

## RESERVATION SYSTEM IN INDIA: From the Perspective of the 103<sup>rd</sup> Constitutional Amendment Act, 2019

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### ABSTRACT

*Reservation is a topic that usually remains in controversy in this country almost all the time. Recently it came in controversy when the Parliament of India amended the constitution in 2019 by the 103<sup>rd</sup> Constitutional Amendment Act and added a provision in the Constitution to provide a 10% reservation for economically weaker sections of the society in Government jobs and Educational Institutions. This article includes everything which a reader wants to know about reservation in India. It covers almost all the events related to the reservation in India which took place after Independence. The Constitutional validity of reservation is also discussed in this article. All the provisions of the Constitution which deal with reservation policy, i.e. Article 14, 15, and 16 are also discussed in detail. The main aim of this article is to provide all the necessary information to the reader about the 103<sup>rd</sup> Constitutional Amendment Act, 2019. This article also provides information to the reader about various arguments against this Amendment Act that are used by the critics which include its constitutional invalidity and how this amendment is totally against the aim of the reservation policy in India. So basically this Article contains the general views of the author about the reservation system in India and also about the 103<sup>rd</sup> Constitutional Amendment Act, 2019. All those who are interested in getting the knowledge about the concept of the reservation system in India from the perspective of the 103<sup>rd</sup> Constitutional Amendment Act can give it a read.*

### INTRODUCTION

The system of reservation in India comprises a series of affirmative action measures, taken up by the government to uplift the weaker sections of society by getting them into government jobs and higher educational institutions.

Indian Constitution recognizes Schedule Castes, Schedule Tribe, and backward classes (including OBC) for the policy of reservation.

India is the only country that uses reservation policy at such a colossal scale. Every democratic country generally follows the principle of equality, but India being a multi-religious and multi-linguistic country, there is a need for a policy like reservation so that all communities can be brought at one level.

The age-old caste system of India is answerable for the origination of the reservation system in the country. Many sections of the Indian society have faced historical injustice due to their

caste identity and because of this, there emerges a need to safeguard the interest of those sections of the society.

In intelligible terms, the reservation system is about facilitating access to seats in the government jobs, educational institutions, and even legislatures to certain sections of the population. As a quota-based affirmative action, it can also be seen as positive discrimination.

This article embraces all the aspects of Reservation policy from the perspective of Indian Society in detail including various provisions mentioned in the constitution that supports the system of reservation in India. This Article also contains all the shortcomings of the 103<sup>rd</sup> Constitutional Amendment Act, 2019 which was implemented with the aim to provide a 10% reservation to the economically weaker section of the society in government jobs and educational institutions.

## CONSTITUTIONAL PROVISIONS RELATED TO RESERVATION IN INDIA

### Article 14

*“The state shall not deny to any person equality before the law and the equal protection of the laws within the territory of India.”*

Article 14 of the Indian Constitution basically touches upon two themes which are:

- Equality before the law, and
- Equal protection of laws

And it is “equal protection of laws” which one has to focus upon to understand the reservation system in this country with greater clarity. This provision is borrowed from the Constitution of the United States of America and it primarily tries to ensure that likes to be treated alike, i.e. people in similar circumstances are to be treated similarly.

Equality means treating everybody equally regardless of the situation, but is this justice? NO. Equal protection of laws is a concept that includes equality with justice. This is something which we call affirmative action policy of the state where the state provides supplementary opportunities to some sections of the society which ultimately results in justice. The act of the state to provide additional opportunities to some sections of the society creates discrimination, but this is positive discrimination.

Let us take an example of a community that is historically discriminated against by the rest of the communities, Dalits. Dr. B.R. Ambedkar, the architect of the Indian Constitution was also a Dalit and for days together he did not drink water because there was separate drinking well allocated to the Dalits, but this well was dry. And on the other well, the water was present, but Dalits were not allowed to drink water from that well because it belonged to the upper caste of the society. This discrimination was based on the twin concept of purity and pollution. It was argued that the drinking and food habits of the lower class people are polluted and the drinking and food habits of the upper-class people are pure. And it was this twin concept of pollution and purity which was the basis of untouchability in this country for centuries.

These social discriminations limited their access to educational opportunities as well. So these communities were declared as socially and educationally backward classes. And there emerges a need for bringing them to the level of other communities and that is how reservation came into the picture. That means the reservation system is possible in this country because Article 14 talks about equal protection of laws.

## **Article 15**

*“Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.”*

Article 15 principally talks about non-discrimination that means the state shall not discriminate against its citizen only on the grounds of religion, race, caste, sex, or place of birth. But can the state discriminate? YES. But for that, there must be an additional ground on the basis of which valid discrimination can be made.

Take an example of a student who is approaching a college for admission for a post-graduate program. He approached the college and the college denied him the admission. Since the college refused to allow him the admission, he assumed that the college discriminated against him because of his religion, race, caste, sex, or place of birth. So, he approached the Supreme Court of India and the Supreme Court issued a notice to the college asking how they can discriminate against any citizen primarily on the ground of religion, race, caste, sex or place of birth. Now the college responds and says that yes we discriminated against him but not on these grounds. We discriminated against him on the ground of educational qualification. You have to be graduate if you seek to apply for the post-graduate program, but this person is not

graduate. Hence, he is not eligible for this program, and because of this, discrimination is valid on this ground.

So, this example proves that state may also discriminate but there must be an additional ground for this in addition to religion, race, caste, sex, or place of birth.

But, the reservation policy is totally against this Article because it discriminates on the basis of Caste, but still, it is declared Constitutional. How?

In the year 1950, Madras Government announced a policy on the basis of which seats were reserved in the Government educational institutions for students belonging to SC and ST communities. This policy was discussed in the famous case of Champak Dorairajan V. State of Madras<sup>1</sup>. The petitioner argued that this reservation policy of the government of Madras is unconstitutional and is discriminating against its citizens only on the ground of caste. The Supreme Court issued notice and the government of Madras replied that we are implementing Article 46 of the Indian Constitution which says that the state shall take steps to protect the educational interest of those who are socially and educationally backward including SCs and STs. The Supreme Court said that this order of Madras government is unconstitutional because they are trying to implement Directive Principles of State Policy but in the process, fundamental rights are violated. Since fundamental rights are superior to DPSP, the policy of the Madras government was declared unconstitutional.

After this event, the parliament got together, amended the constitution and added Article 15(4)<sup>2</sup> in the Constitution by 1<sup>st</sup> Constitutional Amendment Act in the year 1951. This was an exception added to Article 15 and states that Article 15 does not bar 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. And it is because of this Constitutional Amendment Act that the seats got reserved in government educational institutions for the people belonging to SC and ST community.

But this reservation policy was meant only for government educational institutions and not for private educational institutions. So, in 2005 parliament got together again and added

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<sup>1</sup> (1950) IIMLJ 404

<sup>2</sup> 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

Article 15(5)<sup>3</sup> in the Constitution by the 93<sup>rd</sup> Constitutional Amendment Act. This confers power on the state to reserve seats in favour of backward classes of citizens who are socially and educationally backward in educational institutions (including unpaid private institutions but excluding the minority institutions).

## Article 16

*“Equality of opportunity in matters of public employment.”*

Article 16 says that there should be equality of opportunity in public employment which means whenever the government advertises the jobs there should be no discrimination only on the basis of religion, race, caste, sex, place of birth, residence, or decent. So can there be discrimination? YES. But for that, there should be an additional ground on the basis of which valid discrimination can be made. But, the policy of reservation discriminates on the basis of caste only, and still, it is not unconstitutional. How? The constitutionality of this policy is just because of Article 16(4)<sup>4</sup> which is an exception to Article 16 and empowers the state to reserve seats in favour of backward classes (SC and ST included) in public employment provided these classes are not adequately represented in the services under the state.

## HISTORY RELATED TO RESERVATION IN INDIA

In the year 1979, the Prime Minister of India Morarji Desai (Janata Party) appointed a committee headed by the Bihar politician B.P. Mandal. The task of this committee was to identify socially and educationally backward classes of citizens in this country because the Government thought that except SC and ST if there are some other communities in this country as well who are also socially and educationally backward then there is a need to

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<sup>3</sup> 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.”

<sup>4</sup> Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State



provide affirmative action policy to them also. Mandal Commission in his report said that 52% of the population excluding SCs and STs is socially and educationally backward and it recommended 27% reservation for these OBCs (Other Backward Classes) in government jobs and educational institutions.

V.P. Singh, the then Prime Minister of India decided to act on this report but, he does not have the majority of his own. He was supported by two ideological opposites – on one hand by the B.J.P and on the other hand by the communists. Because of this thought of V.P. Singh, BJP felled in a trouble to decide and choose between two M (Mandal or Mandir). BJP then was viewed as a party that has a base only amongst the upper class (it was considered as an upper caste party). But the beneficiaries of the Mandal Commission report were lower caste people. So the BJP was in trouble, whether to support Mandal or go back to Mandir and BJP decided to go with Mandir and withdrawn the support from the V.P. Singh's government. Because of this V.P. Singh's government felled.

In the next general elections, Congress party emerged as the single largest party, and P.V. Narasimha Rao was appointed as the Prime Minister of this country. He decided to expand the reservation policy by providing a 27% reservation to OBCs as well as a 10% reservation in government jobs and educational institutions to economically backward classes of the society. This move resulted in a massive protest in India, particularly in North India. Ramchandra Guha wrote that these protests against Mandal Commission were not so severe in South India in comparison to North India primarily because in North India there was a significant population of upper castes.

This policy was challenged in the case of Indira Sawhney V. Union of India<sup>5</sup>. Indira Sawhney pleaded that this 27% reservation to OBCs and 10% reservation to economically poor sections of the society is unconstitutional. The Supreme Court in this landmark verdict said that the reservation for OBC will be constitutional only if these 4 conditions are satisfied:

1. Prove to us that OBCs are socially and educationally backward.
2. Prove to us that this category of people is not adequately represented in public employment.
3. The reservation cannot, at any point, exceed 50%.

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<sup>5</sup> 1992 Supp 2 SCR 454

4. The overall efficiency should not be affected as required under the Article 335<sup>6</sup> (that means your reservation policy would continue subject to the fact that you are not compromising with the efficiency in administration.)

All these conditions were satisfied and the reservation to OBCs declared constitutional. But, the Supreme Court applied a concept of “Creamy Layer” which means that “The person belonging to the OBC community and having an annual household income of more than 8 lakh will be categorized in the category of Creamy Layer and he will not be able to avail this 27% reservation.”

The Supreme Court, in this case, gave two more important verdicts which are:

- The power conferred by Article 16(4) enables the State to provide reservations only at the entry-level, i.e. at the time of recruitment, and not promotions.
- The reservation-based upon economic backwardness among the General category is no criteria to extend the reservation. Hence, the policy of providing a 10% reservation to economically weaker sections of the society is unconstitutional because the constitution talks only about two types of backwardness – social and educational. Economic backwardness is no criterion for providing reservations in this country.

After this, the parliament got together, amended the constitution, and added Article 16(4A) in the Constitution by the 77<sup>th</sup> Constitutional Amendment Act, 1995. This amendment provided for the reservation in promotions as well for members belonging to SC and ST community. Even this Amendment Act was challenged in the case of M. Nagaraj V. Union of India<sup>7</sup>. The Supreme Court, in this case, held that reservation in promotion for SCs and STs is constitutional, provided it does not flirt with the efficiency in the administration.

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## 103<sup>RD</sup> CONSTITUTIONAL AMENDMENT ACT, 2019

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<sup>6</sup> 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

<sup>7</sup> (2007) 1 SCC(LS) 1013

In the year 2019, a Constitutional Amendment Act was passed by the parliament and this Amendment provided a 10% reservation in Government jobs and educational institutions for the economically weaker section of the society. This 10% reservation was for those who do not come under the existing reservation scheme i.e., this 10% reservation would be valid only for those who do not belong to SCs, STs, or OBCs. This amendment act was religion-neutral as well i.e, people belonging from all the communities who are economically poor will be provided reservation under this provision if they are not covered under existing reservation policies.

The quota can be availed by the persons with:

- An annual gross household income of up to 8 lakh
- Families that own less than 5 acres of agriculture land
- House less than 1,000 square feet
- A plot of less than 100-yards in a notified municipal area or less than 200-yard-plot in a non-notified municipal area.

## **Arguments in against of this amendment**

1. **Constitutional Inconsistency** – The reservation system was introduced to eradicate the biases against the lower caste sections. The main aim of reservation policy is to correct the historic wrongs where the members belonging to so-called lower castes were discriminated against for centuries. That means reservation is a solution only if there is social and educational backwardness (which is also mentioned in the Constitution). Economic criteria as the basis of reservation go against the philosophy based on which reservation was provided in this country.

Economic backwardness can be removed through other means. For example, by providing scholarships and by other such means but not reservation because the reservation is only a tool to correct the historical injustices.

2. **No Jobs Present** – According to a report of the National Sample Survey Organisation, the unemployment percentage in 2019 was 6.1. The unemployment rate in this country was at 45-year-high when this amendment was introduced. This



implies that there were very fewer jobs. When there are no jobs, why we are talking about a 10% quota?

3. **Inconsistencies** – There are some inconsistencies in this Constitutional Amendment Act. Take an example of a farmer whose crops were failed and his annual household income was less than 8 lakhs for that year. Were his children eligible for reservation? Yes. But a year later or 2 years later he has a bumper crop and his annual household income increases and is now 10 lakhs. Will his children be eligible for the reservation? That means the income of an individual can be fluctuating. So there is no sense in making income as the basis for reservation in this country.

Take another example of an individual whose annual household income is 7.9 lakhs. Is he eligible for a reservation? Yes, because he belongs to economically weaker sections of society. On one hand, he is belonging to the economically weaker section of the society and on the other hand, he is considered such a rich individual by the state that 20% Income-Tax is to be imposed on him. These two are contradictory to each other.

The criteria for this 10% reservation and a Non-Creamy Layer OBC are the same. Take an example of a Brahmin (upper-caste) who was never socially discriminated against.

His annual family income is less than 8 lakhs and he meets all these criteria. Will he be eligible for a reservation? Yes. The state by providing this reservation is equating a poor Brahmin with an OBC. But according to the doctrine of “Equal Protection of Laws” mentioned under Article 14, likes should be treated alike. How can a state equate a Brahmin with an OBC? Because as per the existing social condition in our society, Brahmins were never been discriminated against. So this Amendment Act also violates Article 14 of the Indian Constitution.

4. **Reservation for All** – Critics also argues that all these conditions that are mentioned for 10% reservation basically renders 95% of our population eligible for reservation. Only 5% of people will be excluded and 95% of our population would be in the position to fit under these criteria and hence would be eligible for reservation. It is a noted fact that when the reservation is for everybody, there is no reservation at all.

## CONCLUSION

The reservation is undertaken to resolve the historic oppression, inequality, and discrimination suffered by any community and to provide them an area. It's a mean to realize the promise of equality enshrined within the constitution. The most important objective of the reservation system in India is to enhance the social and academic status of underprivileged communities and thus improve their lives. Thus reservation plays an important role in providing equal opportunities for those who are being oppressed by the so-called upper castes for centuries and the main aim of providing reservation is also the same. But this 10% reservation provided by the government to the economically weaker section of the society does not fulfil the main aim for which the reservation is provided. It attacks the economic backwardness of the communities and directly contradicts the Constitution of our country which says that the only ground for reservation in this country is social and educational backwardness.

Thus the reservation in this country is necessary or not is another question. But if it is there in today's society, it should be within the ambit of the Constitution and must fulfil the aim for which it was introduced. But the reservation provided under this 103<sup>rd</sup> Constitutional Amendment Act is not under the ambit of the Constitution of India and it also does not fulfil the aim for which reservation system was introduced in this country. So, there is no need for this 10% reservation for economically poor section of the society because it will not make the things clear, but will only make them complex.