INTRODUCTION

"The process of definition always requires some reflection and care, and is sometimes of considerable difficulty. But there is no case where the difficulty is greater, or the result more disputed than when we try to define justice".¹ Since the time of Plato, Philosophers have tried relentlessly to define justice, but despite their ingenuity no satisfactory definition of justice could emerge. The abstract, universal and all pervasive characteristics of justice make it more perplexing and intricate. On the one hand, philosophers like Plato and Aristotle treat justice as supreme virtue, the source of all others and embracing within itself the whole of morality, and for Kant and Rawls, justice is vital aspect of human existence and first virtue of society. On the other hand, philosophers like Hume, Marx and Engels disparage the concept of justice and for them it is superfluous if not entirely irrelevant. Nevertheless, the very charge of inadequacy or redundancy against justice presupposes its meaningfulness and worth, otherwise all the charges would be futile. Inadequacy is not total worthlessness nor inadequate beneath esteem.² Man's craving for justice arises only when he confronts a real or imagined instance of injustice. Hence, the origin of justice is traced to man's consciousness of injustice in society and consequently to his drive for change in the situation towards a better and desirable one. In other words, man's longing for 'what is good' and 'what ought to be' is the perennial experience that gives rise to the concern for justice. Justice, then, is not an abstract and static concept, rather it is concrete and dynamic one to be realised in human society in terms of the changing social relation of man.

The principal problem India encountered immediately after its independence was the problem of justice which needed due attention and quick redressal. The leadership

was well aware of the fact that if the historic injustice accumulated from the long past was not eliminated and if peaceful transformation of the nation into an egalitarian social order was not achieved, chaos, upsurge and massive disruption would destroy the peaceful progress which is freedom's tryst with Indian destiny. The Republican Constitution of India, adopted after a long, and onerous effort and inventiveness of the framers, spelled out the direction in which the problem of justice would be dealt with. The conception of justice in free India, broadly speaking the underlying philosophy of our constitution, had its implicit expression in the historic Objective Resolution adopted by the Constituent Assembly on January 22, 1947.

The paramount objective of our constitution is to create an equitious social order by securing to all people of India justice, social, economic and political as is expressed in the preamble of the Constitution of India. It was also made amply clear at the time of independence that the weaker sections should be salvaged and a better deal be given so as to inject equality and good conscience into the Indian way of life. Thus, adequate safeguards and special ameliorative measures for the historically disadvantaged sections of society i.e., untouchables, tribals and other backward classes, were incorporated into the Constitution. These special measures are known by various names like - compensatory discrimination, affirmative discrimination, reverse discrimination, positive discrimination, reservation system, quota system and preferential system. The great concern for the weaker sections of the community with its consequent special welfare oriented actions, that runs through the whole of country's Fundamental Law, was part of larger social goal permeating the national freedom struggle of India. This compensatory discrimination policies entailed a systematic and deliberate departure from the norms of formal equality, such as merit, evenhandedness and indifference to ascriptive characteristics, and proceeded from an awareness of the entrenched and cumulative structural character of historic inequality. It was realised that formal equality would tend to accentuate and
perpetuate inequality and injustice in a compartmental society based on structural hierarchy.

Despite the ingenuity and arduous efforts of the framers of the Constitution as well as the leadership, India's achievement in realising the broader goals of justice, and specifically in the amelioration of the conditions of the disadvantaged sections has been dismal. The failure may be attributed to two primary reasons:

(i) The very conception of justice is replete with paradoxes since it is predominantly based on liberal theory with all its inherent limitations and inadequacies. In other words, the Constitution works with a liberal view of justice.

(ii) Furthermore, this inadequate concept of justice remained unrealised because of basic and intrinsic contradictions embedded in our socio-economic structure and because of the nature of the state which was assigned a crucial role in fostering the objectives of justice.

An analysis and explanation of these reasons constitute the primary focus of this study. This work is primarily a theoretical exploration of how the liberal notion of justice with all its ideological underpinnings is reflected in the framing of the Constitution, in the adoption of broader socio-economic objectives, in the functioning of judicial and state institutions, and in the formulation and implementation of development strategy. An effort has been made to theoretically study compensatory discrimination both in the broader context of the conception of justice envisaged after independence and within the institutional parameters set by the nature of the Indian State. I have tried to provide an analytical exposition of how the very fallacious conception of justice based on liberal principles, the unsuitable political and legal system inherited from colonial past, and the developmental paradigm adopted to rectify inequitous situations, have together failed to achieve the basic objectives of justice that independent India professed so vociferously. I will confine myself mainly to those aspects which directly affect the weaker sections of the
Indian society, in particular the SCs and STs.

It is apt to mention some of the existing works relevant to this study on which I have also relied very often. Scholars like Marc Galanter, Sobhanlal Datta Gupta, Andre Beteille, Suma Chitnis, Suneila Malik, Anirudh Prasad, have done commendable job in this field. Prof. Marc Galanter's *Competing Equalities: Law and the Backward classes in India* (1984) is a much laudable study of the Indian experience with the policies of compensatory discrimination for the SCs, STs, and other backward classes. The thrust of this book is mainly on legal study which portrays the relation of courts to the compensatory policies in India. The very title of the book suggests that it primarily concentrates on the legal aspect of compensatory discrimination i.e., the role of judiciary in fulfilling the objective of preferential policies. It has dealt with legal materials of the policy in depth to preserve the detail and complexity that make them meaningful. But he does not treat compensatory discrimination as part of larger problem of justice (in a theoretical term). Nor indeed does he point out the limitation in the very conception of this policy. He gives a sketchy account of the implementational aspect of this policy and its loopholes, and does not deal with the role of the state which is the prime agent in actualising this policy. He has not attempted to trace the cause of failure in the very system itself, of which the judiciary and other implementing agencies are mere components. Anirudh Prasad’s *Reservation Policy and Practice in India* (1991) analyses the role of judiciary in reservation policy and

policy and the operational part of it with its loopholes. His arguments are more akin to Marc Galanter's work.

Sobhanlal Datta Gupta's *Justice and the Political Order in India* (1979) is a notable theoretical work in this area. It is based on a theoretical critique of liberal theories of justice in the twentieth century. This work provides an analytical exposition of how liberal democratic idea of justice has all along worked behind the framing of the Constitution and the functioning of parliamentary and judicial institutions in today's India, strengthened as it has been by the ideologies of the different political parties representing the ruling class in our society. But compensatory justice is out of the scope of his study. He has also not analysed different theories of justice that have shaped the liberal idea of justice. The nature and role of the state and its developmental paradigm, the crucial factor in realising the goals of justice, has been ignored. The implementational aspect of justice, in which the ruling class has a major role, has also not been paid attention. To get a real picture one needs an analysis of both the theoretical and operational part of it since the blemish lies both in its conception and actualisation.

Andre Beteille's *The Idea of Natural Inequality and Other Essays* (1987) is a commendable work. This is a collection of number of essays dealing with various aspects of inequality with special reference to contemporary India, but viewed in a comparative perspective. The work as a whole seeks to combine social analysis with social criticism directing the critical approach to traditional hierarchical order as well as modern systems of inequality generated by the market and state. This volume contributes to the understanding of contemporary dilemma, centering on the question of equality and hierarchy. He has also attempted a sociological critique of the equality provisions in the Constitution of India. This work is more in the spirit of a sociologist. His critique of equality provisions does not go beyond a certain point. He confines himself to the contradictions of individual and group equality, meritocratic and compensatory principles.
and has suggested a 'harmonic system' by just reconciling them conceptually which is more akin to the liberal notion of equality. He has tried to trace the paradoxes in the Constitution in conceptual level only. It seems that conceptual harmony can resolve the contradictions inherent in our society. Given the nature of socio-economic paradoxes prevalent in India, this reconcilatory or harmonic formula, which Beteille suggests, can hardly remove the structural inequality rooted in our social and economic system. Though he is aware of the causes of inequality, he does not try to strike at the root of it. He has also shown the incongruities in judicial decisions but has not attempted to find out the nature and functioning of the judiciary and the system under which it operates. He has also not taken into account the importance of the state and power configurations which is a main hindrance in realising the objective of equality and justice. The discussion of ideological dimension of the Constitutional principles of justice and equality is manifestingly ignored.

Suma Chitnis's *A Long Way to Go* (1981) and Suniela Malik's *Social Integration of Scheduled Castes* (1979) are praiseworthy. The thrust of both the works has been primarily on the implementational aspects of the preferential treatment for SCs and STs and their flaws. They have provided a critique of the very strategy by exploring the inherent defects in the approach and the erroneous functioning of the implementing agencies, for which these preferential policies have failed to ameliorate the conditions of the SCs and STs. In the course of this argument they have also suggested the modifications in policy formulation and implementation to rectify the mistakes. These works have not treated compensatory policies as part of the larger problem of justice nor have they provided any theoretical explanation of the problem. All the above-mentioned works have ignored the role of state and the dynamics of state power. So far as the problem of justice is concerned, any argument without analysing the 'explanatory centrality of the state as potent and autonomous organisational actor' will be inadequate and incomplete. The state as an
autonomous force influences both political and patterned relationship with social group and plays a very decisive role in realising the objectives enshrined in the Constitution.

The present work will deal theoretically with compensatory discrimination both in the broader context of the conception of justice envisioned after independence and within the institutional parameters set by the nature of the Indian State. The present study has been divided into five chapters. In the first chapter an attempt has been made for a conceptual exploration and analysis of the concept of justice. The emphasis has been put on the explanation as to how the concept of justice originated, analysis of different liberal theories of justice and their inadequacies, and the rise of affirmative discrimination within the liberal tradition and the purpose it wants to serve. I have tried to explain how the liberal theory has obscured the meaning of justice and rationalised several forms of injustice by defining it in an abstract and metaphysical way and by viewing justice primarily as a concept of harmony, stability, balance or reconciliation of conflicting interests. The liberal concept of justice, by ignoring the more important socio-economic dimension and giving priority to the possessive individualistic postulates, has accentuated and perpetuated gross inequality. The cause of failure has been attributed to the very idea of justice and its assigned role to bring about desired changes without any specific required structural transformation. As a result of which it has been criticised as conservative, inequitable, abstract, equilibrant and status-quoist.

The second chapter concentrates mainly on justice in the Constitution of India by studying the debates among the members of the Constituent Assembly. The concept of justice enshrined in our Constitution was the resultant product of series of debates among the framers which primarily centred round the problem of identifying the forces of injustice and its elimination through the constitutional mechanism. The analysis and examination of the Constituent Assembly debates would reveal the real intention or motive and the broader perspective and strategy of the framers with which they tried to
deal with the problem of justice. I have tried to elucidate, by studying the debates in the Constituent Assembly, how the liberal concept of justice with all its inherent limitations dominated the idea of the framers. The framers were under the mistaken assumption that professed objectives of social justice could be achieved and the lot of historically disadvantaged section bettered through the preferential treatment by bringing changes in the political sphere without any alteration of the existing inequitous socio-economic structure which breeds and perpetuates injustice. They moved from a fallacious premise that compensatory discrimination would automatically improve the condition of the deprived sections of society and remove the cumulative historic injustice. An attempt has also been made to show that this confounded liberal notion of justice acted behind the accreditation of primacy to the Fundamental Rights over the Directive Principles of State Policies, supremacy to the legal and formal aspect of equality and liberty over the socio-economic dimension, and priority to the individual over the community. This conciliatory and compromising approach had its basic contradictions which got manifested in judicial decisions and ultimately, in the final result it yielded.

The third chapter analyses the role of the Supreme Court in shaping the idea of justice more specifically of compensatory justice. An attempt has been made to study how far the Supreme Court has shown its awareness of the importance of the larger social interests and how it has responded to the issue of affirmative discrimination relevant to the weaker sections of the society. It is essential to study the role of the Supreme Court because it was entrusted with the primary responsibility of securing justice within the constitutional parameters. Moreover, the assertion of judicial supremacy over the legislature has enhanced its importance in playing a more decisive role in shaping and securing the idea of justice. This chapter also tries to trace how the liberal legalistic approach and procedural or static conception of law and justice have made the judiciary more conservative. This conservative, individualistic and legalistic attitude has found its
expression in its interpretation of the Directive Principles, right to property and compensatory discrimination which has resulted in the crisis of Indian legal system and its law. The failure of the judiciary in securing the desired objectives of justice has been attributed to the paradoxes inherent in the very constitutional principles and the contradictions intrinsic in the system.

The fourth chapter provides an elaborate analysis of the compensatory policies which has got three major components: reservations in education, government employment and political participation, and other welfare measures adopted by the state for the weaker sections i.e., SCs and STs and other backward classes of society with a view to removing their social disabilities and to uplift their socio-economic, educational and political status. I have tried to show that contrary to the declared objective of establishing an egalitarian social order by rectifying the exploitative and inequitous social system, the achievement in social justice has been abysmally low. The benefits of the preferential policies have not percolated down to the lower rung; the implementing agencies have taken undue advantage of these measures; the better-off section among the SCs and STs has taken the major benefits of these policies and developed a vested interest having little concern for their fellow-beings; recently the dispossessed SCs and STs have been subjected to ruthless atrocities by the upper castes which go unnoticed and unredeemed. Furthermore, the reservation policy has given rise to unintended consequences. It has been found that the root cause of failure in fulfilling goals of social justice lies in the very faulty approach and the basic weakness of the socio-economic structure which adversely affect the entire scheme of the welfare and advancement of the SCs and STs.

The fifth chapter elucidates the nature and dynamics of the Indian state. But the study of state in isolation will not reveal its real character. Hence the societal base that determines class formation and the state power in a complex social relation, the nature and functioning of the dominant class coalition, the autonomous role of the state, the
state-designed developmental paradigm, and the legitimisation process through which the state makes its power acceptable to the wider section, have all been taken into account. The role of the state in realising the objectives of social justice has been vital because of the importance attached and the tasks assigned to it in societal reconstruction involving nation building, political and economic development, and social change. An effort has been made to examine the autonomous character of the state and the resultant outcome of its development strategy. It is observed that the class content of the dominant coalition has performed a significant function in influencing the structure of dominance and the strategy of governance and development. State directed development strategy has increasingly come to reflect interests of the dominant classes. The state with its development strategy has identifiably emerged as a bourgeois state and the retarded capitalism with a retrograde structure has given rise to severe malaise in the system. The failure of the trickle down theory has exposed the erroneous assumption of the leadership and their growth oriented strategy. The progress in the direction of establishing an equitious social order has been abysmally low. The concept of social justice has been reduced to a rhetorical ploy used very frequently by the political leaders for legitimisation process. The hiatus between the rich and poor has been widened; the inequality and injustice is accentuated and perpetuated by the entrenched and vested interests. This partnership in injustice in the name of justice has acquired the demeanour of justice. This failure in realising the proclaimed objectives has been ascribed to the basic paradoxes embedded in the socio-economic structure and the nature of the Indian state.

This theoretical exercise is mainly based on analysis of primary and secondary sources and deductions from them. In this analytical endeavour, care has been taken to study the problems as objectively and impartially as possible but within the limits of the researcher. The claim of absolute detachment or impartiality will be rather a pretense on my part. "One can make no profession of impartiality beyond the fidelity to sources which
is the obligation of every serious scholar, or beyond that vowal of conscious preferences which should be expected of every honest man".¹ I believe in what A.E. Taylor once told "we have no choice whether we shall have a philosophy or not, but only the choice whether we shall form our theories consciously and in accord with some intelligible principle, or unconsciously and at random".² This exercise does not claim much of originality or scholarship or creativity but its claim is primarily one of meaningful relevance to the present situation of political theory.

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