Jurisprudential Aspects of Justice

• GUNISH AGGARWAL
CJCHS SCHOOL OF LAW, IP UNIVERSITY, DELHI

Justice means the fulfilment of legitimate expectation of the individual under the laws and to ensure him benefit promised therein. Justice tries to reconcile the individual right with social good. It emphasis on the concept of equality. Justice performs the function of cementing and joining up human beings together. The concept of justice is not static. With the changes in the society, the concept of justice has to be changed from time to time. Therefore, justice is an evolutionary concept. Because of justice law and order is maintained within the state. Under the jurisprudential aspects of justice, we will learn how the concept of justice evolved from time to time. We will learn this through a complete cycle chain. These are distributive justice, problem of power, control of liberty, statutory interpretation, custom values, obligation and duty, persons, possession and ownership. For deciding disputes to administer justice it involves knowledge of facts, knowledge of law applicable to those facts and knowing the just way of applying the law to them. We also need to learn how justice can be administered by the latest technology means. After understanding justice, we need to understand administration of justice. It is one of the important functions of the state. To understand the aspects of justice, the above mentioned cycle chain is important. We also need to understand that though the jurisprudential aspects of justice have changed with the pace of time we need to learn that how many people have access to it.

Introduction

Justice is a moral concept and has to be construed in many ways. It is most typically construed deontically[1], but is also sometimes construed axiological[2]. The object of justice varies in the case of assess. It is usually taken to assess social-institutions, basic social-structures and to assess actions and character traits. The term "justice" is sometimes understood to mean moral permissibility as applied to distributions of benefits and burdens or as applied to social structures. The specific content of justice is determined by the objects assessed rather than by a set of moral concerns relevant for assessment. The second sense of justice is also concerned with what we morally owe to others. It is concerned with personal wrongs to others, but not with personal wrongs to self. What we owe to others is roughly is what they can claim from us. Duties of justice in this sense is often contrasted with duties of charity. Moreover, a third sense of justice is also concerned with the limits of legitimate coercion with those moral duties we have that others are morally permitted to force us to fulfil. Justice in this sense is concerned only with legitimate enforceable duties. It is not concerned with those moral duties that are not legitimately owed by others. The fourth sense of justice is giving each his due. It allows that justice may be purely non-comparative and hold that it is unjust when everyone gets more than he deserves. The fifth sense of justice is fairness, where this is understood as purely comparative concern for individuals get what they are owed to an appropriate extent. Justice construed as fairness is purely comparative. Justice places individuals and their relation to just social institutions. Justice requires individuals to comply with just institutions when they exist and promote the existence of just institutions in their formal political behaviour.[3] Justice in this case does not require individuals to make personal sacrifices in their daily living.[4] Justice requires individuals to do whatever is necessary to maximally promote justness of the institutions. It is necessary to what duties of justice individuals have to promote just institutions, the kinds of justice that when they exist and are just, are relevant for determining the duties of justice of individuals, how duties of justice are affected by the extent to which others are fulfilling their duties of justice, do individuals have duties of justice to others and whether individual duties of justice are all derivative from the justness of social structures or whether some duties of justice apply to individuals directly independently of considerations of just social institutions. If justice is understood as something more than fairness, but not of course, if it is understood simply as fairness. Justice has not only one meaning. It is based on the idea of abstract nouns such as freedom, good, virtue, is based on a scale of values built by individuals during their existence in order to guide them. Justice is a virtue among others, it involves morality through which it counterbalances other values connected to it. It is pertinent to mention that all revolutions and wars were in the name of justice, to which many supporters of new order as the defenders of the old one are attached. Justice depends upon the values of each one, he presents various conceptions of justice which emphasize how they can be understood on the basis of different values. How justice varies when liberty is given, what problems are faced by the people and the government system are necessary to be understood. How the judiciary interprets the laws passed by the legislature needs to be understood. For example, in India laws are passed by the legislature and interpretation is given by judiciary. Interpretation of Statutes is one of the most important functions that the judges perform in administration of justice. How the customs have been understood by the judges and how it is used today to present just decisions to the people plays an important role in understanding the jurisprudential aspects of justice. The difference between obligation and duty whether it has been understood in the correct manner is absolutely necessary for justice. How justice in its adaptation has

[1] Some things are permitted by justice and others are not.
[2] Some things are most just than others.
[3] For example voting for or financially supporting political candidates.
[4] For example, contributing time and money to reduce poverty or taking less pay than they could obtain.

changed to administer people is necessary to be understood.

Aspects of Justice

It is an absolute necessity to understand how justice has been developed. What are the concepts through which jurists have understood the methodology of justice needs to be understood. Through which concepts the jurists have understood justice needs to be learnt. The aspects of justice trace the findings of justice from past to present.

DISTRIBUTIVE JUSTICE

Justice is not synonymous with equality; equality is one aspect of it, no more. Justice is not some 'thing' which can be captured in a formula once and for all, it is a process, a complex and shifting balance between many factors, including equality. Justice is never given. It is always a task to be achieved. Some of its tasks are just allocation of advantages and disadvantages, preventing abuse of power, preventing the abuse of liberty, the just decision of disputes and the adaption to change.

JUST ALLOCATION OF ADVANTAGES AND DISADVANTAGES

The difficulty in securing acceptance of a scheme of allocation and, even more so, of keeping it acceptable arises from the fact that sense of justice is a capricious sentiment, which is likely to be influenced, even changed, by the distribution that presently exists. To promote and maintain a successful scheme of justice requires the promotion of a sense of obligation, requiring among other things a curb on the appetite of 'rights', especially when this leads to abuse of liberties. While administrating justice, it is necessary to understand how advantages and disadvantages are to be distributed and when they are deemed to be satisfied. The persons who decide these matters have to be invested with powers and the problem then is of curbing the abuse of power. Different considerations apply to distribution between individuals and over community and a sense of injustice works differently with different kinds of advantages and disadvantages. In the case of disadvantages, the most abundant of these arte duties and liabilities. The imposition of duties is always dictated by policy. Doing justice here involves balancing various considerations, for which no rules can be laid down. With regard to imposition of liabilities equality should be very rough guide so that special variations in their incidence require justification. Various criteria are used to justify the unequal imposition of taxation, or liability to expropriation or destruction of property in emergencies, or equal liability to rationing in terms of shortage. With regard to disabilities, when these affect large numbers of people in question of justice concerns their removal so as to produce equality of advantage rather than their imposition. It is the imposition of disabilities that calls for justification. The question of injustice here concerns the manner in which the liberty and power are exercised. The advantages are divided into claims, liberties, powers and immunities. Advantages which are generally desired and are in fact conducive to the well-being of the people, things such as food, shelter, life, health, clothing, places to move in, opportunities to acquire knowledge and skill.

LIBERTIES

The problem is not one of equal distribution but whether some should be allowed at all. Example liberties to kill, maim, steal, and, if they are allowed how their abuse can be prevented. In the unrestrained exercise of liberties lies the greatest threat to any scheme of distributive justice.

POWER

Power are of various kinds. There should be equal distribution of some, example power to contract, subject course of obvious denials, for example to insane. Other kids of powers in their nature cannot be equally distributed example power to decide what the basic needs are, when they are satisfied and what just distribution is.

CLAIMS AND IMMUNITIES

The problem of the distribution of immunities is different from that of claims. Claims are demandable by all so that denial in a special case needs to be justified, whereas it is not denial but conferment of a special immunity that requires justification. There has been special removal of immunities by the government. The original reason for these was the anxiety to preserve their slender resources from being paid out in damages. The reason no longer obtains with anything like the same force, the question arises as to the justice in persisting with and perhaps, widening their immunities.

The Problem of Power

Power has two connotations. One is physical force, but this, however great, is inert in itself. It can be dangerous only when exercised and juridically its exercise is often a matter of liberty to do so or not. Power has the other connotation of legal capacity to alter jural relations and this is the sense in which the problem of power is considered here and, even so, only the supreme power of making laws will be dealt with.

Power must not be exercised exclusively for the advantage of power-wielders. Power must not be exercised so as to exclude, or accord unequal treatment to, another from society by reason of race, religion or opinion without special justification, which, whatever it is, must not infringe any of these principles. Power-Wielders must conform to accepted procedures in exercising their powers. These may be spelled out in 'due process' clauses, or they may be conventional; but, whichever it be, power-wielders must not go against the way of going about things accepted in the community. No exercise of power should be beyond independent scrutiny and question. Power-Wielders are not immune from compliance with their own dictates. Power-Wielders must not become a closed circle that is the door must be open for participation by other members of the society.

The practical difficulties of introducing a moral control on unjust enactments concerns the methods and agencies through which this might be given effect.

JUDICIAL CONTROL

Judicial Review is concerned, not with the decision bit with the decision-making process. Unless the restriction on the power of the courts is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power. There are, however, certain ways in which judicial control can and does operate. With regard to subordinate legislation, courts may invoke certain principles and doctrines in order to invalidate exercise of power, example by invoking the principles of natural justice or due process. With regard to acts of parliament themselves, something can be accomplished as a part of daily business by interpreting statutes so as to obviate or minimise their effects. Since the technique of interpretation applies to all statutes, whether thought to be just or unjust, it will be postponed for consideration in another context. There are two methods which are important enough for judicial control. One is (Historical Context)[5] in order to utilise the moral basis on which a legislative authority came to be accepted as a check on its power. The other is to invalidate an enactment on the ground that it had not been passed in appropriate (Manner and Form)[6]

WRITTEN CONSTITUTION

In countries which possess written constitutions, the legislatures are bound by the constitutions and courts can declare statutes invalid on the ground that they are unconstitutional. A written constitution provides probably the most effective of all checks on the legislative power, but a contrary effect is that, while a constitution may limit legislative power, it may thereby prevent the government from dealing with the abuse of liberty, which could be as undesirable as the abuse of power. In any case the success of constitution depends upon a number of factors.[7]

[5] A colourable case can be made out for saying that the moral and other reasons for the acceptance of a new-law constitutive medium become built-in limitations on its competence. For example, in Britain the revolution of 1688-1689 was essentially a protest against the abuse of legislative power by the monarch; the revolt of the American colonies was a protest against the abuse of legislative power by the British Parliament. In both the cases new structures were accepted because they were thought to provide guarantees against certain abuses and it is therefore arguable that such guarantees become limitations on the power of new structures.

[6] An indirect method of controlling legislative power the 'manner and form' check is open to Indian courts because the question who decides what constitutes a 'statute' has never been decided. Parliament cannot bind itself not to repel a statute; but the point is whether it is bound to observe a particular procedure in order to pass one. Any requirement as to what constitutes a statute necessarily precedes every statute, for it is this that invests an enactment, but prescribes how power of enactment may be effectively exercised. The one will however, imply the other whenever there is provision to the effect that certain things can only be done after a special procedure is followed. In any case, disregard of appropriate procedures is more likely to occur in passing oppressive or unpopular measures. The argument that the legislation will be invalid unless it conforms to the requirement as to manner and form, however this may be expressed is attractive. In other words, it is for the courts to test the validity of the legislation. The manner and control form could be effective, but the occasions for its use are very rare. A powerful government will be in such complete command as to be able to carry out its policies with a scrupulous adherence to procedure, so the manner and form control will be of least avail when most needed. There are several drawbacks to judicial control of power. Whatever form such control may assume, its success depends on the judges being independent of those wielding the power. Independence means far more than immunity from interference; it means they are free to bring their own sense of values to bear in considering legislation and do not simply reflect the values of the government. For there can be no protection against the abuse of power, even when safeguards are enshrined in a written constitution, if the judges who have to interpret these whenever the government is challenged are are only puppets of the government. The power of even the most independent judiciary suffers from the weakness that the assertion of values contrary to those of government can only be carried to a point. It is pertinent to mention that even normal process of deciding disputes by judiciary does import an important element of discretion guided by the value judgements as between competing social, individual, governmental and other interests

[7] The factors are:

- One of the most important is the language in which the limitations are expressed, whether in fairly specific terms or in generalities open to divergent interpretation.
- The safeguards may be effectively cancelled by countervailing provisions elsewhere in the document.
- If the constitution can be easily amended, a restraint which the government finds irksome will not impose quite such a curb as when the procedure for the amendment is complex and elaborate. The landmark case is Golak Nath v. State of Punjab [1967] 2 SCR 762, in which the Supreme Court of India declared that the Indian Parliament was incapable of amending the Constitution so as to abridge or remove fundamental rights.
- Every constitution has to be interpreted, so the effectiveness of its restraints rests ultimately on the interpreters that is the judges and the measure of their sympathy with and independence of government.

Control of Power

Abuse of liberty is not the path to freedom of justice. In the case of liberty, as with the power, the achievement of justice lies, not in equal distribution, but in disallowing certain liberties altogether and in restraining the exercise of those that are allowed. The crucial point is the criterion by which it has to be decided that a particular liberty should or should not be allowed, or that its exercise is the need of restraint. 'Control of Liberty' is an apparent contradiction in terms, since to abolish a liberty by replacing it with a jurally opposite duty is to restrict with overall area of freedom. The problem of control of liberty concerns how its exercise might be restrained.

LIMITATION OF LIBERTY

- **Duty Not to Exercise Power**

Duties cannot be imposed on sovereign legislatures not to exercise their power to make laws. Sovereign legislatures can of course impose duties on their subjects or to exercise certain liberties, whether by way of exercising powers.

With regard to the limitation of liberty, it is superficially attractive to contend that there that there should be equal liberty all round, or that it should be curtailed equally. The matter is not so simple, however; whether minorities or individuals are allowed certain liberties at all depends, not on equality but on priority of values.

Courts may sometimes protect individuals against abuse of power by the executive; but certain other liberties to abuse power can only be dealt with the government.

LIBERTY AND ANARCHY

In a permissive society, liberties are allowed to the point where society becomes fragmented. Slogans such as 'liberality', 'tolerance', 'reasonableness', are so emotively charged that many people become obsessed with being thought 'illiberal', 'intolerant', or 'unreasonable', which colours their approach. It is correct to mention that people react justifiably against the abuses of power. To condemn an abuse of power is obviously not a denial of all exercises of power. Thus it is necessary to impose limitations on liberty in the interests of all. Limitations have to be imposed on various other kinds of liberties in order to hold the society together.

LAW AND MORALITY

Morality has hitherto been largely bound up with religion and it is said that once a state leaves religion to private judgement it should do likewise with morality. There is however a distinction. Moral ideas of right and wrong dictate behaviour, but religion is a matter of belief and only influences behaviour through moral attitudes which it fosters. Many ideas about everyday morals are not peculiar to any particular religion, or any religion at all. Another reason is that social existence depends upon coordination, which in turn requires restraint on individual action. Such restraint may spring from laws imposing duties to limit liberties, or it may spring spontaneously from moral sense. Liberty and duty are jurally opposite, each beginning where the other ends. The problem confronting law-makers is a difficult one, made worse by modern tendency of people who, though largely apathetic, prepare themselves to protest not against indiscipline, but against any insistence on discipline.

The message which comes through history is that, although emphasis may be laid now on power and now freedom from it, depending upon the paramount need at any particular time.

MACHINERY OF LAW

Granting that laws should uphold morality, at least to some extent, something has now to be said about the word 'uphold'. The two concepts that may be invoked are 'disability'[8] and 'duty'[9]

RESTRAINT OF LIBERTY

Restraint of liberty is more deep-seated problem than power. Firstly, liberty stands behind the very exercise of power. Whatever kind of power one has, there is usually a liberty to exercise it or not. The danger of abuse has to be met by abolishing the power and replacing it with a disability or by abolishing liberty and replacing it with an externally imposed duty not to exercise power, or through voluntary restraint in its exercise. Secondly, the giving of equal liberties could reach the point of anarchy and the question then is how liberties, which are destructive if exercised exclusively are to be restrained. Lastly, even where the law limits liberty by replacing it with duty not to do some act so that the individual no longer has any liberty at law, he still has an inner moral liberty to obey law or to disobey.

Within limits the courts can sometimes restrain governmental exercise of liberty. If reasons are given for a certain action, they can inquire into their adequacy; if none are given, they are powerless. Upholding laws helps in preserving a 'moral atmosphere', which is

[8] Abolishing a duty not to indulge does not affect immoral quality. The moral attitude might still be 'upheld' by rules attaching disabilities with regard to immoral conduct. The law may go further and 'uphold' the moral attitude in other collateral ways.

[9] Direct prohibition of immoral conduct by means of duty is more troublesome. Its functioning should be taken into account along with other considerations. The following factors can said to be relevant:

- The danger to the activity of others,
- The danger to the actor himself,
- The economy of forces needed for detection and pursuit,
- Equality of treatment,
- The nature of sanction,
- The possible hardship caused by sanction,
- The possible effects.

essential to preserving that shared morality, which in turn is essential to encouraging obedience and social action. Enforceability of law depends on the observance by the officials concerned of other laws giving effect to the penalty. The most important aspect of 'Restraint of Liberty' is the promotion of liberty with a sense of obligation. Law serves the society; it should; therefore, help to promote a sense of obligation and to ascribe primacy of duties rather than the rights. How a sense of obligation is instilled through law, involves delicate questions of policy. Therefore, the prevention of abuse of power and liberty must end. There remain problems because the solutions to them, which are the two main tasks of justice, are as yet far away.

Justice in Deciding Disputes: Precedents

Deciding disputes involves three kinds of knowledge: knowledge of facts, knowledge of law applicable to those facts and knowing the just way of applying law to them. Knowledge the law involves knowing how to find it judicial precedents, statutes and immemorial customs and will be dealt with. The doctrine of precedent has assumed a special form, known as *stare decisis*, the effect of which is that judicial decisions have binding force and enjoy law-quality per se. Stare decisis should also be distinguished from another doctrine known as Res Judicata, which means that the final judgement of a competent court may not be disputed by the parties or their successors any third parties in any subsequent legal proceedings. There are some main differences between two doctrines.[10]

APPLICATION OF PRECEDENTS

Applying a precedent to the instant case is a process of matching the fact-pattern of the precedent and the ruling thereon with the fact-pattern of instant case. There are two kinds of knowledge in precedents. These are knowing the facts and knowing the law.

Knowing the Facts

Knowing the facts of the instant case involves an exercise of discretion. This lies initially in believing or dis believing the testimony of witness and weighing it on balance of probability. Firstly, the art of knowing how the distinction between statements of primary and secondary facts. Secondly, there is knowledge of how to state facts at different levels of generality, which makes it possible for the deciding judge and a judge in a later case to make different statements of facts. Thirdly, it is necessary to know how to select material facts. Fourthly, it is the ability of later judge to review material facts of the precedent and add to or subtract from the sum-total of facts selected by the deciding judge or he may re-state the facts at a different level of generality. Such re-statements extend or restrict the ambit of the precedent. Finally, there is the art of knowing how to make different statements by taking different combinations of facts.

KNOWING THE LAW

What is 'law' in precedent is its ruling or *Ratio Decidendi*, which concerns the future litigants as well as those involved in instant dispute. Knowing the law in this context means how to extract the *rationes decidendi* from cases. Statements not part of the *ratio decidendi* are distinguished form *obiter dicta* and are not authorative. Accordingly, ratio is best regarded as a pointer towards the direction which subsequent decisions should take within a broad spectrum of variations. It is not something identifiable once and for all, but a continuing process and as such it has to be viewed in a continuum of time.

OBITER DICTA

Pronouncements of law. Which are not part of the *ratio decidendi* are classed as *obiter dicta* and are not authorative. Rationes and dicta tend to shade into each other. The former have law-quality and are binding on lower courts latter have law-quality, but are not binding at all.

SUBSEQUENT HISTORY OF A CASE

It should be abundantly clear from all this that the *ratio decidendi* of a case depends on the interpretation put upon it no less than on what the deciding judge himself propounded. This can happen in "reversal"[11], "refusal to

[10] Differences are:

- Res judicata applies to the decision in the dispute, while stare decisis operates as to ruling of law involved.
- Res judicata normally binds only the parties and their successors. Stare decisis, relating as it does to the ruling of law, binds everyone, including those who come before the courts in other cases.
- Res judicata applies to all courts. Stare decisis is brought into operation only by decisions of the high court and higher courts.
- Res judicata takes effect after time for appealing against a decision is past. Stare decisis operates at once.

[11] A case may be reversed on appeal. The effect of reversal is normally that the first judgement ceases to have any effect at all. The situation is different if case is affirmed or reversed by an appellate court on a different point from that on which the decision in the lower court is based.

follow"[12], "distinguishing"[13] ,"overruling"[14] and "explaining"[15]

FACTORS THAT KEEP STARE DECISIS INTO BEING

The reasons why stare decisis continues to be a criterion of validity are not the same as those which about its acceptance, though some continue to play their part. There are a number of factors that keep stare decsis into being.[16]

Statutory Interpretation

Legislation may be described as law made deliberately in a set form by an authority, which the courts have accepted as competent to exercise that function. When confronted with the task of interpreting a statute judges say that their task is to ascertain the 'Intention of Parliament' as can be gathered from the meaning of the words used. For instance, when parliament enacts a provision on a mistaken view of the law, the courts will give effect to it according to what the law really was in their view. It cannot be the intention of the body which may have recommended the measure, such as the law reform committee, nor of the draftsman, nor even of the members of Parliament who voted it through, for a good many of them may not have attended on that day, or may have voted only in obedience to party dictates. An act is the product of compromise and interplay of many factors, the result of which is expressed in a set form of words.

Further difficulties arise from the fact that 'meaning' and 'intention' are ambiguous words. Another difficulty derives from the fact that statutes seek to control the future by using broad terms of classes and categories. These are man-made and there are inevitably *casus omissi*, so that a measure of discretion is imported into every decision as to whether a provision applies to the case in hand or not. It is important to note that judicial interpretation of statutory provisions does follow a syllogistic style of reasoning and that the major premise being given in the form of some statutory rule, the judge is relived of the task, which he has to perform so often with case law of finding an appropriate major premise. The present state of statutory interpretation suggests that something is amiss with the judicial approach to the whole exercise. Statutes are designed to operate over indefinite periods of time, so they should be viewed in continuum. There is no single set of rules of statutory interpretation. It would be truer to speak of conflicting approaches and guidelines, largely supported by dicta.

REFERENTIAL APPROACH

[12] Before doctrine of stare decsis came into being, judges freely refused to follow cases which they considered to be contrary to principle. A judge may even now refuse to follow a decision of co-ordinate authority, in which event the conflict awaits resolution by superior tribunal.

[13] Repeated distinguishing of a case is evidence that the decision in not approved and the effect may also be to confine it more or more closely to its own special facts.

[14] This reflects to the action of a superior court in upsetting the ratio laid down by a lower court in some other case. Overruling necessarily involves disapproval of the ratio, but never effects the previous decision so that the parties in the overruled case continue to be bound by the decision under the doctrine of res judicata and accounts that have been settled are not affected.

[15]A judge may place a certain interpretation on a precedent and he may then follow it, or he may refuse to follow it, or he may distinguish it. Explaining is an indication that the *Ratio Decidendi* is being shaped.

[16] The factors are:

- Professional Ethos
  Every specialist vocation evolves its own expertise and habits of thought that is a way of going about the job.
- Absence of Code
  The lack of code was an important factor in bringing stare decisis about, but what part this still plays is doubtful. Even if the common law were to be codified now, this would not dispel the ingrained habits of thinking profession and moreover, there is no reason why stare decsis could not flourish under a code.
- Continued Service of Justice
  The need to continue treating cases alike and so achieving equality, consistency and impartiality remains constant. It may be argued that the broad doctrine of precedent achieves all this no less than *stare decisis*. Equality of treatment, consistency and impartiality are bound up with the need for certainty and predictability. Complete certainty and predictability is important, for if law is to develop at all uncertainties are bound to arise and moreover it may not be the rule that is uncertain, but which of competing rules should apply.
- Avoidance of Inconvenience and Technicality
  A practical drawback is the growing number of reported decisions, which may reach such proportions as to make stare decisis physically unworkable. The chances of relevant authorities being overlooked increases and this strikes at the roots of the doctrine, for ad decision can hardly be treated as authoritative if it was given per incuriam. Digests of cases and comparable services are just about able to make the system work but these may become inadequate with time. It might be possible to make less use of the decisions of judges sitting alone, or to have one opinion only in all appellate courts. A different objection to stare decisis is that in this over-whelming mass of cases there is danger of losing sight of principle. It is also known that case law based on stare decisis is inconveniently slow in adapting itself to a rapidity changing society.

- 'Literal' or 'Plain Meaning Rule'

Judges frequently use the phrase 'the true meaning' of words in the pursuit of their task. The most widely used canon of interpretation, the so-called 'Literal' or 'Plain Meaning Rule' i.e. 'if the precise words used are plain and ambiguous, in our judgement, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. There is a tendency to imagine that courts are thereby giving effect to the intention of parliament on the hypothesis that 'the words themselves do, in such a case, best declare the intention of lawgiver. The 'Pain Meaning Rule' suffers from the inherent weakness that it is not always easy to say whether a word is plain or not. The 'plain meaning' canon which is ill-suited to modern social legislation, which inaugurates whole schemes and policies, nor does it give guidance in marginal cases. A further drawback is that it requires that words are given their ordinary meaning at the time of enactment.

- 'Golden Rule'

The literal sense of words should be adhered to unless this would lead to absurdity, in which case the literal meaning may be modified. It contradicts the 'literal rule' according to which the plain meaning has to be adhered to even to the point of absurdity. Presumably, for the purpose of the 'rule' now being considered, the words though plain should not be too plain, but the apparent plain meaning would lead to a result too unfair to be countenanced.

PURPOSIVE APPROACH

'Mischief Rule'

Statutes are generally of indefinite duration and consideration of them in this way account of their changing functions and functioning. The canon of interpretation that is best suited to give effect to this approach is known as the 'mischief rule' which was propounded in (Heydon's case)[17] in 1584.

JUDICIAL ATTITUDE

Judicial sympathy is more likely to be forthcoming with enactments touching on 'common lawyers' law than with those concerning welfare and other social schemes. Judges have a complete understanding of the problem and background of enactments, they are mainly unfamiliar with the welfare social schemes. Today judges are more and more concerned with statute interpretation, which has overshadowed the slower process of judicial reform of common law. Even common law reform has come mainly via statute, it is not surprising that statutes reforming common law receive more imaginative treatment at the hands of courts than social reform statutes.

Customs

The term custom is used for a variety of senses: local custom, usage (sometimes known as conventional custom), general custom and the custom of the courts. Customs are of slow growth. When a person has been doing a thing over a substantial period of time, it is usual to say that he has grown accustomed to doing it. In considering the law-constitutive character of practices, it is necessary to distinguish between local custons, usages and general custom.

LOCAL CUSTOMS

Customs of particular localities are capable of being recognised as laws in derogation of the common law. Their acceptance by the courts is hedged by a number of conditions which have been evolved by the judiciary. The geographical limits, too, within they are allowed to operate need precise definition.

When custom is considered as an evolutionary phenomenon, the first question is why it came to be accepted by courts as a law-constitutive medium in the first place. In the historic period, necessary conditions had to be fulfilled were obvious.[18]

LOCAL CUSTOM AS 'LAW'

Customs are undeniably a source of law in the sense that they have provided material for other law-constitutive agencies, such as legislation and precedent whether they are themselves law-constitutive has been debated. Austin approached the matter on the basis of his definition of law as the command of a sovereign backed by sanction. Custom accordingly, cannot be law itself, but only by the virtue of sovereign command, which might express as a form of statute. When customs are considered as the products of development overtime the problem disappears. There is no doubt that in the early days customs were accepted as law-constitutive

[17] It was stated:
- What was the common law before making the act?
- What was the mischief and defect for which common law did not provide?
- What remedy had Parliament resolved and appointed to cure the disease of commonwealth?
- The true reason of remedy and then the office of all judges is always to make such construction as shall supress the mischief and advance the remedy and to supress subtle inventions and evasions for continuance of mischief and to add force and life to the cure and remedy according to true intent of makers of the act.

[18] The necessary conditions are:
- The custom had to possess a sufficient measure of antiquity.
- The custom must have been enjoyed continuously.
- The custom must have been enjoyed 'as of right.'
- The custom must be certain and precise.
- The custom had to be consistent with other customs in the same area.

because, in the absence of other guidance, judges were glad to avail themselves of them. With the expansion of common law and legislation, there was less and less need to turn to them, and judicial control over their admission became tighter, thereby reducing their law-constitutive potentiality to vanishing point.

Usages

Society is never still. As it develops it moves away from the letter of law by evolving practices that may influence or simply by-pass existing rules. Such practices only acquire the label 'laws' when incorporated into statute or precedent, but they have immeasurably greater significance and operation apart from this.

Values

Doing justice according to law is thus a continuous operation and the process reveals the whole system of norms that hold society together. Values concern the functioning of laws in the society. Values concern the functioning of law in thee society. Speculation about law in society is useful only in proportion to one's appreciation of how it actually operates for this reason the foundation for any such speculation should be laid, among other things, in actual cases.

The principle of yardsticks by which conflicting interests are evaluated may tentatively be listed as (national and social safety)[19], (sanctity of a person)[20], (sanctity of property)[21], (social welfare)[22], (equality)[23], (Consistency and Fidelity to Rules, Principles, Doctrines and Tradition)[24], (morality)[25] and (international comity)[26].

Obligation & Duty

OBLIGATION

Every obligation is a normative judgement and normative judgements imply social rules. Obligations can be moral as well as legal. Both kinds are supported by pressure for conformity, which is exerted irrespective of individual consent. Both concern behaviour of everyday situations and deviance from either kind of obligation justifies criticism. There are some differences between moral and legal obligations.[27]

DUTY

[19] Both sanctity of the person and of property yield to the safety of the nation or society. Even in time of peace the sanctity of the individual may have to yield before national security.

[20] The choice between personal liberty and property sometimes present difficulty. Not only are courts averse to treating an individual as property, but they are averse to allowing an individual labour to be treated as property

[21] The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been abridged by some public law for the good of the whole.

[22] It is another example of the inroad often made into individual rights in the interests of the wider community. In a modern civilised society, there must always be a delicate balance between the right of the individual and the need of the community at large. Authorities who act on behalf of community are =often given powers which, so long as they exercise them reasonably, do entitle the authority to encroach, usually y with compensation to be paid, on the rights of individuals.

[23] The popular notion of 'justice' is based however vaguely, on a sense of equality, either distributive or corrective. Following points can be mentioned in this connection.

- Redress for wrongdoing, whether in the form of punishment or payment of compensation, has to be proportionate to injury.
- In the exercise of judicial and quasi-judicial powers the rules of natural justice should be observed.
- Distributive justice requires equal distribution of justice among equals. Distributive justice requires equality of burdens as of benefits.
- The need to ensure equality of treatment for all persons is a justification for the doctrine of precedent, though not necessarily of stare decisis.
- The removal of special advantages and disadvantages of certain individuals and bodies is another example of the leaning towards distributive equality.

[24] Some believe that judicial reasoning proceeds exclusively by means of the case-by-case method that the influence of values is infinitesimal, if not non-existent. Two points are always overlooked. One is the perception of similarities and dissimilarities, which is the essence of mode of reasoning, is subjective. The other is the need for consistency and fidelity to rules, principles, doctrines and tradition, which are important values in themselves.

[25] There can be little doubt that moral considerations do influence rules of law, but this aspect has to be distinguished from the question how far laws should give effect to moral attitudes.

[26] The desire to conform to the practice of other nations and to maintain friendly relations with them has shaped a number of rules. In default of any statutory and common law rule, a court may adopt a rule of customary international law.

[27] Differences between moral and legal obligations are:

- Every moral rule is treated as being important, but this is not so with every legal rule;
- Moral rules are not changed by deliberate, single acts, while legal rules can be so changed;
- Breach of moral rules requires voluntary and blameworthy conduct,
- Moral pressure is applied mainly through appeal to the morality of the conduct, not by coercion as with legal rules.

Duty is species of obligation.

FUNCTION OF DUTY

The factors that call duties into being may be summed up generally; there are prescriptions of conduct towards the achievement of some end, moral, social and other. The ends may also determine the form of prescription. A more important question is why a duty continues to exist, by which meant continues to be law. The obvious requirement is the continuance of the purpose for which it has been introduced.

STRUCTURE OF DUTY

Courts use different conceptions of duty so as to do justice in different situations.[28]

APPROVAL AND DISAPPROVAL

The phrasing of a duty signifies the kind of approval or disapproval that is given. Where a duty is embodied in a judicial precedent, the approval or disapproval is traceable to the policy decision of the judge ort judges who laid it down. The attitude of law, whether of approval or disapproval, is based on the purpose to be achieved, which in turn may be governed by social values, morality, justice, or may be a custom of the bygone age.

ENFORCEABILITY

Enforceability may mean, compelling observance of the pattern of conduct enjoined by the duty, or the indirect method of inflicting a penalty or 'sanction', in the event of failure to observe it.

BREACH OF DUTY

Duty is a prescriptive pattern of conduct, which 'exists' in the sense that ideas exist. The breach of duty, however, can only occur as a result of conduct in a given situation, which is why it is always a question of fact. What amounts to a breach of any given duty must follow from the formulation of that duty. Depending on the formulation of the duty, ascription of responsibility for conduct may turn on whether this is an act or an omission, a distinction which has additional significance as to the moment of time when breach of duty occurs. In some cases, breach of duty requires that the conduct has to be blameworthy (malicious, intentional, reckless or negligent), in others it occurs even without blameworthiness (strict responsibility).

Persons

The concept of 'person' focuses large numbers of jural relations, but it allocates them differently to different classes.

HUMAN BEINGS

Individuals are the social units and pre-existed both laws and society. Since laws are made by them and for them and since jural relations arte relations between individuals, it is of no wonder that the jural relations of each individual came to be one of the first and most important unities for legal purposes.

CORPORATIONS SOLE

The main purpose of the purpose of the corporation sole is to ensure continuity of an office. Moreover, the occupant can acquire property for the benefit of his successors, he may contract to bind or benefit them and he can sue for injuries to the property while it was in the hands of his predecessor.

- CORPORATIONS AGGREGATE

The development of trade has enlarged the grouping of jural relations in such a way as to embrace collections of individuals organised into what are known as corporation aggregate.

- CONTROL OF POWER

The separation of power from ownership of the corporate property and ownership of 'notional property', namely shares, has been taken a step further with parent and subsidiary companies. The best known method of controlling power is nationalisation of large concerns in the hope that state ownership would prevent anti-social abuses of power.

- CONTROL OF LIBERTY

Liberty is a freedom of action and actions can be performed by human beings, not by abstractions like companies. When it becomes necessary to control freedom of action, the courts 'pierce' or 'lift the veil' of corporate personality in order to take account of the

[28] Different conceptions used by courts are:

- Duties do not describe, but only prescribe behaviour, it follows that they express notional patterns of conduct to which people ought to conform. Thus they 'exist' only as idea and they remain expressions of 'oughts' even though they may be expressed imperatively as 'must' or 'shall.'
- An 'ought' is legal if it is embodied in one or other of the criteria of validity. Nor all legal rules create duties, but even when they do not always address an additional duty to officials' to treat them as 'law'. Rules conferring powers may confer mandatory or discretionary powers.
- A duty prescribes a person's behaviour primarily for some purpose other than his own interest.
- The conduct envisaged in duties need not necessarily refer to the future, although this is in fact the case with majority of them. A duty can be created with reference to past conduct, in which case it represents a notional pattern of conduct as to how people ought to have behaved. If the behaviour of any person is found to have been contrary to what it ought to have been, he is regarded as having committed a breach of that duty.
- Conduct can be conceived as an omission, an action by itself, an action in relation to circumstances, or an action in relation to both circumstances and results.

conduct of individuals, whose actions are in question. Courts, therefore, do not always adhere to separateness of corporate existence, which excludes any consistent theory and emphasis the need to look at what courts do in a particular situation.

THEORIES OF NATURE OF 'LEGAL PERSONS'

- 'PURPOSE' THEORY

This theory is based on the assumption that 'person' is applicable only to human beings; they alone can be subjects of jural relations. The so-called 'juristic' persons are not persons at all.

- THEORY OF THE 'ENTERPRISE ENTITY'

Related though somewhat removed from the above, is theory of the 'enterprise entity.' The corporate entity, it is said, is based on the reality of underlying enterprise approval by law of the corporate form establishes a prima facie case that assets, activities and responsibilities of the corporation are part of enterprise.

- 'SYMBOLIST' ENTITY

The members of a corporation and the beneficiaries of a foundation are the only 'persons'. This theory assumes that the use of the word 'person' is confined to human beings.

- HOHFELD'S THEORY

Only human beings have claims, duties, powers, and liabilities transactions are conducted by them and it is they who ultimately become entitled and responsible. This theory is purely analytical and analyses a corporation out of existence.

- KELSEN'S THEORY

This theory is also purely analytical and accurate as far as it goes. It omits the policy factors that bring about variations in the attitude of the courts and it does not explain why the special set of rules, of which Kelsen spoke, is involved in the case of corporations.

Possession

Physical control of a thing by a person is a fact external to and independent of laws. When laws came into existence, this fact is known as 'possession'. It is a polymorphous term which may have different meaning in different contexts. It is impossible to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the content of all statutes.

- SAVIGNY'S THEORY

Savigny said that possession consisted of two ingredients, *corpus possesssionis*, effective control and *animus domini*, the intention to hold as an owner. Possession involved both the elements of personal loss of one or the other brought possession to an end.

- IHERING'S THEORY

Ihering's theory of possession is more objective and it presents a sociological approach to possession. According to him the persons holding property in majority of the cases would be owners and the possession was attributed to such persons so that the interdicts might be made available to them. This theory is a flexible one it explains those cases which Savigny's theory found difficult to explain. There are different kinds of possession such as 'mediate and immediate possession', 'corporeal and incorporeal possession'.

Ownership

Ownership consists of an innumerable number of claims, liberties, powers and immunities with regard to thing owed. Ownership is an akin conception of possession. Ownership does not correspond simply with its component elements any more than the word 'team' connotes a group of individuals. Ownership as an asset has value apart from its component claims etc. the term ownership is used with reference to things. Thing has two meanings depending upon whether it is used with reference to physical objects, 'corporeal things', or certain rights, 'incorporeal things'. Ownership in its most comprehensive signification, denotes the relation between a person and any right that is vested in him ownership is therefore 'incorporeal'. The rights of ownership comprise of benefits and burdens the former consist of claims, liberties, powers and immunities, but the advantage these give is curtailed by duties, liberties and disabilities. The claims etc, which comprise the content of ownership may be vested in periods other than the owner. Whether these others may themselves be treated 'owners' depends on whether the conventions of law treat their interest as 'things'. Ownership is an instrument of social concept and an instrument of social policy. The social aspects of ownership reveal the manner in which its content came to be regulated over the years so as to determine how and to what extent an owner shall enjoy his interest in a manner compatible with the interests of others.

Justice in adapting to Change

SOCIAL EVOLUTIION

No society is static. Changes develop gradually over the years in practically every sphere brought about by evolution ion environmental, economic and political circumstances, national and global as well as in religious and moral ideas. They may occur slowly and rapidly; they may be ephemeral as with passing fashions or permanent. The law may be stretched to take account of the development to take account of the development, or it may be ignored until it becomes a dead letter or is repealed. The changes that will have to be made in the wake of welfare activities of the state are still being realised. It is important to understand how vital is the need for the law to adapt itself to social change if it is to survive. In a different sphere, consideration should also be given to changes occasioned by scientific advances. Some of the current developments in the society that have taken place are computers and certain medical advances.

COMPUTERS

The influence of computers on law has already effected significant changes and there is likelihood that there will be many more with the increasing sophistication of equipment and techniques. Computers have brought within them a new jargon: 'input', 'print-out', 'processing', 'programming', 'storage', 'retrieval', 'software', 'hardware'. All that is claimed for human beings for justice is that they can help and improve human justice and relieve people of drudgery by performing routine jobs more effectively. One of the most important facilities provided by computers is the storage and retrieval of information at a greater range and depth. Certain practical advantages are that computers can assist practitioners by timing and costing interviews with clients; they make light work of conveyancing and patent searches and in drafting documents and letters of routine nature; they assist with the tasks of crowd control and the detection and prevention of crime. Several areas of law have changed and are changing. The threat to privacy, in particular, is giving rise to increasing concern copyright and patent law need revision on such questions as the moment at which protection should be available, whether at the input or print-out stage and patent protection for software. Rules of evidence and procedure, too, have needed modification in important respects example enlarging the concept of document, discovery of documents, especially when the information is stored in a neutral owned data bank, the contemporaneous evidence rule and the rule against hearsay. The decision whether or not to report case rests at present with the reporter, which means what becomes law through '*stare decisis*' depends on the choice of individual reporters. If every decision were stored in computer, this would broaden the basis of what becomes 'law', besides eliminating embarrassments caused by overlooked authorities and divergences sometimes found in different reports of the same case.it is of no doubt that computers have brought lawyers to the threshold of exciting new developments.

MEDICAL ADVANCES

Medical science has provided examples of the way in which modern developments are forcing the law to restructure certain concepts hitherto supposed to be so obvious and straightforward that few lawyers, if any, even dreamed that they would be seriously challenged. For example, DNA test, Narco-Analysis, brain mapping, finger-printing, organ-transplantation have been adopted by society with the pace of time. Since with new medical technologies the method of evidencing advances and offences to increase. In order to cope up with the developments new laws and statutes are enacted. The medical developments in the recent years have necessitated a radical rethinking of act and omission.

CHANGE THROUGH DISOBEDIANCE

Civil disobedience has become a problem in many societies in recent times and changes have been brought about in consequence the question is how far, if at all, disobedience can be accommodated within a theory of law. On the face of it, there is an obvious contradiction here, but if law is thought of in a continuum and ability to change is regarded as a condition of the continuity of law, then disobedience could, within limits, be included among the phenomena of legal change.

LIMITS OF DISOBEDIENCE

- Obedience should always be the norm so that disobedience needs to be justified.
- Available means of obtaining redress must be tried first and in this connection the degree of likelihood of their success has to be taken into account.
- Action by the way of disobedience should not impair equal liberty of others to continue to obey.
- Disobedience in order to provide test case is acceptable.
- When disobedience is resorted to a plea for the reconsideration of some decision, the disobedience should cease when reconsideration has been given, even if the result is that the decision should stand.
- Disobedience is persuasive when it is designed to gain publicity and a hearing when other means fail.
- Disobedience should not involve violence or infliction of hardship on others, because it then becomes coercive and not persuasive.
- Disobedience of a national law in order to protest against some evil in another country, especially if it inflicts hardship or inconvenience on innocent persons, is not permissible.

MACHINERY OF CHANGE

Change may be effected judicially or through legislation. Judicial methods include conceptual tinkering, use of fictions and equity. Sir Henry Maine who propounded the classic thesis that what he called 'progressive societies' develop beyond the point at which 'static societies' stop through the use of fiction, equity and finally legislation.

Conclusion

It is evident from the study of different approaches that justice has been understood through various concepts. The jurisprudential aspects of justice clearly lay down a broad idea how justice should be understood and how people can get it. Every aspect of justice explains highlights the pros and cons of it. It is understood from the reading of all aspects that if a particular process is applied then it's both merits and de-merits must be taken into account. Moreover, aspects of justice teach us how the concept of understanding and analysing of justice changed. The journey of undergoing the complete study of aspects of justice has been an invigorating experience of mine. Understanding the aspects of justice helps to learn the most important part of jurisprudence.

