



Analyzing the Constitutional Validity of Reservation for Economically Weaker Section

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Abstract: In India, reservations have always been based on social and educational backwardness and not on economic backwardness. Through 103rd Constitutional Amendment, 2019, reservation was introduced for economically weaker section which raised a serious debate regarding the constitutional validity of reservation brought by the 103rd Constitutional Amendment, 2019. This paper critically examines whether the breach of 50% Reservation Cap violates the basic structure of the Indian Constitution. The author also analyses if reservation can be based solely on economic criteria and if the 103rd amendment violated the equality code. The author also sheds light on the assenting and dissenting decision in the case of Janhit Abhiyan v. Union of India 2022, to understand the stance of Indian Judiciary regarding the constitutional validity of the 103rd Amendment. Finally, the paper concludes that reservation is not the only way to eradicate poverty and help the downtrodden and it argues that by breaching the reservation cap, rights of the merit candidates will be affected.

Keywords: *Reservation, Economically weaker, Constitutional validity, Equality Code, Janhit Abhiyan Case, etc.*

I. INTRODUCTION

In India, Reservation policy is not a new-found policy that was introduced by the Constitution, it has existed since prehistoric times. It derived its roots from the Varna system that was followed in India. Hinduism was divided into four varnas – i) Brahmanas - they were considered to be the intellectuals. Priests, Rishis and teachers (gurus) constituted the Brahmin Varna and it was considered to be the highest Varna. ii) Kshatriyas - the second highest varna, they were the nobility, they were the rulers and protectors of the society. iii) Vaishyas - the third varna comprised of people involved in commerce like traders, money lenders and agriculturists. iv) Shudras - considered as the lowest varna comprised of labours and artisans. Other communities which did not form a part of the varna system, like Dalits were considered to be untouchables and impure.¹ They were denied of basic human rights like food, water, education and they were subjected to heinous atrocities, physical abuse and sexual violence. The untouchables were not allowed to fetch water from the well because it was believed that they would pollute the water with their impurity, so even if an untouchable was dying of dehydration, he had to wait till someone from one of the varnas give water to him. This was the extent of discrimination suffered by the untouchables. Even though the Vaishyas and Shudras were not treated as badly as untouchables but they were deprived of certain privileges which were enjoyed only by the Brahmins and the Kshatriyas.

The caste-based discrimination was the root cause which led to the formation & introduction of reservation policy in India. In 1882, Jyotiba Phule and William Hunter proposed the concept of reservation policy for the first time in India. The caste based discrimination and the practice of untouchability were the primary grounds for reservation. After independence in 1947, when the Constituent Assembly was drafting the Constitution, caste based social discrimination was identified as one of the major barriers to achieve equality in the society. Therefore, reservations for socially backward classes like Scheduled Caste and Scheduled Tribe were introduced by empowering state to make special laws for provision of reservations in Article 15 and Article 16 of the Indian Constitution.

In 2019, the Central government introduced the 103rd Amendment which provides 10% reservation quota for the Economically Weaker Sections based on their economic condition in employment and education for candidates belonging to category other than already reserved categories. This stirred up several questions regarding reservation like - whether 50% reservation limit can be breached, if reservation can be solely based on the economic criteria, whether the 103rd amendment violates the equality code and the basic structure of the Indian Constitution, which will be further discussed in this article.

¹ Sonkhotang Haokip, *Reservation Policy in India: The Practice of Reservation Policy on Education in India*, 6 JETIR, 619 (2019)

II. 103RD CONSTITUTIONAL AMENDMENT 2019

Ministry of Social Justice and Empowerment introduced the Constitution (124th Amendment) Bill in the parliament with the objective to provide 10% reservations to 'Economically Weaker Sections' (EWS) in education and government jobs. The Union government took only 48 hours to amend the constitution, and the Constitution (124th Amendment) Bill became the Constitution (103rd Amendment) Act, 2019. On 7th January evening, the cabinet gave its approval for the amendment; on 8th January afternoon the bill was introduced in the Lok Sabha and after considering the bill for five hours, it was passed by the Lok Sabha. On 9th January afternoon the bill was introduced in the Rajya Sabha and on the same night the bill was passed by the Rajya Sabha with majority votes 165 against 7 votes. The bill was then sent for President's assent and the then President Ram Nath Kovind gave his assent to the bill on 12th January and the Bill came to effect on 14th January 2019.²

The Opposition party Congress did not oppose the bill, but it was of the opinion that Centre introduced the Bill hastily with an eye on the upcoming elections and urged that a parliamentary panel should be consulted and given more time to review it. Since the Supreme Court had dismissed the forward quota initiative of P. V. Narasimha government in the year 1992, opposition members questioned whether the bill would withstand the judicial scrutiny. Several members of opposition questioned the basis on which the government had set the 10% quota.

The Rashtriya Janata Dal (RJD), Indian Union Muslim League (IUML), All India Makis-E-Ittehadul Muslimeen (AIMIM) opposed the bill. In the Rajya Sabha the Bill was opposed by both Dravida Munnetra Kazhagam (DMK) and All India Anna Dravida Munnetra Kazhagam (AIADMK); however, in the Lok Sabha, the Bill was supported by 18 out of 23 parties, including AIADMK.³

2.1 Overview of the Amendment

The 103rd Amendment inserted Article 15(6) and Article 16(6) in the Constitution which allows the State to make provisions of reservation on preferential basis to the Economically Weaker Section (EWS) for admission in government and private educational institutions and for appointments in government jobs.

Eligibility to claim Economically Weaker Section Reservation:

- Candidate should belong to 'general category' who is not covered under any other reservation for SC, ST & OBC).
- Family's gross annual income (from all sources) needs to be less than Rs. 8 Lakhs in the previous year.
- Family shouldn't own agricultural land of 5 acres or more.
- Family shouldn't own a residential house/flat of 1000 square feet area or more.
- Family shouldn't possess a residential plot (in notified municipalities) of 100 square yards area or more.
- Family shouldn't possess a residential plot (other than in notified municipalities) of 200 square yards area or more.

For EWS reservation, family includes:

- Candidate seeking benefit of reservation
- Candidate's parents
- Candidate's siblings below 18 years of age
- Candidate's spouse & children below 18 years of age

Proof of belonging to Economically Weaker Section: Any candidate who intends to claim the benefit of EWS reservation needs to produce an 'Income and Asset Certificate'. The certificate needs to be issued by a local Tehsildar or any other local government authority.⁴

III. DOES BREACH OF 50% RESERVATION CAP VIOLATES BASIC STRUCTURE OF THE CONSTITUTION?

In India, before the provision of 10% reservation for Economically Weaker Section, the total percentage of reservation in India was 49.5% with 15% for Scheduled Castes, 7.5% for Scheduled Tribes and 27% for Other Backward Classes. After the 103rd amendment, the total percentage of reservation has come up to 59.5% which is over and above the 50% reservation cap fixed in the Indra Sawhney case. There have been several contemplations by scholars, legislators, opposition parties, judges, etc that the EWS reservation amendment is violative of the basic structure of the Indian Constitution as it breaches the 50% reservation cap. But before analysing whether the Amendment violates the basic structure of the Indian Constitution or not, it is important to understand what basic structure of Indian Constitution entails.

The basic structure of Indian Constitution was discussed in several cases, but the concept of basic structure was thoroughly discussed and laid down in the landmark case Kesvananda Bharati v. State of Kerala. Justice S. M. Sikri provides that basic structure of the Indian Constitution constitutes:

- Supremacy of the Constitution
- Separation of powers between judiciary, legislature and executive
- Secular character of the Constitution
- Federal character of the Constitution
- Democratic and republican form of government
- Unity and sovereignty of India

Other features that have been recognized as the basic structure of the Indian Constitution over the years are:

- Judicial Review

² Meghnad S, *The Hasty Passage of #ReservationBill Sets A Dangerous Precedent*, NEWS LAUNDRY (Dec. 4, 10:41 PM), <https://www.newslaundry.com/2019/01/10/reservation-bill-quota-10-percent-constitution>

³ Manoj C. G., Harikishan Sharma, In Parliament, *Most Parties Favoured EWS Quota Bill Amid Concerns; DMK, RJD, AIMIM Opposed It*, INDIAN EXPRESS (Dec. 4, 10:50 PM), <https://indianexpress.com/article/india/in-parliament-most-parties-favoured-ews-quota-bill-amid-concerns-dmk-rjd-aimim-opposed-it-8255311/>

⁴ *EWS Reservation: Know Eligibility and Benefits In Detail*, LIVE MINT (Dec. 4, 2:00 PM), <https://www.livemint.com/news/india/ews-reservation-know-eligibility-and-benefits-in-details-11667810411571.html>

- Rule of law
- Parliamentary system
- Balance between fundamental rights & directive principles
- Rule of equality
- Dignity & Freedom of an Individual
- Power of Supreme Court under Article 32, 136, 142 & 147
- Power of High Court under Articles 226 & 227.

Now that the basic structure of the Indian Constitution has been established, let's look into some of the landmark judgements and cases on 50% reservation cap.

The reservation cap of 50% was discussed for the first time in the case *M. R. Balaji & Ors. v. State of Mysore*. The issue before the court was whether providing 68% reservation for SEBCs, SC, ST and OBCs in State Medical & Engineering colleges and leaving only 32% seats for merit candidates was reasonable or not. The Apex court opined that reserving 68% of seats in educational institutions like medical and engineering colleges would constitute Constitutional fraud.⁵ The court reasoned that while reservation is necessary for the advancement of backward classes, it should not become an impediment for the Merit students from getting seat in higher educational institutions.

In the landmark case *Indra Sawhney v. Union of India*,⁶ the Hon'ble Supreme Court while giving decision on reservations for OBCs, laid down the cap of 50% on reservations. The Hon'ble Court said that this cap on reservation can be breached in "extraordinary situations" but great care and caution needs to be exercised. This judgment has been used by judiciary time and again to stay any reservation that exceeds the 50% reservation cap.

In the year 2021, while deciding a case on Maharashtra State Reservation (Socially and Educationally Backward Classes) Act, 2018, which granted 12% & 13% reservation to SEBC on top of 50% reservation, the Hon'ble Supreme Court held that the reservation does not fall under the exceptional circumstances or extra-ordinary situation as carved out in the case of *Indra Sawhney*. The Court held that the Act was unconstitutional and struck down the Act.⁷

In the case *Dr. Rajesh Baghel v. State of Chattisgarh*,⁸ the Court quashed the Amendment which was passed by the state government to raise reservation provided to SC, ST and OBCs to 58%. The Court was of the opinion that there was no extraordinary situation on basis of which the reservation cap of 50% was breached.

The question of whether the 103rd amendment was violative of the basic structure of the Indian Constitution on account of breach of 50% cap was addressed by the Supreme Court in the case *Janhit Abhiyan v. Union of India*. The Apex Court upheld that 103rd amendment in the case by 3:2 verdict and held that the 50% ceiling limit fixed was not "inflexible" or "inviolable" and the 50% ceiling limit applies only to the reservations in education and public employment provided under Article 15(4), 15(5) & Article 16(4) of the Constitution. Justice Dinesh Maheshwari, one of the 3 judges who gave an assenting decision, rejected the claim that with reservation for EWS, the total reservation percent will go beyond 50% ceiling limit set by Mandal Commission, which results in violating the basic structure of the Constitution. He also stated that allowing/empowering State to make special provisions to provide reservations on the basis of economic status, will not result into violating the basic structure of Indian Constitution.⁹

IV. RESERVATION BASED SOLELY ON THE ECONOMIC CRITERIA

The main purpose of reservations was to uplift and provide adequate representation to the backward classes and to rectify the historical injustice done to the disadvantaged groups and to implement policies which will ensure better access to education and employment. Scheduled Caste, Scheduled Tribe and other backward classes were recognised as the disadvantaged groups which suffered grave discrimination which resulted in social and education backwardness and hence needed representation in the society. The basis on which these reservations were provided is caste. In 2019, when the government introduced reservation for the 'Economically Weaker Section' on the basis of income, it resulted into huge turmoil.

The main argument against the income-based reservation is that the primary objective of reservation is to provide adequate representation to the disadvantaged classes and it cannot be used as a poverty alleviating scheme. In our society, discrimination mainly stems from factors like caste, religion, race, etc., and not from a person's economic condition. It has been contended that the SC, ST and OBCs are socially and educationally backward due to the discrimination they were subjected to and hence, there is need of representation of these classes, but what has impeded the advancement of economically weaker section belonging to the forward class because of which they need representation?

Backward classes do not necessarily be restricted only to socially and educationally backward classes, it also covers economically backward classes. In *Ashoka Kumar v. Union of India*¹⁰, the Supreme Court noted that caste is not the only factor that may be used to determine backwardness.

The Indian judiciary has also not completely rejected the idea of income-based reservation. In *K. C. Vasanth Kumar v. State of Karnataka*, Justice D. Y. Chandrachud provided 2 tests for determining whether a particular class of citizens can be termed backward or not. First test is that the concerned class of citizens needs to share same or similar level of backwardness as the members of the Scheduled Caste and Scheduled Tribe. Second test requires the concerned class of citizens to qualify the "means test" set by the State Government to assess whether they are economically backward, in the light of prevailing economic condition in the society. In the same case, Justice Desai also pointed out that "only criterion that can be realistically devised is the one of the economic

⁵ *M. R. Balaji & Ors. v. State of Mysore* 1963 AIR 649

⁶ AIR 1993 SC 477

⁷ *Jaishri Laxmanrao Patil v. The Chief Minister & Ors*, 2021 SCC Online SC 362

⁸ Umang Paddar, *Does the EWS Judgement Remove the 50% Cap on Reservations?*, SCROLL (Dec. 6, 11:34 PM), <https://scroll.in/article/1037537/does-the-ews-judgment-remove-the-50-cap-on-reservations>

⁹ *Janhit Abhiyan v. Union of India* 2022 LiveLaw (SC) 922

¹⁰ [2008] INSC 613

backwardness.” He cautioned that if caste is the only factor to assess backwardness, then it will result into inadvertently perpetuating the caste system.¹¹

Any initiative taken by government towards upliftment of economically backward classes through providing reservation cannot be blatantly rejected or held constitutionally invalid on the sole basis that reservation is based on economic criteria. There is no blanket-ban on providing reservations for people who are economically disadvantaged. The Supreme Court justified that providing reservation for Economically Weaker Section is a stepping stone towards achieving economic justice and social equity. However, there are some loopholes in the amendment that can be used by people to claim this reservation fraudulently. One such loophole is Under-reporting of income. Significant percentage of Indian population has multiple sources of income, irrespective of whether employed in organized sector, unorganized sector or self-employed. Under-reporting of income can happen in multiple ways but 2 commonly encountered scenarios are: i) People employed in the organized sector may disclose only their main source of income and conceal their income from other sources; ii) People employed in unorganized sector or self-employed people may under-report their income from the main source. Under-reporting of income by people who don't actually fall in the economically weaker section to avail the benefit of the reservation of EWS is one of the greatest risks of the EWS reservation.

IV. VIOLATION OF THE EQUALITY CODE

Article 14 of the Indian Constitution ensures equality before law to all the citizens of India. But due to the pervasive social and economic inequality in our society the constitution makers of our country devised certain provisions to eradicate inequality and to establish an egalitarian society. The principle of equality can be stated as “*equals must be treated equally while unequals need to be treated differently*” To apply this principle, differentiation has to be made between people who are equal should be grouped together and people who are different are excluded from that group and this is characterised as reasonable classification. Article 14 prohibits class-legislation, but it does not prohibit reasonable classification.

The provision for reservation for SC, ST, OBC and SEBC are based on the doctrine of reasonable classification and compensatory discrimination for upliftment of these classes who were subjected to hardships, injustice and unequal treatment. In 2019, when the provision for reservation for Economically Weaker Section was introduced the classes/groups who were already availing benefit from the provisions enumerated in Article 15(4), 15(5) & Article 16(4) of the Constitution were excluded from the provision. This exclusion was said to strike at the core of the Equality Code and this issue was also addressed in the Janhit Abhiyan Case.

In this case, contrary opinions were given by Justice Dinesh Maheshwari and Justice Ravindra Bhat regarding the issue of exclusion of SC, ST, OBC and SEBC from the EWS reservation. Justice Dinesh Maheshwari opined that there is no need to provide benefit of EWS reservation to those classes who already enjoy reservation under different provision and without this exclusion, the balance between general principles of compensatory discrimination and equality would have been disrupted with undue advantage being granted to classes who already enjoy the benefit of reservation under Article 15(4), 15(5) and 16(4).

Justice Ravinder Bhatt disagreeing with the majority opinion stated that the 103rd Amendment is violative of basic structure of the Indian Constitution due to implicit exclusion of SC, ST, OBC and SEBC from the said provision. He stated that applying the doctrine of classification to differentiate between poorest segment of society (belonging to forward class and not covered under any reservation) and other segment of the society who are covered under the benefit of reservation due to caste stigmatization and keeping the latter out of the benefit of EWS reservation violates the principle of equal opportunity. He pointed out that poverty haunts every group and class of society, but extreme form of poverty is found in communities that have faced severe discrimination. The non-discrimination principle is indefensibly violated when certain groups of society for whom non discriminatory provisions were formulated are excluded. He noted that as the 103rd amendment strikes at the core of Equality code i.e., non-discrimination, it severely damages the identity of the Indian Constitution and hence the exclusionary clauses Article 15(6) and 16(6) are in violation of the basic structure.¹²

Justice Dinesh Maheshwari's opinion on this issue seems more of a reasonable view. Reservation for Economically Weaker Section is a form of compensatory discrimination serving the sections of the society who are not covered under any reservation and the SC, ST, OBC & SEBC are already covered under compensatory discrimination enumerated in Article 15(4), 15(5) and 16(4). The very nature of Compensatory discrimination is exclusionary, it obtains its value and substance only by excluding others. A reasonable classification is permissible if it prevents double benefit under the equality-code (S. Seshachalm & Ors v. Chairman Bar Council of Tamil Nadu & Ors¹³). If the class of people availing benefits under Article 15(4), 15(5) and 16(4) are included in the reservation for EWS, then that will result into double benefit, therefore exclusion of SC, ST, OBC and SEBC from the EWS reservation can be said to be a reasonable classification and it does not violate the equality code or the basic structure of the Constitution.

V. CONCLUSION

The objective behind 103rd Amendment which provides 10% reservation for the Economically Weaker Section is to reduce socio-economic inequality and to give a helping hand to the downtrodden. The initiative taken by the government towards economic justice in the society is admirable. However, providing reservation for the economically weaker sections is not the solution to eradicate poverty and help the people who are suffering from poverty. The government could take measures and implement policies to provide training and support to the economically weaker section to upgrade the skill levels required to procure a seat in the educational institutions that they are interested in or the job they would like to secure in the overcrowded job market.

With the breach of 50% reservation limit, the opportunity of the merit candidates will be affected as they are left with only 40% of the slots to compete for. The balance between providing reservation to the backward classes and protecting the interests of the merit candidates is disrupted because of the 103rd Amendment. To remove one type of inequality, this amendment is creating another type on inequality against remainder segment of society. However, exclusion of SC, ST, OBC and SEBC who already avail benefits

¹¹ K. C. Vasanth Kumar v. State of Karnataka 1985 AIR 1495

¹² *Supra* 9

¹³ (2014) 16 SCC 72

under Article 15(4), 15(5) and 16(4) cannot be said to be in violation of equality code or the basic structure of the Indian Constitution. Because if they are included under this reservation, it will lead to double benefit to those classes, which is not reasonable. Though there is no ban on providing reservation based on income, there are several complications with income-based reservation. Determining the actual income of the candidate will be one of the biggest complications of EWS reservation amidst deliberate under-reporting of income. Robust mechanism needs to be put in place to fend off fraudulent candidates who seek reservation under EWS, without actually belonging to the economically weaker section. The hurried manner in which this amendment was passed, with least amount of debate over the matter and with approaching elections, one can't help but wonder if this amendment was an appeasement policy directed towards certain segments of the society, which form the majority population of our country.

