

RESERVATION OF ECONOMICALLY WEAKER SECTIONS UNDER THE CONSTITUTION 103RD AMENDMENT ACT, 2019

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ABSTRACT

The Constitution (One Hundred and Third Amendment) Act, 2019 introduced a maximum of ten percent reservation to the “economically weaker sections” of society by amending Articles 15 and 16. This shall not be applicable to the categories already mentioned under Articles 15(4) and 16(4). Through this research paper the author aims to examine this amendment’s constitutionality and whether providing reservation to economically weaker sections is actually a task of the State or is it limited to providing equal opportunity to the socially backward classes. If the answer to the former question is affirmative then what is the criteria to determine the economical weakness? As the government has itself confessed that the criteria given by it is inadequate to decide so, then it puts the amendment in a difficult position to actually get implemented. The purpose of providing reservation is doing justice to the under represented sections of society and in turn doing justice to the whole of the society. The foundation of a just society is equal liberties and equal opportunity to all. So reservation aims to put all the people at the same starting point in a race. But if a section of society has not been under represented or socially/educationally depressed, then is it upon the State to treat them unequally (positive discrimination) or is it the duty of the State to do positive action by providing assistance to those who are placed at the lower end of the economy? This paper aims to differentiate between formal and substantial equality and between positive discrimination and positive action while analysing the objective behind the amendment. The author has used primary as well as secondary sources of research to come to the conclusion that this amendment is unconstitutional and many changes are required in it if it to be implemented fruitfully.

Keywords: Economically weaker sections, EWS quota, 103rd Amendment, Equality, Reservation, Quota, Schedules castes, Constitution, Equality of opportunity, Substantive equality, social and educational backwardness, economic backwardness, EWS reservation, constitutionality, Basic Structure

INTRODUCTION

The Constitution (One Hundred and Third Amendment) Act, 2019 introduced a maximum of ten percent reservation to the “economically weaker sections” of society by adding clause (6) to both Articles 15 and 16. This reservation can be implemented to all educational institutions, whether private or public and whether aided or unaided but not to the minority institutions and also on appointment to posts. The important aspect here is that this reservation shall not be applicable on the categories mentioned under Articles 15(4) and 16(4) who are already availing the benefits of reservation. The maximum limit provided by the amendment is ten percent beyond which reservation shall not be permissible. Regarding the question as to who are “economically weak”, the Act relies on the State to notify it from time to time on the basis of “family income and other indicators of family incomeⁱ”.

The Amendment has been criticised since the very beginning of its inception as unconstitutional, or by some for being just a vote grabbing gimmick by politicians for the forward castes in the country. Consequently it faced many writ petitions challenging its constitutionality in the court and is about to be examined by the Supreme Court that whether it violates the basic structure of the Indian Constitution. A five judges Bench comprising of Chief Justice of India U.U. Lalit J., S Ravindra Bhat J., Dinesh Maheshwari J., S B Pardiwala J., and Bela Trivedi J. has decided to examine three main issues in this matterⁱⁱ. All three issues pertain to whether the amendment violates the basic structure of the Constitution by a) allowing reservation based on economic criteria or b) reservation in admission to private unaided institutions or c) excluding Scheduled Castes, Scheduled Tribes and Other Backward Classes from the scope of the amendment.

It is evident here that the main contention of the petitioners is that the law violates the basic structure of the Constitution which this author has undertaken to examine in this paper later. It

is also being contended that the amendment violates the Supreme Court's ruling in *Indra Sawhney & Ors v Union of India*ⁱⁱⁱ, which sealed the total limit to reservation for all categories at fifty percent. The court also held that economic backwardness cannot be the only yardstick to identify a backward class.

This paper aims to understand the issues of equality and justice through the lens of jurisprudence and also examine what do the statistics say on the issue of representation of different classes in education and employment in the country. The author shall also analyse the original purpose of reservation introduced in our Constitution initially and shall address all the issues under different heads in this paper.

Objective and Provisions of Reservation in India

From the historical perspective, the idea of reservation stems from the caste system prevalent in the Hindu religion. People belonging to the bottom of the classification were treated more or less like slaves and untouchables. There were four "varnas" which were in the order of Brahmins (the intellectuals/ priests), Kshatriyas (the warriors/ rulers), Vaishyas (the merchants/ farmers) and the Shudras (the untouchables). The discrimination which the Shudras faced was so extreme that in certain societies they were asked to tie a broom behind their back so when they are walking their shadow gets swept off the broom. They were not allowed to do anything else than the most menial duties in a society.

The idea of reservation policy in India was originally developed by William Hunter and Jyotirao Phule in the year 1882. Mahatma Jyotirao Phule was a reformer in Maharashtra in the nineteenth century who worked relentlessly to uplift the backward classes in society. In 1882, Sir William Hunter was appointed the chairman of a Commission whose task was to survey the access to education in India. With the objective to educate Indians, Hunter travelled whole India and met important persons in the public field. Various committees were appointed in each district in order to assist the Commission. Experts were interviewed by the Commission on matters of education in their respective provinces. One of the experts was Jyotirao Phule who informed the Commission of his views in writing^{iv}. Because of these efforts, the Commission suggested the government to pay attention to the primary education of all the people of the country irrespective of their caste. All the recommendations were accepted by the government.

But the reservation system that we currently practice in our country was introduced by the then British Prime Minister Ramsay McDonald in 1933 when he came up with the idea of a “communal award”. Basically, the reservation scheme was introduced in India to get rid of the social malpractices against the historically oppressed classes who were denied their basic liberties. The target of this reservation scheme was to uplift the weaker sections of society so that they can get equal opportunities to work shoulder to shoulder with every citizen and not be discriminated against. This is why the issue was raised by Dr. B.R. Ambedkar in the Constituent Assembly who advocated for reserving posts for the oppressed classes in proportion to their population^v. Nowhere it was talked about providing reservation on the basis of low income or poverty or any other economical basis.

Now coming to the present provisions for reservation in India, the Indian Constitution provides the fundamental right to prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth under Article 15^{vi}. No one shall be denied entry to any public place on these grounds (Article 15(2)) and the State is empowered to make special provisions for women and children (Article 15(3)) and also for socially and educationally backward classes and the Schedules castes and tribes (Article 15(4)). This can be applied in case of private aided or unaided education institutions except minority institutions (Article 15(5)).

The fundamental right to equality of opportunity in matters of public employment is provided under Article 16(1) and no citizen can be discriminated in public employment on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them (Article 16(2)). The State is empowered to make provisions of reservation for advancement of socially and educationally backward classes (Article 16(4)) and provisions of reservations for advancement of Scheduled castes and tribes in matters of promotions (Article 16(4A)). Article 16 (4B) empowers State to consider backlog vacancies as different from past year vacancies with respect to the fifty percent ceiling limit.

The 103rd Amendment introduced new clause (6) to both the Articles. Article 15(6) empowers the State to make special provisions of reservation to economically weaker sections of society in any private or public education institution whether aided or unaided but not to minority education institutions and this shall be in addition to existing reservation. This shall not be applicable to the categories already availing benefit of reservation and cannot be more than ten

percent in total. The explanation clause mentions that what constitutes “economically weaker sections” shall be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage^{vii}.

The Economically weaker sections’ reservation was granted based on the recommendations of a commission headed by Major General (retd) S R Sinho. The Sinho Commission was formed to study economic backwardness among the general category and recommended that all below-poverty-line (BPL) families within the general category as notified from time to time, and also all families whose annual family income from all sources is below the taxable limit, should be identified as EBCs (economically backward classes). The Major Sinho Commission recommended that the limit for taxable income should be used to determine whether a candidate is economically backward.

However, it should be noted that the commission suggested that affirmative action other than reservations should be thought of, such as education and skill-building, and improvement in health and sanitation^{viii}.

Reservation on Economic basis

It is being argued that granting reservation solely on the basis of economic status violates the constitutional mandate of special protections provided for socially and educationally backward classes which is a part of the basic structure of the Constitution.

The Supreme Court has repeatedly held that economic backwardness cannot be the only yardstick to grant reservation, and reservation only grants the right of equal opportunity for the under-represented classes and is not a scheme to eliminate poverty^{ix}.

In the case of *Indra Sawhney & Ors. v. Union of India*, the court held that “a backward class cannot be determined only and exclusively with reference to economic criterion. It may be a consideration or basis along with and in addition to social backwardness, but it can never be the sole criterion”^x. It quashed the 10% reservation for economically backward segments. The Court noted that “although social and educational characteristics are comparatively unchangeable and readily provable, economic backwardness is a readily influenced or falsifiable criterion. Reserving 10% of vacancies between many open competition applicants on the grounds of income / property holding means excluding those above line from those 10%

seats. The issue is whether this can be permitted constitutionally? We don't believe so. This may not be acceptable to exclude a citizen from becoming regarded on the grounds of his revenue or property holding exclusively for appointment to an office under the State".

In a similar matter in 2016, the Government of Gujarat issued an executive order providing for 10% reservations in higher education and public employment for "economically weaker sections" of unreserved categories with annual income below Rs.6 lakhs" as an answer to the rising agitation from the Patidar community. This order was quashed by the Gujarat High Court^{xi} on the basis of the Indra Sawhney ruling.

As already discussed, hereabove that the whole system of reservation was introduced in India to protect the oppressed and depressed classes from exploitation at the hands of the forward classes in society. It was measure to safeguard the natural and fundamental rights of the backward castes as they had faced years of discrimination in all possible public fields like education, employment, health, sanitation and even little things like visiting a temple.

Now this new amendment is providing reservation to persons belonging to the forward castes when they had never faced any kind of discrimination in society. This is inherently opposed to the original idea behind reservation and reduces the State's positive affirmative action to mere political appeasement of the forward class. Although if we think of it, this actually would further decrease the share of general seats for the bulk of middle class families from the forward castes.

The government in its defence has quoted Article 46 of the Constitution, a Directive Principle of State Policy by saying that it's the duty of the State to protect the interest of weaker sections of the society. But the government seems to miss on the point that Article 46 directs the State to protect the economic and educational interest of the Scheduled castes and tribes and other backward classes.

Criteria for determining economic weakness

Now even if the court finds the amendment as not unconstitutional, deciding what constitutes as "economic weakness" is a whole another issue. The explanation clause under Article 15(6) states that the State shall notify from time to time what constitutes economic weakness on the

basis of family income and other indicators of economic disadvantage. This sounds fairly vague and unclear. The Ministry of Social Justice and Empowerment released a circular ^{xii}notifying that persons from the unreserved category and whose family income is below Rupees eight lakh shall be identified as economically weaker sections to avail the benefit of reservation. Family would mean the person and his parents, spouse, siblings below 18 years of age and children below 18 years of age. Income would mean income from all sources like agriculture, business, salary, profession, etc.

When asked by the Supreme Court as to how the government reached the criteria of Rs. 8 lakh income, the latter had no definite answer. The author here completely disagrees with the above ground to decide on a person's economic disadvantage. Financial capacity of a person is a dynamic and sometimes fleeting concept not to be equated with a person's social disadvantage. A person can change her financial position in a matter of, sometimes, months whereas it may take years to just remotely remove social discrimination in a society.

Consider a person who has faced generations of poverty and depravity whereas another person who was well off from inheriting huge wealth but recently lost everything to the addiction to gambling. Today both stand at equal footing in terms of financial capacity. Could you say that both deserve positive affirmative action by the State and a reserved post/seat in education? It is obvious that there is something lacking in this criteria set by the government in deciding economic disadvantage.

To estimate poverty, National Sample Survey Office collects data under the Ministry of Statistics and Programme Implementation and reports it to the NITI Aayog. Poverty line estimation in India is based on the **consumption expenditure** and not on the income levels because of various reasons like a) Variation in Income of self- employed persons and daily wage earners etc., b) Additional incomes of regular wage earners, c) tracing the general pattern of income is not feasible d) poverty not only depends on income but also on access to social services and other causes^{xiii}.

There is a concept of measuring poverty known as "Relative Poverty" where the family income is lower than the median income of the nation. This method is majorly used by developed nations. Therefore, the drawback of this method is that it does not give the correct picture in a developing nation like India where people under this category of relative poverty are not

essentially deprived of all basic needs but may not have the same standard of living as the majority of society. This means that they are relatively disadvantaged^{xiv}.

John Rawls' Principles of Justice and Equality

Let's understand the concept of equality through the theory of justice given by John Rawls. John Rawls was a liberal who argues against over emphasis on utilitarianism. According to him, there are two principles of justice. The first principle says that each person shall be given equal liberties in any society or in other words everyone should be able to access equal liberties in the socio-political system.

The second principle talks about justifying certain inequalities. He says that social and economic inequalities are justified if:

- a) It results in greatest "benefit" to the least advantaged. (the Difference principle)
- b) They are attached to offices and positions "open to all" under the conditions of fair opportunity. (Equal opportunity principle)

Rawls explained that there can be three ways through which there can be inequality in a society: a) legal inequality, b) birth and status and c) talent and effort. If the first two inequalities are present in a society it means it is not a just society whereas if only the third conditions in present then it can safely say that is a just society.

Let's understand this through an example. There are two friends X and Y out of which X is neurosurgeon and the Y is an auto rikshaw driver. Their incomes are twenty lakh per annum and twenty thousand per annum respectively. Suppose say X was born in a well to do family of Doctors and got the best education but Y was born in a poor family whose father was himself a rikshaw puller. Now this means there is an inequality of birth status.

This means that society is not just. But if both X and Y were born in well to do families but Y did not work hard because of which he earns very less as compared to X and consequently his children also could not good education and are not well- off till today. According to Rawls under this scenario the inequality in their incomes is justified based on talent and effort.

Both X and Y had equality of opportunity but still their incomes are not similar. This urges the author to analyse the concept of equality of opportunity in more details. Equality can be

classified broadly into “formal equality” and “substantive equality”. While the former talks of the traditional idea of equality which says that likes should be treated alike and unlike should be treated differently. This is based on distributive justice according to which everyone should be placed at the same starting point in life and for that measures should be taken to correct any discrimination faced by any group of people in history.

However, this concept of formal equality is opposed by classical liberalists who argue that the theory of distributive justice is repulsive to a liberal democracy as it imposes too much weight on State. Similarly, another drawback of this approach is that it neglects diversity in a society by giving concrete base to existing discrepancies^{xv}. A few jurists consider this over emphasis on certain disadvantaged classes of persons takes attention away from more important and serious discriminations that cause disadvantage^{xvi}.

The author would like to emphasise that the principle of inequality, i.e. treating like alike and so on is secondary to the principles of equal liberties and equality of opportunity. This brings us to the second type of equality called “substantive equality” which focuses on the equality of outcomes and gives substance to the concept of equality. In many ways the terms describing the equality of outcomes approach have politically controversial interpretations. Politically, more moderate interpretations exist in the form of special treatment provisions wherein it has been recognised that the principle of equal treatment sometimes requires different treatment for certain grounds of disadvantage^{xvii}.

There are various ways in which substantive equality can be achieved like “positive discrimination”, “affirmative action” and “reverse discrimination”. Positive discrimination is different from affirmative action in the sense that “Positive action means offering targeted assistance to people, so that they can take full and equal advantage of particular opportunities. Positive discrimination means explicitly treating people more favourably on the grounds of race, sex, religion or belief, etc. by, for example, appointing someone to a job just because they are male or just because they are female, irrespective of merit^{xviii}.”

We require positive discrimination in uplifting socio-educationally discriminated classes whereas we require positive action in removing economic disadvantages among the poor. This way, we would not compromise the equal opportunity of each and everyone in the society.

Constitutionality of the Amendment

The main contention of the petitioners in the matter is that the amendment violates the basic structure of the Constitution. There are many ways it apparently does so. First, it validates reservation based on economic criteria instead of social and educational backwardness. This issue has already been dealt by the author earlier. Whether this will amount to violation of basic structure or not is a question the Supreme Court will decide. The author can at best conclude that it is unconstitutional and against the original purpose of reservation.

Secondly, the amendment in effect amounts to flouting Supreme Court's decision to keep all the reservation within the fifty percent limit. This amounts to violation of basic structure of the Constitution as it dilutes the principle of equality enshrined under Article 14 of the Indian Constitution. In the case of *M.R. Balaji v. State of Mysore*^{xix}, the court was very clear in its stand that reservations cannot exceed the fifty percent ceiling.

In 2017, the Telangana government increased reservations for Muslims from four percent to twelve percent and for Scheduled tribes from six percent to twelve percent which amounted to total reservation in the state at sixty two percent. The Union government itself invalidated the law. In 2018 the Maharashtra government passed similar legislation which was again quashed on the same ground^{xx}.

Dr. B.R. Ambedkar had rightly pointed out in the Constituent Assembly that:

“Supposing, for example, that reservations have been rendered for a society or a catalogue of communities, totalling about 70 percent of the overall government posts and only 30 percent of the unreserved posts have been retained. Can anyone tell from the point of perspective of providing impact to the first principle, namely equal opportunities, this is satisfactory? In my judgment it can't be”^{xxi}.

Now whether exceeding the limit of fifty percent amounts to violating the basic structure of the Constitution, the author would like to quote the Supreme Court in the case of in *M. Nagaraj v. Union of India*^{xxii}, in which it held:

“The ceiling-limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, the inadequacy of representation and overall administrative efficiency are all

constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse.”

Thus, in one way or the other the amendment is faulted and violative of the Indian Constitution.

CONCLUSION AND SUGGESTIONS

The Supreme Court has time and again ruled that reservation cannot exceed fifty percent limit. In the case *Indra Sawhney v. Union of India*, it held that the ground of caste and not economic criteria can be used to identify backwardness under Article 16(4). If the criteria of economic disadvantage is taken into consideration then the majority of Indians would be covered under it and this would amount to deprivation of the right to equality of those who actually need reservation. This in turn would mean violation of the basic structure of the Constitution^{xxiii}. The court emphasised on the need to exercise power to implement reservation scheme fairly and reasonably by the government.

As already mentioned earlier, the Constituent Assembly debates mirror the same guideline that reservation cannot be granted to the extent that it covers the majority of seats. This power has to be exercised reasonably and limited to a minority of seats only.

The author concludes that the current amendment, though is a good step towards providing an opportunity to the economically disadvantaged groups of the nation but is a hasty legislation that needs a lot of corrections. As a professional in public life, who meets varieties of types of people in society, the author has come across numerous people from the forward castes who still hold on to the social superiority and bias against the oppressed classes. They are the ones who actually need a push forward to participate equally in public life.

To balance the interests of both, the socially backward and the economically backward- there needs to be struck a balance in the number of seats reserved for them so that the fifty percent ceiling is not violated and in turn the basic structure of the Constitution is kept intact as well. Here are a few suggestions by the author to implement the said amendment successfully and legally:

1. The criteria to identify economic backwardness needs a much thorough and meticulous research. Currently, due the hasty legislation there is a huge lacuna in this regard which needs correction. Without proper criteria set for actually identifying the group, the objective and purpose behind the law cannot be realised.
2. It is a settled law that reservation cannot be given to a majority of seats hence, the quantity of seats reserved for the Schedules castes, Schedules tribes and the other backward classes can be reduced by a little percentage in order to accommodate the ten percent reservation to economically disadvantaged groups. We are slowly closing towards almost a century of reservation given to backward groups and by now, things should have been better at promoting their interests. If not, there is a serious problem with the very concept of reservation itself.
3. To implement the above suggestion number (2), there is a possibility of huge political turmoil in the country. So, it is suggested that slowly very less quantity of seats may be reduced in order not to attract hostility from the backward classes.
4. The most suitable method to uplift economic backwardness is hitting at the very base of the cause of poverty. The government needs to do much more in terms of providing subsidies, welfare schemes, etc. The core of the problem lies in the “implementation” of such schemes. The red tapism and corruption in practically implementing welfare schemes is a huge issue in this country and the government needs to address this issue.
5. If the government is really concerned with the upliftment of the poorer sections of the society, then it needs to actually do something beneficial for them rather than just drafting faulty legislations to attract votes.

ENDNOTES

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- ⁱ INDIA CONST. art. 16, cl. 6.
- ⁱⁱ Anonyms, *Supreme Court reserves verdict on pleas challenging Centre's 10 per cent EWS quota*, The Times of India, Sept 22, 2022.
- ⁱⁱⁱ Indra Sawhney v Union of India, AIR 1993 SC 477.
- ^{iv} LAXMAN SHASTRI JOSHI, JOTIRAO PHULE 18 (National Book Trust, 1991).
- ^v Constituent Assembly of India Debates (Proceedings)- Vol. IX.
- ^{vi} INDIA CONST. art. 15.
- ^{vii} Supra Note 1.
- ^{viii} Malvika Parthasarathy, *The Mandal and Sinho Commissions: A Study in Contrasts Part I*, S.C.O., Jan 2022, at 1.
- ^{ix} K. Ashok Vardhan Shetty, *Can the ten per cent quota for Economically weaker sections survive Judicial scrutiny*, The Hindu, Mar 16, 2019.
- ^x AIR 1993 SC 477.
- ^{xi} Hardik Bharatbhai Patel thro. His Father Bharatbhai Narsibhai Patel v. State of Gujarat, R/SCR.A/6330/2015.
- ^{xii} Office Memorandum No. 20013/01/2018-BC-II of 17 January 2019, the Ministry of Social Justice and Empowerment.
- ^{xiii} Anonyms, *Poverty Estimation in India*, DRISHTI (Oct. 10, 2019, 02:10 pm), <https://www.drishtiiias.com/to-the-points/paper3/poverty-estimation-in-india.html>.
- ^{xiv} *Ibid.*
- ^{xv} Hepple et al. Bob et al. Szyszczak, Erika (ed.) *Discrimination: The Limits of the Law*, MANSELL PUB. LTD. 1, 261 – 280 (1992).
- ^{xvi} *Id* at 234.
- ^{xvii} Thlimmenos v. Greece, Judgment of 6 April 2000, (Application no. 34369/97).
- ^{xviii} Department for Communities and Local Government, *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain : A consultation paper*, DISCRIMINATION LAW REVIEW 61 (2007).
- ^{xix} M.R. Balaji v. State of Mysore, 1963 AIR 649.
- ^{xx} *Dr. Jaishri Laxmanrao Patil Vs. The Chief Minister and Ors.*, (2021) 8 SCC 1.
- ^{xxi} *Supra* note 5 ,Vol. VII.
- ^{xxii} M Nagaraj & Ors. v. Union of India & Ors., (2006) 8 SCC 212.
- ^{xxiii} *supra* note 3.