CHAPTER-1
Introduction

“The Myth and Reality of Protective Discrimination in India”

The ‘Right to Equality’ which is a basic feature of the Constitution of India is dealt within Articles 14-18 of the Constitution of India. These provisions provide both a general frame work of equality as well as some specific areas like in matters of public employment untouchability and abolition of titles, which in its course evolved the concept of ‘Reservation’.

The issue of reservation in the Indian Constitution has always been contentious in relation to the doctrine of equality. These two concepts, i.e. the reservation system and equality, are intricately related, providing divergent views concerning its nexus. One view is that the former is an exception to the latter, whereas the other view is that the former is said to be a consequence of achieving the latter. However, the significance and controversy associated with the issue of reservations can be underscored by various Constitutional developments, ranging from the First Constitutional Amendment 1950 to the recent Supreme Court Verdict in the Ashoka Kumar Thakur case.

In the polemical debate on reservations, one often sees a bewildering array of terms employed, like affirmative action, positive discrimination, compensatory discrimination, protective discrimination etc. The proliferation of these terms was a post Mandalian phenomenon. Initially, the policy was nameless, with many content to describe it as

* 1 Basu, Durga Das, “Commentary on the Constitution of India’ 8th Edn.,P-2025
* 2 Krishnan Anirudh, Harini Sudersan- Law of Reservation and Anti Discrimination. P-637
* 3 Ashoka Kumar Thakur- vs- Union of India MANU/SC/1397/2008
"special treatment", 'preferential treatment' or as 'concessions.' In India, they are popularly called as reservations. Marc Galanter proposed the use of the term compensatory description to refer to the array of policies, which are Constitutionally permitted departures from the norm of formal equality for the purpose of favouring specified groups.*4 These policies or preferences are of three basic types:*5 the most important and contentious is reservations or quotas in academic institutions, government jobs and in legislatures. The second is the grant of scholarships, loans, land allotments, health care, legal aid to a beneficiary group beyond comparable expenditure for others. The third is in the nature of protective devices i.e. provisions aimed to abolishing untouchability, forced labour, regulating money lending, protecting Scheduled Caste and Scheduled Tribes from oppression.

The framers of the Indian Constitution consciously applied what is now called “Rawls Substantive Theory of Justice” to create a social order based on justice where in socio-economic equality was guaranteed, subject to the exception that inequality be permitted in cases where it produce the greatest possible benefit for those least well-off in a given scheme (the difference principle and equality of opportunity)*6 Equal distribution among equals means that according to a given criterion of discrimination, unequal cases are to be treated differently, which still leaves open the question whether it is just to select that

* 4 Zoya Hasan Et AL, MARC GALENTER, “The long Half Life of Reservation, in, India’s Living Constitution P-307
* 5 MARC GALANTER, “Law and Society in Modern India”, P-186
particular criterion.*7 Again, to take account of inequalities in fact there
has to be unequal treatment in Law, which means that the question when
the law should depart from equality has to be determined on some
principle other than equality.*8 Accordingly, the programme of
protective discrimination ensured that a fixed number of seats in
government jobs, educational institutions and Parliament were reserved
exclusively for specified groups. Thus, the combination of quotas and
lower eligibility criterion marked the provisions of protective
discrimination in India, specifically meant for SCs, STs and OBCs and
in some aspects for women too.

‘Affirmative action’, on the otherhand, was a term first
used by American President Jhon F. Kennedy with regard to the Civil
Rights Movements in 1961, eleven years after the adoption of our
Constitution. The term affirmative action, encompassing the entire
gamut of policies, was adopted from the American description of race
conscious policies. It began to be used in India in the 1980s though there
are significant differences in the policies of both countries.

However there have been few disagreements with the need
for special treatment of disadvantaged sections in India. The debate
centres on the categories of person in need of help, the form this help
ought to take, and about the efficacy and propriety of what the
government has done under this head. The first task is therefore to
ascertain which groups constitute the ‘Backward Classes’. These groups

* 7 Dias, RWM, Jurisprudence, Fifth Edn. 1994, P-65
* 8 Ibid
are not a single homogeneous block and the term ‘classes’ is employed not in the sociological sense. They are really groups of communities and not classes.*9 The term ‘class’ as used in sociology suggest not only an economic category but also one which is relatively open. In reality backward classes are not classes but an aggregate of closed status groups, where membership is determined by birth.*10

There is also a conceptual confusion between the terms Backward Classes and Other Backward Classes. The term ‘Backward Classes’ broadly refers to three main categories, the Scheduled Castes, Scheduled Tribes and Other Backward Classes (OBCs). The term Other Backward Classes is used to refer to that section of the populace excluding the Scheduled Caste and Scheduled Tribes. Again, the identification of Scheduled Caste and Scheduled Tribes has been fairly well settled prior to the coming into force of the Constitution. The STs have been identified based primarily on ecological and social isolation and comprise tribes living in the hills and forest. The SCs unlike the STs were not isolated, but segregated from the main stream and untouchability has been the criterion employed to define these groups. The term depressed classes was also used to describe ‘untouchables’.

For historical reasons certain classes of Indian citizens were known to be suffering from various socio-economic disabilities and as such they could not effectively enjoy either equality of status or

* 9 ANDRE BETEILLE, “Caste Inequality and Affirmative Action”, P-5
* 10 ANDRE BETEILLE, “Society and Politics in India, Esseys in comparative Perspective”, P-152
of opportunity. Hence, it was thought prudent that for such period as they take for catching up the mainstream of our society, the Constitution itself should provide for special treatment to them for certain purposes. To offset the accumulated oppression of centuries of deprivation, special Constitutional measures were enacted for Scheduled Castes and Scheduled Tribes and Other Backward Classes who had traditionally been the victims of socio-economic oppression. Thus, one of the main concerns of the founding fathers of the Indian Constitution was to create an egalitarian society where in “Justice- social, economic and political” prevail and equality of status and opportunity are made available to all. In order to bring about equality under unequal circumstances, and in seeking to discriminate in favour of those who had been historically discriminated against, a policy of ‘affirmative action’ or ‘protective discrimination’ had been adopted.

In Indra Sawhney-vs-Union of India*11 it was firmly held that protective discrimination or affirmative action implies to provide facilities and opportunities not only among individuals, but also amongst group of people, securing adequate means of livelihood to its citizens and to promote with special care the educational and economic interest of the weaker sections of the people, including in particular the Scheduled Castes and Scheduled Tribes and to protect them from social injustice and all forms of exploitation.

* 11 AIR 1993, SC 477
Undoubtedly, the framers of our Constitution recognized that Indian society was characterized by inequalities owing to the caste system and on the contrary Social Justice was a Constitutional goal. So, they recognized that caste system was the greatest barrier to an egalitarian society, viewing caste differentials intrinsically thereby deserving of preferential treatment as a good number of Commissions have done by according primacy to perceptions of one caste by ‘others’ to assess backwardness, would only perpetuate the polarization of society on caste lines. It was for this reason that caste differentials were seen as instrumental in offsetting the inequalities, educational and economic, it produces.

Social justice does not simply mean to provide special treatment to SCs/STs and OBCs, it means and includes much more to create a new social order. Though social justice is a Constitutional aim, the propagators wish to make it a judicial mission. Jurisprudence, Law, Directive Principles, Preamble, Rule of Law and ultimately the Constitution itself, do not sanction the propagated Social Justice as an attribute of judicial dispensation. Judiciary to take up the responsibility singularly, to achieve social justice, and to make it a pattern of justicing would be more derogatory firstly to the Rule of Law and then to the Constitution. Broadly it is felt that Social Justice is a device to mitigate sufferings of the have-nots. Fulfillment of demand therefore is always contingent to the social conditions. Reconciliation between the demand and social conditions is normally arranged by law. Justice accordingly attempts to fulfill the legitimate desire of the society.
Hence, it is true that the framing fathers of the Constitution of India, inspired by the then social circumstances had inserted some special provisions for the upliftment of the backward classes i.e. SCs, STs and OBCs, with the motto to eradicate the evil of caste from Indian society. However, the framers of the Constitution did not intend the quota or reservation to continue in perpetuity. Art 334 of the Constitution originally provided that reservations for SCs/STs and Anglo Indians in Lok Sabha and Assemblies for 10 years which should have been ceased to exist in the year 1960, but fortunately or unfortunately this has been continuing till date and hopefully census 2011 will make it more confirmed and perpetual for the bludy ends of the politicians or major political parties.

A learned author MICHAL ROSENFELD in his book on “Affirmative Action And Justice – A Philosophical And Constitutional Enquiry”*12 has stated that affirmative action is a phrase that refers to attempt to bring members of unrepresented groups, usually groups that have suffered discrimination into a higher degree of participation in some beneficial programme. The learned author further says ‘affirmative action’ is controversial because it seeks to remedy inequalities by means of unequal treatment. It also seems to be radical because it apparently departs from the ideal of equality of opportunity. Ironically, the sooner affirmative action is allowed to complete its mission, the sooner the need for it will altogether disappear. Reservation is discrimination made in favour of backward classes vis-à-vis the citizens in general and has

been referred to as compensatory discrimination or reverse discrimination or protective discrimination.

However, realizing the constitutional context in which the reservation policy has come into being with the aim of social justice, the following may be considered:

1) It is an exception to the well accepted principle of equality.
2) It is compensatory for those who suffered for centuries for no fault of theirs.
3) It is to be given effect to in such a manner so that efficiency of the system is not affected.
4) It is eventually for the good of the society as a whole and
5) It is transitory in nature.

As such, the special provisions meant for those people specially SCs/STs and OBCs have now become protective discrimination for the rest of the other masses, i.e. who are left out of these category. Accordingly, Articles 15 (3), 15 (4), 15 (4-A), 15(4-B), 16(4) and the special provisions meant for certain classes provided in Articles 330 to 342 of the Constitution of India are some provisions in the nature of protective discrimination, which have been dealt with in detail in the following chapters of this study.

Thus, inspired by the present socio-economic scenario of India as a whole, where most of the people now like to identify themselves as belonging to specified class or caste, the researcher has
taken the plight to make a critical study that how the germ of Protective Discrimination was inputted in the Constitution against the ideal of equality, how far it has achieved its goal and the logic of retaining such provisions which creates frustration to the common masses who are really backward and poor, but unfortunately not covered by the veil of protection like SCs/STs and OBCs.

However, the systematic flaws in the present affirmative action policy are not attempts at making a case for jettisoning quotas or turning a blind eye to the presence of persistent and pervasive caste discrimination, rather it is to highlight the need for exploring alternative strategies that accord primacy to the individual to achieve the constitutional objective of removing impediments to treating individuals as individuals. Thus the whole study of this research work centres round this segment that how far the Constitutional goal of justice-social, economic and political have been achieved in deed through protective discrimination. But “Goals are dreams with deadlines”. Here, social justice is a goal of the Constitution of India, protective discrimination is the never ending dreams for the politicians for their gain and interest too and what the research study wants to suggest is that there must be deadlines or specified time bar for achieving that goal of social justice through the concept of protective discrimination.