



Affirmative Action and Social Justice in India: A Quest for Equality

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Abstract:

Affirmative action is also known as protective discrimination in India, a constitutional device which attempts to redeem historical injustices and ensures that there is substantive equality among the socially and educationally marginalized community. It incorporates the idea of social justice, equality and dignity as envisaged under the Constitution which aims at alleviating caste-based discrimination and socio-economic exclusion through reservations, scholarships wage-employment guarantee and other welfare programmes. This paper memoirs the making, constitutional and legal structure of affirmative action in post-independence India. It examines the essence of certain articles, specifically Articles 14, 15(4), 16(4), 17 and 46 in promoting social justice. It also discusses, how increasing economic inequalities, caste-based politics, and quotes surrounding reservation policies are the contemporary challenges as well. The report ends by noting that affirmative action has provided marginalised communities with unprecedented opportunities over the past two decades, but that its future will only be secure if policies are regularly reviewed, old inequalities addressed through economic and social reforms, educational opportunities expanded and initiatives taken to guarantee equal status of implementation in the context of constitutional values including justice, equality and dignity.

Keywords: Affirmative Action, Protective Discrimination, Social Justice, Reservation, Equality, Scheduled Tribes, Constitutional Law.

Introduction

In India, Protective discrimination is a category of measures intended to correct persistent socio-economic disparities that have resulted from historical wrongs. This idea refers to the implementation of policy makers by the government which are meant to ensure level Playing ground for certain sections of society like SCs, STs & OBCs. Protective discrimination is a method of addressing previous centuries of systematic discrimination and exclusion of these communities and introducing them to opportunities made previous unequal in a way that is now equitable, such as access to essential services in education, public employment and political representation. The State tries to reduce socio-economic differences and give a voice to the marginalized through special measures such as reservations, scholarships and welfare schemes.

Empowering is an important way of tackling social inequality in order to achieve social change in a welfare democracy. The lifting of the status and empowering of historically marginalised groups, people with disabilities (PWD) and their families, needs to be extended with supportive measures and special benefits. The emphasis in this sense is that socially marginalised caste, gender and age groups who have to face systemic discrimination are vulnerable, as they are not able to withstand the oppressive force of society. Thus, Affirmative action turns out to be very important to give a boost and empowerment to these deprived sections so that these sections could have meaningful participation in the society.

Empowerment can be used in almost any context, as Andre Beteille says: “The term empowerment can be used in relation to human rights, economic security, capacity building, skill formation or the conditions of dignified social existence.”¹

Increased empowerment of marginalised and unorganized groups, increased capacities of individuals and communities and the transition from hierarchical settings to egalitarian ones result in a significant shift of power towards meaning and social transformation.

Historical Background Leading to Protective Discrimination

India's history is an inseparable enigma of a caste-ridden glass wall social system of centuries.

¹ Beteille Andre [2000], Antinomies of Society, Oxford University Press, New Delhi, at p. 268.

The caste system renders people into distinct groups in a hierarchical manner on the basis of birth, which resulted in acute social exclusion and economic deprivation of the lower caste-most of them being SCs, STs, and OBCs. Such communities were frequently denied basic human rights, education and any real control over socio-political life.

Social inequalities were reinforced during the colonial era. The policies of the British administration such as separate electorates for the different communities etc. paved the way to institutionalize the caste division, which did not help in reducing caste division.

The struggle for a free India brought out the situation and problems of the marginalised community with their leaders armed with the signature of visualising their rights, that of Dr. B.R. Ambedkar remained one of the most pivotal. Dr. B.R. Ambedkar in the late 1920s became a prominent champion of the demands of the Depressed Classes by his powerful oratory and literature and pointed out the grievances of this class. He vehemently opposed caste-based discrimination based on religious scriptures and brought up the demand for the eradication of caste. He identified the caste system as a religious issue and suggested that the caste system have to be eliminated as the remedy for the problem. He also condemned caste division of labour, which perpetuated rigid barriers in society. He said:

Thus, the caste as economic institution is a bad one in so far as it curtails the free exercise of the natural powers and propensities of man to the requirements of the social rules.²

The framers of the Constitution, therefore, realised the need for 'protective discrimination' after the commencement of Independence in India in 1947. They introduced some specific measures that historically disadvantaged groups could find a level playing field as compared to other members of the society, which is the base of India's affirmative action policy.

Concept and Rationale

The principle of protective discrimination is based on the understanding that centuries of caste-based discrimination, systemic social exclusion and constant economic marginalisation of some groups have deeply scarred the socio-economic fabric of India. These inequalities have been deep rooted and have led to poverty cycle, illiteracy and lack of opportunity for the various

² Ambedkar B.R. [2003], *Annihilation of Caste* extracted in Sen Amiya P., *Social and Religious Reform*, Oxford University Press, New Delhi, at p. 192.

groups including Scheduled Tribes (STs), Scheduled Castes (SCs) and Other Backward Classes (OBCs). The Indian state has adopted proactive measures in the form of different welfare schemes, quotas, reservations, etc. to eliminate these historical injustices and to provide equal opportunities to provide social mobility. The idea behind these measures is not to foster new inequalities but to ensure meaningful equality through providing additional supports and opportunities for historically marginalized communities to be actively involved in the socio-economic development of India.

Constitutional Provisions for Protective Discrimination

India's Constitution, which is termed as a "social document", has more than a few provisions to guarantee equality allowing for positive discriminations. Some of the important constitutional provisions on protection to women are as follows:

a) Preamble

The Preamble of Indian Constitution is like "Lamp" for the Policies of Protective Discrimination. It holds out the promise of justice – social, economic, and political – for all the citizens, while ensuring liberty, equality, and fraternity. Social justice is directed towards the removal of inequalities among groups and bringing people out of the margins so they have an equal opportunity. The phrase “equality of status and opportunity” highlights the state's intent to create equality. Therefore, protective discrimination is a mechanism that can be employed to achieve the constitutional goal of a fair society.

b) Article 14 - Equality Before Law:

In this article before the law is equal and equal protection is guaranteed by the law. It is formal equality whereas protective discrimination aims at substantive equality through differential treatment with you in place of on the basis of certain social and economic considerations. This will help to level the playing field by recognizing that the last case may be a result of past inequalities that need to be addressed with special approaches.

c) Article 15(4) - Special Provisions for Backward Classes:

This is to empower the state for setting up special arrangements for promotion of socially and educationally backward classes, SCs and STs. It makes it legitimate to implement affirmative

action like reservations in education, scholarships and other development schemes for improving access to education.

d) Article 16(4) - Reservation in Public Employment:

Reservations in Government jobs can be offered by the State to any Backward Class which is underrepresented in Governmental services. This guarantees that government employment will be equitably represented by historically disadvantaged communities, thereby minimising socioeconomic inequalities.

e) Article 17 - Abolition of Untouchability:

This article makes untouchability socially unacceptable and declares it as an offence subject to penalty and imposes dignity and equality on SCs. It is a reflection of the commitment displayed by the State to change the entrenched prejudices in the social fabric and to advance social justice.

Under Article 17 and Article 35[a][ii] of the Indian Constitution, the Untouchability (Offences) Act, 1955 was promulgated which was later renamed as Protection of Civil Rights Act (PCRA), 1976 with certain modifications aimed at removing various drawbacks experienced in its implementation. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act was enacted in 1989 to further beef up the law. State laws continue to be in force under Article 372, with provisions that conflict with the 1955 Act being repealed. In order to have a uniform policy for all over India, only Parliament has legislative power in relation with 'untouchability'. The elimination of untouchability has become comprehensive and it extends its reach to the state actions as well as to behaviour of individuals, institutions and organisations.

f) Article 46 - Promotion of Educational and Economic Interests:

In the spirit of the directive principles of state policy, the state needs to help the weaker section of the society, particularly SCs and STs with the aim to provide education and guarantee their welfare in economic upliftment. It symbolises the government's responsibility to shift the hitherto underprivileged to a higher social and economic ladder.

Judicial Interpretation and Landmark Cases

Judicial pronouncements in India have been instrumental to shape and develop the vision and ambit of protective discrimination. These pronouncements have informed India's stance on affirmative action and the necessary measures to balance constitutional guarantees of equality with those of social justice. Key cases include:

State of Madras v. Champakam Dorairajan (1951)³:

This landmark decision came in the context of a case of challenging the caste-based reservation in educational institutions of the state of Madras (now Tamilnadu). The Supreme Court held that caste was an invalid basis on which to make a reservation as it would contravene the constitutional ideal of equality under Article 15(1). But this decision forced the First Constitutional Amendment in 1951 to add Article 15(4) which gave powers to make special provisions in favor of “socially and educationally backward classes”. A judgment that paved the way to the constitutional support for protective policy against discrimination.

Indra Sawhney v. Union of India (1992)⁴:

This case is also referred to as ‘Mandal Commission case’ and the decision had significant implications for the reservation system in India. The Supreme Court had earlier held that OBC had a 27% quota in the central government jobs but 50% reservation was not to be allowed as it will create imbalance with general category. Furthermore, it also denied the reservation benefits to OBCs, who do not fall in the ‘creamy layer’ of the OBCs, and shifted the focus from social to economic considerations in a caste affirmative action scheme. This judgment upheld the validity of protective discrimination and restricted its use to avoid “perpetual inequality.

In *Air India Statutory Corpn. v. Union of India*⁵ Justice K. Ramaswamy observed:

“In a developing society like ours with unbridgeable and ever widening inequalities in status and inequality of opportunities, law is a kind of catalyst, a Rubicon to the poor etc., to reach the ladder of social justice. What is due cannot be judged by an absolute standard, which keeps on changing with respect to time, place and circumstances. The constitutional concern of social

³ *State of Madras v. Champakam Dorairajan v. State of Madras*, A.I.R. 1951 Mad. 120 (India)

⁴ *Indra Sawhney v. Union of India*, AIR 1993 SC 477

⁵ *Air India Statutory Corpn. v. Union of India* [1997] 9 SCC 377

justice as an elastic continuous process is to make facilities and opportunity come to the poor and the workmen in order to remove handicaps and disabilities with which they languish and to secure dignity of their persons. The concept of social justice, therefore, traces out the way for equality to favour and enliven the practical content of life.”

It was pointed out by the Supreme Court in case of *M. Nagaraj vs Union Of India*⁶: “when the freedom to prosper was granted to classes, the distress of any class or person caused by any weakness which was not of his own but social could not be allowed.”

*Ashoka Kumar Thakur v. Union of India*⁷:

This case brought under its consideration the issue of constitutionality of OBC reservation in central institutes of educational institutions under the Central Educational Institutions (Reservation in Admission) Act, 2006. The Supreme Court re-affirmed the 27% quota, but once again confirmed the exclusion of the creamy layer. It also came down to recognize the responsibility of the state to balance equality of opportunity with measures for social justice. This decision reinforced the State's obligation to make reservations, while also emphasizing merit and fairness.

Chief Justice K.G. Balakrishnan has noted: “Reservation is one of the various means available for preserving and promoting the spirit of equality so as to bring the weaker sections of the society to the heart of the civil life. In the field of education, any measure to share among India's vast community of diverse sections knowledge, information and ideas to encourage and improve learning is due encouragement. In the modern world and its complexities and turbulent problems education is a must and it cannot remain cloistered for the use of a privileged few.

Justices of the seven-member bench led by Chief Justice Nuthlakumar ruled in Punjab government's favor in the *State of Punjab v Davinder Singh* case⁸, where the State of Punjab contended that the status of sub-classification in the Scheduled Caste and Scheduled Tribe lists is a matter of public notice. The majority has, in the process, set aside the judgment by the five-judge bench in *E.V. Chinnaiah v State of Andhra Pradesh*⁹.

⁶ *M. Nagaraj v. Union of India* [2006] 8 SCC 212.

⁷ *Ashoka Kumar Thakur v. Union of India*, [2008] 6 SCC 1, at para 6.

⁸ 2024 INSC 562 Civil Appeal No. 2317 of 2011

⁹ *E.V. Chinnaiah v State of Andhra Pradesh* (2005) 1 SCC 394

The CJI said in the judgment, Article 14 of the Constitution makes it clear that a reserved category can be subclassified as it is applicable to a “backward class of citizens” as is the case with Scheduled Castes, Scheduled Tribes and Other Backward Classes. The Chief Justice wrote that the expression, ‘Equal before the law’ is recognised and the second expression is ‘Equal protection of laws. The former means that there are no special privileges for any individual within the territory. However, it doesn't “state that all things should have the same law but all similar things should have the same law”. The latter, the Chief Justice was able to see, required administering equal laws between equals. This, says Chief, also “vests in the State the authority to reasonably categorize those who are differently situated. On this occasion, Chief Justice had used the words “sub-classification is a facet of equality.” The law can also create a sub-class within a class already created by law for a certain purpose (Scheduled Caste group in this case), for another purpose (limited purpose in this case, as the Scheduled Caste group is a heterogeneous group with various stages of backwardness).

The test that was to be adopted is that of intelligible differentia and rational nexus. The intelligible differentia is the difference that is discernible and understandable. However, a distinction can readily be made when there is a clear criterion or standard by which to distinguish between the group the distinction includes and the group it excludes. The judgement highlights that the test to determine whether sub-classification within a class is justified under Article 14, it needs to be assessed whether the class is homogeneous. If the answer is no, then we are able to sub-classify it.

Justice Gavai also pointed out that the “preferential treatment” provided to the more backward and inadequately represented of the Scheduled Tribes would not constitute “tinkering with the Presidential List.” A remark that he made was that there were instances where certain castes of the Scheduled Castes were benefiting from the reservation more than the other castes. Some of these castes, “on their own accord,” should “walk out of the special provisions and give way to the deserving, and needy,” ruled Justice Gavai. He explained that the people for those categories where a big chunk of the seats are reserved are now refusing to give any special consideration to some of the weaker castes in their group; thus, repeating the steps taken by the upper class for centuries to marginalised the backward class. So, he added, its elimination through the creation of the ‘creamy layer’ of SCs can bring real equality. He held that cases

which had granted recognition of the extension of the ‘creamy layer’ principle to the Scheduled Caste group.

All such judgments individually contributed to the outlines of protective discrimination in India. They defined the scope of affirmative action under the Constitution so that affirmative action actions are based on equality and without misuse or overreach. Interpretations are constantly developing and will impact legislative and administrative action that promotes an inclusive and equitable society.

Implementation and Challenges

The constitutionality and legality of the protective discrimination policies are recognised, but this application faces some important problems:

- a) **Inadequate Representation:** The reservation system was supposed to bring opportunities to out castes, but till now, a very few persons of certain castes are in the judiciary, corporate or other important fields. This assessment puts the spotlight on the disconnect between intentions and results of policies – as reserved quotas do not necessarily result in proportional representation in influential institutions.
- b) **Economic Disparities:** One critique of the current protective discrimination regime is that it is based largely on caste which often leaves out the poor from the upper-caste. This has resulted in calls to make reservations on economic criteria, instead of caste, as some say it would be more effective on the present lines of increasing economic imbalance.¹⁰. Thus, a demand has arisen for more liberal policies incorporating the socio-economic aspects as well as caste.
- c) **Political Opposition:** Reservation policies are subject to strong political opposition; critics say reservation policies create divisions within the people of the society. That's often based on issues of equity, merit and how it affects competition in the education and employment fields. This resistance has led to public protest, making the discussion about affirmative action and its effectiveness and potential future problematic.¹¹.

¹⁰ The Constitution (103rd Amendment) Act, 2019.

¹¹ S.K. Thorat & Paul Attewell, *The Legacy of Social Exclusion: Caste Discrimination and Its Impact on Higher Education in India*, 45 Econ. & Pol. Wkly. 2010.

d) **Caste-based Politics:** The reservation of seats on the basis of caste is politicized sometimes, thereby drawing the attention from the very purpose of such reservation-achievement of social justice. Political parties can also use these policies to earn political benefits and by raising caste cognizance of people can leverage votes in favor of their party. This results in skewed perception of 'reservations' their core objective is social upliftment of equitable kind, but they are used for political maneuvers, that further consolidates caste identities in the political spectrum.

Conclusion

In conclusion, protective discrimination has been a significant factor in India's journey towards social justice, equality, and empowerment of historically marginalised communities. It was originally intended to serve as a means of tackling the centuries-old systemic disadvantages and social stratification of the caste system, and has played an important role in ameliorating the social and economic inequalities.¹² Protection Discrimination Provides Opportunities in Education, Employment & Political Representation of SC,ST and OBC in Mainstream Societies making a more inclusive and diverse societies.

But it has not been without its difficulties in applying these policies. The implementation of Affirmative Action has been limited by such factors as underrepresentation in key areas, failure to meet the needs of those who come from an economically disadvantaged upper caste and political backlash and politicization of caste-based preferments. They highlight and reinforce the necessity of continuous policy review and amendment to deal with new issues, balancing favour towards vulnerable groups with equitable and merit principles.¹³

There is a need for more nuanced and balanced perspective to enhance effectiveness of protective discrimination. This can be done through introducing socio-economic considerations into the reservation policies as well as periodically reviewing the policies in light of evolving social and economic contexts. In addition, strengthening education facilities, enhancing access to quality education and developing the skills of disadvantaged grassroots populations to compete in a variety of fields can help close the gap between intention and achievement. Protective discrimination is still very important for social transformation, but if it is to be

¹² Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (1984)

¹³ Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477 (India).

effective, it will be necessary to modify and update it to enable it to truly advance social justice and overcome inequality. Proteive discrimination, if attuned to current times and equitable for everyone, can still be an instrument for incentivizing India on a path towards a more just, inclusive and egalitarian society.

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