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RESERVATION AND CONSTITUTIONAL LAW: 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 unequal.”

Felix Frankfurter

India stands for unity and integrity as a nation of different standings, ideology, religion, languages, castes, and topography. However, no such solidarity is portrayed when it comes to the standing Varna System framework that isolates Indians from Brahmins, Kshatriyas, Vaishyas, and Shudras (the most oppressed are the Scheduled Castes, Scheduled Tribe, and Other Backward Communities). Thus, the framers of the Indian Constitution implemented the Reservation policy to ensure equal social, political, educational, and economic rights and dignity for every person. The actual scenario portrays, shockingly, that even after 70 years of democracy, the political parties are using this strategy as a mere instrument for counting votes. With time, the government has endeavored to mitigate inequalities by reporting on various committees, adopting several statutes concluding with Amendment 124 of the Constitution. The Hon’ble Supreme Court has also provided guidelines in the case of *Indra Sawhney v. UOI*¹. However, those never met expectations. In context, this paper aims to portray the constitutionality of the reservation and critically examines whether the existing provisions are sufficiently competent to satisfy the need for the hour. This is a Doctrinal research paper by which the researcher had gathered secondary data from various Journals, Books, etc., and further detailed the comparison of those.

KEYWORDS –Reservation, Schedule Caste, Schedule Tribe, Other Backward Classes, Equality

¹ AIR 1993 SC 477; 1992 Supp 2 SCR 454.

INTRODUCTION

In India, the caste system is deeply enrooted to certain religious as well as sociological ideologies that are quite orthodox and that have ultimately alienated the countrymen from each other while classifying ethnic and minority groups. The result of this socioeconomic marginalization was the vague and illogical purity and pollution principle² which indicates that the lower caste people are inherently associated with such unhealthy occupations and are thus stigmatized from the mainstream population of society. Over half of the country's population, today comprises the Scheduled Castes (SC), Scheduled Tribes (ST), and Other Backward Class (OBC).

Since time immemorial, Indian society has observed these social, educational, and economic disparities among its people. Although there was no caste-based division in the Vedic society, it also came into its active form with the emergence of Brahminic culture in the Indian subcontinent. This was, in fact, a contribution by the Brahmins towards their community to ensure certain social, economic, and educational security while at the same time subjecting several other communities to their servant's role. Today's SCs, STs, and OBCs represent those populations that have experienced significant social, cultural, and educational deprivation, eventually lagging developed or advanced populations.

Before independence, the reservation system also favored certain communities. Requests for various forms of racial discrimination had been made in many areas of British India. Shahu, the Maharaja of the princely Kolhapur kingdom, instituted reservation in favor of Non-Brahmin and backward classes in 1882 and 1891³, most of which came into force in 1902. He offered free education for all and several hostels were opened to promote their reception.

Ultimately to eradicate the social, educational, and economic disparities caused in the past by purposeful societal discrimination, a reservation policy was thought to be inevitable and justified for those deprived to achieve justice. And, with this, the Constituent Assembly introduced the quota system in India's constitution. Several seats to be filled by election are allocated to the depressed groups of constituencies where they could vote only, although they could vote in other

² Asst. Prof. Hina Kausar and Kauser Husain, "Reservation in India: Deviating from Its Original Purpose." Law Mantra, Vol. 2, Issue 8 (2015).

³ Laskar Mehbubul Hassan. "Rethinking Reservation in Higher Education in India", ILI Law Review 29-30 (2012).

seats as well. The proposal was controversial: Mahatma Gandhi fasted against it in protest but it was favored by Dr. B. R. Ambedkar, becoming the leader of many among the depressed classes. Following negotiations, Gandhi reached an agreement with Dr. Ambedkar to have a single Hindu electorate, with seats reserved for Dalits within. Elections stayed separate for other religions, such as Islam and Sikhism. This has become known as the Poona Pact⁴. In India, the practice of untouchability was a very common form of caste discrimination. The SCs were the primary targets of the operation, which were banned by India's new constitution. In the field of education, reservation as a supporting policy was given to the backward classes so that each of them could obtain a quality education and for that government has reserved a certain number of seats for the SCs, STs, and OBCs in universities and colleges. The seats are reserved for the SC in the quota system, ST is 15 percent, and respectively, 7.5 percent. Leaders such as Rajarshee Shahu Maharaj, Dr. B. R. Ambedkar, too, have taken steps to support those groups.

The problem of reserving employment in the government sector became a problem that was closely linked to ensuring social justice in India. At the same time, it was controversial and prone to conflict especially after the decision to implement the report of the Mandal Commission. The central government's sudden decision to implement the Mandal Commission Report infused the already dormant and controversial reservation policy with a new life. It sent waves of shock through India's entire society and political platform. In sharp contrast to the government's reaction to the Commission report by Kaka Kalelkar and the Mandal Commission report, it is observable that while the former was subject to intense debate and rejected, the latter was endorsed by all political parties without a whisper of hesitation.

This introduced the Caste-based Reservation System whereby its main intention was to improve the conditions of backward caste and community people at every step that the Constitution framers ultimately aimed at. Nevertheless, expectations never met.

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

CONSTITUTIONAL PROVISIONS OF RESERVATIONS

ARTICLE 14 –

Equality before the law, no person shall be denied equality before the law or equal protection of laws in the territory of India Discrimination on grounds of religion, race, caste, sex or place of birth.⁵

It states that: “The state shall not repudiate to any person equality before the law or equal protection of laws within the territory of India.” Therefore, Article 14 highpoints two traits: Equality before Law and Equal Protection of Law. The compulsion imposed on the state by Article 14 is for the betterment and equality among the citizens so that they are not exploited within the territory of India. The benefit of Article 14 is therefore not limited to the citizens of India only, every person whether natural or artificial, whether he is a citizen or alien or non-citizen is entitled under the protection of the same.⁶

Article 14 and Admission to Educational Institution –

Admission to an institution of education has been a subject of judicial review for over three decades. In the form of admission to an educational institution, this would have been found by the courts based on preferential treatment for the students on different grounds and such preferential treatment should be based on Article 14. It has been witnessed that the scheme of any education must be such to deliver the best and the meritorious students, the best of education without considering the reservation policy, even if some of the educational institutions considered reservation it should be such that only obligatory students to be get admitted in these institutions based on reservation and not all those who are under the reservation category and are not deserving students.

In *Unni Krishna, J.P. & Ors V State of Andhra Pradesh & Ors*⁷, the court held that State action in allowing the fee for capitation to be charged by state-recognized educational institutions is entirely arbitrary and as such violate of Article 14 of the Indian Constitution. The Capitation Fee brings a clear class bias to the fore. "Admission of non-meritorious students by

⁵Constitution of India, 1950.

⁶ National Human Right Commission v. State of Arunachal Pradesh, AIR 1996 SC 1234.

⁷ 1993 AIR 217, 1993 SCR (1) 594, 1993 SCC (1) 645, JT 1993 (1) 474, 1993 SCALE (1)290.

charging capitation fees in whatever form strikes at the very root of the constitutional system and education system”

In *Pradeep Jain v Union of India*⁸, the court held that indiscriminately reserving the seats in the courses of M.B.B.S and B.D.S based on domicile or residency in the state is unlawful and invalid as in violation of Article 14.

ARTICLE 15(4) –

“Nothing in this Article or Article 29(2) shall prohibit the State from making any special provision for the development of any socially and educationally backward class of people or the Scheduled Castes and Scheduled Tribes”⁹ However, any 'special provision' as is appropriate under clause (4) of Article 15 must be for the advancement of individuals belonging to such groups and, accordingly, such special provision is not for the advancement of individuals who should not be protected by this clause. Also, clause (4) of Article 15 & 16 can't extend to all ambiguous reservation purposes.

In *State of M.P v Mohan Singh*¹⁰, the Supreme Court ruled that while inmates belonged to the inferior class, they should be as responsible for punishment as other inmates if they violated the statute. In this sense, therefore, the invocation of Article 15(4) is utterly unjustified.

In *M. R. Balaji And Others vs State of Mysore*,¹¹ the State of Mysore issued an order according to Article 15(4) of the Constitution declaring all communities in favor of SEBCs and SCs / STs except the Brahmin community as socially and educationally backward and reserving a total of 75% of seats in educational institutions. Such orders were given quarterly, with minimal variation in reservation percentage. A similar order was given later in which 68 percent of the seats were reserved for SEBCs, SCs, and STs in all Engineering and Medical Colleges and Technical Institutions in the State. Once, SEBCs were split into two advanced-class groups and more backward classes.

⁸ AIR 1984 SC 1420.

⁹ *Supra* note 5.

¹⁰ AIR 1996 SC 2106.

¹¹ AIR 1963 SCR 439.

ARTICLE 16 (4A) –

“No entity in this article will avert the State from creating any provision for the arrangement of appointments or posts in favor of any retrograde class of citizens which, in the view of the State, is not satisfactorily epitomized in the services under the State”¹²

In *Indra Sawhney v. Union of India*¹³, the court observed that Article 16(4A) did not consider or require a reservation for promotional purposes. The court further observed that while it was merely to say that at the initial stage of the career the disabled should be determined as a backward class, it would be unacceptable in the context of the concept of 'Equality of Opportunity' to say that such a person should be promoted at every stage of his career.

In the light of the Constitution 85th Amendment Act, 2001, in the case of **Jagdish Lal v State of Haryana**,¹⁴ the Supreme Court held that if reserved candidates (Dalits or Tribals) had been elevated to a general candidate earlier, their seniority in the new system would be ranked from the date of their admission to promotion.

ARTICLE 16(4B) –

“Nonentity in this article will avert the State from considering any vacant vacancies of a year which are earmarked for being filled up in that year in agreement with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be occupied up in any succeeding year or years and such class of vacancies shall not be well-thought-out together with the vacancies of the year in which they are being occupied up for determining the ceiling of fifty percent reservation on the total number of vacancies of that year”¹⁵ Article 16(4B) lifts the carry-over vacancies limit of 50 percent. However, in the execution of the said '**Carry Forward Rule**',¹⁶ the apex court ordered that consideration should be given on two things: unfilled vacancies and the time factor as decided in case of *M. Nagaraj v Indian Union*¹⁷.

¹² Constitutional 77th Amendment Act, 1995.

¹³ AIR 1993 SC 477; 1992 Supp 2 SCR 454.

¹⁴ AIR 1997 SC 2366.

¹⁵ Constitutional 81st Amendment Act, 2000.

¹⁶ Narendar Kumar, Constitution of India (221).

¹⁷ AIR 2007 SC 71.

The Constitution also prohibits discrimination according to Article 15, ineffectiveness under that provision Article 17 and human trafficking and forced labor, as provided for in Article 23. It provides for special representation in the Parliament by reserving seats for the SCs and the STs under Article 15, Article 330 and the same in the State Legislative Assemblies under Article 332. Nonetheless, instances of breaches of such provisions are at present quite obvious.

CONSTITUTION 124TH AMENDMENT ACT, 2019 –

- Article 15(6) 'nothing in this article or subclause (g) of Article 19(1) or Article 29(2) shall prevent the state from making,—
 - (a) any special provision for the advancement of any economically weaker sections of citizens other than those referred to in clauses (4) and (5); and
 - (b) any special provision for the progression of any economically weaker sections of citizens supplementary to the classes mentioned in clauses (4) and (5) in so far as such special provisions relate to their admission to educational institutions comprising private educational institutions, whether assisted or unassisted by the State, other than the minority educational institutions mentioned to in clause (1) of Article 30, which in the case of reservation would be in accumulation to the existing reservations and subject to a maximum of ten percent of the total seats in each category."¹⁸
- Article 16(6) "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor 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."¹⁹

The fundamental purpose of bringing this 124th Amendment Act was that the economically weaker sections of citizens remained largely excluded from attending higher education institutions and public employment because of their financial inability to compete with economically more privileged people. The advantages of existing reservations according to

¹⁸ The Constitution 124th Amendment Bill, 2019 (Bill No. 3 of 2019).

¹⁹ *Supra* note 17.

clauses (4) and (5) of Article 15 and clause (4) of Article 16 are generally inaccessible unless they meet relevant social and educational retrograde requirements²⁰

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 the 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 sub-caste. 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.²¹

CONCEPT OF CREAMY LAYER

The concept of 'Creamy Layer' owes India's Supreme Court for its birth, because of the Indian Constitution Does not provide scope for the same. The term 'means-test and creamy layer' first found its mention in the landmark judgment of the Supreme Court in the Indra Sawhney vs Union of India²² (also known as the Mandal Commission case), which was delivered on November 16, 1992, by a nine-judge Bench.

The creamy layer was then described as- "some members of a backward class who are socially, economically as well as educationally advanced as compared to the rest of the members of that community. They constitute the forward section of that particular backward class and eat up all the benefits of reservations meant for that class, without allowing benefits to reach the truly backward members"²³

For the first time in 1971 the term creamy layer was introduced by the Sattanathan Commission, which reported that the "creamy layer" should be excluded from the reservation of civil posts and services granted to OBCs²⁴, and with that, the principle of "creamy layer" was established by the

²⁰ *Supra* note 17.

²¹ Editorial, "Domino effect of EWS quotas", Hindustan Times, Jan 28, 2019.

²² 1993 AIR SC 477; 1992 Supp 2 SCR 454.

²³ *Indra Sawhney v. UOI*, AIR 1993 SC 477.

²⁴ Dr Pallavi Gupta, Backward Class Reservation and Concept of Creamy Layer (Deep and Deep Publications Pvt Ltd., 2012).

Supreme Court to exclude the advanced sections of the backward class groups for reservation purposes. Though it eventually alienated the society into backward and forward classes.

Creamy Layer Chronology:

- In 1980, the Mandal Commission report recommended that Other Backward Classes (OBCs) be given a 27 percent reservation in jobs.
- In 1990, the government of V.P. Singh declared such a 27 percent reservation in government jobs for the OBCs.
- In 1991, the government of Narasimha Rao initiated a reform to give priority among the OBCs to the weaker sections while granting the quota of 27 percent.

Thereafter a committee known as the "Justice Ram Nandan Committee" was formed to identify the 'Creamy layer' between backward classes, socially and educationally. They tabled their report on 16 March 1993, which the Government accepted. It was thus issued to the Indian Government in column 3 of the schedule. Later the Supreme Court, in the case of Ashok Kumar Thakur v State of Bihar²⁵ removed the criteria laid down by the State of Bihar and Uttar Pradesh for the identification of the "creamy layer," excluding the affluent section in favor of the backward classes to promote employment.

Creamy layer pertinent to SC/ST:

In the case of M. Nagaraj & Others vs Union of India & Others²⁶, the question arose concerning the validity of the following four constitutional amendments, claiming that those amendments made by the government were intended to reverse the judgments of the Court in the case of Indra Sawhney, 1992

- 77th Constitutional Amendment Act, 1995: The decision of Indra Sawhney had held that only in initial appointments and not promotions there should be reservation. But the government inserted Article 16(4A) into the Constitution through this amendment, allowing the state to make reservation provisions in matters of promotion for employees of SC / ST if the state thinks they are not adequately represented.

²⁵ AIR 1996 SC 75.

²⁶ AIR 2006 SCC 212.

- 81st Constitutional Amendment Act, 2000: It implemented Article 16(4B), which states that a particular year's unfilled SC / ST quota, when carried forward to the next year, will be handled separately and not clubbed with that year's regular vacancies. While the Indra Sawhney Case Supreme Court capped the reservation quota at 50 percent, the government, through this amendment, ensured that the 50 percent limit for such unfilled post forwarded was set at 50 percent.
- 82nd Constitutional Amendment Act, 2000: It inserted a condition at the end of Article 335 that allows the State to make any provision for relaxation in qualifying marks for members of the SC / STs in any examination or lowering of evaluation standards, for reservation in matters of promotion to any class or class of services or posts related to Union or State affairs. (Article 335 recognizes that special measures need to be taken to equalize the claims of SCs and STs on services and posts.)
- 85th Constitutional Amendment Act, 2001: It provided that the promotion reservation can be applied with 'consequential seniority' with retrospective effect from June 1995 that government servants belonging to the SCs and STs.

Although the Five-Judges Bench in Nagaraj case upheld the constitutional validity of all four amendments, in this case, the Supreme Court's following two validations became the bone of contention:

- First: In the matter of promotions, the Court declared that the State is not bound to make a reservation for SC / ST. However, if they wish to exercise their authority and make some provision, the State shall obtain, in addition to accordance with Article 335, quantifiable data demonstrating backwardness of the class and inadequacy of that class's representation in public jobs.
- Second: It also reversed its earlier stance in the case of Mandal, where it removed the definition of the creamy layer on SCs / STs (which applied to OBCs). The Nagaraj verdict made it clear that while the State has valid reasons, it shall ensure that its reservation does not result in an excessive breach of the ceiling-limit of 50%, or the destruction of the creamy layer principle, or the indefinite extension of the reservation. Thus, in this verdict, the Court extended the creamy layer principle also to SCs and STs.

The Court, which clarified its position in the case of *Jarnail Singh vs Lachhmi Narain Gupta*, refused to refer the above matter to a larger bench.

However, it invalidated the requirement for States to collect quantifiable data on the backwardness of SCs and STs while granting a quota in promotions as set out in the Nagaraj Court's verdict, but states need to back it up with adequate data showing an inadequate representation of SCs & STs within the framework. The Court followed the Nagaraj decision on the creamy layer principle of excluding the well-off among SC / ST communities from availing the profit.

The Court held that Scheduled Castes / Scheduled Tribes communities' socially, educationally and economically advanced cream must be excluded from reservation benefits in government services to transfer quota benefits to the weakest of the weaker individuals and not be snatched away by members of the same class who were in the "top creamy layer".

The Court also observed that the weaker sections will not be elevated if only the creamy layer inside that class bags all the coveted public sector jobs and perpetuates themselves, leaving the rest of the class as backward as they were.

CONCLUSION AND SUGGESTION

The constitution's framers were designed to establish a casteless, classless society. We wanted to elevate the downtrodden segment of society and give them a dignified life by concentrating on their work, education, and social standing. Thus, the cornerstone of the reservation definition was rooted in Equality and Justice, in a nutshell. With time the whole was derailed from his track, however. Thus, several shortcomings of reservation policies were brought into the notice after reviewing various dimensions of the government's reservation policy-protected under Articles 15 and 16. To eradicate those shortcomings and achieve the desired goals of the reservation policy, humble suggestions of the authors may be considered as follows:

- A constitutional amendment is needed to remove the ambiguity of the word 'backward class,' as alluded to in Articles 15 and 16. Several times these terms give rise to misunderstanding because women, children, and people living below the poverty line are

often classified as poorer and weaker. Therefore, an amendment for clarification is required to eliminate this confusion.

- In the contest of the clause according to Article 320, it is always argued that the political parties and the government in power wished to retain the quotas, merely to count their voting banks. Therefore, it is suggested that this is the right time to abolish such type of reservation by constitutional amendment and to prevent contamination of Indian politics.
- The exact determination and classification of the creamy layer requires a scrutinizing method. Besides, it is strongly recommended that the creamy layer concept should also be applied to the elite class of Scheduled Caste and Scheduled Tribes. It is also proposed that the creamy layer scheme should be checked correctly with all due knowledge.
- While the government has hurriedly implemented the 10% quota for the Economically Weaker Group in the unreserved group, it is high time the government revised its policy on poverty line determination to ensure that all the vulnerable to needy are covered by this.
- And, above all, the authors suggest that it is high time to focus on the fundamental challenge facing the Reservation Laws, which is nothing more than a faulty mechanism for implementing or implementing the laws or policies being formulated. The actual beneficiary lacks knowledge which is currently a matter of utmost concern.

