Fresh Challenges to the 50% Limit on Vertical Reservations

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The judicially imposed ceiling of 50% on vertical reservations in India has been questioned recently in two ways—the Supreme Court's upholding of the 103rd Amendment Act, which allowed economically weaker section reservations beyond 50%, and the state legislations in Jharkhand and Karnataka, which have expanded reservations beyond 50% for backward classes. These should prompt fresh questions and debate about the wisdom and necessity of this artificial limit on vertical reservations.

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In Kumar (2016), I had pointed out the constitutionally unsound basis for the judicially imposed artificial limit of 50% on the vertical reservations on jobs and seats in educational institutions ("vertical reservations") under the Constitution. Although the 50% limit was firmly entrenched in constitutional law by the nine-judge bench judgment of the Supreme Court in *Indra Sawhney v Union of India* (1992),[1] its underlying basis remains pragmatic rather than principled. Reservation laws that have increased vertical reservations beyond 50% have been repeatedly struck down by the Supreme Court and high courts. Most recently, it was used by a constitution bench of the Supreme Court to strike down a Maharashtra law, which included Marathas as "backward classes" for the purposes of vertical reservations in the state (*Dr Jaishri Laxmanrao Patil v Chief Minister)*.[2] Somewhat bizarrely, it was also used by the Supreme Court to strike down a measure by the Andhra Pradesh and Telangana governments to mandate the appointment of Scheduled Tribe (ST) teachers in schools located in the Adivasi areas (*Chebrolu Leela Prasad Rao v State of Andhra Pradesh;* Kumar 2020).[3]

However, even the Indra Sawhney judgment did not make the 50% limit a hard and fast rule. In "extraordinary circumstances" and for reasons to be justified by the government in question, the Court held that the vertical reservations could constitutionally cross the 50% limit. Some examples of such circumstances are mentioned in the judgment itself. Justice B P Jeevan Reddy says,

> It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main stream of national life and in view of conditions peculiar to and characteristical [sic] to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.[4]

One instance of what such exceptional circumstance might look like is found in *Parents Association v Union of India*[5] where the Supreme Court upheld reservations in favour of tribal people and pre- and post-1942 settlers in the Andaman and Nicobar Islands even though the extent of such reservations crossed 50%. Similarly, states such as Meghalaya and Himachal Pradesh also have vertical reservations in jobs beyond the 50% ceiling, though these have not been specifically challenged in court consequent to the Indra Sawhney judgment.

Notwithstanding Indra Sawhney, states have, as mentioned above, tried to get past the 50% barrier for reservations over the last three decades, largely unsuccessfully. One exception as discussed in Kumar (2016) is the state of Tamil Nadu. According to the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993, 69% of the state government jobs and seats in government educational institutions are reserved for Scheduled Castes (SCs), STs, and Other Backward Classes (OBCs) (Kumar 2016).

This law has not been subject to complete judicial review thanks to the Constitution (76th) Amendment Act, 1994, which placed it in the Ninth Schedule of the Constitution. Even so, the Tamil Nadu law is not fully immune from judicial review.[6] However, following this judgment, the Supreme Court has yet to take up the challenge to the 76th Amendment of the Constitution, which placed the Tamil Nadu law in the Ninth Schedule.

Legislative Action and Judicial Pronouncements

Into this fraught legal situation, two recent sets of developments have taken place, which might provide space for discussion and debate on the wisdom of the 50% ceiling on vertical reservations. Two states, namely Karnataka and Jharkhand, have recently passed laws, which have

increased the quantum of vertical reservations in the respective states beyond the 50% ceiling.

The Karnataka government recently promulgated an ordinance to amend the existing reservation law to increase the vertical reservations for the SCs and STs in the state (*Deccan Herald* 2022). The ordinance has increased reservation for the SCs from 15% to 17% and for STs from 3% to 7%, taking the total reservation tally to 56% in the state (including the existing reservations for backward classes) (Hombal 2022).

Similarly, the Jharkhand legislative assembly enacted a law which raised the overall vertical reservation to 77%. This law increased the reservations for all communities in the state—SCs, STs, OBCs, and Extremely Backward Classes (EBCs), in addition to the 10% for economically weaker section (EWS) reservation (*Telegraph* 2022). The biggest increase was for the EBC category which went from 8% to 15% while the SC, ST, and OBC categories were increased by 2 percentage points each (Upadhyay 2022).

The Karnataka and Jharkhand laws stand out for a couple of reasons. One, they increase the quantum of reservations for SCs and STs and not only for "backward classes." Two, political leaders in both states have acknowledged that while it is necessary to provide such vertical reservations, they would like the union government to side-step any litigation over the constitutionality of such reservations by putting the laws in the Ninth Schedule of the Constitution (Hombal 2022). The Jharkhand law even specifically states that it will take effect only once it is placed in the Ninth Schedule of the Constitution.

Alongside these legislations, the Supreme Court has also upheld the validity of the 103rd Amendment Act, which introduced the concept of EWS reservations into the Constitution. By a majority of three to two, the constitution bench held, among other things, that the 50% ceiling on vertical reservations was not a basic feature of the Constitution, and that such a limit on vertical reservations would not hinder the provision of vertical reservations to persons belonging to the EWS category.

Could these changes herald a different way of thinking about the 50% ceiling on vertical reservations in India?

Questioning the 50% Ceiling

At first glance, it would seem that the Supreme Court's judgment in Janhit Abhiyan has paved the way for reconsidering the 50% ceiling in its entirety. If the Court has upheld the EWS reservations, which were clearly intended to be used beyond the 50% limit, one might presume that the ceiling itself has become far less rigid. That, however, is not the case.

A close reading of the majority judgment in Janhit Abhiyan reveals that the Court has indulged in some unsound jurisprudential pedantry to get around the 50% issue. While the Court is correct that the 50% ceiling cannot be considered a basic feature of the Constitution, it nonetheless holds that the 50% ceiling would continue to apply as intended in the Indra Sawhney judgment to reservations under Articles 15(4), 15(5), and 16(4). The Court has only reiterated the ceiling applicable to vertical reservations for SC, ST, and OBC communities while holding that the EWS reservations would not be limited by this so long as they were limited to 10% themselves.

That said, the Court's holding that the 50% limit is not a basic feature of the Constitution, unwittingly also strengthens the constitutional validity of the Jharkhand and Karnataka legislation. Although the Supreme Court is yet to hear and decide the constitutional validity of the Tamil Nadu law, the case against the law has gotten somewhat weaker since it cannot be argued that the law is affecting the basic structure of the Constitution for merely having gone past the 50% ceiling on vertical reservations. Placing of reservation laws that go past the ceiling of 50% for vertical reservations in the Ninth Schedule would therefore not be unconstitutional per se, though the overall quantum and scope of reservations might still be scrutinised by the Court.

That said, the long-standing ceiling on vertical reservations imposed by the judiciary is beginning to be questioned. Whatever the jurisprudential basis for it, the Supreme Court's verdict approving EWS reservations beyond the 50% ceiling has weakened the constitutional basis for the 50% limit itself. The move by the Karnataka and Jharkhand governments to increase vertical reservations has put the ball in the union government's court. The union will not have a principled or even a partisan basis to deny the request to put the laws in the Ninth Schedule. Should the union agree to do so, other states will immediately follow suit effectively nullifying the Indra Sawhney judgment on the question of a ceiling for reservations.

Although the Supreme Court in Jaishri Patil recently affirmed that there was no need to re-examine the judgment in Indra Sawhney as far as the 50% ceiling was concerned, recent developments might have to prompt a rethink. The next opportunity for the Court will come when the challenge to the Tamil Nadu law is taken up for hearing, and one hopes that, sooner rather than later, the Court revisits this problematic principle.

NOTES

1 *Indra Sawhney v Union of India* (1992), (Suppl) 3, SCC 217.
2 *Dr Jaishri Laxmanrao Patil v Chief Minister* (2021) 8 SCC 1.
3 *Chebrolu Leela Prasad Rao v State of Andhra Pradesh* (2021) 11 SCC 401.
4 Indra Sawhney, para 810, p 735.
5 (2000) 2 SCC 657.
6 *I R Coelho v State of Tamil Nadu* (2007) 2 SCC 1.

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