Reservations *Vis - a – vis* Privatisation in View of Globalisation

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Introduction:

The concept of globalisation and its offshoots liberalization and privatization has emerged as an inevitable bane or boon for the developing and underdeveloped nations especially for the socially and educationally backward classes of people as their economic position is weak when compared with the people of the developed nations. The policies of liberalization, privatization and globalisation are so interwoven that it is impregnable to the constituent elements of the State. This global phenomenon is having direct impact on member nations as well of the United Nations and every nation is bound to follow the dictates of the powerful mighty nations or international organizations or the other members of community.

In view of the above India also began adopting these policies and the process of liberalization and privatization has started with the introduction of NEP- New Economic Policy keeping in mind the national goals enshrined in various provisions of the Constitution especially meant to protect the interest of the Scheduled Castes, Scheduled Tribes and other backward classes or sections of the society in the form of reservation for upliftment of their social and economic position.

Now the process of privatization slowly started by the nation in view of globalisation is throwing new challenges in the area of implementation of reservation for the downtrodden section of the society and the government is finding very difficult to formulate legal policies on lines with the constitutional mandate enshrined in the Constitution. The immediate consequence of privatization and non-implementation of reservations in the educational institutions established and maintained by private undertakings is to make some structural adjustment programmes in tune with the reservation policy already laid in the Constitution which was initially intended for a period of ten years from the date of coming into force of the Constitution and unimaginably the period is being extended from time to time as there is no considerable improvement in the backward sections of the society.

These structural adjustment programmes are mainly intended to satisfy the developed nations and the international organizations namely the World Bank, International Monitory Fund and World Trade Organisation, which are advancing financial facility for the developing and underdeveloped nations in the form of debts. The multinational corporations with the help of these powerful developed nations and international organizations are encroaching into the domain of independent sovereign states which is ultimately resulting in the process of neo-colonization of the third world countries and having terrible impact on the reservation policy.

The structural adjustment programmes taken up by India are being implemented for the last fifteen years from the regime of Mr. P.V.Narasimha Rao the then Prime Minister in the name of liberalization and privatization of the policy, which is otherwise known as LPG (Liberalisation, Privatisation and Globalisation). These policies are not inconformity with the constitutional goals meant to achieve justice for the poorer people

Social justice:

Reservation is mainly based on the principles of Social Justice. Ours is a Welfare State and the Constitution of India provides for promotion of welfare of the people particularly people who are socially and educationally backward.

Hon'ble Judge of the Supreme Court of India *Gajendra Gadker* J[1]., while delivering a judgment pointed out that "the concept of social justice is an essential postulate of the rule of law and it gives special significance to the idea of a welfare state". The Constitution enshrines the concept of Social Justice as one of the objects of state policy and the principles enunciated in "Directive Principles of State Policy" are

fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making special laws for achieving the goals of Social Justice and an egalitarian society and thus "Reservations" have become major part of the Constitution and its Policy and has become National Policy also since enactment of the Constitution for the last 55 years.

But the recent Judgment of the Supreme court relating to reservations in Private Professional Colleges delivered in the latter half of 2005, has laid down that in the absence of a special legislation, reservations as applicable to public institutions cannot be applied for private professional colleges purely established and maintained out of its own resources for the reason that there is no assistance in any way by the Government to these private institutions. This recent trend of the Supreme Court has created havoc to the government and ruling political parties and the issue of reservations in private sector has become very sensational issue.

In order to make equality meaningful and purposeful, the founding fathers of the Indian Constitution made a number of provisions viz, Preamble, Articles 15(4), 16(4A), (4-B), 17,38,46,330 to 342 and 366 (24), (25) to ameliorate the socio-economic conditions of Backward Classes, the Schedule Castes and Schedule Tribes so as to bring them to a level comparable with the advanced sections of our society.

In a caste-ridden and socially and economically imbalanced society like ours, the doctrine of social equality ensuring social justice would be meaningful, if protective discrimination in the form of reservation is given as an equalizer to those who are too weak-socially, educationally and economically. It tries to achieve equality infact by giving preferential treatment to these classes, so that they would join the main stream of national life. This is a policy devised for social reconstruction and to build a classless society and seeks the elimination of the existing inequalities by positive measures.

Special Provision for Backward Classes:

Article 15 Clause (4) contains exception to Clauses (1) and (2). It 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 the Scheduled Tribes."

Article 15 Clause (4) was added by the Constitution (First Amendment) Act, 1951, as a consequence of the decision of the Supreme Court in *State of Madras* v. *Champakam Dorairajan*[2].

Here in this case, the Madras Government issued a communal G.O., providing for reservation of seats in the State Medical and Engineering Colleges for different communities in proportion of students of each community. Thus, the seats were reserved on the ground of religion, race and caste. The Order was challenged as violative of Article 15 (1) since it discriminated on the grounds of religion, race and caste. The Government contended that the Order was issued in order to promote the Directive Principle of State Policy enshrined in Article 46 which enjoined the State to promote with special care the educational and economic interests of the weaker sections of the people and in particular that of the Scheduled Castes and Scheduled Tribes. The Supreme Court, however, held the Order void as violative of Article 15 (1). The Court explained that while fundamental rights were justiciable, the Directive Principles had been expressly declared non-justiciable and that it was their duty to enforce only the justiciable provisions.

The Supreme Court thus gave a literal interpretation to the constitutional provisions, which led to the insertion of Clause (4) in Article 15, enabling the State to make special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

In NTR University of Health Sciences, the Supreme Court pointed out that Clause (4) of Article 15 is an enabling provision. It merely confers discretion on the State to make special provisions[3]. Similarly it does not impose any obligation on the State to take any action under it[4].

The term "backward classes" is not defined in the constitution. Article 340 of Constitution, however, empowers the President to appoint a Commission to investigate the conditions of socially and educationally backward classes within the territory of India[5] and on receiving the Report of the commission, the President may specify the classes to be considered backward.

The Supreme Court *in Jagdish Negi* v. *State of Uttar Pradesh*[6]**,** has ruled that backwardness of citizens could not continue indefinitely and pointed out that the State was entitled to take its own decision whether citizens had ceased to belong to reserved category and review its reservation policy objectively from time to time.

The terms "Scheduled Castes" and "Scheduled Tribes" are defined under Clauses (24) and (25) of Article 366. Article 366 is to be read with Articles 341 and 342, for this purpose.

Scope of Article 15 Clause (4):

Article 15 Clause (4) enables the State to make " Special provision for advancement" which is a wide expression and should not be construed in a restricted sense as meaning only social and educational advancement. It may include many more things besides mere reservation of seats in colleges i.e., financial assistance, free medical, educational and hostel, facilities, scholarships, free transport, concessional or free housing, exemption from requirements insisted upon in the case of other classes[7].

These **"**Special provisions**"** as are permissible under Clause (4) of Article 15 must be for the advancement of persons belonging to those categories and special provision which is not for the advancement of those persons would not be protected under Article 15 (4). The principles evolved for implementing constitutional reservations under Articles 15 (4) and 16 (4) cannot be applied to all reservations unmindful of the purpose of reservation[8].

In *State of M.P v. Mohan Singh*[9], The Supreme Court has held that there was not justification in law for giving remission to prisoners belonging to the Scheduled Castes/Tribes, in so far as these prisoners had broken the law, they stood on the same footing as all other prisoners, and invocation of Article 15 (4) was, wholly unjustified. Further, the court said that grant of remission to convicted prisoners belonging to the SCs/STs, could hardly be said to be a measure for the advancement of the SCs/STs.

While considering of the scope of Clause (4) of Article 15, two issues have arisen before the court.

1. What shall be the basis to determine a class to be socially and educationally backward? and

2. What can be the extent or quantum of the special provision authorized by this Clause?

Socially and Educationally Backward Classes – Test:

The Supreme court in *Balaji* v.*State of Mysore*[10]**,** held that backwardness under Clause (4) of Article 15 must be both social and educational. The caste of a group of persons could not be the sole or even predominant basis to ascertain whether that class should be taken to be backward for the purpose of Article 15 (4). The Court held that as regards social backwardness, the main determining factor would be the result of poverty. One's occupation and place of habitation, could be the other relevant factors in determining social backwardness of a class of persons. The court thus invalidated the test of social backwardness, which was based predominantly, if not solely on the basis of caste.

In *Chitralekha v. State of Mysore*[11], the Mysore Government look into consideration two basic requirements for classifying the classes as socially and educationally backward. These were: (i) economic condition, and (ii) occupations. It did not take into consideration the caste of the applicant as one of the criteria for the backwardness. The Supreme Court upheld the criteria adopted by the Mysore Government for ascertaining the backwardness of a class. In *P. Rajendran* v. *State of Madras*[12], the Supreme Court upheld the test of backwardness, which was solely based on caste. The Supreme Court observed:

"It must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste on the ground that it is socially and educationally backward class of citizens within the meaning of Article 15 (4)."

The Supreme Court in *Periakaruppan v. State of Tamil Nadu*[13], reiterated with approval the observation made in *Rajendran case*[14] and held that a classification of backward classes on the basis of castes was well within the purview of Article 15 (4) provided those castes were shown to be socially and educationally backward.

The Supreme Court again in *State of A.P v. U.S.V. Balaram*[15], reiterated the same view and observed :

"If after collecting the necessary data, it is found that a caste as a whole is socially and educationally backward, the reservation made for such persons will have to be upheld notwithstanding the fact that a few individuals in that group may be both socially and educationally above the general average."

Quantum of Special Provision:

In the case of *Balaji v. State of Mysore*[16], the Supreme Court held that Clause (4) of Article 15 enabled the State to make "special provisions" and not "exclusive provisions", for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. The Mysore Government issued an Order reserving seats in the medical and engineering colleges in the State. Under this Order, the reservation provided was as follows; Backward Classes – 28 per cent; more Backward Classes – 22 per cent; and Scheduled Castes and Scheduled Tribes – 18 per cent. Thus 68 percent of the available seats in the colleges were reserved seats and only 32 per cent seats were left for general merit pool. The validity of this Order was challenged on the ground of violation of Article 15 (4). The Supreme Court held the Order bad and said that it amounted to be a fraud upon the Constitution, plainly inconsistent with Article 15 (4). The Court said that the State would not be justitified in ignoring altogether advancement of the rest of the society in its zeal to promote the welfare of the backward classes. National interest would suffer if qualified and competent students were excluded from admission into institution of higher education. Speaking generally and in a broad way, the Court said that a special provision should be less than 50%, how much less than 50% would depend upon the relevant prevailing circumstances in each case.

The Supreme Court has laid down that special provisions or reservation for weaker sections of the society must not exceed 50 per cent limit[17]. In another case the Supreme Court held that the principle of fixing the percentage of reservation emanates from the doctrine or reasonabless[18].

But in *Akhil Bharatiya Soishit Karmachari Sangh (Rly.)* v. *Union of India*[19], the Supreme Court held that the quantum of reservation had to be seen in the context of overall representation of the Scheduled Castes and Tribes and not in a particular year. The court make a reference to Balaji case[20] and said that quantum of 50 percent laid down in the case, was not a rule laid down by the Court, but was merely an observation of the Court and no fixed rule, the Court said, could be laid down in this respect.

The quantum of reservation again came to be considered by the Supreme Court in *Indra Sawhney* v. *Union of India.*[21] The Supreme court in this case finally held that barring any extraordinary situations reservation should not exceed 50 per cent. The Court has thus affirmed Balaji case[22] in this respect.

The Supreme Court, however, ruled that reserved category candidates getting selected in open competition on the basis of their merit should not be counted against the quota reserved for them[23]. The policy of the government to admit only such number of candidates from the reserved category as were equal to the number of reserved seats even though larger number from that class might have secured more marks than the candidates in the general category, has been held to be arbitrary and violative of Article 14[24].

Examining the object and the purpose of reservation in the context of admission to medical colleges, a three-judge Bench of the Supreme Court in *A.I.I.M.S. Stn. Union v. A.I.I.M.S.*[25] observed:

"Reservation as an exception may be justified subject to discharging the burden of proving justification in favour of the class, which must be educationally handicapped. The rationale of reservation in the case of medical students must be removal of regional or class inadequacy or societally injurious. The higher the level of the speciality the lesser the rule of reservation."

"Backward" and "More Backward" Classes:

In *Balaji* v. *State of Mysore*[26] the Supreme Court invalidated the Mysore Government Order so far as it distinguished between Backward Classes and more Backward Classes for the purposes of Article 15 (4).

But, in *Indra Sawhney* v. *Union of India*,[27] the Supreme Court has held the classification of Backward classes into "Back ward" and "More Backward" not only permissible but essential. The Court explained that the object of the special provision contained in the constitution was not to uplift a few individuals and families in the backward Classes, but to ensure the advancement of the Backward Classes as a whole. In this respect, Balaji decision[28] stands overruled.

The scope and indent of Art.16 (4) has been examined thoroughly by the Supreme Court in the historic case of *Indra Sawhney* v. *Union of India*[29] . In this case the court observed that.

- Backward class of citizen in Art 16 (4) can be identified on the basis of caste and not only on economic basis
- Art 16 (4) is not an exception to Art. 16 (1) [30] . It is an instance of classification.
- Creamy layer must be excluded from backward classes.
- Reservation shall not exceed 50%
- No Reservations in promotions.

In order to dilute the judgment Constitution 77th Amendment Act, 1995 was passed. This Amendment has added a new clause (4-A) to Art. 16, which provide reservation in promotion in Government jobs, will be continued in favour of SCs and STs even after Mandal case if the government wants to do so. The Supreme Court has intervened again. In *Union of India V. Virpal Singh*[31] the Supreme Court has tried to mitigate to some extent the inequity that reservation on caste criterion for promotion is violative of Art. 16 (4) of the Constitution. In this case the Supreme Court has rightly observed that seniority between reserved category candidates and general candidates shall continue to be governed by their panel position prepared at the time of selection.

In a landmark judgment in *P.G Institute of Medical & Research V. Faculty Association* [32] a Five judge Bench of the S.C submitted that until there is plurality of posts in a cadre, the question of reservation will not arise because any attempt of reservation by whatever means and even with the device of rotation of the roaster in a single post cadre, is bound to create 100% reservation of such post whenever such reservation is implemented.

The latest decision in *Indra Sawhney* v. *Union of India – II*[33] is the glaring example to show how the political parties have deliberately flouted the law laid down by the Apex Court in Mandal case (1992) with regard to exclusion of creamy layer in backward classes. In this case the Supreme Court has directed the Kerala High Court to appoint a committee to identify the creamy layer so as to exclude the creamy elites (who were to be treated on par with forward class) among backward classes from enjoying the benefit of reservation. The Apex court observed that the Kerala State Backward Classes (Reservation of Appointments of posts in services) Act 1995 is discriminatory and violative of Art14, 16 (4) and therefore unconstitutional and invalid.

Even though various landmark decisions of the Apex Court reveals to implement Mandal verdict (i.e exclusion of creamy layer), the parliament has added new clause 4-B to Art. 16 by the Constitution 81st Amendment Act, 2000 which enables to exceed 50% ceiling on reservation for SC's and ST's and BC's in backlog vacancies which could not be filled up in the previous years due to the non-availabity of eligible candidates. Now under Art. 16 (4-B) the vacancies which could not be filled up in the previous years shall be treated as a separate class of vacancies and will be filled up in any succeeding years and shall not be considered together with the vacancies of the year, even if they go beyond 50% limit. It shows that, the Government is committed to protect the interests of SCs and STs.

In *P.A. Inamdar* v. *State of Maharashtra*[34] the Apex Court once again reiterated that establishment and administration of educational institutions is an occupation protected under Art. 19(1) (g) of the Constitution. Further, the Court said that education cannot be equated to a trade or business but the mushroom growth of educational institutions started by private entrepreneurs show that education has become a profit making business. In Andhra Pradesh more than 80 % of medical, engineering, pharmaceutical, M.B.A., M.C.A., B.Ed. and other professional courses are run by private managements. The Supreme Court in this case on one hand disapproved reservation policy of the State in private educational institutions on the ground

that no facility or any aid is extended by the Government. On the other hand the Court approved a limited reservation of 15% of seats to non-resident Indians subject to the following conditions-

Firstly, the seats should be utilized bonafide by the NRIs or their children or wards;

Secondly, within this quota the merit should not be given a go - by.

Further, the Court suggested that the money collected from NRIs should be utilized for the benefit of students from economically weaker sections of the society. This judgment has created a havoc in all the political circles and especially the ruling elite and Government is seriously thinking to amend the Constitution so as to make reservation to SCs, STs, OBCs and other deprived classes even in private colleges established and maintained by private agencies even though they are not getting any benefit or facility from the Government

Recent trend appears to be otherwise and non-reserved category argues that the SCs/STs should be given ample educational facilities to improve their merit and reservation should not go on indefinitely. To continue it for prolonged periods of time would be a self-defeating exercise since it may lead to lethargy in the weaker sections. By its very nature it cannot be perennial and therefore such provisions have necessarily to be transitory otherwise, it may institutionalize causing more social unrest and tensions than seeking amelioration. Political parties look at it only for their vote bank and do not bother for the national interest. The real intention of founding fathers behind the reservation was to help the backward classes for a considerable period and not to make 'once backward' is 'always backward'. The excessive use of powers of reservation would go against the basic intentions of the constitution and cause injustice for other section of society who are also really poor and every non-reserved category may not be self sufficient.

Founders of the Republic intended the concept of reservation as exceptional and temporary measure to be used only for the purpose of mitigating inequalities and at least the members of the so called backward classes who have become advanced socially as well as economically and educationally, they should be removed from enjoying the benefit of reservation. So that the benefit will be extended to those who are really in need among the same community. Then only social justice can be achieved. The reservation should not be siphoned of by the creamy elites among the weaker sections. It is submitted that the reservation strategy should be used as a medicine but not as a food. It should be a means to achieve egalitarian society and not an end in itself. The reservation as a social engineering device should be a minimizing phenomenon with the passage of time and not vice versa otherwise it would lead to reverse discrimination.

In the recent *Inamdar* case filed by private institutions offering professional courses to avoid governmental interference in the form of reservations, the Supreme Court passed an order doing away with the reservation quota system in admissions. The Government is very much displeased and considering the ruling of the Supreme Court as a stumbling block in their path and their attempt to usher in social justice by following the rule of reservation. Thus the Government is particular to have reservation quota in private sector undertakings or institutions on par with the Government / public sector institutions. The country's peace and progress would be at stake if the constitutional crisis arises out of judicial activism in the form of too much of interference especially in matters relating to reservations and privatization even though we are in an era of globalisation.

References:

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2. *AIR* 1951 SC 226
3. *NTR University of Health Sciences* v.*G.B.R. Prasad AIR* 2003 SC 1947.
4. *State of M.P.* v. *Mohan Singh, AIR* 1996 SC 2106
5. The first Backward Class Commission was appointed on 29-1-1953. The Second Backward Class commission was appointed on 01-9-1979 (Mandal Commission).
6. *AIR* 1997 SC 3505
7. *K. C. Vasa\ntha Kumar* v. *State of Karnataka AIR* 1985 SC 1495.
8. *K.Duraiswamy* v *State of Tamilnadu AIR* 2001 SC 717.
9. *AIR* 1996 SC 2106
10. *AIR* 1963 SC 649
11. *AIR* 1964 SC 1823

12. *AIR* 1968 SC 1012
13. *AIR* 1971 SC 2303
14. *Supra* Note.12
15. *AIR* 1972 SC 1375
16. *Supra* Note.10
17. *Ibid*
18. *Supra* Note.3
19. *AIR* 1981 SC 298.
20. *Supra* Note.10
21. *AIR* 1993 SC 477.
22. *Ibid*
23. *Id*
24. *Manjit Singh* v *State of Punjab AIR* 1997 P & H 318
25. *AIR* 2001 SC 3262
26. *Supra* Note.10
27. *Supra* Note.21
28. *Supra* Note.10
29. *Supra* Note.21
30. Guarantees equality of opportunity for all citizens in public employment.
31. (1995) 6 SCC 684 followed in *Art Singh Januja* v. *State of Punjab* (1996) 2 *SCC* 775
32. *AIR* 1998 SC 1767.
33. *AIR* 2000 SC 489.
34. *AIR* 2005 SC 3226