we may treat that society as a just society.
Now this chapter is placing numerous theories which provide idea and concept of justice and all these theories have been propounded by renowned scholar of the different schools of jurisprudence. The basic similarity in all these philosophies with number of dissimilarities is, they all have somehow tried to focus upon the establishment of a just legal order and fair functioning of the settled legal norms under that legal order.

3.1 JUSTICE AS UTILITY

There are number of different moral and political theories which fall under the basic periphery of Utilitarianism, and it will not be possible here to discuss all of them. For the purpose of this research it is sufficient to isolate certain basic features which are common to all such theories, and to indicate briefly terms of the major divergences and alternative lines of development that have been seen in different individual theories[13].
The classical theory (Jermey Bentham, JS Mill and Henry Sidwick) took the fundamental basis of morality to be requirement that happiness should be maximized[14]. The theory of utilitarianism tends us towards weighing up the consequences of our numerous actions from the view point of happiness and unhappiness. The action which consequently provides us happiness, only that action should be pursued by us not those actions which have pain at their consequences[15].

However, sometimes latter theories have abandoned the notion of happiness with a view to pursue other values. But all utilitarian theories are concerned with making people better off that is a welfare society. Utilitarian theory has great influenced on the legal system, and it could not have achieved this influence if it did not reflect, in some way and to some extent, important features of our moral beliefs[16]. We may understand the utilitarian moral pursuance in this way that to make world better place in other words for welfare, we assume that the business of reflecting on what we morally ought to do, and of subjecting to moral scrutiny the actions of others. These two said activities have a general purpose to establish a welfare society what utilitarian have pursued. And from this point of view whole aim of human action is to maximize the welfare which ultimately result into moral maximization[17].

Again, if we reflect on accepted moral standards like not to kill, not to steal, not to harm, we may ask why are all these regarded as wrong?. One answer is because these all cause harm to the people and pursue towards human worse off not to better off, hence these acts will not provide welfare to individuals and it will result into maximum of unhappiness which not the ultimate aim of the utilitarian. The certain feature of the theory of utilitarian is focused on the future incident which would be a result of past promise. This theory does not tend towards the past promises unless it has some bearing in future

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[13] Charles Blackorby ET. AL., *Utilitarianism and the Theory of Justice,* UNIVERSITY OF BRITISH COLUMBIA AND GREQAM (1999).

[14] *id*
[15] *id*
[16] *id*
[17] *Supra note 3 at p. 11*

events, it means Utilitarian is exclusively future looking, in this sense it evaluates actions solely by reference to their likely consequences[18].

For example, if I made any promise to any person in past, then I would comply with my promise and would fulfill it not because I had made it and should not breach but my failure to fulfill it, will harm the person whom I promised. Hence, I will fulfill my promises not because I made it in past but I don't want anyone to suffer in future due to its breach. And I will look into consequence of breaching my promises not the past made promises.

3.1.1 CONSEQUENCES UNDER THEORY OF UTILITY

Utilitarian holds that, in deciding what we should do, we should consider only the consequences of our actions: an action could not be justified by its relationship to past facts[19]. An example will make it clear.

Suppose that I have been stranded on a desert island with one other man who is dying. He entrusted me with large sum of money and directed me to deliver that to her single daughter if I ever manage to come out from that desert. I somehow managed to come out from desert and went to his daughter to give her money. When I reached to her, I saw that she was so rich that such sum of money would remain unnoticed for her, however if I give it to the poor people, then it would have better use[20].

Now, according to utilitarian, I am asking at least the right question. I must think whether by keeping the promise I will promote the happiness or by breaching it. But utilitarian will insist that I should not assume the question is easy to answer. The system of making promises and fulfilling it will result into a welfare society. If I breached my promises and disclose it to the others, then in future course of transaction no one would be ready to trust any individual after making any promise and If I don't disclose it to any one, then my decision to break the promise may weaken my own propensity to keep promises in the future[21]. These are the possible consequences of my action which must be considered before giving the money to the poor people.

After all, we may say that it is odd for me to decide by myself that what I should do of the money in respect of which I do not have any right. Because money was given me to give it a specific person not to decide where should I spend it.

The very evaluation of consequences required by the utilitarian approach is, on this view, one that I have no right to engage it.

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[18] *Id.*

[19] *Id.*

[20] *Supra note13 at p. 26*

[21] *Id.*

The utilitarian will insist that he does take account of the past fact of the promise, but only so far as it affects the total consequences of the contemplated act of giving away the money. His opponent will argue that all the claims about general weakening of the system of promise breaking are not only artificial and tortuous, but also immoral in that they suggest that secret promise breaking may be justifiable when open and declared promise breaking would not[22].

3.1.2 RATIONALITY UNDER THEORY OF UTILITY

It is powerful strand under theory of utility that rationality tended towards better ends which would have welfare society. The conception of rationality is historically associated with the philosophy of David Hume, the 18th century Scottish philosopher[23]. He said our reason do not tell us what should we pursue, but it only guide how to attain the ends already chosen. Thus, my reason can tell me that if I would like to keep myself dry in rain, then I must keep an umbrella with me, my reason will also tell me, If I would like to keep myself healthy and well, then I should avoid getting wet[24].

But reason cannot tell us that whether fitness and health are the things worth pursuing. I simply have to decide for myself what I want. If I decide that I do not want to be healthy, happy, or even alive, no one accuse me of being irrational, provided I am fully informed of the relevant facts and have not based my preferences on false factual beliefs[25].

Ultimately Hume argued that our moral beliefs must be based on preferences, like preference for an order and rule based society where promises are not breached and therefore life and material prosperity is possible. These preferences have nothing to do with reasonability or unreasonabilty but these are based on given facts of human nature[26]. But what will happen where there is uniformity in human factual nature, then utilitarian will argue that we should pursue those uniform facts which would have tendency to maximize the happiness and minimize the pain. All demands of rationality will only be fulfilled when person pursues his own happiness, because actions which have tendency to maximize the happiness in the life of individual will make human being rational. All talk of justice and rights as something independent of the concern to maximize happiness is a ridiculous and dangerous diversion from the real demands of morality.

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[22] *Supra note 3 at p. 11.*
[23] Id.
[24] *Id.*
[25] *Id.*
[26] *Supra note 13 at p. 26.*

Although utilitarian has given commendable argument here to pursue the happiness by applying the reason. But this argument of pursuing happiness has been worldly criticized by many philosophers, Finnis is one of them. He argues that man reason indicates certain goals that ought to be pursued, and that happiness is at best one of those goals[27]. Finnis argues that the various objective good are provided by the reason are incommensurable: that is, we cannot weigh or measure one good against the other. While supporting his argument, he emphasized that promotion of one good that is happiness does not make sense[28].

3.1.3 UTILITY AND DISTRIBUTION

Question of law and justice are quite commonly thought of as questions about how wealth, resources and opportunities should be distributed. The fundamental question before philosophers is what would the basis of distribution, whether equality should be basis of distribution or need or merit. One criticism of utilitarian is that it does not support the distribution of resources at all, and therefore cannot be acceptable theory of justice, or an adequate guiding principle of law[29].

It is true that utilitarian does not deal the issue of distribution of welfare rather it emphasizes upon the maximization of happiness or welfare, with how much there is in total. If utilitarian has a choice between two societies in one of which is based upon equality or need or merit and other is based upon inequality in the society, then utilitarian will prefer that distribution which has tendency to maximize the welfare.

It would be a wrong proposition to think that utilitarian does not focus on the distribution of the resources rather they have specific idea for distribution of resources. They will basically argue that equal distribution of opportunities, wealth and other resources is desirable because, and so far as, it will maximize the welfare[30].

The utilitarian is provided with good argument in favor of more equal distribution of resources by theory of diminishing marginal utility. It emphasizes on the argument that if sum of money which is to be given to a millionaire which would be gone unnoticed to him, if it transfers to a poor man then it would become more meaningful[31]. The sum of given money will therefore maximize welfare more effectively if placed in the hand of a poor man than if placed in the hand of a millionaire. If we aim to maximize welfare, we therefore have good reason to transfer resources from rich to poor[32].

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[27] *Id.*

[28] *Id.*

[29] *Supra note 38*

[30]

[31] *Id.*

[32] *Id.*

If we follow this theory of diminishing marginal utility, then utilitarian will become strict egalitarian, believing in an equal distribution of the resources, perhaps modified only to accommodate special needs. But there are other factors which expressly oppose this approach of diminishing marginal utility because it is widely has held that high productivity requires a structure of incentives to encourage people to work hard, to invest, and so forth.

3.1.4 CONFLICT BETWEEN UTILITARIANISM AND JUSTICE

J. S. Mill takes up the supposed conflict between utilitarianism and justice. His argument is difficult, complex, and subtle. In the end the question arises whether he meets the objection or evades it[33].
Mill takes the problem to be that the sentiment of justice feels to most of us more compelling and morally more authoritative than the sentiment of benevolence associated to utilitarianism. Mill thinks that people are in general willing enough to allow that objectively the dictates of justice coincide with a part of the field of general expediency. Still, the subjective mental feeling of justice' is usually more imperative in its demands that the feeling which commonly attaches to simple expediency[34].

We begin with asking what is the common quality that unites all modes of conduct and policy we deem just. It is thought normally to be unjust to (a) violate someone's legal rights, at least those that ought to be his rights, (b) not to treat people as they deserve, (c) to break faith with anyone, (d) to be partial in those situations where impartiality is required, and (d) to treat people unequally, though people disagree wildly as to what sort of equality might be morally required. Mill cannot find a common thread here, so breaks off this discussion and starts another[35].

Mill looks at the history of usage of the word and finds the idea of justice tied to the idea of conformity to law, at least law as it ought to be. We call conduct unjust that we do not think should be enforced by law, but what is thought unjust is always thought to be fit for punishment, either by law, or public opinion, or by pangs of conscience. But this is not the specific idea of injustice but the more general idea of a moral wrong[36]. An act that is morally wrong is one that ought to be punished somehow (and an act is morally right, rather than merely nice, if not doing that act would be morally wrong).
To get the specific idea of injustice we add to the idea of a wrong act a particular person or persons wronged by that wrong act. Mill states, Justice implies something which it is

[33] *Supra note 13 at p.26.*
[34] *Id.*
[35] *Id.*
[36] *Id.*

not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right[37]. Example that illustrates Mill's point: Consider Minimally Decent Samaritanism: acting in an emergency situation to save someone's life when one can do so at small cost and risk to oneself.

Some people think that Minimally Decent Samaritanism is conduct one ought to do, but if one does not do it, one has maybe been uncharitable, but violates no right of the person who is not saved from death[38]. Others think that not only is failure to conform to the norm of Minimally Decent Samaritanism wrong, but it also violates a right that the person who could be saved has to the easy rescue. The people who hold the latter view will say that failing to be a Minimally decent Samaritan is unjust; those who hold the former view will deny such conduct is unjust Mill gives several arguments for not supposing justice is a norm that should have independent moral force against the idea of general welfare[39].

3.1.5 CRITICS OF UTILITARIANISM AS A GROUND FOR JUSTICE

The first and for most critics of theory of utility is that It ignores the distinctiveness of the persons which was raised by John Rawls in his book A theory of justice. Rawls has taken the argument that every individual wants his welfare and for this end, he sacrifices his short terms gains for the long term gains, for example if a person is suffering from toothache, then he will visit to doctor to remove the aching tooth.

The removal of aching tooth will give him pain but for future course of time he will enjoy his welfare. Here, Utilitarian has made a mistake by applying the individual's rationality of welfare to the society at large and while doing so, they have ignored the distinction of persons[40]. For the happiness of people at large utilitarian will say we must sacrifice the happiness of a few, and by this way they may also justify the slavery because by subjecting few people as slaves to majority of the people, the majority of people will be benefited. Hence, the theory of maximum happiness to the maximum number will avoid the happiness of minimum persons in the society.

3.2 A THEORY OF JUSTICE: JOHN RAWLS

[37] *Id.*
[38] *Supra note 3 at p.11.*
[39] *Id.*
[40] *Id.*

John Rawls started with the critics of utilitarian notion of justice and gave a new shape to theory of justice. Utilitarian while maximizing the happiness to bring justice and welfare, confused justice in a legal system with law which might ignore the interests of minority[41]. Rawls' idea of justice was very unique and emerging concept of justice which was based upon few principles about which before him no one thought of. He came with certain dynamic concept like veil of ignorance, Lexical order and different principles and all these principles became the fundamental principles in western legal system for establishing just society[42].
Rawls suggested for arrangement of legal rules and establishment of legal institution through which justice could be provided to the people in the society. Then, He came with a very dynamic concept of lexical order in which he appealed to give preferential treatment to all these concepts accordingly these concepts are Liberty, equality and difference principles[43].
There are following ideas of Rawls which he put forwarded with a view to establish just institution in the society.

3.2.1 PRINCIPLE OF VEIL OF IGNORANCE

Rawls asks to imagine a group of rationale individuals who have to agree on a set of principles that will govern the basic structure and institutions of their society. They are to choose these principles on grounds of rational self-interest and in the knowledge that the principles chosen will be binding upon them. But their choice is constrained by the fact that they are deprived of certain types of knowledge about themselves: they are to choose, as Rawls puts it, from behind a veil of ignorance[44].
Rawls in my words has given a different idea which seems and sounds very worthwhile but the implementation of this kind of thought is not possible in the practical functioning of legal norms. What he suggests is, the legal principles should be arranged by such people who have forgotten their own self interest and come together to take into consideration the interests of the society at large[45].
Further, he suggests that the veil of ignorance excludes the knowledge of all those features that distinguish one person from another. Thus the rational person in the original position as Rawls called it the basic choice system in which one does not know his own

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[41] *Supra note 3 at p.11.*
[42] *Id.*
[43] JOHN RAWLS, A THEORY OF JUSTICE, HARVARD UNIVERSITY (1971).
[44] *Id.*
[45] *Id.*

identity. They do not know what they are, what their ability might be etc. but they have only conception of good life for others[46].
Although Rawls came the different idea to provide justice to the people in the society but there are number of critics of his thought. Amartya Sen in his book the idea of justice has mentioned the number of flaws in the philosophy of Rawls for justice which I will be discussing in latter Chapter.
In my words Rawls' conception of veil of ignorance is an utopian idea of justice not the rational idea of justice. Although it sounds good that the legal principles arranging people will ignore their self interest and will forget who they are but there are number of questions come against this principle of veil of ignorance, like Do they people forget their own interests while making the rules?, Do they people have not pre conceived notion of the society from where they come from?.. I may put number of questions against the utopian philosophy of Rawls which suggests us to imagine a group with veil of ignorance[47].

In contemporary legal system from east to west where the phobia of nepotism is working at large scale, would it not be nonsense for us to think something like called veil of ignorance?., Further in society where people usually come in power after proving their ability to their people, would it not be meaningless to tell them to forget their own ability?., In my opinion Rawls has suggested the philosophy of extreme scale which could never be come in application, however he has placed his philosophy with a view to suggest law makers to take into consideration only the social interests not their self interests.

3.2.2 TRANSCEDENTAL INSTITUTIONALISM

The social contract theory as propounded by Hobbes, Locke and Rousseau, focused mainly on the institutional arrangement for a society which have great influence in the late classical era and beginning of the era of modernism. The idea of social contract, which could also be known as transcendental institutionalism', has two different features[48]. Firstly, it concentrates on the perfection of justice through a well defined sovereign, rather than on relative comparisons of justice and injustice. Secondly, in the quest for the perfection, the focus of the transcendental institutionalism is primarily on getting the institutions right rather concentrating on the actual societies that would ultimately emerge.
Rawls' philosophy of transcendental institutionalism was influenced by the earlier philosophies of social contract theory. Rawls placed his philosophy more on the

[46] *Supra note 43 at p.38.*
[47] *Id.*
[48] *Id.*

establishment of legal institutions than to any other principles. He basically suggested that it is not more worthy to provide maximum happiness to maximum number of people rather it would be appropriate to arrange the legal principles and establish the legal institutions through which justice to the people could be given. However, the institution which he suggested was based upon the principle of veil of ignorance[49]. Utilitarian confused the justice with welfare which was based upon the philosophy of hedonism. Rawls tried to establish a society where there must a legal institution and the law making body under that institution will follow the principle of veil of ignorance.
The approach of Rawls at this point was very influential because he left approach of uncontrolled power of sovereign which was placed by Hobbes, he also tried to overcome from the dilemma of life, liberty and property which was placed by John Locke and for the first time placed the liberty, equality and principles of opportunity as the cornerstones for the idea of justice under the social contract[50].
Nonetheless he has placed an idea of justice as fairness but his approach might be criticized on few grounds. He while placing liberty at the first place under the legal system has ignored the egalitarian notion of justice which prefer equality over other notions of justice. The philosophy of Rawls was shadowed by the capitalist mind set of American economy, this may be because of his upbringing in the environment of capitalism. We may not ignore his idea of equality and principle of equal opportunity but it could not protect Rawls's first principle of liberty because in lexical order he placed liberty at the primary level. Hence, with these critical issues it becomes obvious to discuss his idea of lexical order.

3.2.3 JUSTICE UNDER LEXICAL ORDER (LIBERTY, EQUALITY AND PRINCIPLES OF OPPORTUNITY)

He will stipulate basic liberties such as right to life, liberty, freedom of consciousness and religion, assembly etc and these basic liberties will similarly be demanded by a member of minority community as well, he will not take chance of ending up a member of oppressed minority being tyrannized by a majority. This brings us before the first principle' of Rawls i.e., the Liberty Principle'. Rawls in his book Political Liberalism included this principle in a form of guarantee of fair value of the political liberties[51].

The fair value of political liberties requires that citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining

[49] *Supra note 43 at p.38*
[50] *Id.*
[51] *Id.*

positions of authority irrespective of their economic and social class. Thus ensuring that members of a social group are able to participate in the political process which conforms to the principle of equality. Now coming to the second principle', which proposes that social and economic inequalities are to be arranged in such a way so that they are both i. Reasonably expected to be to everyone's advantage , and ii. Attached to offices and positions open to all under conditions of fair equality of opportunity According to Rawls, social and economic inequalities should be so arranged so that they are for the greatest benefit of the least advantaged persons, also known as the difference principle'[52]. The people under the veil of ignorance don't know that under what system they are going to be placed in, if the veil is lifted, whether they will be healthy or unhealthy, rich or poor.

Therefore, it is advisable to have an arrangement, whereby there is an equal distribution of wealth so as to ensure that each member is on a safe side. Or the members can go for a different setup, on a qualified principle of equality (difference principle), according to which, only those social and economic inequalities will be permitted that work to the benefit or advantage of the least worst off[53].

Rawls by his philosophy of social arrangement tried to save the society from the dilemma which was created by the utilitarian to promote the welfare of majority class and to ignore the happiness of least develop people. This approach was appreciated among the different legal orders because this approach tried to cover the requirement of each class of the society. However, Rawls placed the term liberty as his first priority under legal system to provide justice, and then he placed the social and economic equality which is latter known as difference principles.

The idea which was developed by him was really commendable, however while he is placing all these principles he placed liberty at the first level and also pleaded that when there may be any conflict between these principles, then the principle of liberty would prevail. His lexical order creates a paradoxical situation because on the one hand he is promoting the least developed people by giving them social and economic equality and on the other hand he pleaded that in any conflict between liberty and equality, liberty shall prevail.

The confusion now is if one tries to promote the equality among the society, then it will demand the curtailment of the liberty of other developed people. It is not highly possible in the same legal order to promote the equality of all by curtailing the liberty of few. I may take one example to make my argument more transparent, there are five persons in one family and only three of them are working in a company since morning to till night.

The principle of liberty here would tell the money which is earned by these three members of the family shall be used by them only because they have worked hard to

[52] *Id.*
[53] *Id.*

have that sum of money. However, the principle of social and economic equality will tell these three members to distribute the sum of money equally among the all five members of the family because this distribution will make a just family order in which all members will be happy not only those few who earned the money. If we compel these three to distribute the earned sum of money, then it will have a demand of curtailment of the liberty of these three members, hence it is not possible to keep equality of all by curtailing the liberty of few. And the lexical order of Rawls placed this kind of controversy which will again provide maximum happiness to few and minimum happiness to large number of people.

In my words Rawls while protecting the liberty of few which was ignored by utilitarian forgets the equality of all and it again becomes the theory of hedonism but opposite to utilitarian's hedonism which placed maximum happiness to maximum number and Rawlsian hedonism is providing happiness in the form of liberty to few number of the society.

3.3 THE IDEA OF JUSTICE: AMARTYA SEN

Indian Nobel Laureate Amartya Sen, born 1933, is one of the most important public intell ectuals of our age, an original thinker whose work transcends the standard categories. His 1998 Nobel Prize was awarded for his work in welfare economics, but to describe hi m as an economist (as the term is understood today) would be inaccurate. Better would b e social philosopher, or, better still, the old term political economist, since the scope and range of Sen's work is directly comparable to that of such eighteenth and nineteenth cen tury
practitioners of Political Economy as John Stuart Mill, Adam Smith, and Karl Marx. India n Nobel Laureate Amartya Sen, born 1933, is one of the most
important public intellectuals of our age, an original thinker whose work transcends the st andard categories[54].

Amartya Sen who is the student of great philosopher John Rawls has placed his idea of justice with the cornerstone of the critics of the A Theory of justice of Rawls. The basic arguments which have been enhanced by Sen are based upon the approach that injustices should be diagnosis and should be removed from the society rather to arrange the rules and regulations and establish legal institutions[55]. His idea for justice is primarily against the transcendental institutionalism and arrangement of the rules and principles.

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[54] Dhawal Shankar Srivastav, *Rawls's Theory Of Justice Through Amartya Sen's*, ILI LAW REVIEW (2016).

[55] *Id.*

Sen has basically tried to convince that plurality of ideas are general phenomenon which would occur where legal institutions come together to promote morality and justice in the society. Hence, nothing like veil of ignorance could be accepted under any legal system because it is ultimately converted into plural ideas of the different persons, I will be discussing this issue in next chapter where I will also provide a very famous example which has been projected by Sen to prove plurality of opinions[56].

3.3.1 CRITICISM OF PRINCIPLE OF VEIL OF IGNORANCE

John Rawls placed his theory of justice under the shadow of principle of veil of ignorance where he put his emphasis on law making responsibility of impartial persons which he called at original position. In his principle of veil of ignorance Rawls argued that few people come together and will make the law for the society but these people will forget what they are what their personalities are, which kind of abilities they have, and at this positions they will be seen as they are at the original position and they have ignored their selves interests.

The idea which provided by Rawls for law making sounds very good, and common people not only common people but most of contemporary philosopher have appreciated Rawls' idea of veil of ignorance. However, his student and great Indian economist Amartya Sen opposes the principle of veil of ignorance while stating that what Rawls wanted to portray that he wanted to avoid the plurality of opinions by the legislators for law making which would set as original position. But Sen has argued that even though we call such number of persons who have not in a stage to flourish their self interests but they may still reach to the plural opinions while making the law[57].

For supporting his argument Sen has taken a very famous example that he appealed us to imagine a situation where, there is one flute and there small children demanding that flute and at the same time they are also supporting their demands by providing grounds for their entitlement for that flute. One the children says that I don't have any toy to play and I m so poor that I could not buy any toy, hence please give me this flute because if you give me it, then I may play with it.

Second child pleading that he is only the child who knows how to play that flute, hence I know the utility of that particular flute so flute should be given to me, if you give me it, then I can do the optimum use of that flute and it will serve the purpose of the flute for which it has been created. The third and last child is placing is view as I m the child who has vest his labor in making that flute, I went to forest brought some wood which were required for the creation of that particular flute, and then I placed it to the market to earn

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[56] *Id.*

[57] *Id.*

some money so please give it to me because I have vested my capital in it and philosophy of capitalism will allow me to have it[58].

Now the persons who have been called by Rawls as a impartial persons and standing at the original position after ignoring their self interest, this question now will be putting to them and we will ask them to decide it that which child should be possessed that flute[59]. Sen, here, has placed his argument that even these lawmaking persons are at the original position, however they will reach at the different of opinions while giving the flute to one of the said three children. One may say that the child, who is very poor and have no money to buy any toy, let this flute be given to him and one may also say that no, the child who can do the optimum use of the flute, let the flute go to him and one may also differ by saying that no, the child who has vested his capital while making the flute, let him have that[60].

Sen has tried to establish that we cannot put the law in the hands of certain well arranged legal institutions and settled principles. To do justice with each and every class of the people rather we should diagnosis the injustices which are occurring in the daily life of the individuals and try to remove it not to waste our time in arranging principles and establishing the legal institutions.

Amartya Sen has beautifully placed his idea to make several critics against the theory of Rawls. However, Sen's idea has also few intricacies like in a democratic society where people have vested their rights in a hypothetical sovereign, we cannot take a plea that there is no any requirement of legal institutions or any arranged rules. I think Sen tries to establish such society where people should be informed, media must exercise its rights to fullest extent.

3.3.2 REALIZATIONS, LIVES AND CAPABILITIES

Amartya Sen has emphasized on need of a theory which is not confined to choice of institutions nor the identification of ideal social arrangements.

Sen now argues that importance of human lives, experiences and realizations cannot be supplanted by information about institutions that exist and rules that operate. He basically try to put his argument forward which is based upon the actual realization of human lives rather to settled rules and established principles. He says social realizations are assessed in terms of capabilities that people actually have, rather than ignoring everything other than pleasure or utility they end up having[61].

[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*

He focuses on capability and human choice approach which seems a departure from the theory of Rawls of arranged rules and established institutions. He also makes an argument that freedom to choose gives us opportunity to decide what we should do but with that opportunity comes responsibility for what we do, hence accountability emanates from the power or the ability and deontological demands of duty check on capability based approach.

3.3.3 A CLASSICAL DISTINCTION IN INDIAN JURISPRUDENCE

To make his point more clearly, he has given an example of classical Indian philosophy with a view to understand the distinction between arrangement focused and realization focused view. He took two words of Sanskrit literature, Niti and Nyaya the purpose of both is to do justice with common mass.
Here Niti means organizational propriety and behavioral correctness or in colloquial terms principles or virtues needed to be followed. And the term Nyaya means comprehensive concept of realized justice, in broader perspective it means inescapably linked with world that actually emerges not just institutions and rules which we have[62].

What Sen is trying to say, is that Nyaya is the actual principle of justice which plays a pivotal role in any classical legal system in providing justice to the society because it was based on actual realization or social realization of justice. To make his point strong he has taken an example from Indian classical literature that example is based on matsya nyaya in a given pond.
Sen says in a given pond there are three types of fishes, one is very small, second one is medium and third one is bigger than rest of two types. The smallest type of fishes will tell us world is not just because we are being eaten by some other types of fishes, the medium type of fishes will tell us that world is just to some extent and also unjust to some extent because we are eating smaller fishes, however at the same time we are also being eaten by some other bigger fishes. And the other type of fishes which are larger in nature in the given pond will tell us the world is full up with justice, there is no injustice anywhere in this world because we have all those things for our purposes which we really want without any fear of our lives[63].
Sen here, tries to say that arranges rules and established institutions will not provide a just environment of each and every class of people of the society because this kind of system of settled norms and beliefs irrespective of their practical application. He rather

[62] *Id.*
[63] *Id.*

emphasizes on a theory where legal norms are based on actual realization of human lives, human capability.

3.3.4 FREEDOM OF PRESS WILL FLOURISH THE SOCIAL ACTUALIZTION

Almost everyone recognizes that the media plays a crucial role in real democracies. One must examine the media to understand its role in how democracies work, including how it both enhances and detracts from how well any democratic society works. Amartya Sen recognizes this basic truth in the realms of capabilities, functionings, economics, and freedom. However, there is a tension between this recognition and the fact that Sen does not deeply develop the structural and institutional aspects of the role of the media and of democratic society[64].
In many of his works, Amartya Sen has correctly pointed out the links that exist between many kinds of freedom. One of the most important is the connection between democratic participation, political freedom, and the structure of the media. This is important because Sen argues that direct or representative democracy prevents catastrophic famine. (Sen 1999, 2009) He has also forcefully argued that political participation is important in its own right. In order to reap the full benefits of democracy, Sen has argued that it is crucial have a free press that allows for the free flow of ideas. The free press helps a society decide which policies to pursue, since these discussions lead to the direct consideration of the goals that society thinks are worthwhile[65].

These discussions also shape a society, because they inform citizens how it might be best to pursue goals that are already settled on. On this point, I agree with Sen. Sen has also made his argument in favor of social media because in his words this will knock the door of government in providing the justice to people.

3.3.5 JUSTICE FROM THE VIEW POINT OF IMPARTIAL SPECTATOR

Amertya Sen has termed the principle of veil of ignorance of Rawls as the principle of closed impartiality and made number of critics as I have referred in earlier chapters. Sen was inspired by the idea of Adam Smith who placed the principle of impartial spectator.

Sen contrasts this example of closed impartiality' with the open impartiality' of Adam Smith's impartial spectator'. Smith's reflective device, which asks us to observe our actions and institutions from the standpoint of an outsider, specifically refrains from

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[64] *Id.*
[65] *Id.*

limiting the extent to which the views of others can be considered, refusing to confine moral discussion within the boundaries of a nation-state or any other locality[66].

And, as in social choice theory, such openness to, and critical reflection upon, alternative views and different ways of approaching social problems, Sen believes, can provide a more solid ground for ranking the just-ness' or, at least, manifest injustice of certain social realizations, even if they are merely partial and ordinal rather than comprehensive, cardinal rankings[67].

Of course, an engagement with contrary arguments does not imply that we will be able to arrive at agreed positions on every issue (and Sen does not see this as a drawback in his theory - not at all), nor does it oblige us to accept any of them. But there is a connection between what Sen calls the objectivity' of an ethical judgment and its ability to withstand open public scrutiny. Sen thus underscores the importance of public reasoning for justice throughout the book, and he regards democracy, especially when understood as government by discussion' rather than the Schumpeterian government by elections', as a particularly appropriate form of public reasoning, which can serve to increase the objectivity' of political solutions.

Without doubt, the argument Sen present in the The Idea of Justice deserves to be seriously considered by contemporary political philosophers and lay-readers alike. It commands respect, for even if it fails to convince it will surely sharpen the arguments of others. Much of what passes for philosophy, including political philosophy, has been repeatedly accused of being irrelevant to the real choices and concerns of those outside of philosophy departments. And in *The Idea of Justice* Sen presents a serious challenge to those departments, forcing them to prove their relevance and demonstrate how they can actually inform tough decision-making.

However, if we are convinced by Sen's argument, this raises interesting questions about the role of the philosopher and their claim to any authority or special knowledge. According to Sen, philosophers' should not - and cannot - strive to become the architects of castles in the sky. Instead, he asks us all to start right at the foundations: to share, explore, and debate our perspectives on how to repair the edifices in which we currently live. Justice arises not from a blueprint, but from a process of open public reasoning in which as many potential policies, strategies or institutions are considered as possible. However, in this process it is not clear that the people who currently occupy philosophy departments have any special standing.

They become, according to Sen, purveyors rather than adjudicators of wisdom, on an even standing with economists, doctors, scientists and lawyers, with whom they should

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[66] *Id.*
[67] *Id.*

collaborate intensely. Sen's Philosopher turns out to be anyone willing to cross boundaries, willing to explore alternative ways of thinking and living across disciplines, communities and time. What matters is that people know more about what's out there and make more informed choices - that they are smarter - because, for Sen, smarter is better.

3.3.6 CRITICISM OF AMARTYA SEN'S IDEA OF JUSTICE

Nonetheless Sen has come with new idea of justice which does not focus on the legal institutions and arranged rules rather on the actual realization of the injustices occurring in the society. However, his idea of justice has also in my words number of intricacies. In a modern world where more or less each and country has established democratic form of government, how could we ignore the legal institutions and arranged rules?.,
Sen has made a mistake in taking the democratic form of government for his idea of justice. Sen has flourished his philosophy on the basis of the philosophy of Adam Smith because he was also an economist as Sen is. It may be while focusing more on removal of injustices from the society, Sen has missed the central method of functioning of democratic form of government and has criticized blindly Rawls' theory of justice irrespective of the consequences of his idea of justice. I think Sent tried to avoid absolute standard as an idea of justice through the arranged principles and legal institutions rather through social actualization and human capability[68].
This research tries to accumulate the philosophies of both these philosophers Rawls and Amartya Sen. We cannot not ignore the legal and arranged rules in other words transcendental institutionalism in democratic form of government where the legislators have to legislate the laws in accordance of the general will of the people. In the era of democracy where the pre-established norms are essentially required for the better understanding of laws by the people are very necessary and meaningful[69].

In a large democratic set up as we have, no can say that there is no any requirement of legal institutions we may only address the numerous issue of the people the removing the injustices from the society.
For example we have settled criminal law where any person commits any offence against any person, then aggrieved person has been empowered to lodge a police or judicial complain against the wrongdoer and I may say without any excuse that it is the best way to remove the injustices from the society and do justice with the aggrieved person.
What I think is, Sen' idea of justice might be proved as a milestone or path breaking idea for a small democratic set up where people could have proper opportunity to convey their

[68] *Id.*
[69] *Id.*

issues causing injustices with their legislators. And in such kind of small democratic set up it would also be easy for the government to diagnosis the injustices and remove them from the society.

Sen has also placed his idea that there should be government not by election but only by discussion, I think his communist influence compel him to make such kind of arguments where a person tries to put forward his all points from the view point of discussion of common mass. Because the persons who are going to be governed must be consulted before being governed by the government.

He again failed to understand the need of democratic form of government where people do not want to waste their time in discussion that is why they elect and send their representative to rule them. I may say that discussion is essentially required but before the election, however Sen has placed his stream argument by saying that government only by discussion and by election. We cannot avoid election from a large democratic form of government because a large democratic set up also demands little more time for a government and such time what I think should not be waste in discussion[70].

His preference for nyaya, as the true sense of justice to be adopted, is neither referred to any definite sources in the literature related to Indian or Hindu philosophy, nor does he offer any thorough linguistic analysis and conceptual interpretation of these two terms to derive his preferred sense of nyaya as the sole terminology capable of conveying the true sense of justice in the contemporary society[71].

Hence, the innovation that Sen seems to have attained in offering a true sense of justice, in The Idea of Justice, by making use of the technical distinction between niti and nyaya is not properly grounded and justified[72]. Nyaya is more argumentative than niti that follows a definitive and consequence independent reasoning;[73] as argumentative, according to Sen, the former takes up a comparative weighing of the positions and looks for better and more acceptable consequences or realizations in personal and social life than merely brooding over and worrying about any transcendental view of justice. Sen rejects the niti-oriented practice of justice as more institutional and authoritarian in character.[74]

Sen provides an example of Ferdinand I, the Holy Roman emperor of the sixteenth century, who famously claimed: Fiat justitia, et pereat mundus (Let justice be done,

[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

though the world perish!) to make distinction between the meaning and implication of niti and nyaya. According to him, Ferdinand was insisting on establishing niti, which would be done even if the whole world were to perish. Sen considers nyaya to be broader in its implications.[75] However, Sen's attempt is too simplistic in insisting on a watertight compartmentalization in understanding niti and nyaya.

Even if there is an insistence on niti (understood as organizational propriety and behavioral correctness) in its severest form, it gets its validity not from the blind adherence, but from the foundation upon which every niti is based. For example, the Constitution of India (or of any other nation), according to Sen's distinction, would belong to niti. Although there is always the possibility of an amendment to most of the provisions (theoretically, including even the possibility of a complete redrafting of the Constitution of India, if that would be warranted by the change of Indian national consciousness), the content of these Constitutions would be ethically validated (not legally, as legal reference point will ultimately be restricted to the fundamental principles identified in the Constitutions and the promulgation made by the head of the Republic of India) not merely from the approval of the Parliament of India and the promulgation of the President of India.

There must be valid ethical foundation/s for the same. From a political point of view, Sen would immediately raise the issue that how would we arrive at an agreement or consensus regarding the ethical positions, especially when we see a myriad of theories and positions advocated and adhered to by different individuals or groups of people within a democracy. His preference for *nyaya*, as the true sense of justice to be adopted, is neither referred to any definite sources in the literature related to Indian or Hindu philosophy, nor does he offer any thorough linguistic analysis and conceptual interpretation of these two terms to derive his preferred sense of *nyaya* as the sole terminology capable of conveying the true sense of justice in the contemporary society. Hence, the innovation that Sen seems to have attained in offering a *true* sense of justice, in *The Idea of Justice*, by making use of the technical distinction between *niti* and *nyaya* is not properly grounded and justified[76].

Nyaya is more argumentative than *niti* that follows a definitive and consequence independent reasoning;[77] as argumentative, according to Sen, the former takes up a comparative weighing of the positions and looks for better and more acceptable consequences or realizations in personal and social life than merely brooding over and worrying about any transcendental view of justice. Sen rejects the *niti*-oriented practice of

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[75]*Id.*
[76] *Id.*
[77] *Id.*

justice as more institutional and authoritarian in character.[78]
Sen provides an example of Ferdinand I, the Holy Roman emperor of the sixteenth century, who famously claimed: *Fiat justitia, et pereat mundus* (Let justice be done, though the world perish!) to make distinction between the meaning and implication of *niti* and *nyaya*. According to him, Ferdinand was insisting on establishing *niti*, which would be done even if the whole world were to perish. Sen considers *nyaya* to be broader in its implications.[79] However, Sen's attempt is too simplistic in insisting on a watertight compartmentalisation in understanding *niti* and *nyaya*. Even if there is an insistence on *niti* (understood as organizational propriety and behavioral correctness) in its severest form, it gets its validity not from the blind adherence, but from the foundation upon which every *niti* is based.

For example, the Constitution of India (or of any other nation), according to Sen's distinction, would belong to *niti*. Although there is always the possibility of an amendment to most of the provisions (theoretically, including even the possibility of a complete redrafting of the Constitution of India, if that would be warranted by the change of Indian national consciousness), the content of these Constitutions would be ethically validated (not legally, as legal reference point will ultimately be restricted to the fundamental principles identified in the Constitutions and the promulgation made by the head of the Republic of India) not merely from the approval of the Parliament of India and the promulgation of the President of India.
There must be valid ethical foundation/s for the same. From a political point of view, Sen would immediately raise the issue that how would we arrive at an agreement or consensus regarding the ethical positions, especially when we see a myriad of theories and positions advocated and adhered to by different individuals or groups of people within a democracy.

3.4 KARL MARX AND MAHATMA GANDHI ON JUSTICE

Under this chapter this research work is placing the ideologies which have been developed by two great philosophers, one is from Germany and other is from India they are Karl Marx and Mahatma Gandhi respectively. At a time when many social practices are attacked on the ground that they are unjust, and radical students make appeals to the

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[78] *Id.*

writings of Karl Marx and neo-Marxists, it would be useful to know just what Marx's views about justice were.
Marx's approach has been understood by many of us as unethical and immoral because he was a revolutionary thinker and revolution does not know any ethical principle. However, few latter writers have taken an all together different look for the philosophy of Marx which they have portrayed as just[80].

There may be many reasons to think Marx as a pro- justice philosopher like he gave a different look of the exploitation of working class by ruling class, he the fair distribution as an idea which was inclined towards to benefits of the capitalists[81].
We may see his notion of justice after looking into a passage of him and his friend Angle which provides us a theoretical background to considered him as pro-justice philosopher.
Marx and Engels depict the capitalist society that they abhor as the scene of a great and growing inequality of wealth, where untold riches accumulate in the hands of a small and dwindling class of avaricious capitalist magnates while the masses of working people sink deeper and deeper into a black pit of poverty. Do they not, then, condemn capitalist society because of its inequalities? And finally, what is the capitalist exploitation of labor that Marxism talks about if it is not a relation in which the worker is robbed of what rightfully belongs to him? In all these ways Marxism invites a moral interpretation that sees distributive justice as its central issue[82].

After going through this beautiful passage which was depicted by Marx and Angle, we may now take an argument forcibly that Marx had placed his theory of distributive justice while condemning the unequal distribution of the commodity. Now for a better look we have to go through the Marx's demand of public ownership with a view to establish a just society.

3.4.1 PUBLIC OWNERSHIP ON RESOURCES AS MEANS TO JUSTICE BY MARX

In last paragraph we have seen the strong condemnation of Marx against the unequal distribution of resources and now we will see in this chapter how Marx placed his theory of equal distribution as an idea of justice. Marx placed his argument under his article critique of the Gotha program and had said that I have dealt more at length with the undiminished proceeds of labor, on the one hand, and with equal right and fair

[80] . *supra note 6 at p. 12*
[81] .*id.*
[82] Donald van de Veer, *Marx's View of Justice*, 33 INTERNATIONAL PHENOMENOLOGICAL SOCIETY (March 1973).

distribution, on the other, in order to show what a crime it is to attempt, on the other hand, to force on our party again, as dogmas, ideas which in a certain period had some meaning but have now become obsolete verbal rubbish[83].

Many people have misinterpreted Marx statement of equal right and fair distribution as that initially he supported the idea of fair distribution and subsequently had opined that fair distribution had become obsolete verbal rubbish. But what I point out here, is Marx has placed his argument on the ground of change which had taken place after the commencement of era of capitalism as initially there was equal right of the all and was also fair distribution of the resources but it has now under the capital regime become obsolete verbal rubbish[84]. Marx basically was in favor of equal right and fair distribution and for that purpose he took a view that there must be fair distribution on surplus commodity[85].

For more clarity on subject, what Marx said, was the workers sell their labor as a commodity in the hands of capitalists and now the capitalists or few ruling class use that labor as commodity for their wellbeing. The capitalist also paid some amount to the workers while purchasing their labor, however, the workers lost their control over soled commodity and they were not able to ask for any surplus which might remain after satisfying the profit based allure of capitalist. On this very issue Marx had a great ideological war with the capitalist regime and he hence, put forward his idea of public ownership of the natural resources from where working class would enjoy their fullest right even over surplus.

Justice (Gerechtigkeit), according to Marx and Engels, is fundamentally a juridical or legal (rechtlich) concept, a concept related to the law (Recht) and to the rights (Rechte) men have under it. The concepts of right and justice are for them the highest rational standards by which laws, social institutions, and human actions may be judged from a juridical point of view. This point of view has long been regarded as being of particular importance for the understanding and assessment of social facts. It is not too much to say that the traditional Western conception of society is itself a fundamentally juridical conception[86].

Marx placed his idea of development of society on the basis of Hegelian notion of dialectics. He emphasized that with the development of the society class struggle took place and badly affected to working class. He had also seen the early world as full of with communism where distribution of natural resources corresponded to each people

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[83] *Supra note 72*
[84] *Id.*
[85] *Supra note 6 at p.12*
[86] *Supra note 7 at p.13.*

equally, however with the development of the social norms new social relations came into vogue like relationship of landlord and its tenants which proved as cornerstone for the establishment of the capitalist era[87].

3.4.2 CRITICISM OF MARXIST APPROACH OF JUSTICE

Marx was obsessed with the anti-capital form of the society and under such obsession; he placed a revolutionary and anti-capitalist definition of law. He said for law, Law is instrument of exploitation in the hand of ruling class (capitalist class) to rule over working class. Marx appealed against capitalism repeatedly and forgets to give any proper theory of justice which could save the working class from the hand of ruling class.

In his critique, this work is trying to place an idea that a philosopher like Marx whose philosophy become vehemently a new and revolutionary ideology was fail to provide theory of justice which could provide in what manner legal institutions would implement the legal norms which might be beneficial to some extent in protecting the suppressed interest of working class[88].

Only abusing the capital based society would not make any sense in normal working of any given legal system, he should have come with a more reconciling approach between capitalism and common need of the people but Marx was fail to establish any working theory of law and justice nonetheless his idea for communist society is still governing the numerous legal systems irrespective of his failure to place a proper theory of justice. Justice for Marx was fair and equal distribution of natural resources and distribution of surplus among the working class. However, this idea is not practically workable at all because this idea only arguing against the working of capitalism in the society not placing any philosophical defense for this ideology which could work against capitalism[89].

Marx ideas were very revolutionary and workable in early era where human being were used like commodity and they were not conscious about their rights and were also not sound towards the working of capitalism. In contemporary society where individuals are very sound towards their rights and labor, Capitalism cannot exploit them arbitrarily. In contemporary era where we have different right against the working of capitalism like labor legislation, right to information, fundamental rights etc., ruling class cannot exploit working class as they want. Although Marx's ideology has some challenges in era of

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[87] *Id.*
[88] *Id.*
[89] *Id.*

modernism but it has left his influence on many other ideologies which have become the basic standard for the communist society.

3.4.3 JUSTICE AS NON-VIOLANCE AND SATYAGRAH BY GANDHI

Mahatma Gandhi as an Indian philosopher and religionist placed his idea of justice beyond the need of fundamental rights like equality and liberty like other most of western philosophers placed. He, in my words, saw the world very differently which could not be possible for a living human being, it might be possible for a man who has no any desire, hope, expectation and who is beyond the other illusionary terminology of the society.
Gandhi has pleaded against the colonialism and arbitrary British rule but not as one could criticize and revolt against any colonial rule. He said that only asking for fundamental right against the British would not make any sense because it will ultimately make us as subject. He rather placed an idea of non-violence and satyagrah which would something more than the fundamental rights.
Violence has many sides. It can be spontaneous or planned, it can be individual or institutional, it can be physical or psychological, it can be delinquent or adult, it can be revolutionary or authoritarian. A great deal has been written on violence: on its psychology, on its possible philosophical justifications under
certain circumstances, and of course on its long career in military history. Non-violence has no sides at all.

Being negatively defined, it is indivisible. It began to be a subject of study much more recently and there is much less written on it, not merely because it is defined in negative terms but because until it became a self-conscious instrument in politics in this century, it was really constituted as or in something else[90]. It was studied under different names, first usually as part of religious or contemplative ways of life remote from the public affairs of men and state, and later with the coming of romantic thought in Europe, under the rubric of critiques of industrial civilization[91].

For Gandhi, both these contexts were absolutely essential to his conception of non-violence. Non-violence was central in his nationalist mobilization against British rule in India. But the concept is also situated in an essentially religious temperament as well as in a thoroughgoing critique of ideas and ideologies of the Enlightenment and of an intellectual paradigm of perhaps a century earlier than the Enlightenment.

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[90] *Id.*
[91] *Supra note 6 at p.12*

The term Ahimsa may be appreciated more accurately as not merely avoiding physical violence, but as avoiding cruelty; which may be as much a perceptual issue as a physical one. Gandhi once described Ahimsa as avoiding injury in thought, word, and deed. He further elaborates that Non-violence in action cannot be sustained unless it goes hand in hand with non-violence in thought. Steger also extends the boundary of violence beyond the usually defined physical terms by saying violence in its root sense of violation – referring not only to open, physical forms of violence, but also to emotional injury and psychic terror, such as those present when people are subjugated, repressed, and exploited[92].
Gandhi said that we should not criticize any one because critics come from impure heart rather we should resist the views of others. This idea of Gandhi is quite similar to the idea of Mill, he said our known and accepted beliefs have often turned into wrong, which places a ground to think that the beliefs which are wrong and not accepted today might be turned into right tomorrow, hence we should be tolerant to dissent, not repress it. Gandhi also pleaded to resist the dissent not to criticize them because criticism developed from impure heart which led a man towards non-violence[93].

Gandhi in contrast to other revolutionary philosopher has pleaded that one who raised violence against the colonialism, then he tried to make his opponent conscious to be defensive and this would not result into independence rather into enslavement which was the early stage of that man. He tried to say violence would never led to positive and inspirable change rather it had an influence to hold society at its original state or make it more badly than it was. Gandhi came with idea of disobedience and non-violence in contrast with the revolutionary notion of freedom and pleaded that through the path of truth one could get what he thought to get[94].

Non-violence or ahimsa and satyagraha to Gandhi personally constituted a deeply-felt and worked-out philosophy owing something to Emerson, Thoreau and Tolstoy but also revealing considerable originality. The search for truth was the goal of human life, and as no one could ever be sure of having attained the truth, use of violence to enforce one's own view of it was sinful[95].

Gandhi placed the idea of Satyagrah and the followers of satyagrah were known as satyagrahi in other words seekers of truth. He said no one could attain the truth, however we should always place our lives in search of truth. He said life is a journey in search truth which rarely attained by the individual, here one could be disagree with Gandhi by

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[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*

saying that the thing which could rarely be achieved and sometimes even it could be achieved but it could not be realized, then why did we run after the search of it.

Gandhi here, would argue that end is not more important than the means in search of that end. Gandhi took a different view in comparison to a great philosopher Machiavelli who had said that end justifies the means, He meant that how wrong your means is, it would ultimately justified by the end result which you achieved through those means. However Gandhi took a different view and said the achieved end is the result of our pursuit means, if our means is not justifiable or it is not based upon our moral judgment, then even if we achieved at the end a meaningful end but it could not justify your means. Gandhi always emphasized on the view that we must not leave the path of truth which is based upon our moral judgments and this would tend us towards a happy society.

3.4.4 CRITICISM OF GANDHIAN IDEA OF JUSTICE

Gandhian idea of Ahimsa and satyagrah sound good because we may assum that violence is something similar evil and evil must avoided. However, in practical working of legal tools when we see the world from the view point of its structure and transition in that, then we realize that non violence only seems good theoretically not practically.

3.4.4.1 THE IDEA OF NON-VIOLENCE IS NOT UNIVERSAL

Mahatma Gandhi tried to establish the principle of Ahimsa universally in the heart of the people but it could not take the practical shape. In country from where Gandhi placed for the first time his idea of satygrah, even in that country a person like Nelson Mandela was sent to prison for just cause and violence against him was also perpetuated.

The idea of satyagrah and non violence have been mostly discussing in a country like India, there we saw the brutal division of our country which took place during the life span of Gandhi and left the untold sorrow before us. There are number of instances which proved Gandhian idea as an idea which could be adorned as bouquet in flask at our home. I do not see the practical working of Gandhian philosophy and the philosophy which has no any practical glimpses, it will become a utopian concept of nonsense justice which sounds good but fail to play any role in the common life of human being.

3.4.4.2 TERRORISM GAVE A DEATH BLOW ON PHILOSOPHY OF AHIMSA

Today terrorism has become a global commodity which not only affects the peace and economy of one country rather it affects the cross border peace and trades. Terrorism starts with violence and also end with violence, in its due course we cannot see the idea of non violence, neither on the part of its perpetrator nor on the part of its repressors. Because when a person follow the terrorism and under that influence he attacks on the peace and economy of a country at the same time he rings the bell of violence and legal tools which try to repress it when catch him will hang him which also results into violence. Here, both a terrorist and administration of country are just in their point of view, a terrorist always says that his war is just and administration of country while hanging that terrorist always says that his act was unjust so we hang him.

In the debate and controversy between these two the idea of Ahimsa and satyagrah is being mitigated to largest extent. And the idea of terrorism gives a great death blow on the idea of non violence and a follower of satyagrah looks look helpless thinker against this atrocities against humanity.

The contribution of Gandhian philosophy and idea of Ahimsa and satyagrah could not be avoided at all. However, for its proper implementation a man must improve his own moral judgment and thinking towards others. Because Gandhi has always emphasized to change in the life of one individual being which has effect of changing the society at large, as he said we should not criticize anyone rather repress other's idea and thoughts because criticism comes from impure heart which makes man impure.

CHAPTER 4 CONCEPT OF MORALITY

Ethical, Moral, Unethical, Immoral In ordinary language, we frequently use the words ethical and moral (and unethical and immoral) interchangeably; that is, we speak of the ethical or moral person or act[96]. On the other hand, we speak of codes of ethics, but only infrequently do we mention codes of morality. Some reserve the terms moral and immoral only for the realm of sexuality and use the words ethical and unethical when discussing how the business and professional communities should behave toward their members or toward the public. More commonly, however, we use none of these words as often as we use the terms good, bad, right, and wrong[97].

What do all of these words mean, and what are the relationships among them? Ethics comes from the Greek ethos, meaning character. Morality comes from the Latin moralis, meaning customs or manners. Ethics, then, seems to pertain to the individual character of a person or persons, whereas morality seems to point to the relationships between human beings. Nevertheless, in ordinary language, whether we call a person ethical or moral, or an act unethical or immoral, doesn't really make any significant difference[98]. In philosophy, however, the term ethics is also used to refer to a specific area of study: the area of morality, which concentrates on human conduct and human values. When we speak of people as being moral or ethical, we usually mean that they are good people, and when we speak of them as being immoral or unethical, we mean that they are bad people. When we refer to certain human actions as being moral, ethical, immoral, and unethical, we mean that they are right or wrong. The simplicity of these definitions, however, ends here, for how do we define a right or wrong action or a good or bad person? What are the human standards by which such decisions can be made? These are the more difficult questions that make up the greater part of the study of morality, and they will be discussed in more detail in later chapters. The important thing to remember here is that moral, ethical, immoral, and unethical essentially mean good, right, bad, and wrong, often depending upon whether one is referring to people themselves or to their actions[99].

4.1 CHARACTERISTICS OF GOOD, BAD, RIGHT, WRONG, HAPPINESS, OR PLEASURE

96 file:///C:/Users/Admin/Downloads/article%20on%20Morality.pdf

[97] *Id.*
[98] *Id.*
[99] *Id.*

It seems to be an empirical fact that whatever human beings consider to be good involves happiness and pleasure in some way, and whatever they consider to be bad involves unhappiness and pain in some way. This view of what is good has traditionally been called hedonism. As long as the widest range of interpretation is given to these words (from simple sensual pleasures to intellectual or spiritual pleasures and from sensual pain to deep emotional unhappiness), it is difficult to deny that whatever is good involves at least some pleasure or happiness, and whatever is bad involves some pain or unhappiness. One element involved in the achievement of happiness is the necessity of taking the long-range rather than the short-range view. People may undergo some pain or unhappiness in order to attain some pleasure or happiness in the long run. For example, we will put up with the pain of having our teeth drilled in order to keep our teeth and gums healthy so that we may enjoy eating and the general good health that results from having teeth that are well maintained[100].

Similarly, people may do very difficult and even painful work for two days in order to earn money that will bring them pleasure and happiness for a week or two. Furthermore, the term good should be defined in the context of human experience and human relationships rather than in an abstract sense only. For example, knowledge and power in themselves are not good unless a human being derives some satisfaction from them or unless they contribute in some way to moral and meaningful human relationships[101].
They are otherwise non-moral. What about actions that will bring a person some good but will cause pain to another, such as those acts of a sadist who gains pleasure from violently mistreating another human being? Our original statement was that everything that is good will bring some person satisfaction, pleasure, or happiness of some kind, but this statement does not necessarily work in the reverse—that everything that brings someone satisfaction is necessarily good. There certainly are malicious pleasures.[102]

4.2 APPROACHES TO THE STUDY OF MORALITY

There are two basic approaches to study the morality first is scientific or descriptive and second is philosophical approach.
The scientific approach to study the morality is used in the social sciences and it deals with human behavior and conduct in the society. It is to some extent an empirical approach where social scientists take the data from the social behavior and then drawn certain conclusions. For example in many social research social scientists have reached

[100] *Id.*
[101] *Id.*
[102] *Id.*

to the conclusion the human beings generally inclined towards their self interests. Social scientists also describe how a man acts in many situations and through that we say the moral relation among the human beings in the society[103].
The second approach to study the morality is Philosophical approach which consists of two parts.

4.2.1 NORMATIVE OR PRESCRIPTIVE ETHICS

The first part of the philosophical approach is dealt with norms or standards and prescription. Believers of this approach often say that we do not have any description of human conducts rather we may prescribe. This approach basically rejects the descriptive idea for moral conduct and behavior of human being rather it places an idea of settled standard for human beings in the society with their fellow beings which could not be ignored and rejected. Moral conduct and behavior could be fixes a priori and insight of human being enables a man to understand the nature of the other living creatures and makes them able to be a rationale being in the society, these ideas have been developed by the normative or prescriptive approach to understand the morality.
Another important aspect of normative approach is that it covers the area of making of moral value judgments rather than just presentation or description of facts or data.

4.2.2 METAETHICS OR ANALUTIC, ETHICS

The second part of the philosophical approach to the study of ethics is called metaethics or, sometimes, analytic ethics. Rather than being descriptive or prescriptive, this approach is analytic in two ways. First, metaethicists analyze ethical language (e.g., what we mean when we use the word good). Second, they analyze the rational foundations of ethical systems, or the logic and reasoning of various ethicists[104].
Metaeticists do not prescribe anything nor do they deal directly with normative systems. Instead they go beyond (a key meaning of the Greek prefix meta-), concerning themselves only indirectly with normative ethical systems by concentrating on reasoning, logical structures, and language rather than on content. It should be noted here that metaethics[105], although always used by all ethicists to some extent, has become the sole interest of many modern ethical philosophers.
This may be due in part to the increasing difficulty of formulating a system of ethics applicable to all or even most human beings. Our world, our cultures, and our lives have

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[103] *Id.*
[104] *Id.*
[105] *Id.*

become more and more complicated and pluralistic, and finding an ethical system that will undergird the actions of all humans is a difficult if not impossible task. Therefore, these philosophers feel that they might as well do what other specialists have done and concentrate on language and logic rather than attempt to arrive at ethical systems that will help human beings live together more meaningfully and ethically.

4.3 HART AND FULLER DEBATE ON LAW AND MORALITY

Prof HLA Hart was a legal positivist and a critical moral philosopher. As a legal positivist, he states that it is not necessary that laws have to necessarily satisfy certain demands of morality. While acknowledging the close relationship that exists between law and morality, he does not believe them to be inter-dependant on each other. He states that the existence of law cannot be judged by its merits or demerits[106]. A law happens to exist, irrespective of our likes or dislikes. Whether the law confirms to a set of minimum moral standards is not a pre-requisite for existence of a legal system.

It is not essential that a legal system must exhibit some conformity with morality. Laws simply do not cease to exist on the ground of moral criticisms. Unlike the other legal positivists, Hart does not deny that the development of law has been profoundly influenced by morality[107]. Hart acknowledges that law and morals are bound to intersect at some point. Therefore, it becomes necessary to distinguish between what law is and what law ought to be. According to Hart, legal interpreters should display the truthfulness or veracity about law, by concentrating on what it says rather than focusing on the aspect on what one wishes it to be said.

4.3.1 PROFESSOR FULLER'S VIEW ON LAW AND MORALITY

Professor Fuller defines law as a particular way of achieving social order by guiding human behavior according to rules. It is the enterprise of subjecting human conduct to the governance of rules. According to Fuller, our legal procedures are built out of norms of justice, which have a moral aspect. The procedures which are embodied in a legal system are morally important in determining whether a set of rules count as a legal system. He believes that for a law to be called a law in true sense, it must pass a moral

[106] Sonali Banerjee, *The Relevance of the Hart & Fuller relating to law and morality-A critical Analysis*, 4 INTERNATIONAL JOURNAL OF LAW AND LEGAL JURISPRUDENCE STUDIES.
[107] *Id.*

functional test. If a rule or a set of rules fails to conform to this function, it does not count as law. While explaining the concept of morality, Fuller categorizes the term morality into two different set of components. One set comprises of morality of aspiration and morality of duty[108].

Morality of aspiration connotes a desired norm of human conduct which would seek to promote his best interest. Morality of duty describes the standards which are followed by human beings at given time and place, so as to ensure smooth functioning of the society. The other set of moralities consist of what Fuller calls as the external morality of law and internal morality of law. Internal morality of law is concerned with the procedure involved in making law. Internal morality of law can be said to be a morality of aspiration rather a morality of duty. And, external morality of law denotes the substantive rules of law which are applied in decision making[109].

On the one hand Hart as a positivist has placed his idea with a view to defend the acts of legislators irrespective of their moral compliance. On the other hand a great contemporary natural law philosopher John Fuller has attack the idea of strict separation of law from the morality. Hart has once accepted that law and morality at some point intersect to each other which is a very different argument in comparison to classical positivists who never saw the interrelation between law and morality.

This worldwide debate has become never ending debate in the world; however this research may suggest idea of reconciliation of the debating arguments from the side of both philosophers[110]. I may say the idea of Hart that law and morality meet at some point some way seems more convincing than the any positivist and I would like to build up my suggestions from that point.

The experiences of human race have been accepted that we cannot think about a society in the absence of moral principles eg., Human race has suffered from two world wars and massacre uncountable number of human being which have given untold sorrow to human community. Hence, morality cannot be discarded while framing and implementing any legislation but at the same time codification of law can also not be condemned. Hence, we somehow try to arrange such principles as our law which would be law in their letters but moral in their spirit and application.

We should discuss and also set minimum contents of morality while arranging legal principles and establishing legal institutions. If certain legal principles do not pay homage to moral and social requirements, then the society in which these legal principles are being applied will over a period of time be collapsed and human race would

[108] *Id.*
[109] *Id.*
[110] *Id.*

again suffer from the civil war which could not be the objective of any working legal institution in the new world.

CHAPTER : 5 JUSTICE AND MORALITY: THE SAME OR DIFFERENT

CONSTRUCT

The question before us is whether justice is the part of morality or something different to morality. General understanding of justice makes it part of the morality or sometimes people also use the term justice interchangeably with morality.

If someone hits any person, then it is not only condemned under any existing law and punished at the same time. It is condemned because it hurts and gives pain to the person to whom a person hits. The term morality has always been construed as a wider Connotation than the term justice, morality might refer to personal ethical standard of one individual in a particular society which might be deferred from the other individuals of that society[111]. Justice, however should be equal for all the men living in a particular society because justice is the end result of any given legal system[112].

Hence, the term justice should not be confused with term morality or any moral standard in the society but it is not an easy task to distinguish the term justice from the term morality because these both terms are mingled in a particular legal system. Many thinkers have made their efforts to distinguish these two terms but at the same time few philosophers have taken their stand on the side mixing these two terms together[113].

This could be understood through the theories of moral development, some of them say that the term morality and justice are one and the same narratives and some of them say that no, the term morality is something wider than the term justice and justice is one of the several aspects of the morality.

5.1 CLASSICAL THEORY OF MORAL DEVELOPMENT

Justice and morality have been interpreted interchangeably by few philosophers like For Piaget and Kohlberg, morality and justice were viewed as essentially the same thing[114]. Justice has had a long and deep connection to theory and research on moral development, beginning with the philosophy of Jean Piaget whose philosophy of justice and morality was basically formed and developed on the basis of children behavior. He observed that games of the children are dominated by showing the concerns for fairness.

[111] Linda J. Skitka, ET AL.,*Morality and Justice*, SOCIAL JUSTICE THEORY AND RESEARCH (2016).
[112] *Id.*
[113] *Id.*
[114] *Id.*

In early years, children are showing their concerned more about following the rules, but with the time they also understand that rules are arbitrary as they develop. For them finding ways to coordinate play to facilitate group functions becomes more important than the rules themselves. Piaget has developed new and revolutionary approach for moral principles which earlier philosophers had never thought of. He attempted to find morality under the growing behavior of the children and he also tried to define moral norms from the view point of changing age of human being[115].

He emphasized that with the development of human age and behavior their perspective for society also changed which has tendency to develop new moral principles. Also with the development human being accept it that what they should feel to be bound and what not which basically come from their inner consciousness. He has nonetheless made good attempt to describe the development of moral principles, however In my opinion he has mistaken to understand the notion of moral development it its real sense[116]. What I would like to state here is, The development of moral principles in the life of each human being takes place differently. This philosophy of moral development could not be taken as a specific and certain because the development of morality in human life is not only affected due to human age but also with the societal norms and the societal demands.

For example, A man who has grown up in a society where each and every people are saint, then the development of moral principles in that man will take place smoothly and be developed in such a way that could be permanent and sustainable in him and wherever he goes these moral principles will also represent his society with him. I can take another example of A man who was born and grown in society which is based upon dacoits' ideology, then in that society the moral development in that man would take place scarcely and sometimes it will never take place at all.
Piaget, therefore reached to the conclusion that moral development as the result of interpersonal interactions through which people find solutions all will accept as fair[117].

Kohlberg embraced and adopted the philosophy of Piaget which states that the moral development is rooted in Justice, It is not different from the term justice. For development of moral principle, Kohlberg took few stages of human life[118]. He said at the 1 and 2 stages of life human being generally do little more than to seek avoid punishment and obtain reward. Their conceptualization of justice mainly defined by self- interest.

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[115] *Id.*
[116] *Id.*
[117] *Id.*

[118] *Id.*

At stages 3 and 4, people begin to consider others' expectations of their behavior and implications of their behavior for the society as a whole. They show concern to the feelings of the others in the society and show their willingness to contribute to the group, social institutions[119]. At Stage 5, people define justice in terms of upholding people's basic rights, values, and the legal contracts of society. People at this stage understand social life is a social contract to abide by the laws for the good of all and to protect the rights of the individual and the group[120].

Finally, at Stage 6, people believe that laws or social agreements are valid only if they are based on universal principles, and their justice judgments are motivated by concerns about self-condemnation rather than social approbation. In short, people become increasingly able to take into account the perspectives of others as they progress through the stages, and the source of moral motivation shifts from outside (i.e., heteronomy) to inside the individual (i.e., autonomy). Although the Kohlberg's approach of development of morality was enormously influential, it nonetheless has host of problems.

The main criticism of his approach is that he has tried to give universal shape to the term morality which is not possible. Further his philosophy of moral development has been criticized for championing a western world view and being culturally insensitive.

5.2 CONTEMPORARY THEORIES OF MORALITY

More contemporary theories of moral development, however, have de- emphasized the links between morality and justice operations. Contemporary theories of morality differ from theories of justice in the kinds of connections they make between morality and justice. Moral foundations and moral motives theories, for example, posit that justice is merely one aspect among many that define the moral domain[121]. Alternatively, recent theories of justice maintain that morality is one concern that underlies why people care about justice.

The contemporary theories of morality have their origins in philosophy of Kohlberg which dealt morality from the perspective of behavior of children. However, the contemporary

[119] *Id.*

[120] *Id.*

[121] *Id.*

theories have not been inclined towards justice while dealing the morality as we saw in the philosophy of Kohlberg. The theories have also dropped the controversial aspects of the Kohlberg's philosophy and have tried to establish that justice and morality are different to each other not the same construct as we went through in classical theories of moral development[122].

The relation between justice and morality remains, but the emphasis on justice is not as strong as they were in classical theories of moral development.

There are some theories which focus on the development of morals principles and also establish relation between justice and morality, these theories as follow-

5.2.1 MORAL SCHEMA THEORY

This theory has recognized the theory of Kohlberg as cognitive schema. It emphasizes that people use three kinds of schemas for making any social judgments: personal interest, norm maintenance and post conventional[123]. The personal interest schema takes place in childhood, the norm maintenance schema develops during adolescence, and the post conventional schema develops in late adolescence and adulthood. Once these schemas have developed, people can use any of the schemas to guide their actions and make any moral and social judgment[124].

When people apply personal interests schema, then they tend to focus their own self interests in any given situation and justify their behavior in promoting their personal interests. The norm maintenance schema focuses on the interdependence of the group's members. Although this theory has made an attempt to establish relation between justice and morality, however this theory has failed to take social reaction against the development of human behavior. Because only growing age of human being is not responsible for the development of moral feelings in his life but societal norms and reaction against the behavior of a man is also play a pivotal role in the development of moral notions in the life of a man[125].

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[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *id.*

It also tends towards the group cooperation. It has a belief that living up to these norms and standards will pay off the long run, and it has a strong duty orientation, whereby one must obey and respect the rules which have been established by the authorities. Finally, the post conventional schema has based on the idea that the norms, rules, laws, codes, regulations and contracts facilitate cooperation[126]. However, people also recognize that these standards are relatively arbitrary, and there are a variety of social arrangements that can achieve the same ends. This schema leads people more toward an orientation that duties and rights follow from the greater moral purpose behind conventions, not from the conventions themselves. Post conventional thinking therefore focuses people on ideals, conceptions of the ultimate moral good or imperative.

5.2.2 Domain theory

Domain theory came into vogue as an alternative to Kohlberg's philosophy of moral development. It emphasizes on the point that even young children, differentiate between actions that harm innocent people and those that break rules but does not harm others. This theory viewed that even if few rules are transgressed but it does not harm any individual. Domain theory defines morality as conceptions of rights, fairness, and human welfare that depend on inherent features of actions (Turiel, 1983)[127]. For example, punching a stranger in the face for no reason is wrong because it hurts someone, not because it violates a law, social rule, or custom. This theory is in contrast with convention which create and maintain order in the group, it also emphasizes that such convention is arbitrary in nature[128].
This theory has done commendable job while focusing on moral principles only, however while focusing on morality it casted its principles away from the existing legal rules. As it states that even though some of our acts do transgress the existing laws but it does not harm anyone, but what I would like to say here is, only by transgressing the existing laws one may harm the sentiments of public at large, hence this theory has failed to look into this issue.

Conventions are arbitrary in the sense that they depend on group norms and practices rather than intrinsic features of the actions they govern. For example, greeting someone with a handshake or by showing them the back of your hand with just your middle finger extended is only meaningful in a particular society that has established rules about those

[126] *Id.*
[127] *Id.*
[128] Robert Folger, *What is the Relationship Between Justice and Morality?,* LAWRENCE ERLBAUM ASSOCIATES (2005).

actions. Other societies have established different practices for greetings that are equivalent in terms of how they regulate interpersonal interactions (e.g., kisses on the cheek, flicking your hand under your chin); nothing about these actions in-and-of-themselves is inherently right or wrong[129].

In sum, morals and conventions both establish permissibility or impermissibility and create social order, but conventions depend on group context whereas morals are viewed as more universal. In domain theory, as in formalist ethics, morals (a) are not based on established rules (i.e., rule contingency), (b) prohibit rules that would sanction undesirable actions (i.e., rule alterability), and (c) generalize to members of other groups and cultures[130].

5.2.3 MORAL FOUNDATION THEORY

The moral foundation theory emphasizes that the term morality and justice are different to each other which is in contrast with the classical theories of moral development. However, the philosophers of this theory have also admitted that sometimes the morality and justice seem to be overlapping to each other. It claims that people's conception of justice are often grounded more on conventional beliefs than moral imperatives. Consistent with this assertion, people tend to acknowledge and accept the idea that determinants of fairness can and should vary across situations, but they experience their moral beliefs and convictions as universally generalizable and objective truths[131].

The contract or conventions under the society would often determine the level and criterion for justice. However, for determination of morals principles neither any contract nor any convention is required because these principles have their applications irrespective of any convention or contract. People do not generally accept that their conceptions of morality are or should be contextually contingent or situationally variable, and oppose the very idea that morality could be relative. In their opinions, there could not be any relativism in case of morality in contrast with justice which depends upon the conventions of the people, hence it might be different for the different kinds of people who have different level of conventions in dealing with their laws and norm[132].

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[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*

Even philosophers who reject the idea of moral objectivism nonetheless accept that people's commitment to the idea that there is objective moral truth which could not be changed due to changing places or time. In summary, this theory emphasized on the idea that justice and morality is the altogether different construct. However, it has been accepted that sometimes justice and morality are overlapping to each other[133]. Perceptions of justice are typically more negotiable and flexible than moral beliefs. Justice judgments also are at least as likely to be driven by non-moral as moral concerns. That is, justice judgments often are made using what referred to as personal interest or norm maintenance schemas, or what labeled as the intuitive economist or politician mindsets. Justice only becomes moralized when it is based on post-conventional beliefs about fundamental questions of right and wrong, which unlike normative conventions, are nonnegotiable, authority independent, and autonomous[134].

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[133] *Id.*

[134] *Ibid.*

CHAPTER: 6 JUSTICE AND MORALITY UNDER INDIAN CONSTITUTION AND JUDICIAL ACTIVISM

This chapter is discussing the implementation of existing provisions under Indian Constitution and their judicial interpretation which fundamentally aim to promote justice and morality in the society. The law of the land cannot be understood without justice and morality, because it has been made and enacted by our constitution makers only with a view to establish a just legal order. If it fails to establish a just society, then it seems like a container full up with poison not with milk. Hence, the Constitutional provisions and their interpretation by the Judiciary must aim to promote justice and protect the social values, then only we may say that we are living in the social regime which is just in its construct and fair in its functioning.

Law only provides a structure in the society which is known as a legal structure and when this law becomes fair and reasonable for each individual, then we look this legal order as a just legal order. As a container may contain water, milk or poison etc., but when it contains water or milk, then it seems worthwhile for the individuals who are consuming the substance of that container otherwise with poison it becomes dangerous for the human being who are consuming the substance of that container. In the same way if law

is not just, then it becomes dangerous for the human being upon whom it is being applied.

6.1 JUSTICE AND MORALITY UNDER INDIAN CONSTITUTION

In a democratic order the concept justice and morality assume myriad dimensions and implies several consequences to the dignity and freedom of the individuals. Constitutional morality means adherence to the core principles of the Constitutional democracy. In Dr. Ambedkar's perspective, constitutional morality would mean an effective coordination between conflicting interests of different people and the administrative cooperation to resolve the amicably without any confrontation amongst the various groups working for the realization of their ends at any cost[135].

According to Ambedkar there are conflicting interests in the society and administration should reconcile these interests with minimum friction, then Constitutional morality will be protected and promoted[136].

The preamble of Indian Constitution enshrines the notion of justice and it deals with justice of social, political and economics. And with preamble other part of the Constitution also enshrine the basic notion of individual and social justice eg., part 3 of Indian Constitution enshrines the fundamental rights of the individuals which are basic or minimum requirement of human subsistence, under part 4 it enshrines the idea of state welfare state where the duties have been imposed upon the states to establish a welfare society[137]. The Indian Constitution guarantees justice to all, All Indian citizens are guaranteed equal right to life and personal liberty. The rule of law envisages that all men are equal before law, have equal rights but unfortunately cannot enjoy the rights equally as enforcement of the rights has to be through courts and the judicial procedure especially the criminal system is very complex, costly and dilatory thereby putting the common man at a distance[138].

The Constitution of India enjoins the state to secure social, economic and political justice to all its citizens, making the constitutional mandate for speedy justice inescapable through article 14 it guarantees equality before the law and the equal protection of the laws and article 39A of the Constitution mandates the State to secure the operation of the legal system in such a way that it promotes justice on a basis of equal opportunity and ensures that the same is not denied to any citizen by reason of economic or other

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135. Minu Elizabeth Scaria, *Constitutional morality and judicial value*, LEGAL SERVICE.

[136] *Id.*

[137] *Constitution of India, Parts 3 & 4*

[138] *Supra note 135 at p. 105*

disabilities further equal opportunity must be afforded for access to justice as its not sufficient that the law treats all persons equally, irrespective of the prevalent inequalities but the law must function in such a way that all the people have access to justice in spite of economic disparities[139].

The expression Access to justice focuses on the following two basic purposes of the legal system: The system must provide access to all. It should lead to results which are fast, fair and economically viable.

The Supreme Court has on various events, in its judgments has made it clear that there can be no delay in trial, as that itself constitutes denial of justice. moreover directive principle of state policy directs the state to strive for reducing inequalities amongst groups of people in different areas under article 39A of the constitution of India now while interpreting this provision the supreme court held that, social justice includes legal justice' which means that the system of administration must provide a cheap and expeditious instrument for realization of justice[140].

The system of law which presently operates in India is largely based on English common law because of the long period of British colonial influence during the period of the British Raj. Much of contemporary Indian law shows substantial European and American influence and various legislations which were firstly introduced by the British are still in effect in their modified forms today. In India criminal law is enforced by the state, unlike the civil law which may be enforced by private parties.

It reflects the social ambitions and norms of the society and generally refers to body of rules that defines the conduct which is prohibited by the state because it is held to threaten, harm or otherwise endanger the safety and welfare of the public, and sets out the punishment to be imposed on those who breach the said law. Now substantive criminal law defines crime and provides for their punishments where as In contrast procedural describes the process through which the criminal laws are enforced For e.g. the law prohibiting murder is a substantive criminal law; the manner in which government enforces this substantive law—through the gathering of evidence and prosecution—is generally considered a procedural matter[141].

Laws are made to rule the men not the men are made to the rule the law, This sentence emphasized on the point that the law should not be applied arbitrarily, the legislators must pay homage to the doctrine like Constitutionalism and rule of law. Constitutionalism means a democratic set up where there is a limited government, the working of the

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[139] *Id.*
[140] *Id.*
[141] *Id.*

governmental organs are bound to comply with the reasonable restrictions and they are not allowed to be despotic. The governmental instrumentalities and agencies should not go beyond the doctrine of rule of law which provides equality among the people irrespective of their ranks and also cease the governmental actions from being arbitrary.

In Indian society where people are still not aware of their fundamental rights, the role of judiciary becomes paramount. Because in federal structure the independence and functioning of judiciary becomes very meaningful otherwise the governmental instrumentalities and agencies will exploit the public arbitrarily[142]. Our Indian judiciary has performed its role in protecting the rights of individuals and promoting the justice in the Constitutional frame work. However, we have also gone through the great tussle between legislature and judiciary but ultimately judiciary with a view to protect the Constitutional sanctity has developed the doctrine of basic structure and protects the numerous rights of the individuals from the arbitrary hands of the legislators[143].

6.2 CONUNDRUM BETWEEN SOCIAL AND CONSTITUTIONAL MORALITY AND INDIAN JUDICIARY

The custom and usage are the basic principles upon which a society evolve and set its norms by which members of that society feel themselves bound. Law in the words of Savigny, is the common consciousness of the people, he further said, law developed like language, it evolved with the passage of time and codification of the law could not replace the custom of the society which is based on their common consciousness[144].

This means the society within it develops some basic norms which become the moral and just for the people living in that society and which set social values for that society. However, when the law is being codified, it vehemently rejects the unreasonable laws which provide benefit to few and ignoring the rights of few. The intervention of law making body created some conflict between the existing customs which have become the moral and valuable principles for the society and the new codified laws which try to throughout the unreasonable customs which affecting the basic spirit of the law.

For example in Indian Constitution there are basic idea of equality, liberty, freedom for all irrespective of caste, creed, sex, place of birth and religion, however in the society there are few existing customs which prohibit the gender equality, social freedom for each

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[142] *Id.*
[143] *Id.*
[144] *Hermann Kantorowicz,* SAVIGNY AND THE HISTORICAL SCHOOL OF LAW, 53 (L. Q. Rev. 326 1937)

group. This way we come to see the ongoing conflict between social morality and Constitutional morality[145].

This chapter will critically analyze the numerous judgments of the Indian Supreme Court which have inclined towards protection and promotion of social values and justice.

For the first time in a case, before Indian Supreme Court the matter of reasonableness and justice came. There were three prominent arguments, were raised before the court, Firstly whether Indian supreme court is bound to follow the principle of natural justice while enforcing the rights of any individual with part third of Indian Constitution, secondly, whether the right to life and liberty could be curtailed by the administration without giving the arrestee knowledge of his grounds of arrest and other things, thirdly, whether Indian supreme court should follow the due process of law as it was followed in U.S. Court[146].

The Indian Supreme Court did not allow all these arguments and vehemently ignored the principle of natural justice which is the very fundamental in process of access of justice. However, after a long period of the journey of the Supreme Court, approx after 25 years Supreme Court of India took a different move and has held that, Right to life and personal liberty do not extent only to right to protection of body and limb rather it is something more than that. And Supreme Court also emphasized on the relation between Articles 14, 19 and 21 of Indian constitution and declared all these as a golden triangle and held that all these are exclusive to each other administration could not ignore the one while applying the other.

After the above said judgment of the Supreme Court, the numbers of judgments were delivered by the Indian Supreme Court which directly or indirectly provided justice to individuals and promote the morality in the society. There are following observations have been made by Indian Supreme Court-

Right to medical aid is part of right to life and personal liberty under Article 21 of the Indian Constitution[147].

Right to free legal aid is part of right to life and personal liberty under Article 21 of the Indian Constitution[148].

Right to speedier trail is part of right to life and personal liberty under Article 21 of the Indian Constitution[149].

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[145] *Id.*
[146] *Id.*
[147] Pt. Parmanand Katara vs Union Of India & Ors, 1989 AIR 2039.
[148] Madhav Hayawadanrao Hoskot vs State Of Maharashtra, 1978 AIR 1548.

Right not to hang publicly which affects the human dignity is part of right to life and personal liberty under Article 21 of the Indian Constitution[150]

Right to clean water is part of right to life and personal liberty under Article 21 of the Indian Constitution[151].

Right against handcuffing is part of right to life and personal liberty under Article 21 of the Indian Constitution[152].

Right to sleep is part of right to life and personal liberty under Article 21 of the Indian Constitution.

Right to be silent is also part of freedom of speech and expression under Article 19 of the Indian Constitution[153].

All these above said judgments are paying a great homage to the justice under Indian legal system and also creating a path through which access of justice becomes very smooth. These judgments are not doubt very appreciable to the largest extent because Supreme Court has declared numerous rights some of them were also not known to people at large scale.

However, Supreme Court has declared the numerous rights under its declaratory power but we know that the responsibility of the enforcement of all these declared rights is upon the instrumentalities and agencies of state. Could we really trust the instrumentalities and agencies of state for enforcement of all these justifiable rights?, our answer is no.

In the words of great philosopher Elizabeth Volgast Rights matter for those, who press for it for others it is only a caricature of justice''[154]. I mean by these words that there is lack of enforceability of the guidance of the Supreme Court's judgment which makes rights of the individual meaningless.

This research tries to place an idea that we must have legal enforcement agencies which will enforce the verdicts of Supreme Court and make the rights of the individuals

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[149] Hussainara Khatoon & Ors vs Home Secretary, State Of Bihar, 1979 AIR 1369.
[150] Deena Dayal vs Union of India & ors. Sc(1983) 1155
[151] Narmada Bachao Andolan vs Union Of India And Others, sc 2000
[152] Premnarayan vs State Of M.P. 1989 CriLJ 707

[153] Bijoe Emmanuel & Ors vs State Of Kerala & Ors.1987 AIR 748.

[154] Elizabeth volgast, *Equality and the Rights of Women, 93 The Philosophical Review* 93-97 (Jan.1984).

meaningful. There is difference between law and books and law in the society, if we have a great number of law which come through legislations and judgments have no any sense unless all those are being applied by our state.

6.2.1 CONUNDRUM OF CONSTITUTIONAL MORALITY AND SOCIAL MORALITY IN THE PATH OF JUSTICE

The custom and usage are the basic principles upon which a society evolve and set its norms by which members of that society feel themselves bound. Law in the words of Savigny, is the common consciousness of the people, he further said, law developed like language, it evolved with the passage of time and codification of the law could not replace the custom of the society which is based on their common consciousness. This means the society within it develops some basic norms which become the moral and just for the people living in that society and which set social values for that society. However, when the law is being codified, it vehemently rejects the unreasonable laws which provide benefit to few and ignoring the rights of few. The intervention of law making body created some conflict between the existing customs which have become the moral and valuable principles for the society and the new codified laws which try to throughout the unreasonable customs which affecting the basic spirit of the law[155].

For example in Indian Constitution there are basic idea of equality, liberty, freedom for all irrespective of caste, creed, sex, place of birth and religion, however in the society there are few existing customs which prohibit the gender equality, social freedom for each group. This way we come to see the ongoing conflict between social morality and Constitutional morality.

In 2009, the Delhi High Court, in *Naz Foundation v. NCT of Delhi*[156], invoked Babasaheb Ambedkar's delineation of constitutional morality in asserting the urgency of decriminalizing consensual sexual relations proscribed by Section 377 of the Indian Penal Code. The court cited a second provision as well: Article 15(2) which prohibits any form of horizontal discrimination drawing again from the experience of untouchability that obstructed the universal use of public places, restaurants, water sources, etc. We witnessed again same verdict of Supreme Court as a triumphal return of constitutional morality as a guiding principle for constitutional interpretation. A five-judge bench of the Supreme Court of India, in *Navtej Singh Johar v. Union of India*[157], deployed this

[155] *Id.*
[156] Naz Foundation vs Government Of NCT Of Delhi DL, 2009
[157] Navtej singh johar v. Union of India,wp no. 76/2016, sc.

framework to reaffirm the rights of LGBTQ and all gender non-conforming people to their dignity, life, liberty, and identity.

The genealogy of Ambedkar's signposting of constitutional morality may be traced to the strength of anti-caste resistance and the abolition of untouchability. It is from this context that constitutional wisdom was applied to analogous situations of oppressions based on sexuality. It is time to call the government to account through a recursive method that takes us to the original constitutional proscription of untouchability, armed with the wisdom of the Navtej Singh Johar case

The Five Judge Bench has declared Section 377 IPC unconstitutional, insofar as it criminalizes consensual sexual acts of adults in private. Chief Justice Dipak Misra said it is a unanimous verdict expressed through four separate but concurring judgments. Section 377 IPC is irrational, indefensible and arbitrary. The majoritarian views and popular morality cannot dictate constitutional rights. As per the Judgment of CJI and Justice Khanwilkar Section 377 is unconstitutional, to the extent it criminalizes consensual sexual acts between adults, whether homosexual or heterosexual. However, bestiality will continue as an offence[158].

The 2013 SC judgment in Suresh Kumar Koushal case[159] was overturned by the Constitution Bench. We Felt That Former CJI Dipak Misra Was Allocating Cases to Judges with Political Bias: Justice Kurian Joseph on Press Conference Majoritarian Morality Cannot Dictate Constitutional Morality The judgment of Chief Justice Dipak Misra and Justice Khanwilkar was emphatic in stating that constitutional rights cannot be dictated by majoritarian views and popular morality. Majoritarianism was held to be constitutionally untenable. Constitution is a dynamic document, having the primary objective of establishing a dynamic and inclusive society, said the judgment. The Chief's judgment further noted that it was time to bid adieu to prejudicial perceptions deeply ingrained in social mindset and to empower the LGBT community against discrimination[160].

The Supreme Court has again in it's another verdict has emphasized upon the same rational that majoritarian view cannot prevail over Constitutional morality.

Devotion Cannot Be Subjected To Gender Discrimination, SC Allows Women Entry in Sabarimala By 4:1 Majority[161]; The Supreme Court has delivered one of the most keenly awaited judgment in Sabarimala case by a 4:1 majority, the Court has permitted entry of

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158 *Id.*

159 Suresh Kumar Koushal & Anr vs Naz Foundation & Ors, Civil Appeal No. 10972 OF 2013

160 Id.

161 Indian young lawyers associations vs The State Of Kerala WRIT PETITION (CIVIL) NO. 373 OF 2006

women of all age groups to the Sabarimala temple, holding that devotion cannot be subjected to gender discrimination'. The lone woman in the bench, Justice Indu Malhotra, dissented. Chief Justice Dipak Misra, Justice R F Nariman, Justice A M Khanwilkar and Justice D Y Chandrachud constituted the majority. CJI Ranjan Gogoi and Justices SK Kaul and KM Joseph to Hear Fresh Petitions on Sabarimala on Nov 13 Women is not lesser or inferior to man. Patriarchy of religion cannot be permitted to trump over faith. Biological or physiological reasons cannot be accepted in freedom for faith Religion is basically way of life however certain practices create incongruities, the Chief Justice read out portions of the judgment written for himself and Justice A M Khanwilkar[162].

6.2.2 CRITICAL ANALYSIS OF THE VERDICTS OF SUPREME COURT

The above said two verdicts of the Supreme Court has settled the law in respect of Social and Constitutional morality, and now law is Constitutional morality will prevail over social morality. The Constitutional rights which guarantee individual, right to freedom of speech and expression, right life and personal liberty, right to equality before law should not be curtailed or taken way due to the unreasonable faith of majority in the society. These verdicts have also been given a blow on patriarchal mind set and have been placed the women as per the men in the society. The faith of majority would not discriminate women against the men and there will not be any kind of gender discrimination on name of faith or certain belief. The verdict has also allowed the Constitutional rights to the LGBTQ and now they have the same rights as other genders have.

These verdicts nonetheless are very appreciable because it tries to place all the individuals at one level irrespective of their caste, sex, race, religion, place of birth which was also the aim of our Constitution makers. However, these verdicts of Supreme Court may be criticized on two fundamental grounds. Firstly, these verdicts have to work in the society and society is still not prepare to recognize these rights. We have studied the sociological school of jurisprudence which emphasized that law has to work the society, law is living law which is based upon the common understanding of the individuals living in the society.

It also placed and idea of social solidarity of the people in the society, it means interdependence of the people in the society. In my words, these verdicts are not giving any importance to social solidarity or living law, one may say as in the society over period of time usage develop and takes the place of law in the same manner over period of time these verdicts would be practiced by the people and will take the place of law.

[162] Id.

However, the practices which become the usage, all those practices have social recognition but these verdicts which under hope of becoming the part of society are still waiting for social recognition. In brief, these verdicts have lack of enforcing spirit in the society which is the essential requirement for the functioning of any right of the individual. Secondly, these verdicts have created different class in aggravated form, I cannot deny from accepting the fact that we did not have class earlier to these verdicts but I m emphasizing on the point that these verdicts have increased the tension among all those class which has the larger negative impact among them in the day to day life in the society.

Because when one has guaranteed rights for which he or she has struggled a lot, will try to enjoy all those rights at their largest extent with freedom and without any restrictions and in my thinking this will not be acceptable by the other members of the similar society who have been opposing all these rights since the existence of the society. Hence, the instrumentalities and agencies of the state must try to help holders of all these rights in their enjoyment. Otherwise it would become the subject matter of academic discussion in the classrooms and will have theoretical implementation not the practical one.

CHAPTER: 7 CONCLUSION AND SUGGESTIONS

Doing a research on the justice, morality and law is not an easy task for any man because these are the very vague and debatable terms in their reading as well as in their implementations. For some people morality and justice are inherently part and parcel of the law and for some people law can also serve its purpose in absence of morality, for which it has been legislated. However, this research has placed ideas through which we can make a bridge between these conflicting notions of law, justice and morality. This research has also summarized the ideas and thoughts of other classical as well as modern philosophers who have flourished their philosophies to establish a just legal regime in the society.

7.1 CONCLUSION

This research at its conclusion with summary of all well known and acceptable theories of justice and morality and their implementation in framed legislations, is going to suggest few ideas which might be helpful in playing a pivotal role in implementation of justice and morality under the framed legislations.
The theory of utility which primarily focuses on the usefulness of any law may also play a pivotal role in law making as well as in implementation of law. The idea of utility when comes with principles of equality and liberty, then it faces some intricacies. And due to favor of majoritarian approach, the theory of utility in access of justice has been discarded and has little application in practical functioning of legal institutions.
John Rawls has tried to some extent to put liberty and equality in the same legal order, however he has influenced by individualist approach of American capitalist society and placed a lexical order in which he gave prime importance to liberty in the case of its confliction with equality.
Rawls in his theory of justice has inclined towards arranged rules and established legal institutions rather to practical implementations of those rules and working of such legal institutions. This ignorant of Rawlsian theory left many criticism which have been forwarded by Sen and somehow have been minimized Sen himself. Sen while criticizing the theory of justice propounded by Rawls has stated that we should be more focused on the removal of injustices from the society than to arrangement of rules and establishment of the legal institutions. He has come with very practical notion or idea of justice which sounds well and to some extent also provides help to government of a country in removing the social injustices.
Moving towards the thoughts of Karl Marx fair distribution of natural resources and economy is means to justice and also idea of Mahatma Gandhi that placed idea of nonviolence and satygrah as means to justice. This research has criticized the idea of Marx on the grounds that his idea neither has a proper theory nor has a proper direction or channel through which his ideas would be materialized. Nonetheless Marx has placed a revolutionary idea against capitalism but a revolution without a meaningful direction may become an idea which comes through a beast and inspired by numerous groups of same living beings. Further from his birth to till his death, he was found in criticizing the functioning of legal system and went at a very frustrating stage of his life from where he called law as an instrument of exploitation.

This kind of nonsense words could not be expected from a philosopher who really wants his society to be educated and be developed, because he must know that for the welfare of the society law will act as an instrument of improvement and betterment of the society not as an instrument of exploitation.

We could not assume the development of the society by abusing the arranged principles and well settled legal institutions because these would rather harm and create hindrance in the well functioning of the society. This research may recognize Marx as a frustrated leader of such a common mass, who blindly without looking into practical reality of the society crying and shouting for justice. This research has also placed an idea that Marxist' idea is very far from known reality of the world, hence his idea could not be materialized at its fullest extent.

Mahatma Gandhi tried to establish the principle of Ahimsa universally in the heart of the people but it could not take the practical shape. In country from where Gandhi placed for the first time his idea of satygrah, even in that country a person like Nelson Mandela was sent to prison for just cause and violence against him was also perpetuated. The idea of satyagrah and non violence have been mostly discussing in a country like India, there we saw the brutal division of our country which took place during the life span of Gandhi and left the untold sorrow before us. There are number of instances which proved Gandhian idea as an idea which could be adorned as bouquet in flask at our home. I do not see the practical working of Gandhian philosophy and the philosophy which has no any practical glimpses, it will become a utopian concept of nonsense justice which sounds good but fail to play any role in the common life of human being.

If we look into the debate which has placed two different thoughts, one of them looking morality as a part of justice and other is looking morality and justice as a different construct. Under that chapter, this research has reached on the conclusion that in modern legal regime both justice and morality are different constructs; however they intersect at some point in few exceptional circumstances.

7.2 SUGGESTIONS

Firstly, this research suggests an idea to establish a bridge between positivists' approach of law and morality and naturalists' approach of law and morality. This worldwide debate of Hart and Fuller has become never ending debate in the world; however this research

may suggest idea of reconciliation of the debating arguments from the side of both philosophers. The idea of Hart that law and morality meet at some point some way seems more convincing than the any positivist and I would like to build up my suggestions from that point.

The experiences of human race have been accepted that we cannot think about a society in the absence of moral principles eg., Human race has suffered from two world wars and massacre uncountable number of human being which have given untold sorrow to human community. Hence, morality cannot be discarded while framing and implementing any legislation but at the same time codification of law can also not be condemned.
Hence, we somehow try to arrange such principles as our law which would be law in their letters but moral in their spirit and application. We should discuss and also set minimum contents of morality while arranging legal principles and establishing legal institutions. If certain legal principles do not pay homage to moral and social requirements, then the society in which these legal principles are being applied will over a period of time be collapsed and human race would again suffer from the civil war which could not be the objective of any working legal institution in the new world.

Secondly, this research suggests for reconciliation of conflicting ideas of Rawls and Sen and has reached to the conclusion that we could not reject the role of legal institutions and certain arranged rules which have been rejected by Sen and placed by Rawls. What we can do is, we may establish legal institutions and may also arrange certain rules for regulation of the society and at the same time, we may through our arranged rules and well established legal institutions diagnosis the injustice existing in the society and may curb them.

Thirdly, this research suggests an idea of placing all these three terms utility, equality and liberty in the same flask which practically seems very difficult. Really it will be illusionary idea which tries to place all these three at the equal level with equal weight but this could be practically materialize with the help of certain arranged rules monitoring by well established legal institutions.
This research in the contrast with the approach of Rawls tries to put equality and liberty in the same legal order and it also suggests that equality should prevail whenever it comes under the confliction with liberty. Justification for my suggestion is, equality should be prime concerned under any justice delivery system due to which poverty can be curbed out and at the same time issues of vulnerable classes like women and children can also be properly addressed.

Fourthly, this research has come with new ideas for the judicial approach to the Constitutional provisions. It suggests that Judiciary while declaring any law during the

interpretations of any Constitutional provisions should also take a note of the enforceability of its declared laws. Many of time we see that a law which has been evolved by our Courts do not take the proper shape of law and it ultimately fails to get social recognition.

From the view point of sociological school of jurisprudence, the law must have social acceptance otherwise it would not be considered as a law at all. Hence, The suggestion of this research is on the enforceability aspect of the judicial declaration, it should be take into consideration by the executive bodies of our country on whom the obligation of implementation of law has been conferred.

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