



A CRITICAL ANALYSIS OF THE CONSTITUTIONAL PROVISIONS REGARDING THE RIGHT OF PROTECTIVE DISCRIMINATION IN FAVOUR OF SCHEDULED TRIBES

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Abstract

The Indian Constitution is supreme law of the land and all the other laws of the country must be according to the provisions of the Constitution of India. It provides for various fundamental rights which are available to citizens of India as well as foreigners. Article- 14 of the Constitution of India imposes a duty upon the State to ensure equality before the law and equal protection of laws to every person within the territory of India. This article is part of the right to equality which has been provided in Articles 14 to 18 of the Constitution of India. The expression “equality before the law” and “equal protection of laws” are not absolute because absolute equality is not possible in any society rather these are subject to some exceptions. Article 361 of the Constitution of India is the exception of the expression “equality before the law” because it gives some privileges to the president of India and Governor of a state regarding prosecution for certain offences. The expression “equal protection of laws” is also subject to some exceptions like a reservation to the weaker sections of society. The concept of the reservation is not against the spirit of the right to equality rather it is positive discrimination in the favour of various weaker sections of the society. The main purpose of the reservation is to bring the weaker sections of society into the mainstream of society. In this article, an attempt is made to critically discuss the various constitutional provisions regarding positive discrimination or reservation in the favour of Schedule Tribes.

Keywords: Equality, Law, Protection, Reservation, Scheduled, Tribe.

Introduction

Injustice and inequality are part and parcel of all legal systems in the world and India is no exception. The framers of the Constitution anticipated these issues, including provisions in the Constitution relating to protective discrimination. The object was to eliminate the practices such as the caste system. Thus, the

Constitution of India contains various provisions for the welfare and protection of the weaker sections of the society. The idea of protective discrimination is to give preferential treatment to certain classes of citizens based on their religion, caste, sex, and even their places of residence. It provides special privileges to certain underprivileged classes of society. The concept is not new and is being adopted and following various legal systems to ensure equality amongst its citizens. It is also known by different terminologies such as reserved discrimination and preferential treatment.¹

The Constitution of India and certain other legislations have adopted this concept to empower the weaker sections of the society. When it said 'weaker sections of the society' it indicates the Scheduled Caste and Scheduled Tribe communities. They are the original beneficiaries of reservations under the Indian Constitution.²

Constitutional Provisions relating to protective discrimination of Scheduled Tribes

Article-366 (25) of the Constitution of India defines "Scheduled Tribes." It includes such tribes or tribal communities which have been declared as Scheduled Tribe under Article 342 of the Constitution of India. Article 342 provides that, the President of India either after consultation with the Governor in the case of State or by public notice may determine that, which tribes or tribal communities shall be deemed to be the tribal community as per the Constitution of India. But Parliament may by law either include or exclude from the list of Scheduled Tribes as provided in clause (1) of Article 342.

Fundamental rights and positive discrimination

Right to equality

Article 14 of the Constitution of India ensures "equality before the law" and "equal protection of laws" and imposes a duty upon the state not to deny to any person equality before the law or the equal protection of the laws within the territory of India irrespective of the fact whether that person is a citizen of India or a foreigner. Article 15 prohibits discrimination on grounds only of religion, race, caste, sex or place of birth. In other words, Article 15 imposes a duty on the part of the State not to discriminate against any citizen of India including Scheduled Tribes on the ground only of, race, caste, or religion, place of birth, sex.³

Article 15(4) provides that, the State can make special provisions for the advancement of the Scheduled Tribes. This provision was inserted by the Constitution (First Amendment) Act, 1951 to quash the decision of the Hon'ble Supreme Court in the case of *State of Madras v. Champakam Dorairajan*.⁴ Article 15(5) provides that the state can make special provisions relating to their admission to educational institutions including private educational institutions but this reservation does not apply to minority educational institutions.⁵ The object of these reservations is to remove all these handicaps and disadvantages to which the Tribes were subjected and to bring them to the mainstream of society by providing them opportunities.⁶ However, the reservation imposed must be reasonable considering the equality provisions guaranteed under

¹MJ Vinod and M Despande, *Contemporary Political Theory*, (PHI Learning Pvt. Ltd., New Delhi, 2013).

² Sujit Choudary, Madhav Khosla, *et.al.* (eds.), *The Indian Constitution 720* (Oxford University Press, New Delhi, 2017).

³ Durga Das Basu, *Shorter Constitution of India* 96 (LexisNexis, New Delhi, 15th edn., 2018)

⁴ AIR 1951 SC 226.

⁵C. Basavaraju, "Reservation under the Constitution of India: Issues and Prospectives", 51 *Journal of the Indian Law Institute* 268 (2009).

⁶ Justice B. Sudershan Reddy, *The Constitution of India* 385 (Asia Law House, Hyderabad, 4th edn., 2018).

the Indian Constitution. The Hon'ble Supreme Court of India in the case of *Balaji v. the State of Madras*,⁷ reserved the government's order that provided reservation of 68% of the seats in admission to engineering, medical and other technical colleges. The Court held that the ceiling limit prescribed by the government is unconstitutional and ultra vires the equality provision. The court opined that such reservation limit was excessive and unreasonable and that it affects the meritorious candidates.⁸

Subsequently, the Constitutional validity of this clause was challenged before the hon'ble Supreme Court in the case of *Ashoka Kumar Thakur v. Union of India and Ors.*⁹ and hon'ble Supreme Court held that, it is constitutionally valid provision.

Article 16 provides for equality of opportunity in matters of public employment to every citizen of India without any discrimination on the ground only of religion, race, caste, sex, descent, place of birth, or residence. Article 16 (4A) authorises the State to provide reservation in promotion to the members of Scheduled Tribes.¹⁰ Article 17 abolishes "untouchability" and its practice in any form. If any person practises untouchability, then such person shall be punished according to the law. Hon'ble Supreme Court in the case of *People's Union for Democratic Rights v Union of India*¹¹ held that, when any individual violates a fundamental right contained in Arts. 17, 23 or 24, it is the constitutional duty of the State to take appropriate action against such person and ensure that such person should not violate the rights of others. Merely a person can protect or enforce his fundamental right does not absolve the State from its constitutional duty. To prevent the commission of offences or atrocities against the members of the Scheduled Castes and Scheduled Tribes, the Parliament enacted the 'Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Right to freedom

Article 19(1) clauses (d) and (e) provide that all citizens of India shall have the right to move freely throughout the territory of India and to reside and settle in any part of the territory of India but this right is not absolute rather it is subject to some reasonable restrictions as provided under Article 19(5) in the interests of any Scheduled Tribe. This ground has been inserted into the Constitution of India to protect the Scheduled Tribes in India which are settled in the different parts of the country, especially in the state of Assam and North Eastern States. Scheduled Tribes are vulnerable and they have their own different cultures, script, languages and customs. If the general public tries to enter such places which are inhabited by the Scheduled Tribes, then their rights will be violated.¹²

Directive Principles of State Policy

Article 46, which is part of the Directive Principles of State Policy imposes a duty upon the State to promote the educational and economic interests of Scheduled Tribes and to protect them from social injustice and all forms of exploitation.¹³ The Hon'ble Supreme Court in the case of *M.R Balaji v.the State of Mysore*¹⁴ gave the liberal interpretation to Article 46 vis-a- vis to Articles 15 and 16 of the Constitution of India.

⁷AIR 1963 SC 649

⁸Similar issues were raised in the case of *T. Devadasan v. Union of India*, AIR 1964 SC 179.

⁹AIR 2008 SCW 2899

¹⁰MP Jain, *Indian Constitutional Law* 1024 (LexisNexis, New Delhi, 8th edn., 2019).

¹¹1982 AIR 1473

¹²P.M. Bakshi, *The Constitution of India* 128 (Universal Law Publishing, New Delhi, 13th edn., 2016).

¹³Mohammad Ghouse, *Judicial Control of Protective Discrimination*, 11 *Indian Law Institute* 378 (1969).

¹⁴AIR1963SC649

Ministry for the welfare of STs

Article 164 of the Constitution of India provides that, the States of Chhattisgarh, Jharkhand, Madhya Pradesh and Odisha shall have a Ministry who will work for the welfare of the Scheduled Tribes.

Reservation of seats in elections

Article 243D provides for reservation of seats for the Scheduled Tribes in every Panchayat. It further provides for one-third of the total number of seats reserved for women belonging to the Scheduled Tribes. This reservation shall also be applicable in the case of the position of Chairperson in the panchayats. Article 243T provides for one-third of the total number of seats reserved for Scheduled Tribes in every Municipality including the office of chairperson. Article 330 provides for reservation of seats for Scheduled Tribes in the House of People except for the Scheduled Tribes in the autonomous districts of Assam. Hon'ble Supreme Court in the case of *V.V Giri v.D. Suri Dora*,¹⁵ held that the purpose of Article 330 is to guarantee the minimum number of seats to Scheduled Tribes. If a person belonging to Scheduled Tribes won seats under the general category, then it will not amount to the violation of Article 330 of the Constitution of India.¹⁶

Article 332 provides for the reservation of seats for Scheduled Tribes in the Legislative Assemblies of the States. Article 335 provides that, this reservation of Scheduled Tribes is subject to the efficiency in the administration. Article 335 assumes that candidates belonging to Scheduled Tribes have some claim but this claim is subject to the maintenance of efficiency in the administration which is of paramount consideration.¹⁷

National Commission for Scheduled Tribes

Article 338A provides for the National Commission for Scheduled Tribes. This Commission consists of a Chairperson, Vice-Chairperson and three other Members and the conditions of service and tenure of office of the Chairperson, Vice-Chairperson and other Members so appointed are decided by the rules made by the President. The Commission has the power to regulate its procedure. The Commission investigates all matters relating to the safeguards provided for the Scheduled Tribes under the Constitution or under any other law for the time being in force. It conducts inquiry into specific complaints concerning the deprivation of rights and safeguards of the Scheduled Tribes. It also participates and advises on the planning process of socio-economic development of the Scheduled Tribes and evaluates the progress of their development under the Union and any State. It presents its annual reports to the President regarding safeguards provided for the protection of Scheduled Tribes. It also makes recommendations about the measures that should be taken by the Union or any State for the effective implementation of all safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled Tribes.¹⁸

Special Provision for some States

- Article 371A provides special provisions with respect to the State of Nagaland.
- Article 371B provides for special provision with respect to the State of Assam

¹⁵AIR1959 SC1318

¹⁶ Mahender Pal Singh, *V.N. Shukla's Constitution of India*, (Eastern Book Company, Lucknow, 13th edn., 2019).

¹⁷*Supra* note 4 at 3300.

¹⁸Waseem Ahmad and M. Ashraf Ali, "Social Justice and the Constitution of India", 49 *The Indian Journal of Political Science* 768 (2006).

- Article 371C provides for special provisions with respect to the State of Manipur.
- Article 371F provides for special provisions with respect to the State of Sikkim.

All these States have special provisions for the protection of the interest of minorities.¹⁹

Critical Analysis

The equality and fraternity which was guaranteed by the Constitution of India have existed for several decades in India. The Constitution provides safeguards to more than 160 million and 80 million SC and ST communities respectively who constitute 24% of India's total population. The Constitution Drafting Committee assured that affirmative measures will be taken to ensure the protection and improvement of weaker sections. The system of reservation in jobs and educational institutions was such an initiative. But all these affirmative actions had a negative impact on society. In other words, the Constitutional provisions were not effective to deal with the persisting issues of these sects. For instance, the percentage of representations from weaker sections like the SCs and STs employed in the public sector is comparatively low. They have not even filled the stipulated percentage of the reserved community quota. Instead, these positions are occupied by the members of the dominant community.²⁰ Also, according to National Crime Records Bureau Reports, the instance of crimes committed against Scheduled Tribes are relatively high.²¹ The crime rate increased to 9.4 % as compared to the previous year.²² These crimes include hurt, kidnapping, abduction, murder, dacoity, robbery and even rape. On the basis of study conducted by the National Commission for SCs and STs in 1990 on Atrocities on Scheduled Castes and Scheduled Tribes: Causes and Remedies, various factors were found responsible for the atrocities against STs such as:

- Situation of indebtedness
- Land disputes
- Practice of untouchability
- Caste prejudice
- Not giving minimum wages to the workers belonging to the ST community
- Refusal to do the traditional work for example digging burial pits etc.²³

Some time when the atrocities are committed upon the person belonging to ST community and when he/she visits the police station for registration of F.I.R., the police also usually does not register it due to which accused are not arrested and victim does not get justice.

¹⁹HM Seervai, *Constitutional Law of India* 682 (Universal Law Publications, New Delhi, 4th edn., 2017).

²⁰Prakash Louis, "Scheduled Castes and Tribes: The Reservation Debate" 28 *Economic and Political Weekly* 2476 (2003).

²¹Government of India, Report: *Crime against Scheduled Castes and Scheduled Tribes*

²²Bismee Taskin, "Crimes against SC/STs saw rise of over 9% in 2020, but crimes against women decline: NCRB data" *The Print*, 15 September 2021.

²³ Report of Parliamentary Committee on the Welfare of SCs and STs, 4th Report 2004-05, New Delhi, 2005, para 1.2

Conclusion and Suggestions

The ultimate aim of the protective discrimination is to promote the weaker sections of the society including STs. The best way to achieve this is by allowing the members of these sects to be part of the Parliament, State legislatures, public employment, professional education and other walks of life. This helps them realize that they are no more an inferior group. Again, for ensuring this the legislature and judiciary should act hand in hand.

Following are some of the suggestions that may be implemented to impart social justice to the weaker sections of the society, particularly Scheduled Tribes.

- The Constitutional provisions relating to protective discrimination, such as Articles 15 (4), 16 (4) and 29(2) need to be amended to impose a positive obligation on the State to make laws for the benefit of the STs.
- All provisions relating to the positive discrimination in favour of STs must be implemented in their true spirit.
- Strict action must be taken against persons responsible for failure to implement the provisions of law.
- Lacunae in the existing provisions regarding positive discrimination should be filled by the suitable amendment in the existing Constitutional and statutory provisions.
- If any person violates these provisions or commits any offence against the person belonging to ST community then strict legal action in a time bound manner should be taken against such person so as to create deterrence in the mind of people and enable them to respect the rights of persons belonging to the ST community.
- National Commission for Scheduled Tribe should be given more powers and its recommendations should have binding effect over Government.
- The police officer who does not register F.I.R in the matters relating to offence against the members of ST community must be punished according to law.