RESERVATION UNDER THE CONSTITUTION OF INDIA: A CRITIQUE

SUMMARY OF THE THESIS
Submitted to the Faculty of Law
PANJAB UNIVERSITY, CHANDIGARH
for the degree of

DOCTOR OF PHILOSOPHY

2011

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A society is as strong as its weakest sections. Therefore to protect and promote interests of such sections is to stabilize and strengthen the society. As a National policy, the framers of the constitution provided for special measures to ameliorate the conditions of the weaker sections of society. The policy of ‘Protective Discrimination’ has been to mitigate the existing inequalities between various sections of the society and accomplish a social reconstruction ensuring socio-economic justice to all. The post-constitutional history of protective discrimination policy has arrived at such a cross road from where if we look behind we may find that there is no clear track to be followed. Perhaps the most important lesion of protective discrimination policy in our country is that there is no single big lesson to be proud of. We framed the constitution with grand promises. A splendid compromise between formal equalitarian justice and compensatory justice through begin or protective discrimination was devised so beautifully that, that was to serve the purpose of assimilation, integration and equal partnership in national building by making equal contribution in the main stream of our national life. Even after the working of once and a half decade, the constitution of India was admirably described, for its compromistic vision in conflicting claims, as an original contribution to constitution making.

The idea of ‘Protective’ or ‘Compensatory’ discrimination is consistent with the idea of equality. The aim of compensatory discrimination is to offset the effect of inherited inequalities and remedy historic injustice. Redistribution of society’s goods and services in order to remove or eliminate existing inequalities may ultimately be beneficial to the society as whole. The preferences promote of the disadvantaged groups into the larger society and promote national development.

Equality is an aspect of distribute justice. The equalitarian guarantees of a constitution, often expressed in the individualistic or universal terms, do not stipulate any particular concept of equality. Rather, the contents have to be poured into the equality clauses from time to time responding to the currently accepted social values or norms, established morality of the constitutional goal to achieve overall equality.
In constitutional law, the social equality based claims limiting the ‘individualistic’ equality would give rise to the problem of balancing the competing claims of equalities, e.g., the claims based upon merit, efficiency or competence and the claims for redress of historic injustice. Even if it is agreed that ‘equality’ mandates compensatory discrimination, for the courts faced with the constitutional resolution of these competing claims the choice of means becomes very significant.

Article of 14 to 16 can be so interpreted as mandating some kind of substantive equality of result, by making a reasonable classification on the guidelines supplied by the non – enforceable directive principles which define the constitutional preferential treatment to the backward classes or weaker sections would be given by state by making a proper classification under. Article 14 ‘reasonable classification test’ even without any explicit provisions like Article 15 (4) or 16(4). These protective discrimination provisions have been put in Part – III of the Indian Constitution under the heading ‘Right to equality’ simply due to over – anxiety of the drafters to incorporate the notion of positive Equality. Thus viewed, Article 15(4) and 16(4) are not expectations or provisos to articles 15(1) or 16(1), but are the explanations or illustrations of the right to equality in relation to the backward groups. They are definitive of the notion of substantive equality.

‘Reservation’ is only one of the various means to achieve equality for the disadvantaged groups. The state is free to experiment all possible means to encourage the backward groups in the opportunity structure of the society. The policy of job reservation was quite firmly established during the closing decades of the British rule in India but such policy was designed to redress communal disparities in public services rather than to remedy the historic injustice. Firstly, job reservation initiative has been taken by South Indian Provinces. When article 16(4) was debated in the Constituent assembly there was a considerable discussion on the question of intended beneficiaries of preferential job policies. Some members equated backward classes with the untouchables while other believed that the term included all backward castes and communities. Mr. Munshi stressed upon the factor of educational, economic castes and social backwardness. Dr. Ambedkar frequently referred to castes and communities as the intended beneficiaries of reservations in services. But the overall tenor of the
debate makes it clear beyond doubt that the beneficiaries of compensatory discrimination were not merely economically weak groups but not social groups whose backwardness was associated with discriminatory social structure.

The foundation of education in India is still based on belief in the Vedas which emphasized superiority by birth and the sacraments. Moreover, the right of imparting education was vested only in the priestly castes. Thus, till recently the monopoly of education was vested and exercised by only the higher caste Hindus in the Hindus Society. The education commission (1964-65) has only confirmed that caste loyalties are encouraged in a number of private educational institutions: namely the Banaras Hindu University and the Aligarh Muslim University, organized by the Hindus and Muslims respectively. There is needed to make education an effective instrument for securing a status of equality for weaker sections of society. For this purpose we must prepare a system of public education, which will be open to all children irrespective of caste, creed, community, religion, economic conditions or social status and strive for the repaid development of the weaker sections of the society. The number of Professors, University teachers belonging to the Scheduled Casts and Tribes in the established Universities are negligible. From different education reports, it can be concluded that education in all spheres of life of the weaker sections is extremely meager.

The constitution of India in its Article 16(1) provides that there shall be equality of opportunity for all citizens in matters relating to employment, but at the same time clause (4) provided that nothing in the Article 16 (1) shall prevent the state from making adequate representation in services in favour of backward classes. The 43 years of experience of the operation of these provisions reveals that even the position even today is most unsatisfactory and discouraging. The courts have been particular as regards the quantum of reservation as is evident from the case – Indra Sawhney v/s Union of India. The Supreme Court held that reservation should not be more than 50%. Moreover the claims of the members of the SCs and STs shall be taken into consideration consistently with the maintenance of efficiency and administration in the making of appointments of services and posts in connection with the affairs of the union or of a state as per Article 335 of the Constitution of India.
The 50% of the posts to be reserved for these classes will be adequate if these posts are filled up regularly each year and the question of 'carry forward rule will also not come on the way. These controversies do come on the way due to the reason that government is not in a position to fill up these posts regularly in each year due to its own irregularities. Why the government is not able to educate at least the required number of persons belonging to SCs STs to fill the vacancies in the services earmarked for these categories.

It is the lackadaisical approach of the government towards the implementation of reservation policy and principles of equality, enshrined in the constitution, that it could not educate the required number of people to fill the vacancies in government services. It is suggested that in such case investigation should be made and persons responsible for such irregularities should be punished.

The judiciary has maintained rational, scientific, secular and objective criterion with balanced societal interests and thereby has resisted divisive and separatist forces. In most of the cases the judiciary has been cautious in allowing the preferential treatment to disadvantaged classes under permissible classification. It has upheld preferential treatment in their favour only for special reasons according to facts and circumstances of the each case. However, sometimes we find that judiciary has created confusion in law by its own conflicting decisions.

These masses live in very economic miseries almost in a starving condition, striving to match the two ends. They represent all castes and communities in varying proportion from different social segmentations. A common programme free from governmental target worries is required to be launched. We have got a below poverty line (BPL) mechanism in the government for chalking out the economic planning’s for the people of the last bracket of the society. If one looks at the figures showing the trend or say graphical picture of the BPL, it shows a satisfactory and ever improving condition. But one when goes amidst the slums and chawls of such BPL defined people, the picture does not correspond to what is boasted in the government declarations, pronouncements, publicities, attractively exhibited computer graphs and charts. These poor’s are found in entirely a different world of scarcities and starvations, wants and what not. It warms the cockles of one’s heart as to what
correct. One what is seen with naked eyes or that submitted in the attractive folders, Nets, E-Governance containing nicely worded and beautifully power pointed notes/reports submissions to the bureaucratic Bada Saabs and political bosses.

After independence, a voluntary scheme of earmarking 10 per cent out of profit of business/industrial houses was appealed by the government for being spent for the welfare of weaker/backward class of the society with all financial and schematic flexibilities being vested in the hands of such business/industrial houses. This was theoretically found to be a noble idea and was well appreciated publicly including business and industrial corners as well, but when the question of its implementation came, it was opposed teeth and nail by the very private sector and their representing organizations and the whole scheme disappeared ultimately without implementation.

Literacy rate of the country was5.35 per cent in the year 1901, which went up to 9.50 per cent in 1931 and further to 21.96 per cent in the fifties and now touching to 69 per cent in 2001. In spite of this growth, much is still left to be done. These are the figures as per the government parameters, which also needs to be reviewed with its present day relativity. Our budget allocation after education was 1.2 per cent in the year 1981, which though raised, is still less than 3 per cent in the recent years, which is one of the lowest if globally compared to Amartya Sen, the Indian based Nobel prize winner economist has suggested it to be at least around 15 per cent.

SUGGESTIONS

Education standard in rural area schools should be improved and efforts towards uniform education system should be made. Reservation in education is more significant than in the employment, because without education people of the backward classes will not qualify the eligibility foe getting the jobs. Therefore, without educational reservation, reservation in employment is useless.

Rule of “means test” should be applied to SCs and STs Reservations. Under this reservation first preferences should be given to the members of the depressed sections those who really deserve, or poorest among them. If seats remain vacant then to the other members of the SCs and STs who are excluded by “means test”.
By invoking Article 340, the President of India should set up a high powered commission to find out where reservations are implemented properly and where these are still not implemented.

Under Criminal law (penal) provisions should be made for punishment to those officials who might be found guilty for non-implementation of the reservation policy. Free – Style reservations like reservation in favour of political sufferers, legislators, and State agitators and on departmental bases should be dropped immediately. Rule of “means test” should be applied in case of military quota: by applying this rule the object of this reservation would be served better. Land Reform Acts should be strictly implemented.

Reservation in promotion for SC & ST should be reinforced. Adequate representation implies not merely quantitative representation but also qualitative representation at all levels of Administration. Reservation for O.B.Cs in education filed should also be provided, without educational reservation, reservation in employment is of no positive sequence.

**Caste and class as criteria**

Observation reveals that caste is still one of the important factors which determine the chances of an individual in life. The backward classes are socialized in a culturally inferior social situation and fail to learn about the new avenues and opportunities in life. They are represented much less than even the scheduled castes and the scheduled tribes in the central services and in the service of the state governments. They are in no position to compete with the candidates of the upper castes. In view of this it is only fair that caste should be used as one of the important criteria for identifying backward classes.

However, caste cannot be the only criterion. The Indian constitution talks about socially and educationally backward classes. All the backward classes’ commission and the different Indian states have considered these two variables in their reservation policies. They have, however, failed to recognize the importance of the economic criterion along with the caste criterion. Reservation should be extended only to the poorer sections of the backward castes and not to those who are advanced in respect of the economic and educational variables and backward only in the context of ritual
status. This would exclude the advanced sections of the backward castes from the benefits of reservation. This criterion is in practice in most of the Indian states. Gujarat and Tamil Nadu, however, do not lay down any income limit. The reservation policy in Bihar is based on caste as well as income limit.

**Check on Elite Benefit**

Certain advanced sections and families among the backward classes, the scheduled castes and the scheduled tribes have taken advantage of the reservation policy. This is also one of the causes of heart-burning among the lower and middle class categories of the upper castes. That demand exclusion of certain beneficiaries by adopting a new reservation policy. If certain castes, which are traditionally called backward, are not in fact socially, educationally and economically backward, then they should be excluded from the list of backward classes after a proper investigation. This would provide an opportunity to wider sections to enjoy the benefits of reservation. This process would check the elite trying to corner all the benefits. It would help in containing the anti-reservationists feeling to some extent. It would also minimize literacy, poverty and ignorance in which the masses are sunk.

**Reservation only for one generation**

If the government really desires to uplift the backward classes by means of the policy of preferential treatment it has to devise a way of excluding from the ambit of reservation all those families which have already benefited from reservation. The number of jobs is limited, but the number of aspirants is ever on the increase. There is also much competition among the candidates of the scheduled castes and the scheduled tribes. Sections of the scheduled castes and the scheduled tribes, which have already been benefited from reservation, tend to monopolize all the available opportunities. Other sections among them remain where they have always been.

It is a travesty of justice to provide special facilities to the kith and kin of highly placed officers of the scheduled castes, the scheduled tribes and the backward classes. It is necessary to place some checks on the present reservation policy. The benefits should be restricted just to one generation of backward castes. Subsequent generations should be made to compete with the general categories.
Periodically Evaluation of Reservation Policy
The reservation policy should be evaluated from time to time with reference to the number of people recruited. The results of this evaluation should also be made available to the public. Now there is general talk about the deterioration of administrative standards and efficiency. It is also true that students of the reserved categories are not able to pass medical examinations even after four or five attempts. Besides, only certain castes and families have concerned the benefits of reservation. If specific cases of such miscarriage of justice are brought to light, remedies can be hammered out.

Reservation never more than 50 per cent
The policy of reservation is intended to achieve an egalitarian society. If so, it should not be pursued at the expense of merit and the stability of the social, political and economic system. If reservation is made in proportion to the population even in the case of the backward classes, it would lead to a collapse of the social, political and economic system. That is why the Mandal commission has not recommended that more than 50 per cent of the available vacancies should be reserved for the backward classes. A number of high courts and the Supreme Court have also said that reservations should not exceed 50 per cent of the total number of vacancies.

Reservation policy should be sanctioned by the legislature
In most Indian states it is customary to appoint a backward class’s commission headed by a legislator. Later, on the basis of the recommendations of such a commission, the government tries to implement its policy of reservation by means of an executive order. It avoids getting the reservation policy scrutinized and debated in the legislature; it tries to bypass the legislature. This enables the ruling elite to formulate any kind of policy to suit its political ends. Sometimes this generates a public upsurge against the government order.

If the reservation policy gets the sanction of the legislature after being duly debated in the House, it would get wide publicity, and the government would also stand to gain from the feedback from the public. The legislation would then be more acceptable to all concerned.
Need for Infrastructure
Reservation cannot help in achieving an egalitarian society unless it is supported by a suitable infrastructure like adequate scholarships, hostel accommodation, educational facilities, extra coaching, pre-selection training etc. These measures improve the merit and efficiency of the students of the backward classes and give them confidence. Education can then improve their socio-economic conditions and make them effective participants in the social and political systems. Reservation by itself can hardly benefit the backward classes.

Cut off-Points
It has been observed that in many Indian states students in the general category do not get admission into a professional educational institution or secure a coveted job even with 80 percent marks. On the other hand candidates of the scheduled castes, the scheduled tribes and the backward classes with 30 or 35 percent marks manage to make it. If this is what reservation is in practice, it would spell disaster for the country. There must be reasonable cut-off point for giving benefit to the weaker sections. In any case, the cut-off points should not be more than 10 to 15 percent for admission into technical institutions or for appointment to government or semi-Government jobs.

No Roster system
At present rosters are maintained in the central services and even in the state services for candidates of the scheduled castes and the scheduled tribes. If the vacancies meant for those categories are not filled up in a certain year, they are kept vacant for three years before being de-reserved. In certain years 80 or 85 percent of the posts are reserved for them. This facility is extended to the backward classes too in certain states. The anti-reservationists movement, which took place in Gujarat in 1981, was particularly the result of the inequity of the roster system. It has to be scrapped to check the anti-reservationists feeling among different sections of society.

No reservation for promotions
Reservation at the time of appointment is acceptable, but it is certainly unjust and unacceptable in the matter of promotions. It is in fact subversive of merit, efficiency and social justice. In the service all employees are equal, and they must be treated
equally. If a man gets promotions just because he is a Harijan or a member of a backward class and is placed above others, it would be unjust and would cause frustration among those who are passed over. It would also undermine efficiency. Demoralization due to policy of promotional reservation has long range effects on efficiency of any service. An efficient, experienced and older person suffers humiliation to work under an inefficient, un experienced and young person, if such person is promoted. Such a feature can be assessed by social scientist and not a judge or a chairman of a backward commission.

**Time limit for reservation policy**

Backwardness has a tendency to perpetuate itself. To check this tendency, a time limit has to be set. One view is that when the backward classes become the equals of the advanced classes, the reservation system should be scrapped. Another view is that it would continue for as long as the caste system continues. Our own view is that it must have a time limit of ten to twenty years. At the end of this period, it should be re-evaluated from the viewpoint of the desirability of its continuance.

**National Consensus**

Recently the issue of reservation generated a number of clashes among the different social sections. At the national level the spokesmen of the backward classes are continually pressurizing the government for the implementation of the Mandal Commission recommendations. Instead of accepting the demand for such implementation some leaders have expressed the need for a national consensus on the reservation policy. There can be no such consensus unless the government and the different political parties take a firm, rational and scientific stand- a stand not based on any political motive.

Reviews of reservation policy necessitates a change in policy particularly its adverse impact on efficiency of services. Efficiency should not be sacrificed as that would lead the economy into crisis. On the other hand upliftment of weaker section is also desirable. In such case it is advisable that the children of weaker sections should be provided full infrastructure, such as, free education, free boarding and lodging, clothes, tuition fee, books etc., so that they are provided better environment to learn, level of knowledge, ability to compete in the open labour-market. This would also
force them to devote greater attention towards study than to mere talk about facilities and rights. The security of job through reservation policy does not encourage them towards study, ability and efficiency.

As stated earlier, there are five major schools of thought about the reservation policy. Different social sections have different opinions in line with their own interests. The upper castes and the upper classes are championing the theory of merit and efficiency, whereas the backward classes are in favour of the reservation policy. Some of them favour the economic criterion; and the others, the caste criterion. In these circumstances to achieve a national consensus is a very difficult task.

If the suggestions given above are taken into account in the formulation of a reservation policy, a consensus may be worked out. These suggestions are aimed at making the reservation policy more scientific. The policy should benefit the needy sections of society without undermining efficiency and merit. The policy should not allow the advanced sections of the backward castes to take undue advantage. The poor and the needy among the upper castes too should be enabled to secure relief. Nobody should be allowed to develop a vested interest in the name of backwardness.

(1) The creamy layer among the backward classes must be excluded with a progressive reduction in the percentage of the reservation.

(2) Exclusion from reservation of all those either of whose parents is/ was employed in higher grades (A or B) or is a qualified professional as doctor, engineer etc. or is an income tax or sale tax assesses, or is owner of more than eight hectares of rainfed dry land or its equivalent and also all those either of whose parent is a graduate.

The reservation policy had its critic’s right from the beginning. The impact study clearly shows that the policy has failed to achieve the desired objective underlying it. On the contrary a vested interest has developed in it for extraneous considerations. The existing policy needs fundamental and drastic changes since it has failed to bring out the desired social reconstruction, helped to ameliorate the socio-economic conditions of the weaker sections.