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EPISTEME OF JUSTICE: A Genealogy of Rationality

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EPISTEME OF JUSTICE:
A Genealogy of Rationality

Mritunjay Kumar[*]

[***Abstract***: *Justice has been a desired ideal for every civilisation. Even much before the invention of printing press, justice attracted all too discursive idealisations. In every epoch, justice is discursively crafted and understood. In that sense, theories of justice are produced within the limitations and conditions of episteme, accepted in the particular society, under a few sets of discursive rules. From Greek pre-determinism to the spirit of European enlightenment, the industrial age to the digital age, theories and common understandings of the discourse were formulated and rationalized around a few epistemic principles. In Greco-Roman cultures, for example, pre-determinism and teleological 'rationality' were the preconditions for the discourse of justice. In Scholastic tradition, teleology remains in the form of theology. During the course of Renaissance and afterwards, the spirit of scepticism and inductive reasoning turned out to be the defining features in the establishment of new science as authority; in that epoch, power and knowledge were embraced and celebrated as the episteme to rewrite the relationship between human and nature. In the process of Industrial revolution, instrumental reasoning produced a widespread culture of 'consumer society', and a bureaucratized and rationalized art of government. To address the growing demands for the security of the businesses and the predictability of the outcome, the rationalized systems of law were developed across the Europe. In a post human trajectory, technological rationality has become a source of truth and justice.*]

I

Introduction

What is justice? Whether justice is a virtue? Whether justice is a theological, ethical, social, political, legal, or individual virtue? Is there any possibility to understand justice epistemologically,[1] as an object of knowledge as well as practical principles? Whether justice is the prince of intellect or it has something to do with feeling, emotion, care,

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[1] Epistemology is considered to be a 'science or theory of knowledge'. The evolution of this term could be traced in Greek, *Episteme* and *Logos*; *Episteme* is translated in English as knowledge, and *logos* can be translated as science or reason; *See* Paul Gerard Horrigan, EPISTEMOLOGY: AN INTRODUCTION TO THE PHILOSOPHY OF KNOWLEDGE VII (2007).

sympathy, empathy, and suffering? Under what conditions theories or ideals of justice have been conceptualized in the history of western ideas? Under what strategies and through which methods the theoretical foundations of justice have been conceptualized in western thoughts and imaginations? Was there any other alternate modality, which has remained in the background of mainstream discursive formulation? This paper is a fragment on these questions, and investigates the epistemological foundations and categories of justice. Wherever possible, recourse would be taken to Hindu philosophical literatures, for instance, *Bhagwad Gita*, where *Gyana Yoga* is considered as one of the foundational norms of *Dharma*.[2]

The epistemological basis of justice has been nothing, but ornamental consecration of human minds, which create a few myths, and encompass in its semantic domain the praxis of theoretical boldness and emptiness in the same very signification. Derrida identifies such a linguistic excess as 'transcendental signified'[3] and Wittgenstein would have designated it as unbound metaphysical 'tautology'.[4] Apparently, philosophers are skilful enough in replacing one myth with the other or one illusion with another. Justice, in that sense, has been a hollow concept, without having any specific meaning in itself, unless one projects or consciously articulates certain meaning in a discursive or socio-political framework.

For some, it is a moral virtue and for others, it is a political one. Sometimes, justice is conceptualised as a balancing act by the socio-political institutions. It appears to be, as if, the very idea of justice, which was once conceived by the wisest man in Greek as encompassing and transcendental concept, contrary to the sophistry of many ordinary talks of the sophists, has now been reduced to arbitrary tastes under 'instrumentalized politics'.[5] Justice is conceived with not a single point of reference. It is theorised and understood by each person in his own *sui generis* way. Justice, however, as a political or an ethical question, does pose a form of resistance against the instrumentalized project of 'market society',[6] which governs the socio-political relationships amongst the modern citizens in the name of libertarianism. Its theorisation has been an evergreen project of the western civilization.

The ideas or theories of justice have several dimensions to explain: one, it is established at the meta-level; the aspirational objectives of a juridico-political sphere, for example, the preamble of a Constitution. Second, every society has its own normative structure

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[2] Swami Prabhupada, BHAGAVAD GITA: AS IT IS 9, 13 (1989).

[3] 'Transcendental Signified' means a signified, transcends all signifiers, and it is a meaning, transcends all signs. *See* Gayatri Chakravorty Spivak's *Preface to the English Edition* of Jacques Derrida, OF GRAMMATOLOGY XVI (1998).

[4] Ludwig Wittgenstein, TRACTATUS: LOGICO-PHILOSOPHICUS 63 (1922, 2012).

[5] Instrumentalized Politics adopts a political process of emphasizing efficient means over end. It is also known as 'practical rationality'. Efficiency is embraced as a fundamental goal for instrumental rationality. *See* Max Horkheimer, THE ECLIPSE OF REASON 13 (1947, 2013).

[6] Karl Polanayi, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 258 (1944, 2001).

of justice, which is, aspired by masses as just, fair, and equitable principles, usually found in the 'consciousness of the people'.[7] Third, justice is understood as legitimate end or due expectation in a given theological or rationale apparatus.[8] Fourth, justice as a desired end is conceived through rationalised texts of officials and lawyers in a legal system. Fifth, justice as a dream is canvassed in the poetry of poets and philosophers, who have been, from the Greek to post-human age, demolishing and architecting the mansions of justice. Sixth, justice is sometimes conceived as a value, a desired end, in a relative or transcendental framework, and, lastly, it is treated merely as a means to an end or ends.

The paper identifies some of the predominant discursive rules of justice, which have been prevalent in various periods of history and have reached in specific form to the contemporary societies. These epistemes are: (a) Teleological Justice; (b) Libertarian Justice; (c) Instrumental Justice; (d) Mechanical Justice; and (e) Technological Justice.

II

Teleological Justice

This section describes the teleological conception[9] of justice along with a brief discussion on its genealogical feature. The teleological philosophy has been a dominant perspective to visualize the natural as well as the social phenomenon, from the Greek to the age of modernity.

Teleology was embraced as a dominant form of knowledge and philosophy for Greek.[10] Teleological rationality could be understood as pre-deterministic attitude towards the

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[7] Friedrich Karl von Savigny, THE VOCATION FOR OUR AGE FOR LEGISLATION AND JURISPRUDENCE 24 (Abraham Hayward trans., 1831, 2002).

[8] Rationality could be explained as 'the quality of being rational, the state of being rational or a rational opinion, belief, or practice'; MERRIAM-WEBSTER DICTIONARY; *available at*: https://www.merriam webster.com/dictionary/rationality (last visited 25 Jan., 2020). 'Rational' is defined as someone who can formulate a conception of his good; {John Rawls, A THEORY OF JUSTICE 22 (1971, 1999)}. In common parlance, rationality is the outcome of reasoned explanations of practice, belief, or opinion.

[9] Greek civilization was pre-deterministic in its attitude towards the nature and life process. Pre-determinism could be discerned in their modes and methods of thoughts, which were predominantly teleological. For example, Aristotle thought that everything has its *telos*, the final end, and everything is progressing from potentiality to actuality, like a seed is progressing towards tree. The potentiality is there in the seed to become a tree, the final end; Aristotle, PHYSICS Book III, 39 (R.P. Hardie & R.K. Gaye trans., 350 B.C., 1984). *See* Wayne Morrison, JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM 41-42 (1997, 2005). *See also* Karl Popper, THE OPEN SOCIETY AND ITS ENEMIES Vol. I & II, 222-223 (1945, 2012).

[10] Teleological rationality could be discerned from the Platonic division of biological and social body. Just like a biological body has different components, each one has its final end to pursue;

determination of truth and justice. Aristotelian logic had all the dimensions; from formal and substantial to conventional and teleological reasoning. But the dominant perspective, which was the *archetype* of that age, was the teleological reasoning. Not only Aristotle but also Plato's ideas behind the division of labour were based upon the pre-deterministic principles.[11] Aristotle developed his conception of justice with the premise of honorific notions that justice is to give due to what one deserves. In words of Aristotle:[12]

> 'The term unjust is held to apply both to the man who breaks the law and the man who takes more than his due, the unfair man. Hence it is clear that the law-abiding man and the fair man will both be just. The just therefore means that which is lawful and that which is equal or fair, and the unjust means that which is illegal and that which is unequal or unfair'.

Aristotle was a meticulous organizer of ideas. He classified the concept of justice under various themes.[13] However, Plato was essentially an idealist, and his notion of justice was not restricted to the local and conventional necessities. His notions of justice were more than desert or merit-oriented conceptualization. The theory of justice under platonic meditation was formal but transcendental in its characterisation. Greek society did not have an instrumental conception of justice; rather they conceptualized a purpose or goal-oriented strategy, which was conceived for every phenomenon of the cosmos. In the production and search of knowledge, Greek thinking was pre-deterministic. For example, Socratic dialogue starts with the basic premise that he knows nothing, and similarly no one could be certain about his or her knowledge. Behind Plato's dialogues, the fundamental premise was transcendental in character that our senses elude us, and

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social body is also divided in the same line of reasoning, whereas guardian, auxiliary, and production class have their separate roles to perform. Justice as virtue was not politically cultivated in Platonic conception of justice; it was fixed as per the socially determined purposes. *See* Plato, REPUBLIC 118-124 (Robin Waterfield trans., 376 B.C., 1993).

[11] Slavery and the conditions of women could be understood in context of fate-oriented teleological reasoning. Aristotle naturalized the practices of slavery, and he had a poor opinion about women. What purpose did it serve to condemn more than half of the population? How did it serve to maintain harmony? These are the questions, has remained unsolved in teleological justice. *See* Joseph Karbowski, *Slaves, Women, and Aristotle's Natural Teleology* 32 ANCIENT PHILOSOPHY 323-350 (2012).

[12] Aristotle, THE METAPHYSICS 1129a (T. E. Page ed., Hugh Tredennick trans., 350 B.C., 1936). Quoted from Ch. Perelman, JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING 26 (2012).

[13] Aristotle classified the concept of Justice as general justice and particular justice. The general justice, according to him, means the obedience of law. Further he categorised particular justice as distributive justice and corrective justice. The concept of distributive justice was conceptualised with relation to the distribution of goods, and the corrective justice was conceived with respect to the resolution of conflicts by judicial bodies. He even went on to classify corrective justice as formal and substantive justice; while the formal justice was the culmination of the formal compliance of law and the substantive justice was the integral bond of law and equity; *See* Wayne Morrison, s*upra* note 9 at 47.

reality is outside our senses. For Plato, everything was, in the beginning, a perfect form, but once it falls down into the space and time dimension, that form is no more perfect, rather it decays or becomes corrupt in due course of time. Plato, in a way, presents a pessimistic historicism of idea and truth. To the contrary, Aristotelian notion of historicism was optimistic and evolutionary. He finds every living creature and non-living things are progressing towards its final end, *telos*; the perfect realised potentiality.[14] The progress is the realization of the perfect form, the final goal, in the end, as per the innate potentiality. This historicity of progress, later, became an essential feature in Hegelian dialectical account of the history, which was conceived through teleological rationality that history is progressing towards the complete freedom, where real is rational and rational is real.[15] Fukuyama's prediction of the 'end of history' is the culminated hypnosis of the teleological rationality.[16] Teleological historicism was predominantly prevalent in Greek, and later on, it is found in the literature of Thomas Aquinas, Hegel and Karl Marx. Roberto Unger rightly criticised the teleological account of history and advocated to rescue the social sciences from 'false necessities'.[17] Teleological account treats history as ossified building blocks with having certain determined laws and modes of production, which succeed one after another in dialectical modes of progression.[18] Unger believes that progress of history has not been constant progression, unravelling itself in teleological sense; as if, it is fulfilled as a grand plan of architecture, rather it has been developing spontaneously with uncertainty like a musical chair. History has no teleological law of its own. Such account of historicism brings historical pessimism, and is fatal for human's actions and institutional developments.[19] Sartre was authentically truthful when he said, 'Existence precedes essence'.[20] Teleological reasoning brought dogmatic devotion to the essentialism and essentializing tendency towards moral, legal, and political categories. Such tendency usually generalizes and universalizes a few moral and practical judgments for the humanity. Teleological reasoning may be used to understand the natural phenomenon, nevertheless there cannot be a precise explanation for the same,[21] but when it comes to

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[14] Aristotle firmly believed that every development in the Universe is the progression from potentiality to actuality, a movement from seed to the final form. The development from potentiality to actuality is the fundamental law of the cosmos; *See* Wayne Morrison, *Id*. at 41-42.

[15] Leo Rauch's *Introduction to the English Edition* of Georg Wilhelm Friedrich Hegel, ELEMENTS OF THE PHILOSOPHY OF RIGHT X (1821).

[16] Francis Fukuyama, THE END OF HISTORY AND THE LAST MAN 67 (1992, 2006).

[17] Roberto Unger, *Free Classical Social Theory from Illusions of False Necessity*, BIG THINK (May 30, 2014). *Available at*: http://youtu.be/yYOOwNRFTcY (last visited 20 Dec., 2019).

[18] Roberto Unger, *Id*.

[19] Roberto Unger, *Id*.

[20] Jean Paul Sartre, EXISTENTIALISM IS A HUMANISM 20 (Carol Macomber trans., 1996).

[21] The explanatory power of this thesis lies in the illustration. Suppose, A affirms that the final purpose of rain is to provide water to all the creatures of the Earth. B may differ with this conclusion; rather B may argue that the final purpose of rain is irrigation of crops, so that humans could harvest their crops. This reasoning yields vague and whimsical conclusions in case of social sciences, when the final purposes of human's artifacts are determined by human's

the social and institutional practices, teleological reasoning brings fate oriented pessimism. In that way many social evils could be practiced and justified. There is nothing in our world, which cannot be justified through teleological reasoning. For example, colonisation was justified in the name of civilizing mission![22] Similarly, slavery was accepted and justified through same patronizing reasoning.[23]

From the framework of method, teleological reasoning provides a linear progressive account of history, which is a fictitious methodological reasoning. History is full of such accounts when regressive directions were adopted by civilizations. Every progress, what we witness today, has not reached to this stage in a linear way; development is not always progressive. Teleological method poses the challenge against the institutional and normative progress. Since, this method is often used to justify and rationalize the existing structures of institutions and its functioning. The genealogical[24] reading of past excavate the portrait of anti-teleological movements and dis-continuities across all the well-known civilizations, and of course, future could not be predicted through this reasoning.

III

Libertarian Justice

Justice as a virtue is not separate from what is just or unjust. Though, justice and the questions regarding its significance cannot be limited to semantics or merely politics, after the emergence of European Enlightenment, justice has remained since after more or less as a political question. Libertarian justice is the culmination of alienated worldview of science, and its brainchild in form of right to life, liberty, and property.

The epistemological foundations, therefore, of Libertarian justice could be perceived around a few categories and ideas, such as, science, power, right, liberty, and property. Libertarian paradigm of thought has a long tradition since Immanuel Kant. In

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wishes and desires. In the latter case, the person or authority, who takes the decision, plays a decisive role in shaping the ends.

[22] White men burden, to civilize the so called barbaric societies, was the highest epitome of the teleological rationality, which was the chief precursor to a legitimised and organized colonial exploitation and mass cruelty.

[23] Slaves were owned in Greek. They did not have right to participate in the political process. Slavery was justified through teleological rationality in that culture. *See* Darrell Dobbs, *Natural Right and the Problem of Aristotle's Defense of Slavery*, 56(1) J. POLITICS 69-94 (Feb., 1994).

[24] Genealogical method of the reading history could be traced in the works of Nietzsche and Foucault; Orientalism, a work of Edward Said, was also a genealogical account of history. Genealogy is a method for the reversal of perspective from the marginality. *See* Michael Mahon, FOUCAULT'S NIETZCHEAN GENEALOGY: TRUTH, POWER, AND THE SUBJECT 1 (1992).

eighteenth century of Europe, the emergence of 'Economic Man or *Homo Economicus*'[25] was a complete departure from the teleological conception of life, whereas nature and society were dichotomized and rationalized. The 'iron cage[26] of rationality', since then, has produced a commoditised outlook of nature and abstract sense of persona, dying daily a meaningless death under the hallucination of free-will. Chief constituent elements of the paradigm shall be explained in following manner.

(a) Right and Identity

Right as a political or legal concept can be traced in medieval period, particularly Magna Carta, a charter of rights agreed to by King John of England on June 15, 1215. After the Glorious revolution in England, the Bill of Rights Act, 1689 was passed by the British Parliament. The Bill of Rights limited the scope of Monarch and strengthened the rights of Parliament. In the U.S., the Virginia Declaration of Rights, 1776 came into existence, which was subsequently incorporated in the schema of U.S. Constitution through first ten amendments as the Bill of Rights. The Declaration of the Rights of Man and of the Citizens, 1789, was another significant development in France which strengthened the affirmation of rights. After the Second World War, the Universal Declaration of Human Rights, 1948 and two Covenants on Civil and Political as well as Social, Economic, and Cultural Rights have permanently affixed its place as *a priori* limitation upon the sovereign powers.

The dyadic relationship of jural categories, such as Right-Duty or Power-Liability, etc., do portray an incomplete picture of jurisprudential reality. The fundamental structure of jural categories is conceived at the logic of subject-object dichotomy, which functions with the premise of 'objectification of subject itself'. Every right holder has a sense of self-ownership and self-possession, just like any other material goods, and every right holder is entitled to obligate the obliged; in political and legal terminology, this power is known as enforcement of right or 'Right to have rights'[27]. This structure reflects a rationalized box of claims-counter claims, which is not a historical and social reality. The production of right was not possible without crafting identity in abstraction. Right and 'person'[28], two unique legal categories became possible under the process of

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[25] *See* Sarah Comyn, POLITICAL ECONOMY AND THE NOVEL: A LITERARY HISTORY OF HOMO ECONOMICUS 5 (2018).

[26] Max Weber, THE PROTESTANT ETHICS AND THE SPIRIT OF CAPITALISM 123 (Talcott Parsons trans., 1930, 2005).

[27] Hannah Arendt, THE ORIGINS OF TOTALITARIANISM 296 (1948, 1973).

[28] The concept of Personality has evolved from Greek, *Prosopon*, which was originally referred as 'masks worn by actors'; *See* Sears A. Eldredge, MASK IMPROVISATION FOR ACTOR TRAINING AND PERFORMANCE 13 (1996). Personification is a legal method of abstraction, which is used as legal fiction to conceive a juristic personality. Personification confers legal agency to the entities. In the process of personification, a new legal and formal identity is created. In Roman law, it was known as 'hereditas jacens'; *See* Rudolf Sohm, THE INSTITUTES OF ROMAN LAW 421 (1901). In canon jurisprudence, personification was used as a method to pass the buck from a natural being to the monastery. Since, monastery had no soul to be punished by the wrath of God for

rationalization and de-naturalization. This method was not a *sui generis* gift from positivists like Hobbes, Bentham, or Austin. The fictitious method was manufactured under the scholastic tradition of natural law, later followed by natural rights thinkers, such as Locke and Rousseau. The paradigm of right was an individualized paradigm, which was conceived through atomic conception of being, stripped from history and society, debased from nature, but remained as a symbolic category in an 'iron-cage'[29] of rationality.

In a changing world, every substance moves and transforms itself with its opposite what dialectics suggests, however, right is conceived as a static category, which is conceived on the basis of Aristotelian logic. In fact, most of the formal categories are conceived in desire to find universality, but that desire creates obnoxious effects, especially for those who are not aware about any such reality. For Example, Gandhi was aware about this structure of claims-counter claims, the whole critical tradition of European Enlightenment, and atomic individualism, produced after unhappy divorce from community-life. Imperialism and colonialism were repercussions of that method, which produced a commercialized outlook, and devouring tendencies in human actions and beliefs. Right, in that sense, was not simply a jural category rather it was used as a basic unit to create a structure of market and politics neither meant for the welfare of community nor was it inspired for any civilizing mission. It has achieved nothing, but categories of the first world, second world, and the third world, and there are many worlds which could not be fittingly brought within the scheme of categorisation. Right jurisprudence created a unique structure of property rights, over land, labour, and money. Apart from labour and land, everything else, such as modern notion of property or money is a fictitious product of right. The production, exchange and the whole dynamics of political economy is based upon right and enforcement of right. The method and institution of contract is its true archetype.

This structure mirrors a legal agency, an archetype of libertarian justice, which ignores every practical and moral agency. Legal agency emanates from legal personality and is the fundamental building block of modern life. It was not a natural evolution which helped in redefining agency rather a human artefact, a production mentality, a de-sentimental zone, created the possibility of new-normal, where, coercion and cruelty lost their appeal to ignite human sentiments. Category of right, produced in a neutrality framework, became a culture of subjugation and de-humanization under the guise of

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any sin committed by it. In that sense, person, in the eye of law, was invented. For Parish Church, when the head of the Church died, there was no one to take care of the church's property. To manage the property of the church; the parson got the legal personality right in juristic sense. In medieval ages, King had natural as well as juristic bodies; the King's two bodies were known as 'body natural' and 'body politic'. *See* Ernst Kantorowicz, THE KING'S TWO BODIES 7 (1957). Pope Innocent IV valorised the concept of personification, which, in later centuries, became the fundamental building block for the establishment of corporation as a legal entity. *See* Maitland, STATE, TRUST AND CORPORATION 1-11 (David Runciman & Magnus Ryan eds., 2003).

[29] Max Weber, *supra* note 26 at 123.

rationality and progress. The traces of history may not have written in expressive letters but it has remained as scars in experiences of those 'Wretched of the Earth'[30], belonging to first to third world, and it has jeopardised the very possibility of survival, the way Earth has been mistreated with insatiable contempt.

Right, initially seen as limitations on state power and the strength of its subjects, has now become limitation for the latter as well. There in an ancient wisdom in Buddhism and Taoism that a thing which is owned becomes the owner. In the same line of reasoning Hegel developed 'master-slave' dialectics, whereas, master does not remain master all the time but his position inter-changes with the slave in due course of dialectical movement. Acquisitive wisdom is rationalized as if it is naturally given gift from the nature. However, Nature knows its laws; when a fruit is ripe a tree does not keep it.

The exponential growth of rights and the denial of responsibilities incarnated rights into empty vessels, for example, equality of individuals in political sense. In fact, the demand of rights remained in the dyadic tension between authority and individuals, and the wider imagination of society and nature is still struggling to be recovered amidst 'anthropocentric'[31] worldview.

(b) Science, Power and Human

After seventeenth century, Europe established altogether a distinct paradigm of phenomenonology. When mind- body dualism was adopted and widely accepted, as a Cartesian division, and the scepticism was epistemologically cultivated to erect the grand architect of science. In the process of objectification; also known as 'commodity fetishism'[32] or 'reification',[33] it is often dogmatically ignored that the objectification is impossible without the objectification of subject itself. The knowledge of being is conceived in a detached relationship with the self, and the practical agency requires a mediated relationship between observer and observed, in a sense that the false dichotomy within self ought to be completely extinguished, in order to allow the practical reason of a subject to blossom. But the modern knowledge functions for the sake of knowledge itself; the height of information obscure the possibility of action. Every subject has inside view and perception about self, and the worldview or perception of the subject depends upon the experience he or she is or has been exposed to since birth. The cultural moorings, societal behaviours, and the impact of education are usually inclined towards material conception of life which emerged under the influence of utilitarian philosophy or to say so, under the stimulation of pleasure. The objectification of subject has made the duality of subject-object relationship really complex and intriguing. After the birth of a child, she is nurtured to envision herself like

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[30] Frantz Fanon, THE WRETCHED OF THE EARTH 137 (Richard Farrington trans., 2004).

[31] Jeremy Davies, THE BIRTH OF ANTHROPOCENE 52, 55 (2016).

[32] Karl Marx, DAS KAPITAL Vol. I, 1-44 (1867).

[33] Georg Lukacs, HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS 136 (Rodney Livingstone trans., 1923, 1972).

an object to own. The psyche of ownership is visible everywhere in modern society, from the body-building exercises to beauty-competitions.

The commodification of social sphere or natural sphere, is simply an effect, and is naturalised through the objectification of subject itself. In modern society, a subject treats himself not more than a materialistic body and commercially exploitative intellect; which are valuable for 'use and exchange',[34] mediated by techniques of contract. The 'incentivization of talent'[35] is the fundamental building-block to commercialize mind, body, and emotions of the living beings.

The objectification is a symptom of a grievous malaise, widely known as alienation, which strips the normative contours of the subject, defiles and pollutes the environment, and ruptures the fraternal bond of a society. It is objectification of subject which has facilitated a catastrophe like climate change or social evils such as slavery. The duality of known and knower, or subject and object has ensured a foucauldian gulf of knowledge-power relationship, in which the self, itself is at tension with commoditised subject. Self, the agent, affirms claim over his own body, mind, and spirit; the ownership of self, the right over body, mind, and spirit is the atomic structure upon which the 'open society and its enemies'[36] have been established.

William Wordsworth condemns 'dissection as murder'[37]. The problems with all too classifications are to see reality in isolation. The formative practices of dichotomies, such as subject and object, right and duty, authority and liberty, society and individual, power and liability, nature and man, or liberty and equality, are the results of a false consciousness that reality exists in a dyadic relationship. Jacques Derrida denounced these practices as 'logocentrism'.[38] The edifice of modern knowledge, specialisation, and professionalization are built through microscopic lens of classification and categorisation. From nature to individual, the ontology of being or the sovereignty of the subject is formulated with the exclusionary practices of 'otherness'. Individual in literal sense is conceived as the smallest unit of society which cannot be divided further. However, individual is no less than an object matter of knowledge like any other object of study; for individual is classified as mind and body; the Cartesian duality treats mind as different from the mechanical law of physics which is applicable to body. Mind is elevated, on the one hand, as the instrument of free-will and the body is, on the other hand, accepted as the reflection of determined-mechanical law of the universe.

This relationship is based on an alienated view of life, whereas the imagination of total existence or natural existence is compromised for the sake of illusionary desire of enlightened individualism. The rational choice theory disregards the historical and

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[34] Karl Marx, *supra* note 32.

[35] Akeel Bilgrami, SECULARISM, IDENTITY, AND DISENCHANTMENT 126 (2014).

[36] Karl Popper, *supra* note 9 at 20, 22.

[37] Isaiah Berlin, THREE CRITICS OF THE ENLIGHTENMENT: VICO, HAMANN, HERDER 515 (Henry Hardy ed., 2000, 2013).

[38] Gayatri Chakravorty Spivak, *supra* note 3 at LXVIII.

sociological aspects of life. The method and process of science have something to do with the complete alienation from the nature as well as from the society. Science in its methods and vision does not accept that nature has value apart from its materialistic essence. However, Thomas Kuhn explained that values are the basis of science; without values science is not possible.[39] David Hume proclaimed that 'values come entirely from our state of mind'[40]. Adam Smith, in extension to this reasoning, believed that moral sentiments such as sympathy or empathy are possible only in a human society.[41] Darwin's thesis of the survival of the fittest supports the same conclusion that the ethical value or what is right thing to do is a question raised by the humans for the humans. Karl Marx was a materialist thinker but he had a mediated thesis with respect to the relationship with human and nature.[42]Mahatma Gandhi had spiritual relationship with nature, and he found his source of ethical value in the nature itself. He had a sacred view of nature, which was, of course, not a new vision. The whole romantic tradition of philosophy, for example Gnosticism, New Platonism to Ruskin, William Blake, Wordsworth, Thoreau, Emerson, Tolstoy, Marx, Adorno, Horkheimer, Gandhi, was dedicated to the mediated life with nature and society.

In Greek, Aristotle never believed in the vision that an individual is a source of virtue. He was advocating in favour of civic virtue which is possible in a civil life only. In Roman civilization, 'logos of the nature' was visualized by thinkers such as Cicero, Seneca, Marcus Aurelius, or Epictetus. The categorisation of law, such as *jus civile*, *jus gentium*, or *jus natural*, does portray the normative foundation of the Roman civilization which was far more assimilative with the value of natural law. In medieval period, the source of ethical values could be traced in deep rooted theological tradition; however, the source of value was not conceived as individualistic. In ancient Indian civilization, the gulf between nature and man was missing from the discourse, instead a whole assimilative tradition of creativity and philosophy of life could be located in Vedic traditions. The elevation of man against nature was the defining moment which ruptured the 'un-alienated'[43] tradition of life, which has been progressing since ancient times.

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[39] Fritjof Capra & Pier Luigi Luisi, THE SYSTEMS VIEW OF LIFE: A UNIFIED VISION 3 (2014).

[40] Akeel Bilgrami, *supra* note 35 at 122.

[41] Akeel Bilgrami, *Id*. at 185.

[42] Marx in his observation on modern science wrote, 'For the first time, nature becomes purely an object for humankind, purely a matter of utility; ceases to be recognized as a power for itself; and the theoretical discovery of its autonomous laws appears merely as a ruse so as to subjugate it under human needs'. This sentence is quoted from Akeel Bilgrami, *supra* note 35 at 153. *See also* Karl Marx & Martin Nicolaus, GRUNDRISSE 409-410 (1973).

[43] Akeel Bilgrami travels in the landscape of history of the romantic tradition, from Gnosticism, Neo-Platonism to the German and British romantic tradition, which is also discerned in the thoughts of Marx and Gandhi. Romantic tradition was not merely a reactionary modality, rather it has been an alternative history; the un-alienated life may not become a part of the dominant historical progress, but it has been progressing in a much wider framework from the marginality. The un-alienated framework of life asks for a broader perspective, to envision

The biggest question is posed by cultural critics with reference to history, language, and culture. The origin and growth of knowledge is historically and sociologically determined, and a very limited scope of creativity remains with an individual to expound the knowledge.[44] This is equally applicable in the origin and growth of natural sciences. Gimvattista Vico, a vehement critic of Cartesian philosophy, raised this question in *New Science* to defend historicism as an authentic method for the pursuit of knowledge.[45] The modern science is a culmination of analytic rigour of logic which functions at the scale of inclusion-exclusion and acquisitive wisdom, in that sense, the necessity of identification and categorisation cannot be avoided. In the era of pre-Socratic philosophies, a few natural philosophers speculated about the essence of creation; as the mixture of water, air, fire, etc.[46] Democritus predicted about atoms as the basic element of creation and Anaximander had intuitive knowledge of evolution with respect to humans; when he imagined that humans evolved from fish. In Greek, the planet earth was known as *Gia*; the person of its own. In Hindu culture, the creation was explained as *Panchtantra*; the mixture of five elements- Sky, Earth, Air, Water, and Fire, and the Earth was worshipped as mother; the creator and nurturer of life. The process

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society and nature in harmony. It is, unlike the libertarian tradition of ideas and praxes, assimilative to the normative demands of society and nature. *See* Akeel Bilgrami, *supra* note 35 at 101.

[44] Noam Chomsky relies on an innate structure, known as Generative Grammar, of human's mind in expounding the vast knowledge from the very limited amount of data, a child is exposed to, in the process of learning the language. To the contrary, Michel Foucault raised the question of discursive formative practices of knowledge, which has no relationship as such to the innate structure of human's mind; *See* Noam Chomsky and Michel Foucault, THE CHOMSKY-FOUCAULT DEBATE ON HUMAN NATURE 3-10 (2006). The Existential philosophers, such as Sartre and Heidegger, accept the limitation of historically and sociologically determined ontology, which restricts the possibility of any huge leap of imagination, creativity or freedom. However, the possibility to be creative and free is not completely blocked, but it remains in the confinement of language, history, and culture. *See* Jean-Paul Sartre, BEING AND NOTHINGNESS 565 (1943, 1992).

[45] Vico raised the questions on the fundamentals of natural sciences, which are based on the logical foundations and mathematical analysis; its rules are neither empirical nor natural or metaphysical, rather the whole dynamics of logic or mathematics is the creation of human's mind. In that case, how far a mathematical rule of induction or deduction would be able to discover about the mystery of Universe? On the contrary, this problem does not exist with respect to history, which is determined in the evolutionary process of language and culture. *See* Isaiah Berlin, *supra* note 37 at 151-207.

[46] Thales of Miletus thought that water is the source of life. Anaximander of Miletus explained that 'our world is only one of a myriad of worlds that evolve and dissolve in boundless'. Anaximenes of Miletus believed that the source of all things is air. Parmenides of Elea thought that 'nothing can come out of nothing and nothing exists can be nothing'. Heraclitus of Ephesus had opposite view on the order of things. He thought that the 'flow is the most basic characteristic of nature'. These thinkers are known as natural philosophers, who shaped the philosophical discourse before Socrates, Plato, and Aristotle. *See* Jostein Gaarder, SOPHIE'S WORLD 28-46 (Paulette Moller trans., 1997).

of life has been a mysterious question and yet no answer appears to be complete; this question remains with so many puzzling competing conclusions. However, ancient wisdom was not anthropocentric. The early civilizations were the reflection of 'unalienated life'. The subject-object distinction was not made in those early periods; rather nature and life were conceived through harmony. Rabindranath Tagore once wrote, 'through our sense of truth we realise law in creation, and through our sense of beauty we realise harmony in the universe'.[47] Whether it is law of struggle, survival, or life; there is a cosmic balance in nature. The problem starts with the process of dissection, categorisation, classification, and identification; and a projection, of mind over body, subject over object, and right over duty. Every existence in the Universe has meditative relationship with one and another. Harmony and chaos are inter-twined.

The whole approach is analytical, logical, but the Western paradigm of thinking has remained dialectical or dyadic between empiricism and rationalism, between mind and senses. The truth is that these modes of thoughts are anthropocentric; their perspectives are selfish and narrow. It is often forgotten that the human thoughts and behaviours are also determined by natural circumstances; painters, poets, or novelists find creative inspiration from landscapes, stars, or the Moon. From the perspective of Earth or plant, human's egoistic journey of mastery is timid and insignificant. Every disaster or possible catastrophe ought not to be blamed as cruel or destructive. Libertarian justice, however, in modern form is not only catastrophic for environmental and ecological justice; rather it is, in fact, antithesis to harmony and co-existence. The claims for freedom are antithesis to freedom itself.

The transformation, of nature into natural resources, human beings into citizens, people into populations, and knowledge to live by into speciality to master the nature, is questioned by Gandhi.[48] The process of this transformation was not an inevitable progression. It was the conscious efforts from scientists and thinkers, emerged after the period of renaissance, whose efforts altered the traditional modes of thinking. Max Weber finds a deeper meaning in this outlook for he traced the genealogy of this outlook in Protestant ethics which culminated into the 'spirit of capitalism'.[49] The disenchanted world-view was carefully crafted under the leadership of Royal Society of England, and Sir Isaac Newton was the chief mover and shaker. In *Opticks*, he reduced the Nature into 'brute and inertial universe',[50] just like a non-living matter, devoid of any value property. Nature's ethics and its aesthetics were condemned to mere drudgery and secular perdition. The Nietzschean parables, such as Death of God, portray the miserable ethics of utilitarianism, which must be credited for the new outlook of *Homo Economicus*,[51] the economic man. The dream of *Homo Economicus* was realized with the

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47 M.K. Naik, PERSPECTIVES ON INDIAN POETRY IN ENGLISH 32 (1984).

48 Akeel Bilgami, *supra* note 35 at 133.

49 Max Weber, *supra* note 26 at 123.

50 Akeel Bilgrami, *supra* note 35 at 142. *See also* Isaac Newton, OPTICKS 339-340 (1704, 1721).

51 Who is Economic Man? As far as the relationship between economy and man is concerned, this bond is very ancient. Economic Man, however, is a new development. Economic Man is 'a

advent of 'invisible hand',[52] a market economy, which reduced the human society as a subsidiary to market pattern.

In the traditional society, economy was means to a good life. With Renaissance, under the influence of a new spirit of capitalism; market pattern took a leading role in rewriting the structures and functionality of human society. The mathematical calculability and predictability were considered to be the essential features, of law and legal systems; for a commercialized society, human behaviours and transactions. The philosophy of Benjamin Franklin, one of the founders of the American way of life, mirrors this new spirit, a defining feature of modernity. The romantic tradition from east and west opposed this outlook, for example, William Blake raised his concerns against every attempt to de-naturalize the nature. This paradigm of thinking has been lurking in shadow at near about the age when Christianity emerged. The first outlook of romanticism is found in Gnosticism; subsequently Neo-Platonism and Catholic tradition remained adapted inside nature. After 14th Century onwards, various cities in Europe emerged as the hub for export-import. The Protestant movement challenged the traditional Catholicism and the new prophets for salvation emerged, such as Martin Luther, Calvin, etc. These rationalist prophets had played a vital role in divorcing the worldly religion from the metaphysical transcendentalism. After the Renaissance age, rationalization and commercialisation were used as tools for knowledge and justification, whereas ancient and traditional knowledge were questioned, in a way, totems and taboos disappeared for a systematic and conceptual knowledge, Max Weber conceptualized this process as the 'disenchantment of the world'. Business ethics became the sole ethics of salvation and the economic man was its chief protagonist. In this paradigm of thinking, the only value which got a respectable place was the ethics of market; production and exchange, which was, of course, not there behind a veil. It was a projected practical ideal of humanism and progress, which became the synonym of civilizational ethos. It was 'self-love or self-interest' that turned out to be the substratum of reified cosmos.

In the pastoral and the society of peasants, humans were masters of their own fate. Their primary concern was leisure and comfort; they had a natural attachment with nature, particularly in tribal society, a unique sense of cooperation existed among fellow inhabitants in the community. They had a deep-rooted connection with land and animals. After the renaissance, mastery, in a sense, did not remain against nature, but it was practiced against the fellow human beings as well. The last frontier of mastery was broken down when labour was subjected to market law; the classic example is the amendment of 'Speenhamland law',[53] 1834, in England, which

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hypothetical person who behaves in exact accordance with their rational self-interest'; OXFORD ENGLISH DICTIONARY WEB EDITION. *Available at*: https://www.lexico.com/definition/economic_man (last visited 05 Jan., 2020).

[52] Adam Smith, THE WEALTH OF NATIONS 593 (Edwin Cannan ed., 1977).

[53] Speenhamland system was introduced after an amendment in Elizabethan Poor Law. This system was introduced after a meeting at the Pelican Inn in Speenhamland, where the local

opened the scope of market to conquer labour power. In the period of 1795-1834, this law was instrumental in providing the reliefs for the pauperised people around countryside, and the employers across the country got subsidized by the state, in a way, while providing the reliefs to poor labourers. This law was blamed as an obstacle for the economic progress, even if, wage rates were reduced substantially during that period by the employers in England. The explanation for this trap is offered, which elucidates that on the one hand employers were providing the minimum possible wages to the labourers and rest of the requirements were fulfilled by the State, in that sense, employers were at gain, on the other hand, workers were not enthusiastic about works; many were un-employed, however, state was taking care of their requirements, thus they were not interested to work in the factories, and those employees, who were working in the factories, were not concerned for more wages, so they turned out to be inefficient for the industries.

The transformation of human beings from the subject to that of citizen is often celebrated as emancipatory leap; however, a puzzling feature of this transformation is perceptible. The social contract theory, which provides a juris-generative paradigm for a rationalized and the bureaucratized legal and political system, acts as the rationalized tool that conceives the transformation of human beings into the citizens. Citizen, as a political concept, is an abstract being, which stands in a parallel line with the impersonalized bureaucracy and its detached methods for permanent indecisiveness. After the development of statistics, people as citizens were transformed into abstract numbers like population. From the policy decisions of the government to the newspaper's headlines, population was transformed as a paradigm of abstract watering, and the particularities such as, flesh, blood, bones, emotions, intellect, or the social relationship among the fellow beings lost their crucial place. For all these significant developments, science alone cannot be blamed rather a leap of faith in its detached methods could also be answerable, for its parochial perspective towards nature and its phenomenon. Gandhian deontology had the answer to these puzzling questions, and a deep rooted tradition in the East accepted the nature in totality as the source of life; and to exalt a kingdom of humans was the first step towards de-naturalization of biosphere, and the life-process itself. The anthropocentrism, in a sense, was the episteme of liberalism and libertarian justice, which, subsequently, culminated into a dialectical relationship between two defining principles of Justice, *i.e.,* liberty and equality.

(c) Two Principles of Justice

Fourteenth century onwards, Europe witnessed transformation in form of new way to conceive knowledge, belief, and socio-political institutions. Scientists, artists, philosophers, and literary figures were instrumental in bringing the transformation. For example, Immanuel Kant, Voltaire, Dante, Newton, Galileo, Descartes, Bacon, Grotius,

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magistrate adopted a mechanism to alleviate the suffering of poor, caused by high grain prices. Under this system, families were paid extra apart from wages to a set level as per table. This level used to vary as per the price of bread and the total number of children. *See* Karl Polanayi, *supra* note 6 at 81.

Hobbes, Locke, Rousseau, etc., to name a few, contributed significantly in bringing an epoch of enlightenment, which was different in many ways from a pre-deterministic and teleological understanding of the worldview. In relation to the political institutions, such as State, the question of security, public order, and legitimacy were vital to conceive any political institutions and political scientists came out with a legal model, which is generally known as social contract theory. Every political scientist conceived this idea in hypothetical sense; it was not a socio-historical reality, rather a product of rationalization; everything was moving in mind; this process of rationalization was the complete detachment from the actual social practices in form of customs and conventions. These thinkers hypothesised a fictitious 'state of nature' and 'state of society', whereas Thomas Hobbes thought that state of nature was volatile and prone to violence due to selfish, nasty, and brutish nature of humans, it was necessary to form a commonwealth through a social contract, whereas an absolute sovereignty like an enlightened absolute entity, known as Leviathan, was created. The Leviathan was not under the control of law, rather he became the source of law, in that sense, Hobbes established the legitimacy of sovereignty when Church was dominant enough to affect the lives of people. Isaiah Berlin, a historian of ideas explains the political question which was hanging in the mind of Hobbes. In his words:[54]

> 'Hobbes, who took a somewhat low view of human nature and thought that man on the whole was bad rather than good, savage rather than tame, thought that strong authority was necessary in order to curb the naturally wild, unruly and bestial impulses of man; and therefor drew the frontier between authority and liberty in favour of authority.'

John Locke had a different priority and a different situation to deal with. Locke's theory is considered as the theory of government, unlike Hobbes's theory of sovereignty, he was concerned with *a priori* limitation over the sovereignty. He conceived the state of nature as peaceful, and every human being has by birth the right to life, liberty and property as inalienable rights. However, in the state of nature, people became self-executioner of their rights, in that sense; social contract became necessary to protect these inalienable rights. Locke, in a way, preferred liberty over authority in case of conflict between two. As per John Locke:[55]

> 'That in the state of nature everyone has the executive power of the law of nature, I doubt not but it will be objected, that it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends; and on the other side, that ill nature, passion and revenge will carry them too far in punishing others…I easily grant, that civil government is the proper remedy for the inconveniences of the state of nature.'

Rousseau, like Locke, was also deeply immersed in finding a convergent line between authority and liberty. In words of Isaiah Berlin, 'Nothing is more familiar or more

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[54] Isaiah Berlin, FREEDOM AND ITS BETRAYAL 31 (Henry Hardy ed., 2002, 2014).

[55] Andrew Bailey & Samantha Brenan, *et. al.* (eds.), THE BROADVIEW ANTHOLOGY OF SOCIAL & POLITICAL THOUGHT: THE TWENTIETH CENTURY AND BEYOND Vol. II, 500 (2008).

natural in the history of political thought than the question How is men's desire for liberty to be reconciled with the need for authority'?[56]

For Rousseau liberty was a non-negotiable, sacrosanct value, in his words, 'to renounce liberty is to renounce being a man'[57]. However, he thought that 'men do live in society, and consequently have to create rules whereby human beings must so conduct themselves as not to get in each other's way too much'.[58] He was in quest of finding a form of association, 'in which each, while uniting himself with all, yet may still obey only himself alone and remain as free as before'.[59] For he reached to a formula, 'in giving himself to all, gives himself to nobody'.[60] For him, no compromise is required between two values; both values are identical. 'Liberty and authority cannot conflict for they are one'.[61] In that way he found a unique process to see general and particular will, in harmony.

The idea of contract was integral to the will, autonomy, and the human dignity, which got a sacrosanct place in their political theories, particularly in the formation of state. The contract, as a paradigm of thinking, as a technology, a medium to realize free will, was established and replaced the status or tradition , the medieval outlook, and this legalistic craft was used in the development of some modern day meta-categories; among them various principles of justice were produced in an axiomatic fashion.

The social contract theory was formalized as a method, a structure through which the very formation of modern liberal state was rationalized. For constitution became the constitutive and constituted power in a sense that, from the very constitution itself the laws got their validity, and further laws became an enriching tool for the constitution itself, in a way, both affected each-other. The interface between constituted and constituting powers became a discursive tool to establish the truth of law and the law of truth.

In the same tradition of social contract, John Rawls wrote a masterpiece, *A Theory of Justice*. Before Rawls, the legitimacy of political process and political institutions suffered from deep crisis, especially when two blocks of the world were apparently opposing the political structures and processes of each other. Socialist paradigm of thought questioned the sacredness of liberty and its wider impact on common masses. Capitalism and liberal values were exposed for their utter cruelty for insatiable profit, and for egalitarianism as a value came forefront against liberty. In those tasting time for libertarianism, Rawls emerged as a saviour to protect the value of libertarianism and to provide the legitimacy of 'social welfare state'.[62] John Rawls adopted a hypothetical

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[56] Isaiah Berlin, *supra* note 55 at 30.

[57] Isaiah Berlin, *Id*. at 34.

[58] Isaiah Berlin, *Id*. at 36.

[59] Isaiah Berlin, *Id*. at 38.

[60] Isaiah Berlin, *Id.*

[61] Isaiah Berlin, *Id.*

[62] The Difference principle of justice, propounded by John Rawls, was formulated in defence of distributive justice and social welfare. *See* John Rawls, *supra* note 8 at 57.

situation, the original position, whereas people participated under the 'veil of ignorance' to choose the principles of justice, so as to establish the basic structure of the society. He argued that the first principle of justice which will be chosen by people would be 'equal liberty for all'. Second principle of justice would be consisting of equal opportunity for all, and in case inequality is permitted, it should be in the interest of the least advantageous groups of the society. The second part of the second principle is known as difference principle. His justification for these principles was that since people are not aware about their status, class, or identity, they will choose these principles, so that, even if one is found in a miserable situation, he will be saved by the difference principle. He, however, preferred to elevate liberty in a lexicographical priority over the principle of equal opportunity, and finally, he gave the last priority to the difference principle. Socialist criticized him for keeping liberty at a higher normative position than equality. Libertarians such as Robert Nozick criticized him for his difference principle which he found as an obstacle for liberty and right to property. Nozick believed that if property is acquired as per the principle of justice or transferred as per the principle of justice, it should not be interfered with by state, in the name of equality or utility. Nozick belongs to that neo-liberal tradition which was advocating for self-regulating market, and Rawls, in a way, was interfering with that self-regulatory mechanism.

Certain other critiques like Ronald Dworkin found it objectionable to conceive liberty without equality and equality without liberty. In a way, Dworkin thought like Rousseau did in case of conflict between authority and liberty.[63] But the whole framework of these dyadic relationships begin with alienated framework of life in which both the values are kept in a tension to each-other.[64] Liberty and equality are, of course, the values of wider significance, but to conceive them at centre-stage, and allow one after the exclusion of the other, is a dishonest trap, which culminated into cold war, and cruel politics of armaments. The whole framework of social contract theory, which started with the premise, to conceive liberty in sense of talent, desert, merit, property, or self-ownership, and to transform it as 'universalizable'[65] value, changed the whole outlook towards life and nature. Before this tradition, an organic conception of life had been central to the community life.[66] To conceive liberty in the framework of right, and to attach property

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[63] Bryan Magee, TALKING PHILOSOPHY: DIALOGUES WITH FIFTEEN PHILOSOPHERS 223 (2001).

[64] Akeel Bilgrami, *supra* note 35 at 125.

[65] Akeel Bilgrami, *Id*. at 109.

[66] Organic conception of life is a synonym of 'holism'. Oxford English Dictionary defines 'organicism' as 'the doctrine that everything in nature has an organic basis or is part of an organic whole'; OXFORD ENGLISH DICTIONARY WEB EDITION. *Available at*: https://www.lexico.com/en/definition/organicism (last visited 28 Jan., 2020). The Cartesian division of mind and matter is opposite to the organic conception of life. Before the emergence of modern science, organic conception of life was prevalent across many civilizations. In Hindu tradition, Earth was accepted as mother, rivers were treated as the source of life; the relationship of human beings with plants, animal, air, fire, river, and the Earth was conceived in organic sense. In Greek, Plato conceptualized the universe as an 'intelligent design'. *See* Plato, TIMAEUS 11 (Benjamin Jowett trans., 360 B.C., 2003). *Gaia* was believed as the Greek goddess of the Earth.

with liberty, produced a framework for exploitation, from nature to the conception of society went onto a complete transformation, whereas duty and responsibility, morality and ethics were reduced to impracticality. It was nothing more than freedom to denaturalize and commercialize the social as well as natural sphere.

Freedom emanated from modernity is the narrow conception of freedom, which does not take into account the cultural, spiritual, or psychological dimension of life. Freedom is here and now conceived as 'right to freedom' or 'right to liberty'. Most of the freedoms enumerated in Universal Declaration of Human Rights or under the Covenant were conceived in the nature of civil and political rights. The social, economic, cultural, spiritual, and psychological dimensions of freedom were not conceived as freedom in true sense; nevertheless, freedom of speech and freedom of conscience were accepted as human rights. The gulf between 'positive and negative concept of liberty'[67] is apparent in global politics. Positive liberty is, in fact, enabling liberty. Without the fulfilment of basic needs, no freedom is meaningful. In a liberalized apparatus of education and health-care facilities, the poor is far away from the freedoms even in materialist and political sense. Access to education and health-care is the first and foremost necessity to enable equal freedom to all, irrespective of rich and poor.

Freedom, in eastern cultures, was conceived not simply as unrestricted pursuit of life in political or materialist sense only. It had social, cultural, psychological, and spiritual aspects as well apart from political or legal characteristic. *Swatantrata, Swadhinata, Atma-nirbharta, Swablamban, Sanyas, Nirwana, Mukti,* or *Moksha*; these were a few known concepts of freedom; which were conceived and practiced not only as a political virtue or practical demand in ancient wisdom of eastern cultures, but it had societal and spiritual dimensions as well. Freedom was accepted as totality of nature and interdependence to the nature. It was visualized as being in the nature itself. The emergence of society was considered not less natural than cosmic laws of harmony. The integrated humanism of Gandhi, aesthetics of Rabindranath Tagore, the material thoughts of Charvaka, ascetics of Buddha, or natural philosophy of Lao Tzu, the eastern ways of practicing freedoms have been diverse and based upon inside view of nature.

In the modern paradigm, the concept of liberty was conceived under the episteme of Newtonian mechanics. Before Newton, the Aristotelian teleological reasoning was the defining feature. After Newton, the understanding of the cosmos was liberated from the teleological perspective. In the same epoch, freedom of will or autonomy was

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In words of Amitav Ghosh, 'Long ago the Greeks…gave to the Earth the name Gaia or, for short Ge. In those days science and theology were one and science, although less precise had soul. As time passed this warm relationship faded and was replaced by the frigidity of schoolmen. The life sciences, no longer concerned with life, fell to classifying dead things and even to vivisection'; *See* Zac O'Yeah, *What we have to think about, above all, is how to slow down: Amitav Ghosh*, THE HINDU, New Delhi (Apr. 25, 2020, 04:00 PM). *Available at*: https://www.thehindu.com/books/what-we-have-to-think-about-all-is-how-to-slow-down-amitav-ghosh/article31414696.ece (last visited 25 Apr., 2020).

[67] Isaiah Berlin, *supra* note 54 at 169.

conceptualized. Immanuel Kant with his critical philosophy liberated the epistemology and practical philosophy from the pre-deterministic or fate-oriented metaphysics. Kant divided *noumena* and *phenomena*[68]; while *phenomenon* was considered to be perceptible to the reason and senses, and the *noumena,* the thing in itself, was considered as a distant reality from a subject's framework. The critical philosophy of Immanuel Kant separated the pure reason with practical reason. His practical moral reasoning privileged the human species over other animals; any such categorisation is a *leitmotif* of European enlightenment; in which humans were considered as morally and cognitively superior from other living creatures. Man as a thinking being, and other animals as instinctual beings, were categorised in reference to an anthropocentric paradigm of life processes. For Kant, the capacity to reason posits humans in unique position to develop a unique sense of moral law, which also provides an additional responsibility to respect the autonomy of self, as well as other fellow human beings, this is how one can treat humans not merely as a means but an end in itself.[69] The Kantian anthropocentric philosophical imagination was a departure from the teleological worldview of Greco-Roman cultures. The Kantian-Copernican revolution in the field of cognitive science did help in the establishment of a worldview different from discovery, it was a paradigm of invention; in a sense, not to discover the order of things, but to create, dissect, compare, and erect an opposite paradigm of knowledge, which may not be the representation of natural law, the things in themselves, but the indubitable human will. The pre-deterministic approach of earlier epochs was supplanted with a new vision of autonomy, dignity, and liberty; the natural endowments to the humans, which were expected for diligent use with courage and maturity. This was the motto of Enlightenment. As Kant puts his point succinctly in his work, 'What is Enlightenment?':[70]

> 'Enlightenment is man's emergence from his self-imposed immaturity. Immaturity is the inability to use one's own understanding without another's guidance. This immaturity is self-imposed if its cause lies not in lack of understanding but in indecision and lack of courage to use one's own mind without another's guidance. Dare to know! Have the courage to use your own understanding is therefore the motto of enlightenment… Dogmas and formula, these mechanical tools designed for reasonable use-or rather abuse-of his natural gifts, are the fetters of an everlasting immaturity. The man who casts them off would make an uncertain leap over the narrowest ditch, because he is not used to such free movement. That is why there are only a few men who walk firmly, and who have emerged from immaturity by cultivating their own minds.'

Just like Newton liberated the cosmology from Aristotelian teleology, Kant liberated moral and practical philosophy from pre-deterministic metaphysics with his argument based on free will and autonomy. On the one hand, it was emancipatory in many ways from pre-deterministic worldview, on the other hand, the rationalistic foundation of

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[68] Immanuel Kant, CRITIQUE OF PURE REASON 217 (Max Muller trans., 1781, 1881).

[69] Immanuel Kant, GROUNDWORK OF THE METAPHYSICS OF MORALS 36 (Karl Ameriks & Desmond M. Clarke eds., 1797, 1998).

[70] Immanuel Kant, WHAT IS ENLIGHTENMENT? 1 (Friedrich Gedike & Johann Erich Biester eds., 1784).

materialistic knowledge desacralized the authority of transcendental authority. On that very premise the pursuit of scientific adventures started and the knowledge was prophetically declared as power.[71]

Freedom as a liberal art of justice was conceptualized with the hyphenation of right, as if 'possessive individuals'[72] are able to conceive and realise freedoms only in context of its relentless demands for the enforcement of rights. Freedom in sense of social practices or deontological sense did not get much attention. In modern epoch, distributive justice has got all the attentions. The whole premise of distributive justice is to distribute material goods, including freedom. The principles of distribution differ among various schools of thought.[73] The whole discourses of justice revolve around the materialistic worldview. Libertarian justice was originally conceived to free individuals from the intrusive power of authority. But it progressed into the opposite pole of instrumentality, from there only the possibility of market society has become possible. The episteme of libertarian epoch has been anti-teleological rationality so as to ensure emancipation from the pre-deterministic outlook of the world. However, the classical libertarians could not foresee the instrumental paradigm of justice, which brought the mass consumerism as the necessary culmination from instrumentality.

IV

Instrumental Justice

Jeremy Bentham, the father of utilitarianism, had a life-long project to bring reform at the hedonistic calculus of utility; be it education, prison system, market, labour reform, or legal system as a whole, he advocated for the change of the outlook. It was truly an epoch of governmentality or governmental reason, which meant to take care of 'a new spirit of age'.[74] Jeremy Bentham brought a new form of disciplinary power to the

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[71] In the process of European Enlightenment, knowledge and power transformed as a new synthesis between the relationship of nature and human. Francis Bacon's statement that 'knowledge is power' reflects on this changed worldview. *See* Francis Bacon, NOVUM ORGANUM 188 (Thomas Fowler ed., 1620, 1878).

[72] C.B. Macpherson, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 156 (1962).

[73] Utilitarian thinker, like Jeremy Bentham, prefers hedonistic calculus to judge what is just or unjust distribution. Egalitarian like Marx prefers equality to determine the justness or unjustness of distribution. Similarly, Robert Nozick prefers libertarian or merit based argument over paternalist one to ensure unhampered pursuit of property. John Rawls takes fairness as the guiding principle to ensure just distribution of the material goods. The whole ambit of arguments revolves around a materialist conception of justice. *See* Xiaoping Wei, *From Principle to Context: Marx versus Nozick and Rawls on Distributive Justice* 20 (3) RETHINKING MARXISM 472-486 (2008).

[74] That was an age of utopias and counter-utopias; on the one hand, liberal theorists advocated for the liberation of humankind from the cage of tutelage, on the other hand market, as a tool

domain of prison reforms with his advocacy for 'panopticon'. Panopticism was never meant to apply only to the prison structure. It was considered as an efficient technology to discipline and correct the behaviour of the unruly soul of the society and to produce maximum output with minimum input.[75] In fact, Bentham crafted a new liberal art of governmentality, eclipsed the age of reason with an age of utilitarianism and disciplinary jurisprudence. With Bentham, the episteme of justice witnessed a new height in form of interests and the management of the various conflicting interests. Sociological school of jurisprudence did provide the procedural commitment to solve various conflicting interests, like an engineer does with his tools. Lawyers, judges, prosecutors, police, political leaders, and other professionals across the various segments of the society witnessed a great transformation, as far as the idea of justice is concerned. The conception of Justice did not remain a fancy normative goal to achieve which was a *leitmotif* of natural law jurists from the Greek to the beginning of modern age. Conceptualisation was imagined in terms of numbers, quantities; these aspirational leaps were meant to ensure sense and sensibility. This new spirit of justice left far behind the classical paradigm of external *a priori* limitations of natural rights over governance, and entered into a sphere of interests from whereon internal limitations were developed and deployed to promote efficiency, transparency, accountability, rule of law, and governance. As Michel Foucault rightly pointed out in his celebrated lectures on the 'art

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of rationality, as an over-empowering institution, overhauled and drastically changed the very pattern and behaviours of masses, and their associated social institutions; in words of Karl Polanayi, 'The congenital weakness of nineteenth-century society was not that it was industrial but that it was a market society'; *See* Karl Polanayi, *supra* note 6 at 258. The overpowering logic of market reduced all the social goods as consumable commodities. Industrial revolution was a radical breach from the ancient and medieval moors and modes of production. In ancient and medieval time, economy was inclined towards a need based co-operation oriented economy, primarily based on reciprocity and centricity. Fraternal bonds among the tribes, villagers were visible in their social transactions and relationships. But the industrial age, inspired by a new spirit, compelled the traditional societies to put emphasise on individual interests, and maximization of those interests by any conceivable means, so as to produce the maximum ceaseless profits. Profit based economy, after the industrial revolution, brought the gigantic gap among the haves and haves not; while a few amassed the maximum resources and the vast populations were impoverished, reduced to hand to mouth situation. *See* Karl Polanayi, *supra* note 6 at 49-58.

[75] Karl Polanayi in THE GREAT TRANSFORMATION provides some interesting accounts about Jeremy Bentham. In words of Karl Polanayi, 'Jeremy Bentham, the most prolific of all social projectors, formed the plan of using paupers on a large scale to run machinery devised by his even more inventive brother, Samuel, for the working of wood and metal. Bentham had joined his brother and they were looking out for a steam engine. It had now occurred to them to employ convicts instead of steam: This was in 1794; Jeremy Bentham's Panopticon plan with the help of which jails could be designed so as to be cheaply and effectively supervised had been in existence for a couple of years, and he now decided to apply it to his convict-run factory; the place of the convicts was to be taken by the poor. Presently the Bentham brothers' private business venture merged into a general scheme of solving the social problem as a whole'; Karl Polanayi, *supra* note 6 at 111-112.

of government', 'Well, in a word, it consists in establishing a principle of limitation that will no longer be extrinsic to the art of government, as was law in the seventeenth century, [but] intrinsic to it: an internal regulation of governmental rationality'.[76] Foucault explains his line of argument in details in few lucid words:

> 'What is this internal regulation in abstract and general terms? How can it be understood before any precise and concrete historical form? What can an internal limitation of governmental rationality be? In the first place, it will be a *de facto* regulation, a *de facto* limitation….a *de facto* limitation means that if the government happens to push aside this limitation and go beyond the bounds laid down for it, it will not be illegitimate…but simply a clumsy, inadequate government that does not do the proper thing.'[77]

One of the major advancements the utilitarian pragmatists brought into the domain of governance was their zeal to re-invent the meaning and process of justice. They came out with their critical attitude against the idealist political thinkers and commentators, who dedicated their life and works, to develop a *telos* oriented or right based approach towards the theory of justice. Governmentality, however, was the third culture of justice, unlike the first culture, which was teleological in its oeuvre, and the second culture, which was libertarian in nature, envisioned life and its phenomenon with the narrow lens of pragmatism.

Governmentality was the brainchild of instrumental reasoning, which could be traced out in the philosophy of Berkeley, David Hume, and Jeremy Bentham. Instrumental reasoning functions at the premise that true objective knowledge is unattainable. As Immanuel Kant divided the realm of knowledge as *noumena* and *phenomena*: *phenomena*, on the one hand, is perceptible through reason and senses and *noumena*, on the other hand, is the thing in itself. Instrumentalists draw their inspiration from this division to create a world which is not objectively there in the world itself. Their perception towards knowledge transformed 'why' question into 'how' question. They thought that human society for long believed in natural law, natural reason, or transcendental authority like God. In Greco-Roman culture, Logos got the central importance in thoughts and imaginations of the people, but truth and meaning of life has not been discovered. In fact, such abstract thoughts misdirected human society towards big vision. But, the truth is, prior to the human senses, and to believe, in something transcendental, is just like a dream. In that sense, real question relates to the method to live a happy life. What is God or what is the significance of life is not perceptible through reason or senses. These feelings are merely a set of projection. There is, for them, no final end or final cause. It is to be invented and created by humans for themselves. Only utilitarianism has an answer to them. Because, according to Jeremy Bentham, pleasure and pain are the two sovereign masters.[78] These two values are the guiding light to choose the right action.

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[76] Michel Foucault, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE 10 (Michel Senellart ed., 1978).

[77] Michel Foucault, *Id*.

[78] Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1 (1789, 1823).

The first problem is perceptible in this approach is that the intrinsic value in action is lost. One has to pursue an action whose consequences are pleasurable. It is not necessarily known in the beginning if that consequence would be achieved what is targeted, and even if, that targeted consequence is achieved, but that may not be pleasurable as expected in the beginning. Second, pleasure or pain is not an end result only but it is a part of process itself, and one, who desires a consequence may not feel or enjoy the process which was instrumental in the achievement of the final result. Third, this approach asks to quantify everything, because pleasure and pain cannot be calculated without conceiving the numerical values of everything, but there are certain aspect of human's lives which could not be quantified in numbers, like happiness, misery, love, sympathy, empathy, family relationship, social goods. Michael Sandel believes that there are certain things 'which money cannot buy'.[79] Forth, from the perspective of instrumental method of reasoning, democracy leads towards majoritarian tendency; to choose a policy which is beneficial for the maximum numbers culminates into the exclusion of minority. This method of reasoning is sometimes used to disregard the interest of individual in case of more than one persons are benefitted from that action. Fifth, this method of reasoning treats every person, including own self, as a means to certain end. In that sense, all utilitarian relationships are conceptualized like investment and return. If this reasoning is extended to the family relationships, all emotional aspects of the family are condemned to and reduced as a cooperative empire, to produce pleasure, and those, who are not fit under the scheme are excluded.

Utilitarianism evolved in the heyday period of science, whereas the important framework under which both these values were conceptualized was a method. No science is possible without method, likewise no ethics of utility functions without having a method to calculate and dissect. Deontological ethics or Teleological ethics meant to provide a wider framework of ethics, under the paradigm of teleology, though it remained as formal and rational, but harmony was the basic framework, from cosmos to the family relationship. Deontology was conceptualized in line with individual autonomy and human dignity to find the highest values to pursue. Alike, Kantian categorical imperatives or Gandhian duties were not meant to restrict ethics to merely an apparatus to solve the conflict of interests. In fact, Kant advised not to treat any being merely as a means but an end in itself.[80] Utilitarian ethics, to the contrary, does not qualify that parameter; it functions like any other technology. This technology is used to classify and weigh various interests to reach to a certain conclusion, which is desirable as per the values of pleasure or pain. For example, Indian Penal Code was developed under a utilitarian system; with the zeal of systematization, offences were defined, categorised, punishments were attached at par the doctrine of proportionality, the mitigating and aggravating situations were considered under the broad range of scheme and for that purpose, general exceptions got an important place in the code. The

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[79] Michael J. Sandel, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 1 (2012).

[80] Immanuel Kant, GROUNDWORK OF THE METAPHYSICS OF MORALS 36 (Mary Gregor ed. & trans., 1785, 1998).

utilitarian structure is the defining feature of Indian legal system, which is followed everywhere from the Bar to the Bench.

In recent few decades, the 'market society'[81] has overpowered every social institution. The market logic is often used to solve various contentious issues of the day. For example, surrogacy has been in discourse for the reason that on the one hand this practice is useful for all the parties, but it is not necessarily just from the perspective of maternity, emotional relationship, and intrinsic value of a relationship. The 'market logic' has changed not only our methods of thinking but other social institutions as well. Whether it is education, health care, agriculture, or animal husbandry; every possible social goods have been monopolized and rationalized as per the logic of market. Everything is a means for no other end but for pleasure and profit.

Utilitarianism is a synonym of instrumental ethics, which has been elevated into 'instrumental rationality',[82] a term coined by Max Weber; and the 'cultural industry'[83] is a by-product of that rationality, producing the culture of mass consumption, whereas majority of masses has become the passive consumers. The electronic media, film industries, radio, television, advertising agencies etc., play a vital role in the transformation of the 'consumer society', wherein the possibility of active agency has withered away into oblivion. In words of Rick Roderick, 'the self is under siege'.[84]

Reasoning of instrumental rationality and bureaucratized society[85] are the progeny of mass culture, whereas youthfulness has changed into addiction, consumption, passivity, despair, and meaninglessness. Nature has condemned humans to be free, but

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[81] This term, for the first time, was used by Karl Polanayi. The requirement to establish a market society was explained by him in these words, 'A self-regulating market demands nothing less than the institutional separation of society into an economic and a political sphere. Such a dichotomy is, in effect, merely the restatement, from the point of view of society as a whole, of the existence of a self-regulating market. It might be argued that the separateness of the two spheres obtains in every type of society at all times. Such an inference, however, would be based on a fallacy. True, no society can exist without a system of some kind which ensures order in the production and distribution of goods. But that does not imply the existence of separate economic institutions; normally, the economic order is merely a function of the social order. Neither under tribal nor under feudal nor under mercantile conditions was there, as we saw, a separate economic system in society. Nineteenth-century society, in which economic activity was isolated and imputed to a distinctive economic motive, was a singular departure. Such an institutional pattern could not have functioned unless society was somehow subordinated to its requirements. A market economy can exist only in a market society'; Karl Polanayi, *supra* note 6 at 74.

[82] Darrow Shecter, THE CRITIQUE OF INSTRUMENTAL REASON FROM WEBER TO HABERMAS 187 (2010).

[83] Theodor W. Adorno, THE CULTURE INDUSTRY: SELECTED ESSAYS ON MASS CULTURE 1 (J.M. Bernstein ed., 2001).

[84] Rick Roderick, THE SELF UNDER SIEGE: TWENTIETH CENTURY PHILOSOPHY 1 (1993).

[85] The uniform process of thinking and action is the perfect condition to establish a consumer society, whereas, the mass populations invest their time and energies in consumption of goods and services all the time. *See* Theodor W. Adorno, *supra* note 83.

freedom appears as illusionary when too much information has paralysed the possibility to choose. Kierkegaard, an existentialist philosopher raised this question. He found that humans are trapped between infinite and finite;[86] on the one hand, too many choices result into no choice, most of the time people consume their time in thinking what to consume, on the other hand, humans are no longer going beyond their imaginative character, and living with them entire life, for instance, if someone is doing a job of manager, he is a manger all the time in his life; his behaviour, thought process, and every demeanour are synchronized in the line of that job.

No human society, in authentic sense, is conceivable in bureaucratized sense, whereas everything is written on paper; and all the calculations revolve around the mechanism to avoid the action. The officialdom of bureaucracy is justified for its detachment and neutrality, like science studies the secrets of matters, in that very process of detachment the humane and emotional side of humans are sublimated and mechanised. From those conditions, a mechanical sense of justice is imagined and realized, which is known as 'legalism'.[87]

V

Mechanical Justice

Upendra Baxi, one of the great scholars of Jurisprudence and Human Rights, in one of his lectures, classified the paradigms of justice, like Justice according the law, Justice beyond the law, Justice besides the law, and justice beneath the law.[88] Justice according the law, however, is the true spirit of mechanical justice, which is popularly known as legalism, and other categorisations are the deviations from the sphere of law, yet those deviations are still hyphenated with law. Law remains as the fundamental category to conceive any idea of justice. Constitutional justice, Constitutional morality, Constitutional Renaissance, or Constitutional Enlightenment, whatever word one prefers to choose, these aspects of justice remain located within the tradition of legalism, which originated from the works of classical theorists, like Thomas Hobbes, Jeremy Bentham, John Austin, Hans Kelsen, H.L.A. Hart, Joseph Raz, etc.

These following questions may be raised to investigate and examine the aspects of legalism. First, how far legalism is different from other cultures of justice? Second, what historical and societal conditions compelled to reduce the very sense of justice within the rationalized sphere of law? Third, what process, or what sorts of strategies were

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[86] Soren Kierkegaard, FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH 83-84 (Walter Lowrie trans., 1849, 2013).

[87] In words of Judith Shklar, 'What is legalism? It is the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules'; Judith Shklar, LEGALISM 1 (1964).

[88] Upendra Baxi, *Too Old to Laugh and to Cry: Some Remarks on the State of Legal Education in India* in REFORM OF LEGAL EDUCATION AND RESEARCH 13 (Jeet Singh Mann ed., Forthcoming, 2019).

adopted to transform the imagination of justice as legislation, interpretation, and enforcement of law? Fourth, what impact did it make upon the broader spectrum of justice? Fifth, how far this process has changed the society, and if at all, in what ways?

The first question could be explained in context of history of ideas. In Greco-Roman culture, the idea of justice was based on the natural law argument, to be more specific, in Greek, teleological worldview is apparent from the philosophical discourse of Plato and Aristotle. In Roman culture, fate-oriented attitude led the foundation of stoic philosophy. Justinian Code was one example in which rule based justice was conceived in that culture. Codification, however, is different from legislation. Codification is simply a systemization of existing laws, popularly known as consolidation, on the contrary, legislation is a scientific method to create law. In that sense, Roman culture, ancient Hindu culture, ancient culture in Babylon, or Sumerian culture may have invented the idea of codification of law, but it was merely a process of consolidation of existing practices. For example, the ancient Hindu King was not a law giver; laws were either revealed in Vedas or it came from sages. Sages as law giver did not provide law in theological sense; rather it was a part of the common social practices.[89]

Legislation as a science of law originated after the enlightenment values secularized the ancient sacred paradigm of natural law; from there only natural rights tradition and instrumental rationality emerged. Natural Rights culture produced *a priori* limitation against the paradigm of authority and law, from there only right to life, liberty, and property were conceived under the social contract tradition. That was the moment, a major political change, i.e., the emergence of modern nation state became possible through a legal model of social contract, to provide the legitimacy and order in the society. Written Constitution and the demand of bill of rights were those significant developments, which limited the political process and gave a major role to play for the constituting power in form of Constitution making process and its permanent written character. Prior to this age, constitution existed in ancient cultures as well. Aristotle was a great scholar of comparative law and he studied almost 158 constitutions of the Greek city states. But what was the significant transformation under social contract theory, was to conceive a secular paradigm of politics, constituted by a legal instrument, or at least, a rationalized agreement in hypothetical sense to detach constitution from the space of society and culture, and to erect a separate building block of legal rationality and legal reality, which will judge the cultural and social practices from that rational point of view. For language of law, mostly derived from theology or from the practices of trade and business, had an instrumental role to play in restructuring the order of society at

[89] According to Donald R. Davis Jr., 'A solid consensus of scholars now suggests that Dharmaśāstra is a record of ācāra written in a specialized scholastic idiom. If ācāra were conduct to be observed, then Dharmaśāstra would be a kind of ethnographic report, an observer's journal'; Donald R. Davis Jr., THE SPIRIT OF HINDU LAW 146 (2010). *See also* Patrick Olivelle, *The Semantic History of Dharma: The Middle and Late Vedic Periods*, 32 J. INDIAN PHILOS. 491–511 (2004); Albrecht Wezler, *Dharma in the Vedas and in the Dharmaśāstras*, 32 J. INDIAN PHILOS. 629–654 (2004).

par the logic of induction and deduction. It was a progressive turn- around from 'status to contract'[90], the ancient authority, its traditions and customary practices. Meanwhile, the tradition of contract, championed by intellectuals of modern age, preferred to muddy the water to ensure its continuous complexity. The legalistic traditions across the globe embraced practices, to create innumerable laws in complex languages, from parliament's authority to individual autonomy; every unit of the society accepted law as a means for governance, freedom, autonomy, equality, order, harmony, and of course justice. Legal solution has become too popular and un-popular with its exponential growth. Every problem, with its birth, attracted a legal solution. People across the globe are asking from their governments to provide law to curb sexual violence against women and children, to recognize the sexual privacy and autonomy, to solve the existential problem of climate change and de-weaponization, to control pollution to population, to ensure right to food, sleep, health, identity, employment, to curb the existential pandemic like Covid-19, etc. The project of legal solutions is not simply able to address those structural issues, which could be solved at attitudinal or deontological level. There are structural questions awaiting answers. This relates to the expanding empire of law. The reasons identified by Jonathan Sumption are: 'the growing moral and social absolutism which looks to law to produce conformity. The other is the constant quest for greater security and reduced risk in our daily lives'.[91]

To convert the entire social, political, moral, and ethical issues into, a legal one, or to convert it into the language of claim, counter-claim, enforcement, etc., may be attractive *prima facie*, but it has no healing effect upon the minds of litigating parties. The moral and ethical dilemma could be solved only if the people are capable enough to take their own moral and political decisions. John Rawls from the perspective moral and political philosophy developed two standpoints; *reflective equilibrium*[92] and *overlapping consensus*[93], to solve and resolve moral and political questions. Unwritten Constitution for the U.K. is justified for its unique capability to solve moral and political questions without asking for a legal remedy, and the U.S. Constitution is known for its non-flexibility; quick and efficient decisions, in that sense becomes very difficult to take. It does not mean that legal solution is ineffective in general sense. Legal method, if

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[90] Henry Sumner Maine, ANCIENT LAW 165 (Charles M. Haar ed., 1861, 1963).

[91] Moral and political absolutism, a general tendency is found among the people or the institutions that their moral and political judgments are absolute and non-negotiable, for they find law as useful instrument to produce conformity for those moral and political ideals; Jonathan Sumption, *Law's Expanding Empire*, BBC REITH LECTURERS: LAW AND THE DECLINE OF POLITICS (May 25, 2019, 07:15 PM). *Available at*: https://www.bbc.co.uk/programmes/m00057m8 (last visited 21 Dec., 2019).

[92] Overlapping consensus resolves the question of legitimacy of law. Every varied opinion and belief of the citizen with respect to law raises the question of its legitimacy. That question is solved with the method of an overlapping consensus, whereas the core of overlapping political beliefs of the citizens is taken as a ground for the legitimacy of law and its obedience. *See* John Rawls, *supra* note 8 at 133.

[93] John Rawls, *supra* note 8 at 18.

adopted as the last resort, may be desirable. But to leave every issue for the law as the first preference is detrimental to the art of politics.

Legalism has been achieved through the process of rationalization of law, for that purpose a formal normative order is conceived, a hierarchy is established, and then the question of validity is raised to decide if a law exists or not. As per John Austin, Law is the 'command of the Sovereign'.[94] If the command is a general command given by a political superior to political inferiors and if that commander is habitually followed by the political inferiors, then such commands are law. Kelsen conceives the process of rationalization through normative structure; at the top of it, the *grund norm* is the all source of validity, from their only the lower norms receive their validity. The whole process of rationalization ignores the question of efficacy, social and cultural impacts, political morality and political process in the identification or legislation of law.[95] Positivists avoid the question of politics and morality and do accept law as a rational fact. But the thematic expression of law has remained normative. This problem was not addressed by realists; they failed in appreciating anything real outside the psyche of judges and courts. With the positivist structure of law, a parallel truth was erected in front of social, moral, and political reality. Legal positivism has alienated the law from the branches of society in quest of certain and predictable law, because legalism was the inevitable demand of the market society, for the predictable action and desired outcomes, for the practices of trades and businesses; formal law, in that sense, was the progeny of modernity.

The claim for the purity of law or the pure theory of law has been a hollow slogan without having any substance. In municipal law, the entire process of the drafting of the Constitution, its adoption or the application is nothing less than a political act, similarly the process of legislation, adjudication, or the implementation of law is a part and parcel of the political process. State and law, in the western paradigm of thought, had its origin from theology.[96] Thus, to claim the purity of law, as a separate institution from theology, morals, and politics, is not historically located as truth, nevertheless it is hypothetically conceived to establish a new reality in parallel to social and historical conditions.

International law was deprived from the dignity of law. Thomas Hobbes and John Austin did not see that the international law fulfils the bare conditions of law. Jeremy Bentham, however, emphasized upon its desirability, but did not accept its existence. Kelsen, on the other hand, accepted International Law as the law under impersonalized

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[94] John Austin, THE PROVINCE OF JURISPRUDENCE DETERMINED 27 (1832, 2001).

[95] Hans Kelsen, PURE THEORY OF LAW 208-211 (Max Knight trans., 2005).

[96] According to Carl Schmitt, 'All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development- in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver-but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology'; Carl Schmitt, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 37 (George Schwab ed., 1922, 2005).

normative structure. After the Second World War, the normative development of the International law has thrived; the establishment of United Nations, the normative paradigm of Human Rights, the establishment of the International Court of Justice and International Criminal Court, and the establishment of tribunal under the law of Sea, etc., are some of the paradigmatic developments. Positivists in post war period have been ambiguous in rejecting the status of International Law. The suggested reason is that they are aware about the utility of the International law for the peaceful commerce, even if, the international law does not fit into the scheme of their strict legalism.[97] In spite of all the ambiguities, the status and the utility of the International law have increased in the post-world war and the cold war period. The Nuremberg Trial[98] and the Tokyo Trial[99] are events of significant political and legal developments. In both the cases, values in the name of natural law were imposed upon the defeated nations, even if, in strict sense, their municipal laws did not recognize any such standard as a necessary concomitant of the law; it was rationalized as the universal reason or the universal contract in Kantian sense, but both the trials depict the vulnerabilities of legalism before the political process.

In recent decades, when the human society has progressed towards post-modern and post-human conditions, legalism has shared enormous space with the technology. The technological advancement, in a post human society, is no longer a medium or a means; it has achieved the stature of rationality. Technology has become a paradigm for justice and truth.

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[97] It is a well-known fact that the International law is all about the natural laws, customary laws, and the principles of *jus cogens*. The legal positivism does not fit into the scheme of its broader range. However, the legal positivists are sympathetic towards its developments, because the legal positivism and liberalism have always been close together ideologically. Jeremy Bentham, for example, on the one hand, rejected the natural law as 'non-sense', and on the other hand, expressed his desire for the possibility of International Law, in fact, He coined the term, 'International Law'. *See* Ronald R. Foulke, *Definition and Nature of International Law*, 19 (6) COLUM. L. REV. 460 (1919). Legalism is conceived as empty vessels under the municipal law, but in reality, it has never been a formal empty structure. Without a political process, the origin and growth of law are impossible to imagine. In the origin and growth of International Law, politics had a vital role to play, and in contemporary time, it is still relevant.

[98] Judith Shklar writes about the Nuremberg Trial, 'Political trials reveal the intellectual rigidities and unrealities of legalism as no other occasion can. Here its inability to recognize its own social functions, both in their greatness and in their limitations, is fully revealed'; Judith Shklar, *supra* note 87 at 112 (1964).

[99] In words of Judith Shklar, 'The American prosecution at the Tokyo Trials appealed to the law of nature as a basis for condemning the accused, he was only applying a foreign ideology, serving his nation's interests, to a group of people who neither knew nor cared about this doctrine. The assumption of universal agreement served here merely to impose dogmatically an ethno-centric vision of international order. It was the claim that these universal rules were 'there'-the assumption of general agreement, which was so contrary to the cultural realities of the situation-that made the application of natural law seem both arbitrary and hypocritical under these circumstances'; Judith Shklar, *Id*. at 128.

VI

Technological Justice

Technology is known as 'science of craft, art, or skill'.[100] 'This word has evolved from Greek *Technikon*', means, 'that which belongs to *techne'*.[101]*Techne* was understood in Greek as 'the activities and skills of the craftsman and the arts of the mind'.[102] *Techne* and *episteme* were the similar signifying words, which had a similar meaning until Aristotle. In *Nicomachean Ethics*, Aristotle distinguished the meaning of these two concepts; *episteme* and *techne*. As per Aristotle, *techne '*reveals whatever does not bring itself forth and does not yet lie here before us'.[103] Martin Heidegger, a German philosopher once argued, 'Technology is a mode of revealing. Technology comes to presence in the realm of revealing and unconcealment take place, where *aletheia*, truth, happens'.[104] According to Heidegger, 'the essence of technology is by no means anything technological'.[105] He finds two different definitions of technology; one, it is a means to an end; two, technology is a human activity'.[106] After 17th century, the modern physics appeared with the instrumental conception of technology; to quantify everything in numbers, to treat everyone and everything as a means to an end. This conception of technology is not conceptualized to reveal truth rather 'challenging forth'[107]. Heidegger explains that the modern technology challenges forth the revealing. In his words:

> 'What kind of unconcealment is it, then, that is peculiar to that which comes to stand forth through this setting-upon that challenges? Everywhere everything is ordered to stand by, to be immediately at hand, indeed to stand there just so that it may be on call for a further ordering. Whatever is ordered about in this way has its own standing. We call it standing-reserve…Whatever stands by in the sense of standing-reserve no longer stands over against us as object…Seen in terms of the standing-reserve, the machine is

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[100] Technology in etymological sense evolved from Greek *techne* and *logos*. *Techne* signifies 'art, skill, or cunning of hand' and *logos* means science or reason; H.G. Liddell & Robert Scott (eds.), A GREEK-ENGLISH LEXICON ABRIDGED EDITION 416, 702 (1871, 2015).

[101] Martin Heidegger, THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS 12 (William Lovitt trans., 1977).

[102] Martin Heidegger, *Id*. at 13.

[103] Martin Heidegger, *Id*.

[104] Martin Heidegger, *Id*.

[105] Martin Heidegger, *Id*. at 4.

[106] Martin Heidegger, *Id*.

[107] Heidegger expounds this theme with profound expression, 'The revealing that rules throughout modern technology has the character of a setting-upon, in the sense of a challenging-forth. The challenging happens in that energy concealed in nature is unlocked, what is unlocked is transformed, what is transformed is stored up, what is stored up is, in turn, distributed, what is distributed is switched about ever anew. Unlocking, transforming, storing, distributing, and switching about are ways of revealing. But revealing never simply comes to an end…The revealing reveals to itself its own manifoldly interlocking paths'; Martin Heidegger, *Id*. at 16.

> completely unautonomous, for it has its standing only from the ordering of the orderable.'[108]

The modern conception of technology is to be understood as technological rationality that is instrumental and is conceived to challenge the existing truth, to conceal it, to re-order and re-create it. Truth is caught in insatiable chains of transformation. The modern technology is not conceived to reveal the truth but to conceal it.

Tools have a useful relationship with human species since *homo sapience* evolved 2,00,000 years ago.[109] Daily usage of fire and use of stone as tool for hunting, these techniques were developed to fulfil the need of survival instinct. Many anthropologists agree that the growth of brain size and the decline of the size of teeth of *Homo* caused the necessary pre-conditions for the invention of first tool.[110] Before the evolution of *Homo* some other animals, like chimpanzees 'are known to use sticks to dig for termites'.[111] In a study, it was found that the first stone's tool was used by an ancient species that lived on the shores of Lake Turkana, in Kenya, around 3.3 Million years ago.[112] However, invention of early tools and controlled way of fracturing rock was a behavioural innovation, unique to *Homo* only.[113] Before *Homo sapiens*, stone tools and fire were already in existence. During the Neolithic Period, humans evolved from nomadic groups of hunter gatherers to larger permanent settlement, in this period the stone tools were made by grinding and polishing stones instead of flaking.[114] The emergence of copper and bronze later made a huge difference in the developments of tools.[115]

The transformation of tool as technology signifies a changed relationship between *Homo* and other animals, plants, animate and inanimate objects. Technology, in instrumental sense, was an invention of the 'science of means or science of tools'; just like initial growth of language was un-organized, random gestures for the conveyance of emotions; language as an organized system was a deliberate craftsmanship of the structure, a controlled method to share information about experiences, emotions, and beliefs. This process of organizing language or organizing tools was a substantial transformation of tool into technology, which changed the relationship forever between *Homo sapiens* and other creatures.

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[108] Martin Heidegger, *Id*. at 17.

[109] Yuval Noah Harari, SAPIENS 1 (2011).

[110] Emma Groeneveld, *Stone Age Tools*, ANCIENT HISTORY ENCYCLOPEDIA (Dec. 21, 2016). *Available at*: https://www.ancient.eu/article/998/stone-age-tools/ (last visited 20 Jan., 2020).

[111] Emma Groeneveld, *Id*.

[112] Sarah Pruitt, *Six Major Breakthroughs in Hunter-Gatherer Tools*, HISTORY (Aug. 5, 2019). *Available at*: https://www.history.com/news/hunter-gatherer-tools-breakthroughs (last visited 25 Jan., 2020).

[113] Emma Groeneveld, *Stone Age Tools*, ANCIENT HISTORY ENCYCLOPEDIA (Dec. 21, 2016). *Available at*: https://www.ancient.eu/article/998/stone-age-tools/ (last visited 20 Jan., 2020).

[114] Sarah Pruitt, *supra* note 112.

[115] Sarah Pruitt, *Id*.

There is an interesting anecdote from Plutarch, a Greek biographer, with respect to a technological experiment and the changed power relationship in that society.[116] In *Marcellus' Life*, he writes:[117]

> 'Archimedes, who was a kinsman and friend of King Hiero, wrote to him that with any given force it was possible to move any given weight; and emboldened, as we are told, by the strength of his demonstration, he declared that if there were another Earth, and he could go to it, he could move this one. Hiero was astonished and begged him to put his proposition into execution, and show him some great weight moved by a slight force. Archimedes therefore fixed upon a three-masted merchantman of the royal fleet, which had been dragged ashore by the great labours of many men, and after putting on board many passengers and the customary freight, he seated himself at a distance from her, and without any great effort, but quietly setting in motion with his hand a system of compound pulleys, drew her towards him smoothly and evenly, as though she were gliding through the water. Amazed at this, then, and comprehending the power of his art, the King persuaded Archimedes to prepare for him offensive and defensive engines to be used in every kind of siege warfare.'

The power of technology has always been advantageous for humans who have devised it and used it for the betterment of life. But technology, in ancient cultures, remained within the structure and subordinated to the society just like tools. It was used for the adaptabilities in nature. After the origin and growth of mechanical science, known as Newtonian Cosmology, the power relationship with the nature was changed. Technology did not remain simply a tool for the better adaptabilities in nature; rather it started to alter the power relationship with nature. Technology, in instrumental sense, was transformed as 'technological rationality', started to re-create human lives and human values, under the ambitious project of mastering the nature. The holistic outlook of life, the attitude of discovery of the laws of nature became an archaic and out-dated pursuit, and the adventure of invention was accepted as a new challenge.

When modernity went into the trajectory to post-modernity, 'hyperreal',[118] world became a new reality, whereas human societies started to produce 'sign-value',[119]and the ethical substratum of virtues were transformed into a 'virtual reality'. With the invention and the growth of computers and super computers, and the imaginative leap into the direction of Artificial Intelligence, the 'post-human'[120] reality has become a possibility where, in that sense, 'self under siege', is no longer an ontological question. The exponential growth of social media has challenged the authority of truth; the multiplicities of truths have reduced the possibility of truth

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[116] Wayne Morrison, *supra* note 9 at 56.

[117] T.E. Page (ed.), PLUTARCH'S LIVES Vol. V, 473 (Bernadotte Perrin trans., 1917, 1955); Quoted from Wayne Morrison, *Id*.

[118] Jean Baudrillard, SIMULACARA AND SIMULATION 1, 12 (Sheila Faria Glaser trans., 1981, 1994).

[119] Jean Baudrillard, *Id.* at 6.

[120] Mritunjay Kumar, *Right to Privacy in a Posthuman World: Deconstructing Transcendental Legacies & Implications of European Renaissance in India*, 1 SML. L. REV. 52 (2018).

as a bundle of perspectives. In such a simulating age, technology is redefining the legalistic conception of justice.

From the policy making to the implementation, technology is playing a major role in the governance and the implementation of the welfare schemes, across the world. It has also democratized the voices of the people as well as, has become a tool for the surveillance and the propaganda, which is, in a way, affecting the democracy. The Facebook-Cambridge Analytica data breach, occurred in 2018, was predominantly used for the political advertising activities.[121] Dataveilance and the demands for data protection have been growing in parallel. Human society as a global village is progressing on the path of 'simulacra and simulation'[122].

In recent time, in India, the discourse with respect to the use and misuse of technology and the demand for the enforcement of the fundamental right to privacy, have increased.[123] The application of the narco-analysis, brain mapping, and the polygraph test, were scrutinized by the Supreme Court of India[124] with respect to right against self-incrimination, guaranteed as a fundamental right under Article 21 of the Indian Constitution. The use of forensic science is widespread across the globe for the efficient investigation of crime. The maintenance of data bank for the offenders was also proposed so as to ensure the prevention and detection of crime in India.[125] The Supreme Court of India, in a judgment, questioned the traditional interpretation of section 112, Indian Evidence Act,[126] which provides a legal presumption in favour of the paternity of a child, who is conceived in the course of marriage, and even after the dissolution of marriage, up to 280 days. Some of the advocates of the social policies raise the larger goal of the law, i.e., to prevent the illegitimacy of a child.[127] For that purpose, legal fiction protects the interest of child. On the other hand, debates unbound from the devotees of science, who object the traditional approach. They argue in favour of technology, so as to establish the truth. The purpose of law, for them, is not merely a tool to prove or disprove a fact but to establish the truth,[128] in the interest of truth; technology could be a great guide and

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[121] Julia Carrie Wong, *The Cambridge Analytica scandal changed the world – but it didn't change Facebook* THE GUARDIAN (Mar. 18, 2019, 01:00 AM). *Available at*: https://www.theguardian.com/technology/2019/mar/17/the-cambridge-analytica-scandal-changedthe-world-but-it-didnt-change-facebook (last visited 15 Jan., 2020).

[122] Jean Baudrillard, *supra* note 118 at 1.

[123] *K.S. Puttaswamy* v. *Union of India* (2017) SCC 996.

[124] *Selvi* v. *State of Karnataka* (2010) 7 SCC 263.

[125] Law Commission of India, *271st Report on Human DNA Profiling – A draft Bill for the Use and Regulation of DNA-Based Technology* (Jul., 2017). *Available at*: http://lawcommissionofindia.nic.in/reports/Report271.pdf (last visited 25 Jan., 2020).

[126] *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik* (2014) 2 SCC 576.

[127] *Goutam Kundu* v. *State of West Bengal and Anr.* 1993 SCC (3) 418.

[128] Ministry of Home Affairs, Government of India, *Report of the Committee on Reforms of Criminal Justice System* 27-35 (Mar., 2003). *Available at*: https://www.mha.gov.in/sites/default/files/criminal_justice_system_2.pdf (last visited 20 Jan., 2020).

companion.[129] Some of the advocates question the accuracy of scientific truth and a few others question its inherent possibility for use and misuse.

But the whole paradigm of debate revolves around the instrumental use of technology. Nobody questions the very paradigm of 'verdiction'.[130] For technology as a tool or process of life has been companion of human kind since time immemorial. But the human societies had never been so addicted to the technology as the societies of contemporary age. This dependency is not limited to its instrumental use, rather technology has been elevated as a paradigm of truth and validity, which establishes, decimates, and conceals the notions of truth. Technology as a paradigm of truth has been established at the premise of suspicion that humans are not believable and trustworthy. They are influenced by various other considerations. However, in case of technology, it is reliable, as presumed, and discovers the objective truth. Human emotions, values, and feelings are not quantifiable, but so far as a machine is concerned, it knows the language of mathematics. Nature has a language, emanates in the language of mathematics, as Galileo claimed,[131] and nature's nature is quantifiable through discerning numbers and its patterns. The truth of algorithm is a reflection of 'syntactic truth'.[132]

In the era of Quantum mechanics, the projected reality is hard to ascertain, in fact, the formal or mathematical reality has become the fundamental postulate of all the human colonies across the globe. Quantum cave is a Platonic Cave in reverse, in the sense that Plato thought that the mathematical-formal reality is transcendental, outside this world, and the projected reality is earthly and remains before the senses in constant state of flux. However, in today's quantum cave, mathematical or formal reality is the general postulate across the globe, on the contrary, the projected reality is difficult to ascertain;[133] from the formal sense of reality, the technological truths are invented and a paradigm of justice is established.

The technological rationality has become an end for itself. When technology speaks, no human reason could defend. Reason has surrendered itself before the fine art of technology. The humans are now relentlessly consuming what technology is producing. In that sense, every debate between the human reasoning and the technological efficiency, it is technology, which appears to be the winner without having any contest or challenge. Technology, on the one hand, is active in the production of truth, and the humans are now consumers of such produced truths. The unlimited choices to consume have created a huge crisis for the humans to choose between many choices.

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[129] *supra* note 125.

[130] Michel Foucault, *supra* note 76 at 27. (Michel Senellart ed., 1978).

[131] Alexander Sissel Kohanski, THE GREEK MODE OF THOUGHT IN WESTERN PHILOSOPHY 121 (1984).

[132] Jean Searle, *Minds, Brains and Science*, BBC REITH LECTURERS: BEAR CANS & MEAT MACHINES (Nov. 14, 1984, 09:00 AM). *Available at*: https://www.bbc.co.uk/programmes/p00h2clw (last visited 20 Jan., 2020).

[133] Daniel Burgarth & Paolo Facchi, *et.al*., *Quantum Computing in Plato's Cave*, QUANT-PH ARXIV (Mar., 23, 2014). *Available at*: https://arxiv.org/abs/1403.5752 (last visited 20 Jan., 2020).

In the face of technological submergence, legal and judicial institutions have already conceded much of their space in favour of technological rationality.[134] From the Greco-Roman culture to the modern age, experts were considered as the companions of court, to assist the institution in order to establish the truth. In the process of tribunalization, members associated with technical fields got an equal opportunity to become a part of 'veridictionary jurisprudence'.[135] In the near future, this is no longer a prophesy, technology of algorithm will regulate the principles and the processes of contract, marriage, divorce, creation of will, gift, sale, mortgagee, lease, and trust, etc.

Technological rationality has brought certain challenges to the humanity; without a proper understanding of its impact upon the societies and cultures, human emancipation would be a distant dream. These challenges are in the nature of existential crises, like grievous pandemics, weapons of mass destruction, and climate changes, etc. Such issues could be resolved if the greed and insatiable desire to conquer nature is forgotten, only in that condition, justice to the process of life would be possible.

VII

Conclusion

The history of western civilization has been a landscape of formalization and rationalisation; an apparatus to judge what is just and good at par 'universalizable' standard. In the process of conceiving truth many universes of untruths have been visualized and eliminated from the mainstream, in the defining process of morals and ethics, practices of a vast degree of immorality and unethical standards have been determined and expunged; in the museum of justice, the monuments of injustices have been concealed; and a vast systematization of ethics, politics, morals, aesthetics, and law has taken place. Just like a world of light is conceived under the array of darkness and notion of beauty is articulated with the exclusion of ugliness; darkness or ugliness is not a fact; it is a judgment, a perspective to demarcate a line for inclusion and exclusion, to formulate a concept. Human's languages, for example, are the mirrors of standard; their origin and growth are conditional to the structure of grammar for its significatory relevance; grammar is possible under a common understanding of the society to exclude a vast domain of rules and structure, so as to preserve a narrow system of language. Similarly, a sense of graciousness and ugliness of words are produced

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[134] Technology is not only used or proposed to be used for the purpose of establishing the truth, but also at the institutional level, it may transform an empirical reality into the virtual reality. For example, e-Courts and e-filings have already become a reality in India. *See* K. Subramanian, *The Epidemic and Ensuring Safety in Courts*, THE HINDU (May 11, 2020, 00:02 AM). *Available at*: https://www.thehindu.com/opinion/lead/the-epidemic-and-ensuring-safety-in-courts/article31552305.ece (last visited 11 May, 2020).

[135] 'Veridiction' signifies 'an apparatus to establish truth; 'a site of verification-falsification'; Michel Foucault, *supra* note 76 at 32.

simultaneously. Epistemic production of justice, in that sense, has been articulated in a progressive discursive sense; from teleology to technology; a rationalized historicity of justification has been produced for the appearance of rationality as reality or truth. The epistemic rationalization from Greco-Roman cultures to post human age has become possible under the condition of 'formalisation of truth and justice'.

Teleological rationality, for example, is a formal standard of historicism, adopted by Plato to justify a perfect formal structure of everything, popularly known as concept. The philosophy of concept under Platonic meditation is formal and structural. Concept cannot be formulated without unity of form, like oeuvre of an author is not possible without formal systematic structure of unity, for the marginal and incoherent works are consciously excluded, in the process of highlighting oeuvre of an author or an artist.[136] Every genre of musical composition or every school of thought is produced at formal level; in the process of systematization, random incoherent notes are carefully discovered and alienated. Teleological rationality, was an apparatus of formalization, which produced 'regressive and progressive historicist structures';[137] both historicism have been caught in a circular chain of rationality. All these historicist accounts of truth remain circular in conceiving thesis, its corrupting or decaying reality, and its realization of potentiality as actuality or transformation of thesis into anti-thesis and synthesis. These teleological arguments remain circular and formal, and lead nowhere but remain enclosed within a box of rationality, away from a natural course of law and truth. However, in Greek, the intention to formulate the teleological worldview was to discover the truth, law, reality, or harmony. But in effect, it has produced a few formalized and rationalized historicisms, which could be traced in the philosophy of Plato, Aristotle, Hegel, and Marx.

In medieval period, theology was elevated as a means for truth and justice. Theology, in words of Max Weber, 'is the intellectual rationalization of sacred religious beliefs'.[138] Theology provides a structure of inclusion and exclusion of its adherents and heretics. The discursive formation of religious beliefs has been a conscious attempt of systematization of what is allowed and what is not allowed, what is essential and non-essential practice, the silver-lining between religious and secular practices, the homogenous characterization of all the diversified beliefs and practices; theology functions not necessarily as a science of beliefs rather practices. Theology as a rationalized apparatus governs the whole range of identity formation and its practices. In medieval ages of Europe, truth remained an object of theology under teleological moral reasoning; whereas St. Augustine remained Platonic in his theology and Thomas Aquinas followed the Aristotelian method of reasoning. The whole system of theology

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[136] Michel Foucault, ARCHEOLOGY OF KNOWLEDGE 26-27 (1969, 2002).

[137] Plato formulated a pessimistic teleological historicism of truth and reality- from perfect form to the decaying, changing realities. Aristotle and Hegel, on the contrary, conceptualized an optimistic teleological historicism. On Platonic historicism, *See* Karl Popper, *supra* note 9 at 23, 222. On Aristotelian and Hegelian historicism. *Id.* at 222, 225, & 275.

[138] Max Weber, THE VOCATION LECTURES 28 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004).

was enunciated under formalization of essential and non-essential practices for believers.

The formalization of secular beliefs resulted into Kantian deontological rationality. The conceptualization of categorical imperatives and its universalizable characteristics were not possible under any practical or substantive values, but the formalization of moral reasoning itself. Categorical imperatives were devised as formulas in discovering the moral laws. Autonomy, a fundamental Kantian category, is the basic unit of libertarianism. It is a formal category from where only the freedom of contract and freedom of market have become the possible paradigm of truth and justice. Natural Sciences have treated nature as a mathematical reality, instead of value based existence. The whole ranges of normativity, like human rights, freedom, equality, rule of law have been formulated under supposedly a formal structure of value neutrality, in that sense, alienation from nature was successfully accomplished. Social contract theory in hypothetical sense was the culmination of a formalized process of rationalization, to ensure the legitimacy of state and its governmental practices. In extension to that, the concept of person was conceived in formal juristic sense, divorced from socio-historical reality.

Libertarianism established a market society, which was subsequently transformed into a consumer society under the epistemic formulation of Instrumental rationality. Instrumentality is based upon utilitarian ethics, which functions as modern technology; in a means and end dichotomy, everything is treated as a means to other ends, and achieved ends are treated as means for further ends. The whole transformative chain has created a distinct reality of product and its consumers. The edifice of utilitarianism functions in a relative framework to weigh pleasures and pains and to maximize overall happiness, whereas quantification is embraced as its method, to calculate every quality and every characteristic with the same yardstick of hedonistic calculus. Instrumentality, as a distinct form of rationality, has established the whole range of artificial reality, a mass culture, a permanent veil of ignorance, an unconscious formalization through advertisements, its repetitions, and an indecisive art of govermentality, whereas shifting the buck is designed as its chief characteristic; to delay, in a way, becomes a virtue, which is still in progress. Instrumental rationality has been effectively used for standardisation of ethics, culture, behaviours, laws, and politics.

The development of instrumentality turned out to be fatal for the metaphysics and practical agency. Utilitarianism in its transformative oeuvre, known as Instrumental rationality, has established a consumer society across the globe, and a widespread legalism has pervaded, which substituted the very sense and essence of justice in favour of law. The alienation of law from the landscape of history and society has changed it completely, from the rationalized and abstract constituting powers to the rationalized and hierarchized systems have been established, and from there only, law in its functions, has thrived and replaced the customary practices of the diverse societies. The practices of standardisation and rationalization have culminated into legal positivism, a school of thought, which preferred certainty and universality as goals in its pedagogical rigours and systematic commitments towards legal systems. Other questions from the

spheres of ethics, politics, and theology have been brought within the domain of legal rationality. Apart from the philosophical or epistemological concepts, the legal concepts have been established, for language and law are taken together as co-determinants for proof and truth.

After the invention and the growth of computers, the information age has provided a possibility for the post human trajectory, whereas technological rationality has already become a paradigm of 'veridiction', a tool to invent and establish the truth. Technological rationality has established a new power relationship of human with nature. In this progression of western jurisprudence, the ideas of justice have travelled a long distance, from teleological rationality to technological mastery over nature. In all these epochal developments, formalization and rationalization have been central theme in the western thoughts and imaginations, which is quite different from social practices and value judgments, found in ancient jurisprudence in India. The process of rationalization has alienated nature and life process for superficial reality.

The anthropocentric sense of justice, which is visible in every epochal progression under the Western thought, is antithesis to the holistic and harmonious life. There has always been an alternate modality of thought to compare with the teleological movement of rationality in western hemisphere. The alternative emanated from the deontological culture of South and the romantic conception of life; from Gnosticism, Neo Platonism, to the English and German Romanticism. These points of views were not accepted in the mainstream progressive philosophies. But this tradition is turning out to be relevant and authentic in the age of catastrophes, whereas the volatile human race is facing some of the worst existential crises, like Covid-19, Climate Change, the dangers of extinction from bio-chemical weapons, and the ethical issues like genetic engineering, the fear of nuclear arm race and warfare, etc. Only a holistic sense of justice would be able to heal the miserable conditions from which the human species suffer today.