RESERVATION POLICY AND PRACTICE IN INDIA
A Means To An End

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Preface

Dr. Anirudh Prasad's valuable study of India's experiment with reservation for equality enriches a whole corpus of literature devoted to the subject, much ignored by practitioners of politics in India. But one hopes that this study will attract national attention since it emerges at a point of time when the Indian society is undergoing an agonizing catharsis over the Mandal Commission 'implementation'. Although the Supreme Court of India is now seized of the matter, intransigent postures of power and obstinate forms of public protest, to whose vocabulary stands now added excruciating self-immolation bids by young persons, have contributed to an ethos of unreason. The movement from paranoid and hysterical discourse to reasoned dialogue was never so critical in India, as now its continued absence makes not just the tasks of justice impossible but also endangers all around the very structures of democratic beliefs, virtues and practices. Dr. Anirudh Prasad's studious work, appearing at this juncture, should assist the generation of the much needed atmosphere of rational political and constitutional discourse.

The first two parts of this book provide the indispensable colonial and post-colonial background to the present crises over reservation policies. Conceptually and ideologically, these crises depict the inner dialectic of India's quest for equality: on the one hand, equality notions restrict the power of the state to discriminate among citizens on the bases of caste, colour, creed, sex or domicile. On the other hand, as Articles 17 and 23 themselves demonstrate, the Constitution declares a war on the worst excesses of the Indian caste system: untouchability and slavery. These Articles by way of ensuring fundamental rights declare certain discriminatory practices in civil society as unconstitutional; what is more, uniquely in the annals of constitution-making, they declare such practices as offences (it is normally the function and province of criminal law, not of constitutions, to proclaim certain behaviour patterns as criminal) and

1. These works, including the author's, are abundantly listed in bibliography. But it is clear that this work heavily relies on Marc Galanter's Competing Equalities (1984), even as it goes beyond it in certain valuable respects.

2. Despite the "closing words" (pp. 407-19) which show how the present atmosphere affects even an otherwise dispassionate analysis.
also modify the whole scheme of federal distribution of powers (through Article 35) by endowing Parliament alone the competence to enact laws to combat untouchability and slavery. In this sense what the author describes as the "other side of equality"—namely, "protest against unjust, undeserved and unjustified inequalities" (p. 38) finds its dynamic unfoldment in Articles 15(4), 16(4) and 335, the fissionable site of constitutional reservation policy.

Anirudh Prasad identifies six dimensions of this dialectic of equality. The first is offered by the need to continuously weigh ameliorative, social justice interests with the necessity to prevent "disproportionate protective discrimination" (p. 39). Second, however, that expression may be construed, "merit and efficiency" stand compromised in any (but especially the Indian variety) measure of protective discrimination (p. 40). Third, the distinctive reality of caste system, and the increasing role it plays in the construction of "backwardness", poses the problem of the revitalization of "caste consciousness" (p. 40). Fourth, inherent to protective discrimination policies is the prospect of perpetuation of caste-based quotas; the problem arises of ways of their conversion into "self-abolition in course of time" (pp. 40-41). Fifth, India witnesses the problem of "losing the identity of non-reservational equality" in the process of extending the specific principle of redress to ever increasing sections of society (p. 41). The articulation of runaway reservations policies leads the author to lament (in a felicitous amendment of Coleridge) "reservation, reservation everywhere but not a single prop to stand on" And, sixth, is the worrysome aspect of the stigmatization of communities in the construction and reconstruction of backwardness by state policies; stigmatization, as this process operates in India, threatens equality gains of reservation policies.

So acutely identified are these conundrums of constitutional protective discrimination policies that one might, indeed, say that the entire book provides one massive, though illuminating, series of footnotes to this text. Clearly, unless these tensions and contradictions are live before the mind, no sustained reasoned discourse on the nature and future of reservation policies is really possible.

Much though we may expect from state policy an overall thrust and cohesion in response to this inner dialectic of equality, this great exception has not been fulfilled by any phase of the Indian experience—indeed the Constitution-makers themselves, as noted, prepared ground for this. While purging the polity of communal reservations and proselytizing the virtues of a "politically homogenous society" (p. 115), the founding mothers specifically provided for a decade long reservation for the scheduled castes and tribes in state legislatures and parliament (barring legislative councils and the Rajya Sabha, an innovation over the British Indian formulation); and for reservation of posts in public services for S.C./S.T. consistent with the maintenance of efficiency in administration and for other backward classes not adequately represented in the services of the state. They also provided for the power in the President to appoint special officials for monitoring progress in amelioration of the S.C./S.T. and for appointment of commissions for the identification of backwardness. The principle and the policy of reservation was thus embedded in the very text of the Constitution, expressing, necessarily the dialectic of equality from the very outset. And this principle and policy was not in the least bit affected by the grand rhetoric of Pandit Nehru describing reservations as "props" and as creating false consciousness

They (reservations) produce a false sense of political relation, a false sense of strength, and ultimately, therefore, they are not nearly so important as real educational, cultural and economic advance which gives them inner strength to face any difficulty or any opponent (p. 117).

If the constitution-makers were determined to replace this false consciousness and instead place on the agenda of political action the development of "inner strength" among the scheduled communities and backward classes, surely the text would have been far more articulate on how those tasks were to be accomplished. Instead, Nehru continued to utter prophetic premonitions: he said

Reservation instead of helping the party to be safeguarded or aided is likely actually to turn against it . . . and isolate it from the main current . . . at the cost of forfeiting that inner sympathy and fellow feeling with the majority . . . It is not good from the point of view of majority either (p. 117).

Despite this, the first Parliament, which was the constituent assembly itself acting as such, added (more out of "political necessity" than "legal necessity") the First Amendment which vested by Article 15(4) the power in the state to make "any special provision for the socially and educationally backward classes of citizens" or for the scheduled castes and tribes. Dr. Anirudh Prasad laments that despite "the Nehruvian extraordinary reticence about the use of the word castes" the impact of this amendment "was not in conformity with the spirit of casteless society" and contributed to the heavy politicization of protective discrimination policy (p. 123). This political carte blanche to the dominant groups in the legislature to give preference to any caste or class (to evoke Professor P.K. Tripathi's sharp assessment) was extensively used, particularly by the southern states, which fully deployed Dr. Ambedkar's unfortunate observation at the time of the First Amendment that

What are called backward classes are . . . nothing else than a collection of certain castes (p. 123).

This tendency to give unconstitutional salience to "castes" over
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correct. But the author helps us recall that the Court has not prescribed any rigid floor or ceiling of reservation policy. Indeed the Court has required that reservation policies should be so devised as to “strike a reasonable balance” among “several relevant considerations”. The operative ruling is hedged with caveats:

Speaking generally, and in a broad way, a special provision should be less than 50 per cent. The actual percentage must depend upon the relevant prevailing circumstances in each case (p. 161, emphasis added).

Following the evolution of judicial thinking since Balaji, Dr. Anirudh Prasad pointedly observes that “Balaji showed a value preference” and “if that is the governing spirit, ... in some cases reservation up to 70 per cent or even more will be allowed but in some other reservation of even 10 per cent seats may be impermissible” (p. 162).

Thus, for example, Justice Rangnath Mishra speaking for the Court, explained that “the super specialities in medical education (should be) unreserved, open and free” (p. 164). I would urge you to return to the full text of this part to capture the full complexity of the technical legal issues emerging from the judicial discourse (pp. 169-92), even if the characterisation of it as “judicial gerrymandering” may appear inappropriate. Whatever be one’s views of the judicial performance and achievements, the early analysis by Mr. Justice Douglas in his Tagore Law Lectures, overall continues to hold valid: he observed that the Supreme Court has “struck...telling blows at attempts to divide the community” on lines “based on race, caste or religion” (p. 147). History will undoubtedly pause to applaud this achievement.

Dr. Anirudh Prasad devotes Part IV of this book to reservations benefits to disadvantaged classes other than scheduled communities and the backward classes. He examines preferential treatment for women (pp. 221-44) and in a sensitive analysis indicates how the absence of a proper feminist jurisprudential consciousness has impoverished both the judicial process and state policy-making. Dr. Anirudh Prasad also devotes a whole chapter to an analysis for reservations for not-so-forward and other disadvantaged classes (pp. 245-314). Apart from reservations for rural areas, domicile in ‘forward’ and ‘undeveloped’ areas, the author also includes in his analysis preferential treatment in favour of military, and defence personnel, sports-persons and wards of the “political sufferers”.

This analysis shows runaway tendencies in providing reservation for categories other than the backward classes. For example, the Uttar Pradesh Government extended the benefit of reservations to ex-detennes under the 1975 emergency, on the ground that these people were “political sufferers” of the same order of the freedom fighters. The Allahabad High Court, allowed the analogy and the reservations! In contrast, the Tamil
Nadu Government's pension scheme for anti-Hindi agitators was discouraged by the Supreme Court as unconstitutional. Contrary to the Madras High Court's view, the Supreme Court felt that such conferment of such benefits suffered from the "vice of disintegration and fissiparous tendencies" which needed to be nipped in the bud (p. 263).

Similarly, an expansionist tendency as to the extent of reservations is clearly visible in recent Supreme Court decisions starting from Pradeep Jain v. Union of India (pp. 306-08). It seems clear from the learned author's analysis that so-called 50 per cent ceiling on reservation is considered operative only as regards reservations for the scheduled castes, tribes and backward classes; additional categories of beneficiaries leading to a higher percentage of reservations (going upto 62/63 per cent) in medical colleges (pp. 302-05) is judicially permissible. One hopes that the Supreme Court in the current Mandal petitions before it will take an opportunity to comprehensively consider its own jurisprudence and announce firmly and clearly not just the extent of permissible reservations and the criteria for the determination of backwardness but also the determination of reservational equality, if at all justified, for other categories of people.

Despite some rather partisan articulation of views, and some printer's devils, this work offers a mature analysis of the complexities of the jurisprudence of reservational equalities. It is worth a serious and critical reading. The book exudes concern for a secular and just society, a concern which has today become a prime need of the Indian state and society. The analysis offered by Dr. Anirudh Prasad should assist rational, constitutional discourse aiming at an imaginative reconstruction of reservational equality policy which in its transience will help contribute to the advent of a just social order in India.