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## **Reservations in India : Law and Policy**

*Sudhanshu Shekhar Bisen\**

**Introduction :** India has one of the largest histories of any country in implementing affirmative action policies. Reservations apply to three groups: the scheduled castes (Hindu untouchables and the deprived segments of religious minorities), scheduled tribes and other backward classes (caste groups that lie between the untouchables and the twice-born Dwija). Colonial regimes also adopted the same policy and excluded these groups from the structure of power. The result was that for centuries poverty was systematically concentrated in certain social groups.

By reservation, we mean preferential selection of members of under-represented ethnic or backward communities to desirable position in the society. Reservation policies allocate jobs, promotions, public contract, business loans, admissions to higher education and legislative seats on the basis of membership in disadvantaged groups. Such policies are needed when the disadvantage is social or cultural exclusion. Reservation sometimes is thought to mean the promotion of equity through comprehensive government action. In practice, this intervention has not often produced equitable results, resulting in favouritism towards classes of people, restrictions of personal liberty and excessive regulatory burdens. Reservation also requires special favoured treatment to arbitrary classes of people.

There is a crucial conceptual distinction between a non-discrimination principle and reservation. Non-discrimination is a more passive principle. It suggests that people refrain from discriminating against other on the basis of caste or caste-like characteristics. It suggests that no one should be the object of discrimination simply because who they are. On the other, reservation seeks to move beyond a narrow conception of non-discrimination towards equalising results with respect to various groups. Proponents of reservation in India do not always strictly insist on equalising results, but they do demand a measure of fairness that goes beyond non-discrimination. In that context, reservation for them represents such a measure of fairness.<sup>1</sup>

**Constitutional basis for reservations :** The constitutional basis for affirmative action (especially the reservations) in jobs and educational institutions is article 15(4) of the Constitution which enables the state to make —any special provisions for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes. The Constitution authorises government to provide special benefits and preferences to previously disadvantaged sections of the population. The Constitution of India contains a number of provisions for the removal of disabilities and discrimination against SCs and STs. These provisions relate to the prohibition of restrictions of access to public places,<sup>2</sup> reservation of appointments or posts in favour of any backward classes of citizens not adequately represented in the services under the state,<sup>3</sup> abolition of untouchability,<sup>4</sup> restriction of traffic in human beings and forced labour,<sup>5</sup> special care for the promotion of educational and economic interests of scheduled castes and scheduled tribes,<sup>6</sup> reservation of seats and special representation in Parliament and State Legislatures,<sup>7</sup> reservation in services,<sup>8</sup> and appointment of Special Officers for scheduled castes and scheduled tribes.<sup>9</sup>

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It is under the Directive Principles that the Constitution enjoins upon the state governments \_to promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the scheduled castes and scheduled tribes and shall protect them from social injustice and all forms of exploitation'.<sup>10</sup> Article 340(1) specifically relates to the OBCs who are socially and educationally backward. It is not very clear from the Constitution how to measure the social and educational backwardness of a group of people or class or community. However, the Constitution under article 340 (1) and

(2) has empowered the government to appoint a commission to investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

The Constitution ensures equality before the law and equal protection of law.<sup>11</sup> Although this provision was inspired by the Fourteenth Amendment to the Constitution of the United States, the Indian Constitution further elaborates it by providing that there shall be no discrimination on the grounds only of religion, race, caste, sex, place of birth, or any of them.<sup>12</sup> Similar provisions prohibit discrimination in respect of government services<sup>13</sup> and suffrage.<sup>14</sup> While providing for equality, the makers of the Constitution were not oblivious to the prevailing inequalities in the social life. In independent India, the concept of equality was considered to be a necessary but not sufficient condition for democratic self-government. In the social sphere, discriminatory practices had to be identified and eliminated and, in political sphere, it was felt that equality would be realised only when *representation* rather than *enfranchisement* was provided for.<sup>15</sup>

**Preferential treatment of Vulnerable Groups :** India's reservation policy is composed of an array of preferential schemes. These programmes are authorised by constitutional provisions that permit departure from formal equality for the purpose of favouring specified groups. These policies entail systematic departure from norms of equality. These departures are justified in several ways: First, preferential treatment may be viewed as needed assurance of personal fairness, a guarantee against the persistence of discrimination in subtle and indirect forms. Second, such policies are justified in terms of beneficial results that they will presumably promote—integration, use of neglected talents, more equitable distribution of funds and resources.

The benefits of \_reservation' are extended to a wide array of groups. There are three major classes of people who are the beneficiaries of affirmative action: First, there are those castes designated as scheduled castes on the basis of their \_untouchability'; second, there are the scheduled tribes who are distinguished by their tribal culture and physical exclusion and many of whom are residents of specially protected Scheduled Areas; third, there are the backward classes (as they are more often called the —other backward classes), a heterogeneous category varying greatly from state to state, comprised for the most part of the castes (and some non-Hindu communities) low in the traditional social hierarchy but not as low as the scheduled castes.<sup>16</sup> Apart from these groups, positive steps can also be taken for the welfare of women and other weaker sections of the society. For the most part, preferences have been extended on a communal basis. Members of specified communities are the beneficiaries of a given scheme and all members of the community, however, prosperous, are entitled to the benefits. However, some schemes use a means test to supplement the communal one—only members of listed communities with income below the specified ceiling are eligible.<sup>17</sup>

Preferences to disadvantaged groups are basically of three types: First, there are reservations, which allot or facilitate access to valued positions or resources. The most important instances of this type are reserved seats in legislature, reservation of posts in government services, and reservation of places in academic institutions. To a lesser extent, the reservation device is also used in the distribution of land allotment, housing and other scarce resources. Second, there are programmes involving expenditure or provision of services— e.g., scholarships, grants, loans, health care, legal aid—to a beneficiary group beyond comparable expenditure for others. Third, there are special protections to disadvantaged groups. These special protection schemes are accompanied by efforts to protect the backward classes from being exploited and victimised. Forced labour is prohibited by the Constitution and in recent years there have been strenuous efforts to release the victims of debt bondage, who are mostly from scheduled castes and tribes. Legislation regulating money lending, providing debt relief, and restricting land transfers, attempt to protect scheduled castes and tribes from economic oppression by their more sophisticated neighbours. Protection of Civil Rights Act, 1955 attempts to relieve untouchables from the social disabilities under which they have suffered.<sup>18</sup> The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 specified the atrocities, which are liable to penalties.

Admittedly, affirmative action policies have changed the nature and composition of the Indian society. At independence, the scheduled castes, scheduled tribes and other backward classes could aspire only to a limited degree of upward mobility. Affirmative action policies have broadened their opportunities. However, policies that promote growth with equity are necessary to achieve socio-economic exclusion for the groups. For India this would include investing in the agriculture and other labour intensive sectors and broadening access to assets especially agricultural land for lower castes, should be incorporated within the framework of the Constitution. The measures for the promotion of low castes businesses may include reservations in government and private contracts of various types. In some countries, formal and informal quota systems are incorporated to achieve equality in access to resources.

**Need for participatory democracy :** An essential principle of reservation is that every person and all peoples are entitled to participate in, contribute to, and enjoy civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realised. This means that participation is not simply something desirable from the point of view of ownership and sustainability, but rather a right with profound consequences for the design and implementation of development activities.<sup>19</sup> The principles of participation and inclusion mean that all people are entitled to participate in society to the maximum of their potential. States have the primary responsibility to create the enabling environment in which all people can enjoy their human rights. Participation in the governance and institutions that shape one's community is a basic human right and part of human development. More inclusive governance can be more effective. Today, much is known about the economic and social policies that help eradicate poverty and promote more inclusive growth. India pursues such policies vigorously, often because the potential beneficiaries represent political power and their interests are fully represented in policy decisions. Inclusive democracy presupposes a genuine partnership between men and women, rich and poor, upper-and lower caste groups in conducting the affairs of society. Indeed, the institutions and processes essential to any democracy must include the participation of all members of society. They must defend diversity, pluralism and the right to be different within a tolerant society. Inclusive democracy must also be recognised as a public policy, applicable to all spheres of public affairs.

The policies of affirmative action or positive discrimination are not antagonistic to democracy in any way. Affirmative action policies have the potential to generate significant benefits—perhaps most important is the greater integration of beneficiary communities into society's elite, which can contribute to a more vital democracy and more effective societal institutions as well as greater equity across communities. In any case, within a democracy, discrimination in favour of any group or community can at best be a temporary measure. The ultimate task of all such policies must be to prepare conditions in which fair and open competition can take place. Open competition can, however, be fair when all participants face more or less the same hurdles and obstacles. If any of the competitors have a head start then the race cannot be considered fair.

The view that in a secular democracy the relationship between the citizen and the state should not be mediated by caste and community was held by many in the early years of independence. One of the main concerns of democratic politics is with the distribution and redistribution of the benefits and burdens of society among its various constituent parts. The vision of Indian democracy was defined by the principle, among others, that no person or groups of persons shall be subjected to oppression, domination or discrimination by virtue of religion, caste, gender, colour or creed. Ideologically, reservation policy was/is aimed at the expansion of democratic spaces. In this context, the reservation was seen as a mechanism to overcome untouchability and tribalism.

The caste-based reservations do pose a challenge to the secular democratic governance of India. Reservations impair the secular character of the polity. The use of caste groups to identify the beneficiaries of compensatory discrimination has been blamed for perpetuating the caste system, accentuating caste consciousness, injecting caste into politics and generally impeding the development of a secular society in which communal affiliation is ignored in public life.<sup>20</sup> Although defenders of caste-based reservations said that, it would be temporary as well as benign; critics argued that the government policies seriously weakened the principle of individual personal right that lay at the heart of the modern democracy and international human rights law. In their view, caste-conscious affirmative action policies raised questions that were not exceedingly difficult to resolve in a practical sense, but also possibly pernicious in their political effect. To be sure, caste and class legislation by no means a novelty in twenty-first century Indian politics.

If secularism is defined in terms of the elimination of India's compartmental group structure in favour of a compact and unitary society then the compensatory discrimination policies may indeed have impeded secularism. But one may instead visualise not the disappearance of communal groups but their transformation into components of a pluralistic society in which invidious hierarchy is discarded while diversity is accommodated. In this view, compensatory discrimination policy contributes to secularism by reducing group disparities and blunting hierarchal distinctions.<sup>21</sup>

It is necessary to examine the caste-based reservations in the context of constitutional democracy to understand its relevance. In his Constituent Assembly debate, B.R. Ambedkar stated that 'our Constitution as a piece of mechanism lays down what is called parliamentary democracy. By parliamentary democracy we mean, 'one man one vote'. While we have established political democracy, it is also the desire that we should lay down as our ideal economic democracy... Our object in framing this Constitution is really two fold: (a) to lay down the form of political democracy, and (b) to lay down that our ideal is economic democracy and also to prescribe that every government in power, whatever party it is, shall strive to bring about economic democracy'.<sup>22</sup>

**Conclusion :** India has now entered into an era of liberalisation and market economy. The production and distribution of goods and services will rely on the efficiency and competitiveness of the market forces. In such a situation, according to many, making special quotas for certain people leads to inefficiency and waste. Therefore, the rule of reservation is redundant. Indubitably, governments, both at the central and state levels have started several policies and programmes including reservations to improve the quality of life of the disadvantaged communities. Some of these policies have failed to improve the levels of literacy, quality of health, and so on. Therefore, there is a need to assess these policies and provide an alternative to the existing ones. To be meaningful and sustainable, affirmative action policies must lead to empowerment of those who are left behind. The policies must be based on the recognition of the potential of the people's efforts to overcome hurdles and seek to facilitate an enabling environment for their own initiative and solution. The best approach is to follow the principle of utilitarianism which argues that the morally

right policy is one that yields the best consequences. Any policy of affirmative action can be justified only if it has a capacity to eliminate inequalities in income and resource distribution, reduce caste/racial prejudices, reduce communal tensions, and enhance self-esteem of the marginalised.

**Reference:**

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<sup>1</sup>. Pratap Bhanu Mehta, Affirmation Without Reservation, *Economic and Political Weekly*, 2953 (July 3, 2004).

<sup>2</sup>. Constitution of India, art. 15 (2).

<sup>3</sup>. *Id.*, art. 16 (4).

<sup>4</sup>. *Id.*, art. 17.

<sup>5</sup>. *Id.*, art. 23 (1).

<sup>6</sup>. *Id.*, art. 46.

<sup>7</sup>. *Id.*, arts. 330, 332.

<sup>8</sup>. *Id.*, art. 335.

<sup>9</sup>. *Id.*, art. 338.

<sup>10</sup>. *Id.*, art. 46.

<sup>11</sup>. Constitution of India, art. 14. It is a well-known doctrine of equality that dissimilar treatment to persons equally situated as also similar treatment of those not equally situated, violate the concept of equality.

<sup>12</sup>. *Id.*, art. 15 (1) and (2).

<sup>13</sup>. *Id.*, art. 16 (1) and (2).

<sup>14</sup>. *Id.*, art. 325.

<sup>15</sup>. See Gurpreet Mahajan, *Identities and Rights: Aspects of Liberal Democracy in India*, 119 (New Delhi: Oxford University Press, 2001).

<sup>16</sup>. *Id.* at 185-86.

<sup>17</sup>. *Id.* at 186.

<sup>18</sup>. *Id.* at 186-87.

<sup>19</sup>. UNDP (United Nations Development Programme), *Poverty Reduction and Human Rights : A Practice Note*, 8 (2003).

<sup>20</sup>. See Marc Galanter, *Competing Equalities : Law and the Backward Classes in India*, chap. 4. D. (New Delhi : Oxford University Press, 1984).

<sup>21</sup>. Marc Galanter, 'Pursuing Equality : An Assessment of India's Policy of Compensatory Discrimination for Disadvantaged Groups', in D. K. Basu, and R. Sisson (eds.), *Social and Economic Development in India*, 150 ( New Delhi : Sage Publications, 1986).

<sup>22</sup>. Cf. K. S. Chalam, *Caste-based Reservations and Human Development in India*, 171- 172 (New Delhi : Sage Publications, 2007).

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