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THE CONSTITUTION (103RD AMENDMENT) ACT, 2019 – A FRAUD ON THE CONSTITUTION?

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ABSTRACT

Burdened with the nightmares of the centuries of social discrimination rooted in the Indian social structure, evolving and ensuring reservation policies as part of affirmative action post-independence was rendered a constitutional and social necessity. For ameliorating and alleviating the grave sufferings of the underprivileged and the exploited sections of the Indian society, unique reservation policies are presently in force. Protective discrimination principles were woven into the Indian Constitutional fabric with an excogitated objective of reconstructing and transforming the hierarchical Indian society and building a society, egalitarian in nature, cherished with the values of individual achievements, individual development, individual involvement in the nation building, equal opportunity for all and justice. Presently, affirmative action and reservation appears to be the sole tool, to eradicate the present and the continuing effects of the past discrimination against particular social segments in the country. Affirmative action deciphers in India in the form of quota-based reservations in three major and prominent areas viz., education, jobs and legislative bodies. Amidst the recent 103rd Amendment to the Constitution coming into picture, which further provides reservations for the economically poor strata of the higher caste society, the article seeks to analyse and enunciate whether this reservation is constitutional in the first place or not and what could be the implications of the same.

INTRODUCTION

India's policy of reservations is an issue that almost every Indian born post-independence ponders over, criticizes, utilizes or suffers from at some stage in life. The expression 'reservations', alternatively referred to as 'affirmative action' or 'positive discrimination' or 'compensatory discrimination', refers to justice granted to persons belonging to historically disadvantaged groups. In India, reservations mandated by the Constitution are implemented in the form of percentage-form quotas favouring citizens from traditionally lower rungs of the society. Although Article 14 of the Constitution gives to all people the right to equality before

law, Article 16(4) allows the state to make 'any provision for the reservation of appointments or posts' in favour of backward classes not represented adequately in services under the state. Article 46, a Directive Principle for State Policy, sets out that the state must promote the educational and economic interests of the SCs and STs. Article 340 authorizes the President to form a commission to make recommendations for improving the conditions of backward classes. Articles 341 and 342 lay down the procedure to ascertain which castes and tribes should be considered as SCs and STs respectively.

POST CONSTITUTIONAL DEVELOPMENTS

In *State of Madras v. Champakam Dorairajan*[670], the issue involved was simple. The Government Order (G.O.) provided apportionment of seats for non-Brahmins (Hindus), backward Hindus, Brahmins, Harijans, Anglo-Indians and Christians and Muslims for admission into Government Medical and Engineering Colleges in the prescribed ratio. Articles 15(1) and 29(2) do not permit such discrimination. As the classification was based on religion, race and caste, the G.0 was liable to be quashed as unconstitutional. To save the G.O., the Advocate-General for the State relied on Article 46 of the Constitution, which requires the State to promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the Scheduled Castes and Scheduled Tribes, and to protect them from social injustice and all forms of exploitation. The Court could have rejected this contention outright stating that Article 46 did not require classification of citizens with reference to their religion, race or caste and there was no conflict between Article 46 and Articles 15(1) and 29(2). However, the Court needlessly declared that the Directive Principles of State Policy, which by Article 37 are made unenforceable by a court, cannot override the provisions of Part III which are expressly made enforceable by appropriate writs, orders or directions under Article 32. This initial error affecting the basic structure of the Constitution stalled the socio-economic change contemplated by Part IV. Another reason given for rejecting the argument founded on Article 46 was the absence of a provision like Article 16(4) in Article 29 that enabled the State to protect the interests of backward classes of citizens through reservation of seats for admission into educational institutions. The Parliament responded to these judicial pronouncements by the First Amendment to the Constitution that inserted clause (4) in Article 15 on the lines of

[670] *State of Madras v. Champakam Dorairajan*, AIR 1951.

clause (4) of Article 16, amended clauses (2) and (6) of Article 19 and inserted. Articles 31-A and 31-B along with the Ninth Schedule, besides other changes. Moving the Amendment Bill, Prime Minister Nehru said:

> *"It is all very well to talk about the equality of law for the millionaire and the beggar but the millionaire has not much incentive to steal a loaf of bread, while the starving beggar has. This business of the equality of law may very well mean, as it has come to mean often enough, the making of existing inequalities rigid by law. This is a dangerous tiling and it is still more dangerous in a changing society. It is completely opposed to the whole structure and method of this Constitution and what is laid down in the Directive Principles."*[671]

M.R. Balaji v. State of Mysore[672] is the next landmark case in this area of affirmative action. A Constitution Bench of the Supreme Court grappled with the question whether 'backward classes' mean 'backward castes. The Court held that a class does not mean a caste or a community. In the words of the Court:

> *"If the classification of backward classes of citizens was based solely on the caste of the citizen, it may not always be logical and may perhaps contain the vice of perpetuating the castes themselves."*[673]

In this case, the Supreme Court held that the reservations under Article 15(4) cannot exceed 50% of the seats - "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."[674] The Court was of the view that clause (4) of Article 15, being an exception to clause (I) of Article 16, had to be construed narrowly. In *State of Kerala v. N.M. Thomas*[675], a Bench of seven Judges overruled this proposition and held that Article 16(4) is not an exception but a facet of Article 16(1). Article 16(1) itself permitted reasonable

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[671] Jawahar Lal Nehru's speech in Parliament, delivered on May 29, 1951.
[672] *M.R. Balaji v. State of Mysore,* AIR 1963 SC 649.
[673] *Ibid.*
[674] *Ibid.*
[675] *State of Kerala v. N.M. Thomas*, AIR 1976 SC 490.

classification between dissimilarly situated citizens and the equality of opportunity guaranteed by Article 16(1) was interpreted to be not merely formal or legal equality but 'proportional equality' or 'progressive elimination of pronounced inequality'. The Court held that it might not be irrelevant to consider the caste of the group for deciding the question whether it is a backward class of citizens. This interpretation gave more power to the Executive and Legislature to prefer members of backward classes even after entry into the service. However, the debates in the Constituent Assembly with regard to this provision clearly reveal that Article 16(4) was intended to be an exception to the generic principle laid down in Article 16(1) read with Article 16(2).

In *Indra Sawhney* also, the Court did not agree that clause (4) is an exception to clause (i) of Article 16. It declared that the extent of reservation cannot ordinarily exceed 50%, but in rural and remote areas some relaxation could be made if the situation so warranted. The Court also indicated that having regard to Article 335 it may not be advisable to provide for reservation in 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 obtain, merit alone counts.

In *T. Devadasan v. Union of India*[676], the 'carry forward rule' framed by the government to regulate appointment of persons belonging to the backward classes in government services was involved and in effect 68% of the vacancies were reserved for the SCs and STs. The court went by the *Indira Sawhney* and *M.R. Balaji* views and clearly held that the reservation ought to be less than 50% and in no case go above that and how much less than 50% would depend upon the circumstances of that particular case.

In *M. Nagaraj v. Union of India*[677], a five-judge bench of the Supreme Court made it clear that even if a particular State or the Union has compelling reasons, it has to see that the reservations do not exceed the 50% ceiling limit or creamy layer or extend the reservation indefinitely.

In *R. Chitralekha v. State of Mysore*[678], another Constitution Bench had held that a valid classification of backward classes could be made without reference to caste. In *K.C. Vasanth Kumar v. State of Karnataka*[679], judicial opinion had been divided. D.A. Desai, J. was against making caste the basis for recognizing backwardness. He commended the economic

[676] *T. Devadasan v. Union of India,* AIR 1964 SC 179.
[677] *M. Nagaraj v. Union of India,* AIR 2007 SC 71.
[678] *R. Chitralekha v. State of Mysore*, AIR 1964 SC 1823.
[679] *K.C. Vasanth Kumar v. State of Karnataka,* AIR 1985 SC 1495.

criterion for compensatory discrimination or affirmative action for achieving two constitutional goals:

> *"One, to strike at the perpetuation of the caste stratification of 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 part of the mainstream of life which means eradication of poverty."*[680]

In this case, although economy or income was made a criterion for reservation, nowhere was it mentioned what the extent of such reservation must be and hence this judgement remained unclear on one of the most important aspects with respect to reservation.

In *K.S. Jayasree v. State of Kerala*[681], the State of Kerala appointed a Commission to inquire into and to report as to what sections of the people could be treated as socially and educationally backward in the State. On the basis of the report of the Commission, the government directed that candidates belonging to families whose annual income was Rs. 10,000/- or above would not be eligible for seats reserved for backward classes in Medical Colleges. The Supreme Court upheld the government's direction and held that caste and poverty are in itself relevant factors but cannot be the sole test of backwardness.

In *State of U.P. v. Pradeep Tandon*[682], the Supreme Court had a similar view to that of the *K.S. Jayasree* case. It observed that from an economic point of view the classes of citizens are considered backward when they do not have enough resources to rely upon and even if they do, they cannot make effective use of those resources. Poverty cannot be the only basis of classification to support reservation and it has to be supported not only by other factors but also by clear facts and data.

In *A. Periakaruppan v. State of Tamil Nadu*[683], the Supreme Court held that the classification of backward classes must always be open to judicial review. Reservations much not be allowed to become a vested interest in any manner.

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[680] *Ibid*.
[681] *K.S. Jayasree v. State of Kerala,* AIR 1976 SC 2381.
[682] *State of U.P. v. Pradeep Tandon,* AIR 1975 SC 563.
[683] *A. Periakaruppan v. State of Tamil Nadu*, AIR 1971 SC 2303.

It has been seen in a plethora of cases that the Courts, in general, focused more on the general ill-effects of reservation and the damage it causes to the efficiency of administration which is required to be maintained under Article 335 of the Constitution[684]. With the insertion of Article 16(4A), the Court has begun to invoke strict scrutiny to analyse the veracity of statistical data provided by the State. The focus on quantifiable data, which has been established as a prerequisite evidence of backwardness, is an attempt by the Court to disguise its otherwise subjective opinion as objective reasoning. The result has been the continuous striking down of reservation schemes in promotional posts on the ground that the government has failed to provide reliable data to prove inadequacy of representation and backwardness of communities.[685] Without providing proper quantifiable data for determining reservation, no such decision can be rendered to be final.

CONCLUSION

Initially, the Parliament used to amend the Constitution to facilitate socio-economic reforms for the benefit of the toiling masses. However, in recent years, the power to amend the Constitution is used to nullify sound decisions of the Supreme Court which strengthen the basic structure of the Constitution and further its objects, only for the purpose of gaining electoral advantage.

Reservations are not the solutions; they have in fact become the problem. Prof Andre Beteille says:

> *"what has gone wrong with our thinking on the backward classes is that we have allowed the problem to be reduced largely to that of job reservation. The problems of the backward classes are too varied, too large and too acute to be solved by job reservation alone. The point is not that job reservation has contributed so little to the solution of these problems but, rather, that it has diverted attention from the masses of harijans and adivasis who are too poor and too lowly even to be candidates for the jobs that are reserved in their names. Job reservation can attend only to the problems of middle class harijans and adivasis; the overwhelming majorities of adivasis and harijans, like the majority of the*

[684] The Constitution of India, 1950, Art. 335.
[685] *Suraj Bhan Meena v. State of Rajasthan*, (2011) 1 SCC 467.

Indian people, are outside this class and will remain outside it for the next several generations. Today, job reservation is less a way of solving age old problems than one of buying peace for the moment."[686]

E.S. Venkataramiah, J. indicated the affirmative action to be taken to begin with in *K.C. Vasanth Kumar v. State of Karnataka*:

"There are in all castes and communities poor people who if they are given adequate opportunity and training may be able to compete successfully with persons belonging to richer classes. The government may provide for them liberal grants of scholarships, free studentship, free boarding and lodging facilities, free uniforms, free mid-day meals etc. to make the life of poor students comfortable. The Government may also provide extra tutorial facilities, stationery and books free of cost and library facilities. These and other steps should be taken in the lower classes so that by the time a student appears for the qualifying examination he may be able to attain a higher degree of proficiency in his studies."[687]

Almost two decades have gone by and no Government or Legislature in the country has ever attempted to follow this path. In fact, the only thing they do is to come up with more reservations instead of tackling the underlying and foundational issues that exist in our country especially in the present case of the economic reservation which is unconstitutional for a simple reason that it blatantly ignores the 50% cap on reservation principle set up by the Judiciary and is thereby a fraud on the Constitution of India.

The Supreme Court in *Janki Prasad Parimoo v. State of Jammu and Kashmir* rightfully said:

"Mere poverty cannot be the test of backwardness because in this country except for a small percentage of the population, the people are generally poor – some being more poor, others less poor... In identifying backward classes, one has to guard oneself against including therein sections which are socially and educationally advanced because the whole object of reservation would otherwise be frustrated."[688]

[686] Andre Beteille, The Backward Classes in Contemporary India 42 (1992).
[687] *K.C. Vasanth Kumar v. State of Karnataka*, AIR 1985 SC 1495, 1558.
[688] *Janki Prasad Parimoo v. State of Jammu and Kashmir,* AIR 1973 SC 930.