



## RESERVATION UNDER THE CONSTITUTION OF INDIA: ISSUES AND PERSPECTIVES\*

THE CONCEPT of 'reservation' contemplated in the Constitution of India has arrested the minds of many statesman, jurists, judges, social thinkers and general public in India. The Constitution of India has provided for 'reservation' to secure socio-economic justice to the vulnerable and downtrodden sections of the society to bring them to the mainstream of the nations life. For many centuries, the caste system in India had kept away the under privileged and downtrodden sections from the social life of the society. As a consequence of which they were denied education, access to shops, public places, temples and other places. Therefore, the Constitution makers deliberately inserted the element of 'equality' to the Constitution of India in order to ensure equal treatment to all irrespective of their caste, religion, race, language and place of birth.<sup>1</sup> The makers of the Constitution of India also thought that the meaning of 'equality' based upon individual achievement was too hypocritical in our caste-ridden society where group identification had been historically used for the purpose of discrimination and separation.<sup>2</sup> As a result, they adopted, *inter alia*, a policy of 'preferential treatment' in favor of certain weaker sections of the society to offset the effects of inherited inequalities and historic injustice.<sup>3</sup>

Achievement of social, economic and political justice and equality of status and of opportunity is one of the preambular objectives of our Constitution. In the scheme of our Constitution, the state is prevented from discriminating citizens on the grounds of caste, sex, language, residence and place of birth.<sup>4</sup>

The Constitution of India also provides that in order to achieve the socio-economic equality among all citizens, the state is required to implement various directive principles of state policy. In order to bring about equality in society, the social evil like 'Untouchability' is abolished

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1. Art. 15 (1) of the Constitution of India.
2. Paramanand Singh, "Social Consequences of Reservation Policy" in Madhava Menon (ed.), *Social Justice and Social Process* (1988).
3. Paramanand Singh, *Equality, Reservation and Discrimination in India* (1982).
4. Arts. 15 (1), 16 (2) and 29 (2) of the Constitution of India.



in the Constitution.<sup>5</sup> Dr. Ambedkar, the architect of the Indian Constitution has highlighted the then existing injustice and inequalities in our society in his speech delivered in the Constituent Assembly as follows: <sup>6</sup>

[W]e must begin by acknowledging first that there is complete absence of two things in Indian Society. One of these is 'equality'. On the social plane, we have in India a society based on privilege of graded inequality, which means elevation for some and degradation of others. On the economic plane, we have a society in which there are some with immense wealth as against many who are living in utter poverty ..... in politics, we have equality and in social and economic life, we have inequality. We must remove this contradiction at the earliest possible moment, or else those who suffer from inequality will blow up the structure of the political democracy which this Assembly has so laboriously built up.

The above observation made by Dr. Ambedkar clearly shows that equality should be secured to all persons even in socio-economic life through state's intervention. This can be achieved through the means of reservation of seats in educational institutions and public employment, which has been provided in the Constitution of India.<sup>7</sup> The Constitution has also directed the state to secure adequate means of livelihood to all citizens and to promote with special care the educational and economic interests of the weaker sections of the people and in particular, of the scheduled castes and scheduled tribes and they should be protected from social injustice and all forms of exploitations.<sup>8</sup>

The Constitution has provided reservation of seats in educational institutions and in public employment to three categories of people:

- (i) Persons who are socially and educationally backward classes of citizens,
- (ii) Scheduled castes and
- (iii) Scheduled tribes.

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5. Art. 17 says that 'Untouchability is abolished': Performance of Untouchability in any form is an offence punishable under the Law.

6. II *Ambedkar's Writings and Speeches* 184-87.

7. Arts. 15 (4) & 16 (4) of the Constitution of India. Art. 15 (4) says, 'nothing prevents the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes'.

Art. 16 (4) says, 'nothing in this Article shall prevent the State from making any provision for the reservation of appointment or posts in favour of any backward class of citizens, which in the opinion of the State, is not adequately represented in the services under the State'.

8. Arts. 39 and 46 of the Constitution of India.



The Constitution has obligated the state to protect the interests of the above groups through 'affirmative action'. Through this, a percentage of seats are reserved for the OBC, SC and ST in the public sector units, government departments and all public and private educational institutions. The reservation policy is also extended to legislature (both Parliament and state legislatures) for the SC/ST's. The framers of the Constitution believed that due to caste system, scheduled castes and scheduled tribes were historically oppressed and denied respect and equal opportunities in Indian society and were thus under-represented in nation building activities.

Contemporary issues of 'reservation':

1. Whether the SC/ST socio-economic life has been improved through reservation?
2. Whether the benefit of reservation is really reaching the targeted people?
3. Whether the state is implementing the reservation policy in a true spirit?
4. Whether the 50% rule laid down by the Supreme Court<sup>9</sup> is relevant today?
5. Whether judiciary' approach towards the recognition of reservation policy is quite satisfactory?

### I Judicial approaches towards reservation

In *Champakam Dorairajan v. State of Madras*,<sup>10</sup> the government of Madras has reserved seats in state medical and engineering colleges for different communities in certain proportions on the basis of religion, race and caste. This was challenged as unconstitutional. The government defended its order on the grounds of article 46 of the Constitution, which permits the state to promote with special care the educational and economic interests of the weaker sections of the people and in particular scheduled castes and scheduled tribes to secure social justice. But the Supreme Court struck down the order as it was violative of equality guaranteed under article 15 (1) and observed that directive principles cannot override the guaranteed fundamental rights. As a result, the Parliament brought an amendment to article 15 and inserted clause (4).<sup>11</sup>

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9. *Balaji v. State of Mysore*, AIR 1963 SC 649.

10. AIR 1951 SC 226.

11. The Constitution (First - Amendment) Act, 1951.



As the Constitution has not fixed any limit for providing reservation, the Supreme Court in *Balaji v. State of Madras*,<sup>12</sup> has held that the government order reserving 68% of the seats available for admission to the engineering, medical and other technical colleges is unconstitutional and *ultra vires* the equality provision. The court observed that the 68% reservation fixed by the government was excessive and unreasonable as it affects the merit candidates. However, the court fixed the ceiling limit of 50% for reservation in educational institutions and in providing public employment. But it is unfortunate that the 45 year old 50% rule is still in vogue though population of SC / ST and OBC has substantially changed and economic resource of the state has enormously increased.

In *T. Devadasan v. Union of India*,<sup>13</sup> the question, which came before the Supreme Court, was whether the 50% rule of reservation laid down, is applicable to those posts which were carried forward for next year also. In the present case, as a result of the application of carry forward rule, the reservation of vacancies went upto 64%. This was challenged as unconstitutional, as it would destroy the right guaranteed under articles 16 (1) and 14 of the Constitution. The Supreme Court struck down the carry forward rule as unconstitutional and declared it invalid and observed thus:<sup>14</sup>

[W]e would like to emphasize that the guarantee contained in Article 16 (1) is for ensuring equality of opportunity for all citizens relating to employment and to appointments to any office under the State. This means that on every occasion for recruitment, the State should see that all citizens are treated equally. The guarantee is to each individual citizen and therefore, every citizen who is seeking employment or appointment to an office under the State is entitled to be afforded an opportunity for seeking such employment or appointment whenever it is intended to be filled. In order to effectuate the guarantee, each year of recruitment will have to be considered by itself and reservation for backward communities should not be so excessive as to create a monopoly or to disturb unduly the legitimate claims of the other communities.

The above decision seems to be unscientific and erroneous as it affects the constitutional mandate of social justice, because the members of the SC/ST cannot be brought on par with the rest of the society in providing various public employments. What is due for them should be given to meet social justice.

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12. AIR 1963 SC 649.

13. AIR 1964 SC 179: (1964) 4 SCR 680.

14. *Id.* Para 17.



But in *N. M. Thomas v. State of Kerala*,<sup>15</sup> the Supreme Court has shown the positive approach towards the members of the SC/ST. In the instant case, the government through its GO exempted the members of the SC/ ST employees of registration department from passing the departmental test for promotion to higher posts. This exemption was given only for a period of 2 years. This was challenged as violative of article 16 of the Constitution. But the Supreme Court upheld the GO as valid, as the classification of employees belonging to the SC/ST for allowing them an extended period of 2 years for passing the departmental test for promotion is a just and reasonable classification having rational nexus to the object of providing equal opportunity for all the citizens in matter relating to public employment.

In *Akhil Bharatiya Soshit Karamchhari Sangh (Rly) v. Union of India*,<sup>16</sup> the Supreme Court has shown its concern towards the members of SC / ST employees in the application of 'carry forward rule'. In the instant case, the validity of the railway board circular which provided 64.4% reservation in selection posts for SC/ST was challenged. This was done as the carry forward rule was extended for 2 to 3 years. This excess reservation and carry forward rule was challenged as unconstitutional and *ultra vires*. But the Supreme Court upheld the carry forward rule and observed that 'mathematical precision could not be applied in dealing with human problems'. It also opined that 'some excess will not affect the reservation but substantial excess will make the selection void'.

But in *Indra Sawhney v. Union of India*,<sup>17</sup> the Supreme Court upheld the 50% rule of reservation and observed that, at no point of time, the reservation shall exceed 50% rule as laid down in *Balaji's case*.<sup>18</sup> The court also pointed out that if the reservation exceeds 50% through carry forward rule, the rule is invalid and violative of article 16 (4) of the Constitution. For the purpose of protecting the interests of SC / ST and to extend the reservation even in promotion, Constitution was amended and clause 4A was inserted to article 16 empowering the state to make provision for reservation in matter of promotion to any class or classes of posts in the services under the state in favour of SC / ST's where they are not adequately represented.<sup>19</sup>

In *Ajit Singh v. State of Punjab*,<sup>20</sup> the Supreme Court categorically made it clear that, articles 16 (4) and 16 (4A) do not confer any fundamental rights nor do they impose any constitutional duties but are only in the

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15. AIR 1976 SC 490.

16. AIR 1981 SC 298.

17. AIR 1993 SC 477.

18. *Supra* Note 12.

19. The Constitution (Seventy-Seventh Amendment) Act, 1995.

20. AIR 1999 SC 3471.



nature of enabling provisions vesting a discretion in the state to consider providing reservation.

## II Single post reservation

In many occasions, the judiciary has confronted with the question whether the reservation can be extended even to a single post in a cadre? For the first time, this question came before the Supreme Court in *Dr. Chakradhar Paswan v. State of Bihar*,<sup>21</sup> in which the court held that whenever there is a single post in a cadre, there can be no reservation with reference to that post either for recruitment at initial stage or for filling up future vacancy in respect of that post. The court also observed that ‘no reservation could be made under article 16 (4) so as to create a monopoly, otherwise the equality guaranteed under article 16 (1) and (2) would become meaningless and illusory. But in *Madhav v. Union of India*,<sup>22</sup> the Supreme Court said ‘reservation could be provided even to the isolated posts on the basis of rotation or roster system’. Though this observation seems to be reasonable, it cannot be completely accepted as it imposes the condition of rotation. But this decision was overruled by the Supreme Court in *Post-Graduate Institute of Medical Education and Research, Chandigarh v. Faculty Association*<sup>23</sup> and opined that where there is a single post in a cadre, the same cannot be reserved either directly or by the device of rotation of roster point. The reason was that if reservation is made to a single post cadre, it amounts to 100% reservation, which is impermissible and *ultra vires* the constitutional mandate of equality.

## III Validity of Constitution (Ninety-third) Amendment Act, 2005 and the Central Educational Institutions (Reservation in Admissions) Act, 2006

A host of questions were raised before the Supreme Court in relation to reservation in *Ashok Kumar Thakur v. Union of India & Others*.<sup>24</sup> In the instant case, the validity of the Constitution (Ninety-third Amendment) Act, 2005<sup>25</sup> and the Central Educational Institution Act, 2005 were

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21. AIR 1988 SC 959.

22. (1997) 2 SCC 332.

23. AIR 1998 SC 1767.

24. AIR SC 2008.

25. The said amendment has inserted art.15 (5), which provides that “nothing in Article 15 or sub clause (g) of clause (1) of Article 19 would prevent the State from making any special provision for the Advancement of any socially and educationally backward classes of citizens or for the Scheduled Caste or the Scheduled Tribes in so far as such special provisions relate to their admission to the educational institutions, whether aided or unaided by the State Ministry Educational Institutions referred to in clause (1) of the Article 30 to be excluded”.



challenged as they provide reservation to other backward classes (OBC) scheduled castes and scheduled tribes in the private and unaided educational institutions as well as central educational institutions. The Supreme Court has upheld the 93<sup>rd</sup> constitutional amendment and the Central Educational Institution Act as valid as they facilitate for social justice to the OBC's and SC / ST's. The other question which was raised in the instant case was whether creamy layer is to be excluded from socially and educationally backwards classes? The court answered positively and held that creamy layer should be excluded from the purview of reservation. However, this is not applicable to the members of scheduled castes and scheduled tribes. The justification given by the court for excluding creamy layer from socially and educationally backward classes is that they are economically advanced or educationally forward. This principle of creamy layer is also applied for the purpose of identifying the socially and educationally backward classes from providing them reservation benefit. The 'creamy layer' principle cannot be applied to SC/ST's as they are separate class by themselves.

Besides, a question also arose before the Supreme Court regarding no time limit prescribed for the operation of the central Act. The contention of the petitioner was that as there is no time limit prescribed and the affirmative action would continue for an indefinite period, that would ultimately result in reverse discrimination rather than protective discrimination. But the court struck down the contention and upheld the Act as constitutionally valid and the court has directed the central government to review the situation of the backward classes after ten years.

#### IV Conclusion

In a country like India, affirmative action is very much needed for promoting educational and economic interest of the weaker sections of the society. Through this affirmative action, if the members of SC/ST's enter into Parliament, state legislatures, public employment, professions and into other walks of life, the attitude that they are inferior would disappear. Besides, the Supreme Court should have a relook at 50% reservation rule laid down thirty five years ago in India in the light of changing scenario. The view taken by the Supreme Court on reservation of a single post is also not scientific. It cannot be accepted because there are many instances, where in a department there is only one post in that cadre which cannot be filled by a reservation due to the court's verdict. This is quite unreasonable and unacceptable and against the mandate of social justice.

Thus, the following reforms in the law of reservation is required to be taken in order to ensure social justice to the weaker section of the society.



1. The present articles 15 (4), 16 (4) and 29 (2) have not imposed any positive obligation on the state to make any special provision for the advancement of backward classes including scheduled castes and scheduled tribes. Therefore, these articles should be amended immediately so that positive obligation shall be imposed on the state to implement the reservation policy for the benefit of backward classes including scheduled castes and scheduled tribes.
2. The 50% rule of reservation laid down by the Supreme Court in *Balaji's* case and which continues to be in vogue has to be modified and Parliament itself should make an amendment to the Constitution fixing the percentage of reservation to 65. This is due to the growth of the backward classes population since 1963.
3. An amendment should also be made to article 335 of the Constitution by removing the phrase 'efficiency' in administration. Because, the provision of article 335 is applicable to scheduled castes and scheduled tribes and not to others. Therefore, in order to make article 15 (4), 16 (4) and 29 (2) meaningful, article 335 should be suitably amended to secure justice to the scheduled castes and scheduled tribes. Otherwise, even after 50 years of independence, the conditions of the SC's/ST's would not be improved and the justice provided in the preamble of the Constitution cannot be secured to them.
4. As far as possible, judiciary shall not interfere with the socio-economic programmes launched by the state for the benefit of backwards classes including SC's/ST's. The more judicial interference with the SC's/ST's economic programmes, the more serious set back in the implementation of these programmes.
5. A constitutional amendment shall also be made to extend reservation benefits to private sectors as well as in the *Rajya Sabha* and all the state legislative councils. In these fields, no reservation is being followed since 1950. As such, there is no representation given to SC's/ST's in the above fields. If this is not provided then the essence of articles 14, 15 (4), 16 (4) would be meaningless.

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