



## A CRITICAL ANALYSIS OF PROTECTIVE DISCRIMINATION UNDER INDIAN CONSTITUTION

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### **ABSTRACT**

The political system and structure under the Indian constitution is a federal democratic government based on the principles of justice, equality and republicanism. The framers of the Indian constitution showed absolute respect towards human integrity and dignity and unwavering commitment to non-discrimination, secularity and equality and wholehearted concern for the weak and the poor by taking certain positive measures for certain sections of the society like the schedule caste, schedule tribes and other backward classes.

Keeping in mind the growing trend of reservation, the need of the hour is to critically study and analyze the concept of protective discrimination. The objective of this research paper is to highlight the concept of protective discrimination as reflected under the Indian constitution and scrutinize its relevance in the present dynamics. The research paper would bring to light the positives and negatives of protective discrimination and would attempt to provide viable suggestions and reforms for the same. The research paper would also focus on ascertaining India's stance on the topic as against the other prominent legal systems.

### **CHAPTER 1- INTRODUCTION**

#### **1.1 INTRODUCTION**

Equality is one of the core concepts of the

world democratic aspirations. India is riding on the same boat. Our society has always been a hub of caste stigmas. Seeped in the ancient culture, invaded by the individuals of different religious backgrounds, India emerged as an exclusive symbol of a multilingual, multireligious and multiracial society. Inequality is inevitable, all the societies are clutched by the vice of inequality. In India the traditional caste system, classified people into different social strata on the basis of their birth. The people at the lowest level of this caste hierarchy were denied even the basic inherent rights, they were at the mercy of the upper strata. Their economic backwardness was complemented by social isolation which resulted in destitution and deprived them of their dignity. The lower caste had to adhere to the whims and fancies of the upper caste with their mouth shut and hands tied. This brutal condition continued till some rational individuals of the society realized the depth of the malady which resulted in framers of the constitution to take a step towards resolving the issue.

Every democracy encounters the adversity of reconciling two fundamental contradictory political notions- one is equality before the law regardless of the difference in caste, creed, gender, race and religion and the second is attaining social justice at the cost of the same promise of equality before law. Even a developed democracy like U.S.A is no exception to this contradiction and has implemented the concept of affirmative discrimination to ensure social justice at the expense of equality before the law. India has a similar stance on the issue, in India the people belonging to the lower caste have been subjected to discrimination across the years, to resolve the issue the Indian government



pursued the policy of reservation in education institutions, jobs, loans and various other fields. This policy is referred to as protective discrimination. In other words, protective discrimination is the policy followed by the state granting certain privileges to the downtrodden section of the society. This practice has been enshrined in the Constitution of India and has been institutionalized. The Constitution of India has various articles which deals with reservation and highlights the concept of protective discrimination.

*“Article 15(1) states that, the state shall not discriminate against any citizen on ground only of religion, race, caste, sex, place of birth or any of them”<sup>1</sup>, also provides in clause (4) ‘Nothing in this article or in clause (2) of Article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizen or for the scheduled castes and tribes’<sup>2</sup>.*

*“Article 16(1) states that, ‘there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State’<sup>3</sup>, also provides in clause (4) ‘nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State’”<sup>4</sup>.*

There are many more articles under the Indian Constitution which deal with protective discrimination which will be dealt in detail in the Chapter 2 of the research

<sup>1</sup> INDIA CONST. art. 15, cl. 1.

<sup>2</sup> INDIA CONST. art. 15, cl. 4.

paper.

The preamble of the Indian Constitution ensures “*justice- social, economic and political as well as equality of status and opportunity and to promote among them all*”. This proves that just like United States, India also has to harmonize the twin objective of justice and equality. The comparison between the concept of protective discrimination between India and U.S.A would be dealt in depth in chapter 3.

As established above, Indian constitution deals with the concept of protective discrimination in various provisions, however there has always been a debate whether the notion of protective discrimination is positive or negative, whether the policy is still relevant in present context or not? What started out as a means to protect and safeguard the underprivileged group of the society, is being used as a weapon to promote personal vendetta and goals. The pros and cons of the concept of protective discrimination is further elaborated in chapter 4.

### **1.2 RESEARCH QUESTIONS**

1. What is the stance of Indian Constitution in the case of protective discrimination?
2. How is the concept of protective discrimination different in India as against U.S.A.?
3. Whether the concept of protective discrimination is beneficial for India or a reform is needed?

<sup>3</sup> INDIA CONST. art. 16, cl. 1.

<sup>4</sup> INDIA CONST. art. 16, cl. 4.



## CHAPTER 2 – STANCE OF INDIAN CONSTITUTION ON PROTECTIVE DISCRIMINATION.

### 2.1 INTRODUCTION.

The Indian history saw a transition in almost all the affairs pertaining to this country involving the change in the ruling pattern, from the kings, to a colony and then to a democracy, it has been a rollercoaster ride for the Indian society. However, the one thing that remained static in this dynamic affair was the caste system. The essence of the Indian society is its intersecting and overlapping groups and subgroups formed on vocation, sect, wealth, religion, political affiliation and language. However, the most peculiar and overpowering characteristic of Indian society is its formation of caste-based hierarchical structure. The members of the caste-based groups were decided by their birth, not everyone could be included in these predetermined caste groups. The caste groups residing in a specific geographical territory had their own beliefs, rituals and a way of leading their life. Throughout Indian history the four caste which were prominent were the *Brahmins*, *Kshatriyas*, *Vaishyas* and the *Shudras*, with the *Shudras* being at the lowest rung of this class strata. The *Shudras* were treated as subordinates to the remaining three classes and were approached only for menial jobs. They were deprived of their basic rights such as education, health and practicing their religious beliefs. *Shudras* came to be recognized as the untouchables in the modern India. The untouchables were treated as the outcaste and were admonished as the deferential class. This class was the most oppressed class economically, emotionally and physically.

<sup>5</sup> R.G. MISRA, RESERVATION POLICY AND PERSONAL SELECTION (1990).

### 2.2 INDIAN NATIONAL CONGRESS VIS A VIS PROTECTIVE DISCRIMINATION.

The stance of the Indian National Congress on the abhorrent notion called untouchability was a wobbly one till the framing of the Indian Constitution. The only step in this direction was taken in the Congress's session in Calcutta conducted in the year 1917, wherein the Congress passed a resolution for the same. The resolution was aimed at providing social justice against the retrograde customs imposed on the opposed class over centuries. The key person behind the implementation of this resolution was Natesan. He was supported by Rama Iyer and Bhulabhai Desai<sup>5</sup>.

The plight of the untouchables was highlighted during the 1922 when the Congress was under the leadership of Gandhi with Annie Besant as the president. Despite Gandhi being the torch bearer for the upliftment of the untouchables no significant step apart from the lip service was taken by the Congress. To make the matters worse, the task of eradicating untouchability was given to the Hindu Mahasabha by the Congress in 1923. The first round table conference conducted in 1930 was the turning event which was the first real step taken by the Congress to address the plight of hundreds and thousands of the silent untouchables. The round table saw the first two untouchables being given a say in the matter of governance, this became the first step in recognizing the interests of untouchables were different from the mainstream Hindu society. To further showcase their stance and seriousness on the issue, the Congress also appointed a



minorities committee headed by the then British prime minister Ransay MacDonald.<sup>6</sup>

With the attainment of freedom, the Congress worked for the attainment of upliftment of the scheduled tribes and scheduled caste, but the major reason for this noble deed was the political dependency on these people was the vote banks. Behind the façade of upliftment of the SC's and ST's, Congress was strengthening its roots in the political soil of democracy of the country by treating the SC and ST as the vote bank. The assignment of the constituencies and distribution of party tickets also involved caste system as the core criterion. This made the upper caste wary of their position in the governance of the country.<sup>7</sup> However, despite all the negatives, Congress leaders specially Mahatama Gandhi were the first to recognize the problem of caste system and discrimination and worked in accordance to abolish the evil of discrimination from the country through the notion of protective discrimination as an affirmative action.

### **2.3 REASONING BEHIND PROTECTIVE DISCRIMINATION**

The framers of the constitution recognized Article 14<sup>8</sup>, which provides for equality before the law to be one of the fundamental rights, while, Article 14 provides for equality before the law, it also aims for equality among the equals in pursuit of social justice.

<sup>6</sup> A.K. VAKIL, RESERVATION POLICY AND SCHEDULED CASTES IN INDIA 2(1985).

<sup>7</sup> H. KOTANI, CASTE SYSTEM, UNTOUCHABILITY AND THE DEPRESSED 5 (1997).

<sup>8</sup> INDIAN CONST. ART. 14. (Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth)

Protective discrimination steps in to attain this social justice by following the policy of uplifting the downtrodden and underprivileged class who have suffered through educational, Political, social and economic oppression over the decades. To equal unequal's is to perpetuate inequality. The dice is rolled in the favor of the advantages section of the society when weaker section of the society and the privileged section is treated equally. To provide the weaker section with a fighting chance against the privileged section, the concept of reservation was introduced. To bring both the weak and strong on the same footing, preferential treatment to the underprivileged section becomes a necessary. The same justification and logic were provided by the framers of the Indian constitution. The framers of the Indian constitution used the concept which was inscribed in John Rawl's theory of Justice<sup>9</sup>, which explains deviation from equality for the purpose of attaining justice.

### **2.4 PROVISION FOR THE DEPRIVED CLASS UNDER INDIAN CONSTITUTION**

With the independence, the framers of the Indian Constitution saw a chance at freedom from the evil vice i.e. untouchability and discrimination based on the caste system. To combat against the caste system, the framers of the constitution embedded various

<sup>9</sup> Rawls theory of justice revolves around the adaptation of two fundamental principles of justice which would, in turn, guarantee a just and morally acceptable society. The first principle guarantees the right of each person to have the most extensive basic liberty compatible with the liberty of others. The second principle states that social and economic positions are to be a) to everyone's advantage and b) open to all.



provisions granting special privileges to the downtrodden and minority castes such as the scheduled castes, Anglo- Indians, scheduled tribes and other backward classes.

The scheduled caste and scheduled tribes also referred to as untouchables due to several socio- cultural grounds were far away from their dream of a safe space for them in the society. The concept of occupational mobility was a far- fetched dream for them<sup>10</sup>. To provide the untouchables with a safe space, the framers included various provisions in the Indian constitution. Article 15(1) provides that, “the state shall not discriminate against any citizen on ground only of religion, race, caste, sex, place of birth or any of them”, also provides in clause (4) “Nothing in this article or in clause (2) of Article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizen or for the scheduled castes and tribes.”

The problem faced by untouchables which is of discrimination and lack of opportunities due to their caste was also a challenge to the minorities in India. Therefore, there was a need to protect the minorities from the discriminatory practices as well. For the purpose of providing protection, three groups have been noticed, the religious minorities who are fighting for their political rights, the linguistic minorities, who are working to conserve their language, to acquire

employment and education and the third group includes scheduled castes and scheduled tribes who fight for their economic, political and education rights, along with waging a war to protect their laws and culture. All the three groups have a different set of problems which have been duly acknowledged and steps have been taken to safeguard their interest under the Articles 14, 15 and 16 of the constitution<sup>11</sup>.

The president under the Article 341 has the power to notify, territory wise, "castes, races or tribes or parts of our groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be scheduled castes". Article 330 and Article 332 grants reservation of seats for the scheduled castes in the House of People of Lok Sabha and State Legislature respectively. The time period for the continuance of reservation is stated under Article 334. The time period has been extended perpetually as all the political parties have showed a deep interest in the concept of reservation.<sup>13</sup>

The constitution apart from providing preferential treatment to the scheduled caste and scheduled tribe also provides for preferential treatment toward the "other socially and educationally backward classes"<sup>14</sup>.

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<sup>10</sup> MUMTAZ ALI KHAN, RESERVATION FOR SCHEDULED CASTES, 7(1994).

<sup>11</sup> B.A.V. SHARMA, RESERVATION POLICY IN INDIA 32(1982).

<sup>12</sup> INDIAN CONST. art. 341.

<sup>13</sup> SHEO KUMAR LAL, EXTENT OF UNTOUCHABILITY AND PATTERN OF DISCRIMINATION 3(1990).

<sup>14</sup> INDIAN CONST. art. 15 cl. 4. (Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes.)



socially and educationally backward classes"<sup>15</sup>.

The other backward classes are the communities apart from the untouchables or the SC's and ST's. Although the main point of inference here is that the constitution mentions classes and not caste. However, these backward classes are by and large recognized on the basis of caste. The authority of deciding these other backward classes is at the discretion of the state and majority of the states have adopted the communal criterion to decide these backward classes.

“After the commencement of the Constitution, the Constitution (Scheduled Caste) Order, 1950 (in exercise of powers conferred by clauses (15) of respective Articles 341 and 342) on 10th August, 1950, the Constitution (Scheduled Tribes) Order, 1950 on 6th September, 1950 and the Constitution (Scheduled Castes) (Union Territories) Order, 1951 on 20th Sept. 1951 were issued by the President annexing Schedules incorporating castes or as the case might be, tribes or tribal community for respective states and respective Union Territories or parts thereof. The words "Union Territories" were added by the scheduled castes and scheduled tribes' lists (Modification) Order 1956.”<sup>16</sup>

In the case of Bhaiya Lal<sup>17</sup>, the supreme court observed that the President under Article 341 of the constitution, might arrive at a rationale to include only a part of the group rather than

<sup>15</sup> INDIAN CONST. art. 15 cl. 4. (Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes).

the entire race, tribe or caste. Thus, a caste can be included in one district and excluded from the rest districts from the same state. The reasoning behind the formation of the two prominent schedules namely the scheduled caste and scheduled tribe was not imperative in this situation. Further in the Kishorilal case<sup>18</sup>, referring to the “Tenth Report of the Commissioner for schedule castes and schedule tribe”, the supreme court accentuated the importance of socio-economic situations and conditions in classifying a person as a scheduled caste or scheduled tribe.

Despite the importance provided to the other backward classes in terms of reservation, there is no specific or particular clause in the Indian constitution which defines the term “other backward classes”

The constitution has recognized three backward classes namely the scheduled castes, the scheduled tribes and other backward classes or OBC's. The OBC's are considered to be in a better position than SC's and ST's but not at the same footing with the mainstream society. Scheduled castes and scheduled tribes have been defined in the sub clauses 24 and 25 of Article 366 of the Indian constitution respectively, however the term backward class has not been specified. Different terminology has been provided in different provisions under the constitution for the backward classes. Article 15(4) and Article 340 use the words “socially and educationally backward classes”, Article 16(4) use the term “backward classes” and

<sup>16</sup> RAJ KUMAR JHA, COMMENTARY ON RESERVATIONS FOR SC, ST, OBC AND OTHERS 3 (2001).

<sup>17</sup> Bhaiya Lal v. Hari Kishan Singh, AIR 1965 SC 1557 (India).

<sup>18</sup> Kishorilal Hans v. Raja Ram Singh & Ors., (1972) 2 SCR 632 (India).



Article 46 refers to the “weaker section of people”. There is still not a definite definition of the term backward classes, it has been interpreted differently in various court judgements and have been defined differently by various commissions<sup>19</sup>. Some of the rationales behind deciding the backward classes in the court decisions are noteworthy.

In the landmark M.R. Balaji<sup>20</sup> case, the supreme court stated that, the caste of the group is not the solitary or the forefront reason to determine whether the said group in question is backward or not. For determining whether a particular group falls under the category of backward classes, two tests have to be used, the first is that the said class should tantamount to schedule caste and schedule tribe in the terms of backwardness. The second test involves the class to satisfy the test of economic backwardness developed by the state government in accordance with the prevalent economic conditions.

In P. Sagar v. State of Andhra Pradesh<sup>21</sup>, the court held that, the term “class” is a homogenous group of individuals who are bound together by certain fraternity and similar traits, and identifiable characteristics such as religion, occupation, residency, status, ranks and other such parameters. In class determination, caste therefore, has a role to play. However, we cannot consider caste as the only parameter to determine the class.

In the Periakaruppan case<sup>22</sup>, the supreme court stated that “A caste has always been

recognized as a class. If the members of an entire caste or community at a given time are socially, economically and educationally backward that caste on that account be treated as a backward class. This is not because they are members of that caste or community but because they form a class”.

In the landmark Mandal commission case<sup>23</sup>, the case held that, the expression “backward classes” is not confined to the classes which are in the same boat or have the same conditions as the scheduled caste or scheduled tribe. Backwardness is a relative concept which should be based on the development and amelioration of the Population of the nation or the respective state.

Further, the court in the case of Jagdish Negi<sup>24</sup>, stated that “Backwardness is not a static phenomenon. It cannot continue indefinitely and the State is entitled to review the situation from time to time.”

The welfare policy adopted for the underprivileged sections of the society is well reflected under various provisions of the Indian constitution. Few of those provisions are the Article 14, Article 15 and Article 16 enshrined under Part III of the Indian constitution. Article 338 and Article 340 of the constitution and Article 38 and Article 46 enshrined under part IV of the constitution as the directive principles of the State Policy. The preamble of India also provides for the “Justice, social Economic and Political, liberty of thought, expression, belief, faith and worship; Equality of status and of

<sup>19</sup> S.N. SINGH, RESERVATION POLICY FOR BACKWARD CLASS 76 (1996).

<sup>20</sup> M. R. Balaji & Ors. v. State of Mysore, (1963) AIR 649 (India).

<sup>21</sup> P. Sagar & Ors. v. State of Andhra Pradesh, (1968) 3 SC 28 (India).

<sup>22</sup> A. Periakaruppan Chettiar v. State of Tamil Nadu & Ors., (1971) 2 SCR 430 (India).

<sup>23</sup> Indra Sawhney & Ors. v. Union of India & Ors., (1992) 2 SCR 454 (India).

<sup>24</sup> Jagdish Negi v. State of U.P. & Anr., AIR 1997 SC 3505.



opportunity; and to promote fraternity among them all assuring the dignity of the individual and the unity and integrity of the Nation.”

The preamble of the constitution of India lays down two objectives: “justice-social, economic and political; and equality of status and opportunity”, which are dominant in the domain of improvement of the backward classes and the downtrodden section. Ambedkar in his speech delivered at constituent assembly emphasized on social democracy along with the political democracy. Ambedkar stated “It means a way of life which recognizes liberty equality and fraternity which are not treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy from liberty. Nor can liberty and equality be divorced from fraternity<sup>25</sup>.”

The objective of the preamble of the constitution to secure equality of status and opportunity for the Indians is achieved by various provisions enlisted in the part III of the constitution which deals with the Fundamental Rights. The major provisions to highlighted are those which assures equality and non-discriminatory policies in general and employment in public sector in particular. Article 15(1) of the Indian constitution states “the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them”. Article 29(2) under the “Cultural and Educational Rights” states “no citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of the state funds on grounds only of religion, race, caste,

language or any of them”. However, Under Article 15(4), the state is granted the special power, as stated “nothing in this Article or clause (2) of Article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes or citizens or the scheduled castes and the scheduled tribes”. The principle of equality is further applied to specific fields such as employment in public sector. Article 16(1) states “there shall be equality of opportunity for all citizens in matters relating to employment or appointments to any office under the state”. Article 16(2) states “no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them be ineligible for, or discriminated against, in respect any employment or office under the state”.<sup>26</sup>

Just as Article 15(4) embodies the state with special powers, Article 16(4) also grants the state these powers as an exception to the non-discriminatory principle in matters concerned with appointment or employment in state owned offices as provided under Article 16(2). The Article 16(4) states “nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.” Another exception to Article 16(2) is the Article 335 of the Indian constitution which states “the claims of the members of the scheduled castes and scheduled tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointment to services and posts in connection with the

<sup>25</sup> S.N. SINGH, RESERVATION POLICY FOR BACKWARD CLASS 78 (1996).

<sup>26</sup> *Id.* at 81.



affairs of the Union or of a State”. Both Article 16(4) and Article 335 are exceptions to Article 16(2), while the former expands to all “backward classes” and is restricted only to reservation as a means to ensure preference, the latter is applicable only to the scheduled caste and scheduled tribe and deploys any method of preference. Lastly, Article 320(4) reads that “Nothing in clause ( 3 ) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause ( 4 ) of Article 16 may be made or as respects the manner in which effect may be given to the provisions of Article 335<sup>27</sup>”.

Furthermore, while Article 15(4) applies to all the state dealings, Article 16(4) is confined to public offices only. The public offices under Article 16(4) expands to the administrative as well as judicial offices, however, elective posts and offices are not within the ambit of Article 16(4). Article 16(4) has a broader scope; in the sense it is not applicable only to the appointment practice but expands to the promotional activities of the office as well. In the Rangachari<sup>28</sup> case, the supreme court observed that the term “post” under Article 16(4) includes both appointment and promotion, however, the preferential practice would not be extended to other aspects such as retirement age, salary and pension provided under Article 16(1) and Article 16(2). There is an absolute protection under doctrine of equality and opportunity for such aspects and they do not lie within the ambit of Article 16(4).

The court in the Rangachari<sup>29</sup> appeal interprets the Article 335 of the constitution

and highlights that, the state, while making provisions for the scheduled caste and scheduled tribes, should not overlook the efficiency required for the task or the job. There was a need to strike a balance between their efficiency and the claims these classes made. The decision of court in the Balaji case was along the same lines. The court observed that “the public interest in the efficiency of government services set limits to reservation in promotions, putting outside the scope of Article 16(4) any unreasonable, excessive, or extravagant reservation, for that would, by eliminating general competition in a large field and by creating widespread dissatisfaction among the employees, affecting efficiency.” Keeping in mind the efficiency factor, the court ordered for a reasonable scrutiny of the reservation policy in the domain of promotions.

The phrase “any special provision” in Article 15(4) and “any provision” under Article 16(4), embodies the state with a discretionary power to employ various schemes for the advancement of the weaker section. The government has made use of these provisions and made use of several devices to infer the backward classes with preferential treatment. Reservations is not just restricted to seats, but includes other dimensions such as reduction in fees, reducing the qualifying marks, special training for the preparation of competitive exams and waiving age requirements.

The questions to be posed is whether such practices fall within the ambit of Article 16(4). It has been contested that, reducing the marks for qualifying the competitive marks is

<sup>27</sup> *Id.* at 83.

<sup>28</sup> Rangachari v. The General Manager Southern Railway, AIR 1961 Madras 356.

<sup>29</sup> The General Manager Southern Railway v. Rangachari, (1962) 2 SCR 586.



ultra vires of the state, as it is does not constitute “reservation in any sense of the term under Article 16(4)”. However, these methods are within the constitutional ambit. Though Article 16(4) provides the method of advancement to the state as reservation, the article also provides the state with the power to implement the methods in achieving the purpose of reservation policies. Further, the implementation of Article 16(4) presupposes that the state should be satisfied that there not adequate representation of the backward class in the services. The inadequacy can be either quantitative or qualitative.

#### **2.4.1 DIRECTIVE PRINCIPLES OF STATE POLICY**

The part IV of the Indian constitution which enshrines the “directive principles of state policy” crowns the state with the responsibility of welfare promotion of the individuals and the weaker sections laying special emphasis on the “backward classes”.

Article 38 of the Indian constitution reads-

1. “The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life.”
2. “The state shall, in particular, strive to minimize the inequalities in income, and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.”

The preamble and the “directive principles” sheds light on the socio-economic notions and ideals which the free India sought to achieve. The framers of the Indian

constitution visualized a new India free from the clutches of the evil and on the path to “social, economic and political justice”. Eradication of inequalities deep rooted in the Indian framework was a part of this objective. Furthermore, Article 46 reads: “the state shall promote with special care the educational, and in particular, of the scheduled castes and scheduled tribes, and shall protect them from social injustice and all forms of exploitation.”

The affirmative action used by the government accelerated the socio-economic change which the framers of the constitution sought to achieve. These provisions have brought a positive change in the nation as a whole, which can be clearly witnessed from the gradual increase in the literacy rate in India. While at the time of independence in the year 1947, the literacy rate of the weaker section was just one percent, at present it has increased in leaps and bounds. Though India is still to evade the grasp of illiteracy, the policy of protective discrimination is the kickstart India required. The constitutional provisions which provides for the preferential treatment of these backward classes and weaker section have led to a social order where there is equality and respect for the entire nation and not just the few at top.

### **CHAPTER 3- CONCEPT OF PROTECTIVE DISCRIMINATION DIFFERENT IN INDIA AS AGAINST U.S.A.**

#### **3.1 INTRODUCTION**

The problem of inequality and discrimination is not unique to the just India, rather it is a worldwide problem. To deal with the abomination that is discrimination, the



democracies around the globe have adopted a series of measures. The United States has adopted the affirmative action to improve the situation of minorities and women, whereas, India has adopted the policy of protective discrimination for the amelioration of the underprivileged section of the society. While United States is a developed nation and it might appear that, U.S.A might have adopted such nondiscriminatory measures before India, but the reality is India is a step ahead than U.S.A in this regard. The geographical distance and cultural differences between the two nations and the similar discriminatory history of untouchables in India and Blacks in America, makes the comparative study all the more interesting.

### **3.2 SOCIAL PATHOLOGY**

The preceding chapters of the research paper have highlighted how caste system was the root cause of discrimination in India. The varna system followed in India, placed the Brahmins at the pedestal while the Shudras, the class at the lowest rung of this caste system were left to fend for themselves. There existed an inherited classification and discrimination between the four classes namely: "Brahmins, Kshatriyas, Vaishyas and Shudras" of this varna system. The Shudras later turned into the scheduled caste and scheduled tribes facing discrimination at the hand of the upper caste. This downtrodden and dismembered state of the untouchables prompted India to adopt the policy of protective discrimination<sup>30</sup>.

While the discrimination in India was a result of caste system, in America, the discrimination was based on the race. In

India, untouchability was the vice which was deeply rooted, in America it was slavery<sup>31</sup>. The most prominent thing about slavery system in America was that it was particular to the Negroes. In America the discrimination against blacks continued till the twentieth century. The Jim Crow laws and Black codes were the methods behind this madness.

The blacks lived in a separate neighborhood, and were denied the access to basic public facilities such as transportation, restaurants, schools and churches. Jim Crow rules followed the same principle of white supremacy as followed in slavery. The *Pless vs. Ferguson*<sup>32</sup> case, established the precedent for the Jim Crow rule, where the U.S. supreme court ruled that the development of the separate facilities for the whites and the blacks was not against the thirteenth and fourteenth amendment of the U.S constitution. In fact, the court held that despite there being separate facilities for the two races, they were equals, despite the clear deprived condition of the black neighborhood.

The contrast in the discrimination system in the two countries can be witnessed prima facie. In India the discrimination was based on the caste among the members belonging to the same race, whereas, in America, the discrimination was based on the race. The Caucasian supremacy and dominance over the Negroes. However, despite, the difference in the discrimination models, the situation of the untouchables in India and blacks in U.S.A was the same. Both the groups were restricted from entering public places and were awarded menial jobs such as wage laborers.

<sup>30</sup> AUROBINDO, INDIA'S REBIRTH, INSTITUT DE RECHERCHÉ EVOLUTIVE, PARIS, (2000).

<sup>31</sup> See GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 435-37 (1986).

<sup>32</sup> *Pless v. Ferguson*, 163 U.S. 537 (1896).



### **3.3 CONSTITUTIONAL SAFEGUARDS IN INDIA AND U.S.A**

With freedom which India received in 1947, there came a greater responsibility which was to free India from the unjust practices being followed under the façade of the caste system. The constitution framers incorporated several provisions to protect the weaker sections such as Article 15, 16, 38, 46, 335 and a lot more which have already been explained and elaborated in the previous chapters. Thus, the Indian constitution expressly provides for the affirmative action or protective discrimination and there is no question as to the constitutional validity of the action.

Under the U.S. constitution, the fourteenth amendment states that "All persons born or naturalised in the U.S. and subject to the jurisdiction thereof are citizens of U.S. and states wherein they reside. No state shall make or enforce any law which shall abridge the privilege and immunities of citizens of U.S., nor shall any state deprive any person of life, liberty or property, without due process of laws, nor deny to any person within its jurisdiction the equal protection of laws." However, the fourteenth amendment unlike the Indian constitution does not expressly legitimize benign preferences<sup>33</sup> or affirmative action. "The constitutional validity of affirmative action relies upon an implied justification for such benign

classifications under the Equal Protection Clause<sup>34</sup>."

The landmark case of *Brown v. Board of Education of Topeka*<sup>35</sup> paved the way for development of affirmative action in U.S., the *Brown* case, overruled the decision of *Ferguson* case, and ruled that segregation of facilities was a violation of the 14<sup>th</sup> amendment of the U.S. constitution. The abolition of racial segregation posed another question of the constitutional permissibility of the affirmative action. Title VII (42 U.S.C. S 2000e et seq.) of the Civil Rights Act of 1964 was one of the steps taken by the government to establish greater equality. Title VII was implemented to curb racial and other discrimination in the matter of employment including the private sector<sup>36</sup>.

With the combined effort of various court decisions and the non-discriminatory aspects of the Civil Rights Acts of 1964 lead to the adoption of affirmative action. However, the affirmative action faced its first blow in the infamous *Bakke* case<sup>37</sup>.

In this case, the plaintiff, *Bakke* contended that medical college of the University of California is indulging in violation of the "Equal Protection, Clause of the Fourteenth Amendment, the California Constitution, and Title VI of the Civil Rights Act of 1964" by using the quota system. The judges in the ratio of 5:4 declared the quotas based on

<sup>33</sup> "Benign" racial classifications refer to preferences for minorities. See *Stone*, supra note 38, at 578.

<sup>34</sup> STEPHEN L. WASBY, "COMPENSATORY DISCRIMINATION" AND AMERICAN "AFFIRMATIVE ACTION": SOME PARALLELS - A REVIEW OF GALANTER'S *COMPETING EQUALITIES*, 8 *LAW & POL'Y* 379, 380 (1986).

<sup>35</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>36</sup> MARK ROTHSTEIN ET AL., *EMPLOYMENT LAW TEXTBOOK* 198-200 (1987). The underlying constitutional validity of Title VII is derived from the Fourteenth Amendment and the Interstate Commerce Clause U.S. CONST. art. I, S 8). *Id.* at 192- 93 (citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964)).

<sup>37</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).



race as violative of title VI and hence declared them illegal. However, the court also ruled in the same 5:4 ration that for establishing a student body which diverse, race at the admission program can be an operational factor.

The aftermath of the Bakke case, resulted in the continuation of benign preferences. However, the most debated question whether affirmative action was constitutionally permissible under the “Equal Protection Clause of the Fourteenth Amendment” remained unanswered. Bakke did declare quotas as illegal, however, post Bakke decisions lead to an ambiguous position on the quotas. The devices such as “Temporary quotas”<sup>38</sup> which were used to represent the minority in the employment essentially captured the essence of the quota system. “Under Title VII, mathematical ratios and membership goals<sup>39</sup> have also been upheld.”

The protective discrimination policy adopted by India and the affirmative action followed by the U.S. both aim to achieve equality. However, India is clearer in its stance when it comes to protective discrimination as the Indian constitution expressly provides for the reservations while the U.S. constitution is vague on the stance of quota system. Both the democracies, nonetheless, engage in the affirmative action for the advancement of the deprived in their respective countries.

## **CHAPTER 4- THE CONCEPT OF PROTECTIVE DISCRIMINATION A BOON OR A BANE**

### **4.1 INTRODUCTION**

<sup>38</sup> United States v. Paradise, 480 U.S. 149 (1987).

<sup>39</sup> Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986). See also United Steelworkers of America

The policy of protective discrimination poses a host of questions and challenges. The topic of reservation and protective discrimination have always been controversial and stirred a debate. The initial clause relating to reservation in the Indian constitution was that, reservation was to be carried out for the next ten years, however, across the years, the government has time and again revised the clause and extended the time period of reservations. The policy which was started to uplift the downtrodden has become a tool for gaining votes by the political parties. the main question that surrounds the debate is whether the underprivileged are actually benefitting from the policy. The reservation policy is looked down upon and is constantly being debated, due to the relevance of the topic in the political, social and economic aspects. Here are some arguments which are used in this debate.

### **2 MERIT ARGUMENT**

The merit principle dictates that the admissions, promotions and good should be allocated on the basis of merit. The individual should be admitted into a college or a university on the basis of their achievements, or by clearing the test for the admission based on the knowledge or intelligence. The proponents of this principle believe the merit criterion to be ideal as this structure is free from discrimination and personal bias, such as class, caste, race or religion but focuses on the intellect and achievement of an individual. The merit principle also helps in sorting out the crème de la crème who not only strive for personal growth but the growth of the nation as well. The proponents argue that the policy of protective discrimination

v. Weber, 433 U.S. 193 (1979); Fullilove v. Klutznick, 448 U.S. 448 (1980).



snatches the right of a meritorious student and places it in the hand of an individual who is undeserving. The policy of protective discrimination not only is applicable in the admissions but also the promotions in state owned office, an individual belonging from the general class who have better knowledge and achievements is not being promoted as the promotion is being given to someone from the weaker section which is against the merit principle.

However, the opponents of the merit principle present a strong case as well. The parameters for deciding the merit ignore the situation these weaker sections had to face over the decades. The underprivileged section of the society was never on the same footing as the others due to economical and social backwardness. The policy of protective discrimination is merely a means to bring them on the same platform as the advantaged section and provide them an equal opportunity to earn their rightful place in the society.

Merit argument in its entirety is not a loose one, however, merit solely cannot be the criterion for providing admissions and employment. If we cannot provide uniform living standard to all the individuals society, we simply cannot choose the advantageous over the disadvantaged. This course of action is prima facie unfair and unjust as it perpetuates amelioration of the former and retrogression of the latter.

#### **4.3 RIGHTS ARGUMENT**

The right argument presents a case where in uplifting the underprivileged, the policy of protective discrimination overlooks the right of the others. Due to the reservation policy the individuals who had a right of equality are denied of the same. Every individual has a

right to admission in employment and university and educational institution, however, to uplift one group the others right is infringed in the process.

At the same, group equality is a concept which simply cannot be ignored, if there is a group who has been ignored and is at a disadvantageous position, then to equalize the group with the other groups is not a violation of right to equality but the establishment of the same. The constitution of India provides for reservation to the unrepresented and underprivileged groups, such as the scheduled caste, scheduled tribe, other backward classes and women. In order to provide them with their right to equality and be represented which they have been stripped down from through the years, the policy of protective discrimination is suitable.

The rights argument presents a situation of group rights versus individual rights, with the group rights taking the cake, as the aim of the state is to look after all the citizens and in such a situation group rights would supersede the individual rights. Despite all the factors, the individual rights cannot be ignored and as such the verdict regarding rights argument vis a vis reservation and protective discrimination is still out.

#### **4.4 EFFICIENCY ARGUMENT**

When a person enters an educational institute or a public office through a quota, it automatically raises a question on the efficiency of the individual as a person who was less deserving than someone else is presented with the opportunity. The entry of an individual who is less meritorious in the socio-economic institutes threatens the efficiency of these institutes such as banks,



hospitals, schools etc. These institutes not only serve the office bearers but the public at large. Though the Indian constitution strives to achieve a balance between efficiency and promotion, yet the fact that there is no such requirement at the admission process cannot be ignored.

Though the efficiency of the public offices is an important issue, unequal representation the underprivileged who constitute the majority of the Indian population is also an equally pressing issue. The weaker section who have been deprived of their rights for many decades, should have a chance at proving themselves and protective discrimination provides exactly the opportunity. The policy of protective discrimination only provides for the admission not the promotion, ensuring that once an individual has been admitted to the institution, the rest would depend on the efficiency.

#### **4.5 BALKANISATION ARGUMENT**

The policy of protective discrimination has been looked down upon with a view that it enhances the gap between the caste, and creates caste-based conflicts. In a country like India, which is famous for its multiculturalism, there are innumerable caste and the policy of protective discrimination increases the caste conflict dividing the groups on the basis of caste. As established in the earlier chapter, caste plays a role in dividing the class and most of the classes are based on the caste, this divide become more prominent. The recent situation with the Marathas and Jats claiming to be backward classes is a proof of this caste divide.

The opponents argue that, India has been

ruled by its caste system and the caste divide existed even before the protective discrimination. The policy of protective discrimination in Indian context only helps the caste divide to dwindle by bringing all the castes on the same social and economic standing. The policy is to bridge the gap between the advantaged and disadvantaged. However, it must be looked after that a few at the top do not monopolize the benefits of the policy.

The policy of reservation or protective discrimination in all sectors in India has become a cynical and disturbing process. What started as a means to uplift the weaker section, has become a weapon to enjoying the perks without paying the price. With more and more groups coming forward to claim reservations, it has now expanded from SC's ST's to a number of minorities.

The current reservation policy followed by the government provides for 15% reservation in jobs and educational institutes for the scheduled castes and 7.5% for the scheduled tribes. Apart from these provisions provided by the central government, the state government has the discretion to grant reservations in their respective state. Approximately 50% of the seats are reserved under the policy, leaving only 50% for the majority<sup>40</sup>. The reservation policy is turning out to be a bane rather than a bane for the Indian society, what started out as a means to ensure justice and equality has been turned into a political agenda to gain votes, also the real oppressed class does not receive the benefits which were established for them. The reservation or protective discrimination policy is being grossly misused and the lower

<sup>40</sup> B.A.V. SHARMA, RESERVATION POLICY IN INDIA (1982).



section is not being uplifted by it rather the benefits are being used by the people who have the means and resources and are nowhere near being economically and socially backward.

### **CHAPTER 5- CONCLUSION**

The initial time period of the application of the reservation policy was set at ten years for the upliftment of the scheduled caste and scheduled tribe, however, till this date there has been no effort to revise, change or review the policy in its entirety. The only changes that can be witnessed over the years is to increase the time frame of the policy or to include another group in the section of backward classes. The objective of reservation in India was to improve the situation of the groups who have been discriminated against economically and socially, however, while classifying the classes applicable for reservation, caste has always been a predominant factor, ignoring the income or wealth. Consequently, the individuals who are not oppressed economically or socially enjoy the benefits of the policy while those who actually suffer are left to fend for themselves.

Instead of opting for the protective discrimination policy at the educational level, the problem should be solved at the grassroot level by providing compulsory and free education to these underprivileged individuals. If there is lack of education at the ground level, there is no way for the real oppressed class to receive reservation at the subsequent stages.

Reservation should be based on the economic criterion rather than the caste system. Reservations based on casteism are unjust and unfair. The policies should be

made for those who are actually in need of the same, the people who lack the means to afford their education. On one hand the Indian constitution and preamble is all about equality while on the other hand we are asphyxiating the same notion by the vice that is reservation, through creating caste divide.

At the time when the protective discrimination policy was drafted, people did suffer from the vile of casteism, however, over the decades, the problem of caste has been curbed down and presently there is a need to review the reservation policy and modify it to include groups from the economically weaker section rather than the groups based on caste, who have the means as well as resources to earn their representation as well as living.

The brutal reality of our society is that the policy of protective discrimination is being used to protect those who do not need this shelter and is ignoring the individuals who are in dire need of it. India is far away from the dream the framers of the constitution had in mind while resorting to protective discrimination. Indian policy of protective discrimination is one of the most, tight knit and elaborative policy. The policy unlike the affirmative action in U.S.A expressly provides for the reservation, however where India did fail is in the implementation of the policy. The policy should have achieved its goal in the initial ten years, however, due to the corrupt use of the provisions of reservation we still fail to meet ideals of the policy. It would benefit the nation to review the policy, restrict its extension and take appropriate measures to provide the benefits to those who need it and not those who exploit it.

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