



PROTECTIVE DISCRIMINATION: A POSITIVE STEP TO MAINTAIN EQUALITY

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INTRODUCTION

The framers of the Indian Constitution were great social engineers and the Constitution is an excellent piece of social engineering.¹ The Constitution of India does not seem to be only basic norm of the country, but also an instrument of peaceful political and socio-economic revolution with a view to balance the conflicting interests in Indian society securing the satisfaction of the maximum of wants with minimum of frictions.² The framers were well aware of caste-ridden societal disbalance and special problems of backward communities in India. In order to maintain proper balance in society, they eagerly provided special safeguards in favour of Scheduled Castes, Scheduled Tribes and Backward classes.³ Protective discrimination⁴ envisaged maintenance of social equilibrium and to serve an effective instrument of social engineering.

The present government measures relating to protective discrimination have become instrumental to political ideologies and have given birth to great social tensions and disturbing forces. Nearly a dozen of states have provided job reservation to backward communities other than the scheduled castes and scheduled tribes in their services.⁵ There has been no uniformity in standards to determine backwardness of communities. The governmental move, however seem to go in directions other than intended by the framers or indicated in Judicial pronouncements. This has caused protective discrimination policy of the governments to become a bone of contention between so called forward and backward communities. The governmental reservation policy is developing towards social disequilibrium instead of functioning as means of social engineering.

The Constitution of India has a clear direction about protection of weaker sections as a part of its Seamless job⁶ of social revolution through democratic means along with national unity. Protection of weaker sections is one of the most important themes that is constitutionally litigated upon during the last five decades, and one that aroused wide public debate and public action with sensitive dimensions.

THE CONCEPT OF PROTECTION

Protective discrimination is the policy of granting special privileges to the downtrodden and the under privileged sections of society, most commonly Scheduled Castes, Scheduled Tribes, women & children. These are affirmative action programs mostly where there has been a history of racial and caste discrimination. Protection of the weak is a concept embedded in welfare ideology. Under the Indian Constitution it spreads over the dualism between policy and principle. Ronald Dworkin considers policy as the outcome of preference that democracy reveals and a choice of means amidst several alternatives.⁷ But a principle is an invariable norm that the political system accepts and continues to hold as paramount or trump against utilitarian calculus.

¹ M/s Naurang Raj Chringilal v. State of Bihar, AIR 1959 Pat. 268.

² G. Austin, *The Indian Constitution : Cornerstone of a Nation*, Clarendon Press Oxford, 1966, p. 156.

³ Article 17 abolished untouchability by making its practice an offences punishable under Law.

⁴ Alexandrowicz, *Constitutional Development in India*, 1957, p. 56

⁵ Statement of Minister of State for Home Affairs in Rajya Sabha on 21.12.1978 (Patriot 22.12.1978).

⁶ Granville Austin, *Working a Democratic Constitution*, Oxford University Press, New Delhi,, 1999, p. 6.

⁷ Ronald Dworkin, *Taking Rights Seriously* (1978) extracted in M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, London; Sweet and Maxwell (1), pp. 1308-09.



Protection in 'its limited sense means safeguarding from injury exploitation loss, discrimination and denials. In a wider sense it includes creating conditions which make access to right possible, infusing ability to compete, and to the extent necessary even artificially immunising the subordinated people against hostile competition. The whole process of protection presupposes existence of a stronger section of dominant class who by reasons of social and economic power, dominate; and a subordinated section who by disadvantages of ineffective democratic participation and socio-economic backwardness are denied of good things of life, and the method of rational balancing of their claims within the framework of equal liberty of all. Thus, scrutiny of dominance subordination relation in hierarchical society⁸ becomes essential in identifying the weak, in formulating the appropriate scheme of benefit and rationality determining its extent, keeping in mind the aspects of social benefits and social costs arising therefrom. With the emergence of modern technological world with economic liberalisation and intensive competition, the extent to which the polity can bear the social castes of protection in the long run, has been far from unlimited.

Protection presupposes and activist state⁹ Instead of neutral overseer of social conflicts, state aims to usher in a just social order. The concept of social justice is central to this approach. It means an efficient social arrangement for equitable distribution of opportunities to lead dignified life with primary Social goods and amenities of life.¹⁰ Combination of formal and substantive equality emphasizes equal distribution unless and unequal distribution of any or all of these goods is to the advantage of the least favoured.¹¹

CONSTITUTIONAL PRESCRIPTIONS AND EXPECTATIONS

The Founding Fathers of Indian Constitution had high expectations about protecting the weaker sections through application of constitutional provisions. According to them, through political democracy, social democracy was to be attained.¹²

- (i) The policy of protecting the Scheduled Castes and Scheduled Tribes is supported by the special provisions of temporary political reservation for them, and National Commission for their uplift as reflected in Articles 330-342.
- (ii) The guarantee to right to life and personal liberty under Article 21, because of vast developments on positive rights of dignified life and substantive judicial review, has immense potentiality of rendering social justice to the weaker sections.
- (iii) Greater political participation of women, Scheduled Castes and Scheduled Tribes and other backward classes in three layers of Panchayati Raj Institutions is expected to arouse socio-political consciousness and awareness of rights which help them in overcoming exploitations.

Elevation through empowerment and balanced social growth with interaction between various facets of equality and liberty form the essence of this approach. Now it is appropriate to look to the constitutional development and evaluate it in the light of the grant vision.

The framers of the Constitution specifically provided under Article 14 that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Though the object of the expressions 'equality before law' or 'the equal protection of laws' is the same i.e. equal justice, but the former is a somewhat negative concept and the latter a positive.¹³ The former implies the absence of any special privileges in favour of any individual¹⁴ and means that "among equals the law should be equal and

⁸ Catherine A. Machinnon, *Feminism Unmodified: Discourses on Life and Law* (1987) extracted in M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, London; Sweet and Maxwell (1), p. 1087.

⁹ Bruce A. Ackerman, 'Forward: Law in an Activist State' 92 *Yale L.J.* (1983), p. 1083,

¹⁰ K. Subba Rao, *Social Justice and Law*, p.1.,

¹¹ John Rawls, *A Theory of Justice* (1972), pp. 302-303. Also see L. T. Hobhouse, *The Elements of Social Justice*, 4th Ed., pp. 37-39.

¹² Dr. B. R. Ambedkar, C.A.D., Nov. 25, 1949: Jawaharlal Nehru, cited in B. Shiva Rao, *The Framing of India's Constitution (Select Documents)* V I.II (1967), p. 5.

¹³ *State of U.P. Deoman*, AIR 1960 SC 1125.

¹⁴ A.V. Dicey, *Laws of the Constitution*, 10th ed. p. 193.



should be equally administered, that like should be treated alike".¹⁵ The latter expression implies non discriminatory treatment in equal circumstances. The Constitution of India prohibits discrimination only on the grounds of religion, race, caste, sex, place of birth or any of them.¹⁶

Equality, as an integral part of Justice has been recognized in all civilized states. In order to administer equality before law or equal protection of laws, it requires some positive step to give preferential treatment to those who are socially and economically unequal and in adverse position. "In a plural society" Dr. S.N. Jain, says "not only is there the problem of equality and equal freedom to all, but also certain backward groups may have to be given some preferential treatment so that economic and social justice may operate in the whole society. It is in this context that the Constitution authorizes the state to provide special benefits and preferences to certain sections of the Population to reserve posts in government services, to reserve seats in legislatures and local bodies to reserve places in public institutions and so on."¹⁷

CONCLUSION

The position of schedule caste is always a question mark for the society being a developing country we are saying that we are giving equal statue to them as compared with other caste but in reality its not be like this . In modern time also they are facing problem but we can say that the extent of sufferingness is less as compared to previous time. For improving their conditions government are taking various steps like specific laws are being made for them, commissions were made only for their betterment and by means of reservation also, government is trying to improve their condition .

The Indian experience in the last fifty years unfolds immense developments on the theme of Protection of Weaker Sections. Constitutional feminism is gaining a well-deserved shape and evinces potentiality to enter into every tissue of the legal system for a pro-woman approach. Children, bonded labourers,, untouchables and indigenous people are also similar beneficiaries. The post-emergency renaissance of constitutional values has a greater focus on low social visibility area. Public interest Litigation and enactment of reformative legislations have assisted the task of protection. The positive rights jurisprudence under Article 21, which arose out of reading the Directive Principles into Fundamental Rights, has also succoured the deprived people.

Protective discrimination aims to be used as an effective measure as balancing wheel between haves and have-nots. It does not rob Peter to give it to Paul, nor does it aim "to pull down the advanced sections of society but only to uplift the backward sections, thereof, without unduly and unreasonably effecting the interest of the former."¹⁸ Protective discrimination, in this way, is aimed to achieve social engineering. The debate over Protective discrimination in India is acrimonious and is increasingly finding expression in violence. But a democracy which is essentially a social contraption is neither dictated by logic nor by ethics. At the root of democratic success is social engineering which is effected through political bargaining. In India the process is on and only the future would tell whether its experiments were in the right direction or not.

¹⁵ Sir Ivor Jennings, Law of the Constitution, 5th ed., p. 50

¹⁶ Article 15 prohibits discrimination in societal Treatments and accessibility to public places.

¹⁷ K. Subba Rao, Minority and the Law, Indian Law Institute, N.M. Tripathi, 1972 p. V.

¹⁸ K. Subba Rao, Minority and Law, Indian Law Institute, N.M. Tripathi, 1972 p. 104