

## TRACING THE SHIFTING CONTOURS OF JUSTICE

Prof. Gangotri Chakraborty<sup>1</sup>

### I. The Dilemma

The concept of justice in the nineteenth and twentieth century has been very institution centric. Those who were grappling with the concept of justice as a matter of “entitlement” or “due” to a person felt that it can be enforced by an institution or enforcement machinery of the State. The dilemma to this day remains as to what happens when injustice is meted out by that very same justice enforcing machinery or institution.

The conventional understanding on which western systems of justice seem to be based is difficult to pin down. Although the jurists have been grappling with the ideal that should form the content of justice, they have been equally concerned with implementation aspect. An ideally formulated concept of justice will remain as an ideology or moral until it is enforced. The danger is when the enforcing agency fails to enforce or if it decides to ignore the very concept of justice.

The eastern system of justice is more complex than the western system in its packaging of “*Dharma*”. The word *Dharma* is derived from the root word *DHRI* which means to hold up or to support. Therefore that which renders support and holds one up in life is called *Dharma*. It has a transcendental and metaphysical nature. It is also the endeavor to maintain the balance of life, both mundane and spiritual, between personal and social life, between the mind and the body, also between various factors of the physical world. It is said that the Hindu philosophy or *Dharma* is like an auto balance. Even if there is a malfunctioning enforcement agency the balance corrects itself.

There have been instances in Western jurisprudence when the essentially Eastern understanding of justice sometimes surfaces. Several decades ago, Martin Luther King Jr., in a groundswell of Gandhian activism<sup>2</sup>, raised that Gandhian understanding of justice to a position of near dominance in Western thought. It may be no coincidence that both King and Gandhi suffered the same fate for their troubles. Conventional understandings of justice are not easily undone.

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1 Department of Law, University of North Bengal, District Darjeeling, West Bengal, India, 734013

2 Mary King, Mahatma Gandhi and Martin Luther King, Jr. UNESCO New York Page 5

But playwright Jean Anouilh may have captured the essence of the conventional, and still dominant, Western dilemma in his play *Becket*<sup>3</sup>. Anouilh inserted into the script—just prior to the climactic point of the drama—a point of calm before the storm, a brief colloquy on the meaning of justice. Moments before Thomas Becket is murdered in the Cathedral at Canterbury, he and Brother John, the somewhat feisty and very human monk who served him as acolyte, discussed a premonition of the attack.

Brother John: Will it be today?

Becket: (*Gravely*) I think so, my son. Are you afraid?

Brother John: Oh, no. Not if we have time to fight. All I want is the chance to strike a few blows first; so I shan't have done anything but receive them all my life. **If I can kill one Norman first—just one, I don't want much—one for one, that will seem fair and right enough to me.** [Emphasis of the author]

Becket: (*With a kindly smile*) are you so very set on killing one?

Brother John: **One for one.....That's what justice means, isn't it?** [Emphasis of the author]

Becket: (*Smiles and does not answer*)<sup>4</sup>.

This is a reason for discomfort with the Western systems of justice that Becket merely smiles and does not answer Brother John. Apparently if the institution failed to dispense justice one could take it upon oneself to do so by methods that would per se be unjust. Conversely, one might have expected Becket, who at that point in the play has developed into a wise and saintly man, to answer Brother John with some saintly wisdom. Stating that justice does not lie in killing “one for one” or an eye for an eye. Justice means healing, and reconciling, and showing mercy even though the Normans have shown none.” But Becket only smiles.

The discomfiting truth is that justice does indeed mean, in western jurisprudence, what Brother John thinks it means. It is indeed just that a wrongdoer be punished. That being so, striking back at the oppressor is Brother John's entitlement and the oppressor's due. Hidden in Becket's wan smile at the end of the colloquy, one sees the image of Normans oppressing Saxons, then Saxons oppressing Normans, then Normans oppressing Saxons, et cetera ad nauseam—all in the name of justice. One might wish there were more to justice than the scale.

3 Jean Anouilh, *Becket or The Honor of God* (French: *Becket ou l'honneur de Dieu*), HarperCollins: New York. pp. 360–368. ISBN 0060183152. Also Jean Anouilh, *Becket or the Honor of God*, trans. Lucienne Hill, Signet, New York.

4 Jean Anouilh, *Becket or The Honor of God* (French: *Becket ou l'honneur de Dieu*), HarperCollins: New York. pp. 360–368. ISBN 0060183152. Also Jean Anouilh, *Becket or the Honor of God*, trans. Lucienne Hill, Signet, New York.

## II. Rossian View: Equality and Rationality as Component of Justice

Alf Ross, the Scandinavian jurist and apologist for the logical positivist school of jurisprudence, once analyzed the concept of justice as understood by the major Western legal philosophers and jurisprudential schools and was able to discern the major Western components of the concept<sup>5</sup> as giving everyone their due<sup>6</sup>, Ross noted the uniform occurrence of an equality notion in the more content-oriented definitions of the term—a requirement, in general, that no one be arbitrarily subjected to treatment that differs from that accorded to any other person<sup>7</sup>. Equality is a nice ideal, but it sometimes cuts in strange ways—it was the basis for Brother John’s “one for one” killing of a Norman.

Ross further observed that because none of the scholars’ definitions of justice demanded absolutely equal treatment for individuals, there was a rationality component in the concept as well. A demand that differing treatment be in some way reasonable. A “causal-nexus” yardstick for evaluating the reasons for departures from absolute equality<sup>8</sup>. In the lack of a demand for absolute equality and instead a demand for some form of rationality governing departures from equality, Ross found the gremlin that besets and often unfrocks the Western understanding of justice. He found the gremlin hiding mischievously in one of the noblest facets of Western democratic thought, its tolerance and even championing of ideological pluralism.

Even the wisest differ as to the grounding of concepts of equality and rationality. Ross may have overstated the case when he said, “All wars have been fought by all parties in the name of justice, and the same is true of the political conflict between social classes.”<sup>9</sup>

There does seem to be just enough empirical truth in the eastern assertion to give one pause. It may not be, as Ross contended it was, “possible to advance every kind of material postulate in the name of justice,”<sup>10</sup> but Ross’s main lesson is not lost. In an environment that tolerates and even celebrates ideological pluralism, people may honestly, honorably, and rationally disagree about the content and even the meaning of the term “justice,” and any approach to defining the term that does not take that fact into account is doomed.

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5 Alf Ross, *On Law and Justice*, University of California Press, Berkeley.

6 The seminal and somewhat question-begging definition is that of Ulpian: “*Honeste vivere, alterum non laedere, suum cuique tribuere*” (To live honestly, to cheat no one, and to give each his due). Thomas Cooper, *The Institutes of Justinian*, P. Byrne, Philadelphia. § III, at 150.

7 Alf Ross, *On Law and Justice*, University of California Press, Berkeley.

8 *Ibid*

9 *Ibid*

10 *Ibid*

Ross unsettlingly concludes that to invoke justice is the same thing as banging on the table: an emotional expression which turns one's demand into an absolute postulate. It is impossible to have a rational discussion with a man who mobilizes "justice," because he says nothing that can be argued for or against. His words are persuasion, not argument. The ideology of justice leads to implacability and conflict, since on the one hand it incites to the belief that one's demand is not merely the expression of a certain interest in conflict with opposing interests, but that it possesses a higher, absolute validity; and on the other hand it precludes all rational argument and discussion of a settlement<sup>11</sup>.

The "Banging on the table," goes on until someone in authority, whose say is final, either agrees with the proponent or agrees with our adversary who has been banging on the other end of the table. Perhaps it is the final say that saves the society from the chaos covered by Thomas Becket's wan smile. Nonetheless, the implications of this for participants in the Western systems of politics and jurisprudence are obvious and ominous. The Western systems are—predictably and predominantly—win or-lose apparatuses. With an understanding of justice that grounds itself in the implacability and conflict inherent in ideological pluralism, the society wallows in division and hostility, with some of its members banging on the left side of the table and some others banging on the right side, leftists shouting down rightists, then rightists shouting down leftists, on and on, all in the name of justice. Deep down there is a feeling of discomfort. Deep down, far below the superficial level of verbal "banging" on the table, what is needed in the area of human-social-interaction-gone-awry is not a victory of interests or ideologies but a healing of persons.

### **III. Gandhi's Vision of Justice: Truth, Self, Non-Violence, and Love**

The eastern concept of justice has never been so institutionalized as that in the Western jurisprudence. The Indian jurisprudence has always regarded a person as a reflection of oneself. Thus "justice" in Indian jurisprudence has always meant making the adversary realize his/her mistake or fault and helping the person to rectify him or herself.

Gandhi applied his thought to issues of social justice and to the appeals to justice that inhabit group politics. Moreover, the testing ground for the truth of Gandhi's views on justice was not logic or precedent or conformity with the abstract scholarship of the past, but experience<sup>12</sup>. It is in that modest testing ground of experience that the seed took hold and grew in Gandhi's mind, to blossom into an understanding of justice that eschews banging on the table for something a more nobler, a healing of persons. The West and East both meet and transcend in Gandhi's experiential understanding of justice,

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<sup>11</sup> Ibid

<sup>12</sup> As Justice O. W. Holms would have appreciated.

and in that understanding, ideological pluralism is but an irrelevancy. Furthermore, Gandhi's understanding of justice is not Gandhi and justice merely an epistemology<sup>13</sup>, it is, in a deeply philosophical sense, an understanding of being itself, an ontology<sup>14</sup>.

It is necessary, in approaching Gandhi's counter proposal to Western definitions of justice, to understand about Gandhi's sources and the grounding of his ontological, experiential approach. There is a reason for this need to draw on Gandhi's sources as an aid in understanding the grounding of Gandhi's thought. Although Gandhi was a prolific writer, most of what he wrote was issue specific and, of course, experiential rather than systematized into an organized, abstract theoretical structure. The theory and its grounding are there, but they are blended into discussions of the problems of the age of which Gandhi was a living part. Gandhi sought the justice that was missing in the British colonial rule over India, and in the Hindu treatment of the untouchables, in the relationships between Hindu and Moslem Indians, and in the apartheid of South Africa, all issues that potentially implicate Brother John's understanding of justice, an understanding gently rejected by Gandhi<sup>15</sup>.

It is no secret that Gandhi was greatly influenced by the religious and moral writings of the writer Leo Tolstoy<sup>16</sup>. It is perhaps less well known that Leo Tolstoy was steeped in the philosophy of Arthur Schopenhauer<sup>17</sup>. That is not to say that Gandhi necessarily took some philosophical principles from Schopenhauer, even indirectly. Whatever principles Gandhi could have taken from Schopenhauer were more directly and more readily available in Gandhi's own native Hinduism and in his understandings of the essence of the Christianity to which he had been exposed. It is merely to suggest that there may be a consonance between the thoughts of Schopenhauer and Gandhi, with Tolstoy's thought providing the resonance. The sympathetic vibrations are nowhere clearer than in the solutions each propounded to the problem of evil, leading to a derivative understanding of the meaning of justice. Schopenhauer's solution to the problem of evil is presaged quite clearly in his own ontology. For Schopenhauer, the true reality, that is, the thing-in-itself of everything is "will". Also, consistent with Immanuel Kant, Schopenhauer held that human knowledge of the outside world is conditioned by the structure of the human mind. It is the human mind, in both Schopenhauer's and Kant's thought, that

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13 As is the Western understanding. Epistemology is branch of philosophy concerned with knowledge.

14 Philosophy concerned with nature of being.

15 Mohandas K. Gandhi, *Nonviolent Resistance (Satyagraha)* Schocken, New York.

16 Mohandas K. Gandhi, *An Autobiography: The Story of My Experiments with Truth*, trans. Mahadev Desai (Boston: Beacon Press, This text was first published in two volumes in and, respectively, in the Gujarati language.

17 Bryan Magee, *The Philosophy of Schopenhauer*, rev. edn Clarendon Press, Oxford.

imposes time, space, and the principle of causality on all its perceptions of the outside world. Time, space, and causality do not exist in the thing-in-itself. For Schopenhauer, only timeless, space less, and causeless “will” exists. Consequently the will is undivided. There is, at the nominal or thing-in-itself level of reality, a basic, real unity among all existence—a wholeness to all that exists. In the most basic ontological sense, “we are our brother”. Schopenhauer applies all this to the problem of evil. The difference between the inflictor of suffering and the endure of suffering it is only phenomenal, and does not concern the thing-in-itself which is the “will” that lives in both. Deceived by the knowledge bound to its service, the “will” here fails to recognize itself; seeking enhanced well-being in *one* of its phenomena, it produces great suffering in *another*. Thus in the fierceness and intensity of its desire it buries its teeth in its own flesh, not knowing that it always injures only itself, revealing in this form through the medium of individuation the conflict with itself which it bears in its inner nature. Tormentor and tormented are one. The former is mistaken in thinking that he does not share the torment, the latter in thinking he does not share the guilt<sup>18</sup>.

Gandhi’s concept of justice, based in that staple of Eastern religious thought, was also based in one staple of the Western understanding of justice—entitlement. The entitlement that held Gandhi’s attention, however, bore little resemblance to the acquisitive, table-banging form that permeates Western jurisprudence. Gandhi held it was the oppressor—the doer of injustice—that had the entitlement, and it was an entitlement, not directly to justice, but rather to have the oppressors see the justice or injustice of their activity by viewing its concrete results on, and through the eyes of, their victims. The oppressors may see the results of their actions and, more likely than not, exult in those results. If the vantage point of the oppressors can be changed to that of their victims, however, that exultation will be blunted and quite possibly replaced by that insight into deep-down reality summarized in the Brahman formulation *Tat tvam asi*. Gandhi’s views developed and changed over the years because they depended so much on events and experiences.

The focus here is not on capturing its detail, but rather its spirit. There is an obvious attraction in Gandhi’s theory of justice. Almost by definition, and certainly by design, if it works, it solves the problem of institutionalized enforcement. Gandhi’s theory, as applied to governmental injustices, works outside, against, or perhaps “on” the government’s institutions and organs of justice and not with, or as a part of, or even as a substitute for them. To give Gandhi his due on this point, his nonviolent resistance doctrine is seldom delved into deeply by academicians, and the common belief that it amounts to sketchy idealism is unwarranted. Gandhi placed great stress on method and

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18 Arthur Schopenhauer, *The World As Will and Representation*, vol. I trans. E. F. J. Payne, Dover Books, New York.

effectiveness. This is apparent in Gandhi's oft-misunderstood teaching on fasting as a method of nonviolent resistance. In Gandhi, we find a bit of a lesson—the lesson that justice is to be sought rather than used. It is not a means, it is an end—an end that is justified by the recognition that all human beings are other selves, ourselves in another form: “That action alone is just, which does not harm either party to a dispute.”<sup>19</sup> The lives of Gandhi, his followers, and many others are testimony that we have the means of achieving that understanding of justice within us. Deep down, that is known, and we wonder what goes wrong.

Gandhi dedicated himself to uplift man and society simultaneously. He moralized man and society in his attempt to realize better ordering of the society. He devised new moral strategy with his twin principles truth and non violence.<sup>20</sup> The justification of what the State does is to be sought in the moral values it helps to realize and it ought to provide in achieving an ideal end, the highest goal of man's life.<sup>21</sup>

#### **IV. John Rawl's Theory: Justice as Equality and Fairness**

Like Hobbes, Locke, Rousseau and Kant, Rawls belongs to the social contract tradition. However, Rawls' social contract takes a slightly different view from that of previous thinkers. Specifically, Rawls develops what he claims are principles of justice through the use of an entirely and deliberately artificial device he calls the “Original Position” in which everyone decides principles of justice from behind a veil of ignorance. This “veil” is one that essentially blinds people to all facts about themselves that might cloud what notion of justice is developed.

*“...no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance.”<sup>22</sup>*

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19 Mohandas K. Gandhi, *The Collected Works of Mahatma Gandhi*, vol. I, Ministry of Information and Broadcasting, Government of India, Publications Division, Page. 75

20 A. C. Kapoor, *Principles of Political science*, S. Chand & Company Ltd. [Edn. 2000, Reprint 2001], P. 3, 45, 851-855

21 Ibid.

22 John Rawls, *A Theory of Justice*, Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1971. The revised edition of 1999 incorporates changes that Rawls made for translated editions of *A Theory of Justice*. Some Rawls scholars use the abbreviation TJ to refer to this work. Now available in Indian reprint. Published in India by Universal Publishing Co. Pvt. Ltd. [2000] ISBN: 81-7534-175-0.

Rawls attempts to reconcile freedom and equality offering an account of “justice as fairness.” Theoretically this is fine and there should be no difficulty in its implementation.

The difficulty arises in a situation where there is an agreement on cooperation, but one of the parties to the agreement prefers more of the benefits, and less of the burdens, associated with cooperation. The question relates to nature and content of the principles of justice in such a situation. The task of implementing justice in such a situation, obviously, is upon the State machinery or institution.

Human beings are, as Rawls puts it, both *rational* and *reasonable*. Because human beings are rational they have ends which they want to achieve. Beings reasonable in nature, they are happy to achieve these ends in accord with mutually acceptable regulative principles. But due to different needs and aspirations it is difficult to find principles acceptable to all. Rawls proposes a model of fair situation for making this choice and he argues that two principles of justice would be especially attractive<sup>23</sup>.

## V. The Two Principles of Justice

**First Principle of Justice:** Under the circumstances, Rawls argues, a principle of equal basic liberties should exist that will protect the liberal freedoms of conscience, association, expression, and the like. It must also be ensured that, whatever be a person’s station in society, liberties represent meaningful options for him. For example, formal guarantees of political voice and freedom of assembly are of little real worth to the desperately poor and marginalized in society. Demanding that everyone have exactly the same effective opportunities in life would almost certainly offend the very liberties that are supposedly being equalized<sup>24</sup>. Nonetheless, it has to be ensured that at least the “fair worth” of liberties that makes life to be worth living, with enough effective freedom to pursue personal goals is available to each person.

**Second Principle of Justice:** This leads to the principle requiring fair equality of opportunity, paired with the famous (and controversial) “difference principle”. This principle ensures that those with comparable talents and motivation face roughly similar life chances, and that inequality in society work to the benefit of the least advantaged<sup>25</sup>.

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23 Ibid.

24 John Rawls, “Justice as Fairness.” *Journal of Philosophy* (October 24, 1957), 54 (22), P. 653-662.

25 John Rawls, *Justice As Fairness: A Restatement*, [Ed] Erin Kelley, Universal Law Publishing Co. Pvt. Ltd., [2004], ISBN 0-674-00511-2

## VI. Rawlsian Basic Structure

Rawls held that these principles of justice apply to the “basic structure” of fundamental social institutions like the courts, markets, the constitution, etc. Rawls further argued that these principles were to be lexically ordered, thus giving priority to basic liberties over the more equality-oriented demands of the second principle. Finally, Rawls took his approach as applying in the first instance to what he called a “well-ordered society ... designed to advance the good of its members and effectively regulated by a public conception of justice”<sup>26</sup>. In this respect, he understood justice as fairness as a contribution to “ideal theory,” working “out principles that characterize a well-ordered society under favorable circumstances”<sup>27</sup>. Much recent work in political philosophy has asked what justice as fairness might dictate (or indeed, whether it is very useful at all) for problems of “partial compliance” under “nonideal theory.”<sup>28</sup>

Therefore, one of the major difficulties in Rawls’ proposition is that his concept of justice is completely dependent upon the State and State institutions and there is no remedy in the event of failure of the machinery of the State or where the thereof State perpetuated injustice.

## VII. Amartya Sen’s Idea: Justice is Relative, There is Nothing Called Perfect Justice

According to Sen, Justice is a complex idea yet it is important to understand that justice has much to do with everyone being treated fairly. Keeping this in view, Sen argues that justice has to be deeply concerned with systematic assessment of how to reduce injustice in the world, rather than only with the identification of what a hypothetical “perfectly just society” would look like<sup>29</sup>.

There may be no agreement on the shape of perfect justice and even if there were to be an agreement on what the perfect justice should be, perfect justice will hardly be achievable even if people did agree about what would be immaculately just.

However, there can be reasoned agreement on many removable cases of manifest injustice, for example, slavery, or subjugation of women, or

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26 John Rawls, “The Basic Structure as Subject.” *American Philosophical Quarterly* (April 1977), 14 (2), P.159-165.

27 John Rawls, *Justice As Fairness: A Restatement*, [Ed] Erin Kelley, Universal Law Publishing Co. Pvt. Ltd., [2004], ISBN 0-674-00511-2

28 Jon Rawls, “Justice as Fairness: Political not Metaphysical.” *Philosophy & Public Affairs* (Summer 1985), 14 (3): 223-251.

29 Amartya Sen, *The Idea of Justice*, Allen Lane, an imprint of Penguin Books, [2009], ISBN 978-1-846-14147-8

widespread hunger and deprivation, or the lack of schooling of children, or absence of available and affordable health care. Second, analysis of justice has to pay attention to the lives that people are actually able to lead, rather than exclusively concentrating only on the nature of “just institutions”.<sup>30</sup>

Sen’s idea of justice rules out anything called “perfect” justice. According to him justice is relative to a situation; and instead of searching for “ideal” justice, the stress should be on removing the “more visible forms of injustice such as subjugation of women, poverty and malnutrition.”

There is a conflation of “justice” with “social justice” in Sen’s idea of justice. This is dangerous. Delivering justice is the basic function of the state, and to do this efficiently, a parsimonious definition of justice is necessary. The simplest definition of justice is the redressal of a violation of rights. On the contrary, Sen’s definition is expansive—covering everything from gender inequality to poverty to malnutrition. The more you ask a justice delivery system to do, the less efficiently it can do it, everything else being the same. Sen’s concern with practical delivery of justice, contradicts his own objective by enlarging the scope of what justice should mean.

Justice is the response to an objective evaluation of a deviation from a normative code—for practical purposes, a written or an unwritten constitution. His contention that “justice is relative to a situation”, is untenable because in a rule-of-law environment, justice cannot be a “relative to a situation”, but rather, has to be uniform across situations. If violation of rights is objective, how can the redressal be relative and just at the same time? Should the definition of theft in the Indian Penal Code vary according to the economic condition of the thief or according to the economic status of the person robbed?

Sen’s line of thinking adversely affects the importance of individual rights and freedom, and supplants them with the discourse of social justice. If justice is seen as something relevant to a situation, then it befits only a jungle society rather than a “well-ordered society ... designed to advance the good of its members and effectively regulated by a public conception of justice”<sup>31</sup>. If justice is made relative to situation then the more powerful will make subjective decisions that the less powerful will have to accept that as justice. This will lead to a situation where a common employee will not be able to seek justice against the employer because in such a legal battle the employer will engage such expensive lawyers which the employee will not be able to match. In a rule-of-law environment, the more powerful might still violate the

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<sup>30</sup> Ibid.

<sup>31</sup> Envisaged by Rawls.

rights of the less powerful, but it cannot be passed off as “justice”.

The shores of justice are ever widening. The Hindu philosophers had taken justice to the level of a universal value. Whatever sustained an individual’s claim and entitlement was Dharma<sup>32</sup>. Justice was merely a component of it. Institutions and the State had a very limited role and the ruler itself was bound by Dharma. Something like the relationship of *lex populem* and *lex principem* propounded by Jeremy Bentham. Western philosophers are yet to find a solution to the issue of State/institutional involvement and abuse in matters of justice. Even eliminating injustice requires the role of the State. In cases where the State sponsors injustice<sup>33</sup> the issue of justice becomes transcendental and metaphysical in nature and the task of restoring rule of law of which justice is an integral part reverts back to the people.<sup>34</sup>

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32 Dhri Dharayati Vishwam.

33 Recall the Bengal experience of Nandigram and Singur

34 Lex Populem according to Bentham.