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JOHN RAWLS, PROTECTIVE DISCRIMINATION AND INDIAN JUDICIARY

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Introduction

Every program implementing Protective discrimination or Preferential treatment involves counter-balancing the principles of Justice and equality. An inquiry is necessary to understand, how far these programs are justified with the reference to the principles of justice, equality and utility. Also whether, it is possible to defend preferential treatment policies as an application to the principles of social justice and compensatory justice of the Rawlsian principle of 'Justice as fairness'. This kind of analysis it is hoped, will have some bearing on the eventual resolution of the different legal problems associated with preferential treatment. An examination of the policy of preferential treatment in the light of the Rawlsian theory of Justice is made in this paper to get a holistic jurisprudential understanding of these issues.

John Rawls Theory of Justice

The most influential theory of justice over the last half century has been John Rawls's theory, termed 'Justice as fairness'. John Rawls's 'A Theory of Justice' published in 1971 and a score of articles which constitutes the Rawlsian system in the contemporary political philosophy, is a classic example of the contractual approach applied to liberal justice.

Rawls outlined the features of his conception in an article that appeared in 1957, entitled Justice as Fairness (also the nomenclature for his theory) culminating in 'A Theory of Justice'. The elaboration and classification of his theory continues through two more books 'Political Liberalism' and 'The Law of the Peoples' published in 1999.

'A Theory of Justice'[1] coincided with the culmination of various movements in the United States in the 1960's & 1970's. The movement for Civil Rights, liberation of the Blacks, equal rights for the minorities, alleviation of poverty through the Great society program & the anti-Vietnam war protests raised questions about individuals & minority rights , just and unjust wars and issues of social justice in policy formations and executions. 'A Theory of Justice' examined many of these issues while formulating the principle of justice for a well ordered society. John Rawls attempted to deduce a set of permanent principles of justice as matching with, 'our common sense and firmest convictions', providing the moral basis of a democratic society with which the notion of a just society was inseparably linked.

Rawls acknowledge that existing societies are seldom well-ordered, for there is usually a dispute regarding justice & injustice. He refers to his conception as pure procedural, distinguishing it from perfect procedural & imperfect procedural, since there is no independent criterion for the just result:

"There is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed…the background circumstances define a fair procedure…what make the final outcome…fair or unfair is …a fair procedure (which) translates its fairness to the outcome only when it is actually carried out"[2].

Rawls tries to demonstrate that justice is about rules that govern a social practice, and not about the evaluation of different situations through criteria such as need and desert. He tackles the

main criticism of his approach, which is that, following the rules in an exact manner may produce outcomes that are inconsistent with our common-sense notion of justice. Therefore, he purports to show that under certain carefully specified conditions rational agents choose a set of principles that are consistent with our intuitive ideas of distributive justice, and that, when followed, yield outcomes which, whatever they might be, are morally acceptable. **Norman P. Barry** regards Rawls theory as a contribution to the theory of social justice because of his continual stress that there is a need for rational justification of all departure from equality. Furthermore, there is a strong preference for equality in the theory which contrasts it with other versions of entitlement theory[3]. Rawls makes a clear cut demarcation between production and distribution. Though he understands the importance of productivity to bring out the natural talents in persons, he realizes the importance of controlling the market criteria by principles of social justice. He also rejected *desert* and *merit* on the grounds that skills, talents and endowments are social products. Rawls does not seek to equalize human beings or ignore individual talents and achievements. Rather he believes that inherited advantages and genetic superiority have to serve society and, in particular, the least advantaged.

Rawls critique of Utilitarianism

Rawls developed a concept of justice that is congruent with liberty and reciprocity. Both these concepts are at variance with utilitarianism. Rawls rejected classical Utilitarianism of Bentham and Sidgwick by developing an alternative base on Kantianism, a rival school of Utilitarianism. He observed, that while Utilitarianism is an individualistic theory par excellence it ignores the distinctions that exists between persons. He accepted its premises that each individual has a view of his good, which the society has to satisfy provided no one is harmed in the process. Though Utilitarianism believed in the idea of the 'greatest happiness of the greatest number', Rawls accuses it of ignoring the interests of the least advantaged. He queried about the reasons as to why the greater gain of some should not compensate for the lesser losses of others, more importantly, why should the violation of liberty of a few should not be made right by the goods shared by many[4]. As a result, Utilitarianism treats some individuals only as means towards the ends of others, while justice as fairness considers persons as ends and not as means only. Rawls considers the principle of utility as incompatible with the conception of social cooperation among free and equal individuals for mutual advantage and with the idea of reciprocity implicit in a well-ordered society[5]. Further more, Utilitarianism does not distinguish between the 'claims of liberty & right on one hand and the desirability of increasing aggregate social welfare on the other'[6]. In justice as fairness, basic liberties are taken for granted and rights secured by justice are not 'subject to political bargaining or to the calculus of social interests'[7]. Utilitarianism is a teleological doctrine while justice as fairness is a deontological theory, for it does not specify good independently form the right or interpret right as maximizing good. The question of attaining the greatest net balance of satisfactions never arises in justice as fairness.

Rawls also accuses utilitarian J.S. Mill, in spite of his revision of the doctrine, for failing to secure individual rights. Mill continues to see right as maximizing good without sufficient guarantees of securing equal liberties for all. For Rawls, values like individual status and dignity have an independent status and cannot be derived from the maximization of social good, while for Mill these are derivative. Mill does not show how the distributive ideal could be subsumed under an aggregative one. Like other classical economist, he assumes that greatest good as the maximum total income but fails to devote himself to the question of what happens if maximum total happiness leads to extreme inequality.

Rawls & Contractual Tradition:

John Rawls emphasizes his allegiance to the Social Contract tradition from the very beginning of 'A Theory of Justice', saying , " My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the Social Contract as found, say, in Lock, Rousseau & Kant." "The guiding idea is that the principles of justice …are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association"[8]. Defending his use of the term 'contract' against potential objection, he concludes, "Finally there is the long tradition of the contract doctrine. Expressing the tie with this line of thought helps to define ideas and accords with natural piety"[9].

Rawls's historical connections are more complex then these remarks suggest. For one thing, he draws heavily on David Hume's view about the 'Circumstances of Justice' to flesh out elements that are less explicit in classical contractarian thinkers, although Hume is not a Social contact thinker. This source of complexity poses no problems, however, since Hume's ideas on these issues dovetail well with those of Locke and Kant. Rawls explains his choice of Hume by saying that Hume's account of the 'Circumstances of Justice' is 'especially perspicuous'[10], more detailed than those of Kant and Lock.

In two crucial respects, however, Rawls's theory is different from all preceding social contract views. Because Rawls's aim is to generate basic political principles from a very spare set of assumptions, and because it is an example of what Rawls calls 'pure procedure justice', in which the correct procedure defines the correct outcome, Rawls diverge from the historical tradition by not assuming that human beings have any natural rights in the state of nature. His view thus departs more radically from the natural law views of Grotius and Pufendorf than do the theories of Locke and Kant.

The Second difference involves the role of moral elements in the contract procedure. Rawls's choice situation includes moral assumptions that Hobbes, Locke, and even Kant (in his political writings) eschew. The **veil of ignorance** supplies a representation of moral impartiality that is closely related to the Kantian idea that no person should be used as a mere means of the ends of the others.

Rawls's dual allegiance - to classical social contract doctrine and to the core ideas of Kant's moral philosophy - is a source both of illumination and of profound tension in Rawls's theory. There is no doubt, however, that, despite his deep commitment to moral ideas of equal respect and reciprocity, Rawls never diverges from understanding his project as a part of the social contract tradition, as he reconstructs and interprets it. Even when there are, apparently, important divergences, Rawls points the reader to underlying similarities. Thus, although he appears not to use the fiction of a state of nature, he informs his readers that in fact he does so. "In Justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract"[11]. Through Rawls work the tradition has made its most sophisticated contribution to our thinking about what justice requires when we begin from the idea of equal persons, their worth and their capacities.

Analyzing Rawls theory of Justice

Rawls begin with the assumption that the principle of justice that 'expresses our moral sentiments'[12] is a product of an Original agreement in the Original position, a hypothetical situation, and 'a heuristic device' similar to the state of nature of the traditional social contract theory. The persons in the Original position are rational, capable of a conception of good and have a sense of

justice. They are rational with a capacity for, intelligent pursuit of one's own interests, to enter into agreements that they adhere and fulfill. Rational persons do not suffer from envy, for envy tends to make everyone worse off and is collectively disadvantageous. Like Kant, Rawls also believes that envy is one of the vices of humankind. Furthermore, the parties are not in a position to coerce anyone, thus ensuring that agreement is voluntary. The parties are mutually disinterested, are roughly similar in needs and interests, equal in power, and are moral and autonomous, thereby, making it possible for fruitful cooperation. Like Hume, Rawls characterizes society as a cooperative venture of mutual advantage, where there is both identity and conflict of interests. Borrowing from Hume, he specifies the circumstances of justice with two background conditions, which gives rise to the conception of justice: First are **Objective circumstances** that make human cooperation both possible and necessary. Individuals coexisting together in the same definite territory are similar in physical and mental power and live in conditions of moderate scarcity. The Second are **Subjective Circumstances**, where parties with roughly similar needs and interests are willing to cooperate for mutual advantage. They have their own life-plans, which obviously leads them to have different ends and purposes and make conflicting claims on the available natural and social resources. However, the interests advanced by these plans are not in the interest of the self, for the persons are mutually disinterested with the incomplete knowledge and limited powers of reasoning and memory. Rawls concedes plurality of life-styles and the possibilities of diverse philosophical and religious beliefs and social & political doctrines. Among the objective circumstances are concerned, he emphasizes mutual disinterestedness (limited altruism). The original position based on pure procedural justice was specified to meet these two conditions.[13]

For Rawls justice is achieved through the device called the **Veil of Ignorance**, to nullify the influence of genetic endowments, superior talents and social status, their fortune in distribution of natural assets and abilities, their physical & mental strengths, their conception of good, particulars of their rational plans of life and special features of their psychological framework, like aversion to risk or their ability to be optimistic or pessimistic. They do not know the economic & political situation of their society or its level of civilization and culture. They have no information as to which generation they belong to but do know they are contemporaries. The parties, however, have general facts about human society, 'understands political affairs and the principle of economic theory; they know the basis of social organization and the laws of human psychology'[14]. This ensures that all will have an equal say. He assures that the principles chosen are in a state of **'Reflective equilibrium'**, 'It is an equilibrium because at last our principles and judgments coincides; and it is reflective since we know to what principles our judgments conform and the premise of their derivation'[15]. He introduces the technique as a method of testing rival moral theories and gauge which one is to be preferred. This suggests a harmony between conditions that govern rational choice and a person's intuitive and political judgments and that it was not a neutral one. He acknowledges that Aristotle & later Sidgwick used this method. Taking a clue from Chomsky, he points out that the aim is to formulate principles 'which make the same discriminations as the native speakers'[16]. Rawls used the original position in two capacities: as an analytic device and as a justificatory device. As an analytical device it tries to understand the conception of justice with its formal requirements like generality, publicity, finality that applies to principles. It tries to reduce complex social problems and the choice of principles to simple cognizable problem of individual choice. In its justificatory role, it defends the choice of the two principles through the hypothetical original position.

Rawls clarifies that the principles of justice are to apply to the basic structure of a society that deals with both the economic and social systems. The role of the basic structure is to 'secure just background conditions against which the actions of individuals and associations take place. Unless this structure is appropriately regulated and corrected, the social process will cease to be just, however free and fair particular transactions may look when view by themselves'[17]. The Basic structure is procedurally neutral. Its institutions and policies do not exemplify any particular religious, philosophical or moral doctrines, what he terms as comprehensive conception[18].

The two principles of justice that were chosen through the original position were initially stated as follows:

1) Each person is to have an equal right to the most extensive basic liberty, compatible with a similar liberty for others.
2) Social & economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all[19].

Wolff[20] accused Rawls of falling into the same trap as his utilitarian opponents, namely of confusing justice with welfare and the phrases 'everyone's advantage' and 'equal open to all' to be ambiguous. Rawls acknowledges that this part of the second principle could be interpreted in terms of **Pareto Criterion**, which states that group welfare is at an optimum when it is impossible to make any one man better off without at the same time making at least one other man worse off. In Distributive Justice, Rawls points out the incompleteness of the Pareto Criterion, not only vis-à-vis allocation of goods among individuals but also vis-à-vis the many arrangements that the Pareto principle can serve as a limited criterion of efficiency, but not as a criterion of justice. The first principle embodies the notion of liberty. The second part of the second principles embodied the idea of fraternity. The final statement of the second principle read as follow:

'Social & economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices & positions open to all under conditions of fair equality of opportunity'[21] .

Since the two principles are to be applied to the basic structure it 'is to be arranged to maximize the worth of the least advantaged of the complete scheme of equality, liberty shared by all'[22]. **2a** is called the **difference principle** or **maximin** and **2b** is **fair equality of opportunity**. The difference principle, 'tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative the worst outcome of which is superior to the worst outcomes of the others'[23]. Rawls taking into cognizance Tawney's criticisms about equality of opportunity, acknowledges that it enables only individuals of exceptional ability to overcome the disadvantages which accrue by birth. It is of very little help to individuals of average or ordinary ability. Through fair equality of opportunity Rawls seeks to mitigate the disadvantages imposed by both natural endowments and social circumstances and in the process, the notion of fairness undercuts a meritocratic society. The first principle requires, equality in the assignment of basic liberties (right to vote and to be eligible for public office), freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of person along with the right to hold personal property and freedom from arbitrary arrest & seizure, as defined by the rule of law. The second principle applies to the distribution of income & wealth, the design of organizations that regulates difference in authority, responsibility and chains of command'[24]. The first principle is lexically prior to the second & 2b is lexically prior to 2a. this ordering implies that

a departure from the first principle cannot be justified or compensated for by the greater social & economic advantage. These principles imply that the social structure is divisible into two or more distinct parts, in which the first principle applies to one and the second to the other. If the parties in the original position feel that their basic liberties can be effectively exercised, they will not exchange a lesser liberty for an improvement in economic well-being. Taking into consideration Lessnoff's suggestion that restrictions on liberty are unjust unless, either (a) they are necessary to prevent unjust inequalities or (b) they are to the advantage of everyone whose liberty is restricted, Rawls restates that priority rule of liberty, the first principle and its priority rule is finally as follows:

"Each person is to have equal right to the most extensive total system of equal basic liberties compatible with similar system of liberty for all…..The principles of liberty can be restricted only for the sake of liberty. There are two cases (a) a less extensive liberty must strengthen the total system of liberty shared by all, and (b) a less than equal liberty must be acceptable to those citizens with the lesser liberty".[25]

The superior position is not according to liberty as such but rather to the list of liberties described as basic. Rawls does not offers a general definition of liberty from which this list could be deduced. He argues that his difference principle, which he calls democratic equality, is different from liberal equality and the system of natural liberty. The difference principle is a maximizing principle and functions within a generation and the just savings principle operates between generations. It tips the balance in the favour of equality by removing a bias of social and natural contingencies. Inequalities arising out of natural endowments and by birth are to be compensated, for they are undeserved. It was not the same as that of redress. It transforms the aim of the basic structure so that the total scheme of institution no longer emphasizes social efficiency and technocratic values. It treats natural talents of individuals as social assets whose benefits are to be shared by all individuals. Desert and merit are rejected as the basis.

"The naturally advantaged are not to gain merely because they are more gifted, but only to cover the costs of training and education and for using their endowments in ways that help the less fortunates as well. No one deserves his greater natural capacity nor merit a more favourable starting place in society".[26]

The reasoning is that, natural distribution is neither just nor unjust. They simply represent natural facts. The two principles correct this arbitrariness as 'no one deserves his place on the distribution of native endowments any more than one deserves one's initial starting place in society'[27]. Rawls recognizes that fortune plays an arbitrary role in the distribution of natural abilities. He does not obliterate natural endowments but rather give incentives to the well-off to ensure productivity, which in turn lead to the elevation of the worst-off. Unlike the principle of utility that treats some individuals as means to the end of others the difference principle treated all individuals both as means and as ends. Individual assets are, social assets, which is why he emphasizes the need for reciprocal advantages and benefits, since society recognizes mutual respect between individuals.

Rawls is not nullifying individual achievements but insists on its utilization for the benefit of the least advantaged. He was concerned with majority and minority deprivation. It is the liberalism for the disadvantaged and the underprivileged. The second principle is an acknowledgement of and a tribute to the long socialist critique of liberal equality. He rejected trade-off between efficiency and equality and spoke reciprocal benefits, for he treated productive capacities as social assets. He

accepted social stratification, implicitly rejecting the argument of class divided society.

Rawlsian paradigm has once again revived the debate on equality in the modern jurisprudence. Equality for Rawls is an operational concept tied to his procedural theory of justice. He accepts the fact that strict equality is inefficient and that inequality is an inevitable part of society. The innovative feature of his theory is that inequality is justified if it leads to the elevation of the worst-off. Rawls does not lament, like Plato and Aristotle, on inequality as the cause of instability and revolution in a society, nor does he, like Rousseau, consider inequality to be the source of human misery, moral degradation and corruption. Neither does he , like Gandhi, accepts a poor society, which is equal as compared to a rich society, based on inequalities of wealth and status. His endeavor is to justify the level of morally acceptable inequalities within advanced affluent societies with a pragmatic approach to achieve tangible, substantive and long-term equality. The 'difference principle' maximizes the minimum and is conceived as a basic right. It is offered as an alternative to the Pareto principle as a measure of social welfare. The difference principle he advocates does not aim at the fulfillment of the needs nor does it merely guarantee that the poor will remain above the social minimum. It advocates procedural elevation of the life prospects of the least well-off. Like Kant, he argues, that individual talent and aptitudes have a social origin. However, Rawls does not obliterate unequal individual endowments. He takes into account the criticisms against the liberal ideas of equality of opportunity that it applies only to individuals with extraordinary abilities ignoring ordinary human beings. Through the second part of his second principle he alleviates the disadvantages by birth and social circumstances and undermines a meritocratic society. His idea combines growth with equality, which represented the post-second world war liberal-social democracy consensus.

Ronald Dworkin and John Rawls.

Ronald Dworkin is in league with Rawls in his defense of distributive justice. He offers an egalitarian theory that balances equality with liberty through definition and reasoned argument[28]. He delineates a close bond between freedom and equality, whereby government has to attend to the liberty of all persons to show equal concern for their lives. Dworkin qualifies that since liberty cannot be a resource to be bargained away in a business deal, it has to be safeguarded through an equitable distribution of resources. According to him there are two different types of rights which individuals may be said to have. The first is the right to equal treatment which is the right to an equal distribution of some opportunity or resource. The second is the right to treatment as an equal, which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else[29]. The right to 'equal concern and respect', according to him, is the most fundamental and axiomatic of all rights[30]. He said:

"Justice as fairness, rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice"[31].

This right is owed to human being as moral persons and follows from the moral personality that distinguishes humans from animals. Thus Dworkin emphasizes that 'individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them'[32]. Any arrangement for the allocation of social positions and goods has to be on the basis of this right.

To the objection that affirmative action dilutes merit, Dworkin points out that one cannot

uphold merit in abstract. Instead of confining it to standardized tests and the like, he argues that merit can also be defined to involve the background of lack of privilege such as race. Thus, 'back skin' can be meritorious and socially useful under conditions of inequality, but this is not the same as race superiority[33]. Preferential treatment for Dworkin is not motivated by prejudice but by rational calculation about the socially most beneficial use of limited resources[34]. Those who are excluded on grounds of preferential treatment have to accept the need of society, just like the business man who has to sacrifice for the sake of building a superhighway[35].

Preferential Treatment in India: Jurisprudential reflections.

John Rawls idea of equality is not different from the equality of opportunity that the Constitution of India guarantees. The Constituent Assembly Debates clearly shows that by providing reservation the framers intended to embody the idea of fair equality of opportunity into the Constitution.

"Equal merit pre-supposes equal opportunity, and I think it goes without saying that the toiling masses are denied all those opportunities which a few literate people, living in big cities enjoy. To ask the people from village to compete with those city people is asking a man on a bicycle to complete with another on a motorcycle, which itself is absurd."[36]

Articles 15(4), 16(4), 16(4A), 330, 332 expressly permit the State to afford preferential treatment either in employment, electoral representation or educational and welfare for the Scheduled Castes, Scheduled Tribes or Socially and Educational Backward Class of citizens in India. Hence, what the concept of reservation does is it recognizes the initial social and educational handicaps that affect a certain category of persons and which causes them to occupy a disadvantageous position in society, and move away from the standard procedure of meritocratic selection as demanded by formal equality.

The Difference Principle propounded by John Rawls can be used to justify the concept of Reservations[37] in India. In absence of reservations the requirement of justice and fairness will not be met. Reservation arranges the inequalities in a way that benefits the least advantaged, i.e the Scheduled Castes, Scheduled Tribes and the Socially and Economically Backward Classes. The lower classes that have been marginalized due to historical discrimination are given a preferential treatment in order to create a level playing field. Although reservation does not remove the actual inequality, it rearranges them to afford a fair equality of opportunity to the lower castes.

Indian Supreme Court has attempted to provide a philosophical justification to the Preferential treatment program in India. The first attempt of an enquiry into the jurisprudential basis of protective discrimination was undertaken by Justice Subba Rao in his dissenting judgment in *Devadasan case*[38]. He brought forth the idea of giving practical content to the rule of equality of opportunity by the illustration of a horse race[39]. He understood the need for providing favoured treatment or 'adventitious aids' to backward communities in the following words:

"Centuries of calculated oppression and habitual submission reduced a considerable section of our community to a life of serfdom. It would be well nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case. They would not have any chance if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their own legs. That is why the makers of the Constitution introduced cl (4) in Art. 16"[40].

Justice Subba Rao perceived Art. 16(4) not as an exception, but an 'untrammeled provision'.

He said:

"The expression 'nothing in this article' is a legislative device to express its intention in most emphatic way that the power conferred there under is not limited in any way the main provision but falls outside it. It has not really carved out an exception but has prescribed a power untrammeled by the other provisions of the Article"[41].

This was the nascent attempt to harmonize and equalize the ever conflicting values of individual right and social justice. The approach of Justice Subba Rao created a cataclysmic change in framing a theoretical foundation of protective discrimination in later cases.

Thomas[42] is an eloquent testimony to prove this. Supreme Court in this case abandoned the conventional approach towards equality and protective discrimination and took an innovative step. The Court catapulted the exceptional and special provision of reservation on the position of the mandatory clause of equality of opportunity in employment. This approach supplemented the holding of Justice Subba Rao in *Devadasan case* and thereby fortified the concept of reservation as a facet of equality of opportunity. In *Thomas*, the concept of equality underwent a drastic and dynamic import. The equality provision of the Constitution was interpreted as forming part of a same mutually supplementary code. Moreover, the provision of reservation was held to be an explanation or an emphatic statement of the mandate of general equality of opportunity. By holding that the content of equality should be result oriented and not mere formal equality and it not only necessitates 'progressive elimination of pronounced inequality' but also warrants affirmative governmental action and compensatory measures shows that the Ralwsian principle of redress has been read into the equality provisions of the Constitution in *Thomas*. Justice Krishna Iyer said:

"The distinction would seem to be between handicaps imposed accidentally by nature and those resulting from societal arrangements such as caste structures and group suppression. Society being, in a broad sense, responsible for these latter conditions, it also has the duty to regard them as relevant differences among men and to compensate for them whenever they operate to prevent equal access to basic, minimal advantages enjoyed by other citizens"[43].

Justice Iyer viewed that re-distributive justice should be aimed at providing sufficient environmental facilities for developing the full human potential of the underprivileged and this could be accomplished only when the utterly depressed groups could claim a fair share in public life and economic activity including employment under the State[44]. This observation not only accommodates the Rawlsian concept of justice but also bring forth the idea of power sharing. This idea go fortified by Justice Mathew's analysis that equality of opportunity in matters of employment is comprised of the compensatory measures that need to be taken by the State with a view to putting the backward classes on par with the members of the other communities. This in turn enables them to get their due share of representation in public services[45]. By reading that the result oriented equality of opportunity aims to put backward classes on parity with the forward communities revels Dworkin's concept of right to be treated as equals.

The Supreme Court further trod on the untravelled terrains of Jurisprudence in *A B S K Sangh case*[46]. Starting from the point of identifying the socio-economic rights as a part of human rights, the court went on to explore the theories of Dworkin and Rawls for their relevance and applicability in the Indian context of protective discrimination[47]. Analyzing the Rawls theory of Justice, Justice Chinnapa Reddy said:

"If the statement that 'Equality of opportunity must yield equality of result' and if the fulfillment of Article 16(1) in Article 16(4) ever needed a philosophical foundation it is furnished by Rawls's theory of Justice and the Redress Principle"[48].

Much light was shed by Justice Krishna Iyer on the idea of sharing the state's power. he said:

"Power, material power, is the key to socio-economic salvation and the state being the ridus of power, the framers of the Constitution have made provision for representation of these weaker sections both in the legislative and the executive"[49].

By holding that the special provision of reservation in the Constitution was not a jarring note but 'fostered and furthered' the idea of equality of opportunity, the court re-emphasized its earlier position in *Thomas case*. The courts reformulation of the provision of reservation as a right and not a concession or privilege with a futuristic note that excellence and equality might co-operate fruitfully and not compete destructively, is a significant attempt to reconcile the ever competing equalities within the single fabric of equality of opportunity in public employment.

Justice Chinnapa Reddy, got another opportunity for jurisprudential enquiry in *Vasanth Kumar case*[50]. He highlighted the necessity of extending need based justice to backward classes in the following words:

"They (the Scheduled Castes, the Scheduled Tribes & the other socially and educationally backward classes) need aid; they need facility; they need launching; they need propulsion. Their needs are their demands. The demands are matters of right & not philanthropy. They ask for parity and not charity"[51].

By reading the claim of backward classes into equality as a matter of human and constitutional rights, and treating their rights to equality on par with those of others, denotes the Dworkin's concept of right to be treated as equals. His attempt to explode the myth of controversy between the meritarian principle and compensatory principle is another significant milestone in the path of the jurisprudential enquiry akin to Dworkin's and David Miller's view that meritarian principle should not be overemphasis in an egalitarian society.

It was in Mandal case[52] the doctrine of SharingState power got crystallized. The court rightly perceived the value of employment in shaping the individual's self-esteem and self-worthiness and if it is a government employment it has an added edge in giving opportunity to participate in the State power. Justice P.B. Sawant said:

"The employment whether private or public thus, is a means of social leveling and when it is public, is also a means of directly participating in the running of the affairs of the society. A deliberate attempt to secure it to those who were designedly denied the same in the past, is an attempt to do social and economic justice to them as ordained by the Preamble of the Constitution"[53].

Thus the court reached at the right destination by canvassing the need for equal participation of all sections of society in the State power. This reflects the court's upholding of the values of human worth and egalitarianism. The above analysis of the judicial response reveals that the Indian Judiciary had started its jurisprudential enquiry during the early period of its confrontation with the protective discrimination policies. The fillip of the journey was made by Justice Subba Rao in 1964 & the momentum was obtained in *Thomas* later. The court since then laid down a solid jurisprudential foundation of protective discrimination, a desideratum to build upon a sound and steady legal system.

Though Rawls propounded his theory of justice in the decade of 70's, Rawlsian principles were present while framing of the Indian Constitution. The framers of the Constitution were very much concerned with the greatest benefit of the least advantaged section of the Indian society. Art.16(4) and subsequent addition of Art. 15(4) are a clear implication of the implementation of Rawlsian principle of Justice in Indian Society.

(Endnotes)

1 John Rawls, *A Theory of Justice*, Universal Publication Co. Pvt. Ltd., Second Indian reprint 2005. First published in 1971 by Cambridge, Mass. Harvard University Press, Oxford.
2 Ibid at p.86.
3 Norman P. Barry, *Introduction to Modern Political Theory*, Macmillan, London, 1995, p.173 cf. Supra note 1.
4 Supra note 2 at pp 26, 33.
5 Ibid at p 13.
6 Ibid at p 28
7 Id
8 Ibid at p. 11.
9 Ibid at p. 16. The odd remark about 'natural piety' is an example of Rawls's lifelong respect for the theories of his predecessors, a hallmark of both his teaching & his writing.
10 Ibid at p. 127.
11 Ibid at p. 12.
12 Ibid at p. 130.
13 Ibid at pp 131-135.
14 Ibid at p. 137
15 Ibid at p.137.
16 Ibid at p. 47.
17 John Rawls, 'The Basic Structure as Subjects', *American Philosophical Quarterly*, 14, pp 159-165 at p. 160.
18 John Rawls, 'The Priority of Right over Good', *Philosophy and Public Affairs*, 18, pp.257-276 at p.263.
19 Supra note 2. at p. 60.
20 Wolff, R.P*, Understanding Rawls*, PrincetonUniversity Pres, Princeton, 1977. cf. Supra note 1 at p. 300.
21 Supra note 2 at p. 83.
22 Ibid at p. 205.
23 Ibid at p. 153.
24 Ibid at p. 61.
25 Ibid at p. 250.
26 Ibid at pp 101-102.
27 Ibid at p. 104.
28 Ronald Dworkin, *Taking Rights Seriously*, Universal Publication Co. Pvt. Ltd, 3rd Indian reprint 2005, First published in 1977 by Cambridge Mass, Harvard University Press.
29 Ibid at p. 180.
30 Ibid at p. xii.
31 Ibid at p. 182.
32 Ibid at p. 180.
33 Ronald Dworkin, *A Matter of Principle*, Cambridge Mass ,HarvardUniversity press. P. 298-299.
34 Ibid at p. 302.
35 Id.
36 Constituent Assembly Debate, Vol III, 616 (1950).

37 Reservations of seats in public employments, educational institutions and elections for SC's, ST's and 'Socially and Educationally Backward classes' is a form of preferential treatment adopted in the Indian Constitution.

38 *T. Devadasan*v. *Union of India*(1964) 4 S.C.R. 680.

39 Subba Rao, J., said: "To make my point clear, take the illustration of a horserace. Two horses are set down to run in a race – one is a first class race horse and the other an ordinary one. Both are made to run from the same starting point. Through theoretically they are given opportunity to compete with the race horse. Indeed, that is denied to it. So a handicap may be given either in the nature of extra weight or a start from a longer distance. By doing so what would otherwise have been a farce of a competition would be made a real one". Ibid at p. 700.

40 Ibid at p. 700.

41 Ibid.

42 *State of Kerala* v. *N. M. Thomas*, A.I.R. 1976 S C 490

43 Ibid, at p. 538.

44 Ibid, at p. 536.

45 Ibid at p. 518.

46 *AkhilBharatiyaSoshitKaramchariSangh (Rly)* v. *Union of India* (1981)1 SCC 246.

47 While Krishna Iyer., J, examined Dworkins socio-jural defense of preference from Polyviou's book *Equal Protection of the Laws*, p. 360, Chinnappa Reddy., J. analyzed John Rawls's Theory of Social Justice. Ibid at pp. 292-293, 310.

48 Ibid at p. 310.

49 Ibid at p. 220.

50 *K. C. Vasanth Kumar* v. *State of Karnataka*, AIR 1985 Sc 1495.

51 Ibid at p. 1508

52 *Indira Sawhney* v. *Union of India*, 1992 SCC (L&S) Supp.1.

53 Ibid at p. 213.