

Positive Discrimination: A Constitutional Imperative?

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Abstract

Positive discrimination is a concept of great importance in the context of Article 15 (3) of the Constitution of India. It embodies the essence of affirmative action to assist members of disadvantaged groups in overcoming the obstacles and discrimination they face in the society. The process of empowerment of women started for the cause of dignity of women. Although great efforts have been made to improve the status of women, through various schemes and many programmes in the past in addition to the current slogans of Make in India and Beti Bachao, Beti Padhao the constitutional dream of gender equality is miles away from becoming a reality. This discussion note tends to take place at the interstices of these thoughts on Positive discrimination. Positive discrimination policies have given rise to many scholarly productions, plethora of debates, vast analysis and thinking with myriad appreciation. Yet empirical analysis of the consequences of positive discrimination policies can lead to a more sophisticated and reasoned evaluation of their overall veritability.

Keywords: Positive Discrimination, Article 15 (3), Women, Feminized, Constitutional Imperative.

1. Introduction

The fundamental question is whether positive discrimination is a requisite imperative. The answer is in the permissive, it is fair because, there is a need to break the negative devalorisation of Women. Hitherto, different dimensions and indicators of women empowerment suggested by various authors and academicians range from formal equality to financial independence. The empowerment of women has become the noble cause & the cornerstone of the 21st century at the national forums, amid at the international forefront. However, these efforts and initiatives alone would not be sufficient to achieve this goal and remove the embargo from emancipatory initiatives. Initiatives must be taken to create an atmosphere in which women have full opportunities of decision-making and a firm participatory role with a sense of equality and equalitarian fairness.

2. Aims and objectives of the study

This cross-fertilisation of various positive actions in the march towards realization of women empowerment through elements of positive discrimination, feminized legal science and gender responsiveness with a drill of recourse and references from A.I.R, textbooks and reputed resources provides

a bird's eye view of laws and policy relating to the protection of women in India and reforms in this regard in order to:

- (1). To know the rubrics relating to protection and empowerment of women in the national and international context and the essential paradigm of Art. 15 (3).
- (2). To summarize the role of laws for the welfare of women and remedial measures to women grievances and to curb practices derogatory to women.
- (3) To suggest suitable reforms to facilitate synthesis of the concept of positive discrimination across insights and themes of non-discrimination, women empowerment and equalitarian tasks.

3. Hypothesis

The efforts to amend laws with a view to minimize the gap of gender inequality have not been realized completely and the legal expectations of such reforms have failed to meet the situation in various dimensions.

4. Research methodology

The scope of this Research Methodology is to provide a good little training within the compass of law, policy and goal of improving women's rights

and their access to other productive resources. This synthesis is doctrinal in nature. The present synthesis draws a relation to equality, positive discrimination and the equalitarian fairness tasks generally. It is to be believed firmly that the law relating to women needs to be reformed in the light of the comparative scheme of things keeping in view the notions of substantive equality in other parts of the world and developments at the national and international platforms to ensure that there is no miscarriage of justice and we move smoothly in the march with a proper way forward and worth and dignity of women is protected.

Positive discrimination builds an edifice and interstice of creative empowerment for feministic affirmative scheme. This vital embodiment should not impose a notion of mere static truth, but should undergo dynamic processes to empower women in all walks of life and should be viewed within the context of and as an extension to all the rights of women in society. Not only does the Grundnorm guarantee equal political status to women, there is even a scope for 'positive discrimination' in their favour as stated above in terms of Article 15 (3). Women's empowerment in India is heavily dependent on many horizontal and vertical variables that include urban and rural factors, educational profile, caste and class, marital status, age, molestation and harassment. Policies on women's empowerment exist at the national, state, and panchayat levels in many areas of public life like agriculture, sensitization in health, finance, nutrition, education, economics, gender-based violence, and participatory programmes.

The key compass of a democratic setup, development and participatory programmes have tried to meet the advancement of women in different spheres satisfactorily. There is a good experience of 'Positive discrimination' that is distinctive and significant. Positive discrimination in India corresponds to the essence of the rule of affirmative action in the US. The approach of formal equality under Article 14 and 15 (1) is to ignore the personal characteristics of an individual altogether. However, Articles 15 (3) and 15 (4) constitute exceptions to the same while providing for the State to create exceptions or special provisions in favour of women, children and for the advancement of any socially and educationally backward classes of its citizens.

There is a long history of insensitivity that needs to be reversed according to Lina Gonsalves. Feminized Legal Science or legal theory is an emancipatory concept which talks about the removal of exploitation from women. It is concerned with the myriad appreciation and evaluation of a fundamental function of, '*how the law affects women*'. Moreover,

there is an important difference between the preferential treatment in the United States and the Indian policy which relies primarily on Reservations. Positive discrimination in India is associated with three well known categories of susceptible people who have been entitled to positive discrimination.

The landmark truth of substantive equality has been embedded very differently in India as compared to United States and other North American Countries like Canada and corresponds to the American concept of Affirmative action, which originated later. The need to give preferential treatment to disadvantaged groups in the form of reservations cannot be held violative of the formal doctrine of equality. However, there are significant gaps between policy decisions and actual ground zero situation regarding the implementation of anti-discriminatory measures which needs to be given full consideration on the priority.

Discrimination changes the basic notion of fundamental rights. This principle is repeated in a plethora of fundamental human rights documents of the United Nations and the European Union which incorporate certain uniform notions vis-a-vis rights of Women. It is often based on ignorance, ill prejudice, fad stereotypes and dogmatic thinking.

There is a need to formulate a more balanced and cogent feminized and inner moral precinct of laws and policies promoting a reform in education, making education a service under the consumer law, sensitizing the vulnerable areas and prevention of aggression and violence against women in the light of the feminized legal analysis. Apart from formal equality and positive actions, many other provisions in the Constitution lay stress on equality through directives and duties between men and women. Article 39 (a), states that the State shall direct its policy towards securing equality to men and women, the right to an adequate means of livelihood, and Article 39 (d) enjoins the State to direct its policy towards securing equal pay for equal work for both men and women. Article 42 provides for securing just and humane conditions of work and for maternity relief and Article 51 (A) (e) refers to the fundamental duty of citizens to renounce practices derogatory to the dignity of women.

Landmark steps of Seventy-third Amendment Act, 1993 and the Constitution Seventy-fourth Amendment Act, 1993 reserved seats for women at the local level bodies with the hope that these measures will set the trend to upscale the legitimate place of women in India. Yet, Articles 243 D and 243 T were added to the Constitution to provide that not less than one-third of seats would be reserved for women and such seats may be allotted

by rotation to different constituencies in the local bodies.

A gender-responsive or gender-sensitive indicator measures gender-related changes over time. There is a widespread agreement that gender mainstreaming, the most prominent legacy of the Beijing Conference, has become a technocratic exercise that prevents engagement with the issues of power and politics that lie at the heartbeat of fulfilment of women's empowerment. In fact, Beijing PFA is committed to advance the goals of equality, development and peace for all women everywhere in the interest of all humanity. In the same vein, the framework of ICPD through United Nations Population Fund expands the possibilities for women to lead healthy and productive lives.

Positive discrimination or action is a means of ensuring substantive distributive justice and equality of opportunity. Authorities, leading and well known cases show, a lot of things about the women are perplexing and women are often molested and harassed by the male dominated patriarchal ego. It cannot escape the contours of the discussion that, India is also a signatory to several prominent international Treaties and Conventions. At Beijing, the government of India announced 33 per cent reservation for women in local governing bodies.

India is still adopting measures of United Nations Initiatives and the International movements to enhance its emancipatory initiatives to protect and give equal status to women. At one end of the spectrum, these steps do not violate the Constitutional prerogatives of the advantaged groups, but rather constitute a mandate of favourable exercise on the part of the government to take positive actions progressively and in tune with the spirit of Article 15 (3). At another pole of the spectrum, the Committee on the Status of Women in India endorsed the recommendation given by the UN Commission on the Status of Women with a mandate to review, evaluate and recommend measures to ensure equality between men and women in all walks of national life through an autonomous Commission. In order to secure her dignity, there is an immediate need for a distinct law on marital or spousal rape in India, which should be at par with the accepted international norms on this issue.

There is a state of disagreement and some fissures that obscure the vital discussions and theme for future, for feminized legal theory which fails to interrogate the more productive synthesis and potential analysis that lie in the interstices of gender and feminism. It is not done, if feminized principles and positive discrimination is not nurtured beyond theoretical claims. It is not meaningful unless women

are given a true autonomous mandate. It is half-done, because formal doctrine is one thing and actual and pragmatic practice of these imperatives is another. It is pertinent to mention here that positive steps and emancipatory developmental initiatives in female enrolment in higher education and real GDP per capita would seek to gradually lift the socio-economic status of women, as it has done.

5. Conclusion

Thus, positive discrimination is a Constitutional Imperative, breaking the general rationale of Article 14 and Article 15 (1) because it is often rationalized as a way of correcting prior discrimination or disadvantage. The horizontal dimension of feminism also gathers emancipation of women because the tone is that women's development has to be related to national development anywhere in the world. The three branches of the government have always come forward in a number of ways to promote the mainstreaming of economic, social and above all, the welfare rights of women. Women must understand the prerogatives and application of these laws, with latest upkeep and happenings in order to utilize these laws at the earliest to protect herself and other fellow women of her country and the world because without women life is worth nothing. They are benevolent. They are not malevolent. And why should they be?. They are equal with men. Positive discrimination and affirmative action is in fact a fair concept and a gem of an enlivening paradigm.

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