



PRINCIPLES OF COMPENSATORY DISCRIMINATION UNDER INDIAN CONSTITUTION

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Introduction:

Provisions of reservation are considered as a unique system under Indian Constitution. These provisions are there in other countries like United States as well but they are limited to native India tribes. In their system, they provided them limited seclusion with allotment of specified land. But in India, framers of our Constitution enacted Compensatory Discrimination system for socially and economically backward classes etc. because, there are certain sections in our Indian society for whom securing their bare minimum rights is a struggle. Denial of rights results into the denial of basic human dignity. Our society has always been full of inequalities. Their education, wages, living conditions, social status was dictated by the whims of upper strata of society, reducing them to destitution. In a society compartmentalized on caste basis Lower castes had to serve the upper castes without having any say. This inhumane and barbaric condition perpetuated for centuries, till we drafted a constitution, forbidding all such practices.

Compensatory Discrimination:

Compensatory discrimination is the policy of granting special privileges to the downtrodden and the underprivileged sections of society. These are affirmative action driving their power through constitution or another supreme document. These policies are referred as positive discrimination in the sense that any kind of negative discrimination is prohibited by the Indian Constitution. However, to uplift the underprivileged, we break the general principal of non-discrimination and make special provisions to ensure the equality of status and opportunity.

As mentioned earlier, to limit our study we will be talking about certain specific sections of the society and the corresponding provisions made under Indian Constitution to protect those specific groups:

1. Positive Discrimination in the favor of Socially Backward Class of Citizens:

In the context of this Paper, the term 'socially backward classes' is being used in a wider sense consisting of classes such as SCs, STs, Other Backward Classes or Socially and Educationally Backward classes. Article 15(1) is general in its application, covering all classes of discrimination, whilst articles 16(1) and 29(2) are directed at prohibiting particular species of wrong. Accordingly, the maxim 'generaliaspecialibus non derogant' applies and in the areas of state employment and state education, articles 16(1) and 29(2), respectively, are applicable to those particular type of species mentioned under these provisions.



Articles 15(1) and 16(1) are specific applications of the 'equality in law' mandate of article 14. This is to be distinguished from the concept of 'equality in fact' with which this paper is primarily concerned. Briefly, however, equality in law under article 14 precludes discrimination of any kind but not all legislative differentiation is necessarily discriminatory; if based upon a 'reasonable classification' it will be acceptable. Such classification will be 'reasonable' when it is first, founded on substantial differences and rational in relation to the aim sought to be achieved.¹

State of Madras v. Dorairajan² was the first major test of the Indian judiciary on the issue of compensatory discrimination. The Supreme Court of India adopted a narrow and literalist reading of the Constitution by ruling that compensatory discrimination policies violated the named Articles of the Constitution. However, the central government, led by Prime Minister Nehru, which enjoyed a comfortable majority in the Parliament, amended Article 15 of the Constitution to authorize affirmative action in favor of untouchables and "backward classes. However, a debate is going on in regard to the amount of reservation allowed under article 15(4) and 16(4). Earlier the view of the court was that the reservation can be granted up to any extent.³ Same view was adopted by the Supreme Court in case of Balaji⁴ dealing with the reservation under Article 15(4) and in case of Devadasan⁵ dealing with the reservation under 16(4). It has also been opined by the Supreme Court in various cases that while granting reservation to SC or ST community it requires them to ensure that conditions of Article 335 of the constitution to be followed. Article 335 says that it is required that Reservation Granted should be consistent with the '*maintenance of efficiency of administration.*' Hence in this scenario it is important to make a balance between compensating the wrongs of the past and ensuring growth as a nation.

Few other provisions to ensure Protection to Socially Backwards Classes:

1. Article 341 gives power to the President to determine as to who will form the part of the Schedule Caste requiring positive discrimination. Similarly, Article 342 talks about Schedule Tribe and Article 342A takes about 'Socially and Educationally Backward Class' of citizens.
2. To protect the interests of SC-ST and OBC community, special commissions were formed through constitutional amendments under Article 338⁶, 338A⁷, 338B⁸
3. To ensure adequate representation and to give an opportunity in the formation of public policy, SC and ST community is granted reservation in House of People and the State legislature through Article 330 and Article 332 respectively.

¹ State of WestBengal v. AnwarAli [1952] A.I.R. (SC) 75

² State of Madras v. Dorairajan, 1951 A.I.R. 38 (S.C.) 226

³General Manager, Srh. Ry. v.Rangachari [1962] A.I.R. (SC) 36

⁴Balaji vs State of Mysore [1963]A.I.R. (S.C.)649,664.

⁵Devadasan v. Union of India [1964] A.I.R. (S.C.) 179

⁶ National Commission for Schedule Castes; Added by 89th constitutional amendment act of 2003

⁷ National Commission for Schedule Tribe; Added by 89th constitutional amendment act of 2003

⁸ National Commission for Backward Classes; Added by 102nd Constitutional Amendment Act of 2018



The Indian Constitution expressly authorizes special preferential treatment for the relief of backward classes. Nevertheless, genuine equality can be achieved through those general provisions of the Constitution which create a General Right of Equality, as this right has been interpreted as requiring equality in fact rather than equality in law. These policies are implemented through a broad discretion vested in the State subject to judicial review to prevent what is intended to establish equality of opportunity, creating instead, and institutional discrimination in reverse. In such a structured society, however, the implementation of policies which favor those traditionally seen as less worthy, even 'untouchable', to the detriment of previously entrenched upper classes, has not been easily accepted. The resultant religious and social pressures, outside the scope of this paper, are themselves worthy of careful consideration.

2. Compensatory Discrimination in the favor of Minorities:

It was held in the case of **Bal Patil vs. Union of India**⁹ that the minority character of a group is to be examined on the state level instead of national level.

Other than Article 15 and 16 there are certain express provisions mentioned in the constitution protecting the rights of the person belonging to minority. Some of these provisions are discussed here in detail:

1. Article 25(1) - People's freedom of conscience and right to freely profess, practice and propagate religion – subject to public order, morality and other Fundamental Rights.
2. Article 26 - Right of every religious denomination or any section thereof – subject to public order, morality and health – to establish and maintain institutions for religious and charitable purposes, manage its own affairs in matters of religion, and own and acquire movable and immovable property and administer it in accordance with law
3. Article 28 - People's freedom as to attendance at religious instruction or religious worship in educational institutions wholly maintained, recognized, or aided by the State
4. Article 29(2) - Non-denial of admission to any citizen to any educational institution maintained or aided by the State, on grounds only of religion, race, caste, language or any of them.
5. Article 30(1) - Right of all religious and linguistic minorities to establish and administer educational institutions of their choice.

The purpose of this article is not to give religious or linguistic education rather it is the normal secular education. The religious or linguistic minorities might have a fear that they may be sidelined from the main stream by the majority as they are not educationally developed. To give them an extra assurance, under article

⁹(2005) Appeal (civil) 4730 of 1999



30(1), they can themselves promote their educational interests. But since these rights are not absolute in it, a debate started with the case of **St. Stephen's college vs. Delhi University**¹⁰ where court held that minority community can reserve only 50 percent of the seats for the children of their own community. However it has been clarified further in the case of **P.A Inamdar vs. State of Maharashtra**¹¹ that depending on the extent of the backwardness in that particular community, the reservation can go beyond 50 percent and it can go up to 100 percent in extreme cases.

The expression 'minority' in article 30 remains undefined though the court has observed that it refers to any community which is numerically less than 50 percent of the population of a particular state as a whole when a law in consideration of which the question of minority right is to be determined as a state law. Any community which is a minority in specific area would not be treated as minority for the purpose of this article of the State though a majority in the state as a whole. A minority could not also be determined in relation to entire population of the country. If it was a state law, the minorities must be recognized in relation of that state. But the fact that the expression minority in article 30(1) is used to distinct from 'Any section of citizen' in article 29(1) lends support to the view that article 30(1) deals with national minorities or minorities recognized in the context of entire nation. In that case, however, article 30(1) would become inapplicable to the national majority even if it is a minority in any particular state, e.g., Hindus in Punjab or Jammu and Kashmir.

6. Article 30(2) - Freedom of minority-managed educational institutions from discrimination in the matter of receiving aid from the State;

3. Positive Discrimination in favor of Women in India:

The Constitution of India not only allows equality to women but also sanctions the State to adopt actions towards positive discrimination in favour of girls for making the collective socio-economic, education and political disadvantages faced by them. Fundamental Rights ensure equality before the law and equal protection of the law; prohibits discrimination against any citizen on grounds of faith, race, caste, sex or place of birth, and guarantee equality of opportunity to all or any citizens in matters concerning employment. Other than General Protection granted under Article 15 and 16 there are few specific provisions talking about positive discrimination in favor of women in India. Few of these articles are listed below:

- I. The State to direct its policy towards securing for men and women equally the right to an adequate means of livelihood (**Article 39(a)**); and equal pay for equal work for both men and women (**Article 39(d)**).

¹⁰ 1992 AIR 1630

¹¹ (2004) 8 SCC 139



- II. To promote justice, on a basis of equal opportunity and to provide free legal aid by suitable legislation or scheme or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities **(Article 39 A)**.
- III. The State to make provision for securing just and humane conditions of work and for maternity relief **(Article 42)**.
- IV. The State to promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation **(Article 46)**.
- V. The State to raise the level of nutrition and the standard of living of its people **(Article 47)**.
- VI. To promote harmony and the spirit of common brotherhood amongst all the people of India and to renounce practices derogatory to the dignity of women **(Article 51(A) (e))**.
- VII. Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat to be reserved for women and such seats to be allotted by rotation to different constituencies in a Panchayat **(Article 243 D(3))**.
- VIII. Not less than one- third of the total number of offices of Chairpersons in the Panchayats at each level to be reserved for women **(Article 243 D (4))**.
- IX. Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality to be reserved for women and such seats to be allotted by rotation to different constituencies in a Municipality **(Article 243 T (3))**.
- X. Reservation of offices of Chairpersons in Municipalities for the Scheduled Castes, the Scheduled Tribes and women in such manner as the legislature of a State may by law provide (Article 243 T (4)).

Other than the constitutional guarantees mentioned above, Constitution authorizes the formation of special laws protecting the interests of women. Provision in this regard has been made under Article 15(3) itself.



Conclusion:

To start with, the effect of reservation may appear to perpetuate caste. The immediate effect of caste-based reservation has been rather unfortunate. In the pre-reservation era, people wanted to get rid of the backward tag-either social or economic. But post reservation, there is a tendency even among those who are considered as "forward," to seek "backward" tag, in the hope of enjoying the benefits of "backwardness." When more and more people aspire for "backwardness" instead of "forwardness" the country itself stagnates... Any provision for reservation is a temporary crutch. Such crutch, by unnecessary prolonged use, should not become a permanent liability¹². It is to be recognized that caste-based inequalities will not disappear overnight and that the government must take special steps to alleviate the situation of the SCs, STs, and the genuinely needy among the "backward classes." However, quotas are not the only way in which caste-based inequalities can be reduced. Similarly, Quota for women or minority can never be the solution of problem. It is important to have social awakening and compassion towards vulnerable class of society. We have seen that people at higher juncture in the SC-ST community are the one getting benefitted by the reservation. It is the need of the hour that we start a mass movement to ensure social equality.

¹² Ashoka Kumar Thakur v. Union of India, (2008) 6 S.C.C. 1, 182.