EDITED BY DR. S.K. CHATURVEDI

JUDICIAL PROCESS

Foreword by

Justice Iqbal Ahmed Ansari

Chairperson, Punjab State Human Rights Commission

Former Chief Justice, Patna High Court

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CONTENTS

CHAPTER 16
RELATION BETWEEN LAW AND JUSTICE

BRAJESH KUMAR*

INTRODUCTION

'Law is found in all modern societies, and is usually regarded as the bedrock of civilized existence'.[1] Law is the means of control of social behaviour. 'Law commands citizens telling them what they must do, it lays down prohibitions indicating what citizens cannot do, and it allocates entitlements defining what citizens have the right to do. Although, it is widely accepted that law is a necessary feature of any healthy and stable society.'[2] The act of law differentiates between that which is just and unjust. Justice is the spirit of every legal order. In common parlance, justice is equated with everything that is good –mercy, charity, truth and other equivalent expressions.[3] Justice is the concept of moral rightness based on ethics, rationality, law, natural law, fairness, religion and equity. Justice is the result of the fair and proper administration of law. The role of law in society and the application of the social sciences to the study of law in action and the rendering of law more effectively as an instrument of social control for the ends which law is designed to accomplish in the civilization in the given time and place.[4] All juries consider to law to be a means of justice. Therefore, law is an instrument by which we get justice. Without law we cannot have an assumption of justice because it is such an instrument on which it is possible to differentiate between justice and injustice or right and wrong. If there is no law, justice will remain a blank fantasy. The justification or impropriety of human conduct in society is determined by law. So, law and justice are closely related to each other. Many legalists have considered law to be synonymous with justice.'In this respect, the naturalist and positivist theory followers have their own view. That is the natural law theory followers argue that justice is the source and basement of law. Whereas the positivist theory followers argue that law is the source and basement of justice; and a rendered justice has its source from law. One way or

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1. Heywood Andrew, *Political Theory an Introduction*, (4th edition, Basingstoke, England: Macmillan, p. 174).
2. *Ibid.*
3. Prof. Dr Mukund Sharda and Basim Akhtar, 'Concept of Dharma, Justice and Law: A Study', *Bharati Law Review* (January–March 2017), p. 179.
4. James A. Gardner, 'The Sociological Jurisprudence of Roscoe Pound (Part I)', *Villanova Law Review*, vol. 7, no. 1 (Fall 1961), p. 1. Available at https://warwick.ac.uk/fac/soc/sociology/staff/sfuller/social_theory_law_2015-16/roscoe__pound_the_sociological_jurisprudence.pdf, accessed on 17-09-2020.

another it can be taken that there is unbreakable tie between law and justice in terms of origin and foundation.'[5] Justice is an inherent component of the law and is not separate or distinct from it. But in reality, it is not so. Law is only an instrument of justice whose ultimate goal is to ensure justice.

The ultimate goal of the law is to maintain the justice system in society. The judges of the courts enrich the law by judging their awareness of the changed values, needs and rights in the society. The quality of impartiality is essential in justice. That is why justice is lost in the absence of impartiality. In the words of the former Chief Justice of England, Coke, 'the wisdom of law and justice is greater than the wisdom of man', namely legal justice is a reflection of the collective intelligence of society. According to the law, A.V. Dicey has called justice as 'rule of law.' This means that law and justice are equally applicable to all the people of the society without any discrimination, that is, in terms of justice all persons are equal under the law and no person can be above the law.

LAW AND JUSTICE: CONCEPT

To determine satisfactorily the word 'law' and 'justice' is a difficult task. The concept of the word 'law' varies with time, place and circumstances. There is a difference between law and justice, but both of them cannot work without each other. 'Justice' is a broad term, but 'law' is narrow than justice. Justice can only take place between those whose mutual relations are governed by law, and law is found between those who have the possibility of justice.

Law is a written rule that governs behaviour of the people of a country. Law itself is more than a body of rules. Written law is created by the legal institution of that country by completing the processes, which are used by the judiciary as major sources in democratic countries to provide justice. The law of all countries is based on the view of justice. Law is framed from the point of view of justice. The meaning of law is used in two ways: 'a law', and 'the law'. The term 'the law' is used to refer to legal system or set of laws. On the other hand 'a law' is used for certain specific statute, law or a judicial decision.[6] According to Dias, 'a law' is only a particular way of organizing the material and also because its formulation presupposes to some extent a concept of 'legal system'.[7] According to Gray, 'a law' is generally a statute passed by the state legislature.[8] 'Law is an

5. Abiyou Girma Tamirat,'Law as a Means of Serving Justice' (15-06-2015). Available at https://www.abyssinialaw.com/blog-posts/item/1477-law-as-a-means-of-serving-justice.
6. George W. Keeton, *Elementary Principles of Jurisprudence* (London: A&C Black Ltd., 1930), p. 55. 88 read in Prasad Anirudh, *Principal of Jurisprudence* (2nd edition, Delhi: Eastern Book, 2002), p. 272.
7. R W M. Dias, *Jurisprudence* (5th edition, London: Butterworths, Reprint 2017), p. 59.
8. John Chipman Gray, *The Nature and Sources of the Law* (2nd edition, USA: The Lawbook Exchange, Ltd., 1976), pp. 87–88 read in Prasad Anirudh, *supra* note 6.

instrument of social control, backed by the authority of the state, and the ends towards which it is directed and the methods for achieving these ends may be enlarged and improved through a consciously deliberate effort."[9]

Justice is a principle. The basis of justice is equality, equity, morality, rights, fairness, transparency, and so on. Justice represents equality and fairness and applies to people without discrimination. The approach of providing justice is the same for every country and it is to provide fair justice by following the principle of natural justice. Justice can only take place between those whose mutual relations are governed by law, and law is found between those who have the possibility of justice.[10]

THEORIES OF LAW AND JUSTICE

It is noteworthy that law itself is not practicable. It is an instrument and tool for achieving justice in society. Almost every theory about the law accepts that the purpose of law is to achieve justice. So it is necessary to know the theoretical concept of law and justice. Here we deal with two theories of law and justice:first, equivalence theory; and second, dependency theory.

Equivalence Theory

Justiceis nothing more than the positive law of the stronger class. One of the essential features of the law is often called justice. The main object of justice is to maintain equality in the activities of man. Only through justice can this be made between individuals. Usually, the law cannot be viewed out of justice. To act with justice means to act according to the law and according to the universal and equal requirements of the law. Justice is traditionally understood as retribution of the equal for the equal.[11] Equivalence in society means dealing with justice. Equally situated persons should be treated equally with no leniency or harshness towards anyone. Thus, justice means justice according to permanent standards and norms. The law, according to which equal is given for the equal clearly revealed itself only in the Talien ('an eye for an eye, a tooth for a tooth'). However, at the later stages of legal development, such an understanding of justice was found to be inaccurate and was replaced by the principle of 'equivalence'.[12]

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9. *Supra* note 4 at 9.
10. Clarence Morris, *Aristotle: Nicomachean Ethics Book* (University of Pennsylvania Press, 1971); Clarence Morris (Compiled), *The Great Legal Philosophers* (University of Pennsylvania Press, 1971), p. 21.
11. Vladimir M. Syrykh, 'Why the Law is Equivalent and, as a Rule, Injustice', *Journal of Siberian Federal University. Humanities & Social Sciences* vol. 4 (10, 2017), pp. 598–605. Available at http://journal.sfu-kras.ru/en/series/humanities, accessed on 19-09-2020.
12. *Ibid.*

In my view, the principle of equivalence justice is similar to the distributive justice propounded by Aristotle. Distributive justice is based on the principle that there has to be equal distribution among equals.[13] Under distributive justice, the benefits and economic opportunity available in the society are envisaged to be shared among all members of the community in a proper manner according to status and level. The basic goal of distributive justice is to provide a minimum standard of living to the poor and shiftless persons. The effect of this principle is clearly visible in the bonus law, wages law, pension law and the rules related for providing goods to the poor at a cheap rate in the State.

Equivalence theory holds that all cultures, all societies, all ethics, religions, norms and mores are equally valid. The main objective of this theory is that there should be equal treatment in equal cases. Thus, this theory is closer to the 'Theory of Rule of Law'. 'Equality before Law' is the basic concept of the principle of 'Rule of Law' and it envisages establishing equality of opportunity. The Indian Constitution prohibits discrimination on the basis of religion, race, caste, sex or place of birth as a right to equality and as an essential part of justice. Article 14 of Indian Constitution clearly states that 'The state shall not deny any person equality before the law or the equal protection of the laws within the territory of India.' The principle of justice is based on 'parity' and 'balance'. The duty of the government is to formulate such a law that equal behaviour is established between the poor and rich according to the need of society and justice can be provided on the basis of equality. There should not be a sense in society that 'Justice is nothing but positive law of the strong class'. The ideologues advancing economic ideology like Marx were apprehensive about the law being in the interest of the economically rich minority community.

The class character of Marx's theory is thus clear: 'Law is an instrument used by the economic rulers to keep the masses in subjection. Even after the establishment of the proletarian dictatorship law will continue to be used as the instrument by which the working-class majority can crush and eliminate the capitalist minority. There will still be the need to force people to work, to punish wrongdoing, to stamp out "counter-revolutionary" and other subversive activities, and to maintain some inequality of distribution, which is unavoidable. Law is an instrument of domination.'[14]

It is true that many times, only the strong classes have the benefit of justice. The weaker sections of the society are unable to avail justice due to many reasons and cannot be completely denied the idea of Marx's 'class character of law', but in the present day

13. *Supra* note 7 at 65.
14. *Ibid.* at 398.

in all democratic countries, the law has been constructed on the basis of 'Equivalence Theory' and justice is being accessible to all. The aim of both law and justice is to end the difference between the strong class and weaker class. The State is adopting the 'principle of rule of law' and moving forward on the principle of equivalence. The myth is diluted that 'justice is nothing but positive law of the strong classes'.

India is starting free legal aid to follow the equivalence principle and justice is being made available to the poor. The concept of social and economic justice is the basic foundation of the Indian Constitution. The objective is to remove all disparities in India and to provide equal opportunities to all citizens for social purposes as well as economic activities. The Constitution is committed to such social justice that it can establish a welfare state in India. The Supreme Court of India has established the principle of equivalence through its many decisions. In case of *Amirunnisa* v. *Mehboob Begam*,[15] the Supreme Court declared the discrimination against the Muslim class as illegal on the basis of equality. In the case of *Air India* v. *Nargis Mirza*,[16] the Supreme Court declared the rule made by Indian Airlines unjust and discriminatory. Briefly, the fact of this case is that Regulations 46 and 47 of the Air India Employees Service Regulations were challenged. These service regulations had created a significant amount of disparity between the pay and promotional avenues of male and female in Air Flight Pursers and the Air Hostesses. For instance, under Regulation 46, while the retirement age for Flight Pursers was fifty-eight years and Air Hostesses were required to retire at thirty-five years, or on marriage (if they married within four years of joining the service) or on their first pregnancy, whichever occurred earlier. Under Regulation 47, this period could be extended, subject to the absolute discretion of the Managing Director. This rule was not only considered ruthless behaviour but it was considered an open insult to the Indian women. So, the court declared the same unconstitutional on the ground of violation of Articles 14, 15(1) and 16(2) of the Indian Constitution. In the case of *D.S. Nakara* v. *Union of India*,[17] the Central Services (Pension) Rule, 1972, was declared invalid on the basis of violation of equality. Hereby a distinction was made between pensioners retiring before a certain date and pensioners retiring after that. The Supreme Court considered it unfair and arbitrary and a violation of the principle of equality.

The Supreme Court of India has added the principle of proportional equality after the 1970s. Especially after elaborating Article 21 in the *Maneka Gandhi* case. In this direction, the Supreme Court also made an active effort to implement the provisions given in the Directive Principles of State Policy. In *M.H. Haskat* v. *State*

15. AIR 1953, SC.
16. AIR 1981, SC 1829.
17. AIR 1983, SC 130.

of Maharashtra,[18] the Supreme Court ruled that it is necessary to provide free legal aid by the State to provide justice to the poor and incapable of taking legal aid. The Indian Supreme Court and High Courts have taken a revolutionary decision in the direction of establishing an equitable society through Public Interest Litigation (PIL) and considering the right to equality as an essential element of justice. It has prohibited unequal behaviour on the basis of religion, race, caste, sex, and so on. The court through its decision has tried its best to bring the law to the people at the bottom of the society and tried to break the myth that justice is nothing but positive law of the strong class.

Dependency Theories

For its realization, justice depends on law but justice is not the same as law. The establishment of the State was accompanied by the emergence of well-administered governance. One of the main functions of the State is to establish order in society through judicial administration. The main question that arises before the State is which justice should be rendered because justice is an indispensable element for a systematic legal society. Justice can only be achieved in a well-organized judicial administration. Judicial administration provides justice through orderly machineries, but on what basis should organized machinery deliver justice? A main question that arises is whether following the law or without following the law. This question itself has arisen from the concept that 'justice should be done according to law'. The concept of 'justice according to law' itself raises the question that 'justice can be done without law'. At various times administration of justice has adopted either of these two concepts to render justice. It depends on whether there is a deficiency or excess of discretion in the administration of justice.

The administration of justice which has deficiency of discretion can be called judicial justice and justice administration with maximum discretion can be called a justice of the administrative nature. Both justice and law depend on each other. The legislature makes laws and the main object of law is to provide rights of persons and protect them and the main object of justice is to resolve the disputes arising out of the rights conferred. Thus, it is natural to have close relation between law and justice. The famous French philosopher Pascal writes that 'justice without power (law) is ineffective and power(law) without justice is autocratic'.[19] Thus law and justice are interdependent on each other and its relation between law and justice is called 'Principle of Dependency'. Justice according to law or justice without law also depends on by which means justice

18. AIR 1978, SC 1548.
19. Dr N.B. Pranjape, *Jurisprudence and Legal Theory* (18th edition (Hindi), Allahabad: CLA, 2017), pp. 238.

is rendered, that is, is justice only provided by the judicial body or by other administrative institution.

The principle of dependence is based on the concept that there should be 'justice according to law'. The concept of 'justice according to law' itself raises the question that 'justice can be done without law'. Therefore, for the proper interpretation of justice according to law, it is necessary to consider justice without law.

Justice Without Law

Justice without law is found in such legal system, where the judge has more power of discretion. That is, the one who carries out justice exercises free will. Such administration of justice is not based on predetermined principles of law. The ancient great philosopher Plato favoured a discretionary administration of justice. In his book, *The Republic*, Plato described justice as being based on independent intelligence of best people, rather than on the basis of the rule of law. Plato was an advocate of lawless administration of justice. They did not want the judges to be bound by the rules of the codified law. Plato accepted that the non-law State is excellent for the people, and law State is the second excellent choice.[20] Dean Roscoe Pound, the leading thinker of the Sociological School has described justice according to law as well as justice without law. According to Pound, justice can be ensured with law or in the absence of law. According to law, the meaning of justice is developed and applied by the authority technique.[21] On the contrary, justice without law is administered according to the will and intuition of individuals who exercise a wide range of independent discretion in their decision and is not obliged to follow any definite or any general rule. According to Pound, when the law is completely developed even elements of justice, without law are found in some different form. According to him, five stages are found in the present judicial system of justice without law:[22] first – discretion; second – natural justice; third – equity and morality; fourth – in case of extreme hardships legislative rules were relaxed based on a sense of individual equity; fifth – equitable use of legal principles.

Where justice is not based on law or the law is less used, there the judge has more discretionary power and such legal system is called judicial system of administrative nature. It has all the merits of a judicial system of administration; like it is free from technical complications of the law, able to take quick action in cases, be very successful in settling small disputes, has flexibility and minimum formality. The function of

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20. *Supra* note at 40.
21. Roscoe Pound, 'Jurisprudence'. *Columbia Law Review*, vol. 60, no. 8 (December, 1960), pp. 1124–1132 read in Prasad Anirudh, *supra* note at 195.
22. *Ibid.* at 403.

the legal system is to settle disputes peacefully. Therefore, justice without law has its place. But, Hans Kelsen, a leading thinker of positive law, has argued that 'Law and justice are two different things, each unrelated to the other.'[23] Kelsen calls for a 'clear separation of law from justice.'[24] Kelsen thus has made three points in furtherance of his claim that justice should be separated from law:[25] Law is determinate but justice is indeterminate:

1. Whether or not a law is 'just' is a consideration that is external to the legal system; and
2. Justice under law simply means that a rule of law must be applied to all cases that come within the rule.

Justice According to Law

Justice according to law is applicable in such judicial system where minimum discretionary power exists and the judicial standard is developed and applied by authoritative technique. It is the judicial system that remains a certainty before the disputes arising and is applied with equal treatment to all. Where justice is found according to law, the main qualities of the administration of justice are its uniformity, certainty, fairness and equality. The judgments given by the judges are based on certain principles of law and they are equally applicable to all. Many legalists are in favour of such administration of justice, where the system of justice exists according to law. Professor Morris begins with the proposition that 'justice is realised only through good law' (Morris, The Justification of Law, p. 21).[26] Andrew Heywood thinks that 'people recognise law as binding, and so acknowledge an obligation to obey it, precisely because they believe it to be just. If, however, law is not administered in accordance with justice, or law itself is seen to be unjust, citizens may possess a moral justification for breaking the law.'[27] Undoubtedly, there are inherent difficulties in a regime of justice according to law. But we must pay a price for order, security and a developed economic order. We must pay a price for a balance of security; justice in the sense of the ideal relation among men, and morals in the sense of the highest individual development. No one of these can be carried out to a logical extreme at the expense of the others. Free individual self-assertion–spontaneous free activity–on the one hand, and ordered, even-regimented cooperation, are both

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23. Anthony D'Amato, 'On the Connection Between Law and Justice', *Faculty Working Papers*. Paper 2 (2011), p. 06. Available at http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/2.
24. *Ibid.* at 7.
25. *Ibid.*
26. Morris Clarence, *The Jusification of Law* (USA, Philadelphia: University of Pennsylvania Press, 1971), p. 21; *Supra* note 7 at 484.
27. Heywood Andrew, *Political Theory an Introduction* (4th edition, New York: Palgrave Macmillan, 2015), p 197.

agencies of civilization. The law exists to establish justice in society. Administration of justice is not possible without law. Judges need authority for the judgments which he received from local laws and rules.

Status of 'Justice without Law' and 'Justice According to Law' in Indian Justice System

The method of codification of laws has been adopted in India. The framers of the Indian Constitution have accepted the objectives of the welfare state in the Constitution. The State is empowered to make laws using its legislative power to fulfil many objectives like ensure socio-economic justice in the society; maintain law and order smoothly; make justice accessible to all, and so on, and the judiciary provides justice by following that rule. But there are many situations in our judicial process where the judiciary or quasi-judiciary use the legal as well as prudential power for complete justice. In India, justice without law is found in the case of equity, in the case of passing judgment in the public interest, where judicial discretion is required to exercise complete justice. The Indian Constitution provides discretionary power to the Supreme Court by Article 142. Article 142(1) states that, 'The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.' Since the past few years, the Supreme Court invoked Article 142 several times and decided the case to do the 'complete justice'. Recently, the Supreme Court invoked this Article in *Ayodhya* case (2020)[28] and described its power under Article 142:'The phrase "is necessary for doing complete justice" is of a wide amplitude and encompasses a power of equity which is employed when the strict application of the law is inadequate to produce a just outcome. The demands of justice require a close attention not just to positive law but also to the silences of positive law to find within its interstices, a solution that is equitable and just. The legal enterprise is premised on the application of generally worded laws to the specifics of a case before courts.' In 1989, the Hon'ble Supreme Court invoked Article 142 during the infamous *Union Carbide case* (Bhopal Gas Tragedy case) and provided relief to the thousands of people who were affected during the black night of Bhopal Gas Tragedy. In the said judgment, the Hon'ble Supreme Court while awarding compensation of $470 million to the victims observed that to do 'complete justice' it could even override the laws made by Parliament. But in the case of *Union of India*

28. 1 Supreme Court Cases 1: 2019 SCC On Line SC 1440. Available at https://blog.ksandk.com/constitutional/article-142-as-a-medium-to-deliver-complete-justice/, accessed on 20-09-2020.

v. *Darshan Deve*[29] the Supreme Court determined its limitation of power under Article 142 and stated that the right under Article 142 cannot be exercised where any alternative treatment is available and has been obtained. This power should be used only when no other treatment is available. All courts in India are vested with inherent power. By exercising this power, the court judges in situations where the law is completely absent but justice is required to be given to the parties. The Supreme Court expressed its views in the case of *Manohar Lal* v. *Seth Heera Lal*,[30] and it was held that the inherent power has not been conferred in the court. This is a right which is inherent in the court because its function is to do justice among the parties before it. Due to socio-economic changes in India, the court has shown its activism even in cases where public interest is not being fulfilled by the direct legal principle, then the interpretation of such legal principle is being done from the point of view of public interest and giving many fundamental rights to the people, especially after the interpretation of Articles14, 19, 21 and 32 in active and public interest.

CONCLUSION

After studying the meaning and various aspects of law and justice, it can be said that there is a relationship between them, and many people agree that there is a close relationship between law and justice. In those countries where the principle of rule of law has been adopted, this relationship becomes more important because there is supremacy of the law and all are equal before the law. So law and justice are equally applicable to all the people of the society without any discrimination. All persons are equal under the law and no person can be above the law. Judges also get authority for the judgments from local laws and rule which enact by legislatures and the decision must be according to law. Although presently due to socio-economic changes the practice of giving discretion to judicial institutions has increased, but this discretionary power is also subject to the law. Hence, the relationship between law and justice is beyond doubt, there is an unbreakable bond between the two. It is highly believed that they are two faces of a coin.

29. AIR 1997 SC 166.
30. AIR 1962 SC, pp. 527–534.