



RESERVATION IN PROMOTION FOR SC/ST EMPLOYEES: AN ANALYSIS

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ABSTRACT

A decent standard of living is the basic objective of every person. A good employment can boost the purchasing power, i.e., can provide families with wherewithal. According to Indian notion, this can only be achieved if a person is well settled in a Government job. According to Marc Galanter, "Government employment in India is widely considered a guarantor of security and advancement and prestige."¹

The Indian society has bequeathed upon the future generations also the approach of the discriminatory structure based on caste system. This ritual based disparity between the 'haves' and the 'have nots' the 'majority' and the 'minority' has led to a socio-economic divide. The framers of the Constitution thought of filling this gap with the policy of Reservation at the entry level in employment so that all the communities are adequately represented in the Government services. Since then, the reservation policy in India has attracted the attention of almost every political party.

However, Reservation in promotions has been a much debated issue since the very inception of the Reservation Policy in India. This research paper aims to analyse the

¹ Galanter, Marc. *Competing Equalities: Law and the Backward Classes in India*. Oxford University Press, New Delhi, 1984.

Indian jurisprudence on Reservation in promotions. It also intends to study the idea of the constitution makers behind Reservations and its utility in the present scenario and also suggests the way forward.

INTRODUCTION

According to the Preamble to the Indian Constitution, Equality is the key to Justice-social, economic and political. Hence, inequality would mean discrimination, denial of our basic rights and fretfulness. According to Andre Beteille, "It cannot be denied that in the traditional system inequalities were closely related to the inequalities of caste. The caste system contributes to the persistence of these inequalities by providing the values and norms which were appropriate to the agrarian hierarchy."² In India also the socio-economic disparity is the result of the ritual based caste system we inherited from our forefathers. To compensate that degradation and disadvantage, the Government adopted a policy which comprises of various special provisions for the depressed. This policy is what we know today as the Reservation Policy.

According to Dr. Anuradha Chadha, "Reservation denotes a set quota of public service positions for recognized minorities and includes reservation of seats in educational institutes."³ Hence, reservation to some extent means preferential treatment to the oppressed class.⁴

² Beteille, Andre. *Inequality and Social Change*. Oxford University Press, New Delhi, 1972.

³ Chadha, Anuradha. *Reservation Law and Policy*. Regal Publications. New Delhi, 2016.

⁴ State of UP v. Dr. Dina Nath Shukla, AIR 1997 SC 1095



However, while providing benefits of the policy of reservation, a stable equilibrium is needed to keep between justice towards the Backward Classes, equity for the forwards as well as efficiency for the entire system.⁵ Keeping in mind the history, the framers of the Constitution felt essential to make special provisions for the disadvantaged classes in subjects of Public employment. Unless they are adequately represented, administration cannot work effectively keeping the welfare of every citizen a priority. The goal of making India an egalitarian society or Swaraj can only be accomplished if the down trodden people also have an equal say in the governmental process. Hence, Article 16(4) was included in the Constitution which states that “Nothing in this article shall prevent the state from making any provision for the reservation of appointments 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.”

Article 16(4) is not an exception to Article 16 rather; it was enacted to supplement Article 16 in attaining the bigger objective of equality. Hence, Article 16(4) is an enabling provision and so, citizens have no right to claim reservations under it. Schedules Castes and Scheduled Tribes are no where expressly mentioned under Article 16(4), hence, are entitled to be treated as ‘Backward Class’.⁶

⁵ Supra note 3.

⁶ Chitralkha v. State of Mysore, AIR 1964 SC 1823.

A GLANCE AT THE CONSTITUENT ASSEMBLY DEBATES

Dr. B.R. Ambedkar, in the Constituent Assembly debated pleaded that the reservations for Scheduled Castes and Scheduled Tribes should be allowed for 40 years and after that no further extension would be given. But the short sighted Constituent Assembly rejected this proposal and pleaded that reservation would continue for 10 years only. Along with this statement, they also added a clause for extension of this period if deemed necessary. So many years have passes and there seems no chance of reservation coming to an end. The SC’s and ST’s have become so empowered and assertive now that they are demanding reservations in promotion as well.

The concept of Reservation is very old. The Legislative Assembly was aware about the implications of Reservation policy. In a casteless society, caste based reservation came with Separatist tendencies. It would mean certain degree of exclusion. It would promote enmity rather than brotherhood. It was also argued that reservation is not the ideal way of benefitting people as it would not promote true representation.

Sardar Vallabh Bhai Patel said, “What brought about the abolition of slavery? Was it safeguards granted to it by anyone? No, it was the awakened conscience of the various countries.”⁷ He means to say that with due course of time, things change, people change and thus, democracies change. So, Social Justice would be a part of such change and

⁷ Tadepalli, Apoorva. “Constituent Assembly Debate on Reservation”. LOGOS, logos.nationalinterest.in/2014/09/644/, 2014. Accessed 18 June 2018.



thus political intervention is not required. Eventually, the mindset of people would change and Indian Society will refrain from accepting reservations.

Mahavir Tyagi also pleaded that, “the term Scheduled Castes is a fiction...there are some castes who are depressed, some castes who are poor, some who are untouchables...How is Dr. B.R. Ambedkar a member of Scheduled Castes? Is he illiterate? Is he untouchable? Is he lacking in anything?... I do not believe in the minorities on community basis, but minorities must exist on economic basis...It was not the Scheduled Castes that needed special provisions but ‘cobblers, washermen, and similar classes’ along with farmers who did not enjoy this very urban provision.”⁸

Dr. P.S. Deshmukh also said, “there are millions of people in our country whose obstacles are in no way different from those of Scheduled castes; and I wish to leave room for such people.”⁹

Hence, the main objective of Reservations was to overcome the economic problems irrespective of social status. But to our despair, no such distinction was made while drafting these articles. Hence, till now this social evil persists. So, it can be concluded that inequalities can’t be solved with political interference. A good standard of living, good education, health facilities for all would do more benefit than the Reservation policy.

It is rightly said by Amartya Sen that “Providing Backward Castes with

⁸ Ibid.

⁹ Ibid.

Functional Capabilities brings about a more sustainable approach to real progress and equality.”¹⁰

Backward classes were not defined anywhere in the Constitution. H.N. Kunzru said that, “the word ‘Backward’ is not defined anywhere in the Constitution. Whether any class is backward or not should not be left to the law courts to decide. It is our duty to define the term.”¹¹

T.T. Krishnamachari considering this term as ambiguous said that, “it does not apply to a backward caste...It says class. Is it a class which is based on grounds of economic status or on grounds of literacy or on grounds of birth?”¹²

Once an applicant approached Krishna Menon and urged to recommend him for a certain job because he belonged to backward class. Menon answered, “Well, if you yourself think of yourself as backward, why should you expect me to recommend a backward fellow?”¹³

Thus, reservation policy was a political interference so as to bring about equality in the 10 years as decided. But the aim wasn’t achieved and hence, today reservation is deepening its roots by penetrating in every aspect of Government services.

¹⁰ Ibid.

¹¹ “Constituent Assembly Debates on Reservation Based on Castes”. INDIA AGAINST RESERVATION, jacindia.co.in/blog/2017/12/29/constituent

¹² Ibid.

¹³ Ram, Janki. V.K. Menon: A Personal Memoir. Oxford University Press. Delhi, 1997



It is ironical that a casteless, secular Governmental machinery is appointing employees on the basis of caste which was never the aim of Constituent Assembly and our forefathers.

ARTICLE 16(4)(a)

Till 1993, the Scheduled Castes and Scheduled Tribes were enjoying the benefit of reservation in promotions. But in the Mandal Commission case¹⁴, the Supreme Court curbed the powers under Article 16(4) and confined the provision of reservations only in the stage of initial appointment and not in promotions as that was hampering the efficiency.

But this was not acceptable to the Government and hence Clause 4A was inserted in Article 16 through the Constitution (77th Amendment) Act, 1995 extending reservation in employment to promotions as well. Thus, this amendment gave negating effect to Indra Sawhney judgment.

Relevant parts of Art. 16(4A) read as follows-

“[The state can] make any provision for reservation in matters of promotion to any class or classes of posts.... In favour of the Scheduled Castes or Scheduled Tribes.”

In case of Ajit Singh Januja v. State of Punjab¹⁵, catch up rule was declared by the court as per which consequential seniority in higher posts would not be affected by reservation in promotions.¹⁶

¹⁴ Indra Sawhney v. Union of India, AIR 1993 SC 477.

¹⁵ AIR 1996 SC 1189

¹⁶ “Reservations, Equality and the Constitution-VII: Exploring the Boundaries in M. Nagaraj.”

To negate the effect, Government enacted the Constitution (85th Amendment) Act, 2001 which read as-

“In article 16 of the Constitution, in clause (4A), for the words “in matters of promotion to any class”, the words “in matters of promotion, with consequential seniority, to any class” shall be substituted.”

The Government also inserted clause (4B) to Article 16 by the Constitution (81st Amendment) Act, 2000 making the carry forward rule not subject to 50% limit in contravention to the Indra Sawhney judgment.

M. NAGARAJ JUDGMENT: AN ANALYSIS

The constitutionality of Articles 16(4A) and 16(4B) was challenged in 2007 before a Constitution Bench in the case of M. Nagaraj v. Union of India¹⁷ claiming them as discriminatory and illegal and hence, violative of the Basic Structure of the Constitution.

The Supreme Court upheld these amendments and observed:

“..the boundaries of the width of the power, namely, the ceiling limit of 50%(the numerical benchmark), the principles of creamy layer, the compelling reasons, namely, backwardness, inadequacy of representation and the overall administrative efficiency are not obliterated by the impugned amendments. At the appropriate time, we have to consider the law as enacted by various States providing for reservation if challenged. At that time we

Indconlawphil.wordpress.com/,2014.Accessed 17 June 2018.

¹⁷ AIR 2006 SCC 212



have to see whether limitations on the exercise of power are violated. The State is free to exercise its discretion of providing for reservation subject to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the state has reasons to make reservation, as stated above, if the impugned law violates any of the above substantive limits on the width of the power the same would be liable to be set aside.”¹⁸

The Court also observed:

“Equity, justice and efficiency are variable factors. These factors are context specific. There is no fixed yardstick to identify and measure these three factors; it will depend on the facts and circumstances of each case. These are the limitations on the mode of exercise of power by the state. None of these limitations have been removed by the impugned amendments. If the concerned state fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14.”

Therefore, the above amendments were upheld by the court concluding that-

- 1) The operation of Roaster System ensures equality and justice,
- 2) Subject to backwardness, inadequacy of representation and administrative efficiency
- 3) A post cannot be carried forward for more than 3 years.

This judgment gave the power of judicial review to the courts over individual

promotions. This did not please the Government and hence, it tried to invalidate the Nagaraj judgment in order to limit the judicial review of reservation in promotion policies. The bill has lapsed.¹⁹

Reservation in Promotions is not Ex Debito Justitiae and thus it needs to be supported by empirical data.

RESERVATION IN PROMOTIONS: A CRITIQUE

The M. Nagaraj judgment was challenged by many who felt aggrieved. The premise was that people appointed through reservation would not be able to compete with the rest of the people for promotion and thus arises the need for reservation in promotions.

This would make Reservations at multiple levels. But reservation is not a Poverty alleviation program. It is a retrograde step with the tendency to expand. Today one class will get reservation; tomorrow the other classes would demand the same.

Though the court has allowed to carry on reservations in promotions for the SC and ST category employees in “accordance with law”, the Government needs to examine the interpretation of the same. Entry level reservation is essential but reservation in promotion is cautional and can impair efficiency.

The matter was referred to the Constitution Bench of the Supreme Court because it needs the interpretation of three decisions of Constitution Bench-

- 1) Indra Sawhney v. Union of India

¹⁸ Ibid.

¹⁹ Choudhary, Sujit, et al.



- 2) EV Chinnaiah v. State of AP
- 3) M Nagaraj v. Union of India

Also the basic contention is that the Nagaraj judgment by constitution bench does not rely upon the EV Chinnaiah judgment specifically on SC/ST act.

The irony here is that Justice KG Balakrishnan, 1st Dalit Chief Justice of the country was present in the constitution bench while deciding the M Nagaraj case. He did not dissent with the three conditions laid in the M Nagaraj judgment.

In the leading judgment of American jurisprudence *Brown v. Board of Education*²⁰ which related to an argument with respect to segregation and de segregation of racial classes- black and white, a question was put before lawyers fighting for de segregation that why do u have to worry about segregation aspect at all. Both the communities are different and thus, both can take their decisions on their own without interfering in each others decision making process. The argument which prevailed in the SC was that ability to take decision with respect to each other is an integral aspect of the right to equality.

The system that prevails in the US is preferential system not reservation. Efficiency is not compromised. In US, the Blacks are always in minority. But in India, the Backward Castes, Scheduled Castes and Scheduled Tribes in almost every constituency, when combined, form a majority.

So they are the people who rule the country and take decisions by virtue of their superior numbers in the electoral process. In the Parliament around 125 MP's are from SC/ST category. OBC's are almost 275. If taken as whole more than 2/3rd of the parliament is from reserved class which is thus, the main deciding factor for the future of this country.

Even after 70 years of independence, the SC/ST are suffering because no affirmative action is taken in the right direction. More reservation is not a solution to remove discrimination. More pro-active action needs to be done by providing them with good education, basic amenities and making them capable of competing. The purpose of promotion would be served better if all the candidates are selected in their own merit and then promoted rather than promoted as an affirmative action.

Reservation at each and every level would by no means strengthen the administrative structure as it would be a compromise with the quality of services delivered. Article 335 of the Constitution mentions that reservation should not impact the efficiency in services. Efficiency is the benchmark of good quality services and hence progressive steps should be taken to promote it.

Caste is not a matter of identity, it is an administrative policy and hence, the State should engage with it empirically.

²⁰ 347 US 483 (1954)