UNIT 16 ACCESS TO JUSTICE

Structure

16.1 INTRODUCTION

Category of justice is interpreted in multiple ways. This unit discusses about the larger questions related to the access to justice. Before discussing the access to justice, one needs to engage with the perspectives on justice. The idea of justice has undergone different changes. Society and its transition from customs to that of modern laws have also played a major role in determining the nature of justice. However, the justice becomes a complicated idea due to the coexistence of customs and modern laws. Political formations and social movements across the globe have been defining the idea of justice in its own ways. One needs to know the rudimentary and definitional perspectives related to justice. This unit will try to explore some of the core issues related to the idea of justice. The question of access to justice for whom. At the same time, the unit address on gender and its relation with access to justice.

16.2 LEARNING OUTCOMES

After studying this Unit, you are able to:

- Learn about idea of justice;
- Explore the relationship between people and access justice;
- Engage with the category of gender and access to Justice.

16.3 IDEA OF JUSTICE

The etymological understanding of justice is equally important like that of its epistemological underpinnings. In other words, the meaning and knowledge related to justice need to be understood in this context. Justice refers to the fair treatment of the people. Laws based on the principles of justice

differentiate the character of nation-states. Demands for equal rights and justice are central to unjust political systems. Injustice is conquered through the meaningful clamor and struggle for the justice. Criminal justice systems across the globe subject the people to diverse forms of punishment. Basic literary understanding of the idea of justice discusses about the people who pervert the course of the justice. Diverse social groups across the globe are controlled for their willful efforts to obstruct the justice.

Scholars from the field of psychology usually discuss about the "just world hypothesis". It exposes us to the false and commonsensical belief that characterizes the world as fair in nature. It is falsely believed that those who indulge in good deeds are rewarded and those who indulge in the bad are punished and so on. What is the consequence of this belief? Such belief seeks refuge in the argument that says that the people who are unlucky are suffering due to their fates. Basically, such false belief justifies certain kind of fatalism. For instance, a person who had to face burglary is criticized as a person of careless behaviour. Some of the fundamental debates on victimology explain this kind of conceptual dilemmas in nuanced fashion. Psychologists who analyzed the "just world hypothesis' read it as result of the "illusion of control". The idea of "illusion of control" was first noted and explained by the psychologist, Melvin J Learner from Canada. His article published in the *Journal of Personality and Social Psychology* in the year 1965(Colman,2009:399-400)

Social scientists have probed the term in systematic fashion. The idea of justice is central to ethical theory. It is also seriously discussed in the field of political philosophy. Justice is usually read with the idea of equity. It is also connected to impartiality. From the time of great philosophers such as Aristotle, the idea of justice is categorised into different forms. For example, distributive justice deals with the debates related to "who should get what". Corrective or communicative justice explores how individuals are treated in social transactions. Questions related to punishing a particular person for offence is discussed in the context of the corrective or communicative justice. On the contrary, the idea of distributive justice is very much integral to social philosophy and "policy as social justice". American philosopher, J Rawls in his classic, *A Theory of Justice* foregrounded the modern theory of distributive justice. It is observed that Rawls simultaneously justified individualism and equality. Rawls argued that "All social values-liberty and opportunity, income and wealth and the bases of self-respect -are to be distributed equally unless an unequal distribution of any, or all, or all these values is to everyone's' advantage" (Rawls,1971:62). It also leads us to the conceptual premise that there are tensions exist between personal liberties and social justice. There are scholars who focused on liberties in the context of justice. Robert Nozick is one among those scholars. His work, *Anarchy, State and Utopia* (1974) asserted that private property, individual rights and self-determination have to be guarded in the ideas and practices related to social justice. Nozick asserted the minimal role of state can be defended, if it does not create obstacles for the individual interests related to persona and freedoms. There are conceptual dilemmas related to the idea of equal treatment of all people. It has raised important questions such as who should

be treated equal and so on. The old principle of *lex tallionis* (an eye for an eye) as considered as the fundamental premise of justice. However, the current legal institutions consider correction and rehabilitation as the central to social justice. It is also discussed that it is difficult to define the notion of justice. It is also criticized that one cannot achieve justice in easy manner. Justice is also part of legitimacy. Some of the governments therefore are critical to the notion of justice (Abercrombie, Stephan and Bryan,200:188-199)

Western theories have been exploring the possibilities of well-ordered societies through the theories of justice. Modern theories of justice are influenced by liberalism. The key characteristics of such theories share the following values

a) "conditions of equality between persons acting within just institutions"

b) "societies that are well ordered in that they share a public sense of justice but not necessarily under conditions of social harmony"

c) "the procedures of public justice are formulated and universally accepted by those who agree to exercise their liberties within these procedural limits"

d) "individuals are educated to develop a sense of justice such that they possess a moral and rational disposition which helps them to consider a just society as a value, to know the laws which govern them, and possess the understanding necessary to their full and free participation in such a system'(Dhillon,2001:197).

It is further analyzed that postmodern theories of justice accept some of the premises of the modern theoretical constructions of justice. However, they share skepticism towards the modern theories of justice. Post modern theories of justice believe that modern theories justice exhibits ideal constructions of realities. Modern theories of justice are theoretical and they are detached from the empirical dimensions of practice. Post modern theories explore such aspects through the "role of language in the theory of practice of justice". Broadly, postmodern theorists such as Jean -Francois Lyotard demonstrated the power and knowledge dimensions of justice through the dominant and subjugated sections. It is further noted that modern theories of justice focus on shared public values. They focus on the multiplicity of truth and various possibilities/readings/ interpretations around the idea of justice than a homogenous, defined, modern conception of justice. Thus, it becomes a herculean task to ponder what is "just" and what is "unjust". Thus, postmodern conceptions of the idea of justice seek to analyze the justice in the context of multiplicity. It is further explained that institutional practices related to justice operate via language. It is observed that postmodern theory does not discard 'the possibility of justice". It is doubtful of the modern understanding of justice due to "its skepticism arises from careful attention to concrete heterogenous pragmatics". Postmodern criticism of modern theories of justice are influences by the Immanuel Kant's ideas of totality, universality and equality. Attention to multiplicity is certainly an obligation in the postmodern critiques to the modern constructions of justice"

(Dhillon,2001:197-198).The next sections probes the debates on the people and access to justice.

Check Your Progress-1

1) Write your understanding on idea of justice.

16.4 PEOPLE AND ACCESS JUSTICE

Social stratification and law impact the justice of the people. It also challenges the efficiency of the legal system of any country. Whether the people across diverse societal strata are getting justice or not? One of the central questions that raised is why certain sections of the people are not getting the justice?

Scholars have enquired how poor people suffer from the legal systems. According to Paul Prettitore, access to justice needs to be discussed in any debates on justice. It is observed that legal institutions may emphasize on the access. But it is not practiced in proper manner. Practice is based on opportunities and resources. Access, for Prettitore, is grounded in opportunities and resources. It is further blocked by poverty, race, lack of property and low educational levels in the case of the ordinary sections of the society. It is further analysed that it orders to measure the access, one has to analyze the experiences of the various sections and their experiences connected with legal needs. How various sections in the society are experiencing the law? When one explores the social differences, it exposes the nuances of the "access-to-whom". It is further noted that scholars analyse the details of the household incomes and their experience related to the law and access (The Hague Institute for the Innovation of Law, cited in Prettitore,2022). The study indicates various issues related to the access and law. It raised serious queries to the question of the delayed justice and to the idea of the justice itself. It is observed that low-income households are more vulnerable to legal problems. Legal problems negatively affect the low-income households. In the context of the development, equal access to justice is widely discussed in the context of Sustainable Development Goal 16.3. According to Prettitore, the hiatus that exist in the case of the access to justice may negatively impact the various sections of the society (Prettitore,2022).The next section analyses the questions of racial minorities and their access to justice.

Racial Minorities and Access to Justice

It is further studied that the levels of access to justice varies among the most vulnerable sections in the society. According to Sara Sternberg Green, it is important to examine the interlinkages between the race, class and access to

civil justice. It is observed that people from the poor and minority groups face various kinds of civil legal problems. It is explored that if the experiences of the marginalised sections are negative with the civil legal machinery, it also hampers the legal process and justice. It further detaches themselves from the legal institutions. They are again alienated from the legal systems (Greene,2016). Black Lives Matter and justice movements of Afro-Americans, for Frimpong, have challenged the inhuman nature of the racial discrimination and the struggles for justice of the racially suppressed groups. George Floyd's murder has created major discussions related to the racially oppressed people's quest for the justice.Rashwan Ray observed that "George Floyd is the twenty first century's Emmet Till, a moment similar to (his) murder in 1955 (and) by his mother having the foresight and also the bravery to show his decomposed body in the casket(Ray, Cited in Frimpong,2020).Ray also argued that "...the nation's legacy of slavery continues to be the foundational epicenter of racial discrimination against blacks and minorities"(Ray, Cited in Frimpong,2022).Disparities and victimization of the people from the racial minorities are very much part of the perspectives on the access to justice. Gender too play a vital role in the access to justice. The following section deals with the gender and access to justice.

Check Your Progress-2

1) Write your critique on the debates related to access to justice.

16.5 GENDER AND ACCESS TO JUSTICE.

The term, sex refers to the biological division. The term gender, refers to the social construction of the relations between man and women. It creates society-based division based on masculinity and femininity (Oakley,1972). Judith Butler has analyzed the natural character of the gendered behaviour. It is learned performance related to gender behaviour (Butler,1999). Gender and access to justice are the recurrent themes in the context of society and law.

Social movements across the world played a central role in the social change across the globe. In order to understand the nuances of the shift from the social control to social change, one has to revisit some of the historical junctures that foregrounded the questions of gender and legal reform. According to Sharyn L. Roach Anleu, women's movement and feminists intervened in the significant arena of law to transform the status of women. It is also considered as a struggle for the equality. Initially, women's movement and feminists indulged in the issues of women related to education, property rights, right to vote and training for professions. Feminist groups in the 18th century England emerged to secure the equality across sexes. It was also to

attain the rights for women. It is noted that feminism in the 1960s focused on the reform of law in the case of rape, domestic violence, employment and family (Anleau,2000:183). For instance, there are diverse ideological groups and practices within the rubric of feminism. However, the diversity among the feminists have analyzed it as something that contribute to wilderness. Elaine Showalter analyzed the diversity among the various groups related to feminist criticism as its wilderness and strength (Showalter,1981). There are various debates on the impact of feminism across the disciplines and social/political movements. According to Sharyn L. Roach Anleu, there are differences among the various feminist organizations in the context of gender equality. Anleu mentions about the peculiar character of some feminist organizations in the context of the United States. It is observed that one of the fundamental emphasis of feminists and civil rights activists has been on the courts. In other words, women's rights litigation deploys test cases and *amicus curiae* briefs to foreground the larger view of the women's questions. They have been arguing that the questions of the women should be presented strongly in front of the court. Political lobbying in Britain, Canada and Australia plays a vital role in the legislation related to the women's issues. Feminist groups within the policy regime play a central role in bringing out the voices of women (Anleu,2000:183). Scholars across the globe have studied about the legal transformations made by women's movements. Narratives of the struggles of women's movement also show the impediments of women related to the access to justice. According to Nicholas Pedriana, "Legal frames and legal framing processes offer a unique analytic framework for exploring the link between social movements and social change because law is simultaneously a collective action frame and collective action goal" (Pedriana, Cited in Anleu,2000:184).

Perspectives on law and feminist organizations explore the aim and nature of such organizations. According to Sharyn Anleu, one of the aims of the feminist organizations is to reform laws that address the experiences of women. They also aim to implement the law in the private and domestic domain. There are complexities related to the laws that address the issues of women. Feminist organizations are also aware about the potentials and pitfalls of law in the backdrop of the gender justice. It is observed that some feminists read the dependence of law as self-defeating in nature (Anleau,2000:184). There are critiques to too much reliance on law and its creation of more legal premises. It may reduce the significance of nonlegal terrains (Smart and Thornton, Cited in Anleau,2000:184). The reduction of nonlegal factors raise different questions related to the shift of the focus from the core issues related to women to the instrumentalities related to law. At the same time, legal quandaries related to women are also questioned as something that ignores the men. For instance, demands of women's movement for equal employment opportunities are critiqued for its ambiguities related to gender and law (Anleau,2000:184-185). At the same time, while agreeing on the gravity of the early feminists' demand for legal rights, contemporary scholars are becoming critical of the thin line between the demand for legal rights and rhetoric (Smart,cited in Anleu,2000:185).

It is important to revisit some of the perspective's rights discourse and

women in the backdrop to the debates on gender and access to law. According to Anleau, substantive and prevalent gender inequality prevent women from understanding about their formal rights. The notion of rights is contested as well. There are equal status and conflicts related to various laws within the legal discourse. It is observed that abortion debates happen in the midst of the women's rights versus those of the embryo and the fetus. It is further observed that legal rights need an individual or a group in order to raise a complaint and to start legal proceedings (Anleu,2000:185). It is also critiqued that opposition groups easily appropriate the discourse of the rights. It is overed that "...in 1982, the *Charter of Rights and Freesoms*, which guarantees equal rights, was entrenched in the Canadian Constitution and heralded as a political victory both by and for the women's movement. However, some of the first equality cases to come before the courts consisted of attempts by male defendants to invoke the guarantees of sex equality in order to invalidate statutory rape provisions of the criminal law" (Fudge,cited in Anleu,2000:185).It is also analyzed that claiming rights provide collective identity to women. It empowers them to seriously intervene in the public policy discourse. Assertions based on public nature of rights are considered as vital to the private nature of the discrimination of the women (Schneider, cited in Anleu,2000:185). Rights approach, for Villimore, also initiates social change in the local and personal life of women (Villimore,cited in Anleu,2000:185).

One of the areas that woman faces the issues of law is that of employment. Discrimination on the basis of gender has raised lot of questions to the law and legal practitioners. According to Anleu, Equal pay and work discrimination are addressed by the feminists in the context of legal transformation and industrial relations systems. Women are receiving lower pay due to the gendered, societal stigmas. Anleu discusses how women are terminated from the jobs after the marriage and child bearing. Their commitment to career is less valued than that of men(Hakim,cited in Anleu,2000:185).However women have struggled to reduce the wage gap between men and women(Burstein, cited in Anleu,2000:185).The negation of choices of women and burden from the family-work also raise serious questions related to women and law(Crimpton and LeFeuvre,cited in Anleu ,2000:185).The constrains embedded in the society impact the work of the women(Ginn, Cited in Anleu,2000:185).

Gaps in the wage between men and women also demonstrates the quandaries exist between employment law, gender discrimination and collective-bargaining agreements. One of the central questions related to access to law and women also is the irony between bargaining power, wage labour and patriarchal trade unions. Construction of the male as the bread winner and women as the dependent on men still exists across the globe. The bias and discrimination on those lines provoke scholars to reflect on the idea of family wage and related oppression of the women. Family wage is the amount of the amount of an average, male worker to help himself, his wife and children. According to Anleu, this bias based on family income thus demonstrate the pressures and responsibilities of male and women workers in the context of family and (patriarchal) work places. It is noted that United Kingdom's Equal

Pay Act 1970 ensured "equal pay for like work, not work of equal value, and abolished male and female rates for the same job. Equal pay for work of equal value was limited to jobs that had been evaluated by the employers" (Atkins and Hoggett, Cited in Anleu,2000:186). According to Anleu,pay gap in the case of women is more based on the pay gap based on devaluing women's job than the pay gap based discrimination(Anleu,2000:187). It is observed that "...comparable worth arguments have been used in Australia, but with little success. In 1985, a union of nurses lodged an application via the ACTU before the Australian Conciliation and Arbitration Commission as part of a broad strategy to reduce structural inequality between the men and women in the labour market by addressing the traditional undervaluation of women's work. The nurses argued that pay increases were justified in accordance with the principle of equal pay for work of equal value and incorporated in the notion of comparable worth. The commission pointing out that comparable worth meant different things in different countries and it was inappropriate to adopt the US model, rejected the use of the term, maintaining that it would be confusing and inappropriate to equate with the 1972 principle of equal pay for work of equal value" (Hunter,cited in Anleu,2000:187). Scholars like Anleu cites this fact to show the paradoxes that exist in the context of gender and access to law.

Debates around sex discrimination laws also reveal the issues related to the access to law. It is also observed that minorities and women face discriminations instead of the affirmative action based on the order of the court (Anleu,2000:188). What is the field and scope of sex discrimination laws? It is important to discuss the debates on sex discrimination laws in the milieu of access and law. Discrimination on the grounds of sex, pregnancy, marital status and sexuality are challenged through sex discrimination laws. For example, Title VII of the 1964 Civil Rights Acts forbids discrimination on the grounds of the sex of the individual (also race, colour, religion or national origin). Britain passed peculiar sex discrimination legislation in the year 1975.Australia passed specific sex discrimination legislation in the year 1984(Anleu,2000:187). There are still debates and conflicts related to the legal questions connected to abortion, pregnancy leave, maternity leave, parenting leave etc. throughout the world.Question of sexual harassment also raise various issues for the women.The following section analyses the issues related sexual harassment and the women's search for justice.

16.6 SEXUAL HARASSMENT AND CHALLENGES BEFORE WOMEN

Debates around "Me too movement" has brought the debates on sexual harassment in the contemporary legal discourse. According to Anleu, Catherine Mackinnon played an important role in the debates on sexual harassment. Mackinnon addressed the relations of sexual harassment and sex discrimination. It is argued that "sexual harassment of women at work is sex discrimination in employment "(Mackinnon,cited in Anleu,2000:191). India witnessed lot of debates on the case, Vishaka and others v/s State of Rajasthan that deals with the sexual harassment at the work place. Sexual

harassment at work place is also addressed in the context of the diverse social sections and their access related to law. In addition to women, sexual minorities across the world are facing various stigmas and legal challenges. Homophobia has become central to heterosexual world. Queer communities are struggling against the dominant legal perspectives and its conservatism around the notion of sexuality. It is observed that "The Supreme Court of India ('Supreme Court') in its landmark judgment National Legal Services Authority of India vs. Union Of India(NALSA) recognized fundamental rights of transgender persons arising out of Article 14 ('right to equality'), Article 15 ('prohibition of discrimination'), Article 16 ('equality of opportunity in public appointment'), Article 19 (right to freedom of speech and expression') and Article 21 ('right to life with dignity') of the Constitution of India. This was followed by its judgment in Navtej Johar vs. Union of India ('Navtej Johar') which decriminalized consensual sexual relationships between adults of the same gender by reading down section 377 of the Indian Penal Code, 1860 "('IPC') (Vidhi Centre for Legal Policy's Report).Question of sexual harassment at work place is being discussed in the context of various, social stratifications.

16.7 LET US SUM UP

The unit deals with idea of justice and its multiple interpretations. It discusses about the larger questions related to the access to justice. It probes how denial of justice happen in the everyday life of certain sections. Thus, it engages with the perspectives on justice by engaging with the perspectives of various scholars. The idea of justice has undergone diverse changes. The societal transformation and its transition from customs to that of modern laws have also played a major role in determining the nature of justice in the world. Thus, we studied that justice also becomes a complicated idea due to the coexistence of customs and modern laws. The political formations and social movements across the globe have been defining the idea of justice in their own ways. This unit also explored some of the core issues related to the idea of justice and the complex process-access to justice. Significantly, the unit addresses the relationship between gender and its access to justice.

16.8 UNIT END QUESTIONS

1) Critically evaluate the debates on access to justice?

2) Disuses the relationship between gender and access to justice in the context of contemporary society.

3) Do you agree that access to justice is for privileged people or not? Justify your answer with suitable examples.

16.9 REFERENCES

- Abercrombie, Nicholas, Stephen Hill and Bryan S.Turner (2000) *The Penguin Dictionary of Sociology* ,London: Penguin Books

- Atkins, Susan and Brenda Hoggett (1984) *Women and the Law*, Oxford, Basil Blackwell
- Burstein, Paul (1991) 'Legal mobilization as a social movement tactic: the struggle for equal employment opportunity, *American Journal of Sociology,*96, pp.1201-25
- Butler, Judith (1999) *Gender Trouble: Feminism and the Subversion of Identity*, New York and Londoin: Routledge
- Colman, Andrew M. (2009) *A Dictionary of Psychology*, New Delhi: Oxford University Press
- Crompton, Rosemary and LeFeuvre , Nicky(1986) 'Paid employment and the changing system of gender relations: a cross-national comparison', *Sociology*,30,pp.427-445
- Dhillon, Pradeep (2001) "Justice", In, Victor E Taylor and Charles E.Winquist (edited) *Encyclopedia of Postmodernism* ,London and New York:Routledge,pp.197-198
- Frimpong, Kwado (2020) "Black people are still seeking social justice-why and want to do about it" https://www.brookings.edu/blog/how-we-rise/2020/11/12/black-people-are-still-seeking-racial-justice-why-and-what-to-do-about-it/
- Fudge, Judy (1989) "The effect of entrenching a bill of rights upon political discourse: feminist demands and sexual violence in Canada, *International Journal of Sociology of Law*,17, pp.453-463
- Ginn,Jay,Sara Arber, Julia Brannen, Angela Dale, Shirley Dex, Peter Elias, Peter Moss, Jan Pahl, Ceridwen Roberts and Jill Rubery(1996) "Feminist fallacies : a reply to Hakim on women's employment", *British Journal of Sociology*,47,pp.167-174
- Greene, Sara Aternberg (2016) "Race, Class and Access to Civil Justice" ,*Iowa Law Review*,Vol.101,pp.1263-1321

  https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6141&context=faculty_scholarship
- Hakkim, Catherine (1995) "Five feminist myths about women's employment", *British Journal of Sociology*,46,pp.429:55)
- Hunter, Rosemary (1988) "Women workers and federal industrial law: from Harvester to comparable worth", *Australian Journal of Labour Law*, No.1,pp.147-72
- Mackinnon, Catherine (1979) *Sexual Harassment of Working Women*, New Haven Yale University Press
- Nozick, Robert (1974) *Anarchy, State and Utopia*, Basic Books.
- Oakley, Ann (1972) *Sex, Gender and Society,* Maurice Temple Smith Limited, The University of Michigan.
- Pedriana, Nicholas (2006) "From protective to equal treatment: legal framing processes and transformation of the women's movement in the 1960s", *American Journal of Sociology*,111,pp.1718-1761

- Prettitore,Paul (2022) "Do the poor suffer disproportionately suffer from legal problems ?"

  https://www.brookings.edu/blog/future-development/2022/03/23/do-the-poor-suffer-disproportionately-from-legal-problems/
- Schneider, Elizabeth M. (1986) "The dialectics of rights and politics: perspectives from the women's movement", *New York University Law Review*,61, pp.589-652
- Showalter, Elaine (1981) "Feminist criticism in the wilderness", *Critical* Enquiry, Vol.8,No.2,pp.179-205
- Smart, Carol (1989) *Feminism and the Power of Law:* London: Routledge
- Thornton, Margaret (1991) "Feminism and the contradictions of law reform",*International Journal of Sociology of Law*,19,pp.453-474
- Villmoare, Adelaide H (1991) "Women, differences and rights as practices: an interpretative essay and a proposal", *Law and Society Review,* No.25,pp.385-410.

16.10 SUGGESTED READINGS

- Atkins, Susan and Brenda Hoggett (1984) *Women and the Law*, Oxford, Basil Blackwell
- Burstein, Paul (1991) 'Legal mobilization as a social movement tactic: the struggle for equal employment opportunity, *American Journal of Sociology,*96,pp.1201-25
- Dhillon, Pradeep (2001) "Justice", In, Victor E Taylor and Charles E.Winquist (edited) *Encyclopedia of Postmodernism* ,London and New York:Routledge,pp.197-198
- Fudge, Judy (1989) "The effect of entrenching a bill of rights upon political discourse: feminist demands and sexual violence in Canada, *International Journal of Sociology of Law*,17,pp.453-463
- Schneider, Elizabeth M(1986) "The dialectics of rights and politics: perspectives from the women's movement", *New York University Law Review*,61,pp.589-652
- Showalter, Elaine (1981) "Feminist criticism in the wilderness", *Critical* Enquiry, Vol.8,No. 2,pp.179-205
- Smart, Carol (1989) *Feminism and the Power of Law:* London: Routledge
- Thornton, Margaret (1991) "Feminism and the contradictions of law reform", *International Journal of Sociology of Law*,19,pp.453-474
- Villmoare, Adelaide H (1991) "Women, differences and rights as practices: an interpretative essay and a proposal" , *Law and Society Review,* No.25,pp.385-410.