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A Case for the Application of Horizontal Reservation: A Dynamic System of Self Adjusting Reservation

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ABSTRACT

The Indian reservation policy has been mostly static. A reservation policy which remains static can benefit the people who no longer need reservation and ignore those who really need it. The sections of society which requires reservation today might not require reservation in the future as the condition of that particular section might have improved. The Supreme Court raised the similar issue in the case of Chebrolu Leela Prasad and Ors. v. State of Andhra Pradesh. It pointed out that the review of the list of beneficiaries of the reservation is desperately needed as the benefits of the reservation are not trickling down to the needy. The problem with the review is that once it is completed, the reservation percentages are fixed for years. Nothing can be done in the years falling between two reviews to change the reservation granted. Stretching the logic of the Supreme court further, It should be the aim of the government to have a reservation policy which changes the reservation according to the need in a particular year. It might happen that a certain category require 30 percent reservation in the present year but require only 10 percent reservation in the very next year. Why not have a system of reservation which is dynamic and adjust itself according to the need in a particular year? One such system of reservation is horizontal reservation which is already present in our legal system, but it is applied to selected category only. In this paper I make a case for application of the horizontal reservation across all categories as well as discuss all ancillary issues relating to such application.

Keyword: Reservation policy; Vertical Reservation; Horizontal Reservation.

I. INTRODUCTION

The fundamental aim of the reservation is to provide proper representation to the reserved category.² This aim is derived from the premises that there would have been no reservation in

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² Manoj Kumar Giri vs State Of U.P., (2018) 8 ADJ 782

Reservation is aimed at uplifting a particular class and is essentially an ameliorative measure to enable the members of the said class or group to ultimately shed off the burden of disparity and integrate in society.

the first place if every category was represented equally or substantially. The problem that plagues today's reservation policy is that it cannot provide for a dynamic system of reservation. The system which can adjust itself according to the changing need of the reservation every year. Like many things in life, requirement of reservation changes every year. On one year a particular category might not require reservation because a particular generation of people in that category have not faced any disadvantage that reservation tends to offset or eliminate. On the contrary, in the very next year the next generation might have suffered from such disadvantage and requires reservation to offset the disadvantage they have suffered. Therefore, the question that arises is that can we afford a static system of predetermined percentages of reservation decided in the past where every year the amount of the reservation needed is fluctuating, or do we already have a genus of reservation which can deal with this problem? To answer these questions it is pertinent to understand how exactly reservation is applied in our country. There are two types of reservation; vertical reservation and horizontal reservation.³ The reservation granted to Scheduled Caste, Scheduled Tribe and Other backward class by virtue of article 16 (4) of the India constitution is known as vertical reservation, and the reservation granted to Physically-handicapped persons by the virtue of article 16(1) of the India constitution is known as horizontal reservation.⁴ The reservation granted to women under article 15(3) is also known as horizontal reservation.⁵

II. HORIZONTAL RESERVATION: A DYNAMIC SYSTEM OF RESERVATION

Horizontal reservation works in the following manner

- Firstly a merit list is prepared (without application of any reservation).
- Secondly the no. of reserved category student in that merit list is chalked out.
- Thirdly, pre-existing reservation percent (say 50 %) is decreased by percentage of reserved category student who have made it to the merit list without any reservation (say 20 %).
- Fourthly, Net reservation i.e. is pre-existing reservation percentage is then deducted by the no. of reserved category student who has made it to the merit list. The resultant reservation percentage (50%-20% = 30%) is applied for that year⁶

Thus, horizontal reservation is dynamic in nature as it has a mechanism to check itself every

³ Indra Sawhney vs. Union of India, (1992) 3 SCC 217, para 812.

⁴ Indra Sawhney vs. Union of India, (1992) 3 SCC 217, para 812.

⁵ K. G. Balakrishnan, R. V. Raveendran, (2008) 6 SCC 1.

⁶ Anil Kumar Gupta vs. State of U.P., (1995) 5 SCC 173.

year. For e.g. in 2009, if the pre-determined rate of reservation is 50%, and in that year the reserved category students without any reservation have occupied 40% of the merit list then in the year 2009 the reservation will be adjusted to 10%. On the other hand, if in the year 2010 only 5 % of the reserved category students were able to occupy positions in the merit list then the reservation would be adjusted to 45% for that year. Likewise, every year this dynamic system will keep adjusting the reservation according to the performance of the reserved category students. This system makes sure that no more reservation than pre-determined percentage is granted, and it adjusts the reservation whenever there is a scope of reduction in reservation (as the representation is achieved by the reserved category student on their own without any reservation).

III. VERTICAL RESERVATION: A STATIC SYSTEM OF RESERVATION

The Vertical Reservation applies in a straitjacket manner. In this system the merit list and the reserved category list are independent of each other. Unlike horizontal reservation, vertical reservation does not give any weightage to the no. of reserved category student making it to the merit list. While applying vertical reservation, no consideration is given to the merit list as those who are in merit list are treated as non-reserved category student even if they are from the reserved category. The reservation remains intact even when the representation of reserved category student has already been achieved in the merit list.⁷ Thus pre-determined reservation rate always prevails even when in a particular year reserved category student has performed well. For e.g. if in a particular year, the pre-determined rate of reservation is 50%; and in that year reserved category students, without the needing the reservation, have occupied 40% of the merit list. Now, in this scenario if the vertical reservation is applied then, unlike in horizontal reservation, the reservation won't be adjusted to 10 %. Rather, the reservation will remain intact at 50%. This will mean that the 50 % reservation will still be granted even when the 40 % representation out of the 50 % in the merit list is achieved through the merit, and the total no. of representation of reserved category candidate would be 90%. This shows that vertical reservation can go even beyond the predetermined 50% representation that was sought at the first place. Thus, vertical reservation is static in nature and apparently it can at times surpass the pre-determined reservation rate.

Although there are reasons for applying vertical reservation and same will be appraised by the author later parts of this paper; but on the sole premises that the very fundamental aim of the

⁷ R. K. Sabharwal vs. State of Punjab, (1995) 2 SCC 745. Union of India vs. Virpal Singh Chauhan, (1995) 6 SCC 684. and Ritesh R. Sah vs. Dr. Y. L. Yamul, (1996) 3 SCC 253.

reservation is to provide proper representation and nothing more, horizontal reservation is clearly a better option than vertical reservation as it make sure that no more reservation than the pre-determined percentage is granted, and it adjusts the reservation according to the need of the hour.

IV. NEGATION OF ARGUMENTS AGAINST THE APPLICATION OF HORIZONTAL RESERVATION

We have seen the advantages of applying horizontal reservation, but the rationale to not apply it also requires consideration. One of the rationales of not applying horizontal reservation for ST, SC and OBC might be that legislature wants to apply vertical reservation the way it is applied today. It might be the case that it is the will of legislature to have at least 50% representation of reserved category through the vertical reservation and then some more through the merit in the remaining 50 % seats. Non-application of the horizontal reservation is certainly a matter of choice rather than an accident or an error on the part of the Indian legislature, and there is nothing that I want to argue against a choice which is a subject of policy matter. However, if it is the choice of the legislature to apply the vertical reservation then there should be a disclosure of the total representation of the reserved category achieved every year. A year by year disclosure of the representation achieved through the vertical reservation would provide transparency about the effectiveness of such reservation to the citizens. It would also let people to have a clear picture of how much representation of the reserved category is achieved every year. Transparency in the goals achieved by the reservation policy will go a long way in avoiding unnecessary, at times violent, protest against the reservation policy.

There can be an argument that there is no need of such disclosure as the people are already aware of the representation of the reserved category. This argument can't be any more further from the truth. The argument falls flat on two accounts: Firstly, there can't be proper awareness without the disclosure of the exact numbers disclosing the no. of people receiving the benefit of the reservation; Secondly, not many people understand the complex system of reservation. Even the courts have not been able to understand and apply the reservation in the right manner.

⁸ Therefore, to make a presumption that a lay man will be able to understand the application of reservation when the 'law man' have failed to do so is to stretch the optimism thread a bit too far. The disclosure of the representation achieved through the vertical reservation every year simplifies the complex reservation mechanism for the citizens. It will help the citizens to make

⁸ Tayfun Sonmez & M.Bumin Yenmez, Affirmative Action in India via via vertical and horizontal reservation, Ideas Repec, (2019), (May1, 2021 10.10 PM), <https://ideas.repec.org/p/boc/bocoec/977.htmls>.

an informed choice about the status of reservation in the country. It would help government to secure confidence of people in the current reservation policy, and in some ways will also help to avoid unnecessary rebellion against the reservation policy.

It might happen that the reserved category is taking up all the seats for straight five years, and disclosure of that fact would help to correct that situation; if at all the situation needs to be corrected.

Another argument for the non-application of the horizontal reservation stems from a wrong notion about its effect. The application of the horizontal reservation is sometimes misunderstood to have an effect of not allowing reserved category to compete in the open or the non-reserved category. Even courts have been prey to this misunderstanding.⁹ It's important to address this misunderstanding by a hypothetical example. Consider a scenario where there are ten seats for a position. Five seats are reserved horizontally for the reserved category. The application of the horizontal reservation would cancel out the reservation for the reserved category students if the first five students in the merit list are from the reserved category. However, cancelling out of the horizontal reservation because the first five student in merit list were from the reserved category does not put any kind of bar on the reserved category students to occupy the last five seats. It can very well happen that all the seats will be occupied by the reserved category candidates even after the application of the horizontal reservation. The horizontal reservation per se does not debar the reserved category student from the open category.¹⁰ Both vertical and horizontal reservation can lead to 100 percent representation of the reserved category, and in that sense none of them can be considered as better than the other in terms of producing the 100 percent representation of the reserved category. The difference between vertical and horizontal reservation lies in the means in which they achieve the said result. Horizontal reservation can produce the 100 percent representation with or without reservation, but vertical reservation can achieve the same only with reservation.

Another argument for the non-application of the horizontal reservation is that it leads to negation of the reservation.¹¹ However, this view is not a correct interpretation of the application of the horizontal reservation. The horizontal reservation does not always negate the reservation. It only negates the reservation when the reserved category has achieved the

⁹ Some of the confusion is also caused by the rulings of the court which has wrongly applied the horizontal reservation but those error has been recently rectified by the Supreme court in *Saurav Yadav vs The State of Uttar Pradesh*, (2020) SCC Online SC 1034.

¹⁰ See *Chebrolu Leela Prasad Rao vs State Of A.P*, (2020) SCC Online SC 383

¹¹ Parag A. Pathak and Tayfun Sonmez, *Implementation issues in 10% reservation*, thehindu.com, (May 15,2019,00:15),<https://www.thehindu.com/opinion/op-ed/implementation-issues-in-10-reservation/article27130396.ece>.

required representation. A better interpretation of the application of the horizontal representation is the view that it is a minimum guarantee system which applies only when the required percentage of the representation is not achieved through the merit, and does not apply when the required percentage of the representation is achieved through the merit.

Another argument against the non-application of the horizontal reservation is that it might lead to a formation of class within the reserved class. This happens when the affluent in the reserved class takes up most of the benefit of the reservation. The argument does have some weight, but it is to be noted that this problem is not exclusive to the horizontal reservation. The vertical reservation is equally vulnerable to the said problem. In fact, Supreme Court in the case of *Chebrolu Leela Prasad and Ors. v. the State of Andhra Pradesh*¹² has highlighted the said problem plaguing the vertical reservation in the following words

“....Now there is a cry within the reserved classes. By now, there are affluents and socially and economically advanced classes within Scheduled Castes and Scheduled Tribes. There is voice by deprived persons of social upliftment of some of the Scheduled Castes/Tribes, but they still do not permit benefits to trickle down to the needy. Thus, there is a struggle within, as to worthiness for entitlement within reserved classes of scheduled castes and scheduled tribes and other backward classes....”

V. HORIZONTAL RESERVATION: NOT A SUBSTITUTE TO REVIEW OF RESERVATION QUOTA

Advantages of the horizontal reservation might give an impression that the application of the horizontal reservation system might lead to a system which will rarely require reviewing of the reservation percentages. Such an impression flows from the dynamic nature of the horizontal reservation which keeps on adjusting the reservation percentages according to the representation of the reserved category in the merit list and thereby eliminates the need of the review of reservation percentages. However, such a view of the function of the horizontal reservation is not correct. The horizontal reservation does adjust the reservation according to the representation, but the adjustment happens within a fixed reserved percentage range decided by the legislature. This fixed percentage range within which the horizontal adjusts the reservation is required to be reviewed from time to time by the review committees. Therefore, horizontal reservation can never replace the function of the review committee.

The Supreme Court of India in the recent case of *Chebrolu Leela Prasad and Ors. v. the State*

¹² 2020 SCC Online SC 383.

of Andhra Pradesh¹³ has stated that it is the duty of the government to do timely review of the list which contains the names of the caste who are the current beneficiary of the reservation scheme. The Supreme Court remarked that the benefits are not trickling down to the needy, and hence a revision of the list of beneficiary caste coming within the scheduled caste should be done. Applying the same line of reasoning, it won't be wrong to say that timely review of overall reservation provided to the SC, ST and OBC should also be done. It's not in the scope of this paper to suggest that review should increase or decrease the reservation percentages, but it can be certainly be submitted that timely review of the reservation percentage will not do any harm to anyone. The problem though with reviewing the reservation percentages is that it takes a long time to complete the review, and once it is completed, the reservation percentages are fixed for years. Nothing can be done in the years falling between two reviews to change the reservation percentages. It is in these scenarios that the horizontal reservation comes in handy. The horizontal reservation reduces the pre-decided reservation percentage by the percentage of reserved category representation already achieved through the merit. Hence, Horizontal reservation adjusts the reservation according to the performance of the reserved category students every year.

VI. CONCLUSION

Only one argument amongst all the arguments against the application of horizontal reservation that have been addressed in this paper remains viable. That argument is that the horizontal reservation should not replace the vertical reservation if it is the will of the legislature to provide a fixed percentage of representation to the reserved category through vertical reservation, and then some more representation through merit in the open category. It is submitted that if the horizontal reservation is not applied on this line of reasoning then every year a proper disclosure of how much representation of reserved category is achieved should be disclosed to citizens. This disclosure would help citizens to take an informed view on the current reservation policy of the state which has always been a very tricky topic to form a view upon. Such disclosure might help in avoiding confusion among people about reservation, and thereby It will prevent unnecessary and baseless protests by citizens. All the other arguments against the application of horizontal reservation doesn't not have much weight or stems from the wrong application of the horizontal reservation. As strong and tempting the argument to apply horizontal reservation is because of its dynamic nature, it should never be considered as a replacement of reviewing reservation percentages from time to time. In the last decade there

¹³ 2020 SCC Online SC 383.

have been many protests relating to the reservation system of India. There have been few questions raised by the Supreme Court itself.¹⁴ If the government of India is keen on bringing a change in the reservation policy; the horizontal reservation remains an effective tool to bring about a change in the reservation policy without completely overhauling it.

¹⁴ For how many generations reservations will continue, The Times Of India, (June,04,2021, 10.00AM) https://timesofindia.indiatimes.com/india/for-how-many-generations-reservations-will-continue-says-sc/articleshow/81592965.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.