

RETHINKING RESERVATION IN HIGHER EDUCATION IN INDIA

Mehbubul Hassan Laskar*

Abstract

'Reservation' has always been a debatable topic. The basic object of reservation (as it is said) is the upliftment of weaker sections. There is reservation in the field of education, employment etc. However, this paper is basically concerned with respect to reservation in higher education. The paper critically evaluates the reservation policy in the light of recent judicial pronouncements as well as changing needs of time. It throws light as to how far the object of reservation has been realised, and finally makes an appeal that it is high time to rethink over the reservation policy in an impartial and objective manner.

I. Introduction

EDUCATION IS the most potent mechanism for the advancement of human beings. It enlarges, enriches and improves an individual's image of the future. It emancipates the human beings and leads to liberation from ignorance. A man without education is no more than an animal. It is said that in the twenty first century, 'a nation's ability to convert knowledge into wealth and social good through the process of innovation is going to determine its future, 'accordingly twenty first century is termed as century of knowledge.

Educational institutions are those sacred places where the youth acquire knowledge and wisdom; who in turn determine the future of a nation. It is the number of educational institutions and their quality, which to a great extent, determine the progress of a nation. The educational institutions collectively work as the backbone of a developed nation. Every educational institution has to maintain certain standard of education. It is this standard which determines the level of prosperity, welfare and security of people. It is also interlinked with the development of nation in general.

Education is now charged with responsibility for what is referred to as 'human capital formation' or 'human resource development'. This task is guided by the assumption that in every society there is a limited pool of individuals with a high level of intelligence, spread across all

* LL.M., II Semester (Two-Year Course), Indian Law Institute, New Delhi.

sectors of society. These talented individuals have to be selected and equipped with knowledge and skills, and promoted to run the engines of industrial growth. Others have to be suitably educated to serve as white-collar or blue-collar workers and supervisors. In the context of the doctrine of economic nationalism, it is believed that the prosperity of a nation depends on how well its system of education performs this task.¹

While educational institutions providing elementary education aim at ensuring higher literacy rate by providing access to all, institutions providing higher education aim at producing more and more expert professionals and scholars who can serve the nation and its people in a better way. Therefore, it is to be ensured that there must be quality higher education so that the nation produces the best professionals and scholars. Any step, big or small, compromising with the quality of education can't be accepted in the long run.

The educational institutions in India, in order to maintain their standard and reputation, take the best talents. However, it is subject to article 29(2) of the Constitution which imposes a limitation that no citizen shall be denied admission into any educational institution either maintained by the state or receiving aid from the state on the grounds only of religion, race, caste, language or any of them. It is also subject to general mandate of non-discrimination under articles 14 and 15 of the Constitution. One finds here the philosophy that the doors of temple of learning will be kept open for every eligible candidate.

But the practice has not been so with many institutes of higher learning. Special by-lanes have been made for different categories of students to enter into the universities/colleges, bypassing the rigid eligibility requirements and/or tests. There are reservations prescribed by the government and there are reservations created by the educational institutions themselves. Some have been adopted under the constitutional umbrella, some have been made as a vote catching

¹ Suma Chitnis, "Higher Education", in Veena Das (ed.), *The Oxford India Companion to Sociology and Social Anthropology* 1050 (Oxford University Press, London, 2003).

device, and a few are introduced to appease the agitators or those who are on 'fast unto death'.²

It is to be remembered that education, particularly higher education, in India has been charged with the responsibility of providing suitably trained man-power, and for generation as well as transfer of knowledge required for the country to keep pace and compete with technological advances in the developed countries of the world. Higher education in independent India is expected to develop, within a few decades, knowledge and capabilities of a quality and level that the developed countries have reached through a process that has stressed over two centuries. But the task seems to be difficult because of the 'massification' of higher education, the burden of the policy of reservation, and the inadequacy of resources to maintain and upgrade facilities as needed.³

In such circumstances, surprisingly, the Supreme Court of India on April 10, 2008, in its landmark judgment in *Ashok Kumar Thakur v. Union of India & others*,⁴ upheld the government move for initiating 27% OBC quotas in all government funded institutions, including institutions of higher education. As a result of this, the government is now in a position to reserve upto 49.5% of the seats in all central universities, prestigious professional schools, and elite colleges, such as the Indian Institute of Technology (IITs), Indian Institute of Management (IIMs), National Institute of Fashion Technology (NIFT) and government medical colleges etc.

Now, some of the most important and vital questions that arise are: Whether reservation in higher education will result in compromising with the quality of education? Whether reservation in higher education will benefit the nation in the long run? Would it not amount to a national loss in terms of brain drain and the loss of billions of dollars if middle class parents are forced to send their wards in foreign universities? Would it not deprive the really meritorious and talented from access to quality education?

² C.M Jariwala, "Reservation in Admission to Higher Education: Development and Directions", 42 *JILI* 205 (2000).

³ *Supra* note 1.

⁴ (2007) 4 SCC 361.

This paper makes an attempt to look into the intrinsic value of these questions and try to sort out the best possible answers for the same. The present paper critically evaluates the reservation policy; its necessity, constitutional permissibility, impact on the standard of education and also seeks to advance certain alternative suggestions to do away with reservation in higher education.

II. Concept of Education and Higher Education

Education is difficult to define because the concept entails varied aspects of knowledge, which can be passed on in various forms, including oral, written or behavioural. It also includes various forms of passing on information. However, education has been defined as, “training and instruction designed to give knowledge and develop skills.”⁵

United Nations Economic Social and Cultural Organisation (UNESCO) has given a comprehensive definition of the term ‘higher education’. UNESCO notes that higher education includes, “all types of studies, training, and training for research at the post-secondary level, provided by universities or other educational establishments that are approved as institutions of higher education by the competent State Authorities.”⁶

Higher education is considered throughout the world to be the key to both individual and societal aspirations. For individuals, education beyond the secondary level is assumed to be the way to social esteem, better paying jobs, expanded life options, intellectual stimulation and frequently a good time in the pursuit of any or all of the above. For societies, higher education is assumed to be the key to technology, productivity and other ingredients of international competitiveness and economic growth. It is believed to be a major engine of social justice, equal opportunity and democracy.⁷

⁵ A.S. Hornby (ed.), *Oxford Advanced Learners' Dictionary* (Oxford University Press, London, 1990).

⁶ UNESCO, Convention against Discrimination in Education, adopted on Dec. 14, 1960.

⁷ A. Johnstone, *Funding of Higher Education: International Perspective* (Garland Publishing, New York, 1993).

Historical Background of Reservation in India: A Brief Study

“Reservation”, also sometimes denoted as “affirmative action” or “positive discrimination”, it refers to a policy or program, of giving certain preferences to certain groups (usually under-represented groups) over the others. The policy of reservation, it must be kept in mind, was not a post-constitutional phenomenon but had its antecedents in the colonial times. Caste or communal quotas were in vogue well before the Constitution came into force. Reservations in favour of the backward classes (BCs) were introduced long before independence in a large area, comprising the presidency areas and the princely states in the south of the Vindhyas. Chatrapati Sahuji Maharaj, Maharaja of Kolhapur in Maharashtra, introduced reservation in favour of backward classes in as early as 1902 to eradicate poverty from amongst them and to give them their due share in the state administration. The notification of 1902 created 50% reservation in services for backward classes/communities in the State of Kolhapur. This notification was the first government order providing for reservation for the welfare of depressed classes in India.⁸

Some major events relating to reservation policy in pre-constitutional period followed this rule:

- 1882 - Hunter Commission was appointed. Mahatma Jyotirao Phule⁹ made a demand of free and compulsory education for all along with proportionate reservation/ representation in government jobs.
- 1891 - The demand for reservation in government jobs was made as early as 1891 with an agitation in the Princely State of Travancore against the recruitment of non-natives into public service overlooking qualified native people.

⁸ Marc Galanter, *Who are the Other Backward Classes: An Introduction to the Constitutional Puzzle* 1812, available at: <http://marcgalanter.net/Documents/papers/scannedpdf/WhoAretheOtherBackwardClasses.pdf>.

⁹ Jotiba Govindrao Phule, also known as Mahatma Jyotirao Phule was an activist, thinker, social reformer, writer, philosopher, theologians, scholar, editor and revolutionary from Maharashtra, India in the nineteenth century.

- 1901 - Reservations were introduced in Maharashtra in the Princely State of Kolhapur by Shahu ji Maharaja.¹⁰
- 1908 - Reservations were introduced in favour of a number of castes and communities that had little share in the administration by the British.
- 1909 - Provisions for reservation were made in the Government of India Act, 1909.
- 1919 - Montagu-Chelmsford Reforms¹¹ were introduced. Provisions for reservation were made in the Government of India Act, 1919.
- 1921 - Madras Presidency introduced Communal G.O. in which provisions for reservation were made: 44% for non-Brahmins, 16% for Brahmins, 16% for Muslims, 16% for Anglo-Indians/Christians and 8% for Scheduled Castes.
- 1935 - Indian National Congress passed a resolution called Poona Pact¹² to allocate separate electoral constituencies for depressed classes.
- 1935 - Provisions for reservation were made in Government of India Act, 1935.
- 1942 - B.R. Ambedkar established the All India Depressed Classes federation to support the advancement of the scheduled castes. He demanded reservations for the Scheduled castes in government services.
- 1947 - India obtained Independence. B.R. Ambedkar was appointed chairman of the drafting committee for Indian Constitution. The Indian Constitution prohibits discrimination on the grounds only of religion, race, caste, sex and place of birth. While providing equality of opportunity for all citizens, the Constitution contains special clauses "for the advancement

¹⁰ Rajarshi Shahu, also known as Shahu Maharaja (July 26, 1874-May 6, 1922) was the first Maharaja of the Indian Princely State of Kolhapur during 1884-1922.

¹¹ The Montagu-Chelmsford reforms were introduced by the British Government in India to introduce self-governing institutions gradually to India.

¹² The Poona Pact refers to an agreement between the lower caste untouchables (then called depressed classes, now referred to as *Dalits*) of India led by Dr. B.R. Ambedkar and the upper-caste Hindus of India that took place on 24 September, 1932 at Yerawada Jail in Pune, India.

of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Separate constituencies allocated to scheduled castes and tribes to ensure their political representation for 10 years. (These were subsequently extended for every 10 years through constitutional amendments).

It is significant to note that article 15(4), which provides a constitutional basis for reservation in education, did not form part of the Constitution as it originally stood in 1950, although there was provision for reservation of appointments or posts in favour of any backward class of citizens under article 16(4). However, an equivalent of the current article 15(4) was the subject matter of considerable debate amongst the founding fathers of the constitution.

Constituent Assembly Debate

The fundamental rights sub-committee modified an equality clause, framed by Mr. Munshi¹³ in his draft on the fundamental rights, to read as follows:

“All citizens shall have equal opportunities of receiving education. Nothing herein contained shall preclude the State from providing special facilities for educationally backward sections of the population.”¹⁴

Moreover, B.N. Rau’s notes on the fundamental rights were considered and modified slightly. Based on this modification, it was agreed by the sub-committee that the following clause be added as a fundamental Right:

“The State shall promote with special care the educational and economic interests of the weaker sections of society (in particular, of the scheduled castes and aboriginal tribes), and shall protect them from social injustice and all forms of exploitation.”¹⁵

Prof. K.T. Shah proposed that or “for scheduled castes or backward tribes, for their advantage, safeguard or betterment” are added and with this addition the provision would read as follows:

¹³ K.M. Munshi, Member of the Drafting Committee.

¹⁴ B. Shiva Rao, 2 *The Framing of India’s Constitution* 125 (2005).

¹⁵ *Id.* at 34, 36.

“Nothing in this article shall prevent the state from making any special provision for women and children or for scheduled castes or backward tribes, for their advantage, safeguard or betterment.”

However, B. R. Ambedkar¹⁶ was not in favour of this provision as he took the view that such a provision would result in further seclusion of SCs and STs resulting in a ‘separate but equal’ treatment that was not in their interests. In the opinion of Dr. Ambedkar:

“The object which all of us have in mind is that the general public, for instance, none of us, I think, would like that a separate school should be established for the scheduled castes when there is a general school in the village open to the children of entire community. If these words are added, it will probably give a handle for a state to say, ‘Well, we are making special provision for the scheduled castes’. To my mind they can safely say so by taking shelter under the article if it is amended in the manner the Professor wants it. I, therefore, think that it is not a desirable amendment.”¹⁷

Thus, it is clear that Dr. Ambedkar, the chief architect of Indian Constitution, didn’t consider any special provision for reservation in respect of education for he believed that it would rather lead to further segregation of the society in the name of castes. His belief seems to be correct to a great extent in modern time as learned author R.L. Chaudhari has observed, “Regarding the caste and reservation policy, it can be said that the privileges attached to castes have encouraged ‘casteism’ since caste is proving very beneficial to the person belonging to backward castes. Not only this, there is a general desire for the enrolment in the list of scheduled castes and backward classes even among those who are advanced and who have rejected the caste system for other purposes. Thus, the reservation policy, instead of removing the caste distinctions has maintained and has encouraged social tensions which retard process of social integration. It has also created obstacles in achieving the object of classless society in India.”¹⁸ While such a provision was rejected outright by the Constituent Assembly, it was introduced in the Constitution by way of the Constitution (First Amendment) Act, 1951 in order to nullify the

¹⁶ Chairman of the Drafting Committee.

¹⁷ *Supra* note 14 at 661.

¹⁸ R. L. Chaudhari, *Concept of Secularism in Indian Constitution* 184 (1987).

decision of the honourable Supreme Court in *Champakam Dorairajan v. State of Madras*.¹⁹

In *Champakam Dorairajan* case, the Government of Madras reserved seats in state medical and engineering colleges for different communities in certain proportions on the basis of religion, race and caste. This was challenged as unconstitutional. The government defended its order on the grounds of article 46 of the Constitution, which permits the state to promote with special care the educational and economic interests of the weaker sections of the people and in particular scheduled castes and scheduled tribes to secure social justice. But the Supreme Court struck down the order as it was violative of equality guaranteed under article 15(1) and observed that directive principles can't override the guaranteed fundamental rights. As a result, the Parliament brought an amendment²⁰ to article 15 and inserted clause (4).

Article 15(4) of the Constitution provides:

“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 castes and scheduled tribes.”

Thus, the state has been given discretion to decide the nature of special measures that are needed to protect these classes. Such measures may range from providing exclusive housing for the above classes to providing reservation in educational institutions. However, article 15(4) does not grant SCs and STs and socially and educationally backward classes the right to reservation. It is merely an enabling provision and the state has the discretion to provide for reservation. A writ filed by one of the members of the above classes, praying the court to direct the state to provide for reservation cannot be sustained.²¹

¹⁹ AIR 1951 SC 226.

²⁰ The Constitution (First Amendment) Act, 1951.

²¹ *Dr. N. M. Prasad v. Director, Sri Jayadeva Institute of Cardiology*, AIR 1994 Kant. 309.

III. Who are Entitled to Reservation - A Confusing Question

Under article 15(4) of the Constitution, the state has been empowered to make special provisions in respect of the following classes of persons:

- i. Scheduled Castes (SCs);
- ii. Scheduled Tribes (STs); and
- iii. Socially and Educationally Backward Classes (SEBCs).

But, the Constitution nowhere defines the term socially and educationally backward classes nor lays down any specific criteria for determining them. Moreover, the definitions provided for scheduled castes and scheduled tribes are also vague.²² However, under articles 341 and 342, the President of India may, by public notification, specify the castes, races or tribes, or groups within castes, race or tribes which shall be, for the purpose of the Constitution, be deemed to be scheduled castes or scheduled tribes, as the case may be. Later on, the Parliament may, by law, include more groups in the list and, in fact, the number of groups has constantly increased from time to time.

Although the term 'socially and educationally backward class' has not been defined in the Constitution, yet the Constitution provides for the appointment of a commission to investigate the conditions of socially and educationally backward classes within the territory of India.²³

Kalelkar Commission

Accordingly, the first Backward Classes Commission was appointed in January, 1953 under the chairmanship of Kaka Saheb Kalelkar, with the following terms of reference-

- (a) To determine the tests by which any particular class or group of people can be called 'backward'.
- (b) To prepare a list of such backward communities for the whole of India.

²² See art. 366(24) and (25).

²³ Art. 340.

(c) To examine the difficulties of backward classes and to recommend steps to be taken for their amelioration.

The commission formulated four criteria, *viz.* low position in the traditional caste hierarchy; lack of general educational advancement; inadequate representation in government service; and inadequate representation in trade, commerce and industry. On the basis of these criteria, the commission identified 2,399 backward castes in the entire country, classifying 837 as the “most backward”. Five out of eleven members of the commission were, however, opposed to linking caste with backwardness, and recorded dissent. The chairman, Kaka Kalelkar also opposed the acceptance of caste as the basis of backwardness, but did not record a formal dissent.

The Kalelkar Commission report submitted on March 30, 1955 was presented in the Parliament with a memorandum on September 3, 1956. A significant observation made in the memorandum was that “it cannot be denied that the caste system is the greatest hindrance in the way of our progress towards an egalitarian society, and the recognition of the specified castes as backward may serve to maintain and even perpetuate the existing distinctions on the basis of caste”. However, there was no discussion on this report in the Parliament at the time as the tests recommended by the commission appeared to be too vague to the government and also too wide to be of much practical value. Hence, further investigation by the state governments has been directed and, in the meantime, the state governments have been authorized to give assistance to the backward classes according to the lists prepared by the state governments themselves.²⁴

Mandal Commission

Nearly 23 years after the submission of the report of the first backward classes commission, presidential order under article 340 was issued in January, 1978, setting up another backward classes’ commission consisting of five members with B.P. Mandal as chairman. This commission started working with the following terms of reference: i). to determine the criteria for defining the socially and educationally backward classes; ii). To recommend steps for the backward classes so

²⁴ *Balaji v. State of Mysore*, AIR 1963 SC 649.

identified; and iii). To examine the desirability of reservation of appointments or posts for them.

Using the terms “castes” and “classes” interchangeably as synonyms, the commission evolved 11 indicators or criteria for determining social and educational backwardness and grouped them under three broad heads- social, educational and economic, giving a weightage of three points to each of the social indicators.²⁵ Applying these 11 indicators to all castes covered by the survey for a particular state, the commission classified all castes that had a score of 50% or more as socially and educationally backward. The percentage of such backward classes, called other backward classes (OBCs) by the commission, has been worked out by them on the basis of the caste/community-wise population figures from the census records of 1931 and reported to be 43.7%-52% Hindu OBCs and 8.4% non-Hindu OBCs. However, in view of the Supreme Court’s judgment holding that total reservation under articles 15(4) and 16(4) should be below 50%; the commission recommended 27% reservation for OBCs in all government services and recruitments to public sector undertakings under the central and state governments, and also in technical and professional institutions, both in the centre and the states.

This report was basically a rehash of the first backward classes commission report rejected by the government, inasmuch as it identified backward classes on the basis of castes. In fact, the Mandal Commission report was based on a basic conceptual confusion. It is to be noted that the Constitution has used the terms “caste” and “class” separately. Unfortunately, the commission used the terms caste and class interchangeably as synonyms. But these are well known concepts

²⁵ The four ‘social’ criteria were: being considered socially backward by others; dependence mainly on manual labour for livelihood; percentage of males and females getting married at an age below 17 years being higher than the state average; and, participation of females in work being less than the state average. The three ‘educational’ criteria were: number of children in the age-group of 5-15 who never attended the school being at least 25% above the state average; dropout rate of students in the age-group of 5-15 at least 25% above the state average; and the proportion of matriculates being 25% below the state average. The four ‘economic’ criteria adopted were: average value of assets being at least 25% below the state average; the number of families living in ‘kuchcha’ houses being atleast 25% above the state average; source of drinking water being beyond half a kilometer for more than 50% of the house-holds; and, the number of house-holds having taken consumption loans being atleast 25% above the state-average.

of sociology, which are different in content and connotation, and the differences are absolutely vital. The significant differences are:

- i) The membership of a caste is hereditary or by birth, which is not so with a class.
- ii) Caste is a closed group characterised by endogamy, while class is an open group that one automatically joins when one shares a common situation with other individuals.
- iii) There is a vertical mobility in class so that a person can move upto a higher or go down to a class considered lower in social hierarchy. But there is no such mobility in caste.
- iv) A class can generally be distinguished from another class in terms of some economic criteria, e.g. income, occupation, ownership of land or other means of production, place of residence etc. While some castes may have a traditional or hereditary occupation, they are basically not economic groups and are usually based on religious and mythical traditions.

Had the Mandal Commission kept these conceptual differences in view and also the fact that the government had already explicitly rejected caste as the basis of class and suggested the adoption of “some criteria other than caste”, such as linking backwardness to “occupational communities” and “the application of economic tests”, the mess which had been created by their identifying caste with class would have been avoided.

Consequently, no action was taken on the Mandal Commission report for nearly a decade. It was suddenly in 1990, the Government of India decided to implement the recommendations of the report. There is no evidence that the government at any level examined this report, or there was any kind of discussion or debate on it, or any attempt to evolve a political consensus before announcing the decision to implement its recommendation to provide 27% reservation to OBC in the civil posts and services under the Government of India.

After the Government of India issued certain memoranda in 1990-91, pursuant to this report, various writ petitions were filed challenging the constitutional validity of the Mandal Commission report and office memoranda. These petitions were eventually heard and disposed of on November 16, 1992 by a nine-judge bench in the celebrated case of

Indra Sawhney v. Union of India,²⁶ popularly known as *Mandal Commission* case. In this case, the Supreme Court has exhaustively dealt with reservation policy and upheld the validity of the Mandal Commission report. The court held that caste is an important criterion for determining backwardness of a class, but it is not the sole criteria. The court further held that reservation cannot exceed the limit of 50% as laid down in *Balaji v. State of Mysore*.²⁷ Moreover, the court evolved the concept of ‘creamy layer’ and held that creamy layers in backward classes have no place in reservation system. But the Court failed to give a precise definition of ‘creamy layer’. It was held that persons who are employed in higher services like IAS, IPS, and All-India services or near about as persons having reached a higher level of social advancement and economic status are not to be treated as backward, but to be treated as ‘creamy layer’. This has again led to controversy and confusions as to what income should be treated as base to determine ‘creamy layer’. The Kerala High Court considered annual income of the year preceding the year of admission as the basis²⁸ whereas the Punjab and Haryana High Court held that it should be the average of last five years’ income.²⁹ It is said that burgling and corruption in this branch has witnessed number of unnerved entitlements, including those showing a particular year income, change of profession to show lower income, false income certificate, income only from one source and not the real total income to show reduced income position to claim the benefits of reservation.³⁰

IV. Reservation in Higher Education- Present Position

Recently in *P.A. Inamdar v. State of Maharashtra*,³¹ the Supreme Court abolished state quotas in private unaided professional colleges and specifically held that the state could not impose reservations in

²⁶ AIR 1993 SC 477.

²⁷ AIR 1963 SC 649.

²⁸ *P. Meerakutty v. State of Kerala*, AIR 1992 Ker 273.

²⁹ *Gouri Sankar v. State of A.P.*, AIR 1982 P&H 100.

³⁰ See *P. Sree Kumar v. State of Kerala*, AIR 1998 Ker 77; *R. Dinesh Kumar v. Director of Technical Education*, AIR 1985 Kar 280; *Aruna v. State*, AIR 1985 Kar 196.

³¹ AIR 2005 SC 3226.

unaided institutions. This led to the passing of the Constitution (Ninety-third Amendment) Act, 2005 by the Parliament in December, 2005 inserting the following clause (5) in article 15 of the Constitution:

“Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the state from making any special provision by law, for the advancement of socially and educationally backward classes of citizens or for the scheduled castes or scheduled tribes in so far as such special provisions relate to their admissions to educational institutions including private educational institutions; whether aided or un-aided by the state, other than the minority educational institutions referred to in clause (1) of article 30.”

It is to be noted that article 15(5) - does not specifically provide for ‘reservation’ as such. It is only an enabling provision which empowers the state to lay down by law ‘special provisions’ in the matter of admission to ‘educational institutions.’ There is no particular mention of institutions of higher learning, universities or professional institutions as such. Educational institutions could also mean primary and secondary schools. Also, the ‘special measures’ could mean several measures other than reservation.

However, taking the advantage of this constitutional amendment, the union government brought forth legislation namely, the Central Educational Institutions (Reservation in Admission) Act, 2006 (the Act) under which the following scheme of reservation has been provided:

- i) SC - 15%
- ii) ST - 7.5%
- iii) OBC - 27%

As a result of this, about 50% of the seats have now come under reservation in all central educational institutions including institutions of higher learning and professional institutes like IITs, IIMs and government medical and engineering colleges. However, under the Act, the following institutions are excluded from the purview of reservation- institutions in tribal areas, research institutions as specified in the schedule to the Act, minority institutions and super-

specialty courses as may be specified by the Central Government.³² It may be noted that the Supreme Court, in its various decisions, has held that there can be no reservation in super-specialty courses.³³ But the Act does not specify the super-specialty courses and it has been left to the discretion of the government to determine the super-specialty courses which are to be excluded from the purview of reservation.

The validity of the Constitution (Ninety-third Amendment) Act, 2005 and the Central Educational Institutions (Reservation in Admission) Act, 2006 was challenged in the famous case *Ashok Kumar Thakur v. Union of India*.³⁴ The Supreme Court, in its decision, upheld the validity of the Constitutional Amendment Act as well as the Central Act. The Court has failed to take notice of the fact that reservation is not the only prescribed means for ensuring development of SC/ST/OBC and that such high percentage of reservation in higher education could not have been the dream of the founding fathers of our Constitution. Mediocrity over meritocracy, in this twenty-first century, will not only hamper the quality of education but will also retard the progress of the nation as a whole. Instead of finding out other suitable methods for the development of backward classes, simply giving reservation is nothing but a fraud on the Constitution. In fact, after six decades of the commencement of the Constitution, the time has come to impartially review the entire reservation system and ensure that only the best talents get place in educational institutions, irrespective of his caste or class.

Apart from reservation provided to SC/ST/OBC, there are also various other kinds of reservation which prevail in higher education in India, such as-

- i) Reservation in favour of girl students.³⁵
- ii) Reservation in favour of children of government employees.³⁶
- iii) Reservation in favour of resident of particular territories.³⁷
- iv) Reservation in favour of children of defence personnel.³⁸

³² See Sec. 4 of the Act.

³³ See *Preeti Srivastava (Dr.) v. State of M.P.*, AIR 1999 SC 2894; *AIIMS Students Union v. AIIMS*, AIR 2001 SC 3262.

³⁴ *Supra* note 4.

³⁵ *Subhash v. State*, AIR 1973 All 295.

³⁶ *Manju v. State*, AIR 1972 HP 37.

³⁷ *Chitra v. U.O.I.*, AIR 1970 SC 35.

- v) Reservation in favour of candidates from union territories or the state of J&K.³⁹
- vi) Reservation in favour of candidates who have passed through the qualifying examination of the same university as distinguished from those coming from other universities;⁴⁰ etc.

Although there are various kinds of reservations that have crept into higher education, I have mainly focused on the issue of SC/ST/OBC reservation in higher education which has created much controversy and debate during the last three decades or so.

V. Reservation in Higher Education- A Critique

It is a well-settled principle in law that reservation to a backward class is not a constitutional mandate. It is the prerogative of the state concerned if it so desires, with an object of providing opportunity of advancement in the society to certain backward classes which include the SCs and STs, to reserve certain seats in educational institutions.⁴¹

The pivotal role of an activist Supreme Court in shaping India's affirmative action policies cannot be gainsaid. With due respect to the Apex Court, I most humbly submit that it has failed to understand the rationale behind reservation, which was a temporary measure but it now seems to continue till eternity. It seems that the discretion of the state has been converted into a right of a particular undefined group of persons. The court has accorded caste-based classifications such a presumption of constitutionality that it has made them quite unchallengeable. The Court has given unbridled discretion to the state to determine the condition that is appropriate to trigger affirmative action for the backward classes. India's affirmative action policy, by its very nature, is not susceptible to any pre-fixed termination date. The national commission that reviewed the working of the Constitution for the past half-century recommended "that the ultimate aim of affirmative action or reservation should be to raise the level of capabilities of people of the disadvantaged section and to bring them at

³⁸ *Chanchala v. State of Mysore*, AIR 1971 SC 1762.

³⁹ *Shubasini v. State of Mysore*, AIR 1966 Mys 40.

⁴⁰ *Supra* note 42.

⁴¹ *E.V. Chinnaiah v. State of A.P.*, AIR 2005 SC 162.

par with other sections of the society.”⁴² This seems to be an aim in perpetuity.

Even though the makers of the Constitution originally conceived it as a transient reparatory measure to benefit the historically discriminated backward classes, the reservation system has grown into a sprawling enterprise with its own elaborate infra-structure, programme and supportive constituents.⁴³

It must be noted that mediocrity over meritocracy cuts at the roots of justice and hurts right to equality. Any protective push or prop, by way of reservation or classification, must withstand the test of equality contained in article 14 of the Constitution. Any overgenerous approach to a section of the beneficiaries, if it has the effect of destroying another’s right to education, more so, by pushing a mediocre over a meritorious, belies the hopes of our founding fathers on which they structured the great document of the Constitution and so must fall to the ground.

Any sort of discrimination or classification, in order to withstand the test of equality enshrined in article 14, must satisfy the following two conditions:

- I) The classification must be founded on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group; and
- II) The differentia must have a rational relation to the object sought to be achieved.

For the purpose of reservation in higher education, the government has broadly classified the students into the following two categories-

- a) Students belonging to general category; and
- b) Students belonging to SC/ST/OBC category.

⁴² Government of India, *Report of the National Commission to Review the Working of the Constitution* (March 31, 2002); available at <http://lawmin.nic.in/ncrwc/finalreport.htm>. (popularly known as Venkatachaliah Commission Report)

⁴³ K.G. Janpillai, “Equality in the affirmative action”, 27 *Academy Law Review* 48 (2003).

Arbitrary Procedure for Selecting SC/ST/OBC - No Intelligible Differentia

I firmly contend that this classification cannot be said to be based on any intelligible differentia. This classification might have been justified 60 years back when social evils like ‘untouchability’, caste system etc. were greatly practised in India. As a result, people belonging to these categories were prevented from mixing with common masses and deprived of all social, economic and political benefits. But now the situation has significantly changed. The light of education has helped us to abandon many of the evil (non-scientific) practices. Now, we have been able to abolish untouchability from our society. We have different statutes to protect the interests of SCs and STs such as the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 etc. We have National Commissions for Scheduled Caste and Scheduled Tribe⁴⁴ to look after their well being. Laws have been enacted prohibiting the entry of non-tribals into tribal areas without permit and separate provisions are made for the better administration of tribal areas.⁴⁵ Article 339(2) of the Constitution empowers the centre to issue directives to any state giving directions as to the drawing up and execution of schemes for the welfare of the scheduled tribes. Necessary provisions are also made to meet the costs of the scheme from the Consolidated Fund of India.⁴⁶ As a result, the problems or difficulties which they earlier faced have significantly diminished today. Even the members, who belong to the so called SC/ST category, never use their identity in any matter. It is only when they have to take certain advantages or benefits; they disclose their so called caste identity.

According to article 366(24), “Scheduled Caste” means such castes, races or tribes or parts of groups within such castes, races or tribes, as are deemed under article 341 to be scheduled castes for the purpose of the Constitution. According to article 366(25), “Scheduled Tribes” means such tribes or tribal communities or parts of or groups within

⁴⁴ These commissions have been set up as National Legal Advisory Body to advise the government on broad policy issues and level of development of SCs and STs respectively.

⁴⁵ See schs. V and VI to the Constitution of India.

⁴⁶ See art. 275(1) of the Constitution of India.

such tribes or tribal communities as are deemed under article 342 to be scheduled tribes for the purpose of the Constitution.

Thus, scheduled castes or scheduled tribes are those communities which are listed as scheduled castes or scheduled tribes in the Constitution as per the Order of the President under article 341 and article 342 respectively. But the Constitution does not prescribe any procedure to determine SC/ST before including them in the list. The lists prepared through presidential order are final. It is not open to the court to make any addition or subtraction from the presidential Order.⁴⁷ Now the important question is that whether a community listed as SC/ST sixty years back on the basis of certain criteria still continue to suffer from various drawbacks and is entitled to the benefits attached to SC/ST.

It may be worthwhile to mention that the Supreme Court in *Ajay Kumar Singh v. State of Bihar*⁴⁸ and in several other cases held, “A class/caste may be backward in present time, but it may not be so in coming years due to their socialisation with society and job opportunities. Once a caste is socially and educationally backward community, it cannot remain so for all times to come. It requires periodical review.”

But, infact, no concrete steps have so far been taken for periodic revision of their social and economic conditions. Now, a student becomes an SC/ST only on the basis of a certificate issued by a competent authority of the government. Many a time, in order to take benefits of reservation, students manage to get fake SC/ST certificate. This has given rise to the problems of fake candidates,⁴⁹ cases of conversions⁵⁰ to SC from high castes, adoption by a SC/ST⁵¹ etc. Moreover, many communities in India are agitating to get their communities listed in the SC/ST list. In this regard, long before *Indra Sawhney*,⁵² in *K.C. Basanth Kumar v. State of Karnataka*,⁵³ it was

⁴⁷ See *B. Basavalingappa v. D. Munichinappah*, AIR 1965 SC 1269; *Virendra v. Union of India*, AIR 1992 All 147.

⁴⁸ (1994) 4 SCC 401.

⁴⁹ *R.K. Shaha v. Medical College*, AIR 1976 Cal 347; *Ranbir Singh v. State*, AIR 1978 P&H 109.

⁵⁰ *J. Das v. State*, AIR 1981 Ker 164; *Dr. Neelima v. Dean of PG Studies*, AIR 1993 AP 229; *R. Uma Devi v. Principal, K.M. College*, AIR 1993 AP 38.

⁵¹ *Khazan Singh v. U.O.I*, AIR 1980 Del 60.

⁵² *Supra* note 26.

observed that the paradox of the system of reservation is that it has endangered a spirit of self degeneration among the people. Nowhere else in the world, do castes, classes or communities queue up for the sake of gaining backward status. Nowhere else in the world is there 'competition' to assert backwardness and to claim "we are more backward than you."

Even the position is same in respect of OBC. The two commissions appointed so far failed to lay down specific criteria for determination of OBC. In fact, both the commissions used "caste" as an important factor to determine backwardness of a class. But it is to be remembered that the very inquiry of an individual's caste to determine OBC would amount to grave breach of the Constitution and harm the unity and integrity of the nation. Such exercise would perpetuate and reinforce caste system in India rather than hasten its demise which our founding fathers had never dreamt of. In this light, it is humbly submitted with the greatest respect that the court in *Indra Sawhney* case⁵⁴ was wholly in error in stating that 'caste' could be a factor for identifying the backward classes.

In this regard, eminent jurist Nani Palkhivala commented thus: "The basic structure of the Constitution envisages a cohesive, unified and casteless society. By breathing new life into casteism the judgment fractures the nation and disregards the basic structure of the Constitution. The decision would revitalize casteism, cleave the nation into two- forward and backward, and open up new vistas for intermechie conflicts and fissiparous forces, and make backwardness a vested interest. It will undo whatever has been achieved since independence towards creating a unified, integrated nation. The majority judgment will revive casteism which the Constitution empathetically intended to end."⁵⁵

In this light, it is most humbly submitted that the judgment in *Indra Sawhney*, to the extent it regards caste as an important factor to determine OBC, ought to be reconsidered and the Court must lay down specific guidelines to determine OBC so as to prevent any sort of arbitrariness in this regard.

⁵³ AIR 1985 SC 1495.

⁵⁴ *Supra* note 5.

⁵⁵ Nani Palkhivala, *We the Nations: The Lost Decades* 179 (1994).

Thus, in the absence of specific criteria or guidelines, the determination of SC/ST/OBC cannot be justified. It is confusing in nature. It may be done arbitrarily and based on extraneous and irrelevant grounds. Hence, the classification of students as general and SC/ST/OBC is not based on any intelligible differentia so as to withstand the test of article 14 of the Constitution.

No Reasonable Nexus with the Object Sought to be Achieved

The basic policy of reservation is to off-set the inequality and removes the manifest imbalance, the victims of which for bygone generations lag far behind and demand equality by special preferences and strategies. Thus, the main ground on which reservation is sought to be justified in India is that the people belonging to the class- SC/ST/OBC were historically oppressed and denied respect and equal opportunity in Indian society and were thus under-represented in the nation-building process. Hence, reservation is a way to bring them at par with the general class of the society. Thus, the object sought to be achieved by way of reservation is the overall upliftment of SC/ST/OBC. It is to be remembered that reservation is not an end in itself; it is one of the means to achieve equality. The policy of reservation adopted to achieve that end must, therefore, be consistent with the objective in view.

But, in the present time, it seems that the policy of reservation is being continued without any object. Even after sixty years of India's independence, no concrete steps have so far been taken to determine as to how far the object of reservation has been achieved. The specific requirement of periodic review as stated in section 11 of the National Commission for Backward Classes Act, 1993 and in para 847 of *Indra Sawhney* case has not been followed, and as a consequence, the prevailing lists have swelled to include several thousand "castes" which are treated as 'backward classes', thereby satisfying the political mandate.

Thus, it is clear that the reservation policy has no reasonable nexus with the object sought to be achieved. It has become an important tool of politics in the country. The inclusion of any class/caste has been used as a vote capturing device. There are cases when the party in

power, on the eve of central or state election, included large number of classes in the list of OBC. It is time that the pressure tactics be avoided otherwise the caste/class strife will put an eclipse on the philosophy of common brotherhood and the egalitarian society provided in the Constitution of India.⁵⁶ The judiciary, being the guardian of the Constitution, must adopt a beneficial and careful approach in this regard.

Any Sort of Reservation in Higher Education is against the International Principles

Under article 51 of the Constitution, the Union of India has a duty to take steps to “foster respect for international law and treaty obligations.” In other words, the state has a responsibility, so far as possible, to give effect to the provisions of international treaties.

According to article 26 of UDHR,⁵⁷ “Everyone has a right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”

According to article 4 of the UNESCO Convention Against Discrimination in Education,⁵⁸ “Admission to higher education should be based on merit, capacity, efforts, perseverance and devotion showed by those seeking to access it, and can take place in a life long scheme, at any time with due recognition of the previously acquired skills.” Thus, the Convention proclaims that access to higher education should be based on merit and no discrimination shall be allowed on the grounds of race, gender, language, or religion, or economic, social or cultural distinction.

According to article 13(2)(b) of International Convention on Social, Economic and Cultural Rights (ICESCR),⁵⁹ which deals with secondary education, “Secondary education shall be made generally

⁵⁶ *Supra* note 2.

⁵⁷ The Universal Declaration of Human Rights adopted in 1948.

⁵⁸ Adopted in 1960.

⁵⁹ Adopted in 1966.

available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.” The phrase “generally available” signifies that secondary education is not dependent on a student’s apparent capacity or ability and it must be made accessible to all.

Article 13(2)(c) of ICESCR deals with the “right to higher education.” It specifically states, “higher education shall be made equally accessible to all on the basis of capacity.” Thus, according to article 13(2)(c), higher education is not to be “generally available”, but only available on the basis of capacity i.e. merit.

Thus, it is clear that the international community has recognized that there shall be no compromise with merit and higher education shall be accessible to all only and only on the basis of merit. India, having ratified these conventions, has a positive moral obligation to follow this international norm. But, alas! India is still continuing, rather perpetuating the age old reservation policy without any fixed object. It is time to rethink over the policy.

Reservation Hampers Quality Education

It is also a fact that reservation of any kind hampers the quality of higher education. Through reservation, we may simply create a pass for the reserved category students to enter institutes of higher learning and professional excellence. But it is really very shocking that the majority of such students fail to cope up with the standard of education required at such level. This becomes clear from the fact that in the last ten years or so, in the courses like IITs etc, more than 90% SC/ST/OBC students are either dropped out or were declared failed in the first year or in the second year. In many cases, they simply failed to acquire the benchmark required to sit in the examination.⁶⁰ Thus, the reservation made by the central government/state government has become redundant as these students fail to acquire the minimum benchmark. As a result of this, the reserved seats in higher courses are lying vacant. Had these seats been given to really meritorious eligible candidates, we would have got bundles of expert professionals who

⁶⁰ See *Avinash Singh Bagri & Othrs. v. Registrar, IIT Delhi & Anr.*, 2009(11) SCALE 535.

could be the real treasure of our country. This also clearly shows the violation of right to education of the students belonging to general category who, in spite of their merit and eligibility, fail to get seats in the institutes of higher education only because of the fact that they belong to general category.

Two Major Demerits of Reservation

Apart from various other demerits, I would like to mention the two most significant demerits of the reservation policy:

- i) Reservation hampers the intellectual development of backward classes: The general mode of selection observed in colleges/universities is either the marks scored by the students in the last examination or their marks in an entrance examination conducted by the colleges/universities. But, in keeping with the reservation policy, the colleges/universities demarcate different qualification levels or “cut-off marks.” The backward classes have lower cut-off marks as compared to general category students. But the reduction of cut-off marks only hampers the development of backward classes themselves. It reduces the competitive spirit in them. By doing it, the government seems to tell them that they can just sit back and score just the required minimum, because for them, caste and not marks, is the ticket to enter the colleges/universities of their choice. In this regard, Professor Paramananda Singh says, “What is needed today is that the state should divert more and more of its resources to increase the overall competitiveness of the beneficiaries rather than stick to ‘reservation’ as the only best means to promote equality.”⁶¹ Reservation may have been theoretically aiming at equality, but in practice, it is far from the very idea of equality. Rather, it enhances inequality among the different classes in the society and is against the philosophy of “common brotherhood.”
- ii) Reservation hampers progress: Reservation was undertaken with an additional goal in mind- that of trying to aid progress of society by pulling up even the weakest sections of the society.

⁶¹ Paramananda Singh, “Promoting equality through reservations: A critique of judicial policy and political practice”, 20 *DLR* 46 (1998).

But this seems to be a myth. One obvious reason is that even after so many years of its implementation, there is hardly any significant progress. This may be because most of the really backward people are not included in the list of “backward classes” as prepared by the competent authority and the fairly forward people hang on to the tag of backward so as to avail various facilities. Such faulty procedure is an obstacle in the uniform progress of the nation.

Another important reason as to why reservation hampers progress is that because of reservation, the really meritorious students lose out in the rat race. This not only hampers progress but also procures great loss for the nation. Infact, really meritorious and talented students are the assets of the nation who must be given all types of support to blossom fully and serve the nation. But the reservation policy simply kicks 50% of the really meritorious students belonging to general category out of the race. This fuels the problem of brain-drain as the really meritorious students go abroad simply because of the lack of seats for their caste or community in the institutes of higher learning. In fact, the reservation policy only seems attractive to those who support it but it is of no use to millions of people who are living a very pathetic life in India, irrespective of caste.

VI. Conclusion and Suggestions

The primary imperative of articles 14 and 15 is equal opportunity for all across the nation to attain excellence. Excellence cannot be allowed to be compromised by any other considerations because that would be detrimental to national interest. Therefore, to sympathize whimsically with the weaker sections by selecting sub-standard candidates, and that also in the higher level of education, is to punish the society as a whole by denying the prospect of excellence.

There is no denying the fact that there exist weaker or backward classes in the society which need special care and attention for their development. In fact, uniform development of society is not possible without the development of backward classes. But reservation is not the only means for the development of backward classes and that also in the higher level of education which aims at quality education. But,

in the modern time, the determination of the backward class has itself become a matter of huge controversy. Therefore, first of all, proper procedure and criteria should be laid down to determine the real backward classes of the society who need special attention. Caste should not be considered as relevant criteria for determination of backwardness as it is against the constitutional principle. Rather poverty, geographical location, educational level and occupation may be considered as relevant criteria. A statute in this regard is the need of the time to avoid arbitrariness and confusion in the determination of backward classes. The Law Commission of India, the National Commission for Scheduled Caste and Scheduled Tribe and the National Commission for Backward Classes can successfully help in framing a statute in this regard.

Permissible reservation at the lowest or primary rung is a step in the direction of assimilating the lesser fortunate or backward classes in the mainstream of society by bringing them to the level of others which they cannot achieve unless protectively pushed. Once that is done the protection needs to be withdrawn in the own interests of 'the protected' so that they develop strength and feel confident of stepping on higher rungs on their own legs shedding the crutches. Pushing the protection of reservation beyond the primary level only keep the cripples, crippled forever.⁶²

Thus, the primary duty of the state is to provide quality primary and secondary education to all children, especially the children belonging to backward classes. A recent World Bank study has revealed the poor condition of India's primary and secondary education.⁶³ The report brings to light the poor gross enrolment rate (GER) of students at the secondary level. The report reveals grim overall GERs for Bihar (21%), Rajasthan (43%), Chhattisgarh (44%), Uttar Pradesh (49%), and even Haryana and Punjab, which have only about 50% GERs at lower secondary level and lesser enrolments of 32% and 28% respectively at upper secondary level. The report further reveals that only 65% of the villages have schools within 5 km radius as prescribed by the government. In 35% villages, secondary school students have to commute for more than one hour to attend school. At upper secondary

⁶² D.D. Basu, 2 *Commentary on the Constitution of India* 1827 (2007).

⁶³ Reported in *The Tribune* 1, October 8, 2009.

level, only 635 villages have schools in the listed 10 km radius. Even in high-income states like Haryana, Punjab and Himachal Pradesh, 19, 17 and 5 percent villages, respectively, do not have accessible secondary schools.

The report clearly reveals the poor and deplorable state of India's primary and secondary education. Thus, what is needed is not reservation in higher education but accessible and quality primary and secondary education so that the students belonging to backward classes can also successfully compete with other students and thereby further enhance their intellectual capacity.

Moreover, it is to be remembered that backwardness is also closely related to poor economic condition. Hence, the right approach would be to provide scholarships and other financial assistance at the higher level of education to the meritorious students belonging to backward classes rather than forcing reservation.

In order to make the students belonging to backward classes "natural competitors", coaching schools and institutes should be established and free coaching should be provided to them. It is high time that the society should stop underestimating the calibre and talent of the students belonging to backward classes by providing further reservation.

In fact, reservation can never be a substitute for the upliftment of the weaker sections on the social and economic plane. Reservation was meaningful at the commencement of the Constitution as a temporary measure, at a time when the state was required and expected to promote with special care, the educational and economic interests of the weaker sections of the people, and in particular the scheduled castes and scheduled tribes. The Constitution did not envisage non-implementation of the directive principles of the policy set out in articles 41, 45 and 46 even after sixty years and continuing reservation indefinitely. Sixty years is too long a period to continue reservation without undertaking promotion of the educational and economic interests of the weaker sections in a time bound manner. Neglecting educational and economic interests of the backward classes and continuing to provide only reservation is against the tenor of the

Constitution and the judiciary is not powerless to correct this serious lapse on the part of the state.⁶⁴

It is really very appreciable and welcome step that the judiciary has frowned upon any type of reservation in super-specialty courses. In *Mohan Bir Singh Chawla v. Punjab University*,⁶⁵ the Supreme Court said that at higher levels of education it would be dangerous to depreciate merit and excellence. The Court thus declared, “The higher you go in any discipline, lesser should be the reservation of whatever kind.”⁶⁶ It is high time that the judiciary should move a step further and say “no reservation” in higher education, which is so important for the greater progress of the nation. Let us allow the right to equal opportunity in education to bloom for the best eligible students. Let us make the peoples’ right to education and standard of education vibrant, striving toward “excellence”, so that the nation constantly rises to the highest levels of endeavor and achievement.

Before concluding, I remember the words of our late Prime Minister Pt. Jawaharlal Nehru when he said about 60 years back: “I am grieved to learn of how far this business of reservation has gone based on communal consideration.... This way lies not folly, but disaster. Let us help the backward groups by all means, but never at the cost of efficiency.”⁶⁷

It is high time that we should rethink over the reservation policy, impartially and objectively, keeping in mind the changing global scenario and the role that India should play in this competitive global arena. Let us move towards the right direction...

⁶⁴ P.P. Rao, “Right to Equality and Reservation Policy”, 42 *JILI* page no. 2000.

⁶⁵ AIR 1997 SC 788.

⁶⁶ See also, *Preeti Sagar Srivastava (Dr.) v. State of M.P.*, AIR 1999 SC 2894.

⁶⁷ *Supra* note 62.