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## **“Protective Discrimination and Social Justice in India”**

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### **ABSTRACT**

The concept of protective discrimination is a controversial issue especially in the context of new economic reforms like LPG. Basically protective discrimination is the means of Social Justice. There is nothing avengeful in protective discrimination. A democratic system, based on rule of law and trilogy of justice-social, economic and political has accepted protective discrimination and effectual affirmative action by way of penance for past injustices. Though Youth Unrest and Anti-reservation Movements are taking place in reaction of reservation policy of government. Therefore it is a need of hour to look into the provisions for weaker sections and review of reservation policy for its appropriate implementation. The present paper is a humble effort to analyse the matter in light of new caste based social movements for demand of reservation and caste tensions.

All provisions of the Constitution and all laws enacted by the legislature get their real meaning and import through the process of judicial interpretation. The Constitutional mandate and the various laws providing for protective discrimination in favour of weaker sections, minorities and women relating to several aspects of their social, economic and political life have come up before the courts. Through various devices like judicial review, judicial

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activism, social action litigation and the duty of enforcement of fundamental rights the superior Courts in India have evolved social and gender jurisprudence which has given substance and life to the constitutional scheme of protective discrimination in favour of downtrodden. An overview of the judicial approach regarding various aspects of social justice would be pertinent.

The Term 'discrimination' per se is abhorrent. But in the context of emancipation, empowerment and amelioration of the weaker sections of society who have suffered 'discrimination' and deprivation, a legal strategy of 'discrimination' in their favour to protect and compensate is now a well accepted norm of justice. It is said that iron cuts iron, so, 'discrimination' counters 'discrimination'. But, historically, one discrimination was destructive and oppressive, whereas as a corrective and compensatory measure the other discrimination is protective and remedial. There is nothing avengeful in protective discrimination. A democratic system, based on rule of law and trilogy of justice-social, economic and political has accepted protective discrimination and effectual affirmative action by way of penance for past injustices.

The Founding Fathers of the Indian Constitution gave serious thought to protect and promote the rights of weaker sections including women and children. This was amply reflected in the Preamble which contains "the ideals and aspirations of the people of India". One of the golden ideals is "the equality of status and of opportunity". This objective has been achieved by inserting Articles 14, 15 & 16 in Part III of the Constitution of India. Protection to women under the Indian Constitution is two-fold. The first one talks about equality in general terms and the second one provides for special provisions by way of affirmative action. Article 14 provides for equality in general terms<sup>1</sup> and Article 15(1) expressly prohibits discrimination on the basis of race, religion, caste, sex and place of birth. Thus the Indian Constitution has ensured equality and equal status to all i.e. not only between men and men, women and women, but also men and women.

*Concept of Dalit or Weaker Sections:*

**Dalit**, also called **Outcaste**, is a self-designation for a group of people traditionally regarded as Untouchables. Dalits are a mixed population of numerous caste groups all over South Asia, and speak various languages. While the caste system has been abolished under the Indian constitution, some people claim that there is still discrimination and prejudice against Dalits in South Asia. Since Indian independence, significant steps have been taken to provide opportunities in jobs and education. Many social organizations have encouraged proactive provisions to better the conditions of Dalits through improved education, health and employment.

There are many different names proposed for defining this group of people like '*Panchamas*' (5<sup>th</sup> varna), '*Ashprush*' (untouchables), '*Harijans*' (Children of God), '*Dalits*' (Broken People), '*Downtroddens* or *Deprived* etc. The constitution of India recognizes them as Scheduled Castes and Scheduled Tribes. The word "Dalit" comes from the Sanskrit, and means "ground", "suppressed", "crushed", or "broken to pieces". It was first used by **Mahatma Jyotirao Govindrao Phule** (1827-1890) in the nineteenth century, in the context of the oppression faced by the erstwhile "untouchable" castes of the twice-born Hindus.

According to Victor Premasagar, the term expresses their "weakness, poverty and humiliation at the hands of the upper castes in the Indian society." Mohandas Gandhi coined the word Harijan, translated roughly as "Children of God", to identify the former Untouchables. The terms "Scheduled castes and scheduled tribes" (SC/ST) are the official terms used in Indian government documents to identify former "untouchables" and tribes. However, in 2008 the National Commission for Scheduled Castes, noticing that "Dalit" was used interchangeably with the official term "scheduled castes", called the term "unconstitutional" and asked state governments to end its use. After the order, the Chhattisgarh government ended the official use of the word "Dalit".



"Adi Dravida", "Adi Karnataka" and "Adi Andhra" are words used in the states of Tamil Nadu, Karnataka and Andhra Pradesh, respectively, to identify people of former "untouchable" castes in official documents. These words, particularly the prefix of "Adi", denote the aboriginal inhabitants of the land.

The more general term, "Adivasi" derives from the Sanskrit words *adi* meaning primal, original, first *bas* a verb root meaning to sit, settle, or stay, rendering Adivasi as "indigenous" people of India. People who identify themselves as Dalit may also identify themselves as Adivasi, but the distinction is analogous to that of Scheduled Tribes and Scheduled Castes in which there is some intersection but the two are distinct social identities.

In the context of traditional Hindu society, Dalit status has often been historically associated with occupations regarded as ritually impure, such as any involving leatherwork, butchering, or removal of rubbish, animal carcasses, and waste. Dalits work as manual labourers cleaning streets, latrines, and sewers. Engaging in these activities was considered to be polluting to the individual, and this pollution was considered contagious. As a result, Dalits were commonly segregated, and banned from full participation in Hindu social life. For example, they could not enter a temple or a school, and were required to stay outside the village. Elaborate precautions were sometimes observed to prevent incidental contact between Dalits and other castes. Discrimination against Dalits still exists in rural areas in the private sphere, in everyday matters such as access to eating places, schools, temples and water sources. It has largely disappeared in urban areas and in the public sphere. Some Dalits have successfully integrated into urban Indian society, where caste origins are less obvious and less important in public life. In rural India, however, caste origins are more readily apparent and Dalits often remain excluded from local religious life, though some qualitative evidence suggests that its severity is fast diminishing.

In India's most populous state, Uttar Pradesh, Dalits

have revolutionized politics and have elected a popular Dalit chief minister named **Mayawati**. Dalits and similar groups are also found in Nepal and Bangladesh. In addition, the Burakumin of Japan, Al-Akhdam of Yemen, Baekjeong of Korea and Midgan of Somalia are similar in status to Dalits.

*Constitutional Safeguards for Weaker Sections:*

The important Constitutional safeguards for Scheduled Castes and Scheduled Tribes are mentioned below:

(a) Directive Principles of State Policy

Article 46 is a comprehensive article comprising both the developmental and regulatory aspects. It reads as follows:

“The State shall promote with special care the educational and economic interests of the weaker sections, of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation”.

(b) Social Safeguards

Article 17. “Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law.

To give effect to this Article, Parliament made an enactment viz., Untouchability (Offences) Act, 1955. To make the provisions of this Act more stringent, the Act was amended in 1976 and was also renamed as the Protection of Civil Rights Act, 1955. As provided under the Act, Government of India also notified the Rules, viz., the PCR Rules, 1977, to carry out the provisions of this Act. As cases of atrocities on SCs/STs were not covered under the provisions of PCR Act, 1955, Parliament passed another important Act in 1989 for taking measures to prevent the atrocities. This act known as the Scheduled Castes and the Scheduled



Tribes (Prevention of Atrocities) Act, 1989, became effective from 30.1.1990. For carrying out the provisions of this Act the Govt. of India have notified the SCs and the STs (Prevention of Atrocities) Rules, 1995 on 31.3.1995.

Article 23 prohibits traffic in human beings and beggar and other similar forms of forced labour and provides that any contravention of this provision shall be an offence punishable in accordance with law. It does not specifically mention SCs & STs but since the majority of bonded labours belong to SCs/STs this Article has a special significance for SCs and STs. In pursuance of this article, Parliament has enacted the Bonded Labour System (Abolition) Act, 1976. For effective implementation of this Act, the Ministry of Labour is running a Centrally Sponsored Scheme for identification, liberation and rehabilitation of bonded labour.

Article 24 provides that no child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment. There are many Central and State laws to prevent child labour. This article too is significant for SCs and STs as a substantial portion, if not the majority, of child labour engaged in hazardous employment belong to SCs and STs.

Article 25(2) (b) provides that Hindu religious institutions of a public character shall be thrown open to all classes and sections of Hindus. This provision is relevant as some sects of Hindus used to claim that only members of the concerned sects had a right to enter their temples. This was only a subterfuge to prevent entry of SC persons in such temples. For the purpose of this provision the term Hindu includes Sikh, Jaina and Buddhist.

#### (c) Educational and Cultural Safeguards

Article 15(4) empowers the State to make any special provision for the advancement of any socially and educationally backward classes of citizens or for SC and ST. This provision

has enabled the State to reserve seats for SCs and STs in educational institutions including technical, engineering and medical colleges and in Scientific & Specialized Courses. In this as well as in Article 16(4) the term 'backward classes' is used as a generic term and comprises various categories of backward classes, viz., Scheduled Castes, Scheduled Tribes, Other Backward Classes, Denotified Communities (Vimukta Jatiyan) and Nomadic or Semi-nomadic communities.

Article 330 provides for reservation of seats for SCs/STs in the Lok Sabha.

Article 332 provides for reservation of seats for SCs/STs in the State Vidhan Sabhas (Legislative Assemblies).

Article 334 originally laid down that the provision relating to the reservation of seats for SCs/STs in the Lok Sabha and the State Vidhan Sabhas (and the representation of the Anglo-Indian community in the Lok Sabha and the State Vidhan Sabhas by nomination) would cease to have effect on the expiration of a period of ten years from the commencement of the Constitution. This article has since been amended four times, extending the said period by ten years on each occasion. This provision was to expire in January 2000.

#### (d) Service Safeguards

Article 16(4) empowers the State to make "any provision for the reservation in appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State".

Article 16(4A). Nothing in this Article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State".



Article 335. "The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State".

Article 320(4) provides that nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision under Article 16(4) & 16(4)A may be made or the manner in which effect may be given to the provisions of Article 335.

#### RELATED STATUTES AND LEGISLATIONS :

There are a number of laws, both Central and State, which provide for safeguards to Scheduled Castes and Scheduled Tribes. Some of these emanate from the various Constitutional provisions. An illustrative list of such laws is given below:

- ü The Protection of Civil Rights Act, 1955.
- ü The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.
- ü The Bonded Labour System (Abolition) Act, 1976.
- ü The Child Labour (Prohibition and Regulation) Act, 1986.
- ü Acts and regulations in force in different States to prevent alienation of land belonging to SCs/STs. In some States such provision exists in the Land Revenue Code.
- ü Acts in different States for restoration of alienated land to SCs/STs.

Article 15 of the Constitution is more specific instance of right to equality which prohibits the State from making discrimination "against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." This right is available against an individual being subjected to discrimination in matters of rights, privileges and immunities. To effectuate equality between men and women the Constitution of India prohibits the State to make any kind of discrimination on the basis of caste, sex and religion. However, the framers of the Constitution were conscious of the fact that the pitiable condition of Indian women cannot be improved only by prohibiting discrimination. It can be improved by giving special protection in the form of discrimination in their favour. Thus, they provided under clause (3) of Article 15 that nothing in Article 15(1) shall prevent the State from making any special provision for weaker sections including women and children.

This provision of constitution empowers the State to make laws in favour of weaker sections. Thus, special care has been taken to provide socio-economic justice to weaker sections. Not only this, the framers of the Constitution also laid down clear guideline for future legislators to enact laws for providing socio-economic justice to weaker sections. The State is under an obligation to promote the welfare of the people including weaker sections by securing and protecting as effective as it may be a social order in which social, economic and political justice shall pervade over all the institutions of national life. Article 39 of the Constitution runs like a golden thread. Clause (a) provides that the State shall in particular, direct its policy towards securing adequate means of livelihood to men and women equally. Clause (b) enunciates that there shall be equal pay for equal work for both men and women. Clause (c) directs that the health and strength of working men and women, and that of the teenagers should not be abused and that citizens should not be forced by economic necessity to enter avocations unsuited to their age or strength. It has been obligated upon the State to make Endeavour, to secure just and humane conditions of work and maternity relief



by Article 42. At the same time the Constitution of India imposes fundamental duty upon every citizen of India to renounce practices derogatory to the dignity of downtrodden.

The principle of equality is more negative in putting restraints upon legislators against enactment of laws discriminating against weaker sections and less positive in coming to the aid of deprived in special cases. Thus, it neither gives much positive help to weaker sections nor does improve their lot which is full of many perpetrating injustices under individual and social circumstances. Therefore, the equity of consideration and conscientious interpretation is needed to level up the status of deprives, which depends upon the healthy judicial interpretation as well as on manifest legislative intent to engineer skill to accomplish the task. The emergence of the principle of protective discrimination in favour of weaker sections is the cumulative product of the foresight of the legislators and pragmatic constructive approach of judiciary which has its fruitful source in the interdependence and cross relevance of Parts III and IV of the Indian Constitution to generate an integral view of our Constitution. A critical evaluation of law is therefore necessary to mark the progress in this direction and also to provide a field for further development of law and constructive jurisprudence to provide flesh and blood to our fundamental Constitutional resolve.

After the commencement of the Constitution some positive governmental efforts, legislative and executive, have been made to uplift the socio-economic and political status and position of women. Their success depends upon their true implementation. The doctrine of protective discrimination expresses constitutional mandate and legislative intent in our legal system but its real efficacy lies in its live and dynamic interpretation of the facts and circumstances of individual cases and precedents to co-ordinate the protective discrimination and non-discrimination for the welfare of weaker sections. It is interesting to see that the different interpretations of the principle have come into being due to its

application to different subject matters related to weaker sections. The Indian Judiciary, to certain extent, has taken a lead in securing socio-economic justice to weaker sections. During the recent years the Judiciary has recognized sex caste based discrimination in favour of weaker sections and held it constitutionally valid on the basis of their peculiar conditions – physical, mental and psychological, if it protects the interest of weaker sections.

### ***Protective Discrimination: Judicial Interpretation***

All provisions of the Constitution and all laws enacted by the legislature get their real meaning and import through the process of judicial interpretation. The Constitutional mandate and the various laws providing for protective discrimination in favour of deprived classes relating to several aspects of their social, economic and political life have come up before the courts. Through various devices like judicial review, judicial activism, social action litigation and the duty of enforcement of fundamental rights the superior Courts in India have evolved a jurisprudence which has given substance and life to the constitutional scheme of protective discrimination in favour of weaker sections. An overview of the judicial approach regarding various aspects of weaker sections justice would be pertinent.

### ***Protective discrimination and Socio-Political Justice:***

It is a matter of hot controversy whether provisions of Article 15(3) can be invoked for giving rights to weaker sections for securing political rights. The Supreme Court at the very beginning ruled that the general prohibition against discrimination in clause (1) of Article 15 also extends to political rights and therefore, the umbrella of protective discrimination can be used to secure political rights to the weaker sections. Thus, it is clear that birth is a valid ground for discrimination in favour of deprived for securing political justice and hence will not be violation of Article 15(1) keeping in view provisions of Article 15(3).



It would be relevant to raise a question here that why political empowerment of weaker sections and that too through reservation of seats in Legislatures has assumed importance? Answer is straight and simple. *First*, very few deprived men and women have been voluntarily coming forward to take part in politics which has been rendered tough and filthy. *Second*, our social and political set up is dominated by the men who have vested interest in deliberately keeping women in the four walls of their houses. *Third*, all political parties have failed to promote their cause by giving them more tickets during elections.

In *C.B. Muthamma v/s. Union of India*, the writ filed by Miss Muthamma, a senior member of Indian Foreign Service, speaks a story which makes one wonder whether Articles 14 and 16 belong to myth or reality. It was a unique example of sex discrimination *ultra-vires* Articles 14 and 16 of the Constitution of India. Rule 8(2) of the Indian Foreign Services Rules, 1961 provided that "a woman member of the service shall obtain the permission of the Government in writing before her marriage is solemnized. At any time after marriage, a woman member of the service may be required to resign from service, if the Government is satisfied that she, family and domestic commitments are likely to come in way of the due and efficient discharging of duties. Justice Krishna Iyer while delivering the judgment observed that "Discrimination against woman, in traumatic transparency, is found in this rule. In these days of nuclear families, inter-continental marriages and unconventional behaviour one fails to understand the naked bias against the gender of species." Both the rules were declared violatone of the principle of equality and held discriminatory.

### ***Administrative Convenience and Protective Discrimination:***

In *Savitri v/s. K.K. Bose*, while disposing of application for grant of license, the Excise Authorities preferred women applicants to men applicants without any provision. The Allahabad High Court held that "since no special provision had been made

for women in respect of the grant of liquor license," the grant of the license to the appellant only on the ground that she was a woman was not only made on an irrelevant ground but was also discriminatory and violation of Article 15(1). It is submitted that the Court rejected that license only because preference was given to female applicants over male applicants without any provision i.e. without any protective legislation of Article 15(3) of the Constitution.

Equality is the cardinal principle of the Constitution of India. Several provisions under the Indian Constitution try to bring social equality. It is evident from various cases discussed above that judiciary played a crucial role in protecting rights of weaker sections. In tune with constitutional aspiration of gender equality various laws have been enacted relating to prohibition of female infanticide, dowry, exposure of women in advertisements and films, female child marriage, atrocities and molestation, abduction and rape, maternity benefits, medical termination of pregnancy, prohibition of prostitution and trafficking in women and protection in employment. The positive judicial activism, stimulus for the Indian legislatures to enact several new laws or to bring about the changes in the existing ones with a view to afford better protection to weaker sections is a demand of the time wherein there is emphasis upon socio-economic empowerment. Top of Form

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### ***Dalits or Weaker Communities in Different Religions :***

The Sachar Committee report of 2006 revealed that scheduled castes and tribes of India are not limited to the religion of Hinduism. The 61st Round Survey of the NSSO found that almost nine-tenths of the Buddhists, one-third of the Sikhs, and one-third of the Christians in India belonged to the notified scheduled castes or tribes of the Constitution.



Religion	Scheduled Caste	Scheduled Tribe
<u>Buddhism</u>	89.50%	07.40%
<u>Christianity</u>	09.00%	32.80%
<u>Sikhism</u>	30.70%	00.90%
<u>Hinduism</u>	22.20%	09.10%
<u>Zoroastrianism</u>	—	15.90%
<u>Jainism</u>	—	02.60%
<u>Islam</u>	00.80%	00.50%

It is noted that most Scheduled Tribal societies have their own indigenous religions. Mundas have a Munda religion, for example. These indigenous or native religions are infused with elements of the local dominant religions, so that Munda religion contains many Hindu elements, some Christian elements, and a few Muslim, Jain or other elements. More recently, Dalits in Nepal are now being accepted into priesthood (traditionally reserved for Brahmins). The Dalit priestly order is called "Pandaram"

## CONCLUSION

In the context of emancipation, empowerment and amelioration of the weaker sections of society who have suffered 'discrimination' and deprivation, a legal strategy of 'discrimination' in their favour to protect and compensate is now a well-accepted norm of justice. Protective Discrimination is not only protective but remedial also. There is nothing avengeful in protective discrimination. A democratic system, based on rule of law and trilogy of justice- social, economic and political has accepted protective discrimination and effectual affirmative action by way of penance for past injustices. Though Youth Unrest and Anti-

reservation Movements are taking place in reaction of reservation policy of government.

All provisions of the Constitution and all laws enacted by the legislature are in favour of weaker sections, minorities and women relating to several aspects of their social, economic and political life. Through various devices like judicial review, judicial activism, social action litigation and the duty of enforcement of fundamental rights the superior Courts in India have evolved social jurisprudence in favour of downtrodden. In the light of caste movements demanding reservation, like *gurjar-movement* and *brahmin-movement* in Rajasthan, the incidence of caste tensions and caste conflicts cannot be ruled out. Mission-72 is another anti-reservation campaign in the State of Rajasthan which has mass sanction by public. These movements, Social Engineering by Mayawati and youth unrests are the proof of an urgent need of review on reservation policy.

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