



## FLAWED 10% QUOTA

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### ABSTRACT

The concept of reservation is one of the most discussed and debated topics in the recent times. On January 14<sup>th</sup> 2019, the Constitution (103<sup>rd</sup> Amendment) Act, 2019 was brought into effect providing for 10% reservation in government jobs and educational institutions to *Economically Weaker Sections (EWS) of General category*. In India, owing to the destructive caste system, large sections of people have been historically stigmatized and discriminated on account of their castes. Thus reservation was introduced as a tool to redress historic injustices and provide for social upliftment of such backward classes. It was solely based on caste, since the latter was identified to be the predominant factor that contributed to social and educational backwardness. However, what started as a temporary measure has remained the same even after 70 years of independence. Caste-based reservation no longer fulfills the purposes for which it was introduced. They are only anti-secular and anti-progressive in nature. In today's world, caste is no longer the only obstacle in the way of development of individual. The poor people, owing to their financial incapacity, have historically been deprived of opportunities in education and public employment. Thus economically weaker section reservation is considered to be the right step towards uplifting the weaker sections of the society. However, the criteria that apply to EWS quota are highly defective and flawed. When applied, almost 95% of the population (unreserved category) fall under

the EWS category. Thus the very purpose for which the quota was introduced stands negated. Hence, it is imperative that in order to achieve the purpose for which EWS was introduced, the criteria on which it is based should be modified accordingly.

### 1. INTRODUCTION

Reservation is one of the most critically acclaimed measures devised to act against as well as to compensate for age-old social oppression and injustice faced by certain classes. Indian social framework is to a huge extent, a caste-based hierarchical framework. The presence of caste system resulted in a considerable section of the general public being denied the right to education, ownership of property and social equality. The system of reservation in India comprising of various governmental policies and programs, thus gave certain priorities in terms of reserving access to seats in the various legislatures, to government jobs, and to enrollment in higher educational institutions, to such groups that were considered underprivileged over the others. Otherwise known as affirmative action, reservation strives to enhance the status of historically disadvantaged castes and tribes such as the Scheduled Castes, Scheduled Tribes and Other Backwards Classes (OBC).

However, even after 70 years of independence, the demand for reservation has only increased owing to the vote bank politics that has eventually influenced the entire system.

The Constitution of India primarily governs reservation apart from statutory laws, rules and regulations. It prohibits untouchability and empowers the state to make special provisions for the backward classes.



The caste-based reservation dates back to 1902, when Shahu, the Maharaja of the State of Kolhapur, brought in reservation in favor of non-Brahmin and backward classes in the field of education. However, the type of reservation system that exists today was initiated by British Prime-Minister Ramsay Macdonald in the year 1932, which subsequently resulted in the Poona Pact. After Indian independence, there were many changes in the reservation system. The important one was the institution of Mandal Commission in 1979 to assess the situation of the socially and educationally backward classes and provide for recommendations. After analyzing in depth the conditions of various communities, they identified backward classes and recommended for providing 27% reservations to such Other Backward Classes. But the report was put in cold storage and it wasn't until the 1990s that such recommendations were implemented in Union Government jobs. Initially, the reservation was only intended to stay for a period of 10-15 years and was to be renewed for another few years if the need is still there, but ever since its implementation, it has only extended. Currently, around 15% of the seats are reserved for SCs, 7.5% for STs and 27% for OBCs, leaving just about 50% of the seats for the 'general category'.

## **2. ECONOMICALLY WEAKER SECTION QUOTA**

The status quo was disturbed when the Union Government passed the 124<sup>th</sup> Amendment Bill which paved way to the 103<sup>rd</sup> Constitutional Amendment Act on 14<sup>th</sup> January 2019. The Act amends Articles 15 and 16 of the Indian Constitution by adding a clause that empowers the state to provide up

to 10% reservation in education and public employment for “economically weaker sections” (EWS) of citizens other than the SCs, STs and OBCs who were covered under the existing reservation system. It is over and above the existing scheme of reservations, increasing the total to 59.50%.

- *Article 15(6) states:*

(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.

- *Article 16(6) states:*

(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 per cent of the posts in each category.

Explanation - For the purposes of 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.

The Centre via Office Memorandum no. 20013/01/2018-BC-II dated January 17, 2019 defined *Economically Weaker Sections* as persons whose annual household income is less than 8 lakhs, or owns/possesses agricultural land less than 5 acres, or residential flat less than 1,000 sq. ft., or residential plots less than 100 sq. yards in notified Municipalities, or residential plots less than 200 sq. yards in non-notified municipalities. As already mentioned above, Article 16(6) also allows states (defined under Article 12 of the Constitution) to notify EWS *from time to time on the basis of family income and other factors of economic disadvantage*, to be applied to respective state education and state public employment.

### **3. WHY RESERVATION SHOULD BE BASED ON ECONOMIC CRITERIA**

The basis of the policy of reservation is not intended to be disparaged. But much water has flowed down since the conceptualization of the reservation system. Keeping aside the politics attached to the decision to introduce EWS quota, it's an important step towards an era of income-based reservation though the transition wouldn't be an easy one. It will instill a sense of correspondence between citizens.

It was in 1979 when the Mandal Commission, in its report, identified many communities that were considered socially and educationally backward and concluded that caste as a factor played a predominant role in contributing to their backwardness. However, after all these years, it's almost as if such communities have attained an echelon in the society, that the focus should move to economic criteria considering the fact that

one of the principle objectives of reservation is to bridge the gap between haves and have-nots. Reservation based on economic criteria is a practical and realistic approach to combat the problems that the nation faces in current times.

The goal of reservation in India was to improve the welfare of socially and educationally backward classes. Though, caste-based reservation helped in the achievement of the same, since the time of its inception, a huge chunk of the benefits have also been captured by well-off groups from such backward classes like the Chamars from SC and others who have been economically better off right from the beginning. Latest trends indicate that there is a rush to get OBC/SC/ST status with many communities making attempts to get classified as backward so as to avail the reservation benefits. For e.g., recently, the Patels of Gujarat and the Jats, have been demanding caste-based reservation despite being a politically and economically dominant community with a considerably high living standard. Thus, over the last two decades or so, reservation has been highly misused. The first generation beneficiaries of reservation apart from utilizing the benefits just for themselves perpetuated it to their progeny too. This led to monopolization of the benefits by a few politically and socially dominant caste groups at the cost of more needy people. However, EWS quota stands on a better footing. By denying reservation to the creamy layer, it ensures the deprived and deserving people are able to avail the benefits rightfully.

Caste-based reservation also breeds indolence among individuals who, by virtue of their castes, take advantage of the reservation available to them. This ultimately



results in degradation in the quality of workforce and hampers the growth of India. It was in 1962, when the issue of determining backwardness first arose in the case of *M.R.Balaji v. State of Mysore*,<sup>1</sup> wherein the constitutionality of Article 15(4) was examined by the Supreme Court. The court struck down a governmental order issued by the State of Mysore in which backward classes were solely identified on the basis of caste, by stating that only the words “classes of citizens” were used in Article 15(4) and not “castes of citizens”. It inter alia held that caste as a factor is inapplicable in many sections of the society that do not recognize caste system such as the Muslims or Christians and that ‘caste of a person cannot be the sole criteria for ascertaining whether a particular caste is backward or not’. It also observed that once a caste is considered backward doesn’t mean that it should continue to stay backward at all times and the test to reservation should be reviewed periodically to ensure classes that reach a state of progress are deleted from the list of backward classes. In *R.Chitralekha Anr v. State of Mysore*,<sup>2</sup> the court held that while caste may be a relevant indicator of backwardness, exclusion of caste as a factor does not damage the classification, if other tests are satisfied. In *Jagdish Negi v. State of Uttar Pradesh*,<sup>3</sup> the court decided that no class of citizens can be treated as socially and educationally backward always and the State is entitled to review the situation from time to time.

It can be understood that caste is not the only obstacle in the way of development of an individual. Factors like economic conditions,

gender discrimination and lack of educational opportunities also contribute to denial of opportunities to an individual. Simply put, backwardness is found in various forms due to various reasons. Can it be said with certainty that the so-called backward classes have been uplifted because of reservation? No. Is the lifestyle found in North-Eastern regions even remotely similar to the lifestyle in metropolitan cities? No. After all, girls are discriminated right from the time of their birth. Such types of discrimination have been in practice for ages cutting across religions and caste lines. Thus, relying upon decades-old Mandal Commission report will only hinder the nation’s progress towards creation of an egalitarian society.

It can be said that the measures and means, adopted by the nation, to achieve the development of all, have become an end in itself resulting only in fragmentation and division of the already caste-divided society. The current policy of reservation has virtually divided the society into two, namely, the Oppressors and the Oppressed by classifying classes on the basis of their caste. This is something that the constitution-makers wanted to avoid in the first instance. Individuals have been turned into epitomes of their respective castes irrespective of the multiple identities that they may carry. It has manifested an abhorrent social order at the social and structural level, to the extent that caste has become the only identity of citizens and the only factor for determining social identity.

Economic based reservation by being secular and non-discriminatory in nature, is the need of the hour.

<sup>1</sup> A.I.R. 1963 S.C. 649.

<sup>2</sup> A.I.R. 1964 S.C. 1829.

<sup>3</sup> A.I.R. 1997 S.C. 3505.



#### 4. FIRST BACKWARD CLASSES COMMISSION

The first backward classes commission was set up under the chairmanship of Kaka Kalelkar to determine the criteria to be adopted to identify socially and educationally backward classes, prepare a list of the identified backward classes and also investigate their social, economic conditions. In its report, Kaka Kalelkar opined that in the long run, measures such as reservation would not be in the interest of the society and nation. The principle of caste should be shunned out altogether to ensure justice to poor and deserving members of all communities. He wrote,

*"122. Towards the end of our enquiry, we have come to the conclusion that caste, communal or denominational considerations need not be introduced in the educational policy. A progressive, modern welfare State, cannot afford to tolerate educational backwardness anywhere in the State. In most of the modern States more than 60 per cent of the scholars receive full educational aid. In India, it should be possible for the State to give educational aid to all the poor and deserving students in the country, irrespective of caste, sex or denomination. Whenever it is necessary to show preference it must be for women and for students of rural areas. The present preference for Scheduled Castes and Scheduled Tribes should be continued for some time, but the time has come when all the poor and deserving should, and could, be helped, so that no communal consideration need be introduced in the field of education."*

At the time of tabling the report before the Parliament, Kalelkar mentioned that

recognition of certain castes as backward may only lead to strengthening of the existing distinctions based on caste and perpetuity of caste as a deciding factor of social identity. Shri Govind Ballabh Pant, the then Home Minister stated:

*".....the emphasis on caste has further been highlighted by some of the minutes of dissent. The tone and temper displayed therein bring into prominence the dangers and of separatism inherent in this kind of approach. It cannot be denied that the caste system is the greatest hindrance in the way of our progress towards an egalitarian society, and the recognition of specified castes as backward may serve to maintain and even perpetuate the existing distinctions of caste. There may be, besides castes, a large number of whose members may be classified as backward educationally and economically, but still there may be others among them who cannot be so classified. Similarly, among the so called upper and advanced classes there may be, and in fact there are, large number of those who are not less backward educationally and economically and even among the backward classes some castes are more backward than the others..."*

However, like the powerful recommendations in the report, there were noticeable limitations too. Around three members of the Commission were against caste as a criterion for determining social backwardness. Kaka Kalelkar, himself, before submitting the report, renounced it stating that the recommendations/remedies suggested in the report were worse than the evil it sought to curb in the first place since the recommendations were purely based on caste. He dreaded that it might increase caste consciousness among other things. No meaningful action was taken pursuant to the report as it was considered inefficient.



### 5. DISSENTING OPINION IN INDRA SAWHNEY V. UOI<sup>4</sup>

It is relevant to place reliance on the rationale endorsed by the minority in the case of *Indra Sawhney v. UOI* to understand why the caste-based reservation was an imperfect one.

In the instant case, by a 9:3 majority the Supreme Court upheld the implementation of separate reservation for OBCs in central government jobs (recommendations of Mandal Commission report). Out of the dissenting opinion by 3 judges namely, R.M.Sahai, Kuldip Singh, Dr. T.K.Thommen, the opinion of R.M.Sahai was the most extensively reasoned.

- R.M.Sahai, J inter alia observed that:
  1. The Indian Constitution only uses the word “class” and not “caste”. Rudimentary principles of construction put forth that an interpretation leading to the identification of backwardness based on caste should be rejected.
  2. Providing for reservation under Article 16(4) not only destroys the very purpose of Article 16(2) but also goes against the rule of anti-discrimination on the basis of caste.
  3. Since the caste system does not exist in certain communities, caste-based reservation leads to denial of opportunities to socially, educationally and economically backward members of such communities. For e.g. Bhistis among Muslims.
- Kuldip Singh, J. agreed with R.M.Sahai, J and put forth that identification of backwardness should be based on a secular criterion such as occupation and income.

- Thommen, J. also apart from agreeing to R.M.Sahai, J, added that caste-based reservation may result in iniquitous reverse discrimination.

Thus it is concluded that caste-based reservation is contradictory to the constitutional vision of a casteless society and only reservation based on economic criterion can pave way for such a casteless society thought of by many constitutional makers.

### 6. THE FLAWED CRITERIA

As stated above, *Economically Weaker Sections* was defined as persons whose annual household income is less than 8 lakhs, or owns/possesses agricultural land less than 5 acres, or residential flat less than 1,000 sq. ft., or residential plots less than 100 sq. yards in notified municipalities, or residential plots less than 200 sq. yards in non-notified municipalities. It also allows states (defined under Article 12 of the Constitution) to notify *from time to time on the basis of family income and other factors*, to be applied to respective state education and state public employment.

**Criterion 1:** A family whose household annual income is less than 8 lakhs per year, which translates to ₹ 66,666 per month. Here, the word family includes “the person who seeks the benefit of reservation, his/her parents and siblings below the age of 18 years as also his/her spouse and children below the age of 18 years”. Also, income will include all sources such as salary, agriculture, business, profession, etc.

- As per the 2011-12 National Sample Survey Office report, key indicators of household

<sup>4</sup> A.I.R. 2000 S.C. 498.



consumer expenditure, throw light on the fact that the per capita income of the top 5% of the Indians stands at just Rs.4,481 in rural areas and Rs.10,281 in urban areas. Thus, even if a household consists of five members, the family monthly income won't exceed Rs.51,405 which is way lower than the limit notified under the EWS quota. So at least 95% of Indian families fall under the 8 lakhs annual income limit. In addition, for the year 2018-19, the per capita income at current prices was estimated at Rs.1.26 lakhs p.a. Again assuming a family of five, that translates to around Rs.6.32 lakhs. Thus, a household that gets 8 lakhs a year would be well above the national average. Granting them economically weaker status is definitely ironical. Even as per surveys conducted by National Council of Applied Economic Research (Indian Human Development Survey), this 8 lakhs cap makes around 99% of households eligible.

- Arun Jaitley in one of his speeches put forth data that said tax returns of above Rs.5 lakhs were filed only by 76 lakhs people.
- Estimates suggest that as high as 80% (Bhalla) to 95% (Desai) of the general category households become eligible for EWS quota if the limit is applied.
- Further, during the year 2016-17, around 23 million individuals declared income of over Rs.4 lakhs. So, roughly one crore families would be over the 8 lakhs limit, if an assumption of two individuals per family is taken. It amounts to 4% Indians, out of a whopping Indian population.

A thorough understanding of the above thus indicates that this criterion is faulty. It is only prone to wrong inclusion rather than addressing exclusion.

**Criterion 2:** Agricultural lands should be less than 5 acres.

According to Agricultural Census 2015-16, 86% of land holdings in India are smaller than the prescribed limit of 5 acres.

**Criteria 3 and 4:** Residential flat less than 1,000 sq. ft.; Residential plot less than 100 sq. yards in notified municipalities, or residential plots less than 200 sq. yards in non-notified municipalities

It is terribly evident that only less than 20% of the nation's population might possess a residential plot of over 1000 sq. ft. The 2012 NSSO Report on housing conditions highlighted that only the richest 20% of Indians lived in houses with an average floor space of around 500 sq. ft.

Due to such flawed criteria, virtually 95% of the Indian population (as already stated above) who were not part of any reservation till now (to those whom EWS apply), become eligible to avail the benefits of the EWS quota. This may inevitably result in a vicious cycle with castes competing against castes and religions against religion within the reservation. At times communalisation of quotas may worsen the situation. In the end, it will only lead to the usual, i.e. the poor (having low income, say, Rs.1 lakh or less) will be clubbed with the wealthy without an option of opting out.

These preposterous paradoxical criteria, if not modified accordingly, will only worsen the opportunities available to the deserving youth. The very purpose and objective of economic criteria based reservation will itself be ruined.

## 7. **CHALLENGES**

In addition to the flawed criteria, there are a few challenges that can be faced during the implementation of the EWS quota. They include:



- Only a few non-SC/ST/OBC individuals have a caste certificate. Thus, it will be difficult for such individuals to lay claim to this reservation.
- Determination of the precise amount of income of households, in general, may pose technical difficulties due to the absence of proper records. In addition to this, there are plenty of chances that individuals may get fake income certificates.
- The new law does not explicitly state whether the EWS reservation is horizontal or vertical. This may give rise to a fresh set of problems at the time of implementation.

#### 8. CONCLUSION

Reservation on the basis of economic background has always been implicitly part of the constitution. Article 46 of the Directive Principles of State Policy states that the State shall promote with special care, the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

The criteria provided under this reservation, despite being flawed, convey a poignant fact. At least 80% of the households belonging to the general category are economically weaker even though they are supposed to benefit the maximum in this fast-growing economy in the world.

Thus, the apparent truth is the creation of glaring income inequalities. The gap between the richest and the bottom lot is only growing at faster rates, with time, across castes. The inequalities are deep-rooted. The hopes that the situation of economically backward people will

improve are only thinning and seem to be near impossible. As of 2019, around 46 million people in India live below poverty line. This poverty exists irrespective of castes and religions. To substantiate this, various estimates show unequal opportunities existing in employment and education cutting across castes and classes—due to economic as well as social reasons. The economically backward sections, due to their financial incapacity to compete with the economically privileged, have always been deprived of worthy opportunities with respect to education and employment. Yes, the social and educational backwardness can be attributed to the practice of caste system to a huge extent. But in current times, when all social categories are classified by their levels of income, one can observe a similar pattern existing in employment and education at particular levels of income across social categories. A person belonging to a low-income household will already have or will have access only to less salaried employment and poor or no higher educational attainment when compared to a person belonging to a high-income household.

Caste-based reservation may have been the right step to eradicate social and educational backwardness and uplift them. But that was 50 years back. Now, for reservation to achieve the purpose for which it was introduced i.e. to solve the problem of unequal opportunities, it should target the poor, in general, irrespective of their castes. Excluding the creamy layer from obtaining benefits will only help out the marginalized and poor.

The income criteria, thus, should be rationalized and fixed carefully. Otherwise, the proposed 10% quota will fail to address the problem of unequal opportunities and the





very purpose for which it was introduced will stand negated.

To conclude, it is pertinent to rely upon the statement made by Shri Pundit Jawaharlal Nehru on the floor of the Lok Sabha on 13.6.1951.

*“.....After all, the whole purpose of the Constitution as proclaimed in the Directive principles is to move towards what I may say a casteless and classless society.....”.*<sup>5</sup>

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<sup>5</sup> Statement by Shri Pundit Jawaharlal Nehru, Statement regarding reservation, Lok Sabha (13/06/1951).