

## **Reservation in India: An Impeding Need for Reform**

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### **ABSTRACT**

*The reservation policy has some flaws in it. It itself discriminates among the people. The issue is that reservation emphasizes on the caste or the tribe for identification of backwardness rather than wealth or income. The goal of reservation should be to improve the welfare of the socially and economically backward classes. Hence there is an imminent need to expand the scope of creamy layer. Firstly the concept of reservation is explained. Reservation is the process of facilitating people in education, scholarship, employment, promotion. Then the need for this study is mentioned that is the reservation provided under the Constitution is being misused. Later, problems are listed. Secondly all the constitutional aspects of reservation are explained. Preamble aims at promising its citizens equality. Article 14 of the Constitution guarantees equality before the law and equal protection of the laws. State has the power to classify and categorize people to different groups. Supreme Court developed the jurisprudence of the Article 14 and developed the doctrine of classification. Article 15 and 16 ensures reservation for socially and economically backward classes which also includes scheduled castes and scheduled tribes. Protective discrimination can be made among the people because equals should not be treated unequally and unequals should not be treated equally. Judiciary has said in many cases that the schemes of protective discrimination should be in accordance with the constitutionally permissible objectives and methods. Creamy layer test was formulated as a response to the Indra Sawhney judgement. The objective of creamy layer test is that equals should be treated equally and unequals should be treated unequally. Thirdly the quantum of reservation is an important aspect, as to how much percentage is reserved. As a result of this 50 per cent rule was introduced. Lastly the problem of exclusion of creamy layer is answered.*

## **RESERVATION IN INDIA: AN IMPEDING NEED FOR REFORM**

### **I. INTRODUCTION:**

“The assembly and the Government’s aim is to end poverty and squalor to abolish distinction and exploitation and to ensure decent conditions of living” assured Rajendra Prasad.

Reservation is the process of facilitating people in education, scholarship, employment, promotion. It is a form of quota based affirmative-action. Providing equal opportunities to Scheduled castes, Scheduled tribes and Other Backward Classes is the basis of reservation. Reservation in India is governed by the statutory laws, constitutional law, rules and regulation of the local government. The beneficiaries of reservation are people belonging to Scheduled Caste, Scheduled Tribe and Other Backward Classes.

The reservation system aims at uplifting the lower classes of the society. These lower classes are been exploited and deprived of their rights through ages. These members of lower classes are supported so that they become the part of mainstream of the society. And as a result of this they are accepted by people of other classes. Reservation in India can be traced back to 2<sup>nd</sup> Century B.C.

#### Need for the study:

There is an apparent misuse of the reservation provided in the Indian constitution. There is an imminent need to expand the scope of creamy layer.

#### Problem:

The reservation policy has some flaws in it. It itself discriminates among the people. The issue is that reservation emphasizes on the caste or the tribe for identification of backwardness rather than the wealth or the income. In India the goal of reservation should be to improve the welfare of the economically and socially backward communities. The criteria to identify the beneficiaries should be the income or the economic background rather than the caste the people belong to. There are many communities which are left out and not added under the category of socially and economically backward classes, which actually need upliftment in the society. Rather it is the groups that are well to do are making disadvantageous use of the facilities provided under the reservation policy.

## II. RESERVATION IN INDIA:

### CONSTITUTIONAL ASPECTS OF RESERVATION:

Preamble of the Constitution aims at achieving equality. Provisions relating to equality are enshrined in the constitution, both general provisions and even special provisions.

Article 14<sup>1</sup> guarantees 'right to equality'.

Article 14 –

“The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”.<sup>2</sup>

State has the power to classify and categorize people to different groups so that governmental ends are achieved and there is balance in the society. For instance one of such governmental end would be reduction in the gap between rich and poor. The possibility is that the classification could be made on the basis of the community the people belong and even based on their caste. In many aspects there is classification made in India. But because of the absence of sub-classification the affluent among the community might get away with the benefits and the deserving sectors will be left behind and cheated upon.

#### Doctrine of Classification:

Supreme Court developed the jurisprudence of the Article 14. The basic principles of doctrine of classification was based on the judgement given by Chief Justice S. R. Das in *R. K. Dalmia v. Justice Tendolkar*.<sup>3</sup>

Right to equality is violated when equals are treated unequally but also when unequals are treated equally. Legislature is not obligated to follow any set standard as there is no exact dividing line to demarcate cases. The legislature is only empowered to classify or categorise people. The differences should show that the members fall under the same group.

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<sup>1</sup> Article 14 of the Constitution of India 1950.

<sup>2</sup> Article 14 of Constitution of India 1950.

<sup>3</sup> (1959) SCR 279.

In *Budhan Choudhry & Others v. State of Bihar*<sup>4</sup>,

Justice Das on behalf of seven-judge bench said,

“it is well established that Article 14 forbids class legislation, but does not forbid reasonable classification for legislative purposes. Two conditions have to be fulfilled to pass the test of permissible classification, they are, (i) the classification should be founded on intelligible differentia which differentiates people or things that are grouped together from those who are left out from the group and (ii) differentia must have a rational relation to the object that is sought to be achieved by the enactment that is in question. The classification can be founded on many different aspects or bases, like geographical, or according to objects or occupation or anything similar. The necessity is that there should be a nexus between the basis on which the classification is made and the object of the Act which is under consideration”.<sup>5</sup>

Article 15 and 16<sup>6</sup> ensured reservation for socially and economically backward classes which also includes scheduled castes and scheduled tribes.

Article 15 –

“ Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth -

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) Access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) The use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”<sup>7</sup>

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<sup>4</sup> (1955) 1 SCR 1045.

<sup>5</sup> M P Jain, *Indian Constitutional Law*, 7<sup>th</sup> ed., (Lexis Nexis: Gurgaon, 2014), pp. 460-461.

<sup>6</sup> Article 15 and Article 16 of the Constitution of India 1950.

<sup>7</sup> <https://indiankanoon.org/doc/609295/> last visited on 10<sup>th</sup> December 2021 at 9.30 am.

## Article 16 –

“Equality of opportunity in matters of public employment - (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.”<sup>8</sup>

### **Protective Discrimination under Articles 15(4), 16(4), 16(4A) AND 16(4B):**

The intention of the framers of the Constitution while framing Article 16(4) was that, “by enabling reservation in public employment for backward classes, with an intention to supplement the guarantee of formal equality with a system of preferential treatment to correct social inequality accumulated due to historic reasons”.<sup>9</sup>

Judiciary has said in many cases that the schemes of protective discrimination should be in accordance with the constitutionally permissible objectives and methods.

In *M. R. Bajaj v. State of Mysore*<sup>10</sup>, Mysore government passed an order which provided for reservation of 68 per cent seats in medical and engineering colleges and other technical

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<sup>8</sup> <https://indiankanoon.org/doc/211089/> last visited on 10<sup>th</sup> December 2021 at 10.00 am.

<sup>9</sup> Dr. B. R. Ambedkar, CAD, Vol.7, p. 701.

<sup>10</sup> Ibid.

institutions for backward classes and even the SC and ST. This order was challenged in the court. The question before the court was whether the order passed by the government of Mysore is valid?

Court held that the reservations should be within reasonable limits. And the special provisions must not be more than 50 per cent. But how much will be less than 50 per cent will depend on the current prevailing circumstances. And that depends on each case. The reservation of 68 per cent seats was said to be inconsistent to Article 15(4) of the Constitution.<sup>11</sup> And finally held that Article 15(4) is an exception to Article 15(1) of the Constitution.

Articles 15(4) and 16(4) are facets of equality and not exceptions is the second view. This view was first initiated in *N. M. Thomas*<sup>12</sup>, and it was accepted by the majority in *Indra Sawhney*<sup>13</sup> later on.

### **Right to reservation a Fundamental Right or not?**

In *Ashok Kumar Gupta v. State of U.P.*<sup>14</sup>, Justice K. Ramaswamy said that, “a liberal and purposive construction of the reservation clauses and their connection with right to livelihood and social justice make the right to reservation a fundamental right”.<sup>15</sup>

There cannot be exclusion of the need to balance right to reservation with right to equality.

In *Ajith Singh v. State of Punjab*<sup>16</sup>, the Constitutional bench of five judges of the Supreme court observed that, “Articles 16(4) and 16(4A) do not confer any fundamental right nor impose any constitutional duty. They are in the form of enabling provisions with discretion on the State to consider providing reservation if the circumstances are such mentioned in the Article so warranted.”<sup>17</sup>

### **Creamy Layer test:**

The objective of creamy layer test is that equals should be treated equally and unequals should be treated unequally.

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<sup>11</sup> *Supra* note no. 5, p. 102.

<sup>12</sup> AIR 1976 SC 490.

<sup>13</sup> AIR 1993 SC 417.

<sup>14</sup> (1997) 5 SCC 201.

<sup>15</sup> *Supra* note no. 5, p. 220.

<sup>16</sup> (1999) 7 SLT 476.

<sup>17</sup> *Supra* note no. 5.

Justice Sawant says that, “As society moves forward, at least some individuals and families in the backward classes, however small in number, gain sufficient means to develop their capacities to compete with others in every field”.<sup>18</sup>

As a response to the *Indra Sawhney*<sup>19</sup> judgement the government both Union and State formulated creamy layer test.

In *Indra Swahney II*<sup>20</sup>, a provision of 1995 Kerala statute said that there is no creamy layer in Kerala to any Backward classes. Supreme Court struck this down on the ground that it violates Art. 14 and 16(1) and also of the principles laid down in *Indra Sawhney*.<sup>21</sup>

### **Extent of Reservation:**

Reservation means setting apart or excluding from the competition. Courts have evolved a formula of limitation on the extent of reservation by deviating from the general principle of equality of opportunity.

### **Quantum of reservation:**

When right to equality of opportunity and even provision for reservation of backward classes is guaranteed, there has to be a balance between the two competing claims and that should be a reasonable one. Not only the interest of two completing sides but also the interest in maintaining the standards of administration or of education and of social interest in promotion also should be kept in mind.<sup>22</sup>

### **50 per cent rule:**

*Indra Sawhney v. Union of India (ii)*<sup>23</sup>,

Kerala Government refused for three years to appoint a State Commission which identifies the creamy layer. In the year 1995 Kerala State Backward Classes (Reservation of Appointments or Posts in the Services under the State) Act was enacted by the State Legislature. The Act declared that the State does not consider creamy layer section.

The Act was invalidated by the Supreme Court.

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<sup>18</sup> 1992 SCC (L&S) (Supp) 1, p. 429.

<sup>19</sup> *Supra* note no. 13.

<sup>20</sup> AIR 2000 SC 498.

<sup>21</sup> *Supra* note no.5, p.240.

<sup>22</sup> Udai Raj Rai, Fundamental Rights and their Enforcement, (PHI Learning Private Limited, New Delhi, 2011), p. 613.

<sup>23</sup> (2000) 1 SCC 168.

If any government fails to implement to appoint a Commission and the requirement of excluding the creamy layer, court has issued directions which will compel them in doing so.<sup>24</sup>

Court laced the 50% limitation of reservation with some explanatory provisos. They are as follows:

- “All the places available are divided into two categories- those in the social reservation category and those in other category. This reservation or the division which is 50-50 is known as vertical reservation. It is especially for the SCs and STs and OBCs. Plus other permissible reservations, which are expected to be very few and limited, are to be adjusted against every category, depending on the category to which the beneficiary belongs. This is called horizontal reservation.”
- “The beneficiaries who are eligible for social reservation are entitled to compete for general seats and also against those who are competing for 50 per cent social reservation. This means 50 per cent is reserved for SCs and STs and OBCs and remaining 50 per cent is open for all including the SCs, STs and OBCs.<sup>25</sup>
- The 50 per cent limit is subject to Art. 16(4B). It is inserted in the Constitution through 81<sup>st</sup> Amendment Act of 2000.<sup>26</sup>

Even after the pronouncement by judiciary in *Indra Sawhney* (case ii) in the year 2000, 69 per cent reservation was followed in Tamil Nadu. The reason behind this is the observations made by the judiciary in the pre- *Indra Sawhney* era. They are as follows:

In *M.R. Balagi v. State of Mysore*<sup>27</sup>,

The constitutional bench held that, “the reservation should be not more than 50 per cent”. This case was about the admissions in educational institutions.<sup>28</sup>

In *T. Devidasan v. Union of India*<sup>29</sup>,

The constitutional bench with 4:1 majority held that, “the reservation should be less than 50 per cent in services under the state”.<sup>30</sup>

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<sup>24</sup> J N Pandey, *Constitutional Law of India*, 49<sup>th</sup> ed., Central Law Agency: Allahabad, 2012, p.100.

<sup>25</sup> Udai Raj Rai, *Fundamental Rights and their Enforcement*, (PHI Learning Private Limited: New Delhi, 2011), p. 614.

<sup>26</sup> 81<sup>st</sup> Constitutional Amendment Act, 2000.

<sup>27</sup> (1963) Supp (1) SCR 439.

<sup>28</sup> Supra note no.25, p. 615.

<sup>29</sup> (1964) 4 SCR 680.

<sup>30</sup> Supra note no. 28.



In the year 1976 after a long pause, in *State of Kerala v. N.M. Thomas*<sup>31</sup>, Four out of seven judges viewed that, “50 per cent reservation is merely a caution and guidance”.<sup>32</sup>

In the year 1982, in *ABSK Sangh v. Union of India*<sup>33</sup>, Justice Krishna Iyer observed that, “50 per cent rule was in the nature of caution. What actually mattered was the number of admissions or the selections made from the category of reservation and not the numbers that are mentioned in the rules”.<sup>34</sup>

### III. CONCLUSION:

The seventy years of Constitutional experience in India has seen different phases of reservation. Balancing the provisions of equality helps in achieving the principle of equality.

The positive actions of the authorities or the government has provided help to many beneficiaries in getting relaxation in education, in getting jobs. These beneficiaries were denied of these facilities since long time. Meritocracy is an important aspect, but it loses its meaning without equality.

The caste- based reservation has reduced the gap between the upper classes and the lower classes to a greater extent.

The lower caste people have come to the equal footing with that of the people falling under general category. The people belonging to lower caste have climbed up the social ladder. Some people belonging to upper caste are suffering from illiteracy and poverty as a result of caste based reservation system.

The role played by judiciary cannot be ignored. In Indian system judicial review is an available means that corrects injustice that has arisen due to political pressure and electoral pressures. The list of cases decided by the Supreme Court and different High courts have developed the jurisprudence of reservation system in India.

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<sup>31</sup> (1976) 2 SCC 310.

<sup>32</sup> Supra note no. 28.

<sup>33</sup> (1981) 2 SCR 185.

<sup>34</sup> Supra note no. 28.

To give it a secular look court excluded the creamy layer in its later cases. The drama of reservation has been played differently on the public screen.

*Indra Sawhney* is the land mark case when it comes to reservation. It has provided guidelines to be followed while providing reservation. The quantum of reservation cannot exceed 50%. And there should be exclusion of creamy layer. The creamy layer is only applicable to OBCs.

There are certain classes where they no longer are backward. They have moved forward. Government has to look whether certain groups who have got the facilities have moved forward or not. It is the responsibility of the State to identify creamy layer. Later on the creamy layer will be excluded from the reservation facilities.

Reservation policies should not become the vested interest in the hands of political parties.

The concerns that can be drawn are:

- The castes that should actually be benefitted are not being benefitted. Other castes are taking advantage of the benefits of reservation system.
- Today, to gain the vote banks, the politicians are using reservation as a tool.
- The demand for reservation will be asked by one caste after the other.

#### **IV. SUGGESTIONS:**

1. There is a requirement of serious amendments to the Constitution, in particular to the provisions relating to equality and reservation.
  - The term discrimination has to be defined.
  - The prohibited heads of discrimination under Article 15 and 16 should be extended. These changes would reinforce the object of achieving the principle of equality. That is providing equal status and opportunity to all.
2. India needs a better base for reservation, which should include the poor people and even the backward groups. It should exclude the rich people and the dominating sections of the society.

There should be exclusion of creamy layer as held in *Indra Sawhney v. UOI*. But the exclusion of creamy layer is only for the OBCs.

The suggestion is that the creamy layer is to be made applicable to the SCs and STs also.

3. For the reservation in education the beneficiaries should be the underprivileged children from the deprived castes, and not only the few privileged children with caste tag.

Not only the improvisation of school education outcomes should be looked at, but also the government should concentrate on formulating a more rational model of reservation which should be based on equity.

4. The aspirations of the poor families belonging to the unreserved communities also should be addressed.

To solve this issue commissions or authorities can be set up in regional areas so that the issues can be resolved from the roots itself.

5. The role of the National and State Commissions for Other Backward Classes is to identify OBCs. And to further identify the creamy layer among them.

It is suggested that the commissions should conduct survey every six months so that the creamy layer can be excluded and the actual beneficiaries can take advantage of the facilities.

The Commission should also re-examine the reservation policy keeping in mind the present scenario.

6. Article 16(4A) provides reservation in promotion to SCs and STs. But such a facility should be removed.

Allowing reservation in promotion would allow the candidate belonging to SC or ST to supersede his/her senior. This would be against the principle of equality.

The main reason why reservation is being provided is to bring the SCs, STs and OBCs to the mainstream of the society.

7. The carry forward rule provided under Art. 16(4B) should be eliminated.

Adding previous year's excess seats to the present year would deprive the members belonging to the general category.