

# LEGALFOXES LAW TIMES

## CRITICAL EVALUATION OF RESERVATION FOR ECONOMICALLY WEAKER SECTION

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### 1. Introduction

Reservation is a controversial topic as well as highly debated topic in India. Reservation was added in the constitution for the empowerment of weaker sections of the society, who were exploited by the stronger section of the society for centuries. The constitution allows reservation to different categories on the basis of Caste, Gender, Economic Status or Creed. In present day India reservation is allowed to the varies sections, in various fields like, appointments and posts for government offices, and educational Institutions. This reservation is added with the purpose of making lives of suppressed people better.

After Independence reservation was given to of Schedule Caste (SCs), Schedule Tribe (STs), followed by that in 1980 Other Backward Classes (OBCs) got reservation and finally in 2019 Economically Weaker Section (EWSs) got reservation. Reservations help the categories to get help with recruitment, education, welfare schemes, and other social initiatives of the Government.

As far as reserved categories are concerned, reservation resulted positively in betterment of that section of people and help them to raise the quality of life and social status, but on the other hand unreserved categories/classes ended up feeling neglected and there could be considerate suffering for their hard work or opportunities that they lose to reserved categories with lower qualifications. There is a constant debate between curing historical wrongs and giving special privilege to specific sections. The authorities are constantly questioned on a daily basis regarding the reservation system and this often created a negative impact. However, a balanced reservation scheme along with a non-discriminative and considerate society can only solve the issues together.

### **1.1. Historical Background of Reservation.**

In 1882 William Hunter and Jyotiba Phule conceived the concept of reservation for the first time in India. In 1902, Shahu Maharaja of the princely state Kolhapur introduced the reservations in favor of non-Brahmin caste for education. Mysore and the princely states of Travancore and Kochi also supported his idea.

In 1932, an agreement was signed by the Dr. Ambedkar and Madan Mohan Malviya on behalf of Mahatma Gandhi. This act was the significant result of the Communal Award of August, 1932.

The communal award was provided by the British Prime Minister, Ramsay MacDonald. It is also known as MacDonald Award which extended the separate electorate for the schedule caste and other minority sections of the society.

This award of separate electorate was available for the Muslims, Buddhists, Sikhs, Indian Christians, Anglo-Indians, Europeans and the Scheduled Caste. He introduces this provision to solve the rising problems due to the caste systems in India. Under a separate electorates system, each community was allocated a number of seats in the legislatures

But many Indians including Mahatma Gandhi was against this award because they all were considering this provision as the controversy by the British Government of socially dividing the people of India

In September, 1932 an act was mutually signed by both of them at Pune and it was named as **Poona Pact**. This act considered the social approach of Mahatma Gandhi and political approach of Dr. Ambedkar but the goal was same to uplift the depressed class or untouchables who are called Schedule Caste today of society.

Then in 1990, Prime Minister **V P Singh** announced in the Parliament that the recommendations of the Mandal Commission would be implemented which was the 27% reservation of Other Backward Classes (OBC) in jobs in central Government services and public sector units.<sup>1</sup>

### **1.2. Reservation for the Economically Weaker Section.**

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<sup>1</sup> Law Insider <https://www.lawinsider.in/columns/what-is-the-history-of-reservation-in-india#post-13471-endnote-ref-3> (last visited Dec 17,2022)

The 103<sup>rd</sup> Amendment Act, 2019, which entered into force on 14 January 2019, amended the Article 15 and 16 of Constitution by introducing two new provisions. Those provisions gave power to the State to make a reservation up to 10% for economically weaker sections (EWS) for the people of unreserved category. This amendment excluded people of Schedule Caste (SCs), Schedule Tribe (STs), and Other Backward Classes (OBCs). Article 15 sub clause 6 enables state to make provisions for the advancement of economically weaker sections by making provisions that includes reservation for admissions in academic institution , whether funded by state or not.

The article excludes the minority educational institutions for this clause mentioned in Article 30(1) of the Constitution. Article 16 sub clause 6 gives power to the State to make provisions relating to reservation for appointment or post in public employment for the people of economically weaker sections. This article also exclude the Schedule Caste (SCs), Schedule Tribe (STs), and Other Backward Classes (OBCs). Now the Reservation to SCs, STs, and OBCs, is 15%, 7.5% and 27% respectively, adding this new class will amount to 59.50% reserved seats from the total seats.

## **2. What is the criterion for defining the Economically Weaker Section?**

In 2010 the Major Sinha Commission presented a study. The Major Sinho Commission studied economic backwardness among the 'general category'. The Union Government has used the Sinho Commission Report to justify reservations of 10% for Economically Weaker Sections in higher education and public employment.

The Major Sinho Commission, constituted by the UPA Government to study economic backwardness among the general category, consisted of Retired Major General S.R. Sinho, Narendra Kumar, and Mahendra Singh, an IAS officer. To study economic backwardness, the Commission visited all Indian States and Union Territories, held discussions with government functionaries, the media and social activists. The Commission sent questionnaires to state governments, conducted a workshop and seminar, and engaged with heads of social science institutions. The Major Sinho Commission recommended that the limit for taxable income should be used to determine whether a candidate is economically backward. It said that

affirmative action other than reservations should be thought of, such as education and skill-building, and improvement in health and sanitation.

In 2019, the NDA Government introduced 10% reservations for Economically Backward Sections (EWS) in higher education and public employment through the Constitution of India (One Hundred and Third Amendment) Act, 2019. Candidates with a family income of up to Rs. 8 lakh qualified for reservations under this category. The Government claimed that reservations for EWS were introduced on the basis of the Major Sinho Commission Report.

Hereinafter is an extract from the S.R. Sinha Report on Identifying Economic Backward Classes<sup>2</sup>

*“.....For the identification of Economically Backward Classes, an attempt was therefore made to project an overview of the different categories in our society, including economic backwardness among unreserved category or general categories. However, when the EBCs are considered, in principle, caste cannot be the basis for the identification of backwardness among them because caste is immobile and represent more or less fixed status characteristics, Hence; either the whole caste is forward or backward. And the mandate before the commission was to identify the EBCs among unreserved categories i.e. those which considered socially forward.*

*In the context, General Category (GC) refers to that segment of population that does not receive any reservation benefit under existing policies. It includes the people of the country of all classes and religions except the Scheduled Castes (SCs), Scheduled Tribes (STs) and Other Backward Classes (OBCs).*

*Economically Backward Classes (EBCs), thus, can comprise classes of people with poverty as their common attribute, which means the economic*

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<sup>2</sup> S.R. Sinha, COMMISSION FOR ECONOMICALLY BACKWARD CLASSES , Volume 1, 84 , 2010

*backwardness across all socioeconomic groups, cutting across castes and religions in unreserved categories.*

*Therefore, the EBCs in the present context mean those economically backward classes among general category, who are not covered under the existing policy of reservation/affirmative action/welfare measures.”*

With the help of this report government included the unreserved categories, and excluded the Schedule Caste (SCs), Schedule Tribe (STs), and Other Backward Classes (OBCs). From this bracket of the reservation. So now while it has been decided who will actually get the reservation, the next question arises is, How a person from unreserved category will be identified as economically weaker?

Hereinafter is an extract from the S.R. Sinha Report on Identifying Economic Backward Classes<sup>3</sup>

*“.....The Commission formed the opinion that extending the existing criteria to identify 'Creamy Layer' among OBCs could well serve as to decide the upper limit or as a criterion for identifying EBC families among GC too. However, the concept of Creamy Layer among OBCs included economic backwardness compounded with their social and educational backwardness also while among EBCs economic backwardness is the major concern. The Commission also noted that economic needs of EBCs among GC differ and hence just one criterion of BPL or setting creamy layer as upper limit would not be effective to ensure intended benefits to EBCs. There is a need to follow 'bottom up' approach to ensure benefits reaching to the neediest one. Therefore, it was felt appropriate that instead of taking the income limit for creamy layer, current no-taxable limit up to Rs. 1.60,000/- (as may be revised from time to time) could be taken as the criterion to identify EBCs among GC. This income limit will include the combined income of husband and wife and will exclude the income of their parents and adult children. Since EBCs are to be identified at family level,*

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<sup>3</sup> S.R. Sinha, COMMISSION FOR ECONOMICALLY BACKWARD CLASSES , Volume 1, 97 , 2010

*hence the upper income tax limit should also be considered at family level. The Commission also felt that criteria for identification of EBCs among GC should be simple and the existing criteria would be more effective. Thus, BPL families and non-income tax paying families could be identified as EBCs among GC. Accordingly, this Commission recommends that all BPL families among GC as notified from time to time and all those families among GC whose annual family income from all sources is below the taxable (currently Rs. 1, 60,000/per annum and as may be revised from time to time) should be identified as EBCs' As already indicated, this income limit will include the combined income of husband and wife and will exclude the income of their parents and adult children.”*

In this report, the committee suggested that BPLs are ab initio included in the criteria of EBSs Category. And the committee suggested the including any person in this will be through tax bracket, but the government upholds the criteria of 8 lakh rupees in the office memorandum.

An ‘Explanation’ in Article 15 of Constitution says that - For the purposes of this article and article 16, "economically weaker sections" shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.

In its Office Memorandum No.20013/01/2018-BC-II of 17 January 2019, the Ministry of Social Justice and Empowerment, Government of India has specified the criteria as follows

- a. Individuals (excluding) Schedule Caste (SCs), Schedule Tribe (STs), and Other Backward Classes (OBCs) whose family has gross annual income below Rs. 8 Lakh are to be identifies as the EWSs. Family for this purpose will include the person, his/her parents and siblings below the age of 18 years as also his/her spouse and children below the age of 18 years.

- b. The income shall include income from all source i.e. salary, agriculture, business, profession etc.
- c. Persons whose family owns or possesses any if the following assets shall be excluded from being identified as EWSs, Irrespective of the family income:
  - i. 5 acres of Agriculture Land and Above;
  - ii. Residential flat of 1000sq. ft. and above:
  - iii. Residential plot of 100sq. yards and above in notified municipalities.
  - iv. Residential plot of 200sq. yards and above in areas other than the notified municipalities.<sup>4</sup>

### 3. Critical Evaluation of the EWS reservation

To eliminate the social, educational, gender and economic inequalities and imbalance caused by the socio-religious discrimination in the past and to restore the historical injustices, reservation policy is completely justified. However, whether this reservation will help in rectifying those injustices or not is a subject to evaluation.

The Apex Court of India gave a split verdict on the issue with the 3:2 majorities.

The court framed the 3 main issues for the purpose of the checking its constitutional validity

- i. As to whether reservation is an instrument for inclusion of socially and educationally backward classes to the mainstream of society and, therefore, reservation structured singularly on economic criteria violates the basic structure of the Constitution of India?
- ii. As to whether the exclusion of classes covered under Articles 15(4), 15(5) and 16(4) from getting benefit of reservation as economically weaker sections violates the Equality Code and thereby, the basic structure doctrine?
- iii. As to whether reservation for economically weaker sections of citizens up to ten per cent. in addition to the existing reservations results in violation of basic structure on account of breaching the ceiling limit of fifty per cent.<sup>5</sup>

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<sup>4</sup> Government of India , Office Memorandum, Page 1  
[https://www.iimv.ac.in/images/OM\\_on\\_EWS\\_of\\_MSJE.pdf](https://www.iimv.ac.in/images/OM_on_EWS_of_MSJE.pdf)

<sup>5</sup> Janhit Abhiyan vs Union Of India WRIT PETITION (CIVIL) NO. 55 OF 2019 , Hereinafter Referred as ‘Janhit Abhiyan’

Further the court answer these question in assenting and dissenting judgment as follows

### 3.1.Majority View

- Justice Dinesh Maheswari, Justice Pardiwala and Justice Bela Trivedi, gave the assenting view and uphold the Reservation for the economically weaker section constitutionally valid.

According to Justice Maheswari, poverty is strongly linked to social and educational backwardness for the purposes of Articles 15(4), 15(5), and 16(4) of the Constitution when it comes to SCs, STs, and OBCs. Although he acknowledged that the issue is class poverty rather than individual poverty, he sees nothing wrong with not extending another benefit in the form of a reservation set aside for other economically disadvantaged groups. According to Justice Maheswari, when there is a vertical reservation, the quota set aside for them (beneficiaries of earlier reservation) is not diminished in any way, and that exclusion is the essential requirement to deliver benefit to the target group. Due to the need to strike a balance between the demands of non-discrimination and compensatory discrimination, does not violate Equality Code or basic structure.

Further the court answer these question in assenting judgment as follows

- i. According to the court “Reservation is instrument through which state can ensure the inclusion of all classes suffering from inequalities of the society. and ensure a egalitarian society. Further court clearly says that , it is a tool not just for including socially and educationally disadvantaged sections to the mainstream of society, but also to include any class or group that is so oppressed as to fit the definition of a weaker group. In light of the foregoing, reservations based only on economic reasons do not infringe upon any fundamental provisions of the Indian Constitution and do not harm its fundamental design.<sup>6</sup>

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<sup>6</sup> Janhit Abhiyan, Para 102



- ii. The court states exclusion of SCs, STs, and NCL OBCs as, “being in the nature of balancing the requirements of non- discrimination and compensatory discrimination”<sup>7</sup> which does not violates the basic structure doctrine.
- iii. The addition of 10 percent reservation violates the ceiling of 50 percent capped in “Indra Sawhney”<sup>8</sup>, the court said, “it does not violates the basic structure as the reservation is provided to a entirely new classes.” and the court interpreted the 50% ceiling is for the existing caste based reservation envisaged by Articles 15(4), 15(5) and 16(4) of the Constitution of India<sup>9</sup>. The court further said that “the ceiling limit not inflexible”

### 3.2. Minority View

- **Then chief justice, UU Lalit and Justice Ravinder Bhatt are of the view that is EWS Reservation in unconstitutional.**

In his vehement dissent, Justice Bhatt begins by stating that this court has approved an openly exclusive and discriminatory principle for the first time in the seven decades of the Indian republic. The Constitution's equality code (Articles 14–17) encourages social justice and equality while advancing inclusivity and allowing for accommodations. He observes that the exclusionary clause, which excludes SC/STs and members of economically disadvantaged sections from the benefits of economic reserve, is a death knell for the principles of equality and fraternity.

- i. According to Justice Ravinder Bhatt ‘The impugned amendment is merely enabling, and the state confer the power to make reservation for backward classes, including economically backward classes and thus it does not violates the basic structure doctrine.
- ii. Justice Bhatt is of the opinion that the exclusion of the SCs, STs, and NCL OBCs violates the basic structure doctrine as there exclusion violates right to equality, Justice Further said that the “ the exclusion of the SCs, STs, and NCL OBCs , is merely reasonable exclusion , cannot be accepted.

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<sup>7</sup> Janhit Abhiyan, Para 102

<sup>8</sup> Indra Sawhney and Ors. v. Union of India and Ors.: 1992 Supp (3) SCC 217

<sup>9</sup>Janhit Abhiyan, Para 102

iii. Justice Bhatt in his judgment writes , Breach of the 50% cap violates the basic structure doctrine and there is no need for a specific finding, but he pen downed the consequences of the breach of 50% cap as follows:

- a. The majority view of the bench –that the creation of new class is recipient of 10% reservation over above 50% limit ,can further help the ongoing proceeding to use the loophole In favor of state without the due proceedings of court.
- b. Justice Bhatt in his Judgment said “The final reason I'm not persuaded to concur with the viewpoint that Indra Sawhney was limited to reservations in Articles 15(4) and 16(4) because the contested amendments created a different type of criteria, is that allowing the breach of the 50% rule through this reasoning opens the door for additional violations, which would actually lead to compartmentalization; the rule of reservation could the rule of reservation could dealt well become rule of equality or the right to equality, could then easily be reduced to right to reservation - leading us back to the days of Champakam Dorairajan.”<sup>10</sup>

#### 4. Horizontal V/S Vertical Reservation

Horizontal and Vertical are the two types of reservations , Vertical Reservation is when the classes receiving the reservation are completely exclusive to each other , there is no direct connection between each other, while the horizontal reservation is a type of reservation when there is separate class formed within a class.

Suppose there is reservation to OBCs, ST/SCs, there is individual class receiving reservation exclusively it is called vertical reservation, now suppose there is reservation for women or trans- genders cutting from the vertical reservation of OBCs, ST/SCs it is called horizontal reservation.

The court while answering the question that “*whether exclusion of certain class violates the basic structure*” clearly mentioned that this reservation will be *vertical reservation*

*Hereinafter is the extract from the judgment*

*The amendment in question makes a reasonable classification between*

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<sup>10</sup> Janhit Abhiyan, Para 178

*“economically weaker sections” and other weaker sections, which are already mentioned in Articles 15(4), 15(5) and 16(4) of the Constitution and are entitled to avail the benefits of reservation thereunder. The moment there is a **vertical reservation**; exclusion is the vital requisite to provide benefit to the target group. In fact, the affirmative action of reservation for a particular target group, to achieve its desired results, has to be carved out by exclusion of others. The same principle has been applied for the affirmative action of reservation qua the groups of SEBCs, OBCs, SCs, and STs. Each of them takes reservation in their vertical column in exclusion of others. But for this exclusion, the purported affirmative action for a particular class or group would be congenitally deformative and shall fail at its inception. Therefore, the claim of any particular class or section against its exclusion from the affirmative action of reservation in favor of EWS has to be rejected.<sup>11</sup>*

Justice Mashewari is of the opinion that *“reservation for the benefit of economically weaker sections, the other classes, who are already availing the benefit of affirmative action of reservation by virtue of Articles 15(4), 15(5) and 16(4), are required to be kept out of the benefits of EWS reservation in Articles 15(6) and 16(6).”<sup>12</sup>*

## **5. Conclusion**

The arbitrary exclusion of SCs, STs, and OBCs from the newly established class of EWS is not addressed by the majority view. The degree of poverty among these segments is evident in data that is readily available. The majority also ignored the real justifications for affirmative action, which included SC/STs' and OBCs' underrepresentation in public employment as well as their social stigma and historical difficulties.

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<sup>11</sup> Janhit Abhiyan, Para 79

<sup>12</sup> Janhit Abhiyan, Para 89

Exclusion of the SCs, STs, and OBCs is unacceptable because a large number of the economically weaker section is comprised of the people from the SCs, STs, and OBCs. Their exclusion will amount to further inequality. According to some critics, with the help of these reservation the upper caste in being benefited.

Any new affirmative action policy should have included the existing disadvantaged groups. The fact that a reservation already exists for a completely unrelated reason does not justify its removal. It is imperative that we continue to discuss social justice, equality, non-discrimination, and brotherly commitments both inside and outside of Parliament. These principles alone may be sufficient to prevent further deterioration of constitutional principles.

The criteria decided by the government to provide the reservation to economically weaker section is without any basis and random –according to some critics , while government’s position is that they came up to the 8 lakh limit from the Sinha Commission Report , But the *Sinha Commission Report* actually never mentioned 8 lakh amount, they used the term “*taxable income*”. Now according the some critics , government will use this instrument as the vote bank and will continue to change the scope of EWS category for the vote bank politics.

Now the challenge is a huge number of population will fall under the criteria of 8 lakh income, through which that population will qualify for the reservation the , but the critical thing is that it will eventually increase the competition within the class , and thus the reservation will create further challenges instead of uplifting the particular class.

Several times the court has penned down the opinion that the reservation shall not become the *right of reservation*; it is merely a tool through which state can ensure the historical wrongs can be rectified. But due to the political structure of India reservation is being used as a tool of vote bank politics. Originally Reservation is for 20 years, but latter with the intervention of parliament it keeps on extending. At this

point of time, every caste, community is constantly trying to secure quotas for themselves

