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“The Locus of Discrimination and Consideration in Recent Times under the Paramount Parchment: 103rd Amendment”

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ABSTRACT

The basis of discrimination eventually became a basis for consideration. That changeover underwent bloodshed, protests, parliamentary cognition, statutory enforcement and establishment of various commissions, all in chronological order. Speaking of commissions, it started with the Hunter Commission in the year 1882 and at present, we have the Sachar Committee constituted in the year 2003. The metamorphosis that happened throughout the years resulted in the shape of “reservation”. The system of reservation is a provision allowing a level playing field to all the people from different backgrounds. This paper is not about reservation being a controversial issue. The authors focus on reworking reservations. The classification of classes and the diversification of the same are projected through judicial pronouncements. The 124th amendment to the constitution and its opposition are tackled in this submission. The constitutional validity of the said amendment is upheld. The landmark decision in Mandal’s case is criticized and numerous doctrines concerning ‘transformative constitution’ are also being discussed. Furthermore, the necessity for providing reservation to forward caste is emphasized.

Keywords: *EWS, economic criteria, 124th Amendment Bill, 103rd Amendment, constitutionality.*

1. INTRODUCTION

The preamble to our constitution embodies the striking features of governance and livelihood. The prime concern is about providing an impartial environment to people. As Aristotle puts it, “likes must be treated alike and unlikes must be treated alike” is the foundation of Article 14. In a country like India with massive heterogeneity, bringing everyone in equal footing without leniency through reservations is impossible. The authors herein provide a definition for reservation by quoting it as, “a system ensuring equitability in all aspects to the underprivileged and exterminating inadequacy in representation by anti-discriminatory laws.” There are numerous castes and classes in our society and identifying it individually would be a herculean task. For that purpose, distinct ethnic groups were categorically grouped by respective commissions. Considering the groups and their social, educational and economic backwardness, reservation is made available as per their assigned quotas. For the advancement of the above-mentioned people, the 93rd amendment to the Constitution of India in 2005 allowed the government to make special provisions. However, it made sure that protections of backward communities do not infringe on the rights of meritorious candidates¹. Reservation as a policy could be the only tool for power-sharing and persistent restoration of harmony.

2. RESERVATION AND ITS GENESIS

The concept of reservation dates back to 1902 when Chhatrapati Shahu Maharaj of Kolhapur, Maharashtra implemented 50% reservations in the princely state of Kolhapur. But the deliberations for the same began in the year 1882 by Jyotiba Phule and Sir William Hunter. Raja of Kolhapur was a social reformer and his tireless efforts lead to the liberation of lowers caste people in and around Maharashtra. He strived to provide primary education to every individual irrespective of castes. He united the Marathas by becoming the leader of the non-Brahmin movement. He appointed a young Maratha as the religious teacher of the non-Brahmins when the regular priests (Brahmins) refused to do so. This popularly came to be known as ‘the Vedokta controversy.’ He also joined hands with Dr. Ambedkar and they for the first time came up with the concept of “caste-based reservation.”

¹ M.R.Balaji v. State of Mysore; 1963 A.I.R. 649.

In 1933 the Communal Award was introduced by the British Raj and that provided separate electorates for the Forward Caste, Scheduled Caste, Muslims, Buddhists, Sikhs, Indian Christians, Anglo-Indians, Europeans, and other Depressed Classes. It was opposed by Mahatma Gandhiji and he initiated a hunger strike. But leaders like B.R Ambedkar and Madan Mohan Malviya supported it and convinced Mahatma Gandhiji as well. That resulted in an agreement between B.R Ambedkar and Mahatma Gandhiji which became to be known as the 'Poona Pact'.

After independence, the decisions in the Supreme Court clarified the scenario. In 1951, it was held that caste-based reservations as per the Communal Award violated basic rights². The Kalelkar Commission provided 27% of reservation in the year 1953. Ten years from that 50% cap was introduced by the Courts³. Concerning that, a new ethnic group combining a few other ethnic groups were identified by the Mandal Commission in the year 1979 and titled it as Other Backward Classes. It reaffirmed the 50% cap⁴Prime Minister Manmohan Singh constituted a committee dedicated to the Muslim community in the year 2005 and it was called the Sachar Committee. On January 9, 2019, the 124th amendment to the constitution providing for reservation to people in the forward caste was passed by the Lokh Sabha. The present scenario conveys that reservation is extending its arms to people who were not considered for it previously. Economic yardstick is given emphasis than castes. All of the above-mentioned events unravel the history of reservation policy in India.

3. CASTEISM

Reservation is closely linked with castes since the former has its foundation there. The casteism in India originated in 2000 BC and it is evident from the 'Varna System' that existed before. It is still in existence but in an updated version. The system was initially found in Purusha Suktam, Rig Veda. The Sanskrit word 'varna' when translated to English delivers 'to consider' as its meaning. This caste-based social stratification pointed out four categories of castes: Brahmins; Kshatriyas; Vaishyas; Shudras. The classification was based on the work they did and distinct organs of the human body were used to denote the hierarchy of the above-listed castes. All intellectuals,

² State of Madras v. Smt. Champakam Dorairanjan, A.I.R. 1951 S.C. 226.

³ M R Balaji v. Mysore, 1963 A.I.R. 649.

⁴ Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477.

teachers, and priests were Brahmins and they were considered as the 'mouth' since it is one of the superior organs in the human body. Kings, administrators, and warriors were Kshatriyas and they were symbolized by 'arms'. Farmers, traders, agriculturists were Vaishyas and artisans, laborers workers were Shudras and were indicated by 'feet' i.e. lower in status and were considered as untouchables. It was believed that the varna system maintained the so-called purity of each caste in the society.

Reservation to date revolves around the caste system and it has retained the originality of the varna system by including and excluding castes with different titles. The depressed class comprises of Scheduled Caste and Scheduled Tribes. The prosperous class includes the Brahmins and Kshatriyas. They are referred to as General Class. Other socially and educationally disadvantaged classes were tilted as Other Backward Classes. Article 340 of the Indian Constitution provides for a commission to investigate the conditions of socially and educationally backward classes. On 29 January 1953, by presidential order, a commission came into existence and was called the First Backward Classes Commission, 1955 or the Kaka Kalelkar Commission. Article 338 and 338-A provide for National Commission for Scheduled Caste and Scheduled Tribes respectively. All the caste-based commissions work for the welfare of that community and they take up measures that promise progress. But a similar provision is not made for the general class because of the notion that 'all the people' among the said class are progressive which is in contrast to reality.

Another idea that is associated with the division of classes is the 'creamy layer' concept. It's a term coined to denote people among 'Other Backward Classes' who are not as socially and educationally backward as the other people in 'Other Backward Classes'. They are not eligible for reservation or any other similar benefits. This concept cannot be traced among the 'General Class' people. It again raises a presumption of prosperity. Casteism is deep-rooted in our country and a way out of it is the need of the hour.

4. RESERVATION CRITERIA:

Reservation policy was introduced to uplift the backward classes and elevate them to a level where discrimination was not possible. It essentially came up with two objectives: advancement and

adequate representation. For bestowing the benefit of reservation, the degree of backwardness of every ethnic group based on caste was identified. In *Indra Sawhney V Union of India*⁵, it was pronounced that caste was the determining factor for classifying a class as a backward class. The caste-based hierarchical structure was the premise for reservation and it also became crucial for the same. Owing to the structure's non-flexibility, it did not accommodate changes that circumvented the caste system. After the said degree of backwardness was identified, policies were accordingly framed to make sure 'advancement' in that particular community and to ensure adequate representation in the same.

The Mandal Commission formulated 11 criteria for equating 'backwardness' to the 'degree of backwardness' persistent among the 'Other Backward Classes'. It clubbed all the 11 criteria under three heads, namely, social, educational and economic. Articles 15 and 16 of the Indian Constitution prominently addressed only the social and educational backwardness.

But after the One Hundred and Third Amendment (103), by inserting clause 6 under the said Articles, the economic criteria are also addressed. Under social backwardness, as per the Mandal Commission, the determination was based on: the consideration of caste/class as socially backward by other people, caste/classes that depended on manual labor for livelihood, caste/classes where marriage happened at the tender age of 17 with the proportion of 25 percent females and 10 percent males in rural areas and 10 percent females and 5 percent males in urban areas, castes/classes where 25 percent below the state average was the participation of females in work. Under educational backwardness, the determination was based on: Castes/classes where the rate of children in the age group of 5–15 years never attended school was at least 25 percent above the state average, Castes/classes where the student drop-out rate in the same age group was at least 25 percent above the state average and Castes/classes where the proportion of matriculates was at least 25 percent below the state average.

A comparison of the economic criteria in the Mandal Commission and under One Hundred and Third Amendment Act, 2019, will facilitate better understanding and it is dealt in the next section. On interpreting the above-said criteria, we can come to a conclusion that reservation was and is still founded by the caste system.

⁵A.I.R. 1993 S.C. 477, 1992 Supp 2 S.C.R. 454.

5. THE ECONOMIC CRITERIA:

The economic criteria is not absolutely a newfangled one since a mention of it can be seen in Article 46 of the Indian Constitution which is one of the Directive Principles of State Policy. The Mandal Commission reserved 4 out of its 11 criteria for identifying the backwardness of a class under the economic domain. Its determination was based on: castes/class whose value of family assets was at least 25 percent below the state average, Castes/classes where at least 25 percent above the state average are living in kutcha houses, Castes/classes where more than 50 percent of the households should travel beyond half a kilometer for drinking water, Castes/classes where at least 25 percent above the state average of the households have taken consumption loans. These aspects were considered only for people who were socially and educationally backward among the 'Other Backward Classes'.

Economic criteria have been emphasized in the recent 10% reservation for the 'General Class'. It cannot be said economic criteria have taken the space of 'caste-based reservation' but it co-exists in the same space. An Economically Weaker Section of society is a group that does not come under the already identified castes and is not classified to be a part of the creamy layer sect. A group can be tagged to be a part of Economically Weaker Sections of society only if it is in consonance with the guidelines published for identifying the same. It encompasses:

- Individuals who were not benefited by the policy of reservation earlier and the gross annual income of their family are below Rs. 8 Lakh. Income for this purpose will include income from all sources.
- Individuals holding agricultural land of 5 acres and more will be excluded
- Individuals possessing a residential flat of 1000 Sq. Ft. and above will be excluded.
- Individuals possessing a residential plot of 100 sq. yards and above in notified municipalities will be excluded.
- Individuals possessing a residential plot of 200 sq. yards and above in areas other than the notified municipalities will be excluded.

Thereby, it is evident that the above-stated criteria for an individual as well as for a community play a critical role in relation to reservation in modern times. Moreover, the 'means test' regulates

reservation in this criterion⁶. Economic backwardness cannot be neglected in a country where the economy keeps fluctuating rapidly. Articles of the Indian Constitution and the guidelines formulated by various Commissions sums up the significance of economic criteria in this regard.

6. THE PLIGHT OF 'GENERAL CLASS'

Since time immemorial people among the 'General Class' enjoyed absolute freedom and were never subjected to oppression. History clearly exhibits the oppressors were among the upper/forward caste. They were not socially or educational backward. They were in fact, progressive in every possible way but time changes everything and so it did to this class of people. A progressed community cannot be expected to remain the same when it is prone to multiple factors. It is an admittable fact that even among 'General Class' there are people for whom getting three square meals a day itself is a task. Although they are not better off like the other people in their community, they are not considered for reservation only because of their caste title. This is the plight of 'General Class'. The One Hundred and Third Amendment Act, 2019 came in like a savior granting a 10% reservation for Economically Weaker Sections (EWS) of society for admissions to educational institutions and ensuring employment opportunities. This Bill was introduced by Thawar Chand Gehlot, Minister of Social Justice and Empowerment. Articles 15 and 16 of the Indian Constitution now stand amended because of this. On 12 January 2019, it received assent from President Ram Nath Kovind and came into effect on 14 January 2019. It faced numerous challenges right from contending it to be unconstitutional to arguments that invalidated economic criteria. Youth For Equality filed a PIL challenging its constitutional validity in the Supreme Court and DMK filed a motion in the Madras High Court contending that reservations should be based on the community to which an individual belonged and not their economic status. This policy of reservation does not affect the rights of other castes/class people since it does not disturb their quota but proposes an additional 10% quota. The 50% cap is not mandated by the Indian Constitution. The EWS reservation aim at positive discrimination and it is permissible under Article 14 of our constitution.

⁶ K.C Vasanth Kumar v. State of Karnataka, 1985 A.I.R 1495.

7. THE PRINCIPLE OF ISONOMY

Equality is a dynamic concept with many aspects and dimensions. It cannot be imprisoned within traditional and doctrinaire limits. Article 14 of the Indian Constitution strikes at arbitrariness in State action and ensures fairness and equality of treatment. It enjoins upon the State not to deny to any person 'equality before law' or 'equal protection of laws' within the territory of India. The two expressions although do not lead to the same conclusion, we may notice that Section 1 of the XIV Amendment to the U.S. Constitution uses only the latter expression whereas the Irish Constitution (1937) and the West German Constitution (1949) use the expression "equality before law" alone. The equal protection of laws clause is in the verge of violation if this amendment does not take effect since the reservation system at present tantamount to discrimination against the general quota people. As regards the limit of reservation, the majority has held that the total reservation shall not exceed 50%. While 50 percent shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and its people. In such situations, some relaxation of this rule may be necessary. *The argument that reservation cannot exceed 50% is labelled to be erroneous* as up to 68 per cent quota was given in Tamil Nadu and the state's decision was upheld by the High Court. There the state of Tamil Nadu worked on to change the respective educational institution's enrollment policy to accommodate meritorious students by increasing the number of seats. This is one of the exceptions that were anticipated in the Mandal Commission case.

Hence, the reservation exceeding the 50% limit is not in violation of Article 14. The State is free to exercise its discretion of providing for reservation based on its numerical bench mark of 50% ceiling limit which is subjected to limitation, namely, that there must exist compelling reasons of backwardness, inadequacy of representation in a class of post(s) keeping in mind the overall administrative efficiency. It is made clear that even if the State has reasons to make reservation, as stated above if the impugned law violates any of the above substantive limits on the width of the power, the same would be liable to be set aside.

8. THE BASIS OF INTELLIGIBLE DIFFERENTIA

The Economically backward people are those who were socially and educationally backward for an elongated period. History has recognized economically backward people and has enforced the

reservation provision to enable them to create their own history. Clause 4(A) of Article 16 applies only to Schedule Castes and Schedule Tribes. The said clause is carved out of Article 16(4A). Clause (4A) is governed by two compelling reasons - "backwardness" and "inadequacy of representation". If the said two reasons do not exist then the enabling provision cannot be enforced. Similarly, the two compelling reasons that are yet to enable the reservation provision to EWS are – “economic backwardness” and “inadequacy of representation”. Economic Backwardness is the basic criteria that define the Economically Weaker Sections. Since those classes of people are economically weaker, it becomes a task for them to be adequately represented. Here, we can come to a conclusion that social and educational backwardness arises out of economic backwardness.

The term “backwardness” in clause 4(A) of article 16 does not restrict it’s ambit of definition and thereby it provides for an open interpretation which relates to economic backwardness. This interpretation paves way for the principle of intelligible differentia enshrined in Article 14. The basis of difference between two classes (SC/ST & EWS) in the instant case is “adequacy of representation” and the object sought to be achieved is “reservation.” Hence, the nexus between the two clearly states the object of intelligible differentia. Article 16(4) which protects the interest of certain sections of the society has to be balanced against Article 16(1) which protects the interests of every citizen of the entire society. They should be harmonized because they are restatements of the principle of equality under Article 14 which again resorts to intelligible differentia.

9. DISCRIMINATORY TREATMENT IN QUESTION:

The question revolving around EWS reservation is “whether it amounts to discriminatory treatment among the economically backward class based on caste?” An important aspect we must understand is that the reservation to Schedule Castes/Schedule Tribes and Other Backward Class based on caste was given because they were and to some extent they are still socially and educationally backward. The ‘no reservation policy to other classes of people’ results in reverse discrimination among the general quota people. Hence, to those who are economically poor in the general category and who are in need of such help from the government do not get the same just because they are in general category. The people in Schedule Castes/Schedule Tribes and Other Backward Class based are already having reservation based on social and educational

backwardness and this 10% reservation deals only with the reservation policy to those who are economically backward in general quota and it eliminates the prevalence of reverse discrimination. It provides reservation for all those people who are in such need and helps in upbringing of those who are of the same need in the forward caste community.

The people from the forward caste community were not even considered for such reservation because of their caste which is not true because there are many people in general category who are more or less similarly placed to those who get reservation in other communities because of their caste. As it was held in *Ram Singh and others v. Union of India*, Justice Rangan Gogoi was of the opinion that “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”⁷. Henceforth, it is evident that the judiciary wanted a new class or a new factor to consider backwardness and therefore, 10% reservation based on economic factor to forward caste people will resolve the backwardness prevailing in the society in order to develop those who are in need of such affirmative action.

10. POSITIVE DISCRIMINATION:

Article 15(1) and 15 (2) basically prohibits discrimination in any manner and it allows everyone to access the public places and prohibits discrimination on things based on caste, sex, gender etc., the upcoming clauses in Article 15, both 15(3) and 15(4) provides special treatment for women and children and Schedule castes and Schedule Tribes respectively. Before the 103rd amendment, there was no provision for economically weaker sections (EWS) of the society, which restricted the government to provide such reservation to EWS because there was no constitutional provision for the same. The new provision does not violate Article 15 and Article 16 because they act as an exception to 15(1) and 15 (2) and 16(1) and 16 (2) respectively. By making a constitutional amendment under the provision of Article 368 (1) and by including 15(6) and 16(6), the government can now provide such reservation to EWS because it is under the constitution provision to provide such affirmative action. Therefore, it is clearly not violating Article 15 and Article 16 as they act only as an exception. The bill was passed in the Lok Sabha with 323 MPs

⁷ (2015) 4 S.C.C. 697.

supporting the bill and only 3 MPs opposing it. Important MPs in the Opposition Party too had given their consent to the bill and with such vast support, the bill was passed.

11. INDRA SAWHNEY AND ITS CRITICIZATION:

The Supreme Court bench in the case of Indra Sawhney delivered a judgment mandating that no reservation to be given above 50% and that anything above the decided limit would be dismissed by the same court. But people in general quota have always demanded for reservation contending not to disregard them only based on their caste. They have every now and then asserted the existence of backward people in their community as well. This makes it necessary to look into the matter deeply and not to eliminate the aforesaid affirmative action only because they are of forward castes. Any reservation not exceeding 50% is something that must be let off the hook for the benefit of those who are economically backward in forward caste. This was in fact not discussed in the mentioned case and with that sole reason, it cannot be concluded that this case is against giving reservation to the said section of people who were and are always tagged to be better off under the canopy of “forward castes.” Reservation is provided to 69% people in Tamil Nadu and the same has been upheld by the High Court stating local reasons. There are instances in various states where reservation has superseded the base scale of 50%. In order to bring the people who were out shadowed by other castes within the ambit of reservation, it is mandatory to provide the same to the people in forward castes. Thereby, this article strongly emphasizes on the overriding effect of 50%.

12. CONSTITUTIONAL DOCTRINES:

Principles of legality do not give way to the powers of arbitration. As a result, constitutional doctrines always play an important role in many constitutional issues. Courts have upheld certain doctrines to maintain the spirit and purity of the holy document, our constitution. They in fact mold the understanding of the people in incorporating transformative issues⁸. Two such doctrines, taken into consideration in this regard are the doctrine of progressive realization of rights and doctrine of non- retrogression. The ‘doctrine of progressive realization of rights’ provides that the framing

⁸ Navtej Singh Johar v. Union of India, A.I.R. 2018 S.C. 4321.

of laws should be in a way to fit the modern ethos. The laws must be as forward as a country is to maintain the stability of the same in a society. “Constitution is ever-growing and it is perpetually continuous as it embodies the spirit of a nation,” said Edmund Burke, while delineating upon the progressive and the perpetual growing nature of a Constitution. The comprehension of a manifest ascendancy and triumphant march of and for ‘promised rights’ paves the way for the doctrine of progressive realization of the rights under the Constitution. “This doctrine invariably reminds us about the living and dynamic nature of a Constitution. It is enriched at the present by the past experiences and influences and makes the future richer than the present,” this was upheld by the Supreme Court. This doctrine gives birth to the doctrine of non-retrogression, as a natural corollary and as per which there must not be atavism of constitutional rights. All these doctrines are well supported by the concept of Transformative Constitutionalism. “The concept of transformative constitutionalism has at its kernel a pledge and the urge to transform the Indian society so as to embrace therein, in letter and spirit, the ideals of justice, liberty, equality and fraternity as set out in the Preamble to our Constitution⁹.” This expression can be understood by embracing a pragmatic lens which will help to distinguish and project this concept as what it is in reality. It signifies change and is opposed to something which is static and stagnant, Thus, it becomes the ability of the Constitution to adapt and transform with the changing needs of the times. The 103rd amendment does not come within the perimeters of colorable exercise of powers since nothing which can be done indirectly has been done. The amendment is a direct exercise of power which aims at sustainable and transformative constitution for an ever-growing constitution like ours. Therefore, it is clear that our constitution provides flexibility to the changing needs rather than being resistant to change. Providing reservation to the Schedule Castes and Schedule Tribes and not to Forward Castes back when the constitution was drafted was acceptable because of the social and economic conditions that prevailed at the time. But now, the time has changed and the need to provide reservation to EWS is needed in today’s world when caste alone is not taken into account for deciding the “backwardness” of certain category of people. Therefore, by all means this amendment does not override the constitution. The burden to prove that the enacted law offends Part III of the Constitution is on the one who questions the constitutionality.¹⁰ The mentioned doctrines further paint the right picture of the 103rd Amendment.

⁹ Navtej Singh Johar v. Union of India, A.I.R. 2018 S.C. 4321.

¹⁰ Namit Sharma v. Union of India, (2013) 1 S.C.C. 745.

CONCLUSION

The affirmative action initiated by the Government is exclusively determined to drag people irrespective of their “backwardness” in the same footing. Generally, reservations for backward classes provide a chance for them in getting meaningful education and employment. In the instant case, the issue was about the degree of backwardness and the community of General Class. The present additional reservation policy should be accommodated as similar to the previous reservation quota. Even though there is opposition to the new reservation policy, a clear understanding of its necessity and change of circumstance is mandatory. The generalization of “backwardness” only to the communities mentioned in the Mandal Case is very narrow. No community will remain the same over time owing to various factors shaping that community. This factor has been upheld as constitutionally valid and so the benefit of reservation should reach every community irrespective of what title that community is tagged to be. Transformativeness and the principle of equality should not just exist in books. For a country to maintain its sustainability, it has to build policies that will favor everyone in general. The 103rd Amendment is only a step in this direction and there are many more to come.

RESULTS AND DECLARATION

This paper brings to light the efforts drilled in by the Indian Constitution for the reworking of the reservation system in India. The same has been a burning question and has occupied the center stage of various debates. The plight of the general class to date remains an untold story. We Authors, have attempted to narrate their story in this research piece. We have originally formulated the basis of intelligible differentia mandate under Article 14 by focusing on the nexus between "economic backwardness" and "inadequacy of representation" since the economically weaker sections of the society are one among the inadequately represented societies. The 103rd Amendment is justified because it bridges the gap between different shades of economic standards within a class. We have highlighted the step taken by the Indian Constitution towards positive discrimination which is permitted discrimination in India. The 50% reservation cap introduced by the decision in Indra Sawhney Versus Union of India has been criticized for being inconsiderate of the ups and downs in the economy and its rigidity in the policy. After studying through and

masterminding an excessive research, we have come to a conclusion that the 103rd Amendment to the Indian Constitution has claimed another feather in its cap for being a Transformative Constitution.

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