CHAPTER II

THE CONSTITUENT ASSEMBLY AND ITS CONCEPTION OF JUSTICE

The cardinal problem India confronted just after its independence was the problem of justice which warranted due consideration and immediate remedy. The problem of justice, the framers of our Constitution faced, was of identifying and striking at the roots of social, economic and political forces that gave rise to the present injustice. The basic objective of the leadership was to remove the historic injustice accumulated from the long past and to create a new equitious social order based on justice. This founding objective has paramount position in our society because the struggle for freedom has not only been political but economic and social also. India could ill-afford to ignore the teeming millions who, for centuries, had been denied the equal opportunity and effective right for their self realisation. Because of the socio-economic factors, the downtrodden and the depressed who constitute quite a large section of our society, had been deprived of a share in the management of their affairs and an effective role in shaping their lives. The exclusive pervasiveness of appalling economic deprivation and social suppression made this keynote the most profound ideology of the Indian Constitution. The great concern and the welfare oriented actions for the weaker section of the community, that runs through the warp and woof of the country's Fundamental Law was part of larger social objective permeating the national freedom movement of India. During the period of its independence the environment was also very conducive since, almost everywhere, the modern state had already acquired for itself an interventionist role of social engineering i.e., welfarist role. Everywhere the cry for social justice was very loud and uproarious and the leadership was not in a position to ignore and neglect it since the very basis of state was at stake. India, a newly emerged nation, could scarcely afford to ignore the depressing socio-economic reality of the then period which needed immediate attention. It took some
special ameliorative measures for the historically disadvantaged groups of the population which was rather a historic compulsion. This special measure is known by various names - compensatory discrimination or positive discrimination or reverse discrimination, affirmative action, reservation system, quota-system.

The framers were well aware of the fact that the depressed sections have suffered social injustice too long and been separated by the poverty curtain too strong that if peaceful transformation of the nation into an egalitarian polity were not achieved, chaos, upsurge and massive disruption would destroy the peaceful progress which is freedom's tryst with Indian destiny. Protective discrimination for the SCs and STs is given high priority since whenever one thinks of the handicapped culture of Indian social life, the SCs and STs figure foremost. The Constitution of India is not only the basic norm of the country but also acts as an instrument of peaceful political and socio-economic revolution in order to balance the contradictory interests in Indian society securing the satisfaction of the maximum of wants with minimum conflict. In order to maintain societal equilibrium the SCs and STs were provided with special safeguards which also serves as an effective instrument of social engineering.

This chapter examines mainly the concept of justice enshrined in the Constitution of India by concentrating on the debates among the members of the Constituent Assembly. The concept of justice of our Constitution is the resultant product of series of debates among the framers which primarily centered round the problem of identifying and eliminating the forces of injustice through the constitutional device. The analysis and examination of the Constituent Assembly debates would reveal the real intention or motive and the broader strategy of the framers with which they tried to tackle the problem of justice. The present chapter is divided into four parts. The first part deals with the basic objectives behind the framing of the Constitution which influenced and shaped the idea of justice of the Indian Constitution in the subsequent phases of its making. The second part
deals with the issues relating to compensatory discrimination. It discusses the broad motive of the framers and also the socio-economic and the historic compulsions behind the adoption of this compensatory policy. It also takes into consideration the minorities' problem and the associated problems of preferential treatment. The third part tries to analyse the broad conception of justice, which has its manifestation in our Constitution, through the study of debates among the framers on this issue. The emphasis has been on the debates relating to the fundamental rights and the Directive Principles of State Policy. The fourth part attempts to evaluate the conception of justice, and has also tried to find out whether the liberal notion of justice adopted by the framers is adequate and rational enough to solve the problems of justice the country faced at that time.

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THE BASIC OBJECTIVES BEHIND THE CONSTITUTION

The framers had a particular conception of justice in free India. This conception of free India and its destiny, broadly speaking the underlying philosophy of our Constitution, got reflected in the words of the historic Objective Resolution tabled by Pandit Nehru and unanimously adopted by the Constituent Assembly on January 22, 1947; and which inspired the shaping of the Constitution through all its subsequent stages and ultimately of the idea of justice in the republican Constitution of India. The relevant clause reads:

"Wherein all power and authority of the sovereign Independent India, its constituent parts and organs of Governments are derived from the people;

and

wherein shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law, freedom of thought expression, belief, faith, worship, vocation, association and action, subject to law and public morality;

and
Wherein adequate safeguards shall be provided for minorities, backward and tribal areas, depressed and other backward classes: 1

The Objective Resolution, the underlying philosophy our Constitution, reflects the social and economic justice as well political justice. The socio-economic justice manifested in this historic resolution is multi-dimensional since it symbolises more than one aspect. The essence of socio-economic justice had positive, material and substantive content i.e., rendering benefits to the masses in the form of services provided by the state.

This assumption was clearly mentioned by Nehru:

"The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity...as long as there are tears and suffering, so long our work will not be over... We have to build the noble mansion of free India where all her children may dwell." 2

Dr. Radhakrishnan reiterated this assertion,

"A free India will be judged by the way in which it will serve the interest of the common man in the matter of food, clothing, shelter and the social services." 3

This socio-economic justice had both negative and positive functions. This meant the removal of historic injustice and bridging up the gap between different sections of society and giving adequate right and opportunity to the poor to have a decent human existence so that they can have their fullest development.

The socio-economic justice was held in higher esteem than political justice, at least seemingly, and was accorded higher priority. It was evaluated in terms of substantive benefits to the poor, destitute, hungry and wretched. This assumption was very obvious in Nehru's statement:

"There will be no complete freedom all long as there is starvation, hunger, lack of clothing, lack of necessaries of life and lack of opportunity of growth for every

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1. See CAD, Vol.I.
3. Ibid.:8.
single human being, man, woman and child in the country. We aim at that."^1

It also made the ruling authority responsible for the promotion of the cause of socio-economic justice for the common mass hence making the stability and sustenance of ruling authority dependent on its success in furthering this cause. On the other words it means that the achievement/success in this sphere would only provide rationale and legitimacy to the ruling authority. This apprehension was quite discernible in K.M. Munshi's words:

"The next danger arises from the sagging economic structure of the country... Independence will be weighed in the scales of essentials of life. If they are not forthcoming, the political structure is sure to collapse."^2

The socio-economic aspect of justice was apparently given more weightage than political aspect. This was asserted by Nehru when moving the Resolution regarding Aims and Objects,

"We have given the content of democracy in this Resolution and not only the content of democracy, if I may so, of economic democracy in this Resolution.... Well, I stand for socialism and hope that India will stand for socialism and that India will go towards the Constitution of a socialist state, and I do believe that the whole world will have to go that way... We have laid down, not theoretical words and formulae, but rather the content of thing we desire."^3

It seems that the framers were well aware of the fact that political freedom must not be dissociated from socio-economic freedom because political freedom without the latter is a sheer myth or rhetoric or a form without content. For them the problem of justice was the problem of determining the extent of socio-economic development and political participation to be allowed and also the priority and importance attached to socio-economic or political mobility.

^1 CAD, Vol.IV:739.
THE CONSTITUENT ASSEMBLY AND COMPENSATORY DISCRIMINATION

After a long debate the Constituent Assembly prepared the Constitution of Independent India and on 26th November 1949 the Constitution received the signature of the President of the Assembly and was declared as passed. It incorporated some special provisions for the SCs and STs for their socio-economic and political upliftment. These constitutional provisions\(^1\) are as follows:

Article 15(4): Special provisions for the advancement of any socially and educationally backward classes of citizens, i.e., for the SCs and STs.

Article 16(4): Reservation of posts in Government employment - both at recruitment and promotion stages.

Article 17: Abolition of Untouchability.


Article 29: Protection of Interests of Minorities.

Article 38: State to secure a social order for the promotion of welfare of the people.

Article 46: Promotion of Educational and Economic interests of the SCs, STs and other weaker sections.

Article 330: Reservation of seats in the House of People (Lok Sabha) for the SCs and STs.

Article 332: Reservation of seats in Legislative Assembly of State for the SCs and STs.

Article 335: Claims of the SCs and STs to services and posts.

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1. For detail, see *The Constitution of India.*
Article 338 : Appointment of special officer for the SCs and STs by the President of India.

Article 340 : Appointment of Special Commission for the SCs and STs by the President of India.

Article 341 : Specifying of any particular caste, race or tribe as SC by the President.

Article 342 : Specifying of any particular tribe or tribal community as ST by the President.

The preferential treatment given to these backward classes i.e., SCs and STs, can broadly be divided into three categories:

(A) RESERVATIONS that allocate or facilitate access to valued positions or resources.

The most important types of the reserved field are:

Reserved seats in Lok Sabha, Legislative Assemblies and Local Administrative Bodies;

Reservations of posts in Government employment - both at recruitment and promotion stages;

Reservation of places in educational institutions - especially the coveted higher technological, medical and other professional colleges; and to some extent the preferential treatment is given in distribution of land allotments, housing and other scarce resources including the essential commodities under the Public Distribution System etc.

(B) SCHEMES involving expenditure or provision of services i.e., scholarship, freeships, grants, subsidies, loans at differential rate of interests, health care, legal aid etc., to a defined group of beneficiaries beyond comparable expenditure for others.

(C) SPECIAL PROTECTION schemes are in operations to protect the Backward Castes from being exploited or victimised e.g., efforts to save the victims from debt and
bondage, legislations regarding money lending, providing debt relief, restricting land transfers and attempt to protect the interest of SC and STs.

**Socio-economic Compulsions**

The Founding Fathers of our Constitution were well aware of the peculiar problems of the Indian society. They willingly wished to safeguard against dangerous effect of inherited weakness which they cherished in our society and projected to give special favours to redress the wrong done in the past by creating social disabilities. There was also a desire to protect socially depressed people along with the maintenance of overall social goods. There was a controversy regarding the qualifying phrase *backward* and the framers had some apprehensions. And finally it was decided that preferential treatment should confine only to deserving classes. This was the reason why T.A. Ramlingam Chattiar’s suggestions to delete the word *backward* from Clause (3) of Article 16 was negated. Ambedkar noted that "unless, you use such qualifying phrase as *backward* the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain."¹ K.M. Munshi in a clarificatory note said that the benefits of reservation was to go really to backward class of the people and which was argued to have two purposes:

"In the Fundamental Right in the first clause we want to achieve the highest efficiency in the services of the state... At the same time, in view of the conditions in our country prevailing in several provinces, we want to see that backward classes, classes who are really backward should be given scope in the state services; ... the backward signifies that class of people - doesn’t matters whether you call them untouchables or touchables belonging to this community or that - a class of people who are so backward that special protection is required (for them) in the services."²

² Ibid., 697.
The Drafting Committee reconciled opposing points of view and finally produced a workable proposition which was accepted by all.

It is an undeniable fact of history that the social life in this country for centuries did shut out the opportunities of many sections of the people from a reasonable level of education and employment. There was a large socially disadvantaged population, traditionally engaged in professions considered as appropriate to classes far down in the social hierarchy, who were prevented from intermingling socially with other higher sections of population. As a result these SC and ST, the most depressed section, were completely alienated from the social life. The Republican Constitution of India ensured equality to all prohibiting the discrimination on the grounds of religion, race, caste, sex, or place of birth. The equality conceived here was in its dynamic sense which recognised glaring social and economic inequalities and called for conscious and effective efforts of the state to achieve equality. The objective of affirmative action in favour of the depressed section is to bring about equality under unequal circumstances. Prof. K.T. Shah had aptly argued in the Constituent Assembly,

"In regard to SC and backward tribe, it is an open secret that they have been neglected in the past; and their rights and claims to enjoy and have the capacity to enjoy as equal citizens happens to be denied to them because of their backwardness... so that any special discrimination in favour of them may not be regarded as violating the basic principles of equality for all classes of citizens in the country. They need and must be given for sometime to come at any rate, special treatment in regard to education, in regard to opportunity for employment and in many other cases where their present inequality, their present backwardness is only a hindrance to the rapid development of the country... I only want to draw your attention to the fact there are classes of citizens who may need, through no fault of theirs, some special treatment if equality is not to be equality of name only or on papers only, but equality of fact." 1

The concept of equality is a dynamic concept and it has never been static and has been changing and acquiring new meaning. Equality means providing adequate opportunities to all so that everyone can fulfill himself. But formal equality i.e., equal

treatment to all in equal situation, cannot accomplish its desired goal since some are lagging far behind others. It is accomplished by giving favourable treatment to those who are governed by unfavourable conditions. Hence the efforts should be to transform the downtrodden lifestyle from the primitive aloofist mould to one that is being ushered in for all the citizens of the country through the support of the constitutional provision. Two considerations are also basic to any scheme of social justice and their neglect will brutalize any human society:

"in a civilized society (i) reasonable constraints are placed on the ambitions and acquisitiveness of its more aggressive members and (ii) special safeguards provided to its weaker and more vulnerable sections."

Prof N.G.Ranga had rightly pointed out,

"It is a fact, Sir, it is a miserable fact that millions and millions of our countrymen are not able to take advantage of the various liberties, that we have laid down here, the various privileges that we say, are being thrown upon for everyone to enjoy. They are not educated. Economically they are oppressed and suppressed also, and socially they are backward and downtrodden. For all these people so many things have to be done, may be for sometime to come, before they come to enjoy such rights. They need props. They need a ladder by which they can reach on to the stage when it will be possible for them to come to appreciate the value of the rights that we are placing before them and enjoy them."

Our Constitution makers, in order to create a social order based on justice, had applied the principle of equality in a more dynamic and progressive sense. Accordingly a programme of protective discrimination comprising a wide array of preferential schemes were devised, which is a departure from formal and static equality, for the purpose of

favouring historically disadvantaged groups of the population. Arguing for provision of equal opportunity to those who are lagging far behind the common mass and who really need special help, Nehru pointed out the need of special treatment to such unprivileged class for humanitarian reasons. He was of the opinion that the more basic and fundamental way was to advance them rapidly in the economic and educational spheres which might enable them to stand on their feet. Nehru justified and rationalised this compensatory discrimination at that particular juncture of time and proclaimed:

"In the present context of affairs in regard to these unfortunate countrymen of ours who have not had these opportunities in the past, special attempts should be made. Of course, in the educational and economic field and even in political field to that they have a proper place till they find their own legs to stand upon without the external aid."

And again there cannot be any real progress of the country when a sizeable section of mass lagging far behind. Real progress of a country lies in all-round development of all sections of the community. Realising the importance of this aspect K.T. Shah emphasised:

"Any section of the community which is backward must necessarily impede the progress of the rest; and it is only in the interest of the community itself, therefore, that it is but right and proper we should provide facilities so that they may be brought up-to-date so to say and the uniform progress of all be forwarded."

Reverse discrimination is preferential treatment of individuals who had previously been discriminated against because of their race, origin, sex, age, religion or handicap (and caste in Indian context) to the exclusion of other individuals or groups to rectify an inherent inequality and to incorporate these socially and economically disadvantaged

2. Ibid:401.
groups in mainstream. Broadly speaking it is an attempt by the state to bring the disadvantaged and depressed sections of society more or less on a par with the rest and rejects the Darwinian ideology i.e., *Might is right* and curbs the interplay of free market forces. It is to remedy the historic wrong and injustice that forced the millions to remain subdued and to have a sub-human existence. Precisely for this reason, the framers of our Constitution had incorporated the special constitutional provision for the SCs and STs.

It is universally recognised that in the Indian society and especially among the Hindus that constitute the majority, social inequality (and also concomitant economic disparity) is a product of caste system. The Indian society has for centuries been horizontally split and stratified on the basis of caste. Our society is not socially homogeneous rather heterogeneous with multitude of castes. The Indian caste system is variously described as *closed, rigid, system of inherent inequality* etc. by different sociologists. Structure of inequality is built upon the rigid caste structure as a result of *summation of status* that a caste being high or low on one scale of ranking, for example economic, would also be higher or low on political, social and ritual scales of status system. Caste system has bred a structure of inequality which keeps producing itself and is perpetuated with some adjustments. Like any other system of inequality, it has also provided a structure of differential privileges - cultural, social, economic and political - on an ascribed system of social stratification. Certain castes have historically been ascribed the lowest place and have remained backward - socially, economically, educationally, culturally and otherwise. Caste system is one of the greatest drawbacks that divides the society according to rank and status. No matter how it originated, it has created various gradations in our society which has resulted in inequality and discrimination. The caste

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system and its social gradations/hierarchy have in turn, given rise to economic and educational disparities.

The social hierarchy of the Indian society functioning through several centuries imposed a number of burdens on the lower classes i.e., the Shudras. The untouchables those remain outside the four-fold classification are condemned to live on the fringe of fringe, suffer from numerous stigmas, social and economic, which are ascribed to birth itself.\(^1\) As a result certain classes advanced socially, economically and also educationally at a direct and demonstrable cost of the lower classes who, on the other hand, went on becoming more and more backward. The untouchables are the worst victim of the hierarchical caste order based on the principle of purity and pollution.

But backwardness was neither their own creation nor their choice rather they were forced into it. Trapped in the cul-de-sac of casteism, socially exploited and deprived of equal opportunity and encouragement, these backward classes of citizens, who are backward masses even today have suffered through centuries socially, economically and politically without a fair or reasonable and equitable share in the economy and administration of the Government. These imbalances and inherited inequality of opportunities have resulted in and are responsible for the existence of present injustice - social, economic and political. Although in our social history caste has been playing an extremely important and decisive role in our social hierarchy. Some castes are invested with respectability and privileges whereas other suffer from contempt and disabilities. Thus the status-high or low - of an individual in a society is determined by his caste.

The rigid rituality, hierarchical grading, conformist discipline, exclusivity, the concept of purity and pollution and the hereditary and petrified social stratification of

\(^1\) The disabilities of the *Shudras* are grave and onerous; and they are debarred from the most of the ordinary graces of life (See Andre Beteille, 1987:82). For two thousand years *Untouchables* and *Tribals* have been treated as if they were less than human beings and this treatment was justified by the argument that they were inherently inferior.
Caste system are certain evils. A large number of writers belonging to different, even conflicting schools of thought, including Hegel, Marx and Weber, have regarded caste as a major cause of India's socio-economic stagnation and of the apparent absence of political will and resilience on the part of the masses. The crystallized prejudiced caste-structure and caste-like other social formations, (by creating rigid and impassable social barriers among the people in addition to class divisions), make the mobilization of the masses for accelerated economic development much more difficult than in societies which are relatively free from such rigid hereditary social stratification. A. Gunnar Myrdal has rightly observed that the caste system tends to make the existing inequalities rigid and unyielding. The most tangible impact of caste on poverty (or economic deprivation) is felt through the appropriation and exploitation by the higher castes of a disproportionately large share of the national income by virtue of their social dominance. It is also true that ascriptive rather than achievement criteria on which the caste system is grounded inevitably causes economic inequalities that cannot be explained by purely economic factor, as Bert Hoselitz pointed out. By restricting the lower caste to the low-paid menial jobs through the traditional system of hereditary social stratification, economic inequalities are aggravated as well as perpetuated by the socially dominant upper castes. Traditionally disadvantaged and deprived sections of society are so weak that they have not been able to take equal advantage of equal opportunity compared to other higher castes.

Confronting such a glaring inequality and injustice the state in India has been


entrusted by the Constitution to earmark for the disadvantaged and depressed a certain percentage of seats in the legislative bodies at all levels as well as in country's public services. The framers of the Constitution were well aware of the depressing scenario of Indian society and also realised the gravity of the problem. They wanted to solve the problem through the constitutional provision. After the setting up of Advisory Committee, in the Constituent Assembly on January 29, 1947. Govind Ballav Pant laid emphasis that

"We find that in our country we have to take particular case of the Depressed Classes, the SC and the Backward Caste. We must do all that we can do to bring them upto the general level and it is a real necessity as much in our society as in theirs that the gap should be bridged. The strength of the chain is measured by the weakest link of it, and so until every link is fully revitalized, we will not have a healthy body politic."1

However, despite all conflicting opinions, the Constituent Assembly in its decision, taken on May 25, 1949, retained reservation of seats in favour of the SCs and STs. Nehru described this crucial decision taken in Constituent Assembly as "historic turn in our destiny".2 Realising the importance of this policy K.T. Shah declared in the Constituent Assembly:

"this discrimination is in favour of particular class of our society, which owing to our unfortunate legacy of the past, suffer from disabilities or handicaps. Those, I think, may require special treatment and if they require it, they should be permitted special facilities for sometime so that real equality of citizens be established."3

The formulation of this reservation policy was not that easy as it seems today. There was a lot of controversies regarding the problem of minorities and each minority started claiming some or the other kind of preferential treatment which also threatened the very unity and integrity of the country. Despite all controversies the problem was handled in

Constituent Assembly with mutual confidence and compromise in view of nation building which was the primary goal at that time.

At the time of framing of the Constitution minorities claiming preferential treatment differed in their demands. The issues confronting with the Advisory Committee are broadly related to:

(i) Representation of Minorities in Legislatures; Joint versus separate Electorate and Weightage;

(ii) Reservation of seats for Minorities in Cabinets;

(iii) Reservation for Minorities in the Public Services; and

(iv) Administration machinery to ensure protection of Minority Rights.

The approach to the problem of Minorities was that:

"the state should be so run that they (minorities) should stop feeling oppressed by the mere fact that they are minority and that, on the contrary, they should feel that they have as honourable a part to play in the national life as any section of the community. In particular we think it is a fundamental duty of the state to take special steps to bring up these minorities which are backward to the level of the general community."

On the other hand minorities were also cooperative and accommodative in their approach. The minorities themselves felt that in their own interest, no less than in the interest of the country as a whole, the statutory reservation of seats for religious minorities should be abolished. This realisation led the abolition of the system of separate electorate introduced during the British administration by the Communal Award of August 17, 1932 and subsequent British Policy. It was widely felt that the system of separate electorate had in past

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2. Ibid.
"sharpened communal differences to a dangerous extent and had proved one of the main stumbling blocks to the development of healthy national life."[1]

Dr. Ambedkar, one of the greatest champions of the cause of depressed class, had already become accommodative/cooperative by the time of inauguration of C.A. He was no longer the radical dissenting voice. And his voice had already acquired nationalistic flavour. In C.A. he noted that:

"...given time and circumstances nothing in the world will prevent this country from becoming one. With all our caste and creeds, I have not the slightest hesitation that we shall in some form be a united people."[2]

He too felt that the preferential treatment in favour of Depressed class was a means to the greater end of nation-building since this would remove the apathy, mental agony and sense of alienation and deprivation which had been accumulated (and deep rooted) in their psyche since long. Strongly refuting the charge that SCs were not a minority, Ambedkar asserted that the SCs were more than a minority as

"their social, economic and educational condition was so much worse than that of citizens and other minorities that in addition to protection, the SCs would require social safeguards."

He had submitted a list of safeguards for the SCs and had suggested their implementation for twenty five years, when the position might be reviewed to have a fresh look.[3] Dr. Ambedkar complied with it with a note that if it was considered necessary to extend the period at the end of ten years

"it would not be beyond their capacity or their intelligence to invent new ways of getting the protection which they were promised here."[4]

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1. Ibid.:243.
2. CAD, Vol.1:100.
Ambedkar's reconciliatory attitude was very clear from his memorandum submitted to the Advisory Committee. He said in the Constituent Assembly,

"So far as ultimate goal is concerned... our difficulty is how to make heterogeneous mass that we have today take a decision in common and march on the way which lead us to unity."

And

"Let us prove by our conduct that we have not only the power but also the wisdom to carry with us all sections of the country which is bound to lead us to unity."

After long debate and discussion, the Advisory Committee passed the resolution with voice vote:

"That the system of reservation for minorities other than SCs and STs in legislature be abolished."

The reservation of seats in Lok Sabha or in Legislative Assemblies for the SCs and STs was not accepted on any communal ground but due to the unique position they occupy in the Indian society. They were conceded the benefits of reservation because their standard of education and material being were, even on Indian standard, extremely low and they suffered from grievous social disabilities.

But the framers were not oblivious of the impending danger of reservation. Compensatory justice is like a medicine which is to cure or remove the ailment of body politic and it is meant for a temporary period. Whenever the medicine is taken as a diet, and means is considered as an end world is turned topsy-turvy and the subject becomes master. The framers were also not ignorant of it. In exposing the danger of reservation Nehru commented that:

2. Ibid.:101.
"There is a great danger, whether you deal with an individual, group or community, of giving certain props to that community which gives it a false sense of strength which doesn't belong to it. The props are external to it, and when they are removed, it suddenly make the community weak. A nation ultimately ought to stand on its own feet. So long as it relies on some external prop, it is not strong. It is weak. So these external props, as I might call them that is reservation of seats and the rest - may possibly be helpful occasionally in the case of backward groups, but they produce a false sense of the political relation, a false sense of strength and ultimately therefore, are not so nearly as important as real educational and economic advance which gives them inner strength to face any difficulty or any opponent."

Elucidating the role of special safeguards under a political democracy Nehru said:

"Reservation instead of helping the party to be safeguarded or aided is likely actually to turn against it... and isolate it from the main current... at the cost of forfeiting that inner sympathy and fellow-feeling with the majority... It is not good from the point of view of the majority either." 2

And therefore, Nehru suggested:

"It is only way to proceed about it from the point of view of the minority or majority is to remove every barrier which separates them in the political domain so that they may develop... and work together. I think that doing away with this reservation business is not only a good thing in itself, also good for all concerned more specifically for the minorities but psychologically too it is a very good move for the nation and the world." 3

Historic Compulsions

Besides the willingness of the framers there was historical compulsion behind this conception of justice and specifically this policy of compensatory discrimination. During 1940s in India, the consciousness and the assertiveness of the depressed class under the championship of Dr. B.R. Ambedkar had reached its peak and the clamour for justice i.e., due share of socio-economic development was very high and loud. It had acquired such a bigger dimension that it could have hardly been reversed. The then socio-historical developments had made it more importunate and inevitable. It also started menacing the

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3. Ibid.
very process of nation-building, which was the primary goal of India at that time. Equally there was rising consciousness among the intelligentsia about the lamentable conditions of the dalits for whom it was neither inevitable nor desirable nor immutable. Under such circumstances the framers had no way out but to contrive certain ways to rectify the historic injustice. Hence special provisions for the down-trodden, destitute and dalits.

The consciousness regarding social justice became very glaring only during British rule. But the British Government was almost silent and non-interfering rather upholding and supporting the prevailing caste order marked by graded inequality. The disposition of the legal system was articulated to this system of hierarchical inequality in a more subtle (or passive) way. This policy of aloofness or neutrality was a policy of appeasement. It did not want to antagonise the members of the higher castes which were dominant at that time and also the depressed classes were not conscious enough to assert their right and to pose a threat to its rule. With the support of British Government the members of higher caste could grab most of the new opportunities in education and government services. Paradoxically this aloof neutrality or non-interference of the British Government combined with its secular legal system liberated lower caste from official imposition of disabilities to an extent and enable a fortunate fraction to raise themselves while it provided rich dividends to the rising aspiration of the higher caste.  

The dissemination of western education, liberal value system i.e., liberty, equality and justice as well as the scathing criticism of the Christian missionaries combinedly questioned many aspects of Indian life and particularly the inbuilt structured hierarchical social system. Both the religious reformers and educated groups responded to the humanist and rationalist critique of obscurantist and out-dated Indian institutions and dedicated themselves to reconstruct and purify social institution with new humanist ideas

like liberty, equality and justice. And to a greater extent they were successful in removing the impurities (if not in toto). They might not be successful in terms of concrete achievement but their success lies in creating awareness and in setting things in an irreversible path of progressive change.

The Morley-Minto Reforms of 1909 and the provision of separate electorate for Muslims marked the watershed. This had an indelible impact on the rising concern about the untouchables which was augmented by the first appreciation of their political significance. It encouraged the social movement for the formation of caste association with an objective to demonstrate backwardness of the caste and press for preferential treatment. For the first time a major question that struck and stirred many was: Whether the vast number of untouchables were truly Hindu and to be counted as such or not?\(^1\) Untouchability thus acquired prominence on the Indian political stage. As a result the Indian National Congress had to renounce its long-standing policy of aloofness and excluding social reform from its programme. The formation of Justice Party, the organ of the non-Brahmin party in Bombay, and the provision of a few nominated seats for the depressed classes in the Government of India Act of 1919 catalysed the process of assertiveness of the Untouchables.

This kind of divisive and appeasement policy inspired Dr. Ambedkar to demand reserved seats in the Legislative Assemblies, special educational concessions and recruitment of government jobs for the untouchables before the Simon Commission. The communalism started showing its ugly head in every sphere and this controversy also figured prominently in different sessions of the Round Table Conferences in England during 1929-32. The Minorities Sub-Committee of the Round Table Conference to resolve communal issue by the Indian delegates led the British Prime Minister, Ramsay

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Macdonald in 1932 to declare the famous *Communal Award*. The *Communal Award* was appreciated by B.R. Ambedkar as a helpful measure for the untouchables to improve their status by fair representation in legislature. Mahatma Gandhi very strongly opposed this and announced fast unto death in Yavvada Jail at Poona to resolve this issue. This gave way to an agreement with Ambedkar in the form of *Poona Pact*, which caused relinquishing of separate electorate for the untouchables. Consequently the idea of separate electorate was abandoned and the number of seats in the legislature for the untouchables and the depressed classes was enhanced.

This Pact formed the basis of representation of the depressed class in the Government of India Act, 1935 but the pervasive and divisive communal consciousness and its politics was easily discernible from this Act. The prevailing atmosphere of 1940s culminated in communal pressure demanding more and more concessions for the respective communities. The communal orientation of British policy led to extreme distrust between different communities and specifically between Hindu and Muslim. The communal fervour of the then period brought about the partition of the country and despite the patriotism and accommodative Gandhian spirit it could neither be averted nor availed. But this was not end of communal problem; it remained of course in a different form. The accommodation of the minorities and depressed class by satisfying their claims and aspiration still remained as a herculean task.

Thus by the end of 1940s the preferential treatment of certain classes of Indian people through the policy of reservation had become a hard reality and the nation and its politico-constitutional life was not in a position to divest the beneficiaries of reservation policy. The only alternative left at the time of framing of the Constitution was to take recourse to compromising and balancing approach with ultimate goal of assimilation or integration of all classes of people into the mainstream of national life. When independence came i.e., in 1947, caste was in very bad shape. The misery and hardship
inflicted on the lowest caste inspired humanitarian revulsion. It was widely accepted that efforts should be taken to ameliorate the lot of the destitute and to remove past inequalities. The tone of all class was compromising and reconcilatory and minorites too responded favourably and shared the national feeling.

All that has been elucidated earlier is a part of the theme. This part does not fully reveal real intent and motive of the framers. The policy of compensatory discrimination cannot be analysed in isolation, by separating it from the broader conception of justice visualised by the framers since it is a part and parcel of the problem of justice in a wider sense. The real motive can be surfaced only when the broader idea of justice envisioned by them is analysed with all its interconnections and intricacies.

III

THE CONSTITUENT ASSEMBLY AND THE CONCEPT OF JUSTICE

The Constitution of Repulican India was cautiously and deliberately kept free from any clear-cut and explicit ideological commitment. The preamble to the Constitution that mentioned the aims and objectives of future India was formulated in the light of the spirit of the Objective Resolution. But in the absence of clearcut ideological framework the preamble remained as a pious assurance or a mere palliative. Apart from that the preamble does not have any mandatory effect hence it does not carry much weight. As a result there arises serious controversy regarding the formulation and implementation of the actual provisions of the Constitution dealing with the problem of justice. This riddle was well apprehended by B.R. Ambedkar:

"If this resolution has a reality behind it and a sincerity... I should have expected some provision whereby it would have been possible for the state to make economic, social and political justice a reality and I should have, from that point of view, expected the resolution to state in most explicit terms that in order that there may be social and economic justice in the country. ...I do not understand how it
could be possible for any future Government which believes in doing justice socially, economically, politically unless its economy is a socialistic economy.1

Because of this the creation of new social orders in free India remained as an idea only; and the essential and basic human problem that beset the country since long remained unresolved. Because of their hesitant and half-hearted approach the framers could not eliminate the hindrances on the way leading to future socio-economic justice rather left it on the half-way and their dream of socio-economic democracy remained unrealised.

For the architects of the Constitution the major problem of justice was to bring an adjustment between the two concepts of liberty i.e., positive and negative.2 The dispute regarding the reconciliation between these two concepts of liberty had a great bearing on the substantive aspect of justice. For them the solution of the problem of justice was synonymous with effecting an adjustment between two concepts of liberty. This problem of balancing these two concepts loomed large over the framers which got reflected in Rajendra Prasad's speech in Constituent Assembly:

"One of the greatest tasks which we have in hand is to complete the Constitution under which not only will freedom and liberty be assured to each and all but which will enable us to achieve and attain and enjoy its fulfillment and its fruits... our ideal is to have a Constitution that will enable the people's will to be expressed and enforced and that will not only secure liberty to the individual but also reconcile and make that liberty subservient to the common good."3

This controversy had such a far reaching implication that it not only created a sharp division between two groups in the Constituent Assembly, it also influenced the conception of state i.e., whether a positive interventionist state or negative state, and affected the substantive aspect of justice and also led to the conflict with regard to

1. CAD, Vol.1:100.
incorporation of the Fundamental Right and Directive Principles of State Policy in the Constitution of India.

The members in the Constituent Assembly were divided in two groups on the issue of reconciliation of the two concepts of liberty. One faction was represented by the people like K.M. Munshi, Thakurdas Bhargava, A.K. Ayyar who attached more importance on fundamental Right to be secured through the Constitution, with the help of judiciary, against state intervention. Being apprehensive of an overwhelming state they reiterated their faith on negative liberty and reposed their faith on judiciary as the guarantor of individual right. Because of their affinity with liberal individualistic ethos they pleaded for limited state and put Fundamental Right with judicial review against possible encroachment of state in the sphere of individual liberty and right. Due to their legalistic and individualistic approach the substantive aspect of socio-economic justice become the worst casualty and it was made subservient to the procedural, formal and juridical concept of justice. This is very clear in his illustration,

"If the Fundamental Right and duties have to be legally enforceable, adequate and speedy remedies in the nature of judicial review have to be provided... the Fundamental Rights in the USA and the civil liberties in Great Britain have been preserved by reason of two factors: (i) an independent judiciary and (ii) the prerogative writs of habeas corpus, mandamus, prohibition, certiorari and quo-warranto."

The other section that includes Prof. K.T. Shah, Seth Damodar Swarup, V.D. Tripathi championed the cause of positive liberty. They accorded priority on positive state and emphasised the socio-economic right for the realisation of true liberty of the masses. They argued that a positive interventionist state can eliminate the gross injustice of the society and herald a new era of true liberty by securing socio-economic justice for the masses and more specifically for the destitute and the downtrodden. Highlighting this point V.D. Tripathi argued in length,

"It is stated here that the Constitution which will be drawn up and the state which will be established on the basis of that Constitution, will guarantee social, economic and political justice to all the people... But you know that the body, which is vested with power and authority, interprets the term on its own way... Therefore, it is necessary that we embody in the Constitution some such safeguards that the body vested with power may not interpret these principles in their own arbitrary way... If we don't do so now, the rulers may later can interpret these principles in their own arbitrary way and against the best interest of the people."¹

Some members in the Constituent Assembly were quite justified in their argument that liberty without being guaranteed by right becomes mere pious wishes and empty and abstract concept. And right for its effective realisation, should (and must) be grounded on socio-economic reality. If right is abstracted from ground reality it becomes irrelevant and useless, at least, for common masses who do not have adequate means of livelihood. Right must be associated with favourable socio-economic conditions otherwise in a society marked by graded inequality where a vast chasm lies between haves and have-nots right is a privilege of a few who constitute the upper echelon of society. It would be a mockery of justice if the individual is left alone against the hazards of the stratified society. Equality of opportunity is also an essential requirement for the self-development of individual. Right to equality should be viewed in terms of substantive justice but not in formal and legalistic sense. There should be equal and effective right for every individual for his self-realisation. Hence right and liberty should be seen in the context of the socio-economic structure of the society. In this context Ambedkar stated,

"The connection between individual liberty and the shape and form of the economic structure of society may not be apparent to everyone. Nonetheless, the connection between the two is real."²

He further told,

"Old time constitutional lawyers believed that the scope and function of the constitutional law was to prescribe the shape and form of the political structure of

¹. CAD, Vol.II:311-12.
They never realized that it was equally essential to prescribe the shape and form of economic structure of society, if democracy is to live up to its principle of one man, one value.  

K.T. Shah, criticizing the juridical notion of right to equality noted,

"...the term (right to equality) by itself is likely to be misconceived on interpreted unduly narrowly, if it is not added that equality is not merely equality of treatment before the established system of law and order but also of opportunity for self-expression or self-realisation that may be inherent in every human being."

The difference between two approaches towards justice that got reflected in case of two concepts of liberty, became acute with regard to incorporation of the Fundamental Right and Directive Principles of State Policy, in the Constitution. The dispute centered around mainly two issues i.e., question of justiciability of the Fundamental Right and Directive Principles, and questions of incorporating the economic right in the category of the Fundamental Right.

The Report of the Fundamental Right Subcommittee in its explanation rationalising the division of Rights into justiciable and non-justiciable categories, acknowledged (at least implicitly) that the judiciary, the vanguard of justice, can at best deal with the problem of justice in a procedural and formal way but cannot deal with substantive aspect of justice. Despite this acknowledgement all the substantive economic rights, which truly reflects the socio-economic justice, were put in the non-justiciable category i.e., Directive Principles of State Policy. The rights which were included under the category of justiciable right -- Right to Equality (in a more formal and juridical sense), Right to Freedom, Right to Constitutional Remedies against its violation i.e., against state -- were mainly negative and formal. By putting the substantive economic rights under the

1. Ibid.:102.
2. Ibid.:46.
3. Ibid., 137.
non-justiciable category, the state was made free from any obligation and commitment for securing these rights.

K.T. Shah vehemently criticised the Report that the non-justiciable rights "are likely to be treated as so many pious wishes, which can have no very great binding effect in daily life." And described them more sarcastically as, "a needless fraud, since it would provide an excellent window-dressing without any stock behind that dressing." Some members were highly critical about this. The dissenting voices were quite loud and tumultuous. B. Das being very cynical about it observed,

"I think it is primary duty of the Government to remove hunger and render social justice to every citizen and to secure social security... The teeming do not find any hope that the Constitution that will be passed two months hence will ensure them freedom from hunger, will secure them social justice... I do not find anything that makes it obligatory on the Government, on the state, to discharge their obligatory duties to the people of India about common welfare and well-being of the people... Too much is made of justiciable and non-justiciable... We are up against a brick wall of lawyers... And if I, a Gandhite, am not satisfied with this Draft how can I expect the Socialists and the Communists and the others to be satisfied with it?"

V.D. Tripathi also criticised in the same vein,

"The first basic principle of our Constitution should be that the poor man should have full right to rise to the highest station in life... but we didn't write even a word for removing the poverty of the poor. Except for the right to vote, the poor man has not yet got any other right under the Constitution... There are a few friends of mine who feel insisted at the very word socialism... Therefore, if you dislike the word socialism, let it go, do not use it. But you must make such regulations as may prevent the domination of the vested interests... The public is suspecting as to whether the Constitution that is being framed is for the poor people or for the vested interests."

1. Ibid., 154.
2. Ibid., 192.
4. Ibid., 345-46.
Anticipating the conflict between the Fundamental Right and Directive Principles of State Policy, the Constitutional Adviser, Sir B.N. Rau observed that the fundamental right

"being justiciable will in effect prevail over the Directive Principles of State Policy which are not justiciable. That is to say the private right may override the public weal."¹

So he suggested through amendments that,

"...in a conflict between the rights conferred by chapter-II, which are for the most part rights of the individual, and the principles of policy set forth in Chapter-III, which are intended for the welfare of the state as a whole, the general welfare should prevail over the individual right. Otherwise it would be meaningless to say, ...that these principles of policy are fundamental and that it is the duty of the state to give effect to them in its laws."²

But all these suggestions were not given due importance and were left unheeded. The Drafting committee did not consider it and prepared the Draft as per its own decision. And the conflict between the Fundamental Right and Directive Principles of State Policy remained unresolved.

The most common and valid ground for the criticism of Directive Principles of State Policy, however, is their lack of legal forces. Since they impose no legal obligations on the state, Directive Principles of State Policy have been poohpoohed as mere moral precepts or as pious superfluities which are too familiar to call for enumeration in the Constitution. Referring to the lack of legal sanction Prof. K.T. Shah remarked,

"...it is a kind of provision which encourages the court and also the Executive not to worry about whatever is said in the Constitution, but to act only at their own convenience and on their practicability and go on with it. It looks to me like a cheque on a bank payable when able i.e., only if the resources of the Bank permit."³

². From B.N. Rau's letter annexed to his Note cited in Ibid.,226.
Mr. Nassiruddin, a member of C.A. contended that these principles were no better than new year resolutions which are broken on the second of January. It has also been apprehended by some that these non-justiciable and abstract directive principle which may be safely ignored by the legislatures and also by the judiciary. This apprehension came true in the ‘State of Madras vs. Champakam Dorairajan Case’,\(^1\) and in 'Qureshi vs. The State of Bihar' case.\(^2\) It has truly become 'high sounding sentiments couched in vain glorious verbiage'.

New some major questions strike us: Can this Fundamental Right without any substantive economic content protect the weak and helpless? Can this provide true liberty to the masses who do not have access to the adequate means of livelihood or will it protect the microscopic minority who are already privileged? Can this which lacks mandatory effect and does not have any legal obligation on the state, really herald a new era of social justice? Can these rights ensure equality in a disharmonic system where there is lack of consistency between existential and the normative order, and pervasive existence of inequality? Can our Constitution create democratic set-up which is Freedom's tryst with Indian destiny? Can it really salvage the underprivileged and disadvantages sections of our society who have been languishing since ages?

But regrettably our earlier study does not give a very hopeful and positive answer to all these questions. Rather it presents a gloomy picture. This is not a realisation which came recently. Even some members of the Constituent Assembly at that time realised this and cautioned and suggested remedies also for this. Dr. Ambedkar rightly observed that,

"constitutional lawyers assure that the enactment of Fundamental Right is enough to safeguard their liberty and that nothing more is called for... one more question remains to be answered. To whom and for whom this liberty? Obviously this liberty is liberty to landlords to increase the hours of work and reduce rate of

\(^1\) 1951, SCJ, 313.

\(^2\) 1958, SCJ:983.
wages. This must be so. It cannot be otherwise. For in an economic system employing armies of workers producing goods en masse at regular interval some one must make rule so that workers will work and the wheels of industry run on... Life otherwise will become impossible. In other words what is called liberty from the control of the state is another name of the dictatorship of the private employers.1

The emphasis on the substantive aspect of justice is conspicuously absent in our Constitution. A scholar like K.M. Munshi was so much obsessed with procedural and juridical aspect of justice that this was given priority over substantive aspect which took a back-seat. But the judiciary, which was assigned the role of guarantor of justice, can only take steps after a wrong is done. And it can scarcely create condition which would prevent the commitment of injustice. Emphasising the importance of substantive aspect Prof. K.T. Shah told:

"Life, that is to say, the mere right to exist, will have little value, if it is to be bereft of any opportunity to develop or bring out what is in very man or woman."2

Now the question comes that whether the negative liberty that has been emphasised in our Constitution is adequate enough for the self-realisation of an individual. Negative liberty is too narrowly conceived and at bottom a mechanical and inertial which is appropriate only to a complete market society but not for a society of ours which is marked by graded inequality. This concept of inertial motion is applicable to an atomised market society in which everyone is put on his own to compete with everyone for everything.3 The unequal access to the means of life and labour inherent in our society is an obstruction to the freedom of those with little or no access; and it diminishes the negative liberty and diminishes the area in which they can be pushed around. The formulation of negative liberty which ignores the class-impediments is not entirely

2. Ibid., 41.
adequate. Even the negative liberty is no longer the shield of individuality. Rather it has become the cloak of an un-individualist, corporate and imperial free enterprise. Man needs liberty to live in accordance with his own conscious purposes and decide for himself rather than to be acted upon and decided by others which needs conducive socio-economic atmosphere.

One of the basic postulates of democracy is the equal humanity of every individual the belief that each human has a life to live as much as any other human being. This essential human equality requires equal access with others to the means of self-development and mitigates against class-privilege. Egalitarian principle inherent in democracy requires not only one man one vote but also one man, one equal effective right to live as fully humanly as he may wish. The rights and freedom men need in order to be fully human are not mutually destructive and it must be asserted that the right of any man which are morally justifiable on any egalitarian principle are only those which allow man to be fully human. But consumer equality in a hierarchical society will not be enough to effect equality because the class relation is a necessary measure of social inequality and they are viewed as obstacles that ought to be overcome. The human right must be in some effective sense equal. The minimum acceptable equality may be stated as equal access to the means of decent human living and there must be an obligation on others to respect each man’s right. The freedom and right has the meaning only when the objective and material world helps in the realisation of their substantive content. In a society like ours where there is unequal class-division and conspicuous socio-economic inequality among the people, the liberty becomes mockery and justice a caricature. Hence realisation of common good needs abolition of the exploitative socio-economic condition that creates and nurtures injustice and it warrants state intervention in socioeconomic structure to rectify the wrong that gives rise to injustice.
But our Constitution does not attempt to remove all these hurdles for the creation of a true democracy. Pointing its shortcomings Seth Damodar Swarup observed in the Constituent Assembly,

"...You will not find anywhere in its any provision for bread for the poor, starving, naked and oppressed people of India... Besides this it does not contain any guarantee of work or employment for them... there is no guarantee in it even for a living wage and payment for subsistence... even though this Constitution may be the biggest and bulkiest Constitution in the world, may even be the most detailed one... but so far as the poor and the millions of toiling, starving and naked masses of India are concerned, there is nothing in it for them... Mr. President, on the one hand we desire that today's social structure should be maintained without any alternation and on the other hand we also wish that poverty and unemployment should vanish from this country... A lay man like me is however unable to understand as to how to reconcile these two statements, the one that we hate socialism and want to maintain the status-quo, the other we wish to establish a classless society in our country while preserving the exploiting group. I cannot see how these two objects which are mutually opposite can be realised."

The incorporation of Right to Property in Fundamental Category created tension and controversy in C.A. Shri Ajit Prasad pointed out, in this context that, "Fundamental Right... are... to protect the weak and the helpless. The present clause will have just contrary effect. It will protect the microscopic minority of propertied class and deny right of social justice to the masses." Contrary to the principle of social justice, the economic interests of the microscopic minority overrode the collective economic interests of the community. The actual provisions of the Draft Constitution pursued implicitly the conservative liberal individualistic approach. Arun Chandra Guha commented that, "I feel, as for the economic side the Draft Constitution is almost silent. It is rather anxious to safeguard the sanctity of property; it is rather anxious to safeguard the rights of those who have got something and it is silent about those who are dispossessed and who have got nothing." This ambiguity and contradiction was well elucidated by Jadubans Sahay, "In

this Constitution we have tried to approach this problem in an insipid manner. There is a
clash of ideology... one trying to maintain the old economic structure of society and
stabilise it and the other trying to destroy it and reshape society on a new economic basis...
We are going to clothe them with political power those who do not have two square meals
a day... on the other hand you are going to stabilise the economic structure of society. You
want to maintain the status-quo. Here is a problem you will have to solve... It is a
challenge we have not been able to answer in this Constitution." ¹

The Constitution of India tries to deal compensatory discrimination and the
problem of justice in a broader sense by just bringing an artificial balance between the
interests of the privileged and underprivileged. The Constitution clearly shows a
compromising and balance tendency to solve the problem of justice. But this half-hearted
'balance' or compromise of interests was basically contradictory and incompatible. This
artificial and superficial compromise is antithetical to the basic principles of justice. Since
in a society where there is pervasive inequality this so-called harmony will favour the
already favoured i.e., the haves. The bright example of this half-hearted approach of the
Constituent Assembly is the predominance of Fundamental Right over Directive
Principles of State Policy. It is not an attempt to eradicate the evils that cause injustice
from its root. It has not tried to strike at the socio-economic roots of problem that has
perpetuated this inequality instead it has effected a clumsy patch work of irreconcilable
interests. Rather the word 'consensus' is used as an excellent blanket to hide the
conservative liberal individualistic perspective of justice that has shaped the Constitution.

The framers have put much emphasis on the individual self-realisation and self-
development. Human capacities cannot be developed and exercised by an individual in
isolation. They are located within, and sustained by the framework of socio-economic

relation and this socio-economic relation should be conducive enough to stimulate, nurture and nourish the exercise of these capacities. The social impediments are inversely proportioned to the exercise of one's potentialities i.e., the lesser the social impediments the better the scope of self-development. The social impediments are - lack of adequate means of life (means of material sustenance and general level of material comport), lack of access to labour (i.e., the exertion of human energy), and the lack of protest against invasion by other. But our Constitution failed to remove all these impediments. Hence the dream of the framers to build new social order remains unfulfilled and weaker section of our society remain unsalvaged and unretrieved.

The Republican Constitution of India, so far as the socio-economic justice is concerned, is replete with many paradoxes and contradictions. These paradoxes and its repercussions have been nicely presented by Dr. Ambedkar in Constituent Assembly,

"We must begin by acknowledging the fact that there is complete absence of two things in Indian society. One of these is equality. On the social plane we have in India a society based on the principle of graded inequality which means elevation for some and degraded inequality which means elevation for some and degradation for others. On the economic plane we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th January, 1950, we are going to enter into a life of contradiction. In politics we will have equality and in economic and social life we will have inequality... How long shall we continue to this life of contradictions? If we continue to deny it for long, we will do so by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which the Assembly has so labouriously put up."¹

One also should not forget his note of caution that,

"Independence is no doubt a matter of joy... By independence we have lost the excuse of blaming the British for anything wrong. Times are fast changing. People including our own are being moved by new ideologies. They are getting tired of Government by the people. They are prepared to have Government for the people and are indifferent whether it is government of the people and by the people."²

¹ CAD, Vol.XI:979.
² Ibid:980.
IV

CRITICAL EVALUATION

It becomes evident that the new republican constitution of India tried to deal with the problem of justice by striking a balance or compromise between the formal and substantive aspect of justice, which has been the cornerstone of the liberal theory of justice. Because of the reliance on this equilibrial ideology and the importance attached to the formal aspect of justice ignoring its socio-economic dimension, the concept of justice adopted in our constitution comes closer to the liberal notion. The constitution of India in conformity with the liberal idea tried to reconcile the legally enforceable Fundamental Rights with Directive Principles, legal and formal with socio-economic equality, negative with positive or substantive liberty, equality of status, of opportunity and before the law with the special safeguards of the disadvantaged sections, individual (propertied) interest with group (dispossessed) interests and broadly speaking formal and the procedural with socio-economic or substantive justice. In the Constitution there is a lexical priority given to the individual over group and liberty over equality. Furthermore, the legal and political aspects of equality and liberty have always been given primacy over socio-economic dimension. By attaching unwarranted importance to the property right and its inclusion in the Fundamental Right the framers have inadvertently made the Constitution an apologia of the existing inequitious social order.

The Indian leadership tried to grapple with the problem of justice with an erroneous assumption that the conciliatory approach can create an equitious social order and ameliorate the impoverished conditions of the weaker sections. This approach was quite glaring in their treatment of fundamental rights and Directive Principles i.e., the fundamental rights were given primacy over the Directive Principles. The fundamental rights were essentially negative i.e., - to prevent state's encroachment in the sphere of individual liberty and right, and lacked the substantive economic content. In the presence
of pervasive structural inequality, where there is a big gulf between the few propertied and the large poor, the fundamental right can hardly protect the liberty and rights of the weak and the disadvantaged sections. When the large section of the population do not have access to the adequate means of livelihood this formal and legal equality without socio-economic content can only protect the interests of the microscopic minority of the privileged section. The Directive Principles comprised of substantive socio-economic rights, which could have made a positive contribution to the realisation of the objectives of the social justice, lacks mandatory effect and does not impose any legal obligation on the state to secure those objectives incorporated within this section. The contradiction between the ideal of equality and the practice of inequality, and between the proclaimed objectives of social justice and the approach to accomplish them are quite apparent in the constitution of India. This contradiction found its expression in the judicial decisions of the Supreme Court of India in its interpretation of Directive Principles and the primacy the Court attached to the fundamental rights. The emphasis on the substantive aspect of justice appears to be ignored in our constitution and this was also pointed by some of the members of the Constituent Assembly during the framing of the Constitution.

In the presence of the gross structural inequality the emphasis on the negative liberty, and formal and procedural justice is not expected to bring about a new egalitarian social order. The unequal access to the means of life and labour inherent in our society is an obstruction to the freedom of those with little or no access. Egalitarian principle inherent in democracy requires equal access to the means of self-development and equal effective right for self-realisation. In a society of graded inequality the objectives of social


2. The approach of the Supreme Court in its interpretation of Directive Principles has been discussed elaborately in Chapter-III.
justice cannot be achieved without a structural socio-economic change. The framers being
influenced by the liberal theory of justice with its ideological underpinnings attempted to
remove injustice without striking at socio-economic roots which create and perpetuate it.
This confounded notion of justice was also reflected in the approach to the compensatory
discrimination for the historically disadvantaged sections i.e., SCs, STs and other backward
classes. The framers were under the impression that the compensatory justice can
automatically improve the wretched condition of the weaker sections even without
structural changes. They tried to reconcile these special provisions with legal and formal
equality which later created tensions between the two in the successive judicial decisions
of the Supreme Court. This disingenuous and equilibrial approach to justice has its own
intrinsic contradictions which got manifested in the judicial decisions and also in the
development paradigm of the state.

Due to this fallacious conception of justice the state, conceived and projected as the
main instrumentality of social change,\(^1\) has ceased to fulfill the role assigned to it. Some
scholars remark that the bourgeois format of the state and the bourgeois character of its
legal system, property structure and institutions of governance are evident in the Indian
Constitution - in its central business of laying down some limits and prohibitions through
the rights of property and other formal and procedural rights.\(^2\) Hence it is assumed that

\(^1\) See Rajni Kothari, 1991 : 533-58. This role was to be carried out by a whole range of initiatives, from amel-
iorative measures *vis-a-vis* the poor to transformative strategies *vis-a-vis* the basic structure of society. Today
we find that with respect to the whole range the state has failed to achieve the desired objectives. This part has
been discussed in detail in Chapter-V.

\(^2\) Of course this serious and decisive core is surrounded by looser reformistic advisory clauses and based on
some necessary illusions of bourgeois power, like its extreme constructivism : the myth, seriously believed by
the ruling elite that, patterns of laws can direct social relations rather than reflect them, an illusion which made
the framers carry the constitutional document to an unreadable length (See Sudipta Kaviraj, 1988 : 2430;
Chhatrapati Singh, 1985; Sobhalal Datta Gupta, 1979 : 27-69). This is not a petty point. The Constitutional
documents must be read and understood by the people. The Indian Constitution is a lawyer's document i.e., a
document of the lawyers, for the lawyers and by the lawyers.
the constitution, instead of being an instrument for social justice, has favoured the interests of the propertied few. Contrary to the assertion of Granville Austin, the Indian Constitution has failed to foster the socio-economic revolution in India by creating an egalitarian society.¹

The framers being primarily committed to the liberal theory of justice has tried to absorb socialistic principles - like compensatory discrimination and Directive Principles, as much as their liberal assumptions permitted them. Their conception of justice, despite their knowledge and awareness of the cumulative historic inequality and their intention to establish an equitious social system, necessarily dwells to a great extent within the liberal parameter i.e., abstracting the concept of justice from the socio-economic reality. They have not been able to give an adequate theory of justice in proportion with their apparent ethical commitment to social justice because their reliance on the liberal values and its ideology. Thus, their straddling position is not fully reconcilable. The source of tension lies in their very conception justice, and also between the declared objective and the means adopted for its realisation. The discrepancy between the desired ends and adopted means encounters an impasse which may be unintentional on the part of the framers. But unintentional does not mean lacking in meaning.²


2. It will be apt to quote Godelier here, 'Beyond the field of his conscious activities, the domain of the unintentional is not for man a silent desert in which he suddenly petrifies into a 'thing' like the rest, but is the other face of his world in which all his behaviour finds part of its meaning. It is the place where the hidden regulators are organised that correspond to the deep-lying logic of the system of action he invents and practices. It is the hidden aspect of our social relations where part of the meaning of our behaviour is actively organised' (see Maurice Godelier, 1972 : 317).