III. RIGHT DISCOURSE AND UTILITY DISCOURSE

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Abstract

Modern states distribute burdens and benefits through right discourse; however, in some exceptional cases, they temper right discourse with utility discourse. Right discourse has been conceptualised and ideologised by Immanuel Kant. The validity of an action depends on adherence to a set of rules without reference to surrounding antecedents on a priori basis. On the other hand, utility discourse, in the common law world, has been conceptualised by Jeremy Bentham and succeeding Utilitarians. Utility discourse is consequentialist and is concerned with happiness of the majority. Both right and utility discourses lead to unjust and even monstrous results. However, in a capitalist society, benefits and burdens are distributed through right discourse, but in the interest of equity, and social harmony, in exceptional cases rights are tempered or trumped with utility considerations. The trumping may be done by the legislature or judiciary. Some of such Indian cases have been discussed in this paper.

One of the most important functions of a modern state is to distribute benefits and burdens and advantages and disadvantages among the people and institutions through the only language it speaks, law. There are two methods to do so, through right discourse or through utility

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discourse. Benefits and burdens are distributed through right discourse adhering to a set of rules on which depends the validity of action irrespective of what happens before and after the action. On the other hand, utility is concerned with causes and consequences. In what follows, we shall discuss the anatomy of both the discourses

Immanuel Kant, an eminent German philosopher, has laid out a philosophy, called deontology[1], i.e., the ethical theory stating that the morality of an action is based on adherence to a set of rules or duties rather than on the consequences of the action. It is also called absolute liberalism, preferring right over good (utility). Right is based on the idea, if an interest has been recognised as a binding claim, which one can assert that something is right, independent of the social or other consequence of the right. On the other hand, it is distinguished from hedonism or utility. Hedonism is based on experience of what happened before and after the action, unlike 'right', which is based on adherence to a set of rules (its foundation is logic). It must be borne in mind that Kant contrasted logic from Humean (David Hume's) insistence on superiority of experience over logic. For Kant morality prioritise adherence to a set of rules, whereas for Benthamites it is the consequence of the action. It is interesting to note that almost entire capitalist world primarily relies on right discourse to distribute benefits and burdens in order to justify the existence of economically and

[1] Wayne Morrison, *Jurisprudence: From Greeks to Post-Modernism* (London 2000) 131.

socially stratified society. However, in some cases in the interest of maintaining a semblance of equality to satisfy the poor, entrenched rights are tempered with utility. The Indian legal system, in the common law tradition, which we follow, gives primacy to the right discourse. In this paper we propose to analyse the anatomy of both the discourses, their intellectual foundations, including relative applicability and limitations of experience and logic. Towards achieving this end, we shall discuss Immanuel Kant, David Hume, Jeremy Bentham, John Stuart Mill, Henry Sidgwick and some of the Indian laws and judicial decisions

Deontology (logic) and utility and Humean experience are, to an extent, responsible for the great divide between legal theories, based on experience and logic. Legal positivists, textualists, constructionists, such as Austin, Hart and judges of the Supreme Court of India in fifties and even today in some of the cases, predominantly relied on logic irrespective of the consequences. Whereas those who relied on utility, such as Justice Homes, justice Cardozo, Lon Fuller, Karl Llewellyn included experience in their arguments.

Kant was indebted to David Hume for interrupting his dogmatic slumber. To Hume, relations of ideas, philosophy is in danger of moving in tautological circles, and empirical studies offer real knowledge. On the contrary Kant was of the view that trying to gain every knowledge through experience is similar to the attempt of a

person standing before a mirror with closed eyes and saying he wants to see how he looked while asleep[2]. (135) (1983).

Kant, unlike Hume, was trained to believe in the efficacy of 'reason.' According to him, empiricism is based on non-rational foundations. There are many things that could be understood only through reason. Our duties, men's relations with nature and men's communal life cannot be understood through experience. Morality (duties) are not capable of being comprehended if reason is discarded. Kant proceeded to analyse pure, a priori reason without empirical content. He kept both morality and philosophy out of the reach of empiricism, thus, the key to pure knowledge is only a priori reason, uncontaminated by a posteriori surroundings.

Kant defined modern man as self-defining rather than a being, whose goals are fixed by external surroundings. These goals can be achieved only through pure reason and not through feelings, sentiments or by socially or naturally fixed ends. Self-realisation consists in using a priori reason. Reason by trial and error progress from one kind of insight to another. Unlike Hume, Kant prefers pure reason rather than acquiring knowledge through social interaction. For Kant, Hume's ship, without a pilot moves adrift on the mercy of currents (external factors): whereas Kant's ship is under the control of a pilot (pure reason), who with self-assertion steers the ship safely. Critical

[2] Wayne Morrison, *Jurisprudence: From Greeks to Post-Modernism* (London 2000) 135.

rationality of a free-willing individual, is the appropriate means of acquiring pure knowledge. Distinguishing between ‘a priori’ and ‘a posteriori’, Kant admits that man cannot see world in purity, but bring about certain ways of perceiving and presupposition to make knowledge possible. Man does not work instinctively, but progresses from one kind of insight to another. (it is quite possible that from this observation of Kant, Frederic Hegel may have developed ‘logical dialectics’). For Hume source of knowledge is social interaction whereas for Kant it is pure reason, uncontaminated by social surroundings.

But the important question is how pure knowledge is to be obtained? It is through rationality inherent in our moral belief system. We start from our ‘pre-supposed’ concept of morality. This understanding is ‘a priori.’ The posteriori is supplied by senses and what enables us to understand the experience is by mind.

Kant asks the question, if our moral duty can be ascertained only through feelings. If we treat others as capable of making promises, then they are responsible for the fulfilment of the promises; if they are capable of making choices, they are responsible of the consequences of the choices; they are responsible for all their actions. If man is morally autonomous being; his autonomy cannot be compromised by external factors; his autonomy is not result of cause and effect: his autonomy can be determined through ‘a priori’.

Kant concedes Hume's empiricism correct in many ways. Individual is hemmed on all sides by the physical world. He interacts with others in the physical world in obedience to principle of causality. According to Kant, man lives in two realities; first, in so far as he belongs to the sensible world, he is under the law of nature; secondly, he belongs to intelligible world, not under the law of nature, he is grounded in reason and not empiricism.

Kant defends a priori. In criminal law, when we take into consideration factors such as heredity, social environment, battered woman syndrome, grave and sudden provocation, or abysmal poverty, we suggest we are not responsible for our action, our criminal actions were inevitable. If the concept of inevitability extended to the hilt, criminal law will become redundant. No one is responsible for one's actions, only one's circumstances are.

Kant says that theoretically, as sociologists and psychologist maintain, experience (circumstances) is responsible for the actions of man, but when legislature makes the law, it holds individual responsible for his actions (and attributes responsibility to experience, that is circumstances, only to a limited extent, it may be added). This is a quandary which is solved by Kant; this is another causality of 'freedom'. Why does our morality, unlike sociology and psychology, impute responsibility to the actor (offender), the action is imputed to his intelligible character, that is his reason was wholly free, notwithstanding empirical conditions (we may put a rider, that with

certain mitigating circumstances)? Man operates in both empirical and moral realms. If there is empirical causality, there is also a moral causality, which appeals to intelligible rationale or 'a priori' character, essential to the operation of morality (law; that is standard of behaviour). As a matter of fact, Kant distinguishes between determinism of empirical factors and 'a priori' freedom of choice. Morality (law) is based on 'a priori' freedom of choice and not on deterministic empirical considerations. The conflict between 'a priori' and 'a posteriori' in law is exemplified by Austin's analytical positivism (F N) and justice Home's empiricism, (FN) for Justice Oliver Homes experience is a very important conditioning factor; he famously said life of law is experience not logic (FN). On the other hand, Austin's positivism is based on reason. For Austin, while applying law, considerations of justice, social circumstances are irrelevant factors.

Human freedom is built into the rules of intelligible. The essential requirement of morality (law) is also built into structure of rationality. Hence moral requirements are 'a priori' and must be acknowledged by all rational beings (universal moral rules). But he also insists that only valid rules of morality are those which are acceptable to all. Universally acceptable are those which pass the test of critical rationality.

When an offence (violation of a moral precept), to which condemnation is attached, is not phenomena bound (not related to 'a posteriori' external world), but the activity (the moral precept) is

intelligible (a priori), the external (social-psychological) do not change the character of the moral rule. Nature's phenomena will not make evil deed a non-evil. Kant places emphasis on will (autonomy of the self). Unlike Humean assertion of subjecting reason to passion, he asserts rational man is part of the rational world. Moral law can exist only as an act of will. However, what he attributes to Hume is debatable.

What gives a man his humanity is reason? Reason is ingrained in him because of his humanity. He accepts morality because it is part of himself, not because of some external forces. One who justifies his moral wrongs abandons his rationality. Essence of man is beyond the trap of his empirical contingency. Man is of two domains-the empirical and moral but genuinely he is apart from the empirical world. Without transcendental principle moral life is impossible. However, his attempt to universalise morality is, to say the least, debatable.

Right and Good: - people know from sensus communis (sensus communis is something more than common sense; it is knowledge judgement and is universal: people know full well in practice what is right and what is wrong). For Kant modernity lies in universalism. Man's rational nature gives him self-direction. Man has a 'realm of ends,' which either has a price or dignity. End which has a price can be replaced but that has dignity is irreplaceable. Dignity has no price or equivalent, therefore cannot be replaced. Certain ends have intrinsic worth, that is dignity. We call it Right, and is irreplaceable. Right does not have a price and must be protected against all odds. That is why the

'right discourse' requires enforcement of a legally protected right even if it creates hardship to the majority of people. That which relates to man's inclination and need, it is good and has a price; but something which has an end in itself, does not have a relative substitute and has an intrinsic worth, that is 'right'. It does not have a price but dignity. For Kant, morality has intrinsic worth and dignity and an end in itself. Skill and diligence have a price but fidelity and benevolence have intrinsic worth they have no price. Deontological ends have intrinsic worth, and are not assessed on the basis of consequences.

David Hume[3], the Scottish philosopher, unlike Kant, preferred to rely on a posteriori, the worldly experience as the basis of modernity. For him the existence of any thing can be proved from its cause and effect, founded only on experience. He systematically attempted to destroy deontological (inherent rightfulness of an action is more important than its consequences) theory of natural law (natural law of post Christian Europe) ontology. He was opposed to deontological reasoning, without any empirical groundings, of religious interpretation of natural law. However, Humean reason was guided by sentiments and passion, reducing man to principle of cause and effect. Banning transcendental, he accepts only reason governed by experience and tradition. He also differed from Hobbes, who in social compact, placed individual in place of God and social order was

[3] Wayne Morrison, *Jurisprudence: From Greeks to Post-Modernism* (London 2000) 103–30.

regulated by the commands of a 'sovereign'. Grotius, Hobbes and other social compact theorists replaced Godly natural law with secular natural law. The most important contribution of social contract theories was to place 'individual' at the centre stage of social order, preparing a ground for 'individuation' and modernity.

Hume discards all deontological, religious and metaphysical reasoning; but important is what will replace it. The solution lies in finding the truth in 'common life', the common life operates in a 'tradition'; importance given to tradition means that switch over to modernity will not be revolutionary. The present can be understood only in the context of the past. In practice it means that Humean reasoning operates in mysterious common life guided by tradition. 'common life is not certainly 'sensus communis' of Kant. It is not, as sensus communis is universal inherent knowledge of what is right and what is wrong. Hume's common life is neither inherent knowledge nor universal; it is based on tradition and experience.

The riddle of common life based on experience and tradition cannot be solved without understanding the truth and the 'self'. Hume cannot rely on pure reason. He finds the solution in common life based on experience and tradition. Rules of social order are to be comprehended on the basis of experience and tradition. But what is the place of the 'self' in the traditional society? Is it individual or part of the group and society or both and what is the relation between the 'self' and traditional society? To decipher the position of the 'self', Hume

attempts to reconstruct methodological individualism and social holism. He takes individual as the basic unit of social interaction. They all are autonomous, different from each other. The important question is how to relate the individual with the social whole (society)? Ancient and mediaeval societies treated individual as inseparable part of the group. Coparcenary of Hindus and Roman patria potestas are some of the examples. Modernisation began with the creation of the individual. Even after the evolution of individual, they could not remain isolated and unconnected islands; they must be connected to the society (Parikh, FN). Kant related them through sensus communis, Social compact theorist through a voluntary compact resulting in creation of a state and the legal positivist through law created by a sovereign or a written constitution or an evolutionary sovereign system and Hume through common life.

A constitutional 'ought' creates rules of social interaction as without them there would be chaos. However, the real problem of a constitutional system lies in the difference between imposed and consensual constitution. Most of the societies are majoritarian societies or some are more equal than others. Rousseau[4] attempted to solve the problem through 'general will', Locke through limited government and Marx through socialism. Hume's tradition carries the burden of the past, that is, exclusion complete or partial from common life of certain

[4] Edgar Bodenheimer, *Jurisprudence: Philosophy and Method of the Law* (Harvard University Press 1962).

sections consisting of slaves, the property less, the women, people belonging to certain religion, race or caste. In a traditional society autonomous people with free will may feel constrained.

knowledge of ideas and knowledge of facts: Hume rejects dependence on deontological reason alone but accepts reason based on the foundations of experience in a tradition. Without existence based on experience, self cannot be understood. He distinguishes between knowledge of ideas and knowledge of facts. The former depicts the relation between concepts. The foundations of these concepts are necessarily true, such as, a man who kills another person is a murderer, but these concepts do not tell us anything new. Knowledge of facts are statements about things as they actually are. However, the problem lies in relation between observation and statements of facts. Quite often our observation may be partial which, though does not give us full knowledge, may be considered to be full and complete. If we observe that lizards, we have seen, are non-poisonous, it may be incomplete statement of facts. We cannot catch 'self' through observation, as several perceptions successively make their appearance. Then, how to catch the 'self'.

Hume, to destroy the validity of 'reason' as a tool to advancement of knowledge, relies on the test of scepticism. The opponents of an argument use a counter argument to destroy the argument. As both cannot be correct, he did not accept the authority of 'reason' as a tool of advancement of knowledge. Instead, it is experience and

observation, which are to be used safely. Hume tries to catch pass, re-pass and glide away, and mingle in infinite varieties of postures and situations." (page 111). He concludes that experience and observation is not a secure ground to understand 'self'. Unlike, Locke and Hobbs, who find modernity in nature, instead of God and in consciousness of the individual (pages 112-113), Hume cannot do so; he does not find modernity either in mind which causes confusion (scepticism) nor in rationality but in experience and tradition (which represent our intellectual struggle through generations). Only safe course is to live like others in common life, that is natural operation of institutions; that is the foundationalism of modernity.

We must return to the narrative of modernity; self cannot meaningfully exist in isolation, it can realise itself in the context of tradition and experience in continuity of social existence. Reason does play a role but is secondary to experience and tradition (cumulative experience). Hume finds all rules of justice and fair play in tradition. However, our traditional experience is a mix of good and bad. Bad is represented by torture, exploitation, dehumanisation (the slaves, the poor, the women and in India of the Dalits), whereas good by benevolence and kindness.

Though Hume does not directly talk of utility, our experience may lead it to good. However, tradition creates difficulty, as tradition is contaminated with past practices of injustice (such as inhuman subordination of women and exploitation of Dalits), which in the then

society were considered normal. In spite of the mixed legacy of tradition on which Hume relies, his rejection of deontological position and dependence on experience gave a philosophical advantage to Utilitarians.

Bentham: Deontological reasoning of Kant is juxtaposed with Bentham's consequentialist approach. Bentham tries to assess cost and benefit of 'right' with reference to good/happiness. Kant's right cannot be measured quantitatively but only qualitatively because it has an intrinsic value. Bentham on the basis of consequential pleasure/pain assesses the worth of a right. If the right does not produce happiness, it can be dispensed with. However sometimes Bentham's hedonism leads to 'moral monstrosity' and runs counter to the idea of a right.

However, an English philosopher, Henry Sidgwick, inspired by Kant gave a twist to utilitarianism, developed the concept of 'universal hedonism', which reconciles the conflict between the happiness of self and that of others. The essence of Sidgwick's universal hedonism consists in achieving happiness of most of the people but it is different from egoistic hedonism in as much as in latter's case the emphasis is on promotion of self, whereas in the former the happiness is for all the people. It is also different from intuitionist hedonism as the choice of seeking happiness is objective and not subjective. (Sidgwick-the Methods of Ethics first in 1874; 6th edition 1901)

In making value choices, he makes distinction between egoism, intuitionalism and universalism. Intuitionalism refers to straightforward declaring some acts as right or wrong. Egoism means that self-selection of choices from personal interests. Universalism refers to happiness for all on objective consideration.

Utilitarianism, often, runs up against a number of situations which are monstrous. In a hypothetical situation, there are six critically ill patients in a hospital, awaiting organ transplant such as heart, kidney and liver, but the hospital has run out of the organs. Without transplant all of them will die. There is another healthy patient in the hospital, who has come for routine check-up. Doctors, in order to save the lives of six, use the healthy patient as the supplier of organ; the healthy patient is killed to save the lives of the six (Benthamite utilitarianism: greatest happiness of greatest number). Is it not a monstrous utility? There can be a real example as well. The atomic bombing of Nagasaki and Hiroshima was justified by Allied forces for greater good. Had these cities not bombed, Japanese would not have surrendered and in prolongation of war many more people would have suffered. Bombing was done to avoid greater pain. This is a case of monstrous utilitarian morality. RRR

Benthamite Utilitarians justify punishment only if it produces best consequences. In a city, a member of Y community is alleged to have raped a woman of X community. A lynch mob is preparing to kill indiscriminately the members of Y community. The superintendent of

police, the Judge and the Jailor, honest and well-meaning persons, in order to prevent lynching of hundreds of innocent members of Y community, arrested an innocent person of Y community condemned to death in a mock trial and immediately executed and thus, prevented the lynch mob from committing massacre. An innocent person is sacrificed (punished) for the best consequences. However, J.S. Mill and Sidgwick provide a better alternative hedonism. Mill fixes a benchmark below which the happiness of a minority (Y) cannot be lowered, whereas Sidgwick prefers happiness of all, even if it is not the greatest. Most of the people will say utilitarianism is wrong under these circumstances. A Kantian will philosophically say the right to life has intrinsic value; no amount of consequential good will trump the right.

For the utilitarian punishment means deliberate inflicting of pain in the hope that either the punishment will reform the subject or deter potential criminals from committing crime; they look to the consequences of punishment. But a Kantian would assert that the punishment is just reward of his act/violation of rule of morality/law, irrespective of consequences. Utilitarian looks to the future but the Kantian to the past. Utilitarians are not in favour of law that are ineffective, that is the laws that do not serve to prevent crime, unlike the Kantians who believe in just reward to the wrong doers. The utilitarian rules out ex-post facto laws, laws that are improperly promulgated and the punishment of infants, persons of unsound mind, the persons who are physically compelled to do the wrong. But the

futuristic justification is not acceptable to the Kantian. The only reason to punish a wrong doer is that he has done a wrong. The wrong is not substitutable by any other consideration, it does not have a price (exchange value), that is punishment, the just reward, is deserved irrespective of consequences. The Kantians approve retribution theory, look to what the wrong-doer has done in the past. For his act he must get his deserts. Kant's rationalist deontological argument rejects Cesare Beccaria's (On Crimes and Punishment, published in 1764 C E) (FN) futuristic hedonistic argument. The victim of the wrong-doer has a right, which has an intrinsic value, therefore, the wrong-doer must receive his desert, irrespective of social consequences. Wrong-doer is punished because he has entered into the autonomy of the victim. Individual's autonomy, has dignity, and is not substitutable, therefore the wrong-doer must receive his reward. Individual's autonomy, having an intrinsic value, cannot be manipulated to serve some other social purpose such as preventing crime in future. Only the consideration of retribution can determine the punishment to be awarded to the criminal.

However, a priori of Kant is different from utility of Bentham's greatest happiness of greatest number, that of J.S. Mill's insistence on a benchmark of the happiness of the minority from which benchmark the happiness of minority cannot be lowered and that of Sidgwick's universal hedonism as they all are futuristic. Kant's a priori is related

to intrinsic dignity of man, which does not have a price and therefore, not substitutable. Nothing can compromise the primacy of rights.

As the concept of right is a priori, it has certain unique characteristics, which according to *Lord Bhikhu Parikh* [its Marxist Critique] are as follows: - The Modern Conception of Right and

1. Right is a claim, that is its enjoyment does not depend on charity and kindness of others, but is a claim rightfully acquired which others must respect.
2. Right holder has a title which enables him to show it whenever his right is challenged.
3. The right is recognised by a territorial recognised legal authority and the holder can point to a law which confers the right. Non-statutory customs, conventions in order to acquire the force of a legal right must be recognised by a statutory law. However, in the opinion of the author of this paper, the only exception to the concept that validity of a right emanates from a territorial legal authority and its law, seems to be human right discourse which originates from Kantian a priori intrinsic right concept. A human is human because of intrinsic right.
4. Having a right means that one can do anything with the right in conformity with the condition of its grant. If I have a right over a chair, then subject to the condition of the grant of the right, I can sit over the chair, I can sell it, I can destroy it or can do anything with it. If X borrows a sum of money from Y, Y can

insist on repayment of the sum even if the need for money of X is far greater than that of Y.

5. Having a right does not only mean that the holder of right can do anything, subject to conditions of grant, with the right, but also can exclude others from having access to it, irrespective of relative need of them. If X owns a house consisting of 100 bed rooms but lives alone in the house, he can legally exclude poor people sleeping on pavements in chilly cold weather, from entering in the house. Relatively higher and consequential need is irrelevant.
6. Right also imposes burden and hardship on others. Minimally it requires others not to interfere with the right of others. On the other level they have to contribute financially to create and protect the right. They have to contribute financially for the maintenance of state apparatus to protect the rights. The burden is distributed unevenly. Greater burden is imposed on people with scant resources. Most important is the fact that the disproportionate distribution of rights adversely effect the pride and dignity of the poor. A poor man, whose son cannot get medical treatment for want of money, is naturally tempted to the surplus resources of a rich man, but sanctity and inviolability of rich man's right require the poor man to control his temptation. Uneven distribution of rights adversely effects the pride and dignity of the poor.

Utility, the main characteristic of a welfare state partially tries to restore the pride of the deprived. It either redefine rights or to an extent trump the rights, which are treated inviolable rights of the privileged by the right-discourse.

Modern libertarian states treat liberty as the highest value; for *John Rawls,(FN)* though welfare is the right of the deprived, liberty has a lexical priority, not to speak of *Robert Nozick* for whom liberty alone is a relevant consideration. Libertarian state naturally creates a highly stratified right-domain. Even in the most prosperous of capitalist society there are pavement dwellers living in abysmal poverty.

In most o the capitalist democratic societies, benefits and burdens are distributed by the state through 'right discourse.' Indian political system also follows this model. But everywhere in the world, particularly in the systems that follow welfarism, to a varying and limited extent 'utility discourse' model is allowed to make inroads in the 'right discourse'. This is done to mitigate the rigour and injustice done by right discourse. We, in this paper, shall discuss the complex interaction between right and utility discourses, but shall confine only to Indian legal system. Our inquiry, relating to use of mixed discourse is confined only to Indian Legal System.

Use of utility discourse to mitigate injustice may not only be done at legislative level but at judicial level also. There are several examples when utility discourse was used by Indian legislatures to undo injustice,

wholly or partially, caused by law, based on right discourse. Debt slavery or bonded labour system was based on contractual relations. If a valid law of contract creates rights, these rights, in terms of right discourse deontology, are sacrosanct and must be implemented, even at the cost of inconvenience to others. Bonded labour system was based on contractual relationship between the creditor and debtor. As the debtor, in such cases, an abysmally poor, was not able to provide security for the repayment of the debt, he pledged his personal service to the creditor against starvation wages. For example. X, a debtor promises to the creditor Y that for a debt of five thousand rupees, X will provide his personal service, from six morning to eight in the evening, and food twice a day and a pair of loin cloth and vest every six months, to Y against twenty rupees per month till the satisfaction of the debt, the interest being twenty rupees per month, with the result that the debt will never be satisfied but keep on increasing. This system resulted in perpetual indebtedness of the debtors who more often than not, were Dalits and landless labour. In 1976 Mrs. Indira Gandhi, the then Prime Minister got a law passed by the Parliament, *the Bonded Labour System (Abolition) Act 1976*, which provided that

"An Act to provide for abolition of bonded labour system with a view to preventing the economic and physical exploitation of the weaker sections of the people and for matters connected therewith and incidental thereto." [the preamble]

The system was based on the inability of the debtor to obtain debt on fair and reasonable terms from banks and financial institutions and therefore, they, under duress, were forced to accept any terms of contract. In other words, it was a form of standard contract, the terms of which were dictated by one of the parties alone. The terms of the contract were accepted under duress or acceptance was forced. Under the Act the creditor was forced not to enforce the terms of the contract. Enforcement of the terms of the contract as well as the realisation of the principal and interest became punishable. The Act provides that the bonded labour system has been abolished; no person shall make any advance in pursuance of the bonded labour system contract and force any person to render any bonded labour or forced labour *(section 4)*. After the commencement of the Act, liability to pay debt under the bonded labour system is extinguished (sections 6-9). Any attempt which perpetuates, implement and enforces the bonded labour system is punishable (sections 16-20 and 23).

The provisions of the Act trump a vested right under the Contract Act in pursuance of utility considerations. Has it been done on Benthamite considerations, that is for the happiness of larger number of debtors at the cost of happiness of a few creditors? Or to undo injustice to the poverty-stricken helpless landless labour whose unfortunate condition was exploited by the greedy creditors? Or to implement Mill's insistence on a benchmark of happiness for a minority (debtors though not a minority numerically but a minority in

power structure). Or in consideration of Sidgwick's insistence on happiness of all. Perhaps the parliament passed the law on twin consideration of happiness of greater number and mitigation of exploitation of the poor.

But the legislature deviates from right discourse only in exceptional cases. Right discourse is the rule, utility an exception. If X, the creditor, an exceptionally rich person insists on realising his debt, though the realisation would make X insignificantly richer and the debtors Y and Z respectively would be prevented from meeting his terminally ill wife's medical expenses and continuing with the higher education of his son, the claim of X will be preferred over the claims of Y and Z. Despite the disadvantage caused to Y and Z, all the resources of the legal system would be used to assist X in realisation of his debt. The twin considerations of happiness of greater number and injustice would not persuade the legislature or the judiciary to provide relief to Y and Z. under Indian law or under any other capitalistic system poverty is not allowed to trump or modify rights except in extremely rare circumstances.

The Bonded Labour (Abolition) Act was passed to undo the practice of bonded labour, which resulted in enslaving a number of landless-labour in rural India. But the Indian legislatures have given relief to many even when the consequence was not enslavement. However, we shall discuss only three of them, namely, the Madhya Pradesh

Scheduled Tribe Debt Relief Regulation 1962, the Maharashtra Debt Relief Act 1975 and the Uttar Pradesh Debt Relief Act 1977.

The M. P. Scheduled Tribe Debt Relief Regulation 1962 extends to all scheduled areas in Madhya Pradesh. (section 1). The Regulation extends to all members of any scheduled tribe in Madhya Pradesh, declared as such under Article 342 of the Indian Constitution (section 2). However, the Regulations do not apply to a loan given by a bank or to any due tax (section 4). All cases, including pending cases in civil courts, involving loan given to a member of the tribes in scheduled areas shall be decided by Debt Relief Courts (DR Courts) and jurisdiction of civil courts is barred (sections 3 and 5). Every debtor, within sixty days of establishment of the Debt Relief Courts, shall apply in the prescribed format to these courts (section 6). Neither of the parties is allowed to engage an advocate (section10). The D.R. Court shall reopen the transactions with back dates and shall calculate rate of interest as given in the first schedule (section 13, first schedule: 4.5% for secured loan and 6% for unsecured loan, if more interest already has been paid in earlier transactions, it shall be adjusted towards the satisfaction of the principle). The D.R. Court shall also fix the instalment to be paid by the debtor (section 14). In case of mortgage of land, no land shall be allowed to be transferred to a non-tribal person.

The M.P. Regulations 1962 do not extinguish debts, unlike in case of the Bonded Labour (System) Act, but on equitable consideration, reduce the rate of interest and provide a reasonable schedule for

repayment of the loan. In the case of the tribal people living in a scheduled area, the D.R. Court is allowed to interfere with the rights of the creditor. However, if such a debt exists in favour of debtor who lives in non-scheduled area, or if a non-tribal debtor lives in a scheduled area, the Act would not apply. In other words, the state under the Act will reduce the rate of interest and modify the schedule of payment in favour of the tribal debtor living in a scheduled area. The state on utility considerations, will interfere with the 'vested 'right' of the creditor. It amounts to saying that to a person, not covered under the provisions of the Regulation, the state will use all its resources to enforce the rights of the creditor even if the debtor will not be able to give medical treatment to his terminally ill wife or will not be able to educate his meritorious daughter because the resources of the debtor, are diverted for repayment of the loan, even if the creditor is stingingly rich.

Perhaps the legislature wants to protect the tribal people in the scheduled areas as they are accustomed to a different mode of assignment of property rights. Most of the tribes still live in semi-communal mode of assignment of property rights. That means exclusivity of use of property rights, has not yet been fully internalised by the tribes. To an extent and only to an extent, property rights are communal in the cultural milieu of the isolated tribes. The culture of assignment of property rights in isolated tribes and urban capitalistic culture is different.

In different societies, property rights are assigned differently. Assignment of property is not merely a legal question, it is rather a political and cultural question. Different political dispensations assign property rights differently. In the United States property rights are sacrosanct. They are extension of the personality of an individual; to deprive a person of his property is to deprive him of his liberty and attack his personality. In erstwhile soviet socialist society, property beyond a certain limit was a means of exploitation. The Marxist jurists made a distinction between personal property, the property essential for the personal use of the individual and property for the use of society rather than an individual: the latter category of property, if appropriated by an individual is a means of exploitation (*Karl Renner FN*).

In early, as well as in later colonial period in India to a lesser extent, a number of properties were communal. In Indian villages, wells, ponds, water bodies and pasture lands were communal. Not only property was communal, social behaviour was also cooperative and multiplex as communal property exits only in cooperative environment. The process of individuation had yet to begin. In the absence of an evolved market, people were dependent on each other, unlike in present day society where they are dependent on impersonal one-time bilateral market.

U.P. Debt Relief Act 1977 gives relief from indebtedness to agricultural landless labourers, rural artisans, marginal farmers, small farmers and urban workers. The scheme is aimed at replacing

distribution of benefits and burdens through utility rather than through rights discourse. Legally vested rights of a few creditors have been partially sacrificed in favour of many debtors of certain categories namely agricultural landless labourers, rural artisans, marginal farmers, small farmers and urban workers. But relief given to them and tempering with the right-discourse varies from category to category. However, the vested rights relating to debt (taxes cess and fee) due to central or state government or to a government company, Life Insurance Corporation of India, a banking company, Agriculture Refinancing and Development Corporation, the U.P. State the Agro-Industrial Corporation, the Agricultural Finance Corporation, are not trumped under the Act. Under this Act, unlike in Bonded System (Abolition) Act, indebtedness has not been extinguished but only scaled down, keeping in view the economic and social status of the debtor. For different categories, the quantum of relief is different. The centrality of the Act of the U.P. Debt Relief Act and that of the Bonded Labour (Abolition) Act is the same, that is tempering with the legally vested right on consideration of utility discourse is central to both the laws.

The Maharashtra Debt Relief Act 1975 does both, extinguish the liability to pay the debts in certain cases and diminish the liability in other cases. The Act “provides relief from indebtedness to certain farmers, rural artisans, rural labourers and workers”. The Act has a sunset clause. The Act will remain in force from 22nd August 1975 to

21st August 1989. As the Maharashtra government realised that non-institutional creditors are charging usurious rates of interest from poor debtors, the Act was passed to give relief to them. Section 4 provides that the debt of a worker, a marginal farmer, a rural artisan and a rural-labourers, the market value of whose immovable property does not exceed Rs. twenty thousand, shall be extinguished. however, as per section 14, if the market value of the immovable property of the debtor is more than Rs. twenty thousand but does not exceed Rs. forty thousand, the debt shall not extinguish but shall be scaled down.

In certain cases, even religious and customary rules recognised by courts as binding, curtailed the vested rights. In order to give relief to the debtors, the classical Hindu law provides the rule of damdupat and Muslim law the rule of Riba. The rule of Damdupat is a branch of the Hindu Law of debts. The application of the said rule requires that the debtor must be a Hindu. According to this rule the amount of interest recoverable at any one time cannot exceed the principle. That means the interest cannot be accumulated to such an extent that it exceeds the principle. However, the amount of total interest can exceed the principle if it is realised in several transactions with the condition that the amount at any one transaction must not be more than the principle. Damdupat is also does not meet the test of a Kantian ‘right’ in as much as it trumps the right on futuristic considerations; damdupat operates to avoid consequential harm to the borrowers.

Riba is an Islamic rule that prohibits charging of interest for a loan. Riba also operates to avoid consequential and futuristic charging of interest, for it is not related to profit or loss to the borrower. In place of riba, Islamic law prefers Murabaha, which is cost plus financing system in which the ownership of the property remains with the financer till the amount of the sum given to the debtor plus cost (profit) is not paid to the financer in instalments.

Vested rights may be trumped by the Judiciary as well. In some cases, the discretion to trump vested rights is given by the legislature and at others acquired by the Judiciary itself. The Usurious Loan Act 1918 (it has been amended by various states and its latest update was in 2019), is one of the cases where this power to the judiciary has been conferred by the legislature. The Act instead of scaling down the liability to pay loans, gives the power of scaling down the interest to the courts, if in the opinion of the court the rate of interest is excessive, or if the transaction is substantially unfair but the court cannot re-open the agreement and cannot create new obligations.

Another such case is the culpable homicide not amounting to murder. The accused has deprived the victim of his right to life under grave and sudden provocation. The sentence is reduced because the provocation caused by the victim, an event prior to the deprivation of right to life of the victim, is taken into consideration. In case of culpable homicide caused by the accused under battered woman syndrome, a circumstance, independent of culpable homicide, is used by a Bench of

Madhya Pradesh High Court to reduce the sentence of an accused of murder because murder was committed under 'battered woman syndrome' (though the term battered woman syndrome has not been used by the judge). In *Gyarsi Bai v. State*, [1953 CRILJ 588]. The observations of Dixit J. are significant.

What Dixit J., in the last para says is very significant. "The appellant has been sentenced to transportation for life under Section 302, Penal Code, this is the only sentence which could legally be passed in this case. But having regard to the facts and circumstances of the case and also to the fact that the appellant though not legally insane was not and could not be in a normal state of mind when she jumped into a well with her three children, I think this is not a case deserving of a severe punishment". [V. K. Dixit (ed.) Vinod Dixit: Determinism and Freedom of Choice in Criminal Law: Battered Woman Syndrome, V.K.Dixit (ed.) 2025 1 JCCJ (online) 31.] Perhaps the Judge was referring to a state of mind which is neither 'unsound' nor 'sound'. 'Grave and sudden' provocation is also such a state of mind which stands between 'sound' and 'unsound', but legally it (grave and sudden provocation), for entitlement of relief, can only be a temporary, immediately following the 'provocation' without a 'cooling-off' period. Indian Penal Code does not recognise a longer lasting period between 'soundness' and 'unsoundness,' but whether it also is a characteristic of 'battered woman syndrome,' is uncertain. The Judge further recommended "I would, therefore, recommend to the

Government to commute the sentence of transportation for life to one of three years rigorous imprisonment. The sentence of six months' simple imprisonment awarded to the appellant for the offence under Section 309 is appropriate," [V. K. Dixit (ed.) Vinod Dixit: Determinism and Freedom of Choice in Criminal Law: Battered Woman Syndrome, V.K.Dixit (ed.) 2025 1 JCCJ (online) 31.]

Further in case of punishment the legislature gives discretion to the judge to award imprisonment or fine for any term of imprisonment or amount of fine subject to maximum provided, taking into consideration the antecedents of the parties and attending circumstances, that is, the events happening before or after the actus reus. The events happening before or after the actus reus are a posteriori and not a priori, running counter to Kantian definition of 'right'.

These are some of the many cases, where utility considerations were used to temper with the Kantian concept of right by the legislatures or the judiciary, it is neither possible nor necessary to discuss all of them. It may safely be concluded that in a capitalist society, necessarily benefits and burden are distributed through 'right discourse', primarily because all libertarian societies are economically highly stratified, without which stratification the very basis of capitalism would collapse. It also is incumbent ideologically to do so in a libertarian society as the highest value is liberty and equality either has lexically lower value or only has a marginal value. The natural tendency of liberty is to create a stratified and class divided society. However, in

every libertarian system, even in one envisaged by Robert Nozick, equality cannot be totally dispensed with. For the smooth functioning of the political system, some egalitarian measures have to be taken for those left behind in the cut-throat competitive society. Right discourse is the main tool to distribute benefits and burdens, but utility is a balm for those left behind or have qualities not rewarded by market economy.