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## **UNIT 6: DIFFERENTIAL TREATMENT AND EQUALITY OF OUTCOMES**

**(IMPORTANT ISSUE: AFFIRMATIVE ACTION)\***

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### **Structure**

- 6.0 Objectives
- 6.1 Introduction
  - 6.1.1 What is Differential Treatment?
- 6.2 Why Differential Treatment?
  - 6.2.1 Need for Social Justice
  - 6.2.2 Social and Political Inclusion of the Weaker and Vulnerable Sections
- 6.3 Equality of Outcomes
  - 6.3.1 What is Equality of Outcome?
  - 6.3.2 Prevailing Views on Equality of Outcome
- 6.4 Differential Treatment and Equality of Outcome
  - 6.4.1 Accommodating Differential Treatment and Equality of Outcome
  - 6.4.2 Does Differential Treatment Lead to Equality of Outcome?
- 6.5 Let Us Sum Up
- 6.6 References
- 6.7 Answers to Check Your Progress Exercises

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### **6.0 OBJECTIVES**

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In this unit, you will read about the idea of differential treatment and equality of outcomes. After studying this unit, you should be able to:

- Explain the meaning of differential treatment
- Understand the concept of equality of outcomes
- Comprehend the relationship between differential treatment and equality of outcomes

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### **6.1 INTRODUCTION**

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The idea of equality is one of the most important features of modern political thought. When classical and medieval thinkers considered hierarchy to be

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## Equality

natural or inevitable, it was the modern political thinkers that initiated the assumption that all human beings are equal. In modern times, the concept of equality has been widely accepted as indispensable for human life. The ideal of equality does not mean that all material goods, the national income or all educational opportunities available in society should be equally distributed among all members of society. On the other hand, it implies that individuals with differences in physical, mental faculties, energies and skills should be given equal opportunities for the development of their personal qualities. The issue of equality, however, incites intense debate when it is applied to the distribution of wealth or income in society, what is commonly referred to as 'social justice'. Questions of the restoration of equality and balance in society dominated political debates where some insisted that an equal or at least more equal distribution of rewards and benefits are desirable. Others argued that justice demands that natural differences among humankind should be reflected in the way society treats them. There has also been a resurgence of anti-egalitarian views amongst a school of thought which argues that egalitarian measures reduce market efficiency which in the long run upsets the economic wellbeing of all. Thus, the champions of egalitarianism have come up with the counter that while absolute equality is not desirable, the onus of efforts to preserve and accommodate variety should be on the state. In other words, the idea of equality denotes the establishment of legal, political and social conditions where people having different physical traits, sex, talents, skills, attributes are able to enjoy equally worthwhile and satisfying lives. Equality, in other words, is not about blanket uniformity, but rather it is about 'levelling' those conditions of social existence which are thought to be crucial to human well-being.

The principle of equality has assumed a number of forms and the most significant among them are formal equality, equality of opportunity and equality of outcomes. Formal equality denotes that all human beings are possessors of equal rights, and thus, by virtue of their common humanity, all individuals should be treated equally. The most important manifestation of this idea is the principle of legal equality or equality before law which implies that all individuals irrespective of their caste, creed, religion, sex, social background and capabilities should be treated equally. While the intent of formal equality was noble, it failed to take into account that the individuals are never free from the evil shadows of caste, gender and social background to benefit from the law bestowed by formal equality.

Equality of outcome implies equal distribution of rewards such as income, wealth and other social goods irrespective of their social and family backgrounds or talents and efforts. This principle of equality is rigorously supported by hardcore egalitarians. However, critics point out that as men differ in their talents and efforts and their social backgrounds, equal distribution of rewards disregarding these differences would kill the

incentive to work hard amongst the more competent and industrious and thus, would lead to injustice and stagnation.

The idea of equality of opportunity means the removal of all obstacles that prevent personal development and self-realisation. It advocates that all individuals should have an equal start to life or equal life chances. It argues that the state should provide equal opportunities to all its citizens. And if one chooses to use the opportunity, his achievement would depend on natural talents, ability to work hard or even luck. In other words, if the state ensures that everyone started equally, unequal outcomes are acceptable and legitimised on the grounds of talent or effort. Thus, equality of opportunity seeks to reduce the impact of inequalities attached to social-cultural and economic backgrounds, but agrees to provide differential rewards according to their talents, skills and efforts.

One particularly difficult issue which the principle of equal opportunities leads to is that of reverse or 'positive' discrimination which will be discussed below.

### **6.1.1 What is Differential Treatment?**

The term "differential treatment" 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 a policy through which special privileges are granted to underprivileged sections of society who in the past or the present have been the victim of social, caste or racial discrimination. These are affirmative action programs undertaken by the state to bring equity and justice among all sections of society. This principle of protective discrimination is also known as reservation, reverse discrimination, positive/affirmative action, preferential treatment etc. These provisions together form the framework for the analysis of the concept of social justice in various egalitarian societies. Its objective is to reduce the persistent discrimination or inequality in society by giving preferential treatment to the backward marginalized sections in the distribution of valued social goods and opportunities. The main agenda for introducing differential treatment is to protect the weaker sections of society who have been socially and historically neglected and exploited and to free the disadvantaged sections of the society from the hegemony of the powerful and resourceful by way of creating ample opportunities for their participation.

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## **6.2 WHY DIFFERENTIAL TREATMENT?**

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Ideally, the state regards all citizens as equal in the eyes of the law and so they shall be treated equally by it. 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 the population of a nation is plagued by discriminatory social practices

practiced in the past, 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 (Scheduled Castes and Scheduled Tribes in India and Blacks in the USA). To reform and regenerate the society from social evils, certain definite and bold measures for the eradication of these social maladies had become the need of the hour. Democracy becomes meaningless without transforming vertical inequality into horizontal inequality. To remedy the situation and compensate for the past injustices perpetrated against the disadvantaged groups, preferential treatment in favor of these groups is sought to be provided by the state agencies. This system of preferential treatment is known as “protective discrimination”.or ‘differential treatment’.

### **6.2.1 Need for Social Justice**

Our society has always been full of inequalities and injustices. Since ages, societies existed as a stratified, hierarchical society where a particular segment of society faced discriminatory social practices leading them to live their lives without the realization of basic human rights. Because of the widespread prevalence of racial or class disparities, their education, wages, living conditions, social status was dictated by the whims of upper strata of society, reducing them to destitution. The economic backwardness brought social humiliation, thus pushing them to the lower strata of society that consequently deprived them even of the dignity of life. In a society fragmented by caste, racial, caste or gender divisions, dominant sections occupying the major portion of resources pulled the levers of power. It facilitated them to enforce their whips, detrimental to the interests of lower segments of society. For centuries, this practice existed where the weak and the vulnerable had to serve the ruling classes without being able to voice their grievances and without any mechanism to address them. This inhuman and barbaric practice continued for centuries which created a wide gap between power holding upper strata of the population and the toiling class was at the receiving end of such discrimination. Accordingly, the judiciaries across the world have provided various institutional avenues for social empowerment of the weaker sections of society. One significant measure among them is the policy of protective discrimination which involves the deliberate act of preferential treatment by the state in favor of particular groups of people by race, religion, gender and even spatial location.

### **6.2.2 Social and Political Inclusion of the Weaker and Vulnerable Sections**

The practice of protective discrimination or differential treatment was introduced to uplift the conditions of the deprived sections to bring them at par with the mainstream of 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. Taking into consideration the economic and social reality of our societies, the idea of affirmative action 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 basic facilities for centuries does not 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 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 today's equals.

Thus, through the principle of differential treatment, egalitarian societies attempts social and political inclusion of the weaker and deprived sections.

**Check Your Progress Exercise 1**

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

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

1) Why is differential treatment necessary?

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**6.3 EQUALITY OF OUTCOMES**

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Equality of outcomes is a substantive conception of equality which attempts to provide substance to the concept of equality. While formal equality dictates behavior through the application of rules and procedures consistently, equality of outcomes, on the other hand, seeks to inject a principle of morality into the application of equality. Equality of outcome stands on the idea that the principle of equal treatment sometimes requires different treatment for certain grounds of disadvantage. The social philosophy behind this conception of equality is an egalitarian understanding of social justice and good life. This concept of equality finds expression through a range

of policies and legal mechanisms in various jurisdictions of the world in the form of reverse discrimination, positive discrimination and affirmative action.

### **6.3.1 What is Equality of Outcome?**

As has been mentioned above, the idea of equality of outcome is the most radical and controversial face of egalitarianism. Equality of outcome implies equal distribution of rewards such as income, wealth and other social goods irrespective of the social and family backgrounds or talents and efforts. The idea of equality of outcome necessitates the introduction of far more dramatic measures by the state for necessary changes to be visible in society. This emphasis on 'outcomes' rather than 'opportunities' shifts attention away from the starting point of life to its end results. In other words, equality of outcome emphasises equal distribution of rewards among all sections of society and does not take into account the starting points, efforts, skill and talent of individuals. As such, the idea of equality of outcome not only differs from formal equality and equality of opportunity but could also possibly contradict them. The demand for equal outcomes is mostly associated with the idea of material equality, social circumstances and also wages. Many see equality of outcome as a prerequisite for securing individual liberty as a certain level of material prosperity is essential to lead a worthwhile life.

### **6.3.2 Prevailing Views on Equality of Outcome**

The idea of equality of income is widely accepted by the socialists, the communists and the anarchists who view that it is the most vital form of equality since without it other forms of equality are futile. On the other hand, conservatives and liberals believe such measures to be immoral or unnatural.

For instance, Rousseau was of the view that the only natural inequality among men is that which results from differences in physical strength. The emancipation of new forms of inequality due to private property is not in accordance with the law of nature, and thus, should be contested. He belonged to a school of thought, which recognized the significance of material inequality in society and at the same time sought for individual liberty and economic incentives. Although, a keen advocate of private property, he nevertheless recognized the dangers of social inequality; one who viewed that 'no citizen shall be rich enough to buy another and none so poor as to be forced to sell himself'. One could also draw similarities between the idea of equality of outcome with the modern idea of redistribution of wealth from the rich to the poor which emphasises more on reducing social inequalities rather than on achieving any abstract goal of social equality. Thus, when modern social democrats advocate equality, they generally refer to the modest idea of 'distributive' equality rather than any radical goal of 'absolute' equality. Although they recognize the importance of material

equality, they do acknowledge the significance of unequal measures like incentives to work.

Fundamental socialists, on the other hand, root for a far higher degree of social equality. Marx, for instance, criticised the very idea of equality and instead termed it as a 'bourgeois' right to inequality. He clearly distinguished between the idea of equal or more equal property ownership with his own goal of common ownership of productive resources. According to him, only when one advocates for the abolition of all forms of private property, however equally distributed it be, the idea of 'absolute' social equality could be achieved. Marx envisions a communist, classless society where human emancipation is possible only when people are free from economic inequalities.

Thus, a clear parallel could be drawn between Rousseau and Marx when they both talked about the possibility of exploitation of the poor by the richer sections because of economic inequalities. As Rousseau laments how the poor get duped by the promises made by the rich to secure the consent of the former to institute legitimate power, Marx also shows how the ruling class produces a legitimating ideology to perpetuate the system of economic exploitation. Thus the advocates of both moderate and radical forms of equality of income agree that it is the most vital form of equality, since without it other forms of equality remain futile. They argue that equal legal and civil rights make no sense to citizens who do not have a job or a roof over their head. Critics, however point out that the pursuit of equality of outcome leads to stagnation, injustice and ultimately tyranny.

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#### **6.4 DIFFERENTIAL TREATMENT AND EQUALITY OF OUTCOME**

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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 labourer do 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 marginalized sections of society. In addition to that, 'equality before law' and equal protection of law' mandate that everyone should be treated alike. Although by legal equality, equality of opportunity has been achieved, the eradication or reduction of economic and social inequalities prevalent in society is yet to be accomplished. The hegemony of the richer sections 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 sections of society more often wish to continue with the status quo and may resist any change in the existing discriminatory distributive

pattern. The deprived and marginalized ones, on the other hand, may want a complete revolution of 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.

### **6.4.1 Accommodating Differential Treatment and Equality of Outcome**

The US has been one of the pioneers in introducing this policy which was associated with 'affirmative action' on race issues that discriminated in favor of disadvantaged groups in the hope of compensating for past injustices. Such a policy has been justified in terms of equal opportunities. It was recognized that when racial minorities, for example, are socially underprivileged, merely to grant them formal equality does not give them a meaningful opportunity to gain an education, pursue a career or enter political life. Thus, in the US, equality of outcomes policies have been adopted through quota systems within university admissions procedures. This was recognized, for instance, in the US Supreme Court case *Regents of the University of California v. Bakke* (1978), which upheld the principle of reverse discrimination in educational admissions. In this sense, reverse discrimination operates rather like the handicap system in golf to ensure fair and equal competition between unequal parties. Some argue that this application of the principle amounts to different but equal treatment and so conforms to the strictures of formal equality. Others, however, suggest that unequal treatment, albeit in an attempt to compensate for previous disadvantage, must of necessity violate the principle of equal rights.

The Constitution of Germany puts the onus of gender equality on the state. It states that "Men and women are equal. The state supports the effective realisation of equality of women and men and works towards abolishing present disadvantages." Similar provisions are found in the Greek constitution where it has been mentioned that "Adoption of positive measures for promoting equality between men and women does not constitute discrimination on the basis of sex. The State shall attend to the elimination of inequalities actually existing, especially to the detriment of women." Likewise, South Africa's constitution mandates the state to eliminate gender and racial discrimination and to take positive actions to ensure that the South African state reflects social diversity. The statement, "the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed," is another example of the kinds of positive or affirmative actions that find expression in different egalitarian constitutions.

The Constitution of India made provisions for differential treatment in favor of the Scheduled Castes and Scheduled Tribes (SCs & STs) which constituted about 23% of the then divided India's population. Apart from providing reservations in parliamentary seats, they were also given preference in the



form of quota in admission to schools and colleges, jobs in the public sector, and various other economic benefits for the overall development of this big chunk of population. 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 Scheduled Castes and the Scheduled Tribes”. The state is empowered to take special measures for the betterment and welfare of 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. These provisions are contained in Articles 15 (4), 16 (4), 46 and 340. The above articles comprise the backbone of social justice measures in the form of protective discrimination and equality of outcome enshrined in the Constitution.

#### **6.4.2 Does Differential Treatment Lead to Equality of Outcome?**

Even though equality of starting points is often associated with equal accessibility, there is an important difference between the two. The idea of equal access has its origins from the principle of equality before the law. Equality of access makes way for equal access to all public services by individual merit and not on the basis of birth and inherited privileges. Thus, equal opportunities were understood as equality of access which formed the predominant liberal notion of equal opportunities in present times. But, equality of access to something for all on the basis of merit is one thing and ensuring a level playing field giving equal opportunities to everyone is another thing altogether. When two individuals who are different by nature are put together at the same starting point, it is necessary to create favorable conditions for the disadvantaged or disadvantage the advantaged. In other words, if equality is to be established between two unequal persons, artificial differences have to be created, so that position of the weaker and vulnerable ones comes at par with the privileged. In this way, inequality becomes a means of achieving equality as it attempts to correct the prior inequality.

This equality is, however, not equality of outcome. This idea of equality of opportunity ensures that everyone should have the same opportunity to become the best and that only the best ones obtain the social goods which are limited in supply. In most interpretations of equality of opportunities such as equality of starting points and equality of resources, the focus is not on equality as a specific value. Rather, it revolves around the idea of competition where the metaphor of race is linked with the circle of life. According to Cavanagh, two concepts of meritocracy come into play behind people’s obsession of seeing the process of education or seeking employment as a race. The first concept assumes that a competition is the only way for us to successfully recognize that someone deserves his or her success. The second concept of meritocracy does not see competition as

## Equality

a means of enabling people to deserve their own success, but as a way of identifying an individual's natural talents. However, in neither of the two cases, the argument begins with a reference to equality. Rather, it starts with a reference to competition which is again anti-egalitarian as it does not emphasise the equality between people but promotes and recognises the differences between them. Thus, equality of opportunity does not bring about equal success and equal status, but only ensures fairness of the rules that regulate the efforts of obtaining them. The advocates of the liberal conception of equality of opportunity justify the unequal achievements, if they are the consequences of differences in the ability, will and desires of those engaged in competition. In this context, the idea of equal opportunities is explicitly perceived as being contrary to equality of outcomes. It should be remembered that equality of opportunity or more specifically 'differential treatment' is addressed here from the perspective of justice. Although justice is often defined as equality, inequality is not always unjust, and therefore, this principle favors people who are subject to discrimination so that they are treated fair and equitably. Thus, the liberal conception of equality of opportunity is typically associated either with equality of starting points or resources, but not with equality of outcome.

The issue of 'differential treatment' and 'equality of outcome' has been very emotive, divisive and contentious throughout its journey. There has been an outcry against such policies by classical liberalism which maintains that the distributive justice theory is not in conformity with liberal democratic thought as it imposes a high burden on the state and individual autonomy. However, the concept of equality of outcome and differential treatment makes an important contribution in combating institutions and processes that involve the worst cases of disadvantage and discrimination to different groups. However, it remains a politically charged interpretation of equality, under which competing economic, social and political interests must be addressed and balanced. Although there were continuing debates and challenges regarding the nature of implementation and relevance in present times, nevertheless, it can be said that such measures have contributed significantly to the expansion of democratic principles and inclusion of the poor and the backward classes into the political mainstream in the societies of different parts of the world.

### Check Your Progress Exercise 2

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

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

1) Which articles of Indian Constitution deal with differential treatment?

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### 6.5 LET US SUM UP

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After reading this unit, you must have come to know that various egalitarian societies make way for protective discrimination and equality of outcome. The reason behind the introduction of such protective discrimination is to protect and promote the interests of the weaker and deprived sections of society and provide them ample opportunities to make them empowered enough and bring them at par with the advantaged and privileged sections of society. However, the continuation of protective discrimination in the form of reservation system has given rise to debates regarding its utility and efficiency in the long run. Supporters of protective discrimination believe 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 does not 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 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 today's equals. On the other hand, those who are opposed to the idea of differential treatment and equality of outcome view that the idea of compensating for the wrongs carried out by their ancestors for decades without any definite indication of its culminating period presents an unfair situation. They are also of the view that the practice of protective discrimination essentially leads towards increasing of the functions and jurisdiction of the state which in turns restricts the liberties and rights of the people in general and of the empowered in particular.

Nevertheless, in spite of the criticisms regarding the continuation of differential treatment and provisions for equality of outcome, it cannot be denied that this policy of positive discrimination has gone a long way in expanding and strengthening democratic principles. It has also helped in developing an egalitarian society where the poor and deprived could also dream of thrashing the ladders of hierarchy and acquire the highest positions of honour and occupation. Thus protective discrimination does not violate the principle of fairness. Instead, it creates the condition and environment

## Equality

of justice. In today's society, where discrimination on the basis of race and sex still exists in subtle or not so subtle ways, need for such affirmative action favoring the weak and the deprived is real. At the same time, the fruits of these provisions would be only realized when its benefits reach those who most deserve them, and for that, the resultant outcomes need to be scrutinized from time to time.

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### 6.7 ANSWERS TO CHECK YOUR PROGRESS EXERCISES

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#### Check Your Progress Exercise 1

- 1) Your answer should highlight following points
  - To transform vertical inequality into horizontal inequality
  - To compensate for past injustices against weaker sections

#### Check Your Progress Exercise 2

- 1) Your answer should highlight Articles 15 (4), 16 (4), 46 and 340 of Indian Constitution