

# AN INTROSPECTION INTO RESERVATIONS IN THE LIGHT OF RECENT CONSTITUTIONAL AMENDMENT IN INDIA

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**Abstract:** India, the 'Land of Minorities', is not new to differences and diversities. However, the way in which one overcomes the differences is what defines varied relationships, it be the individual or that of a society or be a nation's ideology. One of the mechanisms that tried its way best to reduce the imbalance existing in the society is the reservations, though it is not immune from its own defects. With the recent introduction of 103<sup>rd</sup> Constitutional Amendment claiming ten per cent reservation to the economically weaker sections of the upper caste has created a debate in the society which requires a legal perusal. In this backdrop the article is an attempt to analyse the nature and historical background of the reservations, observations made by the legal scholars and some of the pertinent questions associated with it.

**Index Terms-Reservations, 103rd Constitutional Amendment**

## I. Introduction

To live is to live with dignity, one of the fundamental aspects of having a dignified existence is to be assured that a person is not discriminated based on the ascribed qualities like race, religion, sex and caste especially by the state. The reason to avoid discrimination is evident from the fact that certain features as 'ascribed', essentially means that the person is not in control of certain aspects or not a reason for some of his qualities like his race, religion etc., in turn that those qualities are mostly attached towards a person by the society. *Jean-Jacques Rousseau* quotes that "Man is born free, and everywhere he is in chains. One man thinks himself the master of others, but remains more of a slave than they are". Claims that are based on the societal chains which were constructed on the person for some necessary convenience or seamless functioning of the society is said to justify the structure many a times. It is unfortunate that with evolving times that it became a tool for mankind to demean the other. This is largely prevalent in cases where the ones in power or those who were higher in the societal hierarchy uses it as a means to exploit the other.

One of the aims and objects of the Constitution of India is to secure to all its citizens, equality of status and of opportunity and to promote among them all fraternity assuring the dignity of the individual and the unity and integrity of the Nation. As the right to equality and prohibition of discrimination against race, caste, sex, or place of birth against any citizen were made to make the basic rights meaningful to the weaker sections of the society. Hence, the concept of reservation has to be considered as the positive or affirmative action. Article 15 and 16 of the Indian Constitution gives us the constitutional mandate to have reservations. It is further made the duty of the State to acknowledge and made rules as per the Directive Principles of the State Policy as reflected in Article 41, 45, 46 of the Constitution of India.<sup>1</sup> It in essence provides for the positive action from the side of the State in upholding the rights of the weaker sections of the society. Further, it permitted reservations in admissions to educational institutions and in posts and appointments consistent with the maintenance of efficacy of the administration.<sup>2</sup> There is a need to promote social and economic equality in order to make democracy meaningful and workable through the constitutional framework.

## II. Historical Evolution of the Caste System in India

<sup>1</sup>Article 41: The state shall within the limits of its economic capacity and development, make effective provisions for securing right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement

Article 45: the state shall endeavour to provide within the period of 10 years within the commencement of the constitution to provide free and compulsory education for all children till they complete 14 years of age

Article 46: the state shall take special care to promote the educational and economic interest of the weaker sections of the society.

<sup>2</sup> Mohammad Shabbir, *Ambedkar on Law, Constitution and Social Justice*, Lexis Nexis, 1995 at 69

To understand the Constitutional mandate of reservation, it is of utmost essence to understand the evolution of caste system in India. Caste system has its origin traced from the early Vedic period where the Social system classified people into four varnas. The concept of varnas is essentially attributed to a person based on the type of work they do. These varnas are Brahmanas, the segment that dominates the highest order in the rank, holds the educational and spiritual leadership and enjoyed much privilege in the society. Kshatriyas who occupied the Second position in the order is essentially function the duty of securing the state or warriorship. The Vysyas who occupied the third position is basically the business community and enjoyed the reasonable position and finally the Shudras are people at the bottom along with other avarnas, primarily the people outside the varna system. Their task is meant to do labour for the rest of the above these orders were entrusted with no esteem, denied the educational and almost all the privileges needed for the reasonable growth of the human being. With the varna system getting deeper and intricate in the society, and new sub-divisions in place, came in place the most complex caste system of India. But the essential problem of the varna or caste system is that certain people enjoy highest benefits in the society and certain section of people were even denied the least privilege and unfortunately the criteria to divide people is based on their birth into specific sect.

### III. Spread of Awareness among the people against Caste System

During the middle of 19th century, a slow but steady awareness spread among the Indians especially those who had the glimpse of modern education started noticing the unfavourable situation prevailing among the lower caste people and felt the pressing need for the up gradation of the people for the benefit of the whole nation, some of the notable reformers are Raja Ram Mohan Roy, Ishwar Chandra Vidya Sagar, Jyothiba Phule, Vinobha Bhave, Swami Vivekananda, B.R. Ambedkar, Mahatma Gandhi etc.

In that case Indian Nationalist Movement is a unique blend of fight against the colonial regime which is an external slavery and at the same time fight against our own internal fallacies like caste system which creates a kind of internal slavery. Many of these luminaries spent their life in bringing about the social change by trying to make the society more inclusive.

Important observation made by Dr. B.R. Ambedkar about caste system, "In India there are castes. The castes are anti-national. In the first place because they bring about separation in social life. They are anti-national also because they generate jealousy and antipathy between caste and caste. But we must overcome all these difficulties if we wish to become a nation in reality. For fraternity can be fact only when there is a nation. Without fraternity, equality and liberty will be no deeper than coats of paint"<sup>3</sup>.

### IV. Constitutional Provisions:

During the extended debates in the constituent assembly, strong moral and intellectual arguments were put forward by many scholars, which highlighted the conditions and need of lower caste people. As a result, the constitution of free India made certain definite and specific provisions to help for those who have been oppressed throughout the history of India.

Article 15: Provides the prohibition of discrimination on the grounds of religion, race, caste, sex, or place of birth. The clause (4) talks about the remedial and promotional policies in favour of weaker sections of the society.

Article 16: Provides equality of opportunity in matters of public employment, however, clause (4) of the same article of the constitution provides the state the full freedom to provide preferential treatment in the form of reservations of appointments or posts for backward classes, thought by the state to be the under-represented.

Article 17- Abolishes untouchability and makes it a punishable offence.

Article 29 (2): Provides full protection and prohibits discrimination in admission in educational institutions based on religion, race, caste and languages.

Certain Articles in Directive Principles of State Policies also were directed in a way of protecting the interest of oppressed people.

Article 330, 332 provides for the reservation of seats for the scheduled tribes and caste in the house of people respectively to ensure adequate representation of those people.

### V. Backward Classes or Castes?

With advent and progress of the reservation has major social impacts in a positive way, it is not free of its own demerits, the government's decision to increase the reservation among the backward classes, created a turmoil in the society, various committees were setup to deliberate upon the criteria to term a caste into a 'backward caste' however, the Mandal

<sup>3</sup> PP Rao edited by Dr. Lokendra Malik, *Reclaiming the Vision – Challenges of Indian Constitutional law and Governance*, Lexis Nexis, 2003 at 71

Commission's report created a major spur among the population and it took almost 10 years for the government to implement the recommendations after settling the dust. However, it led to plethora of cases piled up in the court of law.

One such famous case is *Indra Sawhney vs. Union of India*<sup>4</sup>, in which the fundamental question raised was whether 'identification of backwardness' based on caste was permissible in the present secular society. Majority of the judges held that the 'caste can be considered an important factor in determining the backwardness'. However, in the dissenting opinion given by Kuldeep Singh J and R M Sahai JJ were to be considered, "Secularism is the basic feature of the Indian Constitution. It envisages a cohesive, unified and casteless society. Caste poses a serious threat to the secularism and as a consequence to the integrity of the country... Caste cannot be adopted as a sole measure for the purpose of identifying "backward class" under Article 16 (4)".

According to the judges, caste like religion and race cannot be the basis for the reservation of posts in service. The upliftment of the backward class of citizens should happen by promoting them socially and educationally on parallel grounds with the scheme of reservations, as taking care of weaker sections of society by special programmes and policies is the primary concern of the state.

Also, in the case of *K C Vasanth Kumar vs. State of Karnataka*<sup>5</sup>, the opinion was divided. D A Desai, J, in a well-reasoned opinion, was opposing against making caste the basis for declaring backwardness. He commended the economic criterion for compensatory or affirmative action, he stated "one, to strike at the perpetuation of the caste stratification of the Indian Society so as to arrest progressive movement and to make a firm step towards establishing a casteless society; and two, to progressively eliminate poverty by giving an opportunity to the disadvantaged sections of the society to raise their position and be a part of the mainstream of life which means eradication of poverty".

Nani A Palkhivala's comment<sup>6</sup> on the *Indira Sawhney* judgment is pertinent. He stated:

"the basic feature of the constitution envisages a cohesive, unified, casteless society. By breathing new life into casteism the judgment fractures the nation and disregards the basic features of the constitution. The decision would revitalize casteism, cleave the nation into forward and backward and make backwardness a vested interest. It will undo whatever has been achieved since independence towards a unified and integrated nation the majority judgments will revive casteism which the constitution emphatically intended to end; and the pre – independence tragedy would be re-enacted the erstwhile under privileged would now become the privileged".

He further quoted from Prime Minister Nehru's letter to the Chief Ministers<sup>7</sup>:

"The only real way to help the backward group is to give opportunities for a good education.... But if we go in for reservations on communal and caste basis, we swamp the bright and the able people and remain second rate or third- rate.. it has amazed me to learn that even promotions are based sometimes on communal or caste considerations. This way lies not only folly, but disaster. Let us help the backward groups by all means, but never at the cost of efficiency".

## VI. Present conflicts in the Reservation systems- A detailed Analysis

**6.1 Perpetuating Caste system:** Studies reveal that the policy of reservations has become counterproductive. Prof. Andre Beteille notes that "the prospects of material advancement through job reservation have led to kind of competition for backwardness among the castes at the middle levels of the hierarchy. This kind of competition creates a vested interest in backwardness, and it combines the worst features of a hierarchical and a free- market society. It stifles individual initiative without creating equality between individuals, and it obstructs the natural processes through which the barriers between castes and communities can be effaced"<sup>8</sup>.

**6.2 Creates a Sense of Denigration among People:** The paradox of the system of reservation is that it is a mechanism invented to upgrade the livelihood and dignity among people but due to the competitiveness created by the job opportunities it now a days create a necessity among people to be declared as a backward class so that they enjoy the benefits of the state reservations. Nowhere else in the world the castes, classes or communities queue up for the sake of declaring themselves as backward.

**6.3 Unreasonable Claims made by the so-called Upper Castes:** As benefits of reservations goes to the backward classes it now a days become vogue for the so called well established and upper castes people to engage in protest and rallies to include them in the list of backward class. This is the unfortunate situation where it will not only divert the benefits but also it is the result of

<sup>4</sup> (1992) 3 SCC 217 at 697, 766

<sup>5</sup> AIR 1985 SC 1495.

<sup>6</sup> PP Rao edited by Dr. Lokendra Malik, *Reclaiming the Vision – Challenges of Indian Constitutional law And Governance*, Lexis Nexis, 2003.at 73

<sup>7</sup> PP Rao edited by Dr. Lokendra Malik, *Reclaiming the Vision – Challenges of Indian Constitutional law And Governance*, Lexis Nexis, 2003.at 71

<sup>8</sup> PP Rao edited by Dr. Lokendra Malik, *Reclaiming the Vision – Challenges of Indian Constitutional law And Governance*, Lexis Nexis, 2003.at 73.

indolence existing among the upper class of people. Some of the recent examples are: inclusion of Jats in Rajasthan, protest by Marathas in Maharashtra etc.

**6.4 Usage of reservation as a tool by the Political parties:** for the sake of Consolidation of votes and to capture the power the political parties has started using the reservation as a tool to lure people, completely insensitive towards the consequence it might create in the society. Political parties forget the fact that they come to power to serve not just one sect or caste or class of people but to the entire community as a whole.

**6.5 Creates a tussle between the Parliament and Judiciary:** in Indra Sawhney, the supreme court declared that Article 16 (4) of the constitution does not permit reservation in the matter of promotion and made the declaration prospective by permitting the existing provisions to continue in operation for a period of five years from the date of judgment. To overcome this declaration of law, the parliament amended the constitution in 1995 by inserting clause (4A) in Article 16, enabling the state to make any provision for reservation in matters of promotion of any class or classes of posts in the service under the state.

**6.6 Reservation contradicts certain provisions in constitution:** The operation of the reservation policy should be such as not to inhibit the discharge of the fundamental duty of citizens set out in clause (j) of Article 51 A of the constitution, viz., 'to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievements. It is the duty of the state to secure to all its citizens equality of status and of opportunity and to promote among them fraternity in order to facilitate the development of each citizens according to his innate potential.

**6.7 Few benefits go to the deserving castes:** the most backward sections among the backward classes have not been able to avail the benefit of reservations for the want of education and the acute poverty. Except to the satisfaction of figuring out in the list of backward classes, in real terms, most of them do not derive any applicable benefit. Notwithstanding the theoretical possibility of exclusion of the creamy layer from backward classes as mandated by the supreme court in the Indra Sawhney case, the ground reality is that the dominant sections among the backward classes continue to corner the reservations because the weakest and the most oppressed members of the backward classes cannot compete with them.

**6.8 Job reservation is not a solution:** As observed by Prof. Ande Beteille 'the wrong with the thinking on the backward classes is that we have allowed the problem to reduce sharply to that of job reservation. The problem of the backward classes is too varied, too large and too acute to be solved by the reservations in job sector alone'. The point is that though the job reservations helped to contribute for the betterment of the society yet it diverted the attention from the masses of harijans and adivasis who are too poor and too lowly even to be the candidates for the jobs that is reserved. Today job reservation is less a way of solving age old problems than one of buying peace for the moment.

**6.9 Reservations are crossing the constitutionally allowed time frame:** the makers of the constitution deliberately set a time frame of 10 years for the reservation of seats for SCs and STs in the house of the people and in the legislative assemblies of the states, under Article 330 and 332, respectively and certain other reservations. But by the periodic amendments once in 10 years, the reservations have been done mechanically without much of any debate, all political parties readily support such extensions. In the similar way, the reservations made under Article 15(4) and 16(4) are continued and to some extent enlarged from time to time, irrespective of any party in power.

**6.10 Reservations cause a vicious cycle:** as rightly observed by Justice S Ranganathan<sup>9</sup>, in a case that "once introduce there is a reluctance to withdraw a scheme of reservation though originally it is limited for a limited for a definite period. It is tempting, when the period is about to expire, to yield to pressures to extend the period further".

## VII. 103rd Constitutional Amendment

The recent Constitutional amendment Act which tries to fulfil the duty under Article 46 by protecting the interests of the weaker section of the society. Recently, the reservations were explicitly denied by the Supreme court in Indra Sawhney case by considering the economic status of the person, however there were lot of agitation and demand on the part of the upper castes to have a reservation for the poor or economically weaker sections existing among them, this Amendment Act tries to fulfil that.

As this act is yet to pass the judicial scrutiny, it is important to analyse the major provisions of this Act. The criteria for such reservations are.

- Criterion for Reservation People who have an annual income of less than Rs.8 lakhs,
- Or People who own less than five acres of farm land
- Or people who have house lesser than 1000 sq. feet in town.

The word 'or' hold significance, it essentially meant that if a person fulfils any one of the above-mentioned criteria is fit enough to get into this scheme of reservations. This might sound as a wide promise with vague definitions, as constructing by these criteria will essentially fit a huge number of the present population. The essential question whether crossing the fifty per cent cap

<sup>9</sup> PP Rao edited by Dr. Lokendra Malik, *Reclaiming the Vision – Challenges of Indian Constitutional law And Governance*, Lexis Nexis, 2003.at 77

as laid down by the judiciary in fulfilling the seats of the reservations is a 'basic feature', and if considered as a basic feature then this 103<sup>rd</sup> Constitutional Amendment Act will not violate the basic feature by increasing the cap has to be checked with the progress of the time.

### VIII. Conclusion

The backward classes cannot be allowed to be backward forever. One of the primary functions of the constitution of India and the democratically elected state is to eliminate the discrimination disappear sooner or later, and reservations can be first aid, not a permanent cure to the massive problems of the backwardness. To continue with the system of reservation in this same position without any necessary modifications and neglecting the implementation of the Directive Principles of state policies will only keep the backward class in the backward position.

Reservations also classify and perpetuate the inferior position of the backward section, affecting the dignity and self-respect of individual members of these classes. Reservations divert the attention of the weaker sections from the constitutional goals of socio-economic equality regardless of caste and creed and at many times comes at the cost of efficacy. Also considering the improvements among the backward class, awareness was spread among the masses to enter into the private sector regarding the employment opportunities, which in turn help in their economic prosperity cannot be discarded.

The time for intense debate on the restructuring the reservation system has arrived, one has to bear in mind that the Nation is a Paradox in itself as it holds the largest youth population with immense potential at the same time people who lack even the basic necessities of life, balancing the rights and needs of both the segments have to be the goal for any institution. In that regard one must consider that eliminating the concept of reservations are never be a solution at the same time salvation only through reservations is also questionable, a time-bound reservations with the strong implementation of creamy layer clauses can help the betterment of the socially backward classes of people and at the same time not at the cost of efficiency.

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