

Right to Reservation as a Means of Social Justice

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I. Introduction:

The concept of **Social Justice** denotes a philosophy of life and sets a way in which all social life should behave². All social thinkers from Plato to Gandhiji and others have been making supreme endless efforts in quest of justice in order to abolish injustices, tyranny and exploitation³. A Welfare State is a state that looks after the welfare of its citizens right from cradle to grave. In such a state people expect that their all necessities would be fulfilled by the government. The Preamble and Article 38 of the Constitution envision Social Justice as the arch to ensure life to be meaningful and livable with human dignity. Justice is the key-stone of our constitution and the principle of equality is the very foundation of justice. The preamble of the constitution assures justice, social, economic and political as well as equality of opportunity and status to every citizens of India. In pursuance of this assurance, Article 14, 15, 16 have been enacted which embody certain fundamental rights guaranteed by the constitution of India⁴. The concept of social justice which the Constitution of India engrafted consists of diverse principles essential for the orderly growth and development of personality of every citizen⁵. 'Social Justice' is an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species. Social justice is a dynamic devise to mitigate the sufferings of the poor, weak, dalits, tribal and deprived sections of society and to elevate them to the level of equality to live a life a life with dignity of person. Social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor etc. from handicaps, penury to wards off distress and to make their life livable, for greater good of the society at large. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality which is the legitimate expectation and constitutional goal⁶.

Social justices require equitable or just distribution of the social goods and evils or of burdens and benefits. The task of just distribution in the present

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2 R C Chaturvedi; Natural and Social Justice, 1980, Law Book Company, Sardar Patel Marge, Allahabad.

3 S N Dhyani; Fundamentals of Jurisprudence, Indian Approach, 2002, Central Law Agency, Allahabad, p. 129.

4 S. M. N. Raina ; "Reservation with Justice, CILQ 1990.

5 Air India Statutory Corporation v. United Labour Union. (AIR 1997 SC 645)

6 Ibid.

day society has to be performed primarily by the state and therefore, though social justice may cover even private⁷. Aristotle's distributive justice would be associated mainly with the just allocation of advantages and disadvantages, preventing the abuse of power and preventing the abuse of liberty. Advantages may be divided into claims, liberties, powers and immunities. With regard to claims Professor Honore invites his readers to consider not primarily the duty to act justly, but the demand for just treatment; Advantages which are generally desired and are in fact conducive to their well-being. Such things like life, health, food shelter, clothing, places to move in, opportunities for acquiring knowledge and skill, sharing in the process of making decision, for recreation, travel etc. Men not only have a claim to these things but to an equal share in them⁸.

As we are all aware that the Hindu social structure is based on castes and communities and this creates walls and barriers of exclusiveness and proceed on the basis of consideration of superiority and inferiority. This vice of social inequality assumes a particularly reprehensible form in relation to the backward classes and communities which are treated as untouchable; and so, the problem of social justice is an urgent and important in India as is the problem of economic justice⁹.

History holds testimony to the fact that over the centuries many sections of our caste-ridden society have been the victim of oppression and exploitation at the hands of the dominant groups in society. Indian society has always been full of inequalities. It was a caste-ridden stratified hierarchical society, and a particular segment of the society had been denied the bare human rights. Their education, wages, living conditions, social status were dictated by the whim of upper strata of society, reducing them to destitution. It is very difficult to gauge the extent and depth of social and economic exploitation that resulted in discrimination, misery, poverty and other disabilities for an appreciable large section of our population. It was natural that the higher castes were able to exploit the lower ones. Members of lower castes always suffered from discrimination in all areas of life. One of the worst effects of caste system was that access to knowledge and learning was denied to the lower castes. The economic backwardness brought social backwardness which consequently made them down trodden and thus depriving them even of the dignity of life. In a society which is so compartmentalized on caste basis, upper caste controlled the levers of power enabling themselves to run their whips, prejudicial to the interests of lower segments of the society. Lower caste had to serve the upper castes without having any say and grievance redressal mechanism.

7 R W M Dias Jurisprudence 1994, Aditya Books Private Limited, New Delhi.

8 Ibid.

9 V R Krishna Iyer; Some Half-Hidden Aspects of Indian Social Justice; 1979, Eastern Book Company, 34, Lalbagh, Lucknow.

In a society such as ours where exists forward and backward, higher and lower social groups, the first step to achieve social integration is to bring the lower or backward social groups to the level of the forward or higher social groups. The trinity of the goal of the Constitution viz, socialism, secularism and democracy can not be realized unless all sections of the society participate in the state power equally, irrespective of all discriminations in sharing of the state power made in those grounds are eliminated by positive measures. Using the term social justice in a comprehensive sense so as to include both economic justice and social justice. The concept of social justice, thus taken within its sweep the objective of removing all inequalities and affording equal opportunities to all citizens in social affairs as well as economic activities¹⁰. A just state would be one which can supply in abundance the needs of her people. The first and greater necessity is food which is the condition of life and existence. The second is dwelling the third clothing, then education, right to work and leisure, then freedom from exploitation, and so on and so forth¹¹. The founding fathers of the Constitution were wholly committed to the good of the people and as such were best suited for evolving a framework of welfare state of a socialistic pattern of society. They felt that the caste system as it operated in India of late Forties of the twentieth century had subjected a majority of the population to severe social, economic, political, civil and even legal disabilities. The system needed to be abolished legally and constitutionally. The Constitution made elaborate provisions to remove the disabilities arising from one's caste so as to enable a citizen to participate freely in the social, economic and political activities and to attain fullest development of his personality. They wished to build an edifice of democracy wherein the noble objectives of equality, justice, liberty and fraternity might be materialized in regard to the entire Indian society which includes communities which had hitherto remained disadvantaged and under developed due to historical discriminations perpetrated in the name of caste, creed, race or the like. They designedly embodied certain provisions in the Constitution which conferred special favors and protection to the backward classes of citizens with a view to uplift them to the level of equality with the rest of the society. The Mndal Commission Report¹² recommended that equality before the law is the most precious democratic right of an Indian citizen and it is enshrined in article 14 of the constitution of India. This right is further elaborated and made specific in article 15, 16 and 29 of the constitution. These articles prohibit discriminations against any citizen on grounds only of religion race, caste, sex, language or place

10 V R Krishna Iyer; Some Half-Hidden Aspects of Indian Social Justice;1979, Eatern Book Company, 34, Lalbagh, Lucknow.

11 R. C Chaturvedy; Natural And Social Justice, 1980, Law Book Company, Sardar Patel Marge, Allahabad.

12 Government of India, Report of the Backward Classes Commission, First Part, vol. I and II, 1980, p. 21.

of birth, whether in respect of employment or admission to educational institutions, or access to public places etc. By ensuring equality of opportunity to all citizens in respect of educational and employment opportunities, we may ignoring the special problem of some backward sections of our people who have suffered from social, cultural, educational and economic deprivation for hundreds of years. It is well known dictum of social justice that there is equality among equals. To treat unequals as equal is to perpetuate inequality¹³.

II. Social Objectives of Reservation: An Inclusive Social Order:

The concept of reservation is one of the crucial factors in the Constitution of India to secure socio- economic justice to the downtrodden people and to bring them to the mainstream of the national life. When the Constitution of India was being drafted; the Constitution makers inserted the concept of equality so that no individual shall be treated unequally. They thought that the meaning of equality based upon individual achievement was too hypothetical in our caste-ridden society where group identification had been historically used for the purpose of discrimination and separateness. Therefore, the makers of the constitution adopted a policy of preferential treatment in favor of certain weaker sections of the society to offset the effect of inherited inequality and remedy historic injustice. The Constitution permits the state to adopt such affirmative action as it may deem necessary to uplift the backward classes of citizens to the levels of equality with the rest of our countrymen.

Reservations are the devices for removal of the historical distortions that have crept into our social system. These denote the body of rules recognized and enforced by the state in the administration of social justice. To put it simply, by social justice we mean abolition of all sorts of disparities resulting from inequalities of wealth and opportunity, race, caste, religion, sex, and title¹⁴. In the words of the Supreme Court of India¹⁵, it is the harmonization of the rival claims of the interest of the different groups and sections in the social structure, by means of which alone it is possible to build up a welfare society. Reservation is meant to remedy the handicap of prior discrimination impeding the access of classes of people to public administration. It is for the states to determine whether the evil effects of in-equalities stemming from prior discrimination against classes of people have resulted in their being reduced to position of backwardness and consequent under representation in public administration. Reservation is a remedy or a cure for the ill effect of historical discrimination¹⁶. In *Chattar Singh v. State*

13 Ibid.

14 Harpal Kaur Khehra; Job Reservation Versus Efficiency of Administration, CILQ 1990, p. 28.

15 Held in *Crown Alluminium Works v. Workmen*, AIR 1956 SC 30.

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

*of Rajasthan*¹⁷, the Supreme Court said that the state had evolved the principle of reservation to an office of the state or post as an affirmative action to accord socio-economic justice guaranteed in the Preamble of the Constitution; the fundamental right and the directive principle of state policy which are the trinity of the Constitution to remove social, educational, and economic backwardness as a constitutional policy to accord equality of opportunity, social status or dignity of persons as enjoined in article 14, 15, 16, 21, 38, 39, 39-A, 46 etc. *The Constitution permits 'protective discrimination' in the form of reservation in the three specific areas:*

II. I. Reservation of Seats in the Legislature:

Articles 330 and 332 provide for reservation of seats for the Scheduled Caste and Scheduled Tribes in the House of the People and the Legislative Assemblies of the states. These special provisions for the reservation of seats in the legislature were provided purely as a transitory measure. Initially the reservation was for a period of ten years. However, this arrangement was extended up to forty years by various constitutional amendments as it was felt that the scheduled castes and the scheduled tribes needed the reservation for a longer period. The policy of legislative reservations, no doubt a bold imperative of equity and social justice, adopted at the time of the framing of the constitution, and its continuation by periodical extensions demands a critical social enquiry. A working appraisal of the provisions for legislative reservations clearly shows that they have not served the purpose intended by the founding fathers. An objective assessment of the policy of reservations warrants its early reversal. Since a total abolition may not be a realistic approach; a phased withdrawal at the time of the first extension in 1959 deserves serious consideration¹⁸.

II. II. Reservation of Jobs:

Special privileges through reservation and percentage quotas in recruitment and promotion in services have been given in pursuance to the provision contained under article 16(4). In order to complete the stupendous task of social reconstruction of building an egalitarian society, the framers of the constitution thought it fair that people who were socially, economically and educationally backward should be given special concessions in the form of out – of – turn opportunities in recruitment as well as promotion. It was apprehended that these unfortunate people will not be able to compete on an equal footing with people who are better placed in life, socially advanced and educationally better qualified. The aim was to strike a balance between the fundamental rights

17 AIR 1997 SC 303.

18 D. N. Saraf ; Social Policy, Law And Protection of Wreakers Sections of Society. (ED), 1986, Eastern Book Company, Lalbagh, Lucknow.

of the individuals and social justice to the backward classes.

II. III. Reservation in Educational Institutions:

Under Article 16(4) which specifically provided for reservation of jobs, there was no provision in the constitution which permitted reservation of seats in educational institutions. In *State of Madras v. Smt. Champakam Dorairajan*¹⁹, in pursuance of directive under article 46 to promote with special care the educational and economic interests of the weaker sections of the people, various governments started making reservation was held as invalid and violative of article 15(1) and 29(2). While examining the underlying social policy the court found that except for reservation in services, the framers did not contemplate giving any special treatment to the backward classes. The court recognized the obligation of the state under article 46 to promote the welfare and interests of the weaker sections of the people but considered the underlying object of article 15 and 29(2) so sacrosanct that the promotion of welfare of such classes was not to be by way of undermining it. To overcome such difficulty, the constitution (First Amendment) Act, 1951 was passed which added clause (4) to article 15 of the constitution, which permits state to reserve some seats in educational institutions in favour of socially and educationally backward classes²⁰.

The Constitution permits preferences in the form of reservation under protective discrimination provisions for three categories of people:

1. Scheduled Castes,
2. Scheduled Tribes, and
3. Other Backward Classes.

SCHEDULED CASTES - Those among the weaker sections, the section belonging to depressed classes, suffered the most from untouchability and association with unclear vocations. Broadly speaking, these depressed classes are now known as the Scheduled castes. Article 366(24) defines Scheduled castes as under : “Scheduled Castes” means such castes, races or tribes or parts of groups within such castes, races or tribes as be deemed under Article 341 to be scheduled castes for the purpose of this constitution. In exercise of the powers conferred under clause (1) of Article 341, the President has made the Constitution (Scheduled Castes) Order, 1950 listing the scheduled castes in various states. This list was revised by parliament subsequently.

19 AIR 1951 SC 226.

20 Clause (4) to Article reads: “Nothing in this article or in clause (2) of article 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 caste and scheduled tribes”.

SCHEDULED TRIBES – Those communities which are not fully assimilated in the general social order and the cultural autonomy of which needs to be safeguarded were classified as Scheduled Tribes. The tangible criterion for the specification seems to be isolation and distinct cultural background. Article 366(25) defined Scheduled Tribes as under: “Scheduled Tribes” means such tribes or tribal communities or parts or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purpose of this constitution. In exercise of the powers conferred under clause (1) of Article 342 the president has made the Constitution (Scheduled Tribes) Order, 1950 listing the scheduled tribes in various states. The list was revised by Parliament subsequently.

OTHER BACKWARD CLASSES – While classifying the weaker sections of the society which need special protection it was realized that the specified scheduled groups discussed above do not exhaust the list of all ‘backward classes’. The constitution, therefore, took note of what are called ‘other backward classes’ who were equally or may be somewhat less backward than the scheduled castes and scheduled tribes. Unlike the scheduled group there is no clause defining these backward classes, nor is there any clear-cut method or agency for their determination.²¹ To facilitate the task of identifying the backward classes and laying down criteria for the purpose, Article 340 authorizes the President to appoint a commission to investigate the conditions of the backward classes. In pursuance to this article, the President appointed the Backward Classes Commission under the chairmanship of Kaka Kalelkar in January 1953. This commission is also known as the *First Backward Class Commission*²². This commission had submitted its report on March 30, 1955.

Although the commission tried hard to define backward classes it could not give any exact definition of such a class. It appears that having considered several criteria as relevant in determination of backward classes, it ultimately decided to treat the status of caste as an important factor and it is on that basis that the commission proceeded to make a caste-based list of backward communities. The central Government did not feel satisfied about the approach adopted by the Commission in determining as to who should be treated as backward classes and rejected the recommendations.²³ Sudden spurt in the race for reservation quota on caste and communal basis led to social tension in the form of anti-reservation agitation in various parts of the country. This prompted the Central Government to think de novo in the matter and accordingly the *Second Backward Classes Commission* under the chairmanship of Shri B. P. Mandal

21 D. N. Saraf ; Social Policy, Law and Protection of Wreckers Sections of Society. (ED), 1986, Eastern Book Company, Lalbagh, Lucknow.

22 Ibid at 110.

23 Supra note 20.

was appointed in 1978. The Commission submitted its report to the government on 31st December 1980. Like the earlier Commission, it has also adopted caste as the criterion for defining the socially and educationally backward classes, and accordingly finalized a list of 3743 castes grouped under the category of backward classes. Besides recommending various steps to be taken for the advancement of the socially and educationally backward classes, the Commission has suggested the reservation to the extent of 27 per cent in central and state government services, public undertakings and educational institutions for backward classes. The recommendations were accepted by the then Central Government and the same was implemented accordingly. The present policy of reservation is based on the Mandal Commission Report.

Apart from this the Government has inserted clause (5) to Article 15 by the 93rd Constitutional Amendment Act, 2005 which empowers the state to make special reservation for the advancement of SEBCs of citizen or for SCs and STs in the matter of admission to the educational institutions, including private institutions, whether aided and unaided by the state, other than minority educational institutions covered under article 30(1). The Indian Parliament has also passed the Central Educational Institutions (Reservation in Admission) Act, 2006. Which provides reservation of 27 per cent seats for OBCs in state aided institutions. The constitutional bench of the Supreme Court in *Ashok Kumar Thakur v. Union of India*²⁴ has upheld the constitutional validity of this new insertion on the touchstone of basic structure doctrine, but only in respect of state aided educational institutions.

III. Reservation as A Right:

Reservation under Articles 15(4), 15(5) and 16(4) no doubt fall under Part III of the constitution comprising the Fundamental rights. Every provision of Part III however does not confer a fundamental right. Some of the provisions of Part III are just definitional; others are on the effect of fundamental rights on the existing and future laws. Still others provide for the enforcement and implementation of the fundamental rights while some others provide exceptions to the fundamental rights. Because of this variety of provisions, doubt persists whether above Articles confer fundamental rights. It seems even the courts are not likely to be responsive to such claims as a matter of enforceable rights²⁵. It may be mentioned here that beginning from *M. R. Balaji v. State of Mysore*²⁶ until the nine judge bench decision of the Supreme Court in *Indra Sawhney v. Union of India*²⁷, Articles 16(4) and 15(4) have been treated as enabling

24 (2008) 6 SCC.

25 Mahendra Pratap Singh; "Are Articles 15(4) and 16(4) Fundamental Right ?", (1994) 3 SCC (J) p. 33

26 AIR 1963 SC 649.

27 Ibid note 25.

provisions. In *C. A. Rajendran v. Union of India*²⁸, it was argued that article 16(4) was itself a fundamental right granted to the SCs and STs. The Supreme Court rejected it and ruled that this clause imposed a duty on the state to make reservations but Article 16(4) is an enabling provision and confers a discretionary power on the state to make reservation. This proposition was reaffirmed in all subsequent decisions. In *P & T SCs and STs Employees Welfare Association v. Union of India*²⁹, the Supreme Court categorically ruled that it was not open for a member of SCs and STs to move a court to compel the Government to provide job reservations because article 16(4) was merely an enabling provision.

If a right is a truly a right, it must have some weight to ‘trump’ policy considerations but compensatory discrimination is thought of as serving a policy of increasing castes harmony by eliminating visible and institutionalized prejudices and increasing economic equality by removing some of the obstacles that keep the members of backward classes in an economically and socially disadvantaged position³⁰.

In *Union of India v. Madhav*³¹, a three judge bench held that the government evolved reservation in posts or offices under the state as one of the modes to socio-economic justice to Dalits and Scheduled Tribes. Appointment to an office or post in a service under the state is one of the means to render socio-economic justice. The same consideration was held in *Ashok Kumar Gupta v. State of Uttar Pradesh*³², where it was observed that the policy of reservation is part of socio-economic justice enshrined in the Preamble of the constitution, the fundamental rights under article 14, 15(1), 15(4), 16(1), 16(4), 16(4-A), 46, and 335 and the other related articles to give effects to the above constitutional objectives. It was also held in this case that right is a reservation is a statutory right. It is not a fundamental right. The policy of reservation creates an obligation on the state to treat everyone with equal respect and concern and in this sense this policy serves the principle of equal treatment but this policy does not create any corresponding individual right in favour of the members of the beneficiary group.

IV. Conclusion and Suggestions:

Reservation is not an end in itself but it is a means to achieve equality. The policy of reservation adopted to achieve that end must therefore, be consistent with the objective in view. Reservation must not out last its constitutional object, and must not allow a vested interest to develop and perpetuate itself. There will

28 AIR 1968 SC 507.

29 (1988)4 SCC 447.

30 Parmanand Singh ; “Fundamental Right to Reservation: A Rejoinder” (1995) 3 SCC (J) p.6.

31 (1997)2 SCC 332

32 (1997)7 SCC 201.

be no need of reservation once equality is achieved. Every reservation founded on benign discrimination, and justifiably adopted to achieve the constitutional mandates of equality, must necessarily be a transient passage to that end. It is temporary in concept, limited in duration, conditional in application and specific in object. Reservation must contain within itself the seeds of its termination. Any attempt to perpetuate reservation and upset the constitutional mandate of equality is destructive of liberty and fraternity and all the basic values enshrined in the constitution. A balance has to be maintained between the competing values and the rival claims and interests so as to achieve equality and freedom for all³³.

The working appraisal of the policy of preferential treatment in the form of reservation 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 policy devised to build a classless and casteless society and has instead perpetuated distinctions. The policy as implemented, enlarged and perpetuated has almost completely distorted the original philosophy. It has on the one hand created a vested interest in backwardness and on the other resulted in what is seen as a reverse discrimination against the general class.

The existing policy needs fundamental and drastic changes since it has failed to bring about the desired social reconstruction, nor has it helped to ameliorate the socio-economic conditions of the weaker sections. While making a strong case of caste-wise census, Justice M. N. Rao, Chairperson of the National Commission for Backward Classes said that the present form of reservation is not yielding desired results envisioned by the framers of the policy³⁴. For better implementation of reservation policy the central government will have to complete a single nationwide list of OBCs in terms of Article 340. Many castes listed by Mandal may be absent in the state list and vice-versa. The Commission appointed by the President under Article 340 is not a continuing body with a power to revise the list. Justice Sen in K. C. Vasanth Kumar openly deplores caste-oriented policy of reservation and wanted it to be economically based. Inclusion of more and more castes in to the list of backward serves no purpose other than increasing the number of their voters. List of backward classes is still increasing. According to the Mandal Commission Report 52 per cent population comprises of OBCs and 22.5 per cent SCs and STs If these figures are accepted as correct then 74.5 percent of India's population will be treated as backward and the rest forward, this is both amazing and absurd.

The process of chronic development and the spread of education have resulted in narrowing the gap between the classes considerably. As larger percentages of backward class members attain acceptable standards of education

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

34 THE HINDU, Monday, August 16, 2010. Kolkata.

and employment, they should be removed from the backward categories that attention is given to those classes that genuinely need help. It would be a useful exercise to review the methods of identification and the ways of determination of backward classes once again and also check whether the criterion used for classification of backward is relevant for today's conditions. Reservation should be confined to initial appointments only and when a backward class is in a position to take-off; it should be left for the open competition. Therefore, there should not be any reservation in promotion. It is not something confining the backward in initial jobs rather it would be an effort to make them independent, self reliant and more competitive. Last but not the least important is that the creamy layer amongst backward classes must be excluded from the list of backward classes. Even the exclusion of the creamy layer amongst the SCs and STs is absolutely imperative.