

The National University of Advanced Legal Studies, Kochi



DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF
REQUIREMENTS FOR AWARD OF DEGREE OF MASTER OF LAWS (2020-21)

ON THE TOPIC

ECONOMIC RESERVATION IN INDIA - A CRITIQUE

Under the Guidance and Supervision of

Dr. SHEEBA S. DHAR

The National University Of Advanced Legal Studies, Kochi

Submitted by: **Amal Amir Ali**

Register No: LM0120002

LL.M (Constitutional And Administrative Law)

CERTIFICATE

This is to certify that Mr. **Amal Amir Ali** , Reg. No. LM0120002 has prepared and submitted the dissertation entitled, **“ECONOMIC RESERVATION IN INDIA - A CRITIQUE”** in partial fulfilment of the requirement for the award of Degree of Masters of Laws in Constitutional and Administrative 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:08.10.21

Place:Ernakulam

Dr. Sheeba S Dhar

Guide and Supervisor

Assistant Professor, NUALS, KOCHI

CERTIFICATE ON PLAGIARISM CHECK

1. Name of the Candidate: Amal Amir Ali
2. Title of thesis/dissertation: ECONOMIC RESERVATION IN INDIA - A CRITIQUE
3. Name of the supervisor: Dr. Sheeba S Dhar
4. Similar content (%) identified : 9%
5. Acceptable maximum limit (%):
6. Software used: Turnitin
7. Date of verification: 10-10-2021

*Report on plagiarism check, specifying included/excluded items with % of similarity to be attached in the Appendix

Name and Signature of the Candidate : Amal Amir Ali

Name & Signature of the Supervisor : Dr. Sheeba S Dhar

DECLARATION

I, hereby declare that the dissertation entitled, “ **ECONOMIC RESERVATION IN INDIA - A CRITIQUE** ”, researched and submitted to the National University of Advanced Legal Studies, Kochi in partial fulfilment of the requirement for the award of Degree of Masters of Law in Constitutional and Administrative Law, under the guidance and supervision of Dr. Sheeba S Dhar, is 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.

Date: 08.10.21

Place Ernakulam

Amal Amir Ali

Reg.no:LM0120002

Constitutional and Administrative Law

NUALS Kochi

ACKNOWLEDGEMENT

I take this opportunity to express my profound respect and deep sense of gratitude to Dr. SHEEBA S DHAR, Assistant Professor, National University of Advanced Legal Studies, Kochi for her support, guidance and encouragement throughout the course of research work.

I would like to extend my gratitude to the Vice-Chancellor Prof. (Dr.) K. C. SUNNY for his constant encouragement and support. I thank Prof. (Dr.) MINI S for imparting her impeccable wisdom and inspiring throughout the completion of this work. I also express my due respect and gratitude to all the faculty of NUALS for their constant encouragement.

I convey my thanks to the staff of the Library for their timely assistance to carry out the work.

Words fall short of expressing love, appreciation and gratitude to my loving parents, family members and friends for their constant encouragement.

Amal Amir Ali

List of Cases Referred

- Plessy V.Ferguson, 163 U.S. 537 (1896)
- State Of Madras V. Champakam Dorairajan, AIR 1951 SC 226
- In General manager V. Rangachari, AIR 1962 SC 36
- Balaji V. State Of Mysore, AIR 1963 SC 649
- Chitralekha V. State Of Mysore, AIR 1964 S.C. 1823
- Devadasan V. Union Of India AIR 1964 SC 179
- State of Andhra Pradesh V. Sagar, AIR 1968 S.C. 1379
- C.A Rajendran V. Union Of India, AIR. 1968 SC 513
- Hariharan Pillai V. State Of Kerala, AIR 1968 Ker 47
- Chaitram V. Sikander, AIR 1968 Pat. 337
- Triloki Nath Tiku V. State Of Jammu and Kashmir, AIR 1969 SC 1
- Kesavananda Bharati V. State of Kerala, (1973) 4 SCC 225
- Indira Gandhi V. Raj Narain (AIR 1975 SC 2299)
- State of Kerala V. N.M Thomas, (1976) 2 SCC 310, 527
- Kumari K.S. Jayashree V. State of Kerala, 1977 (1) S.C.R. 194.
- University of California V. Bakke, 438 U.S. 265 (1978).
- State of Karnataka V. Union Of India, AIR 1978 SC 68
- Jagdish Saran V. Union Of India, (1980) 2 SCC 768
- Akhil Bharatiya Soshit Karamchari Sangh (railway) vs.Union of India and ors, AIR 1981 SC 29
- K.C Vasanth Kumar V. State Of Karnataka, (1985) Supp.SCC.714,722

- Indra Sawhney V. Union Of India, AIR 1993 SC 477
- Govt. of A.P V. P.B. Vijayakumar, (1995) 4 SCC 520
- S. Vinod Kumar V. Union Of India, (1996) 6 SCC 580
- Preeti Sreevastava V. State Of Madhya Pradesh, (1999) 7 SCC 120
- T.M.A Pai Foundation V. State of Karnataka, AIR 2003 SC 355
- P.A. Inamdar V. State of Maharashtra, (2005) 6 SCC 537
- M. Nagaraj V. Union Of India, 2006 (8) SCC 212
- Ashok Kumar Thakur v. Union of India, 2008 (6) SCC 1
- Jaishri Laxmanrao Patil V. The Chief Minister, 2021(3) KLT 465 (SC)

List of Abbreviations

AA-	Affirmative Action
AIR-	All India Reporter
Art.-	Article
CAD-	Constituent Assembly Debates
ed.-	Edition
etc-	Etcetera
G.O-	Government Order
i.e -	That is
id.	Idem
ILI-	Indian Law Institute
Ker.-	Kerala
KLT-	Kerala Law Times
Ors.-	Others
SC/ST-	Scheduled Caste/ Scheduled Tribe
OBC-	Other Backward Classes
SEBC-	Socially and Educationally Backward Class
SCR-	Supreme Court Report
Sec.-	Section

TABLE OF CONTENTS

Chapter 1.....	12
1.1 Introduction	
1.2. Statement Of Problem	
1.3. Scope of Study	
1.4. Research Questions	
1.5. Objectives Of Research	
1.6. Hypothesis	
1.7. Research Methodology	
1.8 Chapterisation	
<hr/>	
Chapter 2	
The Evolution Of Reservation System in India.....	16
2.1 Introduction	
2.2 The British Era	
2.2.1 Indian Council Act Of 1909 (Morley-Minto Reforms)	
2.2.2 Government Of India Act 1919	
2.2.3 Simon Commission	
2.2.4 The Round Table Conferences and the Communal Award Of 1932	
2.2.5 The Poona Pact	
2.2.6 The Government Of India Act 1935	
3. Constituent Assembly Debates	
4. Post Independence Era	
5. Affirmative Action in India and United States - A Comparison	
6. History of Reservation in India : 10 Major Milestones -A Timeline	
7. Conclusion	

Chapter 3

Reservation : A Step towards Substantive Equality.....35

3.1 Introduction

3.2 Affirmative Action : Theoretical Foundations

3.3 Affirmative Action : Constitutional Foundations

3.3.1 Reservations : Scope

3.3.2 Reservations and Merit

3.3.3. Quantum of Reservation

3.3.4 Reservations : Exceptional Nature

3.4. Conclusion

Chapter 4

Reservation Criteria Conundrum - Caste or Economic status ?.....54

4.1 Introduction

4.1.1 Identification of Scheduled Castes

4.1.2 Identification of Scheduled Tribes

4.1.3 Identification Of Other Backward Classes

4.2 Views on Constitutional Meaning Of Classes

4.2.1 The Modernist View

4.2.2 The Historic View

4.2.3 The Elastic View

4.3. Caste as Class

4.4. Economic criterion

4.5. Conclusion

Chapter 5

The Ten Percent Economic Quota - Panacea or Gimmick ?.....70

5.1. Introduction

5.2 Constituent Assembly Debates and Economic Reservation

5.3.Object and Features of One Hundred and Third Constitution Amendment Act

5.4. Implementation of 10 percent Quota

5.4.1 Poverty and Economic Reservation

5.5. 103rd Constitutional Amendment Act - Legal Aberrations

5.5.1 Inconsistency with Articles 15 and 16

5.5.2 The Statement of Objective and Reason

5.5.3. Lack of empirical data

5.5.4. Treats Unequals Equally

5.5.5. Exceeds Fifty percent Ceiling

5.5.7 Standard and Limits of Basic Structure Review

5.6 Conclusion

Chapter 6

Conclusion and Suggestions85

Bibliography.....92

Chapter 1

INTRODUCTION

1.1 Introduction

Equality is considered as one of the cardinal principles of our constitutional polity. Our constitution encompasses not just formal equality but also substantive equality by categorising advantaged and disadvantaged persons and providing them equal protection of laws under Article 14. Democratic Countries have always envisaged certain measures to eliminate the unreasonable inequalities in the society to guarantee dignity to the oppressed classes. These measures are addressed as Affirmative Actions, Reservations, Protective Discrimination, Compensatory Discrimination, etc. No Country in the world has a unique and rich diversity in terms of culture, languages, and religion as our country. This diversity is a boon as well as a bane. It is a bane, especially when politicians use this diversity to create fissures in the society purely for the purpose of gathering votes and winning elections especially due to the fact that in a developing country like India, the dream of an average citizen would be to secure a government job and sustain his family. As Justice Krishna Iyer explained in the N.M Thomas Case a special article was devoted to public employment because “public services have been a fascination for Indians even in British days, being a symbol of State power..”. It is a sad fact that concept of Reservations in our country has degraded as a tool in the hand of politicians to garner popular support. The “Constitution 103rd amendment Act” is the latest entry. Also the debate on what should be the basis for Reservation has come to the centre stage once again with the government enacting the “103rd Constitutional Amendment Act, 2019”, and “thus providing 10 Percent reservation for the Economically Weaker Section (EWS) other than SC, ST and OBC” in public employment and educational institution.

1.2. Statement Of Problem

The Concept of Reservations is an exceptional measure to be used to achieve substantive along with formal equality in a society. The Constituent Assembly members sought to restrict reservations to a minority of seats. The main objective of reservations in India is to minimise the systemic and historic discriminations suffered by a sections of society due to the peculiar system of Caste in our country. As Gail Omvedt suggests the “objective of caste-based Reservations is to remove caste-monopoly in access to social resources”. “She suggests that the discourse of Reservation is forcibly turned towards economic criteria because upper-castes want to avoid dealing with caste”. Reservations in our country is not a poverty alleviating measure. Hence, while providing for

reservation a combination of factors like the “social and educational backwardness” of the caste, the occupation, the income, and so forth should be considered. Reservations, except in the case of Scheduled Castes and Scheduled Tribes, cannot be based on a sole criterion of caste or economic criteria.

1.3. Scope of Study

The Concept of reservation in India has grabbed the attention of both the layman as well as the jurist. The Constituent Assembly Members envisaged reservation as an extra ordinary measure that is to be used to remedy the differences that existed in the society especially due to the Caste system of our country. But later on the beneficiaries of reservation were enlarged to include social and educational backwardness. Despite clear judicial pronouncements in the area of reservations which emphasise the objective of reservation and importance of capping reservations at fifty percent, Central and state governments often hand out reservations for merely appeasing the target voters rather than for effectuating substantive equality. As B.R. Ambedkar said “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 means 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”. The aim of reservation should be to rectify this graded inequality.

This study critically analyses economic reservation in India by explaining the evolution of reservation system in india from the pre independence period, by analysing reservation as a concept aimed at furthering substantive equality, by analysing Constituent Assembly Debates, the various judicial decisions to ascertain the criteria for reservations and finally by critically examining the One Hundred and Third Amendment Act.

1.4. Research Questions

1. What is the concept and object of Reservations?
2. What should be the basis for Reservation?
3. Whether economic criterion can be the sole basis for Reservation
4. Whether the 103 rd Constitutional Amendment Act, 2019 is constitutionally Valid?

1.5. Objectives Of Research

- To trace the historical evolution of Reservation in india
- To examine the concept and purpose of Reservation in India
- To examine the the criteria on which Reservation should be based
- To find out whether Economic criteria could be the sole basis for Reservation
- To analyse the legal infirmities in 103rd Constitutional Amendment Act 2019

1.6. Hypothesis

Economic backwardness as the criteria of reservation needs a revisit in consonance with the objectives of reservation.

1.7. Research Methodology

The research methodology adopted in this dissertation is purely doctrinal method. Secondary data like newspaper articles, journals, authoritative judgments of the Supreme Court and various High Courts, Statutes, books, online resources, newspapers, etc. are used to achieve the objectives of this dissertation

1.8 Chapterisation

The first chapter is an introduction to the whole study. It contains a brief introduction to the topic, statement of problem, scope of study of the topic, research questions, objectives of the study, of the study hypothesis and methodology adopted for the study.

The Second Chapter titled “The Evolution Of Reservation System in India” intends to trace the history of reservation system in India. Reservations in the pre- independence period is analysed by examining the Caste system prevalent in India, The Government Of India Act 1909, The Government Of India Act 1919, Poona Pact of 1932. Reservations in the post independent India is traced by examining the Constitutional Assembly Debates, and also all the major events pertaining to reservation in post independent india is listed out. The Constituent assembly debates are scrutinised deeply to understand the rationale and beneficiaries of reservation. The Chapter briefly

explain all the constitutional amendments pertaining to reservation. The chapter also succinctly compare the Indian Affirmative Action with the United States Counterpart.

The Third Chapter titled “Chapter 3: Reservation : Concept and Nature” aims to understand the concept and nature of reservations. This chapter tries to explore the Jurisprudential foundations of concept of reservation by analysing the principles of distributive justice. Further the constitutional foundations of reservations are placed in the Equality provisions. The Chapter analyses all the major judgments pertaining to reservation to understand reservation as a tool to effectuate substantive equality. The chapter studies the reconceptualisation of Article 16 (4) in NM Thomas case from the array of judgments from MR Balaji which conceptualised Article 16(4) as an “exception to Article 16(1)”. The study also extends to the scope of reservations and the extend to which merit can be compromised in providing for reservation.

The fourth chapter titled “Reservation Criteria Conundrum - Caste or Economic status ? examines various judicial decisions from M.R Balaji V. State of Mysore in 1963 to Jaishri Laxmanrao Patil V. The Chief Minister in 2021, to ascertain as to what should be the basis of reservations. The chapter aims to find the criteria in designating the “Scheduled Castes”, “Scheduled Tribes” and the “Socially and educationally backward classes”. The Chapter by analysing the basis to designate socially and educationally backward classes tries to offer an answer as to who should be the beneficiaries of reservation.

The fifth chapter titled “The Ten Percent Economic Quota - Panacea or Gimmick ?” is aimed at critically analysing The Constitution 103rd Amendment Act. The Chapter analyses the object and features of the ten percent quota , the problems that the government will face while implementing the ten percent quota and finally the legal infirmities in the 103 rd constitutional amendment Act. The chapter analyses how the conditions which were cited by the government to provide for ten percent reservation to the economically weak actually does not exist. The chapter also analyses the standard and limits of review under the basic structure doctrine.

The Sixth Chapter deals with conclusions, findings and suggestions drawn by the researcher.

Chapter 2 :

THE EVOLUTION OF RESERVATION SYSTEM IN INDIA

2.1 Introduction

The Religious, Cultural and Linguistic Diversity of our country is extraordinary. This multi-faceted diversity was the cause of scepticism among the British about whether we would be able to govern ourselves. As one of the fastest-growing economies and standing tall in all its glory, India has disappointed all those sceptics. One of the peculiar and distinct features of our country is the Caste System. In the Reservation debates in India, reservation is either identified as the solution for caste based discrimination or the very reason for persisting caste inequalities. Ambedkar himself did not believe that affirmative action or reservations is the solution to the problem of Caste. The Reservation System in our country should be discussed keeping in mind the Caste System prevalent in India . Although narrowly interpreted, it applies to the Hindu Community, features of Caste can be found in non-Hindu groups as well. Dr. BR Ambedkar defined “Caste as an endogamous unit”, an “enclosed class”. He described the Caste system as an “ascending scale of reverence and a descending scale of contempt”. Ambedkar believed that “caste system was not a benign division of labour, but a division of labourers”. “It is a hierarchy in which the division of labourers are graded one above the other”. “This division is neither spontaneous nor based on natural aptitude but based on the attempt to assign tasks to individuals in advance, selected not on the basis of trained original capacities, but on that of the social status of the parents.”¹ Andre Beteille defines “Caste as a small and named group of persons characterized by endogamy, hereditary membership, and a specific style of life which sometimes includes the pursuit by the tradition of a particular occupation and is usually associated with a more or less distinct ritual status in a hierarchical system.”²

There are about 4000 castes and subcastes in our country. Although the hierarchy of the castes vary regionally, the top and bottom can be easily identified. The consequences of this system is that, the status of Caste in the hierarchy is reflective of it’s Social and Economic Power. Castes has peculiar customs and tradition exclusive to it. The Varna System divides the Hindu Society on the basis of caste into four classes or varnas. “According to this theory, society is divided into Brahmins, the

¹ Ashwini Deshpande , Affirmative Action in India 4 (Oxford University Press , New Delhi,1st Edition, 2013)

² Andre Beteile, Caste, Class and Power: Changing Patterns of Stratification in a Tanjore Village 46 (Oxford University Press, Delhi, 3rd Edition,1996)

priestly and scholarly class; Kshatriyas, rulers and soldiers; Vaishyas, merchants and agriculturists; and Sudras, the menial and servant class” .³ Outside of these Varna Castes are the Avarna Castes,- the untouchables. The higher caste Hindus believe that The presence, touch or the very shadow of Avarna castes pollutes them ⁴ Each Region of India had it’s own unique way of perpetrating cruelty upon the untouchables. However , the prohibition in using public wells , public roads, attending schools, not allowed to wear jewellery remained common to almost all regions.

The Constitution of India has declared untouchability illegal and has envisaged a casteless society. However in order to realise a casteless society it was necessary to identify the groups which were socially, politically and economically isolated as an effect of caste discrimination. Hence the preferential treatment in favour of the erstwhile depressed classes and marginalised tribes were continued post independence. The Affirmative action policy although originated in early 20th century, the arguments in favour of reservation are reiterated with contemporary evidence.⁵

2.2 The British Era

The British arrived in India as “traders, conquerors and not as social reformers”. The British altered the Social order of our country drastically.⁶ The British brought in new advancement through education and Public Services. But the Benefit was reaped mainly by the Brahmins and other higher castes. In 1856 Public Policy was announced to “open admission in educational institutions to all without any distinction of Caste, religion and race” consequent to the rejection of admission to a mahar boy in a government run school for the fear of untouchability. This policy ultimately led to the passage of Caste Disability Act⁷ in 1872.

In 1857 , the control over India was taken over by the British crown from the East India Company. The British now was keen on strengthening their grip over the country, the British administration realised that this could be done only by granting more political representation to the Locals.

³ “Marc Galanter, Competing Equalities , Law and The Backward Classes In India 9 (University Of California Press, United States Of America, 1st Edition ,1984)”

⁴ Arundhati Roy, The Doctor and the Saint (Penguin Publications, India, 2019)

⁵ Supra note 1 at 19

⁶ Supra note 3 at 17

⁷ S.R Maheswari, “ Reservation Policy in India : Theory and Practice” 43 Indian Journal Of Public Administration 663 (1997)

However, the British viewed Indians only in terms of religion and consequently any political representation that was granted to the Indians was essentially in the form of communal and group rights, rather than individual rights.

In Mysore, reservation was provided for backward classes in 1874. It had “reserved 20 percent of lower and middle level posts in the Police department for Brahmins and the remaining 80 percent for non- Brahmins, Muslims, and Indian Christians”.⁸ The State Of Mysore from 1918 designated all communities excluding Brahmins as “Backward Classes” and reserved seats for them in Educational institutions and Public Services. This could be deemed as the origin of the Modern Communal Quota System.⁹ In the Princely State of Kolhapur, 50 Percent of Jobs in Public Services was reserved for the Backward Classes. The Backward Classes loosely meant all other classes other than the Brahmins.

The Government Of India Act 1909, The Government Of India Act 1919, Poona Pact of 1932 were instrumental in providing political representation to Indians and these acts also sowed the seeds of Reservation in political arena.

2.2.1 Indian Council Act Of 1909 (Morley-Minto Reforms)

By the beginning of the twentieth Century, the leaders of National movement , largely represented by Congress, advocated increased political representation. Lord Minto and Lord Morley, who were the Viceroy and Secretary Of State respectively in 1905, were keen on granting political representation to Indians. A Committee was appointed to consider the issue of increasing local representation in the Political system. The Muslims, at this time, were very eager to have Political Representation because of fear for cultural homogenisation and that they were falling behind the Hindu Community in the eyes Of the British.¹⁰ In 1906 “Muslim League was formed, and a delegation of the Muslim League met the Viceroy in Shimla to demand Political Safeguards”. Consequently, In the Indian Council Act 1909, “The Muslims, Landholders and various commercial

⁸ *ibid.*

⁹ *Supra* note 3 at 26

¹⁰ Francesca R. Jensenius, “Mired in Reservations: The Path-Dependent History Of Electoral Quotas in India” 74 *The Journal Of Asian Studies* 90 (2015)

interests were given the Right to elect representatives from their communities to the Legislative Councils in British India”.

The Political safeguards granted to Muslims are evidence that the British Believed in Group representation in India rather than individual rights, as Minto explains. “The only representation for which India is at presently fitted is a representation of communities.”¹¹ Minto shared the same thought in his address to the legislative council in 1910 , “We have distinctly maintained that Representative Government, in its Western sense, is totally inapplicable to the Indian Empire and would be uncongenial to the traditions of Eastern populations; the Indian conditions do not admit of popular representation.... But we have been deeply impressed by the changing political conditions alluded to in my note, and we have endeavoured to meet them by broadening the representation authorised by the Council Act of 1893, by expanding its rules of procedure and facilitating opportunities for debate, by inviting the leaders of Indian public opinion to become fellow workers, with us in the British administration, and by securing the representation of those important interest and communities which go to form the real strength of India, whilst at the same time recognising the claims of educational advance”.¹²

Thus , the British were forced to grant group representation for local information and “a lack of belief in popular representation”.

2.2.2 Government Of India Act 1919

The British regretted granting a separate electorate to Muslims after ten years of Morley-Minto reforms . As the writers of the Montague-Chelmsford Report stated, the British regretted the decision because they believed that granting special representation to minorities would drive the minorities to a state of complacency, and the minorities would not strive to improve their position in comparison to the majorities. Despite being convinced of the ill effects of special representation, the Montague Chelmsford Report recommended continuing special representation because the British believed it would be unfair to go back on a political promise made to different communities :

“We have been pressed to extend the concession to other communities. some have based their claim on their backward, others on their advanced condition.Now our decision to maintain separate electorates for Muhammmadans makes it difficult for us to resist these other claims....Any general

¹¹ Grey Elliot Minto, India, Minto and Morly, 1905-1910: compiled from the correspondence between Viceroy and the Secretary of State 102 (Macmillan, London ,1934) as cited in Id. at 91

¹² Grey Elliot Minto, India, Minto and Morly, 1905-1910: compiled from the correspondence between Viceroy and the Secretary of State 372 (Macmillan, London ,1934) as cited in supra note 6. at 91

extension of the communal system, however, would only encourage still further demands, and would in our deliberate opinion, be fatal to that development of representation upon the national basis on which alone a system of responsible government can possibly be rooted".¹³

The Scheduled Castes or the depressed Classes as they were then known were not politically organised and hence were not considered by the Morley - Minto Reforms. However, BR Ambedkar organised the Depressed Classes by 1917, and in 1919 demanded Political representation for depressed classes. The Southborough Franchise Committee was appointed to consider the recommendations of the Montague-Chelmsford Report. In his representation to the committee, Ambedkar wrote that Untouchables "had been treated like slaves for so long that they knew nothing else and hence can be represented by untouchables alone". Ambedkar believed that special representation in favour of depressed classes would help in alleviating the social bias by bringing together various castes together. "So long as each caste or a group remains isolated, its attitude remains fossilised. But the moment the several castes and groups begin to have contact and cooperation with one another, the resocialisation of the fossilised attitude is bound to be the result".¹⁴

Ambedkar convinced the Franchise Committee about the need for special representation in favour of depressed classes. Consequently, the Government of India Act 1919 continued "a separate electorate for religious groups and established a nomination system of a few representatives from the depressed classes". The depressed Classes were thus recognised as a "separate community". The Government of India Act mandated that one person should be from the depressed classes in the "14 non-official members nominated by the Governor-General to the Central Legislative Assembly". Similarly, in the provincial legislature, "the depressed classes were represented by four nominees in the central provinces and one each in Bengal and the United Provinces".

¹³ Lord Chelmsford and Montagu, "Report on Indian Constitutional Reforms." 150 (1918) as cited in Supra note 6 at 92

¹⁴ Evidence before the Southborough Committee on Franchise, 1919, available at: https://archive.org/stream/Ambedkar_CompleteWorks/07.%20Evidence%20before%20the%20Southborough%20Committee_djvu.txt (last visited on March 25, 2021)

2.2.3 Simon Commission

The Simon commission was tasked with to make recommendations for further reforms in 1927. The Simon Commission was boycotted by Indian National Congress for the lack of Indian members in the commission. Simon commission recommended continuing special representation favouring minority religions and depressed classes but was against separate electorates. Congress united all the national parties for framing a new constitution. In the third All Party Conference in January 1928 in Delhi, a committee was formed under Sri Motilal Nehru's leadership for forming a new constitution. The Nehru report of 1928 was against special representation in favour of minority religions and depressed classes and instead recommended proportional representation and language rights favouring minorities. Dr B.R Ambedkar rejected the Nehru report of 1928 and was adamant on the need for either reserved seats or a separate electorate favouring depressed classes.

2.2.4 The Round Table Conferences and the Communal Award Of 1932

As the Simon Commission's report was rejected by most of the political players in India, The British invited the Indian leaders to Round Table Conference in London to negotiate further reforms in the Political field. Three Round Table Conferences were held in London. The Congress representatives boycotted the "First Round Table Conference" (November 1930- January 1931) as most of their leaders were jailed in association with the Civil Disobedience Movement. Dr BR Ambedkar and BR Srinivasan represented the depressed classes. Ambedkar submitted a memorandum to the minorities committee. A demand was made for "adequate representation for the depressed classes in the legislature and equal rights, and a seat in the cabinet". Ambedkar also demanded "adult suffrage and a separate electorate for the first ten years after Independence and then reserved seats with a joint electorate for the Depressed Classes".

In The Second Round Table Conference (September 1931 - December 1931), Gandhi opposed granting special electorates for any group. Nevertheless, Gandhi "grudgingly admitted to separate electorates for Muslims, Christians, Sikhs and Anglo Indians".¹⁵ Gandhi, however, was adamant about not granting separate electorates to Depressed Classes and threatened with Fast Unto death in case special representation was given to the Depressed Classes.¹⁶ In the alternative, Gandhi proposed a constitutional guarantee of language, culture and religion for the Minority. Also, he

¹⁵Supra note 3 at 31

¹⁶ Bhagwan Das , "Moments in History Of Reservations" Economic and Political Weekly 3832 (October 28, 2000)

proposed for joint electorates with proportional representation of seats and adult franchise.¹⁷ In the Second Round Table Conference, Ambedkar demanded “quotas for depressed classes in Legislature, Executive and the Public Services”.

Communal Award of 1932 was enacted in response to the demands. The Depressed Classes, Sikhs and Muslims were granted separate communal electorates under the communal award. The depressed classes were granted separate electorates in seventy eight constituencies and the right to vote in the remaining constituencies.

2.2.5 The Poona Pact

Gandhi went on a hunger strike against separate electorates for the depressed classes. Gandhi said “We do not want the untouchables to be classified as a separate class. The Sikhs may remain such in perpetuity. So may the Muslims and so may Europeans. Would the untouchables remain untouchables in perpetuity? I would far rather prefer that Hinduism died than untouchability lived”.¹⁸

The Congress Leaders negotiated with Ambedkar and a consensus was reached and the Poona Pact was signed on September 24 1932. Ambedkar abandoned the demand for “78 separate electorates in return for 151 reserved seats in provincial assemblies with joint electorates”. The Poona Pact also provided for “18 percent of seats in the Central Legislature to be reserved for the depressed classes”. Regarding the share in the administration, the Poona Pact provided that : “There shall be no disabilities attaching to anyone on the ground of his being a member of the depressed classes in regard to any election 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”.¹⁹ As a consequence of the Poona Pact the government issued orders regarding reservation in services vide “resolution No F 14/17-B 33 dated July 4, 1934 (Gazette Of India, part I, July 7, 1934)” for minorities except the depressed classes. Posts were not reserved for the depressed classes because the government felt no useful purpose would be served by such reservation keeping in mind the

¹⁷ Gurpreet Mahajan and D.L Sheth , *Minority Identities and the Nation- State* 114 (Oxford University Press , New Delhi, 1999) as cited in Supra note 6 at 95

¹⁸ Pattabhi Sittaramaihya, *The History of the Congress* 538 Vol I 538 (The Congress Working Committee, Allahabad, 1935) as cited in S.R Maheswari, “ Reservation Policy in India : Theory and Practice” 43 *Indian Journal Of Public Administration* 664 (1997)

¹⁹ Supra note 14

state of affairs of the general education in the country. The Viceroy appointed Ambedkar as a member of his executive council and Ambedkar submitted a memorandum demanding “reservation in public services, scholarships etc for the Depressed Classes”. This was accepted by the the viceroy and duly recommended to the Secretary of State. In 1942, for the very first time in the History Of India 8.5 percent of seats were reserved for Scheduled Castes in Central Services and other facilities. The Poona Pact had demanded “that 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”.

2.2.6 The Government Of India Act 1935

The reservation of seats in favour of the depressed classes were inculcated into the Government of India act 1935. The Act brought the term “Scheduled Castes” to replace Depressed Classes. The Act Defined Scheduled Castes as “such castes, races or tribes or parts of groups within castes, races or tribes, being castes, races, tribes, parts of groups which appear to his Majesty in council to correspond to the classes of persons formerly known as the Depressed Classes, as his Majesty in council may specify”. The Government of India (Scheduled Castes) Order, 1936 later specified the list of “Scheduled Castes” through out the country. Government of India Act, 1935 also provided for Communal reservation in the public services. The purpose of such reservation was to pacify different sections of minorities in India especially Muslims and to consolidate their position.

3. Constituent Assembly Debates

The Newly formed constituent assembly, with Dr. BR Ambedkar as the chairman of the drafting committee was tasked with drafting a new constitution for India. On 13th December 1946 Nehru moved a resolution and that was the beginning of providing constitutional reservation for the Scheduled Castes and protection for minorities. The objective resolution contained 8 clauses.

Clause 6 of the Objective resolution stated: “where in shall be guaranteed and secured to all the people of India justice, social, economic and political, equality of status, of opportunities, and before the law; freedom of thought and expression ,belief, faith, worship, vocation, association and action subject to law and public morality” Also clause 6 also stated “WHEREIN adequate

safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; ”²⁰

The Sub Committee on Minorities, was given the responsibility of making recommendations on the representational guarantees of minorities. Dr Ambedkar apprised the committee on the cruelty imparted on the Scheduled Castes from time immemorial and the different measures necessary for uplifting their socio- economic conditions. He demanded preferential treatment for the socio economic mobility of depressed classes . Ambedkar raised the demand of separate electorates for the Depressed Classes before the Subcommittee , While Anglo Indians demanded reserved seats in Railways, Posts and Telegraph . The Muslim representatives although demanded reservation in Legislature , there was less demand for reservation in the Public Services . From The Various demands raised before the Subcommittee , the Sub Committee identified the following issues for consideration; “(1) Representation in legislature, joint versus separate electorates and weightage; (2) Reservation of seats in the cabinet; (3) Reservation in services; (4) Administrative machinery to ensure protection of minority rights”. The Committee recommended for reserved seats for Scheduled Castes and minorities on a population basis with joint electorate, and reserved posts in Public Services but rejected the demands for reserved seats in cabinet and Separate Electorate.

The Report of the advisory committee was presented to the Constituent Assembly on August 27, 1947. Sardar Vallabhai Patel argued that “communal representation was a poison which has entered into the body politic of our country”²¹ and Patel stated that reserved seats for Scheduled Castes and Minorities was necessary as a compromise solution so that they get accustomed to the new electoral system. But later on , in the assembly Sardar patel delivered a speech against the reservation system : “So those representatives of the Scheduled Caste must know that the Scheduled Caste has to be effaced altogether from our society, and if it is to be effaced, those who have ceased to be untouchables and sit amongst us have to forget that they are untouchables or else if they carry this inferiority complex, they will not be able to serve their community. They will only be able to serve their community by feeling now that they are with us They are no more Scheduled Castes and therefore they must change their manners and I appeal to them also to have no breach between them and the other group of Scheduled Castes. There are groups amongst themselves, but everyone tries

²⁰ Constituent Assembly Debates on 13th December, 1946 available at : https://www.constitutionofindia.net/constitution_assembly_debates/volume/1/1946-12-13 (last visited on March 26 , 2021)

²¹ Constituent Assembly Debates on 27th August, 1947 available at : https://www.constitutionofindia.net/constitution_assembly_debates/volume/5/1947-08-27(last visited on March 26 , 2021)

according to his own light. We are now to begin again. So let us forget these sections and cross-sections and let us stand as one, and together".²²

Jerome D Souza spoke in favour of reserved seats in the assembly : "for years together the Congress party has been associated with the demand that there shall be joint electorates with reservation. At this stage to give up reservation as some of my friends wish to do would be in contradiction to the promises held out, if not tacitly at least by implicit agreement."²³

Muniswami Pillai, a SC representative from Madras reminded the Assembly about the Poona Pact in his Speech: "It was that Poona Pact to which you yourself have been a signatory along with me and Dr. Ambedkar, that produced a great awakening in this country. Then, Sir, one question was in the mind of everybody, whether the Poona Pact will show signs of a change of heart by caste Hindus in this country. Today I may assure you, Sir, that that change has come, though not full 100 per cent, at least more than 50 per cent. I may give you instances here. The very inclusion of Dr. Ambedkar in the present Dominion Cabinet is a change of heart of the Caste Hindus that the Harijans are not any more to be neglected."²⁴

The SC representative S. Nagappa demanded reservation in the Cabinet: "I want my due share; though I am innocent, ignorant dumb, yet I want you to recognise my claim".²⁵ S Nagappa moved an amendment which provided that a candidate in a reserved constituency in order to be elected should secure 35 percent of the votes of the SC Community. He stated "today if we are elected to reserved seats, when there is agrarian trouble, when the Harijans and the agriculturists are at loggerheads and when we go and appeal to these people these Harijans they say Get out man, you are the henchmen and show-boys of the caste Hindus. You have sold our community and you have come here on their behalf in order to cut our throats. We don't accept you as our representative." "Sir, in order to avoid that what I suggested is that a certain percentage of the Harijans must elect

²² Constituent Assembly Debates on 28th August, 1947 available at :https://www.constitutionofindia.net/constitution_assembly_debates/volume/5/1947-08-28 (last visited on March 26 , 2021)

²³ Supra note 21

²⁴ ibid

²⁵ Constituent Assembly Debates on 27th August, 1947 available at : https://www.constitutionofindia.net/constitution_assembly_debates/volume/5/1947-08-27(last visited on March 26 , 2021)

the candidate so that he may be able to tell them that he has, the backing of some Harijans and he will have the prestige and voice as their representative”.²⁶

As to draft Art.10(4) [now Art.16(4)], the drafting committee was of the opinion that the word “backward” should be inserted before words “class of citizens”, and the committee inserted that word in the Draft Constitution although it was not there in clause 10(4) as passed by the Constituent Assembly. Explaining this action of the Committee, Dr. Ambedkar said: “they will find that the view of those who believe and hold that there shall be equality of opportunity, has been embodied in sub-clause (1) of Article 10. It is a generic principle. At the same time, as I said, we had to reconcile this formula with the demand made by certain communities that the administration which has now-- for historical reasons--been controlled by one community or a few communities, that situation should disappear and that the others also must have an opportunity of getting into the public services. Supposing, for instance, we were to concede in full the demand of those communities who have not been so far employed in the public services to the fullest extent, what would really happen is, we shall be completely destroying the first proposition upon which we are all agreed, namely, that there shall be an equality of opportunity. Let me give an illustration. 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. 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. If honourable Members understand this position that we have to safeguard two things namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State, then, I am sure they will agree that unless you use some such qualifying phrase as backward the exception made in favour of reservation will ultimately eat up the rule altogether. Nothing of the rule will remain. That I think, if I may say so, is the justification why the Drafting Committee undertook on its own shoulders the

²⁶ Constituent Assembly Debates on 28th August, 1947 available at :https://www.constitutionofindia.net/constitution_assembly_debates/volume/5/1947-08-28 (last visited on March 26 , 2021)

responsibility of introducing the word 'backward' which, I admit, did not originally find a place in the fundamental right in the way in which it was passed by this Assembly.”²⁷

The Report of the advisory Committee was accepted with only minimal changes . The draft constitution was submitted to the president of constituent assembly on February 21, 1948. It contained the provisions regarding prohibition of discriminations the “grounds of religion, race, caste or sex and provided for reservation 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”.²⁸

However , after the partition the response of members towards providing reservation to minority members changed. In May 1949 a resolution was passed to abolish reservation in favour of religious minorities. While the quotas for religious minorities were revoked, it was decided to provide reservation for the Scheduled Castes for a period of Ten Years . The Muslim members “were divided in their opinion about reserved seats”. Begam Aizaz Rasul stated that “reservation is a self destructive weapon which separated the minorities from majority all the time”. Similarly Tajamul Husein proclaimed that “the term minority is a British creation and the British have gone and the minorities have gone with them”.²⁹

However, this decision was not without opposition. Mahavir Tyagi spoke for providing Class Based reservation than Caste Based Reservation. “The term Scheduled Castes is a fiction. Factually there is no such thing as 'Scheduled Castes'. There are some castes who are depressed, some castes who are poor, some who are untouchables, some who are down-trodden.....There are thousands of Brahmins and Kshatriyas who are worse off than these friends belonging to the scheduled castes. So by the name of Scheduled Caste, persons who are living a cheerful life, and a selected few of these castes get benefit. This is no real representation. No caste ever gets benefit out of this reservation..... Minorities must exist and must be provided for. There will be no peace so long as minorities are not provided for. I do not believe in the minorities on community basis, but minorities must exist on economic basis, on political basis and on an ideological basis and those minorities must have protection. In this sort of a wholesale decision, the minorities will get little

²⁷ H.M Seervai, Constitutional Law Of India 551 (Law and Justice publishing Company, New Delhi, 4th edition, 2021)

²⁸ Arpana Bansal , Reservation under the Constitution Of India : A Critique (2011) (Unpublished Ph.D thesis, Punjab University)

²⁹ Supra note 10 at 100

representation. I would suggest that in the place of the Scheduled Caste, the landless labourers, the cobblers or those persons who do similar jobs and who do not get enough to live, should be given special reservations. By allowing caste representations, let us not re-inject the poisonous virus which the Britisher has introduced into our body politic. I would suggest Sir, that instead of the so called Scheduled Caste, minorities be protected, if you like, on class basis. I therefore, submit, Sir, that the Scheduled Castes should now go and in place of Scheduled Caste, the words Scheduled classes be substituted so that we may not inadvertently perpetuate the communal slur on our Parliaments”.³⁰

It is to be noted that Thus, While Initially Reservations were sought for SC's for the reason they have “distinctively their own interests that others would not be able to represent”, SC's were now given reservation “on grounds of their Economic, social and educational backwardness”.³¹ The reservation system was set only for a period of Ten years. But, time and again the rules has been extended.

4. Post Independence Era

Equality is one of the cardinal principles of Indian Constitution. Article 14 guarantees the Right to equality for all. Reinforcing Article 14 , Article 15 prohibits discrimination “on grounds only of religion, race, caste, sex, place of birth or any of them”. Article 16 ensures “equality of opportunity for all in matters relating to employment under the state”. Article 46 , placed in the Directive Principles of State Policy commits the State to “promote with special care the educational and economic interests of the weaker sections of the people, and in particular of the SC and ST and their protection from social injustice and all forms of exploitation”. In State Of Madras V. Champakam Dorairajan³² (1951) , the Communal Government Order which reserved seats in professional colleges on communal basis was struck down by Supreme Court as violative of the equality clause. This lead to the “First amendment of the Constitution in 1951” which added Section 4 to Article 15 , which reads : “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

³⁰ Constituent Assembly Debates on 26th May, 1949 available at : https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-26 (last visited on March 26 , 2021)

³¹ Supra note 10 at 101

³² AIR 1951 SC 226

classes of citizens or for the Scheduled Castes and the Scheduled Tribes. The Constitution as adopted in 1950 provided for reservation for the SC and ST in the Legislative bodies". Article 335 said : " Claims of Scheduled Castes and Scheduled Tribes to services and posts 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".

In 1950 Government announced its policy on the recruitment of Scheduled Castes and Scheduled Tribes in the Public employment. The policy continued the 12.5 percent reservation in Public Services where appointment was made by Direct Recruitment in favour of the Scheduled Castes. The reservation in favour of Anglo Indians to certain posts which they enjoyed as on August 15 , 1947 were continued by the policy. The Government made it clear that there wouldn't be any reservation in recruitment by promotion.

Article 338 stipulated "the appointment of Special Officer" for SC and ST. In 1990 by Constitution 65th Amendment Act the post of special officer was replaced by The National Commission for Scheduled Castes and Scheduled Tribes. Since 1994, People belonging to backward classes or other Backward Classes were identified as the new beneficiaries of reservation. Article 340 of the constitution calls for "the appointment of a commission to investigate the conditions of Socially and educationally backward classes and to recommend measures for their advancement". The First Backward Classes commission was constituted with Sri Kaka Kalelkar as its chairman in 1953. The Commission was tasked "to determine the criteria for identifying Socially and Educationally Backward Classes". The commission's 1955 report laid down the following criteria: "low social position in the traditional caste hierarchy"; "lack of general educational advancement among the major section of a caste or community"; "inadequate or no representation in government service"; and "inadequate representation in the field of trade, commerce and industry." The Kaka Kalelkar Commission also identified 2399 castes as "socially and educationally backward" for the purposes of the central government. The Majority report recommended "reservation of 25 percent in Group A, 33.33 Percent in Group B and 40 Percent in Groups C and D Public services". However the chairman submitted a separate report in which reservation on the basis of caste was denounced. The Government also was reluctant to identify caste as a basis of backwardness and thus rejected the Kaka Kalelkar Commission report. Thus there were no new beneficiaries of reservation under the central government other than the SC and STs .

The Second BC Commission was set up under the chairmanship of Sri BP Mandal in 1978. It concluded that 52 percent of the country's population comprised of Backward Classes. "The report found that social backwardness is a consequence of caste status, which leads to various other types of backwardness. To measure social and educational backwardness, weighted indicators were created: four social indicators weighing three points each, three educational indicators weighing two points each and four economic indicators weighing one point each."³³

In 1990 the VP Singh Government issued a memorandum reserving 27 percent of posts under the Central Government in favour of the Socially and Educationally Backward Classes. In 1991 PV Narasimha Rao government amended the memorandum providing an additional 10 percent reservation for the other economically backward classes who were not covered by the existing scheme of reservation. This was a cause of great public outcry and was challenged in Supreme court in *Indra Sawhney V. Union Of India*.³⁴ The Supreme Court held "that economic criterion can't be the sole basis for Reservation". The court affirmed that "social backwardness leads to educational and economic backwardness, as the Mandal Commission had found. Accordingly, the Supreme Court struck down the 10 percent reservation for economically backward sections, for being incompatible with the constitution". Commission recommended that 27 percent of posts under the central government ought to be reserved for Backward Classes.

In May 1995, the Constitution was amended for the 77th time. A new clause (4A) was added to Article 16. This new clause provided : "Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State". By the 85th amendment Article 16 (4A) was further amended and the words "in matters of promotion, with consequential seniority, to any class" were introduced.

In *S. Vinod Kumar V. Union Of India*³⁵, the Supreme Court reaffirmed the view in *Indra Sawhney* that in case of the promotions standards could not be relaxed or waived. The Constitution was , therefore amended for the eighty second time in 2000, adding a proviso to Article 335:

³³ Malavika Prasad, "From the constituent assembly to the Indra Sawhney case, tracing the debate on economic reservations", available at <https://caravanmagazine.in/law/economic-reservations-constituent-assembly-debates> (last visited on March 27 , 2021)

³⁴ AIR 1993 SC 477

³⁵ (1996) 6 SCC 580

“Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State”.

Consequent to the judgments of TMA Pai, Islamic Academy and PA Inamdar, the Constitution was amended for the ninety- third time to provide that there will be reservations in private unaided colleges excepting the minority educational institutions. Article 15(5) provided that : “Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes 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.”

A reservation of “up to 10 percent in government jobs and educational institutions for economically weaker sections of citizens was brought in by the 103rd Constitutional Amendment” on 12 January, 2019. The amendment excludes “those already covered by Articles 15(4) and (5), and Article 16(4) of the constitution—which pertain to reservations for the Scheduled Castes, Scheduled Tribes and Other Backward Classes”.

5.Affirmative Action in India and United States - A Comparison

In India and United States, affirmative action programmes specifically reservation was introduced to compensate for the historical wrongs caused to certain groups as a result of caste and race discrimination respectively. “If race is a system of ascriptive or color-based disparities, caste can be called a system non-ascriptive or non-color based disparities.”³⁶ The comparison between affirmative action programmes in U.S and India assumes significance since untouchables in India and Blacks in U.S share similar histories of discrimination. The Blacks in United States were subject to discrimination in the form of Black Codes and Jim Crow Laws. “Black Codes prevented blacks from entering into occupations other than menial labor”. The Jim Crow laws which was based on the supremacy of white over the blacks, denied the Blacks “access to public facilities, such as

³⁶Ashwini Deshpande, “Affirmative Action in India and the United States” 1 EQUITY & DEVELOPMENT World Development Report 2006 Background Papers (January 2005)

schools, churches, restaurants, and transportation”.³⁷ Even the United Supreme Court in *Plessy V.Ferguson*³⁸ supported the Jim Crow Laws. The U.S Supreme Court held that “there was neither a Thirteenth nor Fourteenth Amendment violation in maintaining separate facilities for blacks and whites”. The Supreme Court Justified the action by ruling that although the facilities provided are separate that doesn’t mean the races are unequal. Thus the The Jim Crow laws “discriminated against blacks in the same way that the caste system discriminated against the untouchables.”³⁹

The Indian Constitution unlike the U.S Constitution provides expressly for affirmative action. In U.S, affirmative action has been provided by the interpretation of 14th amendment. The Constitutional validity of quotas is also in doubt in United States. The “Equal Protection Clause of the Fourteenth Amendment prevented the states from discriminating against blacks”. In The landmark decision of *Brown v. Board of Education*⁴⁰ the Court overruling *Plessy* held “that separate but equal was inherently unequal”. “As Justice Matthew of the Indian Supreme Court states in his analysis of *Brown*: Beginning most notably with the [United States] Supreme Court's condemnation of school segregation in 1954, the United States has finally begun to correct the discrepancy between its ideals and its treatment of the blackman These actions while not producing true equality or even equality of opportunity logically dictated the next step: positive use of government power to create [the] possibility of real equality.”⁴¹

In 1964 Civil Rights Act was passed with the object of attaining greater equality. Title VII of the act sought to combat race and other forms of discrimination. Thus the enactment of Civil Rights Act 1964 and various court decisions paved the way for affirmative action in United States. In *Regents of the University of California V. Bakke*⁴², while deciding on the validity of quota employed by the medical college at the University of California The Court, held “that racial quotas were illegal under Title VI At the same time, the Court also held that race could be used as a factor in an admissions program for the purpose of establishing a diverse student body”.

³⁷ M. Varn Chandola, “Affirmative Action in India and the United States: The Untouchable and Black Experience”, 3 IND. INT’L & COMP. L. REV. 101, 118 (1992).

³⁸ 163 U.S. 537 (1896).

³⁹ *Supra* note 36

⁴⁰ 347 U.S. 483 (1954).

⁴¹ Paramanand Singh, *Equality, Reservation and Discrimination in India*, 20-21 (Deep & Deep Publications, New Delhi, 1982).

⁴² 438 U.S. 265 (1978).

“Both decisions dealt with reverse discrimination and took place at approximately the same time. While Bakke invalidated the use of quotas, Thomas clearly upheld them.”⁴³ Thus Both Indian and American laws has tried to inculcate the principles of substantive equality into a structure of formal equality.

6. History of Reservation in India : 10 Major Milestones -A Timeline

- I. 1874: 20 percent of posts excluding higher level posts in the Police department “for Brahmins and the remaining 80 percent for non- Brahmins, Muslims, and Indian Christians”⁴⁴ reserved in Mysore
- II. 1902: 50 Percent of Jobs in Public Services was reserved for the Backward Classes.
- III. 1918: In Mysore, seats were reserved for “Backward classes in Educational institutions and Public Services”.
- IV. 1932: “Communal Award by British government grants separate electorates in India for Muslims, Buddhists, Sikhs, Christians, Anglo-Indians, Europeans and Depressed Classes.Later, Poona Pact reserves 148 of the general electoral seats for depressed classes”.
- V. 1950: Government announced it’s policy concerning appointment of SC and ST in the Public bureaucracy.
- VI. 1951: First amendment in Constitution to provide reservation “for socially and educationally backward classes, Scheduled Castes and Scheduled Tribes”.
- VII.1953: Backward Classes Commission appointed with Kaka Kalelkar as chairman
- VIII.1990: “Mandal Commission report recommending 27 per cent reservation to OBCs is implemented by Prime Minister V P Singh”
- IX. 1992: Supreme Court strikes down the executive order reserving 10% government jobs for poor among Upper Castes and caps reservation at 50 percent. Apex Court upheld 27% reservation for OBCs subject to exclusion of creamy layer.

⁴³ Supra note 36

⁴⁴ Supra note 7

X. 2019: The Constitution 103rd amendment Act introduces 10 per cent quota for poor in higher education and jobs.

7. Conclusion

Upon examining the evolution of Reservation system in India, we can see that in the British era more emphasis was given to legislative reservation than reservation in public employment and education. And the British was eager to grant legislative representation on communal basis because of their belief that We were not ready politically to have individual rights. In 1917 when the depressed classes were organised under the leadership of B.R Ambedkar, the demand for separate electorates also arose, Ambedkar believed that it is only by securing the representation of depressed classes in legislatures, public employment and education that the maladies of caste system can be cured. While Initially Reservations were sought for SC's for the reason they have "distinctively their own interests that others would not be able to represent", SC's were now given reservation on "grounds of their Economic, social and educational backwardness". Thus reservation was a legal solution to a social problem although it may have indirectly contributed in poverty alleviation. Regarding the beneficiaries of reservation although a few members stressed on the need to focus on the economic, and other factors over the caste. The Constituent Assembly was convinced otherwise. Although reservations as a legal solution was not supposed to remain eternal it is unfortunate that the original purposes of conferring reservation are now replaced by trivial political reasons.

Chapter 3

RESERVATION : A STEP TOWARDS SUBSTANTIVE EQUALITY

3.1 Introduction

Affirmative action “is not a conventional redistributive measure, in the sense that it does not lead to a redistribution of wealth or assets in the same way that , say a policy of land reforms, would achieve. It simply alters the composition of elite position in the society”.⁴⁵ It is not meant to be an anti poverty measure , nor an employment generation measure. The object behind Affirmative Action is that “given systematic and multifaceted discrimination against certain groups , the normal process of development might not automatically close the gaps between the marginalised and dominant groups because dominant groups will disproportionately corner the fruits of development”.⁴⁶ Thus Affirmative Action includes policies and programmes for reducing the problems of the “historically and socially deprived sections of society”. Through these programmes, the access of these sections to education or employment are promoted. Affirmative Action programmes aim to “redress the effects of past and current discrimination, which are regarded as unfair”. Affirmative action can also be defined as "public or private actions or programs, which provide or seek to provide opportunities or other benefits to persons on the basis of, among other things, their membership in a specified group or groups."⁴⁷ “According to Professor David Benjamin Oppenheimer, the practice of affirmative action is comprised of five methods: quotas, preferences, self-studies, outreach and counselling, and anti-discrimination”.⁴⁸ Professor Oppenheimer “classifies these methods under hard and soft affirmative action, with the former consisting of quotas and preferences and the latter encompassing various outreach programmes, self-evaluations, marketing, and labour market developments”.

Affirmative Action Programmes in India can be classified into : “the different kinds of Reservations prevalent allot or facilitate access to valued positions or resources, such as reservations in legislatures, reservations in government services and reservations in educational institutions”. Secondly, there are protective measures like “land allotment schemes, housing schemes,

⁴⁵ Supra note 1 at 9

⁴⁶ *ibid.*

⁴⁷ A. P. Singh, “Affirmative Action Programme in India: The Road Ahead”, 1 J. INDIAN L. & Soc'y 153 (2009).

⁴⁸ Jed Rubenfeld, “Affirmative Action”, 107 Yale L.J. 427 (1997).

scholarships, grants, loans, health care”. The third type of measures is “specific kinds of action plans to remove untouchability, prohibition of forced labour”. According to Professor David Benjamin Oppenheimer, the first type would be a “hard affirmative action”. The second and third types would be examples of “soft affirmative action”.⁴⁹ In India, reservations are the most discussed and sought after affirmative action. In this chapter the theoretical foundations and nature of reservation as a facet of Equality under the Constitution would be analysed.

3.2 Affirmative Action : Theoretical Foundations

Theoretical Foundations for Affirmative Action programme can be provided in the Principles Of Distributive Justice. In Nicomachean Ethics, Aristotle believes that “goods should be distributed to individuals based on their relative claims”. Principles of distributive justice are “normative principles designed to guide the allocation of the benefits and burdens of economic activity”.⁵⁰ The principles of distributive justice place forward the idea of substantive equality rather than formal equality. The Rawlsian theories of Justice and Equality have been used to legitimise various forms of affirmative action. Justice Reddy in *Akhil Bharatiya Soshit Karamchari Sangh (railway) vs. Union of India and ors*⁵¹. quoted with approval the application of Rawls theory of justice to the Indian affirmative action. According to J.Reddy, “John Rawls in *A Theory of Justice* demands the priority of equality in a distributive sense and the setting up of the Social System so that no one gains or loses from his arbitrary place in the distribution of natural assets or his own initial position in society without giving or receiving compensatory advantages in return. His basic principle of social justice is All social primary goods-liberty and opportunity, income and wealth, and the bases of self-respect-are to be distributed equally unless an unequal distribution of any or all these goods is to the advantage of the least favoured. One of the essential elements of his conception of social justice is what he calls the principle of redress: This is the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are somehow to be compensated for Society must, therefore, treat more favourably those with fewer native assets and those born into less favourable social positions. If the statement that Equality of opportunity must yield Equality of Results' and if the fulfillment of Articles 16(1) in Art. 16(4) ever needed a philosophical foundation it is furnished by Rawls' Theory of Justice and the Redress Principle.”

⁴⁹ Supra note 47 at 155.

⁵⁰ Distributive Justice available at <https://plato.stanford.edu/entries/justice-distributive/> (last visited on June 13, 2021)

⁵¹ AIR 1981 SC 29

The conception of justice for which Rawls argues demands⁵² :

- ◆ “The maximisation of liberty, subject only to such constraints that are essential for the protection of liberty itself”
- ◆ “Equality for all, both in the basic liberties of social life and also in the distribution of all other forms of social goods, subject only to the exception that inequalities may be permitted if they produce the greatest possible benefit for those least well off in a given scheme of inequality”
- ◆ “ fair equality of opportunity and the elimination of all inequalities of opportunity based on wealth or birth”.

Rawl has developed his theory in contrast to the utilitarians. Utilitarians accept inequalities and limitations on liberty and restrictions on political rights, provided such arrangement would promote greater well being. Rawl’s greatest criticism of utilitarianism was that by focusing on the greater social good, utilitarians failed to consider the needs of individuals and distinctions between persons or groups of persons. However, Rawls considers the differences of individuals and believes “that a just society will not subject the rights of an individual to ‘the calculus of social interests.’”⁵³

The second and third principles of Rawl’s advocate that “it is not sufficient that positions are left open to all but they must be arranged in such a manner that all are afforded an equal opportunity to attain them”. Thus his idea of fair equality of opportunity “falls between the extremes of formal equality and equality of result”.⁵⁴ Rawls, while acknowledging the need for substantive equality, does not neglect the role of merit in attaining positions. The model of Equality of opportunity that Rawls presents considers “the initial social and cultural handicaps of an individual”. Rawls ground his theory in the fact that “ the arbitrariness of birth and the problem of natural lottery take away the chance of individuals to have an equal start in life”.⁵⁵ The primary goal of Rawls Equality principles “is to negate the social and cultural disadvantages that a person is under by virtues of being born into a particular social stratum and provide all with an equal start so that a person’s social standing is not a hindrance in reaching the open posts and positions”⁵⁶.

⁵² Michael Freeman, Lloyd’s Introduction to Jurisprudence 481 (Sweet and Maxwell. South Asia, 9th Edition, 2021)

⁵³ Sameer Pandit, “Marginalisation and Reservation in India: An Analysis in the Light of Rawlsian Theories of Justice and Equality”, 1 Socio-LEGAL REV. 42 (2005).

⁵⁴ *ibid.* at 43

⁵⁵ *ibid* at 44

⁵⁶ *ibid*

In furtherance of fair equality of opportunity, he develops the difference principle, which does not seek to eliminate inequalities completely but only rearranges them to benefit the least advantaged classes. The Difference principle is based on the assumption that a person is not the sole proprietor of the natural advantages that he is vested with. He is merely the guardian of these abilities and capacities. Rawls consider these as common societal assets.⁵⁷ The difference principle justifies reservations by showing that in the absence of reservations justice and fairness will not be met. Reservations arrange the inequalities in a way that benefits the least advantaged. The lower classes that have been marginalised due to historical discrimination are given preferential treatment in order to create a level playing field. “Justifications for affirmative action lie in the need either to remove the grossly unjust inequalities in the system or to raise particular sections of the society to the level of human existence and to assure them the dignity due to them”.

Rawls idea of equality is no different from the equality of opportunity that the constitutional framers believed in. Hence, what the concept of reservation does is it recognises the initial social and educational handicaps that affect a certain category of persons and which causes them to occupy a disadvantageous position in society and moves away from the standard procedure of meritocratic selection as demanded by formal equality in order to ensure substantive equality.

3.3 Affirmative Action : Constitutional Foundations

Article 14 to 18 of the Constitution guarantees the right to equality to every citizen. In India’s Socio-Political system, Equality has been given an important position. The perceived inequalities which India has inherited from its past, especially the caste system, prompted the draftsmen to accord principles of Equality a vital position in the Constitution. Inequality refers to the conditions created by a few privileged people who influenced the government and used their position of dominance for their purpose.⁵⁸ Equality advocates the abolition of all kinds of special privileges.

Article 14 encompasses “Equality before the law and equal protection of laws”. While the former ensures equal status to everybody and ensures equality in law the latter concept aims to achieve substantive Equality or Equality in Fact by classifying the advantaged and disadvantaged and providing the disadvantaged ones with Affirmative Action Programmes. “It was the realisation that

⁵⁷ Supra note 53 at 46

⁵⁸ Supra note 47 at 152

mere provision of formal Equality would not be sufficient to bring about desired Equality of status and opportunity that led to adopting these provisions". Thus, a Full Bench Of Kerala High Court observed : "It has however been realised that in a country like India where large sections of the people are backward socially, economically, educationally and politically, these declarations and guarantees will be meaningless unless provision is also made for the upliftment of such backward classes who are in no position to compete with the more advanced classes. Thus to give meaning and content to the Equality guaranteed by Articles 14, 13, 16 and 29, provision has been made in Articles 15(4) and 16(4) enabling preferential treatment in favour of the weaker sections"⁵⁹. The Indian Constitution, by providing reverse or positive discrimination in favour of members of the SC and ST, whereby they could be provided with special treatment in various sectors of the socio-economic and political life of the country, has also ensured substantive along with Formal Equality. The State's general duty to promote "Equality in fact" is articulated in Article 46, a Directive Principle of State Policy. Article 46 provides 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 15 (1) confers a fundamental right on every citizen by commanding the state "not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them". If actions of the state are violative of Art. 15 (1), the same will be void under Article 13. The Constitution under Articles 32 and 226 provides a remedy for the citizens if their fundamental rights are violated. Article 15 (2) is directed not only against the state but also to any person, and it provides that "no citizen only on the grounds of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public". Clause (3) enables the state to confer special rights upon women and Children. The constitution 73rd Amendment Act 1992 and the constitution 74th Amendment Act 1992, added articles 243-d and 243-t to the constitution, making provisions "for reservation of not less than one third of the total seats for women in the constitution of the Panchayats and the Municipalities respectively".

⁵⁹ Hariharan Pillai V. State Of Kerala, AIR 1968 Ker 47

The Scope of the government to make special provision for the backward class was soon put to the test in *State Of Madras V. Champakam Dorairajan*⁶⁰. The Communal G.O, which reserved seats in professional colleges, was struck down by the Supreme Court as violative of Article 29(2) and Art. 15(1). The Court did not accept the argument that “the directive principle of Art.46 by its own force established a principle of preference that might lawfully be embodied in legislation”. The Court also observed that an exception to Art. 16 (1) in the form of Art.16(4) was missing in the case of Art. 29(2).The Court observed, “ Seeing, however, that clause (4) was inserted in article 16 the omission of such an express provision from article 29 cannot but be regarded as significant. It may well be that the intention of the Constitution was not to introduce at all communal considerations in matters of admission into any educational institution maintained by the State or receiving aid out of State funds.” The Government reaction to the Supreme Court's Judgement that the government had no power to reserve seats for backward communities in educational institutions was the First Amendment to the Constitution. The First Amendment Act of 1951 inserted Art. 15 (4) into the Constitution, which provided that : (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". Thus, the first amendment was brought in to bring Articles 15 and 29 in line with Art. 16 (4). The Constituent Assembly had rejected the inclusion of an article similar to that of Art. 15 (4) in the Constitution. Thus the same assembly, but in a different role as the Provisional Parliament, passed the amendment because it was needed to empower the state to carry out the Directive Principles of State Policy and also as a facet of Substantive Equality.

The Parliament introduced Article 15(5) by The Constitution **(Ninety-Third Amendment) Act, 2005**. It states that “Nothing in this article or in sub-clause (g) of clause (1) of Article 19 shall prevent the state from making any special provision, by law, for the advancement of any socially & educationally backward classes of citizens or for the scheduled castes or the scheduled tribes in so far as such special provision relates to their admission to educational institutions including private educational institutions other than the minority educational institutions referred to in Art. 30 (1)". The amendment was in response to the Supreme Court's explanation in *P.A. Inamdar V. State of Maharashtra*,⁶¹ of the ratio in *T.M.A Pai Foundation V. State of Karnataka*⁶² that “imposition of

⁶⁰ AIR 1951 SC 226

⁶¹ (2005) 6 SCC 537

⁶² AIR 2003 SC 355

reservations on the non-minority aided educational institutions, covered by sub-clause (g) of clause (1) of Art. 19, to be unreasonable restrictions and not covered by Art. 19(6)".

Article 16 (1) and 16 (2) confers a fundamental right on citizens, namely "equality of opportunity in matters of public employment and the further right not to be discriminated against on the ground, among other things of caste and religion". However, along with this facet of equality that prohibits discrimination, the Constitution also directs the government "to undertake special measures to advance the Backward Groups". Article 16 (4) confers no fundamental right but confers a discretionary power on the State to make the reservation of posts or appointments in the service of the State for backward classes. Also, Article 29(2) prohibits discrimination in state-run and State-aided educational institutions, Article 23(2) prohibits discrimination with regard to compulsory public service and Article 325 regarding electoral rolls. Untouchability is prohibited under Art 17.

Article 15 and 16 are facets of Article 14 which provides that "the state shall not deny to any person equality before the law or the equal protection of the laws". However the statement that article 15 and 16 are facets of art 14 cannot be taken to mean that in every country where the state is constitutionally supposed to provide equal protection of laws, must carry with it the equality of opportunity of public employment also. For eg as in the case of U.S Constitution, the 14th amendment provides for equal protection of laws but there exists no equality of opportunity in matters of public employment.

3.3.1 Reservations : Scope

Article 15(3) enacts that "nothing in Art.15 shall prevent the state from making any special provision for women and children". Originally the Constitution specifically provided for preferential treatment only in the fields of Government employment and legislative representation. Article 16 prohibits discrimination in government employment, but Art 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". In addition, 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 a State". Article 16 (4) is explicitly confined to government employment while

Article 15 (4) applies in all the dealings of the State. In *General manager V. Rangachari*⁶³, the Supreme Court held that Article 16(4) covers promotion within service also. The word "posts" in Art. 16(4) was construed to mean both initial appointments as well as promotions. However, at the same time indicated that preferential treatment under Art. 16 (4) does not extend to salary, increment, pension, retirement age and the same is protected by the Doctrine of Equality. In *Rangachari*, the dissenting judges opined that "reservation was limited to securing adequacy of quantitative representation of the favoured group. At the same time, the majority held that reservation could legitimately be used to secure representation in posts of higher grades. Thus, in establishing preferences in government service, the state can aim at placing the members of the privileged groups in positions of authority".⁶⁴

In *Balaji V. State Of Mysore*⁶⁵, the Court emphasised that "the public interest in the efficiency of government services set limits to reservation in promotions". Thus any "unreasonable, excessive or extravagant reservation" would be out of the purview of Art. 16 (4). Thus the Supreme Court emphatically stated in *Balaji* that the Courts would carefully scrutinise the reasonableness of reservations. Following the Judgement in *Balaji*, in *Devadasan V. Union Of India*⁶⁶, the Court invalidated the reservation because of its unreasonable extent. In *Rangachari*, the Supreme Court had held that "Art.16 (4) permitted reservation of posts not only at the initial stage of appointment but also included promotion to selection posts". In *Indra Sawhney V. Union Of India*⁶⁷, *Rangachari* was overruled and held that "Art. 16(4) was confined to initial appointments only and it did not warrant reservations in the matter of promotion as such". However, Clause (4A) has been added to Art. 16 by the 77th Constitutional Amendment thus "permitting reservation in promotion to Scheduled Castes and Scheduled Tribes". Article 16 (4B) inserted by the 81st Constitution Amendment envisages that "the unfilled reserved vacancies in a year are to be carried forward to subsequent years and that these vacancies are to be treated as distinct and separate from the current vacancies during any year" .

⁶³ AIR 1962 SC 36 at 42

⁶⁴ Supra note 3 at 370

⁶⁵ AIR 1963 SC 649

⁶⁶ AIR 1964 SC 179

⁶⁷ AIR 1993 SC 477

In Govt. of A.P V. P.B. Vijayakumar⁶⁸, the court gave a nuance to article 15(3) by holding that “reservation for women in state employment was also permissible under that provision notwithstanding separate provision in this regard under Article 16”. The Court held that widest possible interpretation should be given to Article 15 (3) so as to even cover reservation in jobs subject to the fifty percent rule. The Court opined that both article 15(3) and 16(4) are aimed at achieving equality in society and both should be interpreted harmoniously.

Article 15(4) has a wider scope and “extends to all areas of government activity that are not covered by a more specific provision”. The expression "making any special provision" is evidently open-ended in nature. The government under this provision can provide a wide range of facilities for promoting the interests of socially and educationally backward classes. Unlike 16 (4), 15 (4) does not limit the state action of preference to reservations alone. Along with reservations, the government can employ “fee concessions, scholarships, special facilities (housing, medical), waiver of age requirements, special coaching, scholarships, grants, and loans”. In Chaitram V. Sikander⁶⁹, the Court held that “the scope of protection authorised is not restricted by the qualifiers socially and educationally which describe the classes who may be benefited but may extend to protection from economic exploitation”.

The Constitution specifically provides for reserved seats in lower houses of parliament⁷⁰ and state legislature⁷¹ for Scheduled Castes and Tribes. Seats are reserved for Scheduled Castes and Tribes in proportion to their population, and the electorate would be a joint one. The Constituent Assembly members were conscious of the harm separate electorates could cause, thus making it extralegal⁷². All the other provisions for preferences in the Constitution are merely authorisations that empower the State to make special provisions for the backward classes. Thus legislative reservations are only reservations that are enacted explicitly by the Constitution and the only type of reservation for which a Constitutional time limit was prescribed. Although initially, these reservations were provided for only ten years from the commencement of the Constitution under Article 334, the reservation has been further extended for 10 years periodically. Although no reservations were

⁶⁸ (1995) 4 SCC 520

⁶⁹ AIR 1968 Pat. 337

⁷⁰ The Constitution Of India, art. 330

⁷¹ The Constitution Of India, art. 332

⁷² The Constitution Of India, art. 325

provided for OBC's in the legislative bodies, article 15 (4) could be construed to bring within its scope reserved seats for OBC's in political bodies at the local level.

3.3.2 Reservations and Merit

In Formal Equality, Equality is “visualized as identical opportunities to compete for the existing values among those differently endowed, regardless of structural determinants of the chances of success or of the consequences for the distribution of values.”⁷³ In formal equality, the differences in intelligence and background training are considered irrelevant for distributional decisions. It insists on uniform standard of competition for selection. On the other hand substantive equality takes into consideration the differences in intelligence, etc for the purposes of resource distribution. Any civilised country should have an ideal balance between substantive and Formal Equality.

In *Balaji V. State Of Mysore*⁷⁴ the supreme court gave preference to merit principle. The Court held that “the need for technical, scientific, and academic personnel was so great that it would cause grave prejudice to national interest if considerations of merit are completely excluded by wholesale reservation seats in all technical, medical or engineering colleges.”⁷⁵ Justice V.R. Krishna Iyer succinctly stated the concept of formal equality as : “ If equality of opportunity for every person in the country is the constitutional guarantee, a candidate who gets more marks than another is entitled to preference in admission. Merit must be the test when choosing the best according to the rule of equal chance for equal marks. To devalue merit at the summit is to temporise with country’s development in the vital areas of profession expertise”.⁷⁶ In *State of Kerala V. N.M Thomas*, Justice Krishna Iyer recognised that “efficiency and national interest will suffer if Scheduled Castes and Scheduled Tribes are selected through reserved quota for higher posts”.⁷⁷ But while defending the employment preferences for Scheduled Castes and tribes, he observed that “by selecting pen-pushing clerks efficiency in administration would not be so much undermined as by selecting them as a space scientist or top administrator, thereby maintaining the need for the merit principle in selecting candidates for highly specified careers”. In *K.C Vasanth Kumar V. State Of Karnataka*,⁷⁸

⁷³ Supra note 3 at 379

⁷⁴ AIR 1963 SC 649

⁷⁵ Id. at 662

⁷⁶ *Jagdish Saran V. Union Of India*, (1980) 2 SCC 768

⁷⁷ (1976) 2 SCC 310, 527

⁷⁸ (1985) Supp.SCC.714,722

Justice A.P Sen also noted the difficulty in “deviating from merit principle” while making selection for higher level profession and services : “Professional expertise, born of knowledge and experience, of a high degree of technical knowledge and operational skill is required of pilots and aviation engineers. The lives of citizens depend on such persons. There are other similar fields of governmental activity where professional, technological, scientific or other special skill is called for. In such services or posts under the Union or States, there can be no room for reservation of posts; merit alone must be the sole and decisive consideration for appointments.”⁷⁹

In *Indira Sawhney V. Union Of India* , the Supreme Court held that “reservations should be excluded in higher echelon posts. While on Article 335, we are of the opinion that there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they are obtained, merit, alone counts. In such situations. It may not be advisable to provide for reservations. For example, technical posts in research and development organisations/departments/institutions, in specialities and super-specialities in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable. Reservations in these kinds of jobs are seen as inconsistent with values of efficiency that are needed for professions and services”⁸⁰. In *Preeti Sreevastava V. State Of Madhya Pradesh*⁸¹ the supreme court ruled that “there could not be any reservations at the level of super specialities in medicine because any dilution of merit would adversely affect national interest. The element of public interest in having the most meritorious students is also present at the post graduate level in medical specialties and super-specialities”.

The Supreme Court in the case of *Ashok Kumar Thakur v. Union of India*,⁸² had once again stated that "once a candidate graduates from a university, he is said to be educationally forward and is ineligible for special benefits under article 15(5) of the Constitution for post-graduate and any

⁷⁹ Parmanand Singh, Tension Between Equality and Affirmative Action: An Overview, 1 J. Jindal Global Law Review 100

⁸⁰ Id. at 101

⁸¹ (1999) 7 SCC 120

⁸² 2008 (6) SCC 1

further studies thereafter. This is for the purpose of balancing requirements of Articles 15, 16 on the one hand and Article 335 on other”.

In the a friend of the court brief submitted by Harvard college in the Bakke case, it defended affirmative action on educational grounds. It stated that “grades and test scores had never been the only standard of admission”. “If scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual existence... The quality of the educational experience offered to all students would suffer. In the past, diversity had meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stock brokers, academics and politicians. Now, the college also cared about racial and ethnic diversity”.⁸³

According to Galanter, “compensatory schemes involve enlargement of the basis of selection to include other criteria along with productivity...such as representation, integration..... This enlargement is justified on the ground that without it the society would be deprived of the various benefits thought to flow from the enhanced participation of specified groups in key sectors of social life.”⁸⁴ The concept of merit can be enlarged and can be viewed as “a system of perceived social need. Where there is a social need for rapid and substantial integration and representation of certain specific identified disadvantaged groups in the mainstream of national life, membership of such groups can itself be a part of one’s own merit. Merit here is understood as a criterion to achieve some pre-determined social objective or value or to satisfy certain perceived social need.”⁸⁵

On analysing the decisions from Balaji to Indra Sawhney, we can conclude that Indian Courts have succeeded in balancing formal and substantive equality. Through out the decisions the courts have stressed the importance of merit, especially in technical posts and higher education. The Courts have accepted the fact that there can be no compromise of merit in certain jobs or occupations, because of the peculiar character of activity. At the same time, we have to reconcile the differences people possess in terms of education or other capabilities for reasons beyond their control or for reasons which was forced upon them. Thus excluding certain posts listed by the supreme court, it is important to offer a helping hand to the deserving people. In the field of education also, ensuring

⁸³ Michael J Sandel, Justice, What’s the Right Thing To Do? 172 (Penguin Books, Great Britain, 1st Edition, 2009)

⁸⁴ Supra note 3

⁸⁵ Supra note 35 at 102.

representation of people from all walks of life would increase the diversity and promote holistic learning.

3.3.3. Quantum of Reservation

The extent of reservations has always been a controversial issue. The Constitution is silent on the extent of reservations. However taking aid from the speech of BR Ambedkar in Constituent assembly and interpretation of provisions providing for preferential treatment as guaranteeing substantive equality the courts have concluded that it should remain to a minority of seats. In M.R Balaji, the court held that a “A special provision contemplated by Art.15(4) like reservation of posts and appointments contemplated by Art.16(4) must be within reasonable limits. The interests of weaker sections of society which are, a first charge on the states and the Centre have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Art.15(4) .In this matter again we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way, a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case”.Thus the court by capping the reservations at fifty percent laid the rule that reservation should always be available only to a minority of seats. If we examine the above extract of judgment we could see that the court by laying down the fifty percent rule has balanced Formal and substantive Equality.

In Devadasan, the court examined the validity of a rule of central government which actually reserved only 17.5 percent posts in the central services for the SC and STs but provided for carrying forward of their unfilled quota to the next two succeeding years, if suitable candidates were not available. The court following the decision of Balaji invalidated the rule because 17.5 percent in three years would come close to 54 percent. Both Balaji and Devadasan was decided by the courts construing Article 15(4) and Article 16(4) as exceptions to Article 15(1) and Article 16(1). As we will see later in this chapter this interpretation was discarded in the NM thomas case.

In Indra sawhney, the court held that “barring extra ordinary situations, reservation should not exceed 50 percent. The Court observed that Article 16(4) speaks of adequate representation and not proportional representation. The fifty percent limit applies to all reservations including those which can be made under article 16(1)”. While in Devadasan and Balaji the court arrived at the 50 percent

limit by interpreting article 15(4) and Art. 16(4) as exceptions, in mandal case the court relied on “balancing of interests under these two provisions and on the reasonable exercise of power under Art.16(4)”.

In Jaishri Laxmanrao Patil V. The Chief Minister⁸⁶ the court held that “the 50 percent rule spoken in Balaji and affirmed in Indra Sawhney is to fulfil the objective of equality as engrafted in Article 14 of which Articles 15 and 16 are facets. 50 percent is reasonable and it is to attain the object of equality. To change the 50 percent limit is to have a society which is not founded on equality but based on caste rule”.

3.3.4 Reservations : Exceptional Nature

Till the decision of Supreme Court in State Of Kerala V. NM Thomas⁸⁷, Art. 15 (4) was construed as an exception to Art. 15 (1) with the consequence that the permissible limit of reservations could not exceed 50 per cent. In Balaji, the Supreme Court held that the exceptional character of compensatory discrimination "has to be read as a proviso or an exception to article 15(1) and 29(2) ... as was evident from its history".⁸⁸ In Devadasan V. Union Of India, the Supreme court held that “article 16 (4) is by way of a proviso or an exception to Art. 16 (1) and cannot be so interpreted to nullify or destroy the main provision”. “Thus its overriding effect is only to permit a reasonable number of reservations... in certain circumstances”.⁸⁹ However, in his dissenting opinion, Justice Subba Rao opined that “Art. 16 (4) has not really carved out an exception, but has preserved a power untrammelled by the other provisions of the article”⁹⁰. In C.A Rajendran V. Union Of India, the Supreme Court held that “Art. 16(4) imposed no duty on the government to make reservations for these classes, but that Article 16(4) is an enabling provision and confers a discretionary power on the state to make a reservation.”⁹¹. Galanter observes that “although the particular means are discretionary, the object is not, the Constitution explicitly declares it is the duty of the state to promote the interests of the weaker sections and to protect them”. He notes that “if these provisions are exceptions, they are exceptions of a peculiar sort. They do not merely carve out an area in which

⁸⁶ 2021(3) KLT 465 (SC)

⁸⁷ (1976) 2 SCC 310

⁸⁸ AIR. 1963 SC 649

⁸⁹ AIR. 1964 SC 179

⁹⁰ Id. at 190

⁹¹ AIR. 1968 SC 513

the general principle of Equality is inapplicable. Instead, they are specifically designed to implement and fulfil the general principle. What these clauses do is to insure state power to pursue substantive Equality vis a vis certain historical formations in Indian society".⁹²

Article 15(4) was considered to be exception to Article 15(1) because as H.M Seervai argues "if Art. 15(1) stood alone, no discrimination could be made in favour of Scheduled Castes because discrimination on the ground of caste is prohibited by Art. 15 (1). Therefore Art. 15 (4) takes out the discrimination favouring Scheduled castes from the prohibition against discrimination on the ground of caste or religion".⁹³ Subordination of "Art.15(4) to Art.15(1) is further strengthened by the fact that Art. 15(1) confers a legally enforceable fundamental right while Art.15(4) confers no right at all". According to Seervai, a sub-article conferring a fundamental right is definitely on a higher plane than a "sub-article which confers no right but merely confers a discretionary power" on the state.

The existing approaches of the Supreme Court as to how the "competing commitments of formal equality and compensatory discrimination are to be combined" was reconsidered by Supreme Court in *State Of Kerala V. NM Thomas*.⁹⁴ In *NM Thomas*, the LD clerks of the reg. dept were allowed to be promoted to UD clerks on a seniority cum merit basis. Tests were also mandated for the same and the candidate had to pass the test within 2 years. Relaxation of a further period of two years was given to Scheduled caste clerks. However, many Scheduled Caste Clerks had not satisfied the test qualification within the extended period. Thus the government promulgated in 1972 a new rule 13AA, "giving the Scheduled Caste and Scheduled Tribes clerks a temporary exemption from passing tests for a specified period". Thus in 1972, "of 51 vacancies in the category of UD clerks, 34 were filled by SCs who had not passed the tests, and only 17 were filled by persons who had passed tests". In the WP filed by N.M Thomas, a LD Clerk who passed the test but was not promoted due to the extensions provided by Rule 13AA, the division bench of Kerala High Court concluded that "What has been done is not to reserve and what has been exempted by Rule 13AA is beyond the scope of Art. 16(4)." On Appeal, the Supreme Court, by a 5:2 Majority, reversed the Judgment.

⁹² Supra Note 3 at 377

⁹³ HM Seervai, *Constitutional Law Of India* 557 (Law and Justice Publishing Co., New Delhi, Fourth Edition, Reprint 2021)

⁹⁴ 1976 (2) SCC 310

The outline of Classification argument can be deciphered from the opinion of Chief Justice Ray. According to CJ. Ray “providing equal opportunity in government employment is a legitimate objective”. Also article 46 and 335 creates a positive obligation on the state.⁹⁵ Thus “classification of employees belonging to these groups to afford them an extended period to pass tests for promotion is a just and reasonable classification having rational rational nexus to the object of promoting equal opportunity relating to public employment. The difference in condition of these groups justifies differential treatment , just as rational classification is permissible under the general equal protection provision of Art. 14 . So it is permissible to treat unequals unequally under Art.16”.

Justice Beg although among the majority did not participate in the reconceptualisation. According to Justice Beg, “the guarantee contained in Art. 16(1) is not by itself aimed at removal of social backwardness due to socio-economic and educational disparities produced by past history of social oppression, exploitation, or degradation of a class of persons. Instead it was in fact intended to protect the claims of merit and efficiency... against incursions of extraneous considerations.” “And efficiency tests, in turn, bring out and measure... existing inequalities in competency and capacity or potentialities so as to provide a fair and rational basis for justifiable discrimination between candidates”. “Thus provisions for equality of opportunity are meant to ensure fair competition in securing government jobs; they are not directed to removal of causes for unequal performances”. “But such provisions do not stand alone: they are juxtaposed with Articles 46 and 335, which imply preferential treatment for the backward classes to mitigate the rigour of equality in the same sense of strict application of uniform tests of competence”. “Article 16(4) was designed to reconcile the conflicting pulls of Article 16(1), representing justice conceived of as equality and of Articles 46 and 335, embodying the duties of the state to promote the interest of the economically, educationally and socially backward, so as to release them from the clutches of social injustice.”

Thus “Article 16(4) maybe thought to exhaust all exceptions made in favour of backward classes”. These rules may be viewed as “implementation of a policy of qualified or partial or conditional reservations which could be justified under 16(4).”⁹⁶

Dismissing the interpretation of “Art.16(4) as an exception to Article 16(1), Justice Mathew articulates the view of equality that implies the doctrinal shift”. According to Justice Mathew “The equality of opportunity guaranteed by the Constitution is not only formal equality with fair

⁹⁵ Supra note 3 at 383.

⁹⁶ Supra note 3 at 384.

competition, but equality of result. In order to assure the disadvantaged their due share of representation in public services the constitutional equality of opportunity was fashioned wide enough to include... compensatory measures.” “Thus the guarantee of equality implies differential treatment of persons who are unequal. Article 16(1) is only a part of a comprehensive scheme to ensure equality in all spheres.”⁹⁷ “If Equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article 16 (1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz , even upto the point of making reservation .” Thus “the state can adopt any measure for ensuring adequate representation of Scheduled Caste and Tribes members in public service and justify it as a compensatory measure to ensure equality of opportunity provided it does not dispense with minimum basic qualification which is necessary for efficiency of administration”.

Justice Krishna Iyer, opined that “Constitution should be interpreted by a spacious, social science approach, not by pedantic, traditional legalism,” Justice Krishna Iyer advocated the need to have a “general doctrine of backward classification to pursue real and not formal equality. According to the Doctrine of backward classification, the state may, for the purposes of securing genuine equality of opportunity , treat unequals equally . Thus Article 16(4) serves not as an exception but as an emphatic statement. So in addition to reservation under 16(4) the state may confer lesser order advantage on the principle of classification under Article 16(1)” .⁹⁸

Although according to Justice Mathew , the compensatory measures might be extended to “all members of the backward classes”. However, According to Justice Krishna Iyer “the lesser degree advantages conferred under 16(1) under the doctrine of classification should be confined to Scheduled Castes and Scheduled tribes alone” . “Article 16(4) covers all backward classes, but to earn the benefit of grouping under 16(1) based on Article 46 and 335 the twin considerations of terrible backwardness of the type harijans have to endure and maintenance of administrative efficiency must be satisfied. Not all caste backwardness is recognised as a basis for differential treatment under Article 16(1). The differentia ..is the dismal social milieu of harijans... The social disparity must be so grim and substantial as to serve as a foundation for benign discrimination. If we search.. .. we cannot find any large segment other than the Scheduled Castes and Scheduled

⁹⁷ Ibid at 385

⁹⁸ ibid

Tribes....No Class other than harijans can jump the gauntlet of equal opportunity guarantee. Their only hope is in Article 16(4).”

We can decipher from four of the majority judgements that Article 16(1) provides for a general authorisation to “adopt reasonable classifications for purposes of securing equality of opportunity . But it is conceded that this does not include a power to employ those classifications specifically prohibited under 16(2) . Thus the implication of the 4 opinions is that Scheduled Castes and Tribes do not constitute a classification on the basis of caste”.⁹⁹

This view of Thomas case was treated by the majority as the “correct one by Chief Justice Kania and Venkatachaliah, Ahmadi and Jeevan Reddy, JJ in Indra Sawhney V. Union of India”. The Court observed “That article 16(1) does permit reasonable classification for ensuring attainment of the equality of opportunity assured by it. For assuring equality of opportunity, it may well be necessary in certain situations to treat unequally situated persons equally. Not doing so, would perpetuate and accentuate inequality. Article 16 (4) is an instance of such classification, put in to place the matter beyond controversy. The backward Class of Citizens is classified as a separate category deserving a special treatment in the nature of reservation of appointments / posts in the services of state. Accordingly, we hold that clause (4) of Article 16 is not exception to clause (1) of Article 16. It is an instance of classification implicit in and permitted by clause (1)” .

The reconceptualisation of the constitutional foundation of preferential treatment, as contained in Article 16(1) seems to have complicated the subject. The position before NM Thomas that Article 16(1) provides for formal equality and 16(4) is an exception and provides for substantial equality was theoretically simple. Following this theory we could also legitimise the capping of reservations at 50 percent. But Justice Mathew’s opinion that formal equality and substantial equality both are contained in article 16(1) itself and the resultant equality provides for preferential treatment might have far reaching consequences. But on the other hand, The concept that preferential treatment is based on reasonable classification under 16(1) could be interpreted to make the reservation process more stringent because the legislature while identifying the beneficiaries of reservation would be forced to identify a class and a reasonable object and nexus to that classification which the reservation tries to remedy but practically. But at the end of the day Dr Ambedkar’s take on Art. 16(4) is relevant : “call it what one will - an exception or proviso or what - and semantics apart, reservation by reason of its exclusion of the generality of candidates competing solely on merits

⁹⁹ Supra note 3 at 387

must be narrowly tailored and strictly construed so as to be consistent with the fundamental constitutional objectives. Clause (4), seen in whatever colour, is a very powerful and potent weapon which causes lasting ill effects and damage unless justly and appropriately used." ¹⁰⁰

3.4. Conclusion

In this Chapter, the nature and basis of reservations were discussed. Reservations are justified on the premise that all persons in society are distinct, and some are situated in the least disadvantageous position that some positive measures are required to guarantee a level playing field in matters among others of education and employment. The said idea is contained in the principles of distributive Justice and the Constitution's equality principles. However, these principles fail to mention the criteria used to identify the least advantageous category. The Rawls theories of Justice justify the reservations as a measure that is beneficial to the most disadvantageous category of people. Till the N. M Thomas decision, "Art. 16 (4) was considered as an exception to Article 16(1)". The same implied that reservations are an extraordinary measure, and they can be used only to correct the injustice caused due to historical discrimination. In N.M Thomas, it was declared that "Art. 16 (4) was not an exception to Art. 16 (1)" and privileges can be granted even under Art. 16 (1) under the doctrine of classification, the writer is apprehensive whether economic criteria would form a rational basis for classification.

¹⁰⁰ VII, Constituent Assembly Debates, 712.

Chapter 4

RESERVATION CRITERIA CONUNDRUM - CASTE OR ECONOMIC STATUS ?

4.1 Introduction

"India's Policy of reservations is an issue that almost every Indian born post Independence ponders over, criticises, utilises, or suffers from at some stage in life.¹⁰¹" In this chapter, an analysis is conducted as to the beneficiaries of reservation and to find an answer to the question:-

what should be the criteria for reservation? Should it be based either on the social status as reflected by the caste, economic status, or both?

"Today, nearly half a billion Indian are eligible to avail some kind of preferential treatment, the count would be higher had it not been for the Supreme Court's periodic interventions"¹⁰². The Constitution provides for reservation in educational institutions and public employment in favour of "Scheduled Castes", "Scheduled Tribes" and "socially and educationally backward" class of citizens under Article 15(4) and Article 16(4).¹⁰³ Articles 341 and 342 authorise the President to issue a notified order in respect of each state specifying the "castes, races or tribes which are to be regarded as Scheduled Castes and Scheduled Tribes". However, the Constitution did not offer any pointers to identify the "socially and educationally backward Class" of citizens in Art. 15 (4) and the "Backward Class" of Citizens in Art. 16 (4).

This chapter analyses the criteria developed by the courts and the government in identifying the categories above. Along with the study on identifying the "socially and educationally backward" Class and the "backward classes of citizens", the same study will also offer general answers as to the basis of reservations, Caste or Economic Factors?.

The Beneficiaries, as identified by the Constitution apart from Scheduled Castes and Scheduled Tribes, are Backward Class of Citizens. It is necessary to understand what "classes" mean.

¹⁰¹ Zia Mody, 10 Judgments that changed India 117 (Penguin Publications , India, 1st Edition,2013)

¹⁰² "George H. Gadbois, Jr, 'Mandal and the other Backward Classes: Affirmative Action in India in the 1990s , Journal of law and social challenges, vol.1 (1997): p.71."

¹⁰³ Article 16(4) uses the term backward class of citizens, in contrast to socially and educational backward Class in Art. 15(4)

According to Oxford English Dictionary, Class is “A division or order of society according to status; a rank or grade of society;... a number of individuals (persons or things) possessing common attributes, and grouped under a general or ‘class’ name; a kind, sort, division.” According to Corpus Juris Secundum (14), Class is “A number of objects distinguished by common character from all others, and regarded as a collective unit or group, a collection capable of a general division, a number of persons or things ranked together for some common purpose or possessing some attribute in common; the order of rank according to which persons or things are arranged or assorted. “The makers of the Constitution must have intended to give broad meaning to the term “classes”, encompassing all persons with some common characteristics.

4.1.1 Identification of Scheduled Castes

Conceptually, the Scheduled Castes was supposed to include the ‘untouchables’ who, on account of their low ritual status, were subject to many disabilities.¹⁰⁴ The identification of these groups has undergone many transformations. The most elaborate effort to identify untouchables was made by J.H Hutton, the 1931 Census Commissioner. He proposed a series of tests to identify untouchable communities, which were designed around the incidence of disabilities:¹⁰⁵

1. “Whether Brahmins can serve the caste or Class in question or not”.
2. “Whether the caste or Class in question can be served by barbers, water carriers, tailors, and so on, who serve caste Hindus”.
3. “whether the caste in question pollutes a high caste Hindu by contact or proximity”
4. “Whether the caste or Class in question is one from whose hands a caste Hindu can take water”.
5. “Whether the caste or Class in question is debarred from using public conveniences such as roads, ferries, wells or schools”.
6. “Whether the caste or Class in question is debarred from the use of Hindu temples”.
7. “Whether in ordinary social intercourse, a well-educated member of the caste or Class in question will be treated as an equal by high caste men of the same educational qualifications”.

¹⁰⁴ Supra note 1 at 60

¹⁰⁵ Marc Galanter, *Competing Equalities*, Law and The Backward Classes In India 126 (University Of California Press, United States Of America, 1st Edition ,1984)

8. “Whether the caste or Class in question is merely depressed on account of its own ignorance, illiteracy, or poverty and but for that would be subject to no social disability”.
9. “Whether it is depressed on account of the occupation followed, and whether but for that occupation it would be subject to no social disability”.

Several of these criteria are not easy to observe. However, Ambedkar pointed out that “the aim was to identify groups that suffer the contempt and aversion of high caste Hindus. He warned that it is a fatal mistake to suppose that differences in untouchability tests indicate differences in untouchables conditions”. After considerable debate, “denial of access to temples and causing pollution by touch or approach were taken as the generally accepted tests of untouchability” and groups in this category were listed in a government schedule in 1936. In the 1941 census, these groups were 19 per cent of the Hindu population and 12.6 per cent of the total population of undivided India. After Independence also, the same approach of identifying untouchables was carried forward. The President has issued Constitution (Sch Castes) Order, 1950 and the Constitution (Sch. Castes) Union territories Order, 1951.¹⁰⁶ Clause 2 of the 1950 order provide “for castes, races or tribes which are to be deemed Scheduled Castes in the territories of states" and are mentioned in parts 1 to 30 of the order. Para 3 of the order also provides that only a person professing Hinduism and Sikhism can come under the category of Scheduled Castes. The Scheduled Caste Order in 1950, was a restatement of the 1936 list. Changes were made to the list subsequently in the form of additions and corrections of groups, but the criteria remain almost the same. Before the 1936 order, there was a recognition that depressed classes existed within Muslim and Christian religions also. However, in the order, castes or communities from other religions were not included.

4.1.2 Identification of Scheduled Tribes

Conceptually, this category includes all those with ‘tribal characteristics’(social, cultural, linguistic and cultural distinctiveness) who are spatially and culturally isolated from the mainstream.¹⁰⁷ The formal mechanism of being listed as a Scheduled Tribe is the same as that for Scheduled Castes. In addition to listing tribal groups in the Schedule, the British practise of insinuating certain areas to protect aboriginal people from “exploitative or demoralising contact with more sophisticated

¹⁰⁶ THE SCHEDULED CASTES AND SCHEDULED TRIBES ORDERS (AMENDMENT) ACT, 1956, available at:https://tribal.nic.in/downloads/CLM/CLM_1/3.pdf (last visited on August 20, 2021)

¹⁰⁷ Supra note 1 at 64

outsiders” are continued even after Independence. Such areas are listed out in the fifth and sixth schedules of the Constitution.

4.1.3 Identification Of Other Backward Classes

The term ‘backward classes’ was used in two senses: “as a group of all communities that needed preferential treatment and as castes low in the socio-economic hierarchy, but not as low as the untouchables”. As the Constituent Assembly debated the use of the term ‘backward’, the final agreement was that “the backward classes other than the SCs and STs would be designated at the local level”. As Marc Galanter suggests the reason for not bringing out a central list of OBC’s then could have been the belief that “the OBC’s were a sufficiently potent political force at the local level to look out for their own interests’and unlike the untouchables, central control of their designation was not required to ensure the inclusion of the deserving”¹⁰⁸ The First Backward Classes Commission under the chairmanship of Kaka kalelkar was established in 1953. The Commission was tasked with to determine “whether any section of the population could be considered backward”. The Commission submitted a list of 2399 groups, and identified castes or communities as “backward Class” based on the basis of “trade and occupation, security of employment, educational attainment, government service representation, and social hierarchy position”. The Commission often relied just on the name of caste to classify it as backward Class. The Commission was criticised for the “use of caste or community” as the yardstick to determine backwardness. A plea was raised to use economic criteria instead. The central government vehemently opposed the report in parliament as it rejected the “definition of backwardness on the basis of communal criteria”. Many state governments formed “Backward Classes Commission”, and some followed economic criteria while most states placed greater emphasis on the caste criterion.

In 1978, under the chairmanship of B. P. Mandal commission was set up to

1. “Determine the criteria for defining ‘socially and educationally backward classes”
2. “Recommend steps to be taken for the advancement of socially and educationally backward classes”
3. “Examine the desirability of making provisions for reserving appointments in favour of such backward class of citizens”

The commission “used 11 social and economic criteria indicators, which were grouped under three heads: social, educational, and economic. This was done for all the Hindu communities. For non-

¹⁰⁸ Id. at 66

Hindus, the commission used another criterion: all untouchables who converted to other religions and all communities which were identified by their traditional occupations, for which the Hindu counterparts were included in the list of backward classes. Based on this, Commission identified 3,743 caste groups as backward, which were 52 per cent of the population.” The commission recommended 27 percent reservation for OBC candidates, so that overall ceiling of 50 percent would not be violated.

The 102nd Constitution amendment Act of 2018 inserted Articles 338B, which deals with “the structure, duties and powers of the NCBC”, while 342A¹⁰⁹ deals with “power of the President to notify a particular caste as SEBC and power of Parliament to change the list”. Constitution Bench of Supreme Court in *Jaishri Laxmanrao Patil V. The Chief Minister*¹¹⁰ ruled that “after the insertion of Article 342A in the Constitution, it is the Central government alone which is empowered to identify Socially and Economically Backward Class (SEBC) and include them in a list to be published under Article 342A (1), specifying SEBCs in relation to each State and Union Territory. The States can, through their existing mechanisms, or even statutory commissions, only make suggestions to the President or the Commission under Article 338B, for inclusion, exclusion or modification of castes or communities, in the list to be published under Article 342A (1)”. However, “the States’ power to make reservations, in favour of particular communities or castes, the quantum of reservations, the nature of benefits and the kind of reservations, and all other matters falling within the ambit of Articles 15 and 16 will however remain undisturbed”..

The Central government has maintained the stand that the 102nd amendment to the Constitution — which deals with the constitutional status of the “National Commission for Backward Classes” — applies only to the central list and states are free to have their own lists.¹¹¹. Consequently “The Constitution (One Hundred and Fifth Amendment) Act, 2021 which restores the power of State Governments to identify and specify Socially and Economically Backward Classes(SEBCs)” was enacted.

¹⁰⁹ “(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 socially and educationally backward classes which shall for the purposes of this Constitution be deemed to be socially and educationally backward classes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the Central List of socially and educationally backward classes specified in a notification issued under clause (1) any socially and educationally backward class, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.”

¹¹⁰ 2021 (3) KLT 465 (SC)

¹¹¹ “State Can have their own backward classes” available on <https://theprint.in/india/governance/states-can-have-their-own-backward-class-lists-102nd-amendment-only-for-centre-govt-says/664523/> (last accessed on August 23, 2021)

4.2 Views on Constitutional Meaning Of Classes

4.2.1 The Modernist View

According to the modernist view, preferential treatment should be awarded on the basis of “income, occupation, illiteracy or other neutral or secular characteristics”. The supporters of the modernist view deplore communal grouping, which is forbidden by our constitution. Hence Classes, according to the modernist view, include individuals who suffer from some disadvantage.

4.2.2 The Historic View

According to historical view, preferential treatment should overcome the accumulated “disparities of power, wealth, and culture among historic communities”. Here Class refers to only historic social formulations like caste and religious groups

4.2.3 The Elastic View

According to the elastic view the provisions providing preferential treatment are broad enough to include the historic communities referred to in the historical view and the disadvantaged category of people mentioned in the modernist view.

4.3. Caste as Class

Caste has been considered the basic institution of Indian Society, especially Hindu Society. Louis Dumont contrasts between societies governed by holism and hierarchy on the one hand and by individualism and equality. According to him, “Indian Society was homo hierarchicus governed by holism and hierarchy, whereas most Western societies are governed by individualism and equality”.¹¹² It is disheartening to accept the fact that the caste system is still prevalent in our system. Data from “the 2011-12 India Human Development Survey (IHDS-II), which involved over 40,000 households”, found that “27 per cent of all households admitted to practising untouchability, with a majority of Brahmin households admitting to it, 24 per cent of households with a graduate as a member are still practising untouchability”. Segregation of caste is a threat to democracy. Democracy to be effective must be based on self-governance among political equals. Mistrust and lack of understanding between caste groups threaten democracy. Reservation on a caste basis is

¹¹² Sheela rai, “Social and conceptual background to to the policy of Reservation” 37 Economic and Political Weekly 4309 (2002)

necessary for political and social integration.¹¹³“The moral lexicon of the caste-based reservations treat it as a medium to restore self-respect, dignity and representation, especially in a social structure which traumatises the Dalit lives on a daily basis through physical assault, violence, stigma, stereotypes and humiliation.”¹¹⁴

At first, the constitutional meaning of classes may seem to be the racial, religious and caste groupings that are forbidden under Arts.15, 16 and 29(2). The said meaning is derived from the exceptional nature of Arts 16(4) and 15(4) to the main provisions. The Constituent Assembly debates also support the same meaning. The addition of Art.15(4) by the amendment was for the specific purpose of permitting preferences for caste groups. Castes can be used in two ways in designating backward classes:

1. Castes or communities as units that are designated as backward
2. “Rank, standing or prestige of a caste be used as a measure of backwardness”

The Courts have only succeeded partially in clarifying the distinction “between caste as a unit and caste as a measure of backwardness”.

For the first time in *Balaji V. State of Mysore*¹¹⁵, the Supreme Court dealt with the question of caste as a unit. The Supreme Court held that:

1. The “bracketing of socially and educationally backward classes with Scheduled castes and Scheduled tribes in Art. 15(4) meant that they were comparable to Scheduled Castes and Tribes in the matter of backwardness”.
2. The “concept of backward classes is not relative in the sense that a class that is backward in relation to the most advanced class in the community must be included in it”. The Supreme court found no constitutional objection in using caste or community as a unit. “The backwardness must be both social and educational and not either social or educational”.
3. The Court did not favour using caste as the sole criteria for designating social backwardness and held that “occupations and place of habitation are also relevant for determining the backwardness of a community of persons”.

¹¹³ Kaleeswaram Raj, Thulasi K Raj, et.al., “Reservation as political imperative”, available at <https://frontline.thehindu.com/the-nation/reservation-as-a-political-imperative/article32404792.ece> (last visited on August 22, 2021)

¹¹⁴ “Caste-based Reservation Is Compensation For Historical Exploitation And Marginalisation”, available at “ <https://www.outlookindia.com/website/story/opinion-caste-based-reservation-is-compensation-for-historical-exploitation-and-marginalisation/355100>” (last visited on August 22, 2021)

¹¹⁵ AIR 1963 SC 649

4. The Court also concluded that “only those communities which are below the state average of literacy could be deemed to be educationally backward”. The Court observed that “It is for the attainment of social and economic justice that Article 15(4) authorises the making of special provisions for the advancement of the communities there contemplated, even if such provisions may be inconsistent with the fundamental rights guaranteed under Article 15 or 29(2).”

Supreme Court explained the decision in *Balaji in Chitrallekha V. State Of Mysore*¹¹⁶. In *Chitrallekha*, the Supreme court held that, “We would hasten to make clear that caste is only a relevant circumstance in ascertaining the backwardness of a class, and there is nothing in *Balaji* which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste. While this Court has not excluded caste from ascertaining the backwardness of a class of citizens, it has not made it one of the compelling circumstances. Under no circumstance, a class can be equated to a caste though the caste of an individual or a group of individuals may be considered along with other relevant factors in pitting him a particular class.” But at the same time Justice Madholkar, in this dissenting judgment observed “It would not be in accordance either with clause (1) of article 15 or clause (2) of article 29 to require the consideration of the castes of persons to be borne in mind for determining what are socially and educationally classes. It is true that clause (4) of article 15 contains a non-obstante clause with the result that power conferred by that clause can be exercised despite the provision of clause (1) of article 15 and clause (2) of article 29. But that does not justify the interference that castes have any relevance in determining what socially and educationally backward communities are” Thus the Majority judgment in *Chitrallekha* clarified that social backwardness can also be determined on the basis of criteria other than caste and such a determination will not be void if it ignores caste. Thus “caste can be a relevant circumstance in ascertaining social backwardness, but it cannot be the sole or the dominant test on that behalf”. The intention of the Courts in *Balaji* and *Chitrallekha* on ruling that caste may not be the sole criteria might be to exclude the well-off people within the backward castes and also the inapplicability of caste to non-Hindu groups. In *P. Rajendran V. State Of Madras*¹¹⁷, the Supreme Court observed “If the reservation in question had been based only on caste and had not taken into account the social and educational backwardness of the caste in question, it would be violative of article 15(1) but it must not be forgotten that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be

¹¹⁶ AIR 1964 S.C. 1823 at 1833

¹¹⁷ AIR. 1968 SC 1012 at 1014

made in favour of such a caste on the ground that it is a socially and educationally backward class of citizens within the meaning of article 15(4)". Thus the supreme court upheld "the use of caste as the units by which Madras's Backward Classes were designated". The Supreme Court observed that "reservations could be made in favour of castes if the caste as a whole is socially and educationally backwards". However, the Court also pointed out that, in such cases, "it does not mean that caste was the sole consideration in finding these groups backward".

The Supreme Court further contributed to the subject of caste as a unit and ranking of caste as a measure of backwardness by defining "Class" in *State of Andhra Pradesh V. Sagar*.¹¹⁸ The Supreme Court defined "class as a homogeneous section of the people grouped together because of certain likenesses or common traits and who are identifiable by some common attributes such as status, rank, occupation, residence in a locality, race, religion and the like. In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class, a test solely based upon the caste or community cannot also be accepted" Thus in the case of *Sagar* the supreme court slightly altered its position from *Balaji and Chitrlekha* by ruling that in determining class, caste cannot be excluded but at the same time class cannot determined solely on the basis of caste. In *Triloki Nath Tikku V. State Of Jammu and Kashmir*¹¹⁹, the Supreme court reaffirmed that "Backward Classes was not equivalent with castes or communities. Members of a caste or community may be treated as a class not for the sole reason that they are members of a particular caste or community but because of their backwardness in terms of social, educational and economic criteria". The Supreme Court in *Triloki Nath* also warned that any determination of class solely on the basis of "caste, community, race, religion, sex, descent, place of birth, or residence" would amount to direct contravention of constitution.

In *Janki Prasad Parimoo V. State of Jammu and Kashmir*¹²⁰, the Court was not in favour of placing "economic considerations above considerations which go to show whether a particular class is socially and educationally backward." In this case , the Supreme Court scrutinised "groups selected on the basis of residence, present occupation, grandfather's occupation, caste, and other characteristics". Galanter observes, "Although the Court does not explain its unease, what seems implicit in the notion that what is supposed to be remedied by provision for backward classes is not

¹¹⁸ AIR 1968 S.C. 1379 at 1382.

¹¹⁹ AIR 1969 SC 1 at 3

¹²⁰ AIR 1973 SC 930

incidents of individual life history but the accumulated disadvantages of palpable social groups. Presumably, these groups may be castes or territorial groups or the followers of an occupation. However, they must have some shared traits which can be measured in terms of social and educational backwardness .”¹²¹ The decision of Supreme Court in Janaki Prasad Parimoo has great significance because this is one of the judgments in which the social significance of reservation as a measure which tries to remedy accumulated disadvantages rather than a poverty alleviating measure can be witnessed.

In Kumari K.S. Jayashree V. State of Kerala,¹²² answering the question of “whether caste can by itself be a basis for determining social and educational backwardness”, the Court observed, “It may not be irrelevant to consider the caste group of citizens claiming to be socially and educationally backward. Occupations, place of habitation may also be relevant factors in determining who are socially and educationally backward classes”. The Supreme Court has reiterated its consistent stand that although caste may be relevant in identifying socially and educationally backward class, along with it other factors must also be considered. In K.C Vasanth Kumar V. State Of Karnataka¹²³ Chinnappa Reddy, J., held that “Any view of the caste system, class or cursory, will at once reveal the firm links which the caste system has with economic power. Social status and economic power are so woven and fused into the caste system in Indian rural society that one may, without hesitation, say that if poverty is the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person’s caste”. Ventataramiah, J., in same decision observed as follows “An examination of the question in the background of the Indian social conditions shows that the expression backward classes used in the constitution referred only to those who were born in particular castes or who belonged to particular races or tribes or religious minorities which were backward. This is so because a caste is based on various factors, sometimes it may be a class, a race or a racial unit and his birth in the family governs the caste of a person”. In Indra Sawhney V. Union of India,¹²⁴ the majority held that “a caste could be and quite often is a social class in India, and if it is backward socially, it would be a backward class for the purpose of article 16(4). There are classes among Non-Hindus, Muslims and Christians and Sikhs, and if they are backward socially, they are entitled to reservation under Art. 16(4)”.

¹²¹ Supra note 3 at 200

¹²² 1977 (1) S.C.R. 194.

¹²³ AIR 1985 SC 1495

¹²⁴ AIR 1993 SC 477

While analysing all these decisions, we can ascertain that the Supreme Court is not in favour of depending on caste alone to determine backward classes. However, at the same time, is aware of the disadvantages faced by certain castes and tribes in our country as a result of systemic and historical discrimination and the need to designate them as backward classes. However, by ruling that caste should not be the sole criteria in determining backward classes, the Supreme Court might be trying to exclude the well of category within these castes. However, in the case of Scheduled Castes, “the caste unit is explicitly authorised by the constitution. Scheduled Castes are composed of untouchables who traditionally suffered disabilities and restricted opportunities precisely on the grounds of membership in a particular caste”. Since untouchability is on the basis of caste, the caste unit is solely used to identify this species of backwardness. The Five Judge Bench headed by Justice Arun Mishra in *Chebrolu Leela Prasad Rao and ors V. State Of A.P and Ors*¹²⁵ observed that “the government should revise the reservation lists of Scheduled Castes and Scheduled Tribes so that the economically affluent among them may be removed so that economically poor among them may take advantage of the provisions”. However, the Supreme court failed to understand the objective behind providing reservations to the Scheduled Castes and Tribes, the objective being not the economic upliftment of Dalits but, the sharing of state power as approved in *Indra Sawhney* and hence to “ensure the adequate representation of backward classes in the public services”.¹²⁶ Sharing of state power was essential because, at the time of independence, the public services were dominated by few communities alone. This was clear in the mind of Dr B.R. Ambedkar, and he raised his voice for representation in state services way back in 1930. He realised that unless the backward classes have a share in the power, their interests cannot be protected. While addressing the All India Depressed Classes Congress at Poona in August 1930, he asserted that “ the best guarantee for the protection of your own interests consists in having the power of control in your own hands so that you may be in a position not only to punish when mischief to your interest is done but to keep a watch over your interests from day to day and prevent possible mischief from arising. The safest remedy seems to me to lie in securing control over the future executive in India in your own hands and that you can have only by means of adequate representation in the legislature of this country.” “It is by this means alone that we can keep a day to day watch upon the doings of the executive and thereby ensure our safety and progress. It is important to keep in mind that mere representation is meaningless without recognition. Recognition is a matter of attitudinal

¹²⁵ *Chebrolu Leela Prasad Rao and ors V. State Of A.P and Ors* available at : https://main.sci.gov.in/supremecourt/2002/8431/8431_2002_31_1501_21807_Judgement_22-Apr-2020.pdf (last accessed on August 21, 2021)

¹²⁶ Kailash Jeenger, “Reservation Is About Adequate Representation, Not Poverty Eradication” available at <https://thewire.in/law/supreme-court-bench-reservation> , (last accessed on August 21, 2021)

changes and transition of morality from social to constitutional and can be achieved when people adopts democracy as a way of life”.

4.4. Economic criterion

The critics of caste-based reservation argue that “it introduces a form of identity politics that makes caste visible”. They raise the question of how caste sensitive reservations can fight caste sensitivity. The same opinion was shared by Justice Desai in *KC Vasanth Kumar*. In *K.C Vasanthkumar V. State of Karnataka*, Justice Desai was against caste as a major determinant of backwardness. According to Justice Desai “If State patronage for preferred treatment accepts caste as the only insignia for determining social and educational backwardness, the danger looms large that this approach alone would legitimise and perpetuate caste system which contradicts secular principles and also run against Art.16(2). Also, caste-based reservation had been usurped by the economically well-placed section in the same caste”. According to Justice Desai., “the only criterion which can be realistically devised is the one of economic backwardness”. “Adoption of economic criteria would translate into reality two constitutional goals: one, to strike at the perpetuation of the caste stratification of the Indian society and to take a firm step towards establishing a casteless society; and two, to progressively eliminate poverty.” Justice Sen in *KC Vasanthkumar* was also of the opinion that the major factor to determine backwardness under Art.16(4) should be poverty. In his words: “The predominant and the only factor for making special provisions under Art.15(4) or for reservation of posts and appointments under Art.16(4) should be poverty, and caste or subcaste or a group should be used only for purposes of identification of persons comparable to Scheduled Castes and Scheduled Tribes”. According to Gail Omvedt “the objective of caste-based reservations is to remove caste-monopoly in access to social resources. The discourse of reservation is forcibly turned towards economic criteria because upper-castes want to avoid dealing with caste”.¹²⁷ Justice desai’s judgment which raises the question of how caste sensitive reservations can fight caste sensitivity showcases a constricted view. The Problem of caste is not superficial, The problem of caste was not going to vanish even if it was prohibited by the constitution specifically. As Arundhati roy says, Caste cannot be annihilated “Not unless we show the courage to rearrange the stars in our firmament. Not unless those who call themselves revolutionary develop a radical critique of Brahminism. Not unless those who understand Brahminism sharpen their critique of capitalism.”¹²⁸

¹²⁷ The 10% Reservation Is a Cynical Fraud on the Constitution available at <https://thewire.in/government/the-10-reservation-is-a-cynical-fraud-on-the-constitution> (last visited on August 30, 2021)

¹²⁸ Supra note 126

But what reservation can do is end the caste monopoly in certain jobs especially in the organised public sector. And we can solve the problem of caste only by accepting the fact that there exists in our society caste based discrimination. The Discrimination based on caste can be brought to an end only if we understand the ill effects and change our mindset. But for the very reason that we are humans and we live in a society, different views are possible, it is natural to have prejudices, caste or otherwise , but we should be able to distinguish between right and wrong and suppress our prejudices with the values of our Constitution .

The Application of economic criteria to determine "socially and educationally backward classes" has been often scrutinised by the courts. Justice Raveendran in *Ashok Kumar Thakur V. Union Of India and Ors*¹²⁹ held that “any provision for reservation is a temporary crutch, such crutch by unnecessarily prolonged use, should not become a permanent liability. Caste has divided this country for ages. It has hampered its growth. To have a casteless society will be the realisation of a noble dream. To start with, the effect of the reservation may appear to perpetuate caste. The immediate effect of caste-based reservation has been rather unfortunate. In the pre-reservation era, people wanted to eliminate the backward tag -- either social or economical and were keen to be known as forward. But post reservation, everyone, including those who are considered 'forward', fight for the 'backward' tag in the hope of enjoying the benefits of reservations. When more and more people aspire for 'backwardness' instead of 'forwardness', the country itself stagnates. Reservation as 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 gap and there is any tendency to continue reservations indefinitely, the country will become a caste divided society permanently. Instead of developing into a united society with diversity, we will end up as a fractured society for ever suspicious of each other. While affirmative discrimination is a road to equality, care should be taken that the road does not become a rut in which the vehicle of progress gets entrenched and stuck. Any provision for reservation should not become crutches which themselves create a permanent disability. They should merely be temporary aid to achieve normalcy. Though the constitutional goal is a casteless society, Constitution advisedly does not specifically prescribe a casteless society nor try to abolish caste.” Justice Raveendran’s judgment points out correctly all that is currently wrong with the reservation system in our country. While realising the true purpose of the reservation, he shares apprehensions

¹²⁹ (2008) 6 SCC 1

regarding the misuse of reservations by the political class of our country. The Judgment realises the importance of the need to revise the beneficiaries of reservation periodically.

In *Indra Sawhney*, the court held unconstitutional “reservation of 10% of the posts in favour of other economically backward section of the people who are not covered by any of the existing schemes of the reservation made by the Office Memorandum dated September 25, 1991, permissible under article 16”. CJ Kania and Justice Jeevan Reddy held: "It may not be permissible to debar a citizen from being considered for appointment to any office under the state solely on the basis of his income or property holding. Since the employment under the state is really conceived to serve the people (that it may also be a source of livelihood is secondary), no such bar can be created. Any such bar would be inconsistent with the guarantee of equal opportunity held out by clause (1) of Article 16". According to P.B. Sawant J. “Clause (1) of Article 16 may permit classification on economic criterion. The purpose of such classification, however, can only be to alleviate poverty or relieve unemployment. If this is so, no individual or section of the society satisfying the criterion can be denied its benefits- particularly the backward classes who are more in need of it. If therefore, the backward classes within the meaning of clause (4) are excluded from the reservations kept on economic criterion under clause (1), it will amount to discrimination. Further, the objects of reservations under the two clauses are different. While those falling under clause (1) from other than the backward classes will continue to enjoy the reservations forever, the backward classes can benefit from the reservation under clause (4) only so long as they are not adequately represented in the services. The services under clause (1) may belong to classes that are adequately or more than adequately represented in the services. The reservations for them alone under Article 16(1) would virtually defeat the purpose of article 16(4) and would be contrary to it. No different result will further ensue even if the reservations are kept for all the classes since all the seats will be captured only by the socially and educationally advanced classes. The two clauses of the article have to be lead consistently with each other so as to lead to harmonious results. Hence, so long as the socially backward classes and the effects of their social backwardness continue to exists, the reservations in services on economic criterion alone would be impermissible either under clause (4) or clause (1) of Article 16.” “However Justice Kuldip Singh, in his dissenting judgment pointed out that backward classes of citizens used in article 15(4) are not confined to socially and educationally backward classes. In the context of article 16(4) , the economic criterion is essentially relevant.” According to him, “poverty is the cause of all kinds of backwardness”. He concluded that “poverty

has a direct nexus with social backwardness, and it is an essential and dominant characteristic of poverty”.

In Indra Sawhney the supreme court clarified that “backwardness under Art.16(4) need not be social as well as educational as is the case under Art.15(4). Art. 16(4) does not contain the qualifying words socially and educationally as does Art.15(4). Backwardness contemplated under Art.16(4) is mainly social backwardness.” A “backward class” cannot be identified solely on the basis of economic criterion. Although it can be identified on the basis of income and occupation without any reference to caste. On Analysing Justice Jeevan Reddy’s Judgement, it seems to have tackled the ghosts of the NM Thomas judgment while sticking to the reconceptualisation of Art.16(4).The NM Thomas Case had stated that reservations can even be made under article 16(1) by the doctrine of classification. The Government taking cue from the judgement had provided for reservation for the economically weaker, but the court in Indra Sawheny struck down the 10 percent reservation by stating even though Art.16(1) permits classification on the basis of economic criterion, it would be discriminatory to except the backward classes from its purview , since the the very object of the economic reservation is alleviation of poverty. It is to bypass this legal hurdle that the government has now come up with the 103rd Constitution amendment act providing for 10 percent economic reservation.

4.5. Conclusion

The concept of Reservation is an extraordinary invention having constitutional foundations which is supposed to remedy a social problem. The Social problem being the fact that there exists differences among people. Reservation is supposed to offer a level playing field by eliminating as far as possible these differences. While identifying the beneficiaries of reservation, we have to keep in mind this understanding about reservation. The Supreme Court in Jaishri Laxmanrao Patil V. The Chief Minister¹³⁰ reiterated that the objective of Article 16(4) is to enable the backward classes to come to the mainstream so that they too can become a meaningful part of state’s power. So reservation under Art.16(4) and Article 15(4) are not carried out as a measure to alleviate poverty Hence reservation cannot be made on sole caste or economic criterion. A combination of factors as identified by the judgements discussed above such as “caste,occupation,income,property holdings, educational qualifications” is ideal to determine the “Socially and educationally backward” classes.And any reservation which is made on sole caste or economic basis other than the

¹³⁰ 2021 (3) KLT 465 (SC)

reservation in favour of the “Scheduled Castes” and “Scheduled Tribes” will not amount to reasonable classification under Art. 16(1). It is to avoid this legal embargo that the Parliament has come up with a constitutional amendment to provide for reservation on sole economic basis.

Chapter 5

THE TEN PERCENT ECONOMIC QUOTA - PANACEA OR GIMMICK ?

5.1. Introduction

Reservations as a social and legal concept have been discussed and debated for ages. The latest entry to the subject of reservations is the ten per cent quota on an economic basis introduced by the One Hundred and Third Constitutional amendment Act¹³¹. The President of India, gave his assent to “The Constitution One Hundred and Third Amendment Act 2019” on the 13th January 2018, as notified in the Official Gazette by the Central Government. The Constitutional Bill, 2019, “was passed in the Lok Sabha by the 326 members who were present and voting, with three members voting against it and consequently, the same was passed by the Rajya Sabha as well”. It is disappointing that such a bill of great social, legal and economic significance was passed without much discussion in the house.¹³² The amendment empowered the state “to provide up to 10 per cent reservation in education and public employment for economically weaker sections (EWS) of citizens other than the Scheduled Castes (SC), the Scheduled Tribes (ST), and the non-creamy layer of the Other Backward Classes”. The 103rd Constitutional amendment intends to overcome the ratio in Indra Sawhney “that Economic backwardness cannot be the sole criteria for reservation” and that reservations must not exceed fifty per cent. Supreme Court has repeatedly held that “economic backwardness cannot be the sole criterion for reservation and that reservation only provides a right of access for the under-represented classes and is not an anti-poverty programme”. In those judicial decisions, a legislation or an executive order was subjected to judicial review. However, now economic criteria as a basis for reservation is brought out by amendment to the Constitution

5.2 Constituent Assembly Debates and Economic Reservation

By providing for Reservation based on economic criteria, the parliament has conveniently forgotten the true purpose, as evident from constituent assembly debates and various authoritative judicial

¹³¹The Constitution 103rd Amendment Act, available at : on <https://egazette.nic.in/WriteReadData/2019/195175.pdf> (last accessed on 28 August 2021”)

¹³² “Parliament passes Bill to provide 10% quota for poor , available at <https://www.thehindu.com/news/national/parliament-approves-10-reservation-for-poor-in-general-category/article25953023.ece> (last accessed on August 28, 2021)”

pronouncements on the subject. The Constituent assembly never considered an economic disadvantage as a basis for Reservation. Even those members who advocated for economic criteria for Reservation believed that it should be confined to the socially disadvantaged groups. Mahavir Tyagi, who was against Caste-based Reservation, said in the constituent Assembly that:- “I would suggest that in the place of the Scheduled Caste, the landless labourers, the cobblers or those persons who do similar jobs and who do not get enough to live, should be given special reservations ... Let cobblers, washermen and similar other classes send their representatives through reservations because they are the ones who do not really get any representation.” Even when Mahavir Tyagi advocated for economic criteria, it was different from the economic criteria in the 103rd constitutional amendment act because he did not rely “on income or wealth as indicators of disadvantage. He was focused on occupational communities and classes of labourers”.¹³³ Similarly, Jerome D’Souza also was against Caste based Reservation. He argued that a reservation ought to be provided based on “individual deficiencies and need, bearing, no doubt in mind the social background.” D’Souza added, “A man is to be assisted because he is poor, because his birth and upbringing have not given him the opportunity to make progress, socially, politically and educationally.”¹³⁴ So even Even those members who advocated for economic criteria for Reservation believed that it should be confined to the socially disadvantaged groups.

In 1951, during the deliberations of the First amendment to the Constitution, Jawaharlal Nehru said “that the amendment served the need to put an end to all those infinite divisions that have grown up in our social life or in our social structures ... We may call them by any name you like, the caste system or religious divisions.” KT Shah, had proposed using economic criteria for determining backwardness and to identify individuals rather than classes as beneficiaries of reservation.

The true purpose behind the reservations, as reaffirmed by the Supreme Court in Jaishri Laxmanrao Patil V. The Chief Minister¹³⁵ is that “backward class should also be put in main stream to enable to share power of the state”. B. R. Ambedkar essentially believed that reservations should be Caste-based because the legal prohibition of untouchability would not alone end discrimination against the

¹³³ Malavika Prasad “From the constituent assembly to the Indra Sawhney case, tracing the debate on economic reservations”, “available at:<https://caravanmagazine.in/law/economic-reservations-constituent-assembly-debates>” (last accessed on August 29,2021)

¹³⁴ Constituent Assembly Debates On 25 May, 1949, available at:<https://indiankanoon.org/doc/790979/?type=print> (last accessed on August 29, 2021)

¹³⁵ 2021 (3) KLT 465 (SC)

lower castes. While enacting quotas on an economic basis by excluding SC and STs implies that “Caste is not necessarily an indicator of social backwardness, and reservations are not meant to remedy Caste-based discrimination”.

5.3.Object and Features of One Hundred and Third Constitution Amendment Act

There has been a hue and cry to abolish caste-based reservation and use the economic criteria across the globe. Even U.S. Supreme Court Justices, before ascending the bench, has expressed support for economic criteria for Affirmative action.¹³⁶ The supporters of economic-based Affirmative action worldwide can be divided into two.

1. Those who view economic-based affirmative action as an alternative to caste/race-based reservation due to the prevailing legal and political climate and
2. Those who consider economic-based reservation because it responds directly to "burdens that have been unfairly placed in ... individual's paths."¹³⁷

The first argument favouring economic-based reservation does not hold good for a country like India, where the Constitution explicitly provides for caste-based reservation. However, it holds good in Affirmative Action in the United States, where the reservations are legitimised by interpreting the equal protection clause in the fourteenth amendment. Moreover, in the case of the U.S., unlike India, there is greater judicial scrutiny of race-based reservation, and public support also favour economic reservation.

Following are the objectives identified for providing for a ten per cent quota for Economically Weaker Sections.¹³⁸

1. Inadequate representation of Economically weaker sections in higher educational institutions and public employment owing to their financial incapacity. “The benefits of existing reservations under clauses (4) and (5) of Article 15 and clause (4) of Article 16 are generally unavailable to them unless they meet the specific criteria of social and educational backwardness”.

¹³⁶ Antonin Scalia, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race,”* 1979 WASH. U. L.Q. 147, 156

¹³⁷ Richard H. Fallon Jr., “Affirmative Action Based on Economic Disadvantage,” 43 UCLA L. REV. 1914 (1996).

¹³⁸ THE CONSTITUTION (ONE HUNDRED AND TWENTY-FOURTH AMENDMENT) BILL, 2019, available at [https://prsindia.org/files/bills_acts/bills_parliament/2019/Constitution%20\(124th%20Amendment\)%20Bill,%202019_0.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2019/Constitution%20(124th%20Amendment)%20Bill,%202019_0.pdf) (last accessed on August 30, 2021)

2. Article 46 of the Constitution mandates 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”. Under the Constitution, reservation is provided for “socially and educationally backward classes of citizens, the Scheduled Castes, the Scheduled Tribes”, in relation to their admission in higher educational institutions and backward class of citizens are provided reservation of appointments or posts. However, economically weaker sections were not provided with any reservation; 103rd amendment act tries to remedy this and thus fulfil the mandate of Article 46

The Constitution 103rd Amendment Act inserted clause 6 to Articles 15 and 16. Article 15(6) empowers “the State to make any special provision for the advancement of any economically weaker sections of citizens, including in matters relating to admission to educational institutions, including private educational institutions (aided and unaided), excluding the minority educational institutions”. Article 16(6) empowers “the State to make any provision in favour of economically weaker sections of citizens for reservation of appointments or posts”. Reservation under Article 15(6) and Article 16(6) is in addition to the existing reservation, excluding the backward class of citizens, socially and educationally backward class of citizens (creamy layer), Scheduled Castes and Scheduled tribes and is capped at ten per cent.

According to the "Office Memorandum no. 20013/01/2018-BC-II dated January 17, 2019¹³⁹, of the Ministry of Social Justice and Empowerment, Government of India, only persons whose families” possess the following conditions are eligible for Economic reservation:-

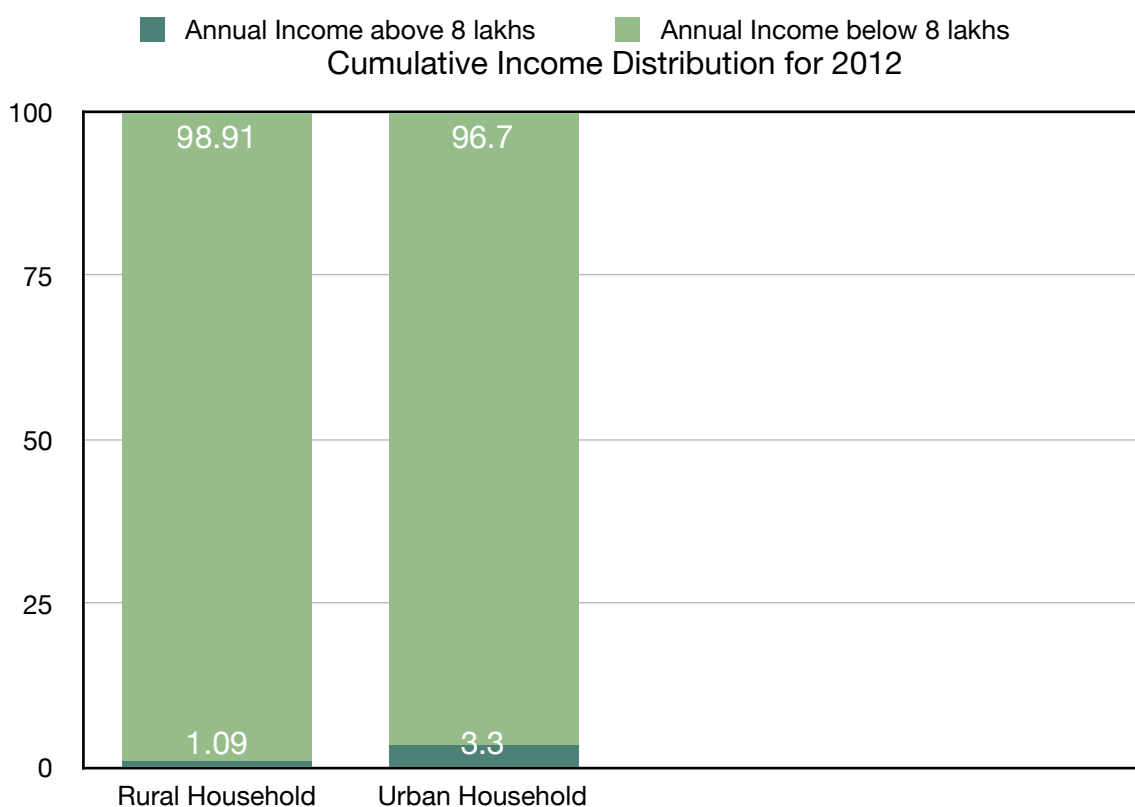
- “Gross annual income should be less than Rs. 8 lakhs”
- “Agricultural land less than 5 acres”
- “Residential flat less than 1000 sq. ft”
- “Residential plots less than 100 sq. yards in notified Municipalities, or
- Residential plots less than 200 sq. yards in areas other than notified Municipalities,”

¹³⁹ “Office Memorandum no. 20013/01/2018-BC-II dated January 17, 2019” available at : https://iimv.ac.in/images/OM_on_EWS_of_MSJE.pdf (last visited on August 30, 2021)

The 1991 Office memorandum pursuant to the Mandal commission report is the only precedent to the provisions of the 103 rd Constitutional amendment act providing for upper caste reservation.

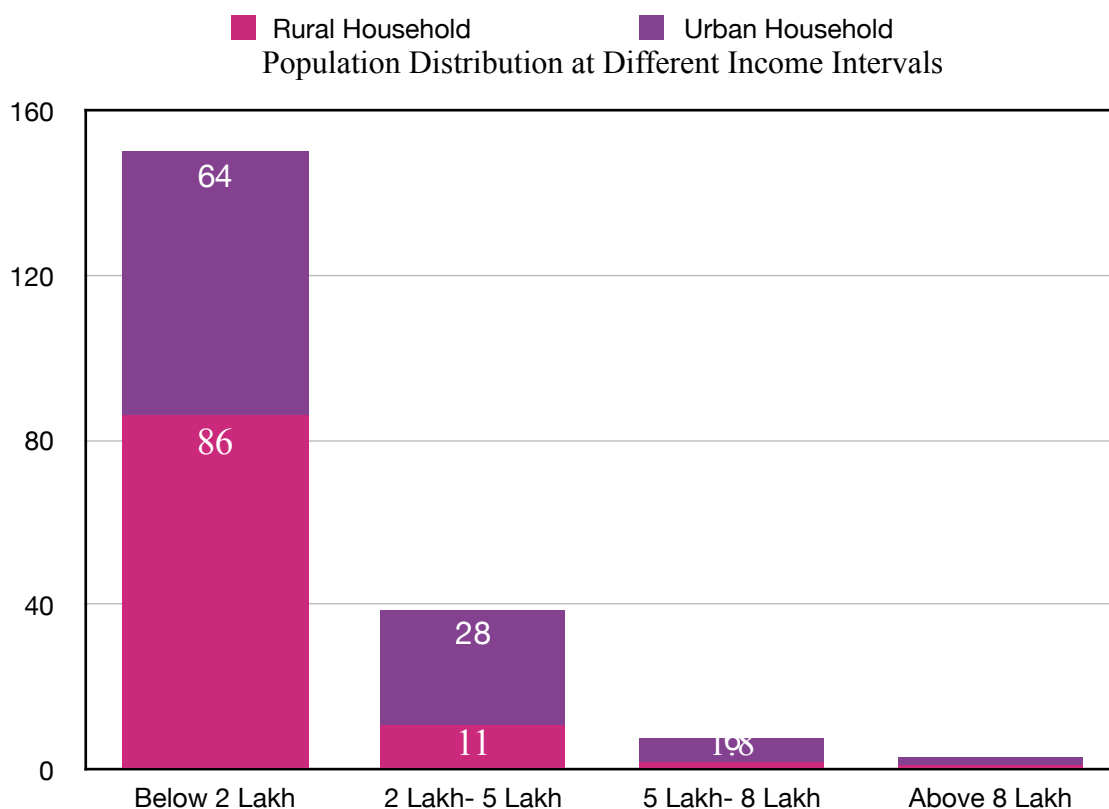
5.4. Implementation of 10 percent Quota

The implementation of 10 percent quota is going to be puzzling. If the objective of economic reservation is considered to be adequate representation of the economically backward in educational institutions and public employment, we can see that based on the data collected from 445 higher education institutions the students belonging to the EWS category are already well represented. In the study, “published in the Economic and Political Weekly, Bheemeshwar Reddy and others” found “that of all the 1.6 million students enrolled in these institutions in 2016-17, 28% (455,000) belonged to the economically backward class”.¹⁴⁰



¹⁴⁰ Vishnu Padmanabhan, “Why the 10% quota may not make sense”, available at <https://www.livemint.com/news/india/why-the-10-quota-may-not-make-sense-1560423749061.html> (last visited on August 30, 2021)

The Criteria enacted by the government to be eligible for economic criteria encompasses the majority of general category citizens. According to the survey conducted by the IHDS in 2012, 98.91 percent of the rural population and 96.7 percent of the urban population is below the annual household income cutoff of Rupees 8 lakhs.¹⁴¹ If we look at the distribution of rural and urban population in different income intervals. We can see that the annual gross income of 86 Percent of rural and 64 percent of the urban population was below two lakhs.¹⁴² So ideally if the 10 percent quota is to be effective it must target the population worst effected. Unless and Until the lowest rung among the EWS get the benefit of reservation, the whole objective of 10 percent quota fails. There are chances for the ‘well of ‘citizens in the EWS category i.e the minimal 28 percent and 11 percent in rural and urban household with annual income between 2 lakh and 5 lakhs and also the minimal population with gross income above 5 lakhs reaping the maximum benefits of job and education reservation and depriving the lowest rung of EWS from this benefit. Also since the percentage of most economically backward i.e population with gross annual income below 2 lakhs is three times that of the urban population, the rural population must get higher preference.



¹⁴¹ Vani S kulkarni, Raghav Gaiha “Reservations based on economic deprivation are an aberration” available at <https://www.livemint.com/opinion/online-views/opinion-reservations-based-on-economic-deprivation-are-an-aberration-1549560469870.html> (last visited on August 30, 2021)

¹⁴² ibid

5.4.1 Poverty and Economic Reservation

If the intention of the Parliament by enacting economic reservation is alleviation of poverty. It is necessary to understand the disadvantages associated with poverty. Any ideal reservation based on economic criteria should be able to minimise the disadvantages associated with poverty. Some of the disadvantages associated with Poverty are¹⁴³ :-

- Obstacles to physical health and development: Poverty can have adverse effects on adequate nutrition, clothing and medical care. The effects of this disadvantage would be the most severe on a child. The Scar on a child who is subjected to inadequate nutrition, clothing and medical care would only get deeper with age.
- Impediments to intellectual development: Extreme poverty can obstruct the intellectual development of children. Lack of money will affect the nurturing of child and the way the child is brought up.
- Economic disadvantages can have adverse effects in character and work habits of an individual.

Besides, there are many other difficulties which is peculiar to each stage of life , be it getting proper medical care, lack of higher educational opportunities, and so forth. All the listed disadvantages although associated with poverty need not be caused by poverty. Sometimes a person belonging to a poor family can grow in a nurturing environment, and sometimes a person belonging to a rich family can suffer from the listed disadvantages associated with poverty. So, this raises an important question that whether reservation should be based solely on economic criteria or a further inquiry should be conducted to as to the presence or absence of disadvantages in the nature listed above which are associated but need not have arisen from poverty.¹⁴⁴ Also, “many of the disadvantaging conditions associated with poverty specifically involve childhood poverty, not present economic status.” As a result, present economic status as measured, for example, by an Annual income of family would not be a good basis to identify the economic disadvantage which the 10 percent quota seeks to compensate.

However it is important to keep in mind that Reservations cannot be seen as anti-poverty measure. “Reservation is not a magic wand, it does not create jobs and it does not eliminate poverty. Reservation is a policy to desegregate the elite and to make the social base of decision-makers more

¹⁴³ Supra note 137

¹⁴⁴ ibid

representative of the underlying social distribution, something that reservation for upper castes does not achieve, as they are already well-represented among the elite.”¹⁴⁵

5.5. 103rd Constitutional Amendment Act - Legal Aberrations

The matter of reservations has been a topic of tussle between the Parliament and judiciary. Legal history shows us that Parliament has nullified the effect of adverse judicial pronouncements on reservations through constitutional amendments. E.g. In *Indra Sawhney V. Union of India*¹⁴⁶ Supreme Court nullified Reservation in promotions in favour of SC and ST , capped the Reservations at 50 percentage including the carry forward vacancies. In reaction to this, the Parliament enacted 77th constitutional amendment to provide Article 16(4-A) which provided Reservation in promotion for Scheduled Caste and Schedules Tribe employees and 81st constitutional amendment which inserted Article 16(4B) which excluded the carry forward vacancies from the 50 percent limit respectively. Article 16 (4A) was amended once again “by the Constitution (85th Amendment) Act, 2001, providing for the grant of consequential seniority to them on promotion,” thus nullifying the decisions of Supreme Court in “*Union of India v. Virpal Singh Chauhan*”¹⁴⁷ and “*Ajit Singh v. State of Punjab*”¹⁴⁸

One Hundred and Third Constitutional amendment act is the latest entry to this area to overcome the Supreme Court's bar on economic criteria for backwardness and the 50 per ceiling on total reservations. In *M. Nagaraj V. Union Of India*¹⁴⁹, the Supreme Court examined the Constitutionality of the 77th, 81st, 82nd and 85th Constitutional Amendments and has explained the standard of judicial review of constitutional amendments as “ "In order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and, as such, binding on the legislature. Only then, it can be examined whether it is so fundamental as to bind even the amending power of the Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure.”

145 Ashwini Deshpande and Rajesh Ramachandran “The 10 percent quota , Is Caste Still an Indicator of Backwardness?” 54 *Economic and Political Weekly* (2019)

¹⁴⁶ AIR 1993 SC 477

¹⁴⁷ AIR 1996 SC 448

¹⁴⁸ AIR 1996 SC 1189

¹⁴⁹ 2006 (8) SCC 212

“In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the width test and the test of identity.” While applying the width test, the court analyses the "boundaries of the amending power and whether any of the constitutional requirements have been violated by the amendments". The Supreme Court in Nagaraj identified the “50 per cent ceiling, the concept of creamy layer, the backwardness , the inadequacy of representations and the overall administrative efficiency as constitutional requirements for providing Reservation”. Under the identity test, the court examines “whether the amendment has altered the identity of Constitution beyond recognition”. The Court observed that “We reiterate that the ceiling-limit of 50 per cent, 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”.

We can list the following as the legal shortcomings of the 103rd Constitutional amendment act.

5.5.1 Inconsistency with Articles 15 and 16

In M. Nagaraj, the supreme court reiterated that for being eligible to Reservation under Article 15(4), the class in addition from “being socially backward must be educationally backward” too and to be eligible for Reservation under Article 16(4), in addition to being backward the class should not be adequately represented in state services. No such conditions are attached to the Reservation provided under Articles 15(6) and Article 16 (6), which makes it inconsistent with Articles 15 and 16.¹⁵⁰ In M.Nagaraj the Supreme Court has identified these conditions as essential constitutional requirements for being eligible for Reservation. The non-obstante clause in Article 15(6) and Article 16(6) will not save the Reservation from the conditions set in M Nagaraj case. There cannot be any reservation inconsistent with Articles 15 and 16, and the non-obstante clause will not make articles 15 (6) and 16(6) independent provisions.

In Indra sawhney while striking down the O.M providing for ten per cent reservation to the economically weaker section, the supreme court observed that “Reservation of 10 per cent of the vacancies among open competition candidates on the basis of income/property-holding means exclusion of those above the demarcating line from those 10 per cent seats”.

¹⁵⁰ K. ASHOK VARDHAN SHETTY, “Can the Ten per cent Quota for Economically Weaker Sections Survive Judicial Scrutiny?” “ available at <https://www.thehinducentre.com/publications/policy-watch/article26436396.ece> (last visited on August 30, 2021)

“The question is whether this is constitutionally permissible? We think not. It may not be permissible to debar a citizen from being considered for appointment to an office under the State solely on the basis of his income or property-holding. Since the employment under the State is really conceived to serve the people (that it may also be a source of livelihood is secondary) no such bar can be created. Any such bar would be inconsistent with the guarantee of equal opportunity held out by clause (1) of Article 16. On this ground alone, the said clause in the Office Memorandum dated 25.5.1991 fails and is accordingly declared as such.” . As Gautam Bhatia observes, “the scheme of Articles 14, 15 and 16 is one that acknowledges the historical fact that in India, *group membership* has been the primary basis of institutional and structural disadvantage. One’s access to opportunity and chances of social and economic mobility have been mediated by one’s group identity – and primary, that identity has been structured around caste. The logic of reservation in India – and this dates back to pre-Independence times – has, consequently, always been that while the *right* to equality is an individual right, the only method of *achieving* substantive equality at an individual level is to *take into account* the disadvantages and barriers that exist on account of groups (and specifically, caste groups).”¹⁵¹

5.5.2 The Statement of Objective and Reason

The Statement of Object and reasons cite fulfilling the mandate of Article 46 as one of the objectives of the 10 per cent quota. Article 46 enjoins 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”. According to the Statement of Object and reasons, since there exists Reservation in favour of SC and ST, the 103rd constitutional amendment was enacted to provide for Reservation to the economically weaker section and “to ensure that economically weaker sections of citizens get a fair chance of receiving higher education and participation in employment in the services of the State”, and thus fulfil the mandate of Article 46. However, while Article 46 collectively speaks of weaker sections of people, Scheduled Castes and Scheduled Tribes, the 10 per cent quota excludes Scheduled Castes and Tribes from the purview of economic Reservation.¹⁵²

¹⁵¹ Gautam Bhatia, “Is the 103rd Amendment Unconstitutional? available at <https://indconlawphil.wordpress.com/2019/01/13/is-the-103rd-amendment-unconstitutional/> (last visited on August 30 , 2021)

¹⁵² Supra note 149

Also, applying the Ejusdem Generis principle, a general term like 'weaker sections' in article 46 must be given a restricted meaning to include only those categories similar to the particular terms of Scheduled Castes and Scheduled Tribes.¹⁵³ Besides there are many anti poverty programmes, scholarships, and grants aimed at ensuring the educational and economic interest as mandated in Article 46 and Reservation, a measure of exceptional character should be the last resort.

5.5.3. Lack of empirical data

The Government has not relied on any empirical data to conclude that Economically weaker Sections are inadequately represented in higher educational institutions and public service due to their financial incapacity. However, contrary data is available that shows that the economically weaker actions are well represented in higher educational institutions .¹⁵⁴ The Supreme court in Indra sawhney and M Magaraj has reiterated the importance of quantifiable data while providing for reservations.

5.5.4. Treats Unequals Equally

By including an income limit of up to eight lakhs , which is the same income limit prescribed for designating the creamy layer among the OBC, the Parliament has made the economically weaker sections, and the Non-Creamy Layer among the OBC Equals. While a person belonging to OBC, to be eligible for Reservation under Article 15(4) need to prove that he is “socially and educationally backward” in addition to below the income limit of eight lakhs, a person falling under the EWS to be eligible for Reservation under Art.15(6) need to prove only that his annual family income is below eight lakhs.

5.5.5. Exceeds Fifty percent Ceiling

Time and again supreme court has reiterated the importance of capping reservations at fifty percent. As the political theorist Partha Chaterjee notes .. "once the 50% limit is gone, the ground for Reservation is no longer that of providing social justice to a minority group which has been

¹⁵³ Ibid.

¹⁵⁴ Supra note 140

historically discriminated against (which was Ambedkar's central argument) but a measure to alleviate the economic deprivation of a majority of the population. If this argument gains currency and force, it could seriously undermine the original principle of Reservation as an instrument to alleviate the collective social discrimination faced by certain caste groups. In fact, the principle of individual entitlement could then be wielded to altogether dismantle caste reservation and institute a universal rule of individual verification of economic status".¹⁵⁵ In *Indira Sawhney v. Union of India* the court adopted a middle ground between *M.R Balaji* and *N.M Thomas*. Regarding the rationale laid down in *N.M Thomas* the Supreme Court ruled that: "We hold that clause (4) of Article 16 is not an exception to Clause (1) of Article 16. It is an instance of classification implicit in and permitted by Clause (1). . . It is a provision which must be read along with and in harmony with clause (1). Indeed, even without Clause (4), it would have been permissible for the State to have evolved such a classification and made a provision for Reservation of appointments/posts in their favour. Clause (4) merely puts the matter beyond any doubt in specific terms." The Supreme Court also upheld the 50 per cent ceiling and said: "Just as every power must be exercised reasonably and fairly, the power conferred by Clause (4) of Article 16 should also be exercised in a fair manner and within reasonable limits – and what is more reasonable than to say that Reservation under Clause (4) shall not exceed 50% of the appointments or posts, barring certain extra-ordinary situations as explained hereinafter... The provision under Article 16(4) - conceived in the interest of certain sections of society - should be balanced against the guarantee of equality enshrined in clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society. It is relevant to point out that Dr Ambedkar himself contemplated Reservation being confined to a minority of seats". "No other member of the Constituent Assembly suggested otherwise. It is, thus clear that Reservation of a majority of seats was never envisaged by the founding fathers. From the above discussion, the irresistible . . . conclusion that follows is that the Reservation contemplated in clause (4) of Article 16 should not exceed 50%". In the latest judgment of Supreme Court in *Jaishri* , the Supreme Court again reiterated the importance of 50 percent ceiling limit. The Court observed that the "50 percent rule spoken in *Balaji* and affirmed in *Indra Sawhney* is to fulfil the objective of equality as engrafted in Article 14 of which Articles 15 and 16 are facets. 50 percent is reasonable and it is to attain the object of equality. To change the 50 percent limit is to have a society which is not founded on equality but based on caste rule".

¹⁵⁵ "The 10% Reservation Is a Cynical Fraud on the Constitution available at <https://thewire.in/government/the-10-reservation-is-a-cynical-fraud-on-the-constitution>" (last visited on August 30, 2021)

5.5.7 Standard and Limits of Basic Structure Review

Since the 103rd Constitutional amendment will be subject to basic structure review, it is necessary to understand the standard and the limits of review under the Basis Structure Doctrine.

The Supreme Court in *State of Karnataka V. Union Of India*¹⁵⁶ observed that “In *Kesavananda Bharti's* case this Court had not worked out the implications of the basic structure doctrine in all its applications. It could, therefore, be said, with utmost respect, that it was perhaps left there in an amorphous state which could give rise to possible misunderstandings as to whether it is not too vaguely stated or too loosely and variously formulated without attempting a basic uniformity of its meanings or implications”. Thus we can infer that the Basic Structure doctrine propounded in the *Kesavananda Bharati* case is always evolving and it is the duty of the supreme court to broaden the contours of the doctrine in tune with the changing social circumstances.

In *Kesavananda Bharati*, Justice Sikri held that “The expression ‘amendment of this Constitution’ does not enable Parliament to abrogate or take away, fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity”¹⁵⁷. According to Justice Khanna: “The power of amendment under Article 368 does not include power to abrogate the Constitution nor does it include the power to alter the basic structure or framework of the Constitution”¹⁵⁸. While Justices Hegde and Mukherjea held that the power of amendment did not include “the power to destroy or emasculate the basic elements or the fundamental features of the Constitution”¹⁵⁹. These opinions can be construed to limit the boundaries of amendment power in three ways: “First, when a constitutional amendment abrogates the entire constitution; second, when a constitutional amendment damages or destroys a basic feature of the constitution; and third, where the challenged amendment, in sikri’s words, threatens the very identity of the constitution”.¹⁶⁰

The limits of Basic Structure doctrine was further expanded by the supreme Court in *Indira Gandhi V. Raj Narain*¹⁶¹. The Court identified different types of basic structure review of constitutional amendments, namely “an extension of Article 13 type judicial review for compliance with

¹⁵⁶ AIR 1978 SC 68

¹⁵⁷ *Kesavananda Bharati V. State of Kerala*, (1973) 4 SCC 225

¹⁵⁸ *ibid* at 824

¹⁵⁹ *ibid* at 512

¹⁶⁰ Sudhir Krishnaswamy, *Democracy and Constitutionalism in India : A study of the Basic Structure Doctrine* 74 (Oxford India Paperbacks, New Delhi, 1st Edition , 2009)

¹⁶¹ AIR 1975 SC 2299

fundamental rights to constitutional amendments, or an independent form of judicial review”.¹⁶² Justice Chandrachud observed: "These provisions (clauses 4 and 5 of Art.329A) are an outright negation of the right of equality conferred by Article 14 a right which more than any other is a basic postulate of our Constitution.....This Court, at least since the days of Anwar Ali Sarkar's case, has consistently taken the view that the classification must be founded on an intelligible differential which distinguishes those who are grouped together from those who are left out and that the differential must have a rational relation to the object sought to be achieved by the particular.....It follows that clauses (4) and (5) of Article 329 A are arbitrary and are calculated to damage or destroy the rule of law.” Justice Chandrachud applied the same test of doctrine of classification and the intelligible differentia test applied since the case of Anwar ali sarkar to the 39th amendment to examine whether clauses 4 and 5 of Art.329 A are violative of Equality. Thus in Indira Gandhi V. Raj Narain case the supreme court extended the limits of basic structure review to include a test of compliance of fundamental rights as an extension of judicial review under Art.13. This was further expanded in In I.R Coelho V. State of Tamil Nadu, in which Justice Sabharwal concluded that the basic structure test would examine “the nature and extent of infraction of a Fundamental Right by a statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the ‘rights test’ and the ‘essence of the right’ test”. We can conclude that the 103rd constitutional amendment can be reviewed for violation of fundamental rights and since the limits of basic structure review has been extended by the subsequent judgments of Indira Gandhi V. Raj Narain, the Minerva Mills case, IR coelho case and the Nagaraj Case the reason for which the executive order providing for ten percent reservation was struck down in Indra sawhny would hold good in the case of 103rd Constitutional amendment also.

An alternative approach to review of constitutional amendments is the “substantive analysis of whether the challenged constitutional amendments damage or destroy the basic structure of the Constitution”.¹⁶³ When the court is engaged in basic structure review it is not concerned whether the constitutional amendment affects any of the fundamental rights. The Court “examines whether the challenged amendments damage the basic features to the extent that it can be claimed that the constitutional identity has been irrevocably altered. Another approach is analysing constitutional amendment on the basis of its historical background. In Waman Rao, while analysing Articles 31-A, 31-B, and 31-C the court observed that “These questions have a historical slant and content : and

¹⁶² Supra note 160 at 71

¹⁶³ ibid at 83

history can furnish a safe and certain clue to their answer”.¹⁶⁴ Applying the historic test , courts can go into the true purpose of reservations, how it evolved and the conditions that prevailed when reservation was first introduced and test the 103rd Constitutional amendment on these grounds.

5.6 Conclusion

Reservations, as a type of affirmative action was supposed to be a tool for ensuring substantive equality along with formal equality. But often, especially in India, reservations has been used as a magic wand by the government to appease sections of citizens in return for their votes. The "Constitution One hundred and Third Amendment Act providing for ten percent quota” for the Economically Weaker Sections of Citizens appears to be a gimmick enacted for reasons other than the upliftment of the poor. If one were to examine the ten percent quota, beyond the true objective of reservations, the implementation of the same is going to be a huge hurdle for the government since the annual family income limit has been broadened upto eight lakhs. It is deeply disappointing, that the Parliament has failed to understand the essence of past supreme Court Judgements which caps reservation at fifty percent and has reiterated that reservations are not a poverty alleviating measure. The Supreme Court will be examining the Constitutionality of the amendment act in *Youth for Equality v. Union of India (WP (C) 73/2019)*, and laymen and the constitutional scholars across the globe are curious to know whether the amendments will pass the judicial muster especially since supreme court has been reluctant to strike down constitutional amendments. As Gautam Bhatia observes, “Contrary to the beliefs of basic structure critics, who see the doctrine as some kind of Damocles Sword that errant judges are always threatening to drop upon the neck of democracy, the Supreme Court has almost never *used* basic structure to invalidate constitutional amendments. The high-profile striking down of the NJAC notwithstanding, in the forty-five years since *Kesavananda Bharati*, the doctrine has been used on an average of once in a decade. And in the seventy-four constitutional amendments after *Kesavananda*, only five have been struck down on substantive basic structure grounds (a strike rate of around 7%).”¹⁶⁵

¹⁶⁴ AIR 1978 SC 280

¹⁶⁵ Gautam Bhatia, “Is the 103rd Amendment Unconstitutional? available at <https://indconlawphil.wordpress.com/2019/01/13/is-the-103rd-amendment-unconstitutional/> (last visited on August 30 , 2021)

CHAPTER 6: CONCLUSION AND SUGGESTIONS

“But a bird that stalks down his narrow cage
can seldom see through his bars of rage
his wings are clipped and his feet are tied
so he opens his throat to sing.

The caged bird sings with a fearful trill
of things unknown but longed for still
and his tune is heard on the distant hill
for the caged bird sings of freedom.”

- Caged Bird by Maya Angelou

The above excerpts from Maya Angelou’s Caged Bird, describes two birds. One Bird is happy and free while the other is caged. The caged bird sings to relieve its sufferings and expresses its hope for freedom. Through this poem Maya Angelou portrays the privileges and entitlements of the un-oppressed and the discrimination and sufferings of the oppressed classes. The Indian Constitution has heard the song of desperation of the depressed classes and enacted provisions to minimise the differences our society. The Concept of reservations in the Indian Constitution is an attempt at reducing the inequalities people suffered and still suffer in our society. Reservations were envisaged as an extraordinary measure to be applied only to a minority of seats. But over time , reservation transformed in its object, often displaying shades of anti poverty programmes. It is high time we regulate the reservations in our country and reduce its proportion only to cover those case which suffer from systemic and historic injustices.

Chapter 2 traces the history of reservation system in India from the Pre- Independence period. One of the peculiar and distinct features of our country is the Caste System. There are about 4000 castes and subcastes in our country. The “positions in the caste hierarchy are often conceptualised in terms of the theoretical division of Hindu society into four classes or varnas”. The consequences of the Caste System is that, the status of Caste in the hierarchy is reflective of it’s Social and Economic

Power. Castes has peculiar customs and tradition exclusive to it. According to the Varna theory, “society is divided into Brahmins, the priestly and scholarly class; Kshatriyas, rulers and soldiers; Vaishyas, merchants and agriculturists; and Sudras, the menial and servant class” .¹⁶⁶ Outside of these Varna Castes are the Avarna Castes,-the untouchables. In the Princely State Of Mysore, reservation was provided for backward classes in 1874 this could be deemed as the first reservations in India. It had "reserved 20 percent of lower and middle level posts in the Police department for Brahmins and the remaining 80 percent for non- Brahmins, Muslims, and Indian Christians". The State Of Mysore from 1918 designated “all communities other than Brahmins as Backward Classes and reserved seats for them in Educational institutions and Public Services”. This could be deemed as the origin of the Modern Communal Quota System. The Government Of India Act 1909, The Government Of India Act 1919, Poona Pact of 1932 were instrumental in providing political representation to Indians and these acts also sowed the seeds of Reservation in political arena. In the Indian Council Act 1909, “The Muslims, Landholders and various commercial interests were given the Right to elect representatives from their communities to the Legislative Councils in British India.” The Government of India Act 1919 continued a separate electorate for “religious groups and established a nomination system of a few representatives from the depressed classes”. Consequent to the poona pact “151 seats were reserved in favour of depressed classes in provincial assemblies with joint electorates. The Poona Pact also provided for 18 percent of seats in the Central Legislature to be reserved for the depressed classes”. In the pre independence era, reservations were a measure of ensuring political representation for different communities. However post independence, reservations were provided for ensuring adequate representation of backward classes in Educational institutions and Public employment.

The Third chapter analyses the scope and nature of reservations. The rationale for Affirmative action is that “given systematic and multifaceted discrimination against certain groups , the normal process of development might not automatically close the gaps between the marginalised and dominant groups because dominant groups will disproportionately corner the fruits of development”.¹⁶⁷ Thus Affirmative Action programme refers to “the policies aimed at addressing the problems of the historically and socially deprived sections of society”. Theoretical Foundations for Affirmative Action programme can be provided in the Principles Of Distributive Justice. The Rawlsian theories

¹⁶⁶ Marc Galanter, *Competing Equalities , Law and The Backward Classes In India 9* (University Of California Press, United States Of America, 1st Edition ,1984)

¹⁶⁷ Ashwini Deshpande , *Affirmative Action in India 9* (Oxford University Press , New Delhi,1st Edition, 2013)

of Justice and Equality have been applied to justify different forms of affirmative action. Rawls idea of equality is no different from the equality of opportunity that the constitutional framers believed in. Articles 14 to 18 of the Constitution guarantees the “right to equality to every citizen”. In India’s Socio-Political system, Equality has been given an important position. The perceived inequalities which India has inherited from its past, especially the caste system, must have prompted the draftsmen to accord principles of Equality a vital position in the Constitution. Till the N. M Thomas decision, Article 16(1) was considered to provide for formal equality and 16(4) as an exception provides for substantial equality. The same implied that reservations are an extraordinary measure, and they can be used only to correct the injustice caused due to historical discrimination. But in NM thomas it was held that both formal equality and substantial equality are contained in article 16(1) itself and the resultant equality provides for preferential treatment. The concept of reservation recognises the initial social and educational handicaps that affect a certain category of persons and which causes them to occupy a disadvantageous position in society and moves away from the standard procedure of meritocratic selection as demanded by formal equality in order to ensure substantive equality.

In the Fourth chapter a study is conducted as to the beneficiaries of reservation and to find an answer to the question:-what should be the criteria for reservation? Should it be based either on the social status as reflected by the caste, economic status, or both? The Beneficiaries, as identified by the Constitution apart from “Scheduled Castes and Scheduled Tribes”, are “Backward Class of Citizens”. The most elaborate effort to identify untouchables was made by “J.H Hutton, the 1931 Census Commissioner”. He proposed a series of tests to identify untouchable communities, which were designed around the incidence of disabilities. As the Constituent Assembly debated the use of the term ‘backward’, the final agreement was that “the backward classes other than the SCs and STs would be designated at the local level”. The First Backward Classes Commission prepared a list of 2399 groups, and identified castes or communities as backward Class based on the basis of “trade and occupation, security of employment, educational attainment, government service representation, and social hierarchy position”. The Second Backward classes commission under the chairmanship of Sri B.P. Mandal used “11 social and economic criteria indicators, which were grouped under three heads: social, educational, and economic”. Based on this, Commission identified “3,743 caste groups as backward, which were 52 per cent of the population”. The Majority judgment in Chitralakha clarified that social backwardness can also be determined on the basis of criteria other than caste and such a determination will not be void if it ignores caste. Thus

caste can be a relevant circumstance in ascertaining social backwardness, but it cannot be the sole or the dominant test on that behalf. In the case of Sagar the supreme court slightly altered its position from Balaji and Chitralkha by ruling that in determining class, caste cannot be excluded but at the same time class cannot be determined solely on the basis of caste. The decision of Supreme Court in Janaki Prasad Parimoo has great significance because this is one of the judgments in which the social significance of reservation as a measure which tries to remedy accumulated disadvantages rather than a poverty alleviating measure can be witnessed. Justice Raveendran's judgment in Ashok Kumar Thakur V. Union Of India and Ors, points out correctly all that is currently wrong with the reservation system in our country. While realising the true purpose of the reservation, he shares apprehensions regarding the misuse of reservations by the political class of our country. The Judgment realises the importance of the need to revise the beneficiaries of reservation periodically. Any reservation which is made on sole caste or economic basis other than the reservation in favour of the Scheduled Castes and Scheduled Tribes will not amount to reasonable classification under Art. 16(1). In Indra Sawhney, the Supreme Court struck down the 10 percent reservation by stating that even though Art.16(1) permits classification on the basis of economic criterion, it would be discriminatory to except the backward classes from its purview, since the very object of the economic reservation is alleviation of poverty. It is to bypass this legal hurdle that the government has now come up with the 103rd Constitution amendment act providing for 10 percent economic reservation. An analysis of judicial decisions will establish the fact that the court never preferred caste or economic criterion as the sole criterion for providing for reservations.

In the fifth chapter the Constitution One Hundred and Third Amendment Act is critically analysed. The amendment empowered the state to provide up to 10 per cent reservation in education and public employment for economically weaker sections (EWS) of citizens other than the Scheduled Castes (SC), the Scheduled Tribes (ST), and the non-creamy layer of the Other Backward Classes". One of the objects of enacting the constitutional amendment is the "Inadequate representation of Economically weaker sections in higher educational institutions and public employment owing to their financial incapacity". But based on the data collected from 445 higher education institutions the students belonging to the EWS category are already well represented. In the study, published in the "Economic and Political Weekly, Bheemeshwar Reddy and others" found that "of all the 1.6 million students enrolled in these institutions in 2016-17, 28% (455,000)

belonged to the economically backward class.”¹⁶⁸ The 103rd Constitutional amendment intends to overcome the ratio in Indra Sawhney that Economic backwardness cannot be the sole criteria for reservation and that reservations must not exceed fifty per cent. The implementation of 10 percent quota is going to be puzzling since the the Criteria enacted by the government to be eligible for economic criteria encompasses the majority of general category citizens. According to the survey conducted by the IHDS in 2012, 98.91 percent of the rural population and 96.7 percent of the urban population is below the annual household income cutoff of Rupees 8 lakhs.¹⁶⁹ The amendment act suffers from various legal infirmities. In *M. Nagaraj V. Union Of India*¹⁷⁰, the Supreme Court examined the Constitutionality of the 77th, 81st, 82nd and 85th Constitutional Amendments and has explained the standard of judicial review of constitutional amendments as “In order to qualify as an essential feature, a principle is to be first established as part of the constitutional law and, as such, binding on the legislature. Only then, it can be examined whether it is so fundamental as to bind even the amending power of the Parliament i.e. to form part of the basic structure of the Constitution. This is the standard of judicial review of constitutional amendments in the context of the doctrine of basic structure”. “In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the 'width test' and the test of 'identity'. While applying the width test, the court analyses the boundaries of the amending power and whether any of the constitutional requirements have been violated by the amendments”. “The Supreme Court in Nagaraj identified the 50 per cent ceiling, the concept of creamy layer, the backwardness , the inadequacy of representations and the overall administrative efficiency as constitutional requirements for providing Reservation”. Under the identity test, the court examines “whether the amendment has altered the identity of Constitution beyond recognition”. The supreme court will be reviewing the amendment act against the basic structure doctrine in *Youth for Equality v. Union of India*.

¹⁶⁸ Vishnu Padmanabhan, “Why the 10% quota may not make sense”, available at <https://www.livemint.com/news/india/why-the-10-quota-may-not-make-sense-1560423749061.html> (last visited on August 30, 2021)

¹⁶⁹ Vani S kulkarni, Raghav Gaiha “Reservations based on economic deprivation are an aberration” available at <https://www.livemint.com/opinion/online-views/opinion-reservations-based-on-economic-deprivation-are-an-aberration-1549560469870.html> (last visited on August 30, 2021)

¹⁷⁰ 2006 (8) SCC 212

SUGGESTIONS

1. Every civilised country in the world, adopts the merit principle to grant entry to educational institutions and for public employment. Deviation from the merit principle must be made only in exceptional circumstances. The inequalities existing in a society, due to systemic and historic discriminations amounts to an exceptional circumstance in which deviation from the merit principle can be adopted. Reservations, being a deviation from the merit principle must be only used exceptionally, should be confined to a minority of seats and the beneficiaries must be a class of citizens who otherwise for reservations would not be able to lead a life of substantive equality. Thus the government must make sure that reservations are granted only in exceptional circumstances and that too only for a minority of seats.
2. The reservations as a concept, although favours substantive equality, there can be adverse impacts on society if it is continued for ever. The government must periodically collect data as to the representation of the backward classes in public employment and revise the percentage of reservations . The government must periodically revise the beneficiaries of reservations based on the criteria of ‘adequate representation’ . While deciding the percentage of reservation the government must always remember that the aim is not proportional representation but that of adequate representation and should never exceed fifty percent. Once reservations exceed fifty percent, the delicate balance between substantive and formal equality would be disturbed.
3. The Government must gradually decrease the number of castes to be notified as Scheduled Castes. More stringent conditions must be adopted to identify Scheduled Castes and Tribes.
4. The Caste System has always been a problem for our country. If we are to bid farewell to the system of reservations forever the government must take pro active steps to create a casteless society. As B.R Ambedkar in Annihilation of Caste suggests “I do not believe that we can build up a free society in India so long as there is a trace of this ill-treatment and suppression of one class by another.” Jawaharlal Nehru in one of his speeches said “the government aims ultimately at removal of all these appellations, descriptions and names which ideologically and

physically separate the people as the Depressed Classes, the Harijans, the Scheduled Castes, the Scheduled Tribes, and so on....” But unfortunately post independence no major efforts has been taken by the government on this front.

5. The government must actively adopt other affirmative action measures such as Scholarships, Grants, health benefits, anti poverty programmes, employment guarantee programmes and so forth, to reduce the dependence on reservations. Programmes like the National Rural Employment guarantee program has played a pivotal role in securing employment to a large number of people, more programmes like these would go a long way in alleviating poverty.
6. The legal and social infirmities of Economic reservation aside, if the economic reservation is to have any impact, the government must reduce the annual family income necessary to fall in EWS category. Unless the government reduces the income slab the poor among the EWS will not be able to reap the benefits of ten percent quota.
7. The objective of economic reservation is considered to be the adequate representation of EWS in educational institutions and public employment. But there is empirical data available which shows that EWS are already well represented. Hence the government must make it compulsory to gather empirical data before providing any type of reservations. Further the government must conduct an impact assessment study to understand the improvements resulting due to reservations.
8. If poverty alleviation is deemed to be the objective of economic reservation, rather than focusing on the annual family income or extent of land holding as eligibility criteria, the government could adopt more specific measures. Rather than introducing blanket conditions, the government can adopt specific conditions separate for reservations in educational institutions and public employment.

BIBLIOGRAPHY

Books Referred

- Ashwini Deshpande , Affirmative Action in India 4 (Oxford University Press , New Delhi,1st Edition, 2013)
- Andre Beteile, Caste, Class and Power: Changing Patterns of Stratification in a Tanjore Village 46 (Oxford University Press, Delhi, 3rd Edition,1996)
- Marc Galanter, Competing Equalities , Law and The Backward Classes In India 9 (University Of California Press, United States Of America, 1st Edition ,1984)
- Arundhati Roy, The Doctor and the Saint (Penguin Publications, India, 2019)
- H.M Seervai, Constitutional Law Of India 551 (Law and Justice publishing Company,New Delhi,4th edition, 2021)
- M.P Jain, Indian Constitutional Law (Lexis Nexis Publications, 7th Edition , 2013)
- M.P Singh, V.N Shukla's Constitution Of India (Eastern Book Company, 13th Edition, 2021)
- Paramanand Singh, Equality,Reservation and Discrimination in India, 20-21 (Deep & Deep Publications, New Delhi ,1982).
- Michael Freeman, Lloyd's Introduction to Jurisprudence 481 (Sweet and Maxwell. South Asia, 9th Edition, 2021)
- Michael J Sandel , Justice , What's the Right Thing To Do ? 172 (Penguin Books , Great Britain, 1st Edition, 2009)
- Zia Mody, 10 Judgments that changed India 117 (Penguin Publications , India, 1st Edition, 2013)
- George H. Gadbois, Jr, 'Mandal and the other Backward Classes: Affirmative Action in India in the 1990s , Journal of law and social challenges, vol.1 (1997): p.71.
- Sudhir Krishnaswamy, Democracy and Constitutionalism in India : A study of the Basic Structure Doctrine 74 (Oxford India Paperbacks, New Delhi, 1st Edition , 2009)

Articles Referred

- S.R Maheswari, “Reservation Policy in India : Theory and Practice” 43 Indian Journal Of Public Administration 663 (1997)
- Francesca R. Jensenius, “Mired in Reservations: The Path-Dependent History Of Electoral Quotas in India” 74 The Journal Of Asian Studies 90 (2015)
- Bhagwan Das , “Moments in History Of Reservations” Economic and Political Weekly 3832 (October 28, 2000)
- Arpana Bansal , Reservation under the Constitution Of India : A Critique (2011) (Unpublished Ph.D thesis, Punjab University)
- Malavika Prasad, “From the constituent assembly to the Indra Sawhney case, tracing the debate on economic reservations”, available at <https://caravanmagazine.in/law/economic-reservations-constituent-assembly-debates> (last visited on March 27 , 2021)
- Ashwini Deshpande, “Affirmative Action in India and the United States” 1 EQUITY & DEVELOPMENT World Development Report 2006 Background Papers (January 2005)
- M. Varn Chandola, “Affirmative Action in India and the United States: The Untouchable and Black Experience”, 3 IND. INT’L & COMP. L. REV. 101, 118 (1992).
- AP Singh, “Affirmative Action Programme in India: The Road Ahead”, 1 J. INDIAN L. & Soc'y 153 (2009).
- Jed Rubenfeld, “Affirmative Action”, 107 Yale L.J. 427 (1997).
- Sameer Pandit, “Marginalisation and Reservation in India: An Analysis in the Light of Rawlsian Theories of Justice and Equality”, 1 Socio-LEGAL REV. 42 (2005).
- Parmanand Singh, Tension Between Equality and Affirmative Action: An Overview, 1 J. Jindal Global Law Review 100
- Sheela rai, “Social and conceptual background to to the policy of Reservation” 37 Economic and Political Weekly 4309 (2002)
- Kaleeswaram Raj, Thulasi K Raj, et.al., “Reservation as political imperative”, available at <https://frontline.thehindu.com/the-nation/reservation-as-a-political-imperative/article32404792.ece> (last visited on August 22, 2021)
- “Caste-based Reservation Is Compensation For Historical Exploitation And Marginalisation”, available at <https://www.outlookindia.com/website/story/opinion-caste-based-reservation-is-compensation-for-historical-exploitation-and-marginalisation/355100> (last visited on August 22, 2021)

- Kailash Jeenger, “Reservation Is About Adequate Representation, Not Poverty Eradication” available at <https://thewire.in/law/supreme-court-bench-reservation> , (last accessed on August 21, 2021)
- Antonin Scalia, “The Disease as Cure:” In Order to Get Beyond Racism, We Must First Take Account of Race,” 1979 WASH. U. L.Q. 147, 156
- Richard H. Fallon Jr., “Affirmative Action Based on Economic Disadvantage,” 43 UCLA L. REV. 1914 (1996).
- Vishnu Padmanabhan, “Why the 10% quota may not make sense”, available at <https://www.livemint.com/news/india/why-the-10-quota-may-not-make-sense-1560423749061.html> (last visited on August 30, 2021)
- Vani S kulkarni, Raghav Gaiha “Reservations based on economic deprivation are an aberration” available at <https://www.livemint.com/opinion/online-views/opinion-reservations-based-on-economic-deprivation-are-an-aberration-1549560469870.html> (last visited on August 30, 2021)
- Ashwini Deshpande and Rajesh Ramachandran “The 10 percent quota , Is Caste Still an Indicator of Backwardness?” 54 Economic and Political Weekly (2019)
- K. ASHOK VARDHAN SHETTY,” Can the Ten per cent Quota for Economically Weaker Sections Survive Judicial Scrutiny? “ available at <https://www.thehinducentre.com/publications/policy-watch/article26436396.ece> (last visited on August 30, 2021)
- Gautam Bhatia, “Is the 103rd Amendment Unconstitutional? available at <https://indconlawphil.wordpress.com/2019/01/13/is-the-103rd-amendment-unconstitutional/> (last visited on August 30 , 2021)
- The 10% Reservation Is a Cynical Fraud on the Constitution available at <https://thewire.in/government/the-10-reservation-is-a-cynical-fraud-on-the-constitution> (last visited on August 30, 2021)

Weblinks

- Evidence before the Southborough Committee on Franchise, 1919, available at: https://archive.org/stream/Ambedkar_CompleteWorks/07.%20Evidence%20before%20the%20Southborough%20Committee_djvu.txt (last visited on March 25, 2021)
- Constituent Assembly Debates on 13th December, 1946 available at : https://www.constitutionofindia.net/constitution_assembly_debates/volume/1/1946-12-13 (last visited on March 26 , 2021)

- Constituent Assembly Debates on 27th August, 1947 available at : https://www.constitutionofindia.net/constitution_assembly_debates/volume/5/1947-08-27(last visited on March 26 , 2021)
- Constituent Assembly Debates on 28th August, 1947 available at :https://www.constitutionofindia.net/constitution_assembly_debates/volume/5/1947-08-28 (last visited on March 26 , 2021)
- Constituent Assembly Debates on 27th August, 1947 available at : https://www.constitutionofindia.net/constitution_assembly_debates/volume/5/1947-08-27(last visited on March 26 , 2021)
- Constituent Assembly Debates on 28th August, 1947 available at :https://www.constitutionofindia.net/constitution_assembly_debates/volume/5/1947-08-28 (last visited on March 26 , 2021)
- Distributive Justice available at <https://plato.stanford.edu/entries/justice-distributive/> (last visited on June 13, 2021)
- THE SCHEDULED CASTES AND SCHEDULED TRIBES ORDERS (AMENDMENT) ACT, 1956, available at:https://tribal.nic.in/downloads/CLM/CLM_1/3.pdf (last visited on August 20, 2021)
- Parliament passes Bill to provide 10% quota for poor , available at <https://www.thehindu.com/news/national/parliament-approves-10-reservation-for-poor-in-general-category/article25953023.ece> (last accessed on August 28, 2021)

ANNEXURE

Economic Reservation in India - A critique , LM0120002

ORIGINALITY REPORT

9%

SIMILARITY INDEX

8%

INTERNET SOURCES

4%

PUBLICATIONS

2%

STUDENT PAPERS

PRIMARY SOURCES

1

[epdf.pub](#)

Internet Source

1%

2

[docs.manupatra.in](#)

Internet Source

<1%

3

[LexisNexis](#)

Publication

<1%

4

[www.thehinducentre.com](#)

Internet Source

<1%

5

Jensenius, Francesca R.. "Mired in Reservations: The Path-Dependent History of Electoral Quotas in India", *The Journal of Asian Studies*, 2015.

Publication

<1%

6

[ir.amu.ac.in](#)

Internet Source

<1%

7

[www.studymode.com](#)

Internet Source

<1%

8

[archive.org](#)

Internet Source

<1%

9	caravanmagazine.in Internet Source	<1 %
10	baadalsg.inflibnet.ac.in Internet Source	<1 %
11	www.uok.ac.in Internet Source	<1 %
12	S.R. Maheshwari. "Reservation Policy in India: Theory and Practice", Indian Journal of Public Administration, 2017 Publication	<1 %
13	www.casemine.com Internet Source	<1 %
14	uir.unisa.ac.za Internet Source	<1 %
15	Submitted to National Law School of India University, Bangalore Student Paper	<1 %
16	www.du.ac.in Internet Source	<1 %
17	Submitted to Amity University Student Paper	<1 %
18	doku.pub Internet Source	<1 %
19	www.cdedse.org Internet Source	<1 %