

Asian Resonance

Protective Discrimination: A Step towards Social Justice



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Abstract

In India being a developing nation is currently facing many challenges and the caste system being one of them. In today's time one of the major road blocks to this equality is the caste system.

Our society has always seen full of inequalities. It was a caste, ridden, stratified, hierarchical society, & an particular sequent of society had seen denied the basic human rights. Their education, wages, living conditions, social status was dictated by upper strata of society, reducing them to destitution. The educational & economic backwardness brought social backwardness which consequently made them downtrodden & thus depriving them even of the dignity of life. The inhumane & barbaric conditions continue for centuries, till "we the people" realized the malady impelling the framers of our constitution to think in India large member of people have experienced social discrimination for which effects have seen made to provide redress under constitution of India. Our constitution framers made special provisions for four-under privileged classes, which not provided to other classes. These under-privileged classes are :- scheduled castes (SCs), the scheduled tribes (STs), other backward classes (OBCs), the religious minorities and women for the uplift these classes, need arise to discriminate positively in favour of them & it is called as protective discrimination. . This paper is an attempt to discuss protective discrimination and the rights provided to SCs, STs and OBCs which are provided in Constitution.

Keywords: Constitution, Fundamental Rights, Directive Principles, Constitution of India, Supreme Court.

Introduction

Meaning and Background

The caste system finds its origin in the old-age caste system of India. The caste system at its birth was meant to divide people on the basis of their occupation like teaching and preaching (Brahmins), Kingship and war (Kshatriya) and lastly business (vaish) etc. but soon it became an instrument to divide the society on caste-basis, creating various walls between different sections of the society. Today we stand divided widely into Hindus, Muslim, SCs, STs and OBCs with newer reservations coming up for other different sections of the society. The rationale have is that without centuries of discrimination, it would be reasonable to expect that such equitable representation would have resulted naturally. In the absence of any beliefs of 'natural superiority' of any one group, such an assumption seems valid. So reservation effectively creates a "protected class" that compete with the rest of the country.

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Caste and Community Profile Peoples below Poverty Line in India Based on NSSO 1999-2015

Caste and Community Groups	Rural	Urban
Sc Schedule Tribes	45.8	35.6
Sc Schedule Caste	35.9	38.3
Other Backward Castes	27.0	29.5
M Muslim Upper Castes	26.8	34.2
Hi Hindu Upper Castes	11.7	09.9
C Christian Upper Castes	09.6	05.4
U Upper Caste Sikhs	00.0	04.9
O Other Upper Castes	16.0	02.7
AI All Groups	27.0	23.4

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Protective discrimination is the policy of granting special privileges to the downtrodden & the underprivileged classes of society, most commonly STs, SCs & OBCs.

This affirmative action programs, visible in both the united states & India. Where there has been a history of racial & caste discrimination. This practice is most prominent in India, where it has been enshrined in the constitution & institutionalized.

The need to discriminate positively in favour of under privileged was felt for the first time during the nationalist movement.¹ It was Mahatma Gandhi who was the first leader to realise, the degrading position of "untouchables." He renewed these untouchable as "Harijans" (People of God).

The constitution of Independent India which largely followed the pattern of the government of India Act 1935, made provisions for protective or positive discrimination in favour of the scheduled castes, scheduled tribes & backward classes (SCs, STs & OBCs), which constituted about 23% of the divided India's population. Besides reserving parliamentary seats for them they were gives advantages in term of allusions to schools & colleges, jobs in the public sector, various pecuniary benefits for their overall development & so on.

The constitution of India indeed guaranteed the fundamental rights of equality of all citizens before the law but it also categorically laid down that nothing in the constitution "shall prevent the state from making any special provision for the advancement of any socially & educationally backward classes of citizens or for the scheduled caste and scheduled tribes."

Constitutional Provisions

Article - 15

Article 15 directs state not to discriminate against a citizens grounds only of religion, race, caste, sex or place of birth or any of them. But third clause (Article 15(3)) empowers the state to unable special provisions for the protection of women & children. The fourth clause² enables the state to make special provisions for the protection of the interest of backward classes of citizens and is there for exception to Article 15(1) & 15(2). Article 15 clause (4) was added by the constitution (1st amendment) Act, 1951 as a result of decision in State of Madras V/S Champakam Dorairajah³. In this case the Madras government had reserved seats in state Medical & Engineering colleges for different communities in certain proportions on the basis of religion, race and caste. The state defended the law on the ground that it was enacted with a view to promote the social justice for all sections of the people as required by Art. 46 of the directive principle of state policy. The supreme court hold the law void because it classified students on the basis of caste & religion irrespective of merit. The directive principles of state policy cannot override the fundamental rights. In another case an order requisitioning land for the construction of a Harijan colony was held to be void under, Article 15(1)⁴. To modify the effect of decision of these two cases, Article 15 was amended by constitution (1st amendment) Act, 1951.

Under this clause state is empowered to make special provisions for advancement of any socially & educationally backward classes of citizens or for the scheduled castes & scheduled tribes. After the amendment it would be possible for the state to discriminate protectively or positively. These under privileged classes, it may be by putting up a Harijan colony in order to advance the interest of the backward classes.

The provisions made in clause (4) of Article 15 is only an enabling provision & doesn't impose any obligation on state to take any special provisions for backward classes. The class contemplated under the clause must be both socially & educationally backward. Article 15(5) also laid down provisions of Protective discrimination. Article 15 (5)⁵ Provides that nothing in Article 15 or in sub-clause (g) of clause (1) of article 19 shall prevent the state from making any special provision by law, for the advancement of any socially & educationally backward classes of citizens or for the scheduled caste or the scheduled tribes in so far as such special provisions relate to admission to educational institutions including private educational institutions, whether aided or unaided by the state, other than the minority educational institutions referred to in clause (1) of Article 30.

The above amendment has been enacted to nullify the effect of the three decisions of the Supreme Court, i.e. T.M. Pai foundation v/s state of Karnataka⁶, Islamic Academy V/s state of Karnataka⁷, and P.A. Inamdar v/s state of Maharashtra.⁸

In T.M Pai foundation and P.A. Inamdar cases it has been held that state cannot make reservation of seats in admissions in privately run educational institutions. In these institution & admission can be made on the basis of concern admission test conducted by state or these institutions and on the basis of merit. The amendment⁹, enables the state to make the provisions for reservation of the above categories of classes in admission to private educational institutions. The amendment, however keeps the minority educational institutions out of its preview. In this way article 15(4) & (5) laid down provisions in favour of underprivileged bulk of society & positively discriminate them from other groups.

Article - 16

Article 16(1) guarantees equality of opportunity for all citizens in matter of 'employment & appointment' to any post under the state.

Clause (2) say that no citizen shall, on grounds only, of religion, race, caste, sex, place of birth, residence or any of them, be indigible for or discriminated against in respect of, any employment or office under the state. Clause (1) & (2) of Article 16 lays down the general rule of non-discrimination. On the other hand clauses (3), (4), (4-A), (4-B) & (5) of Article-16 provides four exception to this general rule of equality of opportunity.

Clause (3) of Article 16 foresides discrimination on the ground of residence & have residence be a ground for reservation. Clause(4) enables the state to make provision for the reservation of posts in government jobs in favour of

any backward class of citizens which in the opinion of state is not adequately represented in the services of the state.

Clause (4-A) added by 77th amendment Act, 1995 empowers the state to make any provision for reservation in matters of promotions for SC and STs which, in the opinion of the state, are not adequately represented in services under the state.

Clause (4-B) has been added also by constitution (81st amendment) Act, 2000, which seeks to end the 50% limit for scheduled castes & scheduled tribes and other backward classes in backlog vacancies which could not be filled up due to the non-availability of eligible candidates of these categories in the previous year or years.

Article 16(4) applies only if the conditions are satisfied:-

1. The class of citizens is backward &
2. The said class is not adequately represented in the services of the state.

In Bala ji" case¹⁰ the supreme court has held that the 'caste' of a person cannot be sole test for ascertaining whether a particular class is a backward class or not. The government from time to time should review if a class reaches the state of progress where reservation is not necessary, it should be delete that class from the list of backward classes.¹¹

The scope of Article 16(4) was considered by the Supreme Court in Devadason V. UOI.¹² In this case constitutional validity of "Carry forward rule" was involved. This rule provided that if sufficient number of candidates belonging to the scheduled castes & scheduled tribes were not available for appointment to the reserved Quota, the vacancies that remained unfilled would be treated as unreserved in the next year for scheduled castes & scheduled tribes in addition to their reserved Quota of the next year. The Supreme Court struck down the "Carry-forward rule" as unconstitutional on the ground that it deny reasonable equality of opportunity in matter of employment for members of classes other than backward.

In Indra Sawhney V. Union of India¹³ (Mandal Case) supreme court overruled Devadason v/s UOI, on this point. It has held that the "carry forward rule" is valid so long as it doesn't in a particular year exceeds 50% vacancies.

The supreme court on various aspects of reservation provided in Article 16(4) may be summarized as follows:-

1. Backward classes of citizens in Article 16 (4) can be identified on the basis of caste and not only on economic basis.
2. Article 16(4) is not an exception to Article 16(1). It is an instance of classification. Reservation can be made under Article 16(1).
3. Creamy layer must be excluded from backward classes.
4. Article 16(4) permits classification of backward classes into backward & more backward classes.
5. Reservation shall not exceed 50%.
6. No reservation in promotions.

7. Disputes regarding new criteria can be raised only in the Supreme Court.

On March 26, 1993 parliament passed the bill setting up a national commission for backward classes for considering inclusions in & exclusion from the lists of castes notified as backward for job reservation purpose.

Article - 17 Abolition of Untouchability

Article 17 provides protective provisions to untouchables. The term 'untouchability' is neither defined in the constitution nor in the Act.

The Mysore High Court held that the term is to be understood is the 'practice as it had developed historically' in this country. This term generally includes STs & SC. So the constitution makers by adding Article 17 under constitution aimed at protecting them from untouchability parliament also enacted untouchability (afferness) Act, 1955 for protecting the above mentioned classes of people.

Article 46 Promotion of Educational & Economic Interest of Weaker Section

Under Part-IV directive principles of state policy Article 46 enjoins the state to promote with special case the education and economic interests of the weaker sections of the people, and in particular of the scheduled castes & scheduled tribes, & to protect them from social injustice and of all form of exploitation.

In this way Article - 46 is also particular provision aimed at protection of interest of scheduled caste & scheduled tribes.

Article 330-342 Special Provisions Relating to Certain Classes

"It would have been a blunder on the part of the makers of our constitution, if, on a logical application of the above principle, they had omitted to make any special provisions for the advancement of those who are socially & economic backward."¹⁴

The constitution doesn't define as to who are the persons who belongs to scheduled castes & scheduled tribes.

Article 341 & 342, however empower the President to draw up a list of these castes & tribes. Under Article 341, the president after consultation with the Governor. With respect to state, specify the caste, races, or tribes or of groups within castes, races, or tribe for the purpose of their constitution any inclusion or exclusion from the Presidential notification of any caste, race, or tribe can be done by parliament by law. Reservation of seats in lok Sabha & State assemblies (Article 330 & 332)

Article 330 provides for the reservation of seats for scheduled castes & scheduled tribes except the ST. In the autonomous district of Assam, similarly Article 332 provides for reservation of seats for SCs & STs (except the autonomous district of Assam) in the legislative assemblies of every state.

Article 335 makes it clear that the claims of the members of the scheduled castes & scheduled tribes shall be taken into consideration, consistently, with the maintenance of efficiency of administration, in the making of appointments to services & posts in connection with the affairs of the union or of a state.

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This Article puts a limit on the extent of reservation. It must not go beyond that limit so as to affect the administration efficiency.

The framers of constitution, must have visualized such a situation, wherein this provision could be used in future for efficiency of administration Article 338 amended by 89th amendment Act, 2003 which provides for the establishment of national commission for scheduled tribes. Prior to this amendment there was a single commission for both the scheduled castes & scheduled tribes. National commission for scheduled castes consists of a chairman, vice chairman & three other members. All these shall be appointed by President of India. In the such way National commission for scheduled tribes (under Article 338-A) constituted & regulated, by going through all the provisions related to protective discrimination in favour of STs. SCs, & OBCs It is suggested that :

Conclusion/Suggestions

The more fundamental question which arises is how far the quotas have & other privileges or protective measures helped the target groups. The target groups have not shown visibly better record as promised by most of the political parties. In country like India where poverty, illiteracy & deprivation are so wide spread that by only emphasizing on reservation the desired result of upliftment of depressed classes cannot be achieved.

A report on the state of primary education in India by the India Today Portrays a depressing picture of the Indian state is failure in this regard. The problem is much larger & there targeting particular section of society would not be effective. The reservation schemes these days only became less expensive & great rewarding schemes for political parties. One common criticism against the reservation policy is that it has benefited only a small section of people. According to estimates only 6% of SC families have benefited from the policy. On the other hand it is seen that the quota system has eliminated whatever goodwill the upper castes had for the lower castes.

The caste conflicts are rampart as a reading of the annual reports of the Home Ministry reveals. So there is a strong need to spread education among weaker section of the society i.e. SCs, STs, and Other

Backward classes. The protective discrimination seems to be less fruitful & sometimes I feel that it would damage the unity between the upper classes & lower classes which was aim of the framer of the constitution, towards calling united society in the country.

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Footnotes

1. National movement (1917-1947) Third & final phase of the movement is u/s Gadhian era
2. added by constitution (1st Amendment Act, 1951
3. AIR 1951 SC 226
4. Jagwant kaur v/s State of Bombay, AIR 1952 Bombay. 461
5. Added by 93rd constitution amendment act 2006 (Provides for reservation of OBC, SC, ST in private educational institution)
6. AIR 2003 SC 355
7. AIR 2003 SC 3724
8. AIR 2005 SC 3226
9. 93 rd constitution amendment act 2006
10. AIR 1963 SC 649
11. State of A.P. V/s Balrum, AIR 1972 SC 1375
12. AIR 1965 SC 179
13. AIR 1993 SC 477
14. Bases D.D. Introduction to the constitution of India. P. 327.