Chapter- 07

CRITICAL ANALYSIS OF EQUALITY VIS-A VIS PROTECTIVE DISCRIMINATION WITH SPECIAL REFERENCE TO ECONOMICALLY WEAKER SECTIONS

[1]Mrs. GARIMA YADAV

[1]Asst. Prof. Apeejay Stya University

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ABSTRACT

The constitution 103rd Amendment act, 2019 has amended article 15 and Article 16 of the constitution by adding clause (6) in each article, which empowers the state to provide a maximum of 10% reservation for Economically Weaker Sections of citizens other than Schedule Caste, Schedule Tribes and Other Backward Classes -Non Creamy Layer in Educational Institutions including Higher Educational Institutions. This paper tries to analyse the concept of equality vis a vis the concept of protective discrimination with a view to understand the justifiability of the Constitutional (103rd Amendment) Act, 2019, and how far it is in conformity with the intent behind protective discrimination provided by the forefathers of the constitution and jurisprudence of reservation at the time of inception of Constitution. This paper examines view of Supreme Court regarding reservation to understand the validity of the 103rd amendment. The paper concludes that intent behind creation of policy of protective discrimination was to uplift the marginalised sections of society because of the stigma and discrimination attached to their castes. Hence to extend the policy to the classes, who were never subjected to such stigma and historical discrimination, is to betray the intent of the constituent assembly. The paper also concludes that upon examination the reservation for economically weaker sections fails to qualify the test of intelligible differentia enshrined under article 14.

Keywords: *Equality, Reservation, Discrimination, Class legislation*

INTRODUCTION

The Constitution of India in its Preamble promises to secure all its citizens equality of status and of opportunity and its promotion among all. The Constitution also provides Right to Equality as one of its basic features which provides for equality before law and equal treatment for all the citizens[24]. Article 14 to 18 talks about different facets of Equality Principle that all in all provides that no person shall be treated differently than the other. It can be said that "equality is one of the magnificent corner-stones of Indian Democracy"[25]. Equality which seems a very simple concept can be a complex notion as by verbatim equality simply means same treatment for everyone, however treating everyone however differently circumstanced may not always amount to fair treatment, hence will result in inequality. Therefore to remedy such scenario the constitution of India Permits that under certain circumstances the state can discriminate between citizens by providing certain benefits of one class of citizens than the others. This discrimination is done through policy of reservation to provide social justice to a class of citizens who were historically treated unjustly for centuries.

[24] M. Nagraj V. UOI, AIR 2007 SC 1: (2006) 8 SCC 212
[25] Indira Sawhney v. UOI, AIR 1993 SC 477: 1992 Supp (3) SCC 212

Reservation can also be referred to as Positive discrimination or Protective discrimination or Affirmative action on the part of State. In simple words the term "Reservation" refers to a policy or programme or scheme of State, providing certain privileges or giving certain preferences to certain class or group of people (usually that are underrepresented).In India since ages owing to the caste system large sections of people were subjected to discrimination on different grounds. The founding fathers through Constitution set out to redress the historic injustices and correct the manifest imbalance by providing reservation in education and in matters of employment. It will not be an exaggeration to say that the vision of Founding fathers of Constitution behind reservation policy was to uplift the weaker sections of citizens in India and their advancement.

The constitution 103rd Amendment act, 2019 has amended article 15 and Article 16 of the constitution by adding clause (6) which empowers the state to provide a maximum of 10% reservation for Economically Weaker Sections of citizens other than Schedule Caste, Schedule Tribes and Other Backward Classes -Non Creamy Layer in Educational Institutions including Higher Educational Institutions, thus bringing the total reservation to 59.5%.

An 'Explanation' says that EWS is the kind that the State may notify on the basis of family revenue and other financial hardship factors from time to time. In its Office Memorandum No. 20013/01/2018-BC-II of 17 January 2019, the Ministry of Social Justice and Empowerment, Government of India has specified that only individuals whose households have a gross annual revenue below Rs.8 lakhs, or agricultural property below 5 acres, or residential flat below 1,000 sq. Less than 100 sq. ft. or housing plots. Municipal yards or housing plots of less than 200 sq., yards in fields other than notified Municipalities shall be recognized as EWS.

Recently 10% Reservation for Economically Weaker sections was also provided for seats in Medical Colleges which again sparked the Great debate of relevance of reservation even after decades of independence. Historically the Policy of Reservation was formulated as a corrective measure by discriminating to protect against historical injustices. However this new amendment provides reservation solely on the basis of Economic criteria and to the masses who were not historically wronged against. The relevance of reservation policy as was formulated by founding father has been under great criticism as the policy was meant originally for ten years which was deemed enough time by the founding fathers to uplift the marginalised groups. However even after more than seven decades of independence the list of marginalised groups that are seeking such protection is only increasing. Now this new amendment has given the

reservation to a class of citizens which constituent assembly deemed, were unfit to be treated as weaker sections. This paper analyses the reservation policy especially the 103rd amendment in light of Equality Principle enshrined in the Constitution of India.

Equality and Protective Discrimination

Article 14 of the Constitution of India provides Equality Principle. It is reiterating the Constitutional promise of Equality for all as enshrined in the Preamble to the Constitution. So the implied object of Article 14 is to secure to all persons, the equality of status and opportunity promised in the Preamble to the Constitution. It states that the State shall not deny any person Equality before Law and Equal Protection of Laws within the territory of India. Article 14 is anti discriminatory in nature as it prohibits the state to discriminate between Persons. There are two expressions that complete the true meaning of Equality under Article 14, which are "Equality before Law" and "Equal Protection of Laws". Both the expressions define different aspect of Equality enshrined under the Constitution. Equality Before law provides for Equal treatment of all in the eyes of law and state shall not discriminate between persons in regard to their duties and liabilities. This expression of Equality has a negative connotation as it is prohibiting the state to not to discriminate between people of the country whether privileged or not[26]. The Expression "Equal Protection of Laws" however has a positive meaning as it enables the state to treat people alike who are in similar circumstances and different than those who are differently placed. It enables the state to compartmentalize citizens according to their circumstances and treat them accordingly.[27] This expression postulates the principle that People in like circumstances should be treated in the same manner.

Though article 14 provides that State shall not discriminate between persons who are in similar circumstances but it does not mean that all people should be entitled to similar treatment. Because it is impossible that everyone will always have equal nature, circumstances and attainment and any strict adherence to equality between people who are not so similar will result in mechanical equality and will lead to injustice.

The Principle of Protective Discrimination or Positive Discrimination or Affirmative Action is based on the principle propounded by "Equal Protection of Laws" under Article 14 of Constitution of India. The underlying intention behind the protective Discrimination can be understood by quoting these words of Dr Ambedkar:-

[26] M.P.Jain,Indian Constitution Law, 8th Edition, (2018) 907
[27] M.P.Jain,Indian Constitution Law, 8th Edition(2018) 908

"There is a complete absence of two things in Indian Society. One of them is Equality. On the Social plane we have in India a society based on privilege of graded inequality and which mean elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who are living in abject poverty. Thus the two groups 'haves' and 'have nots' exist. In such a situation the humaneness of a society is determined by the degree of protection it provides to its weaker, handicapped and less gifted members. The question therefore, is of evolving a programme of social justice".[28]

The Protective Discrimination through Reservation is a policy based on the principle of compensating for the historic injustice done to certain social groups. It is based on the notion that "certain social groups were inherently unequal and were victims of societal discrimination and thus required satisfaction and compensation. The constitution makers 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".[29]

Hence the presumption of backwardness, social and economic is a prerequisite to providing such protective discrimination by way of reservations.

It must be kept in mind that Right to Equality has been declared as the part of basic structure of the Constitution[30]. We can say that the Constitution is wedded to the concept of Equality.[31] The preamble to the Constitution emphasises the importance of concept of Equality and makes it one of the most fundamental principles to be kept in mind while interpreting the Constitution. Hence even a constitutional amendment has to adhere to the Equality principle as violation of which will render such amendment invalid. Article 14 prohibits discriminatory legislations and works as a protective wall against any kind of arbitrary and discriminatory state action whether administrative or legislative. So to judge the reasonableness of 103rd amendment which provides for protective discrimination in favour of Economically Weaker Sections in Educational institutions and Job appointments, one must test it against the Equality Principle.

For the application of principle of Equality in real life, we must segregate the Equals from unequals and this segregation is called reasonable classification. The Classification of Economically Weaker Sections among unreserved as a different

[28] K.D. Vasava, B.K.Gandhi, "Reservation for Social Justice", Dynamics of Reservation Policy, Patriot Publications, (1985)141
[29] Parmanand Singh, "Some Reflections on Indian experience with Policy of Reservation", Vol 25:1 Journal of the Indian Law Institute, (1983) 48
[30] M. Nagraj v. UOI, AIR 2007 SC 1 :(2006) 8 SCC 212
[31] M.P.Jain,Indian Constitution Law, 8th Edition, (2018) 906

category in the same policy of reservation to be reasonable, it has to satisfy the reasonable classification test of Article 14.

Article 14 provides for equality in its general term and article 15 to 18 extends this general mandate of equality by covering specific dimensions of equality principle. Article 14 is the genus while article 15 and 16 are the species[32]. Hence another challenge to 103rd amendment may lie in the manner in which it provides for EWS reservation in Article 16(6) by deviating from the principle enshrined in preceding clauses of Article 16. Article 16 under clause 4 and clause 4A provides that the state may provide reservation for backward classes of citizens, scheduled castes or scheduled tribes if they, in the opinion of the state, are not adequately represented. However such condition of "inadequate representation" has been removed while formulating the policy of reservation for economically weaker sections under article 16(6). The argument that the intent behind reservation under article 16(6) is not adequate representation as what is behind under article 16(4) and article 16(4A), is unjustified. This removal of criteria of "inadequate representation" while granting reservation under article 16 (6) has made it much easier for state to provide reservation for EWS than that for SC, ST and Backward classes. The amendment providing reservation for a community, which was not originally even a target group of such reservation according to Constituent Assembly members and even going to the extent of making it easier for them than the real intended recipient of such policy without any just reason, results in failure to qualify reasonability test of article 14.

Intention of the Constituent Assembly and Judiciary regarding Reservation

The key to understand the intent behind introducing reservation system can be understood by the constituent assembly debate regarding reservation. In which the makers of the constitution, who were well aware of the specific problems of our societal system, willingly safeguarded certain communities as a way of redressal for the wrong done in the past. There were elaborate discussions in the constituent assembly on the criteria for such special treatment. There were some members who opposed the classification of beneficiaries of reservation on the basis of caste. There were members who suggested that in place of caste based reservations, reservations must be provided on the basis of economic criteria[33]. However economic criteria discussed in the constituent assembly debates differs from 103rd Amendment as the latter makes income or wealth as indicator of disadvantage while the former suggested using economic

[32] Naz Foundation v. Government of NCT of Delhi, 2009 (160)DLT 277, M.P.Jain "Indian Constitutional Law" VIII edition Lexis Nexis Publication(2018) 906

[33] https://caravanmagazine.in/law/economic-reservations-constituent-assembly-debates visited 26-08-2021

criteria as a means to uplift certain occupations or classes of labourers.[34] However final vote of the constituent assembly was in the favour of caste based reservation to remedy the social disadvantage arisen out of caste, hence permitted the state to make reservations for Scheduled Castes, Scheduled tribes and Socially Backward classes of People and reservation based on economic criteria was ruled out.

"This preferential treatment was meant to confine only to deserving classes. Protective Discrimination was to serve as an effective formula of societal balance between the enhancement of status of backward communities and general social good"[35]. To quote Dr. Ambedkar, "if the reservation were made for a community or a collection of communities, the total of which came to something like seventy percent of the total posts under the state and only thirty percent of the total posts are retained as the unreserved, could anybody say that the reservation of thirty percent as open to general competition, would be satisfactory from the point of view of giving effect to the first principles, namely that there shall be equality of opportunity? It cannot be in my judgement. Therefore the seats to be reserved, if the reservation is to be consistent with sub clause 1 of Article 10(now Article 16): must be confined to a minority of seats"[36].

These words of Dr. Ambedkar clearly indicate the intention of the Constitution Makers regarding the Protective Discrimination by way of Reservations. Reservations according to the Constituent Assembly were given to backward communities because of them belonging to a certain social class and their misfortune because of their belonging to that particular community. However Dr. Ambedkar cautioned against providing reservation in majority of seats, reiterating the intention of Constituent Assembly that it must be always in minority of seats, if not then it will result in unequal treatment of other communities hence defeating the very purpose of reservation.

103rd amendment creates a protective discrimination in favour of citizens on the basis of economic criteria from the communities or castes that were not historically deprived or underprivileged. It creates a class among general classes of citizens who are economically weaker. Any law that provides for a protective discrimination must pass the reasonable classification test as Article 14 of the Constitution prohibits Class legislation and allows only reasonable classification. Any Legislation can be called a class legislation if the law is differentiating between the same class of persons. For any law to qualify reasonable classification test it must be based on reasonable or just grounds of distinction. It must not be artificial, arbitrary or evasive. For that the law

[34] https://caravanmagazine.in/law/economic-reservations-constituent-assembly-debates visited 26-08-2021
[35] Anirudh Prasad, "Social Engineering & Constitutional Protection of Weaker Sections in India", Deep & Deep Publications (New Delhi) 35
[36] C.A.D Vol. VIII pp. 701-702

must satisfy reasonable classification test which consists of two condition, first being that classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and second condition is that the differentia must have a rational relation to the object sought to be achieved by the law[37].

The reservation in favour of Economically Weaker Sections provided by 103rd Constitutional Amendment also seems to be in contradiction by Supreme Court ruling on Protective Discrimination in the case of Indra Sawhney[38]. In this case Hon'ble Court has held that Reservation cannot exceed the ceiling limit of 50% of seats in any year including both vertical and horizontal reservation. Court also held that Reservation in favour of a class of citizens cannot be made on the basis of "Economic Criteria alone". Also in this case the Court had rejected similar 10% reservation of posts in favour of "other economically backward sections of the people who are not covered by any existing schemes of reservation". The Court held that Reservation of 10% vacancies among open competition candidates on the basis of income/property- holding means exclusion of those who are above the demarcating line from those 10% seats. It is not permissible to debar a citizen from being considered for appointment to an office under the state solely on the basis of his income or property holding. Any such bar will be inconsistent with the Article 16(1)[39].

CONCLUSION

The classification of Economically Weaker Sections from Unreserved General Category solely on the basis of economic criteria of income or property holding, is in the stark contradiction of Indra Sawhney Judgment. Also the reservation provided under 103rd amendment infringes the ceiling limit of 50% imposed by the Indra Sawhney Judgement and intended by Constituent Assembly[40]. The newly added 103rd amendment to the constitution fails to also satisfy the test of Intelligible Differentia because of the reason that the whole scheme of reservation is based on historical deprivation because of stigma associated with certain castes and to provide for their upliftment[41] whereas the new amendment provides for reservation based solely on economic criteria. Economic backwardness alone should not be the criteria of a reservation policy because of its fleeting nature and impermanence. One can have different economic status throughout one's life. However social deprivation resulted

[37] R.K.Dalmia V. Justice Tendolkar, AIR 1958 SC 538
[38] Indra Sawhney V. UOI, AIR 1993 SC 477
[39] M.P.Jain "Indian Constitutional Law" VIII edition Lexis Nexis Publication(2018) 1038
[40] C.A.D Vol. VIII pp. 701-702
[41] C.A.D Vol. VIII pp. 701-702

from belonging to a certain caste, is more permanent in nature, hence require state's assistance in upliftment. Furthermore Constituent Assembly intended it to be on the minority seats so that reservation does not eat up the whole system. In addition, the beneficiaries of such reservation for EWS were not historically wronged hence they do not form a class different from other unreserved category people who are not economically weaker. Therefore the amendment also discriminates between economically weaker sections and rest of the unreserved upper castes without any intelligible differentia. Hence the 103rd amendment providing 10% Reservation for Economically Weaker Sections is a class legislation which infringes the right to Equality guaranteed under Article 14 of the Constitution of India. Lastly 103rd amendment is formulated for a class of people who are already well represented in education and employment sector. A study conducted on 445 premier higher educational institutions revealed that the Economically Backward class already secured 28% seats in the total seats of these institutions beyond the number of seats reserved for this category[42]. Lastly the ceiling limit of 8 lakh per annum for determination of EWS is redundant as almost 98.26% Brahmin and 97.93 % Non- Brahmin Upper Castes families fall under the ceiling limit[43]. In addition to above, according to a data from 78 Ministeries/Departments including their attached/ subordinate office, the representation of SC, ST and OBC in the posts and services under the Central Government as on January 2016, was 17.49%, 8.47% and 21.57% respectively[44]. This would mean that the rest of 52.47% of such central employees were from upper castes. As the data suggests that majority of upper castes fall under ceiling limit of 8 lakh per annum limit, one could infer that most of such 52.47% central employees who belonged to upper castes would also belong to EWS category. It can be said that if we provide reservation for everyone then in reality no one is reserved. Hence it is suggested that instead of providing more reservation and extending it to virtually everyone, the state needs to evolve other welfare measures or programmes and social infrastructure to uplift the real marginalized sections of the country.

[42] Bheemeshwar Reddy A, Sunny Jose, "New Reservation Policy- Is It Empirically Justifiable?", 23 Economic and Political WEEKLY, 12 (2019)
[43] Ashwini Deshpande & Rajesh Ramachandran, "The 10% Quota- Is Caste Still an Indicator of Backwardness?" 13, Economic & Political WEEKLY, 27 (2019)
[44] https://pib.gov.in/Pressreleaseshare.aspx?PRID=1579065