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RESERVATION: PROVIDING OR PREVENTING JUSTICE

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I. INTRODUCTION

The spirit of equality pervades the provisions of the Constitution of India, as the main aim of the founders of the Constitution was to create an egalitarian society wherein social, economic and political justice prevailed and equality of status and opportunity are made available to all.⁷⁶⁷ Our forefathers while making the Constitution back in 1950 had a basic goal for the Constitution in mind and that was to provide the future generation a classless society. Caste-based reservation was a provision made just to compensate for the class system that dominated the traditional Indian society and to give a chance to the down trodden. It is one concept that has since beginning being taken in its wrong sense and till date followed in an abysmal manner. Rather than being an instrument of promoting equality it has become a major Roadblock for equality. And without transforming the vertical inequality in society into horizontal equality, democracy will have no meaning.⁷⁶⁸

Originally reservations of seats in educational institutions and jobs in government and public sector services, etc were only about 22%, 20% for Scheduled Castes (SCs) and 2% for Scheduled Tribes (STs). In 1989 by one stroke of the pen the then Prime Minister V.P.Singh added another 27.5 % for OBCs (Other Backward Castes e.g. Yadavs, Kurmis,etc), by implementing the Mandal Commission Report, making a total of 49.5%.⁷⁶⁹ The whole constitution has been framed to the positive discrimination in favour of the down trodden but that itself promotes casteism while the depressed classes still don't get social justice.

In this backdrop, the real question that arises is that has the goal of the Constitution makers been fulfilled, or the existence of system of reservation is like the existence of caste system in traditional India? Have the down trodden been provided an access to justice or has their position further degraded? Is the Indian society in reality moving towards a classless society as the Constitution makers aimed at, or towards a further division of the society (in the Light of Hardik Patel's demand for inclusion of Patidar caste in the OBC category, or the Jats to be provided a further reservation). The goal of reservation in India has been to bring about an improvement in the welfare who, historically, have been economically and socially depressed. But, have they really benefitted or will they benefit in the future?

⁷⁶⁷ Available online at <http://www.iasir.net> Reservation Policy and Indian Constitution in India

⁷⁶⁸ <http://lawmin.nic.in/nerwc/finalreport/v2b1-2ch9.htm>

⁷⁶⁹ <http://justicekatju.blogspot.in/2015/04/caste-reservations-in-india-originally.html>

II. JUDICIAL APPROACH TOWARDS ENSURING JUSTICE:

• In **K.C. Vasant Kumar v. State of Karnataka**⁷⁷⁰ it was expressed that in the ultimate analysis, attainment of economic equality is the final and the only solution to the besetting problems. There is also one danger in adopting individual property as the criterion to identify a member of the backward classes. The truly lower classes who need the certificate most to prove their poverty will find it difficult to get the certificate from the official or the legislator or any named person [434 B-C] Class poverty, not individual poverty, is therefore the primary test. Other ancillary tests are the way of life, the standard of living, the place in the social hierarchy, the habits and customs, etc. etc. Despite individual exceptions, it may be possible and easy to identify social backwardness with reference to caste, with reference to residence, with reference to occupation or some other dominant feature. notwithstanding our antipathy to caste and sub-regionalism, these are facts of life which cannot be wished away. If they reflect poverty which is the primary source of social and educational backwardness, they must be recognised for what they are along with other less primary sources. Justice Desai also expressed the view that the only basis upon which the backward classes should be identified is the economic one and that a time has come to discard all other basis.

• **Justice A.P. Sen** was also of the opinion that the predominant and only factor for making provisions under article 15 (4) and 16(4) should be poverty and caste should be used only for the purpose of identification of groups comparable to SC/ST. The reservation should continue till such a time as backward classes attain a state of Enlightenment.

A special provision does not only mean to provide for education, agricultural programmes, schemes for training to pursue trade or

business, free education, free hostel facilities, advancement of loan and special procedure of recovery of loan etc. It would also include a affirmative action by the state to make the down trodden into the mainstream of the national life, to live with dignity, self-respect and with their heads held high.⁷⁷¹

• The full bench of Andhra Pradesh High court in **V. Narayana Rao v. state of AP**,⁷⁷² held that the community cum means tests and excluding persons families above that income level is not only permissible but a highly desirable step which would also serve to reduce the division of society on the caste lines. Further it was held that it is not strictly necessary that designated group of persons should be comparable in backwardness to the scheduled caste and Schedule Tribes. The test of compatibility is only a guideline and not meant to be adhered to the exclusive of all other tests. Social and educational backwardness, poverty and caste are interlinked and interdependent.⁷⁷³

• In **Balaji v. State of Mysore**⁷⁷⁴ it was held that 'caste of a person cannot be the sole criteria for ascertaining whether a particular caste is backward or not. Determinants such as poverty, occupation, place of habitation may all be relevant factors to be taken into consideration. The court further held that it does not mean that if once a caste is considered to be backward it will continue to be backward for all other times. The government should review the test and if a class reaches the state of progress where reservation is not necessary it should delete that class from the list of backward classes.'⁷⁷⁵ It was said that 'caste' may be a relevant factor, but not the sole criteria nor the dominant criteria for determination of backward class. In that case, the order of reservation was declared

⁷⁷⁰ AIR 1985 SC 1495.

⁷⁷¹ V.N Shukla, *Constitution of India*, 854 (Eastern Book Company, Lucknow, 12th edn., 2016)

⁷⁷² AIR 1987, SC 579

⁷⁷³ AIR 1987 AP 57(FB)

⁷⁷⁴ AIR 1963 SC649

⁷⁷⁵ Available at: <http://www.youthkiawaaz.com/2011/02/educational-reservations-india-solutions/>

bad as it was based solely on caste without regard to other relevant factors.⁷⁷⁶

- In **Janki Prasad Parimoo v. State of J & K**,⁷⁷⁷ it was held that poverty alone cannot be the test of backwardness as large sections of population in India are backward and thus the whole object of reservation would be frustrated.
- In **Chitrallekha v. State of Mysore**,⁷⁷⁸ an order saying that a family whose income was less than Rs. 1200 per year and followed such occupation as agriculture, petty business, inferior services, crafts, etc would be treated as backward, was declared valid though caste as a criteria was totally ignored for the purpose. It was held that identification of backward classes on the basis of occupation-cum-income, without reference to caste is not bad and would not offend Art. 15(4).
- In **Ashok Kumar Thakur v. Union of India**.⁷⁷⁹ The Hindi version of the Reservation Act which had excluded creamy layer from the ambit of reservation was rejected by the Parliament and the English version of the Reservation Act which did not exclude creamy layer from the benefit of reservation, was accepted.

The analysis above proves that Caste cannot be the only basis for ascertaining and identifying the backward classes for the purpose of articles 15(4) and 16(4) of the constitution when the goal of our constitution is a classless society, de-alienation on the basis of caste as such is bound to prove counter-productive.⁷⁸⁰

- **Indira Sawhney v. Union of India**⁷⁸¹

In Indira Sawhney's case on the question of exclusion of 'creamy layer' from the Backward Classes, there was agreement amongst majority of Judges of this Court a specific declaration of law was made to the effect that those in higher services like IAS, IPS and AH India

Services or near about as persons who have reached a higher level of social advancement and economic status, as a matter of law, such persons should be declared not entitled to be treated as backward. They are to be treated as creamy layer "without further inquiry." They are also in open violation of the Judgments of this Court which are binding under Article 141 and the fundamental concept of separation of powers which has also been held to be a basic feature of the Constitution. Attitude and action of the State of Kerala has unfortunately resulted in allowing 'creamy layer' among backward Classes in the State to continue to grab the posts in the services in Government, public sector etc. even after Indira Sawhney's case and get away with the same. The result is that really backward among the Backward Classes have been deliberately deprived by the State of their legitimate rights because they have no voice in the decision making process.⁷⁸²

III. CURRENT SITUATION OF THE DOWNTRODDENS

Discrimination against Dalits still exists in rural areas in the private sphere, in everyday matters such as access to eating places, schools, temples and water sources. It has largely disappeared in urban areas and in the public sphere. Some Dalits have successfully integrated into urban Indian society, where caste origins are less obvious and less important in public life. In rural India, however, caste origins are more readily apparent and Dalits often remain excluded from local religious life, though some qualitative evidence suggests that its severity is fast diminishing. Now the real question that arises is that have the down trodden ones really been able to get their share till now? The answer to this is a recent incident in Gujarat where on 17th September during Ganesh Chaturthi celebration the backward classes in a school were not allowed to partake the Pooja while the upper castes were participants in the same. Our nation is flooded with such cases and proofs of a defective

⁷⁷⁶ 1962 SCR Supl. (1) 439

⁷⁷⁷ 1973 SCR (3) 236

⁷⁷⁸ 1964 SCR (6) 368

⁷⁷⁹ AIR 1951 SC 226

⁷⁸⁰ H.M Seervai, *Constitutional Law of India*, 258 (Universal Law Publishing, New Delhi, 4th edn., 2015)

⁷⁸¹ [1992] Suppl. 3 SCC 217

⁷⁸² Available at: <http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=16589>
Presentation-Dalits situation in India – (Varusanadu)

approach in giving a chance to the caste who was victim to this appalling system. Dr. Ambedkar like many of our forefathers had honest intentions to carry on the affairs of the country in the name of justice and democracy was concerned for the upliftment of the oppressed.⁷⁸³ Ironically as the nation is leading its way towards progress and development the nation leaders are finding the necessity for more and more and more reservations. The idea is not to degrade the situation of social justice in India by discarding the reservation system but to provide justice through improvising this technique and giving birth to newer ways for providing justice to the sufferers of injustice.

1 crime is committed against a Dalit every 18 minutes

27 atrocities against Dalits every day

13 Dalits are murdered every week

5 Dalit's homes or possessions are burnt every week

6 Dalits are kidnapped or abducted every week⁷⁸⁴

18 Constitutional Amendments have been introduced since Independence aimed at protecting the SC/ST/OBC categories. This ameliorates the whole situation, there was reason why the framers of the constitution had proposed this system for the initial 10 years but political bias and selfishness lead to this situation where the real purpose of 'quota system' is not being met.

IV. RESERVATION: ENEMY OF SOCIAL JUSTICE

Today we notice that even though there has been an improvement in the status of the Supreme Court the internal hierarchy within the schedule caste has become more marked. A small number of them may have benefitted a lot from various government measures but an overwhelming majority of them still find it

difficult to make both ends meet.⁷⁸⁵ Many of the benefits of reservation have been captured by are both relevant for determining the backwardness but neither caste nor poverty alone will be the determining tests. Both are relevant for determining the backwardness. Social backwardness which results from poverty is likely to be magnified by caste considerations. Occupations, place of habitation may also be relevant factors for the purpose. With improvement in economic position of a family, social backwardness disappears and to allow these persons to enjoy the benefits will result in depriving the real backward persons of their chance to make progress.⁷⁸⁶ A tiny minority has prospered, with an estimated 1% of the two "scheduled" groups falling into the highest wealth bracket (calculated as four times above the poverty line), according to a recent study of income data by caste, from 2005. Yet this in turn creates anxiety. If a tiny set flourishes within a broadly disadvantaged group, should it continue to enjoy privileges and quotas from the state? The Supreme Court, addressing the OBCs in particular, says no. It defined the concept of a "creamy layer" of the wealthiest and most privileged among the OBCs, saying they must now be excluded from quotas. The result: debates flare not only over which backward groups deserve privileges, but over whom within the groups should then be excluded. The result, increasingly, will be a mess.⁷⁸⁷

The persons included in the creamy layer are already advanced and can be compared to the so called forward section of the society. They can be treated as equals with the forward section of the society. Thus the contention that exclusion of creamy layer would not bring about equality as those people would remain backward, is not well founded. Instead inclusion of creamy layer would mean unequal persons being treated as equal thus violating Article 14,

⁷⁸³ S. R. Maheshwari, "Reservation policy in India: Theory and practice." *Indian Journal of Public Administration* 43.3 (1997) 662-679.

⁷⁸⁴ UN, Human Rights Watch, Times Database

⁷⁸⁵ R.B. Singh, Scheduled Caste Welfare: Myth Or Reality, Pg-XVII, 2003

⁷⁸⁶ M. P. Jain, "Justice Bhagwati and Indian Constitutional Law." *Journal of the Indian Law Institute* 2.1 (1959): 31-48.

⁷⁸⁷ Available

at: <http://www.economist.com/blogs/banyan/2013/06/affirmative-action>

15 and 16. Another important issue with regard to the creamy layer controversy is whether the restrictions imposed on the creamy layer would apply in case of Schedule Caste and Schedule Tribes also. The Supreme Court held that 'creamy layer' is a parameter to identify backward class. Therefore this principle cannot apply to SCs and STs as they are separate classes by themselves.⁷⁸⁸

V. FILLING THE LACUNAE:

Caste is Omni present both in our conscious and sub conscious relations. Caste based reservations though not a perfect strategy have helped to create voices for the marginalised. There are dissenters both among the beneficiaries of the system and its opponents. Necessary to find out an alternative to this situation. although the social structure of our society is based upon these castes both neither did this deliver justice to its people today nor has it been successful now.⁷⁸⁹ No one in his right senses can have any second thoughts regarding helping the poorer and the weaker section of society. But it's equally important to understand the ways by which we go about the problem. And to that we have examples set to us by the great reformers. Swami Vivekanad, Lokmany Tilak, Veer Savarkar and so many have shown us the right way of addressing the issue. The psychological upliftment should be the first and foremost target⁷⁹⁰. And we by promoting the reservation system are actually promoting the unhealthy psychological mind-set regarding the backward classes.

The Veerappa Moily Oversight Committee on implementation of reservations in higher education can ensure that the reservation for the OBCs is targeted more efficiently by:

1. That the "creamy layer" within the OBCs be made the last claimant on the benefits of the new reservation.

2. That the 27 per cent quota be subdivided among "upper" and "lower" backward classes.
3. Once a person has taken advantage of the quota system then should not be given job or promotion by reservation he or she should thereafter compete on merit.
4. If a person gets a job from the quotas it should not be extended to his or her children.
5. A minimum threshold of eligibility candidates seeking admission into "super speciality" professional courses.
6. Emphasis should be given to proper primary (and secondary) education so that people from so called lower strata of the society become natural competitors and there should be an increase the number of higher education institutes.
7. The government should setup a diversity and disadvantage commission as a permanent statutory body to regularly monitor the diversity profile of public institutions and to advise the government on improving it.⁷⁹¹

Caste only cannot be the basis for reservation. Reservation can be for a backward class citizen of a particular caste. But creamy layer of that caste are not socially and economically Backward Classes and thus they are to be excluded from the benefit of reservation. Inclusion of castes in the list of Backward Classes cannot be mechanical and cannot be done without adequate relevant data. Nor can it be done for extraneous reasons. Care should be taken that the Forward Castes do not get included in the backward castes list. If Forward Classes are mechanically included in the list of Backward Classes or if the creamy layer among Backward Classes is not excluded, then the benefits of reservation will not reach the really backward among the Backward Classes. Most of the benefits will then be knocked away by the

⁷⁸⁸ Available at: http://indialawjournal.com/volume3/issue_2/article_by_rushminsunny.html

⁷⁸⁹ Daniel C. Quan, "The price of a reservation." *Cornell Hotel and Restaurant Administration Quarterly* 43.3 (2002): 77-86.

⁷⁹⁰ Available at: <http://www.youthkiawaaz.com/2011/11/have-reservations-served-social-justice-at-all/>

⁷⁹¹ Siddarth Malik, Affirmative Action in Higher Education: Myths and Realities, 14th October 2015, 6:32 P.m <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=7efb6a9e-c88c-4af1-a8dc-d9742af80478&txtsearch=Subject:%20Constitution,>

forward castes and the creamy layer. That will leave the truly backward, backward for ever.⁷⁹²

VI. CONCLUSION

Reservations might seem necessary for giving equal opportunity to every citizen in educational institutions and public employment however the short term goals of protective discrimination cannot be allowed to affect the permanent feature of the constitution. Further the caste test should be comprehended to be absolute as it affects adversely the vulnerable sections both in the backward and forward classes. This can be minimised the adoption of a test on the basis of class for the grant of benefits of reservations, which must further be based on multiple factors like income, actual occupations pursued by parents literacy levels etc. Unless this change does not come about, reservations will continue to pretend the considerable social tensions prevailing in the society.⁷⁹³

“Jawaharlal Nehru, the first Prime Minister of India wrote in a letter to Chief Ministers dated 27th June 1961: “I dislike any kind of reservations... if we go in for reservations on communal or caste basis we (will) swamp the bright and able people and remain second-rate or third rate... this way lies not only folly but disaster.”

An alternative rather a replacement for caste based reservation could be removal of the mental blindfold otherwise in the wake of the present situation while we give privileges to the down trodden from the past the circle continuing may lead to the never ending reservation system but the change in the ends of it being the Sc/St and OBCs of today becoming the general category of tomorrow. The reservation policy has just become another hostage to suffice the political interests.

The most basic requirement is to ensure that reservations function in a way that enhances or at least respects the principle of equality of

opportunity. The courts have addressed this constitutional necessity by stipulating an upper limit for the seats reserved in institutes and jobs.. this is an important step but requires considerations on the grounds that enable us to reconcile the principle of equal opportunity with policy of reservations.

There is fear that reservation once introduced will never be withdrawn even if there is a proof for upliftment of backward classes, due to political issues. For example, in Tamil Nadu, forward castes were able to secure only 3% of total seats (and 9% in Open Competition) in professional institutions at Undergraduate level as against their population percentage of 13%. This is a clear case of reverse discrimination.⁷⁹⁴ Scrapping reservation would seem to be next to impossible legally, politically and practically, but the fact remains that true equality of opportunity still eludes many disadvantaged people in India. The challenge, therefore, is to make caste-based reservation work better, so as to raise the quality of public education in India.

⁷⁹² AIR 1976 SC 2381.

⁷⁹³ Kirtinath Kalita, "Ambedkarite Philosophy of Reservation and Its Consequences." *Journal of Indian Council of Philosophical Research* 35.3 (2018): 549-556.

⁷⁹⁴ Kajal Kalsi, "Reservation, Rage and Resentment: In Light of the Politics of De-reservation." *Contemporary Voice of Dalit* (2024).