THE NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES, KOCHI

DISSERTATION

Submitted in partial fulfilment of the requirement of the award of degree of

MASTER OF LAW (LL.M)

(2023-24)

ON THE TOPIC

PROTECTIVE DISCRIMINATION OR PERPETUAL DISCRIMINATION: A NEED FOR CHANGE IN RESERVATION SYSTEM IN THE CONTEXT OF INDIA

Under the Guidance and Supervision of

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CERTIFICATE

This is to certify that **SANGEETH MOHAN,** Register No: **LM0123019**, has submitted Dissertation titled "**PROTECTIVE DISCRIMINATION OR PERPETUAL DISCRIMINATION: A NEED FOR CHANGE IN RESERVATION SYSTEM IN THE CONTEXT OF INDIA**" in partial fulfilment of the requirement for the award of Degree of Master of Laws in International Trade Law to the National University of Advanced Legal Studies, Kochi, under my guidance and supervision. It is also affirmed that the dissertation submitted by him is original, bona fide and genuine.

Date: 20th June, 2024

Place: Ernakulam

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DECLARATION

I declare that this Dissertation titled "**PROTECTIVE DISCRIMINATION OR PERPETUAL DISCRIMINATION: A NEED FOR CHANGE IN RESERVATION SYSTEM IN THE CONTEXT OF INDIA**" is researched and submitted by me to The National University of Advanced Legal Studies, Kochi in partial fulfilment of the requirement for the award of Degree of Master of Laws in Constitutional Law and Administrative Law, under the guidance and supervision of Dr. Sheeba S Dhar, and is an original, bona fide and legitimate work and it has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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The Dissertation titled **"PROTECTIVE DISCRIMINATION OR PERPETUAL DISCRIMINATION: A NEED FOR CHANGE IN RESERVATION SYSTEM IN THE CONTEXT OF INDIA"** submitted by SANGEETH MOHAN (Register No. LM0123019) in partial fulfilment of the requirement for the award of Degree of Master of Laws in Constitutional and Administrative Law has been checked for plagiarism in Grammarly on 24-06-2024 and the similar content identified is found to be less than 10%.

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ACKNOWLEDGEMENT

The competition of this dissertation work would not have been possible without the guidance and mentorship of Dr. Sheeba S Dhar, my guide and supervisor who was a pillar of support throughout. The regular inputs and meaningful suggestions meant that my work was made much easier than it could have been. She was always approachable, supportive and gave me clear, cogent and meaningful suggestions, which has aided me profusely in completing this dissertation.

I would also like to extend my gratitude to the respected Acting Vice-Chancellor, Hon'ble Justice (Retd.) S. Siri Jagan and the Director of Centre for Postgraduate Studies, Prof. Dr. Mini S.

Words cannot express the gratitude I have to all the other faculty members of NUALS, library staff, family and friends for their constant encouragement during the course of the writing of this dissertation.

Sangeeth Mohan

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ABBREVIATIONS

1.	AC	- Appeal cases
2.	AIR	- All India Reporter
3.	Anr.	- Another
4.	Art	- Article
5.	CJ	- Chief Justice
6.	Del	- Delhi
7.	Ed	- Edition
8.	EWS	- Economically Weaker Sections
9.	Js.	- Justice
10.	JJ.	- Judges
11.	INSC	- India Supreme Court
12.	L&S	- Law & Society
13.	OBC	- Other Backward Communities
14.	Ors.	- Others
15.	SC	- Supreme Court
16.	SCR	- Supreme Court Reports
17.	SCC	- Supreme Court Cases
18.	ST	- Scheduled Tribe
19.	Supp	- Supplementary
20.	U.S.	- United States
21.	Vol	- Volume
22.	W.P. (C)	- Writ Petition (Civil)

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CHAPTER I :

INTRODUCTION

1.1. Introduction

1.2. Scope of study

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1.4. Research Objectives

1.5. Research Questions

1.6. Hypothesis

1.7. Research Methodology

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1.1. Introduction

The reservation system has existed for decades in India and is essentially a practise of affirmative action for the upliftment of the weaker sections in the society. The reservation has ever since its inception been granted more and more broader scope and the categories of people that come under the purview of reservation has systematically increased. With the recent EWS reservation being granted to the economically weaker sections of the forward castes, there arises a need to revisit the original intentions of the makers of the Constitution and also to review the negative aspects of the current system of reservation. The societal changes over the years have affirmed positive changes in the mitigation of social discriminations faced by the Scheduled Castes and Scheduled Tribes but the continuation of it hints at its perpetuation. "At the end of seventy-five years of our Independence, we need to revisit the system of reservation in the larger interest of the society as a whole, as a step forward towards transformative constitutionalism."[1] This introspection of the Constitutional provisions are long overdue considering the continuity of this issue.

1.2. Scope of study

The change in demography is substantial and the system of reservation as set in the past with past data do not reflect the current population or its social dynamics. The change in attitude of youngsters is also very relevant. The majority of the youth of today no longer care for birth-based systems. It is a generation that is socially active but not socially interactive. They have no interest in socially discriminating people on the basis of any practises. The change in technology in society has entitled each and everyone from social exclusion. Study material, groceries, online classes, dress etc. are all available through e-commerce and other platforms. The data cost in India is also one of the cheapest in the world which has ensured the access to all kinds of facilities. EWS reservation for forward castes has further increased the reservations

[1] Janhit Abhiyan v. Union of India (EWS Reservation), (2023) 5 SCC 1

by 10%. The breach of the 50% ceiling limit and ever increasing quantum of reservation gives rise to fear of perpetuating of reservation system.

1.3. Statement of Problem

The reservation was enacted as a tool of protective discrimination to protect its citizens from the social oppressions of the time and create an inclusive society. But an uncontrolled system of such discrimination, with no end to it in sight, raises the question as to whether the system will be perpetuated for centuries.

1.4. Research Objectives

1. To analyse the evolution and extent of the concept of reservation in India.
2. To analyse the role of Judiciary in construing protective discrimination to ensure equality.
3. To examine the scope of exclusion of economically forward classes among SC/ST from the benefit of SC/ST reservation and its constitutionality.
4. To suggest the methods through which positive changes can be made in the existing reservation system.

1.5. Research Questions

1. What is the evolution and extent of the concept of reservation in India?
2. What is the role of the judiciary in construing protective discrimination to ensure equality?
3. What is the constitutional validity of economically forward classes being removed from SC/ST reservation category?
4. What are the methods through which positive changes can be made in the existing reservation system?

1.6. Hypothesis

1. Current reservation system discriminates against the general community and perpetuates discrimination.
2. Under Article 341 and 342, without creating a creamy layer, the President can by proclamation restrict SC/ST under the Constitution to economically weaker sections of SC/ST community.

1.7. Research Methodology

The study is primarily a doctrinal research. It includes analysis of primary and secondary sources, including Constituent Assembly Debates, statutes, rules, case laws, journal articles, books, newspaper articles, reports and other relevant materials.

1.8. Chapterisation

Chapter 1. Introduction

The Introduction chapter details the contents of the study. It starts off with a small introduction on the area of topic, which is reservation, and concludes with the need for such a study. The scope of study, containing the recent changes in the society, implores the reinspection of the reservation system and creates a brief account on the scope of the study. The statement of the problem raises the context of such a study on reservation. The research objectives and research problems mentions the four areas of concentration of studies and two hypotheses gives a preliminary answer over the question sought to be solved with the study. The research methodology provides the manner of conducting the study and how it gives conclusive answers to questions, either proving or disproving the hypothesis. Chapterisation divided the study into 5 chapters that together comprise the core of the study and the literature review opens up the books and other materials that were referred to during the course of the study.

Chapter 2. Evolution of the system of reservation in India

This chapter starts with a brief introduction pointing to the origin of the caste system in India. Then it moves on to the initiation of discrimination in India which evolved from the original caste system. The subsequent study revolves around the reservation that arose for the protection of marginalised people. The communal award and the poona pact that came about was discussed in detail. The introduction of reservation into the Constitution was also examined. The Mandal Commission Report that played a vital role in OBC reservation was also analysed in detail and the chapter concludes after the examination of the other forms of reservation that evolved in India.

Chapter 3. Scope and extent of reservation system in India

The chapter discussing scope and extent of reservation system in India starts off with the discussion of the concept of 'protective discrimination' in India. Then the study moves onto the balancing between the right to equality and the reservation. The exceptions to the right to equality i.e. the validity of classification is also detailed. How the concept of reservation becomes validated by the Constituent Assembly and under the Constitution is also very systematically extrapolated. The judiciary's approach is also inspected by analysing its plethora of judgments.

Chapter 4. Reservation system in India : Need for change

The chapter on need for change, as the name suggests, is very much about a shift in the reservation policies. The intentions of the Constituent Assembly regarding the perpetuation of reservation is reviewed initially, then the paradigm shift is validated through various reasons. The change from 'protective discrimination' to 'perpetual discrimination' is scrutinised with various factors. Then, finally, the various possibilities that can be done to change the current reservation system is perused and the same is delved upon.

Chapter 5. Conclusion and Suggestions

The chapter first evaluates the reservation system on the basis of the study. The various conclusions inferred from each chapter is summarily concluded in this chapter and then various inferences from an integrated understanding is presented.

The various suggestions that can be derived from the understandings made in the study is the final aspect of the chapter and hopes to give fresh perspectives to the reader.

1.8. Literature Review

A. Books

***Constituent Assembly Debates*: Official Report, Third Reprint (1999)**, Lok Sabha Secretariat, is a comprehensive collection of the debates and discussions that took place during the drafting of the Indian Constitution. The debates span from October 17, 1949, to November 26, 1949, and cover various aspects of the Constitution, including fundamental rights and the aspects of reservation. Being a detailed account of the discussions and amendments that shaped the Constitution, the Debates gives an insight into the minds of the Constitution makers and helps understand the purpose for which reservation was propounded. It also facilitates a better understanding the Indian political system at the time.

Dr. D.D. Basu, *Commentary on the Constitution of India*, 9th ed (LexisNexis, 2014), is a commentary that adopts an interdisciplinary approach, examining the Constitution from philosophical, sociological, political, and legal perspectives, making it a treatise on comparative constitutional jurisprudence which talks elaborately on Right to Equality and the judicial pronouncements that forms it's interpretations, which forms the basis for the current topic of protective discrimination. It is a seminal work that has been updated to reflect the latest developments in Indian constitutional law and therefore holds very valuable insights with regards to the current study.

Marc Gelanter, *Competing Inequalities : Law and the Backward Classes in India*, (1984) is a comprehensive study of India's policies of systematic preferential treatment, particularly focusing on the backward classes. The book discusses the role of courts in public policy, analysing the choices and tensions in Indian policies of compensatory preference. The book also highlights the complexities of using castes as units or classes deemed backward. It therefore gives a comprehensive and holistic

understanding of the reservation system in India and the factual analysis on its effectiveness.

H M Seervai, Constitutional Law of India : A Critical Commentary, 2nd ed., pp. 283 (1975) is a critical commentary on the Indian Constitution, providing a comprehensive analysis of its provisions and implications. It examines the impact of the Constitution on public policy, including issues related to governance, social justice, and economic development. In regards to the current study, the book makes an elaborate analysis on the right to equality and the possibilities intrinsic to it.

B. Articles

Monalisa Chandra & Pratiksha Kumar, *Reservation Policy in India: Scope, Development, History and Employment rights*, International Journal of Human Rights Law Review, Volume 2, Issue 4 (2023) is a comprehensive study on reservation that gave me various insights into the evolution of reservation system in India. This enables an easy understanding of the evolution with its simple language and rich content.

Sharma, D. A. P.. (2021). *Changing characteristics of the caste system in India,* Journal of Oriental Studies. 96 analyses the change in the characteristics of caste system with the socio-cultural and socio-economic changes in the society. It provides a fresh understanding of the newer gradients of caste in the society.

Bhagwan Das. "Moments in a History of Reservations." Economic and Political Weekly 35, no. 43/44, 3831–34 (2000) is a very well written article on the major events that took place with regards to reservation and helps understand the social aspects of reservation. The sufferings and the particulars of events are comprehensively provided in the article.

A. Ramaiah. "*Identifying Other Backward Classes*." Economic and Political Weekly 27, no. 23, 1203–7 (1992) gives a meaningful inference to the OBC reservation system that came about in 1990. OBC reservation, having the largest quantum of reservation, has an enormous bearing on the reservation system of India and this article details the identification of OBCs.

CHAPTER II :

EVOLUTION OF THE SYSTEM OF RESERVATION IN INDIA

2.1. Introduction

2.2. Discrimination

2.3. Start of reservation in India

2.4. Communal Award and Poona Pact

2.5. Validating reservation in Constitution

2.6. Mandal Commission

2.7. Other forms of Reservation

2.8. Conclusion

2.1. INTRODUCTION

"There is equality only among equals. To equate unequals is to perpetuate inequality."[2]

India is a nation with one of the most ancient civilisations in the world. Within its complex history lies a gargantuan civilisation that created law and order and rule based societies way before any existing written laws were created. Glimpses of it can be seen from the Hindu scriptures, shastras and puranas as Hinduism was the predominant religion at the time. The Hindu social structures and institutions revolved around the Varna system. History shows that the ancient Indians created a caste system classifying themselves into 4 varnas according to their occupations, namely, Brahmins, Kshariyas, Vaishyas and Shudras.

The earliest mentions of this can be seen in the Rigvedic hymn of Purushasukta[3]. The Gita also quotes Krishna as saying, "The four-fold Order was created by Me, on the basis of quality and action"[4]. This verse emphasises that the four varnas (Brahmin, Kshatriya, Vaishya, and Sudra) were created based on the innate qualities and actions of individuals, not solely on birth. The system is designed to categorise people according to their natural tendencies and abilities, ensuring that each person performs duties that align with their inherent qualities. The Brahmins, Kshariyas, Vaishyas and Shudras were scholars, warriors, traders and labourers respectively. A system that was said to classify people into the 4 varnas as per their aspirations, periodically, came to be a system of allocation by birth itself.

2.2. DISCRIMINATION

Within the four-fold Varna system, the shudras, who were the labourers, came to be considered as the lowest of people as they were doing menial jobs like manual scavenging. This created a system of caste discrimination against the shudras

[2] Epigraph to 'Report of the Backward Classes Commission' (Mandal Commission Report), Part 1, Vol 1, (1980)
[3] See, Rigveda: 10.90
[4] Bhagavad Gita, Chapter 4, Verse 13

resulting in their alienation from the rest of the society. They faced atrocities, deprived of education, denied access to basic needs like water wells and shops and were even categorised as ‘untouchables’.

The marginalisation that they faced are countless. Some of those include:

➢ Social Segregation: Shudras are often segregated from higher castes in social gatherings, and they are not invited to events until very late or not at all. They also use different surnames to hide their caste.

➢ Occupational Restrictions: Shudras are confined to menial jobs and are not allowed to read or listen to Hindu scriptures, light sacred fire, or bear sacred threads, which are privileges reserved for higher castes.

➢ Discrimination in Relationships: Shudras have faced discrimination in personal relationships. For instance, a woman named Renu Singh was abandoned by her Brahmin partner after he discovered her caste. She was left alone and had to undergo an abortion without support.

➢ Violence and Harassment: Shudras have been victims of violence and harassment. For example, a student from the Shudra community was gangraped by upper-caste members in Rajasthan, and the perpetrators were convicted but continued to harass the victim after their release.

➢ Economic Disadvantage: Shudras are often economically disadvantaged and have limited access to education and job opportunities. This can lead to a cycle of poverty and further marginalization.

The Mughal empire, being ruled by Muslim rulers, saw the dilution of such Hindu practices due to the oppressive practices against the Hindus. The British era also played a role in unifying the divided population of the country. The fight against the British Raj saw even the backward classes being brought to the mainstream. This also saw the transformation of shudras to dalits[5].

[5] Monalisa Chandra & Pratiksha Kumar, *Reservation Policy in India, Scope, Development, History and Employment Rights*, 2 International Journal of Human Rights Law Review, Issue 4 (2023) , *See also*, Menon VP, *Transfer of Power in India* (Princeton University Press 2015).

With little land of their own to cultivate, Dalit men, women, and children numbering in the tens of millions work as agricultural laborers for a few kilograms of rice or Rs. 15 to Rs. 35 (US$0.38 to $0.88) a day. Most live on the brink of destitution, barely able to feed their families and unable to send their children to school or break away from cycles of debt bondage that are passed on from generation to generation. At the end of day they return to a hut in their Dalit colony with no electricity, kilometers away from the nearest water source, and segregated from all non-Dalits, known as caste Hindus. They are forbidden by caste Hindus to enter places of worship, to draw water from public wells, or to wear shoes in caste Hindu presence. They are made to dig the village graves, dispose of dead animals, clean human waste with their bare hands, and to wash and use separate tea tumblers at neighborhood tea stalls, all because—due to their caste status—they are deemed polluting and therefore "untouchable." Any attempt to defy the social order is met with violence or economic retaliation.[6]

The observation made above is astounding and at the same time revealing as to the conditions of dalits at the time. All the marginalisations that were noted earlier are faced by them and the same is reflected in each sentence of the author. The lack of land, meagre income, illiteracy, debts, lack of access to electricity and water, segregation, 'untouchability', violence faced are mentioned in the single excerpt that sums up the condition of the daily life of a dalit in the past.

The historical sufferings of the said backward caste was to be compensated and the social and educational backwardness faced by the people of backward caste continually kept them from raising up and gaining a respectable position in the society. The solution to his perpetual downfall of backward caste was sought to be addressed through the system of reservation.

2.3. START OF RESERVATION IN INDIA

Reservations were adopted in India during the later decades of the nineteenth century, when the subcontinent could be divided into two major types of governance: British India and 600 princely kingdoms .

[6] Broken People : Caste Violence Against India's "Untouchables", Chapter III, Human Rights Watch, (March 1999), ISBN 1-56432-228-9

The idea of reservation was introduced and founded by the William Hunter and Jyotirao Phule in 1882[7]. This idea was adopted by the people especially dalits who were bearing the brunt of social victimisation. In 1891 there was a colossal agitation in Kerala for the demand of reservation in government jobs in the princely State of Travancore against the recruitment of the non-Tamil Native Brahmins into the public service jobs overlooked the highly qualified natives of Kerala[8].

Kolhapur state declared in 1902 that 50% of its services would be reserved for the underprivileged. This was the first ever announcement in India, granting affirmative action for the welfare of the underprivileged. Reservations were made for the castes and other groups associated with the British government in 1908. The Government of India Act of 1909 contained the Morley Minto Reforms. Following a protracted struggle against the oppression of non-Brahmins spearheaded by the underprivileged class known as the Social Justice Moment, Mysore implemented reservations for the backward castes in 1921[9]. The Government of India Act, 1919, included reservation measures. A Government Order by the Madras Presidency in 1921 gave non-Brahmins 44%, Muslims 16% and Anglo-Indian Christians 8% reservation respectively.[10]

2.4. COMMUNAL AWARD AND POONA PACT

Later on, in 1932, the first signs of the community's polarisation started. The natives began to crumble into Ezhavas, Muslims, and some Christians who demanded representation in the Legislature and governmental jobs.

Consequent to the Prime Minister MacDonald declaring a communal representation to the Muslims, Sikhs, Indian Christians, Anglo-Indians, Europeans, and Dalits or Deprived Castes, among other minorities and religious groups, in 1932, the Communal Award and the Poona Pact came into effect. The Communal Award, envisioned separate electorates for the scheduled caste and other minority parts of society. This award is known as MacDonald award as it was created by British

[7] Sharma, D. A. P. Changing characteristics of the caste system in India. Journal of Oriental Studies. . (2021)
[8] *Supra*, note 5 , See also, R KRISHNAKUMAR, 'A History of Reservation' (Frontline 2004)
[9] *Ibid*, See also, Panandiker VAP, The Politics of Backwardness (1997).
[10] *Ibid*

Prime Minister Ramsay MacDonald. Under thus, special districts, where voting was restricted to members of a specific class, were allocated a specific number of seats. MK Gandhi fiercely criticized it, but Dr Ambedkar and other minority organizations supported it.

On August 15, 1932, following lengthy deliberations at the second Round Table Conference, the British government officially established distinct electorates. Gandhi openly opposed separate SC electorates very immediately, although he had no problem with equivalent facilities for Muslims or Sikhs. But the British refrained from revoking the Award.[11]

The Communal Award gave the Untouchables two benefits:— (i) a fixed quota of seats to be elected by separate electorate of Untouchables and to be filled by persons belonging to the Untouchables ; (ii) double vote, one to be used through separate electorates and the other to be used in the general electorates.[12]

The 'Communal Award' was considered as one of the tools of divide and rule in India. Gandhi opposed the British since he felt that their policies would divide the Hindu society and started a hunger strike. Ambedkar, on the other hand, was all for the Communal Award.[13]

The conciliation between them on this issue led to the Poona Pact. Twenty-three people signed the Poona Pact at 5 p.m. on September 24. It was signed by Madan Mohan Malaviya on behalf of the Hindus and Gandhi, and Ambedkar on behalf of the downtrodden sections. As per the agreement, the lower classes received 148 places instead of the British allocated 78 seats.[14] However, untouchables lost the right to elect their own representatives and this right was transferred to the Hindus. The result was that those who were elected remained faithful to the parties and leaders who adopted them as candidates and funded their elections.[15]

[11] Hindustan Times, Gandhi, Ambedkar and the 1932 Poona Pact, (Last accessed 14 June 2024, 8 PM IST)
[12] Dr. Babasaheb Ambedkar : Writings and Speeches, Vol. 9, First Edition by Education Department, Govt. of Maharashtra : (26 January, 1991), Re-printed by Dr. Ambedkar Foundation : (January, 2014)
[13] See, *Supra*, note 11
[14] *Ibid*
[15] Bhagwan Das. "Moments in a History of Reservations." *Economic and Political Weekly* 35, no. 43/44, 3831–34 (2000). http://www.jstor.org/stable/4409890.

The following is the consensus of the agreement:—

(1) There shall be seats reserved for the Depressed Classes out of the general electorate seats in the Provincial Legislatures as follows : Madras 30 ; Bombay with Sind 15 ; Punjab 8 ; Bihar and Orissa 18; Central Provinces 20; Assam 7 ; Bengal 30; United Provinces 20; Total 148.

2) Election to these seats shall be by joint electorates subject, however, to the following procedure :

All the members of the Depressed Classes, registered in the general electoral roll in a constituency, will form an electoral college, which will elect a panel of four candidates belonging to the Depressed Classes for each of such reserved seats, by the method of the single vote ; the four persons getting the highest number of votes in such primary election, shall be candidates for election by the general electorate.

(3) Representation of the Depressed Classes in the Central Legislature shall likewise be on the principle of joint electorates and reserved seats by the method of primary election in the manner provided for in Clause 2 above, for their representation in the Provincial Legislatures.

(4) In the Central Legislature, eighteen per cent of the seats allotted to the general electorate for British India in the said legislature shall be reserved for the Depressed Classes.

(5) The system of primary election to a panel of candidates for election to the Central and Provincial Legislatures, as hereinbefore mentioned, shall come to an end after the first ten years, unless terminated sooner by mutual agreement under the provision of Clause 6 below.

(6) The system of representation of the Depressed Classes by reserved scats in the Provincial and Central Legislatures as provided for in Clauses 1 and 4 shall continue until determined by mutual agreement between the communities concerned in the settlement.

(7) Franchise for the Central and Provincial Legislatures for the Depressed Classes shall be as indicated in the Lothian Committee Report.

(8) There shall be no disabilities attaching to any one on the ground of his being a member of the Depressed Classes in regard to any elections to local bodies or appointment to the Public Services. Every endeavour shall be made to secure fair representation of the Depressed Classes in these respects, subject to such educational qualifications as may be laid down for appointment to the Public Services.

(9) In every province out of the educational grant, an adequate sum shall be earmarked for providing educational facilities to the Members of the Depressed Classes.[16]

While the Poona Pact increased the fixed quota of seats from 78 to 148, the agreement had also deprived the 'Untouchables' of their privilege of double votes.

After the massive rebellion and hunger strikes, the Poona Pact, which reserved seats for impoverished castes within the Hindu electorate, was eventually approved in **1932** and implemented. The Government of India Act **1932**, which provided for the reservation of seats for disadvantaged castes, served as the stamping ground for the Poona Pact of **1932** and its subsequent amendments.

During the time Ambedkar was appointed member of the Viceroy's Executive Council, he submitted a memorandum outlining the grievances of the Scheduled Castes and demanding reservations in public services, scholarships and stipends for study within the country and abroad, a share in contracts, and so on. This was duly recommended by the viceroy and referred to the secretary of state, who accepted the recommendations. For the first time in India's history, the scheduled castes were granted an 8.5% reservation in central services and other facilities in 1942.[17]

2.5. VALIDATING RESERVATION IN CONSTITUTION

A committee headed by Ambedkar was tasked with creating the Indian Constitution following the change of power in 1947. A few members of the constituent assembly were against the scheduled castes receiving reservations. Members of the scheduled castes, who were primarily Congressmen, were concerned that they would lose their

[16] *Supra*, note 11
[17] *Supra*, note 15

reservation since Sardar Vallabhbhai Patel, the minority committee president, was against it. They went to Ambedkar, who suggested that they remind Mahatma Gandhi of the agreement reached in the Poona Pact. Consequently, under Article 334, the Indian constitution provided for a "ten-year" reservation in the legislatures and Lok Sabha, which ended in 1960. A special provision was created under Article 15(3) for creation of special provisions for women and children. Article 16(4) empowered the government to create '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.'[18]

But regarding Article 334, interpretation can be made that Article 335 read together with Article 46 have no time limit prescribed for reservation under the Constitution. Hence, the legislatures have taken it upon themselves to extend the time period for reservation. By virtue of the Constitution (One hundred and fourth Amendment) Act, 2019, the reservation has gained validity for '80 years' from the commencement of the Constitution.[19]

The Constitution of India commits to giving reservations to Scheduled castes and tribes but this excluded converted castes. By **1951**, the First Amendment in the Constitution came in, which legalised the Caste-based Reservation. Article 15(4) validated special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.[20]

Thus began India's historic reservation system that has suffered through various policy decisions, statutory frameworks, constitutional amendments and judicial interpretations. Various aspects to reservation have been implemented, struck down, reimplemented and so forth. The legislature bats for reservation and the judiciary checks its validity.

[18] INDIA CONST, art 16(4)
[19] *See*, INDIA CONST, art 334 amended by the Constitution (One hundred and fourth Amendment) Act, 2019
[20] *See*, INDIA CONST, art 15(4)

2.6. MANDAL COMMISSION

In January 1953, the government had set up the First Backward Class Commission under the chairman of social reformer Kaka Kalelkar. The commission submitted its report in March 1955, listing 2,399 backward castes or communities, with 837 of them classified as 'most backwards'. The report was never implemented.[21]

On January 1, 1979, when Morarji Desai was the Prime Minister of India, the government chose Bindeshwari Prasad Mandal, an Indian parliamentarian and a former chief minister of Bihar, to head the Second Backward Class Commission. Mandal submitted his report two years later, on December 31, 1980. So, the commission was named as Mandal Commission. This commission makes it necessary to recognize the social and educationally backward classes of the society.

The objectives of the Commission were as follows:

(1) to establish the standards for classifying the socially and educationally disadvantaged groups;

(2) to suggest actions for their progress;

(3) to assess whether it would be appropriate to reserve positions or appointments for them; and

(4) to submit a report outlining the information the commission had gathered.[22]

The Mandal Commission primarily employed two exercises: the first used a process of elimination to calculate the percentage of "other backward classes," and the second entailed identifying the backward classes through a socio-educational survey.[23]

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[21] *See*, Sunday Story: Mandal Commission report, 25 years later, Indian Express, (Last accessed 16 June, 2024, 00:54 IST)
[22] *See*, A. Ramaiah. "Identifying Other Backward Classes." Economic and Political Weekly 27, no. 23 (1992): 1203–7. http://www.jstor.org/stable/4398478.
[23] *See*, Bhattacharya, Durgaprasad. "The Mandal Commission in a Historical and Statistical Perspective." Proceedings of the Indian History Congress 51, 641–48. (1990) http://www.jstor.org/stable/44148302.

Eleven criteria were established by the commission to determine which classes were socially and educationally backward. These criteria fell into three main categories: social, educational, and economic. The following are the 11 criteria:

- Social

(i) Classes or castes viewed by others as socially backward.

(ii) Castes and castes whose primary source of income is manual labour.

(iii) Castes/classes in which, in rural regions, at least 25% of females and 10% of men above the state average marry before the age of 17, and in urban areas, at least 10% of females and 5% of males do so.

(iv) Castes and classes in which the proportion of working-age women is at least 2% higher than the state average.[24]

- Educational

(v) Castes/classes in which there are at least 25% more children in the 5–15 age range who never attended school than the state average.

(vi) Castes and classes where the state average for the age range of 5 to 15 years old is at least 25% higher than the rate of student dropouts.

(vii) Castes and classes where the proportion of matriculating students is at least 25% lower than the state average.[25]

- Economic

(viii) Castes and classes whose household asset values are on average at least 25% less than the state average.

(ix) Castes/classes in which there are at least 25% more kuccha home families than the state norm.

(x) Castes and classes where more than 50% of the households get their drinking water from sources farther than 500 meters.

[24] *See*, Supra note 21
[25] Ibid

(xi) Castes and classes in which a minimum of 25% more households than the state average have taken out consumer loans.[26]

Following were the major recommendations of the Mandal Commission report:

- OBCs must be given a 27% reservation in government and public sector jobs.
- At all promotion levels, a 27% reservation must be given to OBCs.
- If the reserved quota positions are not filled, they may be carried over for a maximum of three years.
- OBCs will have the same age relaxation as SCs and STs.
- For backward classes, a list akin to SCs and STs will be created.
- Reservations should be implemented by banks, colleges, universities, and commercial companies that receive government funding.
- In order to implement these recommendations, the government will take the required steps.

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

2.7. OTHER FORMS OF RESERVATION

Apart from the educational reservation provided under Article 15(4) for socially and educationally backward classes and SCs and STs and the public employment reservation for backward classes as enshrined under Article 16(4), there are also other forms that have evolved in independent India. These include:

- ➔ Reservation for Persons with Disabilities (PWDs).
- ➔ Reservation in promotions by virtue of Articles 16(4-A) and 16(4-B).
- ➔ Transgender reservation in Karnataka.
- ➔ Reservations for religious minorities.

[26] *Ibid*

➔ Economic reservation for persons not already reserved under Articles 15(4), 15(5) and 16(4) by inserting Article 15(6) and 16(6) etc.

2.8. CONCLUSION

Indian societal system has evolved through the centuries. From the age-old Varna system and its transformation throughout Indian history to the current multi-linguistic, socially different, culturally diverse and religiously polarised country, there have been instances of suppression, oppression, maiming and social exclusion of various classes of the society. This has necessitated a reservation system and this system was developed despite the hurdles and objections along the way.

Thus, evolution of reservation can be seen reflecting religious, cultural, social, historical, biological, legal and judicial components and needs a very deep and comprehensive analysis to get a clear understanding.

The protective discrimination has not stopped growing with the society and the contemporary government still take initiative to grant reservation to different weaker sections of the society creating a system with no end to reservation in near-sight.

CHAPTER III :

SCOPE AND EXTENT OF RESERVATION SYSTEM IN INDIA

3.1. Introduction
- 3.1.1. Affirmative Action and Protective Discrimination
- 3.1.2. Types of protective discrimination afforded in India
- 3.1.3. Reservation as the essential component of protective discrimination

3.2. Reservation and Equality
- 3.2.1. Article 14 Equality
- 3.2.2. Test for checking exceptions to Equality

3.3. Constitutional basis for reservation
- 3.3.1. Constitutional Assembly Debates regarding reservation
- 3.3.2. Constitutional provisions

3.4. Constitutional validity of reservation
- 3.4.1. Judicial review of reservation
- 3.4.2. Creamy Layer and constitutionality
- 3.4.3. Reservation based on Economic criterion

3.5. Conclusion

3.1. Introduction

India's system of preferential treatment for historically disadvantaged sections of the population is unprecedented in scope and extent. India embraced equality as a cardinal value against a background of elaborate, valued, and clearly perceived inequalities. Her constitutional policies to offset these proceeded from an awareness of the entrenched and cumulative nature of group inequalities[27].

"We must begin by acknowledging the fact that there is complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India, a society based on the principle of graded inequality which elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality."[28]

This statement of Ambedkar gives quite a rude awakening as to how legal equality does not really equate to equality at grass root levels. The ideological equality cannot meet realistic equality and there arises only political equality from a Constitutional provision. The social transgressions and marginalisations faced by dalits and other backward classes and the economic inequality arising out of income disparity and resource allocations are not eradicated by including equality in the Constitution.

This chapter seeks to get an outlay of the judicial interpretation of reservation in India. The equality contemplated under Article 14 was not necessarily equality but equity. The treatment of unequals equally would have resulted in injustice in a stratified society like that of India. The beneficial treatment availed to the downtrodden took many forms through the policy decisions of the ruling government. Vote bank politics also played a critical role in how reservation was utilised. The constitutionally permitted exception to equality through reservation was

[27] Marc Gelanter, Competing Inequalities : Law and the Backward Classes in India, 1 (1984)
[28] B.R. Ambedkar, Constituent Assembly Debates, 25 Nov 1949
https://www.constitutionofindia.net/debates/25-nov-1949/

used, overused and even misused by governments and it is the judiciary, being the watchdog of justice, that kept a check on the arbitrary use of the provision. The digress of the provisions outlined under reservation and the judicial interpretation of the constitutional validity is analysed below.

3.1.1. Affirmative Action and Protective Discrimination

Black's Law Dictionary[29] defines 'Affirmative action programs' as Employment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group members; i.e. positive steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination; commonly based on population percentages of minority groups in a particular area.

The United States has a comparable history of discrimination in its treatment of blacks. Slavery, like untouchability in India, was deeply rooted in American history[30]. Affirmative Action-like policies in India, known as the Reservation System, predated Affirmative Action in the United States and were enumerated in the 1950 Indian Constitution. Conversely, Affirmative Action in the United States did not begin until 1961 when President John F. Kennedy signed Executive Order 10925, which required government contractors to take "affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."[31] While affirmative action is generally attributed to any positive steps designed to eliminate existing and continuing discrimination, in some technical terminologies American reservations are referred to as 'affirmative action' and 'protective discrimination' is used in reference to the reservation systems of India and South Africa. The difference in

[29] Henry Campbell Black, M. A., BLACK'S LAW DICTIONARY, 6th ed.,(1990)
[30] *See*, Geoffrey Stone et al.., Constitutional Law, 435-37 (1986)
[31] Simonne Kapadia, A Comparison of the Reservation System in India to Affirmative Action Policies in the United States, Michigan State International Law Review, (2021)

'affirmative action' and 'protective discrimination', used in America and India respectively, can be observed in the burden during judicial review.

The American version necessitates compelling state interest and the State needs to prove that the action serves towards positive discrimination whereas in India there is no such strict scrutiny and compelling state interest is not required. The burden also shifts towards others to prove that their equality is being violated.

American position on affirmative action and compelling state interest can be seen from a series of case laws regarding the Equal Protection Clause. In **Shapiro v. Thompson**[32], the Supreme Court struck down Connecticut's and Washington, D.C.'s one-year residency requirement for receiving welfare benefits. Justice Brennan wrote, *"the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest."*

The Court importing the compelling state interest standard into equal protection can be seen in cases involving voting rights such as Kramer v. Union Free School Dist[33] and Cipriano v. City of Houma[34].

It was not until 1984, in Palmore v. Sidoti[35], that an opinion for the Court declared that "to pass constitutional muster" racial classifications "must be" both narrowly tailored and "justified by a compelling governmental interest". While not exactly the completion of the spread of the "compelling state interest" standard - it took another five years for the Court to decide to employ it in affirmative action cases[36].

In contrast, the tests of judicial review in India for checking constitutional validity of reservation in India have a low standard of review. There is no necessity of

[32] Shapiro v. Thompson, 94 U.S. 618 (1969).
[33] Kramer v. Union Free School Dist., 395 U.S. 621 (1969).
[34] Cipriano v. City of Houma, 395 U.S. 701 (1969).
[35] Palmore v. Sidoti, 466 U.S. 429 (1984)
[36] Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, The American Journal of Legal History , Oct., 2006, Vol. 48, No. 4 (Oct., 2006), pp. 355-407 ; See also, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. Croson, 488 U.S. 469 (1989).

compelling state interest and the scrutiny is not very high. It is the people or the judiciary that has to establish the violation of equality and the government need not be proactive in proving the non-infringement of equality.[37]

3.1.2. Types of protective discrimination afforded in India

As was detailed above, the judicial review in India was a scrutiny having a low standard of review. The absence of need to justify positive discrimination and the lack of need for compelling state interest empowers the government. With such authority and discretion vested in the government, the government has persisted to make social welfare measures and include protective discriminatory practices wherever possible.

- ❖ Provisions for protection of women and children
- ❖ Reservation in government jobs and public education: The Constitution of India provides for reservations in government jobs and admissions to public educational institutions for historically disadvantaged groups like Scheduled Castes (SCs), Scheduled Tribes (STs), and Other Backward Classes (OBCs). This is also being granted to other disadvantaged sections like Persons with Disabiliies (PWD) and others.
- ❖ Reservation in promotion in jobs: This is seen as a necessary aspect to bring the backward communities to positions of decision making. Their participation should not be limited to the lower stratas of the society.
- ❖ Reservation in legislatures: There are reserved seats in the Lok Sabha and state legislative assemblies for SCs and STs to ensure their political representation. The Amendment to extend this to females was also recently passed by the Parliament.

[37] *See*, Infra 3.2.3. Test for checking exceptions to Equality

❖ Protection from Criminal acts: The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 aims to protect marginalized communities from discrimination and violence.

❖ Compassionate appointment: Through compassionate appointment, the government provides a social security scheme granting appointment to a dependent family member of a government servant who dies during service or retires on medical grounds. The objective of the scheme is to provide immediate financial assistance to the family who is left in poverty and without any means of sustenance

❖ Welfare initiatives: Along with reservations, various welfare schemes and programs are implemented to uplift the socio-economic status of disadvantaged communities.

❖ Subsidies: Subsidies in fees and other monetary remissions are extended to backward classes in a bid to reduce the burden on them and to overcome the scenario of the backward classes being deprived of accessibility, despite reservations, due to their poor economic conditions. .

These affirmative action practices have been implemented to promote social justice, empower marginalised communities, and ensure their representation in various spheres of society.

3.1.3. Reservation as the essential component of protective discrimination

Among all the above protective discrimination practises existing in India, reservation towards educational institutions and jobs and the promotion therein is the most empowering. While the reservation for legislative assemblies and the Parliament opens up the political landscape to the backward classes, such reservation is limited to the SCs and the STs and now to women. This reservation, extended to a portion of the 543 Parliamentary seats and the very limited assembly seats, empowers very few people in a country of more than 140 crore people, more than half of which belongs to backward classes. This limits the positive impact on the society as a whole. The

subsidies given in fees and the other welfare initiatives are also limited in its application and the inclusivity.

The additional layer of protection against criminal oppressions were very vital considering the circumstances at the time of independence. But this measure also has limited use in empowering people as it is nothing but a negative right. It plays little role in actuating the dreams of the backward classes.

Reservation in educational institutions allowed the backward classes to educate themselves and pick up skills. The value addition done through this would enable their potential to be higher. The reservation in government jobs facilitated their inclusion in the workforce and the promotional reservation works towards truly uplifting them.

In this sense, reservation is the most essential component in the protective discrimination practised in India.

3.2. Reservation and Equality

"Equality and equity are incongruous quantities, viewed from an elitist perspective, but must be so harmonized by social technology as to live in functional friendliness, not snarling fretfulness, if democracy in a developing country, is to be not 'a teasing illusion' but humanism in action."[38]

Reservation was initially thought to be an exception to equality and then as an intrinsic part of equality[39]. In essence, reservation conforms and harmonises with the constitutional conceptualisation of equality.

[38] Justice Krishna Iyer (Foreword to Parmanand Singh's book, Equality, Reservation and Discrimination in India, 1982).
[39] State of Kerala v. N.M. Thomas, (1976) 2 SCC 310

3.2.1. Fundamental Right to Equality

The Constitutional inclusion of equality can be seen from Article 14 to 18 of the Indian Constitution. This comes foremost among the six fundamental rights incorporated into Part III. By 'Equality before law - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'[40], Indian Constitution grants equality to its citizens as well as the foreigners.

The two limbs to equality are 'equality before law' and 'equal protection of law'. While equality before law contemplates the equal treatment of people before a court of law, the second limb of 'equal protection of law' goes beyond just uniform application of law. Under this, unequals should not be treated equally. The underprivileged should be given a helping hand and the society should be equal in terms of status and of opportunity. By giving a privileged treatment to the underprivileged, the end result becomes an equality of opportunity.

In India, reservation was seen as the positive discrimination that would alleviate the backwardness and therefore a solution towards the past and continuing injustices faced by the backward sections. The government deemed it a 'protective discrimination' by which the backward classes could be protected from being deprived of equality of opportunity.

While in earlier cases, the Supreme Court understood the guarantee of equality in Art. 14 to mean absence of discrimination, in later cases, the Court has come to hold that in order that the equality of opportunity may reach the backward classes and the minority, the State must take affirmative action by giving them a preferential opportunity may reach the backward classes and the treatment or protective discrimination; and taking positive measures to reduce inequality.[41]

Thus, it can be seen that while Article 14 does not have any express reasonable restrictions, implied limitations and classifications are permitted. The right to

[40] INDIA CONST, art 14
[41] DD Basu, Commentary on the Constitution of India, 9th ed., 1418, (2014)

equality is more than just a fundamental right. After Kesavananda Bharati v. State of Kerala[42], equality is regarded as one of the basic features of the Constitution. Therefore, not even through Constitutional Amendments can equality be violated. Only using the inherent limitations can special provisions, that infringes equal treatment, be created. For the judicial review of such classifications, Supreme Court itself has devised some test through its interpretations

3.2.2. Test for checking exceptions to Equality

"It is now well established that while Article 14 is designed to prevent a person or class of persons from being singled out from others similarly situated for the purpose of being specially subjected to discriminating and hostile legislation, it does not insist on an "abstract symmetry" in the sense that every piece of legislation must have universal application. All persons are not, by nature, attainment or circumstances, equal and the varying needs of different classes of persons often require separate treatment and, therefore, the protecting clause has been construed as a guarantee against discrimination amongst equals only and not as taking away from the State the power to classify persons for the purpose of legislation."[43]

While the Constitutional Assembly Debates had deliberated upon remedial measures for the backward communities, they created no tests to ascertain whether any such acts would violate equality. Thereby, despite initiating the protective discrimination that violates equal treatment, the Constituent Assembly left a lacunae on the tests which should be undertaken on judicial review. This vacuum was filled by the judiciary through cases before itself. The tests that were developed over the years are:

i) The twin test

In **Anwar Ali Sarkar**[44], the Supreme Court held, "In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on

[42] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461
[43] State of West Bengal v. Anwar Ali Sarkar, (1952) 1 SCC 1
[44] *Ibid*

an intelligible differentia which distinguishes those that are grouped together from others, and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act." Thus, the twin test of intelligible differentia and rational nexus was created. This was reiterated and given effect in **Ram Krishna Dalmia v. Justice Tendolkar**[45] and many other cases.

Reservation fulfils the twin test and therefore does not violate equality. It is for certain backward classes and for SCs and STs which are expressly provided for and therefore ensures an intelligible classification. The rationale was, as also discussed above, to provide for their upliftment and to ensure their participation and put an end to their marginalisation. Thus, with intelligible differentia and rational nexus, the classification and reservation thereof, does not violate equality under Article 14. If any reservation policy subverts either of the two requirements, it will be invalidated by the judiciary for not adhering to equality.

ii) Arbitrariness test

Originating from the Supreme Court in **S.G. Jaisinghani v. Union of India**[46], where it was observed that "absence of arbitrary power is the first essential of rule of law", arbitrariness found its way to become a ground for checking violation of equality.

The judgment in **E.P. Royappa v. State of Tamil Nadu**[47] developed arbitrariness as a distinct doctrine on which State action could be struck down as violative of rule of law contained in Article 14. The arbitrariness test became another test towards the validity of classifications in equality.

"From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14."[48]

[45] Ram Krishna Dalmia v. Justice Tendolkar, AIR 1958 SC 538
[46] S.G. Jaisinghani v. Union of India, (1967) 65 ITR 34 : 1967 SCC OnLine SC 6
[47] E.P. Royappa v. State of Tamil Nadu, AIR 1974 SC 555
[48] *Ibid*, Js P.N. Bhagawati

The Court emphasized that while Article 14 forbids class legislation, it does not forbid reasonable classification. Any classification that does not follow the norms laid down by the Supreme Court about classification would be arbitrary. The Court also established that Article 14 is a guarantee against arbitrariness and that any order passed independently of a rule or without adequate determining principle would be arbitrary.

The **E.P. Royappa**[49] judgment thus firmly embedded the concept of arbitrariness as a ground for striking down any legislative or executive action that is antithetical to Article 14. It expanded the horizons of the right to equality and established that Article 14 is a guarantee against arbitrary state action.

Js. Bhagawati in the following case of **Maneka Gandhi v. Union of India**[50], expanded on his assertion in E.P. Royappa by stating, "Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14."

In **Ajay Hasia v. Khalid Mujeeb**[51], the scope of this doctrine was further expanded to include all State actions, whether of the legislature, or executive or any other "authority".

"It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality……..Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional

[49] *Ibid*
[50] Maneka Gandhi v. Union of India, (1978) 1 SCC 248
[51] Ajay Hasia v. Khalid Mujeeb, (1981) 1 SCC 722

scheme and is a golden thread which runs through the whole of the fabric of the Constitution."[52]

A dissent on this established principle was struck in **State of A.P. v. McDowell & Co.**[53] with the Supreme Court stating "*No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act*". This discordant note paved the way to the creation of 'manifest arbitrariness'

Even after **McDowell**[54] case, the Supreme Court has in fact negated statutory law on the ground of it being arbitrary and therefore violative of Article 14 of the Constitution of India.[55]

In **Shayara Bano v. Union of India**[56], the Court held that the judgment in McDowell itself is per incuriam and the judgments, following McDowell, namely, State of Bihar v. Bihar Distillery Ltd.[57], State of M.P. v. Rakesh Kohli[58], Rajbala v. State of Haryana[59], Binoy Viswam v. Union of India[60], which held absolute bar to the use of "arbitrariness" as a tool to strike down legislation under Article 14, and are therefore, no longer good law.

The application of this test can be seen in the cases of reservations also. The Supreme Court in the case of **M. Nagaraj v. Union of India & Ors**[61] held that the state must collect quantifiable data showing backwardness and inadequacy of representation before making provisions for reservation in job promotions. The quantifiable data would prevent arbitrary exercise of power to grant the benefits of

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[52] *Ibid*
[53] State of A.P. v. McDowell & Co., AIR 2002 SC 2538
[54] *Ibid*
[55] *See* Malpe Vishwanath Acharya, (1998) 2 SCC 1; Mardia Chemicals Ltd., (2004) 4 SCC 311; K. Shyam Sunder, (2011) 8 SCC 737 and A.P. Dairy Development Corpn. Federation, (2011) 9 SCC 286 wherein the position of law that a legislation can be struck down on the ground that it is arbitrary and therefore violative of Article 14 of the Constitution was reiterated and applied
[56] Shayara Bano v. Union of India, (2017) 9 SCC 1
[57] State of Bihar v. Bihar Distillery Ltd. (1997) 2 SCC 453
[58] State of M.P. v. Rakesh Kohli, (2012) 6 SCC 312
[59] Rajbala v. State of Haryana, (2016) 2 SCC 445
[60] Binoy Viswam v. Union of India, (2017) 7 SCC 59
[61] M. Nagaraj v. Union of India & Ors, (2006) 8 SCC 212.

the reservation to the underserved. Similarly all legislative and executive actions are subjected to the test of arbitrariness to ensure the non-infringement of Article 14.

iii) manifest arbitrariness test

In **Shayara Bano v. Union of India**[62], Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, was assailed as being constitutionally invalid. Section 2 of the aforesaid Act specifically sanctioned Triple Talaq as a means for divorce. After perusing case laws on the various nuances pertaining to the issue under consideration, this Court by a narrow margin of 3 : 2, held that Triple Talaq is "manifestly arbitrary" in the sense that the marital tie can be broken "capriciously and whimsically" by a Muslim man without any attempt at reconciliation, which is against the fundamental tenets of the Shariat[63].

The Court held that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. Arbitrariness in the sense of manifest arbitrariness as pointed out would apply to negate legislation as well under Article 14.[64]

The most recent use of the doctrine can be seen in **Association For Democratic Reforms And Anr. v. Union Of India & Ors**.[65] or the Electoral Bond case, that held "The doctrine of manifest arbitrariness can be used to strike down a provision where: (a) the legislature fails to make a classification by recognizing the degrees of harm; and (b) the purpose is not in consonance with constitutional values."

[62] *Supra*, note 57
[63] Eklavya Dwivedi, The Doctrine Of "Manifest Arbitrariness" – A Critique, India Law Journal, https://www.indialawjournal.org/the-doctrine-of-manifest-arbitrariness.php
[64] *Supra*, note 57, Para 101
[65] Association For Democratic Reforms And Anr. v. Union Of India & Ors, 2024 INSC 113

With regards to reservation, in **Dr. Abhinav Kumar and Ors. v. Union of India**[66], regulation 9(3) of the Postgraduate Medical Education (Amendment) Regulations, 2018 was challenged to the extent that it provides for minimum marks of 50th percentile as a mandatory requirement for admission to postgraduate courses for reserved candidates while it is 55th percentile for general category. It can be seen that the Delhi High Court checked the manifest arbitrariness. Manifest arbitrariness has become very relevant in deciding constitutional validity of cases including that of reservation.

Considering that most reservation cases would be challenged against violation of equality, manifest arbitrariness is a very useful in the exercise of judicial review hereby ensuring that nexus will have to be proved in Court to not render it void.

iv) Proportionality test

"By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the adminis-trative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality."[67]

In the **Council of Civil Service Unions v Minister for the Civil Service**[68] (GCHQ case). The case primarily focused on the three traditional grounds of judicial review under common law: illegality, irrationality, and procedural impropriety. However, the case did touch upon the idea of proportionality in the context of the royal prerogative

[66] Dr. Abhinav Kumar and Ors. v. Union of India, 2022 SCC OnLine Del 2241
[67] Om Kumar v. Union of India, (2001) 2 SCC 386
[68] Council of Civil Service Unions v Minister for the Civil Service, (1985) AC 374

power. Lord Diplock mentioned the possibility of adopting the principle of proportionality in the future, but it was not a central issue in the case.

The first decision of this Court in administrative law which referred to "proportionality" is the one in **Ranjit Thakur v. Union of India**[69] quashing the punishment on the ground of it being "strikingly disproportionate". But it will also be noticed that while observing that "proportionality" was an aspect of judicial review, the Court still referred to the **GCHQ** description of irrationality, namely, that it should be in outrageous defiance of logic if it was to be treated as irrational.

The principle of proportionality was later clarified in the Supreme Court of India's judgment in Union of India v. G. Ganayutham[70], where it was emphasized that proportionality is a basis for judicial review in India.

"So far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the courts considered the question whether the classification was based on intelligible differentia, the courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality."[71]

The principle of proportionality evaluates two aspects of a decision:

(1) whether the relative merits of differing objectives or interests were appropriately weighed or "fairly balanced"?
(2) whether the measure in question was in the circumstances excessively restrictive or inflicted an unnecessary burden on affected persons?[72]

[69] Ranjit Thakur v. Union of India, (1987) 4 SCC 611
[70] Union of India v. G. Ganayutham, AIR 1997 SC 3387
[71] *Supra*, note 69
[72] Sweet and Maxwell 5th Edn 598, (1995)

The legal parameters of judicial review have undergone a change. Wednesbury principle of unreasonableness has been replaced by the doctrine of proportionality.[73]

This proportionality was always a criterion for the Court even before it expressly came into being as a criterion. This can be seen from a plethora of cases where the Court opined and judged whether any provision, especially reservation, was excessive or in relation to a nexus. Anything additional to the necessary would be declared by the Court as being against equality.

3.3. Constitutional basis for reservation

While it has been clarified that equality under Article 14 do permit classifications and class legislations, it is also time to look into how reservation came into being under the Indian Constitution and how the judiciary has responded to it during the course of judicial review. The evolution of reservation has been analysed intensely in Chapter II and now it is time to delve into the intricacies between reservation, constitution and the judiciary.

3.3.1. Constituent Assembly Debates regarding reservation

Articles 15 and 16 of the Indian Constitution was correspondingly Articles 9 and 10 in the Draft Constitution. The most relevant discussions concerning the protective discrimination afforded to the backward classes were deliberated on 29th November 1948 and 30th November 1948. Some excerpts from the Constituent Assembly Debates having weight over the understanding of the provisions are mentioned below.

The initiation of the debates were done by Prof K T Shah by proposing the amendment to Draft Article 9(2)[74] which read "Nothing in this article shall prevent the State from making any special provision for women and children." The proposed

[73] *See* Indian Airlines Ltd. v. Prabha D. Kanan [(2006) 11 SCC 67 : (2007) 1 SCC (L&S) 359] , State of U.P. v. Sheo Shanker Lal Srivastava [(2006) 3 SCC 276 : 2006 SCC (L&S) 521] and M.P. Gangadharan v. State of Kerala [(2006) 6 SCC 162 : AIR 2006 SC 2360]

[74] Amendment No. 323 of Draft Constitution, negated by voting

amendment was "That at the end of clause (2) of article 9, the following be added:– 'or for Scheduled Castes or backward tribes, for their advantage, safeguard or betterment'."[75] In his words, "Those, I think, may require special treatment; and if they do require it, they should be permitted special facilities for some time so that real equality of citizens be established….They need and must be given, for some time to come at any rate, special treatment in regard to education, in regard to opportunity for employment, and in many other cases where their present inequality, their present backwardness is only a hindrance to the rapid development of the country….I have, of course, not included in my amendment the length of years, the term of years for which some such special treatment may be given. That may be determined by the circumstances of the day."[76]

Dr. B. R. Amedkar opposed this argument on the ground that scheduled castes and scheduled tribes should not be segregated from the general public.[77] The amendment was consequently negated.[78]

The draft article 10(3) provided that nothing in the article shall prevent the State from making any reservation of appointments of posts in favour of any backward class of citizens who, in the opinion of the State, are not adequately represented in the services under the State.

Damodar Swarup Seth proposed the deletion of this clause. He criticised that if this clause is accepted, it would give rise to casteism and favouritism which should have nothing to do in a secular State. He accepted giving facilities and concessions to backward classes for improving their educational qualifications and raising the general level of their uplift. But, wanted the appointments to posts to only be left to the discretion of the Public Services Commission, to be made on merit and qualification, and that no concession whatever should be allowed to any class on the plea that the same happens to be backward.[79]

[75] 2, Constituent Assembly Debates, 655
[76] *Ibid*, pp 655-656
[77] *Ibid*, pp. 661
[78] *Ibid*, pp. 664
[79] *Ibid*, pp. 679

Hriday Nath Kunzru wanted to substitute `Nothing shall, during a period of ten years after the commencement of this Constitution, prevent the State from making any reservation' for the original content adding that the government should not be able to give reservation after the expiry of 10 years.[80]

Mohammed Ismail Khan observed that"I feel that no period need be stipulated at all for this purpose. That period might be less than ten years, or it may be more than ten years, according as the backwardness persists or disappears. The measure, as I said, should be the effect and result of the steps that are being taken for removing and eliminating those conditions which go to make the backwardness."[81]

Both proposals, in regard to deletion of Article 10(3) and with regard o insertion of 10 year limit for reservation, was negated through voting.[82]

There were other proposed amendments to change the term 'backward' in Article 10(3), include Scheduled Castes and even to include Gurkhas in the wordings of Article 10(3). All these did not find its way into the verbatim of the provision.

But the conclusive response to these arguments given by Ambedkar jusitifes the use of reservation and the term 'backward'. He states,

"As I said, the Drafting Committee had to produce a formula which would reconcile these three points of view, firstly, that there shall be equality of opportunity, secondly that there shall be reservations in favour of certain communities which have not so far had a `proper look-in' so to say into the administration…Therefore the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is then only that the first principle could find its place in the Constitution and effective in operation….. A backward community is a community which is backward in the opinion of the Government…"[83]

[80] *Ibid*, pp. 679, Amendment No. 348
[81] *Ibid*, pp. 693
[82] *Ibid*, pp.704
[83] *Ibid*, pp.701-702

This is very vital in inferring the reason for the use of the term 'backward' in the creation of reservation in public employment. Furthermore, Ambedkar can be seen emphasising the confinement of reservations to a minority of seats. He expounds that the violation of this will result in infringement of equality.

3.3.2. Constitutional provisions

The only specific authorizations for preferential treatment in the original Constitution were in the fields of government employment and legislative representation. Discrimination in government employment is outlawed by Article 16, but Article 16(4) permits the State to make 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.[84]

Article 15(4)[85] empowered State to make special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

The Directive Principles of State Policy also envisions the upliftment of the weaker sections by permitted positive actions towards them. Article 46 entrusts 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.

Article 38 necessitates the State to secure a social order for the promotion of welfare of the people in which justice, social, economic and political, shall inform all the institutions of the national life and in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

[84] *Supra*, note 28
[85] INDIA CONST, ART 15(4), Inserted by the Constitution (First Amendment) Act, 1951, s. 2.

Article 341 (1) regarding Scheduled Castes reads 'The President may with respect to any State or Union territory, and where it is a State after consultation with the Governor thereof, by public notification,specify the castes, races or tribes or parts of or group within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.' and Article 341(2) permits Parliament to amend the said notification. Article 342 is *pari materia* but that of Scheduled Tribes.

Article 335 provides that 'the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.'

Article 320(4) negates the requirement for the Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of article 16 may be made or as respects the manner in which effect may be given to the provisions of article 335.

In relation admissions to educational institutions, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes, including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions, Article 15(5) was inserted.[86]

Promotional reservation was permitted constitutionally through the insertion of Article 16(4-A)[87] with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes.

Article 16(4-B)[88] ensured that filling up vacancies of prior years cumulatively with current years' would not violate the 50% ceiling on reservations.

[86] INDIA CONST, art 15(5), Inserted by the Constitution (Ninety-third Amendment) Act, 2005, s. 2 (w.e.f. 20-1-2006)
[87] INDIA CONST, art 16(4-A), Inserted by the Constitution (Seventy-seventh Amendment) Act, 1995, s.2.
[88] INDIA CONST, art 16(4-B), Inserted. by the Constitution (Eighty-first Amendment) Act, 2000, s. 2 (w.e.f. 9-6-2000).

Originally, by virtue of Article 334, the Constitution mandated that reservation of seats and special representation for the SC,ST and the Anglo-Indian community towards Legislative Assemblies and to Lok Sabha to cease after 10 years. The government used to extend it by 10 years at a time. But recently through the 104th Amendment, while extending the SC and ST reservation under Article 334 by another 10 years, the same for the Anglo-Indian community was not extended and thereby not extending reservation for the Anglo-Indian community anymore.

Another recent and landmark shift came in the 103rd Amendment Act. It inserted articles 15(6) and 16(6) heralding the creation of the 10% reservation for Economically Weaker Sections (EWS) of the society.

Article 15(6) reads, "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."

Similarly, 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 favour 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."

3.4. Constitutional validity of reservation

The equality contemplated under Article 14 was not necessarily equality but equity. The treatment of unequals equally would have resulted in injustice in a stratified society like that of India. The beneficial treatment availed to the downtrodden took many forms through the policy decisions of the ruling government. Vote bank politics also played a critical role in how reservation was utilised. The constitutionally permitted exception to equality through reservation was used, overused and even misused by governments and it is the judiciary, being the watchdog of justice, that kept a check on the arbitrary use of the provision. The digress of the provisions outlined under reservation and the judicial interpretation of the constitutional validity is analysed below.

3.4.1. Judicial review of reservation

Reservation is one of the most widely discussed areas in the Constitution by the Indian judiciary owing to the different variations of protective discrimination employed by the governments, both at the Union as well as the federal level. The judicial review of all these along with the overruling of its own precedents has made reservation an intensely interpreted provision.

Although the word "discriminate" is not used in Art. 14, it is usual to aver the violation of Art. 14 by pleading that the impugned law or executive act "discriminates against" the party pleading. But, we have seen that Art. 14 does not forbid classification, and that equality is not denied by a permissible classification.[89]

In 1951, the government of Tamil Nadu had reserved seats in state medical and engineering colleges for different communities based on religion, race, and caste. This reservation policy was challenged as unconstitutional in **State of Madras v. Champakam Dorairajan**[90]. The government defended its order by citing Article 46 of the Constitution, which allows the state to promote the educational and economic interests of weaker sections, particularly Scheduled Castes and Scheduled Tribes, to

[89] H M Seervai, Constitutional Law of India : A Critical Commentary, 2nd ed. 283 (1975)
[90] State of Madras v. Champakam Dorairajan, (1951) SCC 351

ensure social justice. However, the Supreme Court struck down the order, ruling that it violated the equality guaranteed under Article 15(1) and that directive principles cannot override fundamental rights.

In **Jagwant Kaur Kesarsing Dang v. State of Bombay**[91], the Collector of Pune made an order under Section 5 of the Bombay Land Requisition Act, 1948, requisitioning certain land for the purpose of establishing a Harijan Colony for the Pune City Municipal Corporation. This order was challenged as unconstitutional, as it was argued to be discriminatory against non-Harijans in violation of Article 15(1) of the Constitution. The Court held that the order violated the fundamental right to equality and that Article 46 of the Constitution, which permits the state to promote the educational and economic interests of the weaker sections, particularly Scheduled Castes and Scheduled Tribes, cannot override the fundamental rights enshrined in Part III of the Constitution. Hence, declared the Collector's order requisitioning land solely for the benefit of Harijans as void and unconstitutional

Consequently, the Parliament introduced an amendment to Article 15, adding Clause (4) to address these concerns. Amendment of article 15.-To article 15 of the Constitution, the following clause shall be added:-"(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."[92]

In 1962, the State of Mysore reserved 68% of seats for various backward classes, which was challenged in **M.R. Balaji v. State of Mysore**[93], wherein the Court held that the reservation should be below 50%. And in a very notable observation, the Court made the remark, “in dealing with the question as to whether any class of citizens is socially backward or not, it may not be irrelevant to consider the caste of the said group of citizens. In this connection it is, however, necessary to bear in mind that the special provision is contemplated for classes of citizens and not for individual citizens as such, and so, though the caste of the group of citizens may be

[91] Jagwant Kaur Kesarsing Dang v. State of Bombay, AIR 1952 Bom 461
[92] *Supra*, note 86
[93] M.R. Balaji v. State of Mysore, 1963 Supp (1) SCR 439

relevant, its importance should not be exaggerated. If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the castes themselves."[94]

Further, in **T. Devadasan v. Union of India**[95], it was held that the unfilled seats for reserved categories in a year cannot be carried forward to the next year. Carry Forward Rule maintained that if the reserved vacancies were not filled in a particular year, the shortfall was carried forward to the next year and added to the reserved quota. This could be done for two consecutive years. The carry forward rule was initially seen as a way to ensure that SCs and STs had a reasonable opportunity to fill the reserved vacancies. The Supreme Court held that the carry forward rule was violative of Article 16(1) of the Constitution, which guarantees equal opportunity in employment, as it could lead to a monopoly for SCs and STs and undermine the principle of equal opportunity.

In 1979, the Government of India set up the Mandal Commission (officially known as the Socially and Educationally Backward Classes Commission) to identify the socially and educationally backward classes in the country and recommend reservation policies for their advancement. The Commission, chaired by B.P. Mandal, submitted its report in 1980, concluding that approximately 52% of India's population consisted of Other Backward Classes (OBCs) and recommended reserving 27% government jobs for them.

The policy was challenged in the Supreme Court in the landmark case of **Indra Sawhney v. Union of India**[96] (1992), where a 9-judge bench upheld the 27% reservation for OBCs but maintained that the total reservation should not exceed 50% of the total vacancies in a year.

The concept of "creamy layer" was permitted and it was held that reservation should be confined to initial appointments and not extend to promotions. The unfilled reserved vacancies (carry forward rule) should also not breach the 50% ceiling.

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[94] *Ibid*
[95] T. Devadasan v. Union of India (1964) 4 SCR 680
[96] Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217

The rule of 50% limit unless under exceptional circumstances to not violate equality is very relevant and balances reservation with equality on a very tight rope.

In the case of **Dr. Jaishri Laxmanrao Patil v. The Chief Minister of Maharashtra**[97], the Supreme Court struck down the Maharashtra Socially and Educationally Backward Classes (SEBC) Act, 2018, which granted 12% and 13% reservations to the Maratha community in education and public employment, respectively. The Supreme Court held that the granting 12% and 13% reservation to Maratha Community in addition to 50% social reservation is not covered by exceptional circumstances as contemplated by the Constitution Bench in the Indra Sawhney case. The Court also held that the 102nd Amendment introduced Articles 338B and 342A, which empowered the President to notify SEBCs and Parliament to include or exclude communities from the SEBC list.

Reservation in promotions is another area of contention between the advocates for reservation and its opposers. The pro-reservationists makes their contention on the fact that the upliftment is only good if it ensures and enables the downtrodden to climb higher ranks. The opposite side, however, emphasises that once affirmative action is extended to the backward, and equal starting point is ensured, reservation is no longer needed and that reservation is promotion will only work against equality.

In **CA Rajendran v. Union of India**[98], the challenge was against a Central government order stating that there would be no reservations for SC and STs in promotions to Class I and II services in the railways because these positions needed a higher level of efficiency and responsibility. The SC held, "Our conclusion therefore is that Article 16(4) does not confer any right on the petitioner and there is no constitutional duty imposed on the Government to make a reservation for Scheduled Castes and Scheduled Tribes, either at the initial stage of recruitment or at the stage of promotion. In other words, Article 16(4) is an enabling provision and confers a discretionary power on the State to make a reservation of appointments in favour of backward class of citizens which, in its opinion, is not adequately

[97] Dr. Jaishri Laxmanrao Patil v. The Chief Minister of Maharashtra, 2021 SCC OnLine SC 362
[98] CA Rajendran v. Union of India, AIR 1968 SC 507

represented in the Services of the State. We are accordingly of the opinion that the petitioner is unable to make good his submission on this aspect of the case."[99]

In 1975, dealing with the question of reservation in promotions, 2 judges out of the 5-Judge Bench in **State of Kerala v. N.M. Thomas**[100], remarked that 50% limit is not an absolute rule and it is a rule of caution. The matter was further referred to a larger Bench. Thereafter, the 7-Judge Bench upheld the constitutional validity of Rule 13AA of the Kerala State and Subordinate Services Rules, 1958 which empowers the State Government to exempt members of the SC's and ST's already in services from passing the test for a specified period. For the first time, reservation was remarked to be intrinsic to equality and not an exception to equality.

Indra Sawhney v. Union of India[101] made it clear that reservation cannot be extended in case of promotion and can only be availed for initial appointments thereby overruling **Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India**[102]**,** wherein it was held that reservations in appointments or posts under Article 16(4) included promotions.

However, the Parliament through Constitution (Seventy –Seventh Amendment) Act, 1995, and Constitution (Eighty-First Amendment) Act, 2000 inserted Articles 16(4-A) (Reservation in matters of promotion with consequential seniority) and 16 (4-B) (Carry forward rule) respectively to circumvent **Indra Sawhney**[103]. This clause under 16 (4A) allowed the State to make provisions for reservation in matters of promotion to any class or classes of posts in the services under the State in favor of the Scheduled Castes and the Scheduled Tribes (SCs and STs) if they are not adequately represented in the services under the State. The above-mentioned amendments were held constitutional in **M. Nagaraj v. Union of India**.[104]

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[99] *Ibid*
[100] *Supra*, note 40
[101] *Supra*, note 98
[102] Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India, (1981) 1 SCC 246
[103] *Supra*, note 98
[104] *Supra*, note 62

In **R K Sabharwal v. State of Punjab**[105], the Court upheld the Punjab Government's policy of reservation in promotions, which provided for 16% reservation for SCs and 2% for Backward Classes. The Court held that the roster system, which was used to implement the reservation policy, was valid and constitutional. The roster system ensured that the reserved posts were filled by members of the reserved categories and that the general category candidates were not entitled to be considered for the reserved posts. It was also held that the reserved categories candidates appointed/promoted in non-reserved posts as a result of competition, cannot be considered to work out the prescribed percentage of reservation.

In the case of **Union of India v. Virpal Singh Chauhan**[106] (1995), the Supreme Court of India dealt with the issue of seniority between general category candidates and reserved category candidates promoted through reservation in government services. The Court held that once a reserved category candidate is promoted against a reserved vacancy, their seniority will be counted from the date of their promotion, even if a general category candidate who was senior to them in the lower grade is promoted later. However, if a general category candidate who is senior to the promoted reserved candidate reaches the same grade later, then the general candidate will regain their seniority over the reserved candidate

In **Ajit Singh Januja v. State of Punjab**[107], The case was filed by Ajit Singh Januja and others, who were members of the Punjab Service of Engineers (Class I) in the Irrigation Department of the State of Punjab. They challenged the Punjab Government's policy of reservation in promotions for Scheduled Castes (SCs) and Scheduled Tribes (STs), which provided for 16% reservation for SCs and 2% for Backward Classes. The case reaffirmed the ‘catch-up rule’.

However, this was overruled in **Jagdish Lal v. State of Haryana**[108], wherein the grievance of general category candidates was that the seniority of SC/ST candidates who were junior to the general category candidates, but were promoted earlier than them, should be downgraded when general category candidates were also promoted,

[105] R K Sabharwal v. State of Punjab, (1995) 2 SCC 745
[106] Union of India v. Virpal Singh Chauhan, (1995) 6 SCC 684
[107] Ajit Singh Januja v. State of Punjab, (1996) 2 SCC 715
[108] Jagdish Lal v. State of Haryana, (1997) 6 SCC 538

as the Court held that SC/STs will get seniority with reference to the date of their promotion.

Ajit Singh & Ors. (II) v. State of Punjab & Ors.[109] restored the original position in Ajit Singh and Virpal Singh by overruling Jagdish Lal.

In the case of **B.K. Pavitra v. Union of India**[110], the Supreme Court upheld the constitutional validity of the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservations (to the Posts in the Civil Services of the State) Act, 2018. The Supreme Court upheld the constitutional validity of the Karnataka law providing for consequential seniority to government servants promoted on the basis of reservations, after the state collected quantifiable data to justify the reservations as per the Nagaraj judgment.

3.4.2. Creamy Layer and constitutionality

In the case of **State of Kerala v. N.M. Thomas**[111], the Supreme Court upheld the policy of reservations in promotions. While this judgment did not explicitly use the term "creamy layer," Justice Krishna Iyer cautioned against the benefits of reservations being monopolised by affluent individuals from backward castes. He emphasised that this would be detrimental to the truly disadvantaged members of the same communities, who would then be unable to access the benefits of reservations

In the landmark case of **Indra Sawhney v. Union of India**[112], the Supreme Court upheld reservations for Other Backward Classes (OBCs) but emphasized the need to exclude the "creamy layer" from these benefits. The creamy layer refers to OBC individuals who have achieved significant social and economic advancement, making them comparable to forward class members. The Court ruled that exclusion from reservations based on the creamy layer principle should not solely rely on economic criteria. However, if an individual's economic advancement is so

[109] Ajit Singh & Ors. (II) v. State of Punjab & Ors (1999) 7 SCC 209
[110] B.K. Pavitra v. Union of India, (2019) 16 SCC 129
[111] *Supra*, note 40
[112] *Supra*, note 98

substantial that it leads to social advancement, their income can be used to determine their social status, and they would be considered part of the creamy layer

Further,in **Ashoka Kumar Thakur v. Union of India**[113], The Court struck down the Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes, Scheduled Tribes and Other Backward Classes) (Amendment) Ordinance, 1995. Through this Ordinance, the State Government of Bihar laid down certain criteria for the identification of the creamy layer. As per these criteria, Other Backward Class professionals or IAS officers earning more than ten lakhs per annum would be included in the creamy layer. The Court held that in a country where the per capita national income was ₹6,929 (1993-94), it was difficult to accept that only IAS officers and other professionals earning more than ten lakhs per annum would be included in the creamy layer category. It held that the Bihar Government's criteria for the identification of the creamy layer were arbitrary.

In Indra Sawhney in 1999, the Court deliberated on how to define the creamy layer. It stressed that without enforcing the creamy layer principle, the benefits of reservation would not reach the most backward in the backward classes category.This would lead to discrimination, because unequals cannot be treated as equals, and result in a violation of the Right to Equality. The Court held that backward class persons belonging to higher government services such as the IAS and the IPS were socially and economically advanced and were de facto included as part of the creamy layer.

In the case of **E.V. Chinnaiah v. State of Andhra Pradesh**[114], the Supreme Court examined the validity of the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000. The Act aimed to divide the 57 castes enumerated in the Presidential List of Scheduled Castes into four groups based on inter-se backwardness and fix separate quotas in reservation for each group. The Court held that any "sub-classification" of the Scheduled Castes would violate Article 14 of the Constitution, which guarantees equality before the law. The Court distinguished the case from the Indra Sawhney judgment, which allowed sub-classification for Other

[113] Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1
[114] E.V. Chinnaiah v. State of Andhra Pradesh, (2005) 1 SCC 394

Backward Classes (OBCs). The Court held that the same principle cannot be applied to Scheduled Castes and Scheduled Tribes (SCs and STs), as they are considered a homogeneous class under the Constitution. This matter was considered and decided by a bench of 5 judges.

In a similar bench of 5 judges in **Jarnail Singh v. Lachhmi Narain Gupta**[115], the Supreme Court upheld the application of the creamy layer principle to exclude the socially advanced sections of the Scheduled Castes (SCs) and Scheduled Tribes (STs) from availing reservation benefits in promotions. The Court held that the creamy layer principle is an integral part of the equality principle enshrined in Articles 14, 15 and 16 of the Constitution. Excluding the creamy layer ensures that the truly disadvantaged within these communities can access reservation benefits. Justice Nariman observed that the purpose of reservation is to uplift the backward classes, but if the creamy layer is included, the backward classes will remain as backward as they were, as the advanced sections will corner most opportunities

Both **Chinnaiah**[116] and **Jarnail Singh**[117] being adjudged by a bench of 5 judges has resulted in the ambiguity as to whether the sub-classification can be effected for SCs and STs. Consequently the matter came before a 7 judge bench of the Supreme Court again in **State of Punjab v. Davinder Singh**[118]**, 2024,** which is currently pending before the Supreme Court.

3.4.3. Reservation based on Economic criterion

In **MR Balaji**[119], it was observed that poverty is not only relevant but also one of the criterions of social backwardness. ‘Social backwardness is on the ultimate analysis the result of poverty to a very large extent. The classes of people who are deplorably poor automatically become socially backward. They do not enjoy a status in society and have, therefore, to be content to take a backward seat. It is true that social

[115] Jarnail Singh v. Lachhmi Narain Gupta, (2018) 10 SCC 396
[116] *Supra*, note 114
[117] *Supra*, note 115
[118] State of Punjab v. Davinder Singh, Civil Appeal No.2317/2011 before Supreme Court
[119] *Supra*, note 95

backwardness which results from poverty is likely to be aggravated by considerations of caste to which the poor citizens may belong, but that only shows the relevance of both caste and poverty in determining the backwardness of citizens.'

In **Triloki Nath v. State of J&K**[120], The Court held that reservation is a tool to address social and educational backwardness, not economic backwardness. Mere poverty or economic criteria is not a sufficient justification for reservation under Articles 15(4) and 16(4) of the Constitution. The Court emphasized that reservation is meant to uplift socially and educationally backward classes, not economically weaker sections.

In **R. Chitralekha v. State of Mysore**[121], saw the Supreme Court upholding a reservation hat omitted caste and gave out reservation on the basis of only occupation and economic criterion.

In **State of UP v. Pradip Tandon**[122], The Court held that reservation of seats for candidates from rural areas is unconstitutional and invalid. The Constitution does not enable the State to bring socially and educationally backward classes under Article 15(4) merely on the basis of their place of residence in rural areas. the Court held that poverty alone is not a sufficient criterion for reservation

In 2019, Parliament passed the Constitution (One Hundred and Third Amendment) Act which does not mandate but enables 10% of reservations for economically weaker sections, in addition to the existing reservations. The 5-judge Constitution bench of UU Lalit, CJ and Dinesh Maheshwari, S. Ravindra Bhat, Bela M Trivedi, JB Pardiwala, JJ in **Janhit Abhiyan v. Union of India**[123]**,** has upheld the constitutional validity of the Constitution (One Hundred and Third Amendment) Act, 2019.

[120] Triloki Nath v. State of J&K, (1961) 1 SCR 103
[121] R. Chitralekha v. State of Mysore, 1964 (6) SCR 368
[122] State of UP v. Pradip Tandon, AIR 1975 SC 563
[123] *Supra*, note 1

In a 3:2 judgment, the majority judges permitted the reservation made solely on the basis of economic criterion on the note that it also serves inclusion.

3.5. Conclusion

From these and some other decisions of the highest court of the land as well as of the High Courts, no clear and uniform policy, guidelines or test of deter- mining backwardness for purposes of Articles 15(4) and 16(4) emerges[124].

The judiciary, through its interpretations, has kept a check on the application of reservation provisions in India. Creamy layer has been upheld for OBCs but regarding that of SC and ST, there is ambiguity in the interpretation. Reservation solely on the basis of economic criterion was permitted in Janhit Abhiyan.

But the pending decision of Davinder Singh might change the criterions for creamy layer again. Thus, the ambiguities regarding the reservation persists even after 7 decades of independence. The same is true for the backwardness in the society.

[124] V N Shukla, Constitution of India, 12th ed, p 97 (2013)

CHAPTER IV :

RESERVATION SYSTEM IN INDIA :

NEED FOR CHANGE

4.1. Introduction
- 4.1.1. Intentions of Constituent Assembly regarding time limit for reservation
- 4.1.2. Reasons for need for change

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- 4.3.5. Intent for systematic withering of reservation system in India

4.4. Conclusion

4.1. Introduction

This chapter aims at going through the Constituent Assembly Debates trying to find the intentions of the makers of the Constitution regarding the time limit for which reservation was created and finding some possible changes that can be effected in the reservation system to make it more appealing to all factions of the society.

4.1.1. Intentions of Constituent Assembly regarding time limit for reservation

Hriday Nath Kunzru wanted to substitute `Nothing shall, during a period of ten years after the commencement of this Constitution, prevent the State from making any reservation' for the original content adding that the government should not be able to give reservation after the expiry of 10 years.[125] He identifies some problems and observations regarding not limiting the time period for reservation.

- ★ There will arise temptations to sections of these and other communities to claim that they are backward in order to get the protection of clause (3) of article 10.
- ★ The system should not encourage fissiparous tendencies and under which it should not be to the interest of any class to claim that it is backward.
- ★ Legislature should from time to time be able to see how it has worked and how the State has discharged its duty towards the protected classes.
- ★ Unless this is done, he states that the venture to think that 'article 10 would not be in conformity with the intention of the constitution to remove all those conditions on account of which special protection is necessary'[126].

Santanu Kumar Das remarked that "*It has been said that reservation should be kept for ten years. Why only for ten years? If we get equal rights within two years all*

[125] *Supra*, note 76, pp. 679, Amendment No. 348
[126] *Ibid*, pp. 681

would be on the same level after that period and there would be no need for reservations."[127]

Mohammad Ismail Khan objected the amendment stating " *the measure or yard-stick in any such matter should not be the period of time. The backwardness of the people is the result of conditions which have been persisting and in existence for several centuries and ages, and these will not die off easily. So the measure really should be the steps that are being taken to liquidate that backward condition, and it should be the forwardness of the people which has resulted as a consequence of those steps. Therefore, when these people advance and have come forward as much as any other community in the land, then these very reservations would automatically disappear. I feel that no period need be stipulated at all for this purpose. That period might be less than ten years, or it may be more than ten years, according as the backwardness persists or disappears. The measure, as I said, should be the effect and result of the steps that are being taken for removing and eliminating those conditions which go to make the backwardness."*[128]

At the end, the amendment to restrict reservation to 10 years was not passed in the voting hat followed but here, it can be seen from their arguments that the outlook towards reservation was a way to uplift the backward communities and not to provide reparations to them. This is very relevant in understanding that the object is to bring the oppressed to the mainstream and not compensate for the historical wrongs suffered by them. The difference that arises due to the intention is that in case of reparation the compensatory measures would continue even after they are brought to the mainstream as opposed to upliftment which will cease once they are deemed equal. Even those that opposed the amendment were in consensus to removing reservation once the forwardness of the people was ensured.

But at no point in time was there an opinion towards perpetuating the reservation system indefinitely. This denoted the possibility of a very limited time period of protective measures. The time limit contemplated in the above debate is around 10

[127] *Ibid*
[128] *Ibid*

years or even less in bringing up the backward people and sufficiently promoting their rise.

4.1.2. Reasons for need for change

It can be observed from the above that the reservation system was intended for a very limited time frame by which upliftment was supposed to undergo. But the existing reservation makes us rethink the effectiveness of this system just by the fact that even after 76 years of independence, the backwardness among the communities persists very vividly.

"Reservation as an affirmative action is required only for a limited period to bring forward the socially and educationally backward classes by giving them a gentle supportive push. But if there is no review after a reasonable period and if reservation is continued, the country will become a caste divided society permanently…..Any provision for reservation is a temporary crutch. Such crutch by unnecessary prolonged use, should not become a permanent liability….. Constitution seeks to remove the difference in status on the basis of caste. When the differences in status among castes are removed, all castes will become equal. That will be a beginning for a casteless egalitarian society."[129]

The observation of the Court highlights the danger of using reservation perpetually and at the same time gives a reflection of the true aim of the Constitution which was to eliminate all differences including caste.

The reservation in Indian socio-economic polity is currently in need of a rehaul because:

➢ The ever-growing reservations have increased to nearly 60% and much more in some states, causing dissatisfaction among the unreserved 'general' community and violates their equality of opportunity.

[129] *Supra*, note 113

➢ The disparity and indoctrination based on scheduled caste, scheduled tribes and other social and educationally backward classes have played a vital role in perpetuating the discrimination.

➢ The poverty and backwardness of the people even after 76 years of reservation for SC and ST and 32 years of reservation for OBC shows that only a very few in the 'creamy layer' enjoys the benefits of affirmative action given through reservation.

➢ The reservations in educational institutions and employment works towards demoralising and demotivating the reserved communities from working hard and striving to achieve their potential because they need not compete with the best.

➢ The elimination of better qualified due to need for reservation has pulled back the growth of the economy on the macro level and the specific institutions on the micro level.

➢ Change in technology and society has reduced the discriminations faced by the backward communities. From access to education to goods and services, everything is now available online and at the fingertips. So the social isolation and deprivation of basic commodities and education does not happen in the contemporary technology driven nation.

➢ Any discrimination faced can be told to the world and nobody can suppress it. Social media ensures the fast travel of online content which cannot be easily suppressed. Therefore the social conduct of ostracisation is no longer much of an issue that needs reservation as the solution. Substantive criminal statutes exist for an additional layer of protection for SCs and STs and that should suffice.

➢ The creamy layer of the reserved, who has access to money, should be eliminated from being given access to positive discrimination as they have the money, power and means to fight their oppression through other legal means, if it happens.

➢ The magnitude of usage of backward communities for vote bank politics has created a political environment where all political parties want the differences between people to continue.

4.2. Protection or perpetuation

The reservation system which was intended as a method of protective discrimination for backward classes were supposedly brought about for a few years. But in the last 7 decades of independence, the scope and extent of reservation has only widened in magnitude. The cascading policies of protective discrimination has begged to question the deviation from the original intentions of the Constituent Assembly and even now there is no end in sight to the reservation system in India.

4.2.1. Increase in reservation over the years

Reservation for students on the basis of religion, race and caste in State Medical and Engineering Colleges in Madras initiated by the Madras government was the first instance of such reservations through government policies. Even though this was not permitted by the Supreme Court, the Central government amended the Constitution itself through the 1st Constitutional Amendment, 1951 and grabbed the power for itself.

Governments started devising their own policies on reservation. First, SC and ST reservations were introduced. Promotional reservation was permitted constitutionally through the insertion of Article 16(4-A) with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes. The catch up rule that came about in **Virpal Singh Chauhan**[130] and reaffirmed in **Ajit Singh & Ors (II)**[131], was stuck down in **B. K. Pavitra**[132]**.**

[130] *Supra*, note 108
[131] *Supra*, note 111
[132] *Supra*, note 112

Then in 1990, on the recommendations of the Mandal Commission Report, 27% reservation of Other Backward Classes (OBC) in jobs in central Government services and public sector units were introduced.

The 73rd and 74th Amendments passed in 1993, which introduced panchayats and municipalities in the Constitution, reserve one-third of seats for women in these bodies.

Reservation of seats in private educational institutions for backward SC/STs is provided under the 93rd Amendment Act, 2006, which was passed in 2006. Following the new Clause 5 of Article 15, no clause or sub-clause (g) of Clause 1 of Article 19 precludes the legislature of any state from enacting legislation to advance the advancement of any socially, economically, or educationally backward class of citizens or from admitting members of Scheduled Castes or Scheduled Tribes to any educational institution, regardless of whether the institution is public or private. It nullified the decisions of the Supreme Court; nonetheless, this change exempts minority educational institutions from being included under their jurisdiction.

The 103rd Constitutional Amendment Act, 2019 created the EWS reservation by adding new clause (6) to Article 15 and clause (6) to Article 16 to the Indian Constitution, permitting the provision of reservation for economically disadvantaged groups other than Scheduled Castes, Scheduled Tribes, and Other Backward Classes (SCs, STs, and OBCs). This rule states that people from economically disadvantaged groups are given a 10% reservation in government positions and educational institutions. The persons' family income must not surpass a specific threshold in order for them to be eligible for this reservation, and they must not fall under any other restricted group.

By making opportunities more inclusive and available to individuals who might not have had access to them owing to financial limitations, the introduction of EWS reservation seeks to advance social fairness and equality.

The Constitution also provides for reservation of seats in Lok Sabha and state legislative assemblies for Scheduled Castes (SCs) and Scheduled Tribes (STs) in proportion to their number in the population. In addition to this, reservation of seats in Lok Sabha and state legislative assemblies and the Legislative assembly of NCT Delhi, through the Constitution (One Hundred and Twenty-Eighth Amendment) Bill, 2023 introduced in Lok Sabha on September 19, 2023, seeks to reserve one-third of the total number of seats in Lok Sabha and state legislative assemblies for women. With the Presidential assent, it became the Constitution (One Hundred and Sixth Amendment) Act, 2023. It was created for a period of fifteen years.But it will come into force only after an exercise of delimitation is undertaken for this purpose after the relevant figures for the next census.[133]

The contemporary governments still continue to extend reservations. In 2021, Karnataka became the first state to give Reservation to a transgender community in the governmental job.[134] It amended the Karnataka Civil Services (General Recruitment) Rules, 1977 to provide for 1% horizontal reservation for transgenders. In 2007, Tamil Nadu allotted 3.4% reservation to Muslims and Christians as Minority Seat. Andhra Pradesh introduced the law in 2004 that enables 4% reservation to Muslims as a Minority seat. In 2017, Telangana passed a law proposing 12% reservation for OBC Muslims.[135]

Some reservations still in agitation for demand are the Jat Reservation of Haryana when Jats demanded OBC status and the Gurjar in Rajasthan who ordered from OBC to ST status. The Patel or the Patidar community of Gujarat demanded OBC status too. The Kapu community of Andhra Pradesh protested too for the Backward Class status. The well-known and famous Maratha reservation is the focus of discussion where the Marathas, who are the Dominant Caste of Maharashtra, demanded OBC status since the 1990s. Marathas make up 16% of the total population of the State. The Maharashtra Government gave them a SEBC category with 16 % Reservation; however, the Supreme Court of India quashed this SEBC reservation to the Marathas.

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[133] *See*, Regisered No. DL—(N)04/0007/2003—23, The Gazette of India https://egazette.gov.in/WriteReadData/2023/249053.pdf
[134] *See*, Karnataka Civil Services (General Recruitment)(Amendment) Rules, 2021.
[135] *See*,Telangana's Muslim Reservation Bill, 2017

Recent state-wise extent of reservation can be seen as below:

State	Reservation Quota
Haryana	60%
Bihar	60%
Telangana	50% (previously 64%, reduced later)
Gujarat	59%
Kerala	60%
Tamil Nadu	69% (18% SC, 1% ST, 20% MBC, 30% OBC)
Chhattisgarh	82% (including 10% EWS), stayed by high court
Madhya Pradesh	73% (including 10% EWS), stayed by high court
Maharashtra	62%
Rajasthan	64%
Jharkhand	60%[136]

This data shows how the states are violating all standards of equality in pursuit of their political power that can be achieved through vote-bank politics. For these, the governments are willing to even extend reservation to communities that are not included in the scope of reservation.

The downgrade to these lies for the general community not covered under any reservation. The spectrum for their meritorious achievement is diminishing, furthering the existing discontent over the reservation and the reservation beneficiaries.

4.2.2. Continued extension of Art 334

Article 334 originally titled ‘reservation of seats and special representation to cease after ten years’ read “Notwithstanding anything in the foregoing provisions of this Part, the provisions of this Constitution relating to— (a) the reservation of seats for the Scheduled Castes and the Scheduled Tribes in the House of the People and in the

[136] *See*, Alok Ranjan, Existing reservation quota limit of the Indian states, (2021) https://www.indiatoday.in/news-analysis/story/existing-reservation-quota-limit-of-the-indian-states-1799705-2021-05-06

Legislative Assemblies of the States; and (b) the representation of the Anglo-Indian community in the House of the People and in the Legislative Assemblies of the States by nomination, shall cease to have effect on the expiration of a period of ten years from the commencement of this Constitution."

But the reservation period has been extended several times since then. The Constitution (8th Amendment) Act, 1969, extended the reservation period to 20 years. The Constitution (23rd Amendment) Act, 1969, extended it to 30 years. The Constitution (45th Amendment) Act, 1980, extended it to 40 years. The Constitution (62nd Amendment) Act, 1989, extended it to 50 years. The Constitution (79th Amendment) Act, 1999, extended it to 60 years. The Constitution (95th Amendment) Act, 2009, extended it to 70 years for SC/ST communities and Anglo-Indian communities. The Constitution (104th Amendment) Act, 2019, extended it to 80 years for SC/ST communities and discontinued reservations for Anglo-Indian communities.

In this regard, on July 10th, 2000, the validity of the Constitution (79th Amendment) Act, 1999, which amended Article 334 of the Constitution of India, 1950 extending it to 60 years was challenged in **Ashok Kumar Jain v. Union of India & Anr**.[137]for deprivation of their democratic rights, which are the rights to freely cast votes in elections, to choose who to vote for and to stand for elections and for violation of the Right to Equality under Article 14. But this matter is yet to be adjudged by the Supreme Court and is pending before it.

4.2.3. Scope of ending reservation system in India

While the reservation for the anglo-indian community came to an end on account of the Constitution (104th Amendment) Act, 2019, it is still a small impact on an otherwise very vast and prolonged reservation provision. Population of the Anglo-Indian community is mostly negligible and does not make much of a wave in an election. A community that maintains a sway in the elections will not have their

[137] Ashok Kumar Jain v. Union of India & Anr., W.P. (C) No. 000546/2000, before 5-Judge Constitution Bench of the Supreme Court of India

reservations deprived. In this context of periodical extension granted, we can see the lack of intent of the government to dissolve the provisions of the Article.

The EWS brought through the 103rd Constitutional Amendment in 2019 created a new type of reservation solely on economic criterion. In addition, it also circumvented the 50% limit, both of which were upheld by the Supreme Court in **Janhit Abhiyan**[138]**.**

The one-third of the total number of seats in Lok Sabha and state legislative assemblies for women reserved through the Constitution (One Hundred and Sixth Amendment) Act, 2023 is for a period of fifteen years but considering more than half the population being women in the country, the possibility of perpetuating the same indefinitely through periodic extension is highly probable.

Thus, the three latest amendments show no signs of making any drastic changes to this reservation system other than to increase it. This makes the doubts regarding the perpetuation of otherwise supposedly short time reservations, very valid. This is further expounded by the fact that the scope of beneficiaries is too huge that no ruling government is willing to risk their continuity in power, just to make amends as the society evolves.

Compensatory preference involves a delicate combination of self- liquidating and self-perpetuating features. Reservations of upper- echelon positions should become redundant as preferential treatment at earlier stages enables more beneficiaries to compete successfully, thus decreasing the net effect of the reservations. A similar reduction of net effect is produced by the extension to others of benefits previously enjoyed on a preferential basis (e.g., free schooling). Judicial requirements of more refined and relevant selection of beneficiaries (and of periodic reassessment) and growing use of income cut-offs provide opportunities to restrict the number of beneficiaries.[139]

[138] *Supra*, note 1
[139] *Supra*, note 28, pp. 550

4.3. Nature of changes needed

"In the light of experience, here and elsewhere, the danger of "reservation", it seems to me, is threefold. Its benefits, by and large, are snatched away by the top creamy layer of the "backward" caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, this claim is overplayed extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the "weaker section" label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher "backward" groups with a vested interest in the plums of backwardism."[140]

As asserted earlier, imposing and accruing reservations over existing ones is not a long term solution. The society's changes should be reflected in the reservation system. The social conditions and mental outlook just past the criminalisation of practising untouchability, widespread misogyny and gender injustice, case based social isolation and lack of access to resources are not the India of today. While it is true that the social evils of the past are not totally eradicated and that there are still discriminatory practices, it is not in the same magnitude as the past. Maintaining the quantum of reservation at nearly 70% is not really the way towards equality. The transformative constitutionalism should reflect the conditions of the society and holding on to the past reservation system is just a message that India has not really socially improved in regards to the prejudices and the equality of opportunity from that of the India right after independence. Maintaining the current system is also depriving the real beneficiaries, who ought to be the ones being protected, by granting it to the affluent among the community. Thus, a systematic evolution of the reservation system following the changes mentioned below is the need of the hour.

[140] Js. Krishna Iyer in State of Kerala v. N.M. Thomas, (1976) 2 SCC 310 at pp. 363

This will be steps towards the gradual disappearance of the reservation system in the annals of history.

4.3.1. Creamy layer for SC/ST

'Creamy layer' is something that distinguishes the needy from the greedy. It identifies the real marginalised sections within the community for whose benefit the reservation system should exist. The wealthy and influential people who are being granted the benefit of reservation should be deprived of it. They are not the targeted beneficiaries and leeching of the system just because you were born in the community should be prevented.

Redistribution is not spread evenly throughout the beneficiary groups. There is evidence for substantial clustering in the utilisation of these opportunities. The clustering appears to reflect structural factors. (e.g., the greater urbanisation of some groups) more than deliberate group aggrandisement, as is often charged. The better situated among the beneficiaries enjoy a disproportionate share of program benefits. This tendency, inherent in all government programs-quite independently of compensatory discrimination-is aggravated here by passive administration and by the concentration on higher-echelon benefits. Where the list of beneficiaries spans groups. of very disparate conditions with the most expansive lists of OBC-the "creaming" effect is probably even more pronounced.[141]

The Supreme Court in **Indra Sawhney**[142], said that it is important to note that eight of the nine learned Judges in Indra Sawhney applied the creamy layer principle as a facet of the larger equality principle. On the question of exclusion of the "creamy layer" from the Backward Classes, there was agreement among eight out of the nine learned Judges of this Court. There were five separate judgments in this behalf which required the "creamy layer" to be identified and excluded.

[141] *Supra*, note 28, pp. 548
[142] *Supra*, note 98

The judgment of Jeevan Reddy, J. was rendered for himself and on behalf of three other learned Judges, Kania, C.J. and M.N. Venkatachaliah, A.M. Ahmadi, JJ.. The said judgment laid emphasis on the relevance of caste and also stated that upon a member of the backward class reaching an "advanced social level or status", he would no longer belong to the backward class and would have to be weeded out. Similar views were expressed by Sawant, Thommen, Kuldip Singh, and Sahai, JJ. in their separate judgments. Their views can be summarised as follows:

While considering the concept of "means-test" or "creamy layer", which signifies imposition of an income limit, for the purpose of excluding the persons (from the backward class) whose income is above the said limit, the Court held that exclusion of such (creamy layer) socially advanced members will make the "class" a truly backward class and would more appropriately serve the purpose and object of clause (4).

❖ Jeevan Reddy, J. declared that there are sections among the Backward Classes who are highly advanced, socially and educationally and they constitute the forward section of that community. These advanced sections do not belong to the true backward class. They are "as forward as any other forward class member".[143] 'If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. They would be misfits in the class.'[144] After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward.'[145] The basis of exclusion of the "creamy layer" must not be merely economic, unless economic advancement is so high that it necessarily means social advancement, such as where a member becomes owner of a factory and is himself able to give employment to others. In such a case, his income is a measure of his social status…. Income or the extent of property-holding of a person is to be taken as a measure of social advancement — and on that basis — the "creamy layer" within a given caste, community or occupational group is to be excluded to arrive at the true backward class.

[143] *Supra*, note 98, pp. 723
[144] *Ibid*, pp. 724
[145] *Ibid*, pp.725

❖ The creamy layer can be, and must be excluded[146]. Creamy layer has to be excluded and "economic criterion" is to be adopted as an indicium or measure of social advancement.[147] The socially advanced persons must be excluded.[148] That is how Jeevan Reddy, J. summarised the position.

❖ Sawant, J. too accepted that "at least some individuals and families in the Backward Classes — however small in number — gain sufficient means to develop capacities to compete with others in every field. That is an undeniable fact". Social advancement is to be judged by the "capacity to compete" with forward castes, achieved by the members or sections of the Backward Classes. Legally, therefore, these persons or sections who reached that level are not entitled any longer to be called as part of the backward class, whatever their original birthmark.[149]

❖ Thommen, J. observed that if some members in a backward class acquire the necessary financial strength to raise themselves, the Constitution does not extend to them the protection of reservation. The creamy layer has to be "weeded out" and excluded, if it has attained a "certain predetermined economic level".[150]

❖ Kuldip Singh, J. referred to the "affluent" section of the backward class. Comparatively "such (sic rich) persons in the backward class — though they may not have acquired a higher level of education — are able to move in the society without being discriminated socially". These persons practise discrimination against others in that group who are comparatively less rich. It must be ensured that these persons do not "chew up" the benefits meant for the true backward class. "Economic ceiling" is to be fixed to cut off these persons from the benefits of reservation. In the result, the "means-test" is imperative to skim off the "affluent" sections of Backward Classes.[151]

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[146] *Ibid*, pp.768
[147] *Ibid*, pp.771
[148] *Ibid*, pp.772
[149] *Ibid*, pp. 553
[150] *See*, Ibid (paras 287, 295, 296, 323)
[151] *Ibid*, pp. 493

❖ Sahai, J. observed that the individuals among the collectivity or the group who may have achieved a "social status" or "economic affluence", are disentitled to claim reservation. Candidates who apply for selection must be made to disclose the annual income of their parents which if it is beyond a level, they cannot be allowed to claim to be part of the backward class. What is to be the limit must be decided by the State. Income apart, provision is to be made that wards of those Backward Classes of persons who have achieved a particular status in society, be it political or economic or if their parents are in higher services then such individuals must be precluded from availing the benefits of reservation. Exclusion of "creamy layer" achieves a social purpose. Any legislative or executive action to remove such persons individually or collectively cannot be constitutionally invalid."[152]

"*If some of the members are far too advanced socially (which in the context, necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps…. how and where to draw the line? ….The basis of exclusion should not merely be economic, unless, of course, the economic advancement is so high that it necessarily means social advancement."*[153]

There is no constitutional bar to classification of backward classes into more backward and backward classes for the purposes of Article 16(4). The distinction should be on the basis of degrees of social backwardness…. For excluding 'creamy layer', an economic criterion can be adopted as an indicium or measure of social advancement."[154]

The Supreme Court in **E.V. Chinnaiah**[155] contemplated the validity of the Andhra Pradesh Scheduled Castes (Rationalisation of Reservations) Act, 2000, was challenged, and dismissed by a five-Judge Bench of the Andhra Pradesh High Court by a majority of 4 : 1[156]. The 15% reservation that was made in favour of the Scheduled Castes was further apportioned among four groups in varying percentages

[152] *Ibid*, pp. 627
[153] *Ibid*, pp. 725
[154] *Ibid*, pp. 770
[155] *Supra*, note 116
[156] *See*, Mallela Venkata Rao v. State of A.P., 2000 SCC OnLine AP 613 : (2000) 3 APLJ 320

— Group A to the extent of 1%; Group B to the extent of 7%; Group C to the extent of 6%; and Group D to the extent of 1%**.** SC opposed the creation of creamy layer on the following reasons :

i) We do not think the principles laid down in Indra Sawhney case for subclassification of Other Backward Classes can be applied as a precedent law for subclassification or subgrouping Scheduled Castes in the Presidential List because that very judgment itself has specifically held that subdivision of Other Backward Classes is not applicable to Scheduled Castes and Scheduled Tribes. This we think is for the obvious reason i.e. the Constitution itself has kept the Scheduled Castes and Scheduled Tribes List out of interference by the State Governments.

ii) Classification whether permissible or not must be judged on the touchstone of the object sought to be achieved. If the object of reservation is to take affirmative action in favour of a class which is socially, educationally and economically backward, the State's jurisdiction while exercising its executive or legislative function is to decide as to what extent reservation should be made for them either in public service or for obtaining admission in educational institutions. In our opinion, such a class cannot be subdivided so as to give more preference to a minuscule proportion of the Scheduled Castes in preference to other members of the same class.[157]

In the **M. Nagaraj**[158] case, the Supreme Court held that for providing reservations in promotions, the state must collect quantifiable data to demonstrate the backwardness of the community and the inadequacy of their representation in the services. This implies that the state must first prove the backwardness of the community and then show that the reservation would not negatively impact administrative efficiency.

Jarnail Singh[159], arises out of two reference orders—the first by a two-Judge Bench in State of Tripura v. Jayanta Chakraborty[160], referred to in a second reference order,

[157] *Ibid*
[158] *Supra*, note 62
[159] *Supra*, note 117
[160] State of Tripura v. Jayanta Chakraborty, (2018) 1 SCC 146 : (2018) 1 SCC (L&S) 14

dated 15-11-2017 and State of Maharashtra v. Vijay Ghogre[161], which is by a three-Judge Bench, which has referred the correctness of the decision in M. Nagaraj v. Union of India[162], to a Constitution Bench.

The five-judge bench invalidated the condition of demonstrating the backwardness of Scheduled Castes and Scheduled Tribes as mandated by the **Nagaraj**[163] judgment. The court held that the state does not need to prove the backwardness of the SC/ST communities or that the reservation would not affect administrative efficiency, in order to provide reservation in promotions. The court also tackled the issue of excluding the "creamy layer" from reservation benefits. It held that the creamy layer principle applies to the SC/ST communities as well, to ensure that the truly disadvantaged within these communities can access the reservation benefits.

From the series of cases, it can be seen that the Courts regard creamy layer exclusion to be part and parcel to equality. The judgments make it amply clear that deprivation of benefits of the system to the non-creamy layer is what is in fact the violation of equality. **Indra Sawhney**[164] judgment, while expressly stating that creamy layer was for OBCs and not for SCs and STs, communicates all its favourable arguments for OBC creamy layer in a way that can be read with regards to creamy layer for SCs and STs also. Even **E.V. Chinnaiah**[165] judgment, not permitting creamy layer for SCs and STs, was founded upon the argument that SC and ST lists created through the Presidential list are kept away from the hands of governments and creating a creamy layer would grant such power to the governments.

It is also of utmost importance to note that while the Supreme Court has been hesitant in permitting creation of creamy layer by government for the SCs and STs notified under the Presidential notification under Article 341 and 342, it has asserted time and again that the list can be amended by the Parliament.

[161] State of Maharashtra v. Vijay Ghogre, (2018) 17 SCC 261
[162] *Supra*, note 62
[163] *Ibid*
[164] *Supra*, note 98
[165] *Supra*, note 116

Sinha, J.,after referring to Indra Sawhney, stated that whenever such a situation arises in respect of Scheduled Caste, it will be Parliament alone to take the necessary legislative steps in terms of clause (2) of Article 341 of the Constitution. The States concededly do not have the legislative competence therefore.[166]

"The Constitution provides for declaration of certain castes and tribes as Scheduled Castes and Scheduled Tribes in terms of Articles 341 and 342 of the Constitution. The object of the said provisions is to provide for grant of protection to the backward class of citizens who are specified in the Scheduled Castes Order and Scheduled Tribes Order having regard to the economic and educational backwardness wherefrom they suffer. The President of India alone in terms of Article 341(1) of the Constitution is authorised to issue an appropriate notification therefore. The Constitution (Scheduled Castes) Order, 1950 made in terms of Article 341(1) is exhaustive."[167]

Jarnail Singh[168] also notes, "We do not think it necessary to go into whether Parliament may or may not exclude the creamy layer from the Presidential Lists contained under Articles 341 and 342. Even on the assumption that Articles 341 and 342 empower Parliament to exclude the creamy layer from the groups or sub-groups contained within these Lists, it is clear that constitutional courts, applying Articles 14 and 16 of the Constitution to exclude the creamy layer cannot be said to be thwarted in this exercise by the fact that persons stated to be within a particular group or sub-group in the Presidential List may be kept out by Parliament on application of the creamy layer principle. One of the most important principles that has been frequently applied in constitutional law is the doctrine of harmonious interpretation. When Articles 14 and 16 are harmoniously interpreted along with other Articles 341 and 342, it is clear that Parliament will have complete freedom to include or exclude persons from the Presidential Lists based on relevant factors. Similarly, constitutional courts, when applying the principle of reservation, will be well within their jurisdiction to exclude the creamy layer from such groups or

[166] *Supra*, note 116, pp. 430
[167] *Ibid*, pp. 434
[168] *Supra*, note 117

sub-groups when applying the principles of equality under Articles 14 and 16 of the Constitution of India."[169]

Thus, an unexplored possibility opens up by which the Presidential notification itself can be used in a way to create a list that restricts the reservation to the people among the SCs and STs who needs the protective discrimination.

Article 341 and 342 states :

341. Scheduled Castes
(1) The President may with respect to any State or Union territory, and where it is a State after consultation with the Governor thereof, by public notification,specify the castes, races or tribes or parts of or group within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.
(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

342. Scheduled Tribes
(1) The President may with respect to any State or Union territory, and where it is a State after consultation with the Governor thereof, by public notification specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.
(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

[169] *Ibid* at pp. 425

Careful reading of the provisions shows that the President can by notification specify 'castes, races or tribes or parts of or group within castes' and 'races or tribes the tribes or tribal communities or parts of or groups within tribes or tribal communities' meaning that the entire caste or community need not be Scheduled caste or tribe for the purpose of the Constitution but any group or part within SCs and STs can be limited for the purpose of the Constitution. While this could also affect other Constitutional provisions for SCs and STs, a careful amendment can help the reservation reach the marginalised.

The permeation of the reservation system to benefit the real targets is not just the need of the hour, it should be considered the need of the minute. The development of the economy and the country should not be on the back of the disparity in incomes but on an inclusive growth that takes care of the underprivileged.

4.3.2. Reimposing 50% limit

The 50% ceiling limit imposed on reservation in **Indra Sawhney**[170] was taken as a line that balanced the right to equality with that of the need for reservation.

In **Nagaraj**[171], the Court remarked, "We reiterate that the ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse."[172]

But the majority in Supreme Court in **Janhit Abhiyan**[173] held, "reservation for economically weaker sections of citizens up to ten per cent in addition to the existing reservations does not result in violation of any essential feature of the Constitution of India and does not cause any damage to the basic structure of the Constitution of India on account of breach of the ceiling limit of fifty per cent because, that ceiling

[170] *Supra*, note 98
[171] *Supra*, note 62
[172] *Ibid*, SCC pp. 278-79, paras 121-24
[173] *Supra*, note 1

limit itself is not inflexible and in any case, applies only to the reservations envisaged by Articles 15(4), 15(5) and 16(4) of the Constitution of India."[174]

A note of caution was made by Lalit. C.J. and Bhat. J. ,stating that permitting the breach of the 50% rule as it were through this reasoning, becomes a gateway for further infractions whereby which in fact would result in compartmentalisation; the rule of reservation could dealt well become rule of equality or the right to equality, could then easily be reduced to right to reservation.[175]

The 50% ceiling should be reimposed as it was the only stop gauge against the tendency of the governments to create more reservations. The 69% reservation existing in Tamil Nadu is an excellent eye-opener. The 76th Constitutional Amendment, 1994 which inserted as Entry 257-A — the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services under the State) Act, 1993 in the Ninth Schedule is still pending before the Supreme Court. If 50% limit is breached this will gain constitutional validity. It is to be noted that 69% reservation is sans the EWS reservation of 10%. If that is also brought about in Tamil Nadu, the total reservation of the state would be at 79%, almost four-fifth of the total reservation. This is in no way the kind of equality envisioned by Ambedkar. In his words, "*Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent. of the total posts under the State and only 30 per cent. are retained as the unreserved. Could anybody say that the reservation of 30 per cent.as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment."*[176]

The reading of the 50% limit in Indra Sawhney to just 15(4), 15(5) and 16(4) is a faux pas that needs to be remedied by the Supreme Court at the earliest.

[174] *Supra*, note 1, para 184.3
[175] *Ibid*
[176] *Supra*, note 83

4.3.3. Integrating EWS with backward class reservations

The current system of reservation gives reservation to SCs and STs and Other Backwards Classes (OBCs). The EWS reservation of 10% is the entitlement of economically weaker sections that are already not provided reservation.

In essence SCs and STs get reservation regardless of their income as the creamy layer is not yet imposed on them. For OBCs, the income limit is Rs. 8 lakhs per annum. If the family earns more than Rs 8 lakhs per annum for three consecutive years, they are not eligible for the OBC reservation due to them being in the creamy layer.[177] The EWS reservation is also limited to below Rs. 8 lakhs per annum.[178]

The divisive character that can be seen in this is the classification primarily on the basis of class and then the income. But if reservation is going to be extended to both forward and backward classes, then it would be better to give reservation in the name of EWS for all first and then some additional benefits to SCs and STs. This would help a lot towards the stigma of reservation being for backwards classes and help integrate the SC, ST, OBC and EWS under one umbrella, atleast up until the income limit of Rs 8 lakhs per annum. This measure will not give any quantifiable effects but may help a lot in integrating the society. The divisive reservation policies currently existing would be better off being changed to prevent the perpetuation of the caste and class based mindset inculcated in the people through his system.

4.3.4. Gradual reduction of income limit for EWS

The current limit for OBC and EWS is set at 8 lakhs per annum which needs to be revised periodically. But this should not be increasing proportional to the inflation rate but insead should increase at a reduced pace as to gradually reduce the scope

[177] O.M. No. 36033/1/2013-Estt. (Res.), Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pensions, dated 13.09.2017. *See also,* Income Limit for OBC/EWS, Ministry of Social Justice & Empowerment, Posted On: 09 FEB 2022 5:07PM by PIB Delhi d
[178] *Ibid*, Income limit for OBC/EWS, Ministry of Social Justice & Empowerment, 2022

and extent of people covered under the reservation. This is very essential for the systematic elimination of the reservation system in India.

The beneficiaries of reservation as of now are very high and any changes of high magnitude will only result in civil unrest and political instability. His would not benefit neither the country nor the economy. Due to the same, a gradual diminishing of beneficiaries will help in the withering away of the system.

4.3.5. Intent for systematic withering of reservation system in India

The reservation which started off as a temporary measure should go back to the soil. The continued increase in this system even post 75 years of independence shows atleast a partial failure of the existing system. By the intent of the Constituent Assembly, as was discussed earlier, the reservation was intended to be flexibly used to provide protective discrimination and compensatory discrimination for a limited period by which time the backward communities should have been brought to the forefront.

The Parliament and the government should show the same intent and try to bring about an end to reservation at the very least within another two or three decades. The problem currently is the entitlement felt by the backward classes that the reservation is their right. The self entitlement prevents the governments from reducing any of their benefits lest it affects their vote banks.

Thus, only by limiting the beneficiaries and reducing the number of people covered under the spectrum of reservation can the reservation system wither away. For the same, the intent of the governments are very critical.

4.4. Conclusion

The reservation system in India was a great idea for inclusivity in the pluralistic and complex society existing at the time. Even after the gaining of independence from

the British, the social evils were lingering in the society and the minds of the people. The oppressed, marginalised, ostracised and downtrodden people needed support to rise. They needed a helping hand to grasp onto the opportunities that came their way. This led to the creation of reservation.

The system persists even now, despite all the social, economic, technological and cultural strides that we have undertaken. This can be attributed to the real targets not getting the benefits of reservation and the mentality of having reservation as a right instead of as a policy benefit.

This needs a change and change can only come gradually. The steps in the path towards the much needed shift was outlined in his chapter and this could be a potential game changer for India in its stride towards real equality.

CHAPTER V :

Conclusion and Suggestions

5.1. Introduction

5.2. Conclusions

5.3. Suggestions

5.1. Introduction

The Indian reservation system is unique in its origin because no other country has had caste based discrimination perpetuated from antiquity. The reservation system was brought forth as a measure of temporary relief that gives a protective discrimination and tries to lift up historically suffering people. The basis of equality through equity was employed and the Constitution makers envisioned an India that will remain a haven of equality, not just socially, economically and politically, but also in its mindset. But as some of the visionary members of Constituent Assembly feared, without any set limit to reservation, the society is becoming more polarised and the forward classes are showing tendencies that they want to be in the backward classes because of all the benefits that these classes hog to themselves. Furthermore, the benefits of reservation are being considered as a right nowadays which could further complicate its elimination. Even Ambedkar's advice of confining the reservation to a minority of seats have been upheaved, causing discomfort among the general community.

The study on the reservation system in India has delved deeply into its evolution from a protective measure to one that is increasingly becoming perpetual in nature. Over the decades, the reservation policy has expanded in scope and become entrenched in the social and political fabric of the country. What was meant to be a protective measure has, in many ways, transformed into a perpetual system of entitlement, with beneficiary communities often using it as a tool for political mobilisation and bargaining.

5.2. Conclusions

Reservation is the cornerstone of the protective discrimination utilised in India to address historical injustices and provide equal opportunities to marginalised communities. The reservation system is a form of affirmative action designed to uplift socially and educationally backward citizens, as well as Scheduled Castes

(SCs) and Scheduled Tribes (STs), who have faced systemic discrimination and exclusion for centuries.

The aim of the reservation policy is to facilitate access and representation for these historically disadvantaged groups across various spheres - education, employment, government schemes, scholarships, and political bodies. By reserving a certain percentage of seats and positions, the policy seeks to create a more equitable playing field and enable greater social mobility and empowerment of marginalised communities.

The implementation and evolution of the reservation policy has been a complex and often contentious process, marked by debates around issues of merit, social justice, and the need to balance equality of opportunity with the imperative of addressing historical disadvantages. Nonetheless, the reservation system remains a crucial instrument for promoting inclusive development and ensuring substantive equality for marginalised communities in India.

Despite the challenges and criticisms, the reservation policy continues to be a cornerstone of the country's efforts to build a more equitable and just society, where all citizens, regardless of their social or economic background, can access opportunities and participate fully in the nation's progress.

The first chapter ‘Introduction’ is a summary of the contents of the study. The chapter was divided into eight sub-headings, namely, introduction, scope of study, statement of problem, research objectives, research questions, hypothesis, research methodology, chapterisation and literature review. This chapter gives an outset of what is to come. The introduction chapter of the study outlines the main topics and objectives. It begins by providing a brief overview of the topic, which is reservation, and concludes by highlighting the need for such a study. The scope of the study includes recent changes in society that necessitate a reevaluation of the reservation system. The chapter also provides a brief summary of the study's scope and context. The statement of the problem sets the stage for the study by highlighting the context in which it is being conducted. The research objectives identify the four main areas of focus and the same is framed into and research problems. They correspond to

analysing the evolution and extent of the concept of reservation in India, analysing the role of Judiciary in construing protective discrimination to ensure equality, examining the scope of exclusion of economically forward classes among SC/ST from the benefit of SC/ST reservation and its constitutionality and suggesting the methods through which positive changes can be made in the existing reservation system. Two hypotheses that were predetermined were to be tested with the study to prove or disprove the notion. The research methodology outlines how the study had to have been conducted and how it will provide conclusive answers to the questions being asked. The study used was purely doctrinal and used books, articles and other materials to form the conjecture. The study was divided into five chapters that together form the core of the research. The literature review provides an overview of the books and materials that were referenced during the study, the most prominent being books authored by Dr. D.D. Basu, Marc Gelanter and H.M.Seervai.

The conclusions that are derived from the second chapter 'Evolution of the system of reservation in India' is a comprehensive analysis on reservation on a historical basis. The introduction to the chapter showed how the caste system came about, atleast as far as the Hindu scriptures go. The four caste system propounded on the basis of action, as mentioned in Rig Veda and the Bhagavad Gita took a turn for the worse with the stigma of caste attached to birth. The discrimination that followed on the basis of caste such as social segregation and occupational restraints along with violence worsened the situation. The initiation of the idea of reservation in 1882 and its adoption by various princely states and the British are detailed in the third sub-chapter. The Communal Award by the British and the subsequent issues culminating in the Poona Pact are included in the next portion. The reservation being acknowledged and included in the Constitution by the Constituent Assembly. The intention of the Constituent Assembly while creating the reservation was to limit it to a certain period which is not adhered to today. The Mandal Commission that was set up in 1979 and his report that led to the OBC reservation in 1990, is discussed substantially considering the major role it had in the reservation system in India. The most quantum of reservation was, thereafter, reserved for OBCs which consequently threatened the right to equality considering many states' reservation being more than half the total. The chapter ends with noting different forms of reservation afforded in India which includes reservation for Persons with Disabilities (PWDs), reservation in

promotions by virtue of Articles 16(4-A) and 16(4-B), transgender reservation in Karnataka, reservations for religious minorities, economic reservation for persons not already reserved under Articles 15(4), 15(5) and 16(4) by inserting Article 15(6) and 16(6) etc. The failure of seven to eight decades of reservation has shown that the benefits are not permeating the class based classification, to reach the real target beneficiaries. The caste and class reservations are divisive to society. While in the past, the benefits of backward upliftment outweigh the cons, now the society is too divided in their mentality. Vote bank politics have also entrenched itself into the reservation system. No ruling party wishes to lose votes by removing the reservation systems. On the contrary, this is one of the reasons more and more reservations are popping up. There has not been any show of intent for the systematic removal of the reservation system in India.

The third chapter basically examines the scope and extent of reservation system in India. The use of terminologies of 'affirmative action' in the US and 'protective discrimination' in India is inspected with the differentiations on the basis of the levels of scrutiny adopted by the judiciary, standard of review for violation of equality, the state interest that needs to be present and the burden of proof. This clears up the position in both countries. Then the chapter lists out various measures of protective discrimination adopted in India from compassionate appointments to giving out subsidies. Then the fact that reservation is the most prominent form of protective discrimination is substantiated. Afterwards, the chapter moves onto correlating reservation and equality. The reservation being intrinsic to equality and not an exception to equality is asserted. The tests used by judiciary to validate classifications made under Article 14, namely, the twin test, arbitrariness test, test of manifest arbitrariness and the proportionality test are deliberated through the Supreme Court judgments in various cases. Then the discussions moved onto the Constitutional Assembly debates that sought to include the provisions of reservations in the legislature of India and the objections that arose as well. The Constitutional provisions that were finalised and included in the Constitution were expressed in detail before moving onto the Constitutional validity of reservation. The various reservations that arose over the years and how the judiciary has responded to that was analysed. The initial invalidation of reservation in jobs to the insertion of Articles 15(4) and 16(4) in the Constitution marked the beginning of reservation.

Then OBC reservation came and was validated by the judiciary. The reservation in promotions was also initially not permitted by the judiciary and after the insertion of Articles 16(4-A) and 16(4-B) the same was allowed. The introduction of the 'catch up rule' to oppose 'consequential seniority' was initially approved but was struck down in 2019. The 50% limit imposed on total reservations was taken as a hard and fast rule initially but very recently, in 2022, the 50% limit was said to be limited to Articles 15(4), 15(5) and 16(4). The EWS reservation, brought about with the insertion of Articles 15(6) and 16(6) was also validated in the same case. The creation of a creamy layer for the OBC was permitted but regarding sub-classification for SCs and STs, the judiciary has conflicting opinions. There are three important decisions pending before the Hon'ble Supreme Court, the first being related to legality of subclassification of SCs and STs on the basis of income, the second regarding the Tamil Nadu state government extending 69% reservation even before the EWS reservation and the third and final one being the continued extension of the period under Article 334 through constitutional amendments.

The fourth chapter contains the vital essence of the study which is regarding the need for change. The chapter begins with the intentions of the Constituent Assembly having the intent to create a system of reservation that has a limited lifetime up until the backward communities being lifted up enough to compete equally with others. This limited life period they created was for 10 years subject to change according to the change in social circumstances. But the intent being for in or around 10 years is very overt but the lack of substantial conditions after almost 80 years creates the idea for a need of change. Other reasons for the need for change are also deliberated in the chapter. Dissatisfaction among the unreserved 'general' community, stigma over reservation for caste, the continuing poverty and backwardness to the non-creamy layer, demotivation among reserved communities, growth in access due to technology etc. are all reasons for the change in the existing system. The analysis on 'protection' or 'perpetuation' is done in the chapter on the context of the continued increase in various reservations over the years and the continued extension of validity of reservations under Article 334. The rest of the chapter revolves around the scope of ending reservations in India and the changes that need to be effected to this system. The changes that was discussed to be effected include creamy layer for SC/ST, reimposing 50% limit on reservation, integrating EWS with the creamy layer

of SC,ST and OBCs to remove the caste stigma attached to reservation, gradual reduction of income limit to let poorer sections access the benefits and most importantly, the intention from the government to do away with the reservation system. The discriminations faced by the people are not completely eradicated but there has been a lot of change due to the social, technological and holistic growth that prevents the social isolation and ostracisation of any community. There are substantive criminal statutes to protect against any violence meted out to marginalised and backward communities like the SCs and STs. The reservations are not only decreasing with time but can be seen to be growing more and more. The only eliminated reservation was that which was afforded to the Anglo-Indians. The scope of Article 341 and 342 to be used by the President to change the beneficiaries of SCs and STs by limiting the meaning of SCs and STs for the purpose of the Constitution. Through a notification under the said provisions, the President is indeed empowered to limit the reservation to the non-creamy layer.

The fifth chapter, titled "Conclusions and Suggestions," begins with an introduction that sets the context for the culmination of the research study. A couple of introductory paragraphs provide insight into the overall scope and objectives of the study, giving the reader a clear understanding of the journey undertaken. This introduction is then followed by a comprehensive paragraph that summarises the key conclusions drawn from each of the preceding chapters. This section offers a concise yet insightful analysis, distilling the various aspects of the study into a cohesive whole. By highlighting the salient points from each chapter, this paragraph gives the reader a holistic understanding of the research findings, allowing them to grasp the study in a nutshell. The chapter then transitions into a section dedicated to suggestions, where the researchers put forth their recommendations based on the comprehensive understanding gained through the study. These suggestions serve as a guide, outlining a possible way forward that the researchers believe should be considered in addressing the complex issues surrounding the reservation system in India. Thus, the "Conclusions and Suggestions" chapter can be considered the most crystallised and important section of the research work, as it encapsulates the essence of the study and provides a roadmap for future action.

With this in mind, the hypothesis for the study can be inferred as

- Current reservation system discriminates against the general community and perpetuates discrimination.

- Under Article 341 and 342, without creating a creamy layer, the President can by proclamation restrict SC/ST under the Constitution to economically weaker sections of SC/ST community.

5.3. Suggestions

1. Reservation has served its purpose of bringing backward communities into the mainstream and getting them equal opportunities, despite being confined to a limited quantum of beneficiaries. The discrimination in the society has also not been completely eradicated and hence the reservation cannot be scrapped in its entirety today. But continuing the same treatment and even more beneficial treatments cannot be justified with the mitigation of discrimination to a large extent. Therefore, all stakeholders should take note that reservation is moving from its nature of protection to that of perpetuation and therefore, that the changes to the system are necessary.

2. The most important aspect for change needs to be the mentality of the governments. If the government has no intention to put an end to reservation, no method or plan will work out. The government should take initiative to systematically eliminate the reservation system. This has not been the case in the past. Reservations are provided one after the other for getting votes. The government should get out of the mindset of initiating reservation policies for votes and instead strive to bring real equality in the society.

3. The people should also be aware of the issues that perpetuate in the country due to the reservation system. Caste identity is the most perpetuated negative externality of the reservation system. Therefore, vote bank politics should be

refrained from being used by the beneficiaries of the reservation system to tie the hands of ruling governments.

4. The governments should make amends to the policies in such a way as to benefit the real targets and not the highly affluent. The rich and the powerful should not be granted access to reservation on technicalities so as to not defeat the original purposes of the policy.

5. The politicians should strive towards not associating reservation to a right. In no way should the idea of reservation as a right should be planted in the minds of the people. Taking away a preferential policy and taking away a right can have different rhetorics on the people.

6. The lack of meritocracy in the system is also concerning. The temporary implementation might help bring the marginalised and backward people upwards and increase the purchasing power of the people, thereby positively impacting the economy of the country. But the use of the reservation system for too long will create a system which generalises mediocrity and rewards complacency. This system will harm the interests of the nation because of lack of competency in positions of power. The reserved people will also lack motivation to work efficiently because of the lack of need to do so. This system will degrade the quality of students and workforce.

7. There are atleast three important decisions pending before the Hon'ble Supreme Court regarding creamy layer of SCs and STs, 69% reservation in Tamil Nadu and extension of the period under Article 334. These decades-long pending cases on reservation should not be permitted on account of the substantial nature of the subject matter and the huge number of people affected. Judiciary should act quicker and more responsibly.

8. Article 341 and 342 can be used by the President to change the beneficiaries of SCs and STs by limiting the meaning of SCs and STs for the purpose of the Constitution. Articles 366(24) and 366(25), also being definitions of SCs and STs can be utilised for purposes other than for reservation through a proper amendment. The government should measure the amendments appropriately and make necessary changes.

9. It is the changes suggested in the previous chapter that gains importance with the need for change in the reservation system. These changes need to be examined in detail, analysed to understand the feasibility, checked on its legality, and thereby circumvent any barrier to its possible implementation.

10. Thus, the examined possibilities of changes are reiterated as suggestions. They are :

☐ The imposition of the "creamy layer" concept is crucial to ensure that the benefits of reservation reach the truly marginalized sections of society. Without such a mechanism, there is a risk of the reservation system being hijacked by the more affluent and socially advanced members of the backward communities, leaving the real intended beneficiaries deprived of the intended support. The government must take a proactive stance in implementing the creamy layer criteria effectively, rather than merely granting a substantial quantum of total reservation without ensuring its proper permeation. The government's role should not end at simply allocating a certain percentage of seats or positions for the historically disadvantaged groups. It must also put in place robust mechanisms to identify and exclude the "creamy layer" - those members of the backward classes who have already achieved a higher level of social and economic status, and no longer require the protective discrimination of reservation. By doing so, the government can ensure that the limited resources and opportunities available through reservation are channelled towards the most marginalised individuals, empowering them to overcome the entrenched barriers they face. This targeted approach, combined with complementary measures for educational and economic empowerment, can help realise the true intent of the reservation system - to create a more equitable and inclusive society.

☐ The 50% ceiling limit on total reservation, regardless of the specific categories, should be strictly reimposed and enforced. This is crucial to ensure that the right to equality, as enshrined in the Constitution, is not violated. The unchecked expansion of reservation quotas, with some states crossing the 50% mark, poses a serious threat to the principle of equal opportunity. When the cumulative reservation exceeds half the available seats or positions, it

effectively denies a fair chance to the general, unreserved category candidates. This skews the system in favour of specific groups, compromising the meritocratic foundation that should underpin public employment and educational institutions. The 50% ceiling limit on reservation must be strictly reimposed and enforced, regardless of the specific categories or the constitutional articles invoked. This will ensure that the delicate balance between affirmative action and the fundamental right to equality is maintained, paving the way for a more equitable and fair system that benefits all sections of society.

- ☐ The government needs to make concerted efforts to remove the stigma associated with reservations being linked to caste identity. The current system has perpetuated the tendency of people to seek inclusion in the "backward classes" category, often for political and economic gain, rather than genuine social integration. This has further entrenched the caste divisions in society, undermining the very purpose of the reservation system.

- ☐ To address this, the government must work towards dissociating reservations from caste identity. People should be able to access the benefits of affirmative action without having to publicly identify with a particular caste group. This can be achieved through a gradual shift towards more economically-based criteria for reservation, rather than the current caste-based approach. Additionally, the government should launch awareness campaigns to promote the idea that one's caste should not define their social or economic status. Only through such efforts to integrate people beyond their caste identities can the deep-rooted segregation in Indian society be truly addressed. The ultimate goal should be to create a system where people are empowered to associate themselves freely, without the burden of caste-based labels, and have equal access to opportunities based on their individual circumstances.

- ☐ After imposing the creamy layer criteria across all communities, including the Scheduled Castes (SCs) and Scheduled Tribes (STs), the reservation system must gradually shift its focus towards identifying beneficiaries primarily based on their economic status rather than caste. While reservation was originally conceived as a means to address historical injustices faced by certain

communities, the time has come to evolve the system to better suit contemporary realities. Caste-based discrimination remains a harsh reality, but the reservation system should not perpetuate caste identities as the primary basis for accessing opportunities.

- By gradually transitioning to an income-based criterion, the reservation system can ensure that the truly disadvantaged individuals, irrespective of their caste, receive the intended support and benefits. This shift would require amending the Constitution to facilitate the removal of caste-based classifications as the primary determinant for reservation. The society as a whole must transform its mindset and demand that the government take the necessary steps to bring about this change. Reservation should remain an affirmative action tool, but one that is based on economic need rather than caste status. This will help create a more equitable system that uplifts the poor and marginalised while promoting social integration beyond the confines of the caste system.

- The gradual decrease in the income limit for reservation eligibility can be a prudent approach to ensure that the benefits of affirmative action reach the truly impoverished sections of society. Currently, the income threshold for the Economically Weaker Sections (EWS) reservation is set at a relatively high level, effectively excluding the poorest of the poor from accessing these opportunities. By gradually lowering this income limit over time, the government can ensure that the reservation system is targeted towards the most marginalised and disadvantaged individuals, irrespective of their caste or community. This measured approach can also pave the way for an eventual elimination of the caste-based reservation system without causing widespread protests and civil unrest. The shift towards an economically-driven criterion for reservation, coupled with a steady reduction in the income limit, can help create a more inclusive and equitable system. However, any hasty measures to dismantle the existing reservation framework should be avoided, as it could trigger significant backlash from the beneficiary communities. A carefully calibrated and consultative process is essential to navigate this sensitive issue and ensure a smooth transition towards a more merit-based and economically-just system of affirmative action.

The extrapolation of this study shows an imminent need for changing the ways the government operates in relation to the reservation system. The trend of reservation in India violates the core values of the Constitution. Equality and reservation was intended to be balanced and gradually go away. This calls for the revisiting which should be taken up by the beneficiaries, the non-beneficiaries, the political parties, the government and the judiciary.

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APPENDIX

CERTIFICATE ON PLAGIARISM CHECK

1.	Name of Candidate	Sangeeth Mohan
2.	Title of Dissertation	Protective Discrimination or perpetual discrimination: A need for change in reservation system in the context of India
3.	Name of the Supervisor	Dr. Sheeba S Dhar
4.	Similar Content Identified	6%
5.	Software Used	Grammarly
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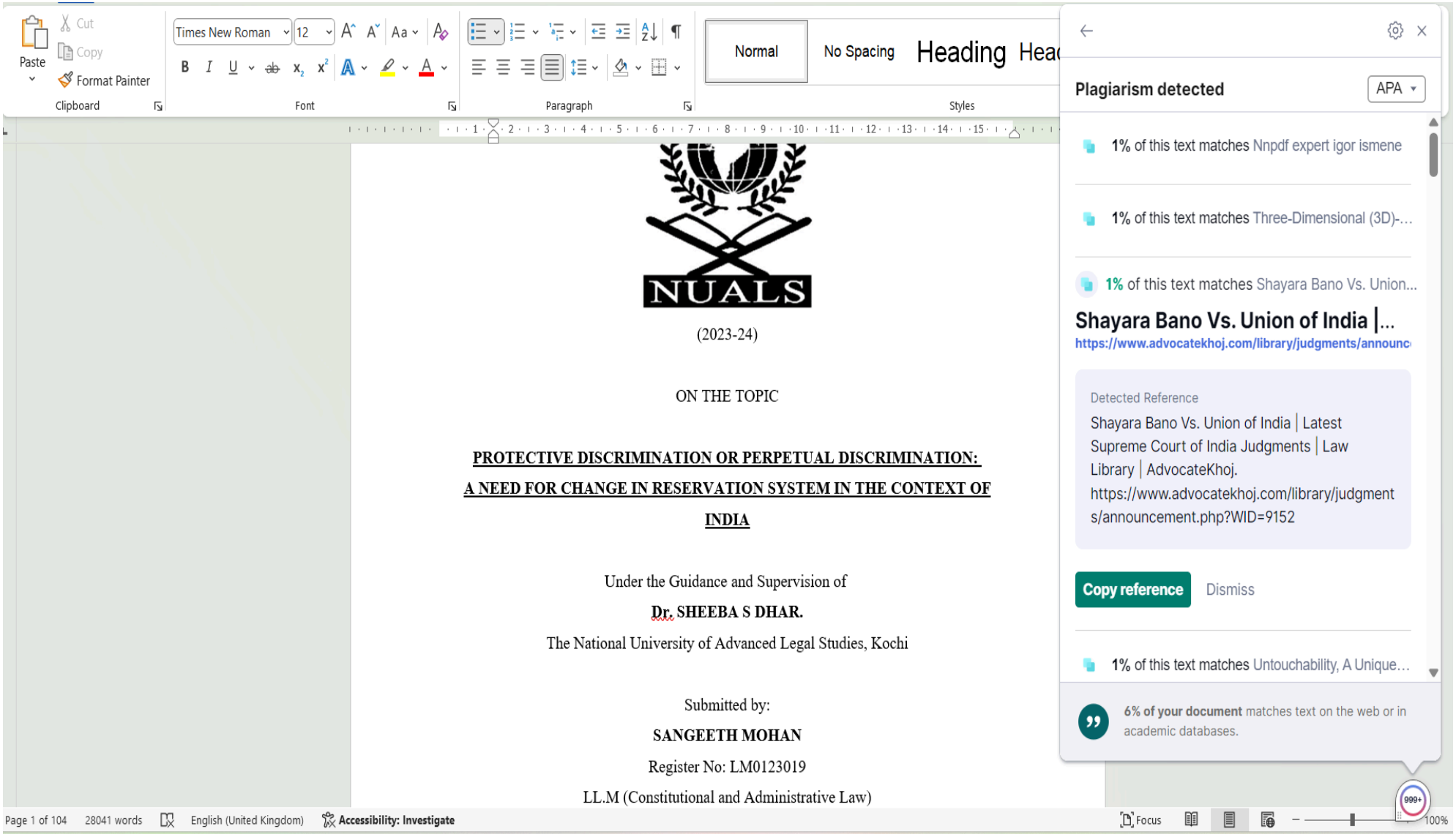

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ON THE TOPIC

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Under the Guidance and Supervision of

Dr. SHEEBA S DHAR.

The National University of Advanced Legal Studies, Kochi

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