CHAPTER I

Justice and the Judicial Function :
Concept of Justice - Kinds of Justice
Justice and Law - Justice and
Constitutional Government

Concept of Justice :

Broadly speaking, justice, means the fulfilment of the legitimate expectation of the individual under laws and to assure him the benefit promised therein. Justice tries to reconcile the individual rights with the social good. The concept of justice is related to dealings amongst human beings. It emphases on the concept of equality. It requires that no discrimination should be made among the various members of the society

To define justice it is very essential to refer to the root idea of the word "Jus" meaning joining or fitting. Thus, justice carries the meaning of cementing and joining up human beings together. The values of liberty, equality and fraternity are important in any system of law and justice These values exist in different proportions and there are conflicts between them too. Therefore, there is need for a constant process of adjustment between the conflicting claims of these values in a society. In this way justice assumes the key role of an adjuster and synthesiser. It reconciles the claims of one person with another.

The concept of justice is not static. With the changes in the society, the concept of justice has also changed from time to time. Justice is an evolutionary concept. Hence, it is essential to examine the concept from the time of ancient Greece to the present day. It should also include a discussion on the ancient Indian concept of justice to find out how the idea of justice as conceived by the ancient Hindus was evolved.

Ancient Greece :

The Greek concept of justice was closely related to ethics. Accordingly, Greek scholars have tried to define justice in their own way To Cephalus, justice consists of telling the truth and repaying one's debt

Polemarchus defines justice as giving what is due to every person in society. Trasymachus opines that justice is the importance of the weaker The Sophist philosophy of justice is based on the right of might as a basic postulates of natural law. Socrates criticised this philosophy. Plato also rejected all these concepts of justice. Plato believed in the natural inequality of men and accordingly, he advocated the class system through which he divided people into four categories, namely, the ruling class, the military class, the producing class and other craftsmen. Plato said that every man has specific functions and should confine his activity to the proper discharge of his functions. Justice, according to Plato is the quality of the soul. Plato conceived of an ideal state based on justice. Plato's perfect justice is, to a great extent synonymous with morality and therefore, exist only in an ideally constituted community. Plato mentioned two other kinds of justice known as individual justice and legal justice. But Plato's justice is in no way concerned with the judicial system.

Aristotle, though influenced by Plato, differed from him in many ways. According to him, "Justice is a social virtue which is concerned with relationships between persons ..... Justice alone is the good of others, because it does what is for the advantage of another"[1]. Thus Aristotle introduced equity in the administration of justice. Moreover, he classified justice in two categories, namely, distributive and corrective justice. According to the principles of proportionate equality, when justice deals with the distribution of right, honours, goods etc. to the citizen it is called the distributive justice. The scope of distributive justice is wide. The womens' right to franchise or labour's right to better pay and amenities and their right to vote irrespective of any other qualifications or their right to form unions come within the scope of distributive justice. Rights like the right to safety and security of citizens falls under the distributive justice

1. Aristotle, Nichomachean Ethiest, Transt H. Rackham, Edn. 195, BKV.117

In a democracy distributive justice is dispensed by a legislative body. But in a non-democratic state, distributive justice is dispensed by the autocratic ruler or body.

Another kind of justice, according to Aristotle, is corrective justice which implies making good the loss of a person to whom some wrong has been done. Corrective justice stands against injustice. The term "unjust" according to Aristotle, applies both to man who breaks the law and the man who takes more than his due, the unfair man. Hence, it is clear that the law-making man and the fair man will both be just[2].

Classical Rome :

The Roman lawyers were influenced by the Greek philosophy to a great extent. The absolute power system was the dominant feature of the Roman political organisation. The Roman law was produced from this absolute power system. In the eye of Roman law justice is a fixed and abiding disposition to give to every person his right. The precepts of the law are to live honourably, to injure no one, to give to every man his own respect.

Many Roman political thinkers developed different theories of justice. Cicero was a lawyer and a statesman of 106-43 B.C. who was profoundly influenced by Plato and Aristotle. He was the only Roman political thinker who exercised tremendous influence throughout the middle ages. Cicero advocated that justice is a natural law which does not depend upon the consent of man. It is not brought into existence by convention and is not devised by men for the advancement of their benefit It is unchangeable and eternal. It is binding upon all men and all nations All legislations should conform to it. It commands men to perform their duties and also restrains them from doing wrong things which is of

2. Ibid. Book V.iv

universal application. God is the author of this law, its interpreter and enforcing judge. Disobedience to this law is disobedience to one's own nature and should be punished. Cicero's law of nature is the law of God. He says that the main function of the state is to give effect to the principle of justice.

Middle Ages :

The Church dominated the medieval period. St. Augustine (354-430), the famous Christian theologist of this period says that justice is the foundation of the state. Where there is no justice there can be no jus. Moreover, he added that justice does not exist in a state which does not worship God. It exists only in Christian states. Justice is not created by the civil authority but by the Church. St. Augustine believed in the authority of the Church as the guardian of the eternal law of God According to Augustine, justice consists in the right relationship between men and God. The medieval concept of eternal law of God was advocated by St. Thomas Acquinas. He also agreed with Aristotle on the concept of justice based on equality. Accordingly to Acquinas human beings must submit to natural laws. Justice is expressed only through law which is proportionate equality. St. Acquinas also divided justice into two kinds, namely - distributive and communicative. Distributive justice implies distribution of something to an individual in proportion to his personal dignity and status. But communicative justice is not related to the dignity and status, rather it supported the equal distribution of justice irrespective of high or low in the community.

The most important concept of the Middle Ages was the principle of justice. St. Augustine asserted that where there is no justice, there is no commonwealth. This was also said by Plato, Aristotle and Cicero. The medieval thinkers thought justice as a form of law.

Renaissance and Reformation :

Renaissance and Reformation were the two movements which have put emphasis on the realisation of justice. The movement which grew against the Catholic Church during the sixteenth century is known as the Reformation. The break-up of the Holy Roman Empire and a revolt against the authority of the Roman Church paved the way for "Reformation". The movement grew as a protest against the abuses of the Church under the leadership of Martin Luther, which was also known as Protestant Revolution. Luther was suspicious of man-made laws. He insisted that good judges are very essential for getting justice. Modern political thinkers opine that the essence of justice lies in the attainment of the common good as distinguished from the good of the individual. By justice, they mean a social order based on liberty and equality. According to Barker justice is the source of the social and democratic principles like liberty, equality and fraternity. Justice lies in doing one's own duty without causing any injustice to others. Lord Bryce says that if the lamp of justice goes in darkness how great is that darkness.

Concept of Justice - Karl Marx :

According to Karl Marx, the concept of justice in a capitalist society is based on the capitalist mode of production and the capitalist relations of production. It carries the result that justice has meaning for those only who own the means of production. According to Marx, the positive law of the state is imposed on its members by the authority of the class which controls the means of production. Therefore, the idea of justice and its content varies with the economic interest of the ruling class

Ancient India : .

The discussion about the concept of justice will not be complete without reference to the ideas of philosophers of ancient India

The Hindu legal system is embedded in Dharma as propounded in the Vedas, Puranas, Smritis and other works on the topic The word Dharma is used to mean justice (Nyaya), what is right in a given circumstance, moral, religion, pious or righteous conduct, being helpful to living beings, giving charity or alms, natural qualities or characteristics of properties of living beings and things, duty, law and usage or custom having the force of law, and also a valid Rajashasana (royal edict)[3].

Thus the Indian or Hindu concept of justice is to preserve or conserve a just, social order. From the "Varna" system of the Indian society the concept of justice can be drawn out easily. Justice or Dharma stood for the Varna system. This concept of Varna system is similar to Platonic concept of justice to some extent.

In Hindu thought the State or King is the protector of Varna. The four fold division of society existed at that time are - Brahmins Kshatriyas, Vaishyas and Sudras. Brahmins are like "the lovers of wisdom", in Plato, Kshatriyas are like the warriors, in Plato, Vaishyas are like the appetite element in Plato and Sudras are also the slave class in Plato - unfit for any work except to serve others.

The discussion about the Indian concept of justice will not be complete without the concept of justice explained by Manu and Kautilya Both of them were in favour of protection of social order in accordance with the system of Varna and Dharma.

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3. Justice M. Rama Jois : Legal and Constitutional History of India, p. 3, Universal Law Publishing Co. Pvt. Ltd. (2001)

Justice as conceived by Manu :

The "Smriti" or the code of Manu forms an important landmark in the legal history of India. The systematic and cogent collection of all rules of Dharma Sastras, covering all the branches of law then in force and the simple language and great clarity in its composition made the Manusmriti the most authoritative source of ancient Hindu jurisprudence.[4]

The word "Dharma" is used to mean justice (Nyaya). Manu says Dharma protects those who protect it. Those who destory Dharma get destroyed. Therefore, Dharma should not be destroyed so that we may not be destroyed as a consequence thereof. The entire concept of Rule of Law is incorporated in the principle laid down in this concept of Justice. Justice regulates the mutual obligation of individual and the society. Manu warns, "Do not destroy Dharma, so that you may not be destroyed".

In this way, Manu establishes the importance of justice by pointing out that justice being violated, destroys justice, being preserved, preserves. Therefore, justice must not be violated lest violated justice destroy us. He believes that justice remains with a person not only in his lifetime but after death also. Manu entrusts the King of a state the major responsibility of administering justice on the basis of law. Manu tries to make justice lawful, impartial and honest which is clear from the system of lawsuit provided by Manu himself. He gives emphasis to evidence and the honesty of witness in lawsuits. According to him trustworthy men of all the four varnas may be made eye witness to lawsuits. He prohibits some sections of the society from becoming witness in any case and they are King, the actors, a strotriya, an ascetic, a wholly dependent man, a man of bad frame, an aged man, an infant, man of lowest class, a thief etc.

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4. Ibid, p. 28

Kautilya's concept of Justice :

The Arthasastra of Kautilya occupies the most important place in the legal and constitutional history of India. The author of this work is Chanakya or Vishnugupta, who was the Prime Minister of the Magadha Empire during the reign of Chandragupta Maurya[5], has made Arthasastra an encyclopedia of statecraft and legal system for the guidance of all concerned which covered the topics relating to law, constitutional law and other affairs of the state.

Kautilya was the first ancient law giver who gave every man and woman the right to move the court of law. He says law in the hands of ignorant people gets tampered and becomes incomplete. He prescribes a panel of three members acquainted with sacred law and three ministers of the King to carry on the administration of justice. He prescribes for judicial organisation and procedure with a high sense of honesty and impartiality. The present judicial system is based on this type of judicial organisation which is conducive to a sound judicial system.

This great work remained untraced till it was unearthed by Dr R. Shamasastry of the Oriental Research Institute, Mysore. He translated this work and published it in 1915[6].

The above discussion clearly reveals that the ancient Indian concept of justice as well as Plato's concept of justice is conservative and aristocratic in nature whereas modern concept of justice is liberal and democratic in nature.

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5. R.C. Majumdar : Ancient India, p. 104
6. Kautilya's Arthasastra : Translated by Late Mahamahopadhyaya, Arthasastra Visharada Vidyalankara, Panditaratna Dr. R. Shama Sastry, p. 494

Rawls concept of Justice :

A significant study on the subject of justice appeared a few years ago which puts its author John Rawls in the category of great political thinkers like Plato, Kant, Mill.

A thorough going attempt to formulate a general theory of justice is that of Professor John Rawls (b.1921) of Harvard University He writes mainly from the angle of philosophy and political science rather than of Law[7]. Since its publication in 1971 it has received wide attention

Professor Rawls assumes that society is a more or less self sufficient association of persons, who in their mutual relations recognise as binding certain rules of conduct specifying a system of co-operation Principles of social justice are necessary for making a rational choice between various available systems[8]. The way in which a concept of justice specifies basic rights and duties will affect problems of efficiency, co-ordination and stability. This is why it is necessary to have a rational conception of justice. Practical rationality has three aspects, namely - value, right and moral worth.

In modern times, contractual nature of justice was explored by Kant that influenced John Rawls. A social contract test of political policies is, in Kant's view a way to secure that acknowledgement by hypothetically involving each member of the society in the assessment of those policies in a way that respect his interest and perspectives as an individual. Rawls also believes that a contract test takes the individual seriously in a way that *utilitarian* does not.

Rawls justice is concerned not merely with human welfare but also with individual's welfare. Rawls argues that adequate theory of justice must morally respond to, and preserve the "distinction of persons".

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7. Rawls, "A Theory of Justice" (1971)
8. Ibid, p. 4

The idea of the "original position" and the "Veil of ignorance" as given by Rawls may be understood in the light of this interpretation that the people as negotiators have general wisdom but particular ignorance They strive to protect and promote their material interest, but in doing so they are unable to distinguish their interests with the interests of others They can protect and promote their interest by depending upon the system of law and justice of a country.

The basic principles of justice are generalised means of securing certain generalised wants, "primary social goods", comprising what styled the "thin theory of the good", i.e. maximisation of the minimum (as opposed to a "full theory")[9]. These primary social goods include basic liberties, opportunity, power and a minimum of wealth. The first principle of justice is : "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"[10]. The basic liberties include equal liberty of thought and conscience, equal participation in political decision-making and the rule of law which safeguards the person and his self respect[11]. The second principle is : '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 their fair equality of opportunity[12]. The just savings principle is designed to secure justice between generations and is described as follows : 'Each generation must not only preserve the gains of culture and civilisation, and maintain intact those just institutions that have been established, but it must also put aside in each period of time a suitable amount of real capital accumulation[13]. With the aid of these principles Professor Rawls seeks to establish a just basic structure of an equalitarian society. It can also be said that Rawls is not an egalitarian desiring equal distribution of social and economic advantages but he is an egalitarian as he is in favour of autonomy of each individual

9. Ibid, p. 396
10. Ibid, p. 302
11. Ibid, p. 205
12. Ibid, p. 302
13. Ibid, p. 285

Kinds of Justice :

Concept of justice is not static as it varies from person to person. Keeping in view the various concept of justice, justice may be classified into certain kinds, namely - natural justice, economic justice social justice, political justice, legal justice, distributive justice and corrective justice.

Natural Justice :

Man as a member of society has to mould his behaviour so that he can act in a proper way without disturbing the feelings of others Thus to mould the behaviour of an individual to his fellow beings in accordance with the laws of nature implies natural justice.

The word "nature" literally means the innate tendency or quality of things or object and the word "just" means upright, fair or proper So the expression "natural justice" would mean the innate quality of being fair. It is another name of common sense justice meaning thereby natural of what is right and what is wrong[14]. Justice Sarkaria has stated. The phrase is not capable of a static and precise definition. It can not be imprisoned in the straight jacket of cast-iron formulae. Historically, natural justice has been used in a way, which implies the existence of moral principles, of self-evident and unarguable truth[15]. In course of time, judges nurtured in the traditions of British jurisprudence often invoked with a reference to "equity and good conscience". Legal experts of earlier generations did not draw any distinction between "natural justice" and "natural law". Natural justice was considered as that part of natural law which relates to the administration of justice. On making the above observation Sarkaria, J. has observed "Rules of natural justice are principles into the conscience of man. Justice being based substantially on

14. P.S. Kurien Vs. P.S. Raghaban AIR 1970 Ker 142
15. Paul Jackson – Natural Justice, 2nd Edition, p. 1

natural ideals and human values the administration of justice is here freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. Rules of natural justice are not embodied rules. Being a means to an end not an end in themselves, it is not possible to make an exhaustive catalogue of such rules"[16].

Economic Justice :

The concept of economic justice is very wide. Economic justice is nothing but a corollary of social justice. It evolves equal economic values, opportunity and right for all and prohibition of economic discrimination between man and woman in economic matters. No other form of justice is realisable without being associated with economic justice. The very concept of economic justice involves the idea of a socialistic pattern of society. The ideal of Indian constitution is to establish a welfare state. Therefore, economic justice has been accepted as one of the basic principles. Nehru said, "I trust this Constitution itself will lead us to the real freedom that we have clamoured for and that real freedom, in turn, will bring food to our starving people, clothing for them, housing for them and all manners of opportunity of progress"[17].

The Constitution makers' desire about the social welfare activities to be undertaken by the government is reflected through the principles of economic justice enshrined in the Preamble and the Directive Principles.

Political Justice :

Political justice prevails in a society where everyone has a share in the political process. The state should establish political justice

16. Swadeshi Cotton Mills Vs. Union of India AIR 1981 SC 818 (1981), SCR 533
17. Constituent Assembly Debates, Vol. II, p. 302

by creating conditions under which all including the minorities find scope for exercising their political rights in pursuance of a system of Universal Adult Suffrage, rule of law, achievement values as opposed to ascriptive values.

The essence of political justice as enshrined in the Constitution of India, is the opportunity to all for taking part in the government of the state. The makers of the Indian Constitution say that political justice involves Universal Adult Franchise and no distinction on the grounds of religions, sex, caste, colour and the like in matters of recruitment of public services. It also ensures reasonable reservations and safeguards for the betterment of the minorities and other weaker sections of the society.

Social Justice :

Social justice may be regarded as an important factor of social transformation. Social justice implies the absence of discrimination on the basis of caste, colour, religion etc. It also prohibits forces creating artificial social barriers like those of untouchability. Social justice demands equality along with liberty. Besides these, protection and improvement of the weaker and downtrodden sections of the people, equitable distribution of the necessities of life etc. constitute social justice. Social justice, in a wider sense, demands harmony and co-operation between labour and capital, a substantial minimum wage according to the capacity of each industry and other incidental benefits that improve the standard of living of the general people of the country.

Legal Justice :

Justice must be supported by law. Legal justice implies justice given according to law which again implies equality before law. It means no one can be above the law and everybody should be equally punished for equal crimes. Barker says that law ought to have both validity and value. Validity stands for sanction of law and law draws its value from justice. The courts of law can give legal justice.

Thus the fundamentals of modern justice are the codes of civil and criminal law, law of evidence, property and contract law, procedure of trial, provisions for appeal to higher courts etc. All those were evolved from the medieval concept of rude and crude justice based on the mood or mercy of the ruler or similar self-styled despot.

Justice and Law :

Justice and law are closely inter-related. The end of law is justice. Bentham says that justice is the immediate purpose of law and without an element of justice it will become an instrument of oppression The end of law is justice. In the legal sense, justice is nothing but an application of law to particular cases. In this sense law would include common law, enacted law, equity law or case law. If law is the instrument to maintain order, justice is the end of the state.

Though law and justice are intimately connected with each other, there is difference between the two. When there is no legislation on any matter, the court has to evolve some principle of customary law or equity and decide the case. When there was almost no legislation, custom helped in shaping the judicial decision.

Law seeks to give justice, but law is not justice. Law generally cannot need the ideal standard of justice. It is seen that in some places courts give law and not justice. The courts of law give legal, not moral justice.

Justice and Law viewed by different political thinkers :

Plato :

The Platonic conception of law and justice is wider than that of ours. It covers the moral life of the individual. Plato does not make a distinction between legality and morality.

The Roman Lawyers :

Though the writings of Roman lawyers were not original, these are not insignificant. Their conception of justice and of law of nature is related to that of Stoics and opposed to those of the Epienreans and of later Academics. The Roman lawyers recognised three main types of law jus gentium, jus naturale and jus civile. Now-a-days, the jus civile is known as municipal law or positive law. Most of the Roman lawyers including Cicero, considered law as ultimately rational, universal and divine. Cicero says that every state must be founded upon justice and upon law. The form of the state may vary but its foundation must be justice.

Middle Ages :

The Roman writers regarded law and justice as the fundamental basis of the state, but Augustine does not agree with the

Roman writer. According to Augusitne Justice does not exist among men who do not serve God. Just as Cicero says that the state is one in which justice is meaningful, St. Augustine says justice is the foundation of state He believed that just state is one in which belief in true religion is taught and one in which it is maintained by law and authority.

Thomas Acquinas, says that law is some ordinance of reason for the promotion of common good, promulgated by him who has the care of the community. All true laws are the manifestation of eternal law He said that law is eternal and the entire universe is governed by eternal law Acquinas said about natural law also which is according to him is essentially universal.

The law of nature may be changed when there is a change in human conditions. Natural law enables human beings to seek good and avoid evil, to preserve themselves and to live as perfectly as possible

About divine law, Acquinas said that divine law is the knowledge disclosed to man by divine agency. For example, the special code of law which God gave to the Jews, the special rules of Christian morality or legislation given through scripture or Church are examples of divine law.

There is another type of law, namely - the human law or positive law. The positive law supplies certain rules to man which are not provided by natural law. The positive or human law must be just and in harmony with common good. It must be legitimate and it must be duly promulgated. It must derive its powers either from the people or from someone who has been elected by the people. Discussing about the allegiance of the subject to the law of his society Acquinas said, "Man is bound to obey the secular ruler so far as the order of justice requires".

Reformation and Renaissance :

The movement which grew against the Catholic Church during the sixteenth century is known as the Reformation. During the period of Renaissance, because of the change in man's outlook people became aware of the various shortcomings of Catholism and consequently there was a widespread desire for religious reforms. A movement grew against the shortcomings of Catholism and the Church under the leadership of Martin Luther. Luther is suspicious of manmade laws. He, therefore insisted that good judges, not so much as good laws are essential if judges are not men of good talent and mature judgement, they are likely to do great harm.

Both these two movements put emphasis on law and justice in the modern world. The English political thinkers, namely, Richard Hooker Sir Francis Bacon, Edward Coke expressed their different views on law and justice. The King claimed that as law was founded upon reason and that as he possessed reason in abundance, he could take away the cases from any judge and try them himself. Edward Coke replied that as the King was not learned in the laws of England, he should not deal with the decision of disputes. All disputes should be referred to courts of law and decided according to common law. Ultimately Coke established the sovereignty of common law.

Law and Justice as conceived by various political thinkers of modern world :

Various political thinkers of fifteenth century made scientific approach to law and justice.

According to Hobbes, natural law implies primarily a restriction rather than liberty in doing what seems best for preservation. In practice, the law of nature is nothing but a set of general principles of civil law. The main difference between the two is that the civil law is written but the law of nature is not written.

In Locke's view that law of nature is based on the law of reason. Man recognises reason and is guided by reason. The law of nature defines what is right and what is wrong. If anyone violates the law of nature, the injured party has a right to punish the transgressor. One of the vital achievement of Locke is that government should exercise its authority through clearly defined laws and enforced by impartial judges.

Rousseau, another political thinker of the modern period, is also an upholder of the rule of law against the rule of Kings. According to him where ruler is above law, the people are not free, Rousseau looks to a new order of society - the Republic - in which men would be free and equal before law.

In the seventeenth century Montesquieu published his famous book, "The spirit of Laws" (1728). His conception of law is sociological and ecological. He says that law is a concrete social fact. It is a crystallisation of social experience. It is not a mere command of a superior to an inferior. It is deeply rooted in the nature of land and its people, climate, situation, extent of territory, character of soil, economy and commerce, population and wealth, to mention some of them. All these influence the nature of laws. They are not universal in nature and therefore not suitable for all countries but only to the one to which they are related. They retain a connection with their origin, with the objects of the law giver and the circumstances in which they are created. Each law is related to the other. The totality of this relation is the spirit of laws. Montesquieu says that the entire universe is regulated by laws. Before the emergence of law there

was human existence and men lived under the law of nature. According to Montesquieu there are three types of law - natural law, political law and the law of nations. The political law is man made and local in nature. The basis of all laws must be reason. Montesquieu's conception of law is much broader and more comprehensive than that of his predecessors.

Kant, another great thinker of the 18th Century opined that the law must be universal in character. It must be applicable to all persons at all times. Kant held that justice must deserve the old principle - eye for eye and tooth for tooth. Punishment must be given to see that eternal principles of justice were upheld.

In the nineteenth century, Karl Marx, demonstrated his hatred for political authority. He contended that the basis of the state is force. The whole structure of law is based on this hard fact of political life. The law is an instrument of the ruling class whose purpose is the protection of private property. Marx says that the positive law of the state is imposed on its members by the authority of the class which controls the means of production. According to Marx justice has meaning for those only who own the means of production. The idea of justice and its content varies with the economic interests of the ruling class.

From the above discussion it is clear that justice is not synonymous with equality. Rather equality is only one aspect of justice The concept of justice viewed at different times by different scholars from Aristotle, Kant to Marx and Rawls as well as the Hindu concept of justice reveal that 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. As Freiedrich observed "justice is never given, it is always a task to be achieved"[18]. Dias stated in his "Jurisprudence" that justice is the just allocation of advantages and

18. RWM Dias : Jurisprudence, Fifth Edn., p. 66

disadvantages, preventing the abuse of power, preventing the abuse of liberty, the just decision of disputes and adapting to change.

Justice and Constitutional Government :

In every democratic state there are three separate organs to perform the state function. They are - legislature, executive and judiciary. Like the other two organs of a government, judiciary is also an important organ which plays a pivotal role in imparting justice to the people. Therefore, it becomes necessary to discuss about justice and constitutional government. Daniel Webster in support of a judiciary bill said, "the maintenance of the judicial power is essential and indispensable to the very being of the government. The Constitution without it would be no constitution; the government no government"[19].

England :

The growth of the judicial system in England is very significant. Sir Ivor Jennings pointed out that the division of state function to three units was unknown to federal England. A lord or the government of manor maintained a court in the federal system. The lord was Tenant of a superior lord and was governed in that lord's court, thus there were many lords superior to each other until at least one arrived at the King. There was hierarchy of courts. "After the Norman conquest, it was assumed that every parcel of land was in a manor and was held by the King or by a mesne lord who held as vassal directly or indirectly form the King. There was, however no hierarchy of courts .... By the side of manorial courts were the country courts. The Kings court was feudal court which not only dealt with any disputes between great Vassals, it also

19. Cited by K.P. Chakravarty in his "Jurisprudence and Legal Theory", p. 388

controlled the Sheriffs and through them maintained order and collected the Kings revenues"[20].

Under the reign of Henry II (1154-1189) the manorial jurisdiction became limited. The King's court shed its feudal character and exercised control over the whole country, specially in the matters of revenue and criminal justice. Matters of political importance were determined by the King in his court or by his council and the courts of common pleas, Exchequer, King's Bench and chancery gradually separated from this council to form the first set of specialised institutions, the courts of law and equity or judiciary. They were, however, subordinates or delegates of the council and the judges and the baron rendered active assistance in council. By the time of Henry VII the manorial system had almost completely broken down.

During the reign of Henry VII the function of the council were generally exercised by a kind of sub-committee sitting in the Star Chamber which later became known as the court of Star Chamber.

During the reign of Stuarts, it became an instrument of tyranny, specially under Charles I between 1629 to 1840 when Charles I tried to rule without Parliament. One of the significant acts of the Long Parliament in 1641 was to do away with the court of Star Chamber and the whole controlling jurisdiction of the council. This act had the effect of not only freeing the Superior Courts from the formal control, but also to giving the justices of the peace a free hand.

The justices were still royal servants and dismissable at King's pleasure. It was ultimately provided by the Act of Settlement in 1971 that they should hold their commission during good behaviour.

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20. Jennings : The law and the Constitution, 5th Edn., (1979, ELBS), p.p 9-10

America :

America became independent in 1776. Before independence, the English Law was in force in the British colonies in America and justice was administered according to English Law. A Constitution was drawn in America after the independence and the Article III of the Constitution provides for the judiciary. The judges in U.S.A. are constitutional functionaries and are not civil servants as in France. Section I of Article III provides that the judicial power of the United States shall be vested in the Supreme Court and the Congress may establish inferior courts from time to time. The judges both of the Supreme Court and inferior court shall hold their offices during their good behaviour, and shall at stated times receive for their service, a compensation, which shall not be diminished during their continuance in office.

In America, there is the federal system of government Therefore, there are two types of government-national government and the state government. Each state has its own Constitution. The state courts and the national courts are distinct entities. There are three major constitutional courts in U.S.A., namely - Supreme Court of the United States, having original as well as appellate jurisdiction, United States (Circuit) courts of appeals, United States District court having only original jurisdiction. The United States District court's jurisdiction is to try almost all civil and criminal cases arising in the vast realm of federal jurisdiction

The American legal system is so strong that the judgements delivered by eminent judges like John Marshall, Oliver Wendell Holmes, Benjamin IV, Cardozo, Earl Warren and Felix Frankfurtos of the U S Supreme Court will be remembered for ever. They stand as the inspiration of the judges of all the democratic countries.

India :

The Indian Independence Act passed by the British Parliament in July 1947, ushered in a new chapter in the constitutional history of India. It brought to the end, a period of two hundred years of serfdom and dependence for India and gave her a sovereign status A Constitution was drawn in India after securing this sovereign status and it came into force with effect from 26th January, 1950.

During the British rule, the Federal Court of India was the highest court of the country. From 1950, the Supreme Court of India has replaced the Federal Court. Article 124 of the Constitution of India provides for the judiciary. In India, there is an integrated or unified judiciary for the whole country. In the U.S.A., there are separate judicial systems for the states and the Union. Contrary to this, in India the whole country has only one judicial system. It is an unfederal character of the Constitution of India.

The Indian judiciary is organised pyramidically. At the apex there is the Supreme Court and at the bottom there are numerous Nyaya Panchayats. In between these there are various other courts, namely Munsif's courts, District Courts and High Courts. There are mainly three sets of courts - Subordinate courts. High Courts and the Supreme Court As the Supreme Court stands at the apex of the Indian judiciary, it has complete control over all the courts functioning in the country. No court can disobey the orders, directions or judgements given by the Supreme Court of India.

In a federal system, both the union and the states derive power from the Constitution, but there may arise some disputes between the union and the states or between the states. The Supreme Court of India is the sole authority to settle those disputes and to interpret the

Constitution. The question of law decided by the Supreme Court is binding on all other courts within the territory of India. The great responsibility of interpreting the Constitution rests on the Supreme Court. Thus the Supreme Court controls the entire judicial system in the country and occupies a very significant place as the guardian of the Constitution and custodian of the Fundamental Rights of the citizens. As a court of record it sets the ideal for all courts in India.

Nobody is above law. The delegated authorities, the people are under the command of the Constitution. But now-a-days corruption has eaten into the basic principles of governance. The politicians have not only captured power but eaten away the very principles of democracy. Currently, the corruption in the highest political level, numerous scams etc. are the main reasons for bringing about some sort of judicial take-over in India. Despite this, the working of the Supreme Court during the last 52 years of its existence has been able to exhibit commendable authority as the guardian of the Constitution, the protector of the liberty of people and the court of record. With all its shortcomings, the Supreme Court has decided constitutional cases with great distinction. It has extended the scope of Fundamental Rights over the years. Moreover, it has developed new tools and remedies for dispensing justice to the masses through public interest litigation.