2.2 CONCEPT OF DISTRIBUTIVE JUSTICE

All the world over true peace demands not upon gun-power but upon pure justice.

– MAHATMA GANDHI

Justice is rooted and grounded in the fundamental instincts of humanity.

– WOODROW WILSON

Only the just man enjoys peace of mind.

– EPICURUS

The memory of the just survives in heaven.¹

– WORDSWORTH

To start writing on the concept of justice is to invite, to my mind, a serious risk. The reason is quite simple. In the realm of political philosophy it is the discussion of this concept that has generated perhaps the worst, and on occasions quite loud and violent, controversies. In fact, while philosophers from the time of Plato down to the present day have spared no efforts in clarifying the concept, our experience, however, has not been a very happy one. The moral philosophers, have somehow made the issue more complex and

¹ All the quotations quoted in, S.M.N. Rana, Law Judges and Justice, (1979), p. ll.
debatable, leaving behind a trail of confusion. Thus, it is a very vague and ambiguous concept, having its abstract, universal and all-pervasive characteristics those prompts one to raise two questions. First, how does the idea of justice emerge in human mind? Secondly, since the notion of justice is invoked to defined the righteousness of a cause, is justice essentially a moral concept?²

Ever since men have begun to reflect upon their relations with each other and upon the vicissitude of the human lot, they have been preoccupied with the meaning of justice. It is the subject of the most famous philosophical discussion in literature, the Republic of Plato (that “noble romance”, as Huxley called it.³ Man’s craving for justice can be explained as “the active process of preventing or remedying what would abuse the sense of injustice⁴. It is men’s necessity for remedying injustice that prompts him to resist it through all possible acts of solidarity and there justify these acts and urges in the name of justice. This awareness of injustice arises in society in the context of a prevailing system of human relationships. Thus, the origin of justice, therefore, has to be traced to man’s awareness of injustice in society and, consequently, to his search for changing the situation. Hence justice, primarily, is a social concept, which has its origin in man’s life in society.⁵

Even since the birth of human society justice has been one of the most important quest of human endeavour. Fiat Justitia ruat caelum - let heavens fell, justice has to be done, become the main preoccupation of may religious, political moral and legal philosophers of all ages.

Law and justice are two distinct concepts. No doubt, they are interrelated but each has a distinct sphere of its own. The concept of justice is even older than that of law. Justice is the legitimate end of law. According to Salmond, right or justice comes first in the order of logical conceptions and law comes second and is derivative.\(^6\) Thus, from St. Thomas Aquinas to Salmond many philosophers and jurist considered justice as a goal of law. It must, therefore, necessarily precede law because people thought of law as they wanted justice.\(^7\) Justice as a force of civic equilibrium presented a much simpler problem to the ancient static society than the modern dynamic world.

The importance of law and justice has also been referred in Hindu *Dharma Shastra* as well. Manu in his code obverse:

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\text{धर्मं एवं हतो हन्ति धर्मं रक्षति: ।}
\]
\[
\text{तस्मादभम: न हन्तव्यम: मा नो धर्मं हतोऽवधीते ।}^8
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(Destruction of Law and Justice brings about the destruction of society; the protection of law and justice has a protective influence. Therefore, law and justice should not be destroyed. Thus, there exists an intimate relationship between the theory of law and theory of justice.)

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\(^6\) Glanville Williams, *Salmond on Jurisprudence*, (11\(^{th}\) ed.), p. 61.
\(^8\) *Manusmriti*, viii, 15.
Justice means giving one what is due to him. “For justice consists precisely in not singling persons out for special treatment in the absence of significant differences, but in treating like cases alike and meeting out fair and equal treatment to all”. As a principle of law, justice delimits and harmonises the conflicting interests and claims in the social life of a man. The result of law is justice, therefore, conflict amelioration is the law’s basic function. Thus, law is an ‘integrated’ mechanism. The function of law is the orderly resolution of disputes which ultimately leads to justice. Hence, the main function of law is justice, which further leads to social change. Justice is politically and legally directed mechanism so as to balance the conflicting interests people concerned and to eliminate social, economic, and political inequalities existing in all societies.

Justice lies in the domain of morality and the instinct for justice is a part of human nature. Justice is essentially a social virtue and the question of justice mainly in the context of one person’s conduct in relation to other. The purpose of justice is to maintain or restore an equilibrium in human affairs. Thus, C.K. Allen acknowledges that it is the concept of harmony, balance or reconciliation of interests that has been the dominant theme in the treatment of justice from Aristotle to Roscoe Pound. He feels that in a modern democracy it is the function of justice to blend the different tones of society into a satisfying wholeness through the very differences of parts.

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13 Allen, op.cit., No. 3, p. 5.
15 Id., pp. 16-17; See also, Datta Gupta, op.cit., No. 2, p. 7.
In modern society, if we take the view, that all its problem of distribution, then the recourse is left open to justice and nothing else. Justice then demands equality in the distribution of advantages or burdens as such. These advantages or burdens which are to be distributed are of numerous kinds for instance, wages, property, power (political i.e., right to vote, right to participation and proportional representation etc. honour, dignity, taxes punishment, individual and social performances or rights and duties as allocated and apportioned by the legal or political system. In all cases justice demands equitable distribution.

According to Aristotle Justice is of two kinds. One is 'Distributive Justice (DJ) and the other is 'Corrective Justice' (CJ). DJ works to ensure a fair division of social benefits and burdens amongst the members of a community. This concept of justice has been universally accepted by almost all philosophers. In fact, it was in accordance with this concept that Bentham asserted that so far as right to vote is concerned, each should count for one and no one for more than one. As, the notion of DJ was initially formulated by Aristotle the idea being of proportionate equality. In distributing such things as honours and offices the state must take account of the differences in individuals. It is as unjust to treat unequals equally as to treat equal unequally. The problem of DJ, therefore, is to decide what differences are relevant, for Aristotle, the criterion of these differences was merit. As Aristotle points out in Politics, “Justice is relative to persons, and a just distribution is one in which the relative values of things given correspond to those of the persons receiving a point which has already been made in the Ethics”. The object of CJ is to restore the

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16 Raina, *op.cit.*, No.: 1, p. 29.
17 Fitzgerald, *op.cit.*, No. 9, p. 61.
19 The Politics of Aristotle, III, IX. 3. Translated with an Introduction, Notes and Appendices by
equilibrium in a society which is disturbed by another. For example, if ‘A’ wrongfully seizes ‘B’s property, CJ acts to restore the status quo by compelling A to make restitution. Justice in its distributive aspect serves to secure, and in its corrective aspect to redress, the balance of benefits and burdens in a society.\(^\text{20}\)

The aim of DJ is to strike a balance in the socio-economic structure of the society and bring equipoise between conflicting interests of individual citizens. One way of looking at the problem of DJ is from the perspective of the disparity between himself and his rich friends, and always yearning on the grounds of justice for equalitarian and egalitarian rectification. Another perspective is what of an uneasily contented rich man who, ill at ease about the same disparity, is always eager to defend strongly on systematic grounds of a particular social system which permits and perspectuated such disparities. Thus DJ then Serves to secure a balance or equilibrium among the unequal or unbalanced members of the society which according to Prof. Roscoe Pound is social engineering.\(^\text{21}\)

The idea of DJ particularly with respect to economic dimension of social justice is not new one. There are references of DJ in Dharma Shastras of different religion as well.

The reference to DJ occurs in a late hymn of the Rgveda:

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\text{n va u deva: shrudhambuto vancha duhruhatahitamup gacchhantu muutvah: }\text{।}
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\[
\text{utto raahi puroto nope daksyantu tapaspatu mandirtaara n vinrdahe }\text{।}\text{22}
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\(^\text{21}\) Fitzerald, op.cit., No. 9, p. 61.
\(^\text{22}\) See, also, Aniruth Prasad, Social Engineering & Constitutional Protection of Weaker Sections in India, (1980), (Introduction), pp. 17-20.
The God of death not only takes the lives of poor or destitute, but does not even spares the lives of rich and wealthy people as well. The peace of mind, and wealth of virtuous can never be destroyed while greedy and other persons can never get their peace of mind and happiness in their life. Therefore, the best way of removing disabilities (inequalities) is to donate or distribute the collected wealth among the poors in order to bring them at par with the other people of the society. In this way the poor people will have respect and honour for them and also their wealth will not even destroy. If the rich people will not follow this distributive principle of justice the people will destroy their property and honour leading to destruction in their life instead of peace and happiness.

Thus, the DJ embraces “the whole economic dimension of social justice, the entire question of distribution of goods and services within the society”. The different principles of DJ have been expressed through number of maxims: (i) to each according to his need; (ii) to each according to his worth; (iii) to each according to his merit and (iv) to each according to his contributions to the common good etc. These maxims do not represent a perfect formula or solution for DJ or equity, since the needs of individuals may be in inverse proportion to their abilities and to their contribution to society, and in any case they will normally differ from person to person, what these maxims express, is simply an ethic of brotherhood as such.

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22 *Rgveda*, 10.117.1.
24 Id., pp. 73-78, DJ has been held to consist, wholly or primarily in the treatment or all people as (a) equal; or according to their (b) need; ability or achievements; (c) efforts and sacrifices; (d)
In the modern age of economic engineering, economic goals have an uncontestable claims for priority over ideological one's on ground that excellence comes only after existence. The twentieth century juristic thinking has formulated two jural postulate such as: (i) every one is entitled to assume that the burdens incident to life in society will be borne by society (ii) everyone is entitled to assume that at least a standard human life will be assured to him; not merely equal opportunities of providing or attaining it, but immediate material satisfaction.

Various theories of justice has been propounded from time to time in search of an ideal standard of justice. For merely the concept of justice was closely linked with property. Locke, who looked upon the law of nature as the principal foundation of justice and of all just order, attached a good deal of importance to property and considered justice mainly in the context of property. Thus, the various writers and philosophers such as, Nicholas Rescher, John Rawls, Julius Stone and Roscoe Pound etc. have formulated different theories of justice in order to explain the concept of DJ. Important of these theories, which contains all the above mentioned principles of DJ are, namely, (i) the utilitarian and (ii) contractarian. The former represents an established tradition of ethical thought, though subject to continuing requirements and restatments. The latter owes much to John Rawls who in recent times has most illum inatingly used the idea of primordial social contract to arrive at the basic principles of justice.

productive contribution; (e) requirement of common good and its equivalents;(f) a valuation of their useful economic services (the so called cannon or supply and, demand).

The utilitarian doctrine, as is well known, rests on the principle of utility prescribing that goods or, utility be so distributed as to secure "the greatest good of greatest numbers". But the principle suffers from incompleteness, ambiguities and frequent discard with moral judgements. The inherent weakness of utilitarian theory from the perspectives of DJ is that it accords more importance to the quantity of good or welfare distribution at the cost of equality. If quantity of welfare be raised by grossly unequal distribution, for instance, as in an efficient system of slavery, then we have to favour inequality. Equality, on utilitarian scheme is servant of quantity of welfare. But the discord with the intuitively felt ideas of justice becomes even more acute, when we shift our attention from inequality to deprivation even of the most minimal utilities and necessities of life.

John Rawls rejected utilitarianism as an adequate criterion of justice. According to him, justice when applied to an institution requires the elimination of arbitrary distinctions and the establishment structure of a proper balance or equilibrium between competing claims.

According to John Rawls the principles of justice are collectively formulated "by free and independent persons" in a primordial situation. On this basis, he has formulated the following two principles of justice governing a just order:

First Principle: Each person; is to have an equal right to the most extensive total system of equal basic liberties-compatible with a similar system of liberty for all.

Second Principle: Social and economic inequalities are to be arranged so that they are both: (a) the greatest benefit of the least advantaged, consistent with the just savings

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31 Friedrich and Chapman, op.cit., No. 27, p. 302.
principle, and (b) attached to offices and positions open to all under the conditions of fair equality of opportunity.\textsuperscript{32}

The theory as propounded by him has been criticised by Brian Barry.\textsuperscript{33} The above mentioned principles of Rawls lacked both in clarity and completeness. Therefore, in order to make more understandable and clear, Rawls put forward two more principles. There are:

Assuming the framework of institutions required by equal liberty and fair equality of opportunity, the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of the society.\textsuperscript{34}

The above observation is based on the “difference principle’ whose aim is that the social order should not help securing advantages to those who are better off, unless doing so is to the advantage of those who are less fortunate.

The second principle is known as ‘redress principle’. It aims at compensating the underserved or inevitable inequalities. Thus, the principle holds:

That in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favourable social positions.\textsuperscript{35}

\textsuperscript{32} Rawls, \textit{op.cit.}, No. 29, p. 302.
\textsuperscript{33} See, Raina, \textit{op.cit.}, No. 1, p. 35.
\textsuperscript{34} Rawls, \textit{op.cit.}, No. 29, p. 75.
\textsuperscript{35} Id., p. 100.
Hence after explaining the fundamentals of these theories, it is often reiterated that these theories must take into consideration at least three important aspects of distributive process: (a) the ‘total amount of goals (or utility) to be distributed, (b) the pattern of distribution arrived at’ and (c) ‘the distributional procedure, describes aptly as ‘the principle of selection by means of which the distribution is arrived at’.

Thus, the Rawls’s construction of the theory of justice is ambiguous and absolutely conditional on the existence of hypothetical “original Position”.

The philosophy of Karl Marx is also not free from controversy in regard to his approach to justice. Although according to Harold J. Laski and A., D. Lindsay, his fundamental passion was passion for Justice, he definite1y rejected justice as an ideal. One of the basic requirements of justice is that the means are as important as the ends. Those who deny the relevance of justice may, therefore, attempt to achieve ends by any means which they considered proper regardless of the considerations of justice.

The Thomistic conception of DJ is not at all relevant in modern context. The Thomistic premise is that in matter of social justice the individuals does not have separate inherent right, whatever, rights he possesses are those which belong to a member of the group. In the present situation, the distributive realm is thought of primarily in terms of opportunities. The US Supreme Court held in one of the case:

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36 Rescher, op.cit., No. 23, p. 87.
38 Friedrich and chapman, op.cit.,No. 27, pp. 306-325.
The fundamental rights to life, liberty and the pursuit of happiness considered as individual possessions are secured by those maxims of constitutional law which are the monuments showing the progressive progress of the race in securing to men the blessing of civilization under the reign of just and equal law... The very idea that one man may be compelled to hold his life or means of livelihood or any material right essential to the enjoyment of life at the mere will of another seems to be intolerable in any country where freedom prevails.\textsuperscript{40}

However, Marx, has a different approach with respect to the distributive aspect of justice. People will receive according to their needs. At this point Marx quotes, for the first time and only time in his writings, the old French socialist formula, “From each according to his ability, to each according to his needs”. Robert C. Tucker in his article on ‘Marx and DJ’ said that this is not a formula for justice. Nevertheless it does connect the idea of communism with a principle of distribution.\textsuperscript{41}

This conception of social life and the values which is embodies need a theory of justice which would account for these substantial transformations in the individual relationship to the society. Prof. Rawls theory of justice as fairness is responsive to this need. “He views the problems of social justice as one of procedure. The subject of justice is the structure of society. To established social must create a public system of rules by reference to which the conflicting claims which inevitably arise can be authoritatively determined”.\textsuperscript{42} Ultimately Rawls concludes that DJ is simply a function of just society. The principles of

\textsuperscript{40} Yick Wo v. Hopkins, 118 US (1886), pp. 356-370.
\textsuperscript{41} See, Robert C. Tucker, ‘Marx and Distributive Justice’ in Friedrich and Chapman, \textit{op.cit.}, No. 27, p. 318.
\textsuperscript{42} Murphy, \textit{op.cit.}, No. 39, p. 154.
justice as enumerated above provide a theoretical framework for the modern conceptions of freedom and equality. The Rawlsian rule that the distributive differences must be judged from the perspectives of the least advantaged is a moral hypothesis which must itself be tested by standards of human freedom.

All these observations lead to the conclusion that “the pivotal concept of our position is coordination, that an acceptable theory of distribution requires the due meshing of consideration of justice (in the narrow sense fairness and equity) with those of utility (in the sense of general welfare). Regarding the rational of DJ, our position is neither strictly deontological nor strictly utilitarian it is deontological utilitarian. Utility is no longer the queen bee, but becomes merely one among several workers in the ethical hive.

But inspite of all this juristic chivalry, the polemical problem of DJ remains to be incomplete and imperfect in any of the legal system of modern world. Its complete realisation is always an utopia. Rescher at another place observed:

Distributive Justice.... exactly like punitive justice.... can be brought to realization only in this world, that is, in an imperfect world populated by imperfect man. A perfectly just system of punitive justice.... cannot fail to depart from the ideal in several ways (say by catching some of the innocent and by letting escape some of the guilty). And these modes of injustice are interrelated and interlocked: as we modify the system to avoid injustice of one kind, we *ipso facto* increase those of another.... exactly the same is true in evaluating socio economic arrangements with respect to their

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43 Rescher, *op.cit.*, No. 23, p. 120.
44 *Id.*, p. 121.
accordance or violation with the principles of distributive justice.\textsuperscript{45}

Coming back to the question that which of the two theories the utilitarian and the contractarian seem relevant to the Indian economy, the answer is, both are relevant, but the Rescher’s approach is more suitable as it is based on the economy of scarcity, and insufficiency of available utilities and necessities of life. In such an economy our approach should always be directed at the amelioration of the weaker sections of our society and help in reducing, to as few as possible, the number of people whose share of utilities of life fall below the minimal level.\textsuperscript{46}

The founding fathers of our constitution were very well aware of the existing socio-economic conditions of the down-trodden communities of our society. In order to ameliorable them, they incorporated various measures of preferential treatment or compensatory discrimination\textsuperscript{47} in the constitution. These preferential policies have been defined on different arguments, and DJ argument is one of them. The other arguments are, compensatory and utilitarian.\textsuperscript{48} Thus, the framer of the Constitution applied the principle of DJ in the preferential treatment and provided certain provisions in the Constitution\textsuperscript{49} so as to achieve DJ.

The DJ arguments\textsuperscript{50} focus mainly on the need to promote the redistribution of income and other important benefits and to reduce the

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\bibitem{45} Id., p. 8.
\bibitem{47} Hereafter referred to as reservation. Other synonyms for compensatory discrimination in legal literature are “quotas” and “protective discrimination”.
\bibitem{48} These arguments are well analysed in J.W., Nicket “Preferential Politicies in Hiring and Admission: A Jurisprudential Approach”, 75 \textit{Columbia L. Rev.} 534 (1975).
\bibitem{49} Articles 14, 15(4), 16(4), 46, 330 and 332 etc.
\bibitem{50} For other arguments on ‘Compensatory’ and utilitarian see, Paramanand Singh, ‘Bakke and Thomas: A Comparative Legal Analysis of Emerging Judicial Responses to The
inequalities created by the existing distributive system. Those who have been disadvantaged by the existing distributional system should be given more benefits by altering the ways of distribution.\textsuperscript{51} This notion recognises that some people are undeservedly poor, some are undeservedly rich and it is the function of the state to reduce poverty and inequalities in the society. The DJ argument typically accompanies the idea of proportional equality which says that justice is apportioning reward to groups on the basis of proportionality and that all groups should be represented at all levels of income and achievement in proportion to their members in the country’s population. Justice as proportionality permits numerical quotas.\textsuperscript{52}

According to Aristotle, DJ works to ensure a fair division of social benefits and burdens amongs the members of a community. And thus, the principle of DJ has been successfully applied in the preferential policies –reservation in educational institutions and reservation in services etc. But this principle could not be extended to Political Reservation (PR) as such. However, it can very conveniently be applied to PR as well. It is true that political power can not be equally distributed, that can only be shared proportionately in democratic hierarcrical order. Thus, it is the political right (Right to vote and right to participation etc.) that can be equally distributed. Though, Ibn Khaldum, the fourteenth century Arab Historian very rightly said, “the possession of power is the source of riches”,\textsuperscript{53} however, the political power is proportionately distributed through proper and proportional

representation in legislatures (Lok Sabha and State Assemblies), in our political system.\textsuperscript{54} Hence, our constitution extended DJ in all the three dimensions of reservations i.e., reservation in educational institutions,\textsuperscript{55} in services\textsuperscript{56} and legislatures.\textsuperscript{57}

\textsuperscript{54} See, Arts. 330 and 332.\
\textsuperscript{55} Art. 15(4).\
\textsuperscript{56} Art. 16(4).\
\textsuperscript{57} Art. 330 and 332.