

# An Essay on Need to Re-work Extant System of Reservation in India

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**Abstract:** The current upheaval in perennially simmering cauldron of clamor for reservation /quotas [1] stands to reason that the quota based reservation policy, envisaged as a tool of egalitarianism, now has become a “prized booty”. It is begotten out of an amalgamate of “brute majority and/or brutal muscle power, blood-shed, vandalism, tacit political/administrative patronage and above the all, rampant political opportunism”. Let me clarify, at the very outset, that caste based reservation to a certain extent is still the indispensable need of hour keeping in view the most abhorrent & pernicious discriminations & prejudices heaped on a sea of humanity in the name of castes from time immemorial in our Country. Although, extant form of reservation policy in practice in our Country is a politically sponsored, constitutionally enabled and judicially sanctioned fraud with the masses of all hues. Hence, it has become imperative to review the entire policy and efficacy of quotas in the present form.

**Keywords:** Discrimination, Prejudices, Reservation, Castes and Categories.

**Introduction:** Amidst forbidding clamor for/against reservations all around, I venture out to put forth certain suggestions to possibly remedy the ills plaguing the extant system of reservation:

1. Free, assured and quality school education to children of “have-nots”. To ensure maximum enrollments and minimal drop-outs accompanied by emphasis on skill development of such children.
2. To classify various castes in SC and OBC categories (by and large all states have some classification wrt OBC category. Central government should also sub-categorize the 27% central quota. The NCBC had also proposed the same to the central government in the 2015) and assignment of differential quotas to consequent sub-classes, and induction of some creamy layer criterion wrt SCs [2]. And to widen the scope of extant quite narrow creamy layer criteria wrt BC/OBCs [3] so that all castes of these reserved categories and actually deprived persons of these castes equitably reap the benefit of reservation.
3. To gradually move away from sole caste based criterion. To begin with let us reduce the present caste based quota of 50% to 35% and carve out a new category based on individual/class/occupation linked income criteria and assign it 15% quota besides 1%-5% horizontal quota for Sportspersons/Ex-servicemen/PWD/Women etc. For example, from the standpoint of an individual all persons placed below poverty line (BPL) or persons

forming part of some identifiable tangible class viz. rickshaw pullers, construction workers, farm laborers, domestic workers, small farmers, small traders etc may be made eligible for reservation. In Indra Sawhney case [1992 Supp. (3) SCC 217], the Hon'ble SC held that "it is, of course, permissible for the Government or other authority to identify a backward class of citizens on the basis of occupation-cum-income, without reference to caste, if it is so advised."

#### PRINCIPLE OF QUEUE

Moreover, the benefits of reservation should accrue to those who need it most, from the marginalized groups. Therefore, those who have already availed the benefits of reservation should be placed at the end of the queue. In this manner, the benefits of reservation would go to those who are the most needy.

4. To follow in letter and spirit the supreme court's declared constitutional imperative that "in every case where the state decides to provide for reservation it has to collect quantifiable data pursuant to a scientific survey showing backwardness of the caste/class to such an extent that people belonging to such caste/class are not able to compete in open/general category and resultant inadequacy of representation of that caste/class in public employment". (See Indra Sawhney etc vs UOI, 1992 ; M. Nagaraj and others vs UOI and others, 2006; Ram Singh & others vs UOI , 2015; Ram Kumar Gijroya vs Delhi Subordinate Services Selection Board & Anr, 2016. Also see Division Bench judgment of Bombay High Court in Writ Petition (L) No. 2053 of 2014 decided on 14/11/2014 titled as Shri Sanjeet Shulka vs State of Maharashtra & others); Division Bench judgment of Gujarat High Court in Writ Petition (PIL) No.108 of 2016 decided on 04.08.2016 titled as Dayaram Khemkaran Verma s/o Khemkaran Verma vs. State of Gujarat & another; Division Bench order of Punjab and Haryana High Court on 23/9/2016 in CWP No.18514 of 2016 in Kalindi Vashishtha vs. State of Haryana and ors.). The only contemporaneous data of backwardness available in Haryana is in the form of Justice KC Gupta Report 2012 which was found flawed and unworthy of being acceptable by the Supreme Court in the case of Ram Singh & Ors vs Union of India 2015 (quashing the Central OBC Jat Reservation notification and following which Chandigarh High Court stayed the Special Backward Classes (SBCs) reservation notification in Haryana in the year 2015).

Thus, it has become imperative to conduct such survey of all castes already in bc/obc pool, and other castes seeking inclusion therein and then retain/include only those castes which fulfill above said test laid down by Supreme Court.

5. Decadal periodic revision of respective OBC lists by Union and state governments as per the Supreme Court's order in Indra Sawhney case in 1992. Such revision of Central OBC list by the Central Government is also warranted by Section 11 of the The National Commission for Backward Classes Act, 1993.

6. Moreover, Supreme Court in I.R. Coelho case (2007) unequivocally held that “9<sup>th</sup> Schedule does not provide a blanket immunity to a law that abrogates or abridges Fundamental Rights . Such a violation/infracton shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article 14, Article 19 of the Constitution and the principles underlying there under and such law may be invalidated in exercise of judicial review power of the Court in appropriate cases”.

7. The Supreme Court has also held that “Reservation in employment in services, and admission in educational institutes shall not ordinarily exceed 50% of the appointments or posts or seats barring certain extra-ordinary situations (See Indra Sawhney 1992, M. Nagaraj and others Vs Union of India and others 2006, Ashoka Kumar Thakur 2008).

8. Therefore, the State is free to exercise its discretion of providing for reservation to certain caste(s)/class(es) [in addition to SC/STs] subject to Constitutional and Supreme Court's laid down limitations, namely, the ceiling-limit of 50% (quantitative limitation); the principle of creamy layer (qualitative exclusion); the compelling reasons, namely, backwardness, inadequacy of representation, and the overall administrative efficiency.

9. Moreover, we need to understand that not only peasantry class is under distress due to continual shrinkage of agricultural land holdings but even other castes are no longer comfortably placed in their traditional occupations/professions since people in significant number from all across the board have joined those occupations/professions in this age of cut throat competition. Be that as it may, however, distressed farmers stuck in the whirlpool of agrarian crisis are at the centre of current reservation agitation in Haryana. But the existing creamy layer criteria wrt BCs are too illusory, narrow & ineffective to allow any substantial benefit of reservation to percolate down to the said most needy segment of society.

10. From 1981 onward several anti-reservation stirs took place largely in Gujarat, Maharashtra, Andhra Pradesh, Rajasthan, Haryana, Uttar Pradesh and Delhi. Pro-reservation agitations are post 2000 phenomena. Interestingly, the very same castes which had opposed tooth and nail the reservations in those States in the past are now vociferously demanding for reservations although they are considered politically and socially highly dominant having made progress leaps and bounds in all spheres over the years by dint of hard work as well as owing to immense political clout.

11. It is no gainsaid to emphasize that reservation is neither a mercantile goody nor an agricultural bounty nor a discretionary free-bee by government. It is something which has serious bearing on fundamental rights of citizens enshrined in Articles 14, 19 and 21 of the Constitution and may be granted only after thoroughly & strictly complying with the requirements of the law of the land.

12. It would be apt to say that Reservation is like an elevator. It should be meant for those who can't climb the stairs. The Founding Fathers' idea of reservation policy was like that of the crutches lent to a physically challenged person until his limbs grow up and he stands on his own legs. Contemporary developments mark a

paradigmatic shift in the conceptualization of reservation/quota system from a supporting “crutch” to extortionist “might is right.”

The time has come at such a pass, paradoxically, where we see that the some of the erstwhile physically challenged persons although now having fully grown-up limbs yet do not want to let go of the borrowed crutches, and the historically able-bodied persons (albeit some of them are no longer strong enough and some others are feigning to have been emasculated) have also started clamoring for the crutches.

13. The observation of the Hon’ble Supreme Court in *Ram Singh and Others vs Union of India*, 2015 is also worth taken note of which goes thus “It is in *Indra Sawhney’s* case that this Court held that the terms “backward class in Article 16(4)” and “socially and educationally backward classes in Articles 15(4) and 340” are not equivalent and further that in Article 16(4) the backwardness contemplated is mainly social. The above interpretation of backwardness in *Indra Sawhney* would be binding on numerically smaller Benches. We may, therefore, understand a social class as an identifiable section of society which may be internally homogenous (based on caste or occupation) or heterogeneous (based on disability or gender e.g. transgender). Backwardness is a manifestation caused by the presence of several independent circumstances which may be social, cultural, economic, educational or even political. Owing to historical conditions, particularly in Hindu society, recognition of backwardness has been associated with caste. Though caste may be a prominent and distinguishing factor for easy determination of backwardness of a social group, this Court has been routinely discouraging the identification of a group as backward solely on the basis of caste. Article 16(4) as also Article 15(4) lays the foundation for affirmative action by the State to reach out the most deserving. Social groups who would be most deserving must necessarily be a matter of continuous evolution. New practices, methods and yardsticks have to be continuously evolved moving away from caste centric definition of backwardness. This alone can enable recognition of newly emerging groups in society which would require palliative action. The recognition of the third gender as a socially and educationally backward class of citizens entitled to affirmative action of the State under the Constitution in *National Legal Services Authority vs. Union of India* (2014) 5 SCC 438 is too significant a development to be ignored. In fact it is a path finder, if not a path-breaker. It is an important reminder to the State of the high degree of vigilance it must exercise to discover emerging forms of backwardness. The State, therefore, cannot blind itself to the existence of other forms and instances of backwardness. An affirmative action policy that keeps in mind only historical injustice would certainly result in under-protection of the most deserving backward class of citizens, which is constitutionally mandated. It is the identification of these new emerging groups that must engage the attention of the State and the constitutional power and duty must be concentrated to discover such groups rather than to enable groups of citizens to recover “lost ground” in claiming preference and benefits on the basis of historical prejudice. The perception of a self-proclaimed socially backward class of citizens or even the perception of the “advanced classes” as to the social

status of the “less fortunates” cannot continue to be a constitutionally permissible yardstick for determination of backwardness, both in the context of Articles 15(4) and 16(4) of the Constitution. Neither can any longer backwardness be a matter of determination on the basis of mathematical formulae evolved by taking into account social, economic and educational indicators. Determination of backwardness must also cease to be relative; possible wrong inclusions cannot be the basis for further inclusions but the gates would be opened only to permit entry of the most distressed. Any other inclusion would be a serious abdication of the constitutional duty of the State. Judged by the aforesaid standards we must hold that inclusion of the politically organized classes (such as Jats) in the list of backward classes mainly, if not solely, on the basis that on same parameters other groups who have fared better have been so included cannot be affirmed.”

14. Moreover, we must be alive to the hard fact that reservation is a State's indulgence and one should not seek indulgence of other unless it is not at all possible to stand on one's own legs due to some insurmountable present compulsions (like victims of calamities, genocides, war, disabilities, acute economic constraints) or historical discriminations/deprivations/injustice.

#### ENDNOTES:

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[1] Known as affirmative action in the USA. Reservation in India and Nepal. Positive discrimination in the UK. Also known in a narrower context as employment equity in Canada and South Africa.

[2] In *Indra Sawhney* 1992 Supp. (3) SCC 217, the Hon'ble SC held that “there is no constitutional bar to classify the backward classes of citizens into backward and more backward categories.” In *E.V. Chinnaiah v. State of Andhra Pradesh and Ors* (2004), the Supreme Court while relying on the judgment in *State of Kerala vs N.M. Thomas and Ors* (1976) held that by virtue of Article 341 and Presidential notification, the Scheduled Castes constitute a homogenous class by themselves and, therefore, ‘any executive action or legislative enactment which interferes, re-groups or re-classifies the various caste found in the Presidential List will be violative of scheme of the Constitution and of Article 341 of the Constitution. However, the Hon'ble Supreme Court in *Haryana Dhanak Sewa Samiti v. State of Haryana & Ors*. (Civil Appeal No. 5586 of 2010) and *State of Punjab & Ors. v. Davinder Singh & Ors*. (Civil Appeal No. 2317 of 2011) has expressed doubts on the correctness of view taken in the case of *E.V. Chinnaiah* and hence referred the matter to a larger Bench. The Referral order reads thus “we are of the view that *E.V. Chinnaiah* needs to be revisited in light of Article 338 of the Constitution of India, and exposition of law in *Indra Sawhney* case. Moreover, the matter also involves interpretation and interplay between Article 16(1), Article 16(4), Article 338 and Article 341 of the Constitution of India as well. In this view of the matter, we refer the matter for consideration of the above aspects by the larger Bench. Let the matter be placed before the Chief Justice on administrative side for appropriate order.” The Supreme Court will hear a petition to exclude the affluent members, or the creamy layer, of the Scheduled Castes and Scheduled Tribes from the benefits of reservation. A Bench, led by Chief Justice of India Dipak Misra, will hear the petition which argues that the rich among the SCs/STs are “snatching away” the benefits, while the deserving and impoverished continue to “bite the dust.” It is this lack of percolation of benefits to the poor and really backward among these communities that has led to social unrest, Naxalite movements and perennial poverty, it says. This is the first time a petition has been filed urging the Supreme Court to introduce the creamy layer concept for the SCs/STs. The petition, filed by advocate Shobhit Tiwari, refers to the Constitution Bench's 2006 judgment in the *M. Nagaraj* case that the “means test [a scrutiny of the value of assets of an individual claiming reservation] should be taken into consideration to exclude the creamy layer from the

group earmarked for reservation.” See “Plea to exclude SC/ST creamy layer from quota”, The Hindu, January 29, 2018. (<http://www.thehindu.com/news/national/plea-to-exclude-scst-creamy-layer-from-quota/article22544974.ece>)

[3] As per the creamy-layer criteria issued by Government of India DOPT O.M. No.36012/22/93-Est. (SCT) dated 8.9.1993 (also adopted by Supreme Court in judgment in Ashoka Kumar Thakur Vs. Union of India and Ors (Civil writ petition no. 265/2006) on 27% OBC reservation in Central higher educational institutions) actually the creamy-layer income limit of Rs. 6 lakhs is not applicable to "salary income" of "government servants and those employed in private sector" and "farmer's agricultural income".

