

Reservations - Possibilities and limitations

BY ANUP SURENDRANATH

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As the nation celebrates the 124th birth anniversary of B.R. Ambedkar and political parties jostle for his political legacy, there has been very little reflection on the fate of reservation in independent India. Reservation in representative bodies, education and public employment is a very important part of Ambedkar's constitutional legacy, but it also perhaps counts amongst the most divisive of his legacies. But it is a legacy that has transcended the law and contributed in no small measure to the political mobilisation of groups that were political untouchables. While there does exist a very serious debate on whether Ambedkar viewed reservation as far too limiting to achieve the kind of social revolution and transformation that he envisaged, the fact remains that within the contours of the Constitution of India it remains one of the most important vehicles for achieving some measure of social justice.

Unfortunately, the predominant question concerning reservation in our contemporary social discourse has not been whether reservation can go far enough in helping us achieve the kind of "fraternity" that Ambedkar thought must lie at the heart of any meaningful social democracy. While I will only address concerns that have arisen out of the judicial discourse on the issue, it must be remembered that the legal narrative is both influenced by and in turn influences the social and political narratives.

Is reservation anti-equality?

The Supreme Court in its early years took the position that reservation was an exception to equality and allowed very little space for the state to design reservation policies, particularly in the context of higher education. In June 1951, the first constitutional amendment introduced Article 15(4), which allowed "special measures" for the advancement of "socially and educationally backward classes or the Scheduled Castes/Scheduled Tribes (S.C./ S.Ts)". Governments then relied on this provision to provide not just for reservation in higher education but also for measures like financial support, hostel facilities, and age relaxation. However, the Supreme Court changed its position through its decision in *N.M. Thomas* (September 1975). It declared that keeping in view the constitutional scheme and the social reality of the country, reservation was in furtherance of the idea of (substantive) equality and that it was necessary to move beyond mere formal equality. This approach was also accepted by the Supreme Court in its nine-judge Bench decision in *Indra Sawhney* (November 1992).

Reservation, merit and efficiency

While the courts have repeatedly stated that reservation furthers substantive equality, much of the remaining discourse has not really reflected that position of the court. In *Indra Sawhney* itself, in its attempt to answer the rather bold question "Are reservations anti-merit?", the court falters. With very little justification, the opinion by Justice B.P. Jeevan Reddy declares that the "*the very idea of reservation implies selection of a less meritorious person*". In the very next line of the opinion, the court views reservation as a "cost" to be paid for the constitutional promise of social justice. The court does not seek to interrogate the concept of "merit" and has no answers as to why "merit" is to be understood only as being the top scorers in an examination.

Similarly, the court in *Indra Sawhney* imagines reservation as necessarily taking away from “efficiency”. Efficiency as a consideration finds mention in Article 335 of the Constitution and uses that as the basis for setting a ceiling of 50 per cent as the maximum possible reservation. The court could have easily found other constitutional reasons for setting this limit, but instead it chose to justify it on the basis that a higher price could not be paid.

Efficiency in Article 335 has rather curiously been given such a high constitutional status that it is now also viewed as a restriction on the amendment power of Parliament. While deciding the constitutional validity of an amendment that sought to provide reservation in promotions, the Supreme Court in *M. Nagaraj* (October 2006) held that one of the conditions for upholding the validity of the amendment would be that governments, while acting under the amendment, would have to necessarily ensure that efficiency is not compromised. The court provided no real guidance on what this meant and gave further credence to the perception that reservation is necessarily against efficiency.

The Supreme Court’s denial of reservation in specialised courses and certain kinds of employment also does not sit very well with its view that reservation furthers substantive equality. The court in *Indra Sawhney* and *Preeti Srivastava* relies on the efficiency and “national interest” paradigms to hold that there cannot be reservation in specialised and super-specialised courses in medicine, engineering, mathematics and other physical sciences. Also excluded from reservation are appointments in research and development, defence and space organisations, Air India (pilots), professors in education, and so on. These spheres, the court says, must be driven purely by merit. This reflects a rather strange and deep conceptual confusion, especially after having held that reservation furthers substantive equality. Apart from the grand constitutional position that reservation furthers substantive equality, the court’s approach to merit and efficiency unfortunately demonstrates that it views reservation as anti-merit and anti-efficiency.

A different framework?

Undoubtedly, the burden of justification on governments cannot be the same at all levels of education and public employment. If we imagine education and public employment as ladders, the burden to justify special measures and reservation should be the least at the bottom and incrementally increase as these measures are proposed at higher levels. The decision of the Supreme Court in the right to education case is a good example. It is time we abandoned the line of constitutional thought that views reservation as some sort of unhappy compromise or sacrifice being made by society. Reservation must be viewed within the framework of protection of equality and ensuring equality of opportunity. And it is within this equality of opportunity framework that we can develop a meaningful discourse on imposing higher burdens on governments to justify reservation at advanced levels of education and public employment. The argument here should be that as we go through to higher levels of education and employment, reservation properly implemented at the earlier levels should have incrementally achieved equality of opportunity. This framework does not rely on the rather patronising approach that identifies certain spheres for reservation and excludes certain other spheres.

Identifying beneficiaries of reservation

The identification of beneficiaries for reservation has been a complex area of the judicial discourse. The identification of Other Backward Classes (OBCs) has been a particularly contentious issue. The methodology adopted by the Mandal Commission, a weighted combination of economic, social and educational factors, was approved by the Supreme Court in *Indra Sawhney*. However, many points of confusion have arisen in this context in the post-*Indra Sawhney* phase. The judgment in *M. Nagaraj* on the constitutionality of inserting Article 16-4A (reservation in promotions with consequential seniority for S.C./ S.Ts only) has raised questions about identification of S.C./ S.Ts eligible for reservation. It was settled law until *Nagaraj* that, unlike OBCs, there was no need to establish backwardness of individual beneficiaries within S.C./ S.Ts. However, one of the conditions on which the Supreme Court upholds the validity of the amendment inserting Article 16-4A is that the state must ensure that the beneficiaries are backward. Since the provision is applicable only to S.C./S.Ts, this requirement of the Supreme Court is seen as an attempt to sneak in the concept of “creamy layer” for S.C./ S.Ts through the back door. This was a significant move by the court because when the concept of the “creamy layer” was introduced in *Indra Sawhney*, the court had explicitly stated that the concept was inapplicable for S.C./ S.Ts. In that sense, it was surprising that a five-judge Bench in *Nagaraj* brought in a requirement that was specifically ruled out by a decision of a nine-judge Bench in *Indra Sawhney*.

Articles 16(4) and 16-4A both require that the beneficiary groups identified must be those that are not, in the opinion of the state, adequately represented in the services under the state. But this requirement of “inadequacy of representation” is increasingly being used by the court to check the state. As reflected in *UP Power Corporation* (April 2012), the court’s understanding has increasingly been that the state must demonstrate “inadequacy of representation” in the specific cadre in which it seeks to implement reservation in promotions under Article 16-4A. Essentially it means that if the state wants to institute reservation in promotions for station masters, the state must show inadequacy of representation of S.C./ S.Ts in that specific cadre. It is no longer open to the state to justify such a measure on the basis that there is inadequate representation in the Railways generally or in the services of a particular state or in public employment generally. The court has not provided any real justification as to why the specific cadre must necessarily be the unit for determining “inadequacy of representation”.

Reservation for Muslims is a significant issue pending in the Supreme Court that awaits determination by a Constitution Bench. Different models have been adopted across States in India to provide for reservation for Muslims. A common model has been to include backward classes of Muslims in the State list of OBCs and give no special status to Muslim OBCs. There has been no real controversy surrounding this model. The models that have attracted constitutional debate and scrutiny are those that seek to set aside a specific quota for Muslim OBCs within the larger OBC quota (Andhra Pradesh) or where a specific and separate quota was proposed for backward classes amongst Muslims (Maharashtra). In the arguments before the High Courts, significant emphasis was placed on the methodology by which the States came to the conclusion that certain classes of Muslims were “backward” for the purposes of being entitled to reservation under the Constitution. The decisions from the High Courts do not provide any convincing/ conclusive answers on this and it will remain for the Supreme Court to clarify whether States can rely on reports like that of the Sachar Committee to provide separate reservation for backward class Muslims.

As is evident from the discussion above, the battle is slowly progressing into the empirical realm. It is a strategy that forces governments to move away from pure political considerations and move towards adopting a rigorous and defensible methodology for determining backwardness of groups. The courts seem to be sending out the message that a bald political determination that X or Y groups require

reservation will fail constitutional scrutiny and we saw this playing out in the Supreme Court's recent judgment on reservation for Jats.

Future concerns

The design of special measures and reservation in India has demonstrated a lack of vision, rigour and ambition. Particularly in the sphere of education, it is extremely unfortunate that our policymakers have thought it fit only to worry about the entry of students through reservation. Hardly any thought has been given to the support structures that need to be built inside educational institutions and it is rather short-sighted on our part to think that equality of opportunity has been achieved the moment a student steps into an educational institution. Further, as education at all levels gets increasingly privatised, we will need robust policies that ensure social inclusion. And a similar story will play out in public employment as the pie gets smaller and the focus will inevitably shift to the private sector, where we can no longer ignore the skewed composition of the workforce at the top end.

In answering the above questions, we need to think beyond reservation as well. By equating reservation and social justice, the political discourse has prevented a deeper debate on the meaning of equality of opportunity and ideas for effective economic redistribution, where reservation is just one tool. Perhaps the most crucial limitation to the over-reliance on reservation in India lies in its inability to achieve any sort of meaningful economic structural change. And if one were to hazard an informed guess, I would think that B.R. Ambedkar would tell us that Mandal-style reservation alone is not going to achieve that radical vision of a social revolution.

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