

## RESERVATION POLICY IN INDIA

India is constituted into a sovereign, democratic republic to secure to all its citizens, fraternity assuring the dignity of the individual and the unity of the nation. Therefore, rights conferred on citizens and non-citizens are not merely individual or personal rights. They have a large social and political content, because the objectives of the Constitution cannot be otherwise realised. Fundamental rights represent the claims of the individual and the restrictions thereon are the claims of the society.

**Justice**, social, economic and political is provided not only in Part IV (directive principles) but also in Part III (fundamental rights). Article 38 in Part IV is the only article which refers to justice, social, economic and political. However, the concept of justice is not limited only to directive principles. There can be no justice without equality.

Article 14 guarantees the fundamental right to **equality before the law** on all persons. The gravamen of Article 14 is equality of treatment. Article 14 confers a personal right by enacting a prohibition which is absolute. By judicial decisions, the **doctrine of classification** is read into Article 14. Equality of treatment under Article 14 is an objective test. Therefore, the basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances. Equality before the law, guaranteed by the first part of Article 14, is a negative concept while the second part is a positive concept which is enough to validate equalising measures depending upon the fact situation. Equality is not violated by mere conferment of discretionary power. It is violated by arbitrary exercise by those on whom it is conferred. This is the theory of “**guided power**”. This theory is based on the assumption that in the event of arbitrary exercise by those on whom the power is conferred, would be corrected by the courts.

The Right to Equality enshrined in our Constitution is not merely a formal right or a vacuous declaration. Affirmative action though apparently discriminatory is calculated to produce equality on a broader basis. By eliminating de facto inequalities and placing the weaker sections of the community on a footing of equality with the stronger and more powerful sections so that each member of the community whatever is his birth, occupation or social position may be, enjoys equal opportunity of using to the full, his natural endowments of physique, of character and of intelligence.

Great social injustice resulted from treating sections of the Hindu community as “untouchable” and, therefore, Article 17 abolished untouchability and Article 25 permitted the State to make any law providing for throwing open all public Hindu religious temples to untouchables. Therefore, provisions of Part III also provide for political and social justice.

The concept of “public employment” is socialistic and, therefore, falls within the Preamble to the Constitution which states that WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC. Similarly, the Preamble mentions the objective to be achieved, namely, justice, social, economic and political. Therefore, the concept of “equality of opportunity” in public employment concerns an individual, whether that individual belongs to the general category or Backward Class. The conflicting claim of individual right under Article 16(1) and the preferential treatment given to a Backward Class has to be balanced. Both the claims have a particular object to be achieved. The question is of optimisation of these conflicting interests and claims.

Reservation is one of the many tools that are used to preserve and promote the essence of equality, so that disadvantaged groups can be brought to the forefront of civil life. It is also the duty of the State to promote positive measures to remove barriers of inequality and enable diverse communities to enjoy the freedoms and share the benefits guaranteed by the Constitution. In the context of education, any measure that promotes the sharing of knowledge, information and ideas, and encourages and improves learning, among India's vastly diverse classes deserves encouragement. To cope with the modern world and its complexities and turbulent problems, education is a must and it cannot remain cloistered for the benefit of a privileged few. Reservations provide that extra advantage to those persons who, without such support, can forever only dream of university, education, without ever being able to realize it. This advantage is necessary.

## **CONSTITUTIONAL PROVISIONS**

### **Article 16**

Clauses (1) and (4) of Article 16 provide:

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

**Article 335 - Claims of Scheduled Castes and Scheduled Tribes to services and posts.**

The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State:

[Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters or promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.]

**Article 341 of Constitution of India "Scheduled Castes"**

(1) The President may with respect to any State [or Union territory], and where it is a State after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State [or Union territory, as the case may be].

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

**Article 342 of Constitution of India "Scheduled Tribes"**

(1) The President may with respect to any State [or Union territory], and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any

tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

### **SUBSTANTIVE VERSUS FORMAL EQUALITY**

The core of the present case is based on the constitutional content of equality. For equality to be truly effective or substantive, the principle must recognise existing inequalities in society to overcome them. Reservations are thus not an exception to the rule of equality of opportunity. They are rather the true fulfilment of effective and substantive equality by accounting for the structural conditions into which people are born. If Article 16(1) merely postulates the principle of formal equality of opportunity, then Article 16(4) (by enabling reservations due to existing inequalities) becomes an exception to the strict rule of formal equality in Article 16 (1). However, if Article 16 (1) itself sets out the principle of substantive equality (including the recognition of existing inequalities) then Article 16 (4) becomes the enunciation of one particular facet of the rule of substantive equality set out in Article 16 (1).

Reservation as a concept is very wide. Our Constitution has, however, incorporated the word “reservation” in Article 16(4) which word is not there in Article 15(4). Therefore, the word “reservation” as a subject of Article 16(4) is different from the word “reservation” as a general concept. Applying the above test, we have to consider the word “reservation” in the context of Article 16(4) and it is in that context that Article 335 of the Constitution which provides for relaxation of the standards of evaluation has to be seen. We have to go by what the Constitution-framers intended originally and not by general concepts or principles.

### **EQUITY, JUSTICE AND MERIT**

The above three concepts are independent variable concepts. The application of these concepts in public employment depends upon quantifiable data in each case. Equality in law is different from equality in fact. When we construe Article 16(4), it is equality in fact which plays the dominant role. Backward Classes seek justice. General class in public employment seeks equity. The difficulty comes in when the third variable comes in, namely, efficiency in service. In the issue of reservation, we are being asked to find a stable equilibrium between justice to the backwards, equity for the forwards and efficiency for the entire system.

Therefore, Article 16(4) has to be construed in the light of Article 335 of the Constitution. Inadequacy in representation and backwardness of the Scheduled Castes and Scheduled Tribes are circumstances which enable the State Government to act under Article 16(4) of the Constitution. However, as held by this Court the limitations on the discretion of the Government in the matter of reservation under Article 16(4) as well as Article 16(4-A) come in the form of Article 335 of the Constitution.

## **RESERVATION AND AFFIRMATIVE ACTION**

**Equality of opportunity** has two different and distinct concepts. There is a conceptual distinction between a **non-discrimination principle and affirmative action** under which the State is obliged to provide a level-playing field to the oppressed classes. **Affirmative action** in the above sense seeks to move beyond the concept of non-discrimination towards equalising results with respect to various groups. Both the conceptions constitute “equality of opportunity”. It is the **equality “in fact”** which has to be decided looking at the ground reality. Balancing comes in where the question concerns the extent of reservation. If the extent of reservation goes beyond cut-off point then it results in reverse discrimination. Anti discrimination legislation has a tendency of pushing towards de facto reservation. Therefore, a numerical benchmark is the surest immunity against charges of discrimination.

### **Reservation and enabling provisions**

Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country. Reservation is underwritten by a special justification. Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4-A) is enabling. The discretion of the State is, however, subject to the existence of “backwardness” and “inadequacy of representation” in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in. However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned in Articles 16(4) and 16(4-A) are maintained. As stated above, equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State. Therefore,

in each case, a contextual case has to be made out depending upon different circumstances which may exist Statewise.

There is a basic difference between “equality in law” and “equality in fact”. If Articles 16(4-A) and 16(4-B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4-A) and 16(4-B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of “guided power”. We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred.

