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Protective Discrimination in Post-Independent India: An Analysis

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ABSTRACT

The concept of “equality” and “inequality” has been a theoretical conundrum since time immemorial; two people of different classes can never be treated in the same manner. At the time of the drafting of the Indian constitution, one of the major challenges faced by the founding fathers of the constitution was to design a system where the social and economic divide existing between the various groups of the country could be bridged. The agenda was to create a society where there is equality of status and opportunity, which is why the virtue of justice and equality has also been included in the Preamble of the Constitution. But it was not easy due to the evident position of a certain class of people suffering from the economic and social affliction. This was the primary reason for establishing a system of “class-based” reservation in areas where people belonging to the “vulnerable class” needed upliftment. This came to be known as Protective Discrimination in the Indian Jurisprudence; initially, when this concept was introduced into our constitution, it was intended for a short span of time, but fortunately or unfortunately, it is still very much prevalent in our country. This research is aimed at analysing the concept of protective discrimination, its correlation with the virtue of social justice mentioned in the Preamble and understanding its current standing in Indian Jurisprudence.

Keywords: *Equality, Protective Discrimination, Backward Classes, Jurisprudence, Constitution.*

I. INTRODUCTION

“Equality” is a concept that has been an essential facet in the growth and development of human civilisation; this idea originated from the consideration of devising a system to bridge the differences in people belonging to the same section or outside of it. The earlier approach to equality included subjugation, elimination and segregation, but later on, the approach towards equality evolved. The act of treating two people in two different manners is known as Discrimination; usually, this term is used in a negative sense as it indicates differentiating between two individuals and providing one of them with leverage. As history suggests, a certain class of people in India suffer from various socio-economic disabilities, and due to this, they

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have been constantly denied equal status and opportunities. Due to years of oppression, people belonging to these classes were identified as weaker sections of society by the framers of the Constitution. This resulted in them coming up with a counter-strategy to bridge the gap between weaker sections of society and others, also known as “Protective Discrimination”. The term “Protective Discrimination” suggests a right or privilege being dispensed in favour of those sections of society who have been victims of some kind of long-term oppression. Due to a variety of historical reasons, there are various approaches to “equality” that are trying to gain predominance in legal systems universally. The most accepted approach is “equality of status and opportunity and of non-discrimination on the basis of race, caste and so on. The constitutional mechanism of India has adopted this approach towards equality to phase out age-old practices of discrimination that exist in the country. A certain class of citizens were denied equal status and opportunities on the basis of their caste or sex; uplifting these vulnerable classes is also an efficient method employed to facilitate social transformation. The concept of Protective discrimination is based on the theory that “iron cuts iron”, which basically means that the damage that was done by discriminating amongst people based on various aspects can be reversed by the application of the same discrimination from a different angle. However, discrimination in olden times was negative and catastrophic in nature, but discrimination employed by the constitutional mechanism is protective and restorative in nature.

It is only fair that people belonging to these sections of society be given a chance to catch up with others; protective discrimination is one of the best and most eccentric features of the Constitution of India. As it is evident that all citizens of this country have the right to be treated equally before the law,² but equality cannot be said to be observed without the presence of equity. Equality is meaningless if two people are treated similarly in different circumstances; the element of fairness is absent in such a transaction, which violates the very essence of our constitution. The preamble of our Constitution states that Social, Economic and Political justice will be provided to every citizen of this country, and to provide equality in unequal circumstances the concept of Protective Discrimination was inculcated into our constitution. It was essential to create a system of positive discrimination in favor of those who had been historically a victim of negative discrimination. To facilitate this idea an affirmative action was adopted by framers of constitution in the form of Article 15, there are number of other constitutional provisions as well which supports Protective Discrimination but Article 15 has a special status amongst those provisions. Since, the idea of equality is of paramount importance to constitutional mechanism, it is essential to explore the concept of “proportional equality” in

². Article 14, Constitution of India.

certain cases³.

II. PROTECTIVE DISCRIMINATION AND THE CONCEPT OF “SOCIAL JUSTICE”

Social Justice generally suggests the idea of devising an egalitarian society or institution that is based on principles of equality and solidarity, that understands and values human rights, and that recognizes the dignity of every human being. “Justice” is not a term which has a textbook explanation, it has a different meaning in every different context, Social Justice would not mean application of general rule that would govern people of different social classes. Here, there has to be a different dictum governing each class in a way which amounts to fair treatment to all classes. It is well-known that certain class of people have always been denied equal status and opportunities, their oppression required the State to act in a manner which is restorative and curative. If they are looked at from the same lens as every other class who are empowered socially and otherwise, it will not support the idea of Justice. Even legal equality can exist only insofar as each member of the community possesses in fact, not only in form, equal chances of using his natural endowments. In proportion as the capacities of some are sterilized or stunted by their social environment, while those of others are favored or even pampered by theirs, the right of equality becomes an elegant but anaemic euphemism. Hence the claim with which society and the legal order are being presented, that there is a social duty to make ‘compensation’ for the inequalities under which less-favored members of the community have had to live — a claim that the law is urged to recognize and support⁴.

Social Justice in Indian context would mean dealing with the social evils like casteism and sexism, the major factors polluting the Indian social setup are caste-system and gender inequality that has created other social evils like untouchability and atrocities towards women. Social Justice undertaken to be achieved in the Preamble of the constitution will only be achieved when people belonging to these social classes have been provided remedial measures to balance out the wrong, they have suffered. The constitutional mechanism of our country has been dedicated to imbibe this spirit which resulted in the doctrine of “Protective Discrimination”.

III. THE CONCEPT OF WEAKER SECTIONS IN INDIAN SOCIETY

The discrimination and oppression inflicted upon some sections of society over a period of time has influenced the inception of doctrine of Protective Discrimination in order to devise a system

³. Dr. Malika Talukdar, “Perspective of Protective Discrimination in India”, 1 *IJR* 198 (2014).

⁴. Abhinandan Malik, *Social Justice: Sunset or Dawn* by V.R Krishna Iyer 126-127 (Eastern Book Company, New Delhi, 2nd edn, 1980).

to safeguard their interests as well. The rationale behind employing this method is to offer essential facilities to certain class of disadvantaged sections and to bridge the distance between these sections and mainstream society⁵. Some provisions of the constitution are designed with the object to create equal opportunities to weaker sections of society, the idea is to eradicate the disparity that exists between mainstream society and vulnerable classes. However, the policy of discrimination adopted by the framers of the constitution is purely class-based and on caste-based, there are conflicting views on this subject due to such protective discrimination also being extended to members of Scheduled Caste and Scheduled Tribes. But, the doctrine of protective discrimination is extended to vulnerable classes and backward sections of society who require upliftment and if by the virtue of social conditions members of certain castes are also provided with the same privilege then it is most certainly not a caste-based discrimination. According to the Constitutional mechanism of the country, these are the people accepted as members of Vulnerable Classes-

- Women;
- Children;
- Scheduled Caste;
- Scheduled Tribe.

It is well established through the social statistics as well as Judicial interpretation that people belonging to these classes have been victims of inequality and oppression for years, that creates a reasonable classification for them to be considered for positive reservation. Years of oppression and social inequality have rendered these classes unable to be at par with other members of a society which is why India as a democratic state strives to create a path for them towards equality.

IV. CONSTITUTIONAL PROVISIONS AIDING PROTECTIVE DISCRIMINATION

There are certain provisions inculcated in our constitution to employ methods to facilitate “equality between unequals” which are as following-

- *Article 14-* Article 14 of the Constitution of India states that “The State shall not deny to any person equality before law or equal protection of laws within the territory of India”. This provision encompasses a spirit of equality and lays down that all citizens of India are entitled to be treated equally before law, the meaning of the term “equality” in

⁵. <https://www.google.com/amp/s/blog.ipleaders.in/discrimination-of-citizens-under-the-indian-constitution/amp/> (Visited on December 15, 2020).

this provision is does not imply equal treatment to everybody. Equality and equity go hand in hand which explains that law should be equal amongst equals and administered accordingly amongst unequals⁶.

- *Article 15(1)*- Article 14 establishes the general principle of equal treatment and right to equality, on the other hand Article 15(1) talks about prohibition of discrimination of any kind based on race, gender, caste, religion, place of birth by State. This provision read with Article 14 establishes that State is bound by law to not discriminate against any individual on the basis of above-mentioned grounds. These constitutional provisions are instrumental in safeguarding the fundamental rights of every citizen of this country.
- *Article 16(1)*- Article 16(1) guarantees equality in the matters of opportunities regarding employment or appointments offered by the State. It further explains that State is bound by law to not discriminate in such matters against any individual on the basis of place of birth or residence, descent, race, caste or gender.
- *Article 17*- Article 17 talks about the practice of untouchability, this provision strictly forbids such practice in all forms. Enforcement of a disability arising out “untouchability” shall be an offence punishable in accordance of law⁷.

The above-mentioned provisions constitution are general principles of equality that are established by the law of the land in order to curb any possibility of discrimination by State against individuals. However, due to years of oppression and inequality inflicted on certain class of people, some provisions of the constitution provide specific privilege to them. As opposed to the general principles of equality established by the above-mentioned provisions, these provisions create an intelligible differentia so as to bring the vulnerable classes at par with the rest of the society. Protective discrimination has been employed in the following provisions-

- *Article 15(3),(4) & (5)*- Clauses 3, 4 and 5 of Article 15 acts as an exception to the general rule laid down in clause 1 and 2, it states that State is at liberty to formulate special provisions to in favor of women and children; and in the interest of advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes. State is empowered to make policies relating to their admission to educational institutions including private educational institutions, whether aided or unaided by State, other than the minority educational institutions. Despite of being under the exception to the legislation

⁶ Dr. G.R Jagadeesh, “Protective Discrimination: Maintaining the Balance under the Constitution”, *KLEJ* 14 (2015).

⁷ Article 17, Constitution of India.

that prohibits discrimination on the basis of gender and caste, these provisions display “Protective Discrimination” which is restorative in nature. Whether it is reservation in academic institutions to certain class of citizens or special provisions in favor of women and children, the agenda here is empowerment of socially and educationally backward sections of society. The idea underling this provision is positive and it is well aligned with the concept of “intelligible differentia”, Right of Children to Free and Compulsory Education Act, 2009 and Maternity Benefit (Amendment) Act, 2017 are some of the relevant examples of this policy. In case of *Union of India v. K.P. Prabhakaran*⁸, the railway administration decided to initiate appointment cum reservation clerks in four metropolitan cities i.e. Mumbai, Chennai, Delhi and Kolkata. The post was only available to women candidates, the Court held that this policy was protected under Article 15(3) and thus cannot be held ultra vires. The applicability of the term “special provisions for women” was clearly established in this case. Similarly, in *Rajesh Kumar Gupta v. State of Uttar Pradesh*⁹, U.P government made a policy regarding reservation in BTC training program which was 50% candidates would be selected from Science stream and 50% from Arts, 50% candidates would be female. People raised contentions on this policy stating that it is discriminatory on the basis of gender and is arbitrary in nature, it was held that the format applied for reservation was not warranted by the constitution. The phrase “socially and educationally backward classes” in Article 15(4) talks about underprivileged classes of people who have suffered from years of oppression and prejudice from the privileged classes. This category includes the class of people who belong backward classes but are not members of Scheduled Caste or Scheduled Tribe, OBC’s have been categorized under this classification of reservation.

- *Article 16(4) & (4-A)*- This provision empowers the State to make certain policies for reservation of posts in government jobs in favor of those class of citizens who are not adequately represented in State’s services. Article 16(4-A) was inserted in the constitution by the way of 77th Amendment Act, 1995 in order to specifically create a policy of reservation for members of Scheduled Caste and Scheduled Tribe in State’s services who are not adequately represented¹⁰. In case of *Indra Sawney v. Union of India*¹¹, Supreme court held that there has to be separate policy to secure reservation for other backward classes in central government jobs who are not adequately represented in State’s services. The court further held that such reservation policy should be limited within 50% of the total vacancies available. The scope of

⁸. (1997) 11SCC 638.

⁹. AIR 2005 SC 2540.

¹⁰. *Supra* note 3.

¹¹. AIR 1993 SC 477.

Article 16(4) was examined by Supreme Court in the case of *Devadasan v. Union of India*¹². The “carry forward rule” made by government in reference to appointment of backward classes in State’s services was struck down by the Apex court on the grounds of being “unconstitutional”, the Court further held that the power vested in State to create reservation in matters of government jobs cannot be exercised in a manner that it infringes the right of equality of opportunity of members of classes other than backward classes. In this particular instance, due to the carry forward rule the limit of reservation had exceeded the 50% of the total and had gone up to 68%, the court ruled that each year of recruitment must be considered by itself and the reservation for each year should not be excessive¹³. The next question on the scope of Article 16(4) was if reservation was applicable in matters of promotion in public employments, in a plethora of judgments it was held that promotions were part of reservation in public employment i.e., *State of Punjab v. Hiralal*¹⁴ and *Akhil Bhartiya Soshit Karamchari Sangh (Railway) v. Union of India*¹⁵. This contention was later overruled by Supreme Court in the case of *Indra Sawney v. Union of India*¹⁶.

- *Article 330 & 332*- Article 330 talks about reservation for members of scheduled caste and scheduled tribe in the autonomous district of Assam and Article 332 provides for reservation of seats in legislative assemblies for members of scheduled caste and schedule tribe of all the states except for Schedule Tribe that are within the autonomous district of Assam.

- *Directive Principles of State Policy*- Constitutional provisions envisaged in the directive principles of State policy are not enforceable in a court of law but they have a profound impact on the development of Indian jurisprudence. Articles 40, 42 and 45 provide for various benefits for people of weaker sections of society, which includes reservation for women and backward classes in panchayats, protection of children from exploitation and free pregnancy care.

V. PROTECTIVE DISCRIMINATION IN INDIAN JURISPRUDENCE: CLASS BASED OR CASTE BASED?

At the time of framing of constitution, our forefathers decided to introduce protective discrimination as a method to tackle age-old oppression that existed in our country. But India as a democracy, undertakes to favor no religion, caste, race or gender in any manner. This was the primary reason why a system of equitable classification was devised where reservation was

¹². AIR 1964 SC 179.

¹³. <https://www.lawctopus.com/academike/equality-opportunity-public-employment/> (Visited on December 15, 2020).

¹⁴. (1970) 3 SCC 567.

¹⁵. (1981) 1 SCC 246.

¹⁶. *Supra* note 9.

aimed at protection of “classes”. Our constitution is aimed at providing equality to all religious and ethnic communities, due to which no “caste-based” reservation policy was devised at the time of framing of constitution. But with the passing time, the “class-based” protective discrimination transformed into “caste-based”, a method employed to minimize social and economic inequality became an instrument of contributing to vote bank. It is in no way implied that members of certain castes are not in need of upliftment, but the benefit of protective discrimination should not be a general rule for them. It should be judiciously allocated to exactly that number of members who are in need of it.

According to Mandal Commission’s recommendations, reservation policy should be devised in accordance with castes. In a lot of ways, it is very much against the spirit of constitution because it would legitimize the caste system, we have been trying to fight for significant amount of time. It is also incorrect to accept caste as determinant to ascertain backwardness of a community, categorizing people into classes aligns much more with the secular principles imbibed in the constitution. It is essential to acknowledge the present social reality of the country and accept that class formation is a much efficient system of dispensing this protective discrimination. The major reason of eradicating the caste system was because it created a sense of divide due to its origin being rooted in certain castes being viewed as “polluted” or “impure”; a reservation policy generalized in those terms will only contribute more such divide¹⁷. Although, we cannot completely rule out that members of certain castes are in need of protective discrimination due to suffering from social inequality even in today’s day and age. For example, in recent times in Hathras, a Dalit woman was brutally raped by men of upper caste of Uttar Pradesh. This is a self-explanatory situation, despite of all these policies in favor of weaker classes they are still falling prey to caste-based dominations and social inequality, which says that we cannot completely phase out caste-based reservation policies but we can devise a system to streamline it.

VI. CONCLUSION AND SUGGESTIONS

The doctrine of Protective Discrimination was introduced in Indian jurisprudence given the long-term oppression of vulnerable class of citizens; it was intended to serve as a protective provision in the interest of those who need empowerment. However, in the due course of time this curative measure has transformed into a mere instrumentality of contribution to vote banks. Present reservation policy has become a more political concept than jurisprudential, it had originated out of the need to create legal sanction for special protection to people of backward

¹⁷. Ghanshyam Shah, “Caste, Class and Reservation”, 20 *EPW* 132 (1985).

classes of society. In present scenario, it has become a political agenda to extract votes from people of backward castes. Yes, “class-based” reservation as provided for women is extremely efficient as they have suffered age-long oppression at the hands of patriarchal social setup and gender inequality is still a rampant issue in contemporary India in many States. But any kind of inequality, whether social, educational or economic cannot be general and exist in same amount in all places; not every woman in this country suffers from social and educational backwardness i.e., Kerala as a State has excellent number of female literacy and employment thus reservation policy existing there as a general rule for women is not a smart employment of resources. Similarly, Scheduled Caste, Scheduled Tribe and Other Backward Classes (OBC) have been accepted as socially backward classes but it is not a rule of general application, a number of other factors have to be taken into account before giving them the benefit of Protective Discrimination. This doctrine was created with the agenda of acting as a restorative measure in order to uplift members of those sections of society who need to be brought up to par with others but dispensing that measure without any discretion of who actually needs it is not efficient. In conclusion, the present reservation policy existing in our country has lot of drawbacks; these are the few suggestions I would like to make to implement a better system of dispensation such benefit-

- There should be an annual data analysis in each State to ascertain the position of backward classes in each separate State and reservation policy should be dispensed each year according to the statistics of the State. The reservation policy should be devised on the basis of both social and educational grounds, this would aid in allocating resources in an efficient manner.
- The reservation policy of each State should be dynamic and change according to the statistics of that year. The state government of each State should oversee the system and central government should inspect all such policies every year.
- In case of any conflict regarding the policies made the matter should be left up to judicial interpretation.
