

RESERVATION IN PUBLIC EMPLOYMENT

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

Reservation not a fundamental right in the Constitution. However, the law mandates that the state shall promote with special care the educational and economic interests of the weaker sections of the people. | Photo Credit: Getty Images/iStockphoto

The jurisprudence of reservation relies on the symbiotic coexistence of constitutionally guaranteed equality of opportunity in public employment under Article 16 (1) of the Constitution of India and classifications thereunder various clauses of the same article, especially Article 16(4) and Article 16 (4 A), which are in the nature of facilitating provisions, vesting a discretion on the government to consider providing reservations for the socially and educationally backward sections of the society and to provide reservation in promotion to Scheduled Castes and Scheduled Tribes, respectively.

It is a settled law, time and again reiterated by the Supreme Court, that there is no fundamental right to reservation or promotion under Article 16(4) or Article 16(4 A) of the Constitution, rather they are enabling provisions for providing reservation, if the circumstances so warrant (*Mukesh Kumar and Another vs State of Uttarakhand & Ors. 2020*).

However, these pronouncements no way understate the constitutional directive under Article 46 that mandates that the state shall promote with special care the educational and economic interests of the weaker sections of the people and in particular Scheduled Castes and Scheduled Tribes. In fact, sensitivity of the welfare state towards the weaker sections over decades resulted in the gradual expansion of canopy of reservation in the form of increasing classifications under Article 16, a set of actions that created a wave of litigation by which resulted in the ever-evolving jurisprudence of affirmative action in public employment.

Reservation in employment which was otherwise confined to Scheduled Castes and Scheduled Tribes got extended to Other Backward Classes as well on the basis of the recommendations of the Second Backward Class Commission as constituted, headed by B.P. Mandal.

The recommendation of Mandal Commission (1980) to provide 27% reservation to Other Backward Classes in central services and public sector undertakings, over and above the existing 22.5% reservation for Scheduled Castes and Scheduled Tribes, was sought to be implemented by the V.P. Singh Government in 1990 and the same was assailed in the Supreme Court resulting in the historic Indra Sawhney Judgment (1992). In the judgment, a nine-judge bench presided by Chief Justice M.H. Kania upheld the constitutionality of the 27% reservation but put a ceiling of 50% unless exceptional circumstances warranting the breach, so that the constitutionally guaranteed right to equality under Article 14 would remain secured.

The Court dwelled on the interrelationship between Articles 16(1) and 16(4) and declared that Article 16(4) is not an exception to article 16(1), rather an illustration of classification implicit in article 16(1).

While Article 16(1) is a fundamental right, Article 16(4) is an enabling provision. Further, the Court directed the exclusion of creamy layer by way of horizontal division of every other backward class into creamy layer and non-creamy layer.

In Indra Sawhney Case, the Supreme Court had held that Article 16(4) of the Constitution of

India does not authorise reservation in the matter of promotions. However, the judgment was not to affect the promotions already made and hence only prospective in operation, it was ruled.

By the Constitution (Seventy-seventh Amendment) Act, 1995, which, Article 16(4-A), was inserted to provide that "nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State".

Later, two more amendments were brought, one to ensure consequential seniority and another to secure carry forward of unfilled vacancies of a year, the former by way of addition to Article 16(4 A) and the latter by way of adding Article 16(4 B).

A five-judge bench of Supreme Court declared the 1995 amendment as not vocative of basic structure of the Constitution but laid down certain conditions which included the collection of "quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment". . The bench held that the creamy layer among Scheduled castes and tribes is to be excluded from reservation.

In the aforementioned case, a constitution bench of Supreme Court was called on to examine wisdom of the 2006 judgment in the light of the constitutionally recognised socio-economic backwardness of the Scheduled Castes and Scheduled Tribes which may not require any further substantiation. It was also contended that the requirement to identify creamy lawyer among Scheduled Castes and Scheduled tribes fell foul of Indra Sawhney decision. The constitution bench invalidated the requirement to collect quantifiable data in relation to Scheduled Castes and Scheduled Tribes but upheld the principle of applicability of creamy lawyer in relation to Scheduled Castes and Scheduled Tribes. Jarnail Singh judgment authored by Justice Rohinton Nariman indicates a critical turn in the jurisprudence of reservation.

The 10% reservation for Economically Weaker Sections (EWS), other Scheduled Castes, Scheduled Tribes and backward classes for government jobs and admission in educational institutions is currently under challenge before the Supreme Court which has referred the same to a constitution bench. The adjudication awaited in this regard may also turn to be a critical milestone in the jurisprudence of reservation as traditional understanding of backwardness is broadened to specifically include economic backwardness without social backwardness as is traditionally seen.

Despite the Indra Sawhney ruling, there have been attempts on the part of many States to breach the rule by way of expanding the reservation coverage and the Maharashtra Socially and Educationally Backward Classes Act 2018, (Maratha reservation law) came under challenge before the Supreme Court which referred the same to a bench of five judges and one question was whether the 1992 judgment needs a relook.

Interestingly, the Supreme Court not only affirmed the Indra Sawhney decision, but also struck down Section 4(1)(a) and Section 4(1)(b) of the Act which provided 12% reservation for Marathas in educational institutions and 13% reservation in public employment respectively, citing the breach of ceiling. "The 2018 Act as amended in 2019 granting reservation for Maratha community does not make out any exceptional circumstance to exceed the ceiling limit of 50% reservation," declared the apex Court. This judgment is likely to rein in the propensity on the part of some State governments to blatantly disregard the stipulated ceiling on electoral grounds rather than any exceptional circumstances as conceived by the constitution bench. It is pertinent to note that several States such as Maharashtra, Karnataka, and Andhra Pradesh had made submissions before the Supreme Court against any upper limit on reservation.

Abhilash M.R. is an advocate practising in the Supreme Court of India.

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