

FILLING THE UNJUST CRACKS: A CRITICAL VIEW OF SOCIAL JUSTICE

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Abstract: Indian society has evolved out of various paradoxes and imperfections. Indian communities are so diverse in their origin and experiences, that, we don't find a common picture of marginalization, exclusion, injustice, discrimination, assertion, etc. from all sides. It is very difficult for our largest democracy to assemblage all these varied questions into one common rule or national umbrella. Even the various efforts of upliftment and empowerment from the side of Indian polity, has created a differentiated hierarchical zone of power which further divides the lower sections into *haves* and *have-nots*. The path of social justice and its various mechanism through Indian Constitution has resulted into a positive space for historically marginalized classes. Even the socio-legal advocacy for these weaker sections from the side of Human Rights activist or social welfare agencies through writs, petitions or PIL, has created a civil and democratic space of public means. But despite a long journey (74th) of independence and republic symbol, cases of unjust discrimination and inhuman practices used to appear every single day for varied sections of Indian society.

This paper will look out the possibilities of providing all the philosophical principles of social justice on the reality ground. It will also critically examine most of the legal statements and decisions in the way through secondary data.

Keywords: Social Justice, Preamble, Directive Principles of State Policy, Social Welfare, Public Interest Litigation.

Concept and Philosophy of Social Justice:

The concept of social justice emerged out of a process of evolution of social norms, order, law and morality. It laid emphasis upon the just action and creates intervention in the society by enforcing the rules and regulations based on the principles in accordance with social equality. The term 'social' as we can understand, is concerned with all human beings within the society and term 'justice' is related with liberty, equality and rights. Thus, social justice ensures liberty, equality and maintains their individual rights in the society. In other words,

securing the highest possible development of the capabilities of all members of the society may be called social justice. In dealing with the concept of social-justice, it becomes essential to differentiate between the traditional idea of 'justice' and modern idea of 'social justice' intended to establish an egalitarian society. The notion of social justice, however, is relatively recent phenomenon and largely a product of the modern social and economic developments. The traditional idea of justice which is described as often conservative approach, focused on the qualities of 'just' or 'virtuous' man, while the modern idea of social justice assumes a just-society. In ancient Greek and Hindu

approach, the justice is concerned with functioning of duties, not with notion of rights. Both Plato and Aristotle hold the state to be prior to the individual. Under ancient Indian tradition, Dharma is another name of code of obligations and justice is nothing but virtuous conduct with dharma. In modern liberal philosophy "justice" is defined in terms of rights not as duties. The source of such rights is the state legislation which limits the state power non-infringing or taking away fundamental rights. In modern societies, almost all constitution's guarantee such rights and ensure their effective implementation. In this sense justice becomes a disposition to give everyone's his rights. The modern liberal-view of justice has been developed in the writings of various thinkers including John Locke, Bentham, John Stuart Mill, Spencer and Adam Smith. According to Rousseau men are equal by nature but the institution of private property has made them unequal and further perpetuated inequalities. Therefore, the perfection of man lies in the improvement of society that can be done by observing cultivating natural feelings and sentiments which guarantee equality and social-justice. According to Marxist analysis, the source of injustice is the private ownership of the means of production, which creates the social divisions into bourgeoisie and proletariat classes. To establish of the ideal state of justice it is necessary to abolish private property and to create a classless society. The objective of social justice is to organize the society so as to abolish the source of injustice in social relations, such as discrimination on the basis of caste, sex, religion, race, region etc. whereas social justice may also require protective discrimination in favour of the downtrodden, underprivileged and weaker sections of the society. The concept of

social justice is an evolving concept and despite various efforts, it is problematic to define the same. Each conceptualization is concerned with the distributive character of imparting justice. Thus, the notion of social justice requires the equal distribution of economic goods and opportunities. More recently the development of the notion of justice may be found in the work of John Rawls and Robert Nozick. They also emphasized on the distributive character of justice. In the opinion of Nozick, historical entitlement is a significant component of distributive justice where the society is aware of its wrongs and has an increased interest in compensation. John Rawls conceptualizes justice as fairness where there is desirability of advantage for the marginalized groups in some respect. In the broader perspective, social justice deals with the regulation of wage; profits and protection of individual rights through the legal system of allocation of goods and resources. In other words, social justice means availability of equal social opportunities for the full development of human personality to all the people in the society, without any discrimination on the ground of caste, sex or race etc. Therefore, the notion of social justice is associated with social equality and individual rights. Social justice can be made available only in a social system where the exploitation of one human being by another human being is absent, and where privileges of the few are not built upon the miseries of the many. Despite various attempts to define the term 'social justice', it is a very vague concept and cannot be captured empirically. Krishna Iyer in his work '**Justice and Beyond**' rightly proclaims "social justice is not an exact static or absolute concept, measurable with precision or getting into fixed world. It is flexible, dynamic and relative." In fact, the

emergence of just man, just action and just state of affairs in society seems to be a manifestation of social justice. In the view of former Chief Justice of India Justice Gajendragadkar, the concept of social justice has dual objectives of 'removing all inequality' and affording equal opportunities for 'economic activities of all the citizens'.¹⁰² The core element of social justice is equal social worth which required that citizens be guaranteed certain social rights as well as the civil and political rights. The idea of social justice demands freedom, equality and other human rights to secure the greatest happiness and common good of human beings. In *D. S. Nakara v. Union of India*, the Supreme Court has held that the principal aim of a socialist state is to eliminate inequality in income, status and standards of life. The basic frame work of socialism is to provide a proper standard of life to the people, especially in terms of security from cradle to grave. Amongst there, it envisaged economic equality and equitable distribution of income.

Social Justice and Indian Constitution

The Indian Constitution is unique in its contents and spirit. The constitutional scholar Granville Austin, in his magisterial work, states that probably no other Constitution in the world "has provided so much impetus towards changing and rebuilding society for the common good". Though borrowed from almost every constitution of the world, it has several salient features that distinguish it from the constitutions of other countries. Social justice is the idea of creating a society or institution that is based on the principles of equality and solidarity, that understands and values human rights, and that recognizes the dignity of every human being. Feeling of social justice is a form of

relative concept which is changeable by the time, circumstances, culture and ambitions of the people. Social inequalities of India expect solution equally. Under Indian Constitution the use of social justice is accepted in wider sense which includes social and economic justice both. The makers of the constitution who were well known to the use and minimalist of various principles of justice wanted to search such form of justice which could fulfil the expectations of whole revolution. Social justice found useful for everyone in its kind and flexible form. Although social justice is not defined anywhere in the constitution but it is an ideal element of feeling which is a goal of constitution and it is the foundation stone of Indian Constitution.

The preamble and various Articles contained in Part IV of the Constitution promote social justice so that life of every individual becomes meaningful and he is able to live with human dignity. The concept of social justice engrafted in the Constitution consists of diverse principles essentially for the orderly growth and development of personality of every citizen. Social justice is thus an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species; Social justice is a dynamic devise to mitigate the sufferings of the poor, weak, Dalits, tribals and deprived sections of the society and to elevate them to the level of equality to live life with dignity of person. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation of every section of the society. In a developing society like ours which is full of unbridgeable and ever widening gaps of inequality in status and of opportunity, law is a catalyst to reach the ladder of justice. The philosophy of

welfare State and social justice is amply reflected in large number of judgments of this Court, various High Courts, National and State industrial Tribunals involving interpretation of the provisions of the Industrial Disputes Act, Indian Factories Act, Payment of Wages Act, Minimum Wages Act, Payment of Bonus Act, Workmen's Compensation Act, the Employees Insurance Act, the Employees Provident Fund and Miscellaneous Provisions Act and the Shops and commercial Establishments Act enacted by different States. The preamble itself says: "We, the people of India, having solemnly resolved to constitute India into a sovereign, socialist and democratic Republic and to secure to all its citizens—Justice, social, economic and political...." Clearly, social justice in all its forms and to all citizens was regarded as fundamental to the set-up which our founding fathers prescribed for the country; it is mentioned on top of the other equally sound concepts. The words, "Socialist", "secular", "democratic" and "republic" have been inserted in the preamble which reflects it's from as a "social welfare state." The term 'justice' in the Preamble embraces three distinct forms- social, economic and political, secured through various provisions of Fundamental Rights and Directive Principles. Social justice denotes the equal treatment of all citizens without any social distinction based on caste, colour, race, religion, sex and so on. It means absence of privileges being extended to any particular section of the society, and improvement in the conditions of backward classes (SCs, STs, and OBCs) and women. Economic justice denotes on the non- discrimination between people on the basis of economic factors. It involves the elimination of glaring inequalities in wealth, income and property. A combination of social justice and

economic justice denotes what is known as 'distributive justice'. Political justice implies that all citizens should have equal political rights, equal voice in the government. Under Indian Constitution the use of social justice is accepted in wider sense which includes social and economic justice both. As stated by Chief Justice Gajendragadkar, "In this sense social justice holds the aims of equal opportunity to every citizen in the matter of social & economical activities and to prevent inequalities". The Constitution of India does not completely devote to any conventional ideology as – Equalitarian, Utilitarian, Contractarian or Entitlement theory. Dedication of constitution is embedded in progressive concept of social justice and various rules of justice such as- Quality, Transaction, Necessity, Options etc are its helping organs. To accept right to equality as an essential element of justice, Indian Constitution prohibits unequal behaviour on the grounds of religion, race, caste, sex. The term 'equality' means the absence of special privileges to any section of the society, and provision of adequate opportunities for all individuals without any discrimination. The Preamble secures at all citizens of India equality of status an opportunity. This provision embraces three dimensions of equality- civic, political and economic. But the question is how to determine inequality? In India it is not easy to determine inequality. Equality is movable concept which has many forms and aspects. It cannot be tightened in traditional and principles circle. Equality with equal behaviour prohibits arbitrariness in action. In view of securing to all its citizens social justice Indian Constitution provides some Fundamental rights in Part III some of which are available to all persons and some are enjoyable only by the citizens of India.

Further, to realize the goal of social justice the constitution also provides some direction to the State in the form of Directive Principles of State Policy and lays down that the state shall direct its policy towards securing these objectives. In India, courts have performed a great role to make the social justice successful. In the field of distributive justice, Legislature and Judiciary both are playing great role but courts are playing more powerful role to deliver compensatory or corrective justice but these principles are known as mutually relatives not mutually opposites. Ideals and goals are to deliver social justice. Medium may be distributive or compensatory justice. The adopted type may be of quality, Necessity, Equality, Freedom, Common interest or other. The courts are now taking leading part in the design of administration of many services - including services for mentally ill and retarded, for prison populations, for public welfare recipients, and for abused children and other dependent persons. With that end in view the Supreme Court of India evolved a new mechanism of public interest litigation or social interest litigation in the early eighties. In the fifties and sixties, the role of judiciary more or less remained as a sober manifestation of the movement for social justice based on progressive values. While other institutions have lost their progressive shine, the judiciary remains a uniquely situated instrument for social justice, perhaps the only effective force for challenging the institutions of the welfare state. The Supreme Court of India has given a principal and dynamic shape to the concept of social justice. Social justice has been guiding force of the judicial pronouncements. The judiciary has given practical shape to social justice through allowing affirmative governmental actions are held to include compensatory justice as

well as distributive justice which ensure that community resources are more equitably and justly shared among all classes of citizens. The concept of social justice has brought revolutionary change in industrial society by charging the old contractual obligations. It is no more a narrow or one sided or obscure concept. It is founded on the basic ideal of socio-economic equality and its aim is to assist the removal of socio- economic disparities and inequalities. This judicial activism sharing the passion of Constitution for social justice was rejuvenated with the Maneka Gandhi case in which fundamental right of personal liberty has been converted into a regime of positive human rights unknown in previous constitutional diction. Thereafter, gradually the Supreme Court, particularly some socialist justices tried to explore social justice in the Fundamental Rights and Directive Principles of State Policy. In this way the courts try to force the government to realize the new concept of social justice in the cases of Sunil Batra (right against torture); Bandhua Mukti Morcha (right against bondage); Peoples Union for Democratic rights (right against bondage); M.C.Mehta (right against environmental pollution), Upendra Baxi (right to human dignity), Sheela Barse (right to legal aid); many others. In these cases, the judges maintain that in a developing society judicial activism is essential for participative justice and the bureaucrats as well as the elected representative will have to face the judicial admonition and pay the penalty if the people in misery cry for justice.

Indian Constitutional provisions ensuring Social Justice: Fundamental rights in Part III some of which are available to all persons and some are enjoyable only by the citizens of India are:- a) Equality before law (Art 14)) Prohibition of

discrimination on ground of religion, race, caste, sex or place of birth (Art 15)) Equality of opportunity in matters of public employment (Art 16)) Abolition of Untouchability (Art 17)) Abolition of titles (Art 18)) Protection of certain rights regarding freedom of speech etc. (Art 19)) Protection of life and personal liberty (Art 21)) Protection in respect of conviction for offenses (Art 20)) Protection against arrest and detention in certain cases (Art 22)) Protection of traffic in human beings and forced labour (Art - 23)) Prohibition of employment of children in factories or mines or in any other hazardous employment (Art 24)) Freedom of Religion (Art 25 - 28)) Protection of interests of minorities (Art 29-30)) Judicial remedies for enforcement of rights conferred by this Part - III of the Constitution (Art 32). Chapter IV of Indian Constitution Article 36 to 51 incorporate certain directive principles of State policy which the State must keep in view while governing the nation. The most important of these directives are – a) Promotion of welfare of the people (Art 38)) , Adequate means of livelihood; equal distribution of material resources of the community; distribution of means of production to the common good and equal pay for equal work; - promotion of health and strength of workers, men and women and the children : Protection against exploitation of child hood and youth (Art 39)) Equal justice and free legal aid (Art 39A)) Right to work, education and to public assistance in certain cases (Art 41) , Just and human conditions of work and maternity relief (Art 43) Living wages for workers (Art 44) Uniform civil code (Art 44) Free and compulsory primary education for children (Art 45)

“The principles of Policy set forth in this part are intended for the guidance of the State. While these principles shall not be

cognizable by any Court, they are nevertheless fundamental in the governance of the country and their application in the making of laws shall be the duty of the State.”

By incorporating the system of special provision for backward classes of society, it is to try to make the principle of equality more effective. The State, according to Article 15(1) of the Constitution, "shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them." Under Article 15(4) the state shall make any special provision for the advancement of any socially and educationally backward classes of citizen or for the scheduled castes, and the Scheduled tribes and in the same manner by accepting the opportunity of equality to employment under state in Article 16 (1), it has excepted the principle of equalization under Article 16(4). If it is in the opinion of the state that any class of the citizens has not adequately representation under state employment, state shall make any provision for the reservation of appointments. According to Art 46 the State shall promote with special care the educational and economic interests of weaker sections of the people, and in particular, of the scheduled castes and the scheduled tribes, and shall protect them from social injustice and all forms of exploitation. In a very important case of **Indra Shahani vs. Union of India** the Supreme Court declared twenty seven percent reservations legal for socially and economically backward classes of the society under central services. Social justice is a dynamic device to mitigate the sufferings of the poor, weak, Dalits, tribals and deprived sections of the society. State to secure a social order for the promotion of welfare of the people Article 38 has been a keystone of the Directive Principles. This article is a directive to the

State to give effect to the objectives expressed in the Preamble to the Constitution, by securing a social order for the promotion of the welfare of the people. Article 38 stipulates as under: - (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. (2) The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocation. While reading Arts. 21, 38, 42, 43, 46 and 48A together, the Supreme Court has concluded in *Consumer Education & Research Centre v. Union of India*, that “right to health, medical aid to protect the health and vigour of a worker while in service or post retirement is a Fundamental Right...to make the life of the workman meaningful and purposeful with dignity of person.” In the instant case, the Supreme Court dilated upon the theme of social justice envisioned in the Preamble to the Constitution and Art. 38. Social Justice is the arch of the Constitution which ensures life to be meaningful and liveable with human dignity. Social justice, equality and dignity of the person are cornerstones of social democracy. If a law is made to further socio-economic justice, it must be prima facie reasonable and in public interest. In other words, if it is in negation, it is unconstitutional. Provisions of articles 39 (e), 39 (f), 41 and 47 can be pressed into service to make suitable provisions regarding child labour. Article 39 clause (e) states that the health and strength of workers, men and women, and the tender age of children are not abused and that

citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Clause (f) states that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and the childhood and youth are protected against exploitation and against moral and material abandonment. Accordingly, the Supreme Court has issued directions to the State to see that an adult member of the family whose child is in employment in a factory, mine or hazardous employment gets employment anywhere, in lieu of the child. Article 39 (e) requires the State to direct its policy towards securing that the health and strength of the workers and the tender age of children are not abused. Relying on this Directive Principles, the Court issued directions to State Governments for ensuring that care homes must provide at least the minimum conditions ensuring human dignity. The state shall in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Relying on Article 39(e) and (f), the Supreme Court laid down the procedural and normative safeguards for adoption of children by foreign parents. Principal 6 of the Declaration of Rights of The Child, 1959, provides that a child of tender years shall not, save in exceptional circumstances, be separated from his mother. The expression ‘material resources’ in Article 39 (b) means all things which are capable of producing wealth for the community. It is wide enough to cover not only natural or physical resources, but also movable or immovable property, such as, land, buildings, workshops, vehicles etc. The

word 'distribution' in Article 39 (b) is to be given a wider interpretation. It does not only mean that a property of one should be taken over and distributed to others. It also includes nationalization, which is an effective distribution process, as it prevents concentration of wealth in a few hands and thus benefits the society at large. 'Equal pay for Equal Work' has not been secured as a fundamental right, but has been held to be deductible from Articles 14, 16 and 39 (d). It has been held that this principle of equal pay for equal work' might be applied to cases of unequal scales of pay based on no classification or irrational classification. A statutory corporation (even if it is not a public utility) must comply with Article 39 and charge only fair prices; the right to livelihood was not given much importance earlier. However, in *Olga Tellis v. Bombay Municipal Corporation*, the Supreme Court has declared it to be a part of the right to life guaranteed by Article 21. The Court lay down that the Directive Principles contained in Articles 39 (a) and 41 should be regarded as equally fundamental in understanding and interpreting the meaning and content of Fundamental Rights. Equal justice and free legal aid under Article 39A the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislature or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Article 39A promotes justice on the basis of equal opportunities. It imposes an imperative duty upon the State to provide free legal aid to the poor. It is with a view to enable the poor litigant to have an easy access to a Court of Law to invoke legal right and to secure him equal protection of

laws against his well-to-do opponent, that the scheme of affording legal aid and assistance to the poor has been conceived. It has now been settled that legal aid constituted a part of the right to personal liberty guaranteed under Article 21 and was enforceable by the Court. The Government should set up a "sitor's fund" to meet the cost of defending a poor or indigent. Under Article 41, it is expected to the state that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement, and in other cases of underserved want. Under Article 42 the State shall make provision for securing just and humane conditions of work and for maternity relief. Article 43 of the Constitution provides the State shall endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas. In *PUDR vs. Union of India*, 22 the Supreme Court has held that minimum wages must be given and not to pay minimum wages is the violation of human dignity and it is also known as exploitation. In *Bijoy Cotton Mills Ltd. v. State of Ajmer*, the Court held that the fixation of minimum wages of labourers under the Minimum Wages Act, 1948, was in the interest of the general public and, therefore, it was not violation of the freedom of trade, secured to the citizens under Article 19 (1)(g). The basic principle of a Socialist State is to eliminate

inequality in income, status and standards of life. The 'living wage' is to be distinguished from 'minimum' and 'fair wage'. While 'living wage' is such wage as enables the male earner to provide for himself and his family not merely the bare necessities but a measure to frugal comforts, 'minimum wage' on the other hand, is just sufficient to cover the bare needs of a workman and his family. Article 45 lays down that the State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years. The Directive contained in Article 45 has been held to be a fundamental right forming part of the Right to life secured by Article 21. It implies that the direction under Article 45 is not confined merely to primary education. It extends to the duty to provide free education until the children attain the age of 14 years, whatever the stage of education it may come to be. Articles 29 and 30 which secure Cultural and Educational Rights to minorities, the Court held, were to be read in the backdrop of Articles 41 and 45. By the 86th Amendment Act, 2002 this directive in Article 45 of Free and compulsory education for children has been given the status of fundamental right and can be enforced in the Court of law.

In India, courts have performed a great role to make the Social justice successful. It has given a principal and dynamic shape to the concept of social justice. Social justice has been guiding force of the judicial pronouncements. In **Sadhuram v. Pulin**, the Supreme Court ruled that as between two parties, if a deal is made with one party without serious detriment to the other Court would lean in favour of weaker section of the society. The judiciary has given practical shape to

social justice through allowing affirmative governmental actions are held to include compensatory justice as well as distributive justice which ensure that community resources are more equitably and justly shared among all classes of citizens. The concept of social justice has brought revolutionary change in industrial society by charging the old contractual obligations. It is no more a narrow or one sided or pedantic concept. It is founded on the basic ideal of socio-economic equality and its aim is to assist the removal of socio-economic disparities and inequalities. In **J.K. Cotton Spinning and Waving Co. Ltd. V. Labour Appellate Tribunal**, the Supreme Court of India pointed out that in industrial matters doctrinaire and abstract notions of social justice are avoided and realistic and pragmatic notions are applied so as to find a solution between the employer and the employees which is just and fair. Basically, protective discrimination is used to fulfil those lacks which arise due to a long-time deprivation. It is a part of corrective and compensatory justice. It has been told that people of backward class of society have been bearing injustice for generation to generation. Provisions of protective discrimination under the Constitution included for the benefit of these deprived people. Through equal opportunity on the basis of quality the Supreme Court has tried to make a reasonable balance between distribution of benefits and distributive justice. In **M.R. Balaji vs State of Mysore**, the Supreme Court has held that for the object of compensatory justice, limit of reservation should not be more than 50%. In **Indra Shahni vs. Union of India** full bench of nine judges approved this balance between distributive justice through quality and compensatory justice.

Conclusion

Though there is a remarkable progress in the economy, science and technology, infrastructure development but the gap between the rich and poor is widening day by day. The socially Their excluded status is the product of multiple and intersecting inequalities. Though various initiatives have been taken by the government to achieve the target even though some of the targets are far from to achieve and still comprehensive programmes and policies are required to achieve these targets. The constitution should be interpreted in such a manner to make it a living document in order to fulfil the aspirations of the people. The judiciary has played a great role in updating the constitution through its positive interpretation. It is the collective effort of all the organs of government which lead the social justice to all the citizens. The need of hour is to ensure the proper and balanced implementation of policies so as to make social justice an effective vehicle of social progress.

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