

# Constitutional Law and Reservation: A Critical Study

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## ABSTRACT:

*"It is a wise man who said that there is no greater inequality than the equal treatment of unequals."*

*-Felix Frankfurter.*

India, a nation of different standings, ideology, religion, languages, castes and topography, stands for unity and integrity. However, no such solidarity gets portrayed when it comes about the standing framework of Varna System which isolates Indians into Brahmins, Kshatriyas, Vaishyas and Shudras (Scheduled Casts, Scheduled Tribe and Other Backward Communities, the most oppressed ones). The framers of the Constitution of India thus introduced the policy of Reservation to secure the social, political, educational and economical rights and dignity of every citizen equally.

Astonishingly, the actual scenario depicts that even after 70 years of Independence this policy is being used by the political parties as a mere tool to count vote. With time Government strived to mitigate the inequalities by executing reports of various commissions, enacting several Statutes concluding with the Constitution 124<sup>th</sup> Amendment. The Hon'ble Supreme Court has also provided guidelines in the case of Indra Sawhney v. UOI<sup>1</sup>. However, those never met expectations.

Contextually, this paper aims at portraying the constitutionality of reservation and critically examines whether the existing provisions are competent enough to meet the need of the hour. This is a Doctrinal research paper whereby the researcher had collected secondary data from different Journals, Books etc., and the reference of those has been detailed further.

**Key Words:** Reservation, Schedule Caste, Schedule Tribe, Other Backward Classes, Equality.

## Introduction:

The cast system in India is deeply enrooted to certain religious as well as sociological ideologies which are quite orthodox in nature and which has ultimately alienated the countrymen from one another while classifying the ethnic and minority groups. This socioeconomic marginalization has originated out of that vague and illogical *Principle of purity and pollution*<sup>2</sup> which depicts that the lower cast people are basically associated with certain unhealthy professions and thus are stigmatized from the main stream population of the society. Today more than half of country's population is constituted by the Scheduled Castes (SC), Scheduled Tribes (ST), and Other Backward Class (OBC).

Indian society has observed these social, educational and economical differences among its people since time immemorial. Though there was no cast based division in the Vedic society but with the emergence of Brahminical culture in Indian subcontinent, class and cast system too came into its active form. In fact, this was a contribution of the Brahmins towards their own community for ensuring certain social, economic and educational security and at the same time subjecting several other communities to play the role of their servant. The SCs, STs and OBCs of present time represent those aforementioned communities who have suffered severe social, economic and educational distress, ultimately lagging them behind in comparison with the developed or advanced ones.

The reservation systems favored certain communities before independence as well. In several areas of British India demands for various forms of positive discrimination had been made. In 1882 and 1891<sup>3</sup> Shahu, the Maharaja of the princely state of Kolhapur, introduced reservation in favored of Non-Brahmin

<sup>1</sup> AIR 1993 SC 477, 1992 Supp 2 SCR 454.

<sup>2</sup> Asst. Prof. Hina Kausar and Kauser Husain, "Reservation In India: Deviating From Its Original Purpose." *Law Mantra, Vol. 2, Issue 8 (2015)*.

<sup>3</sup> Laskar Mehubul Hassan. "Rethinking Reservation in Higher Education in India". *ILI Law Review* 29-30 (2012).

and backward classes, much of which came into force in 1902. He provided free education to everyone and opened several hostels to make it easier for them to receive it.

Eventually with the purpose of eradicating the social, educational and economic disparities caused by purposeful societal discrimination in the past, reservation policy was thought to be inevitable and justified for deprived ones to attain justice. And, with that the Constituent Assembly introduced the **Quota** system in the Constitution of India. The depressed classes were assigned a number of seats to be filled by election from constituencies in which only they could vote, although they could also vote in other seats. The proposal was controversial: Mahatma Gandhi fasted in protest against it but Dr. B. R. Ambedkar becoming the leader of many among the depressed classes favored it. After negotiations, Gandhi reached an agreement with Dr. Ambedkar to have a single Hindu electorate, with Dalits having seats reserved within it. Electorates for other religions, such as Islam and Sikhism, remained separate. This became known as the Poona Pact<sup>4</sup>.

A very common form of caste discrimination in India was the practice of untouchability. Primary targets of the practice were the SCs, which was outlawed by the new Constitution of India. Reservation as a supportive policy was given in the field of education to the backward classes so that each of them could be able get quality education and for that government has reserved certain amount of seats in Universities and Colleges for the SCs, STs' and OBCs. In the quota system the seats are being reserved for the SC, ST is 15% and 7.5% respectively. Leaders like Rajarshee Shahu Maharaj, Dr. B. R. Ambedkar too took initiatives to help the people of those communities.

The question of reservation of jobs in the government sector became an issue intimately connected to the assurance of social justice in India. At the same it was controversial and conflict prone particularly after the decision taken to implement the Mandal Commission report in. The sudden decision by the central government to implement the Mandal Commission Report did infuse a new life into the already dormant and controversial reservation policy. It has sent shock waves through the entire society and political platform of India. In stark contrast to the government reaction to Kaka Kalelkar's Commission report and Mandal Commission report, it is observable that while the former was subject to intense debate and rejected, the latter was accepted without a murmur of hesitation by all political parties.

With that the **Caste based Reservation System** got introduced whereby its main intention was to improve conditions of the people of backward castes and community at every step which the framers of the Constitution ultimately aimed at. However, expectations never met the end.

### Constitutional provision of reservation:

#### Article 14

"The state shall not deny to any person equality before the law or equal protection of laws within the territory of India." Therefore, Article 14 highlights two aspects: equality before law and equal protection of laws. The obligation imposed on the state by article 14 is for the benefit of all persons within the territory of India. The benefit of Article 14 is therefore not limited to citizens. Every person whether natural or artificial, whether he is a citizen or alien, is entitled to the protection of this article<sup>5</sup>. However, the true scenario often depicts a different picture.

#### Article 14 and Admission to Educational Institution.

Admission to Educational institution has been a matter of judicial scrutiny for more than three decades. In the context to provide admission to educational institution such should be imparted to students on the basis of preferential treatment to the students on various grounds has been considered by the courts and such preferential treatment must be on the basis of Article 14. It has been observed that the scheme of any education must be such to provide the best and the meritorious students the best of education without considering the reservation policy, even if some of the educational institution considered reservation it should be such that only required students to be get admitted in these institution and not all those who are under the reservation category. In *Pradeep Jain v union of India*<sup>6</sup> the supreme court held that wholesale

<sup>4</sup> Menon V. P. (Reprinted Ed.), *Transfer of Power in India* (Orient Blackswan, 1957, 49-50).

<sup>5</sup> *National Human Right Commission v. State of Arunachal Pradesh*, AIR 1996 SC 1234.

<sup>6</sup> AIR 1984 SC 1420.

reservation in the seats in the M.B.B.S and B.D.S courses on the basis of domicile or residence within the state is unconstitutional and void as being in violation of Article 14<sup>7</sup>.

#### Article 15(4)

“Nothing in this article or in clause (2) of article 29 shall prevent the state from making any provision for the advancement of any socially and educationally backward classes of citizen or for the Schedule Castes and the Scheduled Tribe.” Such “special provision” as are permissible under the clause (4) of Article 15 must however be for the advancement of person belonging to those categories and therefore those special provision are not for the advancement of people who would not be included in this clause. Even clause (4) of article 15 & 16 cannot be applied to all the vague purpose of reservation. In *State of M.P v Mohan Singh*<sup>8</sup> the Supreme Court verdict that though prisoners were from the backward class they will be equally liable for punishment as of other prisoners as they have broke the law. The invocation of Article 15(4) in this context is thus wholly unjustified.

#### Article 16(4A)

“Nothing in this article shall prevent the State from making any provisions for reservation in the matter of promotion to any class or classes of posts in the services under the State in favor of SCs and STs which in the opinion of the State are not adequately represented under the State.”<sup>9</sup>

In *Indra Sawhney v Union of India*<sup>10</sup> it was thus observed by the court that article 16 (4A) does not contemplate or permit reservation in promotion. The court further observed that while it was just to say that the handicapped should be determined as backward class at the initial stage of career but it would be unacceptable in context of the concept of ‘Equality of Opportunity’ to say that such person should be elevated with promotion at every stage of his career.

In context of Constitution 85th Amendment Act, 2001, the Supreme Court in the case of *Jagdish Lal v State of Haryana*<sup>11</sup> clarified that when reserved candidates (Dalits or Tribals) had been promoted earlier to a general candidate, their seniority in the new cadre would rank from the date of their joining on promotion.

#### Article 16(4B)

“Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number of vacancies of that year”<sup>12</sup>

Article 16(4B) lifts the 50% cap on carry over vacancies. However in execution of the said ‘Carry Forward Rule’<sup>13</sup>, the apex court directed that two things should be taken into consideration: unfilled vacancies and the time factor as decided in the case of *M. Nagaraj v Union of India*<sup>14</sup>.

The Constitution also prohibits discrimination under the provision of Article 15, untouchability under that of Article 17 and trafficking of human being and forced labour under that of Article 23. It provides for specific representation through reservation of seats for the SCs and the STs in the Parliament under the provision of Article 15 Article 330 and the same in the State Legislative Assemblies under that of Article 332. But even so, instances of violations of uch provisions are quite evident at present time.

#### Constitution 124<sup>th</sup> Amendment Act, 2019

- Article 15(6) “Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making,—
  - (a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and

<sup>7</sup> Roopangshu Banerjee and Asst. Prof. Punam Kumari Bhagat, “Reservation system in India vis-à-vis right to equality: A critical study”, *IJAR*, Vol. 3, 87-90 (2018).

<sup>8</sup> AIR 1996 SC 2106.

<sup>9</sup> Constitutional 77th Amendment Act, 1995.

<sup>10</sup> AIR 1993 SC 477, 1992 Supp 2 SCR 454.

<sup>11</sup> AIR 1997 SC 2366.

<sup>12</sup> Constitutional 81st Amendment Act, 2000.

<sup>13</sup> Narender Kumar, *Constitution of India* (221).

<sup>14</sup> AIR 2007 SC 71.

(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten percent of the total seats in each category.”<sup>15</sup>

- Article 16(6) “Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten percent of the posts in each category.”<sup>16</sup>

The basic purpose to bring this 124<sup>th</sup> Amendment Act was that the economically weaker sections of citizens have largely remained excluded from attending the higher educational institutions and public employment on account of their financial incapacity to compete with the persons who are economically more privileged. The benefits of existing reservations under clauses (4) and (5) of article 15 and clause (4) of article 16 are generally unavailable to them unless they meet the specific criteria of social and educational backwardness<sup>17</sup>.

Whether or not the move passes the scrutiny of the Supreme Court will have to be seen. What is already evident, however, is the domino effect this move has had across the country. The Gujarat government has announced that benefits of EWS quota will not be given to those who have settled in the state after 1978. The Andhra Pradesh government has said that it will carve out half of the 10% EWS quota for the Kapu subcaste. Tejashwi Yadav from the Rashtriya Janata Dal has demanded that reservations be increased to 90%. The pattern is clear. Reservation policy has become a huge tool for vote mobilization rather than a corrective mechanism for the backwardness due to historic discrimination.<sup>18</sup>

### **The concept of ‘Creamy Layer’:**

The concept of ‘Creamy Layer’ owes for its birth to the Supreme Court of India<sup>19</sup> because Indian Constitution has no scope for the same. It generally refers to those backward caste be it SC, ST, OBC or even any unreserved one who may be regarded as untouchables or not got enough land, money to live a healthy life and their children will be not be able to get the reservation. For the first time the term creamy layer got introduced by the Sattanathan Commission in 1971 which reported that the “creamy layer” should be excluded from the reservation of civil posts and services granted to OBCs<sup>20</sup> and with that the “creamy layer” principle has been laid down by Supreme Court for the exclusion of the advanced sections of the backward class groups for the purpose of reservation. However it ultimately divided the society into backward and forward classes.

Subsequently, a committee was formed known as the “Justice Ram Nandan Committee” to identify the ‘creamy layer’ among the socially and educationally backward classes. They submitted their report on March 16, 1993 which was accepted by the government. It was thus published in column 3 of the schedule to the government of India. Later, in the case of *Ashok Kumar Thakur v State of Bihar*<sup>21</sup> the Supreme Court removed the criteria laid down by the State of Bihar and Uttar Pradesh for identifying the “creamy layer”, whereby excluding the affluent section for the purpose of promotion in job employment in favour of the backward classes.

### **Concluding Remarks & Suggestions:**

<sup>15</sup> The Constitution 124<sup>th</sup> Amendment Bill, 2019 (Bill No. 3 of 2019).

<sup>16</sup> Supra 15

<sup>17</sup> Supra 15

<sup>18</sup> Editorial, “Domino effect of EWS quotas”, *Hindustan Times*, Jan 28, 2019.

<sup>19</sup> *Indra Sawhney v. UOI*. AIR 1993 SC 477. Supreme Court tries to define “creamy layer” by quoting an office memorandum of Sept 8, 1993.

<sup>20</sup> Dr Pallavi Gupta, *Backward Class Reservation and Concept of Creamy Layer* (Deep and Deep Publications Pvt Ltd., 2012).

<sup>21</sup> AIR 1996 SC 75.

The framers of the constitution aimed at establishing a casteless and classless society. They aimed at uplifting the downtrodden section of the society and providing them with a dignified life by focusing upon their employment, education and social status. Thus in a nutshell, the foundation of concept of reservation was embedded into **Equity and Justice**. However, with time the entire got derailed from its track.

Thus, after reviewing various dimensions of reservation policy of the government protected under Article 15 and 16 several shortcomings of reservation policies have been brought into the notice. To eradicate those flaws and to achieve the desired goals of reservation policy, the authors' humble suggestions may be considered as follows:

- A constitutional amendment is required to clear the ambiguity of term “backward class” as mentioned in Article 15 and 16. Several times these expressions make confusion because women, children and persons living below poverty line are too categorized as backward and weaker section. Therefore, to remove this ambiguity an amendment for clarity is expected.
- In contest of the provision under Article 320 it is often complained that the political parties and the government in power wanted to sustain the reservations, just for the sake of counting their vote banks. Therefore, it is suggested that this is the right time to abolish such type of reservation by constitutional amendment and to restrain Indian politics from getting contaminated.
- A scrutinizing approach is required for the exact determination and classification of creamy layer. Besides it is strongly recommended that the concept of creamy layer should apply on elite class of Scheduled Caste and Scheduled Tribes also. It is also suggested that scheme of creamy layer should properly be reviewed with all due intelligence.
- Although the Government has introduced the 10% quota for Economically Weaker Section in unreserved category in haste but this is high time that the Government should revise policy regarding determination of poverty line and ensure that all poor and needy are coming under such ambit.
- And, above all the authors suggest that this is high time to focus on the basic challenge being faced by the Reservation Laws which is nothing else but faulty mechanism of implementation or execution of Laws or policies being formulated. The actual beneficiary is lacking in knowledge which is something of utmost concern presently.