CHAPTER- 3

Social Justice and Doctrine of Equality under the Constitution of India

3.1 Jurisprudential Aspect of Social Justice and the Constitution of India:

Civilization has first thirst for “Justice”. Dennial Webster held that: Justice has been the highest interest of man which he seeks persistently, fight for it resolutely, expect confidently from the Ruler and neighbours. Denial or absence there of he reacts bitterly.\(^1\) Conveniently people can sense the phenomena, but find it difficult to put it aptly in written words. Harold Potter has therefore remarked that many people believe that they understood the meaning of justice, but their notions are not clear.\(^2\) Thus, expressions of a man has not attained that proficiency to define it, but nevertheless we use the concept in many different contexts to make a variety of moral and political points.

Greeks has an ancient culture, which has a foundation on morality and ethics. For Greeks David Miller says- “The sense in which Justice was equivalent to virtue in general.”\(^3\) David Miller then attempted to give practical contents to term “Justice” by defining “to each according to his right, desert and need” This finds a proximity with the concept in the developing civilized society.

---

\(^1\) Pound Roscoe - The Task of Law- P.-1
\(^2\) Singh Bakshish - The Supreme Court of India as an instrument of social justice- P-30.
\(^3\) Miller David - Social Justice, P.-17
The principles of justice are distributive principles. And indeed the most valuable definition of justice is that which brings out its distributive character most plainly i.e. to each his due and after which there will be no ground for claim to agitate. The just state of affairs is that in which each individual has exactly those benefits and burdens which are due to him by virtue of his personal characteristics and circumstance. Thus in general the definition of justice has two important corollaries. First it implies that there can never be perfect equality in the world. When two men are equal in relevant respect, they should be treated equally and thus it approves to “treat equals equally” or “treat men equally except where there are relevant differences between them”. This principle is always considered as general characterization of justice, though it embodies a weak sense of equality. Again the second principle of justice is the principle of proportion. Such principle applies in cases where a person’s due depends upon and attribute which can be quantified. We then have the principle that the amount of benefit he enjoys or the amount of burden he suffers should be proportional to the quantity of the relevant attribute which he possesses. Thus the principle of proportion allows us to deal not only with cases in which ‘dues’ are identical, but with cases where ‘dues’ are different. Further to search for the ways through which a man’s due might be determined, there comes the relationship between the concepts of ‘Justice’ in general and ‘Social Justice’. And for the purpose of this study the most important contrast is between Legal and Social Justice.
Legal Justice concerns the punishment of wrong doing and the compensation of injury through the creation and enforcement of law in that regard. It deals with two types of issues -- Firstly it stipulates the conditions under which punishment may be inflicted, adjust the scale of punishment as per the nature of different crimes and in the sphere of Civil law, regulates the amount of restitution which must be made for injuries. Secondly it lays down the procedure for applying the law—the principle of fair trial, rights of appeal etc. form part of Legal Justice.

Social Justice, on the other hand, concerns the distribution of benefits and burdens throughout a society, as it results from the major social institutions like property systems, public organization etc. It deals with such matters as regulation of wages and profits, the protection of person's right through the legal system, the allocation of housing, medicine, welfare benefits etc. And for this end distribution of power is both casually and conceptually relevant to Social Justice.

Though the criteria of justice are not necessarily the same in both legal and social justice, but Law as an institutions falls within the scope of both these sub divisions of justice, and although they are concerned with different aspects of it. As David Miller said that legal justice deals with the treatment of offenders and social justice deals with the benefit to the individual of having legal rights etc.

While giving a general account of Justice, David Miller had summarized the whole concept of justice dividing it into three principles
- (1) To each according to his rights, (2) to each according to his deserts and (3) to each according to his needs. And all these three principles generalized the one formula of David Miller's justice i.e. to 'each his due' which in turn helped to bring out the distributive character of justice. At the same time David Miller also said that 'Rights and Deserts' and 'Rights and Needs' are contingently in conflict. Because it is fairly clear that justice as the protection of rights and justice as deserts are of conflicting values. We have no reason to believe in general that individual rights which are to be protected by conservative justice, correspond to their deserts. It is also clear that justice as distribution according to need comes into conflict with justice as distribution according to deserts. In spite of these conflicting interpretations of justice, we may strive for a social order in which each man as a right to that which we deserves or to that which he needs. If such perfectly just societies could be created, the contrast between conservative and ideal justice would vanish.

Great Jurist Sidgwick believed that in our thinking about justice we were inevitably led to contrast conservative justice, consisting in the recognition and protection of legal and other customary rights, with ideal justice, consisting of principles for changing these rights in accordance with some ideal standard.

The notion of conservative justice can be derived from the general formula by interpreting a man's due as that to which he has a right or is entitled. It may thus be described in the form "to each
according to his rights”. In order to put such a conception of justice into practice, it is of course necessary to know what each man’s rights are. The rights in question may be legal rights, institutional rights or certain types of moral right, such as the rights one derives from a promise or other non-legal agreement. Rights generally derive from publicly acknowledged rules, established practices, or past transactions, they don’t depend upon a person’s current behavior or other individual qualities. For this reason it is appropriate to describe this conception of justice as ‘Conservative.’ It is concerned with the continuity of a social order over time and with ensuring that men’s expectations of one another are not disappointed.

Again the principles of ideal justice in Sidgwick’s view was the principles of desert; that men ought to be rewarded according to their deserts. So, this is another way in which the general formula of justice can be filled out and a man’s due here being taken to mean his deserts. Deserts in turn may be interpreted in a number of ways, although it always depends upon the actions and personal qualities of the person said to be deserving. Thus, a man’s ‘deserts’ or ‘needs’ may be measured by his moral virtue, his productive efforts, his capacities and so on.

Thus, Justice is conservative when it strictly follow the statutory rules and regulations without giving importance to one’s need and desire and needs of the society at large. And Ideal Justice is one which is based on distributive character i.e. to each as per his due and
need, together. The principles of Justice are distributive principles and in
deed the most valuable general definition of justice is that which bring
out its distributive character most plainly. The just state of affairs is that
in which each individual has exactly those benefits and burdens which
are due to him by virtue of his personal characteristics and
circumstances.

The definition of Justice has two important corollaries, as
according to David Miller first, it implies that where two men are equal
in the relevant respects, (so that their 'dues' are the same) they should be
treated in the same way. This principle (Treat equals equally or Treat
men equally except where there are relevant differences between them)
has often been proposed as a general characterization of justice. This
principle embodies only a weak sense of equality, whose connection
with our general definition of justice is obviously close.

The second corollary of this principle is the principle of
proportion. Such a principle applies in cases where a person's due
depends upon an attribute which can be quantified. We then have the
principle that the amount of benefit he enjoys or the amount of burden
he suffers should be proportional to the quantity of the relevant attribute
which he possesses. Thus, if the relevant attribute were gravity of crime
committed we would have the principle that the amount of punishment
inflicted on each man should be proportional to the gravity of the crime
which he has committed. The principle of proportion allows us to deal
not only with cases in which dues are identical, but with cases in which ‘dues’ are different and yet can be expressed has quantities of the same attribute.

But before we turn to look at the ways in which a man’s due might be determined, something must be said about the relation between justice in general and social justice. The idea that justice might display a number of sub-divisions is an old one, being found in both Greek and Christian thought. For our purpose the most important contrast is between legal and social justice.

Legal justice concerns the punishment of wrong doing and the compensation of injury through the creation and enforcement of a public set of rules (the law). First of all, it stipulates the conditions under which punishment may be inflicted, adjust the scale of punishment to fit the nature of different crimes and in the field of civil law, regulates the amount of restitution which must be made for injuries. Secondly, it lays down the procedures for applying the law i.e. the principles of fair trial, right of appeal etc.

Social justice on the other hand concerns the distribution of benefits and burdens through out a society, as it results from the major social institutions – as narrated before. It deals with the matters like regulations of wages and profits, the protection of persons rights through
the legal system, the allocation of housing, medicine, etc. Again distribution of power is both causally and conceptually relevant to social justice.

This separation of legal justice from the very concept of social justice is important because the criteria of justice are not necessarily the same in the two areas. But certain moral considerations will be common to legal and social justice. For example, the rights which a person possesses are relevant both to the question of when and how he may be punished, and to the question of what social benefits he ought to be given. Again it is important that the law as an institution falls within the scope of both subdivision of justice, although they are concerned with different aspects of it, legal justice with the treatment of offenders etc., social justice with the benefits to the individual of having legal rights etc. Thus the separation of the two ideas is made for the purpose of analysis only.

Justice is as free as air or water. It has a relation every sphere of human activity. Its pursuit, when confine to court room invite serious debate as regards its forms and contents. Rawls found himself in difficulty when he said “there is no single conception of justice which can rationally be defined”*4

In the same way Juristic philosophy does not find unanimity and clarity in defining ‘Social Justice’. To some it is

*4 Miller David - Social Justice, P-341
allocation or reallocation of assets. And to some it means equality of opportunity. The Supreme Court observed that social justice is hard to define---vague and indeterminate expression...*5 Whatever might be the peculiarities of social justice it can not reasonably claim existence outside the concept of 'Justice'. David Miller in his treatise opens with "The concept of Social Justice is best understood as forming one part of the broader concept of justice in general."*6 Thus it is conveyed that 'Justice' is a body of which 'Social Justice' is one of the species. Broadly explains "social justice is not a simple and single ideal of society, but is an essential part of great complex of social change, for which something may have to be sacrificed for greater good."*7 So, in the process of social change, social justice could be one of the most cherished desire of society and while marching towards social change, the society amongst others may endeavor to accomplish the said goal. Bakshish Singh defines justice as the fulfillment of legitimate expectations of individuals under the existing law and ensuring him the benefit of promise therein and to afford him protection against any violation of its rights or against any encroachment of his rights. According to propagators of 'social justice' law hardly legitimized the urge of society and it is only social justice which is an incarnation of justice and in terms of complete justice.

Justice K. Subba Rao explains that social justice is a compound word where in 'Justice' is the noun and 'Social' is the

---

*5 Miller David - Social Justice, P-341
*6 Ibid. P-17
*7 Singh Bakshish - The Supreme Court of India as an instrument of social justice. P-71
adjective. It means social justice is one of the discipline of justice. Justice is a virtue of being just and fair to all individuals. It pleads to give everyone, what is due to. However, there is no yardstick to ascertain what is due. It depends upon time, place and circumstance. On the whole it conveys that there shall be equality. Justice K. Subba Rao however remarks “it is impossible to make all men equal, justice to all and not favoured class.” Justice may demand preferential treatment to the weaker section, to correct the imbalances and not to cause unnecessary harassment to the advance sections thereof. In broader sense it endeavors to remove the imbalances in the political, social and economical life of the people. 

Social Justice means justice which serves the cause of the society at large without doing harm to the individual in their enjoyment of civil, constitutional and other statutory right (including customary traditional rights)

David Miller, in his analysis about social justice from socio logical perspective had tried to show that substantive ideas of social justice- i.e. the principles used to assess the distribution of benefits and burdens among the members of society take radically different form in different types of society. And for convenience of study he had divided the different types of societies into three and they are referred as primitive societies, hierarchical societies and market societies and ours present society was presented as a modified form of market society.

*8 Justice Rao K. Subba - Social Justice and Law, P-2
Primitive societies, are small scale societies in which basic nexus between man and man is kinship. The division of labour is not extensive, and there is no strong, well defined system of political authority, if such authority exist at all, it will vested in the village headman or council of elders. Justice is understandably not a prominent feature of primitive societies.

In Hierarchical Societies, men were arranged vertically in social strata, each stratum having a definite mark in the hierarchy. There is a strong, though not universal tendency for economic dominance, social prestige and political power to combine in the hands of the group at the top of the hierarchy. Stratum membership confers traditionally established rights and obligations and largely determines the type of work which the individual will perform.

Market Societies, finally, are typically large, economically developed societies, in which the basic nexus between man and man is contract. The division of labour is extensive and each man is formally free to decide upon his occupation, to enter into whatever associations he wishes and generally to choose his place in society.

However, this classification is not meant to be an exhaustive social typology, many societies do not belong to any of the three categories. Thus, this typology can be used to explain variations in men’s ideas of justice. The fundamental assumption is that a man’s sense of justice is strongly affected by the nature of the relationship
which he enjoys with other men. The social structure of a particular society generates certain type of interpersonal relationship, which in turn gives rise to a particular way of assessing and evaluating other men and of judging how benefits and burdens should be distributed. Therefore, ‘Justice’ of which ‘social justice’ is a part, is a ‘distributive idea.’

While analyzing “social justice in sociological perspective” David Miller had stated that there is an intelligible connection between the social structure and the ideas of social justice. His examination of social type has uncovered none in which social justice means equality, understood as the principle that each member of society should enjoy the same level of wellbeing as every other. Accordingly it is true in his view that primitive societies, hierarchical societies and market societies in their modified form, each give some weight to considerations of need in their social thinking. But equally in each case, distribution according to need serves as a minor modification to another principle (in primitive societies the common good; in hierarchical societies, justice as protection of rights; in organized market societies, justice as desert). It is safe to generalize that in no society has distribution according to need become the main element in a shared conception of social justice. Thus, Miller had introduced a new concept i.e. social justice as equality or in one word as ‘Egalitarian Justice.’ Therefore, Justice, social justice as its part and equality as its counter part strive for the common goal of ‘social justice’ in toto.
3.2 Social Justice and the Concept of Equality – both a constitutional goal in India:

To summaries Social Justice as a constitutional object, having elastic concept with a continuous process and also an object of democracy; wherein Social Justice may be defined as justice to all members of society. Again the doctrine of equality is the foundation of law. The concept of Social Justice implement the doctrine of equality and it gives practical contents to the latter. The doctrines of Social Justice and Equality are complementary to each other and maintain their potency. It is also one of the mottos of democratic constitution to provide just and fair treatment to each individual and the concept of social justice tries to bring equality into reality. And the constitution of India is of no exception in this regard. In India Social Justice is a fundamental right.*9 Social Justice is the comprehensive form to remove social imbalance by law, harmonizing the rival claims or the interest of different groups and or sections in the social structure or individual by means of which alone it would be possible to build up a welfare State.*10

After advent of independence, the Nation with entire solemnity resolved under the constitution, to secure for all its citizens Justice- social. The constitution is the fundamental law of this land. The fundamental law has been passing through experiment to achieve its purpose inter-alia of justice- social. The experiment involves initiative and perennial engineering. So, to make the experiment successful

---

* 10 Dalmia Cement (Bharat) Ltd.-vs-Union of India (1996) 10 SCC 104
initiative, continuous engineering, adequate and up-to-date equipments, great deal of thought and dynamism would be indispensable. This needs to be in possession of the citizen and state including the Judiciary. The experiment with modification in its engineering as desired, having from time to time, has to be carried, having regard to the situation and requirement

The experiment to achieve the cherished goal of Social Justice, is to be performed with an abiding faith, which is built up on living and changing realities. India is a country which is over processed with divergent thoughts, habits, cultures, faiths and religions. On the dawn of Independence the nation had gone through an experiment of constitutional democracy with its largest Republic.

In sovereign India, justice-socio-economic-political to the people, is a cherished goal of paramount consideration as proclaimed by the Preamble of the constitution of India. Democracy merely in a political format remains a structure without substance “Democracy is by the people, for the people and of the people.” So, it implies a responsible Government which is responsible to its people i.e. the subjects. People’s consensus is prima-facie important for those who holds the administration of the country and the Judiciary is the guardian of their rights which emanates from the constitution. To make it meaningful, justice is necessarily to be administered in various walks of life of the people. The Preamble has a role to conceptualize the justice in the life of Republic. History of evolution, purpose and scope of this Preamble, have been traced to seek an answer to the question, could
'Justice-Social' as envisaged by the Preamble be held synonymous to 'Social justice.' And to answer in the affirmative means Preamble intended only that 'justice - social' which is to be secured from the Judiciary. The Judiciary is one of the instrumentality of State and it has to share the proportionate responsibility to achieve the goal.

Justice-social-economic is a National mission, which is to be carried on in accordance with the modalities stipulated under the Constitution. The functionaries under the Constitution, as per modalities settled there under, have to co-ordinate with the people in their pursuit. Thus, Judiciary has certainly to participate in the mission actively, but not to make justice-social its own mission. Doing so would be an act of taking the Judiciary above the Constitution. Because the main task of Judiciary is to interpret the existing law and to make the law. Through interpretation within the Constitutional limit, the Judiciary can give a new look to the existing law keeping pace with the need of the hour and changing circumstances of that particular society. Through interpretation the Judiciary can preserve, safe guard and effectively distribute, what has been created by other instrumentalities under the Constitutional scheme. To meet the challenge of Social Justice, foisting a task to create through interpretation, almost tantamount to making 'Justice-Social' as a mission of the Judiciary.

Constitutional mandate is that each instrumentality with respective domain must assist to secure Justice Social. To confine the
connotation of Justice to one which is to be administered by the court would be in derogation to the spirit as condensed in the Preamble.\textsuperscript{11}

To achieve the goal of social justice, Justice Krishna Iyer gave much stress on interpretational creativity, procedural non-formalism, structural engineering of Judicial process. Petrie Devlin says “Social Justice is body of the principles. Law must run in conformity thereof. Social justice guides the law makers. Law guides the Judges.”\textsuperscript{12} Social Justice is thus above law and could be Jurisprudential source for law making. And Indian Jurisprudence takes care of science and philosophy of law together. Law is therefore, a custodian of social values and requirements.

Dr. B.R. Ambedkar, while emphasizing on incorporation of the term socialist economy in the Preamble referred to phraseology “in doing justice socially”. Having regard to the intendment of the Preamble, within the contemplation of the founding fathers, it conveys in an unambiguous term, that the Justice to be ensured to the community in its social life as well in economic and political. To treat that Justice-Social as analogous to a popularly professed ‘Social Justice’, would completely be an illusion. In a similar rhythm, we have then to coin a term ‘Justice-Political’ as ‘Political Justice’ also to be dispensed with by the court. This would be further distortion.

\textsuperscript{11} Justice Desai Ashok A. - Justice versus Justices, P-29
\textsuperscript{12} Petrie Devlin- The Judge, P-8
The founding fathers have decided to administer Justice in the social sphere of the Nation. The Republic has declared its way of life through the Preamble and worked out its modalities in the Constitution. People and the instrumentalities have a pledge not merely with the Preamble but with the entire Constitution.

Justice- Social is destinations of the Republic. In reaching the same, there could be problems. Those are to be solved as per the mechanism provided by the Constitution itself. However problems could be resolved by bringing best co-ordination between various Constitutional functionaries and 'we the people'. Challenge of social justice as articulated is artificial. In practice it would be a threat not only to the Judiciary, but also to the entire Constitution. In short pledge to the Preamble, means a commitment to Justice-Social and not to 'social justice' a pattern of justicing as being asserted. The stream of social justice originates at the 'Preamble', and reaches the "Directive Principles of State Policy"

The Constitutional of India is the lengthiest and the most detailed of all the written Constitutions of the world. It is the basic law of the land. The framers of the Indian Constitution, has gained experience from the working of all the known Constitutions of the world and accordingly they incorporated some of the best provisions of those Constitutions like Fundamental Rights from American Constitution, Directive Principles of State Policy from Ireland, emergency provisions from German Reich and the Govt. of India Act 1935.
The inclusion of a chapter on Fundamental Rights reflects the modern democratic thought of the framing fathers. The object behind the inclusion of the chapter of Fundamental Rights in the Constitution of India is to establish "a Government of Law and not of man" or in short the object is to establish Rule of Law in the society. Rule of Law simply means the existence of public order and to establish Rule of law means to establish peace and order. Again 'Rule of law' forms a fundamental principle of the Constitution of India. Dicey says that it has three meanings or may be regarded from three different points of view.

It means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative or even of wide discretionary authority on the part of the Government.

For Dicey, 'Equality before law' is the second aspect of 'Rule of law.' It means equal subjection of all classes to the ordinary law of the land and in its most obvious sense means an equality of rights and duties.

Lastly Dicey says, "the Constitution is the result of the ordinary law of the land." It is equally true that the law of the land is the result of the Constitution. Thus 'equality before law' which is the second corollary from Dicey's concept of 'Rule of Law' is correlative to this concept for all round evaluation of healthy social order. It means that no man is above the law of the land and that every person, whatever
be his rank or status, is subject to the ordinary law and amenable to the jurisdiction of the ordinary tribunals.

The Constitution of India in this respect goes much ahead than any other Constitution of the world. The object of inclusion of this concept of Rule of law in the Constitution of India is not only to provide security, equality, justice and fair play to all citizens living in this land but they were also intended to make all citizens and persons appreciate that the paramount law of the land has swept away privileges and has laid down the paramount 'perfect equality' between one section of the Community and another in the matter of all those rights which are essential for the material and more perfection of man. In one sentence the 'doctrine of equality' which is a fundamental right, is also a necessary corollary of Rule of Law which pervades the Indian Constitution.

The phrase 'Equality before the law' occurs in almost all written Constitutions which guarantee the right to equality. The U.S. Constitution uses the expression “equal protection of the laws”, while on the other hand the Constitution of India uses both expressions in Article 14 which contain the Doctrine of Equality in general. Thus, every person is entitled to equality before law and equal protection of laws. Here the State is bound to protect every human being from inequality. Though the two expressions seem to be identical, but in fact, they mean different things. And as to their origin, 'equality before law' is an expression of
English Common law, while the other expression owes its origin to the American Constitution. Thus Art 14 guarantees equality before law and equal protection of laws.

However, the phrase ‘Equality before law’ in Art 14 of the Indian Constitution cannot be taken as redundant. It is to be noted that Art 7 of the Universal Declaration of Human Rights contains both equality before law and equal protection of the laws. It runs thus - “All are equal before the law and are entitled without any discrimination to equal protection of the law.” Again Art 26 of the International Covenant on Civil and Political Rights, 1966, not only uses both the expressions but also adds explanatory words prohibiting discrimination.

Art. 26 runs –

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Again without going into detail discussion of the implications of the two expressions as enshrined in Art 14 of the constitution of India ‘equality before law’ is a negative concept implying the absence of any special privilege in favour of any individual and equal subjection of all classes to the ordinary law, while ‘equal protection of the laws’ is an more positive concept implying equality of
treatment on equal circumstances. Thus, the expressions ‘Equality before law’ and ‘Equal protection of laws’ do not mean the same thing, even if there may be much in common. Meanings of these expressions has to be found and determined having regard to the context and scheme of our Constitutional provisions in that regard.

Article 14 guarantees both formal and substantive equality. Art. 14 does not ensure universal application of all laws but ensures equal treatment of equals and unequal treatment of unequals. While Article 14 strikes at hostile discrimination, it permits reasonable legislative classification.

The concept of Equality as ingrained in Art.14 can be tested under two basic heads –

1) Reasonable legislative classification test and
2) Doctrine of Arbitrariness

1) Reasonable legislative classification:
This doctrine strikes a balance between need for equality and demand of the state to classify individual for execution of its laws and for ensuring that those inherently unequal are not treated equally.

A law is said to satisfy the reasonable legislative classification test if -

a) The classification is based on intelligible differentia,
b) The differentia has a reasonable nexus with the object of the statute.

(Will be discussed in detail in next chapter)
2) **Doctrine of Arbitrariness:**

According to doctrine of Arbitrariness, any state action which is arbitrary i.e. not based on reason is violative of Art.14. The reason for this as explained by the Supreme Court of India is that arbitrariness and equality are opposites. Any state action that is arbitrary can not be in furtherance of the right to equality. In E.P. Royappa- vs State of Tamil Nadu*13 the Supreme court has challenged the traditional concept of equality which was based on reasonable classification and has laid down a new concept of equality. Accordingly, equality is a dynamic concept with many aspects and dimensions and it can not be cribbed, ‘cabined and confined’ within the traditional and doctrinaire limits. From a positivistic point of view, equality is antithesis to arbitrariness. The conclusion is that if the action of state is arbitrary, it is implicit in it that it is unequal and therefore violative of Art.14. Article-14 strikes arbitrariness in state action and ensures fairness and equality of treatment.

The basic postulates of Rule of Law is that justice should not only be done, but it must also be seen to be done. In Maneka Gandhi vs Union of India*14 also it was approved that equality is a dynamic concept with many aspects and dimensions and it can not be imprisoned within traditional limits. The principles of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, which pervades Art.14 like a brooding omnipresence.

* 13 AIR 1974 SC 555
* 14 AIR 1978 SC 597
Thus according to the doctrine the content and reach of Art.14 can not be determined on the basis of the doctrine of classification. Art.14 has rightly activist magnitude and it embodies a guarantee against arbitrariness. It is attracted where equals are treated differently without reasonable basis.

3:2 A : Certain established propositions regarding equality under Art.14 of the Constitution of India:

The following propositions are of great relevance to understand the scope of the right guaranteed by Article. They have been enunciated in great detail by learned jurist H.M. Seervai.*15

a) The right to equality is available with respect to both substantive laws and procedural laws.

b) There is a presumption of validity of the classification and the burden of proving unconstitutionality is on the petitioners.

c) The Legislature may have priorities and restrict the benefits of classification to certain cases where the need is manifest.

d) Even a single person can be the subject matter of classification.

e) There is a presumption that the Legislature has correctly understood the needs of the people, while making the classification.

f) A classification need not be made with mathematical precision.

So, while talking about the concept of equality in India the first picture comes to our mind is that the Constitution of India guarantees the Right to Equality through Articles 14 to 18. And equality is one of the magnificent corner stones of Indian democracy. Art.14 out laws discrimination in a general way and guarantees equality before law to all persons. In view of a certain amount of indefiniteness attached to the general principle of equality enunciated in Art.14, separate provisions to cover specific discriminatory situations have been made by the subsequent Articles. Thus Art. 15 prohibits discrimination against citizens on such specific grounds as religion, race, caste, sex or place of birth. Art. 16 guarantees to the citizens of India equality of opportunity in matters of public employment, Art.17 abolishes untouchability and Art. 18 abolishes titles, other than military or academic distinction. Thus, in this series of Constitutional provisions, the Indian Constitution has put all its efforts to inculcate the concept of ‘Equality’ with all its significance.

In situations not covered by Articles 15 to 18, the general principle of equality embodied in Art. 14 is attracted whenever discrimination is alleged. It may be noted that the right to equality has been declared by the Supreme court of India as basic feature of the Constitution. The Constitution is said to be wedded to the concept of equality. Neither Parliament nor any State Legislature can transgress the principle of equality. In a series of cases the Supreme court since Keshwanand Bharati vs state of Kerala*16 up till now has strongly

*16 AIR 1973 SC 1461
affirmed that equality is a basic feature of the Constitution of India and any treatment of equals unequally or unequals as equals will be violation of basic feature of the Constitution of India*17 thus equality in the basic structure would prevent the state from taking any action that would amount to treating unequals equally, more than equals. Therefore, again we find the formulation of equality within the four corners of the text of Art. 14 and nothing beyond.

Thus, how the equality concept pervades the Constitution of India has been dealt in next chapter in relation to some protective provisions which seems to be discriminatory to the other masses of the country. It is to be noted here that those protective measures have been incorporated in the Constitution by way of special measures or reservations meant only for the weaker sections of the society. And further it is also important that those provisions were drafted by the framing fathers of the Constitution or subsequently amended by the Legislators, inspired by the values and principles of ‘social justice’

Though there is no exact definition of ‘social justice’, as discussed above, even then Equality and Social Justice are seem to be the two sides of the same coin. However the judiciary through its creativity has been consistently dealing with the concept of equality as it is a dynamic concept in itself, so is the position of Social Justice too.

* 17 MG Badappanvar-vs-State of Karnataka AIR 2001 SC 260

1) Non Arbitrariness:

The Supreme court of India had made a progressive contribution to the doctrine of equality jurisprudence by adding the American concept of ‘Due process’ to that of equal protection in the 14th Amendment to the American Constitution.

In India, there is no ‘Due process’ clause in the Constitution directly. Hence, though the court could not directly introduce the concept of Due process in the interpretation of Art 14; it has indirectly done that by reading Art. 14 along with Art.19 and Art. 21, which have earlier been interpreted to ensure the requirements of reasonableness, non-arbitrariness, justice and fairness. In short, when the constitutionality of a law is challenged under Art 14, the court has to consider it “on the anvil of interplay” of Articles 14, 19 and 21, as if they were all parts of an ‘integral scheme.’

Equality is the essence of Indian democracy and accordingly a basic feature of the Constitution as narrated above. The concept of equality like the concept of “representative democracy” and “secularism” is delineated over various Articles. It is true that equality has several facets. However each case has to be seen in the context of the placement of an Article which embodies the foundational value of equality.*18

*18 M. Nagaraj-vs- Union of India (2006) 8 SCC 212
II. Equality of status & opportunity:

Another facet of equality before law is that the state should offer equal status and opportunity to all its citizens, as envisaged in the Preamble to our Constitution. And this facet is specifically dealt with in Articles 15 (1) and 16 (1). But there may be denial of equal opportunity outside Art 15 (1) on grounds other than those specified in that Article and matters other than employment to which Article 16 (1) is confined. Such denial offence against the genus of Art. 14 of which Articles 15 to 16 only constitute species. This will be deal in detail in subsequent chapters.

III. Equal Justice vis-à-vis Social Justice:

Once it is acknowledged that equality of opportunity is an ingredient of 'equality before law', the denial of which invalidates state action, a further step is an affirmative corollary that Art. 14 imposes upon the state a positive duty to build up such a society where equality of opportunity is available to all citizens and the poor can also enjoy the fundamental rights guaranteed by the Constitution.*19 By one swing thus the equality concept under Art. 14 shifts from its traditional negative role to an affirmative or creative or socialistic one. Hence equal justice is an aspect of social justice. It was held in Indra Swahney vs Union of India,*20 the concept of equality before law contemplates minimizing inequalities in income and eliminating inequalities in status, facilities and opportunities not only among individuals, but also among groups of people securing adequate means of livelihood to its citizens

* 19 Indra Sawhney-vs-Union of India AIR 1992 SC 477
and to promote with special care the educational and economic interest
of the weaker sections of the people including in particular Scheduled
Caste and Scheduled Tribes and to protect them from social injustice
and all forms of exploitation. Thus equality means equal opportunity for
all and there should be no privileged class and such equality can be
predicted meaningfully only in an 'equal society' i.e. a society
contemplated in Art. 38 of the Constitution of India.

IV. Affirmative action needs protective discrimination:

In most of the earlier cases, the Supreme Court understood
the guarantee of equality in Art. 14 to mean the absence of
discrimination, but in later cases the court has come to hold that in order
that equality of opportunity may reach the backward classes and
minority, the state must take affirmative action by giving them a
'preferential treatment' or 'protective discrimination' and taking positive
measures to reduce inequality.

To make equality a living reality for the larger masses of
people, those who are unequal can not be treated by identical standards.
It is necessary to take into account de facto inequalities which exist in
the society and to take affirmative action by way of giving preference to
the socially and economically disadvantaged persons or inflecting
handicaps on those more advantageously placed in order to bring about
real equality. Such affirmative action though apparently discriminatory
is calculated to produce equality as a broader basis by eliminating de
facto inequalities and there by placing the weaker sections of the
community
on a footing of equality with the stronger and most powerful sections, so that its member of the community, whatever is his birth, occupation or social position may enjoy equal opportunity of using his full natural endowments of physique, of character and of intelligence. Protective discrimination is a facet of equality under Articles 14, 15 and 16 of the Constitution of India. The very concept of equality implies recourse to valid classification for preferences in favour of disadvantaged classes of citizens to improve their conditions to that of the other advanced members of the society. It was held by Supreme Court that the object of protective discrimination was empowerment of backward classes and adequate sharing of power.

In the words of Prof. D.D. Basu in his commentary on the Constitution of India, 8th edition (2007) said that reservation is remedy for historical discrimination and its continuing ill effects, other affirmative action programmes are intended to redress discrimination of all kinds whether current or historical. It was declared that affirmative action is not compensatory justice, but it is also distributive justice making to ensure that community resources are more equitable and justly shared among all classes of citizens and from the point of view of social utility, affirmative action promotes maximum wellbeing for the society.

After the decision of Indra Swahney’s Case, Supreme Court held that it would be Constitutionally immoral to perpetuate in equality among majority people of the country in the guise of protecting
the Constitutional rights of minorities and Constitutional rights of the backward and downtrodden. All the rights of these groups are part of the right to social development which can not render national interest and public interest subservient to the right of an individual or right of a community.*21

Preference to a class of persons whether based on caste, creed, religion place of birth, domicile or residence is already embedded in our Constitutional scheme. On the other hand equal protection clause requires affirmative action for those placed unequally. Affirmative action or positive discrimination is inbuilt in equality of opportunity in status enshrined in Articles 14 and 16 (1) of the Constitution. Mostly the people suffer from disability either belonging to oppressed community or by way of economical, cultural or social imbalances. But the Courts shall all along stir hard for maintaining a balance*22. OBC’s though socially and educationally not forward, they don’t suffer the same handicaps inflicted upon Scheduled Caste and Schedule Tribes. They are always treated as dissimilar and they do not form an integrated class with Dalits and Tribes for the purpose of Articles 15 (4), 16 (4). The Constitution has not expressly provided benefits to the OBC’s except by way of specific orders and public notifications by the appropriate Government.*23

---
* 21 Islamic Academy of Education vs- state of Karnataka (2003) 6 SEC. 697
* 22 Saurabh Chaudri (Dr)-vs- Union of India, AIR 2004, SC 361. (2003) II SEC 146
Equality under Art 14 is not indiscriminate. Conferment of special benefits or protection to a particular groups of citizens for rational reasons is envisaged under Art. 14 and is in the concept of equality. Under the guise of affirmative action, the state can not subdivide a class, so as to give more preference to a minicule proportion of Scheduled Caste in preference to other members of the same class. Affirmative action is limited to decide the extent of reservation to be made for a class that is socially, educationally and economically backward either in public service or for obtaining admissions to educational institutions. Sub classification of the Scheduled Caste as contained in the Presidential List under Art. 341 is impermissible and will be violative of Art. 14 and can not be supported as an affirmative action.*24

It was also held that though Art 15 (4) of the Constitution envisages policy of protective discrimination, such policy should be reasonable and consistent with ultimate public interest i.e. national interest and interest of community or society as a whole. It was, therefore, held that at the level of super specialization in medical education there can be no reservation.*25

In state of Kerala vs- N.M. Thomas, it was held that it was permissible to give preferential treatment to Scheduled Castes and Scheduled Tribes under Art. 16 (1) outside Art. 16 (4). It was held that

* 25 Preeti Srivastava (Dr.)-vs- State of U.P. AIR 1999 SC 2894 (1999) 7 SCC 120
Art. 16 (4) is not an exception to Art. 16 (1), but only a facet of Art. 16 (1) making a departure from the earlier decision*26

Social Justice is one of the sub-divisions of the concept of Justice as discussed earlier. It is concerned with the distribution of benefits and burdens throughout a society as it results from social institutions, property systems, public organizations, etc. There are three criteria to judge the basis of distribution for social justice namely rights, deserts and needs, as already discussed in previous paragraphs. These three criteria can be put under to concepts of equality, 'formal equality' and 'proportional equality'. There is difference between the two.

Formal equality means that law treats everyone equal and does not favour any one either because he belongs to the advantaged section of the society or to the disadvantaged section of the society. Concept of proportional equality expects the state to take affirmative action in favour of disadvantaged section of society within the frame work of liberal democracy. Proportion equality is equality 'in-fact' whereas formal equality is equality 'in-law'. Egalitarian equality is proportional equality.

When 'protective discrimination' for promotion of equalization is pleaded, burden is on the party who seeks to justify ex-facie deviation from equality.*27 It was held therein that reservation is

* 26 T. Devadasan -vs- Union of India, AIR 1964 SC 179
* 27 AIMS Students' Union -vs- ARMS AIR 2001 SC 3262 : (2002) 1 SCC 428
protective discrimination, provision for sources of entry is aimed at securing equal or proportionate distribution. The characteristics of the two may be to some extent overlapping, yet there is distinction between the two.

Hence it has been seen that the Preamble of our Constitution promises equality of status and opportunity to all citizens and that this ideal of Equality embraces both social and political equality. So far as the ideal of social justice vis-à-vis social equality is concerned, it is embodied in a series of Articles of which Art. 14 is the genus and the Articles 15-18 contain particular application thereof. Art. 14 being a general provision, is to be read subject to the special provisions which engraft exceptions to the general rule of equality as well as those Articles which explicitly override Art. 14 to the specified extent. Thus, for example, the special provisions for women and children in Art 15 (3) or for the Backward Classes in Art 15 (4) and 16 (4) can not be challenged on the ground that they violate the rule of equality enunciated in Art. 14 of the Constitution of India.

There can be no justice without equality. The provisions of Part III of the Constitution of India amongst which ‘Right to equality’ is the mother right to all which provide for social justice in true sense of the term. We can hardly overlook in this context that under the Constitution of USA, racial discrimination persists even today, not withstanding recent judicial pronouncement of the country. The position
in U.K. is no better as demonstrated by current events, even after the enactment of the Race Relations Act 1976*28

In India, Our Constitution is wedded to the concept of equality which is the basic feature of the Constitution and any amendment which offends basic feature is declared as invalid. The Preamble to the Constitution emphasizes upon the principle of equality as basic structure to the Constitution. Accordingly as to the grand objectives and socio-economic goals to achieve which the Indian polity has been established, these are stated in the Preamble. These are: to secured to all its citizens social, economic and political justice, liberty of thought and expression, belief, faith and worship, equality of status and opportunity and to promote among them fraternity so as to secure the dignity of the individual and the unity and integrity of the Nation.

Emphasizing upon the significance of three concepts of liberty, equality and fraternity used in the Preamble, Dr. Ambedkar observed in his closing speech in the Constituent Assembly on November, 25th, 1949 “the principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty can not be divorced from equality, equality can be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty, would kill individual initiative.”*29

* 29 B. SHIVA RAO, The framing of Indian Constitution, Select Documents Vol. iv. P-994
The Supreme Court has emphasized that the words "fraternity assuring the dignity of the individual" have a special relevance in the Indian context because of the social backwardness of certain sections of the community who had in the past been looked down upon.*30

At the last but not the least it is important to note about the concept of 'socialist' state which was inserted in the Preamble by the 42nd Amendment of the Constitution in 1976 and which is firmly attached with the concepts of 'Social Justice' and 'Equality'.

The Supreme Court has in a number of decisions referred to the concept of 'socialism' and has used this concept along with the Directive Principles of State policy to assess and evaluate economic legislation. The court has derived the concept of 'social justice' and of an economically egalitarian society from the concept of socialism. According to the Supreme Court, "the principal aim of socialism is to eliminate inequality of income and status and standards of life, and to provide a decent standard of life to the working people."*31

Democratic socialism aims to end poverty, ignorance, disease and inequality of opportunity. Socialistic concept of society should be implemented in the true spirit of the Constitution. In Samatha-vs- State of A.P.*32 the Supreme Court has stated while defining

* 30 Indra Swahney-vs- Union of India AIR 1993, SC 477
* 31 S.R. Bommai-vs-Union of India AIR 1994 SC 1918
* 32 AIR 1997 SC 3297, 3330
socialism, establishment of the egalitarian social order through rule of law which is the basic feature of the Constitution.

The Court has laid emphasis on Social Justice so as to attain substantial degree of social, economic and political equality. Social Justice and equality are complementary to each other. Thus, the Constitution envisions to establish an egalitarian social order rendering to every citizen, social, economic and political justice in a social and economic democracy.

To make the human relation just by eliminating the disproportionate imbalances and disparity is one of the Constitutional destinations. This could popularly be termed to administer justice in social life of the Nation. This could bear a popular nomenclature as 'Social Justice'. It is a continuous process which runs till eternity. It varies according to fall and rise of the civilization in the society.

The Constitution has recognized the Rule of Law and equality as the means to reach the destination of Justice-Social. Every instrumentality including Judiciary has to uphold and enforce it. Thus, Justice- Social, as a constitutional goal, could be described as social justice, which is the dream of every welfare state. It differs in its size and contents according to the prevalent social conditions.

* 33 Air India Statutory Corp.-vs- United Labour Union, AIR 19997 SC 645
On the whole, in conclusion of this chapter it is important to note that Social Justice could be an objective of the State. The State in its journey for accomplishment could solicit the participation of Judiciary in well-settled modalities. But the Judiciary can not take lead on its own initiative and drive and make the Social Justice as Judicial Mission. For defiance of social justice, Legislature would be answerable before the proper forum.