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# UNIT 13 PROTECTIVE DISCRIMINATION VS. PRINCIPLE OF FAIRNESS\*

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## 13.0 OBJECTIVES

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The main objective of this unit is to understand the meaning of two key concepts in Political Science – protective discrimination and the principle of fairness. As you go through this unit, you should be able to:

- Explain the concept of protective discrimination;
- Know what the Principle of Fairness is; and
- Analyze the debate between the two concepts

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## 13.1 INTRODUCTION

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Inequality and injustice have been a part of all societies and India is no exception. After the departure of the British in India, the framers of the Indian Constitution acknowledged the gravity of the problem and decided to introduce protective discrimination as a measure to eradicate malpractices like the caste system. Accordingly, the Constitution of India has provided various institutional avenues for social welfare of weaker sections. Protective discrimination involves the deliberate act of preferential treatment by the state in favor of particular groups of people based on caste, religion, gender and even spatial location. The principle of protective discrimination is also known as reservation, reverse discrimination, positive/affirmative action, preferential treatment etc. The debate between protective discrimination and the principle of fairness is part of the overall relationship between equality and justice. Those aspects have been discussed in the following sections.

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## 13.2 CONCEPT OF PROTECTIVE DISCRIMINATION

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The term protective discrimination refers to policy measures that are consciously designed by the state to discriminate among the citizens by certain specified criteria to protect the interests of the weakest among them. It is the policy through which special privileges are granted to the underprivileged sections of society, those who in the past or the present have been the victim of any discrimination. These are affirmative action programs undertaken by the state to bring equity and justice among all sections of society. These provisions together form the framework for the analysis of the concept of social justice in the Indian context. It aims to reduce the persistent discrimination or inequality in society by giving preferential treatment to the marginalized sections in the distribution of valued social goods and opportunities. The main agenda for introducing protective discrimination is to protect the weaker sections of society who have been socially and historically neglected and exploited and to free the disadvantaged sections of society from the hegemony of the powerful and resourceful by way of creating ample opportunities for their participation in the national mainstream.

For understanding the purpose of positive discrimination, it is necessary that we distinguish the concept of social justice from a general theory of justice. Any general theory of justice as a discourse takes into account the society as a whole independent of the existing social and power relations of a particular society. This is the reason, why the general theory of justice in spite of its claim of universality may not always prove helpful in the analysis of socio-cultural specific policies like positive discrimination. On the other hand, social justice derives its principle from a given socio-cultural specificity. It is based on some substantive premises about social life which are usually derived implicitly or explicitly from the actual context of the society where the theorization takes place. Therefore, social justice as a concept need not always conform to the general theory of justice, and since it is socio-cultural specific, it often comes in conflict with the general theory of justice. Moreover, the fact that the concept of social justice does not come from a vacuum, it is bound to come into conflict with the already existing power structure.

Ideally, the state regards all citizens as equal in the eyes of law and treats them equally. However, a modern liberal state has recognized the necessity and avenue for differentiated treatment among its citizens by their socio-economic backgrounds. If a significant part of population of a nation is plagued by discriminatory social practices and such an affliction has hampered their right to a dignified life and primary access to state resources, then that part of the population is considered fit for being treated preferentially. To remedy the situation and compensate for the past injustices perpetrated against the disadvantaged groups, preferential treatment in favor of these groups is ought to be provided by the state agencies. In India, despite its abolition under Article 17 of the constitution, discrimination against the lower castes still exists in various subtle or unconcealed ways. To reform and regenerate the society from these social evils, certain definite and bold measures for the eradication of these social maladies had become the need of the hour. According to some scholars, following are the arguments in favor of protective discrimination:

- Equality of opportunity is very feeble which does not exist unless made more effective.
- There is a causal relationship between being unequal and hence, poor, illiterate and socially and culturally backward.
- Any system of allocation of goods and services will fall short of equality of opportunity and will be unfair if the allocation works out unequally between different sections of the society.
- Protective discrimination is one of various means to correct such imbalance in distribution of goods and services and does not violate the principle of fairness.

Democracy becomes meaningless without transforming vertical inequality into horizontal inequality. The social and economic gap between the upper castes and lower castes was strikingly high at the time of independence. During the freedom movement, the leaders understood the political logic of inducting this large group of people into the political mainstream who were otherwise outcasted from mainstream society. They recognized that without the induction and mobilization of these people, the realization of a broad-based inclusive national movement would not be possible. One of the main concerns of the founding fathers of the Indian Constitution was to create an egalitarian society wherein ‘justice, social, economic and political’ prevails and ‘equality of status and of opportunity’ is made available to all. It is not, therefore, surprising to find the spirit of ‘equality’ pervading the provisions of the Constitution of India. The constitution guaranteed the fundamental right of equality of all citizens before the law, but it also categorically laid down that nothing in the constitution “shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or the Schedules Castes and the Scheduled Tribes”. The state is empowered to take special measures for the betterment and welfare of the disadvantaged sections of society. In other words, the policy of reservation or positive discrimination stands at least in the short run, as an integral part of the process of socio-economic change, integration and development of India. Some of these provisions are contained in Articles 15 and 16 (Right to Equality), Article 46 (promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections) and Article 340 (welfare of Other Backward Classes). The main areas where the state has pursued this policy of protective discrimination are education, welfare and economic activities (like housing, grant of land, etc.), public services and political representation. Except concerning political representation, provisions of which are *mandatory*, in all other respects, the Constitution has left it to the discretion of the state to provide for protective discrimination.

### Check Your Progress 1

**Note:** i) Use the space given below for your answer.

ii) See the end of the unit for tips for your answer.

1) What do you understand by protective discrimination?

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### 13.3 PRINCIPLE OF FAIRNESS

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Before moving on to understand the principle of fairness, let us first confer what Rawls's theory of justice is about on which the principle of fairness is premised. Justice as fairness refers to the conception of justice that John Rawls presents in his book, *A Theory of Justice*. According to Rawls, certain moral principles are binding upon us because they would be acceptable by rational beings like us in the "original position". Justice for him is not the law of nature or something based on reason, but is a fair distribution on fair procedure. Rawls maintains that in society, all individuals do not have equal knowledge and do not live in similar economic and social conditions. He refers to his idea of veil of ignorance where some people are subjected to, and this veil excludes them not only from others but also from themselves—the least advantaged members of society. Thus, justice demands due care for the least advantaged members of society as well. Justice, according to him, is the distribution of benefits among all members of society not in proportion to what one does, but in such a manner that the weakest of the weak benefitted. Rawls feels such a distribution of benefits is not only fair, but also in accordance with the norms of justice. Thus, we can conclude that justice for Rawls is fairness. Justice as fairness assumes a view of society where there is a fair system of cooperation between free and equal persons. The object of justice as fairness is to find out appropriate principles which help in the realisation of liberty and equality. These appropriate principles that attempt to seek liberty and equality are the results of an agreement among the people concerned of their mutual advantage. When the people become free and equal, they soon realise that they need the same primary goods to pursue their conception of good. These primary goods include among other things, the basic rights, liberties, opportunities, income, wealth, self-respect. Thus, justice would mean that all the primary goods are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored. This conception of justice concerns society's basic structure—that is, "society's main political, constitutional, social, and economic institutions and how they fit together to form a unified scheme of social cooperation over time". According to Rawls, the fundamental idea in the concept of justice is fairness, and he considers justice only as a virtue of social institutions, or what he calls practices. The principles of justice are regarded as formulating restrictions as to how practices may define positions and offices, and assign to it powers and liabilities, rights and duties.

The principle of fairness on the other hand, states that if a number of people are producing a public good that we benefit from, it is not morally acceptable to accept free goods without service or enjoying the benefits without paying the costs. We owe them our fair share of the costs of the production of that good. Initially, the principle of fairness has been formulated by *H.L.A Hart* and then by Rawls, to ground a principle-based understanding of the distribution of burdens and benefits regarding the production of public goods in a fair scheme of cooperation. The principle of fairness grounds a moral obligation not to free ride as part of a fair scheme of cooperation, also called 'the duty of fair play'. If some people are contributing to the production of a public good, one should not simply enjoy the benefits without doing ones' share in the production of that good. This is a non-consequentialist moral obligation, for the underlying rationale is guided not so much by a desire to avoid the bad outcome of undersupply as by

a desire to set a standard of justice to aspire to. The underlying intuition is that it would be an injustice to those who contribute to the production of the public good if some of those who benefit from it turn out to be, in a patterned fashion, those who do nothing for its production. The principle can be invoked to justify some social and political obligations. Indeed, it is often invoked in various areas of applied philosophy as in social ethics in support of services that are normally associated with good governance or in response to some of the inequalities generated by the globalizing economy etc. Libertarians like *Nozick* and *Flew* do not agree with Rawls and deny his claim that those who are naturally disadvantaged have a claim on those with advantage. They believe in merit and excellence and natural inequality of human beings.

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## 13.4 PROTECTIVE DISCRIMINATION VS. PRINCIPLE OF FAIRNESS

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Talking about equality, we do not talk of legal equality only in the sense of equality of opportunity, but also equality of conditions and equality of outcome or results. Since the son of a doctor and the son of a poor man may not get equal opportunities, justice as fairness demands that the social environment must be changed if equal start for everyone is to be provided. However, for that, we need collective consent and decision to give favored treatment to the deprived and marginalised sections of society. In addition to that, ‘equality before law’ and equal protection of law’ mandate that everyone should *not* be treated alike.

### 13.4.1 Formal v/s Substantive Equality

Formal equality refers to liberal notion of equality before law. It involves the principle of universalisability where two persons are treated equally unless there is a differentiating principle. According to Lucas, the need for universalisability of laws arises from the fact that the state is unable to make as many laws as there are individuals because they are different. So, for practical reasons, the state makes universally applicable laws. This means formal equality can provide only procedural justice. On the other hand, substantive equality is a broader concept which also relates to other values like justice, rights and equality. According to Fredman, there are four approaches to substantive equality.

- **Equality of results:** Equal treatment does not guarantee equality of results.
- **Starting point equality:** True equality is unachievable if individuals begin the race from different starting points and an equal opportunities approach therefore, aims to equalize the starting point.
- **Right-based equality:** It treats equality as auxiliary to substantive rights.
- **Value-driven approach:** This approach emphasizes dignity, autonomy and worth of all individuals apart from their fair participation in society.

Although through legal equality, equality of opportunity has been achieved in India, eradication or reduction of economic and social inequalities prevalent in society is yet to be accomplished. The hegemony of the upper castes in gaining access to the resources of the state for centuries has created an extremely asymmetrical society that affects the compositeness of the whole society since there are wide disparities in political as well as the social system. In this situation, the empowered and powerful section of society more often wish to continue

with status quo and may resist any change in the existing discriminatory distributive pattern. The deprived and marginalised ones, on the other hand, may want a complete revolution in the social system and aspire for drastic measures by the state to ameliorate their social and economic position. Thus, both groups voice their demands and put pressure on the state agency to get them fulfilled which puts the state in a quandary. This kind of situation led to the emergence of a pertinent question as to what is to be prioritised, liberty or justice? However, in most cases, when the empowered groups vouch for liberty, justice becomes a matter of survival for the marginalised and deprived sections of society.

Thus, the practice of protective discrimination was introduced to uplift the conditions of the deprived sections to bring them at par with mainstream society. This policy of affirmative action is also called reverse discrimination because it guarantees differential treatment to certain deprived sections just as overtly as it was used or discriminated against them in the past. However, this practice of giving preferential treatment to certain members of marginalised groups has generated a fierce philosophical debate in contemporary political history. While the egalitarians and positive liberals are in support of such discriminations because it helps to achieve a just and fair society, the libertarians and legal positivists express their displeasure with such discriminations. According to them, it affects the excellence, merit of the overall quality and also the basic rights of freedom and property of individuals.

Taking into consideration the economic and social reality of a country like India, the idea of affirmative action still holds ground for delivery of social justice and the consequent full realisation of democracy. It is important to remember that the concepts of justice and equality are not opposing ones, as the claims of justice and equality do not clash with one another. The practice of providing preferential treatment to those who were discriminated and denied of basic facilities for centuries doesn't in any sense stand against the principles of justice. Rather, such preferential treatment essentially seeks to build the properties and environment of justice. Justice consists in the rightful allocation of benefits and burdens. Equality would be meaningful only when it is accompanied by a sense of justice. The exercise of granting and providing social justice to the needy ones leads to the strengthening of the claims of equality as it strives to bring unequals hitherto on parity with the today's equals. Quite a few scholars have finely articulated some important arguments relating to the debate.

Any society is characteristically divided between the rich and the poor where the prosperity of the rich doesn't match with that of the poor and the weaker sections of society. Thus, in a society of equals, it is the weaker that need protection, it is the downtrodden that need special care, and it is the poor who needs security. In simple terms, we need to distinguish between a wolf and a lamb and decide in favor of the one who is the most vulnerable. The practice of protective discrimination is an important feature of the Indian Constitution that provides protection in the form of special measures for the socially and economically weaker parts of society. However, India is not the only country in the world having provisions for protective discrimination. The idea behind the *US* affirmative action in favour of the Blacks is the same as that of protective discrimination enshrined in our constitution, and both do not violate any claim of equality, or any principle of fairness.



To provide equal opportunities to people is something which is always appreciated and in no ways does it deny the principle of fairness and to that extent, such claim of equality is not opposed to the claim of justice. The idea of protective discrimination is described as the idea of correcting a wrong done against the weaker and marginalised sections of society. The basic idea is to seek compensations for the injustices carried out by one's forefathers. However, the idea of compensating for decades without any definite indication of its culminating period presents an unfair situation to many. Another debate circulating the practice of protective discrimination is that it essentially leads towards increasing the functions and jurisdiction of the state, which in turn, restricts the liberties and rights of the people in general and of the empowered in particular.

### Check Your Progress 2

**Note:** i) Use the space given below for your answer.

ii) Check your answer with that given at the end of the unit.

1) What do you understand by 'equality of condition'?

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## 13.5 CRITICISM

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The idea of protective discrimination has generated a lot of debate and discussion among scholars around the world. Those who oppose it see it as one form of discrimination substituting another. Advocated of procedural equality stand for market logic where merit should decide allocation of resources. However, merit should be seen in a social and cultural context and there is a need for culturally neutral definition of merit in order to avoid hegemony of dominant interests. Another point of criticism is that affirmative action had to be a temporary measure; it has become a permanent feature as it leads to political benefits for those in power. Among the target groups, the benefits have generally gone disproportionately to the members who are better-off. The benefits have not reached the ones who are really disadvantaged among the marginalized sections. There may be many arguments against protective discrimination but one cannot simply do away with distributive justice in a complex society like India. It is justifiable in morally compelling cases.

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## 13.6 LET US SUM UP

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In conclusion, it can be said that to establish a fair and just society, we must be able to distinguish between the weakest and the vulnerable sections and the empowered and advantaged sections of society. For the enhancement of democracy, we must take appropriate actions to protect the deprived and marginalised one's to bring their conditions at par with the advantaged. True

justice would be only realised when its benefits reach those who *most* deserve them. The exercise of granting and providing social justice to the needy ones leads to the strengthening of the claims of not only equality, but also of democracy.

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## 13.7 REFERENCES

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## 13.8 ANSWERS TO CHECK YOUR PROGRESS EXERCISES

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### Check Your Progress 1

- 1) Your answer should highlight the following points
  - Efforts by the government to protect weaker sections of society.
  - Also called affirmative action.
  - Arguments supporting such policies.

### Check Your Progress 2

- 1) It means social environment must be changed to provide equal start for everyone.