

EQUALITY AND PROTECTIVE DISCRIMINATION UNDER THE CONSTITUTION OF INDIA

Om Prakash Sharma*

In India, the constitution intends to establish a welfare state; actually it is the role of law which adds to the relevance and validity of law. Therefore, the concept of the rule of law is a dynamic one which not only aims at safeguarding and advancing the civil and political rights of the citizens of the country but also at establishing social, economic, educational and cultural conditions under which their legitimate aspirations and dignity may be realized. Further, whenever social inequality exists or an economic injustice is found, a democratic state enters the arena, and with the aid of law, establishes social equality and removes economic injustices.¹ Therefore, it is, one of the objectives of the Constitution to secure to all citizens equality of status and of opportunity and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the nation. As the right to equality and prohibition of discrimination on grounds of religion, race, caste, sex or place of birth against any citizen were not enough to make the basic human right meaningful to the weaker sections, the framers of the constitution made additional provisions requiring positive state action and permitted reservations in admissions to educational institutions and in appointment of different state services.²

For these reasons we will have to travel beyond the letter of the constitution to defend and justify affirmative actions that are urgently needed either to remove the existing grossly unjust inequalities in our society or at least to raise all sections of the society to the level of human existence and to assure them their due "dignity" expressly envisaged in the preamble of the constitution³. The preamble of the constitution assures justice social, economic and political as well as equality of opportunity and status to every citizen of India. In pursuance of this assurance Article 14, 15 and 16 have been enacted which embody certain fundamental rights guaranteed by the constitution.⁴

The claims based on the right to equality pose formidable difficulties in

* *Lecturer-in-Law, Department of Law, North Bengal University, Darjeeling.*

1. H.C. Upadhyay, Reservations for Schedule Caste & Schedule Tribes, Anmol Publications, 4378/4B Ansari Road, Darya Ganj - New Delhi.
2. P.P. Rao, 42 JILI (2000) p. 193.
3. M.P. Singh, Jurisprudential Foundation of Reservation, 18, IBR (1991), 246.
4. Justice S.M.N. Raina, Reservation with justice, 1990 (III) CILQ, P-1

have been treated as untouchable and denied the right of association with other members of the society. They have suffered all kinds of indignities and disabilities not as individuals but as members of a group or caste and that entitles them to special treatment as members of a group without violation to the right to equality of the non-members. The individual's right to equality in this situation is given due recognition in so far as the members of the group can compete among themselves for the limited goods available for distribution of allocation.¹⁷

Here a distinction should, however, be recognised between what Dworkin calls "the right to equal treatment" and "the right to treatment as an equal". While the former right comprehends "as equal distribution of some opportunity burden" the latter means not a right "to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else". The right to treatment as an equal, "according to Dworkin, "is fundamental, and the right to equal treatment, derivative".¹⁸ Thus the right to equal treatment will require that each one should automatically have a right to higher or technical education in the same manner as the right to vote. Therefore, so long as the state guarantees equal concern or respect for all the claim of equality is satisfied.¹⁹ Thus if the state lays down a criterion for admission to institutions of higher learning, it shows equal respect for all so long as the criterion does not arbitrarily exclude or put at disadvantage anyone. But since any criterion, including the so-called "merits", is likely to exclude or put at disadvantage some people, it is a matter of policy to decide which criterion should be laid down that reasonably serves the overall gain to the society with least disadvantage to any group. On this test a policy of affirmative action would be consistent with the right to equality, if it assumes greater overall gain to the community, either in terms of result equality or cohesion, or integrity and harmony in the society. This is not an argument based on preferences but an argument that a more equal society is a better society, even if its citizens prefer inequality. This "argument does not deny anyone's right to be treated as an equal himself."²⁰ It supports a professional policy only if it "respects the

17. *Supra* Note 16, at 260.

18. Dworkin, *Taking Rights Seriously*, 227 (1977), cited in *supra* note 16.

19. Rawl's two principles of justice are 'First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: Social and economic equalities are to be arranged so that they are both (a) reasonably expected to be to every one's advantages and (b) attached to positions and offices open to all.

20. R. Dworkin, *Taking Rights Seriously*, 182 (1977) Cited in *supra* note 16.

right of all members of the community to be treated as equals, but not otherwise." In our society preferences to certain people or groups, such as scheduled castes and tribes, as well as any other identified backward classes, definitely assure a greater equality in the society. So long as they achieve that end they cannot be said to be violating anyone's right to be treated as an equal.²¹

Equality postulates not merely legal equality but also real equality. The equality of opportunity has to be distinguished from the equality of results. The various provisions of our constitution and particularly those of Arts. 38, 46, 335, 338 and 340 together with the preamble, show that the right to equality enshrined in our constitution is not merely a formal right or a vacuous declaration. It is a positive right, and the state is under an obligation to undertake measures to make it real and effective.²²

The Indian constitutional policy of compensatory discrimination was based upon the notion that certain social groups in India were inherently unequal and were victims of societal discrimination and thus required satisfaction and compensation. They believed that the meaning of equality based upon individual achievement was too hypocritical in a caste-ridden society where group identification had historically been used for the purposes of discrimination and separateness. To them there was nothing paradoxical in the idea that individual claims of equality might sometimes clash with an otherwise desirable social goal including a policy of making the community equal as a whole.²³

It is envisaged that government will not only refrain from discriminating but will actively undertake to remove existing discriminatory practices in the private sphere. But this attack on discrimination is only one facet of the constitutional scheme to secure equality. The constitution also directs and empowers the Government to undertake special measures for the advancement of backward groups.²⁴

The constitution of India prohibits discrimination on caste, religion, sex or language by the state in matters relating to education and employment. On the other hand, it recognised as an interim measure protective Discrimination in favour of specific groups on grounds of social justice. At present, the reservations exists for the benefit of three groups namely, (a) Scheduled Caste

21. *Ibid.* Note 7. at 261.

22. *Indra Sawhney v. Union of India*, AIR 1993 S.C. 477 at 637.

23. Parmanand Singh some reflection on Indian experience with policy of Reservation 25, *JILI* (1983).

24. Marc Galanter. "Protective Discrimination" For Backward Classes in India.

have been treated as untouchable and denied the right of association with other members of the society. They have suffered all kinds of indignities and disabilities not as individuals but as members of a group or caste and that entitles them to special treatment as members of a group without violation to the right to equality of the non-members. The individual's right to equality in this situation is given due recognition in so far as the members of the group can compete among themselves for the limited goods available for distribution of allocation.¹⁷

Here a distinction should, however, be recognised between what Dworkin calls "the right to equal treatment" and "the right to treatment as an equal". While the former right comprehends "as equal distribution of some opportunity burden" the latter means not a right "to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else". The right to treatment as an equal, "according to Dworkin, "is fundamental, and the right to equal treatment, derivative".¹⁸ Thus the right to equal treatment will require that each one should automatically have a right to higher or technical education in the same manner as the right to vote. Therefore, so long as the state guarantees equal concern or respect for all the claim of equality is satisfied.¹⁹ Thus if the state lays down a criterion for admission to institutions of higher learning, it shows equal respect for all so long as the criterion does not arbitrarily exclude or put at disadvantage anyone. But since any criterion, including the so-called "merits", is likely to exclude or put at disadvantage some people, it is a matter of policy to decide which criterion should be laid down that reasonably serves the overall gain to the society with least disadvantage to any group. On this test a policy of affirmative action would be consistent with the right to equality, if it assumes greater overall gain to the community, either in terms of result equality or cohesion, or integrity and harmony in the society. This is not an argument based on preferences but an argument that a more equal society is a better society, even if its citizens prefer inequality. This "argument does not deny anyone's right to be treated as an equal himself."²⁰ It supports a professional policy only if it "respects the

17. *Supra* Note 16, at 260.

18. Dworkin, *Taking Rights Seriously*, 227 (1977), cited in *supra* note 16.

19. Rawl's two principles of justice are 'First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: Social and economic equalities are to be arranged so that they are both (a) reasonably expected to be to every one's advantages and (b) attached to positions and offices open to all.

20. R. Dworkin. *Taking Rights Seriously*, 182 (1977) Cited in *supra* note 16.

right of all members of the community to be treated as equals, but not otherwise.” In our society preferences to certain people or groups, such as scheduled castes and tribes, as well as any other identified backward classes, definitely assure a greater equality in the society. So long as they achieve that end they cannot be said to be violating anyone’s right to be treated as an equal.²¹

Equality postulates not merely legal equality but also real equality. The equality of opportunity has to be distinguished from the equality of results. The various provisions of our constitution and particularly those of Arts. 38, 46, 335, 338 and 340 together with the preamble, show that the right to equality enshrined in our constitution is not merely a formal right or a vacuous declaration. It is a positive right, and the state is under an obligation to undertake measures to make it real and effective.²²

The Indian constitutional policy of compensatory discrimination was based upon the notion that certain social groups in India were inherently unequal and were victims of societal discrimination and thus required satisfaction and compensation. They believed that the meaning of equality based upon individual achievement was too hypocritical in a caste-ridden society where group identification had historically been used for the purposes of discrimination and separateness. To them there was nothing paradoxical in the idea that individual claims of equality might sometimes clash with an otherwise desirable social goal including a policy of making the community equal as a whole.²³

It is envisaged that government will not only refrain from discriminating but will actively undertake to remove existing discriminatory practices in the private sphere. But this attack on discrimination is only one facet of the constitutional scheme to secure equality. The constitution also directs and empowers the Government to undertake special measures for the advancement of backward groups.²⁴

The constitution of India prohibits discrimination on caste, religion, sex or language by the state in matters relating to education and employment. On the other hand, it recognised as an interim measure protective Discrimination in favour of specific groups on grounds of social justice. At present, the reservations exists for the benefit of three groups namely, (a) Scheduled Caste

21. *Ibid.* Note 7. at 261.

22. *Indra Sawhney v. Union of India*, AIR 1993 S.C. 477 at 637.

23. *Parmanand Singh* some reflection on Indian experience with policy of Reservation 25, *JLI* (1983).

24. Marc Galanter. “Protective Discrimination” For Backward Classes in India.

(b) Scheduled Tribes and (c) Other backward classes.²⁵

The constitution establishes secular democracy. The animating principle of any democracy is the equality of the people. But the idea that all people are equal is profoundly speculative. It is well said that in order to treat some persons equally, we must treat them differently. We have to recognise a fair degree of discrimination in favour of minorities. But it is impossible to have an affirmative action for religious minorities in religious neutral way. In order to get beyond religion, we can not ignore religion.²⁶ We must first take account of religion. It is exactly in the spirit of these considerations that the supreme court in its advisory opinion in the Kerala Education Bill case²⁷ recognised a four degree of discrimination in favour of religious minorities. In this respect the court seems to have acted on the same principle which is applied to socially² and educationally backward classes, that is the principle of protective discrimination. In *M.R. Balaji v. State of Mysore*²⁸ while examining the validity of reservation to socially and educationally backward classes under Art. 15(1). Gajendra Gadkal, J., as he then was, pointed out that the reservation to socially and educationally backward classes would serve the interests of the society at large by promoting the advancement of the weaker elements in the society.

In the *State of Kerala v. N.M. Thomas*²⁹ Ray, C.J., while dealing with the concept of equality guaranteed by Articles 14, 15(1) and 16(1) with reference to the preferential treatment for backward classes observed that preferential treatment for members of the backward classes with due regard to administrative efficiency alone can mean equality of opportunity for all citizens. Equality of opportunity for unequal can only mean aggravation of inequality. Equality of opportunity admits discrimination, with reason and prohibits discrimination without reason. Discrimination with reasons means rational classification for differential treatment having nexus to the constitutionally permissible objects. Preferential representation for the backward classes in services with due regard to administrative efficiency is permissible object and backward classes are a rational classification recognized by our constitution. Therefore, differential treatment in standards of selection are within the concept of equality.

In *Akhil Bharatiya Soshit Karmchari sangh (Railway) v. Union of*

25. B. Shiva Ramayya. Protective Discrimination and Ethnic mobilization 22 JILJ 480 (1980).

26. *St. Stephen's College v. University of Delhi*. (1992) 1 SCC 558. Shetty, J.

27. Kerala Education Bill, 1976.

28. AIR 1963 se. 649.

29. AIR 1976 SC 490.

*India*³⁰. Chinnappa Reddy, J., While explaining the interrelationship of Articles 16(1) and 16(4) said that Article 16(4) is not in the nature of an exception to Article 16(1). It is a facet of Article 16(1) which fosters and furthers the idea of equality of opportunity with special reference to underprivileged and deprived classes of citizens. It is illustrative of what the state must do to wipe out the distinction between egalite de droit and egalite de faile. It recognises that the right to equality of opportunity includes the right of the under privileged to conditions comparable to or compensatory of those enjoyed by the privileged. Equality of opportunity must be such as to yield equality of results and not that which simply enables people, socially and economically better placed to win against the less fortunate, even when the competition is itself otherwise inequitable.

It is now an accepted jurisprudence and practice that the concept of equality before the law and the prohibitions of certain kinds of discrimination do not require identical treatment. The equality means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal. To treat unequal differently according to their inequality is not only permitted but required.³¹

In *Indra Sawhney v. Union of India*³² the Supreme Court held that there is no doubt that no classification can validly be made only on the basis of caste just as it cannot be made only on the basis of religion, race, sex, descent, place of birth or any of them, the same being prohibited by Article 16(2). What is, however, required to be done for the purposes of Article 16(9) is not classification but identification. The identification is of the backward classes.

In *Preeti Srivastava v. State of Andhra Pradesh*³³ the Supreme Court held that Article 15(4) which was added by the constitution, First Amendment of 1951, enables the state to make special provisions for the advancement, inter-alia, of Scheduled Castes and Scheduled Tribes, notwithstanding Articles 15(1) and 29(2). The wording of Article 15(4) is similar to that of Article 15(3). Article 15(3) was therefore exception. It enables special provisions being made for women and children notwithstanding Article 15(1) which imposes the mandate of non-discrimination on the ground of (among other) sex. This was envisioned as a method of protective discrimination. The same protective discrimination was extended by Article 15(4) to (among others) scheduled castes and Schedule Tribes. As a result of the combined operation

30. (1981) 1 SCC 246.

31. *St. Stephen's College v. University of Delhi* (1992) 1 SCC 558.

32. AIR 1993 SC. 477 at 648.

33. AIR 1999 SC. 2894.

of these Articles, an array of programmes of compensatory or protective discrimination have been pursued by the various states and the Union government. Marc Galanter in his book, "Competing Equalities",³⁴ has described the constitutional schemes of compensatory discrimination policies entail systematic departures from norms of equality (such as merit, even handiness, and indifferences of ascriptive characteristics). These departures are justified in several ways first, preferential treatment may be viewed as needed assurance of personal fairness, a guarantee against the persistence of discrimination in subtle and indirect forms. Second, such policies are justified in terms of beneficial results that they will presumably promote: integration, use of neglected talent, more equitable distribution, etc. with these two - the anti discrimination theme and the general welfare theme - is entwined a notion of historical restitution or reparation to offset the systematic and cumulative deprivations suffered by lower castes in the past³⁵.

Since every such policy makes a departure from the equality norm, though in a permissible manner, for the benefit of the backward classes it has to be designed and worked in manner conducive to the ultimate building up of an egalitarian non-discriminating society. That is, its final constitutional justification. Therefore, programmes and policies of compensatory discrimination under Article 15(4) have to be designed and pursued to achieve this ultimate national interest. At the same time the programmes and policies cannot be unreasonable or arbitrary, nor can they be executed in a manner which undermines other vital public interests or the general good of all. All public policies, therefore, in this area have to be tested on the anvil of reasonableness and ultimate public good. In the case of Article 16(4) the constitution makers explicitly spelt out in Article 335 one such public good which cannot be sacrificed, namely, the necessity of maintaining efficiency in administration. Article 15(4) also must be used, and policies under it framed, in a reasonable manner consistently with the ultimate public interests.³⁶

34. Marc Galanter, Quoted in AIR 1999 SC 2894 at 2904.

35. Ibid.

36. Ibid.