

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

---

Volume 7 | Issue 2

---

2024

© 2024 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

---

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact [Gyan@vidhiaagaz.com](mailto:Gyan@vidhiaagaz.com).

---

**To submit your Manuscript** for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to [submission@ijlmh.com](mailto:submission@ijlmh.com).

---

# Does Protective Discrimination Violate the Principle of Justice?

---

RAJKUMAR SINGH<sup>1</sup> AND AMBAR SRIVASTAVA<sup>2</sup>

## ABSTRACT

*The paper is both multi-layered and fragmented as it dives into the complicated terrain of social equality, in which the principles of protective discrimination and affirmative action are the foundation stones of justice restoration and the building of a just society. The principle of equality is considered in this regard, an explicit recognition that special rights which are based on caste, religion, sex, region and ancestry should be done away with; and that all people can enhance their socio-economic status by merit and hard work without overlooking the need to harness people's potential, no matter where they come from. On the other hand, that case of affirmative action, as a mechanism for safekeeping of the interests of the disadvantaged and underprivileged classes socially and economically, as a central point. Positive discrimination could be named as the crucial means for achieving social justice and equity. The main thread of the paper illuminates the role of affirmative action, through which the members of the ethnic minorities face unequal treatment in different spheres: education, employment and. It is concerned with the way this concept plays out in terms of the huge bubble of tough versus soft type of affirmative action, sticking the spotlight on the complexity of these policy forms. It argues for the refined conception of protective discrimination and the equal opportunities promotion raising the issue of national and social equality concern and the way the inclusive and fair development is promoted. It stresses on the qualities of rationality, ethics and more importantly, equitable policymaking to evaluate historical injustices dealt by the society, resulting in equality of opportunities for every single person of the society and the advancement of principles of justice and equity.*

**Keywords:** *Protective Discrimination, Affirmative Action, Reverse Discrimination.*

## I. INTRODUCTION

When we demand equal social rights in the society, we mean that if the traditional special rights of the special class in the society are abolished then no special rights should be given to any person on the basis of caste, religion, sex, region or ancestry. The deprived classes, like other

---

<sup>1</sup> Author is a student at Law College Dehradun Uttarakhand University, Dehradun, Uttarakhand, India.

<sup>2</sup> Author is an Assistant Professor at Law College Dehradun Uttarakhand University, Dehradun, Uttarakhand, India.

classes, should be given a fair opportunity to attain the necessary socio-economic wealth, respect and power on the basis of their ability and hard work.

When some coordination is established or an attempt is made to establish coordination with other classes, to protect the interests of socially and economically backward classes then it is called protective discrimination. The principle of equality is a dynamic principle in itself because it is very important to give equal respect and opportunity to all people to eliminate the discrimination prevalent in the society. No person should be denied opportunities for advancement on the basis of sex, language, colour or any other irrelevant basis because none of these factors constitute a rational basis for discrimination. Equality does not mean that all people are to be treated the same. But according to common sense it seems right that all people should be treated equally but if seen from specific conscience then treating similar people equally is actually equality. Equality simply means that everyone is to be treated the same, which is actually a negative equality. Whereas positive equality means that similar people should be treated equally so that there is social justice and social equality among the people and equal opportunities for self-development should be available to all individuals.

The principle of equality certainly opposes special facilities, but it would not mean that no special facilities should be provided to any person or class. In government schools, there is a mid-day meal scheme for children coming from very poor families, free scholarship, the government also provides books to the children, there are many schemes of the central government for those children but there are no such facilities for the students of private schools. Do not take equality to mean that every person in the society should be treated exactly the same. The true meaning of equality is to treat similar people equally. The principle of equality emphasizes fairness and assumes that every person in the society should get adequate, equal opportunities for his self-development. Equality should not be dominated by any person. All individuals should get opportunities to achieve their self-development. On this issue, The English Philosopher and Political Theorist John Locke also said that the basic needs of the people should be fulfilled and all the people should get the facilities of education so that no person's talent is wasted. If the government establishes some special kind of schools for the disabled and the expenditure on their education is more than the expenditure on the education of an ordinary child. Similarly, the government also takes care of old age homes and the government also takes the responsibility of looking after the children of Orphan Children House because the government believes that even the marginalized person should get the opportunity to play a key role in the development of the society. It should be given and it is also the responsibility of the government to take care of such people and this is a very good step of the

government.

## **II. BEYOND MERITOCRACY: BALANCING NEED WITH ABILITY FOR A JUST SOCIETY**

Those who are supporters of equality often suggest that whenever there is distribution of social facilities or opportunities, while doing that distribution along with allocation according to ability, an imbalance is created in the society, so far as it is possible to balance it. Allocation should also be adopted as per requirement as far as possible. Much more is spent on schools for the disabled and orphan children than what is spent on the education of an average child. Along with distribution according to merit, distribution according to need should also be kept in mind. This will highlight the concept of equal distribution of wealth and power in the society, which it will prove to be very helpful for the principle of equality. In the context of equitable distribution, some other facts also come to the fore like the sections of the society which have been victims of oppression and exploitation for centuries will not be able to compete with the very progressive people in free competition. Some special arrangements may have to be made to ensure that these people get their fair share of the scarce resources of the society.

For many centuries, a large section of the Indian society was deprived of the opportunity of higher education, profession and social prestige only on the basis of birth i.e. on the basis of caste. You must read Dr. B.R. Ambedkar's 'Annihilation of Castes', after reading this you will clearly understand the kind of social inequalities that existed at that time. In the beginning of the nineteenth century, when a new social consciousness was emerging in India and many social reformers had expressed deep concern about the social injustice in our Indian social system, after the independence of India, social goodwill or social harmony was called. It was considered necessary and the government had to make some special arrangements for the development of the socio-economically backward classes so that these people could play their appropriate role in the nation development. This did not mean that these classes got appropriate representation in proportion to their population in representative institutions, government jobs and important courses of education. This meant that all these classes should receive appropriate representation in proportion to the population, in institutions of government jobs and education. If I talk about Delhi University, here girls students are given 1% relaxation due to 'positive equality' protective discrimination i.e. this is an affirmative action taken by the government to increase the participation of women in the field of education on a rational basis. And this is also called the policy of protective discrimination.

If you actually look at the ratio of education in India, even today it is not very good. The number of women per thousand men has also been very low for a very long time. Their level of education

has been much lower than that of men. If you look at the statistics of violence from the National Crime Records Bureau, it will clear to you that even today women are in a marginalized position. Therefore, the 1% relaxation taken by the government to increase the percentage of women in education is an example of an affirmative action.

### **III. THE LOGIC AND CRITICISM OF PROTECTIVE DISCRIMINATION**

In India we use the term Protective Discrimination whereas in America the term Affirmative Action is used and both of them are based on the same logic because according to both these logics, efforts are made to give adequate and fair representation to the deprived sections. Sometimes some people call this effort Reverse Discrimination. They argue that if atrocities and injustice have happened to them in the past, then we are not responsible for it, but the people of that time and the social and economic system are responsible and you can do it again in a way to correct that thing today. Trying to make contrast discrimination. But this logic is not correct here. If we talk about America's society, then in America, Black caste and women are given preference at the time of entrance in medical allotment, in many jobs, in education courses. The special action that is taken in the interests of the deprived sections by identifying them is called Affirmative Action. When some seats are reserved for various backward classes in government jobs, opportunities for higher education, housing facilities etc. and they have to fulfil the necessary qualifications, and then some age relaxation is given. Similarly, on the other hand, the general category contestants complain that they are more qualified and despite being more qualified, they are deprived of such rare opportunities whereas in the reserved category, people who are less qualified than them also get selected. Opponents of reverse discrimination or protective discrimination argue that if equality means elimination of discrimination, then what is the justification for turning old discrimination in the reverse direction in the name of equality. If there has been any inhuman discrimination against today's deprived classes in the past, would it be appropriate to now discriminate against other groups on the same illogical basis to compensate for it? It is very important to mention here that in India the issue of reverse discrimination is not raised as loudly as it is in America. There are many other arguments in favour of positive discrimination in the interests of disadvantaged groups and we will also consider these arguments.

Some people say that the opportunities for advancement in the society are so rare that while allocating them, it is very important to keep in mind the need along with the qualification; hence the need of the deprived classes is so strong that the members of this class should not have the necessary qualification. Based on this, relaxation in some marks is also given but it is not a huge

difference. If a member of a family 1. In favour of protective discrimination, the inhuman treatment meted out to today's deprived classes in the past is responsible for their present plight. Remember that Dr. B.R. Ambedkar did not have the right to sit inside the classroom; he was forced to study sitting outside the classroom. Many other such incidents of atrocities were present in the then society. Some people also argue that if the backward classes are asked to face major competition with the advanced classes, then the process of their selection to higher posts will become very insignificant. Even today, if you start making government school children compete with private school children, then perhaps those children will not be able to survive there. For this, it is very important that the structure of government schools and the education system there should be so good that they can compete with English medium children at every level. This will not bring about any significant change in understanding the class structure of the society. On the contrary, when they will be given preferential treatment and they will also be selected for some posts, then the structure of the society will gradually change. This will not only increase self-confidence in these classes but the entire society will also gradually move towards equality from backward classes gets an opportunity for progress, then a good education and good standard of living for the entire family also helps in the development of their self-esteem. This also strengthens the process of social change. In 1992, the Supreme Court of India had also given a decision in which while giving the benefit of reservation to the backward classes, it had said that it is very necessary to remove the creamy layer while giving representation to the other backward classes and this situation would be worse for the candidates belonging to Scheduled Caste and Scheduled Tribe. But it is not applicable because the main reason for this is that the social discrimination done against these classes, mainly the Scheduled Castes, or sometimes increases. Even today it is seen in many newspapers that in many areas of Rajasthan, the groom has to take out his procession and wedding procession under police protection and all this happens on the basis of caste and not on economic basis. India Mission In 2019, the Government of India introduced a constitutional amendment, the 124th Constitutional Amendment 2019. Through this, the government has created a sub category of 10 percent additional quota for general category candidates who are from economically weaker sections and whose annual income is less than ₹ 8 lakh and who do not belong to any reserved category, Scheduled Caste or does not belong to Other Backward Class. We see different definitions of Economic Backward Class and Most Economic Backward Class in different states as well as in different institutions. In the context of protective discrimination and affirmative action, Professor David Benjamin Oppenheimer states that we can see the implementation of affirmative action through five types of processes:

- A few seats should be reserved from the quota.
- Area preference or preferential treatment through preferences
- Through self study
- Outrage Program and
- Through mentoring through some outreach programs and counselling programs and finally affirmative action is implemented through anti-discrimination provisions. We can see the classification presented by Professor Oppenheimer by dividing it into two parts.

#### 1. Tough Affirmative Action

And

#### 2. Soft affirmative action.

Defining the classification of affirmative action in India, Professor Ashok Acharya of Delhi University, along with Rajeev Bhargava, has written a book on 'Political Theory' and he has tried to define affirmative action on three grounds.

- through the policy of reservation
- through special cooperation and
- through security policies

### **IV. RESERVATION POLICY**

Reservation policy means giving representation to deprived communities in politics and government jobs and educational institutions and making special provisions for groups like Scheduled Castes, Tribes and women through special support. For example, some provisions on scholarship purchase and sale of land, allotment of houses, health facilities etc. are given some preference. Provision for some legal help is made. Poverty alleviation programs and rural development programs are included. From the point of view of security, it is very important to stop many social evils like bonded labour and it is very important to provide protection to the individual from exploitation and in these three factors the moral commitment of the states increases a lot. Equality means treating similar people equally and if the government formulates any such public policy which provides protection to some sections and gives them equal rights in the mainstream of development and if there is any rational basis for the same. If yes then it can be accepted. If the government makes any logical provision to bring the deprived classes, neglected classes and marginalized people into the mainstream, then it is not actually a violation of the principle of equality but it is an affirmative action. This is protective discrimination and

this is what John Rawls called the Different Principle i.e. discriminatory justice within the Theory of Justice. John Rawls said that fundamental justice means that any public policy of the government can be supported if that policy ensures maximum welfare of the weakest person of the society and this is what we call Affirmative Action. That is, affirmative action, protective discrimination, reverse discrimination or different principles can also be done.

\*\*\*\*\*



**V. REFERENCES**

1. Social Contract: Essay by John Locke
2. Justice as Fairness by John Locke
3. Liberty, Equality & Law by John Rawls
4. Theory of Justice by John Rawls
5. Political Theory by Ashok Acharya and Rajeev Bhargav
6. Comparative Equality and Anti Discrimination Law by Prof. David B. Oppenheimer

\*\*\*\*\*