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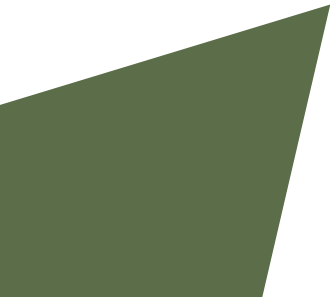
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A Kaleidoscopic study on Equality and Protective Discrimination

Kanika Birje

INTRODUCTION

On 30th November, 1949, the Constituent Assembly debated on draft Article 10 (now Article 14) and it was B.R. Ambedkar, who argued that “there must be a provision for the entry of certain communities which have so far been outside the administration”.¹ It was the forefathers of our Constitution that understood the dominance of the caste system and hence, they incorporated various provisions² that facilitated protective discrimination³.

Nearly 70 years after the Constitution came into force and protective discrimination was legislated by the State, the topic still remains polarising. A large number of people, in disagreement with the Constituent Assembly, believe that protective discrimination in India goes behind the logic of repenting for sins of the past and that this cycle can be never ending.⁴ This argument however does not do justice to the fact that the backwardness of these sections of society are a result of past events that socially subjugated their ancestors to oppression and disregards the notion of transgenerational trauma that these classes often carry. Various other arguments surrounding the relevance of merit has also ensued around this topic, followed by the ‘creamy layer’ argument.⁵ Taking a look at Supreme Court rulings and various laws passed and their relationship with Article 14⁶ of the Constitution, can help us understand a fundamental part of this discussion.

¹ On the very same day, he also argued that these reservations would only be of any value if they formed a minority. CAD India, , https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-30 (last visited May 23, 2020).

² The Indian Constitution has facilitated protective discrimination in various Articles: Articles 15 and 16 prohibit discrimination while allowing for affirmative action to uplift backward classes, Articles 38 and 46 are Directive Principles of State Policy and advice the State to aim to reduce social inequalities as well as promote the economic and educational interests of the backward classes, appointment Scheduled Castes and Scheduled Tribes for a period of ten years to the Union and State Legislatures is dealt with in Articles 330, 332 and 334, Article 335 deals with the appointment of members of Scheduled Caste and Scheduled Tribes to services that are associated with the functioning of the Central and State Governments and Article 340 empowers the Government to appoint Commissions to look into the condition of backward classes in the country.

³ Protective discrimination or affirmative action means, “an active effort to improve the employment or educational opportunities of members of backward classes”. This active effort is usually taken up by the State in order to improve the socioeconomic conditions of these backward classes. Affirmative Action | Definition of Affirmative Action by Merriam-Webster, , <https://www.merriam-webster.com/dictionary/affirmative%20action> (last visited May 23, 2020).

⁴ Sachidananda, Rethinking at Scheduled Caste Reservation, in A.K. Lal (ed.) , Protective Discrimination: Ideology and Praxis 33, (Delhi : Concept Publishing Company 2002).

⁵ The term ‘creamy layer’ was coined by Justice Krishna Iyer in State of Kerala v. NM Thomas, where he argued that if reservations were implemented, the benefits will be taken by the economically advantaged sections of these backward classes, which he went on to call the ‘creamy layer’. The Pioneer, Scourge of reservation: The invisible creamy layer, The Pioneer , <https://www.dailypioneer.com/2015/columnists/scourge-of-reservation-the-invisible-creamy-layer.html> (last visited May 28, 2020).

⁶ India.CONST. art.14.

THE INFORMAL CHALLENGE

At present, in India, the State has the authority to introduce reservations for the backward classes only in government jobs and institutions, i.e., the public sector. Although, reservation can be made even in the private sector, it is not mandatory under a central law. This discussion becomes even more relevant as the Indian economy has gone through and is possibly still going through liberalisation and privatisation.

But a bigger problem appears when we take a look at the job distribution in India. According to the Indian Employment Report, there are only 1.9 private sector jobs compared to the 3 crore government jobs and these numbers are miniscule in comparison to the 18 crore jobs in the informal sector. Also, only 10 states in India account for the major portion of the employment in private sectors.⁷ The informal sector is characterised by irregular wages, job uncertainty, lack of employment benefits like healthcare and caste-based discrimination is more prevalent in this sector.⁸ Hence, even if reservation is fully implemented in both the public sector and private sector, forming an unlikely scenario, the informal sector still poses a challenge. The informal sector often involves low paying jobs with poor working conditions and also does not ensure other facilities like healthcare and job safety. Caste and gender discrimination is also more evident in this sector. This is not just a problem for the egalitarian society that are forefathers dreamed of achieving, but when the parliament fails to achieve equality, people turn towards the Supreme Court to help us not just understand what it means to be equal but also to guide the parliament towards the right path.

UNDERSTANDING EQUALITY

Article 14⁹ of the Indian Constitution guarantees citizens the fundamental right of equality.¹⁰ The same article prohibits discrimination on any ground, including caste . At the surface, the very concept of protective discrimination is violative of Article 14¹¹. However, it is here that we need to understand equality as a dynamic concept. Equality takes the form of formal equality and proportional equality. Formal equality is the theoretical form of equality and in simple terms is

⁷ IMA India, The Indian Employment Report 4-5 (2017), https://www.ima-india.com/templates/imaindia/report_pdf/The%20India%20Employment%20Report.pdf (last visited May 27, 2020).

⁸ Bhaskar Neog and Bimal Kishore Sahoo, Wage Discrimination in India's Formal and Informal Labour Markets (2016), <http://papers.ssrn.com/abstract=2795990> (last visited May 28, 2020).

⁹ India.CONST. art.14.

¹⁰ Article 14 of the Constitution states that, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Prohibition of discrimination on the grounds of religion, race, caste, sex or birth place." India.CONST. art.14.

¹¹ India.CONST. art.14.

equality before the law. On the other hand, proportional equality is the practical form of equality, where affirmative action is taken because of the fact that not everyone is born equally.¹²

In *Bachan Singh v. State of Punjab*¹³, the Court established that any law which makes a classification between two people or classes without any reasonable justification for the classification is considered to be violative of Article 14. In another case, regarding the interpretation of Article 14, the Court ruled that a law that treats unequal's equally is also a violation of Article 14.¹⁴ It was in the *Andhra Pradesh Service Commission case*¹⁵, that the Supreme Court ruled that a law by the State that discriminates but is protective or affirmative in nature is not in violation of Article 14¹⁶, but is in furtherance of it. Hence, both the Constitution and Supreme Court are in accordance with the meaning and interpretation of Article 14, but the Supreme Court has also given judgments about protective discrimination, more specifically reservation, that seem to be contradictory to these judgments.

IS RESERVATION A FUNDAMENTAL RIGHT?

In February 2020, the Supreme Court ruled that reservation “in appointment and promotions under Article 16(4)¹⁷ and 16(4A)¹⁸ of the Constitution” is in fact not a fundamental right and that it is up to the discretion of the state or the central government.¹⁹ This judgment was in response to the Uttarakhand government banning reservation in promotions in all state government jobs. The apex court also ruled that if the state government decides to make reservations in promotions, it must prove that “there is an inadequacy of representation of these classes in public services by providing quantifiable data”.²⁰ The ruling called for protests across the nation and was criticised by various political parties.²¹ However, this judgment is not the first to classify reservations as not coming under the ambit of a fundamental right.

¹² Formal equality is used when two persons are equal in one aspect and they are treated equal in relation to that one particular aspect. Proportional equality on the other hand is much more specific and focuses on bringing unequals on the same footing by treating them unequally. Stefan Gosepath, Equality, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Spring 2011 ed. 2011), <https://plato.stanford.edu/archives/spr2011/entries/equality/> (last visited May 24, 2020).

¹³ *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684.

¹⁴ *AtyantPiccharaBargChatrasangh vs. Jharkhand State Vaishy foundation*, AIR 2006 SCC 718.

¹⁵ *Andhra Pradesh Service Commission v. Badhavnath (Balaji)*, 2009 5 SCC 1.

¹⁶ India.CONST. art.14.

¹⁷ India.CONST. art.16.

¹⁸ *Ibid*

¹⁹ *Vinod Prakash Nautiyal v. State of Uttarakhand*, Writ Petition(S/B) No. 45 of 2011.

²⁰ *Ibid*

²¹ The Indian National Congress as well the Communist Party of India criticised the judgment. Apoorva M & Hani, SC quota ruling is nothing new — reservation in jobs was never a fundamental right, *ThePrint* (2020), <https://theprint.in/theprint-essential/sc-quota-ruling-is-nothing-new-reservation-in-jobs-was-never-a-fundamental-right/363200/> (last visited May 29, 2020).

Even prior to the Mandal Commission²² which recommended reservations for the backward classes, the Supreme Court on various occasions has ruled that the State is not obligated to reserve seats for backward classes in appointments or reservations.

In the year 1962, a five-judge bench of the Supreme Court, in *M.R. Balaji v. State of Mysore*²³, while interpreting Article 15(4)²⁴ of the Constitution, ruled that “it does not impose an obligation, but merely leaves it to the discretion of the appropriate government to take suitable action, if necessary.” This was reiterated in the case of *Indira Sawhney v. Union of India*²⁵, where a nine-judge bench ruled that reservations must not exceed 50% of the total appointments.²⁶

CONCLUSION

It is clear now that the implementation of protective discrimination in India has not reached its full potential. Seven decades later, an animosity among the general public towards protective discrimination, especially affirmative action still remains. The polarising nature of the topic has made its way into the political sphere and political parties have mostly refrained from addressing the issue. Rejecting the idea of affirmative action for backward on the grounds that it has not worked for us only acts as a smoke screen to hide the actual problem of income and social inequality.

Statistics show that restriction of reservation only to government jobs has not worked out for us and in the era of privatisation a policy such as this can be a roadblock to equality. The need for representation of backward classes is not just felt by the members of these classes, but its effects permeates through every social, economic and political sphere of the society. A need for consistency in law is required. With the Constitution of India signifying the importance of representation and the abolition of the caste system in order to build an egalitarian society, it becomes important for these ideals to be felt in every aspect of governance. The Supreme Court ruling that reservation is not a fundamental right, brings about inconsistency in law, especially as reservation has been one of the only measures taken by the Parliament to uplift backward classes.

²² The Mandal Commission was the second backward classes commission after the Kaka Kalelkar Commission. The report of the first commission was not even discussed in parliament as a proper method of identifying backward classes was not given in the report. It was the Mandal Commission that specified a 11-point method for identifying backward classes.

²³ *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649.

²⁴ Article 15(4) states that, “Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.” India.CONST. art.15.

²⁵ *Indira Sawhney v. Union of India*, AIR 1993 SC 477.

²⁶ The court ruled that new appointments plus the carry over reservations must not exceed 50% of the total. However, the parliament dismissed this and put a cap on the reservations not exceeding 50% only in the new appointments.

Without fully and efficiently implementing protective discrimination, one cannot even dream of abolishing reservation. Equality can truly be felt when those that make and administer the law practise equity.