The Ancient and Modern Thinking about Justice: An Appraisal of the Positive Paradigm and the Influence of International Law

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" Each member of society is thought to have an inviolability founded on justice . . . which even the welfare of every one else cannot override . . . Therefore in a just society . . . the rights secured by justice are not subject to political bargaining or to the calculus of social interests."

- John Rawls (A Theory of Justice, pp. 3, 24-25, & 513)

Abstract

Despite being endlessly discoursed from the ancient times, the concept of justice has constantly been appeared to be one of the most stimulating as well as penetratingly controversial ideas. Among others, at least three issues have been incessantly involved in the discourse about the concept of justice. First, the question—what is justice—has been enduringly deliberated. Nevertheless, the problem has not yet been sufficiently elucidated to the level of desirable scientific certainty. Therefore, the issue of justice still seems to be a fresh one. This paper has briefly reviewed nine different theories about justice with a view to explore an answer to the question: what is justice? Second, the concept of justice has often been fraught with normative evaluations; consequently, diverse explanations of justice have effortlessly been predisposed to the normative impetuses of the commentators. By briefly assessing why the normative explanations of the concept of justice have endured fallacious ramifications, this paper has therefore proposed a positivist explanation of justice to remedy the problems of conceptual disarrays. Third, the question about the concept of justice has been relentlessly contested against the prospects of good laws. The issue— what are good laws—has attended a profoundly analytical breadth when justice

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at the practical level is invariably imparted according to law. Against this background, this paper has also explored the composite contours of a good law both from the perspectives of domestic law and the growing demands for the harmonization of domestic laws with the international laws. Moreover, at the heart of the analysis of these three issues, this paper has unequivocally retained the concept of justice with the methodology of the positivity of law, i.e., law as justice.

1. Introduction

It is not an exaggeration to say that Socrates spent his whole life inquiring into the meaning of justice. Throughout his inquiry into the nature of justice, Socrates was genuinely motivated to resolve a problem that he considered far too important for academic trifling. For Socrates, justice was 'minding one's own business.'[1] One day before the execution of Socrates, his friends offered him help to escape from prison. There were people willing and ready to help Socrates to get out of prison, at no great risks or cost. But Socrates refused to escape from prison; instead he chose to accept the death. He refused to abandon the principles he lived for. He valued law higher than unlawful survival, which signifies the Platonic idea of justice. One of his most valued methodologies of knowledge founded on the *a priori* concept was centered for emulating social relationships based on the idea of the rule of law. Socrates was sure that the decision that imposed the death penalty on him was not a correct one; nevertheless, it was a legal decision and he firmly believed that his duty was not to defy the law and a legal decision. Otherwise, he had a firm belief that social relationships could not be organized by the idea of the rule of law.

At the end of the nineteenth century, the case of *Dudley & Stephens*[2] presented a grave issue of justice. Thomas Dudley, Edward Stephens, and Richard Parker, a young boy of seventeen years of age were on a lifeboat drifting on the ocean. They were finally rescued on the 24th day at the sea. For eleven days they subsisted on two small cans of turnips and a small turtle caught on the 4th day. For seven days they were without food and for five days without water. On the eighteenth day, Dudley proposed a lottery to decide who should be put to death in order to save the others. Finally, they rejected the idea of a lottery and decided to kill Parker, since they believed he was going to die of starvation soon. On the 20th

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1. *See* G. Stanley Whitby, *Justice* 52 ETHICS 399, 395-433 (1942).
2. (1884) 14 OBD 273 DC.

day they killed the boy, fed on his flesh, and drank his blood. Upon being rescued, they were prosecuted for murder. They had argued that the act of killing was compelled by necessity to save their own lives; otherwise, they would also die of starvation. One of the judges opined that the accused were not guilty of murder since the commission was done under a condition of inevitable necessity. But the majority of judges found the accused guilty of murder and passed the sentence of death. However, the Crown commuted their sentence to six months.

Against the background of the Socratic sacrifice and the Dudley case, this paper will broadly discuss the fundamental concept of justice by assessing the ideas of a few major justice thinkers, some key theories of justice, and some cardinal indicators of justice with a few practical examples from across the globe. The idea of justice, from its early history to the present day, has occupied an important place mirrored in the socio-economic and political structure at the domestic level, and friendship and cooperation at the international level. Conventionally, justice is often confined to explain the socio-economic and political dynamics at the domestic level, separated from its heightened significance in shaping international relations. In recent days, however, justice is gaining importance in designing and institutionalizing international rules that are profoundly important for managing international relations.

Historically, justice has regularly attracted the profound interests of politicians, economists, sociologists, and jurists among others. Despite its significant role in institutionalizing social institutions and designing the system of distribution, the question—what is justice—has always endured the problem of conceptual disarrays[3] and is still unfolding demands for conceptual clarities and interpretations. Until recently, the socialist and capitalist countries were presenting diametrically contrasting roadmaps on the core issues of justice: including equality, property rights, political rights, and human rights, among others. The division seems now been significantly narrowed down; nonetheless, to some extent it still exists. With the major transformation of this sharp division

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3. How conceptual disarrays are pandemic in academic discourses as well, philosopher G. E. Moore succinctly presents in his well-known book—Principia Ethica— (at page vii), he mentions, "It appears to me that in Ethics, as in all other philosophical studies, the difficulties and disagreements, of which its history is full, are mainly due to a very simple cause: namely to the attempt to answer questions, without first discovering precisely what question it is which you desire to answer. I do not know how far this source of error would be done away if philosophers would try to discover what question they were asking, before they set about to answer it; for the work of analysis and distinction is often very difficult: we may often fail to make the necessary discovery, even though we make a definite attempt to do so."

after the 1990s into at least some common grounds, the globe, especially of its poor countries, before institutionalizing peace and harmony have been precariously swept by the leaps and bounds of the ethnic perceptions of justice leading also to violent ethnic conflicts.

Somehow, the idea of justice has always been trapped by political ideology, religion, cultural intolerance, poverty and deprivation, gender discrimination, violations of human rights and inequality, among other social handicaps. For example, whether tax rates for the rich should be increased or decreased has become one of the hotly debated justice issues in the United States, especially during the Obama administration. How should the financial crisis be contained in Europe has become another overwhelming issue in Europe. The issue of the blind Chinese human rights activist Chen Guangcheng attracted global attention, when he escaped the house arrest and uploaded human rights abuses suffered by him and his family on the YouTube, resulting in attracting the diplomatic attention of the United States. These examples give us an idea that justice is an important issue for individual, society, state, and the international community, as well.

Once, a Danish legal philosopher, Alf Ross, observed that when justice is defined with ideology it leads to implacability and conflict, since on the one hand it incites the belief that one's demand is not merely the expression of a certain interest in conflict with opposing interests but that it possesses a higher, absolute validity; and on the other hand it precludes all rational arguments and the discussion of a settlement.[4] This observation certainly poses a question that how could incompatible normative obsessions be addressed in a coherent and harmonious way? Therefore, the problem—what is justice—seems afresh.

For convenience and to move our discussion forward, let us borrow the justice concept of Michael Sandal. According to Sandal, justice is the 'right thing to do.' This concept of Sandal invites a possible question that how do we know what is the right thing to do. When one is confronted with critically unavoidable options, being bound to choose one of them, and takes a decision, how does she/he know that the decision taken was the only right thing in fulfilling the aspirations of justice? How do we know, the action taken by the international community in Libya in 2011 was the right thing to do and an action expected, but not taken, by the international community in Syria to solve the Syrian crisis since 2011 is also the right thing to do? How do we know that the first Iraq war in 1989 was the right thing to do and the second Iraq war in 2003 was not the right thing to do?

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4. *See* Alf Ross, On Law and Justice 274 (London, Stevens & Sons Ltd. 1958).

How do we know that military actions by NATO forces in Kosovo in 1999 and by the USA in Afghanistan in 2001 are the right things to do? How do we know that Socrates accepting the death penalty, instead of leaving his country, was the right thing to do? How do we decide whether each ethnic community, or only a few major ethnic communities, should have legal rights for ethnic states in our modern democracy? How do we know that a poor person is dying of starvation in the shadow of the extravagant luxurious life of the rich is a right thing to do or not? How do we know whether abortion is a right thing to do or not? How do we know that same-sex marriage is a right thing to do or not?

Undoubtedly, all these and many more pertinent questions (perhaps controversial issues) related to social policy and welfare, in particular questions of inequality, poverty, injustice, discrimination, and so on should be clearly dealt by the concept of justice. These questions, simply and clearly give a message that justice is pervasive and all-encompassing, since it touches upon all social, political, cultural, and economic policies of an individual, society, state, and the international community. Therefore to discuss the specific issue of—what justice is—it would be profitable to briefly ruminate on some of the key theories of justice proposed from early history to our days.

2. Some Leading Justice Thinkers

Among many leading authorities, only a few leading justice thinkers (nine of them) are discussed here. The concept of justice of Buddha, Confucius, Plato, Aristotle, Bentham, Kant, John Rawls, Michael Sandal, and Amartya Sen are briefly reviewed here. One omission is clearly visible, i.e., the justice theories of Hans Kelsen and H. L. A. Hart, which are equally important to understand the concept of justice; though, they are not included in this review, except some useful references elsewhere in this paper.

2.1 Buddha (623-543 B.C.)

Gautam Buddha from Nepal is one of the earliest justice thinkers. Law and justice are clearly and closely interlinked in Buddha's concept of justice. Buddha's law is the law of justice, enunciated in the principles of fair reward and proper punishment. For Buddha, every good thought, word, and deed deserve fair reward and every evil one its proper punishment.[5] Buddha considers law as the

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5. *See* H. S. OLCOTT, THE LIFE OF BUDDHA AND ITS LESSONS 19, kindle 86 (India, The Osophilic Publishing House, 1912).

instrument, which grafts the system of reward and punishment with the idea of righteousness.[6] Buddha's reverence to law was extraordinary. He considered that the follower of law would possess true knowledge and serenity of mind.[7] *Dhammapada*, a collection of verses being one of the canonical books of Buddhism, claims that, "If an earnest person has roused himself, if he is not forgetful, if his deeds are pure, if he acts with consideration, if he restrains himself, and lives according to law, then his glory will increase."[8]

Buddha's concept of justice is not confined only to respecting the law, but it also justifies a revolutionary concept of disobedience or defying law,[9] if the law is evil.[10] Buddha clearly instructs to follow the law of virtue and not to follow the law of sin.[11] Buddha answers the question—what is right thing to do—in a logical way that the right thing to do is to follow law if the law is virtuous. The right thing to do is to defy law if the law is evil. This explanation seems not only logical, but also thought provoking. Nevertheless, these ideas of Buddha are not immune from critical appreciation. If the definition and choices of virtue and evil are prompted by individual perception, or ideological quagmire, perhaps this very normative orientation could push human relationships into a state of uncertainty, conflict, and chaos defeating the whole expectations of Buddhism, itself.

In short, it can be said that Buddhist idea of justice is significant in terms of deciding right things to do by deriving instructions from law. However, Buddha deeply connects the idea of law itself with the normative concepts of virtue, evil, and sin that are problematic in engendering positive standards. As a result, the idea of 'the right thing to do' could be influenced with the appetizing choices of normative standards. In short, Buddha's theory of justice is primarily a normative and not a positive in its epistemology.

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6. S*ee* Charles Eliot, Hinduism and Buddhism: an Historical Sketch Ch. X, EBook 582 (London, Routledge & Kegan Paul Ltd., Vol. 1, Reprint 1962/1921).

7. S*ee* F. Max Muller trans., The Dhammapada Ch. 1, verse 20 (EBook, The Project Gutenberg, 2008). Verse 34 provides that, "If a man's thoughts are unsteady, if he does not know the true law, if his peace of mind is troubled, his knowledge will never be perfect."

8. S*ee id.*, verse 24.

9. The idea of civil disobedience was systematically practiced by Mahatma Gandhi and Martin Luther King and philosophically explained by Ronald Dworkin, Buddha had clearly laid the foundation for disobedience. *See* Ronald Dworkin, A Matter of Principle 104-118 (Harvard University Press, 1985).

10. S*ee id.*, verse 167.

11. S*ee id.*, verses 168 & 169.

2.2 Confucius (551-479 B.C.)

The idea of virtue found in the philosophy of Buddha, is also commonly found in the philosophical traditions of Confucius, Socrates, and Plato, among others. Like Buddha, Confucius also saw both virtue and ethics as the standards of justice, which could transform individual and social life into peace, and harmony. Confucius saw justice in the form of a justified duty that would lead to the welfare of both individual and the state. Confucius connected the idea of justice with reason.[12] He maintained that, "He who entertains thoughts contrary to justice will act contrary to reason."[13] His idea of justice also reminds us of the Buddhist idea of justice, in which both law and justice are closely connected.[14] Justice was the standard to punish the evil.[15] Most importantly, justice was the standard of governance for Confucius.[16]

In the Confucian philosophy, the idea of justice was rooted in virtue like in the Buddhist philosophy, but unlike to the idea of justice as the individual virtue in Buddhist philosophy, for Confucius justice was the idea of governance to be firmly rooted in the virtue of a ruler. Confucius maintained that a government should honor five fair things and spurn four evil things. A person who governs should be kind, but not wasteful; should burden, but not embitter; can be covetous,

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12. The concept of 'reason' is one of the complex concepts. Michael Oakeshott in his book 'Rationalism in Politics and Other Essays' has brilliantly explored the complexities of reason. He raises some important questions: What is the generation of reason in the sovereignty? Whence springs this supreme confidence human reason thus interpreted? What is the provenance, the context of this intellectual character? And in what circumstances and with what effect did it come to invade European politics? (p. 17). Paul Carus succinctly argues that, "Is reason a faculty like sight enabling us to become aware of or know things, and, if so, what things? Or is it a power like intelligence that enables us to do or learn to do things, and, if so, what things? What is the relation between reason, rationality, reasonableness, reasons, and reasoning? Do we know *a priori* what is rational, what is irrational, or do we know it *a posteriori* by some kind of perception or observation, some inner or non-sensory sense, or can we know it in either way? Is reasoning the same as inferring, and inferring the same as deducing, or are there types of sound reasoning in which the conclusion does not follow logically that is, with logical necessity, from the premises? Does reason have the power to move us to action or is it wholly inert? Can reason tell us what ends to pursue or can it only tell us the appropriate means to ends determined in other ways?" in Kurt Baier, Paul Carus Lecture Series 18: The Rational and the Moral Order—Social Roots of Reason and Morality 23 (Chicago, Open Court, 1995).

13. *See* Robert K. Douglas, Confucianism and Taouism, Ebook 371 (London, Society for Promoting Christian Knowledge, 1879).

14. *See* Leonard A. Lyall trans., The Sayings of Confucius, EBook 110 (The Project Gutenberg, 2007).

15. *See id*., at 126.

16. *See id.,* at 171.

but not greedy; should be high-minded, but not proud; and should be stern, but not fierce. The four evils a ruler had to avoid were: cruelty, tyranny, careless orders, and discrepancy in rewarding.[17] Some jurists have explained these four vices as: tyranny, violence, oppression, and mechanical administration of law.[18] For Confucius, tyranny consists of punishing people without educating them. Violence consists in requiring people to obey law without letting them to know what the law is. Oppression consists in requiring people to abide by laws that are in disuse or where no law exists at all. Disconnection of law from justice is the condition of a mechanical administration of law.[19] On the whole, the justice system of Confucius was derived from the idea of practicing virtue and the avoidance of evil at the institutional or governance level.

The Confucian system of justice embodies reason as the important standard of a right thing to do. The Chinese word *zhengyi* is the counterpart of the English word justice. *Zheng* means setting things right and rectifying things, and *yi* means righteousness, truth, fitness, or the right principle. Thus, the term *zhengyi* connotes setting things right and setting righteousness to stand straight.[20] However, reason as the standard of a right thing to do is intrinsically associated with virtue, which ultimately leads to normative inferences. The Confucian idea of justice, thus, shares the same weaknesses, as the Buddhist idea of justice is fraught with the lack of the positive structure of law as the precise standard of justice.

2.3 Plato (429-347 B.C.)

The Platonic idea of justice is expressed through the faculty of his teacher, Socrates, who is Plato's interlocutor. In his Dialogues, Plato consistently speaks through his teacher Socrates, who takes the main character in almost all Platonic dialogues. Plato has specifically dealt with justice in one of his Dialogues called Republic. Book I and II of Republic especially elaborate the Platonic concept of justice.

At the end of Book I, Socrates remarks that, "And the result of the whole discussion has been that I know nothing at all. For I know not what justice is, and

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17. *See id.,* at 172.

18. *See* Sᴜʀʏᴀ Pʀᴀᴋᴀsʜ Sɪɴʜᴀ, Jᴜʀɪsᴘʀᴜᴅᴇɴᴄᴇ: Lᴇɢᴀʟ Pʜɪʟᴏsᴏᴘʜʏ 86 (St. Paul, West Publishing Co., 1993).

19. *See id.*

20. *See* Xunwu Chen, *Justice: The Neglected Argument and the Pregnant Vision*, 19 Asɪᴀɴ Pʜɪʟᴏsᴏᴘʜʏ 191, 189-198 (2009).

therefore I am not likely to know whether it is or is not a virtue, nor can I say whether the just man is happy or unhappy." This observation of Socrates springs from the long discussion between a numbers of high profile people attempting to define justice mostly from three broad perspectives. First, justice was discussed as an act of fulfilling a duty. The example taken was a paying-off a debt. Socrates exposes exceptions to this idea of justice. With the exception in place, the next concept of justice was discussed. Second, the discussion focused on distinguishing between justice and injustice or just and unjust. Among a number of examples discussed, one of the representative ideas was that being friendly, or just, to friend and being unjust to enemy was considered as the standard of justice. However, Socrates again discounted this idea of justice arguing that one should not be exempted from paying off the debt even to an enemy. Third, being dissatisfied with the discussion, philosopher Thrasymachus proposed a third idea of justice. His idea of justice was that whatever the forms of government might be—tyrannical, monarchical, or democratic—the interests of the ruler are ordered (commanded) in the form of law, which in the final analysis is justice. Socrates also discounted the third idea of justice proposed by Thrasymachus. A question arises, then, what Socrates means by justice.

The provisional agreement among the discussants, including Socrates, was that, 'justice was virtue and wisdom, and injustice vice and ignorance.'[21] This provisional idea of justice is comparable with the Buddhist and Confucius concepts of justice. More specifically, in Book II, Socrates explains justice both as an individual as well as the virtue of a state.[22] This two-prong analysis of justice again reminds us of the unity between the Buddhist and the Confucian concepts of justice. The Buddhist concept of justice focuses on individual virtue, whereas the Confucian concept of justice mainly focuses on virtue on the part of a ruler (state). Platonic justice combines both forms of virtues: individual and institutional. For Buddha, virtue was the sole factor that could transform human life into peace and harmony. For Confucius, virtue was the sole factor that could control the ruler from committing injustice and encourage the ruler for promoting justice. For Plato, virtue is good and advantageous; therefore, virtue is the source of well-being. Thus, Plato draws well-being as the standard of justice both at the individual and institutional contexts.[23]

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21. *See* Benjamin Jowett, tans., THE COMPLETE WORKS OF PLATO, location 22761 (Kindle, 2011).

22. *See id.*, location 23069.

23. *See id.*, location 23326.

The virtue of a state being reflexive of creating a system of well-being, including establishing a constitution where both individual and social demands could be attended by a process of supply. Engendered by the need for the institutionalization of demand and supply, a state, and the power and duty of a government also spring from the very basis of this necessity. Broadly explicated in harmony with well-being, individual virtue can be flourished by specialization of skill and knowledge in relation to the demand and supply mechanism.[24] The Platonic idea of justice, thus, stands as the synthesis of the analysis of major socio-economic and political concepts such as well-being, demand and supply,[25] trade,[26] comparative advantage, production specialization,[27] and constitutionalization of a state.[28]

There are at least two remarkable facets of Platonic justice. First, human needs demanding for a system of demand and supply in place are the foundational factors for creating a state, which should be institutionalized on the basis of a constitution (law). A constitution, in turn, can be a source of justice or injustice. It is because the constitution defines virtues, both individual and institutional, in a legitimate form. If laws legitimize unjust, discriminatory, or exploitative provisions, law may serve injustice. Therefore, Plato focuses on how 'virtues' in other words optimum and efficient standards could be legitimized through law.

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24. *See* i*d*., location 23067.

25. *See* i*d*., location 23088. Socrates explains that, "Then, I said, let us begin and create in idea a State; and yet the true creator is necessity, who is the mother of our invention. . . . Now the first and greatest of necessities is food, which is the condition of life and existence. . . . The second is dwelling, and the third clothing and the like. . . And now let us see how our city will be able to supply this great demand: . . . Then again, within the city, how will they exchange their productions? To secure such an exchange was, as you will remember, one of our principal objects when we formed them into a society and constituted a State."

26. *See* i*d*., location 23119. Socrates maintains that, ". . . to find a place where nothing need be imported is well-nigh impossible. . . . There must be another class of citizens who will bring the required supply from another city. . . But if the trader goes empty-handed, having nothing which they require who would supply his need, he will come back empty-handed. . . . And therefore what they produce at home must be not only enough for themselves, but such both in quantity and quality as to accommodate those from whom their wants are supplied."

27. *See* i*d*., location 23109. Socrates claims that, ". . . we must infer that all things are produced more plentifully and easily and of a better quality when one man does one thing which is natural to him and does it at the right time, and leaves other things."

28. *See* i*d*., location 23161. Socrates claims that, "Yes, I said, now I understand: the question which you would have me consider is, not only how a State, but how a luxurious State is created; and possibly there is no harm in this, for in such a State we shall be more likely to see how justice and injustice originate. In my opinion the true and healthy constitution of the State is the one which I have described."

This idea of Platonic justice has deeply influenced Bentham and Pareto, among others. Second, for Plato, justice is reflexive of the conditions of well-being in place. In fact, both of these Platonic ideas of justice have vastly influenced economists, social scientists, jurists, and philosophers in a myriad of ways.

2.4 Aristotle (384-322 B.C.)

Like Buddha, Confucius, Socrates, and Plato; the Aristotelian idea of justice also further thrives the idea of virtue as the basic standard of justice. In this sagacity, every virtue, as an attribute of character, is summed up in justice. As noted above, there are significant differences between Buddha, Confucius, and Plato. Besides a few similarities, there are notable divisions between the philosophies of Plato and Aristotle, in particular. The philosophical divisions between Plato (the teacher of Aristotle and a student of Socrates) and Aristotle (one of the most intelligent students of Plato) have divided the philosophical world, whose influence can still be found reflected afresh in the idea of justice, among others.

Aristotle's inquiry on justice begins with a question: what is the highest of all goods achievable by human actions? Despite various accounts, Aristotle infers that the answer to the question for all people should be 'happiness.'[29] As the highest achievable good, happiness can be perceived in several ways. Among them, Aristotle finds three interpretations of happiness: *pleasure, wisdom, and virtue*. Many people perceive happiness as pleasure, which Aristotle considers as animalistic instinct. Some people perceive happiness as honor, which Aristotle considers as the practical wisdom or political wisdom. Few people perceive happiness in virtue,[30] which Aristotle considers the highest form of human achievement. Nevertheless, all types of people choose happiness for self-satisfaction and never for the sake of something else. Pleasure, honor, and virtue

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29. *See* ARISTOTLE, NICOMACHEAN ETHICS, location 19714, in ARISTOTLE'S COLLECTION 29 BOOKS (W. D. Ross Transl. Kindle Edition, 2007). Aristotle mentions that, "Let us resume our inquiry and state, in view of the fact that all knowledge and every pursuit aims at some good, what it is that we say political science aims at and what is the highest of all goods achievable by action. Verbally, there is very general agreement; for both the general run of mean and people of superior refinement say that it is happiness, and identify living well and doing well with being happy; but with regard to what happiness is they differ; and the many do not give the same account as the wise."

30. *See id*., location 19731-19740. Aristotle observes that, "To judge from the lives that men lead, most men, and men of the most vulgar type, seem to identify the good, or happiness, with pleasure; which is the reason why they love the life of enjoyment. . . . Further, men seem to pursue honor in order that they may be assured of their goodness; at least it is by men of practical wisdom that they seek to be honored, and among those who know them, and on the ground of their virtue; clearly, then, according to them, at any rate, virtue is better."

are chosen for the sake of happiness, judging by means of them one should be happy. Contrarily, no one desires happiness only for the sake of pleasure, honor, or virtue, but for anything other than itself.[31] The question Aristotle asks: is happiness self-sufficient?[32] Aristotle argues that as the end of an action, where acts are pleasant to the lover of justice and in general virtuous acts to the lover of virtue, only virtuous acts are self-sufficient.[33]

In Book V of Nicomachen Ethics, Aristotle specifically dealing on justice asks a question that what kind of actions would champion justice. Aristotle infers, justice is a kind of character reflected in just acts and injustice is the opposite of just acts reflected in unjust deeds.[34] He further explains what are just and what are unjust acts. Aristotle powerfully argues that all lawful and fair acts are just; all unlawful and unjust acts are unfair.[35] In quintessence, Aristotle emphasizes that all lawful acts are what we mean by justice.[36] Further, Aristotle contends that just acts are divided into two categories: lawful and fair; likewise, unjust acts are also divided into two categories: unlawful and unfair.[37] This analysis of Aristotle is highly impressive, but fails to answer the question of whether in any modern state, is a person supposed to interact with others with both of these standards (lawful and fair) side by side? Are people free to choose a standard conceived fair by them instead of a lawful standard? If there is conflict between fair and lawful standards, what standards should the people and institutions choose? These basic

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31. *See* id., location 19803.

32. *See* id., location 19812. Aristotle observes that, ". . . self-sufficient we now define as that which when isolated makes life desirable and lacking in nothing; and such we think happiness to be; . . . Happiness, then, is something final and self-sufficient, and is the end of action."

33. *See* id., location 19856–9866.

34. *See* id., location 20944. Aristotle observes that, "We see that all men mean by justice that kind of state of character which makes people disposed to do what is just and makes them act justly and wish for what is just; and similarly by injustice that state which makes them act unjustly and wish for what is unjust."

35. *See* id., location 20952-20961. Aristotle mentions that, "Let us take a starting point, then, the various meanings of an unjust man. Both the lawless man and the grasping and unfair man are thought to be unjust, so that evidently both the law-abiding and the fair man will be just. The just, then, is the lawful and the fair, the unjust the unlawful and the unfair."

36. *See* id., location 20961. Aristotle mentions that, "Since the lawless man was seen to be unjust and the law-abiding man just, evidently all lawful acts are in a sense just acts; for the acts laid down by the legislative art are lawful, and each of these, we say, is just. Now the laws in their enactment on all subjects aim at the common advantage either of all or of the best or of those who hold power, or something of the sort; so that in one sense we call those acts just that tend to produce and preserve happiness and its components for the political society."

37. *See* id., location 20997.

questions discounted by Aristotle in analyzing the concept of justice have opened a historically unsettled debate on the nature of law, morality, and justice.

On the one hand, this very concept of Aristotelian justice presents a brilliant idea about justice and on the other hand, it also presents a complex conceptual disorientation. The confusion emanates from combining lawful and just acts within the framework of justice.[38] Should an act be lawful to be just? Or, should an act be just to be lawful? If the answers were positive, then the division between just and lawful or unjust and unlawful would be redundant. In other words, any act that is not justified by law cannot be supplied as a standard of human interactions. In this sense, the idea that law in itself is justice has been ignored under the Aristotelian framework of justice. As a result, normative undertakings have overwhelmed the Aristotelian discourse on justice.

The Aristotelian concept of justice as a means or an intermediate, and injustice as an extreme, is equally thought provoking as to the idea of virtue. For Aristotle, justice plays a commensurate role in the process of exchange and distribution. For instance, maintaining a state of equilibrium in the process of exchange is the name of fair distribution. In this state of equilibrium no one gets more or less disproportionate to the value of exchange. Injustice, on the other hand, is an excess or deficiency in the process of exchange. Injustice, by its very nature violates proportionality in the system of exchange.[39] This idea of injustice of Aristotle has inspired economists and policy makers to develop social policies either to end or at least contain injustices. One of the iconic figures in our time, Amartya Sen, whose idea of justice is discussed under subsection 2.9, argues that at least by strategic activities states can remove or contain the several causes of injustices deeply rooted or prevalent in societies. Thus, by addressing the conditions of injustices, Sen believes that justice can be promoted. In a grandiose way, Aristotle thoughtfully examined the conditions of justice and injustice by arguing to promote the conditions of justice and ending the conditions of injustices. By applying this Aristotelian project, one can be hopeful to achieve

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38. H. L. A. Hart brilliantly mentions that, "The terms most frequently used by lawyers in the praise or condemnation of law or its administration are the world 'just' and 'unjust' and very often they write as if the ideas of justice and morality were coextensive. . . . The distinctive features of justice and their special connection with law begin to emerge if it is observed that most of the criticisms made in terms of just and unjust could almost equally well be conveyed by the words 'fair' and 'unfair'. Fairness is plainly not coextensive with morality in general; reference to it are mainly relevant in two situations in social life." See H. L. A. Hart, The Concept of Law 157-158 (Oxford University Press, 3rd ed., 2012).

39. *See* i*d*.

better justice conditions in the social realm of practices.

2.5 Bentham (1748-1832)

Jeremy Bentham is one of the notable towering figures in making a lasting contribution in expanding the English ideas of justice across the globe. As a thinker (a jurist, a political philosopher, and an economist, among others) and a fervent reformer, Bentham critically analyzed the role of institutions and offered two guiding ideas for effective functioning of institutions (state, law, market, and society, among others). For Bentham, first, the goal of each institution should promote happiness. Second, happiness should be decided on the principle of utility. In short, known as utilitarianism, the idea of justice, Bentham explores is naturally grafted on the premise of analytical tradition.

Bentham's answer to the question 'what is a right thing to do' is clear: happiness and utility. Among others, *An Introduction to the Principles of Morals and Legislation*, 1789; *A Fragment of Government*, 1776; and *A Manual of Political Economy*, 1843 are considered the most popular contributions of Bentham. As discussed above, Buddha, Confucius, Plato, and Aristotle, all have placed virtue at the center of the analysis of human actions. Bentham, unlike them, took completely different standards to analyze human actions: pain and pleasure. He observes that, "Nature has placed mankind under the governance of two sovereign masters, pain and pleasure."[40] These two sovereign masters guide our actions both individually and institutionally.[41] Voluntarily, we engage in those activities that give us pleasure, and disengage in those activities that give us pain.[42] These two sovereign masters subject us all. The principle of utility recognizes this subjection and explains how to nurture happiness and reduce pain with the instruments of law and reason.[43]

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40. *See* Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 1781, location 221 (White Dog Publishing, Kindle edition, 2010). Bentham says, "They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it."

41. *Id.* Bentham states that, "I say of every action whatsoever, and therefore not only every action of a private individual, but of every measure of government."

42. *Id.* Bentham observes that, "By the principle of utility is meant that principle, which approves or disapproves of every action whatsoever, according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words to promote or to oppose that happiness."

43. *Id.* Bentham maintains that, "The principle of utility recognizes this subjection, and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and of law."

Utility as the property (standard) of happiness (benefit, advantage, pleasure, good, or any other sequel that adds happiness) prevents the happening of pain (mischief, evil, unhappiness, or any other sequels that are connected to pain). The conflict of interests or the conflict between happiness and pain among different stakeholders (an individual, a group or a community, and an institution or a state) demands how effectively the principle of utility could be deployed in the rigor of addressing or managing the conflict of interests. Bentham explains that the community is a fictitious body, composed of the individuals who are its members. The interest of the community is the sum of the interests of the members who compose it. Thus, Bentham claims, it is in vain to talk of the interest of the community, without understanding what is in the interest of the individual.[44] Bentham justifies any measure that augments the interest (happiness) of a community or a government if such measures do not diminish the happiness of an individual. Bentham, in fact, did not use the axiom 'the greatest happiness of the greatest number' in the *Principles of Morals and Legislation*, which he contributed after his book *On the Fragment of Government*, in which he had used the axiom. Moreover, the axiom has been widely misinterpreted to mean that Bentham ignores individual happiness or happiness of the minority for the sake of head-count majority. In fact, Bentham clearly puts a precondition to the axiom; i.e., it should conform law.[45] Therefore, the science of legislation occupies a center place in Bentham's idea of justice and utilitarianism.

In brief, Bentham's concept of justice signifies his idea of utility as it is legitimized in law. In other words, the Benthamite idea of justice conceives law as the factor of justice. Understandably, a corollary becomes obvious that justice might be defective if the law itself is substandard to the principle of utility. Thus, Bentham's ideas of law, justice, and utility are inseparable from each other. What is more, Bentham's project is best known for his two strategies: reforming laws and making of institutions (including law enforcement agencies) on the basis of the principle of utility, and promoting utility on the basis of law. Considering this proposition of the analytical concept of law, Bentham occupies the position of the founder of modern analytical jurisprudence (positivism).[46] However, most of the

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44. *Id.*, location 232-244.

45. *Id.*, location 244-257. Bentham claims that, "When an action, or in particular a measure of government, is supposed by a man to be conformable to the principle of utility, it may be convenient, for the purposes of discourse, to imagine a kind of law or dictate, called a law or dictate of utility: and to speak of the action in question, as being conformable to such law or dictate."

46. But Joseph Raj considers Austin to be the first analytical jurist. *See* JOSEPH RAJ, THE

post-Benthamite positivists have focused on the positivity of law by disconnecting Bentham's strategy of promoting utility on the basis of the science of legislation. Consequently, Bentham's idea of utilitarianism has somehow been misconstrued.

The Benthamite concept of law as justice is further found in Mill's contribution. Bentham's disciple, John Stuart Mill, further explains Bentham's concept of justice in considering that one can sacrifice his/her happiness for the sake of virtue, which is better than happiness.[47] This act of disjuncture of virtue from the Aristotelian highest form of happiness is strikingly noticeable in Mill's exposition. Mill examines justice as a human instinct, to be controlled and enlightened by a higher reason.[48] Mill inquires whether the instinct of justice is a *sui generis* or a derivative feeling? He deems that justice encompasses only a particular kind or branch of general utility.[49] As a derivative idea, justice is associated with what is just and what is unjust, reflected in a 'perfectly definite sense' of rights enshrined by law.[50] Though law itself will be made on the principle of utility.

However, legal rights might have several limitations or exceptions. The law itself might be a bad law. Opinions about the quality of law or justice might differ. Some may argue that, no matter how bad the laws are, they should not be disobeyed. Some may argue that a bad law should not be followed. If a law is disobeyed on the basis of personal judgment of its quality, it may lead to social anarchy. Thus, Mill argues that justice is meant to obey law and if the law is bad, there should be an endeavor for the alteration of the offending law so that human relationships are conducted purely on the basis of law and rights.[51] Justice, in its natural sense, implies a mode or manner of doing things, not on personal choices and preferences driven by moral judgment but in the manner prescribed by law. Thus, justice emanates from positive law.[52] Justice as associated with a legal claim

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CONCEPT OF A LEGAL SYSTEM 10 (Oxford University Press, 2nd ed., 1980).

47. *See* John Stuart Mill, Utilitarianism 36 (Ebook, Gutenberg, 2004/1863).

48. *Id*., at 93. Mill mentions that, "The feeling of justice might be a peculiar instinct, and might yet require, like our other instincts, to be controlled and enlightened by a higher reason. If we have intellectual instincts, leading us to judge in a particular way, as well as animal instincts that prompt us to act in a particular way, there is no necessity that the former should be more infallible in their sphere than the latter in theirs: . . . we have natural feelings of justice, and another to acknowledge them as an ultimate criterion of conduct.. ."

49. *Id*., at 95.

50. *Id*., at 97.

51. *Id*., at 97-99.

52. *Id*., at 104-105. Mill states that, ". . . the etymology of the word which corresponds to Jus,

forms the part of perfect rights distinguishing it from a moral claim, comparable with imperfect rights that are not enforceable.[53] Lawful command and sanctions are absent in moral claims, whereas both of these features are present in legal claims and thus in justice.[54]

2.6 Kant (1724-1804)

Immanuel Kant, a German philosopher was concerned on solving two problems: how to address the clash between reasoning and empiricism on the one hand; and on the other hand; how to manage the conflict between free individuality of citizens and the regulated organism of the state. These two problems investigated by Kant in the eighteenth century still resonate the underlying problems of many societies, especially of countries in transition to democracy. To address these conflicting traditions with the methodology of 'Categorical Imperative' was Kant's main preoccupation. He brought out seminal works, *The Critique of Pure Reason*, 1781 and *The Critique of Practical Reason*, 1788 to unite *a priori* reason (synthetic knowledge) and *a posteriori* experience (analytical knowledge).

Kant's idea of justice coupled with his notion of Categorical Imperative was firmly founded on *a priori* reasoning, considering this reasoning as the groundwork in the form of morality. Morality, being supposedly autonomous with its justification ever to be found on experience or empirical fact, but on *a priori* reasoning alone could be underlined in exploring the concept of justice.[55] Any act,

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points to an origin connected either with positive law, or with that which was in most cases the primitive form of law-authoritative custom. *Justum* is a form of *jussum*, that which has been ordered. Jus is of the same origin. *Dichanou* comes from *dichae*, of which the principal meaning, at least in the historical ages of Greece was a suit at law. Originally, indeed, it meant only the mode or manner of doing things, but it early came to mean the prescribed manner; that which the recognized authorities, patriarchal, judicial, or political, would enforce. *Recht*, from which came right and righteous, is synonymous with law . . . right did not originally mean law, but on the contrary law meant right. But however this may be, the fact that *recht* and *droit* became restricted in their meaning to positive law . . ."

53. *Id.*, at 110-111.

54. *Id.*, at 141. Mill observes that, "Justice remains the appropriate name for certain social utilities which are vastly more important, and therefore more absolute and imperative, than any others are as a class and which, therefore, ought to be, as well as naturally are, guarded by a sentiment not only different in degree, but also in kind; distinguished from the milder feeling which attaches to the mere idea of promoting human pleasure or convenience, at once by the more definite nature of its commands, and by the sterner character of its sanctions."

55. *See* Immanuel Kant, Fundamental Principles of the Metaphysics of Morals 59 (Gutenberg, EBook (2005). Kant observes that, "Now all imperatives command either hypothetically or categorically. The former represent the practical necessity of a possible action as means to something else that is willed (or at least which one might possibly will). The categorical

which is good as a means to something else, is a hypothetical imperative; whereas, any act that is self-sufficiently good in itself and conforms to reason is a categorical imperative.[56] Thus, for Kant, right is purely rational in its origin, although it can be applicable to experience, as well.[57] His system of justice subsists in the concept of the science of rights.[58] He divides the science of rights into two categories: practical and pure. The practical branch belongs to jurisprudence; a tool to apply positive law to cases occurred in experience. The empirical aspects of law and rights succumb to retreat from being designated with the philosophical and systematic principle of knowledge of law and rights. The pure science of rights or law provides the philosophical justification and reason derived from the principles of natural rights. It is from this pure science that the immutable principles of all positive legislation must be derived.[59]

In Kant's system of justice, rights are categorized into two broad domains: metaphysical or rational and empirical or practical.[60] In both contexts, rights retain moral representations either of having good qualities in them or being means to good qualities for an end or result. Empathically, reason alone can provide imperative character or command of law in the form of rights. Practically, as a means to an end, rights signify actions led by desire for pleasure or pain. In Bentham's system of justice, pleasure and pain are considered as the main casual factor for guiding human actions, including determining the content of law and justice. Unlike the utilitarian explanation of Bentham, Kant offers that in every case, pleasure and pain cannot be regarded as the causes. This is because the pleasure or pain connected with the object of desire does not always precede the activity of desire.[61]

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imperative would be that which represented an action as necessary of itself without reference to another end, i. e. as objectively necessary."

56. *Id*., at 60.

57. *See* Immanuel Kant, The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right 38 (Liberty Fund Inc., EBook, 2010).

58. *Id.,* at 76. Kant mentions that, "The science of rights has for its object the principles of all the laws, which it is possible to promulgate by external legislation. Where there is such a legislation, it becomes in actual application to it, a system of positive right and law; and he who is versed in the in the knowledge of this system is called a jurist . . ."

59. *Id.*

60. *Id.,* at 39.

61. *Id.,* at 40. Kant claims that, "The capacity of experiencing Pleasure or Pain on the occasion of a mental representation, is called 'Feeling,' because Pleasure and Pain contain only what is subjective in the relations of our mental activity. They do not involve any relation to an object that could possibly furnish a knowledge of our own mental state."

The autonomy of law or rights consists of moral, juridical, and ethical components.[62] When laws are deployed to be the standards (principles) of determining our actions then they are ethical in Kantian terms. A 'right thing to do' is thus finally governed by law. In this context, unlike many conventional explanations on the diametrically different positions between Kant and Bentham, both of them regard law as the source of justice. Nevertheless, there is a clear distinction between the Benthamite concept of justice and the Kantian concept of justice. For Bentham, laws are positive: man made or made by the parliament. For Kant, there are both positive and moral laws.[63] Laws connected with the hypothetical imperative are positive laws. Positive laws involve ethical component and such laws are derived by desire and are instrumental for an end. Moral laws are not instrumental as they are *a priori* or good in themselves. Thus, moral laws are the reflection of reason or the categorical imperative.

A looming large question is: how to address the conflict between positive and normative laws? For Bentham, morality is what the positive law dictates, whereas Kant offers the idea of the supremacy of moral laws (laws of reason) over positive laws.[64] What results could be derived if we apply both Benthamite and Kantian concepts of justice to the problems that we have mentioned above in Section 1 of this paper: the case of Dudley, the trial of Socrates, and the ethnic claim and right to self-determination. Dudley could claim that the reasoning of survival and existence prompted his action of killing. Perhaps, for Kant, the law of reasoning should prevail over positive law in dealing the case of Dudley, which could lead to

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62. *Id.,* at 45. Kant observes that, "The Laws of Freedom as Moral, Juridical, and Ethical. The Laws of Freedom, as distinguished from the Laws of Nature, are moral Laws. So far as they refer only to external actions and their lawfulness, they are called Juridical; but if they also require that, as Laws, they shall themselves be the determining Principles of our actions, they are ethical."

63. *Id.,* at 77. Kant mentions that, "It is quite easy to state what may be right in particular cases (*quid sit juris*), as being what the laws of a certain place and of a certain time say or may have said; but it is much more difficult to determine whether what they have enacted is right in itself, and to lay down a universal criterion by which right and wrong in general, and what is just and unjust, may be recognized. All this may remain entirely hidden even from the practical jurist until he abandon his empirical principles for a time, as search in the pure reason for the sources of such judgments, in order to lay a real foundation for actual positive legislation."

64. *Id.,* at 47. Kant claims that, "But it is otherwise with moral laws. These, in contradistinction to natural laws, are only valid as laws, in so far as they can be rationally established *a priori* and comprehended as necessary. In fact, conceptions and judgments regarding ourselves and our conduct have no moral significance, if they contain only what may be learned from experience; and when any one is, so to speak, misled into making a moral principle out of anything derived from this latter source, he is already in danger of falling into the coarsest and most fatal errors."

a condition that could take positive laws for granted. Similarly, for Kant, the Socratic trail and death sentence ordered under the guise of positive law should have contravened the law of reason; thus, Socrates had to escape from the jail in order to survive. The sensitive point here is that the prominence of the law of reason could be used as a method of avoiding or depreciating positive laws, which could simply lead to a state of chaos and unrest. Against this background, one may raise a question that, should unjust laws be faithfully obeyed? This question is discussed under subheading 3 of this paper.

2.7 John Rawls (1921-2002)

Perhaps, John Rawls is one of the most influential American philosophers of the 20th century.[65] He founded that most of the earlier philosophical explanations of justice had opened a wide array of discrepancies into the concept of justice, pushing the concept of justice towards an uncertain terrain. He wanted to avoid the uncertainty and foster a practical idea of justice congenial to the political notion of constitutional democracy. In quintessence, for Rawls fairness is justice or justice is fairness.[66]

"Justice as Fairness" is not only a popular phrase widely used across the globe in almost all social science disciplines under the influence of Rawls, but also represents a deep explication of the concept of justice. Despite being influenced by Kant, Rawls clearly departs from the Kantian conception of justice by claiming that 'justice as fairness' is not a metaphysical conception (a categorical imperative) but a political conception of a liberal democracy. As a metaphysical concept, the idea of justice always placed priority to the laws of reason (moral laws) over the positive laws. Rawls considers such an idea of moral laws would be detrimental to democracy; instead, he offers how laws, including a constitution, could incorporate

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65. On November 27, 2002 the Guardian wrote about Rawls, "A leading political philosopher in the tradition of Locke, Rousseau and Kant, he put individual rights ahead of the common good . . . Rawls never wrote about himself, and virtually never gave interviews . . . With the death of John Rawls, . . . the English-speaking world lost its leading political philosopher. An exceptionally modest and retiring man, with a bat-like horror of the limelight, he consistently refused the honors he was offered, and declined to pursue the career as public commentator or media guru opened to him by his achievements." *See* Ben Rogers, *John Rawls*, THE GUARDIAN (Nov. 7, 2002), available at <http://www.guardian.co.uk/news/2002/nov/27/guardianobituaries.obituaries>.

66. *See* John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHILOSOPHY & PUBLIC AFFAIRS 223-251, at 223 (1985). Rawls observes, "Briefly, the idea is that in a constitutional democracy the public conception of justice should be, so far as possible, independent of controversial philosophical and religious doctrines."

the idea of justice and implement justice as a part of the rule of law. Yet, it should not be ignored the fact that the Rawlsian conception of justice has some roots still connected with the Kantian legacy. Rawls himself has acknowledged that 'justice as fairness' resembles, in a fundamental way, with the Kantian moral conception.[67] Despite the fact, the Kantian idea of justice and the Rawalsian idea of justice are not the same.

A Theory of Justice[68] is one of the most important works of John Rawls. It offers two principles of justice. First he offers these two principles provisionally and then with an in-depth analysis, offers the final version of the two principles, which are also revised. The provisional version of the two principles is as follows:[69]

> First: Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

> Second: Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.

The first principle can be called a principle of liberty and the second principle can be called a principle of managing inequality. However, Rawls calls the first principle as the rule of priority of liberty, and the second principle as the rule of priority of justice over efficiency and welfare. It is interesting to closely examine and compare his provisional and final principles. Rawls provides the very same

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67. *See* John Rawls, *Kantian Constructivism in Moral Theory*, 77 JOURNAL OF PHILOSOPHY 515-572, at 516-517 (1980). Rawls mentions that, "The leading idea is to establish a suitable connection between a particular conception of the person and first principles of justice, by means of a procedure of construction. In a Kantian view the conception of the person, the procedure, and the first principles must be related in a certain manner-which, of course, admits of a number of variations. Justice as fairness is not, plainly Kant's view, strictly speaking; it departs from his text at many points. But the adjective 'Kantian' expresses analogy and not identity; it means roughly that a doctrine sufficiently resembles Kant's in enough fundamental respects so that it is far closer to his view than to the other traditional moral conceptions that are appropriate for use as benchmarks of comparison."

68. *See* JOHN RAWLS, A THEORY OF JUSTICE (Cambridge, MA, The Belknap Press of Harvard University Press, 1971). In later days, Rawls made a number of changes or shifts of emphasis, especially on the idea of 'primary goods' articulated in the Theory of Justice. *See* John Rawls, *Kantian Constructivism in Moral Theory*, 77 JOURNAL OF PHILOSOPHY 515-572 (1980).

69. *Id*., A THEORY OF JUSTICE, at 60 (Kindle edition, 2005, i.e., the original 1971 version); at 53 of the 1999 revised edition. In the 1999 revised edition, Rawls also slightly modifies the provisional first principle of justice. For comparison both are reproduced here. They are:
1971 version of the first principle: "Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."
1999 version of the first principle: "Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others."

final version of the principles of justice both in 1971 book and its 1999 revision. They are as follows:[70]

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

Second: Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

Before we discuss these two principles of justice, it would be worthwhile to compare the provisional and final principles.

Box 1: Rawls Two Principles of Justice

Provisional Principles	Final Principles
First	First
Each person is to have an equal right to the most extensive basic *liberty* compatible with a similar liberty for **others**. (1971 version) Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. (1999 version)	Each person is to have an equal right to the most extensive <u>total system of equal</u> basic *liberties* compatible with a similar <u>system of</u> liberty for <u>all</u>. (the same both in 1971 and 1999 versions) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all. (Restatement, 2001)
Second	Second
Social and economic inequalities are to be arranged so that they are both (a) **reasonably expected to be to everyone's** advantage, and (b) attached to positions and offices open to all. (the same both in 1971 and 1999 versions)	Social and economic inequalities are to be arranged so that they are both: (a) <u>to the greatest benefit of the least</u> advantaged, <u>consistent with the 'just savings' principle</u>, and (b) attached to offices and positions open to all <u>under conditions of fair equality of opportunity</u>. (the same both in 1971 and 1999 versions) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the different principle). (Restatement, 2001)

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70. *Id.*, at 302; and at 266 of the 1999 revised edition.

> Notes:
> · Underline indicates words added
> · Italic indicates words modified
> · Bold indicates words removed in the final version

While developing the provisional principles of justice into the final one, some words have been deleted and some words have been added, both for the sake of conceptual clarity and also to derive a sense of inclusiveness. For example the word 'others' has been replaced by the word 'all', giving a sense of inclusiveness. The words in the second principle (a) 'reasonably expected to be to everyone's' have been deleted. The second principle (a) has in fact been completely reformulated in the final version. It is because the provisional version contained some conceptual confusion. If the arrangement of inequality had to be 'to everyone's advantage' it would finally turn futile and the disadvantaged groups would be left behind. The first part of the final version of the second principle (a) is comparable with the utilitarian idea of 'the greatest happiness of the greatest number' modified to 'to the greatest benefit of the least advantaged.' Inequality should also be managed to the greatest benefit of the least advantaged, but it is not unconditional. Rawls puts one significant condition, i.e., to be 'consistent with the just savings principle.' Thus, the 'just savings principle' plays an important role in the Rawlsian conception of justice. Similarly, the idea of 'fair equality of opportunity' constitutes another important precondition in managing inequality.

What is the principle of 'just savings'? Does it imply that the wealth of the better off people should be scaled down until eventually everyone has nearly to the same income level? Rawls clearly says this is a misconception of managing inequality.[71] However, he strongly maintains that for justice there should be a condition available for a 'social minimum.'[72] Does the social minimum imply to the average wealth of the country, so that everyone should reach to the average in terms of acquiring wealth? The answer to this question depends mostly on the system of distribution. Since a state cannot make everyone equal, the principle of difference is undeniable. Thus, Rawls proposes that the social minimum should be set at that point in which wages are taken into account for maximizing the expectations of the least advantaged groups.[73]

Rawls argues that, suppose for simplicity, that the minimum is adjusted by

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71. *Id*., at 285.

72. *Id*., at 284.

73. *Id*., at 285.

transfers paid for by proportional expenditure (or income) taxes. In this case, raising the minimum entails increasing the proportion by which consumption (or income) is taxed. Presumably as this fraction becomes larger there comes a point beyond which one of two things can happen. Either the appropriate savings cannot be made or the greater taxes interfere so much with economic efficiency that the prospects of the least advantaged in the present generation are no longer improved, instead begin to decline. In either event, the correct minimum has been reached. The difference principle is thus satisfied and no further increase is called for.[74]

Then, what is to be done? Rawls claims that finding a just savings principle is one of the problems of justice. He acknowledges that, "Now I believe that is not possible, at present anyway, to define precise limits on what the rate of savings should be."[75] However, Rawls offers that even if one cannot define a precise just savings principle, one should be able to avoid extremes.[76]

Let us take the example of the education system. Children from rich families attend a good school, get better education, and acquire a better job and social position due to their greater competitive capability. Children from poor families cannot afford to attend a good school, most likely by attending public schools end up with less competitive capabilities compared to children from rich families. How could the second principle of Rawlsian justice address the problem of systemic inequality? Should good and expensive schools be banned, requiring all kids to go to the same level of schools with a view to produce the same level of human resources? Should resources be channeled from the rich for the improvement of the quality of public schools with a view to produce children from public schools as equally competent and capable of to the children from a rich family? Either way, the 'savings principle' comes into play. And, Rawls concludes that it is more appropriate in the original position than other stages of social

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74. *Id*.

75. *Id*. Rawls further acknowledges that, "How the burden of capital accumulation and of rising the standard of civilization and culture is to be shared between generations seems to admit of no definite answer. It does not follow, however, that certain bounds, which impose significant ethical constraints cannot be formulated. As I have said, a moral theory characterizes a point of view from which policies are to be assessed; and it may often be clear that a suggested answer is mistaken even if an alternative doctrine is not ready to hand. Thus it seems evident, for example, that the classical principle of utility leads in the wrong direction for questions of justice between generations."

76. *Id*., at 287.

institutionalization.[77] The points here elucidate the inherent shortcomings in the Rawlsian principle of managing inequality. Further, while reformulating the concept of justice in the Restatement, Rawls did not incorporate the concept of 'just savings' within the formulaic premise of the two principles.[78]

Rawls' second principle of managing inequality focuses on the idea that offices and positions should be opened to all, under conditions of 'fair equality of opportunity.' But what constitutes the 'fair equality of opportunity'? Rawls makes it clear that the inequalities in the distribution of income and wealth and the distinctions in social prestige and status which attach to the various positions and classes are just if and only if they are part of a larger system in which they work out to the advantage of the most unfortunate.[79] In the above example, children from rich and poor families are on different level playing fields in terms of capability and competition. Can the mere chances of education open for all without ensuring the quality of educational institutions constitute the 'fair equality of opportunity'? Rawls' clear response to this question reveals that the idea of the 'fair equality of opportunity' represents the idea of pure procedural justice.[80] The meritocracy principle is fair only if a condition of opportunity for a

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77. *Id*., at 289. Generally, Rawls identifies four stages of social cooperation and institutionalization processes: (i) the original position (ii) constitutionalization of rules (iii) legislation, and (iv) implementation.

78. *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, at 42-43 (Belknap Press, 2001). Rawls states that, "To try to answer our question, let us turn to a revised statement of the two principles of justice discussed in Theory § § 11-14. They should now read:

"Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and

"Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be the greatest benefit of the least-advantaged members of society (the difference principle)."

However, it should be noted that Rawls has discussed on the just savings principle from pages 159-161 in the Restatement, as well. Rawls mentions that, "The relation between the difference principle and the principle of just saving (Theory § 44) is this. The principle of just saving holds between generations, while the difference principle holds within generations. Real saving is required only for reasons of justice: that is, to make possible the conditions needed to establish and to preserve a just basic structure over time. Once these conditions are reached and just institutions established, net real saving may fall to zero. If society wants to save for reasons other than justice, it may of course do so; but that is another matter."

79. *See* John Rawls, *Distributive Justice*, in JOHN RAWLS COLLECTED PAPERS, 130-153, at 138 (Samuel Freeman ed., Harvard University Press, 1999).

80. *Supra* note, A THEORY OF JUSTICE, at 83. Rawls maintain that, "I should now like to comment upon the second part of the second principle, henceforth to be understood as the liberal principle of fair equality of opportunity. It must not then be confused with the notion of careers open to

level playing field is created in earnest. In short, Rawls' principle cannot offer a practical solution to the problem of inequality agape. Indeed, it is not the objective of Rawlsian principles to create an egalitarian society but to protect procedural fairness with differential principles in place.

In his later works, Rawls recasts his idea of justice, in some respects, moving from a moral perception to a political conception, though still broadly within the normative framework. Although, Rawls accepted that in debating justice and rights, we should set aside our personal, moral and religious convictions and argue from the standpoint of a political conception of the person, independent of any particular loyalties, attachments, or conception of the good life.[81] The demand that we separate our identity as citizens from our moral and religious convictions means that when engaging in public discourse about justice and rights, we must abide by the limits of liberal public reason.[82]

2.8 Michael J. Sandel (1953-)

On the issues of theory of justice, Michael Sandel is a very popular figure and an amazing commentator in our times. His Justice Course at Harvard is extremely popular, with his unique style; it has caught the attention of many people. His lectures are even available as podcasts. He starts his lectures and writings with some mind-boggling examples, often involving hard questions such as: the brake failure of a runway trolley, Dudley's case, price gouging law, bailout outrage, Afghan goatherds and so on. He does not only give mind-boggling examples but connects them with leading philosophers and justice theorists to examine the issues in depth. Doing so, Sandel clearly claims that his goal is not to show who influenced whom in the history of political thought, but to invite readers to subject their own views about justice to critical examination.[83] As a scholar, Sandel is keen to understand and explain what people think about justice and why they think so.

When the question comes to the crunch, what is Sandel's take on justice; it is not easy to answer. It is because, as a gifted debate creator and designer of public

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talents; nor must one forget that since it is tied in with the difference principle its consequences are quite distinct from the liberal interpretation of the two principles taken together. In particular, I shall try to show further that this principle is not subject to the objection that it leads to a meritocratic society."

81. *See* Michael J. Sandel, Justice: What is the Right Thing to Do? 247 (New York, Farrar, Stras and Giroux, Kindle version, 2010).

82. *Id.*, at 248.

83. *Id.*, at 29.

opinion, he emphasizes on continuous public discourse on justice, rather than philosophizing justice. Nevertheless, it is not possible to hide his extraordinarily communitarian philosophical stature.[84] Untiringly, Sandel argues that both philosophically and politically deliberations about justice cannot proceed without reference to the conceptions of the good.[85] Sandel argues that the entirety of difficult questions associated with justice prompt us to articulate and justify our moral and political convictions.[86] He explains that moral reflection is not a solitary activity but it is involved with a public endeavor.[87] When individuals are confronted with hard questions and are supposed to take decisions about a 'right thing to do,' individuals move back and forth between judgment and principles. Sandel claims the turning of mind, from the world of action to the realm of reasons and back again, is the domain of moral reflection.[88] He denies the claim that our moral convictions are fixed by upbringing or faith, beyond the reach of reason.[89] At the end, it seems that moral reason occupies the heart of Sandel's idea of justice.

Sandel is critical of utilitarianism,[90] the Kantian version of liberalism,[91] and

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84. *See* Michael J. Sandel, Liberalism and the Limits of Justice xi (Cambridge University Press, 2nd ed., 1998). Sandel though does not consider himself as a communitarian. He argues that, "A second way of linking justice with conceptions of the good holds that principles of justice depend for their justification on the moral worth or intrinsic good of the ends they serve. On this view, the case for recognizing a right depends on showing that it honors or advances some important human good. Whether this good happens to be widely prized or implicit in the traditions of the community would not be decisive. The second way of tying justice to conceptions of the good is therefore not, strictly speaking, communitarian. Since it rests the case for rights on the moral importance of the purposes or ends rights promote, it is better described as teleological, or (in the jargon of contemporary philosophy) perfectionist."

85. *Id.,* at 186. Sandel claims that, "Those who dispute the priority of the right argue that justice is relative to the good, not independent of it. As a philosophical matter, our reflections about justice cannot reasonably be detached from our reflections about the nature of the good life and the highest human ends. As a political matter, our deliberations about justice and rights cannot proceed without reference to the conceptions of the good that find expression in the many cultures and traditions within which those deliberations take place."

86. *See* Sandel, Justice: What is the Right Thing to Do?, at 29.

87. *Id.*, at 28.

88. *Id.*

89. *Id.*, at 27.

90. *Id.*

91. *See* Michael J. Sandel, Liberalism and the limits of Justice 1 (Cambridge University Press, 2nd ed., 1998). Sandel mentions that, "Deontological liberalism is above all a theory of justice, and in particular about the primacy of justice among moral and political ideals. . . . regulative principles above all is not that they maximize the social welfare or otherwise promote the good, but rather they conform to the concept of right a moral category given prior to the good and

the Rawlsian theory of justice.[92] Sandel's disagreement with Rawls primarily entails with the issue of whether justice is relative to social good or independent of it. Justice as a political conception should be independent of social good for the Rawalsian concept of justice; whereas, Sandel argues that justice is relative to social good and not independent.[93] In his book, *Justice: What is Right Thing to Do*?, Sandel develops three broad analytical perspectives on justice: welfare, freedom, and virtue. Broadly, he connects utilitarianism with welfare, the Kantian version of justice with freedom, and the Aristotelian idea of justice with virtue. He finds the approaches of welfare and freedom unable to incorporate 'something more visceral'[94] and on the issue of price gouging laws he argues that, ". . . the debate about price-gouging laws is not simply about welfare and freedom. It is also about virtue—about cultivating the attitudes and dispositions, the qualities of character, on which a good society depends."[95]

Eventually, he endorses the virtue perspective of justice, bringing him into the line of a neo-Aristotelian scholar. He claims that, ". . . then it may be worth reconsidering Aristotle's way of thinking about justice."[96] Sandel observes that, "Aristotle maintains that we can't figure out what a just constitution is without first reflecting on the most desirable way of life. For him, law can't be neutral on questions of the good life."[97] Indubitably, Sandel claims that, "Devoted though we are to prosperity and freedom, we can't quite shake off the judgmental strand of justice. The conviction that justice involves virtue as well as choice runs deep. Thinking about justice seems inescapable to engage us in thinking about the best

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independent of it. This is the liberalism of Kant that I propose to challenge."

92. *See* Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 Political Theory 81-96, at 82 (1984). Sandel claims that, "First, it has a deep and powerful philosophical appeal. Second, despite its philosophical force, the claim for the priority of the right over the good ultimately fails. And third, despite its philosophical failure, this liberal vision is the one by which we live." *See also*, C. Edwin Baker, *Sandel on Rawls*, 133 U. PA. L. REV. 895 (1985).

93. *See* Michael J. Sandel, *Political Liberalism*, in Justice: A Reader 364 (Michael J. Sandel ed., Oxford University Press, 2007). Sandel argues that, ". . . what reason remains for insisting that our reflections about justice should proceed without reference to our purpose and ends? Why must we bracket or set aside, our moral and religious convictions, our conception of the good life? Why should we not base the principles of justice that govern the basic structure of society on our best understanding of the highest human ends?"

94. *See supra* note Justice: What is Right Thing to Do? at 6.

95. *Id.*, at 8.

96. *Id.*, at 242.

97. *Id.*, at 8.

way to live."[98] What standards of justice Hart[99] and Kelsen[100] repudiated; with his brilliant style of articulation Sandel endorses and tries to bring them back as to be the grounds of justice.

With his conception of justice associated with moral reasoning reflected in virtue, judgmental strand, and good life; Sandel creates a Trojan horse, pushing the concept of justice into an unmanageable domain of normativity. First, Sandel's conception of justice is uncertain, since virtue, judgmental strands, and a good life, breed a pervasively contrasting varieties of ideas allowing competition in society with no mechanism available to harmonize them. Second, Sandel pushes the concept of justice from a positive legal structure to normative reasoning, giving priority to the moral concept of identity over a positive legal structure, which is not only defective but also destructive both theoretically and practically. Third, Sandel contextualizes the concept of justice, deeply rooted with the perspective of individual judgment regarding 'what is right thing to do', by bringing the mark of virtue as a tool to help individuals decide the right thing to do. In short, justice in Sandel's explanation seeks its place beyond law, which is fundamentally faulty.

2.9 Amartya Sen (1933 -)

Amartya Sen, a Nobel laureate in economics, is a rare combination of intellectual and philosophical sharpness. Among his many brilliant works, *The Idea of Justice*, 2009 is one of the recent thought-provoking contributions, which Hilary Putnam considers the most important contribution to the subject since John Rawls's *A Theory of Justice*. As discussed above, one can easily notice that most of the

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98. *Id.*, at 9.

99. Hart argues that, "Legal rules as we have seen, may correspond with moral rules in the sense of requiring or forbidding the same behavior. Those that do so are no doubt felt to be as important as their moral counterparts. Yet importance is not essential to the status of all legal rules as it is to that of morals. A legal rule may be generally thought quite unimportant to maintain; indeed it may generally be agreed that it should be repealed: yet it remains a legal rule until it is repealed." CONCEPT OF LAW, at 175.

100. Kelsen forcefully argues that, "If justice is happiness, a just social order is impossible if justice means individual happiness. But a just social order is impossible even on the supposition that it tries to bring about, not the individual happiness of each, but the greatest possible happiness of the greatest possible number of individuals . . . if by happiness is meant a subjective value, and if, consequently, different individuals have different ideas of what constitutes their happiness. The happiness that a social order is able to assure cannot be happiness in a subjective-individual sense; it must be happiness in an objective-collective sense, that is to say, by happiness we must understand the satisfaction of certain needs, recognized by the social authority, the lawgiver . . ." *See* HANS KELSEN, WHAT IS JUSTICE? 5 (University of California Press, 1957).

philosophers and thinkers focus on analyzing the nature of justice, or in other words, have tried to answer the question: what is justice and how a just society could be institutionalized? Sen rather adopts a different methodology. He draws attention from 'definitional trite'[101] to analyzing conditions, that could help either to enhance justice or remove injustice.[102]

Sen embraces three specific methodologies. First, he focuses on the cognitional aspect of decision-making. He inquires into how decisions are made about institutions, behavior, and other determinants of justice. Second, he emphasizes on how to manage conflicting considerations about justice. He claims that 'disengaged toleration' cannot manage conflicting considerations of justice, for we need impartial scrutiny with 'reasoned argument.' Third, he focuses on day-to-day transgressions of justice rather than institutional shortcomings, and believes that these behavioral transgressions are remediable injustices.[103]

The idea of creating just institutions has overpowered our discourses, which Sen considers inadequate. Unfortunately, the lives of people and their ability to enjoy justice are often denied by powerful segments of society that causes far-reaching impediments in realizing justice. Sen emphasizes creating an environment that could help enhance capability of people to fight oppression, protest systemic neglect, repudiate the permissibility of torture, reject the quiet tolerance of chronic hunger, and other circumstances that deprive them of justice. Some positive changes in the remedial aspects of injustice will help to reduce injustice, and enhance justice in the daily life of the people, Sen argues.[104] Reasoning, he considers as a central instrument to understand justice and particularly important in a world of unreason. With reason, justice can be promoted and injustice can be contained. This very method of reasoning subsides the pragmatic approach of Sen. The question is—who decides the validity of

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101. *See* Alf Ross, *What is Justice? Justice, Law and Politics in the Mirror of Science* [Book Review], 45 CALIFORNIA LAW REVIEW 564-567, at 565 (1957). Ross observes that, "Question of the type 'what is . . . ?' should be avoided in logical analysis because they smell of essentialism. You may ask what a certain substance, for instance 'water' or 'powder' is when it is manifest that you mean (designate) by the term 'water' or 'powder.' The question is inappropriate when the principal problem is to determine the meaning with which the word actually is used or the meaning which logically could be ascribed to it but only diffusely appears in common use."

102. *See* AMARTYA SEN, THE IDEA OF JUSTICE ix (London, Penguin Books, 2010). Sen mentions that, "What is presented here is a theory of justice in a very broad sense. Its aim is to clarify how we can proceed to address questions of enhancing justice and removing injustice, rather than to offer resolutions of questions about the nature of perfect justice."

103. *Id.*, at ix-x.

104. *Id.*, at xi-xii.

reasoning when there comes a disagreement—pure reasoning, practical reasoning, normative reasoning, positive reasoning or similar sorts of reasoning. It is a critical question because Sen's proposition otherwise leads to a normative domain. Once Lord Mansfield concisely remarked that, ". . . consider what you think justice requires and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly wrong."[105]

The capability approach of Sen is unquestionably important. Logically, its practical value in reducing injustice opens the same age-old issue of distribution of public and private resources, which was one of the main areas of analysis of the Rawlsian concept of justice. There is no single paradigm, theory, or methodology that could govern the issue of distribution beyond any contradictions. It is because the issue falls into the domain of 'ought' that is as normative as non-positive reasoning. And, unequivocally, Sen comes to argue that; "The requirement of a theory of justice includes bringing reason into play in the diagnosis of justice and injustice."[106] Sen's therapeutic approach is practically useful in reducing or containing injustices, but without a clear concept of justice in place the endeavor might lead to what G. E. Moore observes, "At all events, philosophers seem, in general, not to make the attempt; and, whether in consequence of this omission or not, they are constantly endeavoring to prove that 'yes' or 'no' will answer questions, to which neither answer is correct, owing to the fact that what they have before their minds is not one question, but several, to some of which the true answer is 'no' to others 'yes'."

3. Law as Justice

Among many important theories regarding justice, this paper has modestly canvassed only nine major philosophers and their theories. Along with the basic understanding of these few theories on justice, one can easily grasp the fact that besides producing extensively diverse explanations of justice, these theories do also share a few common features. With some exceptions, one common thread found in all of them reveals that they tend to explain justice as a proposition disjunctive of positive law, rather these theories are occupied in conjoining justice with moral standards, such as, virtue, ethical principles, or normative practical programs. Being mostly detached from the positive idea of rights, duties, and

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105. *Cited in id.*, at 4.

106. *Id.*, at 5.

institutional responsibilities, these normative explanations of justice suffer some endemic conceptual misadventures. In other words, in any modern civic state, human behaviors and relationships (personal, social, and institutional) gain legitimacy only in the forms of rights, duties, and institutional responsibilities shaped by positive laws. No patterns of behaviors can gain legitimate, valid, and authoritative (enforceable) features by renouncing the domain of positive law. Therefore, any persuasive theory of justice should logically engage in an explanation, which would spring from the legitimate, valid, and enforceable standards of law. To be precise, with this perspective, this paper derives a proposition that 'law is justice' or 'what is meant by justice, that is law.' In other words, this proposition broadly refers justice to the facts and processes of the creation, protection, promotion, and enforcement of rights, duties, and institutional responsibilities. However, this idea should not be taken as a completely new proposition.[107]

The claim, law is justice; might be uncomfortable, especially to those governments, agencies, and power brokers who perpetuate injustice, distort law, deny rights of the people, subjugate people to tyranny for the sake of order, and also do not leave any scruple of human conscience while killing people in the name of insurgency, civil war, or in any other forms of irrationalities. It is true, as St. Augustine once observed that, "What are states without justice but robber-bands enlarged."[108] Remedies to these horrible problems are urgent and conceivable only under the domain of positive law. The domain of positive law is not exclusive to domestic legal system. With the development and institutionalization of the idea of global constitutionalism,[109] in all three aspects of

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107. *See* Kautilya's Arthashastra location 3502 (R. Shamasastry trans., Spastic Cat Press, Kindle 2009). Kautilya in 3rd Century BC contributed a book called Arthasastra (economics). In fact this book is not confined to economics alone but covers law, legal system, governance, and finance as well. In Book III Chapter I, Kautliya sets the duties of a king (ruler). Among many other duties, imparting justice was one of the main duties of a king. King was required to deliver justice in accordance with law. Kautilya identified four types of laws: sacred laws (*Dharma*), evidence (*vyabahara*), customary practices (custom), and edicts of a king (positive law). In case of conflict between these four laws, Kautilya clearly prescribed the superiority of positive laws. In this regard, Kautilya can be regarded as one of the early founders of positive jurisprudence.

108. *Cited in* Hart, *supra* note, kindle location 3407.

109. For detail discussion on 'global constitutionalism' *see* Surendra Bhandari, *Global Constitutionalism and the Constitutionalization of International Relations: A Reflection of Asian Approaches to International Law*, 12 Ritsumeikan Annual Review of International Studies 1-53 (2013). *See also* Jan Kalbbers, Anne Peters, & Geir Ulfstein, The Constitutionalization of International Law (Oxford University Press, 2009); Jeffrey Dunoff and Joel P. Trachtman eds., Ruling the World Constitutionalism, International Law, and Global Governance (Cambridge

positivity: legitimacy, enforceability, and validity, international law is taking precedence over domestic law. Furthermore, like domestic laws, international laws are also the products of the exhaustion of a legitimacy apparatus. Generally, legitimacy comprises of the adherence to the hierarchy of law, observance of the prescribed procedures, and democratic representation in law making. The first two are the part of process, whereas consent of the sovereign states from the stage of participation in negotiations to the ratification of treaties refers to the democratic representation in the international law making. With the accomplishment of the process and consent requirements, global constitutionalism as a positive method secures legitimacy of international laws and legal systems.

Untiringly, both at the domestic and international levels, two social instruments constantly govern human behaviors and relationships: prescriptive (positive) and non-prescriptive (normative) standards. Rightly or wrongly, often the idea of justice is constructed with the support of one of these or both of these domains: normative and positive. These domains and their features are shown in the following chart.
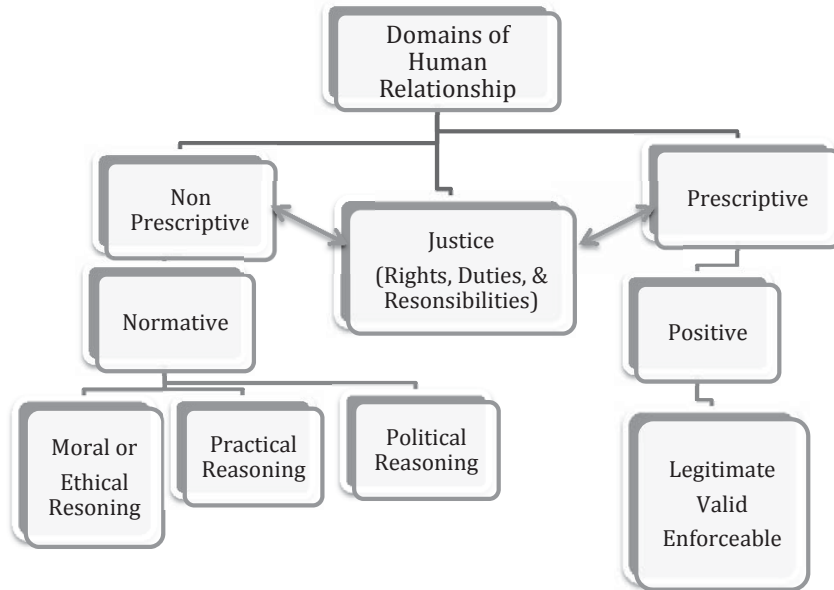
Chart 1: Domains of Human Relationship

These two domains are distinct as well as complementary to each other. They are distinct because the normative standards lack legitimacy, validity, and enforceability; whereas, the positive domain of law is the name of only those standards that are legitimate, valid, and enforceable. They are also complementary to each other. Especially, through the legitimate process, normative standards are transformed into positive standards. A normative reasoning can offer theoretical explanations, political justifications, and practical urgings in the forms of demands, arrangements, and realization in the making of domestic and international social legal frameworks. They are especially critical while accomplishing the legitimization process.

Usually, the positive domain of law is never absent from us. Either in the form of legitimizing human behaviors by prescribing what can be done and what cannot be done, with a consequence of incentive or punishment, or transmuting non-prescribed standards into the positive domain through the legitimization process. More specifically, the legislative body bears the responsibility of fashioning prescriptive standards. Correspondingly, within the premise of constitutional and legislative frameworks, precedent, rules, regulations, and contracts also constitute the prescriptive standards. Prescriptive or positive laws demonstrate the characteristic features that either they authorize or disable;

facilitate or limit; permit or prohibit activities of persons (both natural and artificial persons). To put it differently, the positive domain of law is all about creating, protecting, and enforcing rights, duties, and institutional responsibilities that are legitimate, valid, and authoritative. Any claims or standards that are not valid, legitimate, and enforceable, establish no tangible connections with the idea of justice. Not being a theoretical fiction, but being a practical program that should be exercised and enjoyed by persons (both natural and artificial) in the day-to-day realm, justice firmly stands on the positivity of law alone. Therefore, it is unrewarding to bring in any normative standards within the framework of justice.

In any society, in real practice, it seems that the behaviors of persons (both artificial and natural) are guided not only by the positive laws but also by normative standards in the forms of moral, ethical, practical, and political reasoning, among others. These normative standards are part of the social process, but they are not equivalent to formal or positive standards. Most of the justice theories discussed above ignore this very distinction excessively being attentive to explaining justice in the form of a 'right thing to do' from the standpoints of diverse normative standards, which in fact expose the striking inadequacies inherent in these theories. These normative explanations of justice suffer from at least three defects.

First, they are not legally binding standards. They cannot create any legal claim. The concept of rights and duties under the normative domain are merely moral, ethical, or political but not legal. If these normative rights and duties are breached, one cannot get remedy through enforceable formal structures of the state or specifically from the court. Second, in the worst paradigm, normative standards might transgress or defy law. If they happen to defy law, the offensive acts are met with punishment under the prescribed standards of law. The offensive acts cannot be exempted on the grounds of their moral, ethical, or political exigencies. Thus, on the logical ground, all binding human actions fall into the domain of prescribed law resenting by their very nature to be subdued within the normative existence. Third, in a normal setting, normative standards might consist in customary practices compatible with positive law. Moreover, under international law, customary practices are part of prescriptive international rules unless they ostensibly defy the body of international law posited in treaties.[110] In this scenario too, normative standards are either transformed into

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110. *See* Wimbeldon case (France, Italy, Japan, & UK v. Germany), PCIJ 28 June 1923, Series A. No.1. In this case the PCIJ has held that customary international law and treaty law have

the domain of positive law, or lose their autonomous authoritative status.

No need to say, in a modern civic or constitutional state, normative standards hardly could gain autonomy and authority in defiance of law. Plausibly, any standard recognized by law instantly loses its normative autonomy and turns to be a positive standard. To a certain extent, this process reminds us the Hartian idea of 'union of primary and secondary rules.' Accordingly, the idea of justice cannot be conceived beyond the positive domain of law. At this point, two questions can be raised. First, is there any significance of the different theories of justice, especially what we have discussed above? Second, what about justice if the law itself is undemocratic, oppressive, treacherous, and unjust? In other words, should laws be good to ensure justice?

The above-discussed theories are inadequate in explaining justice, since their quests are discomfited with the positive domain of law and are heavily dominated by the normative underpinnings. Nevertheless, their epistemic significance cannot be underestimated. First, they offer valuable insights in regard to framing and interpreting positive rules or laws with the application of the methodology of welfare-*grundnorm*.[111] In many cases, normative standards are thoroughly understood and examined for their social roles and thus transformed into positive standards with the help of the methodology or theory of legitimacy, validity, and enforceability. This paper terms this theory as an integrated approach to law.[112] Second, normative standards are helpful in enhancing civic discourses by engaging stakeholders in warranting a change or reform to the existing body of laws and legal systems.

A commonplace but exceedingly egregious belief that has been pervasively disseminated argues that good laws spring only from the moral, ethical, or political reinforcements. Perhaps, a few but simple facts are enough to dispel this misunderstanding about the moral goodness of law. For example, eating pork is immoral, unethical, and not virtuous for a Muslim. But the same act might be ethical or moral for people from other communities. Eating beef is immoral, unethical and not virtuous for Hindus. But the same act might be considered ethical or moral for people from other communities. Before the decision of *Brown v.*

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equal authority. However, if a treaty and custom exist simultaneously in respect of the issue in dispute then the treaty provision takes precedence.

111. For detail discussion on the issue of 'welfare-grundnorm' *see* Surendra Bhandari, *Legitimacy, Authority, and Validity of Law: An Integrated Approach to Legal Positivism and the Methodology of Welfare-Grundnorm*, 22 THE JOURNAL JURISPRUDENCE 117-194 (2014).

112. For detail discussion on the integrated approach to law *see id*.

Board of Education,[113] discrimination between African American and White children at educational centers was not only ethical but also legally permissible in the US. Demands for democracy might be virtuous for people (including people in Syria at the moment) but it might be offensive to the political morality of autocrats. To its political extreme, any discourse against the regime might be illegal in North Korea. Having an ethnic state might be the most valued moral outcome for some communities, but not for all communities in Nepal. There are chances, which are real, to have interests competing from the personal level to the group, community, institution, and political levels on the grounds of normative belief systems. Against this background, it would be fitting here to borrow what Alf Ross persuasively observes, "All wars have been fought by all parties in the name of justice, and the same is true of the political conflict . . ."[114]

How would the justice theories that this paper has canvassed address the issue of good law, especially when the law itself is contested? What methodology would be satisfactory for law in managing the competing interests? A complete transformation of individuals through instilling them the quality of virtue was the preferred remedy in managing the competing interests for Buddha, which seems unpalatable in our time where power, money, and beauty alone seem to be the motivating forces. Confucius requires a ruler (king) to faithfully observe virtues, but the modern world is fraught with full of governance problems resulted due to the denial of the rule of law by the rulers. Socratic virtues require to abide by law even unto the point of death, which seems idealistic from the standards of present day political dynamics where laws are bent for vested personal advantages on a daily basis. Aristotelian virtue allows reason to take precedence, which itself is deeply mired in contestations and therefore may not be able to stop the acts of undermining the rule of law by offering the ascendancy role to arbitrary moral narratives. Perhaps, against this background, Alf Ross once remarked that, "Justice is the correct application of law, as opposed to arbitrariness. Justice, therefore, cannot be a legal-political yardstick or an ultimate criterion by which a law can be judged. To assert that a law is unjust, as we have seen, is nothing but

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113. 347 U. S. 483 (1954). The Supreme Court of the United States invalidated the practice of segregation. It upheld that segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment, even though the physical facilities and other tangible factors of white and Negro schools may be equal. *See also* David A. Eisenberg, *In the Names of Justices: Enduring Irony of Brown v. Board*, 22 The Journal Jurisprudence 101-116 (2014)

114. *See* Alf Ross, *supra* note, at 269.

an emotional expression of an unfavorable reaction to the law."[115]

One might not completely disagree with Alf Ross. But the way he endorses an emotional expression as the criteria for the identification of a bad law is far from resonating the social reality that exists in perpetuating injustices. To get rid of these problems, the role of a good law is perhaps undeniable. Therefore, the significance of legitimacy, validity, and enforceability processes in formulating frameworks where good laws exist and justice is imparted in accordance with the law.

The dynamics of justice thus need to be examined in encompassing three important processes for good laws: demands, arrangements, and realization. In other words, demands imply creation or recognition of rights, duties, and institutional responsibilities. Arrangements are those institutional aspects that take responsibilities in realizing or enforcing the demands. Realization is an end, i.e., symbolically the supply side that fulfills all necessary conditions for the full enjoyment of rights, duties, and institutional responsibilities.

Unpretentiously, persons always strive for better conditions, better outcomes, and quality accomplishments, which foster demands from individual to institutional levels. These demands might be political, social, cultural, economic, or likes. Also, there might have been the existence of competing demands, which are not unnatural. But demands by themselves cannot simply create rights, duties, and institutional responsibilities. Therefore, demands unless featured in the form of rights, duties, and institutional responsibilities do not deserve to be supplied with arrangements for their realization. This process thoughtfully demands a critical role for legitimacy, validity, and enforceability in ensuring good laws.

With the successful completion of the legitimacy, validity and enforceability processes, the manufacturers of law—a legislature, a government, a judiciary, and individuals—will be able to create good laws. On the issue of legitimacy, this paper proposes three basic features: a faithful completion of a legalized process, obedience to the hierarchy of law in the process, and unflinchingly maintaining the democratic representation or democratic rightfulness in the process. Through the completion of these three features of legitimacy process, the manufacturers of law also assess the most appropriate normative standards, theories, principles, and justifications in designing optimal, efficient, or at least those standards that maintain equilibrium in society. Legislatures are unerringly supposed to have the

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115. *Id*., at 280.

awareness of avoiding the act of legitimization of any inefficient standards. This exercise of finding optimal or efficient standards, and maintaining at least the condition of equilibrium by avoiding inefficient standards is what this author has explored as the methodology of *welfare-grundnorm*. In short, with the application of the methodology of welfare-grundnorm, good laws can be produced, and bad laws can be amended, changed, or avoided.

The outcomes of the legitimization process feature rights, duties, and institutional responsibilities, which are properly and effectively enforced by the state apparatus. Otherwise, unenforceable standards how good they might be, lose the distinction of positivity. Only being legitimate and enforceable is not enough to be a good law. The law should also be valid, i.e., justified by the domestic and international legal systems. The traditional self-gratification in maintaining positive standards only within the premise of domestic legal system is not sufficient in our globalized world. If domestic positive standards are incongruent with international rules, the international legal system(s) requires the domestic legal system to devise its rules or laws in compliance and harmony with the international laws. This conspicuousness phenomenon is constantly growing in shaping the nature of the rule of law and justice both at domestic and international realms.

4. Conclusion

Despite being endlessly discoursed from the ancient times, the concept of justice constantly appears to be one of the most stimulating as well as penetratingly controversial ideas. Among others, at least three issues have been incessantly involved in the discourse about the concept of justice.

First, the question—what is justice—has been enduringly deliberated. Nevertheless, the problem has not been sufficiently elucidated to the level of desirable scientific clarity; thus, it still seems a fresh one. This paper has briefly reviewed nine different theories about justice with a view to explore an answer to the question: what is justice? Second, the concept of justice has often been fraught with normative evaluations; consequently, diverse explanations of justice have effortlessly been predisposed to the normative impetuses of the commentators. By briefly assessing why the normative explanations of the concept of justice have endured fallacious ramifications, this paper has therefore proposed a positivist explanation of justice to remedy the problems of conceptual disarrays.

Third, a question about the concept of justice has been relentlessly contested

against the prospects of good laws. The issue—what are good laws—has attended a profoundly analytical breadth when justice at the practical level is invariably imparted according to law. Against this background, this paper has also explored the composite contours of a good law both from the perspectives of domestic law and the growing demands for the harmonization of domestic laws with the international laws. Moreover, at the heart of the analysis of these three issues, this paper has unequivocally retained the concept of justice with the methodology of the positivity of law, i.e., law as justice.

However, the fact cannot be entirely ignored that the idea of justice has constantly been trapped by political ideologies, religions, cultural intolerance, poverty, deprivation, gender discrimination, violations of human rights and inequality, among other social handicaps. Therefore, justice has historically caught the profound interest in addressing these problems. In searching solutions to these problems, justice thinkers have developed many useful theories of justice from various paradigms. Among many such paradigms, this paper has identified and analyzed six of them: virtue paradigm, moral paradigm, political paradigm, utilitarian paradigm, therapeutic paradigm, and positivistic paradigm.

As discussed above, the theories of justice offered by Buddha, Confucius, Plato, and Aristotle can be classified within the broad premise of a virtue paradigm. The theories of Kant, Sandel, and Aristotle can be placed within the premise of moral paradigm. Rawls and Bentham respectively fall within the political and utilitarian paradigms. Sen represents the site of therapeutic paradigm. Besides producing extensively different explanations of justice, all these theories also share a few common features. Nevertheless, their explanations of justice are substantially disengaged from bringing the idea of positive rights, duties, and responsibilities of institutions within the core framework of justice theory.

In any modern civic state, human behaviors (personal, social, and institutional) gain legitimacy only in the virtual forms of rights and duties created by positive laws. No other patterns of behaviors are valid, legitimate or authoritative (enforceable) if they are unyielding to the domain of positive law. With this logical proposition in place, any persuasive theory should demand the explanation of justice built in the form of positive law. Thus finding it conceptually valid, this paper has analyzed and drawn a proposition that 'law is justice.' In other words, beyond the premise of positive standards there exists no meaningful prototype of justice.

However, the dangers of bad laws are real in the regular praxis of justice. Not

being effectively addressed the problem by normative perspectives, the problems of bad laws demand legitimacy, validity, and enforceability processes and tests as the only reliable remedial frameworks. Thus, with the application of the methodology of positivity in its entirety, law defines and vanguards justice. In quintessence, this paper reaffirms and draws the conclusion that 'law is justice.'