RESERVATION FOR EWS: A MOVE ANTI OR PRO DISCRIMINATION?

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ABSTRACT

The reservation made based on the caste system has been prevalent for a long period of time in India which has been questioned on the ground that its performance has not been in consonance with the objectives it sought to attain. The provisions mentioned in the Constitution have also been studied wherein it talks about the Socially and Educationally Backward Classes along with SC/ST and also how the new provision for Economically Weaker Sections may be incorporated in the same. The role played by political forces in the reservation policy is also essential to understand as it casts a direct impact upon the citizens of the State and how they perceive the system.

Keeping the practices of other countries in mind that of India has been compared with the former and the pros and cons are thereby analyzed. The provision of 10% reservation for Economically Weaker Section of Upper castes including Christians and Muslims has grabbed limelight despite the fact that a great many attempts by the Government in the past years have failed. It is important to figure out what system would be more beneficial for the society for its wholesome development and to fulfill the goals initially set out in the policy.

INTRODUCTION

The Constitution of India is a masterpiece put together by the former leaders of our country. The vast and intricate provisions contained therein on diverse subjects are a testimony to the fact that many brilliant minds went behind its making. Article 14, Right to Equality, regarded as the basic structure of our Constitution not merely implies identical treatment. Rather, it paves way for reasonable classification. Where Article 14 lays down the general principle of equality, Article 15 and Article 16 are specifically pertaining to the prohibition of discrimination on various grounds and equal opportunities in matters of public employment respectively. After several controversial cases before the Court such as State of Madras v. Champakam Dorairajan1, Indra Sawhney v. Union of India2, the effects of such cases were overturned by way of amendments and inclusion of clauses (4) and (5) in Article 15, also clauses (4A) and (4B) in Article 16 which permits reservation for Socially and Economically Backward Classes (SEBCs) as well as SCs and STs. Whereas the Supreme Court in M. Nagaraj v. Union of India3 has made it clear that even if the State has compelling reasons, it has to see that the reservation does not lead to an excess of 50% ceiling limit or obliterate creamy layer for extending the reservation indefinitely4.

What started as a measure to uplift the classes in need of advancement has now widened to include in its ambit upper classes as well. By the virtue of the Constitution (One Hundred and Third) Amendment Act,

1 AIR 1951 SC 226
2 AIR 1993 SC 477
3 (2006) 8 SCC 212
2019 even the Economically Weaker Sections (EWS) of the general categories or upper castes would be able to reap the benefits of direct reservation in government jobs and higher educational institutions. It would be an understatement to say that this Act has been a receiver of much controversy. Not only is its constitutionality challenged, but many voices have come up, especially the Opposition questioning the perfect timing of bringing forth such change right before the dawn of Lok Sabha Elections, 2019. The NDA led Government was successful in bringing the provision of 10 percent reservation for EWS of Upper Castes including Christians and Muslims, which had collapsed on various occasions even under the guidance of leaders such as P.V. Narsimha Rao or by way of Ordinance promulgated by the Government of Gujarat which was later struck down by the High Court of Gujarat. The Constitution (One Hundred and Twenty Fourth) Amendment Bill, 2019 received President’s assent on January 13th, 2019 resulting in the addition of clauses (6) in both Article 15 and Article 16 of the Constitution.

CONSTITUTIONAL VALIDITY OF RESERVATION

As depicted, the Amendment Bill of 2019 even though passed in both the Houses of the Parliament but before obtaining the assent of the President, it was challenged by an NGO named “Youth for Equality” within few hours of it being passed. It was contended that the Bill was in contravention to the basic structure of the Constitution. As the Bill aims at providing reservations solely based on economic criteria i.e. families with an income less than Rs. 8 lakhs p.a. and the Apex Court’s decision in the Indra Sahwney case clearly prohibits economic reservation, the Bill violates the doctrine of the basic structure. In addition, the Mandal Commission\(^5\) case also held that the maximum limit of reservation cannot exceed the cap of 50 percent. The present scenario though exceeds such capping limit as the former reservation accounted for 49.5% including 15%, 7.5%, and 27% quotas for Scheduled Castes, Scheduled Tribes and Other Backward Classes respectively.

With the newly introduced 10% reservation for upper castes, also being referred to as the creamy layer by many brings the reservation up to 59.5% in total. However, many constitutional and legal experts think to the contrary. SK Sharma, former secretary to Lok Sabha opines that “had it introduced the quota Bill without amending the Constitution, it would have been struck down by the Supreme Court. But since, the government has introduced the Bill with a proposed amendment in the Constitution; the proposed legislation – if it becomes law – would stand judicial scrutiny, as the apex court is only supposed to interpret the Constitution as it exists.”\(^6\) On the other hand, Faizan Mustafa, Vice-Chancellor of NALSAR University of Law, Hyderabad holds a similar view that such kind of a legislative action via introducing an amendment to the Constitution via Article 368 will be upheld on the ground of Equality before the Supreme Court, “equality as a principle is part of the basic structure and with equality of status and opportunity in the

\(^5\) AIR 1993 SC 477

\(^6\) Upper Caste Reservation Bill, available at https://www.newsclick.in/ (Visited on 19th August, 2020)
preamble also as a basic structure, the court may agree to the economic criterion for reservation.”

With a rise in writ petitions being filed in the Supreme Court under Article 32 by NGO’s including Youth for Equality, TMA Pai Foundation, Janet Abhiyan and even businessman such as Tehseen Poonawala, CJI Ranjan Gogoi has said that even though they cannot pass an order restricting the 10% reservation, but the plea shall definitely be heard this March 28th, and will be considered whether it requires to be handled by a Constitution Bench. The bench further enunciated on the fact that the filing of short notes of points raised in the petition is to be done.

POLITICAL ASPECT IN INCOME BASED RESERVATION

The fast-approaching Lok Sabha General Polls of 2019 raises an important question on the genuineness and motive behind the income-based criteria for reservation. The issue at hand has been much politicized from its inception so much so that plenty are terming this move as a “masterstroke” pulled off by the NDA led Government. The Constitution of India formerly provided quotas for SEBCs and SC/ST/OBCs in the public as well as private education sector and in jobs by the virtue of Article 15 and Article 16. “The idea was to not just improve their economic status, but to address the denial of rights and oppression meted out to these groups over the years, and to work towards rectifying their utter lack of representation in public office” whereas the newly introduced reservation for General Category is entirely based on EWS of the upper castes or the forward castes. It aims at bringing citizens of general categories at the same pedestal as others in educational and employment fields which for long has been a non-reachable dream due to the constraints imposed by poverty. But, one must pay heed to the timing of the Amendment.

The Opposition Party calls this an “election gimmick” to lure in and gain support from the Upper Castes which was prior to the said change, drifting away. Another fact to ponder upon is that all such previous attempts to bring in a reservation for the general category were set aside by the Court. As in the year 1991, an attempt moved by PV Narsimha Rao’s Government to introduce 10% reservation for poor among the forward/upper castes could not stand due to the majority opinion given in the famous Mandal Case. Similarly, in 2016 Gujarat promulgated an Ordinance on similar grounds and provided justification by quoting Article 46, but the same was quashed. “The High Court of Gujarat observed that the unreserved category itself is a class and economic criteria was too fluctuating a basis for providing quota.”

Surprisingly, this time around the same was passed not only by Lok Sabha where BJP possesses major support but also by Rajya

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7 Upper Caste Reservation Bill, available at https://www.newsclick.in/ (Visited on 19th August, 2020)
8 Busted:4 Myths on Caste Based Reservation Policies, available at https://www.epw.in/ (Visited on 18th August, 2020)
Sabha. “A jubilant BJP and its allies hailed the move as historic and masterstroke saying it is in sync with the Modi Government’s motto, sabka math sabre vikaas.” It is contended that even though the Opposition Party is calling it a mere stunt to gain vote bank, regardless it has supported this move due to its political significance and also this far ahead of Lok Sabha Elections 2019, no party seems to lose out on the support and get in the bad books of the Upper Caste population and be regarded as anti-General by them.

RESERVATION IN OTHER COUNTRIES

The caste-based reservation has been followed in India to uplift the weaker sections of the society, this practice has been followed in other nations as well such as Nepal, Pakistan, and Sri Lanka whereas other countries such as U.S.A., Canada, Malaysia, Russia, and others generally follow the reservation which deals with affirmative action. It is a policy through which one promotes the employment and education of all those groups of persons who have suffered any form of discrimination and is different from that of the caste system.

The International Convention on the Elimination of All Forms of Racial Discrimination hosted by the UN laid down that as a means to rectify systematic discrimination, affirmative action programs may be needed by countries that had countersigned the convention. Also, the United Nations Human Rights Committee states that the principle of equality sometimes requires State parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.

In the United States of America, affirmative action was introduced to battle against discrimination based on race, gender, creed, color, or national origin. The judicial decisions serve as the framework for implementing the policies of affirmative action. Also, the authorities are free to make their own laws concerning with such actions. In the year 2018, it was seen that the university campuses had abandoned the administrative policies that asked the universities to consider race as one of the factors for its diversification. Though in August 2020, the voters in California would be responsible to approve the return of affirmative action in November which would restore the rights of colleges and universities in the states to consider race, ethnicity, and gender in admission decisions.

Malaysia follows a Malaysian New Economic Policy (NEP) whose main objectives are “to achieve national unity, harmony, and integrity; through the socioeconomic restructuring of the society; and to minimize the level of poverty in the country.” It was also witnessed that where the quotas were made available for admission in universities were removed which saw a

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11 Which countries other than India have caste-based reservation systems, available at https://www.quora.com/ (Visited on 20th August, 2020)
12 Affirmative action incentivizes high schoolers to perform better, new research shows, available at https://www.sciencedaily.com/ (Visited on 23rd August, 2020)
rise in people from the minority groups taking admission. The Malaysians witnessed was that there was a rise in admission in the universities by the minority groups when certain quotas that barred them from taking admission were removed. The purpose of such a provision was to make sure that there was a redistribution of wealth so as to extend ownership of enterprises which might also help in increasing the economic process. Although, if these policies were to elevate the poor Malays then they have backfired as the government ends up using them for their political gain.

In Canada, affirmative action is followed using the term “Employment Equity” wherein the seats are reserved for Canadian tribal, women, and physically disabled people in colleges and the public sector. There is an Act governing this policy which is known as the Employment Equity Act. The main purpose is to ensure that unnecessary hoops during the hiring can be removed. In April, 2020 an amendment was made by the Treasury Board of Canada Secretariat (TBS) in the Treasury Board Policy on People Management and Policy of Management of Executives. It introduced the modernized and broadened directive on employment equity, diversity and inclusion, and a directive on the duty to accommodate.14

The Union of the Soviet Socialist Republics (USSR) was called the World’s first Affirmative Action Empire by a Harvard historian, Terry Martin where he also says that the architects pictured it as a state that followed the principle based on self-

determination of the nations. The quota system (now abolished) in the USSR was for the social groups including ethnic minorities, women, and factory workers. Though in the modern USSR, this is partially retained to the extent where the needs of some ethnic minorities and inhabitants of some territories are met.

In Nepal, minorities are included based on caste, region, religion, gender, inhabitation, and language. Here, even though the caste-based discrimination is punitive in the Article 14 of the Interim Constitution of Nepal, 2063 in 2007, as per the critics they have been promoting casteism which has not reduced and men with money in the minorities have taken good advantage over it which defeats the very purpose of existent policies.

In Sri Lanka, the caste system has been divided into three parts (Sinhalese, Sri Lankan Tamils, and Indian Tamils) which run parallel to each other. The Sinhala caste group is socially excluded as they are an underprivileged group who are considered a weaker and spatially dispersed group due to which they are excluded from services like free education resulting in poverty, limited contact with the State and limited opportunities to grow in the country. Here, the strongest caste-based discrimination is towards the Tamils leaving them deep in poverty and being powerless. Though explicit caste discrimination has been reduced over the years, but urban untouchability has continued because of their caste and their past roots.15


RECENT DEVELOPMENTS

CHALLENGE TO 103rd AMENDMENT ACT, 2019:

Janhit Abhiyan……………………Petitioner
VERSUS
Union of India & Ors. ……..Respondents

From the moment Indian media started carrying the news reports about the Union Cabinet granting its approval for the One Hundred and Twenty Fourth Amendment Bill, 2019, the nation became restless already and talks about its unconstitutionality started doing rounds. Several writ petitions were filed in the Supreme Court challenging the constitutional validity of the impugned Act. Certain contentions were put forth by the petitioners, which were as follows:

1. The Act violates the fundamentals of equality enshrined under Article 14 which is a part of the Golden Triangle of the Fundamental Rights enshrined in Part III of the Constitution. This Court has recognized Article 14 as one of the basic features of the Constitution which implies that it is not open to amendment by the Parliament of India vide power vested in it under Article 368.

2. The provision of reservation up to 10% meant exclusively for the Economically Weaker Sections in addition to the already prevalent reservation for SC/ST and OBC brings the reserved seats/posts far beyond the 50% capping limit set by the Supreme Court in Indra Sawhney v. UOI & Ors. And reaffirmed in M. Nagraj v. UOI & Ors.

3. That the economic criterion alone cannot be a determinant of creating a reservation for citizens in educational institutes or public services of State. Providing for the same is a clear assault of the famous Mandal Commission case and various cases that followed.

4. Mandatory reservation of seats in private educational institutions either aided or unaided by the virtue of the inclusion of Clause (6) in Article 15 is a direct contravention of freedom granted under Article 19(1)(g).

5. Sri Rajeey Dhanwan, learned senior counsel appearing for a petitioner while placing reliance on ‘Rules of Court, etc.’ under Article 145(3) and also on Order XXXVIII of the Supreme Court Rules, 2013 requested for a referral of the matter to a Constitution Bench of five Judges as it involved questions of constitutional importance and even touched upon the basic structure of the Constitution.

Whereas the Counter Affidavit filed by the respondents and argued by Attorney General Sri K.K. Venugopal on behalf of Union of India presented the following defenses:

1. That the ratio of Indra Sawhney case has no application to the present amendments made to the Constitution by inserting Article 15(6) and Article 16(6) as in the former, an Office Memoranda (O.M.) was challenged whereas in the latter i.e. the present scenario, a constitutional provision already has been incorporated via the Amendment Act in challenge. The O.M. struck down by majority in Indra Sawhney couldn’t be upheld due to absence of any constitutional backing for the same, but the same cannot be said for the new clauses as a due procedure of law has been

16 1992 Supp. (3) SCC 217
17 (2006) 8 SCC 212
18 W.P.(C)No.122 of 2019
19 Supra
20 Ibid.
followed and the same has been done by the State to secure justice to all citizens based on social, economic and political.\textsuperscript{21}

2. The limit of 50\% on the reservation was decided by the Supreme Court w.r.t. Articles 15(4), 15(5), and 16(4). But the Act in question has added a separate clause (6) to both Article 15 and 16. Therefore, there exists no basis for the application of such limitation upon the 10\% bracket for EWS.

3. Another contention raised by the petitioner Youth for Equality was that the said amendments violate the freedom guaranteed under Article 19(1)(g) as it mandates provision of reservation to EWS up to 10\% even in private unaided educational institutions.\textsuperscript{22} It has been pleaded by the Attorney General speaking for UOI that Article 19(6) empowers the State to impose reasonable restrictions on such freedom in the interest of the general public and the insertion for this separate quota aims to benefit the public itself which could not get access to such opportunities owing to their lack of resources. Also, the petitioner itself is an organization in receipt of aids from the State and therefore, has no locus standi in the present matter.

4. The learned Attorney General also submitted that a three-Judge Bench of the Hon’ble Supreme Court approved and upheld the provision of reservation or classification based on economic criteria as provided for under the Right of Children to Free and Compulsory Education Act, 2009 in the case of Society for Unaided Private Schools of Rajasthan v. Union of India & Anr.\textsuperscript{23} Keeping this view in mind, the impugned Act can neither be termed as illegal nor said to be violating the basic structure of the Constitution.

5. Further, reference for the same can also be made to the decision propounded by this Court in Ashok Kumar Thakur v. Union of India\textsuperscript{24} wherein, it was held that “upon expiry of the time-limit, the criteria for identifying OBCs should only be economic in nature because our ultimate aim is to establish a casteless and classless society.”\textsuperscript{25}

On the 5th of August, 2020 the Supreme Court issued an order after considering all the pleadings and arguments raised by the learned counsels for both the petitioners and the respondents. Without entering into the merits of the issue, based upon the submissions made by several counsels for petitioners for a reference to be made to a Constitution Bench of five Judges to decide upon the constitutionality of 103rd Amendment Act, 2019, the Apex Court agreed to refer the matter before a five Judge Constitution Bench keeping Article 145(3) and Rule 1(1) of the Supreme Court Rules, 2013 in mind.

“The judges identified two crucial issues which motivated them to constitute a five-judge bench:

a) The question of the Act violating the basic structure of the Constitution in light of the ‘width’ and ‘identity’ equality principles;
b) The issue of the 50\% ceiling limits and whether reservation to EWS constituted an exception to this limit.”\textsuperscript{26}

\textsuperscript{21} The Constitution of India, Preamble
\textsuperscript{22} W.P. (C) No.73 OF 2019
\textsuperscript{23} (2012) 6 SCC 1
\textsuperscript{24} (2008) 6 SCC 1
\textsuperscript{25} Supra

\textsuperscript{26} EWS Reservation, available at: https://www.scobserver.in/court-case/reservations for-economically-weaker-sections (last visited on 10 August, 2020).
Also, few transfer petitions were filed by the Union of India under Article 139A (1) read with Order XLI Rules 1 to 5 of the Supreme Court Rules, 2013 praying for these writ petitions filed in various High Courts all over the nation to be transferred to the Supreme Court of India as these pose a challenge to the validity of the Constitution (One Hundred and Third Amendment) Act, 2019 which already is pending before the Hon’ble Court titled, ‘Janhit Abhiyan v. Union of India & Ors.’ 27 It was held that the contentions raised by the Attorney General for/on behalf of UOI being deemed appropriate by this Court are fit to be allowed.

CONCLUSION

Every country in the world has at one point fallen prey to the disease called ‘discrimination’. It may have been in different forms, but essentially all mean the same, that is, to show who is superior as well as treat others as inferior and not let them grow. Everyone who was dealt with the same fate has been subjected to years of suppression which resulted in people accepting them in the same capacity as it has been going on for decades. This was inhumane and due to this, every country placed certain rights to eradicate such discrimination and give power to the minorities so that they could grow and be an equal part of the community.

The caste system in India has been one of the oldest surviving practices, where due to dominance of the Hindu Society, many castes which were not in majority have been a victim of atrocities, social and economic backwardness. The constitutional foundation of which was laid down by the founding fathers for the upliftment of these sections in society. The essence of this policy was that those who felt weakened and helpless were given equal opportunity to make them feel more involved and given opportunities that were formerly denied to them. They have been given a certain number of limited seats that are reserved for them and could be filled only by those belonging to that category.

In today’s world, it can be evidently seen that till the time one is oppressed under the caste system, any affirmative action towards it would manifest as ineffective. With time, the minority groups have used the quotas in order to uplift their status in the society. Though in certain cases the now creamy layer of the people reaping the benefits of the quotas is using them for their coming generation as well which leaves the ones who actually require them helpless. While announcing the results of UPSC 2019, they announced that the Economically Weaker Section candidates would get a reservation of 10%. Also in July, 2020 a Brahmin Development Board was set up by the Karnataka state government to issue caste certificates to Brahmins in order to avail the benefits of the EWS quota. This came into existence when the Brahmins who were actually eligible in the quota were refused by the tehsildars on the issuance of caste and income certificates.

The reservation system has played a vital role throughout history in the political world and partly being used as an agenda to gain votes which have resulted in a slow change in the reservation system in India since a very long time.

Though this type of reservation has its share of drawbacks but it has helped in making the
conditions better in terms of making the weaker sections feel more powerful and lessened poverty. Many people are coming forward and pursuing their passions and are being treated as equals while doing the same. It has improved the economic and living conditions of these groups as they feel their rights are being protected and being heard by the government. Even so, this system needed to be modified and changed so that it helps those who have been suffering due to the pre-existing policy.