

## CONSTITUTION AND RESERVATION

By

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Every person high or low, rich or poor, and equal protection shall be given to all persons within the territorial jurisdiction of the Union in the enjoyment of their rights and privileges without favouritism or discrimination.

The Supreme Court by a majority of four to one held the rule carrying forward *ultra vires* and invalid upon the ground that the power vested in the State Government under Article 16 Clause (4) cannot be so exercised as to deny reasonable equality of opportunity in matters of public employment to members of the classes other than backward.<sup>1</sup> The object of that provision, the majority thought, was to ensure that the backwardness of the Backward Classes did not unduly handicap their members from securing public employment and state, when it made reservations did in fact provide to the backward class an opportunity equal to other classes in matters of public employment.

In *Venkataraman v. State of Madras*,<sup>2</sup> it was held that the communal order of the Madras Government which besides making reservation of posts for Harijanas and backward Hindus as sanctioned by the Article 16 Clause (4), also made reservations of posts for other communities, *viz.*, Muslims, Christians, Non-Brahmin Hindus and Brahmins was repugnant to the provisions of Article 16.

The principle of equality permeates the Constitution of India. All the citizens are

entitled to be treated by the State equally, irrespective of their caste, race, religion, sex, descent place of birth and residence. No citizen may be discriminated against by the State only on any of these grounds. The exceptions to this principle are made in favour of women, and children, the Backward Classes, the Scheduled Castes and Scheduled Tribes and the Weaker Sections.

Under Article 15 Clause (3) of the Constitution, any special provision may be made for women and children belonging to all social groups transcending caste, religion *etc.*, for their advancement and welfare in all fields. The Government of India and the Government of State are empowered to make special provisions for women in respect of employment or any other purposes under the State which is an integral part of Article 15(3). This power conferred under Article 15(3) is not laid down in any manner by Article 16. The special provision which the State may make to improve women's participation in all activities under the supervision and control of the State can be in the form of either affirmative action or Reservations. Any special provision for protection or upliftment of women and children does not offend against the guarantee of non-discrimination.

Article 16 Clause (1) of the Indian Constitution guarantees equality of opportunity for all citizens in matters relating to "employment" or "appointment" to any post under the State. Clause (4) of Article 16 permits the State to make any provision for the reservation of appointment, or posts in favour of any backward class of citizens, which, in the opinion of the State, is not

1. R.C. Agarwal Modern Indian Constitution and Administration 1984 p.84-85.

2. AIR 1951 SC 229.

adequately represented in the service under the State. Article 16 Clause (4) does not confer any right on the citizens and there is no constitutional duty imposed on the Government to make such reservation. Article 16 Clause (4) is an enabling provision and confers a discretionary power on the State to make reservation either or at the stage of the initial recruitment or at the stage of promotion in favour of backward class of citizens is not adequately represented in the service of the State,<sup>3</sup>.

The provision for reservation of appointments or posts in favour of backward classes of citizen, contemplated by Article 16 clause (4) can be made not only by the Parliament/Legislature but also by the executive in respect of Central/State and by the local bodies and other authorities contemplated by Article 12,<sup>4</sup>.

Clause (4-A) of Article 16 of the Constitution permits the State to make any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State,<sup>5</sup>.

A new clause (4-B) after clause (4-A) has added in Article 16 of the Constitution which seeks to end the 50 per cent limit for Scheduled Castes and Scheduled Tribes and other Backward Classes in backlog vacancies which could not be filled up due to the non-availability of eligible candidates of these categories in the previous year or years,<sup>6</sup>. The

expression 'Backward Class' in this clause is interpreted by the Supreme Court to mean, socially, and educationally backward as is specifically mentioned in clause (4) added later to Article 15 of the Constitution. The Supreme Court observed that there are millions of other citizens apart from the Scheduled Castes and Scheduled Tribes who also belong to the Weaker Sections, and directed the Central Government to draw up a guideline for this purpose,<sup>7</sup>.

### ***Right to admission into State educational institutions :***

Under Article 15 Clause (1) read with Article 29(2) post, each citizen has to be afforded an equal opportunity, according to his ability (irrespective of his race, religion, caste or languages) to be admitted into educational institution owned or aided by the State, subject only to exceptions in favour of the Scheduled Castes and Scheduled Tribes and other socially and educationally Backward Classes,<sup>8</sup>. Article 29 of the Constitution contains a prohibition that no citizen shall be denied admission at any educational institution receiving aid from the State Exchequer on the ground of religion, caste, *etc.* however, in 1958 the Supreme Court gave its advisory opinion in the Kerala Educational Bill case holding that receiving Government aid was not a ground to impair the right of the minority to administer educational institutions. This opinion of the Supreme Court became the foundation for all later decisions concerning the subject. It is not changed even now.

### ***Promotion of educational and economic interests of SC, ST and other Weaker Sections :***

The humanity shares one planet, it is a planet on which there are two worlds, the

3. *State Bank of India SC/ST Employees Welfare Association v. State Bank of India and others*, AIR 1995 SC 1838-1941.

4. *Indra Sawbhay and others v. Union of India and others*, AIR 1993 SC 447.

5. Clause (4-A) was inserted by the Constitution (77th Amendment) Act, 1995.

6. Inserted by the Constitution (81st Amendment) Act 2000, Section 2.

7. *Shantistar Builders v. Narayana*, AIR 1990 SC 630 (paras 12-13).

8. *Jagdish v. Union of India*, AIR 1980 SC 298.

world of the rich and the world of the poor.<sup>9</sup> The world of the poor by contrast is characterized by its lawlessness, by the tyranny of its leaders and by the extreme and absolute poverty of its people, and the reservation opportunities should be given to the poor persons at the right time.

Article 46 directs the State to promote with Special care the educational and economic interests of the 'Weaker Sections' of the people, particularly of the Scheduled Castes and Scheduled Tribes and also directs the State to protect them from social injustice and all forms of exploitation. It is the constitutional duty of the State to take into consideration the claims of the members of the Scheduled Castes and Scheduled Tribes in the matter of appointment (subject, of course, to the consideration of the efficiency of the administration,<sup>10</sup>.

Although *prima facie*, these appear to be the exceptions to the citizens right to equality before the law or to the equal protection of the laws guaranteed by Article 14, a deeper consideration will show that in fact they enable the State to make the right to equality a reality for the vast majority of the Backward Classes which, together with the Scheduled Castes and Scheduled Tribes, constitute about 85 per cent of the population.

Would not the purpose have been served if the expression, 'Backward Classes' had been used instead of 'Weaker Sections' as done in Article 16 Clause (4) which would mean all the Weaker Sections, including the Scheduled Castes and Scheduled Tribes? It may be remembered here that clause (4) of Article 15 was not there originally – it was inserted by an amendment and the expression Backward Classes was used with a qualification socially and educationally (Backward Classes) and not only socially

or educationally backward but backward on both counts. Second, the Scheduled Castes and Scheduled Tribes were separated from the expression 'Backward Classes' to make a distinction between them and the other Backward Classes (OBCs).

In *Indra Sawhney*, the Supreme Court has clarified that the expression "weaker-section" of the people is wider than the expression "backward class" of citizens, which is only a part of the weaker-section. Backward Classes comprise only those which are socially or economically backward. The term weaker sections does not necessarily refer to a group or a class. It connotes all sections of the society which are rendered weaker due to various causes *e.g.* poverty, natural calamity or physical handicap,<sup>11</sup>.

The effort, it seems, has been to maintain the same distinction in Article 46.

Incidentally, it is also necessary to point out that the Supreme Court in all its decisions on reservation has interpreted the expression Backward Classes in Article 16 Clause (4) of the Constitution to mean the socially and educationally backward.

### ***System of Reservation :***

The present system of reservation is in favour of classes and not individuals. Individual means, a group of one caste or one community or one religion or a particular class of citizens. The reservation is in favour of Scheduled Tribes is extended to 33 sub-castes and same extended to the categories of Scheduled Castes and in order that the individuals may qualify for them, they must belong to those classes. There is no one or particular class, which is economically backward. All classes and social groups have economically backward individuals. But on that account alone, a group does not qualify to be called a

9. (Raanan Weitz, 1986) The Hindu dated 24-11-2003.

10. Article 335 of the Constitution.

11. *Indra Sawhney v. Union of India*, (1992) SCC 217.

Backward Class and reservation is not extended to them.

What is, however, argued is that it is not the upper Castes or the Social groups who should be entitled to reservation. As has been pointed out earlier, reservation has been provided in the Constitution for classes not individuals. If the individuals have to be provided with reservation on the economic criterion, then those satisfying the said criterion, and belonging to any Castes and Social groups, irrespective of any distinction will be entitled to it, including the individuals belonging to the Backward Classes and the Scheduled Castes and the Scheduled Tribes.

Some other features of the present reservation system may be borne in mind, which is often forgotten by many in their supercilious approach to the problems of reservation.

#### ***Reservation for Muslim Minority in Andhra Pradesh :***

Two incidents occurred recently have brought the issue of reservations on the basis of religion on the agenda. One is, the Act brought about, providing 5 per cent reservations to the Muslim Minorities in Andhra Pradesh. Second, the decision taken, allocating 50 per cent of the seats in Aligarh Muslim University to the Muslim students only have evoked sensation.

Before the Assembly Elections held in April, 2004, the Congress Party in Andhra Pradesh promised that, it comes to power, it would bring about an Act, providing 5 per cent reservations in education and employment for the Muslims.

The Bharatiya Janatha Party (BJP) is arguing that such providing reservations especially for the Muslims facilitates divisions of the country once again on the basis of religion and that the Andhra Pradesh

Congress Government have taken this decision only to satisfy the Muslims for votes.

The second issue relates to Aligarh Muslim University. The Executive Committee of the University decided to allot 50% of the total seats to the Muslim students all over the country. The Union Ministry of Human Resources Development (HRD) put the stamp of approval on it. This 50% reservations is not extended to the other minorities.

#### ***Should there be reservations on the basis of religion ?***

Reservations are made on the basis of backwardness. It should be social, economic and political backwardness. Backwardness does not depend on religion. There are several religions in the country who are socially, economically and politically backward classes and are not adequately represented in the service under the States. Inequalities are continuing in a religion. There is Caste discrimination in our country. On the basis of Caste, social exploitation, harassment, bonded labour and repression are continuing. The framers of our Constitution had taken castes as the basis for backwardness. Therefore, reservations on the basis of religion cannot change backwardness. This 5 per cent reservation is not extended to the Christians, Sikhs, Buddhists and Jains, who are also minorities and backwardness.

#### ***Are not Muslims backward ?***

Like among the Hindus, there are backward people among the Muslims also. If religion is taken as the basis for reservations, people of other religions also welcome. Reservations have to be provided to the Buddhists, Jains and Sikhs also. The 5 per cent Reservations to the Muslim Minorities in Andhra Pradesh, is on the basis of religion, and unconstitutional and Indian are not ready to accept such reservation to excluding other minorities.

Providing 5 per cent Reservations for Muslims by the Government of Andhra Pradesh, throughout history, there has never been a separation of Hindus, Muslims and Sikhs on the basis of religion. The 5 per cent Reservations to the Muslims, should not be a vote bank, changing religion into a political instrument is communalism by providing such Reservations. The Reservations of appointments of posts in favour of any Backward Class of citizens including Hindus, and minorities, this Reservations should be extended to other minorities like Sikhs, Jains, Buddhists and Christians.

The State Unit of All India Catholic Union (AICU) and Catholic Association of Hyderabad, Andhra Pradesh appealed to the Government of Andhra Pradesh to extend Reservations and benefits to Christian on par with Muslims and to pass the Dalit Christian Bill,<sup>12</sup>.

***Extend reservation to those who needed it***

India is probably the only country where the rich enjoy the benefits availability from Indian resources, while the poor are enjoy the benefits availability of reservations under Constitution only. In our country, where social diversity is a fact, the architects of post independence India had come up with the idea, of reservations to provide ample opportunism to the weaker sections of the society. Such ample opportunities of reservations should be extended to those who needed, in educational institutions including

unaided private minority and non-minority institutions.

In globalization era, a number of private educational institutions and Universities have been established with a common view to provide education to all citizens of India. More than 80 per cent population are available from reserved communities like, B.C, S.C, S.T, and Christian and remaining less than 20 per cent non-reserved category population is not enough to take admission in the private educational institutions.

In this regard the Legislature has exclusive power to enact any law pertaining to reservation with-out interference of judiciary.

For the welfare of the weaker section people the Central Government or State Governments should enact legislation to prevent commercialization of professional educational institution and to provide reservation to them and such reservation benefit are always extended to those who needed it the most. Union Government to enact a central law to provide reservation for Scheduled Castes, Scheduled Tribes, Backward Classes, and most Backward Classes in unaided minority and non-minority professional educational institutions following the recent Supreme Court judgment abolishing quotas and reservation in such institutions. The Government is equally responsible for their welfare. The Reservation should be extended to the working class become equal ruling class.

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**A NOTE ON 2005 (5) ALD 675 (FB)**

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Recently the Full Bench of the Andhra Pradesh High Court consisting of B. *Sudershana Reddy*, C.V. *Ramulu* and K.C. *Bhanu*,

JJ have delivered an important ruling on the A.P. Land Grabbing (Prohibition) Act, 1982 and the rules made thereunder. Apart from

12. The Hindu National News Paper P.4 dated 12-8-2005.