

# PROTECTIVE DISCRIMINATION UNDER THE CONSTITUTION OF INDIA

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## ABSTRACT

The Constitution of India, through various laws and provisions, aims at eliminating disparities between different sections of the society and providing equality of status and opportunity to all. The framers of our constitution were well conscious about the distressed condition of these weaker sections of the society. They putted their best foot forward for the upliftment of weaker sections by providing some auspicious provisions in the constitution for instance equality under article 14, prohibition on discrimination under article 15 and many more. The Constitution of India, through various laws and provisions, aims at eliminating disparities between different sections of the society and providing equality of status and opportunity to all. A nation cannot flourish if a significant portion of its population falls behind in the development race and, as a result, is unable to benefit from the equality of opportunity granted to all Indian citizens as a fundamental right.

**Key words:** Disparities, distressed condition, upliftment, auspicious, *judicial mind*, *underprivileged*, *downtrodden*, *affirmative action*, *egalitarian society*. *Prejudice*.

## INTRODUCTION

*Over a great period, a certain section of the society had always been suffering from oppression and exploitation of all kinds. The malady of social disparities crippled the underprivileged and downtrodden classes so intensely that they became economically disabled for generations after generations.* The framers of our constitution were well conscious about the distressed condition of these weaker sections of the society. They putted their best foot forward for the upliftment

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of weaker sections by providing some auspicious provisions in the constitution for instance equality under article 14, prohibition on discrimination under article 15 and many more. In some of the articles framers of our constitution has also provided some privileges in the favour of weaker and backward sections of society. *The founding fathers of the Constitution dreamt of an egalitarian society that would be free from prejudice and discrimination.*

*The Constitution of India assures Equality to all its citizens. However, absolute equality is impractical for the Indian society is diverse with culture, language, religion, and geography, and so forth. Thus, the makers of the Constitution applied their judicial mind for an affirmative action that would potentially accomplish the desired object.* In other words it means that framers of our constitution has provided for protective discrimination in the constitution. Though the general rule lay down in our constitution provides that all the citizens of India are equal and they cannot be discriminated on the basis of race, caste, sex or place of birth, some of the exceptions are also provided as to that general rule which speak of protective discrimination.

## **DISCRIMINATION**

Discrimination means the act of differentiating between two people. It is a well known quote that “Iron cuts iron”, hence discrimination counters discrimination.

The act of differentiating between two individuals is termed as discrimination. It is the granting of some favorable position to a specific segment of a social class above others. Protective discrimination means a privilege or some right in favour of those who had been discriminated and oppressed since ages. The weaker section remained cold for a considerable length of time as nothing more than garbage in the general public. The oppression of the weaker section of society is not behind the curtains for anyone. They suffered a lot in every day in day out throughout their life. This evil had to be nipped in the bud but now as aftermath it has become a huge tree with its roots deep buried in the Indian society. The upper crust rules the democracy everywhere. Article 15(1) of the constitution says that the state shall not discriminate among

the citizens only on grounds of religion, race, caste, sex or place of birth or any of them. So the general principle is that the state cannot discriminate among citizens.

## **HISTORICAL BACKGROUND OF PROTECTIVE DISCRIMINATION**

India has had a long past of oppression and suppression. Certain communities have always been discriminated against, whether it be in the puranic times, the era of monarchy or British rule. These communities were exploited for long and their sufferings have been silenced by the influential non-discriminated people of the society. They were so underprivileged that they lost all financial authority and were forced to live a life of poverty for generations after generations. The makers of the Indian Constitution dreamt of a society where everyone is treated as equal and no one is exploited based on their colour, caste, sex or race. The makers of the Constitution applied their judicial mind for an affirmative action that would potentially accomplish the desired object. It was the idea of protective discrimination that added a new dimension to a great socio-economic man oeuvre.

## **SIGNIFICANCE OF THE STUDY**

The policy of protective discrimination is a way to ensure social justice in society. The scheduled castes, scheduled tribes, other backward classes, and women are the most exploited and discriminated groups in Indian society, and the Constitution hence aims at making their lives better by providing them with some special privileges. These actions are justifiably enshrined in the Constitution of India as "*Protective Discrimination*". Protective Discrimination as an idea has been practised by many civilized nations including developed nations like the USA because of their dark history of racial discrimination. In India, these special provisions for the downtrodden and exploited are provided as reservations or quotas in educational institutions, jobs, and parliamentary privileges and it commands the legislatures to legislate special provisions for their overall advancement.

## **NEED FOR PROTECTIVE DISCRIMINATION FOR BACKWARD CLASSES IN INDIA**

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The Supreme Court in *Marri Chandra Sekhar Rao v. Dean Seth G.S Medical College* (1990) held that equality must be a living reality for the people. Those who are unequal in status and opportunity cannot be treated by identical standards.

The caste system is a deep-rooted social problem that dates back centuries ago. Even though the Constitution prohibits discrimination against these groups but, the legal position apart, the caste system is still the order of the day and this is the sad undeniable truth. Lower castes have to serve the upper castes without having any say and grievance redressal mechanism. Two Constitutional Amendments have been incorporated into Article 16(4). The 77th Amendment to the Constitution has taken effect, allowing Scheduled Castes and Scheduled Tribes to be given preference in promotions. As a result, Parliament has erased the premise that an appointment does not imply promotion, as defined by the Supreme Court in *Indira Sawhney*, by modifying the Constitution.

The 81st Constitutional Amendment also brought changes in Article 16(4)(B), which states that “Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause(4).”

## **CONCEPT AND ISSUES OF PROTECTIVE DISCRIMINATION**

Discrimination against discrimination is based on the widely known quote “*iron cuts iron*”. It is clear from history that one type of discrimination is negative and destructive in nature whereas the other type is curative and protective. The discrimination suffered by the oppressed sections of the society such as the SC and STs Over a great time period has caused the concept of protecting discrimination to protect their interests. The essential reason behind defensive discrimination is to offer essential facilities to the disadvantaged sections and to bring them to the mainstream society.

However, the nation faced with the quandary that this would suggest that in the society characterised through the distinctions on the idea of caste, religion simplest who are higher

positioned than the rest could get all of the benefits and the backward and repressed lessons will remain sidelined. The vulnerable section of the society includes-

1. Women
2. Children
3. Old age people
4. Transgender
5. Scheduled Caste
6. Scheduled Tribe

## **BEGINNINGS OF DISCRIMINATION IN INDIA - THE CASTE SYSTEM**

Caste has existed in India for such a long time and has undergone considerable change but it still involves millions of people. The issue of caste is a very complex and complicated one. Caste is perceived as "an exclusively Indian phenomenon which is not paralleled by any other institution elsewhere in its complexity, elaboration and inflexibility. According to the caste system a person is regarded as a part or member of the caste into which he or she is born. In Hindu custom the caste system owes its origins to the four *varnas*. One of the religious theories gives details on how the four *varnas* were founded. They are Bramhan, Kshatriya, Vaishya and Sudra. This system has worked well for Indian people in segregating them and even now plays a fundamental role in contemporary India.

According to the Indian Constitution the exception lies in the minority and religious educational institutions for the socially and educationally backward classes of citizens or the Scheduled Castes and Scheduled Tribes, who are perceived by the government to be inadequately represented in these services and institutions. This term encompasses the allocation of seats in educational institutions as well. Specifically, the Constitution of India provides for "reservations" in favour of two disadvantaged groups; namely, the Scheduled Castes (SCs) and the Scheduled Tribes (STs). These reservations exist in the following areas:

- (a) In the state legislatures and the union legislature or parliament,
- (b) In services under the states, and
- (c) In educational institutions.

Apart from reservations in educational institutions, other programmes for the upliftment of the backward classes include:

- (a) Exemption from school fees,
- (b) The provision of stipends or scholarships,
- (c) The provision of facilities like book grants, and
- (d) The maintenance of hostels, or assistance to hostels for SC students.

## QUOTAS

Quotas are enforced through this system of reservations, whereby at least forty percent of seats are reserved for persons from the SCs, STs and OBCs. Mitchell describes the quota system as a "numbers game enforced by a policing system supported by industrial courts" and warns that the quota methods can prove to be counter-productive with companies resorting to filling quotas without developing skills. Like the quota system in other constitutions, seats and jobs are reserved for persons from disadvantaged groups. This policy of special or preferential treatment of the disadvantaged sections of society is called by the name of "protective discrimination" or "protective measures", "compensatory discrimination programmes" or "reverse discrimination". However, in the Indian system, affluence alone has not improved the status of a caste (*jati*) into a higher *varna*.

## CONSTITUTIONAL PROVISIONS

Article 14 of the constitution of India states that "the state shall not deny to any person equality before the laws within the territory of India". According to this article, there will not be an upper or a lower class in society. Equality among all the citizens is provided in the article. It states that the law should be equal among equals and administered equally.

**Article 15(3)** enables the State to confer special rights to women, and children. This provision empowers the State to make special provisions and enactments in favor of women and children for their all-round upliftment in the society.

**Article 15(4)** enables the State to make special provisions for the improvement of socially and economically backward classes of citizens specifically the Scheduled Tribes and Scheduled Castes. This provision was added in the Constitution by the First Constitutional Amendment Act in 1951 as a result of the decision given in *State of Madras v. Champakam Dorairajan*.

**Article 15(5)** was inserted in the Constitution in 2005 which enables the State to make special provisions concerning the reservation of seats in educational institutions.

**Clause (6) to Article 15** inserted through the Constitution (one hundred and third Amendments) Act of 2019. This clause directs the State to make special provisions for the upliftment of economically weaker sections of the citizens concerning admission into educational institutions, including private, aided or unaided by the State.

**Article 16 (1)** guarantees to all citizens equality of opportunity in matters relating to employment in public offices, clause (3) to (6) of Article 16 contains an exception to the rule of equality of opportunity incorporated in clauses (1) and (2). **Clause (4) to Article 16** expressly permits the State to make provisions concerning the employment of backward classes of the citizens.

In 1995 through the Constitution (Seventy-seventh Amendment) Act, **Clause (4A) to Article 16** had been inserted in the Constitution. This provision enables the State to make provision concerning reservation in matters of promotions with consequential seniority, in favor of Scheduled Tribes and Scheduled Castes.

**Article 16(4)**- This article allows the State to make certain provisions for the reservation of posts in government jobs in favor of any backward training of citizens which, in the State's opinion, is not always competently represented within the State's services.

**Article 16(4-A)**-This article introduced by means of the 77th Amendment, 1995 empowering the State to make any reservation provision in matters of promotions for SC and ST that, in the State's opinion, are not accurately represented within the State's services.

**Article 16(5)** permits that, concerning the operation of affairs of any religious institution or denomination, the incumbent shall necessarily be a person professing a particular religion or belonging to a particular denomination. This exception may be read together with Article 25 to 28 that is fundamental Right to Freedom of Religion and the right of the minorities under Article 29 and 30.

**Article 16(6)** added to the Constitution through the Constitutional (one hundred and third amendments) Act 2019, which enables the State to make provisions for reservation in the matters of employment or appointments in favor of economically weaker sections of the citizens, subject to a maximum of ten percent in addition to the existing reservation.

**Article 46** imposes a duty upon the State for the promotion of educational and economic interests of the weaker section of the people, especially those belonging to Scheduled Tribe, Scheduled Castes, to protect them from the vicious cycle of all forms of exploitation and injustice.

**Article 336** speaks for the protection of rights of the Anglo-Indian Community in appointments in various sectors including railways, postal services, and customs. The Parliament in 2020 brought the Constitution (one hundred and fourth amendments) Act 2019, amended Article 334 which extended the reservation of seats to STs and SCs in the Parliament for a further ten years reservation applicable up to 2030.

**Article 330**-This article provides for the reservation of some seats in the autonomous district of Assam for the scheduled caste and scheduled tribe.

**Article 332**- This article gives reservation of seats for the scheduled caste and the scheduled tribes in legislative assemblies of all the states except the scheduled tribes that are within the autonomous district of Assam.

## JUDICIAL RESPONSE RELATING TO PROTECTIVE DISCRIMINATION

1. In ***Mohan Kumar Singhania v. Union of India (1991)***, the Supreme Court explained that Article 16(4) is an enabling article that gives the state freedom to make any provision or reservation for any backward class of citizens that is not adequately represented in the state's service. The state government takes the total population of the backward class and their representation in state services, does the appropriate calculations, and then makes the reservation and provides the percentage of reservation for the posts, which must be carefully adhered to.
2. In ***Triloki Nath v. J & K State (II) Shah (1973)***, the bench stated that 'a test primarily based on caste, community, race, religion, sex, descent, place of birth, or residency cannot be used to determine whether a section represents a class for the purposes of Article 16 (4) since it would directly violate the Constitution.'
3. In ***A. Peeriakaruppan, etc. v. State of Tamil Nadu (1970)***, the Supreme Court stated that 'A caste has traditionally been considered a social group. If an entire caste or community is socially, economically, or educationally backward at any given period, that caste or group is considered a backward class. This is because they form a class, not because they are members of that caste or group.'
4. In the case of ***Jagdish Negi v. State of U.P (1997)***, it was stated that backwardness is not a one-time occurrence. It can't go on indefinitely, and the government has the right to examine the issue at any point.
5. In ***Vishakha v. State of Rajasthan***, one another landmark judgment case in history, the Supreme Court held that women have a fundamental right to freedom from sexual harassment in the workplace. Equality Article 14 speaks for gender equality which includes protection from sexual harassment and the right to work with dignity.
6. ***Air India v. Nargesh Meerza***, known as the Air Hostesses case, Regulation 46 of Air India was challenged. The impugned regulation stated that Air Hostess to retire from services on attaining the age of 35 years or upon marriage, or on first pregnancy. Although the Apex court held the impugned order void, it was observed that the State

must enforce only the justiciable provision of the Constitution. The court gave a literal interpretation to the Constitutional provisions led to the insertion of Clause (4) to Article 15.

7. ***Indra Sawhney v. union of India*** well known as the ‘Mandal Commission case’ has a major impact on today’s reservation system of our country.
8. ***In-State of Kerala v. N.M Thomas*** the dispute before the Court was whether preferential treatment to SC’s and ST’s comes under the permissible limit of Clause (1) of Article 16. In this case, the Supreme Court by 5:2 majority held that classification of employees belonging to SCs and STs that provided an extended period of two years for allowing them to pass the tests for promotion from other classes of employees was just and reasonable one that can be defended on the ground of providing rational nexus between such classifications and the object of promoting equal opportunities amongst all citizen for employment and appointment matters to the public offices.
9. ***In a recent case of Ranveer Singh & Anr. v. Union of India***, the Central Administrative Tribunal (CAT) observed that the scope of Article 15(3) is much greater than Article 16(4) of the Constitution. CAT upholds the reservation of 80% posts of Nursing Officer in favor of female in AIIMS. It was held that the said reservation is to be treated as a special provision for women candidates under Article 15(3) and a separate classification is held to be valid.

## CONCLUSION

The constitution of India via various provisions aims at eliminating disparities between different sections of the society and providing equality of status and opportunity. However, there has been a long-debated dilemma of preservation of rights of the historically oppressed and socially as well as economically backward classes of citizens and the privileged section simultaneously. All people mustn't be equal by their nature, attainment, and circumstances. The changing needs of different classes of persons often require diverse treatment. Where the essence of the right to equality is pervading throughout the constitution, it also speaks of special treatment to a particular section.

In India, there is a growing discussion about positive discrimination. A democracy, on the other hand, is not restricted by logic or ethics because it is fundamentally a social creation. A nation cannot flourish if a significant portion of its population falls behind in the development race and, as a result, is unable to benefit from the equality of opportunity granted to all Indian citizens as a fundamental right. Application of the same laws parallel to everyone irrespective of socio-economic differences may result in violation of the spirit of the right to equality. Henceforth, protective discrimination, as a constitutional tenet for protection and preservation of the rights of scheduled castes, scheduled tribes, and other backward classes of citizens as well as women, is highly recommended in our society.

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