

Affirmative Action and its Changing Contours in India

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Abstract:

This paper talks about the reservation and its evolution in India. It explained the constitutional provisions related to reservation and how does it help to achieve equality, freedom and justice which has been mentioned in the constitution of India. It examines whether the reservation can provide social equality and political representation or not to the marginalized sections of the society.

Keywords: *Reservation, Caste, Inclusive, Exclusive, Equality, Freedom, Social and Political Justice*

Introduction

Caste, in Indian social structure is an influential and determining feature inherent to the ‘Hindu’ social order. The history of development of *Hinduism* as a religion is impenetrable and obscure so as caste as a base of social stratification on the notion of ‘purity’ and ‘pollution’. The obnoxious stratifying social order that downsizes credibility of human civilisation is existent over centuries and has its hold in same strength as it had in the past in the functioning of the society and the nation. The caste framework of *Hindu* social order has over the time inflicted all sects, religions of the Indian sub-continent and beyond where the members of this social order have migrated and settled¹.

The order that divides human beings into different social groups centring on the spurious notion of ‘purity and pollution’ putting them from ‘birth to death’ on a hierarchal caste-ranking, has in the course of time resulted in ‘untouchability’ and gradual and progressive exclusion of the social groups located at the bottom of the caste-hierarchy. This has yielded severe forms of social discrimination, economic exploitation and political marginalisation in the society. The hierarchical division of caste-structure emerged as a complex psycho-socio-economic institution in the Indian social milieu. Though the

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segregation particularly in the twenty first century is crudely visible on the grounds of colour, race, religion, gender and minority, however, its impact is most excruciating and demeaning on the socially excluded people in the name of caste.

Evidences of history demonstrate that innumerable attempts have been made in different times to vitiate the strength of the notion of 'purity and pollution', a base of hierarchical stratification of the society which is believed to have resulted in severe form of social disharmony and backwardness and is considered as major threat to Indian modernity.

Reservation policy embodied in the Constitution of India is undoubtedly a milestone step in the history of mankind to make a way-out for liberating the segments of the society from the clutches of such historically created and sustained inhuman process of social exclusion.

What is Reservation?

Reservation is a mechanism whereby certain space is reserved for those who have been historically excluded from the mainstream social, economic and political sphere of the society. The process of exclusion may occur due to social, traditional, deliberate, incapability, inefficiency, poverty and unemployment arising from failure of government policies etc. The sections which are 'incapable' to compete for availing space in the mainstream sphere have to *compete* with the 'capable' for the same. In a pure competition the incapable is lagging behind or excluded from accessing the space which is absolutely essential for existence. In a democratic egalitarian set up, the government is in principle responsible for protection of the incapable for their survival and to make them capable to participate in 'competition for survival'. The process of protection is 'Reservation' which is also called 'protective discrimination' or 'positive discrimination'. It is also known as 'affirmative actions'. The word 'Reservation' is used to refer to reserving space in the mainstream sphere for the incapable. Protective discrimination implies to protection of incapable from competition. Positive discrimination is preferential treatment to the incapable. Affirmative actions are actions specially designed for the incapable. All these phraseologies together imply making special provisions for those who are excluded because of capability deprivation.

Reservation can be defined in constitutional, legal, social, political, economic, philosophical context.

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Social context: Generally there is a debate that suppose if an extraordinary talented person in the reserved or marginalized section qualifies any examination and scores equal or more marks than his general category counterparts, how should s/his selection be classified whether the person would be treated in the general category merit or reserved category. Some analysts have argued that if they are counted among the general category candidates this would eat away the share marked for general category candidates. On the other hand some sociologists and political thinker point out that merit has to treat like merit. And if a reserved category candidate having scored general category merit is counted in the reserved category it will be the death of the merit. Reservation provision is meant for the people who are crippled by social discrimination and exploitation.

Why Reservation? For Representation

Who is entitled? - Excluded and marginalized sections of society.

Evolution of Reservation:

The origin of the 'idea of Reservation' can be traced back in the second half of 19th century. The conditions of discrimination and exclusion historically created in the social milieu of the country formed a space for emergence of such policies which ameliorate the distorted social order. The society was dominated by blind-belief, feigned notion of 'pure' and 'pollution' and a social group dominated the whole society by the virtue of their birth and captured the whole resources and power segregating a larger segments of the society from the mainstream. The sections of the society suffered from lack of all the social and economic vital necessities required for survival. Kings were the oppressive rulers and the so-called upper caste *Brahmins* subjugated the political and the social system by virtue of their 'birth' and knowledge. The socio-economic conditions created as a consequence of thousand years of oppressive social order by the kings rule and Brahmins was again aggravated by the tyrannical exploitative rules of Britishers who kept this country as a colony for two and a half century. During this colonial rule some radical changes took place in the belief system and the ago-old traditions and cultures of the Hindu society as consequence of introduction of English language in the education system by Lord Macaulay in 1835. A study describes the impact of English language and education on India

Dr. B R Ambedkar is the chief architect of the idea of reservation. He was born on 14th April 1891 in a member of untouchable sections and victim of untouchability, discrimination and exclusion-the byproduct Indian social system. India was ruled by the Britishers for and the idea freedom and justice was and a

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jurist and constitutionalist par excellence of the modern India. As a chief leader of down-trodden classes he tried to annihilate the caste from Hindu society. To him without annihilation of caste from Hindu society it is impossible to establish the casteless society or ideal society. His ideal society is based on liberty, equality and fraternity. His thought and process of movement evolved the annihilation of caste from Hindu society.

The provisions enshrined in Indian Constitution address a historical continuity of socio-economic disparities rooted in the Indian caste system. The debate and the movements stated right in 1930s which was led by Dr. Ambedkar in which he argued that only the political freedom is not sufficient and the inner colonialism will be required to be thrown out. Ambedkar regressed spearheaded the cause of women, Dalits (previously known as untouchables) and other minorities so that real freedom can be achieved towards India's progression for highest democratic tradition. He laid down step by step methods and mechanism to ensure equal and appropriate representation of the socially marginalized section. The most prominent of them was the provision of separate election for Dalit population. His understanding was that the *Dalit* representation has to be ensured only among the *Dalit* voters, and even in areas where Dalit population was every political candidate will have to muster their support also. However, this was not accepted and Gandhi went on a fast to protect against this proposal. He was of the opinion that this will break the inner social unity and Indian society was always remained divided. It was at that time in 1932 which later came to be known as Poona Pact, an understanding was made that reservation would be introduced in education, employment and political institutions. It may be argued that India's struggle for political freedom and inner social equality went hand in hand and the provisions of reservation were included in the main frame of the Constitution after achieving its Independence in 1947.

Development

In the mid of Nineteenth century the idea of reservation came to being in the administrative sphere when the Madras Presidency initiated the movement in 1852. In 1858, the Government of Bombay Presidency opened all the schools maintained at the cost of the Government to all classes without discrimination. Between 1874 to 1885, 20 per cent middle and lower level jobs were reserved for the Muslims, Hindus,

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and Indian Christians². In 1914, the Government of Mysore introduced the system of nomination of qualified candidates from backward classes to the posts of assistant commission.

Constitutional Provisions

The Constitution of India was adopted by the Constitution Assembly on 26th November, 1949 and came into force on 26th January, 1950 after independence on 15th August 1947 from the tyrannical and exploitative colonial rule of Britishers of nearly two centuries. On 29th August, 1947 the Drafting Committee was appointed with Dr. B.R. Ambedkar, as Chairman and other six members assisted by a constitutional advisor. The framers of the Constitution after a long process of, though heated but logical, articulations, debates and discussions on the social, economic and political conditions of the country, codified in various Articles of the Constitution the provisions of reservation. Different sections of the Constitution starting from the Preamble ensure social, economic and political justice and equality to all the citizens of the country.

Articles of the Constitution: The Constitution of India is the lengthiest Constitution of the world which presently contains 448 Articles in 12 parts in 12 Schedules. All the values that the Constitution aspires to establish in the country are clearly mirrored in its Articles in which justice, liberty, equality, and fraternity stand as pillars of the Constitution.

Art.14 of the Indian constitution says that the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”. Principle of equality, absence of any form of discrimination, is an essential feature of democracy.

Art.15 says that the State shall not discriminate against any citizen on grounds of only religion, race, caste, sex or place of birth.

Art. 16 talks about ‘equality of opportunity’ in matters of public employment.

Art. 17 deals with the abolition of untouchability. It forbids its practice in any form.

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Art. 46 talks about the promotion of educational and economic interests of SCs, STs and weaker sections of the society. The state will protect them from social injustice and exploitation.

Art. 335 claims for the Scheduled Castes and Scheduled Tribes to service and posts.

Art. 340 says that the President of India will appoint a commission to investigate the conditions of the backward class.

A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

Articles 341 and 342 provides definition of Scheduled Castes and Scheduled Tribes with respect to any State or Union Territory.

Directive Principles of State Policies:

The Part IV of the Indian constitution shall not be enforceable by any court. The principles laid down as DPSP are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Articles 38, 41, 46 and 47 in Part IV (“Directive Principles of State Policy”) of the Constitution are especially relevant for the work of the Department of Social Justice and Empowerment are quoted below:

Article 38 says that it is the duty of State to secure a social order for the promotion of welfare of the people by achieving justice- social, economic and political to minimize inequalities in income, status, facilities and opportunities.

Article 41: The state will secure the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement.

Article 46: The state shall promote the educational and economic interests of SCs and STs as well as weaker sections of the society to safeguard them from social injustice and exploitation.

Article 47: Duty of the State to raise the level of nutrition and the standard of living and to improve public health. Also, It talks about the prohibition on the consumption of intoxicating drugs and drinks which leads to health issues.

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Spheres and Scope of Reservation

Education: In the case of education, the provision relates to non-discrimination in educational institutions, equal representations, and measures for educational promotions. Article 15 (4) states that “Nothing in this article 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 29(2) provides protection for admission and against discrimination in any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Employment: The constitution provides for both appointment and promotion in the government services. Article 16 (4) empowers the State to make “any provision for the reservation in appointments, or posts in favour of any backward class of citizens”. Article 16 (4A) enables the State to make provision for reservation in matters of promotion to any group or groups of posts in the services under the State in favour of the SCs and STs. Article 335 states: The claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments of services and posts in connection with the affairs of the Union or of a State.

Political and democratic institutions: The constitution empowers the State to take steps to provide due representation to the SC/STs. Various articles contains provisions for the reservation of seats for the SC/STs in the nation’s legislative bodies in proportion to their population: Central Legislative Assembly (Article 330), Legislative Assembly of the States (Article 332), in Municipalities (Article 243 T), in various Panchayat (local self-government) level bodies, namely, village, taluk (block) and district (Article 243 D).

Criteria for selection of beneficiaries: Any provision offered through the policies of the government to the citizens if equally applicable to all without any differentiation. All the citizens are equally eligible to avail the provision irrespective of caste, creed, gender, and ethnicity or any ground. For example, For making available the provisions of reservation to all those who require special attention for their peaceful survival, the Constitution of India has mentioned criteria for selection in its various Articles and Directive Principles of State Policy. These categories of people are unable to compete. Reservation is not

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confined within the basis of caste factor rather it considers various socio-economic conditions and other 'conditions that mediate for the exclusion of some sections from the social, economic and political mainstream of the society'. Exclusion from the mainstream society creates serious consequences for the development.

The basis on which the provisions of reservation are facilitated to beneficiaries is multi-dimensional. The reservation policy considers as its beneficiaries' victims on the grounds of caste, race, ethnicity, gender, socio-economic and other conditions that mediate for exclusion of groups or individuals from the social, political, and economic mainstream of the society. After a long and logical debate on the social, economic and political conditions of the country, the members of the drafting committee of the Constitution determined the bases for selection of beneficiaries for making available the provisions of reservation. The victims of a long inhuman practice of discrimination on the ground of caste, known as *Dalits* or 'scheduled castes', the tribals who have been geographically isolated from the mainstream, and other backward classes excluded because of their socially, economically and educationally backwardness, the women discriminated for ages on ground of gender, the physically challenged excluded on the ground of physical incapability and other conditions that create space for exclusion are considered eligible for reservation provisions.

Beneficiaries

The Constitution of India has identified various sections of the society to be eligible for availing the provisions of reservation on the basis of which they have been excluded from the mainstream social, economic, and political life. The beneficiaries covered under the Policy are women, members from Scheduled Caste, Scheduled Tribes, Nomadic Tribes and Other Backward Castes, Physically Challenges, Ex-service Men, Sports Persons, and any other section of the society which suffer from social and educational backwardness. The Reservation Policy takes care of all these vulnerable sections of the society by means of reserving seats in Government educational institutions, posts in public sector employments and seats in political institutions where their representation is required to be ensured.

The women constitute 48 percent of total population. The socio-economic conditions in which the women particularly from weaker sections survive is completely incongruous to their contribution to the society. The declining sex ratio, high level of illiteracy, lack of employment opportunities, domestic violence,

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rape, molestation and other forms of gender discrimination are the serious concern not for the country but also for the international agencies which are mediating for women empowerment.

The total number of beneficiaries covered under reservation policy is more than the total population of the country.

Scheduled Caste: The eligibility criteria for selection of Scheduled Caste people for the provisions of reservation have been clearly specified in different Articles of The Constitution. The status of Scheduled Caste was given in Article 341 and 342 of the Constitution provides for drawing up the lists of Scheduled Castes and Scheduled Tribes respectively.

Scheduled Tribe: Article 366 (25) of the Constitution of India refers to Scheduled Tribes as those communities, who are scheduled in accordance with Article 342 of the Constitution. This Article says that only those communities who have been declared as such by the President through an initial public notification or through a subsequent amending Act of Parliament will be considered to be Scheduled Tribes.

Constitutional Safeguards: The constitution provides various safeguards in favour of Scheduled Tribes. These may be broadly divided into two parts, viz., (1) Protection and (2) Development. Protection of interests of Scheduled Tribes is very essential for their development. The protective provisions are contained in Articles 15(4), 16(4), 19(5), 23, 29, 46, 164, 330, 332, 334, 335 and 338, 339(1), 371(A), 371(B), 371(C), Fifth Schedule and Sixth Schedule. Articles 15(4), 16(4) and 19(5) are exception to the fundamental rights of equality and freedom guaranteed under Part III of the Constitution. Provisions relating to development of Scheduled Tribes are contained mainly in Articles 275(I) first proviso and 339(2). A brief mention of these provisions is given below.

Scheduled Tribes: Indications of primitive traits, distinctive culture, geographical isolation, shyness of contact with the community at large and backwardness.

Other Backward Castes: The Constitution does not define Other Backward Classes. However, in pursuance of the judgment of Supreme Court in Indira Sawhney's case, the Government enacted the National Commission for Backward Classes (NCBC) Act in April, 1993. As per Section 2 of the NCBC Act, "Backward classes" means such backward classes of citizens, other than the Scheduled Castes and

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Scheduled Tribes, as may be specified by the Central Government in the lists. For the above purpose, Section 2 also defines “lists” as lists prepared by the Central Government for providing reservation in appointments to backward classes of citizens, which, in its opinion are not adequately represented in services, under the Government of India and any local or other authority. The Ministry of Social Justice and Empowerment has notified the lists of Castes / Communities which are treated as Other Backward Classes.

Let us learn as to what mechanism was adopted by the Commission to identify the ‘other Backward Classes’. The Mandal Commission in its report has set out the eleven indicators/ criteria to determine the social and educational backwardness. These 11 indicators were grouped under three broad heads i.e. Social, Educational and Economic.

Women: One of the important special measures adopted by the State was the 73rd and 74th Amendments to the Constitution, which provides for reservation of seats and the posts of chairpersons for women in institutions of local governance. To ensure effective participation of tribal women in the process of planning and decision making, these amendments have been extended to the Scheduled areas through the Panchayats (Extension to the Scheduled Areas) Act, 1996. Government has taken affirmative action to increase women’s participation in local self- governing institutions and decision-making bodies by enacting the 73rd and 74th Constitutional Amendments, 1993. These legislations provide for reservation of not only 1/3rd of all seats at all levels of local Government, but also reserved 1/3rd of all posts of chairpersons in these bodies for women, both in rural and urban areas. Further, there is reservation of not less than 1/3rd of the total number of seats reserved for SCs and STs for SC and ST women. Over a million women have entered public office across the country due to this initiative.

Constitutional Provisions

The Constitution of India not only grants equality to women but also empowers the State to adopt measures of positive discrimination in favour of women for neutralizing the cumulative socio economic, education and political disadvantages faced by them. Fundamental Rights, among others, ensure equality before the law and equal protection of law; prohibits discrimination against any citizen on grounds of religion, race, caste, sex or place of birth, and guarantee equality of opportunity to all citizens in matters relating to employment. Articles 14, 15, 15(3), 16, 39(a), 39(b), 39(c), 42,46,47, 51A, 243D (3), 243 D

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(4), 243T (3) and 243t (4) of the Constitution are of specific importance in this regard.

Special Initiatives for Women:

1. **National Commission for Women:** In January 1992, the Government set-up this statutory body with a specific mandate to study and monitor all matters relating to the constitutional and legal safeguards provided for women, review the existing legislation to suggest amendments wherever necessary, etc.
2. **Reservation for Women in Local Self -Government :** The 73rd Constitutional Amendment Acts passed in 1992 by Parliament ensure one-third of the total seats for women in all elected offices in local bodies whether in rural areas or urban areas.
3. **The National Plan of Action for the Girl Child (1991-2000) :** The plan of Action is to ensure *survival, protection and development of the girl child with the ultimate objective of building up a better future for the girl child.*
4. **National Policy for the Empowerment of Women, 2001:** The Department of Women & Child Development in the Ministry of Human Resource Development has prepared a “National Policy for the Empowerment of Women” in the year 2001. The goal of this policy is to bring about the advancement, development and empowerment of women.

Differently Aabled: For the physically handicapped persons in November 1977. Handicapped persons who benefited from this scheme are the blind, the deaf and the orthopedically handicapped, each category being entitled to 1 per cent reservation making up the total of 3 per cent of those posts within Group C and D in the Central government Offices which have been identified as suitable for the physically handicapped and are filled by direct recruitment. Reservation in promotion within Group D and up to within Group C has also been introduced i.e. November, 1984.

Reservation for Ex-servicemen: “Reservation for Ex-servicemen Initially reservation for ex-servicemen was provided for a period of 2 years from 1.7.66. This has been extended from time to time and is in force on a permanent basis from 15.12.79. 10 per cent of the vacancies in Group C services and posts, and 20 per cent of the vacancies in Group D services and posts and 10 per cent of the vacancies in posts of the level of Assistant Commandants in paramilitary forces are reserved for ex-servicemen subject to certain conditions. Ex-servicemen candidates, who have already secured employment under the Central Government in Group C and D have been allowed the benefit of age relaxation as prescribed for Ex-

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servicemen for securing another employment in a higher grade or cadre in Group C and D under the Central Government. The Director General (Resettlement), Ministry of Defense monitors the implementation of these orders in the Central Government agencies”.

Achievement

The implementation of reservation in Public Undertakings is not uniform. While most of the Public Undertakings including Banks, Autonomous organisations and State Governments do generally implement the reservation policy laid down for the members of Scheduled Castes and Scheduled Tribes in their recruitment, there are some Undertakings and Autonomous bodies which violate it or find ways to traverse it. A review of recruitment to various posts in Public undertakings and Autonomous Organisations is necessary to bring forth the inadequacy in implementation of reservation policy and plug the loopholes. There is need of continuous monitoring of implementation of reservation policy and plug the loopholes. Instructions have been issued in April and May 1989 by the Ministry of Personnel, Public Grievances and Pensions to the Central Ministries/Departments to fill up all the vacant reserved posts for Scheduled Castes and Scheduled Tribes within three months by launching a special recruitment drive with effect from 1st June, 1989. Special efforts are made by each Ministry/Department to fill up such reserved vacancies falling within its preview by Scheduled Caste and Scheduled Tribe candidates. The progress made in this direction is to be monitored by the Ministry of Personnel. This drive is expected to improve the situation. Similar time bound action is necessary at the state level to clear the backlog of reserved vacancies in the states. The State Governments have also prescribed reservation, keeping in view the tribal population in their states. A statement showing the position of reservation in 17 States and 2 Union Territories is given in Annexure XII. The position of reservation in the four tribal majority States of Arunachal Pradesh, Nagaland, Mizoram and Meghalaya and two Union Territories of Lakshadweep and Dadra and Nagar Haveli have not been indicated”.

Scope of Reservation

Fields where reservation is implemented

- Reservation in jobs
- Reservation in education
- Reservation in politics

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Reservation of Seats to Cease After Forty Years

As per Article 334, the Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of People (Lok Sabha) and in the Legislative Assemblies of the States (Vidhana Sabha) shall cease to have effect unless extended further, on the expiration of the period of forty years from the commencement of the Constitution. This provision, initially made for 10 years, has been extended from time to time by amendment of the Constitution.

Judicial Protection The judicial and legal protection is also an important apparatus to protect the interest and promote the process of inclusion of the secluded sections considered as beneficiaries of the reservation provisions. The Supreme court had set the benchmark of 50% limit on quotas by a nine-judge Bench in the landmark *Indra Sawhney vs Union of India* (1992) case.

Demand for Reservation on the basis of income: Reservation is a mechanism not only to make arrangements for reserving seats and posts in educational institutions and employment but rather a mechanism in which national wealth and resources are allocated equally among all citizens on the principle of distributive justice by some policies of compensatory and protective discrimination to ensure social integration and development. The in-built mechanism of Reservation offers preferential treatment to the beneficiary groups, certain oppositions by instinct of human nature stand to obstruct it. These sorts of oppositions get even more instigated if the resources at the disposal fall short to fulfil the desired needs.

After the introduction of privatisation in 1991, several market reforms were introduced and global companies entered Indian market. Right from the time an argument has been built up to view marginality not on the basis of social level but at economic level. This build-up has grown stronger and stronger with the passage of time and now it has come to a level that there is strong demand for replacement of caste-based Reservation with income-based Reservation. The fundamental argument that has been made in the defences that poverty knows no caste and therefore all Reservation provisions should be made available on the basis of economic status irrespective of caste. It is believed that caste-based Reservation has been implemented for a long time now and has also achieved its social purpose.

The large-scale poverty and unemployment among the forward social groups adds substance and solidarity to their demand. Now, it has been a subject of enormous debates and discussions on ground of

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its efficacy and morality as a large chunk of population of other sections is deprived of basic needs of life and suffers from acute unemployment.

Abolition of Reservation on the basis of efficiency and merit: Reservation from the time of its adoption in the Constitution as a policy of positive discrimination and an instrument of social and economic justice has been challenged on multiple grounds. Not only India, the countries which have adopted reservation in the form of affirmative actions have confronted with strong oppositions at the academic and public domain. The affirmative actions have always been subject to serious controversy on grounds of efficiency and productivity. These policies are designed to reserve the opportunities for the eligible beneficiaries which otherwise could be distributed through competition. Certain sections of population due to various reasons, historic and contemporary, are unable to compete and get excluded from the race. Access to resources depends on social, political and personal factors which that groups lack and live in an extreme condition of poverty and scarcity.

Conclusion:

Reservation has been incorporated in the constitution of India as a temporary measure for the upliftment of down-trodden sections of the society who has been excluded from the main streams of society. Our constitution makers keeping in mind the development of a nation is not possible without the development of an individual of the state. Reservation has been provided for the political representation as well as social development but it has diverted from its journey and goal.

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