

Original Paper

Riservation Policy: Sources for Achieving the Social Justice in India

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Abstract

In a democratic form of Government all citizens of the country are equal before the law of land. There is no scope of differences in any stage of life between them. Although natural discrimination may be possible, but politically and legally all should be equal. Discrimination on one or more of these factors became normal feathers particular in the third world countries of Africa and Asia. Really this social discrimination reflects in political rights and economic opportunities of the people so that the question of social justice became very important.

In India, there has been so many social, economic and educational discrimination among the people from the very beginning. Weaker sections of the people have been deprived their rights. They are living like animal even today. So, Framers of the constitution of India include the provisions of reservation in the constitution of some posts of Government services to Scheduled Caste, Scheduled Tribes and Other Backward Classes for their upliftment. Actually, these reservation policies were implemented for scheduled castes and scheduled tribes only at the time of implementation of the constitution. After very long time, the then prime minister Late V.P. Singh had implemented 27 percent reservation to other backward classes for gaining of Social Justice. But due to conspiracy and the upper castes the conditions of reamy layer were imposed by the supreme court of India. Thus this paper will disclose all secrets in this countex.

Keywords

act, Constitution, court, discrimination, justice, social trust

1. Introduction

The liberal state holds the promise of civil liberties and political rights equally for all. But the society is not made of equals. There are wide differences, both natural and acquired, among its members. The natural differences may be those of caste, creed, religion, race, ethnicity, physical characteristics, mental and moral capabilities. The acquired differences may be education, health, income and wealth and the like. The liberal state requires market economy and class division into capitalists and the multitude of workers, which further widen these differences.

It was once thought that political democracy based on adult franchise would necessarily lead to economic and social democracy. The capitalist economy ruled out the possibility of economic democracy. The enfranchisement of the masses did not lead to social democracy either. Political democracy failed to cut across the divisions of ethnicity, caste, race, religion etc. Discriminations based on one or more of these factors became normal features particularly in the Third World countries of Africa and Asia. These social discriminations reflected in political rights and economic opportunities of the people so that the question of social justice became important.

The concept of social justice mainly denotes absence of discrimination based on race, religion, caste, ethnicity, sex or the like. Discrimination based on race or colour is writ large in the history of the United States of America, so that originally the American Constitution treated a black as only 3/5th person. It was the fifteenth amendment which removed that discrimination and stipulated that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, colour, or previous condition of servitude. Similarly the XIXth amendment removed any discrimination in voting right on the basis of sex.

The Brown decision in 1954 (D. Irish) was a landmark inasmuch as it initiated a process of desegregation of the Blacks from public life and was followed by a series of affirmative actions to give to the Blacks guaranteed opportunities of entry to educational institutions and public services.

The removal of discrimination and affirmative action to provide opportunities for development are the two sides, the negative and positive of the concept of social justice.

Liberal democracy which assured equality before law and equal protection of the laws and also civil liberties and political rights equally to all did not address the question of social justice except marginally as in the Black Movement in the USA. It is in India in the closing decade of the 20th century that the question of social justice assumed the proportions of a nation-wide movement. The apprehension is that the requirements of social justice may encroach upon and erode the fundamental rights of liberty, equality and property which are the bed-rock of liberal, bourgeoisie, democratic state. The liberal state must cope with the challenge of social justice. This is best exemplified in India. Here the society is endlessly divided into castes and sub-castes so that it is difficult to determine their exact number.

There are mainly four castes. It is believed that they are divinely ordained. The caste attaches to a person by birth. Every person is born into one or the other caste. The Brahmin, Kshatriyas and the Vaishyas are the upper castes and the fourth caste is the Shudras or the untouchables.

The Shudras are the menials, the low born, the untouchables. They were discriminated against by the upper castes who attached disabilities to them in the matter of land owning, habitation, religious practices, profession and occupation and social intercourse in general. The caste system itself imposed rigid restrictions in the matter of social relationships specially as regards sharing dining tables or marital bond. In this way a large segment of population, the Shudras were segregated from the society and they constituted roughly 15 percent of the population. The British government in India made a list of such castes and since then these castes are known as the Scheduled Castes.

After Independence, the government of India issued an order listing the Scheduled Castes and Tribes (Backward Classes commission Report, 1955). The tribes living in forests and hilly tracts have been for long cut off from civilized life and wedded to their tribal customs and ways of living and are as backward and poor as the Shudras. The Scheduled Castes and Scheduled Tribes constitute the weakest, the most deprived and the oppressed sections of society who have been segregated and discriminated against in the name of religion and with the sanction of scriptures since the ancient times. The Scheduled Castes were known as the Shudras. Gandhiji used the name Harijan for them. The Shudras prefer to call themselves the Dalits and the word echoes the historical repression and exploitation they have suffered for centuries. The tribes constitute 7.5 percent of the population. Besides the Scheduled Castes and Scheduled Tribes, there are other socially and educationally backward classes (the OBCs). The Kaka Kalekar Commission for backward classes identified as many as 2379 castes as other backward castes/classes (BCC Report, 1955). These are believed to be 52 percent of the population.

With so much of large and widespread backwardness covering some 75 percent of the population, rights of equality, freedom, and property would only freeze the status quo. On the contrary, with these rights guaranteed, the gap between rich and poor, haves and have nots, low caste and upper caste will go on widening.

The Indian Constitution has adopted a two pronged strategy to provide for social equality—one, it has prohibited discrimination in public life, two it provides for affirmative action by authorizing the state to make special provisions for the upliftment of the Scheduled Castes, Scheduled Tribes and the Other Backward Classes and also for women and children.

2. Prohibition of Discrimination

Several provisions of the Constitution prohibit discrimination.

Art. 15(1): The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Art. 15(2): No citizen shall, on grounds only of religion, race, caste, sex place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) access to shops, public restaurants, hotels, and places of public entertainment or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public.

Art. 16(1): There shall be equality of opportunity for all citizen in matters relating to employment or appointment to any office under the state.

Art. 16(2): No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the state.

Art. 17: Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law.

These provisions seek to prohibit discrimination in social and public life and coupled with the constitutional guarantee of equality before law and equal protection of the laws to all persons within the territory of India, they seek to translate the promise given in the Preamble, to secure to all citizens equality of status and of opportunity, into reality.

However, the founding fathers of the nation realized that legal equality is not enough. The adult franchise was a step in the direction of social and political equality and equality of opportunity and status. They went further and provided that special provisions in favour of the weaker sections of society would be no infringement of the right of equality but would be necessary to lift these sections to the level of the rest of the society. The Scheduled Castes had been oppressed for centuries and denied opportunities of education, employment, occupation, habitation of their free will and choice and were even socially ostracized. The same was the lot of the Scheduled Tribes.

In these circumstances the Constitutional guarantee of equality and freedom and property could be only paper provision. Unless these guarantees were supplemented by special provisions for upliftment of these unequal members of society, liberty, equality and property would have no meaning for them.

The Constitution therefore makes exceptions to the right of equality by authorizing the state to make special provisions for Scheduled Castes, Scheduled Tribes and Other Backward Classes. It provides, *inter alia*

Art. 15(3): Nothing in this article shall prevent the state from making any special provision for women and children.

Art. 15(4): Nothing in this article or Cl. (2) of Art. 29 shall prevent 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): 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 to the opinion of the state, is not adequately represented in the services of the state.

Art. 330 provides that seats shall be reserved in the Lok Sabha for the Scheduled Castes and the Scheduled Tribes in proportion to their population. This reservation was initially for a period of 10 years but a ten year extension has been granted seven times already.

Art. 335 states: The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a state.

The Constitution originally authorized the state to make exceptional provisions for advancement of the Scheduled Castes and Tribes only. The government accordingly made provisions for,

- i. reservation of seats in the Lok Sabha and the State Assemblies.
- ii. Reservation of posts in the services under the Union and the states to the limit of 15 percent for Scheduled Castes and 7.5 percent for Scheduled Tribes.
- iii. Reservation of seats in educational institutions including institutions of higher and technical education.
- iv. Lowering of test qualifications for admission into these institutions and for clearing competitive examinations.
- v. Lowering of fee and raising of age limit in respect of various examinations, recruitments etc., and sundry other concessions, facilities and privileges for the Scheduled Castes and Scheduled Tribes.

In 1951 following a decision of the Supreme Court in the Champakam Dorairajan case (AIR, 1951, CS, 226) the Union government rushed a constitutional amendment through the provisional parliament to provide that the state shall have the right to make special provisions for the advancement of socially and educationally backward classes of citizens in addition to the Scheduled Castes and Scheduled Tribes. In this way the ambit of reservation was enormously enlarged as the Other Backward Classes constituted nearly 52 percent of the population. The amendment enabled the state governments in the South to continue with the reservation of seats in the educational institutions in favour of various caste and communities other than the Scheduled Castes and Scheduled Tribes.

The first amendment (1951) gave recognition to the existence of backward classes and communities other than the SC and ST and the movement slowly built up over the years to demand reservations and concessions for them in the name of social justice.

The first Backward Classes Commission headed by Kak Kalelkar acknowledged the need of reservation in educational institutions and government service for the Backward Classes other than SCs and STs not exactly in proportion to their population but of a specified percentage of seats and posts, namely,

Class I: 25 percent of vacancies

Class II: 37.5 percent of vacancies

Class III and IV: 40 percent of vacancies

The commission also underlined the necessity of devising some method to ensure equitable representation of all the communities in the OBC group “otherwise it is likely that the more advanced among the OBCs will get all the representation and the most backward will be left out. This would perpetuate the very system which we are attempting to remedy...” (Report of Backward Classes commission, 1955).

The Commission suggested a number of measures to assist the OBCs advance in the educational field, such as facilities for advanced studies abroad, award of scholarships and freeships, reservation of seats in science, medicine, engineering, agriculture, veterinary and other technological institutes of higher learning.

Prior to Independence the reservation policy was in force for the SCs and STs in all parts of the country and at the Centre but was operative only in South Indian states and in Bombay for the Other Backward Classes. The Backward Class commission was not unanimous on the issue of reservation of posts in government service for the OBCs, though there was unanimity of view in regard to measures for the educational advancement of these castes and communities. Three members of the Commission recorded their dissent to the majority view favouring reservation of posts in government service for the OBCs.

Dr Anup Singh, M. P. opposed such reservation as “reservation on caste or class basis will accentuate caste feelings, thus jeopardizing the chances of national cohesion and solidarity” (Report of BCC, 1955). Another member, Arunangshu De recorded his fear that reservation of posts on caste basis would lead to disintegration for “caste virus would infiltrate the entire body politic of India”. He warned that “one result of reservation in services on caste basis would be that only the advanced sections among the backward caste would benefit by it. Those who are already really backward would gain nothing but would remain backward and unrepresented in the services” (Report of the BCC, 1955). An another member, P. G. Shah was in principle opposed to reservation in services for any class or community. He wrote in his dissenting note”, caste should be deprived of any special privileges, or power or prestige that it may possess and no conscious or unconscious addition to these advantages should be permitted even in the name of social relief. A weed has to be completely denied both soil and nutrition until it is thrown out” (Report of the BCC, 1955). He expressed the view that caste should not be the basis of any concession or privilege or reservation and Scheduled Castes and Scheduled Tribes should be no exception. However he was willing to concede that so long as the Scheduled Castes and Scheduled Tribes are given reservation in services, Other Backward Classes may also be brought under the net of reservation but in no case should be reserved quota exceed 50 percent of the total number of vacancies. (Report of the BCC, 1955).

Kaka Kalelkar, the Chairman of the Backward Classes Commission did not append any note of dissent. But in his letter to the President he said, "I am definitely against reservation in government services for any community for the simple reason that the services are meant for the service of society as a whole. Administration must have the services of the best men available in the land and these may be found in all communities. Reservation of posts for certain backward communities would be as strange as reservation of patients for particular doctors" (Report of the BCC, 1955). He conceded that if it was not possible at this stage to scrap the benefits already being given to SCs and STs then the OBCs may also be extended the same privilege.

The second Backward Classes Commission headed by Mr. B. P. Mandal submitted its report in 1980. The Mandal Commission, as it came to be known, identified some 52 percent of the population as comprising the backward classes other than the SCs and STs. It recommended in general, reservation quantum of 27 percent in their favour in the government services and educational institutions, including medical, engineering and other technical colleges. Since the submission of the Mandal report, the OBC, reservation has emerged as the central problem of social justice.

The demand is that reservation should be proportionate to the numerical strength of a class or community. In case of Scheduled Castes and Tribes this was the formula applied when 15 percent reservation was fixed for the Scheduled Castes and 7.5 percent for the Scheduled Tribes. That would total up to 22.5 percent reservation. In the Balaji case (1962) the Supreme Court had laid down a ceiling of 50 percent on reservations. (AIR, 1963, p. 649). That would leave bare 27 percent reservation for the OBCs and the Mandal Commission seized upon this residue to recommend 27 percent reservation for the OBCs in government services and educational institutions.

The National Front Government headed by Mr. Vishwanath Pratap Singh announced the acceptance of the Mandal Commission recommendations on 15 August 1989 and simultaneously the state governments followed in the footsteps of the Central government. In fact, the Southern states and Maharashtra and Gujarat were already providing for OBC reservation in state services and educational institutions and in many cases, in excess of the 50 percent ceiling.

The reservation in Central services and in many States in northern India for the OBCs was provided for after the 1989 announcement on implementation of the Mandal Commission Report by the Prime Minister, V. P. Singh. However, the upper limit was pegged at 50 percent. In the South reservations in excess of this limit were quite common and were challenged in courts from time to time. In the Balaji case the Supreme Court ruled that reservations in excess of 50 percent were a violation of the constitutional guarantee of equality.

Nevertheless many states continued to flout this limit. The Tamil Nadu government sought constitutional protection for its law providing for 69 percent reservation in services and colleges of the state and the 76th constitutional amendment placing the Tamil Nadu measure in the IXth Schedule was

enacted by the Parliament in the year 1994. In the Karnataka assembly, a bill providing for 80 percent reservation for SC, ST and OBCs was introduced on 7.9.1994 amidst stiff opposition from the opposition members.

The validity of OBC reservation was challenged in the *Indira Sawhney Vs. Union of India* (AIR, SC, 1993, pp. 477-761) and in its judgment delivered in November 1992, the Supreme Court rejected the petition. It however laid down several rules limiting reservations that

(1) that the over all reservation for SC, ST and OBCs should not exceed 50 percent for the vacancies in any one year,

(2) Reservation of posts can be only at the stage of initial recruitment, not at the stage of promotion.

(3) The well off sections within any community or caste, what the court called “creamy-layer” within a caste or community, should be excluded from the privilege of reservation.

(4) Reservation in promotion is constitutionally impermissible.

(5) There are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit alone counts. In such situations, it may not be advisable to provide for reservations. Some of the services and posts to whom application of the rule of reservation may not be advisable are:

- i. Defense services including all technical posts therein but excluding civil posts.
- ii. All technical posts in establishments engaged in research and development including those connected with atomic energy and space and establishments engaged in the production of defence equipment.
- iii. Teaching posts of Professors and above, if any.
- iv. Posts in super specialties in Medicine, Engineering and other scientific and technical subjects.
- v. Posts of pilots in Indian Air Lines and Air India.

The list given above is merely illustrative and not exhaustive. The *Indira Sawhney* decision may be said to have set out the parameters of social justice within the reservation policy and any infringement thereof would be going outside of the bounds of social justice.

3. 50 percents Is the Outer Limit

The primary concern of social justice should be the balancing of the right of equality with adequate representation of the backward class of citizens in the public services and rolls of educational institutions. In the *Indira Sawhney* case (1992) the Supreme Court said that Art. 16(1) which guarantees equality of opportunity in the services of the state and Art. 16(4) which empowers the state to provide for adequate representation of the backward classes in state services, should be read together and harmonized and should be seen as aiming at the very same objective, namely, equality of opportunity. The provision under Art. 16(4) conceived in the interest of certain sections of society should be

balanced against the guarantees of equality enshrined in Art. 16(1) which is a guarantee held out to the entire society and to every citizen. Therefore the reservation contemplated in Art. 16(4) should not exceed 50 percent (AIR, 1993).

In the Balaji case reservation of 68 percent of the seats in state's medical and engineering colleges was challenged and the court said that reservation should not be unreasonable, excessive or extravagant. Reservation made under Art. 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution.

It said that "while the interests of the weaker sections had to be adjusted with interests of the community as a whole a special provision should be less than 50 percent, how much less than 50 percent would depend upon the relevant prevailing circumstances in each case" (AIR, 1963, SC, p. 649).

4. Carry forward Rule

In the Indira Sawhney case (1992) the court clarified that the ceiling of 50 percent is to be applied by taking a year as a unit. The 50 percent rule is to be applied not with reference to the total strength of the entire cadre or service but with reference to the vacancies existing and advertised at any time. Setting aside the decision in Devadasan case that the carry over rule was impermissible, the Supreme Court in Indira Sawhney case said, "carry forward rule of unfilled reserved vacancies is not per se unconstitutional, but such rule should not result in breach of the 50 percent rule" (AIR, 1976, SC, p. 490). In recent years there have been many infringements of these well accepted principles reconciling the right of equality with the requirements of social justice.

5. Promotion

The Supreme Court setting aside the decision in General Manager vs. Rangachari ruled that Art. 16(4) does not contemplate or permit reservation in promotion as well. (AIR 1992, SC, p. 36):

It gave the following reasons for denying reservation in promotion:

(1) Reservation in promotion is constitutionally impermissible as once the advantaged and the disadvantaged are made equal and are brought in one class or group then any further benefit extended for promotion would be treating equals unequally. It would not be eradicating efforts of past discrimination but perpetuating it.

(2) While it is just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, it would be a serious and unacceptable inroad into the rule of equality of opportunity to say that such a handicap should be provided at every stage of promotion throughout their career. That would mean creation of a permanent separate category apart from the mainstream- a vertical division of the administrative apparatus.

(3) Reservation of appointments or posts theoretically and conceivably means some impairment of efficiency. There can be no justification to multiply the “risk” by holding that reservation can be provided even in the matter of promotion.

(4) At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service, efficiency of administration demands that these members compete with others and earn promotion like all others, no further distinction can be made thereafter with reference to their “birth mark”.

(5) Reservation in promotion means that the members of reserved categories need not have to compete with others but only among themselves. There would be no will to work compete and excel among them. Whether they work or not they tend to think their promotion is assured. This in turn is bound to generate a feeling of despondence and heart burning among open competition members.

(6) Denying reservation in matter of promotion need not have the effect of confining the backward class of citizens to the lowest cadres. It is well known that direct recruitment takes place at several higher levels of administration and not merely at the level of Class III and Class IV.

For these reasons the Court reached the conclusion that reservation in promotion is not required for social justice. Instead such reservation being an inroad into the right of equality would be an infringement of justice.

6. Creamy Layer and Social Justice

The objective of Art. 16(4) is the empowerment of the deprived backward communities by giving them a share in the administrative apparatus and in the governance of the state.

If some segments or members among the backward classes are able to advance economically, and may be educationally as a result of reservation benefits or otherwise and, acquire positions of power and status, they can no longer be said to be in need of reservation. The Supreme Court said, “the connecting thread between them and the rest snaps. They would be misfits in the class. They should be excluded from the benefit of reservation. Such exclusion benefits the truly backward”.

The Supreme Court directed the government to exclude the creamy layer of the backward class from the benefit of reservation and to specify the basis of exclusion, whether income or holding or otherwise (AIR 1993, SC, 1, pp. 477-762). Kuldip Singh J. suggested the means test to skim off the affluent section of the backward classes for the purpose of job reservation.

In *Chhotelal vs. U. P. Govt.* the Allahabad High Court had said, “The object of reservation will be defeated if on the inclusion of the class in a list of backward classes, the class is treated as backward for all time to come”. It therefore advised the state government to keep under constant periodical review the list of backward classes and the quantum of the reservation of seats for the classes determined to be backward at any point of time (AIR 1979; Allahabad, p. 135).

7. Criticism of Reservation Policy

It is surprising that the safeguards suggested in the Indira Sawhney case by the apex court have been gradually thrown to the winds and no attempt has been made by any government whether the Rao government (1991-1996), United Front Government (1996-1998) or the Vajpayee government (1998-2003) or Man Mohan Govt. (2004-2014) or Modi Govt. (2014-Continuing) to build a national consensus on the fundamentals of reservation policy so as to keep it within the confines of social justice and not allow it to attack the basic structure of the Constitution.

The 50 percent ceiling prescribed by the Balaji ruling (AIR 1963, SC, p. 649) and endorsed by the Indira Sawhney decision is fast losing its sanctity. In the southern states reservation exceeding 50 percent is the common practice. In Tamil Nadu the State Assembly has adopted legislation fixing reservation at 69 percent of the posts and vacancies and seats and the Parliament has given it the Constitutional protection and immunity from judicial scrutiny by including it in the IXth Schedule of the Constitution (76th constitutional Amendment, 1994).

In Karnataka, the State Assembly enacted laws to increase reservation progressively from 68 to 73 and finally to 80 percent (Times of India, 9 Sept. 1994). In Kerala the entire Muslim community has been declared to be backward and so eligible for reservation (Times of India, 29 Oct., 1994). In Andhra Pradesh also the Muslims are being extended reservation in addition to the backwards. Even the A. P. Backward Classes Welfare Association has contested the legality of this step in a writ petition before the State High Court.

Likewise on 10th May 2000, the Lok Sabha adopted the 90th Constitutional Amendment Bill (2000) which provides that reservation quota may exceed 50 percent limit laid down by the Supreme Court. The bill was passed with only one dissenting vote. This shows the unanimous political consensus underlying it. Though the Statement of Reasons gives the reservation backlog and the necessity of accommodating it along with 50 percent reservation for SC, ST and OBCs as the reason for raising the ceiling, there is no reference to backlog in the body of the bill. It means that reservation exceeding 50 percent of the vacancies is being legitimized even if there is no carry over of reserved vacancies from the previous years.

This amendment is full of dangerous potential as it is likely to give a spur to the demand of the OBCs for proportionate reservation presently claimed to be 52 percent. This, in addition to the SC and ST reservation, will push the reservation quantum to over 74 percent and defeat or nullify the main rule of equality contained in Cl. (1) of art. 16 of the constitution. Speaking in the Constituent Assembly, Dr. Ambedkar clarified that the seats (posts) to be reserved, if reservation is to be consistent with the right of equality, must be confined to a minority of seats. Giving an illustration he said, "supposing reservation were made for a community or a collection of communities, the total of which came to something like 70 percent of the total posts under the state and only 30 percent are retained as

unreserved could any body state that the reservation of 30 percent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity?" He replied, "It cannot be, in my judgment" (Coustituent Assembly Debates, 1948).

By removing the ceiling on reservations the above amendment (81st Amendment) has taken care of backlog or carry over of the reserved seats or posts of the previous years. While the 50 percent limit obtained the reserved seats carried over from the past could not be accommodated as the current reservation already occupied this space. The 81st Amendment has ensured that reservation can be up to any limit and the back log can be added to the current year's vacancies or can be cleared in a special drive for recruitment reserved exclusively for the backward classes and communities.

In this way the reservation policy has strayed from the realm of social justice and entered into the arena of power politics. It was conceived to be an instrument of social justice. It has been moulded into a weapon of power politics.

The Tamil Nadu measure as also the 90th Constitution Amendment Bill (1990) was passed with just one dissenting vote in each case. It means no political party is prepared to oppose the onslaught on the right of equality and limit the reservation policy to the demands of social justice. All the major parties have bargained social justice for electoral gains. At the all-parties meeting held on September 3, 1990, convened by the Prime Minister, the Congress (I) favoured pegging of reservations at 50 percent of the vacancies at any time. This would include reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes. No other party, however, made any commitment either way. The National Front government was unwilling to make any definite response. The there Law Minister, Dinesh Goswami was prepared to Admit was that if the reservation went beyond 50 percent, there may be legal obstacles. In a Press statement later, while quoting the relevant extract from the Balaji decision, the Law Minister said that in more recent years a number of judges of the Supreme Court in different cases had observed that no hard and fast rule could be laid down nor could this matter be reduced to a "mathematical formula" so as to be adhered to in all circumstances. The Minister added, "in other words they were not prepared to read Balaji as arbitrarily laying down 50 percent as the outer limit of reservation. While reservation not exceeding 50 percent will not be open to challenge, it is difficult to state whether the Supreme Court will necessarily strike down reservations exceeding that limit" (Times of India, 5 Sept., 1990).

The deliberations at the all party meeting showed that no party except the Congress (I) was prepared to commit itself to the 50 percent ceiling on reservations, or to denounce it. Notably, all parties including the Congress (I) lent support to the 85th (Tamil Nadu Bill) and the 90th Constitution Amendment Bills in the Parliament which sanctified the vioiation of the 50 percent rule in respect of reservations.

The reservation for Scheduled Castes and Tribes and Other Backward Classes has no reference to the religion of the beneficiaries. Indeed, the Mandal Commission in recommending 27 percent reservation for the Other Backward Classes had in mind the backward of both the Hindu and non-Hindu communities including the Muslims, Christians and the Buddhists, So it is the case with the Scheduled Castes and Tribes which include the Hindu and Muslim castes and non-Hindu tribes alike. It is therefore distressing that many national leaders like V. P. Singh, Mulayam Singh Yadav, Sitaram Kesari, Syed Shahabuddin and a number of Muslim organizations have been demanding separate reservation for the Muslims in public services. This is unwarranted as the Muslims are already included in the lists of Scheduled Castes and Other Backward Classes. If the Muslims are separately given reservation as a minority community it will mean double reservation for them.

Moreover reservation for the Muslims will be a booster to communalism. It will erode the secular principle of the Indian polity. It will be breach of an essential feature of the basic structure of the Indian Constitution, namely, secularism. Nor can reservation for Muslim be justified on the ground of historic injustice and deprivation. In fact it is the other way round as the Muslims since the Ghaznavi invasions have been the ruling class consistently. These facts make it obvious that any promise of reservation for the Muslims is not motivated by considerations of social justice but by purely selfish political gains.

8. Backwardness

As stated earlier, backwardness cuts across class, community and caste and is a social phenomenon. It is however, difficult to define and measure social backwardness. The first Backward Classes Commission suggested four criteria for general guidance (BCC Report, 1955).

- (1) Low social position in the traditional caste hierarchy of Hindu society.
- (2) Lack of general educational advancement among the major sections of a caste or community.
- (3) Inadequate or no representation in government service.
- (4) Inadequate representation in the field of trade, commerce and industry.

In the Balaji case (AIR 1963, SC 649) the Supreme Court made the following observations:

- (a) The concept of backwardness was not relative in the sense that any classes who are backward in relation to the most advanced classes of the state should be included in the list of backward classes.
- (b) Backwardness should be social coupled with educational.
- (c) Caste may be a relevant factor in determining the social backwardness of a group or class of citizens, it cannot be made the sole dominant test in that behalf.
- (d) It is only communities which are well below the state average that can be properly regarded as educationally backward.

In this case the Court held caste, poverty, occupation, place of habitation as some relevant factors for determining social backwardness. Departing from Balaji and Chitralkha, the Court in P. Rajendra vs.

State of Mysore, approved caste-wise classification as valid for indentifying social and educational backwardness. It said, "A caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is socially and educationally backward class of citizens within the meaning of Art. 19(4)" (AIR, 1968, SC, p. 1012).

The Mandal Commission held social backwardness as the primary cause of poverty and not vice versa. It said "lower and impurer castes in the Hindu caste hierarchy were permanently assigned menial tasks and refused any access to avenues for a better life. It was the all pervasive tyranny of this caste system which kept the lower classes socially backward and economically poor. The poverty of these castes stemmed from their social discrimination and they did not become socially backward because of their poverty...in the ultimate analysis social backwardness is not the result of poverty. In fact it is just the other way round" (Mandal Commission Report, 1980). In the Indira Sawhney case the Supreme Court said that in Art. 16(4) the word class is used in the sense of a social class and not in the sense it is used in the Marxist jargon. It said "A caste is nothing but a social class- a socially homogeneous class. It is also an occupational grouping" (AIR, 1993, SC).

Cl. 4 of Art 16 of the constitution does not contain the qualifying words, "socially and educationally" as does Cl. 4 of Art 15. The backwardness contemplated by Art. 16(4) is mainly social backwardness. In this way backwardness has come to be defined in terms of caste. The caste of a person is a fair index of his social and economic status, occupation, education and habitation. In *P. Sagar vs. State of Andhra Pradesh*, the Supreme Court said, "In case a caste was made a criterion, proper inquiry or investigation should be conducted by the state government before listing certain castes as socially and educationally backward" (AIR, 1968, SC, p. 1379). In *Jayasree vs. Kerala* and in *Laila Chacko Vs. State of Kerala* the court ruled that a classification based solely on poverty was not logical (AIR, 1976, SC, p. 2381). In *Chhotelal vs. U.P. Government* the Allahabad High Court upheld the relevance of both caste and poverty in determining the backwardness of citizens. It said, Social backwardness is in the ultimate analysis the result of poverty to a very large extent. Social backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong...(AIR, 1979, Allahabad, p. 135).

9. Creamy Layer

The backwardness, in Indian conditions, may be defined in terms of caste and community but within a caste or community the uppermost layer may be rich landowning and powerful as are the Yadavas, Kurmis, Ahirs and Jats in northern India. In such a situation justice requires that this segment be separated from the rest and excluded from the privilege of reservation. The Indira Sawhney decision popularized the idea that creamy layer be skimmed off the backward classes for the purpose of

reservation.

The reservation policy may in course of time produce a segment in the caste or community no longer in need of reservation. Thus we put it; those who benefit from affirmative action owe it to society to put their newly acquired social talents back into the collective social pool. This would mean that they would automatically fall outside the scope of affirmative action programme in the future. The net would no longer cover them as they already have socially useful assets. Indeed the society will be richer and better endowed.... As members of hitherto disprivileged communities begin to fall outside the net of protective discrimination, they release, and at the same time contribute, resources for the extension of the affirmative action programme. In this process the society gains as a whole (Gupta, 1997).

10. Rajiv Gandhi Rormula

Most political parties favour a “means test” applicable within a backward class to measure backwardness, or in other words, the caste should be moderated by the economic criterion to decide who shall be eligible for reservation. The CWC meeting on 30 August 1990 adopted a resolution sponsored by Rajiv Gandhi which bars the efficient and the well to do among the backward classes, specifically the children of those who are or have been gazetted officers or professionals such as a doctor, engineer or chartered accountant, or ministers in the Union government or in the state, or a judge or land or property owner of specified area, or tax payers, from the purview of reservation test they should corner all the benefits, leaving the larger of backwards to what they are and where they are. The relevant resolution recalls:

The equity and fairplay demanded that job reservations and other special measures for the backward classes as a whole be not pre-empted by the richer or more privileged segments of backward classes (Hindustan Times, 31 Aug., 1990).

At the all party meeting convened by the Prime Minister, V. P. Singh, on 3 September 1990, Rajiv Gandhi reiterated his party’s stand that those categories of backward classes who had done well in life and had children studying in public schools on payment of full fees, or who were in various professions, who were leaders or ministers in Centre or State or who owned land or property should be excluded from reservation. He insisted that the reservation policy should aim at benefitting the poorest of the poor and deserving only (H.T., 5 Sept., 1990).

Of the major parties, the BJP and the CPI (M) were in favour of the economic criterion so that “the better of sections among the backwards themselves did not obstruct the progress of their more unfortunate brethren by cornering all the benefits for themselves behind the caste label and to ensure that the expected benefits of reservations went only to the really deprived among the groups referred to as backward classes” (H.T., 9 Sept. 1990). The BJP leaders, Atal Behari Vajpayee and L. K. Advani

favoured modification of the Mandal recommendations keeping in view the economic criterion (H.T., 5 and 9 Sept., 1990). Both Mr. Vajpayee and Mr. Advani lent support to what has come to be called the Karpoori Thakur formula. This formula on job reservation is also favoured by the CPI(M) which in a resolution dated 30 August 1990 urged upon the National Front Government to give due consideration to the Bihar experiment on the reservation issue for the backward classes. E. M. S. Namboodripad also stated that the Bihar pattern could be taken as the basis for implementation of the Mandal Commission Report.

11. Karpoori Thakur Formula

The pattern of reservation introduced by Karpoori Thakur government in Bihar in 1978 provided the economic criterion within the reservation for certain backward classes by having two lists. The first list provided for 12 percent reservation without the economic criterion for “the most backward” classes. List II provided for 8 percent reservation for Other Backward Classes provided they satisfied the “means test”. In addition it provided 3 percent reservation for women and another 3 percent for poor of the forward classes. The Janata Dal leader, the Orissa Chief Minister, Biju Patnaik, questioned as to why the highly placed among the backward classes should have special privileges for their children. He said in a letter written to the Prime Minister that social and economic backwardness should be the criterion for reservations, not caste solely (H.T. 30 Aug., 1990). Likewise the Secretary of the Mandal Commission, M. S. Gill in an article appearing in the Times of India (5 September, 1990) said that “a means test (income ceiling) should be applied within the backward classes” (H.T., 5 Sept., 1990).

In this way a national consensus was emerging soon after the announcement on implementation of the Mandal Commission Report:

- (1) On the need to keep out the more affluent and well to do among the backward from the purview of reservation scheme.
- (2) On the need to evolve some economic criterion or the means test or the income ceiling for this purpose.
- (3) Not to treat caste as the sole basis of social backwardness.

In fact in *R. Chitralakha Vs State of Mysore* (AIR, 1964, SC, p. 1823) the Supreme Court observed that while the caste was a relevant circumstance, in ascertaining the backwardness of the class, there was nothing which precluded the authority concerned from determining the special backwardness of the group of citizens if it can do so without reference to the caste. The court said, “caste is not one of the compelling circumstances according a basis for ascertainment of backwardness of a class” (AIR, 1964, SC, p. 1823). It may be noted that many states have never prepared lists of OBCs nor do they think it necessary to create new caste based categories for state patronage. These include the states of West Bengal, Arunachal Pradesh, Madhya Pradesh, Manipur, Mizoram, Nagaland, Sikkim, Tripura, Orissa

and almost all the Union Territories.

The West Bengal government indeed set up a committee for this purpose in 1980. It recommended that “poverty and low levels of living standards rather than caste should be the most important criterion for identifying backward classes”. The committee also recommended the identification of occupational groups as backward, and formulation of comprehensive programmes for groups which are below the poverty line. The government accepted the report of the committee which was against the reservation of quotas in government services for the backward classes (Gupta, 1977). In Kerala, where reservation for the OBCs has been in force for quite sometimes, income ceiling for qualifying for benefits under it has been raised to Rs. 6000 annually.

12. Essentials of Reservation Policy Consistent with Justice

As Dr. Ambedkar said, reservation policy must be so designed as to reconcile two conflicting interests, namely, there should be equality of opportunity for all citizens and there must, at the same time, be a provision made for the entry of certain communities which have so far been outside the administration (CAD, 1948).

Cl. (1) of Art. 16 guarantees that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state.

Cl. (4) Enables the state to make 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, “The objective of Art. 16(4) is empowerment of the deprived backward communities—to give them a share in the administrative apparatus and in the governance of the community” (AIR, 1993, SC, p. 521). Over the years the courts have attempted to reconcile the two clauses so as to protect the right to equality as also to promote the cause of the backward classes. They have interpreted the reservation policy in a manner that will adjust protective discrimination to equality of opportunity.

The essentials of the reservation policy that would be consistent with social justice as deduced from judicial decisions and writings of publicists and ground realities would be:

(1) Firstly 50% Reservation should also be given to SCs, STs, and OBCs in India Judiciary (From top to bottom) for their representation and also impartial interpretation of constitutional and common law. This is the best device of social Justice.

(2) Reservation in no case should exceed half the vacancies to be filled in at any time. This should cover the Scheduled Castes, Scheduled Tribes, Other Backward Classes, the backlog carried over from the post, and any categories statutorily created such as poor among the upper castes, women, dependents of political sufferers, freedom fighters, ex-armymen or the like.

(3) The secular character of reservation policy should be maintained. In no case should religion be made the basis of reservation. It means that there is no case for separate reservation for the Muslims or Christians or for any other religious community.

(4) The quota of reservation beginning with 50 percent should decrease by 1 percent every year so that in a span of 50 years there is no reservation of any kind for anyone and the goal of a casteless, democratic, egalitarian social order is fully realized.

(5) The list of backward classes should be carefully drawn after scientific investigation and data collection. The revision or updating of the lists should be a continuous process with additions and deletions in accordance with changing circumstances.

(6) Caste alone should not be the criterion of reservation. It should be coupled with the means test' on the basis of income, landholding, property and the like. The Rajiv Gandhi formula provides a sound basis for de-reservation which should be taken into account. The creamy layer in each caste and community should be skimmed off for reservation in services and educational institutions alike.

(7) Reservation should apply only at the initial stage of appointment. There should be no reservation at the stage of promotion of the employees and officers. Once appointment has been secured by any person he should stand on his merit for the purpose of the next promotion.

(8) While minimum standards for admission to educational institutions and recruitment to government posts and service may be lowered for the backward classes but should not be waived altogether.

(9) Reservation should also be applied to appointments in the academic and scientific fields. Similarly there should be reservation for admission to super specialities in medicine or engineering or a like area. There should be reservation, for instance, in the appointment of teachers in the universities, or of pilots, navigators, doctors, engineers also.

There has been no discussion so far on any time frame for terminating reservation or on any scheme of gradual de-reservation. In many states in the past the attempts by the state governments to drop a caste or community from the reservation list has evoked sharp protest and violent resistance often forcing the state government to backtrack on the issue. At the all party meeting held on September 3, 1990 the Congress (I) was the lone party publicly committing itself to a 50 percent ceiling on the quantum of reservation, and to announcing a formula for skimming off the creamy layer from the benefit of reservation. Of the other parties, the BJP and the CPI (M) supported the idea of moderating caste by an economic criterion for the purpose of reservation. The parties of the National Front, however, were non-committal on every point. The meeting therefore failed to formulate any consensus on limiting the reservation policy.

Since then no government—whether Narasimha Rao's (1991-1996), or United Front Government (1996-1998) or Vajpayee's (2000-2005) or Man Mohan (2005-2014) or Narendra Modi (2014-present day) has exhibited any inclination to confine the reservation policy within the bounds of social justice.

On the contrary, every political party is keen to be publicly seen as one up in the matter of reservation for the OBCs. The 81st constitutional amendment protecting reservations beyond 50 percent up to any limit and the 77th amendment for continuing reservation in promotions were passed during this period. Reservation of more than half of the vacancies and seats will make a mockery of the constitutional guarantee of a quality. This is not social justice but power politics. Instead of yielding to reckless demands from castes and communities for reservation in jobs and seats, the parties should join hands to evolve a national consensus to checkmate this rat race. So, we have described the case for rescuing the goal of social justice from the arena of power struggle in the following passage which in spite of its length is worth quoting.

Therefore, Social justice is not only amelioration of the downtrodden and the deprived sections of the society. It is certainly that but it must be done carefully and cautiously in such a manner that it does not create more of the downtrodden than it uplifts. Secondly, it is imperative that it is done in a manner that the quality of life (social, academic, scientific, material, moral) does not deteriorate. That will be detrimental to all, to what may be called the haves as well as the have nots is it in the interest of the Dalits that scientific or academic or technological progress or economic development or social morality should come to a halt or should degenerate. If it is not then the amelioration programmes should be formulated and implemented with the willing consent and cooperation of all sections of people and not merely imposed in a manner that smacks of tyranny of the majority. It must be underlined, if standards, moral or material decline, then every body is the sufferer. A substandard physician or surgeon will be risky to the patient regardless of the latter's caste, community or religion. If the administration lacks efficiency, honesty, sincerity, professional skill, its fall out affects every body, more so the weak and the poor than the well to do and the rich. So there is general social interest in maintaining standards of morality, efficiency and scientific, technological and academic levels. This cannot be achieved without evolving rational restraints on the current political rat race for reservation.

References

- AIR. (1951). *SC 226, state of Madras Vs. Champakam Dorairajan.*
- AIR. (1963). *SC 649, Balaji Vs. State of Mysore, the Supreme Court said that reservation made under Cl. 4 of Art. 16 must be reasonable. It should not be so excessive as to make a nonsense of citizen's fundamental right to equality. It held that any reservation in excess of half of the vacant posts at any time shall be unreasonable and as such violative of the guarantee of equality.*
- AIR. (1963). *SC 649.*
- AIR. (1964). *SC 1823, R. Chitralakha Vs. State of Mysore.*
- AIR. (1968). *SC 1012, P. Rajendran Vs. State of Mysore.*
- AIR. (1968). *SC 1379.*

- AIR. (1976). *SC 2381, Jayasree Vs. Kerala and Air 1967, Kerala 124, Laila Chacko Vs. Kerala*. According to the Constitution (Scheduled Castes) order, 1950, the number of Scheduled Castes in various states is 867, and according to the Constitution (Scheduled Tribes) Order, 1950, the number of Scheduled Tribes in the country is 344. See Report of the backward Classes Commission, Vol. II New Delhi, 1955, pp. 131-252. The Commission identified as many as 2379 Other Backward Classes in the country. Constituent Assembly Debates, 30 November 1948, pp. 701-702.
- AIR. (1976). *SC 490, Devadasam case*.
- AIR. (1979). *Allahabad, 135, Chhotelal Vs. U.P. Govt*.
- AIR. (1979). *Allahabad, 135*.
- AIR. (1992). *SC 36* (p. 41). <https://doi.org/10.2307/forhis/36.1.41-a>
- AIR. (1993). *Indira Sawhney Vs. Union of India* (pp. 477-761).
- AIR. (1993). *SC* (p. 521).
- Gupta, D. (1997). Positive Discrimination and the Question of Fraternity. *Economic and Political Weekly*, XXXII(31), 1976.
- Hindustan Times*. (1990). New Delhi, 30 Aug., 1990, 5 September 1990, 9 September 1990.
- Irish, M. D. (1963). *Continuing Crisis in American Politics*, Prentice Hall (p. 121).
- Report of the Backward Classes Commission (Mandal Report)*. (1980). Akank Publications, Delhi (p. 30).
- The 76th Constitution Amendment Act*. (1994).
- The 81st Constitution Amendment Act*. (2000). Signed by the President on 19 June 2000.
- Times of India*. (1994). New Delhi, 5 Sept., 1990, 9 September 1994, 29 Oct., 1994.