

*Editorial***ECONOMICALLY BACKWARD RESERVATION:
A PARADIGM SHIFT IN PUBLIC POLICY****Satya Narayan Misra**

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Abstract

The Government of India came up with the 103rd Amendment for reserving 10% of jobs and entry into public educational institutions for economically weaker sections (EWS) of the society. This is a significant departure from earlier reservation for SC/ST and OBCs, which were 'vertical' in nature while the 2019 Act for EWS is 'horizontal' in character. The Supreme Court has put a cap of 50% in total for different types of reservation, keeping in mind the constitutional stipulation that it should be reasonable and proportionate. In Indra Sawhney judgement, (1992) the court has excluded creamy layer from the ambit of reservation for the OBC. The Madras High Court has asked to Tamil Nadu government to get concurrence of Supreme Court to provide 10% reservation to medical seats to EWS, as it would cross the cap of 50%.

This paper is an attempt to run through political and judicial journey in looking at the conflicting challenges of equality of opportunity with affirmative action for bolstering socio-economic vulnerable sections of the society. It does not, prima facie, find any infirmity in the notion of economic backwardness qualifying for reservation as against caste based reservation. The paper also unveils how the income limit of Rs.8 lakhs per annum to qualify as EWS is humongous and at variance with the definition of BPL families whose per capita income was pitched at Rs.33 per day by the Tendulkar Committee in 2011. Many judges of the Supreme Court have observed that caste based or income based reservation has the disadvantage of promoting inefficiency in government jobs, particularly in specialised areas. Liberal democracy and market economy put a premium on competition and efficiency as the sine qua non of higher growth. The paper argues that a better way for promoting equality is to create an enabling environment, build human capability in terms of vocational training, skilling, access to state of art technology and higher social sector investment in merit goods, than is being presently done.

Keywords: EWS, Merit Goods, Liberal Democracy, Market Economy, Tendulkar Committee

1. Introduction

The Madras High Court has nixed the 10% quota for economically backward sections of society for admission into the medical colleges. The notification of 29th August, 2021 of the Madras Government was in pursuance of the Constitutional Amendment Act (2019), which provides for 10% quota for economically backward sections of the society, both for admission to educational institutions and public employment by adding Article 15(6) and 16(6) to the Constitution. Such quota will exclude those who are being benefited under the rubric of 'backward classes' under Article 15(4) and Article 16(4). It may be recalled that when the new reservation policy for "EWS" was introduced, twenty petitioners filed a writ in the Supreme Court stating that (a) the amendment violates 'basic structure' of the constitution, (b) reservation can't be based on economic criterion alone, (c) SC/ST and OBC can't be excluded from economic criteria, as it will run contrary to right to equality provision, (d) the additional 10% reservation will bust the limit of 50% put by Indra Sawhney judgement. The Supreme Court has referred the case to a 5 judge Constitution bench; being a matter of involving 'substantial interpretation of the constitution of India' under Article 145(3). The Constitution bench is yet to take up this significant policy issue. The Madras High Court has observed that the OBC quota should be limited to 27% as notified by the Union Government and not 50% as demanded by the DMK government and that the proposed 10% quota for EWS would need approval of

the Supreme Court. This paper attempts to bring out (a) government initiatives to bring up reservation provision and the Supreme Court response, (b) the major landmarks of Indra Sawhney case (c) genesis of the new EWS provisions and (d) the way forward.

2. Government initiatives for Reservation and SC Judgements:

The first spat with the Supreme Court took place in 1951 when the Supreme Court struck down caste based reservation in medical colleges in Madras, in the famous Champakam Dorairajan Case (1951). The court clarified that caste based reservation runs contrary to Article 29(2) of the Constitution, which guarantees equal opportunity to all for admission in state educational institutions. It also did not agree with the contention of the state that it was promoting educational interests of SC/ST and weaker sections of the society as provided at Article 46, since the directive principles are non justiceable in nature as per Article 37. Such clinical and textual interpretation against affirmative action by the state spurred the Government to move the first amendment to the constitution in 1951, empowering states to make special provision for advancement of educationally backward classes of citizen or for SC/ST by adding Article 15(4) to the Constitution.

2.1. The issue of caste based reservation again reared its head in 1962 in the famous M. R. Balaji and Others vs. State of Mysore case, which challenged a government 1959 notification as per which all communities except Brahminical community fell within the

definition of educationally backward classes; and reservation aggregating to 75% was envisaged. The court termed such reservation as “fraud on the constitutional powers under Article 15(4)”, as categorization of ‘backward classes’ on the sole of basis of caste is not permitted. It defined ‘backwardness’ in terms of social and education attainment. Those citizens whose average of student population is substantially below the state average could take advantage of educational reservation under Art 15(4). The Court also put a cap of 50% as maximum limit for reservation. The court believed that ‘excessive reservation would eliminate general competition and create wide spread dissatisfaction among employees, affecting their efficiency’.

2.2. Incidentally Tamil Nadu Government which is now in the eye of the storm has the dubious distinction of reserving 69% of seats and jobs for SC (18%), ST (1%) and 50% for OBC. The DMK founded in 1949 by C.N. Annadurai was based on a quest for social justice for the OBCs. When the Supreme Court in the Indra Sawney’s case in 1992 reiterated the Balaji case decision to put a cap of 50% for all kinds of reservation, the Central government moved the 76th Amendment in 1994, reserving 69% of seats in colleges in Tamil Nadu and placed the Act in the 9th schedule of the Constitution. In *IR Coelho vs. State of Tamil Nadu* (2007) the Supreme Court has clarified that any Act put in the 9th schedule after 24.4.1973 (*Kesavananda Bharati* judgement) will be subject to judicial review. However, the anomaly of 69% reservation in Tamil Nadu still persists.

3. Major Landmarks of Indra Sawhney Judgement

The Indra Sawhney judgement (1992) is a major landmark in judicial activism, as it has not only reiterated a 50% ceiling on reservation but has tried to answer a number of complex and vexatious questions, like what constitutes backward classes, class and proportionality. It may be recalled that Dr. BR Ambedkar added the word ‘backward’ before classes in November 30, 1948, which was challenged by prominent members like H.N. Kunzru, as being ‘vague’ and likely to lead to complications later on. Though Dr. Ambedkar carried the day its exact purport still remains opaque. The Mandal Commission which had recommended reservation for OBCs had identified three criteria for backwardness viz. social, economic and educational, the benchmark for backwardness being 25% below the state average to be considered as backward.

The debate between the judges in Indra Sawhney case was twofold; how to reconcile the conflict between Article 16(1) which stands for equality of opportunity and Article 16(4) which advocates reservation. The second debate was whether the reservation % should be proportional to population, percentage as was the case with SC/ST, or less. The Mandal Commission had noted that the 1933 census had put the % of OBC as 52%; in which case the total reservation (SC/ST/OBC) would work out to 74.5%. While Justice Fazal Ali was comfortable with giving more than 50% reservation to OBC as was Justice Krishna Iyer, eventually to constitution

bench pegged OBC reservation at 27%, as Article 16(4) speaks of 'adequate' rather than 'proportionate' reservation.

3.1. The court had to handle another tricky terrain; as to whether reservation is antimeritarian. The judges in Balaji case seemed to agree that it does. However, the judges in Indra Sawhney case took a more diplomatic route by observing 'one need not make a fastidious fetish of it'. However, the judges were quick to add that posts involving R&D, Defence Services, Atomic Energy, Space, professors and Pilot, should not have provision for reservation. Balancing merit with positive discrimination towards SC/ST/OBC has thus witnessed a rare synergy between government policy and judicial approval.

3.2. Such a position is sharply different from USA, where the Constitution does not provide for reservation for backward communities like the blacks who constitute 18% of the population. However, the US Supreme Court has been at the forefront in ensuring that there is equality in treatment between the whites and the blacks. In the path breaking judgement *Brown vs. Board of Education* (1954), the Supreme Court struck down 'state sponsored segregation' in public schools. It overturned an earlier judgement of Supreme Court which approved 'separate but equal doctrine' in *Plessy vs. Ferguson* case (1896).

4. Genesis of the new EWS Provision

Dr. Ambedkar became the messiah of the SC/ST by providing reservation in jobs and educational access in our

Constitution in 1950. The Mandal Commission expanded the ambit to include the OBCs, a dream espoused by Jyotirao Phule through his Satyashodhak Samaj founded in 1848. The Modi government has taken reservation out of the narrow lane of caste backwardness to the alley of 'economic backwardness' through the 103rd Amendment. The trigger for this was provided by the National Commission on EWS headed by Maj. Gen. (Retd.) S.R. Sinho in his report of 2010. The committee had concluded on the basis of NSSO estimates that the people below BPL was not only high amongst SC, ST and OBC but high amongst the General Category also; at around 18.7%. The commission had also observed that poverty is not caste based, but socio-economically conditioned. It made a powerful plea to identify the economically weaker sections for 'extending various welfare measures' to them. However, the Commission did not recommend reservation on the EWS basis. The report provided the requisite ballast to Mr. Modi to capitalise on voters of upper caste sections of the society, cutting across all castes and religions, as EWS reservation has an All India resonance, since they felt discriminated vis-a-vis SC/ST/OBC caste only.

4.1. The Global MDPI report (2019) had estimated that 28% of India's population (364M) were below the poverty line, though India has a creditable record of lifting 271 million out of the quagmire of poverty (2006-216) though a slew of employment generation programs like the MNREGA. On the face of it it will be difficult to argue that the 103rd amendment offends

the 'basic structure'. Reservation on the basis of economic backwardness is horizontal in nature as against caste based reservation which are 'vertical' in nature. It is difficult to agree with the Supreme Court that the concept of class is not linked to economic criteria or poverty line. The Marxist logic of class conflict is predicted on economic criteria of labourers who are exploited by a motley group of capitalists. Besides, the basis of putting a cap of 50% on reservation of all types stands on fuzzy logic. However, the major discomfiting aspect of the 103rd amendment is the annual income limit of Rs.8 lakh to qualify for EWS, as against poverty line per day of \$0.5 (Rs.32) (Rs.27 per day in rural area and Rs.33 for urban area as per Tendulkar Committee report (2011-12)).

The Way Forward

The Supreme Court's judgements on reservation is largely based on the doctrine of affirmative action, as the Preamble to our constitution is predicated on 'socio-economic justice for all' and directive principles in Chapter IV which implores the state to undertake 'distribution of national resources to sub-serve common good' and reduce inequality in income. However, there are areas where the logic used in different judgements is sharply in variance. A case in point is Indra Sawhney judgement where the Constitution bench disallowed the 'creamy layer' to avail of OBC reservation. However, in the Ashok Thakur Case (2008), it did not see any merit in excluding creamy layer amongst the SC/ST from the ambit of reservation,

since they belong to a different 'class'. Besides, the court has not arrived at any consensus, if reservation is anti merit. The economics of market competition runs against the politics of reservation. Political unanimity on reservation is based on harvesting political fortune, rather than promoting efficiency and higher growth in India. We have created a privileged pool within SC/ST, whose scope is not getting widened significantly. Reservation has created an elite class amongst SC/ST. The OBC experience is not similar.

Reservation of any form cannot be perpetuated indefinitely by any nation, striving to have a larger pie of national and global opportunity foster higher economic growth. With public sector jobs shrinking and entry into private schools increasing because of their thrust to foster quality of education, the discourse and hopes of the vulnerable and disabled section remain trapped in disillusionment and despair. The dichotomy between a flourishing private sector and a stagnant public sector in India, despite reservation in jobs, in shining testimony to the fact that the state is not investing adequately, in quality school education, better learning outcomes, and reducing digital dichotomy, which has widened further during Covid-19. A better way of promoting equality would be in terms of providing equality of opportunity for human capability development, after which they should compete on a level playing field for public sector job opportunity. Employment through the backdoor is against the canon of transparency and fairness in a democratic set up like ours.

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