

IS RESERVATION THE ONLY VIABLE ALTERNATIVE TO UPLIFT THE MARGINALIZED IN INDIA?

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ABSTRACT:

“History shows that where ethics and economics come in conflict, victory is always with economics. Vested interests have never been known to have willingly divested themselves unless there was sufficient force to compel them.” -Bhim Rao Ambedkar

Reservation as it is popularly known in India connotes that there shall be an affirmative action by the State to ensure that the downtrodden and marginalized are brought into the mainstream of the society and are able to live their lives with basic human dignity as envisaged in our Constitution. This is not an indigenous concept in the sense that it has been quite prevalent in other nations as well, notably in the USA it is referred to as 'affirmative action' and in UK it is known as 'positive discrimination'. It has been a significant cause of disagreement in the contemporary times when it comes to our country, as there is a cynical perspective of the majority who are not the beneficiaries of it and for the marginalized is nothing less than a panacea. However, it remains to be seen what is the ground reality of reservation in today's day and age. Its efficaciousness has been a subject of great scrutiny of legal as well as economic nature. It also cannot be denied that the political parties to woo a certain section of the demographic that too right before the elections by implementing the said reservation have used it as an eye-candy. Reservations by the State have some far-reaching ramifications on the Constitutional Jurisprudence of the country. This paper seeks to unravel the legalities, nitty-gritty's and other aspects of reservation in the context of India.

KEYWORDS: Constitution, Economically Weaker Section, Other Backward Classes, Reservation, Scheduled Castes and Scheduled Tribes.

I. INTRODUCTION:

Reservation in simple language implies to an act of withholding, reserving or keeping back some of the seats for the upliftment of status and standard of living of socially and educationally backward sections, classes or groups. Reservation in Indian law is a form of affirmative action whereby a percentage of seats are reserved in the public sector units, union and state civil services, union and state government departments and in all public and private educational institutions, except in the religious/ linguistic minority educational institutions, for the socially and educationally backward communities and the Scheduled Castes and Tribes who are inadequately represented in these services and institutions. The major reason for the inclusion of reservation scheme in Indian Constitution is that the framers of the Constitution believed that, due to the caste system, SCs and the STs were historically oppressed and denied respect and equal opportunity in Indian society and were thus under-represented in nation-building activities. Thus, to enhance their standards this scheme was made a provision under Article 15 and 16ⁱ

Reservation in India came in to address a context, much like the caste system itself did. The caste system meant to be an occupational division, took an ugly turn over the ages. Intermingling of classes were restricted and it led to untouchability and other social evils and built an oppressive environment of animosity. There is no denying that social discrimination based on caste, creed, and religion continues to be one of the most inhuman and evil practices in human society. The colonial rulers of India made the first introduction of reservation for the depressed classes in the Government of India Act of 1909. It did not matter that they themselves added too much of the discrimination. Later, even as the British seemed to sense that their grip over India was loosening, they decided on more “positive discrimination”, now on religious lines. Muslims and Sikhs, Indian Christians and Anglo Indians, Hindus and Europeans were to all have their Quota of representation. The Dalits would have their share of reservations too.ⁱⁱ

The lesser-known fact about reservation is that it was an issue of great complexity and much contention as well whilst it was being deliberated and debated upon in the Constituent assembly. It is believed that Dr. Ambedkar was not in favor of these reservations and was very reluctant to pass them through the assembly however, he agreed on this condition that these reservations shall cease to exist after a period of 10 years. The then Prime Minister Shri Pandit Nehru was not an ardent supporter of reservation as well in fact he in a letter to all the Chief

Ministers went on to say, "The only real way to help a backward group is to give opportunities for good education. This includes technical education, which is becoming more and more important. Everything else is provision of some kind of crutches which do not add to the strength or health of the body"ⁱⁱⁱ.

The situation of reservation in the Indian context has only seemed to further entangle with the 103rd Constitutional Amendment^{iv}, which has introduced a new class of reservation, which is for the persons having an annual family income of less than Rs 8 lakhs and other conditions, this new genus is colloquially or otherwise known as the Economically Weaker Section (EWS). The implication of this maneuver is that now there are four categories in reservation in India viz. SC's and ST's, OBC's and EWS.

II. OBC RESERVATION A SOLUTION TO THE PROBLEM OR A PROBLEM ITSELF

In 1979, the Mandal Commission was established to assess the situation of the socially and educationally backward. The commission did not have exact figures for a sub-caste, known as the Other Backward Class (OBC), and used the 1931 census data to estimate the OBC population at 52%, and further classified 1257 communities as backward. Determining that 52% of our people are Other Backward classes, of course, is not enough. To make its recommendations operational, the Mandal Commission had to specify which castes in each state were backward. And to do so it had to assess several things about them: from nebulous things like the extent to which they were discriminated against socially to easy-to-get things like the extent to which they were represented in services, elected bodies, etc. In 1980, the commission submitted a report, and recommended changes to the existing quotas, increasing them from 27% to 49.5%. The report was implemented in 1990 amid a great deal of controversy, and led to the resignation of the then acting Prime Minister, V.P. Singh. According to 2001 census, out of India's population of 1,028,737,436 the Scheduled castes comprises 166,635,700 and Scheduled Tribe 84,326,240, that is 16.2% and 8.2% respectively. There is no data on OBCs in the census. However, according to National Sample Survey's 1999-2000 round around 36 per cent of the country's population is defined as belonging to the Other Backward Classes (OBC). The proportion falls to 32 per cent on excluding Muslim OBCs. A survey conducted in 1998 by National Family Health Statistics (NFHS) puts the proportion of non-Muslim OBCs as 29.8 per cent. In other words, we do not have a reliable Census headcount

for the OBCs, except that made by State-level Backward Class Commissions, which are not really Census-like in nature. It may be useful to have a detailed caste-wise census to look at the actual numbers. This could be attempted at least in the coming Census.^v

The key point here being that the provisions for Scheduled Castes and Scheduled Tribes were present in the original draft of the Indian Constitution in the form of Article 15 and Article 16 and that the Reservation for Other Backward Classes (OBC) was implemented only from the year 1993. The OBC's were not originally intended to get benefits of the reservation. The OBC reservations opened a Pandora's box of problems with every other linguistic community/caste group agitating for them to be given the status of OBC.

This article in no manner whatsoever is trying question the legitimacy of the OBC reservation however it is trying to point out the loopholes and the grey area in the implementation of the said reservation. India as a society has undergone a metamorphosis through the ages, which has led to multiple groups/communities being subject to violence and ostracism. One cannot really determine through a universal yardstick as to which community was oppressed and socially backward and which was prospering hence the chaos, which has gripped the landscape in terms of OBC reservation.

The pertinent question, which arises, is that if all the major linguistic/religious groups seek reservation and achieve to get it will all the persons in those groups truly benefit. Hypothetically speaking if 80-90% of the population is a beneficiary of reservation it will lead to cutthroat competitions among the beneficiaries of reservation for those seats. It will essentially mean that almost everyone will have reservation and if everybody will have reservation nobody will have reservation. The Constitutional Provision will itself become futile.

The State is on a very slippery slope here and needs to proceed with utmost caution and discretion whilst dealing with the OBC reservation. It cannot simply succumb to any demand of reservation made by any group which prima-facie does not appear in need of reservation at the same time it also cannot refuse a constitutionally protected right to those who are in the true sense marginalized.

III. JUDICIAL PRONOUNCEMENTS AND LEGAL SCRUTINY OF RESERVATION

Reservation as a concept needs to understand in terms of its legality. It is enshrined in the Constitution, which is the grundnorm in Indian jurisprudence. Just as all statutes derive their authority or sanction from this grundnorm reservation is no different. It finds a mention in Chapter III of the Constitution, which is the Chapter of fundamental rights and certain other parts as well. We shall have a glance at all those provisions and understand their intrinsic value. There also have been multiple petitions in history of independent India in which the Constitutionality of reservation as a provision has been challenged through judicial review. We ought to look at the landmark cases to that extent as well.

The Constitutional Provisions entailing reservation and their assessment is as follows:

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.—(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to— (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 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.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes 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.

(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

(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 per cent. of the total seats in each category.

16. Equality of opportunity in matters of public employment.—(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office [under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation [in matters of promotion, with consequential seniority, to any class] or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(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 per cent. reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

(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 per cent. of the posts in each category.^{vi}

As there is great clarity that these provisions are under the Right to Equality as envisaged in the Constitution the relevant ones from the abovementioned articles being 15(4),15(6),16(4) and 16(6). After examining these provisions one can infer that the State whilst preserving and upholding the right to equality is bound to carve out an exception for the SC's, ST's, OBC's and EWS. The presence of the said provisions is of paramount importance since in its absence these exceptions would not have been plausible to implement them without abridging the rights of the other citizens. The stark contrast here with those exceptions can only be explained presuming that this were inserted by keeping in mind the principle of equity. Equity in layman's terms would mean that there should be a level playing field for all citizens. Further to elaborate it means that all persons from the society have an equal opportunity to achieve anything they set out to and that their caste, religion, creed and economic status are no barriers in doing so. Therefore, these reservations are given in the sphere of public employment and education as a means to the end of equity. It is fascinating to observe how the State has reconciled the two divergent principles of equality and equity.

The wide array of judicial precedents on the matter of reservation are as follows^{vii}

In the case of *Nain Sukh Das v. State of U.P.*^{viii}, the Supreme Court invalidated an Act of the State legislature which provided for elections on the basis of separate electorates for members of different religious communities.

Clause (4) was added by the Constitution (First Amendment) Act, 1951 as a consequence of the decision of the Supreme Court in *State of Madras v. Champakam Dorairajan*^{ix}. In that case the Court struck down the communal G.O. of the Madras Government which, with the objective to help the backward classes, had secured the proportion of students of each community that could be admitted into the State medical and engineering colleges. Although the Directive Principles of State Policy envisaged in Article 46 of the Constitution has laid down that the State should promote with special care the educational and socio-economic interests of the marginalized and protect them from discrimination, the court held that “the Directive Principles of State Policy have to be in consonance to with and act as an ancillary to the Chapter of Fundamental rights”. Now clause (4) enables the State to make special provisions for the upliftment of socially and educationally backward classes of citizen or for the Scheduled Castes and Scheduled Tribes. Such provisions include reservations or quotas and can be made in the exercise of executive powers without any legislative support.^x

In *M.R. Balaji v. State of Mysore*,^{xi} it was held that the caste of a group of persons cannot be the sole or even predominant factor though it may be a relevant test for ascertaining whether a particular class is a backward class or not. Backwardness under Article 15(4) must be social and educational, and that social backwardness is, in the comprehensive assessment, the result of poverty. One’s occupation and place of habitation could be the other relevant factors in determining social backwardness. The Court nullified the test of backwardness which was based predominantly, if not solely, on caste. In this instance the validity of a Mysore Government Order reserving 68 per cent of the seats in the engineering and medical colleges and other technical institutions in favour of backward classes including the Scheduled Castes and Scheduled Tribes was challenged. The Supreme Court characterized Art. 15(4) as an exception to Art. 15(1). Reservation of 68 per cent of the seats in the colleges was found to be plainly inconsistent with Article 15(4) of the Constitution.

In the *State of U.P. V. Pradeep Tandon*,^{xii} in admission to medical colleges in U.P. in favour of candidates from- (a) rural areas, (b) hill areas and (c) Uttarakhand area was challenged. The categorisation was based on geographical or territorial considerations because in the eyes of

the government the candidates from these areas constituted socially and educationally backward classes of citizens. The Court upheld reservations for persons from hill and Uttarakhand areas. It was concluded that in the absence of means of communication, technical processes and educational facilities meant that the poor and illiterate people in the remote and sparsely populated areas shall be deemed backward. However, reservation of seats for rural areas was nullified because the division of the people on the ground that the people in the rural areas were poor and those in the urban areas were not, was not supported by any empirical evidence. Further, the rural population was heterogeneous and not all of them were educationally backward.

This question was reconsidered in *Jayasree v. State of Kerala*^{xiii}, where the Hon'ble Apex Court was called upon to ascertain whether the constitutional protection could be extended to a person who belonged to a backward community but the family's income exceeded the prescribed limit of certain amount per annum. The court held that in ascertaining social backwardness of a class of citizens, it may not be irrelevant to consider the caste of group of citizens. Castes cannot, however, be made the sole or dominant test as social backwardness which results from poverty is likely to be aggravated by considerations of caste. This shows the relevance of both caste and poverty in determining the backwardness of the citizens but neither caste alone nor poverty alone can be the determining test of social backwardness.

Upholding the validity of a total of 49.5 per cent reservation (22.5 per cent for SCs and STs and 27 per cent for SEBCs) in the *Mandal Commission case*,^{xiv} the Court held that unless any extraordinary situation Court mentioned of a far-flung remote area whose population needs special treatment for being brought into the mainstream. For such cases the Court suggested extreme caution and making out of a special case. The 50 per cent limit does not include those members of SEBCs who get selected on their own merit. They are entitled to get adjusted against the open category. The 50 per cent limit, however, applies to all reservations, including those which can be made under Article 16(1), i.e., altogether the reservation should not exceed 50 per cent limit. But this limit applies only to reservations and not to any other form of affirmative action. Therefore 50 per cent limit may not apply to many situations under Article 15(4) and 16(4). For the application of 50 per cent rule a year should be taken as the unit and not the entire strength of the cadre service or the unit, as the case may be. So long as this limit is observed, carry forward rule is permissible. In this case, the Court clearly held that Article

15(4) and 16(4) are not exceptions to clauses (1) and (2) of those articles or to Article 14. They are rather the means to the end of right to equality as enshrined in those articles. Article 16 of the Constitution deals with the equality of opportunity in matters of public employment. It is incumbent with the clause which says that nothing in the article would prevent the States from making any provision for reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the service under the State.

In the case of *Gazula Dasaratha Rama Rao v. State of A.P.*^{xv} Justice Das stated:

“Article 14 guarantees the general right of equality; Articles 15 and 16 are instances of the same right in favour of citizens in some special circumstances. Article 15 is more general than Article 16, the latter being confined to matters does not mention descent as one of the prohibited grounds of discrimination as Article 16 does.”

In *Devadasan case*^{xvi}, the Hon'ble Apex Court was required to adjudicate upon the validity of the "carry forward rule". The carry forward rule envisaged that in a year, 17½ per cent posts were to be reserved for Scheduled Castes/Tribes; if all the reserved posts were not filled in a year for want of suitable candidates from those classes, then the shortfall was to be carried forward to the next year and added to the reserved quota for that year, and this could be done for the next two years. The result of the rule was that in a year out of 45 vacancies in the cadre of section officers, 29 went to the reserved quota and only 16 posts were left for others. This meant reservation up to 65% in the third year, and while candidates with low marks from the Scheduled Castes and Scheduled Tribes were appointed, candidates with higher marks from other classes were not taken.

In *State of Kerala v. N.M. Thomas*,^{xvii} the Hon'ble Apex Court held that it was permissible to give preferential treatment to Scheduled Castes/Tribes under Art. 16(1) outside Art. 16(4). The Court observed: Art. 16(4) is not in the nature of an exception of Art. 16(1). It is a facet of Art. 16(1) which fosters and furthers the idea of equality of opportunity with special reference to an under privileged and deprived class of citizens. Thus, Art. 16(1) being a facet of the principle of equality enshrined in Art. 14 permits reasonable classification just as Art. 14 does. The majority opined that Art. 16(4) is not an exception to Art. 16(1). Art. 16(1) it permits reasonable classification for attaining equality of opportunity guaranteed by it.

In *Ashoka Kumar Thakur v. State of Bihar*^{xviii}, the Hon'ble Apex Court has evaluated the validity of unrealistically high levels of income or holdings of other conditions prescribed by the Legislatures of UP and Bihar as criteria to identify the creamy layer. The Hon'ble Apex Court has quashed these conditions as discriminatory. The Court has ruled that these conditions laid down by the two States have no 'nexus' with the object sought to be achieved. The criterion laid down by the two States to identify the creamy layer are violative of Art. 16(4), wholly arbitrary, violative of Art. 14, and against the law laid down by the Hon'ble Apex Court in the *Mandal* case, where the Court has expressed the view that a member of the All India Service without anything more ought to be considered as belonging to the "creamy layer".

As the recent trend has shown that the State legislatures have willfully disobeyed and ignored the 50% ceiling devised by the Hon'ble Apex Court in the *Mandal case*^{xix}. All this in pursuit of fetching votes from certain communities. These moves can have some electoral gains in the short-run it definitely goes against the interest of the society at large in the long-run. It is crystal clear that if State Legislature's want to give away reservation to certain populous communities/caste groups who do not already have it, they will exploit the OBC reservation in order to accomplish their nefarious intentions. That is so because the OBC reservation is quite ambiguous and it is not precisely defined as to what constitutes as "backward". These maneuvers negate the interest of the communities in question itself let alone the interest of the one's not in question.

The 103rd Constitutional Amendment further complicates the legality in this matter because inserting such an amendment is facile but to be able to sustain it through the judicial scrutiny is difficult. The argument against this amendment is that it is violative of the basic structure of the Constitution because it alters the very essence of the original reservation provision which was only intended for historically marginalized and oppressed caste groups/social groups. This new genus of EWS does not seem to fit in that silo of reservation and is in diabolically opposite direction on plain reading. Assuming it somehow stands the test of law what will be the scenario for its implementation. Empirical data suggests that the number of persons as per the present criterion in EWS are estimated to be somewhere around 85-95%^{xx} of the population. These figures do not look pleasing from the perspective of the legislature who passed it. If such a large chunk of the population will be deemed eligible for reservation one can only ponder who will be left out. Thus, one can only infer this amendment which creates reservation of 10%

for 85-95% of the population seems like a good move on paper but in the true sense only contributes to the devaluation of the word "reservation".

IV. CONCLUSION

It is well established that reservation is one of the most challenging socio-political issues in the contemporary times facing our country. Its complications can be explained as it only emerged because of the feudal caste-system being prevalent in our society, a system evolving and entangling over the course of hundreds and thousands of years. The solution to a complicated problem cannot be simple is something everybody concurs with. Reservation was conceived as an interim measure to bridge the gap between communities and promote inclusiveness. Almost seven decades later one can still fathom if that goal has been achieved or not. Let there not be any doubt that this issue will remain a cause of disagreement as long it exists. The scenario one must consider is a country without reservation in the future and think beyond reservation as a tool to uplift the marginalized in this country. This is not to imply that we need to do away with reservation at present or in the near future but rather embark on a quest for a better alternative in the distant future. Some alternatives and ancillaries to reservation would be: 1)The State shall ensure that good quality higher/technical education be provided to every citizen seeking it and that nobody is secluded for a discriminatory reason. 2) The State along with other stakeholders formulate a plan to revamp and rejuvenate the system of higher education in our country because at present it is in shambles as long as the quality of the education offered is not top-notch it would not help the marginalized in any manner.3)The State may propagate awareness about reservation policies to the masses in order to sensitize those who are not the beneficiaries of these policies and promote harmony among communities at large. 4)The State ought to reconsider its stance with respect to OBC and EWS reservation as the shortcomings in both of these categories are too jarring and they only add on to the burden of the state if not implemented properly which has been tragically the case so far. Thus, to conclude this statement "if caste is a thing of the past reservation should also be, however if caste still prevails in our lives so should reservation for the victims of the same caste system".

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