

PERSPECTIVE OF PROTECTIVE DISCRIMINATION IN INDIA

Dr. Malabika Talukdar¹

ABSTRACT:

The idea of equality and inequality, the theory that no two people can be equal and the notion that equality of opportunity could combat the drawbacks which many faced due to their social position have occupied the minds of eminent philosophers such as Locke, Rousseau, Huxley and many others. There was nothing ambiguous about the arbitrarily hierarchical and socially and economically exploitative caste system that had guided India since before the Independence. For, centuries, they had been victims of humiliation and oppression and at the dawn of independence, the framing fathers had taken the plight to ensure then with justice- social economic and political, as set forth in the Preamble of the Constitution of India and thus inserted an extraordinary phase for the upliftment of the masses of humanity from the morass of subhuman social existence, abject poverty and economic exploitation too.

Initially we all know that the genie of affirmative action was installed in the Constitution for a temporary period of 10 years, but fortunately or unfortunately it is on and on till date (through members amendment to that effect) and the census 2011 has made it more confirmed, threatening the Constitutional goal of “casteless society” rather making it a “caste based” society. Therefore, it has been tried to find out some agreeable or considerable solutions for balancing the interest of the persons who are actually socially, economically and educationally backward without making classification on the basis of ‘caste’, who claims reservations or special provisions by birth.

KEYWORDS:

Equality, arbitrarily, affirmative action, casteless society, caste based society, Protective discrimination, backward classes, social justice, reservation, judicial mission, Jurisprudence

¹ [B.A(H), LL.M, Ph.D.], Assistant Professor, University Law College, Gauhati University, Guwahati- 781014, Assam

E-mail id: malabikatalukdar11@gmail.com

INTRODUCTION

The concept of “Protective discrimination” for so called backward classes of people in India has assumed a new dimension because of the massive socio-economic changes after Independence and resultant change in the perception regarding ‘Equality’. Soon after independence, the social problem of caste inequality came to the fore though there are many kinds of inequalities in our country, the main emphasis is on caste because of the potential of ‘caste’ in the battle for ballots. Caste is considered peculiar and intrinsic to the Indian society but escapes strict definition, owing to its complexity. Yet it is used in so many contexts with this lack of precision. It is a term widely used to describe the hereditary, endogamous social classes and sub classes of traditional Hindu society.

The issue of protective discrimination through reservations is steeped in questions of equality, merit and social justice. Understanding the interactions between these questions has long evoked judicial, political and academic debate. The debates on affirmative action or protection discrimination tend to employ the language of rights, particularly the rights of “upper”

against the rights of “lower” castes. The demands that the state should distribute benefits of education and employment between different castes and communities is a strong one as it echoes a social ideal that has prevailed in India for centuries. What is noticeable is a continued tendency to assert “rights” of one group as against another, as opposed to rights of an individual as an individual. The Indian Constitution guarantees fundamental rights of equality of opportunity and non-discrimination to individuals.

While the justification for the reservation policy and the quota system has been accepted by all, debates are polarized on 3 main questions: the beneficiaries of the policy, its extent and its permanence. These have been thrashed out since the turn of the century, however debates intensified post Mandal and Indra Sawhney and their legacy continues till date. So, inspired by all these logical situations of contemporary India, where from every state there is hue and cry for reservations and people get delighted to identify themselves belonging to a particular backward class or caste, the reservation has undertaken the issue of protective

discrimination, to study it from socio- legal perspective.

In the polemical debate on reservations, one often sees a bewildering array of terms employed, like affirmative action, positive discrimination, compensatory discrimination, protective discrimination etc. The proliferation of these terms was a post Mandalian phenomenon. Initially, the policy was nameless, with many content to describe it as ‘special treatment’, ‘preferential treatment’ or as ‘concessions.’ In India, they are popularly called as reservations. Marc Galanter proposed the use of the term compensatory description to refer to the array of policies, which are constitutionally permitted departures from the norm of formal equality for the purpose of favouring specified groups. These policies or preferences are of three basic types: the most important and contentious is reservations or quotas in academic institutions, government jobs and in legislatures. The second is the grant of scholarships, loans, land allotments, health care, and legal aid to a beneficiary group beyond comparable expenditure for others. The third is in the nature of protective devices i.e. provisions aimed to abolishing

untouchability, forced labour, regulating money lending, protecting Scheduled Caste and Scheduled Tribes from oppression.

HISTORICAL PERSPECTIVES

For historical reasons certain classes of Indian citizens were known to be suffering from various socio-economic disabilities and as such they could not effectively enjoy either equality of status or of opportunity. Hence, it was thought prudent that for such period as they take for catching up the mainstream of our society, the Constitution itself should provide for special treatment to them for certain purposes. To offset the accumulated oppression of centuries of deprivation, special Constitutional measures were enacted for Scheduled Castes and Scheduled Tribes and Other Backward Classes who had traditionally been the victims of socio-economic oppression. Thus, one of the main concerns of the founding fathers of the Indian Constitution was to create an egalitarian society where in “Justice- social, economic and political” prevail and equality of status and opportunity are made available to all. In order to bring about equality under unequal circumstances, and in seeking to discriminate in favour of those who had

been historically discriminated against, a policy of 'affirmative action' or 'protective discrimination' had been adopted.

In *Indra Sawhney-vs-Union of India*¹ it was firmly held that protective discrimination or affirmative action implies to provide facilities and opportunities not only among individuals, but also amongst group of people, securing adequate means of livelihood to its citizens and to promote with special care the educational and economic interest of the weaker sections of the people, including in particular the Scheduled Castes and Scheduled Tribes and to protect them from social injustice and all forms of exploitation.

CONCEPT OF SOCIAL JUSTICE

Social justice does not simply mean to provide special treatment to SCs/STs and OBCs, it means and includes much more to create a new social order. Though social justice is a Constitutional aim, the propagators wish to make it a judicial mission. Jurisprudence, Law, Directive Principles, Preamble, Rule of Law and ultimately the Constitution itself, do not sanction the propagated Social Justice as an attribute of judicial dispensation. Judiciary

to take up the responsibility singularly, to achieve social justice, and to make it a pattern of justicing would be more derogatory firstly to the Rule of Law and then to the Constitution. Broadly it is felt that Social Justice is a device to mitigate sufferings of the have-nots. Fulfillment of demand therefore is always contingent to the social conditions. Reconciliation between the demand and social conditions is normally arranged by law. Justice accordingly attempts to fulfill the legitimate desire of the society.

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,

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AIR 1993, SC477

Judiciary has certainly to participate in the mission actively, but not to make justice-social its own mission. 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.

To achieve the goal of social justice, Justice Krishna Iyer gave much stress on interpretational creativity, procedural non-formalism, structural engineering of Judicial process. Petric 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." 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.

To make equality a living reality for large masses of people, those who are unequal cannot be treated by identical standards. It may be equality in law, but it would certainly not be of real equality. The state must resort to compensatory state action for the purpose of making people who are factually unequal in their wealth, education, social environment and equal in specified areas. 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 in order to bring real equality. Such affirmative action though apparently discriminatory is calculated to produce equality as a broader basis by eliminating *de-facto* inequalities and placing the weaker sections of the community at par with the stronger and more powerful sections, so that each member of the community, whatever is his birth, occupation or social position may enjoy equal opportunity of using to the full of his natural endowments of physique, of character and of intelligence.²

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1. Pradeep Jain V. U.O.I, AIR 1984 SC 1420

Hence, from the above analysis it can be ascertained that to prove equality before law in true sense of the term, some sort of preferential treatment or protective discrimination is required to equalize the unequals in our society where people are factually unequal in some way or other. So, protective discrimination is a facet of equality before law.

JUDICIAL TREATMENT AND THE CONSTITUTION OF INDIA REGARDING PROTECTIVE DISCRIMINATION

In some of the earlier cases, the Supreme Court of India understood that the guarantee of Equality in Art. 14 simply means the absence of discrimination, but in the later cases, the court has come to hold that in order that the equality of opportunity may reach the backward classes and the minority, the state must take affirmative action by giving them a ‘preferential treatment’ or ‘protective discrimination’³ and taking positive measures to reduce inequality. To make equality a living reality for the large masses of people, those who are unequal cannot 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 in order to bring real equality. Hence, it is said that ‘Protective Discrimination’ is a facet of equality under Articles 14, 15 and 16 of the Constitution.

In the historic case of *Indra Sawhney –vs- Union of India*,⁴ popularly known as

the *Mandal* case, the Supreme Court examined the scope and extent of reservation under Article 15 (4) and 16(4) respectively in detail and clarified various aspects on which there were difference of opinion in various earlier judgments. The majority opinion of the Supreme Court may be summarized briefly as follows –

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2. *St. Stephens College V. University of Delhi*, AIR 1992 SCC 558
3. *Supra* note 1.

1. Backward Class of citizen in Art 16 (4) can be identified on the basis of caste and not only on economic basis. The majority held that a caste can be and quite often is a social class in India and if it is backward socially it would be a backward class for the purpose of Art 16 (4)

2. Art 16 (4) is not an exception to Art 16 (1). It is an instance of classification. Reservation can be made under Art 16 (1)

3. Backward Classes in Art 16 (4) are not similar to as socially and educationally backward in Art 15 (4). It is

much wider. Art 16 (4) does not contain the qualifying words 'socially and educationally' as does clause (4) of Art 15. Hence the Backward class of citizens in Art 16 (4) takes in SCs/STs and all other backward classes of citizens including the socially and educationally backward classes.

4. Creamy layer must be excluded from backward classes.

5. Art 16 (4) permits classification of backward classes into backward and more backward classes.

6. A backward class of citizens can not be identified only and exclusively with reference to common criteria.

7. Reservation shall not exceed 50 percent.

8. Reservation can be made by 'Executive Order'

9. No reservations in promotion.

10. Permanent statutory body to examine complaints of over-inclusion/ under inclusion or non-inclusion of groups, classes

and sections in the list of other backward classes.

11. Mandal Commission Report- No opinion was expressed on the correctness or adequacy of the exercise done by the Mandal Commission.

12. All objections and disputes regarding new criteria can be raised only in the Supreme Court.

Therefore, Articles 14, 15 and 16 including Articles 16 (4), 16 (4-A) must be applied in such a manner so that the balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes and also for the other members of the community who do not belong to reserved classes. Such a view has been indicated in Balaji's case (AIR 1963 SC 649); Devadasan case (AIR 1964, SC 179) and Sabharwal case (AIR 1995, SC 1371). Even in Indra Sawhney case, the same view has been held by indicating that only a limited reservation not exceeding 50% is permissible. It is to be appreciated that Article 15 (4) is an enabling provision like Article 16 (4) and the reservation under either provision should not exceed the

legitimate limits. In making reservations for the backward classes, the state cannot ignore the fundamental rights of the rest of the citizens.⁵

After Indra Sawhney where the court held that reservation under Article 16 (4) must only be confined to appointment and not promotion, and that 50% ceiling limit on reservation should be applied each year, so as not to choke the general category, the government amended the Constitution insert Articles 16 (4-A), 16 (4-B) and the proviso to Article 335. These amendments, firstly, empower the state to make reservations in matters of promotion in favor of SCs and STs and secondly permitted the state to fill and unfilled vacancies [(reserved under Article 16 (4) and (4-A)] in a particular year in the next succeeding years as a separate class of vacancies which is not to be considered as part of the 50% ceiling limit for those successive year⁶ and further allowed the state to make provisions relaxing the qualifying marks or lowering the standard of evaluation of SCs and STs, notwithstanding the overall efficiency requirements of Article 335.⁷

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5. U.O.I V/S Ramesh Ram & Others AIR 2010 SC2691
6. Article 16 (4B), Inserted by 81th Amendment Act, 2000
7. Art. 335 Proviso, Inserted by the Constitution 82nd Amendment Act 2000

These amendments were challenged as resulting in reversed discrimination and thereby destroying the rule of equality which is a basic feature of the Constitution, in M Nagaraj-vs- Union of India⁸. In the instant case the court held with respect to clause (4-A) of Article 16 that it is an enabling provision which is carved out of Article 16 (4) and thus, any state action under Article 16 (4-A) would have to be guided by the two compelling requirement of Article 16 (4); i.e., ‘backwardness’ and ‘inadequacy’ of representation. Further it would also have to take into account the ‘overall efficiency in administration’ as provided under Article 335, since it had already been held in Ajit Singh II⁹ that Article 335 was an essential consideration for any reservation policy under Article 16 (4). Thus, all the three factors would have to be kept in mind by the state when providing reservations in promotion for SCs and STs¹⁰. Thus, it is important that Article 16 (4-B) has removed the ceiling limit of 50% on the percentage of

carry over unfilled vacancies, any state action taken there under must incorporate the time factor. By introducing time factor within Article 16 (4-B), the Court dealt with the question of the said amendment going against the mandate of Indra Sawhney, and preserved the effect of the main clause or Article 335 despite its relaxation by the proviso. Thus, the Constitutional scheme of reading Article 16 (4) with Article 335, and not Article 16 (4) in isolation, becomes the hallmark of the basic structure in cases of reservation.

Therefore, the idea of equality and inequality, the theory that no two people can be equal and the notion that equality of opportunity could combat the drawbacks which many faced due to their social position have occupied the minds of eminent philosophers such as Locke, Rousseau, Huxley and many others. There was nothing ambiguous about the arbitrarily hierarchical and socially and economically exploitative caste system that had guided India since before the Independence. For, centuries, they had been victims of humiliation and oppression and at the dawn of independence, the framing fathers had taken the plight to ensure then with justice- social economic

and political, as set forth in the Preamble of the Constitution of India and thus inserted an extraordinary phase for the upliftment of the masses of humanity from the morass of subhuman social existence, abject poverty and economic exploitation too.

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8. AIR 2007 SC 71
 9. Ajit Singh II V/S State of Punjab, AIR 1999 SC 3471
 10. Nag raj V/S U.O.I, AIR 2007 SC 71

To offset the accumulated oppression of centuries of deprivation, social Constitutional measures were enacted for the Scheduled Castes and Scheduled Tribes who had traditionally been the victims of socio-economic oppression, though the word “Other Backward Classes” was further added to the segment. Nevertheless, it reflected the idealism and moral commitment of the founding fathers that in framing the Constitution they sought to establish a democratic secular state based in equal rights for all before the eyes of the law.

Thus, while in one hand, the Constitution itself guarantees the right to equality of status and opportunity but on the other hand, it provides some special provisions as of fundamental right under

part III of the Constitution for the advancement of certain Backward Classes including SCs and STs. Besides these the general right to equality which is the basic feature of our Constitution, is in conflict with Articles 15 (3), 15 (4), 15 (4A) 15 (4B) and 16 (4) respectively. All those rights guaranteed under these Articles are blanket provisions, a kind of protective discrimination in the nature of special provisions for the benefit of the classes mentioned therein. Thus, as regards the persons not belonging to such classes, those provisions may appear to be a sanction for discrimination.

Despite the above mentioned fundamental rights which are in clash with the concept of equality in general and the special provisions too meant for certain classes in part XVI of the Constitution (Art 330-Art 342); there are certain Directive Principles of state policy which requires the state to take special care in promoting educational and economic interest of the weaker sections of the people and in particular Scheduled Castes and Scheduled Tribes. Thus, the picture of 'Equality' concept under the Constitution of India seems to be greatly diluted and the whole

effort of providing equality throughout the Constitution is under the moist of discrimination in some way or other.

The disharmony and turmoil which is presently prevalent is due to the paradox of equality versus the visible marks of inequality and injustice which still have not disappeared from our society. The driving force behind the idea if protective discrimination may be presumed that certain groups, caste or races have special claims in society which cannot be overlooked to merely pursue individual excellence. The compensatory principle in which reparation is made for ancient wrongs to whole classes and groups of people may not always succeed in repairing past injuries and care must be taken, so that in destroying the old inequalities, no new should be created, otherwise 'rule of law' and 'equality' together will vanish from the concept of Constitutionalism and Constitution of India as well.

SUGGESTIONS TO COUP UP WITH THE PRESENT SITUATIONS AND CONCLUDING REMARKS

After about three decades of the operation of the policy of protective discrimination, the parameters of the socio-economic situation has changed enough. Now the Scheduled Caste and Scheduled Tribes are no longer as uniformly backward as they have been when the Constitutional provision for preferential facilities for them were made. As individuals they had reached a point at which they seemed to be much less deserving of preferential provisions than the mass of the population to which they belong. Therefore the Creamy Layer test should also be applied to the SCs and STs for identifying the actual beneficiaries under the Schedule, prepared for them only.

The continued reluctance to define the elements that constitute the 'backwardness' of the Scheduled Caste and Scheduled Tribes results in a failure to recognize and attend to the specificities of their situation. It reduces to mechanical, administrative measures what should be carefully designed strategies for the advancement of a historically disadvantage section of Indian society. So, it's high time

to frame out the criteria and yardstick through which SC, ST & OBC could be defined.

Economic criteria should be the basic consideration for judging whether a particular individual is eligible for or deserves some special protection or not, along with his social background. Simply on the basis of educational and social backwardness as indicated no one should be judged as belongs to a particular castes or class. It is still unsolved that whether Articles 15 (4) and 16(4) are enabling provisions or are guaranteed rights. So, a clear and certain guideline is required to be find out either by the Supreme Court or the Parliament regarding the true character of these two Articles, to make it adequate for the purpose for which they are made.

Presently various groups demand various benefits. The state is tugged and pushed. It lurches from one concession to another. It becomes paralyzed. It loses its legitimacy and capturing the state become all important. And all this is done in the name of 'will of the people', the mandate by the Janata and 'Social Justice'. Justice-social economic and political is a triune phenomenon inscribed as a pledge in the

Preamble glory of our Constitution.¹¹ And with our independence from the British rule we have lost the excuse of blaming the British for anything going wrong, we will have nobody to blame except ourselves. So, time has come to change our attitude towards the framing of casteless society with due protection for the downtrodden and under privileged people, providing Justice-social, economic and political in the true sense of the term. From jurisprudential point of view also it is not enough to work out a just scheme of distribution, from whatever point of view, but there is the further problem of getting it accepted and keeping it acceptable, which requires constant redistribution according to changing circumstance. Both initial acceptance and continued acceptance depend on people feeling that the scheme is at least not unjust.¹² Therefore, “wheel turns history changes”. Old order may change yielding place for a new social and economic order, but the process of transition must be accompanied by honest and transparent attitude and then only Social Justice can be said to have been done. It is equally true that “Goals are dreams with deadlines”; hence, social justice is a goal of the Constitution of India, protective discrimination is the never

ending dreams for the politicians for their gain and interest too. Therefore, it can be suggested that there must be deadlines or specified time bar for achieving that goal of social justice through the concept of protective discrimination.

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